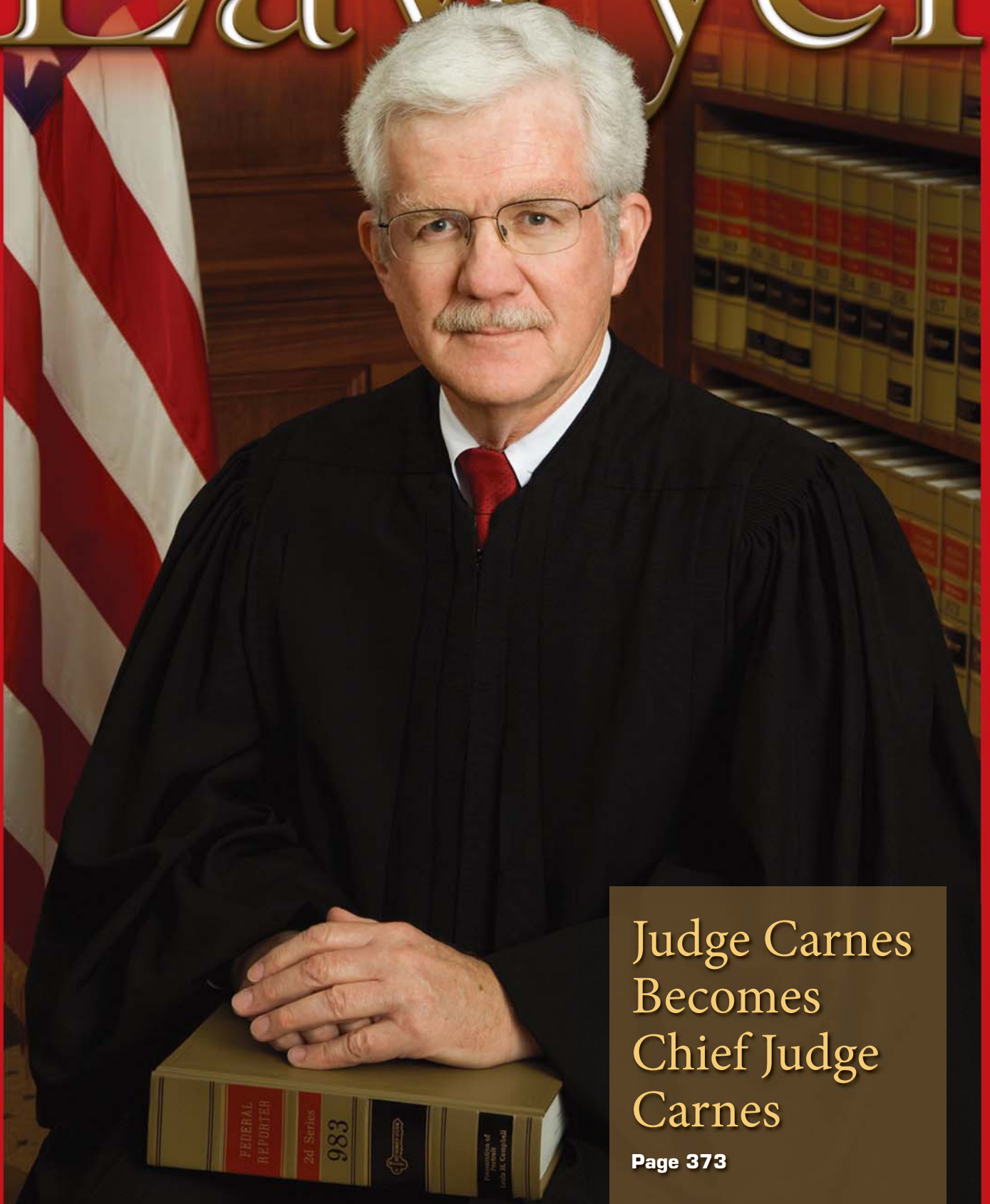


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Judge Carnes  
Becomes  
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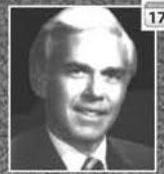
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Are you ready for 2014? Get key updates on significant developments in Alabama law, as well as late-breaking information to raise your level of expertise and keep you competitive in your practice.

## 6 Tort Law

Get practical advice from our legal experts on hot topics in Alabama Tort Law including immunity issues, subrogation, uninsured/underinsured motorists, and use of social media in your tort practice. Whether you represent the plaintiff or defendant, attend the seminar and pick up valuable practice tips that can help you handle the case for your client and lead to a winning verdict.

## 13 Estate Planning

Your clients depend on you to protect their financial interests, but planning in today's financial environment is more complex than ever. Don't miss this important program, which for 36 years has provided Alabama attorneys with the practical, up-to-date information essential to any estate planning practice.

## 18 Employment Law

In these uncertain economic times, it is vitally important to understand the challenges facing businesses and their employees. Whether you represent employers or employees – or both – this seminar will provide the necessary tools to address your clients' issues.

## 19 Alabama Update- Birmingham

Are you ready for 2014? Get key updates on significant developments in Alabama law, as well as late-breaking information to raise your level of expertise and keep you competitive in your practice.

## 20 Trial Skills featuring the NEW Rules of Evidence with Charles Gamble and Friends

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The morning session will be devoted to the new Rules of Evidence, while the afternoon session will focus on creative practice tips from some of the best trial lawyers in the state. Don't miss this opportunity to increase your expertise and hone your litigation skills!



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## ON THE COVER

On August 1, 2013, United States Circuit Judge Ed Carnes assumed the duties of Chief Judge of the United States Court of Appeals for the Eleventh Circuit and as chair of the Eleventh Circuit Judicial Council. In fulfilling the duties of the office, Chief Judge Carnes becomes the highest-ranking judicial officer in the Eleventh Circuit and fills one of the Circuit's two positions on the Judicial Conference of the United States, the principal policy-making organization for the United States courts. Judge Carnes succeeds Judge Joel F. Dubina of Montgomery, who served as Chief Judge from June 1, 2009 to July 31, 2013. Judge Dubina will remain in active service on the court.

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## Stand Up—A Lawyer's Passing

### Introduction

We all remember the quote from the timeless classic, *To Kill a Mockingbird*: “Miss Jean Louise, stand up. Your father's passin’.”<sup>1</sup> This acknowledgment reflects not only a deep, abiding respect for Atticus Finch as a lawyer—but also the nobility that he earned in and outside the courtroom. I am a firm believer that our profession is noble and deserves to be recognized as such. Our service to the community is unparalleled, and our professional involvement remains a critical ingredient in the fair administration of justice. Yet, continually we are bombarded by jokes about lawyers and questioned regarding our worth in society. Alabama lawyers do many great things, day in and day out, to improve the lives of many. “No brag. Just fact.”<sup>2</sup> It's time for us to stand up and say, “I'm a lawyer and I am proud.”

### Where We Stand Today: The Pew Research Study

In a recent Pew research study, some Americans were asked to rank 10 professions and their contributions

to society.<sup>3</sup> Lawyers ranked last.<sup>4</sup> There is no need for me to discuss what society would be like without lawyers or how lawyers ensure that professionals who ranked above lawyers are able to carry out their responsibilities freely, safely and orderly or how lawyers protect, defend and preserve “social order.”<sup>5</sup> I know I am preaching to the choir. I also know that this survey can be skewed and, in the end, may have limited value. This study is the view of only a small sample, and not necessarily the opinion of all, especially those clients who have benefited from the skillful advocacy and counsel of their attorneys.

All that said, the bar has a responsibility to continue to improve its image, the public's understanding and respect for the law and the role of lawyers. How do we accomplish this if the public perceives that we, as lawyers, are contributing the least to society? The simple answer is to stand up and change that perception by communicating with and engaging the community to ensure that it is aware of the outreach performed by members of the bar. Efforts are underway to facilitate our message.



## Local Outreach Efforts

We cannot change the public's attitude or perception without providing the public with a basis for that change. This is where the work of our newly formed **Local Outreach Committee** comes into play. It is tasked with identifying public service and educational events and programs sponsored by the state and local bar associations and ensuring that the public is aware of those. The Outreach Committee includes a **Local Bar Outreach Network Initiative** that involves a lawyer in each county or circuit who is responsible for facilitating communication between the state bar and the local community. This initiative will publicize important news, programs and other annual initiatives, and, in turn, foster a more positive public image of the role of a lawyer in the local community.



Justice Hugh Maddox

Retired **Alabama Justice Hugh Maddox** said it best when he observed that, "Lawyers could improve the public's image of the profession by participation in the volunteer programs created by the Alabama State Bar to furnish pro bono legal services to persons who need such services."<sup>6</sup>

During the past few years, over 4,000 lawyers have served in 2,300 pro bono cases, donating more than 23,000 hours of their valuable time. While I truly believe that our volunteers are not seeking personal recognition for their efforts, it is important nonetheless that other bar members, and most importantly, the general public know of the profession's good works and contributions lawyers make to better our Alabama communities.

## How Each Can Help

The **Alabama Law Foundation** is the only 501(c)(3) arm of the bar tasked with the responsibility of helping to address the civil legal needs of our less fortunate citizens. Over the years, its primary source of funding has been from interest derived from IOLTA funds and volunteer contributions. It should be noted that the IOLTA program is entering its fifth year of record low interest rates. While the need for civil legal services continues to grow, along with Alabama's poverty population, the main revenue sources for the foundation continue to shrink. Thus, we need to step up and help fill the void.

Starting next month, we will have a real opportunity to make a difference. In December, all Alabama lawyers will receive notice of the annual assessment notice for the **Client Security Fund**. This notice will now include a \$50 "opt-out" provision (less than a round of golf that we are always accused of playing when we don't answer the phone or email; or what amounts to a little more than \$.15 per day). This is strictly a voluntary contribution where we can stand up as lawyers to help the least fortunate served by the foundation. It is my hope and prayer that every lawyer in our great state will **opt in**, and stand up to make access to justice opportunities available to those who need it most. (Quick note: a task force is actively working on the process of consolidating all fees and contributions on one form. This has been a recurring complaint from many of you. We hear you—and we are going to make this happen. More details to follow in the next few months.)

A critical piece of what this bar does is addresses the legal needs of our less fortunate citizens. No greater need exists in our world than to assist those who are not able to help themselves. Through these important contributions, the Alabama Law Foundation will be able to help our impoverished citizens through access to justice programs, to come to the aid of children whose parents were killed or permanently disabled,

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to assist with projects designed to improve the administration of justice, to work on law-related education, and to administer much-needed law school scholarships. The needs are growing and our role is a vital obligation to society. The foundation is relevant to each of us because it what is what we do as servant leaders.

**Conclusion**

If you look around your community, you will see that in almost any civic endeavor, lawyers are leading the way or performing an integral function. They are contributing to charitable organizations, guiding school boards, serving as PTA members, participating in the arts, raising capital funds, supporting youth groups, acting as Scout leaders, working with at-risk children, coaching various youth sports teams, and a host of other charitable efforts. Despite all of this evidence to the contrary, however, the public's perception



*Alyce Spruell is presented with the 2013 Albritton Award by Judge Harold Albritton for helping make free civil legal services available to the poor and disadvantaged.*

is often negatively affected by media reports, bad experiences in the legal system and, yes, the ever-perpetuating reservoir of jokes. In this state, we proudly cheer for our respective schools; wear their colors and stand and applaud

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for even their slightest achievement, yet we do not do the same for our profession. It is time for us as lawyers to recognize our heritage, acknowledge our profession and stand and cheer for our good works.

**Judge John Godbold** told this story in a *Cumberland Law Review* article of a lady who worked for his family:

“One night as I drove her home, with conversation tumbling out as it always did, I asked: ‘except for friends who call me by my first name, people call me Mr. Godbold. Why do you always call me “Lawyer Godbold?” Her response was immediate: ‘Because it is a title of honor.’”



*Judge John Godbold*

Being a lawyer is a title of honor. We must respect what we do and ensure that the public knows it. So to all, I say:

**Stand Up—A Lawyer’s Passing!** | [AL](#)

## Endnotes

1. Harper Lee, *To Kill a Mockingbird*
2. Walter Brennan, *The Guns of Will Sonnett*, ABC television series (1967-69)
3. Pew Research Religion & Public Life Project (2013), <http://www.pewforum.org/2013/07/11/public-esteem-for-military-still-high/>.
4. *Id.*
5. “Social ordering is my term, though a sociologist or political scientist may have another. By social ordering, I refer to the process that our society uses to consider and to adopt stabilizing means that will keep society intact and reasonably orderly, and permit all of us to live together in security and with appropriate self-assertion. The legal profession is central to that process.”
6. Hon. Hugh Maddox, *Lawyers: The Aristocracy of Democracy or “Skunks, Snakes and Sharks?”* 29 *Cumb. L. Rev.* 323 (1999)
7. Hon. John C. Godbold, *Lawyer—A Title of Honor*, 29 *Cumb. L. Rev.* 301 (1999)



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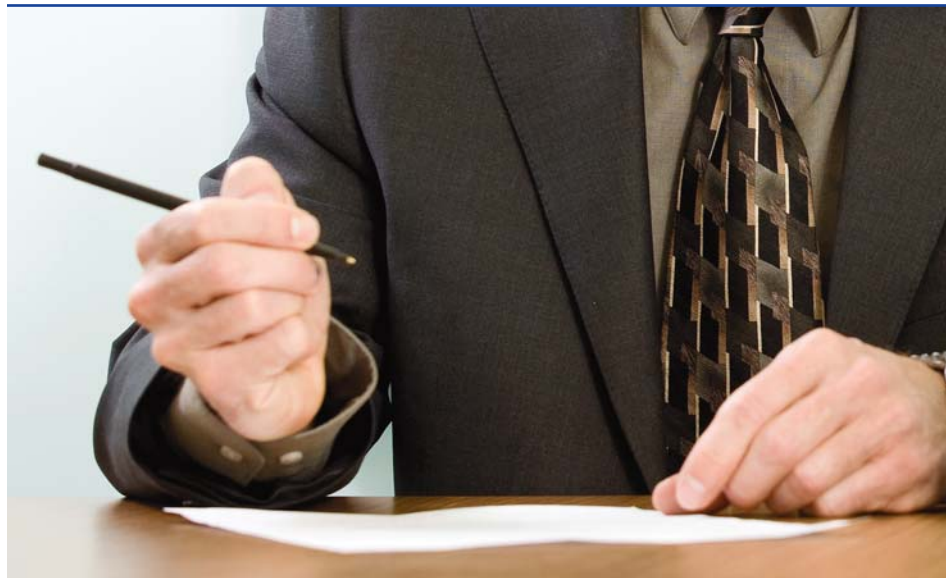
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# The Latest Changes to the Bar Exam

The Alabama Supreme Court has recently approved changes to the Alabama Bar Examination which you need to know. The first change made by the court was recommended by the Alabama State Bar Board of Bar Commissioners (BBC) and the Board of Bar Examiners (BBE). It is the final step for the examination to be a true Uniform Bar Exam (UBE). As you may recall, the court approved changes to the *Rules Governing Admission to the Alabama State Bar* in 2011 so that Alabama became the second jurisdiction (after Missouri) to implement the UBE.<sup>1</sup> One of the most important aspects of the UBE is that it permits the transportability of a bar exam score among jurisdictions which have adopted similar rules.

Unfortunately, the 2011 order retained a provision from the former rules that was no longer necessary for purposes of the UBE. This was the Alabama essay component of the exam dealing exclusively with Alabama civil litigation. In its order this past August, the court removed this requirement

and, in its place, charged the BBE with developing the content and method of delivery of a course on Alabama law. As a result, starting in July 2014, applicants seeking admission to the bar will be required to complete this requirement before being certified to practice law. A committee is now developing the course and curriculum which will be available to applicants online.

Another feature of this particular change is that the exam will be shortened to two days. The Multistate Performance Test (MPT) and the Multistate Essay Exam (MEE) will be administered on the first day (Tuesday) and the Multistate Bar Exam (MBE) will be given on the second day (Wednesday). Candidates for admission will have a window of time to take the online course so that upon achieving a passing score on the examination, they can be certified to practice law.

A second, but less significant change is the enlargement of the time a bar examination score, or a component score, remains valid—or viable. Under the former rule, a score remained



viable for 20 months. Now, a score will be viable for 25 months. There are several different scenarios where a score's viability is a factor, including the transfer to Alabama of a UBE score from another jurisdiction or when an examinee has failed the bar exam but scored 140 or above on either the MBE or the written tests (MPT and MEE). The unsuccessful candidate may then choose to be exempt from retaking that portion of the exam where a score of at least 140 was achieved; however, the failed portion of the exam must be retaken within 25 months of the last examination.

The court also requested that the bar examination's passing score (or cut score) be reviewed. Alabama's present cut score, 128, is the lowest in the country. As you may recall, a cut-score study was completed in 2006.<sup>2</sup> Based on that study, the BBE recommended to the BBC that the cut score of 128 remain unchanged for the time being. As a result of the court's recent request, a second committee has been reviewing the cut score and will be making its recommendation to the BBC, which will report back to the court whether or not to raise the score, and if so, by how much. The court will then decide to either to keep the present score or to reset it.

Led by chair **David Hymer**, the BBE, as it historically has done, continues to provide the leadership and expertise that keeps our bar exam at the forefront of bar examinations. These new changes and the UBE will have a direct and positive impact on licensing future candidates as attorneys in Alabama for many years to come. I am grateful for the BBE's continued dedication to improve this important function of the bar.

## Education Debt Update

Of those taking the July 2013 bar exam, 70 percent had educational debt. The average amount for those with debt was \$102,650. | [AL](#)

## Endnotes

1. For an overview of the UBE, see the Executive Director's Report, "The ASB, UBE, BBE, NCBE, MBE and MPT," *The Alabama Lawyer*, March 2011, pp. 101-102.
2. For a discussion of that study, see the Executive Director's Report, "Cut Score Study Concludes Final Phase of Comprehensive Bar Examination Review," *The Alabama Lawyer*, March 2007, pp. 104-105.



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### Local Bar Award of Achievement

**Position Available:  
Director, Montgomery  
County Public Defender's  
Office**

**Alabama Lawyers'  
Hall of Fame**

**Judicial Award of Merit**



## Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's 2014 Annual Meeting at the Hilton Sandestin Beach Golf Resort & Spa.

Local bar associations compete for these awards based on their size—large, medium or small.

The following criteria will be used to judge the contestants for each category:

- The degree of participation by the individual bar in advancing programs to benefit the community;
- The quality and extent of the impact of the bar's participation on the citizens in that community; and
- The degree of enhancements to the bar's image in the community.

**To be considered for this award, local bar associations must complete and submit an award application by May 30, 2014.** Applications may be downloaded from [www.alabar.org](http://www.alabar.org) or obtained by contacting Christina Butler at (334) 269-1515 or [christina.butler@alabar.org](mailto:christina.butler@alabar.org).



# Position Available: Director, Montgomery County Public Defender's Office

Pursuant to *Ala. Code* (1975) §15-12-4, the Montgomery County Indigent Defense Advisory Board is establishing a Public Defender's Office for Alabama's 15<sup>th</sup> Judicial Circuit. Our board is seeking extraordinary candidates for the position of director for our Public Defender's Office. Our director will be responsible for establishing a fully-staffed law office, while fulfilling the Constitutional obligation for high-quality legal representation for indigent citizens in Alabama's second-largest county. The founding director will be empowered to establish this office, hire its initial staff and be its spokesperson. This Public Defender's Office launch is a major achievement and the founding director will be granted substantial latitude to achieve its successful creation and operation.

## Duties of the Director

- Lead the Public Defender's Office as its senior lawyer and chief executive;
  - Have, or develop, an intimate understanding of Montgomery County's criminal justice system, along with its unique needs;
  - Hire sufficient staff to provide indigent defense services for Montgomery County. This will include, but is not limited to attorneys, paralegals, investigators, legal assistants, administrative, and other clerical staff. The Advisory Board views this undertaking as comparable to establishing a large law firm;
  - Achieve dual goals of higher-quality legal representation and greater efficiencies, relative to indigent defense expenses;
  - Manage relations with the 12 judges of the 15<sup>th</sup> Judicial Circuit, the Montgomery County District Attorney's Office, the Montgomery County Bar Association, the Alabama State Bar, Montgomery County's indigent defense programs (Montgomery County Bar Foundation and Legal Services Alabama), and Montgomery County's Alternative Sentencing Programs, etc.;
  - Launch new initiatives and strategies to promote the image of the Montgomery County Public Defender's Office to citizens of Montgomery County and of the state;
  - Provide leadership in reforming, and in increasing our quality of, indigent defense in Alabama; and
- Operate the Public Defender's Office in conjunction with, and pursuant to, the oversight of our Local Indigent Defense Advisory Board and the director of Indigent Defense Services for the State of Alabama.

## Requirements

- The successful applicant must be prepared to serve the public defender's defined term of three years, subject to renewal, and to the provisions of *Ala. Code* (1975) §15-12-41.
- The successful applicant must be a member in good standing with the Alabama State Bar, or become so prior to taking office, and a member in good standing of every other bar of which the applicant is a member.
- The successful applicant must have a minimum of five years' criminal practice experience, preferably with significant criminal trial experience. This experience must demonstrate an ability to provide, and to inspire, zealous, high-quality representation for criminal defendants.
- The successful applicant must be able to effectively manage this office.
- The successful applicant must be, or become, a resident of Montgomery County prior to taking office.
- The successful applicant must be able to prove their capacity for competency, integrity and leadership.
- Salary range: \$90,000-\$110,000

As a State of Alabama employee, benefits include:

- Low-cost health/dental insurance (single coverage)
- Optional family coverage (health/dental)
- Accrue 13 annual leave days per year
- Accrue 13 sick days per year
- Thirteen paid holidays per year
- Retirement plan
- Flexible employee benefit plans

Read the Montgomery County Indigent Defense Advisory Board's "Montgomery County Public Defender Application" and the qualifications for the position in the explanatory preface titled "Fifteenth Judicial Circuit Montgomery County Indigent Defense Advisory Board." The application will be hosted on the circuit's website, [15jc.alacourt.gov](http://15jc.alacourt.gov), as well as various other sites. A copy can also be obtained from Rob Sachar, court administrator, 15th Judicial Circuit, (334) 832-1357. **The deadline for submission of applications is December 15.**

## Alabama Lawyers' Hall of Fame

May is traditionally the month when new members are inducted into the Alabama Lawyers' Hall of Fame which is located at the state judicial building. The idea for a hall of fame first appeared in 2000 when Montgomery attorney Terry Brown wrote state bar President Sam Rumore with a proposal that the former supreme court building, adjacent to the state bar building and vacant at that time, should be turned into a museum memorializing the many great lawyers in the history of the state of Alabama.

The implementation of the idea of an Alabama Lawyers' Hall of Fame originated during the term of state bar President Fred Gray. He appointed a task force to study the concept, set up guidelines and then to provide a recommendation to the board of bar commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004. Since then, 40 lawyers have become members of the hall of fame. The five newest members were inducted on May 3, 2013.

A 12-member selection committee consisting of the immediate past president of the Alabama State Bar, a member appointed by the chief justice, one member appointed by each of the three presiding federal district court judges of Alabama, four members appointed by the board of bar commissioners, the director of the Alabama Department of Archives and History, the chair of the Alabama Bench and Bar Historical Society, and the executive secretary of the Alabama State Bar meets annually to consider the nominees and make selections for induction.

Inductees to the Alabama Lawyers' Hall of Fame must have had a distinguished career in the law. This could be demonstrated through many different forms of achievement—leadership, service, mentorship, political courage, or professional success. Each inductee must have been deceased at least two years at the time of their selection. Also, for each year, at least one of the inductees must have been deceased a minimum of 100 years to give due recognition to historic figures as well as the more recent lawyers of the state.

The selection committee actively solicits suggestions from members of the bar and the general public for the nomination of inductees. We need nominations of historic figures as well as present-day lawyers for consideration. Great lawyers cannot

be chosen if they have not been nominated. Nominations can be made throughout the year by downloading the nomination form from the bar's website and submitting the requested information. Plaques commemorating the inductees are located in the lower rotunda of the judicial building and profiles of all inductees are found on the bar's website at <http://www.alabar.org/members/hallfame/index.cfm>.

Download an application form at [http://www.alabar.org/members/hallfame/halloffame\\_ALH\\_2014.pdf](http://www.alabar.org/members/hallfame/halloffame_ALH_2014.pdf) and mail the completed form to:

Sam Rumore  
Alabama Lawyers' Hall of Fame  
P.O. Box 671  
Montgomery, Alabama 36101

**The deadline for submission is March 1, 2014.**

## Judicial Award of Merit

**The Alabama State Bar Board of Bar Commissioners will receive nominations for the state bar's Judicial Award of Merit through March 14, 2014.** Nominations should be mailed to:

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

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

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

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





# Judge Carnes Becomes Chief Judge Carnes

*By Emily J. Tidmore*

## An Architect, Not a Mere Bricklayer

The Scottish author Sir Walter Scott observed that “[a] lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect.”<sup>1</sup> If Scott’s observation is true, we can say with certainty that as he takes on new job responsibilities, Judge Ed Carnes will not merely be stacking bricks; instead, he will continue to do his architectural work constructing opinions with a flair for style as well as content. On August 1, 2013, Judge Carnes, who has served on the Court of Appeals for the Eleventh Circuit for 21 years, became the chief judge.

To the task of leadership, he brings a treasure trove of knowledge, not just of the law but also of history, literature and

popular culture, and drawing from that cache, he has scattered little gems in the engaging opinions he is renowned for writing. Veteran legal reporter Alyson M. Palmer described Judge Carnes’s opinions as “crackl[ing] with personality” and as characterized by some “biting zingers” along with a tone that is “[c]onversational, and often blunt.”<sup>2</sup>

## Irony, Wit, Allusions

To take just one example, in an appeal about whether a magazine and one of its writers could be compelled to reveal a confidential source, Judge Carnes addressed some events that were likely familiar to many Alabamians, beginning his opinion with this jewel of an introduction:

“In the Spring of 2003 Mike Price was head coach of the University of Alabama’s Crimson Tide football team. Given the near-fanatical following that college football

has in the South, the head coach at a major university is a powerful figure. However, as Archbishop Tillotson observed three centuries ago, ‘they, who are in highest places, and have the most power . . . have the least liberty, because they are most observed.’ If Price was unaware of that paradox when he became the Crimson Tide’s coach, he learned it the hard way a few months later in the aftermath of a trip he took to Pensacola, Florida.<sup>39</sup>

That passage is probably the only time Archbishop Tillotson has shared a page with a football coach, and the points that passage makes are all the richer for the unexpected but apt connection. This kind of writing calls to mind what Justice Holmes once described as his own “chief interest” in showing “the universal in the particular.”<sup>40</sup> A Carnesian judicial opinion often contains engagingly written particulars that offer a glimpse of the universal.

Irony and wit are no strangers to his opinions either. For example, the next paragraph of that same opinion continues:

“While in

Pensacola to participate in a pro-am golf tournament, Price, a married man, visited an establishment known as ‘Artey’s Angels.’ The name is more than a little ironic because the women who dance there are not angels in the religious sense and, when he went, Price was not following the better angels of his nature in any sense. Scandal ensued, and as often happens in our society, litigation followed closely on the heels of scandal.<sup>32” 5</sup>

In the first two of those three sentences about the coach’s trip to the strip club, Judge Carnes crafted a fitting allusion to a line from one of Shakespeare’s sonnets (“The better angel is a man right fair”),<sup>632</sup> and to a line from Lincoln’s First Inaugural Address (“The mystic chords of memory . . . will yet swell the chorus of the union, when again touched, as surely they will be, by the better angels of our nature.”).<sup>7</sup> In the third sentence, he linked the facts to another broader truth: in our society, litigation often “follow[s] closely on the heels of a scandal” (emphasis added).



## More than Just Politically Correct

As for the particulars, Ed Carnes’s Alabama roots run deep. He was born in Albertville, Alabama and graduated at the top of his class from the school of commerce and business at the University of Alabama before heading north for his legal education at Harvard Law School, where he graduated with honors in 1975.

He went to work in the Alabama Attorney General’s Office and his duties there included prosecuting cases across the state, ranging from bootlegging to burglary and manslaughter to murder. Early in his career as an assistant attorney general, he worked to ban the importation into Alabama of South African coal, which, at that time, was mined by indentured black laborers under penal sanction.

In the famous Sixteenth Street Baptist Church bombing case prosecuted by Attorney General Bill Baxley in 1977, Carnes was chief appellate and habeas counsel for the state

in the case involving the first of the Ku Klux Klansmen killers to be prosecuted.<sup>8</sup> He convinced the Alabama appellate courts to affirm the conviction of the Klansman for murdering the four little girls and persuaded the federal courts to deny habeas relief.

As a prosecutor and appellate lawyer, he considered his clients to be the State of Alabama and those of its people who were the victims of crime. He received an award from the Victims of Crime and Leniency organization for his efforts on behalf of crime victims, which included authoring and helping lobby into law 18 statutes involving criminal law and victims’ rights.

One of his other duties was to prosecute in the Alabama Court of the Judiciary’s ethical complaints filed against state court judges by the Alabama Judicial Inquiry Commission. In 18 of the cases that he prosecuted, he succeeded in having the judge convicted of violating the Canons of Judicial Ethics and disciplined by the Court of the Judiciary. Two of the cases were brought against state court judges who had separately engaged in racist conduct or made racist comments. He advocated that both of



those judges should be removed from the bench, and they were.

Years before the United States Supreme Court's *Batson* decision prohibiting the racially discriminatory use of peremptory strikes, he urged district attorneys not to strike a black juror unless they would strike a white one in the same circumstances.<sup>9</sup> In a case involving a Ku Klux Klansman charged with lynching a young black man in Mobile, he fought all the way to the Supreme Court in an effort to prevent the defendant from striking all of the blacks from the jury. After the *Batson* decision, he drafted and lobbied for legislation that would have extended its ban on racially discriminatory strikes to both sides. And, in a case involving the retrial of a black defendant who had been convicted twice before by all-white juries for murdering a white victim, he persuaded the attorney general to agree to a change of venue to a county with a higher black population to ensure a multi-racial jury.<sup>10</sup>

## The Red Baron

As a lawyer, he was a skilled and tenacious advocate but a fair and ethical one. In an open letter to the Alabama State Bar in 1989, attorney **David Bagwell** sought lawyers to handle capital cases at the post-conviction stage including federal habeas corpus proceedings. He cautioned those who would step forward to volunteer that Carnes, the attorney who represented the state, was

“very, very bright,” knew that area of the law cold and “could beat anybody in the country on this subject.”<sup>11</sup> Bagwell warned them that in the battle “you will not meet a German farmhand; you will meet the Red Baron. Good luck.” He added parenthetically that Carnes “is also, in my experience, entirely fair and ethical.”<sup>12</sup>

In 1992, President George H. W. Bush nominated Carnes to the United States Court of Appeals for the Eleventh Circuit. Bagwell, who had personally litigated against him in two capital cases, was one of many opposing counsel who openly supported the nomination, attesting to Carnes's fairness. Bagwell testified before the Senate Judiciary Committee about the man who had been his opposing counsel: “Nobody could have been more fair, nobody could have been more helpful, nobody could have been more cooperative than Ed Carnes was. He was straight. He did not overreach. . . . He has immense credibility with the judges in Alabama, and the reason is he has earned it by speaking straight when he speaks.”<sup>13</sup>

Two other attorneys who had represented death row inmates told the Senate Judiciary Committee about how Carnes, in two different cases, while representing the state in the post-conviction stage, had uncovered and immediately brought to their attention and to the attention of the court exculpatory evidence that led to the murder convictions and death sentences being overturned.<sup>14</sup> In one of those cases, he discovered exculpatory evidence in another prosecutor's file, notified defense counsel that same day, drafted an order granting the death row inmate a new trial and,



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the next morning in the presence of defense counsel, presented that order to a federal judge and persuaded him to sign it.<sup>15</sup> Defense counsel stated that if Carnes had not taken the action that he did, his client would have been executed.<sup>16</sup>

Another testament to his fairness is that Carnes has been the only Alabama Assistant Attorney General in the history of the state known to have litigated on the defendant's side of a criminal case against the position of district attorneys, and he did it twice.

In one of those cases, the district attorney had convinced the judge to sentence to death a teenager convicted of brutally murdering a young woman.<sup>17</sup> Carnes urged the DA to ask the trial judge to change the sentence to life imprisonment because of the defendant's age at the time of the murder and, when that did not happen,<sup>18</sup> he weighed in on the defendant's side and argued to the Alabama Court of Criminal Appeals that the death sentence should be set aside as unconstitutional.<sup>19</sup> It was.<sup>20</sup>

In another case, he filed a brief and argued in the Alabama Supreme Court that trial judges should be given the authority to order district attorneys to open their entire file to defense counsel in capital cases even though the Constitution, state law and the rules of criminal procedure did not require an open-file policy.<sup>21</sup> The District Attorneys Association filed a brief and argued against his position.<sup>22</sup> The court agreed with Carnes and made his position the law of the state.<sup>23</sup>

Carnes was also one of those rare attorneys who worked to increase the amount of funding for those who represent the other side in court. Along with an attorney from the Southern Poverty Law Center, he co-authored and lobbied for legislation that would have increased the compensation of attorneys representing capital defendants at trial, on appeal and in state collateral proceedings.<sup>24</sup> When that legislation failed to pass, he wrote and signed an attorney general's advisory opinion, which was issued, that doubled the maximum payment for out-of-court work by appointed counsel at the trial stage of capital cases.<sup>25</sup>

## A Secret Wish?

During his time as an assistant attorney general, Carnes became an expert in criminal law and procedure. As an attorney, he served as a member of the Alabama Supreme Court's Criminal Procedure Rules Committee, and as a judge, he served as a member and chair of the Criminal Rules Advisory Committee of the Judicial Conference of the United States. As one lawyer who has appeared before him as a judge remarked, "He's a master at criminal law. He knows it far better than anyone else I know."<sup>26</sup>

Judge Carnes has spent 21 years establishing a judicial record notable for legal brilliance and stubborn insistence on following the rule of law. The only party line he appears to follow is the one leading to hors d'oeuvres at courthouse socials. Lawyers who have cases before him have made observations like these: "He's at the top; he's extremely bright. . . . He's very interested in the law and where the 11th Circuit is in the whole nation with the other circuits. He's a national legal mind."<sup>27</sup>

Though not lauded as the most genteel judge on the bench during oral argument ("He's generally courteous, but he lacks patience with unprepared lawyers or advocates"), he is described as being "very

prepared" and is known for asking "probing questions."<sup>28</sup> Lawyers who have appeared before him at oral argument have also described him as an active questioner: "He's really an aggressive questioner and you'd better be prepared" and "He asks a lot of questions; he didn't give me a chance to say hello."<sup>29</sup> He is praised by lawyers for his well-written opinions, which are described as "scholarly" and "really fun to read," an unusual combination.<sup>30</sup> Lawyers know him as having "a very distinctive style" and for being "a fanatic about excellent writing."<sup>31</sup> One lawyer stated, "He takes real pride in his writing and he's good at it. I think he secretly would have loved to have been a famous novelist."<sup>32</sup> Judge Carnes as a novelist would be surprising because he has expressed a preference for non-fiction by stating on many occasions that the only fiction he reads is in briefs.

Last spring, a group of judges studied his writing style in an advanced course that he taught in Duke Law School's Masters of Judicial Studies Program. (The other half of that writing course was taught by Justice Antonin Scalia.) He has also given many talks on effective writing and editing to bar associations, judges' conferences and students at law schools around the country.

Chief Judge Carnes will have a host of new responsibilities in his leadership role. While the administrative responsibilities that come with being chief judge of a federal appellate court are demanding, most readers will likely share the hope his new duties do not take too much time away from the architectural art of drafting legally astute opinions that are also a pleasure to read.

## Top Priority

He is the son of **T. J. Carnes**, who practiced law in Albertville for nearly 50 years before retiring, and the brother of **Jimmy Carnes**, who still practices law there. When he was in the tenth grade, the young man who would become chief judge worked up enough courage to ask a classmate out on a date. After going steady for seven years, they were married 41 years ago, and she is still the love of his life. He and his wife, Becky, live in Montgomery and have a daughter who works in hotel real estate finance in Atlanta. | [AL](#)

## Endnotes

1. Sir Walter Scott, *Guy Mannering, Complete Works of Sir Walter Scott* 77 (Conner & Cooke, Franklin Buildings 1833).
2. Alyson M. Palmer, *Smarts and Zingers, Daily Report*, Feb. 12, 2009, available at <http://www.dailyreportonline.com/PubArticleDRO.jsp?id=1202551783683&slreturn=20130726185449>, last visited Aug. 26, 2013.
3. *Price v. Time, Inc.*, 416 F.3d 1327, 1329 (11th Cir. 2005) (footnote omitted).
4. Oliver Wendell Holmes, Jr., "Aug. 31, 1920 letter to Morris Cohen," in *The Collected Works of Justice Holmes: Vol. I 19-20* (Sheldon M. Novick, ed., 1995).
5. *Price*, 416 F.3d at 1329-30.
6. William Shakespeare, "Sonnet 144," *The Oxford Shakespeare Complete Sonnets and Poems* 669 (Oxford Univ. Press 2008).
7. Abraham Lincoln, "First Inaugural Address," *The Declaration of Independence and Other Great Documents of American History 1775-1865* 88 (John Grafton, ed., Dover Thrift Editions 2000) (1861).



8. *See Chambliss v. State*, 373 So. 2d 1185 (Ala. Crim. App. 1979).
9. Letter of District Attorney Robert L. Rumsey to Senator Joseph R. Biden, chair, S. Comm. on the Judiciary (May 7, 1992).
10. Letter of Don Siegelman to Senator Joseph R. Biden, chair, S. Comm. on the Judiciary (May 11, 1992).
11. David A. Bagwell, "Letter to the Editor," *Alabama Lawyer*, Nov. 1989, at 292.
12. *Id.*
13. *Confirmation Hearings on Federal Appointments: Hearings before the S. Comm. on the Judiciary*, 102d Cong. 170 (1992) (Statement of David A. Bagwell) (hereinafter *Confirmation Hearings*).
14. Letter of Joseph A. Fawal to Senator Joseph R. Biden, chair, S. Comm. on the Judiciary (March 12, 1992); *Confirmation Hearings*, 102d Cong. 163-69 (statement of Rick Harris).
15. *Confirmation Hearings*, 102d Cong. 167.
16. *Id.* at 168.
17. *See Flowers v. State*, 586 So. 2d 978 (Ala. Crim. App. 1991).
18. Letter from Assistant Attorney General Ed Carnes to Baldwin County District Attorney David Whetstone, Feb. 26, 1990; *see also* Letter from Whetstone to Carnes, March 6, 1990; Letter from Carnes to Whetstone, March 9, 1990; Letter from Whetstone to Carnes, March 16, 1990; Letter from Whetstone to Attorney General Don Siegelman, Sept. 17, 1990 (asking the attorney general to defend the judgment of death by electrocution that the state trial court had imposed); Letter from Siegelman to Whetstone, Oct. 17, 1990 (informing Whetstone that Carnes would do all he could to facilitate Whetstone's filing an amicus brief with the state appellate court setting out his arguments in support of the judgment).
19. *Flowers*, 586 So. 2d 978.
20. *Id.* at 990-91.
21. *See Ex parte Monk*, 557 So. 2d 832, 836-37 (Ala. 1989).
22. *See id.* at 833.
23. *See id.* at 836-37.
24. Letter from Assistant Attorney General Ed Carnes to Dennis Balske, Jan. 29, 1988 (enclosing a copy of the bill proposing to amend *Ala. Code* §§ 15-12-21 and 15-12-23).
25. Ed Carnes, advisory opinion letter to the Circuit Judge John B. Bush, April 26, 1990.
26. *Almanac of the Federal Judiciary*, 2013 WL 4482372 (2013) (last visited Aug. 28, 2013) (hereinafter *Almanac*).
27. *Almanac*, 2013 WL 4482372.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*



## *Alabama Law Opens Foreclosure Relief Clinic*

The University of Alabama School of Law, through a grant from the Alabama Attorney General's National Mortgage Settlement funds, has added a new legal clinic specializing in foreclosure issues. The clinic will offer legal assistance to individuals in Lamar, Fayette, Pickens, Tuscaloosa, Greene, Hale and Bibb Counties who are in foreclosure, or who face the threat of foreclosure, on their homes.

The foreclosure relief clinic addition expands Alabama Law's clinic program to eight. Other clinics offering free legal assistance to the community are:

- Capital Defense
- Domestic Violence
- Community Development
- Elder Law
- Criminal Defense
- Civil Law
- Mediation Law

*For more information please call (205) 348-4960.*

# Dean Kenneth C. Randall Retires: University of Alabama School of Law, 1994-2013

In June, Dean Ken Randall retired from the University of Alabama School of Law to become president of iLawVentures LLC, where he continues his work in building excellence in legal education. Dean Randall's tenure at the University of Alabama led the law school to national prominence in both academic stature and innovative learning. As he departs for a new career, Dean Randall's legacy includes a law school ranking of seventh among public law schools and an overall ranking of 21<sup>st</sup> out of 210 law schools nationally.

Under Randall's leadership, the law school underwent a quiet, yet extraordinary, transformation. Judy Bonner, president of the University of Alabama, recognized Randall's legacy: "The University of Alabama School of Law was transformed under the leadership of Dean Kenneth C. Randall during the past two decades. By any measure, Dean Randall's tenure as dean was an era of amazing progress for our law school and our university. Our school of law experienced unprecedented growth in reputation, academic excellence and vast expansion and improvements in programs and facilities."

Randall joined the faculty in 1985 as an assistant professor, teaching Constitutional law, international business transactions and public international law. Prior to joining the UA law faculty, Randall served as an associate in the New York City offices of Simpson Thacher & Barlett. Randall became vice dean of the law school in 1988, and dean in 1994.

When Randall became dean, the law school was nationally ranked in the third out of four tiers. In 2013, *United States World and News Report* ranked the UA 21<sup>st</sup> out of the 210 law schools in the United States and as the seventh best public law school.

Working with **Judge Harold Albritton**, Randall established the Albritton Lecture Series to bring United States Supreme Court justices to the law school. Since 1998, nine justices have delivered lectures there.

In partnership with the firm of Skadden, Arps, Slate, Meagher & Flom LLP, Randall established the Morris Dees Justice Award in 2005 to recognize outstanding public service by lawyers.

In 2011, Randall worked with the *ABA Journal* to establish the annual Harper Lee



Randall

Prize for Legal Fiction (honoring, thus far, John Grisham, Michael Connelly and Paul Goldstein).

Randall made the student experience a priority. One key example is Randall's support of the Public Interest Institute established in 1999. **Professor Pam Pierson** noted its impact on students. "Over 500 UA law students have earned awards for public service through this institute. More than \$300,000 has been given in summer grants to law students who perform public interest legal work." Randall was recognized by the Alabama State Bar for his work in pro bono legal services with the 1999 Alabama State Bar's Pro Bono Award. In 2011, Randall established certificates in Governmental Affairs and in Public Interest for UA law students specializing in these areas, and launched a semester-long externship in Washington, DC for UA law students.

Alumni are equally appreciative of Randall's strategic leadership. **Julia Roth**, president of the University of Alabama School of Law Foundation, said, "Under Dean Randall's leadership, the law school has been catapulted into one of the highest-ranking law schools in the nation. Dean Randall provided strategic, thoughtful leadership and vision for our law school over the past 20 years, and we cannot thank him enough for his tireless service. He will be greatly missed."

The chair of the Farrah Law Alumni Society, **Mike Ermert**, added, "Dean Randall's positive impact on the University of Alabama School of Law will be felt for generations to come. He raised

the standard of legal education in this state to a level heretofore unimagined."

Randall recently worked with alumni to raise \$15 million to build a new wing of the law school. The new wing allowed the law school to establish clinics on site, previously housed in scattered locations. He established international exchange programs for UA law students with the University of Fribourg in Switzerland and the Australian National University in Canberra, Australia and developed relationships for UA law students with law schools in Israel, India and Korea.

**Boots Gale**, general counsel at Regions Financial Corporation and also treasurer of the Alabama Law School Foundation, added, "Our graduates and the entire state owe him a great deal. His service truly transformed our law school. He is a great leader and made a real difference."

Randall holds four law degrees, including doctoral and master's degrees from Columbia University, a master's degree from Yale University and a J.D. from Hofstra School of Law. He is the author of the book, *Federal Courts and the International Human Rights Paradigm*, published by Duke University Press in 1990, and numerous articles published in the Columbia, Texas, NYU International, Minnesota, Washington University, and Ohio State law reviews. | [AL](#)

**Professor Pam Pierson, Alyce Spruell and Cathy Wright contributed to this article.**

## INTERIM DEAN

Bill Brewbaker was named interim dean of the University of Alabama School of Law in July of this year. A native of Montgomery, Brewbaker practiced law in Birmingham for six years before joining the Alabama law faculty in 1993. He has law degrees from Virginia and Duke and teaches classes in health care law, property and Christian legal thought. In 2011 and 2012, he served as associate dean for special programs.



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# From Clients' Lips to Counsel's Ear: Effective Service to Institutional Clients

By Timothy M. Lupinacci

Over the past few years, I have moderated several panels

with in-house counsel from a variety of businesses, including Fortune 500 companies. The focus of these programs was to identify ways that attorneys can provide effective, efficient and valuable service to in-house counsel and their clients. While the entire foundation of delivering legal service has changed fundamentally over the past five years, it is clear that regardless of the innovations that characterize the legal industry of the future, client service remains a cornerstone.

One of the more striking aspects of talking with clients about these issues is that while each company lawyer has his or her own approach, style and process, the best practices in client service are remarkably consistent. This article provides practical advice from clients on actions that outside counsel should need in building trusted advisor relationships with in-house counsel.

## **One Thing Remains: Understanding the Clients' Business And Objectives**


Outside counsel must be excellent lawyers, have specialized expertise in the

matter at hand, provide good advocacy, be efficient, and add value. These requirements are a foundation to get in the door to handle their matters. Equally important, however, is for outside counsel to know and understand the client's business, the company's risks and its strategic plan. It is important to see the big picture and know the client's business objectives. The particular strategies may change how you handle the case once you have a clear understanding of the business objectives.

By way of example, winning a case at trial is not necessarily viewed as a victory for the client if its business objective is to expeditiously resolve matters. A quick settlement a year before incurring the cost and expense of a trial may be the best outcome for the client. Therefore, it is critical to ask clients (and listen to them) about their objectives for a particular matter.

Likewise, knowing the companies' business is critical if you expect the client to hire you for new business. In-house counsel uniformly disdain lawyers who waste time at a valuable business meeting or lunch simply to find out the basics about the company. Do your homework about this business *before* you attend the meeting so that the meeting can focus on the client's legal needs and trends it has encountered (which, hopefully, you also learned about in conducting your research).





**It is important to be attentive to clients, including promptly returning phone calls and emails.**

## **Clarity: Effective Communication Is Critical**

Communication is an important element that you must proactively discuss with the client at the beginning of a matter. You must understand the in-house counsel's preferred method of communication and what items need to be communicated on what basis. Some clients prefer telephone calls for routine updates, while others choose emails. It is important to ask and listen to the client in developing a communication strategy for each individual client representative and matter. The style and preference of the client can vary from one in-house counsel to another, even if they are on the same team. Likewise, it can vary by matter depending on the internal profile of the matter.

Most clients do not want to receive a call on their cell phone to grant a seven-day extension to answer discovery. Similarly, counsel does not want an email with an urgent request that has to be addressed immediately, since the email may be lost in the shuffle of the day. You must use good judgment based on a clear understanding of the client's preferred method of communication in handling these types of issues.

A corollary of this communication plan is written reports. It is important to understand the in-house perspective on the volume of reporting that they have to monitor and produce. You can provide significant value by helping in-house counsel provide concise statements of updates and information that they need to complete their reports. Some clients request monthly status updates through the use of spreadsheets or other electronic communication. Some like bi-weekly, monthly or quarterly reports providing an overview of all cases that the particular firm is handling. Others only want updates on meaningful developments in the case. The critical point is to make sure that you understand how your client wants to receive and process information. In-house counsel expects you to let her know what she needs to know about the matter.

In-house counsel do not want you to send "CYA communication" to them. They do not want to hear that whatever

problem or delay has occurred is not your fault, nor do they want an elaborate message trying to justify actions. Rather, they want to know what the plan is to fix it. You need to be proactive in communicating the proposed action plan to address the situation. In-house counsel want lawyers who will admit mistakes and identify the plan to fix the mistake. Don't make your problem the client's problem.

It is important to be attentive to clients, including promptly returning phone calls and emails. If you are going to be out of town, let the client know in advance and set up a bounce-back out-of-office message with details on who they can contact. When you are out of town set up the infrastructure so that matters will continue in your absence.

One in-house counsel noted that he has been surprised by outside lawyers who get contentious and argumentative with the client. Often, outside counsel lose sight of who the audience is and that they need to view in-house counsel with respect and as a partner in the process. In-house counsel do not want lawyers who are arrogant and who only focus on telling in-house counsel what they know. Rather, they want someone who can listen and help them strategize to reach an objective.

A final piece of practical communication advice is to provide specific information in reference lines of emails to alert the client as to what the subject of the communication is. Do not merely put the name of the client in the email. Be specific about the matter the email involves and the topic contained in it. Do not send lengthy emails to the client with an action point buried at the end. Emails need to be succinct. Highlight any response or action items that the in-house counsel needs to take.

## **Radioactive: Surprises Are a Quick Way to Damage Relationships**

It is important to manage the matter and client expectations during the engagement so that there are no surprises along the way. This includes effective

budgeting, as well as communication. The in-house counsel is managing expectations and risks within the company, and the worst possible scenario for her is for a surprise in expense, outcome or strategy to arise about which they are unaware.

In-house counsel also wants no surprises on invoices. If you anticipate a significant amount of research will be performed, check with the client in advance to performing the research. It is possible that the in-house department already has research on the topic. In-house counsel is managing files based on internal budgets. If your matter is about to incur increasing fees, let them know what is coming up and your expectations on increased fees. That helps the lawyer manage budgets. If a particular invoice on a matter is going to be significant in a given month, give the counsel a heads-up as to the anticipated up-tick in fees and the expectations moving forward.

In-house counsel looks to outside lawyers to help them manage risk. You need to understand the client's appetite for risk and to alert them to problems about their case at the outset of the engagement and along the way as other factors come to light. When counsel gets a new matter, their risk scale is \$0 to the maximum exposure. The client ultimately judges the efficiency of the matter by how far the lawyer can move the client toward paying \$0 on the scale without risking too much in time and expense and liability. By way of example, a client gets sued for \$2 million. At that point, the client's exposure runs from \$0 to \$2 million (plus fees and expenses incurred). If the client determines they can settle the case immediately for \$500,000, but based on counsel's recommendation, it proceeds to litigation and ultimately receives a defense verdict but pays the lawyer \$750,000 in fees, the lawyer has not helped the counsel limit liability.

## The Way: Providing Proactive Recommendations

When in-house counsel asks you a question, they want you to give an answer and recommendation. They do not want a lengthy memo that concludes with "the answer could be A, B or C." They want to know what you think the answer is, along

with a recommendation on how to proceed. They understand that ultimately the court may rule differently or the negotiations on the deal may veer sideways, but if you have outlined the possible scenarios and given your recommendation, the in-house counsel understands the risk. In-house counsel expect outside counsel to "know what I need to know" and will rely on your recommendation based on the facts presented.

In-house counsel want advocates, not scribes. An effective counsel is one who analyzes the facts and law governing the matter, considers the clients' business objectives and provides informed recommendations. Ultimately, the best practice for an outside attorney is to give practical advice about how to solve their problems, including taking a position on how best to achieve that result.

## Suit and Tie: Following the Clients' Policies And Billing Procedures

It is critical to follow all client policies and procedures during your representation. If you do not make it a priority to understand and follow the client's procedure, the in-house counsel has no reason to continue using you.

A lack of respect for process and procedures is one of the easiest ways to get terminated by a client. You may not be told that you are terminated, however you will get no more work in the future. One client mentioned an example where an outside attorney failed to get the signature block accurate for the client. This was viewed as a significant issue.

## Feel the Moment: Timeliness and Responsiveness Matter a Lot

In-house counsel hate to be "jammed up," editing pleadings at the last minute. You have to build in significant time before the pleadings or documents are

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due, to give counsel the ability to manage and review all the pleadings in a timely manner. Be timely in getting documents to the client. Do not send a rough draft of the document; send a final version that is client-ready.

Responsiveness means that clients want to hear back from you with an acknowledgement the day that they leave the message. It is fine if you cannot answer substantively that day, but let them know when you will get back to them with an answer.

## Daylight: Invoices Tell the “Story of The Case”

An area of fertile discussion is invoices. The invoice is the road map of the case for in-house counsel. They need to see a detailed description about what is going on and what value they are getting for the

money they are being asked to. They do not want to see “internal chattering” unless there is a detailed description about what the internal meeting accomplished for the client. One counsel noted that they often get billed for research and preparation of legal memos or other documents, but they never see the draft or final product of the memo. That is the client’s property once the bill is paid, so they need to see copies of all memos prepared on their behalf.

Just because the client is huge, or the matter is large, does not mean that it is a dumping ground to which lawyers should bill time. In-house counsel review all invoices and are regularly looking at fees. Clients like to see “no charge” on invoices for junior lawyers getting experience on matters. This shows the client that they are not paying for this time.

Avoid invoice irritants such as too many lawyers on a bill. Also, do not take an unproductive lawyer in a different practice area and try to pass them off as having

expertise on a matter since they need work. In-house counsel see right through these attempts. Clients want people who understand and have expertise in the particular matter to handle their matters.

## Wanted: Adding Value beyond the Billable Hour

The best outside counsel look for opportunities to provide value to the client above and beyond the billable hour. This includes doing in-house training seminars, forwarding recent developments in the particular industry and providing regular status reports on the matters being handled.

The clients expect that you understand the basics of the particular area of law that you are handling. You need to focus on adding increased value above the basic legal work. Keep your eyes open for new cases or trends in the law that will help

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— Henry Ford.



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counsel in their work. Pass along industry updates so that they have knowledge about trends or issues if asked internally.

Online capabilities are crucial in today's legal environment. The ability for the client to access basic data regarding the status of a matter, expense and fees incurred to date, as well as particular documents and pleadings in a matter, are very helpful for the client. Legal project management is an effective tool to facilitate these efforts.

## **The A Team: Effective Staffing For Projects**

It is important to have consistency in handling the matter from “cradle to grave.” There is significant benefit in having a lawyer with the full deal history that can help with strategy down the line. One irritant to in-house counsel is a lead lawyer who lacks knowledge of a particular deal or transaction. They want the comfort of knowing that when they call you about a particular matter, you will be up to speed on the case.

Do not delegate matters on a particular deal to other attorneys without getting in-house counsel's buy-in. They do not want to be contacted by a lawyer they have never heard of about a matter they assume that you are handling. Most in-house counsel do not tell the lawyer when they are “firing” them from future deals. They just stop calling.

## **Just Give Me a Reason: Identify Opportunities to Build Relationships With the Client**

Get to know the client outside the office. Dinners and lunches are good ways to get to know clients. Do whatever helps in building personal relationships with the client. This depends on the person. Some prefer eating meals together, while others would rather have a “lunch and learn” program. However, do not make in-house counsel “babysit” you when you

visit by having to show you around the office for several hours.

## **Thrift Shop: The Importance of Budgeting**

For planning purposes, there is little an attorney can do that is more valuable to clients than effective budgeting of matters. In-house counsel consistently rate effectively budgeting, and consistent and regular updating of the budget, as crucial elements in client service. In-house counsel is trying to manage legal budgets and, therefore, outside counsel's budget is a key component in meeting the company's legal budgets.

In-house counsel understand that often matters go in directions not previously contemplated at the outset of the case. The important note here is not only to prepare a budget at the outset of the case, but also to update the budget based on actual expenditures and increased responsibilities as the case proceeds. The ability to budget and effectively update budgets turns on clear communication with the client.

Some in-house counsel will have a view on whether she wants monthly updates to the budget, quarterly updates or periodic updates when significant portions of the budget are expended or new issues have arisen in the case or transaction. Some clients have particular budget forms they request outside counsel to use. Others leave it to the outside counsel to develop an effective budget metric. Some leading firms are effectively incorporating legal project management implementation to provide clients with real-time tracking of legal expenditures.

## **Cruise: Building Trusted Client Relationships**

Effective client service ultimately depends on building trusted client relationships. Listening to the client's needs is vital in building this relationship. Successful implementation of these strategies will help you cement long-term client relationships. | AL



**Listening to  
the client's  
needs is  
vital in  
building this  
relationship.**





# ECONOMIC DURESS: A Poor Excuse for Non-Performance

*By George M. Walker and Robert S. Walker*

Frequently in commercial litigation, a party fails to meet or comply with a contractual requirement,

causing the party serious annoyance or inconvenience in the litigation. To avoid the breach of contract and the consequences of such breach, the breaching party sometimes tries to justify its non-performance by invoking economic duress as a defense to the claim of breach of contract. While economic duress can be pled in an effort to avoid the requirements of any contract, it is most often invoked in efforts to avoid the effects of arbitration agreements, loan and loan modification agreements, releases and employment agreements. Over the course of the defense's existence in Alabama, economic duress has been frequently invoked but only rarely found to be available as an excuse for non-performance. The cases analyzing invocations of economic duress point out why.

## **The Definition of Economic Duress**

Economic duress has been described as “[a]n unlawful coercion to perform by threatening financial injury at a time when one cannot exercise free will.” *Black’s Law Dictionary*, p. 543 (8<sup>th</sup> ed. 2004). It has been similarly defined in the *Restatement (Second) of Contracts*, §175(1) (1979): “If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”

## **The Development of The Economic Duress Defense in Alabama**

The concept of economic duress as a defense to a contract claim has been recognized in Alabama since as early as 1834. See *Hatter’s Ex’ors v. Greenlee*, 1 Port. 222, 225, 26 Am. Dec. 370 (Ala.



1834) (If a warrant of arrest is obtained by false pretenses, any act produced by the arrest warrant will be void). While there were a few cases addressing economic duress over the following 150 years,<sup>1</sup> the real development of the law of economic duress in Alabama began in earnest in the 1980s.

In *Ralls v. First Fed. Sav. & Loan Ass'n of Andalusia*, 422 So. 2d 764 (Ala. 1982), the court recognized economic duress as a valid defense to the bank's argument that it was entitled to 12 percent interest on a \$600,000 loan that it had initially committed to make with a 10 percent interest rate. Interest rates rose between the date the commitment was signed and the date that the plaintiff was ready for the funds. Thus, when the bank provided the loan a year later, the bank imposed the 12 percent rate. *Id.* at 765-766. Ralls signed the loan agreement with the 12 percent interest rate because he had substantial financial commitments that he could meet only by obtaining the loan. The bank later contended that the loan agreement was an accord and satisfaction, but Ralls argued that he signed the loan agreement under economic duress and was entitled to the initially agreed-upon 10 percent rate. The trial court directed a verdict for the bank, but the supreme court reversed, finding that economic duress could be invoked to avoid a defense of accord and satisfaction as well as to vitiate a contract entirely. *Id.* at 766. There was evidence from which the jury could have concluded that a bank representative misled Ralls about the availability of an extension of the commitment with the 10 percent interest rate, and there was also evidence that Ralls relied on such representation up to the point where he had no choice but to accept the loan at the higher rate to complete his project. The court therefore concluded that there was a jury question presented as to economic duress, requiring a remand to the trial court. *Id.*

The Alabama Supreme Court's first opportunity to flesh out the elements of the economic duress defense was in *International Paper Company v. Whilden*, 469 So. 2d 560 (Ala. 1985). International Paper had entered into a series of contracts with Whilden for the cutting and hauling of timber on a certain tract of land owned by the Loftin family. Only certain specifically marked trees were to be cut, but it turned out that unmarked trees on the Loftin tract had also been cut. At the conclusion of the cutting, International Paper owed Whilden approximately \$7,000, but it refused to pay him unless he would, in return, execute a blanket indemnity agreement holding International Paper harmless against any claim made by the Loftins for the cutting of the unmarked trees. *Id.* at 561-562. Whilden signed the agreement after being told by International Paper that only about 30 unmarked trees had been cut (in fact the number was over 650), and he signed it because he needed the money to pay back a bank loan he had obtained to purchase logs from International Paper in a separate agreement. *Id.* at 562.

After International Paper was held liable to the Loftins for damages due to the cutting of the unmarked trees, it pursued a third-party claim against Whilden based upon the indemnity agreement. The trial court entered judgment for Whilden, concluding that he had executed the indemnity agreement under economic duress and that the agreement therefore was not enforceable. *Id.* The supreme court affirmed this judgment, concluding that the "trial court could reasonably have found that International Paper took unfair advantage of Whilden's economic necessities to coerce him into making the agreement." *Id.* at 564.

In its decision, the court referred to a three-element *prima facie* case for economic duress:

- (1) wrongful acts or threats;
- (2) financial distress caused by the wrongful acts or threats;
- (3) the absence of any reasonable alternative to the terms presented by the wrongdoer. *Id.* at 562 (citing *Sonnleitner v. Comm'r*, 598 F.2d 464 (5<sup>th</sup> Cir. 1979)).

Subsequent decisions have made clear that these are the elements for a *prima facie* claim of economic duress in Alabama. See *Penick v. Most Worshipful Prince Hall Grand Lodge Fe&AM of Alabama, Inc.*, 46 So. 2d 416, 431 (Ala. 2010); *Wright Therapy Equip., LLC v. Blue Cross and Blue Shield of Alabama*, 991 So. 2d 701, 707 (Ala. 2008); *Clark v. Liberty Nat'l Life Ins. Co.*, 592 So. 2d 564, 567 (Ala. 1992).

While the economic duress defense is alive and well and recognized by Alabama appellate courts, there are difficulties of proof in the elements of the *prima facie* case that make it a very difficult defense to establish and to defeat a summary judgment motion or motion for judgment as a matter of law. An examination of each of the elements, and the evidence required to meet each of the elements, demonstrates the difficulty in establishing economic duress as a legitimate excuse for non-performance.

## A. WRONGFUL ACTS

The *Whilden* court had much to say about what constitutes a wrongful act sufficient to invoke the economic duress defense. First, quoting from the *Ralls* decision, which in turn quoted from 17 C.J.S. *Contracts* §177 (1963), the court stated that economic duress:

"applies only to special, unusual, or extraordinary situations in which unjustified coercion is used to induce a contract, as where extortive measures are employed, or improper or unjustified demands are made, under such circumstances that the victim has little choice but to accede thereto." 469 So. 2d at 563.

The court appears to have intended to adopt the defense for only the most serious cases of misconduct.

Second, the court emphasized that it is the conduct of the wrongdoer that must be the focus of the fact finder:

"Tantamount to a claim of economic duress is the wrongful pressure exerted by one party which overcomes the will of another." *Id.* at 563.

Lest there be some confusion about the true nature or scope of the wrongdoing that would support invocation of economic duress as an excuse for non-performance, the court quoted with approval language from an Alabama Court of Civil Appeals decision describing the wrongful act requirement:

It is said that economic duress must be based on conduct of the opposite party and not merely on the necessities of the purported victim. The entering into a contract with reluctance or even dissatisfaction with its terms because of economic necessity does not, of itself, constitute economic duress invalidating the contract. Unless unlawful or unconscionable pressure is applied by the other party to induce the entering into a contract, there is not economic compulsion

amounting to duress. *Chouinard v. Chouinard*, 568 F.2d 430 (5<sup>th</sup> Cir. 1978). 469 So. 2d at 573 (quoting from *Board of School Commissioners of Mobile County v. Wright*, 443 So. 2d 35, 38-39 (Ala. Civ. App.), rev'd on other grounds, 443 So. 2d 40 (Ala. 1983)).

Accordingly, a “wrongful act” requires employment of unlawful or unconscionable pressure by a party to coerce the execution of a contract.

Since 1982, the Supreme Court of Alabama has found evidence of wrongful acts sufficient to create a jury issue on an economic duress defense in only three cases. In *Ralls, supra*, the court concluded that a jury could conclude that the plaintiff was a victim of economic duress based on the bank’s conduct in forcing him to accept the loan with a 12 percent interest rate after committing to loan the money at a 10 percent interest rate. *Ralls*, 422 So. 2d at 766.

In *Whilden*, the court concluded that International Paper’s refusal to pay Whilden for the timber he cut unless he signed an indemnity agreement protecting the company amounted to a wrongful act. *Whilden*, 469 So. 2d at 563-64.

And, in *Newburn v. Dobbs Mobile Bay, Inc.*, 657 So. 2d 849, 852 (Ala. 1995), the court held that a jury question existed relative to economic duress where the defendant truck dealer would not return the plaintiff’s truck after making repairs until the plaintiff signed a general release of all claims he had against the defendant.

From these decisions, it is clear that a “wrongful act” consists of some act or conduct on the part of one party—that it has no right to do—that is intended to coerce, and does coerce, the other party to sign a document that he or she would not have signed but for the improper coercion.

Since the *Whilden* decision, Alabama appellate courts have been far more active in identifying what is not a wrongful act for economic duress purposes than in describing or defining what is a wrongful act. In *Choksi v. Shah*, 8 So. 3d 288 (Ala. 2008), the court held that instituting or threatening to institute civil suits or other court proceedings is not duress:

“[I]t is the well-settled general rule that it is not duress to institute civil suits, or take proceedings in court, or for any person to declare that he intends to use the courts wherein



While the economic duress defense is alive and well and recognized by Alabama appellate courts, there are difficulties of proof in the elements of the prima facie case that make it a very difficult defense to establish and to defeat a summary judgment motion or motion for judgment as a matter of law.



to insist upon what he believes to be his legal rights. *It is never duress to do that which a party has a legal right to do*, and the fact that a threat was made of a resort to legal proceedings to collect a claim which was at least valid in part constitutes neither duress nor fraud such as will avoid liability on a compromise settlement.” *Id.* at 293-94 (emphasis added) (quoting *Neuberger v. Preferred Acc. Ins. Co. of New York*, 18 Ala. App. 72, 74, 89 So. 90, 92 (1921)).

A party claiming economic duress based on threatened litigation will have difficulty overcoming the *Choksi* decision.

In *Wright Therapy, supra*, the court found that an overbilling repayment agreement between Blue Cross and a medical equipment provider was not the product of a wrongful act such as to permit the agreement to be avoided based upon economic duress. The court rejected the plaintiffs’ argument that Blue Cross’s withholding of amounts necessary to recoup its overpayments was a wrongful act, since there was no allegation that Blue Cross was not entitled to do so under the contract between the parties. *Wright Therapy*, 991 So. 2d at 707. In addition, the court found it significant that the 2004 agreement was a negotiated resolution of a business dispute:

[I]t appears that the 2004 repayment agreement was the result of a good-faith negotiation between the parties in compromise of a disputed debt. . . . The fact that Blue Cross may have had greater bargaining power than did Wright Therapy or that Wright Therapy may have executed the agreement out of financial necessity does not alone amount to economic duress. *Id.* at 707-08.

The fact that a claimed victim of economic duress had the benefit of legal advice makes it very difficult to make a persuasive economic duress argument. See *Wilson v. Southern Medical Association*, 547 So. 2d 510, 513 (Ala. 1989) (rejecting invocation of the economic duress defense where plaintiff acted on advice of legal counsel); *Anderson v. Amberson*, 905 So. 2d 811, 814 (Ala. Civ. App. 2004) (economic duress defense rejected where plaintiff’s own attorney drafted and negotiated the release sought to be avoided).



In *Bama's Best Housing, Inc. v. Hodges*, 847 So. 2d 300 (Ala. 2000), the plaintiff contended that an arbitration agreement was signed under economic duress because the defendants had delivered a mobile home that the plaintiff had agreed to buy, but the defendants refused to set it up until he signed the arbitration agreement. *Id.* at 301-02. Because the plaintiff had not made a down payment on the mobile home, and, therefore, would forfeit nothing if he failed to sign the arbitration agreement, the court concluded that he had not offered sufficient evidence to create a material factual dispute relative to his economic duress defense. *Id.* at 303-04. While the court did not clearly say so, this decision appears to indicate that economic duress cannot be established unless the claimed wrongful act caused financial distress to the claimed victim.

In *Ponder v. Lincoln Nat'l. Sales Corp.*, 612 So. 2d 1169 (Ala. 1992), the court affirmed dismissal of a complaint seeking an affirmative recovery based on a claim of economic duress predicated upon the refusal of a holder of a renewal option on a lease to exercise the option at the option price. The holder instead negotiated a lower, more favorable rate. *Id.* at 1170. The court noted that "merely taking advantage of another's financial difficulty is not duress," and affirmed the dismissal because the allegations of the complaint "suggest nothing more than that the modification of the lease agreement occurred by mutual agreement of sophisticated parties engaged in an ordinary commercial real estate transaction." *Id.* 1171.

To date, the Alabama Supreme Court has rejected invitations to adopt economic duress as a substantive tort, leaving it to be invoked only as an affirmative defense. See *Cahaba Seafood, Inc. v. Central Bank of the South*, 567 So.2d 1304, 1306 (Ala. 1990); *Guillot v. Beltone Electronics Corp. of Chicago*, 540 So. 2d 648, 650 (Ala. 1988).

In *Clark v. Liberty Nat'l Life Ins. Co.*, 592 So. 2d 564 (Ala. 1992), Clark sought to avoid the terms of his agent agreement with Liberty National because it contained a non-compete agreement that he conceded he had violated after terminating his relationship with Liberty National. *Id.* at 565. The court rejected this



The option is only available, however, in very limited circumstances where the party can demonstrate by substantial evidence that he or she would not have signed the document but for the unlawful or unconscionable pressure applied by the other party that caused the signing party financial distress, and left him or her with no reasonable alternative except to execute the contract.



invocation of the economic duress defense, stating: "The fact that Liberty National required Clark to sign the new contract in order to continue his employment at Liberty National does not amount to economic duress. Liberty National did not apply any unlawful or unconscionable pressure to force Clark to sign the contract." *Id.* at 567. The court also could have noted that Liberty National did not take advantage of any financial distress into which it had placed Clark in order to coerce him to sign the contract.

In *Rose v. Delaney*, 576 So. 2d 232 (Ala. 1991), the court rejected the defendant's argument that an indemnity agreement could not be enforced against him because the defendant "took advantage of the fact that he was unemployed and had no money, to coerce him to enter into the indemnity agreement." *Id.* at 233-34. The evidence was to the contrary, and the court affirmed the judgment against the defendant.

In *Wilson*, *supra*, the plaintiff sought to avoid the terms of a resignation letter, contending that he was coerced to sign it by his employer's threat to forestall and withhold payments of funds from an escrow account if he did not sign it. *Id.* at 513. Noting the statement in *Whilden* that "mere withholding of payment of a debt, without more, is insufficient to constitute economic duress," 469 So. 2d at 563, and noting that Wilson acted on advice of counsel in accepting the terms of the resignation letter, the court affirmed summary judgment enforcing the terms of the resignation letter. 547 So. 2d at 513.

These decisions make clear the difficulty in establishing the first element of a sustainable defense of economic duress. There must be a "special, unusual, or extraordinary situation[]," and there must have been "unjustified coercion," or "extortive measures" or "unlawful or unconscionable pressure" employed to induce the execution of the challenged contract before the wrongful

act element is established. It is a very rare occasion indeed when a signature on a contract is obtained under such circumstances.

## B. FINANCIAL DISTRESS

In *Ralls*, the financial distress was the debt incurred by Ralls in reliance upon the bank's promise to loan him \$600,000 at 10 percent



interest. In *Whilden*, it was Whilden's inability to pay back his bank loan if he was not paid the \$7,000 that International Paper owed him. In *Newburn*, it was the risk that the Newburns would breach delivery contracts if they could not get their truck back from defendant. In each of those cases, the parties seeking to avoid the contract had signed the contract under financial distress caused by the misconduct of the party who later sought to enforce the contract.

While there does not yet appear to be an Alabama appellate court decision rejecting invocation of the economic duress defense solely on the basis of the failure to establish this second element of the defense, a few of the decisions referenced above provide some guidance. In *Bama's Best Housing, Inc.*, the court rejected the defendant's invocation of the economic duress defense seemingly upon the basis that, because he had not made a down payment for the mobile home that the plaintiff initially refused to install, he was not in financial distress caused by the plaintiff at the time he executed the arbitration agreement that he later sought to avoid. *Bama's Best Housing, Inc.*, 847 So. 2d at 304. In *Ponder*, the court rejected invocation of the economic duress defense and stated specifically that "taking advantage of another's financial difficulty is not duress." *Ponder*, 612 So. 2d at 1169. Finally, in *Rose*, the court rejected the defendant's contention that he was the victim of economic duress based on the fact that he was unemployed and had no money, presumably because there was no evidence that the plaintiff had committed some wrongful act that caused him to be unemployed and have no money. *Rose*, 576 So. 2d at 233-34.

Perhaps there will be further development of this issue in future decisions. For now, it appears very clear that a party invoking economic duress as a defense will be able to establish the second element of the defense only by showing that he or she signed the challenged contract as a result of some existing financial distress that the offending party both wrongfully created and took advantage of. It is certainly not enough simply to demonstrate a party's own "exigent financial circumstances." See *Haston v. Crowson*, 808 So. 2d 17, 23 (Ala. 2001).

### C. REASONABLE ALTERNATIVES

The third element of a *prima facie* claim of economic duress has been addressed rarely by Alabama's appellate courts. In *Penick v. Most Worshipful Prince Hall Grand Lodge F&AM of Alabama, Inc.*, 46 So.3d 416, 431-32 (Ala. 2010), the outcome was, in fact, based on this third and final element as the court noted that "Penick cites no evidence in the record showing that his *only reasonable alternative* to the allegedly wrongful foreclosure was to sign the modification agreement as it was presented to him." *Id.* at 431-32 (emphasis added). See also, *Brown v. First Federal Bank*, \_\_\_ So. 3d \_\_\_, \_\_\_, 2012 WL 415568, \*12 (Ala. Civ. App., Feb. 10, 2012) (finding insufficient evidence of economic duress where plaintiff had "reasonable alternatives" to refinancing her home loan). In affirming the trial court's rejection of Penick's invocation of the economic duress defense, the court also made it clear that, because duress is an affirmative defense under Rule 8(c) of the *Alabama Rules of Civil Procedure*,

the burden of establishing economic duress, and the risk of non-persuasion, falls to the party invoking it. *Id.* at 432 n.14.

Two other decisions rejected invocation of the economic duress defense and mentioned the fact that the proponents of the defense were represented by counsel at and prior to the execution of the challenged agreements. Both cases imply that the plaintiff had failed to establish the lack of reasonable alternative as required by the third element. See *Wilson v. Southern Medical Ass'n*, 547 So. 2d 510, 513 (Ala. 1989) (reiterating that "the victim must show that he had no reasonable alternative but to agree to the other party's terms or face serious financial hardship."); *Anderson v. Amberson*, 905 So. 2d 811, 819 (Ala. Civ. App. 2004). In rejecting Anderson's challenge to a release that he had signed, the court noted that:

Further, the record indicates that Anderson's own attorney allegedly drafted and negotiated the release. At the time he signed the release, Anderson was aware of the claims he now brings against the defendants. Anderson could have executed a release with more favorable terms, perhaps reserving certain claims against the defendants, or he could have abstained from signing the release altogether; however, he chose to sign the release and waive his claims against the defendants. Given the foregoing, we cannot say that Anderson has demonstrated error with regard to this issue. *Id.* at 819.

It appears clear from these decisions that in any case in which a party seeking to void a contract has had the benefit of advice of counsel at the time of or prior to execution of the contract, satisfaction of the third element of the economic duress defense is quite unlikely.

## Conclusion

Any party who regrets signing a contract and who finds himself in litigation over the breach of the contract may wish to avoid the consequences of the breach. Economic duress is an initially attractive defense. The option is only available, however, in very limited circumstances where the party can demonstrate by substantial evidence that he or she would not have signed the document but for the unlawful or unconscionable pressure applied by the other party that caused the signing party financial distress, and left him or her with no reasonable alternative except to execute the contract. Because the Supreme Court of Alabama has found the existence of economic duress only in the most egregious cases, parties should generally look for stronger defenses in seeking a lawful excuse for non-performance. | [AL](#)

## Endnote

1. For example, in *Sterling Oil of Oklahoma, Inc. v. Pack*, 291 Ala. 727, 745, 287 So. 2d 847, 862 (1973), the Alabama Supreme Court noted that, "This Court apparently has not heretofore expressly applied the [economic duress] doctrine in the context of business compulsion. . . ." The court did not apply the doctrine in that case either, deciding to "deter fuller treatment to a more appropriate case." *Id.* n. 7.





# The Veterans' Benefit Known as "Aid and Attendance"

By William G. Nolan

## There are over 316,000 wartime veterans living in Alabama,<sup>1</sup>

including over 160,000 veterans over the age of 65.<sup>2</sup> These veterans and the widows of veterans might qualify for a veterans' pension benefit commonly known as "Aid and Attendance." Unfortunately, Veterans Administration studies suggest that only 12 percent of eligible veterans are currently receiving this pension benefit.<sup>3</sup>

It is hoped that this article makes Alabama attorneys aware of this benefit and explains how a veteran (or the widowed spouse) might qualify for the benefit. Most of us know a veteran, either among our clients or our families. Veterans and their spouses comprise 40 percent of the total population receiving Social Security benefits. Many of those over age 65 with whom we come in contact every day are either veterans or the widow of one, individuals who might qualify for this benefit and not know they do so.

On June 22, 1944, President Roosevelt signed into law the Serviceman's Readjustment Act of 1944, commonly known as the GI Bill. One of the well-known benefits of the law is the provision whereby a veteran can attend college at

the government's expense. By the time the original GI Bill had run its course in 1956, over 7.8 million WWII veterans had received a college education.<sup>5</sup> The VA didn't force a college education on a veteran, but if the veteran believed that a college education would benefit his/her family, it was available. Similarly, the pension benefit is not forced on anyone, but if the pension will help the veteran and his/her family meet their monthly expenses, it too, is available. Almost every veteran has heard of the GI Bill. Sadly, only a small percentage of veterans are aware of the pension benefit.

## What is the VA Benefit?

There are two broad categories of VA disability benefits—*compensation*, which requires a service-connected disability, and *pension*, which is non-service-connected. This article will focus on the latter, the non-service connected benefit officially known as "The Improved Pension Benefit," (hereinafter "IPB"), but commonly referred to as "Aid and Attendance" ("A&A"). This benefit is available to veterans who served at least



90 continuous days of active duty, one of which was during a defined wartime period.<sup>6</sup> It is also available to the widow of an eligible veteran.<sup>7</sup>

For an eligible wartime veteran with a dependent, the monthly tax-free payment can be as high as \$2,054.<sup>8</sup> For a veteran with no dependents, the monthly benefit can be as high as \$1,732. For a widow of a wartime veteran, the monthly benefit can be as high as \$1,113. This benefit is paid monthly, like Social Security benefits, and is normally direct-deposited into a bank account. No monthly proof of need is required.

## What the VA Benefit Is Not

This benefit is not for veterans who are healthy or for veterans who have substantial means at their disposal.<sup>9</sup> To qualify for this benefit, there are income and resource limitations in addition to medical conditions that must be met.<sup>10</sup> Although not all veterans are eligible, for those who are, the benefit can enable the veteran to live in his home years longer than otherwise, or it can be used to pay for assisted living expenses when necessary. The application process often takes months before benefits begin, but benefits are normally paid retroactively. Preparing and filing the claim requires a series of specific steps.<sup>11</sup> Some are discussed, *infra*. The VA has recently instituted a new application process called the “Fully Developed Claim”<sup>12</sup>, which was implemented in part because of the serious backlog in pending claims. In our experience, this new process had reduced the claim period from six months to as short as 30 days.

## The VA Benefit: Background

The Improved Pension Benefit (IPB) falls under Title 38 of the *United States Code* and Title 38 of the *Code of Federal Regulations*.<sup>13</sup> The purpose of this benefit is to provide financial assistance to veterans and widows who have sacrificed career opportunities to fight for our country.

It is worthwhile to note that attorneys cannot charge a veteran to assist him/her file a claim for these benefits, a limitation that dates back to the Civil War. Believing that there were a number of lawyers who were waiting to prey on Civil War veterans returning home, Congress limited attorney’s fees to only \$10, an amount which never increased, and in 1988 even this amount was eliminated. Congress assumed that veterans did not need the assistance of attorneys in the filing of these claims. Because of the concern that attorneys might take advantage of veterans who were eligible for this benefit, Congress limited the fees, effectively eliminating attorney involvement in the process.<sup>14</sup> The limitation on fees still exists today. No one, attorney or otherwise, may charge a fee to assist an eligible veteran or widow file a claim for veteran’s benefits.<sup>15</sup> An additional limitation is that no one, attorney or not, may provide free assistance to a veteran more than once without becoming accredited.<sup>16</sup>

In addition to the widespread lack of awareness of this benefit and the limitation for attorney involvement, other barriers exist. Misinformation is a major problem. Many veterans rely on the advice of “experts,” such as their barber or next-door neighbor. Many veterans trust these less-than-informed sources of information and, as a result, forego over \$24,000 in annual benefits. Another barrier is when the veteran’s claim is initially denied, the veteran simply gives up, assuming that he will never be able to qualify. In reality, the steps necessary to help a veteran qualify for benefits might be as simple as explaining to him how to make a non-exempt asset become an exempt asset. The VA however, is not obligated to assist in this way, though, so many veterans who could qualify for this benefit never receive it. The veteran or his family assumes that just because they did not qualify the first time that they will never qualify. That is not always the case. Persistence and knowledge are often the keys to a successful claim.

There are only three types of individuals who are authorized to assist a veteran file a claim for benefits: the Veterans Service Officer (VSO), the Accredited Agent and the Accredited Attorney. A VSO is normally an employee of an

organization such as the Veterans of Foreign Wars or the American Legion. The State of Alabama employs many excellent VSOs who are available to assist veterans and families with a wide range of benefits, in addition to the IPB, at no charge. Unfortunately, in June 2012, the state reduced the number of VSO offices throughout Alabama from 67 to only 50<sup>17</sup>, so the demand on the remaining offices is greater now than ever before. As with any free service from the government, the waiting times and locations can often prove to be barriers for many claimants, especially as claimants lose their independence and ability to drive.

In addition to VSOs, veterans can consult with accredited agents, but there are presently only five throughout the entire state. They are often financial advisors, annuity sales people or CPAs who have regular contact with veterans and are often veterans themselves.

The third resource available to veterans is the attorney accredited by the VA, of which there are over 150 in Alabama<sup>18</sup>. Although the initial accreditation process is straightforward,<sup>19</sup> the VA requires that accredited attorneys maintain their accreditation through regular educational events, much like CLE events for other practice areas and annual compliance reporting.<sup>20</sup> Accredited attorneys are able to determine whether a veteran is eligible, and if not, can then assist a non-eligible veteran to become eligible through basic estate planning techniques. VSOs and accredited agents are not able to render legal advice.

Additionally, as a practical matter, a veteran (or widow) needing the IPB now is likely to become a person needing Medicaid in the foreseeable future. The coordination of veterans’ benefits with Medicaid planning is critical and cannot be provided by the accredited agent or VSO. A common technique to qualify for the IPB is to either gift assets outright or transfer them to an irrevocable trust. This is permissible according to the VA policy, but can create a transfer penalty with Medicaid. Obtaining a \$2,054/month benefit is beneficial but if the planning disqualifies the veteran or his spouse from qualifying for a \$5,000/month or more Medicaid benefit later, it can be disastrous. This would be an undesirable



To qualify for this benefit, there are income and resource limitations in addition to medical conditions that must be met.

outcome, but not an unusual one when an accredited attorney is not involved in the planning.<sup>21</sup>

Additionally, many veterans have no estate planning in place. They might have disabled adult children living with them and no provision has been made in terms of providing for the disabled adult child after the death of the veteran. Guardianships and conservatorships might also become necessary—all good reasons why any attorney should be a part of this planning process.

## What Are VA Eligibility Requirements?

The basic requirements that must be met in order to be considered eligible for the IPB include:

**Wartime service:** The veteran must serve at least 90 continuous days<sup>22</sup> of active-duty service, one of which is during a defined wartime period, in order to be eligible. The wartime periods are:

- WWII—12/7/41–12/31/46
- Korea—6/27/50–1/31/55
- Vietnam—8/5/64–5/7/75 (if in-country and can prove it, eligibility begins on 2/28/61)
- Persian Gulf War—August 2, 1990 through a date to be prescribed by Presidential proclamation.<sup>23</sup>

**Disability:** If *over 65*, the assumption is that the veteran is disabled and no proof of disability is needed.<sup>24</sup> If *under 65*, the veteran

must prove “permanent and total disability which is not service-connected.”<sup>25</sup> In addition, the impairment must be reasonably certain to continue throughout the veteran’s lifetime.<sup>26</sup>

**Discharge:** The veteran’s discharge must be something better than “dishonorable.”<sup>27</sup>

**“Means” test:** The benefit is not designed for veterans of substantial means, so a veteran’s net worth is reviewed to determine whether or not the benefit will merely be helpful<sup>28</sup> or is actually necessary for the veteran’s comfort. There is broad misunderstanding as to the maximum amount of assets a claimant might have and still qualify. Some quote the magic number as being \$80,000, but that figure is never mentioned in the various manuals and codes applicable to administering veteran’s benefits.<sup>29</sup> There is anecdotal evidence that the VA has used the \$80,000 figure as a rule of thumb to gauge whether a claimant had more assets than is allowable. As a practical matter, though, the \$80,000 standard is no longer in use and claims submitted with this amount of assets will invariably be denied. Rather than having an objective standard like \$80,000 by which to gauge a claimant’s net worth, the VA now utilizes a very subjective test which takes into account the veteran’s age and remaining life expectancy, his present medical condition, whether the veteran is married or single, the number of dependents, and what part of the country he lives in for cost-of-living purposes.<sup>30</sup> This

change makes what was once an objective test (+/- \$80,000) now one that is so subjective that two identical claims might result in two different determinations. Assets considered do not include the claimant’s personal residence or his car or personal effects but do include virtually all else.<sup>31</sup> A spouse’s assets are included in this calculation as well, so separating a couple’s assets into two separate shares does nothing to help eligibility.

**Income:** While the VA does not have strict income limitations like Medicaid does,<sup>32</sup> the VA does measure a person’s net income after subtracting all unreimbursed medical expenses<sup>33</sup> (UME), which gives the VA a figure known as IVAP, or income for VA purposes.<sup>34</sup> If this IVAP figure is zero or negative, the claimant would be entitled to the full monthly pension amount. For example, if a claimant had \$1,500 in monthly income and \$1,500 in assisted living costs, his/her IVAP would be 0 and he/she would be entitled to the full monthly pension amount.

Common unreimbursed medical expenses (UME) include the costs of skilled care each month while in a nursing home and the monthly costs of living in an assisted living facility. These expenses can be several thousand dollars each month, easily surpassing most people’s monthly incomes. It is worthwhile to note, however, that the monthly costs of living in an independent living community are no longer considered UME by the VA. Mortgage payments or rent do not qualify as a UME, either.





Specifically, the bill before Congress (SB 748) seeks to impose limitations on eligibility, including a look-back period on all transfers made by a veteran or his/her widowed spouse within the three-year period immediately preceding filing of the claim for benefits.

Conversely, in-home care does qualify as a UME, even when provided by a non-dependent family member. So if an adult daughter regularly assists her father, the veteran, with meeting the normal activities of daily living such as bathing, dressing, eating, etc., and she tracks her hours and ideally, operates under a written “care agreement,” she can bill her father the customary hourly rate in her area and, if he pays her, the amount he pays her is a legitimate UME that can be used to offset his IVAP each month.

Other UMEs include the premiums for health insurance and long-term care insurance, prescription drug costs and for the costs of disposables such as adult briefs and syringes and co-pays the claimant might pay. In practice, many unrepresented claimants underestimate their total UMEs resulting in a higher IVAP and lower monthly pension benefits than they might otherwise qualify for.

Once these requirements have been met, the claimant should be entitled to what is known as “the Base Pension Amount.” The 2013 amount for a veteran with one dependent (a spouse for example) would be up to \$1,360 per month. Should a veteran be suffering from a medical condition that might justify a greater monthly award, the VA has two additional levels of assistance. These are known as “Special Monthly Pensions” or SMPs.

The first of these is known as the “Housebound Benefit”<sup>35</sup> and the second is the “Aid and Attendance” or A&As.<sup>36</sup> Housebound benefits are warranted if the claimant is essentially confined to his

home because of his disability.<sup>37</sup> A&A benefits are warranted if, in addition to being housebound, the claimant also needs the regular assistance of another person, due to his condition, to meet the activities of daily living.<sup>38</sup> The 2013 monthly Housebound allowance increases the base pension amount up to \$1,591. The Aid & Attendance allowance increases the monthly payment up to \$2,054. All benefits are tax-free.<sup>39</sup>

## Helping a Claimant Become Eligible For VA Benefits

Many veterans and widows meet all the requirements for benefits except for being ineligible in one or two areas. For example, assume Bob is an 83-year-old veteran who has a mortgage of \$100,000, a bank certificate of deposit (CD) of \$150,000 and an old Buick. He does not presently qualify for benefits because his assets—the CD—would push him over the subjective threshold. He would be denied by every VSO in Alabama should he consult with them. If Bob were to redeem his CD, however, and pay off his mortgage and trade in his old car for a new one, he would now qualify. He has done nothing illegal; he’s merely rearranged his assets. The equity in his home is an exempt asset while the CD was not. A car of any value is also exempt. If he needs liquidity he can take out an equity line on the home. The VA, however, is not obligated to advise the veteran of this or any other planning strategy.

Similarly, some veterans choose to reduce the assets under their dominion

and control by either gifting assets to their family or transferring them to an irrevocable trust. The VA has no rules regarding these transfers, but there are Medicaid concerns that must be addressed. Other veterans might choose to annuitize an investment, which removes the asset from consideration by the VA, while some might choose to begin paying an adult child in order to increase UME. The point is that assisting a veteran to qualify for benefits that he has earned is not a matter of counseling the veteran to hide assets or to engage in illegal behavior. It is helping the veteran understand the difference between an exempt asset and a non-exempt asset. It is essentially the same as helping a client understand the intricacies of the tax code or Medicaid.<sup>40</sup>

Once a veteran has qualified for the Housebound or Aid & Attendance benefit, he/she is also eligible for many other VA benefits for free or at greatly reduced cost. The most valuable benefit is that they are “fast-tracked” into the four state-run VA nursing homes. Without the benefit, the waiting list could be two years, but with the benefit, the wait could be reduced to only several months. Each month saved equates to a \$5,000 or more monthly savings to the veteran and his/her family.

## The Future of VA Benefits

A discussion of the pension benefit would not be complete without reference to pending legislation in Congress to limit the benefit. Although this benefit has been available in one form or another for decades, some in Congress believe that

the benefit is being taken advantage of by greedy veterans and their families with the help of financial planners who assist these veterans obtain the benefit. The term “*pension poachers*”<sup>41</sup> has been bandied about by some in Congress as a means of castigating veterans and their advisors who utilize completely acceptable asset-protection planning strategies prior to filing a claim. Specifically, the bill before Congress<sup>42</sup> (SB 748) seeks to impose limitations on eligibility, including a look-back period on all transfers made by a veteran or his/her widowed spouse within the three-year period immediately preceding filing of the claim for benefits. This look-back period would be similar to those now imposed by Medicaid, which penalize the claimant with a period of ineligibility unless the transfer is completely reversed or cured. To date, there is little support for this bill, with chances of enactment estimated to be only six percent.<sup>43</sup> | AL

## Endnotes

1. [http://www.va.gov/vetdata/veteran\\_Population.asp](http://www.va.gov/vetdata/veteran_Population.asp)
2. *Ibid.*
3. [http://www.va.gov/opa/publications/factsheets/fs\\_americas\\_wars.pdf](http://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf)
4. <http://www.ssa.gov/policy/docs/ssb/v66n2/v66n2p1.html>
5. [http://www.gibill.va.gov/benefits/history\\_timeline/](http://www.gibill.va.gov/benefits/history_timeline/)
6. 38 U.S.C.S. §1101(2)(A) and (B)
7. 38 C.F.R. §§ 3.50, 3.1(j)(2006), Note however that this requirement of being of the opposite sex may be changing due to the recent successful challenge to the Defense of Marriage Act.
8. 38 U.S.C.S. §1521; 38 C.F.R. §3.23(a)(2006)
9. 38 U.S.C.S. §1522(a); 38 C.F.R. §3.274(a)(2006)
10. 38 U.S.C.S. §1502(c); 38 C.F.R. §3.351(d)(1)(2006)
11. 38 U.S.C.S. §5101; 38 C.F.R. §3.15(a)(2006)
12. <http://www.benefits.va.gov/fdc/>
13. 38 U.S.C.A. §101 et seq.; 38 C.F.R. §0.735-1 et seq.
14. This \$10 fee translated from 1864 dollars to 2013 dollars would equal a fee of \$151. See CPI Inflation Calculator, US Bureau of Labor Statistics, [www.measuringworth.com/uscompare/result.php?year\\_source=1864&amount=10&year\\_result=2013#](http://www.measuringworth.com/uscompare/result.php?year_source=1864&amount=10&year_result=2013#)
15. See 38 C.F.R. §20.609.
16. 38 U.S.C.S. §5903
17. [http://blog.al.com/wire/2012/05/17\\_veterans\\_assistance\\_offices.html](http://blog.al.com/wire/2012/05/17_veterans_assistance_offices.html)
18. <http://www.va.gov/ogc/apps/accreditation/accredpeople.asp>
19. 38 U.S.C.S. §§5901-5905 and 38 C.F.R. §§14.626-35(2006)
20. 38 C.F.R. §14.633(2006)
21. <http://www.aarp.org/money/scams-fraud/info-03-2012/scam-targets-vets-wa-1889.html>
22. Unfortunately, veterans who enlisted on or after September 8, 1980 must complete 24 months of continuous active duty service or the full period for which he/she was called or ordered for active duty. See 38 U.S.C.S. §5303(a)
23. Note that the periods extend beyond the end of each conflict, so even if a veteran began his/her term of service after the end of WWII (8/15/45), he or she could still qualify as being within the wartime period.
24. 38 C.F.R. § 3.321(b)(2)
25. 38 C.F.R. §3.3(a)(vi)
26. 38 C.F.R. §§3.340, 3.342
27. 38 U.S.C.S. §101(2)
28. 38 C.F.R. §3.274
29. See M21-1MR, Part V, Subpart I, Chap 3, section A
30. 38 C.F.R. §3.275(d)
31. 38 C.F.R. §3.275
32. 38 C.F.R. §§3.271, 3.272
33. M21-1MR, Part V, Subpart I, Chapter 3, Section D
34. M21-MR, Part V, Subpart iii, Chapter 1, Section A
35. M21-1MR, Part V, subpart ii, 3.2
36. M21-1MR, Part V, subpart ii, 3.1
37. 38 U.S.C.S. §1521(e); 38 C.F.R. §3.351(d)(2) (2006)
38. 38 U.S.C.S. §1502(b); 38 C.F.R. §3.351(b) (2006)
39. <http://www.benefits.va.gov/compensation/>
40. There is still a lingering belief that offering advice to Medicaid applicants runs afoul of a law known as “Granny Goes to Jail” which was also extended to Granny’s attorney goes to jail. Attorney General Reno stated in a letter to House Speaker Gingrich on March 11, 1988 that the Department of Justice would no longer defend the constitutionality of the law as it was plainly unconstitutional under the First Amendment. Counseling clients with regard to either Medicaid or Veterans benefits planning has not been threatened since then.
41. <http://newoldage.blogs.nytimes.com/2013/05/21/v-a-warns-aging-veterans-against-pension-poachers/>
42. <http://beta.congress.gov/bill/113th/senate-bill/748>
43. <http://www.govtrack.us/congress/bills/113/s74>

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# Alabama and the Uniform Law Commission

*By Senator Cam Ward*

## What do banking regulations governed by the Uniform Commercial Code

have in common with the rules that govern organ donations? What about the rules governing the management of charitable endowments and the law which governs how unclaimed property can be handled? The obvious answer is that Alabama has enacted laws on all these subjects. The less obvious answer is that all of these laws were drafted by the Uniform Law Commission.

Uniform laws have been part of the legal landscape in Alabama for more than a century. The first Uniform Act was adopted in Alabama more than 100 years ago: the Uniform Negotiable Instruments Law of 1896—the first uniform law adopted in every state—was adopted in Alabama in 1909. Since then, Alabama has enacted nearly 100 uniform acts, including the landmark Uniform Commercial Code, and, in recent years, the Uniform Collaborative Law Act, the Uniform Interstate Depositions and Discovery Act, the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, the Uniform Child Abduction Prevention Act, and the Uniform Power of Attorney Act. Uniform laws have an impact on the lives of Alabama citizens every day—from a simple transaction such as a child buying candy to a complex partnership agreement—these and many more transactions are governed by uniform laws. Although lawyers in Alabama use uniform

laws every day, many are unfamiliar with the origins of these laws.

Uniform laws are the product of the Uniform Law Commission (ULC), also known as the National Conference of Commissioners on Uniform State Laws (NCCUSL). The ULC, a 121-year-old legal institution, has worked for the uniformity of state laws since 1892. The ULC was originally created by representatives of seven states as a way to consider state law, determine in which areas of the law uniformity is important and then draft uniform and model acts for consideration by the states. Alabama has been a member of the ULC since 1906.

The ULC convenes as a body once a year, meeting for a period of seven or eight days, usually in July or August. At each annual meeting, proposed acts are read and debated, usually line by line, before all commissioners sitting as a committee of the whole. The ULC spends a minimum of two years on each draft, but no act becomes officially recognized as a uniform act until the ULC is satisfied that it is ready for consideration by the legislators of every state. Work on large-scale projects, such as revisions to the Uniform Commercial Code, can take many years to complete.

In July 2013, the 122<sup>nd</sup> Annual Meeting of the Uniform Law Commission convened in Boston. Four new acts were completed in 2011, including the Uniform Act on the Prevention of and Remedies for Human Trafficking.

**The Uniform Act on Prevention of and Remedies for Human Trafficking** is a

comprehensive new law directed against human trafficking. Human trafficking—a form of modern-day slavery—is a global concern that affects the United States on federal, state and local levels. The federal Trafficking Victims Protection Act of 2000 identifies two primary forms of human trafficking: sex trafficking and labor trafficking. The Uniform Act provides the three components necessary for ending human trafficking: comprehensive criminal provisions, provisions for victim services and the establishment of a coordinating body to help government and non-government organizations coordinate their human trafficking activities. A comprehensive uniform act will enable federal, state and local agencies to better identify victims, provide needed services and facilitate prosecution.



The objective of the new **Uniform Powers of Appointment Act** is to codify

the law of powers of appointment. A power of appointment is the authority, acting in a non-fiduciary capacity, to designate recipients of beneficial ownership interests in, or powers of appointment over, the appointive property. An owner, of course, has this authority with respect to the owner's property. By creating a power of appointment, the owner typically confers this authority on someone else. The power of appointment is a staple of modern estate-planning practice.



The objective of the **Uniform Harmonized Business Organization Code (UHBOC)**

is to harmonize, to the extent possible, the language in the ULC's business entity acts (including the Model Entity Transactions Act, Uniform Partnership Act, Uniform Limited Partnership Act, Uniform Limited Liability Company Act, Uniform Statutory Trust Entity Act, Uniform Limited Cooperative Associations Act, Uniform Unincorporated Nonprofit Association Act, and the Model Registered Agents Act) so that the language in the provisions that are common in one or more of the acts are identical. Amendments to the UHBOC which were approved this year address some technical corrections which needed to be made since the act's promulgation in 2011.



**Amendments to the Uniform Child Custody Jurisdiction and Enforcement Act Pertaining to International Proceedings** were

also approved at the ULC's annual meeting. These amendments to the UCCJEA were drafted as part of the effort to implement the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement, and Cooperation in respect to Parental Responsibility and Measures for the Protection of Children.



In the interim between annual meetings, drafting committees composed of commissioners, observers and ABA advisors meet to prepare working drafts that are to be considered at the annual meeting.

The ULC is comprised of more than 300 uniform law commissioners appointed by every state, the District of Columbia, Puerto Rico and the U.S. Virgin Islands. Commissioners donate their time and expertise as a pro bono service, receiving no salary or fee for their work with the ULC.

Alabama's Uniform Law Commission consists of 12 members and each is appointed by the governor (or other appointing authority). Alabama's current commissioners are: **Jerry L. Bassett, Judge John L. Carroll, Judge W. Scott Donaldson, William H. Henning, Justice (ret.) Gorman Houston, Thomas L. Jones, Othni J. Lathram, Robert L. McCurley, Bruce J. McKee, Jeffrey R. McLaughlin, William S. Poole, and Cam Ward.**

The ULC can only propose. No uniform act can take effect unless and until it is adopted by a state legislature. Thus, once a uniform act is approved by the ULC, commissioners have the responsibility to inform their home states about the act and to provide assistance to lawmakers interested in introducing the new act in their own legislature.

During its long history, the ULC's work has brought consistency, clarity and stability to state statutory law with such pivotal contributions to state law as the aforementioned Uniform Commercial Code, the Uniform Partnership Act, the Uniform Anatomical Gift Act and the Uniform Interstate Family Support Act, all of which have been enacted in Alabama.

While the process of drafting uniform acts can be time-consuming, the results are well-drafted legislation that has simplified the legal activities of businesses and individuals for more than a century.

For more information on Uniform Acts or the Uniform Law Commission, go to [www.uniform-laws.org](http://www.uniform-laws.org).

Senator Ward is a Uniform Law Commissioner from Alabama, and chair of the Alabama Senate Judiciary Committee. | [AL](#)



Ward





*Tom Oliver, Denise Oliver, Rosemary Bolin and Associate Justice Mike Bolin at Alabama Law Foundation Fellows Dinner*

# Foundation Welcomes New President and Board Members

The Alabama Law Foundation announces that **Thomas L. Oliver, II** is the new board of trustees president for 2013-14.

Tom Oliver is a founding shareholder in Carr Allison's Birmingham office. In addition to serving on the Alabama Law Foundation Board, Oliver has served as president of the Auburn University Bar Association and chair of the Workers' Compensation Section of the Alabama State Bar, and is active in the Alabama State Bar and the American Bar Association. He is a member of the Alabama Law Foundation's Atticus Finch Society and has been acknowledged as a fellow. Oliver's extensive volunteer work includes the Kids' Chance Scholarship program which provides, through the Alabama Law Foundation, scholarships to students whose parents were killed or severely disabled by on-the-job accidents.

In addition to the new president, the Alabama Law Foundation welcomes two new board members, **Sally B. Hawley** and **Richard J. R. Raleigh, Jr.**

Hawley is president of Transworld Business Valuation Services, which provides a variety of accounting services. She has worked in banking for First

Commercial and AmSouth, and as controller for Ransom Industries, Inc. She is active with Highlands School and the UAB Comprehensive Center for Healthy Aging. Hawley's financial expertise made her a valuable member of the Alabama Law Foundation's Grants Committee.

Raleigh works as an attorney and managing shareholder of Wilmer & Lee in the Huntsville office. In July, Raleigh became president-elect of the Alabama State Bar. He is a fellow of the Alabama Law Foundation and past president of the Volunteer Lawyers Program board.

The Alabama Law Foundation Board Trustees assume the responsibility of advancing the foundation's mission of making access to justice a reality for all Alabama citizens. Returning board members include **Joseph A. Fawal (vice president)**; **Laura L. Crum (treasurer)**; **Anthony A. Joseph**; **Anne W. Mitchell**, **Hon. R. Donald Word, III**; **Mary Margaret Bailey**; **Phillip W. McCallum**; **Alexander M. Smith**; **Thomas N. Carruthers, Jr.**; **Edward A. (Ted) Hosp**; **Patrick S. McCalman**; **J. Cole Portis**; and **W.N. (Rocky) Watson**. | [AL](#)

# JUSTICE JANIE L. SHORES Scholarship Recipient Named



Dana Taunton, Hannah K. Hooks (2013 scholarship recipient), retired Justice Janie L. Shores and Allison Skinner

The Alabama Law Foundation announces that **Hannah K. Hooks** has been awarded \$4,500 as the 2013 winner of the Justice Janie L. Shores Scholarship. **Allison Skinner**, chair of the scholarship committee, said, "In 2006, the Women's Section of the Alabama State Bar, along with the Alabama Law Foundation, established Janie L. Shores Scholarship to support a female Alabama resident attending an Alabama law school." The Justice Janie L. Shores scholarship is named in honor of the first female Alabama Supreme Court Justice, who was elected in 1974.

Hooks graduated magna cum laude with a B.A. in communication arts from the University of Alabama. She has been admitted into fall 2013 classes at the University of Alabama School of Law through the U.S. Honors Admission Program for undergraduates.

Academic accolades include Honors College, Collegiate Scholar, President's List and Deans List. Other notable honors are the Rainbow City Lion's Club Award and the Gadsden Kiwanis Club

Award. Hooks has worked throughout her academic career to help support herself and meet the ever-increasing cost of higher education. She was employed as a student assistant in the College of Continuing Studies at the university and as a legal intern at the Law Office of Rodney L. Ward.

In addition to her work hours and academic load, Hooks volunteers for Physicians Who Care, Brewer Porch Children's Center and Wings of Grace Tornado Relief. She expressed her appreciation for the scholarship: "I am beyond blessed to be receiving an award from a group of attorneys that I admire and hope to be a part of one day."

Hooks was recognized at the Maud McLure Kelly Award luncheon during the state bar annual meeting. The luncheon is named in honor of Alabama's first woman lawyer, who continued blazing pathways by becoming the first woman lawyer in the United States to plead a case before the U.S. Supreme Court. A silent auction, held the evening after the luncheon, raised money for the scholarship. | [AL](#)

## Foundation Announces Kids' Chance Scholarship Recipients

The Kids' Chance Scholarship Fund helps students whose parent or parents have been permanently disabled or killed on the job to attend college or technical school. When a parent is killed or disabled in an on-the-job accident, a family's standard of living is lowered and parents cannot help their children with the costs of higher education. Realizing that these students need help, the Workers' Compensation Section of the Alabama State Bar founded Kids' Chance in 1992. Kids' Chance is administered by the Alabama Law Foundation.

The awards for this school year totaled \$29,500, with \$574,000 having been awarded to more than 202 students since 1993.

Scholarship recipients for 2013 are:

<b>Nicholas Barbre</b> , Athens.....	\$2,000
<b>Judith Burroughs</b> , Bessemer.....	\$2,500
<b>Nicholas Burroughs</b> , Bessemer.....	\$2,500
<b>Cassidy Cambron</b> , Phoenix City.....	\$2,000
<b>James Duggan</b> , Gulf Shores.....	\$2,500
<b>Summer Faulkner</b> , Troy.....	\$2,500
<b>Amy Fleming</b> , Brundidge.....	\$2,500
<b>Garrett Lawrence</b> , Calera.....	\$2,000
<b>Harry Griffin, Jr.</b> , Elba.....	\$2,500
<b>Kristen Johnson</b> , Moody.....	\$2,000
<b>Karlie Oliver</b> , Russellville.....	\$2,000
<b>Nicholas Owens</b> , Sylacauga.....	\$2,000
<b>Yana Rodgers</b> , Jackson.....	\$2,500



**Robert Burrell**

**Demetrius Newton**

**Herbert W. Peterson**

## Robert Burrell

Robert “Bob” Burrell, 60, of Decatur, passed away Friday, March 15, 2013. Bob was born May 30, 1952 in Rome, Georgia. He was predeceased by his parents, Leon and Louise Burrell. He received his undergraduate degree at the University of Georgia and his law degree at Cumberland School of Law, Samford University.

Bob Burrell served as Morgan County District Attorney for 24 years from 1987 to 2011, and for eight years prior to that he served as an assistant district attorney under Mike Moebes. Former Decatur Police Chief Ken Collier, who became acquainted with Bob 40 years ago, said, “He prosecuted several of my cases. He always had the best interests of Morgan County, and I never doubted that for a second. He was a class guy.” Morgan County Circuit Judge Jennifer Howell, who worked for Bob’s office as assistant DA for six years said: “My fondest memory of serving with Bob was him coming into my office in the mornings. He’d always pull aside the blinds and look out the windows, as if he were looking out over the whole county. He cared so much about what went on outside those windows.” Morgan County Circuit Judge Steven Haddock recalled Bob as “a tough, hard-nosed prosecutor with a work ethic second to none. He would arrive in the early mornings and stay late.”

Bob had almost a Lincolnesque sense of humor which he displayed during a meet-and-greet in a primary election battle in 2010 with Scott Anderson, the current district attorney. “It was late in the evening, and we were both tired from being on the campaign trail,” Anderson recalled. “Bob walked over to me and said, ‘I’ll leave if you will.’ Even in the face of the campaign, where it is very stressful, he maintained his sense of humor.”





After serving as district attorney, Bob was of counsel with Harris, Caddell & Shanks PC. Barney Lovelace, a member of the firm and close friend, said of Bob, "He had a keen sense of being able to size up people and situations better than anybody I have ever known. He was a low-key person, not a typical politician, and he loved the law."

Bob was the founder and past president of the Morgan County Child Advocacy Center. Susan Coggins, who worked as a therapist and did forensic interviews before becoming the center's executive director in 2010 said, "He was dedicated to the mission of the center. Bob and I reviewed hundreds of cases of people who were suspected of child abuse, and that was on his own time. He continued to serve on the board of directors until his death."

He was a member of the Alabama, Georgia and American bar associations and of the United States Supreme Court bar. He was also a member of St. John's Episcopal Church. Bob received the Golden Gloves Award for the highest DUI conviction rate in Alabama awarded by the Alabama Chapter of Mothers Against Drunk Driving Club. He founded and was past president of the Young Lawyers' Section of the Morgan County Bar Association, which continues to be active today.

He was also past president of the Decatur Jaycees, the American Heart Association, the Boys and Girls Club of Morgan County and the Frances Nungester PTA. Bob was an active member of the Rotary Club of Decatur along with the Morgan County and State Republican Executive committees. He was a former member of the Board of Directors of Parents and Children Together, Decatur Chamber of Commerce, Decatur City Council of PTA's and the Chestnut Grove PTA.

Bob Burrell faced his two-year battle with cancer with a quiet dignity and grace. Having served with him as an assistant district attorney from 1977-79, I held Bob Burrell in high esteem personally and professionally. The last time I saw Bob was at the funeral of respected Decatur attorney John Key, shortly before his own death. It was a terrible, rainy day, and I knew Bob didn't feel well, but he came out of respect for a colleague. Bob was a true professional.

Bob Burrell is survived by his wife, Mary Stuart Burrell; children Jenny B. Mercieca, Ben Burrell, Bill Burrell and Gaines Rowe; grandchildren Hannah and Bailey Mercieca; a brother, Jimmy Burrell, and his wife, Luverene.

*-Morgan County District Judge Charles B. Langham*

## Demetrius Newton

Alabama lost a great leader and fearless lawyer with the passing of Birmingham lawyer and state legislator Demetrius Newton on September 11, 2013. His passing will be felt deeply by the legal community in Alabama as well as its citizens.



Demetrius Newton was a graduate of Wilberforce University in Ohio and Boston University Law School. He was a proud member and national president of his fraternity, Phi Beta Sigma. It was at Boston University that Newton met Martin Luther King while they were both students. Newton would join in the quest for equality, representing many of those arrested during civil rights marches in Birmingham and Selma. He later became a city judge and served as Birmingham's city attorney. He was a proud father of Deirdre and Demetrius, Jr. and friend to many who knew and worked with him.

However, it is as an Alabama legislator that the death of Demetrius Newton creates a public void. He was first elected to the Alabama Legislature in 1986 and rose through positions of leadership to becoming president pro tem of the house of representatives in 1998. He served in this position for 12 years. It was once said by a legislative leader, "If I had Demetrius Newton's wit, charisma and charm, I could be governor."

Demetrius Newton's enduring legacy for lawyers will be the leadership and passion he brought to improving the law for

all Alabamians. He became president of the Alabama Law Institute in 2002 and served until 2011. During his presidency, he also served as chair of the Legislative Council and speaker pro tem of the house of representatives. As president of the Alabama Law Institute, the institute performed unprecedented service to the legislature and the state.

The legislature approved 24 major revisions, including the Business Entities Code, now a national model; a complete revision of Alabama's Election Code; and laws to protect senior adults, children and victims of domestic violence.

Alabama was brought into the digital age with bills providing for electronic transactions and electronic filing of real estate documents. Alabama's business laws were kept current with revisions of articles of the Uniform Commercial Code, the Uniform Trust Code and the Prudent Investment of Institutional Funds law. Alabama passed an Athlete Agent's bill and the state's first Residential Landlord-Tenant law.

Also during his leadership the institute became the legal staff for 22 house and senate committees with legal analysts. Interns began assisting legislative committees and an office was provided in the state house for committee lawyers and interns.

The leadership of President Newton and the institute was recognized as having one of the premier legislative orientation programs in the nation and expanded its training of public officials. President Newton expanded the use of volunteer lawyers, thus saving the state millions of dollars through donated legal services. These volunteers provided the expertise to place Alabama in the forefront of states with up-to-date laws for attracting business while protecting children and families.

The legal profession, citizens of Alabama and future generations have benefited and will continue to benefit from the sensitive, caring leadership of Demetrius Newton. He was truly a great man who dedicated his life to his family, and service to his community and his state.

## Herbert W. Peterson

Herbert W. Peterson, age 96, of Tuscaloosa, passed away August 2, 2013. He is survived by his beloved wife, Anne Hughes Peterson; three sons, Drew W. Peterson (Sue), Herbert Kent Peterson and Mark Charles Peterson (Susan, deceased); grandchildren Grey (Brenda), Patrick, John Mark, Joe, and Grace Peterson; great-grandchildren Conner and Bailey Peterson; five stepsons, Randy Cobb, Scott Cobb, Mark Hughes Cobb, David Cobb, and Jimbo Cobb; and one step-grandchild, Elizabeth Anne Cobb. Mr. Peterson was preceded in death by his late wife, Agnes "Sis" Violet Peterson; his parents, Herbert W. and Kate Goodgame Peterson; his sister, Imogene Peterson Newsome; and his grandson, Jacob Taylor Peterson.



Mr. Peterson was born October 3, 1916 in Bessemer. He was a graduate of Phillips High School and the Birmingham School of Law (at age 19). Mr. Peterson is a former member of the United States Army Jag Corps and served in England in WWII. He remained as an active reservist for some 30 years and retired as a lieutenant colonel.

Mr. Peterson began his law practice in Birmingham in 1937 when he was hired by attorney Al Rives. Together, Mr. Peterson and Mr. Rives established the prominent Birmingham law firm of Rives & Peterson LLC.

Subsequent to his retirement from Rives & Peterson, Mr. Peterson served as a professor of law at Cumberland School of Law, Samford University. He retired in 1998 with the status of professor emeritus. The Herbert W. Peterson Scholarship in Trial Advocacy was established at Cumberland upon his retirement by Lanny Vines of Birmingham.

Mr. Peterson served as the president of the Birmingham Bar Association in 1962 and was an emeritus fellow of the

American College of Trial Lawyers. He became a member of American College of Trial Lawyers in 1965. He was a member of the Alabama Defense Lawyers Association during his practice. The Executive Committee of the Birmingham Bar Association passed a resolution for meritorious service to the profession in 1984. He served as the municipal judge for the City of Vestavia Hills for many years.

Mr. Peterson was a dedicated Christian and lifelong member of Vestavia Hills United Methodist Church and served as chair of the Administrative Board of the church for three years. His

love of the Lord led him to teaching the "Crusaders" adult Sunday School Class for 43 years.

Mr. Peterson was a true and loyal fan of the University of Alabama and enjoyed every time Alabama played football. Roll Tide! He was also an avid fan of the Atlanta Braves. He loved playing golf and was a member of the Vestavia Hills Country Club where he served as president in 1965. He was also a member of the Diamondhead Country Club in Diamondhead, Mississippi where he and his wife, Anne, lived for 13 years.

**Andress, Michael Paul**

Valley  
Admitted: 2003  
Died: August 14, 2013

**Jackson, Harvey Shillings, Jr.**

Jasper  
Admitted: 1949  
Died: June 19, 2013

**Reynolds, Robert Roger**

Tuscaloosa  
Admitted: 1959  
Died: February 4, 2013

**Cauley, Woodham Wendell, Jr.**

Wetumpka  
Admitted: 1977  
Died: August 20, 2013

**Johnston, Vivian Gaines, Jr.**

Mobile  
Admitted: 1949  
Died: February 10, 2013

**Russell, Donald Ray**

Trussville  
Admitted: 1969  
Died: August 2, 2013

**Conway, Charles Thomas**

Prattville  
Admitted: 1995  
Died: August 14, 2013

**Ledbetter, Robert Cleveland**

Birmingham  
Admitted: 1985  
Died: July 31, 2013

**Simpson, Henry Evans**

Birmingham  
Admitted: 1960  
Died: July 8, 2013

**Hines, James Thomas, Jr.**

Mobile  
Admitted: 1956  
Died: August 28, 2013

**Moon, Horace, Jr.**

Mobile  
Admitted: 1966  
Died: August 7, 2013

**Sully, William Leslie, Jr.**

Las Vegas, NV  
Admitted: 1974  
Died: April 3, 2013

**Hollingsworth, Vera Smith**

Decatur  
Admitted: 1993  
Died: August 13, 2013

**Nelson, Dr. Frank L.**

Hoover  
Admitted: 1987  
Died: February 7, 2013

**Thagard, Thomas Werth, Jr.**

Birmingham  
Admitted: 1961  
Died: July 3, 2013

**Horne, Richard Dowdle**

Coffeeville  
Admitted: 1976  
Died: August 25, 2013

**O'Kelley, James Ligon**

Birmingham  
Admitted: 1977  
Died: August 12, 2013

**Twitty, Thomas Eskridge, Jr.**

Mobile and Birmingham  
Admitted: 1953  
Died: August 19, 2013





**Wilson F. Green**

### **By Wilson F. Green**

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

### **By Marc A. Starrett**

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



**Marc A. Starrett**

## **RECENT CIVIL DECISIONS**

### **From the Alabama Supreme Court**

#### **Arbitration; Waiver**

##### ***O'Neal v. Bama Exterminating Co., No. 1120176 (Ala. July 3, 2013)***

Because parties had agreed that plaintiff could take depositions of third parties, and defendant could participate without waiver of its right to compel arbitration, 18-month delay in seeking arbitration did not result in defendant's having waived right to compel arbitration, even where defendant litigated enforcement of a contractual damage limitation in the parties' contract

#### **Medical Malpractice; Fictitious Party Practice**

##### ***McGathey v. Brookwood Health Services, Inc., No. 1110760 (Ala. Aug. 2, 2013)***

The court reversed summary judgment for hospital in suit by patient for injuries resulting from overheated surgical sling, holding that expert testimony was not needed to prove that hot object would burn human skin. The court affirmed the trial court's denial of leave to amend to substitute for fictitious parties for lack of reasonable diligence; plaintiff had records before expiration of limitations period identifying the potential defendants, and plaintiff waited many months after commencement of suit to substitute.

#### **Pharmacist Malpractice**

##### ***Morgan v. Publix Super Markets, Inc., No. 1120522 (Ala. Aug. 16, 2013)***

Pharmacist's failure to fill a prescription with correct medication is an error of such a nature as to be understandable to the average layperson, thereby obviating the need for any expert testimony from plaintiff in order to establish a breach of the standard of care

## Juror Misconduct; Jury Charges

**McDonald v. Kubota Mfg. America Corp., No. 1111513 (Ala. Aug. 16, 2013)**

Venireman's answers to questions in voir dire were not false or even misleading so as to give rise to "probable prejudice." Plaintiff's specifically-argued objections in charge conference were not sufficient to preserve argued error in charges on appeal, because at end of charges, plaintiff simply stated objections to specific charge numbers, without stating specific grounds for the objections.

## Insurance; Scope of Appraiser's Authority

**Ex parte Tower Ins. Co., No. 1120228 (Ala. Aug. 23, 2013)**

Under *Rogers v. State Farm Fire and Casualty Co.*, 984 So. 2d 382 (Ala. 2007), the courts are to determine whether a loss is in fact a covered loss, and that appraisers generally are to determine only the amount of a loss where the amount but not the coverage itself is disputed.

## Wrongful Death; Standing and Capacity

**Ex parte Drummond Co., No. 1120580 (Ala. Aug. 23, 2013)**

Administrator of estate brought wrongful death action under *Ala. Code* 25-5-11 (which confers claims upon the "dependents" of the worker). More than two years later, administrator moved to add wife of decedent as a co-plaintiff (who was a "dependent"). Defendants opposed, arguing that administrator lacked "standing" to assert claims via section 25-5-11 and, therefore, the amendment could not relate back, because the original pleading was a nullity. The trial court granted the amendment, holding that the issue was one of "real party in interest" and not "standing" so as to create relation back problem. Defendants petitioned for mandamus. The supreme court denied the writ without opinion.

## Administrators Ad Litem; Wrongful Death

Two interrelated decisions were released on August 23, 2013. First, the court denied rehearing in *Golden Gate National Senior Care, LLC v. Roser*, 94 So. 3d 365 (Ala. 2012), which contained a special concurrence by Justice Bolin explaining the inability of an administrator ad litem to bring a wrongful death case, but noting that the error is one of capacity and not standing. Second, the court denied mandamus relief in *Ex parte Wilson*, No. 1120879, which involved the same issue.

## Medical Malpractice

**Smith v. Fisher, No. 1120445 (Ala. Aug. 30, 2013)**

Board-certified internist was not properly qualified under *Ala. Code* § 6-5-548 to offer testimony as to standard of care for neurosurgeon and neurosurgical resident

## "Loaned Servant" Doctrine

**Eastman v. R. Warehousing and Port Services, Inc., No. 1111323 (Ala. Aug. 30, 2013)**

Because evidence was in dispute as to the issue of who exercised ultimate control over agent, trial court acted properly to give instruction on the "loaned servant" doctrine.

## Fraud; Reasonable Reliance; Contractual Performance

**Target Media Partners Operating Co, LLC v. Specialty Marketing Corp., No. 1091758 (Ala. Sept. 6, 2013)**

On original submission (December 21, 2012), the court reversed in relevant part a fraud verdict for a commercial plaintiff, holding that a fraud claim does not lie under Alabama law for misrepresentations made in connection with contractual performance, because such a claim is essentially in contract only.

On the first application for rehearing, decided on April 19, 2013, the court withdrew its decision on original submission, and affirmed without opinion the judgment for plaintiff. On second application for rehearing, decided September 6, 2013, the court (in a plurality opinion) affirmed in relevant part the judgment for plaintiff as to liability and compensatory damages, on both claims of fraudulent misrepresentation and promissory fraud.

## Foreclosure and Ejectment Procedure; Wrongful Foreclosure

**Harris v. Deutsche Bank Nat. Trust Co., No 1110054 (Ala. Sept. 13, 2013)**

Under *Ala. Code* § 35-10-12, an agent or nominee of the creditor cannot execute the power of sale unless that agent or nominee holds the right to repayment of the debt. Moreover, a claim of "wrongful foreclosure" requires proof that the creditor used the power of sale for some purpose other than repayment of the debt.

**Ex parte GMAC Mortgage LLC, No. 1110547, (Ala. Sept. 13, 2013)**

The failure of a foreclosing party to have received an assignment of the mortgage before "the initiation of foreclosure proceedings" does not of itself invalidate the eventual conveyance of the property in foreclosure of the mortgagor's rights, so long as the holder of the right to repayment executes the power of sale at the time of execution.

***Ex parte BAC Home Loans Servicing, LP*, No. 1110373 (Ala. Sept. 13, 2013)**

In a post-foreclosure ejectment proceeding, whether the party which exercised the power of sale held the right to repayment of the debt at the time of sale goes to the merits of the ejectment action and is not an issue of that party's "standing" to bring the ejectment action.

**Contempt; Timeliness of Appeal**

***Moultrie v. Wall*, No. 1111507 (Ala. Sept. 13, 2013)**

Appeal from contempt citation was untimely because ARCP 70A(g)(2) renders a contempt adjudication immediately appealable

**Amendments to Pleadings; Fictitious Parties; Timeliness**

***Ex parte General Motors of Canada Ltd.*, No. 1120629 (Ala. Sept. 13, 2013)**

Poole (plaintiff) did not act with reasonable diligence in substituting GM Canada for fictitious party. Poole should have known that GM Canada manufactured the vehicle because it was identified as such on a federally-mandated sticker on the car door, where the car was in the possession of Poole's former counsel.

**Arbitration; Post-Award Review**

***Raymond James Fin. Servs., Inc. v. Honea*, No. 1110424 (Ala. Sept. 20, 2013)**

Circuit court never had jurisdiction over appeal from arbitration award, because the clerk never entered the arbitral award as a judgment, as provided in *Ala. Code* § 6-6-15. (Note: the opinion contains no mention of *Ala. R. Civ. P.* 71B, which was adopted in December 2008 and effective February 1, 2009, and which sets out the applicable procedure).

**Standing vs. Failure to State Claim**

***Ex parte MERSCORP, Inc.*, No. 1111370 (Ala. Sept. 20, 2013)**

***Ex parte U.S. Bank National Association*, No. 1111567 (Ala. Sept. 20, 2013)**

Whether probate judges had private right of action for the recovery of recording fees was not an issue of "standing" (reviewable by mandamus), but, rather, was of the viability of the cause of action (not reviewable).

**Standing; Substitution or Addition of Parties; Class Actions**

***Whitty v. Montgomery County*, No. 1091762 (Ala. Sept. 30, 2013)**

Whether plaintiff had a viable claim was not an issue of standing, but rather went to the merits of her allegations, and, thus, plaintiff's standing conferred jurisdiction to support a proffered amendment adding new plaintiffs

**Appellate Review; Aggrieved Party**

***Gaddy v. Brascho*, No. 1111376 (Ala. Sept. 20, 2013)**

A loser in motion in limine hearing candidly admitted the case should be dismissed, with trial court commenting that the ruling in limine could be appealed. The supreme court (Parker) dismissed the appeal, holding that loser had requested the dismissal. Justice Murdock dissented, joined by CJ Moore.

**Foreign Judgments; Collateral Attack**

***Lanier v. McMath Constr. Inc.*, No. 1120413 (Ala. Sept. 20, 2013)**

In foreign judgment enforcement action, the Louisiana court never adjudicated the issue of whether service was effected properly, and, therefore, no *res judicata* applied. Judgment was void for improper service under the Louisiana long-arm statute.

**"Own Work" Exclusions; CGL Policies**

***Owners Ins. Co. v. Jim Carr Homebuilder LLC*, No. 1120764 (Ala. Sept. 20, 2013)**

Damages for mental anguish and repair costs associated with faulty workmanship claims, asserted against a general contractor who built a house, were not covered by a CGL policy because of the "own work" exclusions.

**"Accepted Work" Doctrine**

***Weaver v. Balch*, No. 1100637 (Ala. June 28, 2013, on rehearing Sept. 20, 2013)**

On original submission, the court adopted the "accepted work doctrine" in effect in other jurisdictions, under which "an independent contractor under contract with the state (for road construction) is not liable for injuries occurring to a third person after the contractor has completed the work and turned it over to the owner (the state), and it has been accepted by him. On rehearing, the majority opinion became a plurality only.



## Regulatory Takings

***Town of Gurley v. M&N Materials, Inc.*, No. 1110439 (Ala. Dec. 21, 2012, modified on denial of rehearing Sept. 27, 2013)**

Inverse condemnation claim based on a “regulatory” taking asserted against town by landowner is not cognizable under Ala. Const. Sec. 235, which requires the governmental body either to have physically intruded onto the property or to have engaged in active interference with access to the property. A section 23 takings claim requires a complete physical taking of the property.

## “Abnormal” Bad Faith

***State Farm Fire & Cas. Co. v. Brechbill*, No. 1111117 (Ala. Sept. 27, 2013)**

Lack of arguable basis for non-payment is an essential element of both a “normal” bad-faith refusal to pay and “abnormal” bad-faith failure to investigate claim.

## Arbitration; Post-Arbitral Review

***Terminix International LP v. Scott*, No. 1111232 (Ala. Sept. 27, 2013)**

Defendant (loser in arbitration) was entitled to a hearing on its Rule 59 motion based on allegation of “evident partiality” of arbitrator, based on affidavits establishing that arbitrator’s law firm had represented parties in a matter adverse to defendant several years before the arbitration

## Declaratory Judgments

***Ex parte Valloze*, No. 1111335 (Ala. Sept. 27, 2013)**

The court granted mandamus petitions by declaratory judgment defendants in non-liability suit by manufacturer, holding “that declaratory-judgment actions are not intended to be a vehicle for potential tort defendants to obtain a declaration of non-liability”

## Discovery; Post-Accident Investigation Report

***Ex parte Schnitzer Steel Industries, Inc.*, No. 1120251 (Ala. Sept. 27, 2013)**

Post-accident report relating to accident occurring at SSI subsidiary’s worksite was protected work product

## Medical Malpractice

***Boyles v. Dougherty*, No. 1120395 (Ala. Sept. 27, 2013)**

Plaintiff’s nurse expert satisfied both the breach of standard of care and causation through opinions that arterial stick was positioned too high on minor child, and that this could cause and did cause occluded blood flow to minor’s right hand

## State Agent Immunity

***Ex parte Mason*, No. 1120531 (Ala. Sept. 27, 2013)**

Bus driver for school system was entitled to state agent immunity on claims by student that he was negligently and wantonly dropped off at a stop location which required student to cross four-lane highway, during which crossing student was struck after bus had left and continued on its route

## Tax Sale Redemption Procedure

***Ex parte Foundation Bank*, No. 1120920 (Ala. Sept. 27, 2013)**

Circuit court was without jurisdiction to enter any supervisory order concerning the probate court’s consideration of a property redemption matter. Before a redemption certificate issues from the probate court under *Ala. Code* § 40-10-122, the proposed redemptioner must pay both the amount of taxes to the probate court and the amount for improvements to the tax sale purchaser.

# From the Alabama Court Of Civil Appeals

## Workers’ Compensation; Successive Injury

***McRae v. Second Mile Development, Inc.*, No. 2111122 (Ala. Civ. App. Aug. 2, 2013)**

In a successive injury case, the applicable standard is whether the second injury is the direct and natural result of the first injury, regardless of whether it was incurred at work or elsewhere.

## Workers’ Compensation

***Devero v. North Am. Bus Inds.*, No. 2120133 (Ala. Civ. App. Aug. 9, 2013)**

The court overruled *Farris v. St. Vincent’s Hospital*, 624 So. 2d 183 (Ala. Civ. App. 1993), under which a workers’ compensation summary judgment order nevertheless had to comply with the requirements of *Ala. Code* § 25-5-88. Summary judgment orders otherwise in compliance with Rules 52 and 56 can be reviewed on their merits.

## Workers’ Compensation

***Malone v. Steelcase, Inc.*, No. 2111256 (Ala. Civ. App. Sept. 20, 2013)**

*Ala. Code* § 25-5-57(c)(3) did not authorize employer to receive a credit against the award for amounts received in salary while working after the date she reached maximum medical improvement (“MMI”)

## Arbitration; Non-Signatory Enforcement

***Macon County v. Murphy*, No. 2120755 (Ala. Civ. App. Sept. 20, 2013)**

Employees' claims against Macon County were properly subject to arbitration under AFLAC's arbitration agreement, because the complaint alleged that the county was acting as AFLAC's agent in the sale of the policies, and because the arbitration agreement was broad enough to encompass the claims against the county.

## From the Eleventh Circuit Court of Appeals

### Antitrust; Relevant Market

***Gulf States Reorganization Group, Inc. v. Nucor Corp.*, No. 11-14983 (11th Cir. July 19, 2013)**

Attempted monopolization claim under Section 2 of the Sherman Act failed because plaintiff's "relevant market" definition was too narrow, in that manufacturers of pickled and oiled steel, a related product, could switch their production to that of black hot rolled coil steel, without much difficulty or cost, creating a "cross elasticity of supply."

### FLSA

***Scantland v. Jeffrey Knight, Inc.*, No. 12-12614 (11th Cir. July 16, 2013)**

In collective FLSA action, the Court reversed summary judgment for employer; four of six factors supported determination that plaintiffs were "employees" and not "independent contractors"

### CAFA; Mass Actions

***Scimone v. Carnival Corp.*, No. 13-12291 (11th Cir. July 1, 2013)**

Under CAFA, a defendant may not remove multiple and separate lawsuits to federal court as mass actions, even if the cases contain 100 or more aggregate plaintiffs whose claims revolve around common questions of law or fact, where neither the plaintiffs nor the state court have proposed that 100 or more persons' claims be tried jointly.

### Arbitration; Class Actions; Review of Arbitral Award

***Southern Communications Services, Inc. v. Thomas*, No. 11-15587 (11th Cir. July 12, 2013)**

Since the arbitrator was arguably interpreting the parties' arbitration agreement in construing an arbitration clause as allowing for class actions, there was no basis for vacatur of the arbitrator's class certification.

### FLSA

***Nall v. Mal-Motels, Inc.*, No. 12-13528 (11th Cir. July 29, 2013)**

FLSA claims brought by former employees against former employer can be settled only through the DOL or through settlement approved by district court, so as to preclude direct agreement to settle between plaintiffs and employer

### Warn Act

***Sides v. Macon County Greyhound Park, Inc.*, No. 12-14673 (11th Cir. Aug. 5, 2013)**

In WARN action against MCGP arising from VictoryLand closing, the Eleventh Circuit affirmed the district court's classification of certain layoffs as "plant closings," and that MCGP was not entitled to invoke the "unforeseeable business circumstances" defense.

### Federal Jurisdiction; Abstention

***Jackson-Platts v. GE Capital Corp.*, No. 11-14379 (11th Cir. Aug. 22, 2013)**

*Colorado River* abstention was inappropriate over post-judgment fraudulent transfer action removed from Florida state court

### RICO

***Lehman v. Lucom*, No. No. 12-14126 (11th Cir. Aug. 28, 2013)**

Under the "separate accrual" rule, "the commission of a separable, new predicate act within a four-year limitations period permits a plaintiff to recover for the additional damages caused by that act." The allegations in this case, however, did not allege injuries that are new and independent.

### Employment Discrimination

***Weatherly v. Alabama State University*, No. 12-13414 (11th Cir. Sept. 3, 2013)**

The first line of Judge Dubina's opinion says it all: "The facts of this case should greatly concern every taxpaying citizen of the State of Alabama, especially because it involves a public institution largely funded with tax dollars paid by the people of Alabama." You'll just have to read it to believe it.

## Magistrate Judge Jurisdiction; Class Actions

***Day v. Persels & Assocs. LLC*, No. 12-11887 (11th Cir. Sept. 10, 2013)**

Magistrate judge had subject-matter jurisdiction to enter a final judgment in class action, because absent class members are not parties whose consent is required for a magistrate judge to enter a final judgment under section 636(c)

## Daubert

***USA v. Alabama Power Co.*, No. 11-12168 (11th Cir. Sept. 19, 2013)**

The Eleventh Circuit reversed (as being clearly erroneous) the district court's disallowance of expert testimony of Mr. Koppe and Dr. Sahu, government-proffered experts in a Clean Air Act case brought against the APCO. The Eleventh Circuit held that the *Koppe-Sahu* model was sufficiently reliable to establish a relationship between potential generation of electricity and expected pollutant emissions.

## Daubert

***Tampa Bay Water v. HDR Engineering, Inc.*, No. No. 12-14600 (11th Cir. Sept. 23, 2013)**

The Court affirmed the district court's allowance of expert testimony challenged under *Daubert*, reasoning that the expert's methodology was sufficiently reliable.

## Bankruptcy

***Hope v. Acorn Financial*, No. 12-10709 (11th Cir. Sept. 26, 2013)**

Issue: whether a confirmed Chapter 13 plan which gives a creditor a secured position is binding on a trustee who, aware of defects in that creditor's security interest, recommends confirmation of the plan

## RECENT CRIMINAL DECISIONS

# From the Alabama Supreme Court

## Juvenile Capital Cases

***Ex parte Henderson*, No. 1120140 (Ala. Sept. 13, 2013)**

The Court rejected a constitutional challenge to juvenile capital sentencing in Alabama, predicated on *Roper v.*

*Simmons*, 543 U.S. 551 (2005), and *Miller v. Alabama*, 132 S.Ct. 2455 (2012), holding that a sentencing hearing for a juvenile convicted of a capital offense must now include consideration of 14 factors.

## Search and Seizure; Students

***Ex parte State of Alabama*, No. 1120593 (Ala. Sept. 13, 2013)**

Public-school student's association with an individual known to be involved in criminal activity and suspected of being affiliated with a gang, without more, is not reasonable grounds for a search of the student by a school official

## Apprendi

***Ex parte Lightfoot*, No. 1120200 (Ala. Jul. 12, 2013)**

The trial court's sentencing enhancement based on the defendant's use of a firearm during his trafficking activities violated *Apprendi*, because the jury was not provided an opportunity to make a finding as to this issue.

# From the Court of Criminal Appeals

## Duty to Retreat

***George v. State*, CR-12-0642 (Ala. Crim. App. Aug. 30, 2013)**

Defendant's murder conviction was reversed because the trial court instructed the jury regarding a duty to retreat, though the amended *Alabama Code* § 13A-3-23 provides that one may "stand one's ground" when faced with deadly force.

## Fifth Amendment

***Rigsby v. State*, CR-11-1279 (Ala. Crim. App. Jul. 12, 2013)**

Prosecutor's question during closing argument—"Why didn't he just admit what he done [sic] and give these boys some peace?"—constituted an impermissible direct comment on the defendant's invocation of his Fifth Amendment privilege

## Evidence

***Bailey v. City of Ragland*, CR-12-0275 (Ala. Crim. App. Jul. 12, 2013)**

Prosecution's failure to introduce the municipal ordinance into evidence rendered its evidence insufficient to convict the defendant of a violation of the ordinance | [AL](#)



**Reinstatement**

**Disbarment**

**Suspensions**

## Reinstatement

- Birmingham attorney **David Walker Steelman** was reinstated to the practice of law in Alabama, effective May 20, 2013, by order of the Supreme Court of Alabama. The supreme court's order was based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Steelman on November 29, 2012. Steelman was suspended from the practice of law in Alabama, effective August 20, 2008, by order of the Disciplinary Commission of the Alabama State Bar. [Rule 28, Pet. No. 2013-2138]

## Disbarment

- Montgomery attorney **David Coleman Yarbrough** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective August 7, 2013. The Alabama Supreme Court entered its order based upon the July 8, 2013 report and order of Panel II of the Disciplinary Board of the Alabama State Bar disbaring Yarbrough.

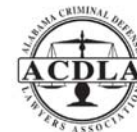
In ASB No. 2009-1352(A), Yarbrough was found guilty of violating Rules 4.1(a), 8.4(a), 8.4(c) and 8.4(g), *Ala. R. Prof. C.* Yarbrough represented the plaintiff on a contingency-fee basis in a lawsuit. After filing suit, the opposing party filed a counter-claim. As a result of the counter-claim, Yarbrough's client sought coverage by their insurer. The insurance company retained Yarbrough to defend his client on the counter-claim at a rate of \$200 per hour. Yarbrough misrepresented a settlement amount to the insurance company's in-house counsel and convinced the insurance company to settle the case for \$455,000. In fact, Yarbrough had already negotiated a settlement of \$125,000 with the opposing counsel. The \$455,000 was deposited into Yarbrough's trust account. He disbursed the \$125,000 settlement and then disbursed \$214,500 to his client and \$115,000 to himself. Yarbrough was later sued by the insurance company. He authorized a settlement of approximately \$400,000. Yarbrough's malpractice insurer paid the settlement. Other testimony demonstrated Yarbrough previously sought assistance of opposing counsel in defrauding the insurance company by refunding the excess funds after settlement.

In ASB No. 2009-1810(A), Yarbrough was found guilty of violating Rules 1.3, 1.4(a), 1.4(b), 8.4(a), 8.4(c), 8.4(d), and 8.4(g), *Ala. R. Prof. C.* Yarbrough admitted much of the misconduct in that he represented the plaintiff on a contingency-fee basis involving injuries from an automobile accident and failed to respond to any discovery pro- pounded by the defendant or the subsequent motions to compel. Yarbrough also admitted to a failure to notify his client that the case was dismissed due to his repeated fail- ures to respond to discovery requests and to prosecute the case. The panel determined that both disbarments are to run concurrently. [ASB nos. 2009-1352(A) and 2009- 1810(A)]

## Suspensions

- Millbrook attorney **Heather Leigh Friday Boone** was sum- marily suspended from the practice of law in Alabama, by order of the Supreme Court of Alabama, effective June 14, 2013. The supreme court entered its order based upon the Disciplinary Commission’s order finding that Boone had failed to respond to a request for information concerning a disciplinary matter. On July 29, 2013, after responding to the bar’s request for information, Boone filed a petition to dissolve summary suspension. On July 31, 2013, the Disciplinary Commission granted Boone’s request that the summary suspension be dissolved, and entered an order to that effect. [Rule 20(a), Pet. No. 2013-963]
- Birmingham attorney **Gregory David Harrelson** was sus- pended from the practice of law in Alabama for 60 days, by order of the Supreme Court of Alabama, effective July 9, 2013. The supreme court entered its order based upon the Disciplinary Commission’s acceptance of Harrelson’s conditional guilty plea, wherein Harrelson pled guilty to violating Rules 5.1(a) and 5.3(a) and (b), *Ala. R. Prof. C.* Harrelson was ordered to serve 30 days of the suspension, and the remaining 30 days to be held in abeyance. In addition, Harrelson was placed on probation for one year and ordered to obtain an additional nine hours of CLE (ethics and professionalism). Harrelson failed to make reasonable efforts to ensure that the conduct of both lawyer and non-lawyer employees were in compliance with the *Alabama Rules of Professional Conduct*. Both lawyers and non-lawyer employees engaged in the improper solicitation of potential clients. [ASB No. 2010-869]

- Birmingham attorney **Samuel Ray Holmes** was suspended from the practice of law in Alabama for 180 days by order of the Disciplinary Commission of the Alabama State Bar, effective August 21, 2013. The suspension was ordered held in abeyance and Holmes was placed on probation, with conditions, for one year. The order of the Disciplinary Commission was based upon Holmes’s conditional guilty plea to violations of Rules 1.15(d), 8.4(a), 8.4(b), 8.4(c), 8.4(d), and 8.4(g), *Ala. R. Prof. C.* In April 2012, Holmes issued two checks to clients totaling \$25,333.24 that were later returned for insufficient funds. Holmes informed the Office of General Counsel this was merely an oversight and the matter was resolved. Holmes admitted that at the time he made these representations to the Office of General Counsel the matter was not resolved. Finally, Holmes admitted he endorsed a settlement check in the amount of \$55,000 that was not properly deposited into his IOLTA trust account. [ASB No. 2012-698]
- Spanish Fort attorney **John Perry Thompson** was sum- marily suspended from the practice of law in Alabama by order of the Disciplinary Commission of the Alabama State



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Bar, pursuant to Rules 8(e) and 20(a), *Ala. R. Disc. P.*, effective August 6, 2013. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing that Thompson failed to respond to requests for information during the course of a disciplinary investigation. On August 9, 2013, after responding to the bar's request for information, Thompson filed a petition to dissolve summary suspension. On August 15, 2013, the Disciplinary Commission granted Thompson's request that the summary suspension be dissolved and entered an order to that effect. [Rule 20(a), Pet. No. 13-1425]

- Tuscaloosa attorney **Jarrett Nathaniel Tyus** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama for five years, effective April 25, 2011. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Tyus's conditional guilty plea wherein he pled guilty to multiple violations of Rules 1.2(a); 1.3; 1.4(a) and (b); 1.15(a); 1.16(a), (c) and (d); 5.5(a)(1); 8.1(b); 8.4(a), (c) and (d);

and 8.4(g), *Alabama Rules of Professional Conduct*. Tyus willfully neglected legal matters entrusted to him, failed to adequately communicate with clients, failed to notify clients of a prior suspension and engaged in the unauthorized practice of law while suspended. Under the terms of the conditional guilty plea, prior to petitioning for reinstatement, Tyus is also required to make restitution. [ASB nos. 2012-176, 2012-656, 2012-1380 and 2012-1487]

- On July 9, 2013, the Supreme Court of Alabama affirmed the June 20, 2013 Disciplinary Commission's order accepting the conditional guilty plea of Pelham attorney **John Scott Waddell** to a 180-day suspension, effective July 9, 2013. On May 24, 2013, Waddell entered a conditional guilty plea to violations of Rules 1.5(a), 1.15(a), 1.15(b), 1.15(c), 1.15(e), 1.15(j), 8.4(a), and 8.4(g), *Ala. R. Prof. C.*, wherein Waddell admitted he used his IOLTA trust account for personal business and also received several insufficient funds notices from his bank regarding his trust account. [ASB No. 2013-539] | [AL](#)


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**J. Anthony McLain**



# May an attorney share legal fees with a non-lawyer earned while prosecuting a BP claim?

## QUESTION:

May an attorney share legal fees with a non-lawyer earned while prosecuting a BP<sup>1</sup> claim?

## ANSWER:

No. The sharing of a legal fee with a non-lawyer while prosecuting a BP claim violates Rules 5.4(a), 5.5 and 7.2(c), *Ala. R. Prof. C.*

## DISCUSSION:

The Office of General Counsel has received numerous requests for opinions regarding the handling and filing of claims administered by the BP Claims Program on behalf of clients of accountants, accounting firms and persons holding themselves out as adjustors, public adjustors and consultants. Specifically, a number of Alabama attorneys have been approached by the above-described groups regarding the handling and filing of BP claims for those groups' clients. In many instances, these groups propose referring their clients to the Alabama lawyer in exchange for a portion of any contingency fee obtained by the lawyer or upon an agreement that the lawyer will protect the referring person's fee in the matter. The Disciplinary Commission is issuing this formal opinion to provide guidance regarding the *Alabama Rules of Professional Conduct* and the prosecution of BP claims.

As a starting point, Rule 5.4(a), *Ala. R. Prof. C.*, states as follows:

### **Rule 5.4 Professional Independence of a Lawyer**

- (a) A lawyer or law firm shall not share legal fees with a non-lawyer, except that:
- (1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;
  - (2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion

of the total compensation which fairly represents the services rendered by the deceased lawyer; and (3) a lawyer or law firm may include non-lawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

In addition, Rule 7.2(c), *Ala. R. Prof. C.*, provides:

**Rule 7.2 Advertising**

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

\* \* \*

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay the reasonable cost of any advertisement or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service.

Both Rules 5.4(a) and 7.2(c), *Ala. R. Prof. C.*, prohibit attorneys from sharing legal fees with non-attorney and/or paying a non-lawyer anything of value in exchange for a referral of a legal client. The argument raised by some concerning the prosecution of BP claims is that the filing and prosecution of a BP claim is not the practice of law and, therefore, the ethical prohibitions prescribed by Rules 5.4(a) and 7.2(c) do not apply. The Disciplinary Commission disagrees.

In the opinion of the Disciplinary Commission, the filing or prosecution of BP claims on behalf of another is the practice of law. Section 34-3-36, *Ala. Code* 1975, states:

Whoever,

(1) In a representative capacity appears as an advocate or **draws papers, pleadings, or documents, or performs any act in connection with proceedings pending or prospective before a court or a body, board, committee, commission, or officer constituted by law or having authority to take evidence in or settle or determine controversies** in the exercise of the judicial power of the state or any subdivision thereof; or

(2) **For a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document, or instrument affecting or relating to secular rights;** or

(3) For a consideration, reward, or pecuniary benefit, present or anticipated, direct or indirect, **does any act** in a representative capacity on behalf of another tending to obtain or secure for such other the prevention or **the redress of a wrong or the enforcement or establishment of a right;** or

(4) As a vocation, **enforces, secures, settles, adjusts, or compromises defaulted, controverted, or disputed accounts, claims or demands** between persons with neither of whom he or she is in privity or in the relation of employer and employee in the ordinary sense; is practicing law.

*Ala. Code* § 34-3-6 (1975) (emphasis added). An understanding of the BP claims process is fundamental to our conclusion that any person prosecuting a BP claim without a license to practice law is, in fact, engaging in the unauthorized practice of law.

The claims process begins with counseling regarding the claimant's rights under the settlement agreement and follows with completion of the appropriate claim form. Examples of potential claims include seafood compensation, individual economic loss, business economic loss and certain real property claims. Because the claim form becomes an integral part of the record for the claimant and answers provided therein may be prejudicial to the claimant's rights, one must have an understanding of the terms of the settlement agreement, the claims administrator's "policy decisions" interpreting the settlement agreement, as well as Judge Barbier's and Magistrate Shushan's orders interpreting the rights of the parties, including the parties' rights, obligations, filing deadlines, the preclusive effect of procedural defects in the parties' submissions, and the nature of the claims released by participating claimants. The settlement agreement includes over 1,000 pages of exhibits detailing the requirements for qualification, applicable causation tests depending on the claimant's qualifications, the authority of the claims administrator to consider evidence or other matters with respect to eligibility, causation or economic damages, and the rights and procedures for appealing eligibility, causation and damage determinations.

Pursuant to § 34-3-6, *Ala. Code* 1975, non-lawyers cannot perform any act for an Alabama resident or business in connection with the BP claims program which constitutes

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advising or counseling another as to their legal rights or seeking redress of a wrong. However, the prosecuting of BP claims via the process described above would be directed to the enforcement, securing, settling, adjusting, or compromising a claim. Under these circumstances, it is impossible for a non-lawyer to assist an Alabama claimant in the BP claims program without having to communicate and explain the settlement agreement and the BP claims program as well as the rights and obligations of the parties.

Additionally, depending on the type of claim involved, the claimant is required to present specific information relating to their potential claimant status. In a business economic loss claim, for example, the claimant is required to submit organizational documents establishing the existence and nature of their business. The claims administrator has a right to, and does, conduct independent investigations into a claimant's claim including their status. A claimant or his representative is often contacted by a claims administrator reviewer. Another circumstance requiring advocacy involves analysis of the language in the settlement agreement regarding an inconsistency between the language explaining the "Modified V-test" for causation and the example relating to the "Modified V-test." Counsel for claimants are routinely required to argue to the claim reviewer in those cases where the "Modified V-test" applies.

Following the submission of a claim, the claimant's representative is often contacted by a claims administrator reviewer. The reviewer typically asks a number of questions relating to eligibility, causation or compensation, and routinely requests additional corroborating evidence. This places the claimant in an adversarial posture due to the authority of the reviewer to employ discretion during his or her review.

The conclusion of the review of a claim ends with either a formal notice of eligibility or a denial. The claimant has 30 days to accept this determination or to pursue three alternate avenues to adjudicate the claim. First, claims can be re-reviewed. This process involves counsel presenting new evidence and exhibits to alter the original outcome. Second, the claim can be reconsidered. This involves the claim being reviewed de novo. New evidence and exhibits can and, in almost all cases, must be presented by counsel so that the client has the best opportunity to change the original result. Finally, a claim can be appealed, which involves counsel officially notifying the claims center that they wish to appeal, submitting a filing fee and adhering to the strict deadlines of the appeal process. BP also has between 10 and 20 days to appeal all claims above \$25,000. A review of the claims administrator's status report No. 10, dated June 11, 2013, on the official court-authorized website reveals that BP has appealed 12.4 percent of the claimant award. This high percentage of appeals illustrates the "non-neutral" adversarial nature of the claims reviews process.

The claim form required by this process becomes part of an official record. It has a potentially prejudicial effect on the claimant's rights under the settlement agreement, and is the basis upon which the court-appointed claims administrator determines qualification, eligibility and compensation. The claims process is clearly a proceeding "pending or prospective before a court or a body, board, committee, commission or officer constituted by law or having authority to take evidence in or settle or determine controversies."

In the opinion of the Disciplinary Commission, the shepherding of a claim through the claims process described above, to the extent it includes the advising of parties of their legal right, acting on parties' behalf in a representative capacity to enforce those rights and/or seek redress for violations of the same, the filing of claims or the appearance before a body authorized to take evidence and settle or determine controversies, is the "practice of law" as defined by § 34-3-36, *Ala. Code* 1975. Therefore, Rule 5.4(a), *Ala. R. Prof. C.*, prohibits an attorney from sharing fees with a non-lawyer or other consideration paid by a client for those services provided in conjunction with the prosecution of a BP claim.

Additionally, an attorney in violation of Rule 5.4(a), *Ala. R. Prof. C.*, by virtue of such impermissible fee-splitting would also be guilty of violating Rule 5.5, *Ala. R. Prof. C.*, which prohibits a lawyer from assisting another in the unauthorized practice of law. Rule 5.5, *Ala. R. Prof. C.*, states:

**Rule 5.5 Unauthorized Practice of Law**

(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

**(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.**

(b) Subject to the requirements of Rule VII, *Rules Governing Admission to the Alabama State Bar (Admission of Foreign Attorneys Pro Hac Vice)*, a lawyer admitted in another United States jurisdiction but not in the State of Alabama (and not disbarred or suspended from practice in that or any jurisdiction) does not engage in the unauthorized practice of law when the lawyer represents a client on a temporary or incidental basis (as defined below) in the State of Alabama. Services for a client are within the provisions of this subsection if the services:

(1) are performed on a temporary basis by a lawyer admitted and in good standing in another United States jurisdiction, including transactional, counseling, or other non-litigation services that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice;

(2) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding held or to be held in this or in another jurisdiction; or

(3) are performed by an attorney admitted as an authorized house counsel under Rule IX of the *Rules Governing Admission to the Alabama State Bar* and who is performing only those services defined in that rule.

(c) A lawyer admitted to practice in another jurisdiction but not in the State of Alabama does not engage in the unauthorized practice of law in the State of Alabama when the lawyer renders services in the State of Alabama pursuant to other authority granted by federal law or under the law or a court rule of the State of Alabama.

(d) Except as authorized by these Rules or other law, a lawyer who is not admitted to practice in the State of Alabama shall not (1) establish an office or other permanent presence in this jurisdiction for the practice of law, or (2) represent or hold out to the public that the lawyer is admitted to practice law in Alabama.

(e) Practicing law other than in compliance with this rule or Rule VII or Rule VIII of the *Rules Governing Admission to the Alabama State Bar*, or other rule expressly permitting the practice of law, such as the Rule Governing Legal Internship by Law Students, shall constitute the unauthorized practice of law and shall subject the lawyer to all of the penalties, both civil and criminal, as provided by law.

(emphasis added). However, the Comment to Rule 5.5, *Ala. R. Prof. C.*, makes clear that a lawyer is not prohibited from employing the services of professionals whose skills are necessary to properly present the claims of the lawyer's clients, for example, claims adjustors, employees of financial or commercial institutions, social workers, accountants, and medical personnel.

While an attorney cannot share a fee with a non-lawyer or assist a non-lawyer in the unauthorized practice of law, an attorney may employ the services of an accountant or other professional to assist in supporting or proving the client's claim. In formal opinion 1993-20, the Disciplinary Commission previously held that an Alabama attorney may, consistent with the *Alabama Rules of Professional Conduct*, compensate a non-lawyer for services rendered in connection with its representation of certain plaintiffs in litigation. Therefore, an attorney hired to prosecute a BP claim may hire an accountant to perform loss calculation services as described in *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179, Doc. 6430-1 (E.D. La. filed May 3, 2012).

However, the attorney may not split or share any contingency fee with the non-lawyer as a means for compensating the non-lawyer for their services. If the accountant or non-lawyer has a separate fee agreement with the client, the attorney may not agree to protect the fee of the accountant or non-lawyer in exchange for a referral of that accountant's or non-lawyer's client.

Finally, pursuant to Rule 1.5(c), *Ala. R. Prof. C.*, any contingency fee between an attorney and the client must be in writing. Further, an attorney may not be hired by an accounting firm on a contingency fee basis to prosecute the claims of its clients. In other words, the attorney's client must be the person or business for whom the BP claim is being prosecuted and the attorney should have a contract clearly stating this arrangement with each client.

Based on the foregoing, the Disciplinary Commission counsels all Alabama attorneys to take great care to avoid violations of Rules 5.4, 5.5 and 7.2(c), *Ala. R. Prof. C.*, in the prosecution of BP claims. [RO-2013-01] | AL

## Endnotes

1. This process is governed by the "Deepwater Horizon Economic and Property Damage Settlement Agreement" (as amended). See, *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, MDL No. 2179, Doc. 6430-1 (E.D. La. filed May 3, 2012). On the official court-authorized website at [www.deepwaterhorizoneconomicsettlement.com](http://www.deepwaterhorizoneconomicsettlement.com), one can find much of the information regarding the settlement agreement (as amended) including: 1) the settlement agreement; 2) claim forms; 3) claims administrator's "policy decisions" interpreting the settlement agreement; 4) court orders interpreting the rights of the parties and/or administering the settlement program; and 5) rules governing the appeals process which includes the right to appeal directly to the District Court.

At the home tab of the court's website is the following statement: "The Economic & Property Damages Settlement resolves certain economic loss and property damage claims related to the 2010 Deepwater Horizon oil spill." (See, official court-authorized website, [www.deepwaterhorizoneconomicsettlement.com](http://www.deepwaterhorizoneconomicsettlement.com)).



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# The Long and Winding Road of Reform: Campaign Finance Changes 2010-2013

A year from now, in November 2014, we will be in the midst of a significant general election. Alabama will be holding elections for governor and other constitutional offices, a number of appellate judges, district and circuit judges, all members of the legislature, all sheriffs, and a number of local elected officials. This means that today candidates are in the midst of campaigning and fundraising for those elections.

Few areas of the law have undergone such a dramatic change since the 2010 elections than Alabama's campaign finance statutes (which are primarily found in the Fair Campaign Practices Act or FCPA).<sup>1</sup> Changes began in the December 2010 special session and have continued through the regular session of 2013. In all, six significant pieces of legislation have been enacted over the past three years to reshape the landscape of how campaigns are financed and operated in Alabama<sup>2</sup>. A summary of those changes is set forth below.

## **PAC-to-PAC Ban**

During the 2010 Special Session, the legislature generally banned political action committees (PACs) from contributing or transferring funds to any other PAC except for transfers from a PAC to a candidates' principal campaign committees (PCC).<sup>3</sup> Some revisions to these restrictions were enacted in 2013.<sup>4</sup>

## **Prohibited Contributions and Expenditures**

The 2010 revisions made it unlawful for any PAC, PCC or Section 527 political organization<sup>5</sup> to make a "contribution, expenditure or any other transfer of funds" to any other PAC or 527 organization. The PAC-to-PAC ban also prohibits a candidate's PCC from contributing or transferring funds to a PAC or to another candidate's PCC.<sup>6</sup>

## **Candidates Contributions/Payments to Political Parties**

While the PAC-to-PAC ban prohibits a candidate's PCC from contributing or transferring funds to a PAC, there is a limited exception that permits a PCC to contribute funds to a political party (which is, by definition, a PAC under the FCPA) for qualifying fees. In addition, under the 2010 revisions, a PCC could also expend up to \$5,000 of campaign funds during the term of office for tickets to political party dinners and functions and state and local political party dues or similar expenses incurred by independent or write-in candidates. During the 2013 Session, the legislature amended this provision to provide that the \$5,000 allowance for such political party expenditures applies over a two-year period (from one November general election to the next).<sup>7</sup> The 2013 revision prevents any discrepancy between office holders whose terms of office are for six years versus those with four-year terms.



## Permitted Contributions and Expenditures

Under the 2010 revisions, a PAC may make contributions to a candidate's PCC. In addition, another exception permits a PCC to transfer funds to the same person's PCC for another state office. For example, a state representative running for governor would be permitted to transfer funds from his state representative campaign committee to his gubernatorial campaign committee. It should be noted that, under federal law, a state officeholder with an existing state PCC could not transfer funds from that PCC to a federal candidate committee or PAC.

## Use of Funds Raised by a Federal Candidate Committee

The 2010 revisions include restrictions on a candidate's PCC receiving (or spending) funds that were raised by a federal candidate's "principal campaign committee."<sup>8</sup> According to the secretary of state's guidance during the 2012 election cycle, a PCC may not receive (or spend) more than \$1,000 in campaign funds that were raised by a federal candidate's campaign committee.

## Corporation and Association PACs

As originally enacted in 2010, the PAC-to-PAC ban did not affect a provision in Title 10A (the business entities code) that arguably permitted certain corporate and association PACs (separate, segregated funds) to transfer funds among themselves. The 2013 revisions to the FCPA remove the language that may have permitted those types of transfers.<sup>9</sup>

## Electronic Reporting

The 2011 revisions require that beginning with the 2014 election cycle, disclosure reports for most candidates who

file with the secretary of state must be filed electronically on the new system that the secretary of state has developed.<sup>10</sup>

## Schedule for Campaign Finance Disclosure Reports



Under the 2011 revisions to the FCPA, PCCs and PACs are required to file many more campaign finance disclosure reports and must now do so on an annual, monthly, weekly and (in some cases) daily basis. The 2012 revisions further modified the requirements for filing these reports in the 2014 election cycle when electronic filing will be in place and eliminated some duplicative, overlapping reporting obligations. The 2013 revisions implement additional technical changes, including some regarding the duplicative reporting schedule. The secretary of state has posted a helpful listing of all these filing deadlines at <http://www.sos.alabama.gov/downloads/election/2014/2014fcpaifilingcalendar.pdf>.

## Monthly Reports

For the 12 months prior to the date of an election, monthly reports must be filed by a PCC or PAC that makes a contribution or expenditure "with a view toward influencing an election's results." Reports covering each month are due on the second business day of the subsequent month.

## Weekly Reports

For the four weeks prior to an election, weekly reports covering each week must be filed on Monday of the following week. In addition, the 2012 and 2013 revisions make clear that a candidate or PAC that is required to file a *weekly* report during a certain period is *not* also required to file a *monthly* report in the month in which the election is held. This will eliminate a duplicative filing.



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## Daily Reports

For the eight days preceding a legislative, state school board or statewide election, reports must be filed by a PCC or PAC if it receives or spends an aggregate of \$5,000 or more in a single day. According to secretary of state regulations, once a PCC or PAC files a daily report it must continue filing daily reports until the election. Daily reports must include all activity occurring on the day of the report. A candidate or PAC that is required to file a *daily* report for a particular day is *not* also required to file a *weekly* report for the week preceding the election. The 2013 revisions modified the deadline for the final daily report that is due the day before an election so that it will now be due by 12:01 p.m. (just after noon) on the Monday preceding an election (instead of just after midnight on that Monday at 12:01 a.m.).

## Annual Report

The 2013 revisions add to the 2012 revisions to make clear that a PCC or PAC that is required to file a monthly report during a certain period is *not* also required to file an *annual* report in the year in which the election is held. This will eliminate a duplicative filing where an annual report is filed within days of a monthly report. At the same time, without this revision, candidates would not have been required to file annual reports following an election.

## Major Contribution Reports

Under the 2011 revisions, any single contribution of \$20,000 or more must be reported within two business days of receiving the contribution. Under recently published secretary of state regulations, the statutory definition of “contribution” is used to determine what triggers the major contribution filing obligation. It should be noted that this definition includes more than monetary contributions and also reaches loans, in-kind contributions and permitted transfers between political committees.

## Designated Filing Agents

The 2013 revisions authorized a PCC or PAC to identify a “designated filing agent” who can electronically submit FCPA reports for the PCC or PAC.<sup>11</sup> This revision will assist candidates as the electronic reporting system is implemented during the 2014 cycle.

## Disclosure Associated with “Electioneering Communications”

Under the 2011 revisions to the FCPA, disclosure requirements for “electioneering communications” (modeled to some extent on federal election law requirements) were added to the to the FCPA.

## Electioneering Communications Defined

An “electioneering communication” is defined as any “communication disseminated through federally regulated broadcast media, any mailing or other distribution, electronic communication, phone bank, or publication which (1) contains the name or image of a candidate, (2) is made within 120 days of an election in which the candidate will appear on the ballot, (3) the only reasonable conclusion to be drawn” from the communication is that it is intended to influence the outcome of an election and (4) entails an expenditure of more than \$1,000.<sup>12</sup>

## Disclosure Obligation

The person or entity paying for any electioneering communication must file a disclosure report with the secretary of state as if it were a PAC.<sup>13</sup>

## Exemptions

These provisions include exemptions for churches and trade associations communicating with members. Under the 2013 revisions, exemptions were added for employers communicating with their employees, their stockholders or the families of employees or stockholders.<sup>14</sup>

## Disclaimers

Electioneering communications appearing in any print media or broadcast must clearly identify the entity responsible for paying for the communication.<sup>15</sup> There are specific exclusions from this requirement for various enumerated items such as those designed to be worn, placed as a graphic or picture link where compliance is impractical due to the image’s size, distributed on a social networking site or sent in a text message.

## Robocall Disclosure and Source Identification

Under a 2012 revision to the FCPA, it is unlawful for an “automated or pre-recorded communication ... transmitted through an automated telephone dialing service” (such as a

“robocall”) to be conducted without providing clear notice at the end of the communication that it was a paid political advertisement and identifying the person or entity that paid for the communication.<sup>16</sup> The revisions also made it unlawful for a person or entity to knowingly misrepresent the person or entity that paid for such an automated or pre-recorded communication.

## Enforcement Provisions

The 2013 revisions substantially revised the enforcement provisions of the FCPA.

## Intent

Prior to the 2013 revisions, many of the criminal violations in the FCPA did not include any requirement that there be intent on the part of the person acting. The 2013 revisions make clear that violations must now be intentional in order to be prosecuted as crimes.<sup>17</sup>

## Administrative Fine System

Under the previous law, there was little enforcement of the requirement to file the various reports required under the FCPA on time or accurately other than a separate provision that could have a candidate removed from the ballot (or out of office) if they did not cure the problem before the election. The 2013 revisions included an administrative enforcement scheme with fines for minor violations and criminal penalties for intentional violations.<sup>18</sup> Fines are paid to the county or to the state General Fund (and not to the filing official). Additionally, a candidate or PAC is permitted to correct an otherwise timely filed report so long as it is initiated by the filer (as opposed to the filing official) and corrected prior to the election. The administrative fine schedule is below:

- 1st offense = Greater of \$300 or 10 percent of amount not reported
- 2nd offense = Greater of \$600 or 15 percent of amount not reported

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- 3rd and subsequent offenses = Greater of \$1,200 or 20 percent of amount not reported
- 4th offense establishes rebuttable presumption of intent necessary for criminal violation

### Clarifies Person Responsible for Compliance

The 2013 revisions make clear that a candidate or PAC treasurer is the person responsible for making the filings required by the FCPA.

### Enforcement for Out-of-State Violators

The 2013 revisions establish the venue for the prosecution of out-of-state violators and violations as being in Montgomery County.<sup>19</sup>

### Repeals So-Called Candidate “Death Penalty”

The so-called candidate “death penalty” for errors in filing is repealed under the 2013 revisions.<sup>20</sup>

### Other 2013 FCPA Revisions

A number of other revisions were made to the FCPA in 2013.

### Candidate Registration Thresholds

The 2013 revisions require any candidate who raises or expends \$1,000 to begin filing disclosure reports.<sup>21</sup> Previously, there was a wide variety of thresholds (*e.g.*, \$25,000 for state office other than circuit or district, \$5,000 for circuit or district office, \$10,000 for senate, \$5,000 for house, \$1,000 for local). Under the 2013 revisions, there is now a uniform threshold of \$1,000 for all candidates for any office, which will result in most candidates filing disclosure reports earlier in the process.

### Repeal of Corporate Contribution Limit

The FCPA now regulates all corporations in the same manner as other entities (*e.g.*, LLCs and partnerships) and individuals by removing restrictions (such as the \$500 corporate contribution limit). However, utilities may not contribute to any candidate for the PSC.

### Corporate/Association PACs

A separate code section in Title 10A (the business entities code) that addressed how corporations and associations

may establish separate, segregated funds (SSFs) for political participation moved into the FCPA (in Title 17) and a few clean-up revisions were made to that section including the deletion of the authorization of transfers between SSFs referenced above.<sup>22</sup>

### Legislative Caucuses

Legislative caucuses have existed for many years without any specific provisions of law for identifying them or their purposes. In the past, some caucuses that attempted to specifically influence elections actually became PACs by operation of law. Today, caucuses are more likely to be organized as nonprofits and focus on policy issues. The 2013 revisions provide for the registration of caucuses with the clerk of the house and/or secretary of the senate and prevent them from working to influence elections if they are so registered.<sup>23</sup> In addition, candidates are permitted to give excess campaign funds to a legislative caucus, but this may only be done if the caucus is registered and if the caucus does not attempt to influence the outcome of elections.

### Fundraising Blackout

The legislative fundraising blackout has been changed to apply only to legislative and statewide candidates. Previously, the campaign fundraising blackout period during the legislative session applied to legislators and statewide candidates as well as to candidates for “state offices” which, under the FCPA, included positions such as circuit and district judges, circuit clerks and district attorneys who have nothing to do with the legislative process.<sup>24</sup>

### Refund of Contributions

The FCPA now clearly allows for the return or refund of campaign contributions. Over the years, candidates and PACs have needed to refund unwanted contributions from donors they do not want to accept funds from or if they had excess contributions at the end of a campaign. It is now clear that contributions can be returned and can be refunded so long as the refunds are itemized and reported.<sup>25</sup>

### Local Candidates Electronic Filing

Local candidates (except for municipal candidates) who normally file with the judge of probate will now have the option of filing electronically with the secretary of state. If the local candidate wants to do this, they must also file notice with the judge of probate that they will be filing with the secretary of

state and file reports in that manner throughout the election.<sup>26</sup> The Probate Judges' Association has developed a form for candidates to use for this notice.

## Eliminating Filings in Multiple Courthouses

Local candidates will no longer be required to make duplicative filings if they are running for office in a municipality that is located in more than one county. Previously, those municipal candidates had to file with the judge of probate for each county in which that the municipality is located. The FCPA now provides that the candidates are required to file only with the judge of probate in the county in which the city hall is located.<sup>27</sup>

Many of the 2013 changes were the result of a study committee created by resolution of the legislature in 2012 and chaired by **Senator Bryan Taylor** and **Representative Mike Ball**. The committee met over the course of 2012 to make recommended changes for consideration by the legislature. The success of the committee led to its being extended, and it continues to meet now in anticipation of making further recommendations for the 2014 Legislative Session.

*Other information related to this article is available at* [http://www.alabar.org/sections/elections\\_ethics\\_government/](http://www.alabar.org/sections/elections_ethics_government/). | AL

## Endnotes

1. See, *Alabama Code* §17-5-1 *et seq.* An unofficial draft of the restated, red-lined FCPA as revised since 2010 and presented during the 2013 Alabama State Bar Annual Meeting can be found on the state bar webpage for its Elections, Ethics & Government Relations Law Section ([http://www.alabar.org/sections/elections\\_ethics\\_government/](http://www.alabar.org/sections/elections_ethics_government/)).
2. See Ala. Act Nos. 2010-765, 2011-687, 2011-697, 2012-477, 2012-461, and 2013-311.
3. See, *Alabama Code* §17-5-15(b).
4. The 2010 revisions also included "private foundations" within the above restrictions on contributions and expenditures; however, the inclusion of this provision had the unintended consequence of prohibiting this subset of charitable foundations from donating to each other when "private foundations" are already significantly restricted under federal tax law in their ability to participate in in political campaigns. A 2013 amendment to the FCPA deletes this reference to "private foundations" in the PAC-to-PAC ban.
5. The term "Section 527" references the section of the Internal Revenue Code that provides for the tax-exempt status of "political organizations." See 26 U.S.C. 527.

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6. Litigation involving parts of this statute is currently pending in the 11<sup>th</sup> Circuit Court of Appeals. See *Ala. Democratic Conf. v. Strange*, No. 11-16040 (11<sup>th</sup> Cir. filed on Dec. 22, 2011); see also Case No. 5:11-cv-02449 (M.D. Ala. Dec. 14, 2011).
7. See, *Alabama Code* §17-5-7(d).
8. See, *Alabama Code* §17-5-15.1.
9. The 2013 amendment also moved all provisions relating to election activity previously contained in Title 10A to Title 17. See, *Alabama Code* §17-5-14 through 14.1.
10. See, *Alabama Code* §17-5-8.1.
11. The term is defined in Section 17-5-2(a)(3) and used throughout.
12. See, *Alabama Code* §17-5-2(a)(5).
13. See, *Alabama Code* §17-5-8(h).
14. See, *Alabama Code* §17-5-8(i).
15. See, *Alabama Code* §17-5-12.
16. See, *Alabama Code* §17-5-16.
17. See, *Alabama Code* §17-5-19.
18. See, *Alabama Code* §17-5-19(d)
19. See, *Alabama Code* §17-5-19(c).
20. This was previously codified as Section 17-5-18.
21. See, *Alabama Code* §17-5-2(a)(1).
22. See, *Alabama Code* §17-5-14.1.
23. See, *Alabama Code* §17-5-5.1.
24. See, *Alabama Code* §17-5-7(b).
25. See, *Alabama Code* §17-5-7.1.
26. See, *Alabama Code* §17-5-9(d).
27. See, *Alabama Code* §17-5-9(c).



Please email announcements to Margaret Murphy, [margaret.murphy@alabar.org](mailto:margaret.murphy@alabar.org).

Due to space constraints, *The Alabama Lawyer* no longer publishes address changes, additional addresses for firms or positions for attorneys that do not affect their employment, such as committee or board affiliations. We do not print information on attorneys who are not members of the Alabama State Bar.

### About Members

This section announces the opening of new solo firms.

### Among Firms

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

## About Members

**Michael A. Anderson** announces the opening of **Michael A. Anderson LLC** at 1904 Cogswell Ave., Pell City 35125. Phone (205) 338-0925.

**Brad J. Latta** of Birmingham announces the opening of an office in Mobile.

## Among Firms

**Ables Baxter Parker & Smith** of Huntsville announces that **William C. Love** joined as of counsel.

The **Alabama Bankers Association** of Montgomery announces that **Jason Isbell** recently joined as vice president of legal and governmental affairs.

**Baker Donelson** announces that **Jennifer L. Howard** has joined the Birmingham office and that **Brent L. Rosen** has joined the Montgomery office.

**Balch & Bingham LLP** announces that **Kimberly L. Bell, Steven C. Corhern, Kerra K. Hicks, John W. Naramore, Daniel J. Ruth, Lauren E. Thornton, and A. Kelly Walker** joined the firm as associates.

**Bradley Arant Boulton Cummings LLP** announces that **Brad Robertson** has joined the Birmingham office as an associate.

**Herbert E. Browder LLC** announces that **David B. Welborn** has joined the firm.

**Campbell Law PC** in Birmingham announces that **Taylor Powell** joined the firm.

**Chason & Chason PC** in Bay Minette announces that **Joseph D. Thetford, Jr.** has become associated with the firm.

**Constangy, Brooks & Smith, LLP** announces that **Richard Trehwella** has joined as a partner in its Birmingham office.

**Cox & Reynolds LLC** announces that **Joshua Beard** has joined as an associate.

**Estes, Sanders & Williams LLC** of Birmingham announces that **R. Matthew Elliott** has become a partner.

**Fuller Hampton LLC** announces the opening of a Roanoke office and that **Sara G. Bragdon** has joined as an associate.

**Gaines, Gault, Hendrix PC** announces that **Karen D. Farley, Daniel J. Newton** and **Kristen S. Osborne** joined the firm as associates in the Birmingham office.

**L. Scott Johnson, Jr. and Katy N. Sipper** announce the opening of **Johnson & Sipper LLC** at 4252 Carmichael Rd., Montgomery 36106. Phone (334) 356-5200.

**Jones Walker LLP** of Mobile announces that **Clay A. Lanham** recently joined as a partner.

**McCallum, Methvin & Terrell PC** in Birmingham announces that **Brandon S. Hays** joined the firm as an associate.

**Rachel Picket Miller** has joined **Mark G. Montiel, PC** in Montgomery as an associate.

**Frances Ross Nolan and Leigh Reynolds Byers** announce the formation of **Nolan Byers PC** at 301 19<sup>th</sup> St., N., Birmingham 35203. Phone (205) 314-0638.

The **Judicial Council for the United States Fifth Judicial Circuit** appointed **Paul Benjamin Anderson, Jr.** as the circuit executive for the Fifth Judicial Circuit.

**Maynard, Cooper & Gale PC** announces that **W. Edward Bailey** has joined as of counsel and that **James W. King** and **Sarah Dorner** have joined the Birmingham office.

The **Rubio Law Firm** announces that **Gustavo A. Heudebert** has joined as an associate.

**Smith Moore Leatherwood** announces that **Andy Lemons** has joined the Atlanta office.

**Tanner & Guin** announces that **Jonathan Guin** has joined the firm. | [AL](#)



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