

# THE MISSISSIPPI Lawyer

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- 2012: 72 of 83 or 86.7% of MC Law grads passed (overall 81.3%)
- 2013: 76 of 89 or 85.4% of MC Law grads passed (overall 86.2%)

## ENTERING CLASS (AUGUST 2013)

- 159 JD candidates
- 64% Mississippi / 36% out of state
- 56 undergrad schools
- 164 high LSAT
- 149 median LSAT
- 4.21 high GPA
- 3.30 median GPA
- 57% male
- 43% female
- 25% minority
- \$2,017,000 awarded in merit scholarships to entering students
- 4 LLM candidates (Mexico, Philippines, Afghanistan, China)

## CLASS OF 2013 (EMPLOYMENT 9 MONTHS AFTER GRADUATION)

- 79 (42%) private law firms
- 25 (13%) government
- 24 (13%) seeking employment
- 20 (11%) business
- 14 (9%) judicial clerks
- 10 (5%) graduate degree
- 6 (3%) public interest
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# THE MISSISSIPPI Lawyer

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# Reflections from the ABA Mid-Year Meeting in Houston, Texas

Your Mississippi contingent just got back from the ABA Mid-Year meeting in Houston, Texas. Your President Elect, Roy Campbell and I attended something called the National Conference of Bar Presidents (NCBP), which takes place on the front end of the mid-year meeting. There are plenary sessions and breakout sessions that cover the gamut of bar related issues. Everything from diversity programs to handling damage control, the need for which occurs when our States are sometimes cast in the spotlight on law related issues.

My good friend and current President of the Missouri Bar, Reuben A. Shelton, was cast in just such a position when a white Ferguson, Missouri police officer shot and killed a young black man named Michael Brown. It is important to know that Reuben is an African-American from St. Louis. He knew the prosecutor, the judge, the chief of police and the mayor well, but most importantly he represented every attorney in the State of Missouri and, therefore, represents our system of justice while it is under attack at many levels. The one thing that stood out to me was how Reuben handled all of the above. He expressed publicly that the Missouri Bar would see to it that the “rule of law” was upheld, and if anyone stepped outside of those bounds, they would be dealt with accordingly by the disciplinary arm of their Bar. Neither emotions, riot nor any other turmoil, was going to change that position. He was able to say that, to date, the system of justice in Missouri has upheld the rule of law. What more can you ask? The system is working and we must let it work. Reuben has handled his position well under these horrendous circumstances. Thank you Reuben for defending our system of justice in such an admirable manner.

We went to a plenary session with Bar Presidents and Presidents-Elect from all over the country. Hang in here with me because this is worth being aware. The session entitled, “The Future is Here: NCBP Futures Conference,” was about the delivery of legal services. The tenor of the discussions relied on data that the mid-income level of our society is underserved when it comes to delivery of legal services. This refers to those who do not qualify for various forms of legal aide and cannot afford to hire a lawyer or law firm. It goes without saying that access to affordable legal services for the public is critical in a society based on the rule of law. Throughout my legal career, legal proceedings have grown more expensive, time consuming and complex. Many in our society do not even realize there are legal solutions for problems they suffer daily, and even those who know they have a legal problem, too often cannot afford an attorney.

Our new ABA President, William C. Hubbard from South Carolina, has appointed the ABA Commission on the Future of Legal Services to study this perceived gap in the effective delivery of legal services. This blue ribbon committee is chaired by a distant Young Lawyer (i.e., back when we were both young lawyers) and acquaintance of mine, Judy Perry Martinez, from Louisiana.

Judy had this to say, “Lawyers realize we’re not meeting the needs of the public and there needs to be a combination of solutions. But, what’s the priority, lawyers or the public? I think



*Eugene M. Harlow  
President of The Mississippi Bar  
2014-2015*

*Continued on next page*

## Reflections From the ABA Mid-Year Meeting Houston, Texas

those interests align. The interest of the client, the interest of the public, has got to be the guiding light.” It is clearly my impression that this Commission will proceed on the basic assumption that the problem exists and try to address what our profession and “the market” can do about it. We have all seen what happens when a perceived need goes unmet. Someone or something will come in to fill that need, especially if money can be made in the process. Is that not exactly what is happening in the technology arena as we read this? Alternative providers such as LegalZoom, Rocket Lawyer and many others are providing legal services and are growing at a very rapid rate. Can this type of technology serve as a resource that facilitates personal legal services rather than disrupt it?

ABA President Hubbard in addressing the ABA House of Delegates, states in part, “We must engage in fresh thinking...” I will paraphrase a few of his salient points. He argues that we must reimagine the fundamental roles of courts and our profession by opening up our minds to innovative approaches to serve the needs of our society. He points out that in 2012 over \$66 million was being spent on startup businesses designed to provide legal assistance to the public. By 2013, the number exceeded \$458 million, and last year over \$1 billion was invested. He argues that we must marry our efforts with theirs to bring about meaningful change that will address the delivery of legal service to the underserved in our communities.

It appears that familiar and traditional practice structures, while still relevant, are showing signs of giving way in a marketplace that continues to evolve. We know that our model of delivery of legal services has served us and our clients, who could afford us, well for a very long time. Across the pond in the UK, they have reworked the regulatory framework for legal services, allowing new business models to emerge. Even right here at home, the medical profession is flush with “non-doctor” service providers. There is no one better way to address this need, but very likely with much forethought and planning, there are multiple ways that the Mississippi legal community can make a difference. Does Mississippi want to join the conversation? I don’t advocate a defined solution, but I do hear the dog barking at the door.

In June of 2012, the distant State of Washington, through their Supreme Court, adopted a rule authorizing persons who are not traditionally licensed lawyers to deliver legal services in a limited fashion. A Civil Needs Study commissioned by their Court in 2003 revealed that segments of the population were not receiving adequate access to the legal system. It was not only the poor but also the lower middle income and middle income families that were found to be lacking access. This study suggested that the substantive areas of need were family law, elder law, immigration and housing. In response, the Court adopted the Limited License Legal Technician (LLLT) Rule. By this rule, LLLTs were authorized to deliver legal services in a limited scope in certain Supreme Court approved practice areas. These practitioners received education from paralegal programs, as well as the state’s three law schools. The technicians must pass an examination, engage in continuing education, follow the rules of professional conduct, and show proof of financial responsibility, among other stringent requirements. Prior to licensure, the LLLTs must obtain 18 months of full-time substantive law-related work experience under the supervision of an attorney. The likely business models for LLLTs will be either freestanding practices, on staff with other lawyers and law firms, or perhaps in the civil legal services arena. The LLLTs must uphold the same ethical standards as fully licensed attorneys.

The Washington Supreme Court created an LLLT Board to handle the process of implementation and administration of the program. However, the program is regulated by the Washington State Bar Association (WSBA). The WSBA oversees the applications to the program, testing, licensing, discipline, continuing education, and all other regulatory and professional needs for LLLTs.

It was reported that one of the exciting dynamics that evolved since the LLLT Rule was adopted was a collaboration among their three law schools and their many community colleges to create and implement the education component of the program. The LLLT Board initially chose the single practice area of family law as this was understood to be the area of highest unmet need. However, the rule was designed to be applied to a number of practice areas and the expectation is that it will be expanded as the program grows. To quote Dorothy from *The Wizard of Oz*, “Toto, I’ve a feeling we’re not in Kansas anymore.”

Whether Mississippi ever adopts such a system is not the point. The point is we live in an ever evolving society and our system of justice has to evolve to meet the needs of all the people. Technology is changing as we read this and will adapt to changing needs. When it involves our legal system and meeting the legal needs of the people of Mississippi, I think we should be at the forefront of change, not reacting to it.

The ABA Commission on the Future of Legal Services plans to conduct a series of community-based grassroots meetings and then a national convocation designed to encourage bar leaders, judges, court personnel, practitioners, businesses, technologists and innovators to share their vision for more efficient and effective ways to deliver legal services. The ABA Commission offers a Grassroots Resources Toolkit to encourage bar associations to hold such meetings around the country. Details of the Commission’s work and resources are available on the ABA website. Buckle your seatbelts — times they are changing! ■



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# Employment Title VII After Va



# Law Update *nce and Boh Bros.*

*By Matthew W. Burris<sup>1</sup>*

**I**n 2013, the United States Supreme Court decided *Vance v. Ball State University* and defined “supervisor” for the purposes of Title VII workplace harassment.<sup>2</sup>

This article examines two subjects. First, whether *Vance*’s definition of supervisor significantly affected Title VII discrimination cases. Second, the scope of the Fifth Circuit’s breathtaking break with same-sex sexual harassment precedent in a *Vance*-related case, *EEOC v. Boh Bros.*

### **I. From *Meritor* to *Vance*: “Supervisors” and the Different Frameworks for Employer Liability**

In 1986, the Supreme Court decided *Meritor Savings Bank v. Vinson*, which established that while Title VII prohibits the creation of a hostile work environment, to be actionable the alleged harassment must be “sufficiently pervasive to alter the conditions of the victim’s employment and create an abusive work environment.”<sup>3</sup> In *Meritor*, the Supreme Court rejected the proposition “that employers are automatically liable for . . . harassment by their supervisors, as well as the employer’s suggestion that absence of notice to an employer automatically insulates that employer from liability,” but the Court refused to further clarify the issue of employer liability, suggesting only that the lower courts “look to agency principles for guidance[.]”<sup>4</sup>

#### **A. *Ellerth/Faragher***

Twelve years later, the Court clarified the extent of an employer’s liability for acts of the employer’s supervisors in the twin cases of *Burlington Industries, Inc. v. Ellerth*<sup>5</sup> and *Faragher v. City of Boca Raton*.<sup>6</sup> The Court explained that an employer’s liability for workplace harassment depends on the harasser’s status.<sup>7</sup> “If the harassing employee is the victim’s co-worker, the employer is liable only if it was negligent” - *i.e.*, if the employer knew or reasonably should have known about

the harassment but failed to take remedial action in controlling working conditions.<sup>8</sup> “If the harassing employee is a ‘supervisor,’ different rules apply.”<sup>9</sup> If the supervisor’s harassment culminates in a tangible employment action, the employer is strictly liable.<sup>10</sup> Consistent with the Court’s rejection of automatic liability in *Meritor*, if the harassing supervisor takes no tangible employment action, the employer may escape vicarious liability by establishing what is now known as the *Ellerth/Faragher* affirmative defense: (1) employer exercised reasonable care to prevent and correct the harassment, and (2) employee failed to take advantage of any preventive or corrective measures offered by the employer.<sup>11</sup> The Court explained this framework as a compromise that “accommodates the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII’s equally basic policies of encouraging forethought by employers and saving action by objecting employees.”<sup>12</sup> The Court cautioned that “most tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation,” and consequently, “something more” is required in order to warrant vicarious liability.<sup>13</sup> However, the Court in *Ellerth* and *Faragher* left open the question of who qualifies as a “supervisor” in a Title VII harassment case.

#### **B. *Vance v. Ball State University***

Because the Court left “supervisor” undefined in *Ellerth* and *Faragher*, a circuit split resulted. Some circuits defined “supervisor” as one having the actual authority to make a tangible employment action, meaning that person could hire, fire, demote, promote, transfer, or disci-



By Matthew W. Burris<sup>1</sup>

pline the victim.<sup>14</sup> Other circuits adopted a more open-ended approach, consistent with EEOC guidelines, which attached supervisor status to one who can exercise significant direction over the daily work of another.<sup>15</sup> The Court granted cert in *Vance* to define “supervisor” and resolve the circuit split.

In *Vance*, the petitioner (Vance), sued her employer, Ball State University, alleging that a fellow employee, Saundra Davis, created a racially hostile work environment in violation of Title VII.<sup>16</sup> Vance agreed that “Davis did not have the power to hire, fire, demote, promote, transfer, or discipline her,” but nonetheless argued that Davis was her supervisor by pointing to the responsibilities included in Davis’ job description, which stated that Davis supervised, led, and directed some employees.<sup>17</sup> Both the majority and dissent rejected the idea of relying on Davis’s job description, with the majority insisting (and holding) a “supervisor” must be able to take a tangible employment action,<sup>18</sup> and the dissent stating “the supervisor status inquiry should focus on substance, not labels or paper descriptions.”<sup>19</sup> In the end, the *Vance* Court adopted the Seventh Circuit’s definition of “supervisor,” holding:

[A]n employer may be vicariously liable for an employee’s unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.*, to effect a ‘significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’<sup>20</sup>

### C. Circuit Court decisions after *Vance*.

*Vance* has not significantly altered the analysis of employer liability. For example, *Vance* continues to recognize an alternate route to vicarious liability when the harassing employee was not a supervisor, but the supervisor did not normally work with the harassed employee. In *Kramer v. Wasatch County Sheriff’s Office*,<sup>21</sup> the Tenth Circuit imposed vicarious liability

*Vance continues to recognize an alternate route to vicarious liability when the harassing employee was not a supervisor, but the supervisor did not normally work with the harassed employee.*

through this exception, stating: “Where a harasser is empowered to effect significant changes in employment status indirectly through recommendations, per-

formance evaluations, and the like, and where the person with final decision-making power does not work directly with the plaintiff, the harasser may be a ‘supervisor’ under Title VII.”<sup>22</sup> *McCafferty v. Preiss Enters., Inc.*, clarifies the importance of empowered supervisors working with the victim. In *McCafferty*, the Tenth Circuit found no genuine dispute regarding the non-supervisory status of a male shift manager who directed the victim’s daily activities and had significant influence over hiring, firing, and promotion.<sup>23</sup> While the shift manager did, under the pretense of giving a 15-year-old female employee a ride to work, instead take her for three days of drugs and statutory rape, he did not have the actual authority to

*Continued on next page*

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## Employment Law Update Title VII After *Vance* and *Boh Bros.*

hire, fire, or promote her, and the employees who did have the actual authority normally worked with her. In *Lambert v. Peri Formworks Sys. Inc.*, the Seventh Circuit found that *Vance's* definition of "supervisor" for purposes of strict liability does not absolve "people who stand higher in the chain of authority" of the obligation to process reports of harassment up the chain of command if it is reasonable to expect them to do so.<sup>24</sup> Finally, in *E.E.O.C. v. Boh Bros. Const. Co., L.L.C.*,<sup>25</sup> the Fifth Circuit simply accepted a foreman's testimony that he had the authority to hire, fire, transfer, and promote, to find him a supervisor under *Vance* for purposes of vicarious liability.

### II. *Boh Bros.*: Outlier or Sea-Change?

*Boh Bros.*, while not especially significant for its treatment of *Vance*, is especially noteworthy for its analysis and break with precedent regarding same-sex sexual harassment in the workplace.

#### A. *Oncale*: 1998-2013.

In the landmark *Oncale v. Sundowner Offshore Services, Inc.*,<sup>26</sup> a unanimous Court extended Title VII to sexual harassment in the same-sex context.<sup>27</sup> Addressing criticism that *Oncale* risked transforming Title VII "into a general civility code for the American workplace,"<sup>28</sup> the Court stated that the risk would be "adequately met by careful attention to the requirements of the statute."<sup>29</sup> The Court was clear that "Title VII does not prohibit all verbal or physical harassment in the workplace," only "discrimination because of sex."<sup>30</sup> "The critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."<sup>31</sup>

The Court noted that an inference of discrimination "because of sex" was "easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity." The same inference would be available in same-sex cases where the alleged harasser was homosexual, but harassing conduct need not be based on sexual desire to support an inference of discrimination because of sex.<sup>32</sup> General hostility towards one sex, or direct comparative evidence of how an alleged harasser treated members of both sexes in a mixed sex environment would also support an inference of discrimination because of sex.<sup>33</sup> However, no matter what evidentiary route a plaintiff followed, he "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted discrimination because of sex."<sup>34</sup>

In the Fifth Circuit's only published decision prior to *Boh Bros.*, *La Day v. Catalyst Technology, Inc.*, the court identified a two part test: first, whether the harasser's conduct constitutes discrimination because of sex. If the answer is "yes", the court then determines whether the harassing conduct satisfies the requirements for a *quid pro quo* or hostile environment claim.<sup>35</sup> This was the understood test in the Fifth Circuit until 2013.

#### B. *Boh Bros.*

Two years after the EEOC lost an almost identical challenge in the Northern District of Alabama,<sup>36</sup> *E.E.O.C. v. Boh Bros. Const. Co., L.L.C.*,<sup>37</sup> arrived on appeal to the Fifth Circuit. In *Boh Bros.*, the EEOC brought an action on behalf of a male iron worker (Woods), who claimed that his supervisor (Wolfe) engaged in same sex harassment. The jury awarded \$451,000,<sup>38</sup> the Fifth Circuit panel overturned the jury verdict finding no causation (no "because of" sex), the EEOC appealed, and the court sat for *en banc* review.

Wolfe was the worst offender in "an undeniably vulgar" all-male jobsite, and Woods received the brunt of his abuse.<sup>39</sup> Many times a day Wolfe used vulgarities to describe Woods. Many times a week, when Woods would bend over to work, Wolfe would come up behind him to simulate anal sex.<sup>40</sup> Wolfe regularly exposed himself to Woods while smiling and waving.<sup>41</sup> The event that took up the lion's share of the court's analysis, however, was that Woods once shared with his co-workers that he used "Wet Ones", which subjected him to increased ridicule and abuse, as Wolfe considered their use "kind of gay" and "feminine."<sup>42</sup>

One day, Woods committed a terminable offense.<sup>43</sup> This was reported to Wolfe, who reported it to his supervisor, Duckworth.<sup>44</sup> When Duckworth confronted Woods, Woods complained in detail about Wolfe's conduct and also that Wolfe was "probably stealing."<sup>45</sup> Duckworth sent Woods home, but assured Woods he would look into his allegations.<sup>46</sup> Duckworth briefly investigated, but did not document, Wolfe's conduct and determined there was no sexual harassment.<sup>47</sup> He investigated Wolfe's possibly stealing gas by hiring a private detective and paying for 85 hours of investigation work, including two written reports.<sup>48</sup>

The *Boh Bros.* majority cited *La Day's* two-step test,<sup>49</sup> which required Woods to prove that the alleged harassing conduct "actually constituted discrimination because of sex."<sup>50</sup> Regarding the inference of discrimination, the court stated that *Oncale's* inferential routes are not "the exclusive paths to success on a Title VII same-sex harassment claim." However, that is where the court's analysis gets

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interesting. The majority never identified the evidentiary path used to support its inference of discrimination.<sup>51</sup> Rather, it “relie[d] on the harassment, in and of itself, as a substitute for actual evidence reflecting a subjective intent of Wolfe to engage in sex discrimination[.]”<sup>52</sup>

Where *Oncale* and *La Day* both carefully articulated the “the critical issue” as “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed”, the majority in *Boh Bros* overlooked this guideline.

In a pitch-perfect dissent, Judge Jolly criticized the lack of testimony or other evidence of Woods’ perceived or alleged femininity. The majority responded that the plaintiff was not required to “prop up his employer’s subjective discriminatory animus by proving that it was rooted in some objective truth.”<sup>53</sup> However, according to precedent, it *is* (or was) the plaintiff’s burden to prove discrimination because of sex, and a same-sex plaintiff must establish some inference of discrimination. If the inferential route he chooses is discrimination because his behavior did not conform to traditional gender stereotypes, the plaintiff indeed *does* (or did) have to provide objective evidence of his nonconformance “to demonstrate the presence or absence of the employer’s subjective discriminatory animus.”<sup>54</sup> In the end, the majority relied on testimony by Wolfe<sup>55</sup> in which, at most, he stated he considered Woods’s use of wet wipes to be feminine, but insisted he did not consider Woods himself to be gay, feminine,<sup>56</sup> or to not fit into the stereotypical iron worker work environment.<sup>57</sup>

*Boh Bros.* failed to establish the *Ellerth/Faragher* affirmative defense because: it had a broad, non-specific policy, its employees were unaware of the policy, there were no specific guidelines on how to report or investigate harassment complaints, the annual training lasted approximately five minutes, and the company did little to implement its policies.<sup>58</sup> The dissent suggested the majority focused on form over substance, noting that *Boh Bros* had not one “cause” finding by the EEOC in forty years.<sup>59</sup> Besides, “Woods knew how and to whom

to complain about harassment . . . he just never did so until . . . his own misconduct was reported.”<sup>60</sup>

Prior to *Boh Bros.*, the framework for same-sex sexual harassment cases was clear: first, a plaintiff had to prove discrimination because of sex. He could do this by one of *Oncale*’s suggested routes, or by any other route which provided a reasonable inference that the plaintiff had been subjected to detrimental terms and conditions of employment that members of another gender had not. If the first step was established, the court then addressed the claim under a *quid pro quo* or hostile work environment standard.

After *Boh Bros.*, evidence only of harassment may be enough to establish a reasonable inference of intentional sexual discrimination, and the form of an employer’s sexual harassment policy may be considered as important as the employer’s practice of policy enforcement. ■

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1 Matthew W. Burris is an attorney with Mayo Mallette PLLC in Oxford, MS. He practices primarily in Labor and Employment and specializes in the area of Higher Education.

2 *Vance v. Ball St. Univ.*, 133 S.Ct. 2434, 2443 (2013) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).

3 *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

4 *Id.* at 72.

5 *Ellerth*, 524 U.S. 742 (1998).

6 *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

7 *Vance*, 133 S.Ct. at 2439.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.* at 2442.

13 *Id.* at 2447-48.

14 *Vance v. Ball State Univ.*, 646 F.3d 461, 470 (7th Cir. 2011); *Noviello v. Bos.*, 398 F.3d 76, 96 (1st Cir. 2005); *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, 1057 (8th Cir. 2004).

15 *Mack v. Otis Elevator Co.*, 326 F.3d 116, 126-27 (2d Cir. 2003); *Whitten v. Fred’s, Inc.*, 601 F.3d 231, 245-47 (4th Cir. 2010).

16 *Vance*, 133 S.Ct. at 2439-40.

17 *Id.* at 2439, 2449

18 *Id.* at 2454.

19 *Id.* at 2465 (Ginsberg, J., dissenting).

20 *Id.* at 2443.

21 743 F.3d 726 (10th Cir. 2014). For those interested, *Kramer* is a “what not to do” guide for employers interested in limiting liability.

22 *Id.* at 741.

23 534 F.App’x 726, 731 (10th Cir. 2013).

24 723 F.3d 863, 866-68 (7th Cir. 2013)

25 731 F.3d 444 (5th Cir. 2013).

26 *Oncale*, 523 U.S. 75 (1998).

27 *Id.* at 79.

28 *Id.* at 80.

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.*

33 *Id.* at 80-81.

34 *Id.* at 80-81.

35 *La Day v. Catalyst Technology, Inc.*, 302 F.3d 474, 478 (5th Cir. 2002).

36 *E.E.O.C. v. McPherson Companies, Inc.*, 914 F.Supp.2d 1234 (N.D. Ala. 2012) (all-male workplace; same-sex gender discrimination suit based on gender stereotyping and a “hostile” work environment; neither harassers nor the plaintiff were homosexual or perceived as effeminate; and the plaintiff waited years to report the “offensive” language).

37 *Boh Bros.*, 31 F.3d 444 (5th Cir. 2013).

38 *Id.* at 451.

39 *Id.* at 449.

40 *Id.*

41 *Id.* at 449-50. However, as the dissent pointed out, Wolfe did this to the other employees, and the other employees themselves were “vulgar.” *Id.* at 473 (Jolly, J. dissenting). Wolfe “mooned” others regularly and called his own son, also an employee, “a queer.” *Id.* at 478 & n.7 (Jones, J. dissenting).

42 However, “[F]our current NFL players are participating in an advertising ‘marketing blitz’ to promote men’s use of a brand of moistened toilet wipes similar to Wet Ones.” *Id.* at 485 & n.3 (Smith, J. dissenting).

43 *Id.*

44 *Id.*

45 *Id.*

46 *Boh Bros.*, 31 F.3d at 450.

47 *Id.* at 451. Duckworth estimated that he spent 20 minutes investigating Wolfe’s conduct.

48 *Id.*

49 *Id.* at 453.

50 *Id.* at 455.

51 *Id.* at 471 (Jolly, J., dissenting).

52 *Id.* at 472.

53 *Id.* at 456-57.

54 *Id.* at 472 (Jolly, J., dissenting).

55 *Id.* at 457-59.

56 *Id.*

57 *Id.*; see also *id.* at 471-72*Id.*

# Exceptions to Employment at Will Remain

## EMPLOYEE

### Personal Information

Name (Last)

Address (Mailing Address)

Address



# the Mississippi t Will Doctrine n Viable

OFFICE OF  
TERMINATION

(First)	(Middle Initial)	Home Telephone
(City)	(State)	Other Telephone



*By  
Rachel and Jim Waide*

...ssed? Yes No

Graduate

Degr  
&

The Mississippi Supreme Court has recognized two important exceptions to Mississippi's "employment at will" doctrine.

By Rachel and Jim Waide

First, *McArn v. Allied Bruce-Terminix Co., Inc.*, 626 So. 2d 603,607 (Miss. 1993) held:

We are of the opinion that there should be in at least two circumstances, a narrow public policy exception to the employment at will doctrine and this should be so whether there is a written contract or not: (1) an employee who refuses to participate in an illegal act as in *Laws* shall not be barred by the common law rule of employment at will from bringing an action in tort for damages against his employer; (2) an employee who is discharged for reporting illegal acts of his employer to the employer or anyone else is not barred by the employment at will doctrine from bringing action in tort for damages against his employer.

Second, *Levens v. Campbell*, 733 So. 2d 753, 760 (Miss. 1999) held:

"One who intentionally and improperly interferes with the performance of a contract ... between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him." Restatement Second of Torts § 766A (1979). This section does apply to contracts terminable at will. *Id.* at cmt. d. There are numerous cases from other jurisdictions which make

it clear that at will contracts of employment are subject to a tortious interference claim.

....

Following the law of the aforementioned jurisdictions, this Court concludes that a claim for tortious interference with at-will contracts of employment is viable in this state as well.

These two exceptions to the employment at will doctrine have met differing responses from state and federal courts. Various *McArn* issues have been presented to the Mississippi Supreme Court after *McArn*, and that Court has never retreated from *McArn*. See *Jones v. Fluor Daniel Services Corp.*, 959 So. 2d 1044 (Miss. 2007) (The *McArn* exception applies whenever illegal acts reported relate to employer's business); *DeCarlo v. Bonus Stores, Inc.*, 989 So. 2d 351, 354 (Miss. 2008) (Approving *Laws v. Aetna Finance Co.*, 667 F.Supp. 342, 344 (N.D. Miss. 1987), which correctly anticipated *McArn* by holding that under Mississippi law, an employee cannot be fired for reporting "unsavory and possibly illegal business practices...of his employer."); *Willard v. Paracelsus Health Care Corp.*, 681 So. 2d 539, 543 (Miss. 1996) (Holding that discharge "in retaliation for an employee's good faith effort to protect the employer from wrongdoing" is actionable under *McArn*); *Buchanan v. Ameristar Casino Vicksburg, Inc.*, 852 So. 2d 25, 26 (Miss. 2003) (Upholding dismissal of wrongful discharge claim because plaintiff "does not allege . . . that she was terminated for reporting illegal acts . . .").

The only restrictive interpretation of *McArn* by the Mississippi appellate courts



Rachel Waide



Jim Waide

is the recent decision in *Strong v. North Mississippi Center for Higher Education Advancement, Inc.*, \_\_\_ So.3d. \_\_\_, 2014 WL 4695789 (Miss. App. 2014) (petition for rehearing pending), which held that *McArn* does not apply to an employee whose contract was not renewed because he reported illegal acts.

While the state courts in Mississippi have continued to interpret *McArn* broadly, the federal courts have narrowly interpreted the case. *Wheeler v. BL Development Corp.*, 415 F.3d 399 (5th Cir. 2005), for example, held that it was not unlawful to fire an employee for reporting that casino executives were receiving free dry cleaning from an outside laundry service. *Vaughan v. Carlock Nissan of Tupelo, Inc.*, 553 Fed.Appx. 438 (5th Cir. 2014), held that *McArn* does not apply if a plaintiff cannot prove the acts which he or she reported are actual crimes.

It is debatable whether the Mississippi Supreme Court would follow either the federal court's narrow interpretation of the *McArn* public policy exception to the employment at will doctrine or the court of appeals' narrow interpretation of *McArn* in *Strong*. There is some public policy exception to employment at will in at least forty-one (41) states and, further, such an exception "has almost unanimous support among employment law commentators." Thomas L. Cluff, Jr., *In Defense of a Narrow Public Policy Exception to the Employment at Will Rule*, 16 Miss. C.L. Rev. 437, n.35 (1996).

While narrowly construing *McArn*, federal courts have favorably applied *Levens*. For instance, *Gibson v. Estes*, 338 Fed.Appx. 476, 477 (5th Cir. 2009) held that a city mayor was individually liable for tortious interference with a police chief's employment when the mayor caused the police chief to be fired, not because of job performance, but because the police chief had investigated the mayor's son. Similarly, *Vaughan v. Carlock Nissan of Tupelo, Inc.*, 553 Fed.Appx. 438 (2014), while rejecting a *McArn* claim, upheld a malicious interference claim of a sales clerk that her store manager had fired her because she reported unsavory sales practices. The Fifth Circuit wrote:

The Mississippi Supreme Court has recognized that "a claim for tortious interference with at-will contracts of employment is viable in [Mississippi]." *Levens v. Campbell*, 733 So. 2d 753, 760 (Miss. 1999). However, "one occupying a position of responsibility on behalf of another is privileged, within the scope of that responsibility and absent bad faith, to interfere with his principal's contractual relationship with a third person." *Shaw*, 481 So. 2d at 255. Hill occupied a position of responsibility, acting on behalf of Carlock, and thus was privileged to interfere with Vaughan's employment unless he did so in bad faith or outside the scope of his employment. *See id.* Consequently, we must consider whether Vaughan has demonstrated a genuine issue of material fact regarding whether Hill interfered with her

employment in bad faith. Vaughan may satisfy this "bad faith exception" by showing that Hill acted with malice, in other words, that he terminated Vaughan "without right or good cause." *Morrison v. Miss. Enter. for Tech.*, 798 So. 2d 567, 575 (Miss. App. 2001).

*Vaughan*, 553 Fed.Appx. at 444.

These two (2) exceptions to the employment at will doctrine (discharge for reporting illegal acts and malicious interference with employment), should be interpreted to comply with the Mississippi Supreme Court's dissatisfaction with the Mississippi employment at will doctrine in general. In *Shaw v. Burchfield*, 481 So. 2d 247, 254 (Miss. 1985), the Court held:

Such contracts in form are reciprocal in that either party may terminate at will. Still, we may not remain insensitive to

*Continued on next page*

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## Exceptions to the Mississippi Employment at Will Doctrine Remain Viable

the fact that the impact of termination upon the employee is in general more adverse in a way that is qualitatively different than what the employer experiences when it is the employee who walks off the job. We approach this case cognizant of the force of Anatole France's pointed observation that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread". Were this a case where no employment contract established expressly the ground rules for termination and where the employer was calling upon the state to furnish the law which authorized termination, we might well be charged to reconsider the at will termination rule.

(footnote omitted).

Ultimately, whether the employment at will doctrine is expanded will depend

upon the efforts and diligence of lawyers in presenting the applicable principles to the Mississippi Supreme Court. In this connection, Bryan C. Sanders, *The Inconvenient Worker—Can Mississippi's Public Policy Exceptions to the Employment-at-Will Doctrine be Expanded to Encompass the Exercise of Workers' Compensation Rights?* 81 Miss. L.J. 1563, 1581-82 (2012), has argued that the *McArn* public policy exception should be broad enough to encompass protecting employees who are fired because they filed workers' compensation claims:

[A] plausible argument could be made that interpreting the Workers' Compensation Act to allow a wrongful discharge cause of action would not be judicial intervention in legislative affairs, but simply construing its language to effectuate the legislative intent. The courts have found that the legislature intended the Act be given a liberal construction and

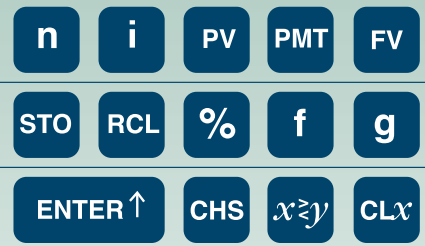
that "[d]oubtful cases must be compensated." The Act is to be viewed as a whole without isolating any particular provision apart from the rest. A statutory contract is created, vesting employees with a right to receive compensation and placing a duty on employers to provide it. In consideration, the employee forgoes any action in tort against the employer while ensuring a minimal recovery for his injuries. The Mississippi Supreme Court has recognized the strong public interest behind the Act, stating: "The entire system was designed to insure that those injured as a result of their employment would not be reduced to a penniless state and thereby become dependent on some form of governmental public assistance." ■

(footnotes omitted).

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A photograph of a conference room. In the foreground, there are several rows of dark wood conference tables and light-colored leather chairs. In the background, a large whiteboard is mounted on a wall. The text is overlaid on the whiteboard area.

# The Employee Appeals Board – An Overview

*By Ingrid Dave Williams<sup>1</sup>*

### OVERVIEW OF MISSISSIPPI STATE LAW

**T**he law governing the process and recourse available to state employees faced with disciplinary action is contained in the Mississippi Code of 1972 and the Mississippi State Personnel Board Rules and Regulations promulgated by the Mississippi State Personnel Board.

The principles of the state personnel system include the directive to ensure fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, national origin, sex, religious creed, age or disability.<sup>2</sup>

“State Service” means all employees of state departments, agencies and institutions, except those officers and employees excluded by the law.<sup>2</sup> The law provides an extensive list of positions which are not considered State Service including: employees who are terminated due to a reduction in force conducted in accordance with the rules and regulations of the state personnel system;<sup>4</sup> probationary employees, who have been employed for less than twelve months; and professional employees such as doctors, lawyers, nurses, academicians; and elected officials.<sup>5</sup> Another important exclusion is for “time-limited” positions, which the law defines as personnel who are paid from a federal grant which has been approved by the Legislature or the Department of Finance and Administration whose length of employment has been determined to be time-limited in nature.<sup>6</sup> Even though those employees may have the same positions as State Service employees and receive the same benefits, they are “non-State Service” employees. Consequently, “time-limited” employees are not entitled to the same protections as “State Service” employees under state law. Thus, it is incumbent upon anyone representing a state employee with regard to an employment matter to first determine if the employee is on probation, “State Service,” “non-State Service,” or “time-limited.”<sup>7</sup>

With regard to disciplinary actions against employees, the law provides that employees who are subject to the rules and

regulations prescribed by the state personnel system may be dismissed or otherwise adversely affected as to compensation or employment status for inefficiency or other good cause, after written notice and hearing within the department, agency, or institution as specified in the rules and regulations of the Mississippi State Personnel Board.<sup>8</sup> On appeal, any employee who has been dismissed or otherwise adversely affected as to compensation or employment status must prove that the reasons stated in the notice of dismissal or action adversely affecting his compensation or employment status are not true or are not sufficient grounds for the action taken.<sup>9</sup> Note that this section of the law establishes the burden of proof in appeals for employees in employment disciplinary proceedings and places the burden of proof on the employee – not the state agency.

The Employee Appeals Board (“EAB”) consists of three hearing officers.<sup>10</sup> These hearing officers hold hearings, compile evidence, and render decisions on appeals of state agency actions adversely affecting the employment status or compensation of “State Service” employees and appeals of applicants for state employment, probationary employees and time-limited employees who make claims of discrimination. One hearing officer is appointed from each of the three Supreme Court districts, and the three hearing officers serve staggered four-year terms.<sup>11</sup>

Either party may appeal the presiding hearing officer’s ruling to the entire EAB, *en banc*. If an employee is aggrieved by a final order of the EAB, *en banc*, the employee may then appeal to the Circuit Court of the principal county of the employee’s employment or the Circuit



By Ingrid Dave Williams<sup>1</sup>



Court of Hinds County.<sup>12</sup> The scope of review by the Circuit Court is limited to the record before the Employee Appeals Board. The court is limited to determining if the action taken by the Employee Appeals Board is supported by any substantial evidence, is arbitrary or capricious, or is in violation of a statutory or constitutional right of the employee.<sup>13</sup>

As noted above, when an employee appeals a decision of the EAB Full Board, the standard of review is provided for by law. The state agency must apply for a writ of certiorari to the circuit court in order to obtain judicial review of the final EAB Board order.<sup>14</sup> In *Gill v. Mississippi Department of Wildlife Conservation*, 574 So.2d. 586 (Miss. 1990), the Mississippi Supreme Court outlined the standard of review when the agency appeals, as follows: “We thus are in our familiar posture of judicial review of administrative processes wherein we may interfere only where the board or agency’s decision is arbitrary and capricious, accepting in principle the notion that a decision unsupported by any evidence is by definition arbitrary and capricious.”<sup>15</sup> The Mississippi Supreme Court in later decisions has elaborated on this standard of review, based on the general standard of review applied to appeals from administrative bodies,<sup>16</sup> and in some instances conflated it with the standard of review provided by statute for employee appeals.<sup>17</sup> It appears that a form of the standard of review outlined in the statute applies to appeals from both the employee and the agency.

Any Party aggrieved by the action of the Circuit Court has further recourse through the normal appellate process.<sup>18</sup>

### MISSISSIPPI STATE PERSONNEL BOARD RULES GOVERNING EMPLOYEE DISCIPLINARY AND GRIEVANCE PROCEDURES

The administrative rules governing disciplinary actions and appeals to the EAB are contained in the Mississippi State Personnel Board Policy and Procedures Manual.<sup>19</sup> Chapter Nine of the Manual addresses disciplinary actions for state employees. Disciplinary offenses are divided into three groups — Group One offenses, Group Two offenses and Group Three offenses.

Group One offenses are less serious,

and employees who commit such offenses may be disciplined with a written reprimand. However, the accumulation of multiple Group One offenses may result in demotion or dismissal, depending on the frequency of the offenses.<sup>20</sup> Group Two offenses are more serious offenses, and an employee may be disciplined with a written reprimand or receive a suspension without pay for five days. Group Two offenses may also result in demotion or dismissal depending on the accumulation and frequency of offenses from Groups One and Two.<sup>21</sup> Finally, Group Three offenses are the most serious offenses. State employees who commit a Group Three offense may be disciplined with a written reprimand, suspension without pay for up to 30 days, demotion, or dismissal. Group Three offenses are not necessarily cumulative and an employee may be dismissed for the commission of one Group Three offense.<sup>22</sup>

Chapter Nine of the Manual also outlines the specific due process to be accorded to any State Service employee

prior to an action that would adversely affect the employee’s employment status or compensation. The employee must be provided written notice of any proposed disciplinary action which states with sufficient particularity the charges or allegations being made against the employee; the proposed discipline which may be taken; and provides the opportunity for a conference with the employing agency, appointing authority, or designated representative of the appointing authority. The notice must be provided to the employee at least seven working days prior to the conference.<sup>23</sup> Chapter Nine also provides procedures for the immediate suspension of employees under extraordinary circumstances.<sup>24</sup>

Chapter Ten of the Manual sets forth the rules governing employee grievances and lists the matters which State Service employees may contest. This Chapter also clarifies that applicants for state employment, probationary employees, and Non-

*Continued on next page*

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## The Employee Appeals Board – An Overview

State Service employees may contest alleged acts of discrimination on the basis of political affiliation, race, color, handicap, genetic information, religion, national origin, sex, religious creed, age, or disability.<sup>25</sup> State Service employees may appeal the specific employment matters outlined in the rules, as well as any matter of concern or dissatisfaction to an employee if the matter is subject to the control of the state agency except for those matters which are specifically listed as non-grievable.<sup>26</sup>

### EMPLOYEE APPEALS BOARD RULES

Chapter Ten of the Manual also contains the rules for an appeal to the Employee Appeals Board. The EAB operates through the EAB Administrative Office. The EAB Administrative Office is responsible for accepting and processing all appeals, maintaining appeal records, compiling and maintaining aggregate data on appeals, and providing administrative support to the hearing officers.<sup>27</sup>

The EAB has jurisdiction of all appeals filed by permanent State Service employees regarding any action which adversely affects the employee's compensation, employment status, or grievable actions.<sup>28</sup> All other employees, including probationary and Non-State Service, and applicants for employment may appeal alleged acts of discrimination based on political affiliation, race, color, handicap, genetic information, religion, national origin, sex, religious creed, age, or disability.<sup>29</sup> The rules also give the EAB jurisdiction over any appeals alleging acts of retaliation against whistleblowers,<sup>30</sup> and the decision that an employee is not eligible to receive donated leave.<sup>31</sup> In order for the EAB to have jurisdiction, the employee must have exhausted all applicable agency level grievance procedures.<sup>32</sup> An appeal to the EAB is usually the employee's exclusive state remedy; however, 42 U.S.C. §1983 actions against persons in their individual capacities are not required to be adjudicated through the EAB,<sup>33</sup> and federal discrimination complaints are often

filed concurrently with EAB appeals.

An appeal to the EAB must be filed within 15 calendar days after the date the employee receives written notice of the final decision of the state agency action, or within 15 days of the first attempted delivery of the final decision by certified mail, whichever occurs first.<sup>34</sup> The appeal filing fee is \$100.00.<sup>35</sup> A form containing all of the required information for filing is available on the MSPB website, although use of the form is not a requirement.<sup>36</sup>

The administrative rules provide that prehearing conferences may be held, within the discretion of the hearing officer, to resolve any matters which may simplify or expedite the hearing.<sup>37</sup> Ten days prior to the hearing, both parties must file a witness list, which contains each witness' name, employer and employer's address. The witness list must also contain a brief summary of the witness' testimony.<sup>38</sup> This summary should be more extensive than a pro forma recital that the witness will testify to the facts and circumstances surrounding the disciplinary action. The hear-



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ing officer has the authority to issue subpoenas for witnesses and subpoenas duces tecum.<sup>39</sup> Any request for subpoenas must be filed no less than twenty days prior to the hearing and must be accompanied by the appropriate fees.<sup>40</sup>

The rules specify that the purpose of the hearing is to ascertain the truth, and specifically provides that the hearing officer may question the witnesses.<sup>41</sup> The hearing is *de novo*.<sup>42</sup> The hearing officer has the authority to control the presence of witnesses in the hearing room, but generally the hearing officer will accede to the employee's request in this regard.<sup>43</sup> Employees may be represented by attorneys licensed in Mississippi.<sup>44</sup>

Hearings before the EAB are informal and technical rules of evidence are relaxed.<sup>45</sup> Witnesses testify under oath and are subject to cross-examination.<sup>46</sup> The standard of proof outlined in the law is reiterated in the rules, and the employee is required to prove that the reasons stated in the state agency's final decision are not true or are not sufficient grounds for the action taken.<sup>47</sup>

The EAB may reinstate a terminated employee and restore all applicable employee rights and benefits.<sup>48</sup> The EAB may also modify any action of a state agency, but cannot increase the severity of any state agency action. However, the EAB may not modify the personnel action if the agency has acted in accordance with all MSPB policies, rules and regulations.<sup>49</sup> The EAB does not have the authority to award attorneys' fees.<sup>50</sup>

If either party is aggrieved by the hearing officer's final order then the aggrieved party may appeal to the EAB *en banc* for review of that order. Such a request for review must be filed within 15 days after the date that the final order is filed. The parties may file briefs within thirty days of the request for review. The *en banc* review is based on the record created at the EAB hearing.<sup>51</sup> Either party, the employee or the agency, aggrieved by a final decision of the EAB, sitting *en banc*, may appeal to the Circuit Court.<sup>52</sup>

### REPRESENTING THE EMPLOYEE BEFORE THE EAB

Prior to appeal to the EAB, the employee is required to exhaust all administrative remedies. The agency is required

to provide due process in employment actions where the employee's compensation or employment status is adversely affected. Therefore, although there are no formal discovery procedures, because the employee is entitled to several levels of administrative review before the employee appears before the EAB, there is usually ample documentary evidence available to the attorney representing a state employee.

*If either party is aggrieved by the hearing officer's final order then the aggrieved party may appeal to the EAB en banc for review of that order.*

This information is often available via a simple request to the agency or via the issuance of a subpoena duces tecum. Every attorney should be thoroughly familiar with the documentation generated in a grievance procedure or disciplinary action prior to the EAB hearing. The Rules governing appeals to the EAB are readily available to state employees and the public. The EAB Administrative Office is available to assist employees and attorneys with any issues which may arise.

Many of the employees who appear before the EAB are unrepresented and unfamiliar with any type of legal process, whereas the agency is always represented by legal counsel. When an employee appears *pro se*, the hearing officers take special care to make sure that the employee is able to present his or her case to the best of that employee's ability. In such situations, procedures are more likely to be informal and the rules of procedure and evidence are relaxed to assist the employee in presenting his or her case.

### CONCLUSION

Since the law establishing the Employee Appeals Board was enacted in 1980, the Circuit and Appellate Courts

have reviewed the decisions of the EAB more than 300 times. In their review of the cases decided by the EAB, the courts have found that the decision of the EAB to reinstate a game warden who helped his brother poach game fish was arbitrary and capricious;<sup>53</sup> that an agency is not required to institute a performance improvement plan before implementing disciplinary action;<sup>54</sup> that when an employee is terminated for sleeping on the job it is incumbent on the hearing officer to determine that the employee was not asleep in order to reinstate the employee;<sup>55</sup> that one instance of the use of a racial slur is not sufficient to create a hostile work environment;<sup>56</sup> and that an employee who is politically inactive and unconnected is protected equally as one who has positive political opinions and affiliations.<sup>57</sup>

The EAB provides a valuable service to the state in providing an avenue for review of agency disciplinary decisions both mundane and momentous. The EAB gives employees a fair and impartial venue for review of disciplinary matters and

*Continued on next page*

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## The Employee Appeals Board – An Overview

grievances, and in doing so provides an alternative to expensive and lengthy litigation. ■

- 1 Ingrid Dave Williams is the Chief Hearing Officer of the Employee Appeals Board. The author acknowledges the assistance of Hearing Officer Michael N. Watts and Director of the EAB Administrative Office, Dianne Harrell.
- 2 Miss. Code Ann. §25-9-103(e) allows all applicants for state employment and Non-State Service Employees to appeal acts of discrimination to the EAB.
- 3 Miss. Code Ann. §25-9-107 (b)
- 4 Miss. Code Ann. §29-9-127 (1); Mississippi State Personnel Board Policies and Procedures Manual, 7.7
- 5 Miss. Code Ann. §25-29 107 (c)
- 6 Miss. Code Ann. §25-29-107 (c)(xiv)
- 7 Mississippi State Personnel Board Policy and Procedures Manual, 10.7.3.D.
- 8 Miss. Code Ann. §25-9-127 (1)
- 9 *Id.*
- 10 The Current Hearing Officers are Ingrid Dave Williams (First Supreme Court District), B. Ray Therrell, II (Second Supreme Court District), and Michael N. Watts (Third Supreme Court District)
- 11 Miss. Code Ann. §25-9-129
- 12 Miss. Code Ann. §25-9-132 (1)
- 13 Miss. Code Ann. §25-9-132 (2)
- 14 *Gill v. Mississippi Department of Wildlife Conservation*, 574 So.2d. 586 (Miss. 1990)
- 15 *Gill*, 574 So.2d at 591
- 16 *Harris v. Mississippi Department of Corrections*, 831 So.2d 1105 (Miss. 2002)
- 17 Miss. Code Ann. 25-9-132 (2); *Pannell v. Tombigbee River Valley Water Management District*, 909 So.2d, 1115, 1119-1120 (Miss. 2005)
- 18 Miss Code Ann. §25-9-132 (4)
- 19 <http://www.mspsb.ms.gov>
- 20 Mississippi State Personnel Board Policy and Procedures Manual, 9.1.A.
- 21 *Id.*, 9.1.B.
- 22 *Id.*, 9.1.C.
- 23 *Id.*, 9.3.
- 24 *Id.*, 9.3.B.
- 25 *Id.*, 10.1., Mississippi Code Ann. §§25-9-103(e), 25-9-149; Genetic Information is not mentioned specifically in the state statutes, although such discrimination is prohibited by the Federal Genetic Information Nondiscrimination Act.
- 26 Mississippi State Personnel Board Policy and Procedures Manual, 10.2.; 10.3.
- 27 *Id.*, 10.7.
- 28 *Id.*, 10.7.3.A. and B.
- 29 *Id.*, 10.7.3.D.
- 30 *Id.*, 10.7.3.E.
- 31 *Id.*, 10.7.3.F; Miss. Code Ann §25-3-95
- 32 Mississippi State Personnel Board Policy and Procedures Manual, 10.7.4.A.
- 33 *East Mississippi State Hospital v. Callens*, 892 So. 2d 800 (Miss. 2004)
- 34 Mississippi State Personnel Board Policy and Procedures Manual, 10.7.5.B.
- 35 *Id.*, 10.7.5.C.
- 36 <http://www.mspsb.ms.gov>
- 37 Mississippi State Personnel Board Policy and Procedures Manual, 10.7.12; 10.7.13.
- 38 *Id.*, 10.7.15.A.
- 39 *Id.*, 10.7.16.
- 40 *Id.*, 10.7.16. D. and F.
- 41 *Id.*, 10.7.18.A. and B.
- 42 *Id.*, 10.7.18.C.
- 43 *Id.*, 10.7.18.D.
- 44 *Id.*, 10.7.18.F.
- 45 *Id.*, 10.7.19.A.
- 46 *Id.*, 10.7.19.B.
- 47 *Id.*, 10.7.20.B.; Miss. Code Ann. §25-9-127 (1)
- 48 Mississippi State Personnel Board Policy and Procedures Manual, 10.7.24.A.
- 49 *Id.*, 10.7.24.B.
- 50 *Mississippi Employment Security Commission v. Culbertson*, 832 So.2d 519 (Miss. 2002)
- 51 Mississippi State Personnel Board Policy and Procedures Manual, 10.7.25.
- 52 *Id.*, 10.7.26.; Miss. Code Ann. §25-9-32 (4); *Gill*, 574 So.2d 586
- 53 *Mississippi Department of Wildlife Conservation v. Browning*, 578 So.2d 667 (Miss. 1991)
- 54 *Young v. Mississippi State Tax Commission*, 635 So.2d 869 (Miss. 1994)
- 55 *Mississippi Department of Corrections v. McClee*, 677 So.2d 732 (Miss. 1996)
- 56 *Richmond v. Mississippi Department of Human Services*, 745 So.2d 254 (Miss. 1999)
- 57 *Gill*, 574 So.2d 586

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## Ethics Opinion No 260 of The Mississippi Bar Rendered November 20, 2014

**CAVEAT:** This Opinion is limited strictly to the facts as presented for analysis under the Mississippi Rules of Professional Conduct. The facts and questions outlined below and the opinion rendered is limited to ethical issues only.

**Is it ethical for a criminal defense lawyer to participate in a “Plea Agreement” that requires the Defendant to waive past or future ineffective assistance of counsel claims? Does this provision of the plea agreement create a personal conflict of interest between the criminal defense lawyer and the client? If so, does such conflict rise to the level of denial of the right to loyal counsel under the Sixth Amendment of the United States Constitution? Is this a violation of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution? Is this an attempt by defense counsel to limit liability of the lawyer to the client? Does this waiver violate the prosecutors’ ethical responsibility?**

### ANALYSIS

The Ethics Committee for The Mississippi Bar has been requested to render an opinion as to the ethical implications of an attorney participating in a “Plea Agreement” where the client waives past or future ineffective assistance of counsel. In the hypothetical posed by the requestor, the defendant is entering into a voluntary plea agreement, and in consideration of the plea offer the defendant has been requested to waive any rights that he might have to attack the plea or other conduct under 28 USC §2255 or other available remedies concerning the “effectiveness of counsel’s” responsibility prior to or subsequent to the plea.

The Committee is of the opinion that it is improper for a criminal defense attorney to participate in making such a plea agreement and it is equally unethical for a prosecutor to require such a waiver. Whether a particular plea agreement containing such a waiver is lawful, enforceable and/or constitutional are questions of law outside the scope of this opinion. This Opinion addresses only the propriety of a lawyer

participating in such an offer under the Mississippi Rules of Professional Conduct.

The Preamble to the Rules of Professional Conduct accurately describes a lawyer as “ a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” This obligation extends to a number of functions: as an advisor, as an advocate, as a negotiator and as an intermediary and evaluator. The important goal of finality in criminal convictions must be balanced against the fact that an effective and fair criminal justice system necessitates both competent, diligent and conflict free defense attorneys and prosecutors who promote the fair administration of justice. Plea bargains are a central part of the administration of the criminal justice system and account for nearly 95% of all criminal convictions. *Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012).

Several of the Mississippi Rules of Professional Conduct (“MRPC”) are at play and interrelated in this scenario. First Rule 1.7(b), MRPC states:

A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interest, unless the lawyer reasonably believes:

- (1) the representation will not be adversely affected; and
- (2) the client has given knowing and informed consent after consultation. The consultation shall include explanation of the implications of the representation and the advantages and risks involved.

Axiomatic in Rule 1.7 is counsel’s obligation to avoid conflicts – conflicts that would be detrimental to the client’s interest. The Comment to Rule 1.7 explains that loyalty is an essential element in the lawyer client relationship and the lawyer’s own interest cannot be permitted to have an adverse effect on the representation of the client. Defense counsel has an undoubtable personal interest in the issue of whether he has provided constitutionally effective representation.

That same defense lawyer cannot be expected to objectively evaluate his own representation in an ongoing case when considering and advising his client on a plea agreement that contains such a waiver. This is a conflict that cannot be waived by consent of the client. A majority of states to consider the propriety of this practice have likewise found it impermissible for defense counsel to participate in making a plea agreement that waives a defendant’s past or future claims for ineffective assistance of counsel.<sup>1</sup>

As for the prosecutor who may request such a waiver, his conduct in requesting the waiver is likewise prohibited. Rule 3.8, MRPC, and its comment explain that a prosecutor has a heightened responsibility as a minister of justice and not simply that of an advocate. This heightened responsibility includes seeing that the defendant is accorded procedural justice. Rule 8.4(a) prohibits a lawyer from inducing another to violate the rules of professional conduct. Rule 8.4(d) prohibits any conduct that is prejudicial to the administration of justice. A prosecutor’s insistence on a waiver of past or future claims of ineffective assistance creates a conflict for the defense counsel between his client’s interest and his own and is prejudicial to the administration of justice. Foreclosing a defendant’s ability to have claims that defense counsel has failed in his most fundamental duty to provide competent, diligent and conflict free representation undermines confidence in our criminal justice system.

### CONCLUSION

For the reasons stated above, an attorney representing a defendant in a criminal case may not participate nor enter into a “Plea Agreement” where the Defendant waives past, present or future “ineffective assistance” of counsel. Similarly, a prosecutor may not insist on such a waiver. ■

<sup>1</sup>North Carolina Ethics Opinion 129 (1993); Tennessee Informal Ethics Opinion 94-A-549; ; Vermont Ethics Opinion 95-04; Ohio Ethics Opinion 2001-6; Missouri Formal Ethics Opinion 126 (2009); Alabama Informal Opinion September 1, 2010; Virginia State Bar Legal Ethics Opinion 1857 (2011); Florida Bar Professional Ethics Opinion 12-1; National Association of Criminal Defense Lawyers Formal Opinion 12-02; ABA Resolution 113E, August 2013.

# MB Election Results



**W. Briggs Hopson, III**  
*Vicksburg, MS*  
*President-Elect*  
*of The Mississippi Bar*

W. Briggs Hopson, III, has become President Elect Designee of The Mississippi Bar. He will assume his elected position during the Bar's Annual Meeting in Sandestin in July. Jackson attorney Roy D. Campbell will assume presidency of the Bar at that time.

In addition to the race for President-Elect, the following have been certified as newly elected members of the Board of Bar Commissioners:

**2nd District – Post 1**

Karen K. Sawyer, Gulfport

**7th District – Post 4**

Susan R. Tsimortos, Jackson

**7th District – Post 5**

Stephen Montagnet III, Jackson

**9th District**

Penny B. Lawson, Vicksburg

**10th District**

Robert M. Dreyfus, Jr., Meridian

**13th District**

Wesley Broadhead, Mendenhall

**15th District**

Matthew D. Shoemaker, Petal

**18th District**

John A. Piazza, Laurel

**20th District – Post 2**

Paul Randall, Jr., Ridgeland

**22nd District**

James D. Shannon, Hazelhurst

# YLD Election Results

Bradley M. Reeves of Jackson has been elected Secretary of the Young Lawyers Division. Certified to serve on the Young Lawyers Division Board of Directors are the following:

**Central I**

Joseph Spencer Young, Jr., Flowood

**Coastal II**

Lauren R. Hillery, Gulfport

**Hinds Post IV**

Gerald A. Mumford, Jackson

**Hinds Post V**

Kaytie M. Pickett, Jackson

**Hinds Post VI**

Elizabeth "Betsy" Turley, Jackson

**North East**

Kristin G. Belvin, Tupelo

**South West**

Sarah M. Moulder, Hazelhurst

**Director-at-Large**

Kassie A. Coleman of Meridian



**Jenny Tyler Baker**  
*Gulfport, MS*  
*President-Elect*  
*of the Young Lawyers Division*

Jenny Baker has been elected to the position of President-Elect Designee of the Young Lawyers Division of The Mississippi Bar. Her term will begin in June of this year. Diala H. Chaney of Oxford will assume duties of President of the YLD at that time.

**James D. Harper, J.D., M.A.**

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Jennie Eichelberger  
Young Lawyers Division President  
2014-2015



## Young Lawyers Division News

Pro Bono Committee of the Mississippi Association for Justice to draft wills for members of the Hinds County Sheriff’s Department. We look forward to more events this spring.

Our new service project, which will provide legal clinics for our homeless youth is getting ready to start with some clinics this spring across the state. We look forward to the opportunity to serve our children in need.

The High School Mock Trial Competition wrapped up on February 28 with Sacred Heart Catholic High School prevailing in the Finals. I was fortunate enough to serve as a judge in the Final Round, along with Judge Linda Anderson, Robert Gibbs, Gene Harlow and LaKeysha Greer-Isaac. The winning team will travel to Raleigh, NC, in May to compete in the National Competition. As always, we could not have this competition without the generosity of our attorneys and judges in giving their time to judge the regionals and the statewide competition in January and February. A big thank you to all of our volunteers and a huge congratulations to all participants. We know Sacred Heart will make us proud in North Carolina!

This year, YLD has concentrated on offering more services for our members. That started with the Litigation 101 Series, which has been hugely successful. This program is a series of CLEs on how to handle a case from the beginning through appeals. We are in the planning stages of a Deposition boot camp, later this spring. Additionally, the Second Annual YLD Mid-Year Conference will be held in Jackson on March 27 at the King Edward Hotel. The event will kick-off with a reception the evening before at the King Edward Hotel, and the conference will begin the next morning. This year, the conference will feature a continuation of skills CLEs, including voir dire, opening statements and closing arguments, mediation and deposition skills. We will feature two speakers, Patrick

Nelson, the founder of I’m ME, and Judge James Graves of the 5th Circuit Court of Appeals. Patrick Nelson will speak to our young lawyers about the need to think outside the box when giving back to the community and people in need and the necessity of public service. We will hear his personal story of how public service drove him and his brothers, including David Nelson, a professional football player, to form a non-profit organization to help the homeless children in Haiti. The day will close with an ethics hour of advice from Past Presidents of The Mississippi Bar. We are very excited about this event and hope to see you there!

We look forward to building on our active fall and winter as we head into the spring months. If you would like to become more involved with YLD, please contact Rene’ Garner at [rgarner@msbar.org](mailto:rgarner@msbar.org) or me at [jennie.eichelberger@splcenter.org](mailto:jennie.eichelberger@splcenter.org) ■

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## 2015 Mississippi High Sch



*Sacred Heart Catholic School Team 2 displays the First Place gavel they were awarded during the 32nd Annual High School Mock Trial Competition. Pictured with their teacher sponsor, Paul VanZandt, and their attorney coaches (left to right) Don Hinton and Carey Varnado.*



**O**n Saturday, February 28, in the Hinds County Courthouse, Sacred Heart Catholic School Team 2 finished in first place and will represent Mississippi in the 2015 National High School Mock Trial Competition on May 14-16 in Raleigh, North Carolina.

Distinguished members of the Bar judged the statewide final round. These judges included Jennie Eichelberger, President of the Young Lawyers Division of The Mississippi Bar; Gene Harlow, President of The Mississippi Bar; Magistrate Judge Linda Anderson, Southern District of MS; LaKeysha Greer Isaac, member of South Pike High School's Mock Trial Team that won 1st at Nationals in 1993 in Atlanta and earned 3rd place at Nationals in 1992 in Madison, Wisconsin; and Robert Gibbs, who has judged the final round for 25 years, served as the presiding judge.

Twenty-six teams from around the state participated in three regional competitions, which were held in January in Jackson, Gulfport and Oxford. From those teams, 19 teams advanced to the statewide competition held on February 27 - February 28 at the Hinds County Courthouse and Chancery Courthouse in Jackson.

Sacred Heart Catholic School Team 1 earned the second place trophy gavel, coached by Don Hinton and Carey Varnado. The following schools earned the remainder of the top six positions – Cleveland High School, third place, coached by Michael Carr and Arthur Calderon; St. Patrick Catholic High School, fourth place, coached by Judge Jennifer Schloegel and Elena Guida; MSMS Team 1, fifth place, coached by Scott Colom; and Madison Central, sixth place, coached by Rogen Chhabra and Staci O'Neal. A special thanks to all of the attorney coaches and judges that volunteered their valuable time to help with this Young Lawyers Division law related education program in its 32nd year. ■



*The final round judges included (left to right): Gene Harlow, President of The Mississippi Bar; Jennie Eichelberger, President of the Young Lawyers Division of The Mississippi Bar; Robert Gibbs, who has judged the final round for 25 years, served as the presiding judge; LaKeysha Greer Isaac, member of South Pike High School's Mock Trial Team that won 1st at Nationals in 1993 in Atlanta and earned 3rd place at Nationals in 1992 in Madison, Wisconsin; and Magistrate Judge Linda Anderson, Southern District of MS.*



# UPDATE

## ool Mock Trial Competition



# Mississippi Attorneys Who Served As Team Coaches During The Mississippi 2015 High School Mock Trial Competition

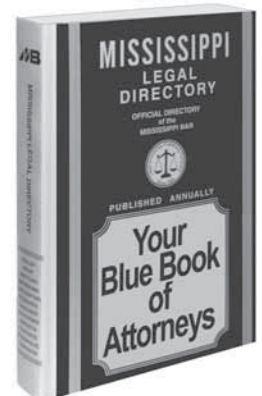
David Harris ..... <i>Biloxi</i> Biloxi High School	Staci A. O'Neal..... <i>Madison</i> Madison Central
John A. Meynardie ..... <i>Biloxi</i> Biloxi High School	Scott Colom ..... <i>Columbus</i> MSMS
Gina B. Tompkins..... <i>Biloxi</i> Biloxi High School	Keith Pearson ..... <i>Oxford</i> Oxford High School
Judge James K. McDaniel ..... <i>Brandon</i> Brandon High School	Brad Morris ..... <i>Oxford</i> Oxford High School
Michael S. Carr..... <i>Cleveland</i> Cleveland High School	Wes Curry ..... <i>Hattiesburg</i> Presbyterian Christian School
Arthur H. Calderon ..... <i>Cleveland</i> Cleveland High School	Kimberly-Joy Lockley ..... <i>Hattiesburg</i> Presbyterian Christian School
Milton Carroll McCardle ..... <i>Hazlehurst</i> Copiah Educational Foundation	Stephen W. Burrow..... <i>Pascagoula</i> Resurrection Catholic School
Daniel W. Kitchens ..... <i>Crystal Springs</i> Copiah Educational Foundation	Deborah Kazal..... <i>Pascagoula</i> Resurrection Catholic School
Mary Lee Walker Brown ..... <i>Hernando</i> Desoto Central High School	Don Hinton ..... <i>Hattiesburg</i> Sacred Heart Catholic School
Cole Massie ..... <i>Hernando</i> Desoto Central High School	Carey R. Varnado..... <i>Hattiesburg</i> Sacred Heart Catholic School
Judge Robert P. Chamberlin ..... <i>Hernando</i> Hernando High School	Tammye Brown ..... <i>Jackson</i> St. Andrew's Episcopal School
Walter J. Brand..... <i>Jackson</i> Jackson Prep	Bradford J. Blackmon ..... <i>Canton</i> St. Andrew's Episcopal School
Wesla S. Leech..... <i>Mendenhall</i> Jackson Prep	Judge Jennifer T. Schloegel..... <i>Gulfport</i> St. Patrick Catholic High School
Kathryn McNair ..... <i>Meridian</i> Lamar School	Elena Guida..... <i>Gulfport</i> St. Patrick Catholic High School
Amanda Glover Evans ..... <i>Meridian</i> Lamar School	Lee Ann Turner ..... <i>Starkville</i> Starkville High School
Rogen Chhabra..... <i>Jackson</i> Madison Central	Wendell James..... <i>Bay Springs</i> Sylva-Bay Academy

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# Special Thanks to Mississippi Attorney Judges for 2015 Statewide & Regional Mock Trial Competition

**T**he Mississippi Bar Young Lawyers Division would like to thank the following members of The Mississippi Bar for their efforts as attorney judges during the 2015 High School Mock Trial Competition.

## Regional Judges

Jessica Bates.....Pascagoula  
Pat Bennett .....Jackson  
David Bridges.....Jackson  
Angela Brooks.....Tupelo  
Bryan Buckley.....Canton  
Matthew Burris.....Oxford  
Jennifer Case .....Jackson  
Marcy Croft .....Jackson  
John Dawson .....Gulfport  
Tommy Defer.....Water Valley  
Sarah Dickey.....Oxford  
Brad Dillard.....Tupelo  
Dan Duggan.....Brandon  
Jessica Dupont.....Pascagoula  
Bill Eckert .....Gulfport  
Steven Eckert.....Biloxi  
Jeremy England Ocean Springs  
Will Ford .....New Albany  
David Frazier.....Pascagoula  
Joanna Frederick.....Senatobia  
Katy Gerber .....Chicago  
Ryan Hall.....Oxford  
Joshua Hill.....Oxford  
Lauren Hillery .....Gulfport  
Wendy Hollingsworth.Pascagoula  
Aaron Hommell.....Flowood  
Julie Howell .....Oxford  
Jack Hunt.....Jackson  
Jamie Jacks.....Cleveland  
Andy Johnson.....Madison  
Robert Jolly.....Olive Branch  
Rita Jones.....Choctaw  
John Kavanagh.....Mobile  
Matt Kittrell.....Gulfport  
Philip Levy .....Oxford

Blythe Lollar.....Aberdeen  
Alex Lowman.....Pascagoula  
Jacob Malatesta .....Jackson  
Will Manuel.....Jackson  
Neal Marlow.....Duck Hill  
April McDonald .....Lucedale  
Megan McGrew.....Jackson  
Mike McPhail .....Hattiesburg  
Sue Merchant.....Jackson  
Jimmy Milam .....Tupelo  
Cheryn Netz.....Jackson  
David Parker.....Clinton  
Brad Rath .....Biloxi  
Brett Richards.....Gulfport  
Ben Robinson .....Ridgeland  
Jim Rosenblatt .....Jackson  
Bill Sanders.....Charleston  
Bryan Sawyers.....Gulfport  
Al Shiyou.....Hattiesburg  
Matthew Shoemaker.Hattiesburg  
Petesy Smith .....Vicksburg  
Francis Springer .....Madison  
Austin Stewart .....Jackson  
Mallory Street .....Madison  
Forrest Stringfellow.....Clinton  
Tom Taff .....Hammond  
Sumeka Thomas .....Okolona  
Amanda Tollison.....Oxford  
Elizabeth Treadway.Olive Branch  
Catherine Umberger..Southaven  
Dietrich von Biedenfeld  
.....West Columbia, TX  
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Clarence Webster .....Jackson  
Rebecca Wiggs .....Jackson  
Jason Zemek.....Flowood

## Statewide Judges

Brandi Ajpacaja.....Clinton  
Judge Linda Anderson.Jackson  
John Ayers.....Ridgeland

Matt Baldrige.....Ridgeland  
Ed Bean.....McComb  
Pat Bennett .....Jackson  
Eric Brown.....Jackson  
Michael Brown .....Jackson  
Stephanie Brown .....Jackson  
Neill Bryant.....Jackson  
Bryan Buckley .....Canton  
Barry Campbell .....Ridgeland  
Jack Carmer.....Jackson  
Graham Carner .....Jackson  
Jennifer Case .....Jackson  
Mel Coxwell .....Brandon  
Paul Davis .....Ridgeland  
Nakimuli Davis-Primer ..Jackson  
William Drinkwater....Jackson  
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Ben Watson .....Ridgeland  
George Whitten.....Greenwood  
Josh Wiener.....Ridgeland  
Rebecca Wiggs .....Jackson  
Kelly Williams .....Ridgeland  
Jason Zemek.....Flowood

# Supreme Court and Bar Host Luncheon for Lawyer Legislators



Justice Randy Pierce (left) visits with Rep. Sherra Lane, Waynesboro at the luncheon.



Attending the lawyer legislator luncheon are: (l to r) Darlene Ballard, Director, MS Commission on Judicial Performance; Sen. Sean Tindell, Gulfport; Rep. David Baria, Bay St Louis; Justice Jess Dickinson, Gulfport and Court of Appeals Chief Judge Joe Lee, Jackson.



Chief Justice Bill Waller addresses the lawyer legislator luncheon.



Pictured at Lawyer Legislator Luncheon are: (l to r) Sen. Briggs Hopson, Vicksburg; Court of Appeals Judge Gene Fair, Hattiesburg; Court of Appeals Judge Kenny Griffis, Jackson; Billy Saul, Director of the Office of Drug Court Compliance, Crystal Springs; Rep. Willie Perkins, Greenwood and Judge Mike Taylor, Brookhaven.



Court of Appeals Judge Jimmy Maxwell, Oxford visits with Sen. Derrick Simmons, Greenville and Rep. Andrienne Wooten, Jackson.



Discussing funding for the MS Commission on Judicial Performance is: (l to r) Rep. Willie Perkins, Greenwood; Darlene Ballard, MCJP Director and Gene Harlow, MB President, Laurel.



House Speaker Phillip Gunn speaks during the lawyer legislator luncheon.



Judge Mike Taylor of Brookhaven reports on Mississippi Drug Courts.



MVLP would like to thank the following individuals, businesses, organizations and agencies that helped to make the inaugural 2014 Pro Bono Awards Dinner a huge success. Because of your support, MVLP can continue to advance justice and restore hope in the lives of many Mississippi residents in need of legal services.

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# 22nd Annual Evelyn Gandy Lecture Series

February 20-22, 2015 Marriott Grand Hotel, Point Clear, AL



Friday afternoon panel speakers included from left: Selene Maddox, Tupelo; Julie Gresham, Pascagoula; Dean Wendy Scott, Jackson and Cindy Mitchell, Clarksdale.



Chair of the 2015 Gandy Lecture Series Tiffany Grove of Jackson and Co-Chair of the Gandy Lecture Series Alison Goodman of Tupelo.



Debbie Bell of Oxford and Guest Speaker U.S. Representative Marsha Blackburn.



Nina Stubblefield Tollison of Oxford, Charliene Roemer of Biloxi and Lydia Quarles of Starkville.



Brittany Smith, Tchanavia Bryant and Gayla Carpenter-Sanders, all of Jackson.



Jenny Tyler Baker, Gulfport; Cheryn Netz, Jackson; Jessica Dupont, Pascagoula and Jennifer Hall, Jackson.



Kathy Brown van Zutphen of Gulfport and Katherine Kerby of Columbus.



Tiffany Graves, Jackson; Kristi Brown, Gulfport; Nicole McLaughlin and Alison Goodman both from Tupelo.



Friday afternoon panel speakers included from left: Anne Veazey of Ridgeland, Gene Harlow of Laurel and Rebecca Wiggs of Jackson.



Judge Deneise Turner Lott, Jackson; Lydia Quarles, Starkville; Judge Virginia Mounger, Jackson and State Treasurer Lynn Fitch of Jackson.



Sarah Beth Wilson and Ellen Robb both of Ridgeland.



Judge Jacqueline Mask of Tupelo, Judge Cynthia Brewer of Canton and Jennifer Ingram of Hattiesburg.



Pat Bennett of Jackson and Judge Lillie Blackmon Sanders of Natchez.



Front: Elizabeth Feder – Hosey of Ocean Springs and Patti Golden of Biloxi; Back: Margaret McGill Lane of Point Clear, AL and Maura McLaughlin of Hattiesburg.



Lisa Meggs of Columbus, Judge Jannie Lewis of Lexington and Shakeba Johnson of Greenwood.



Sandra Buchanan, Tianna Raby, Sherri Flowers-Billups, Joan Potter all of Jackson and Vangela Wade of Ridgeland.



Emily Fertig of Gulfport and Katherine Henderson of Ocean Springs.

# 22nd Annual Evelyn Gandy Lecture Series



*Karen Sawyer, Gulfport; Judge Lisa Dodson, Gulfport; Constance Jordan, Gulfport; Charliene Roemer, Biloxi; Elizabeth Feder – Hosey, Ocean Springs; Patti Golden, Biloxi and Kimberly Rosetti, Gulfport.*



*Chereka Witherspoon of Tupelo and Shakeba Johnson of Greenwood.*



*Judge Cynthia Brewer of Canton and Amanda Alexander of Jackson.*



*Selene Maddox and Judge Jacqueline Mask, both of Tupelo.*

*Break-out session speaker Angel Patano-Myers of Pascagoula.*



*Jessica Ayers and Dana Sims both of Jackson and Alexis Farmer of Oxford.*



*Alison Baker of Gulfport, Tiffany Grove of Ridgeland and Catherine Bell of Jackson.*

*Cheryn Netz of Jackson, Jessica Dupont of Pascagoula, and Michelle Easterling of West Point.*







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# THE MISSISSIPPI BAR'S HISTORY & HERITAGE

*By Cham Trotter, Belzoni*

In 2011 the Board of Bar Commissioners established the Legal History Committee as an ad hoc committee of the Bar, and this Committee has been in continuance existence since that time. The Legal History Committee is charged with fostering the preservation, recording and dissemination of historical information related to the Bench and Bar in Mississippi. This article is a report to the readers of *The Mississippi Lawyer* on what has been accomplished in these four years.

At its inception, the Legal History Committee identified five specific areas to be addressed. These are Cotesworth House in Carrollton, the ante-bellum home of J. Z. George, generally recognized as the author of Mississippi's 1890 Constitution. Next was the gathering of oral history to have tape and video repositories of outstanding Mississippi attorneys. The Committee then looked into preservation of courthouses, legal sites and historical records. These would include books and photographs. The Committee then sought to obtain information on Women in the Law and African-American legal history. Other general items of legal history all seemed to fall within these five categories.

The Cotesworth House was purchased in the summer of 2014 by the Cotesworth Legal Historical Society, and is in the process of having restoration made. Adjacent to the house (which was featured in the movie "The Help") is the library of J. Z. George, which is an amazing eight-sided building. The Committee has started the process of accepting donations of old law books to have this library look, as nearly as possible, as it would have in the late 1800s. The Cotesworth House itself is envisioned to be used to showcase not only legal history, but also for agricultural history and tourism.

The Committee is in the process of identifying attorneys for inclusion in oral history by use of tape and video. A few years ago, the Bar produced five oral his-

stories of Attorneys Boyce Holleman, Reuben Anderson, Thomas Ethridge, Clare Hornsby and Robert Cannada. Three of these attorneys have since passed away, and we realize that time is of the essence in recording the unique histories that only outstanding Mississippi lawyers can provide.

The preservation of our history was started by developing a bibliography of articles, books, or other writings that relate to the legal history and heritage of our state. Many of these books have been written over the years, but the Committee is attempting to assemble in one bibliography books and articles on the history of our Courts' significant decisions, legal figures, law firm history, local Bar history and personal reminiscences of Mississippi attorneys. Copies of some of this bibliography are published here for anyone interested in specific areas of our heritage.

As our committee moves forward, there are exciting projects that will be developing in the near future. The Bar Association is looking to soon publish the stories of Mississippi's first 100 women lawyers. The Committee is still looking for articles for our bibliography. We have several promising leads and will be adding to this on a continuing basis.

One extremely exciting item is the report we received from Felicia Adams, U.S. Attorney for the Northern District of Mississippi, that mentioned a book entitled "Emancipation: The Making of the Black Lawyer 1844-1944", which includes a chapter on the emergence of the African-American lawyer in Mississippi beginning in 1969. The Committee is looking to obtain a good copy of this book or the chapter on Mississippi. Also, the Committee is attempting to receive from the Library of Congress a composite photograph entitled "Negro Lawyers of Mississippi, 1909", which has photographs of 25 African-American lawyers in Mississippi in that year.



*Cham Trotter, Chair  
The Mississippi Bar  
Legal History Committee*

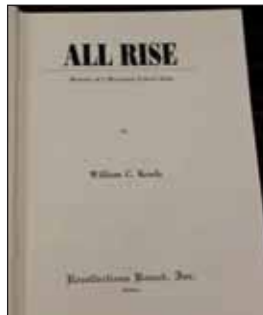
Finally, the Legal History Committee has been asked to work with the Mississippi Supreme Court on the Bicentennial celebration of the legal branch of government in Mississippi, which began at statehood in 1817, and will be celebrated during the year 2017. Work has already begun to make this a memorable year in celebrating 200 years of Mississippi's legal system. Our Committee is enjoying its work and solicits any and all ideas and suggestions from our membership.

There is an old rock and roll song from the 1950s that has the line "I don't know much about history", or science books or French I took, or sliderules for that matter. But with the continuing work of the Mississippi Legal History Committee we will let sliderules and science fend for themselves, and we will do our best to take care of history. ■

*The Mississippi Bar's Legal History Committee Bibliography  
of articles, books, and other writings related to Mississippi's legal history.*



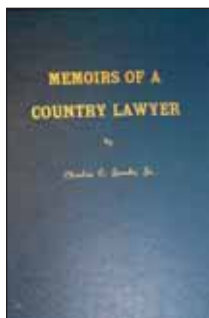
Mississippi Law Journal  
Volume XXXVI  
Journal of the Mississippi State Bar  
By Dick Bennett  
1965



All Rise: Memoirs of a Mississippi  
Federal Judge  
By William C. Keady  
1988



A History of Mississippi Volume II.  
"Lawyers, Courts, and Judges,  
1890-1970."  
By E. Everett, Jr.  
1973



Memoirs of a Country Lawyer  
By Charles C. Jacobs, Jr.



Biographical & Historical  
Memoirs of Mississippi  
Volume I. Chapter 5. 1891



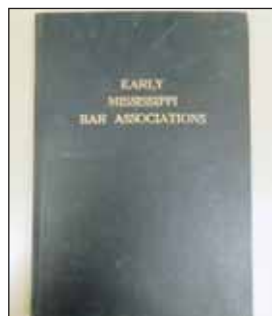
Courts, Judges, and Lawyers  
of Mississippi 1798-1935  
By Dunbar Rowland



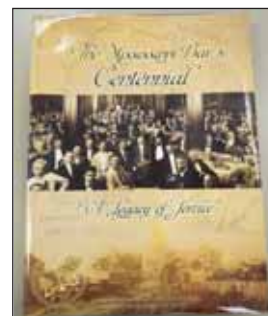
The High Courts of  
Mississippi 1817 - 1875  
By Meredith Lang



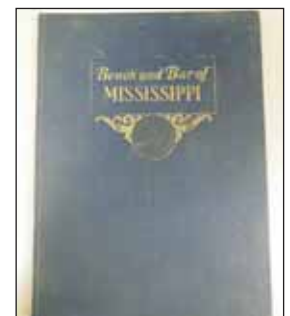
A History of the Mississippi  
Supreme Court 1817 - 1948  
By John Ray Skates, Jr.



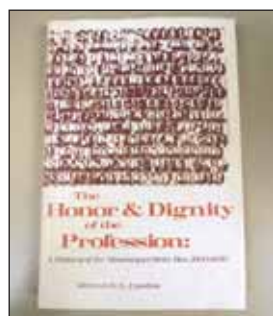
Early Mississippi Bar  
Associations  
By Mississippi Bar Foundation



A Mississippi Bar's  
Centennial  
"A Legacy of Service"



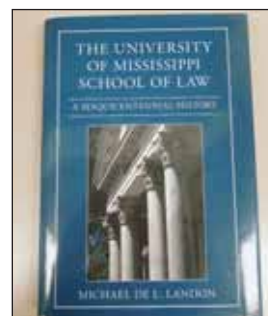
Bench and Bar of  
Mississippi  
1938



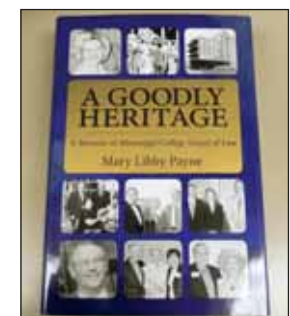
The Honor & Dignity  
of the Profession  
1906 - 1976  
By Michael de L. Landon



The Challenge of Service:  
A History of The Mississippi's  
Young Lawyers 1936 - 1986  
By Michael de L. Landon



The University of Mississippi  
School of Law  
A Sesquicentennial History  
By Michael de L. Landon



A Goodly Heritage A Memoir  
of Mississippi College  
School of Law  
By Mary Libby Payne



MVLP salutes the following law firms, businesses, agencies, organizations and individuals who contributed to the 2014 "Advancing Justice: Restoring Hope" Annual Campaign. Through your efforts, MVLP will be able to provide much-needed legal services to thousands of Mississippians of low-income and limited means.

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# MS Access to Justice Commission



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*Judge Margaret Alfonso, Judge Jacqueline Mask, Jamie Bardwell, and Gwen Baptist-Hewlett*



*Dean Wendy Scott*



*Jamie Bardwell, Gwen Baptist-Hewlett, David Baria, and Beau Cole*

# CLE Calendar of Events

The following live programs have been approved by the Mississippi Commission on Continuing Legal Education. This list is not all-inclusive. For information regarding other programs, including teleconferences and online programs, contact Tracy Graves, CLE Administrator at (601)576-4622 or 1-800-441-8724, or check out our website, [www.mssc.state.ms.us](http://www.mssc.state.ms.us). Mississippi now approves **online programs** for CLE credit. For a list of approved courses, check the Calendar of Events on our website. For information on the approval process for these programs, please see Regulations 3.3 and 4.10 posted under the CLE Rules on our website or contact Tracy Graves at the numbers listed above.

## APRIL

- 8 Children's Advocacy Centers of Mississippi "Social Media & Ethics." 2.0 credits (includes ethics). Biloxi, MS. Contact 601-940-6183.
- 8-10 Children's Advocacy Centers of Mississippi "One Loud Voice: A Multidisciplinary Team Approach." 12.0 credits. Biloxi, MS. Contact 601-940-6183.
- 9 NBI "Anatomy & Physiology 101 for Attorneys." 6.0 credits. Jackson, MS. Contact 715-835-8525.
- 10 Children's Advocacy Centers of Mississippi "One Loud Voice: Post Conference Session." 2.0 credits. Biloxi, MS. Contact 601-940-6183.
- 10 UM CLE "Effective Mediation Skill (Refresher)." 6.0 hours (includes ethics). Ridgeland, MS, Hyatt Place. Contact 662-915-7283.
- 10 MC School of Law "Arbitration CLE." 6.0 credits (includes ethics). Jackson, MS, MC School of Law. Contact 601-925-7107, Tammy Upton.
- 17 MC School of Law "Education Law CLE." 6.0 credits (includes ethics). Jackson, MS, MC School of Law. Contact 601-925-7107, Tammy Upton.
- 21 NBI "Planning for Long Term Care." 6.0 credits (includes ethics). Jackson, MS. Contact 715-835-8525.
- 23 Sterling Education Services, Inc. "Employment Law: Beyond the Basics."

6.7 credits. Biloxi, MS. Contact 715-855-0495.

24 MC School of Law "Mediation Training Certification/Re-Certification." 6.0 credits (includes ethics). Jackson, MS, MC School of Law. Contact 601-925-7107, Tammy Upton.

24-25 UM CLE "Mississippi Law Update." 12.0 credits (includes ethics). Natchez, MS, Dunleith Plantation. Contact 662-915-9282.

## MAY

1 MS Bar "CLE on the Road." 6.0 credits (includes ethics). Tupelo, MS. Contact 601-353-1703, Kellie Freeman.

1 MC School of Law "17<sup>th</sup> Annual Guardian Ad Litem Training." 6.0 credits (includes ethics). Jackson, MS, MC School of Law. Contact 601-925-7107, Tammy Upton.

8 MS Bar "Hot Tips." 6.0 credits (includes ethics). Jackson, MS. Contact 601-355-9226, Rene Garner.

11-15 Children's Advocacy Centers of Mississippi "Child First MS Forensic Interview & Court Preparation." 18.0 credits. Jackson, MS. Contact 601-940-6183.

15 MC School of Law "Social Security Disability CLE." 6.0 credits (includes ethics). Jackson, MS, MC School of Law. Contact 601-925-7107, Tammy Upton.

## JUNE

4 NBI "Social Security Disability Bootcamp." 6.7 credits (includes ethics). Tupelo, MS. Contact 715-835-825.

5 MC School of Law "Youth Court Parental Representation." 6.0 credits (includes ethics). Jackson, MS, MC School of Law. Contact 601-925-7107, Tammy Upton.

12 MC School of Law "Criminal Law CLE." 6.0 credits (includes ethics). Jackson, MS, MC School of Law. Contact 601-925-7107, Tammy Upton.

26 MC School of Law "Litigating the Commercial Trucking Case." 6.0 credits (includes ethics). Jackson, MS, MC School of Law. Contact 601-925-7107, Tammy Upton.

## JULY

6-8 MS Bar "2015 Summer School for Lawyers." 12.0 credits (includes ethics). Sandestin, Florida, Bayside-Linkside Conference Room. Contact 601-353-1703, Kellie Freeman.

23 MC School of Law "Annual CLE Marathon." 6.0 credits (includes ethics). Jackson, MS, MC School of Law. Contact 601-925-7107, Tammy Upton.

24 MC School of Law "Annual CLE Marathon." 6.0 credits (includes ethics). Jackson, MS, MC School of Law. Contact 601-925-7107, Tammy Upton.

28 Your DUI Pro "Winning DUI Cases." 6.0 credits (includes ethics). Tupelo, MS. Contact 208-340-2933.

29 Your DUI Pro "Winning DUI Cases." 6.0 credits (includes ethics). Meridian, MS. Contact 208-340-2933.

30 Your DUI Pro "Winning DUI Cases." 6.0 credits (includes ethics). Gulfport, MS. Contact 208-340-2933.

31 MS Center for Legal Services "MCLS' 32nd Annual CLE Seminar." 6.0 credits (includes ethics). Jackie Dole Sherrill Community Center, Hattiesburg, MS. Contact 601-545-2950, Virginia Hales Brown.

31 Your DUI Pro "Winning DUI Cases." 6.0 credits (includes ethics). Jackson, MS. Contact 208-340-2933.



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## IN MEMORIAM

### Sam H. Allen, III

Sam H. Allen, III, 69, of Knoxville, TN, died January 2, 2015. A graduate of the University of Mississippi School of Law, he was admitted to practice in 1973. Allen served as a special agent of the Federal Bureau of Investigation for 28 years. He retired from the FBI in 2002. During the summers of 1967 - 1969, he served as a Park Ranger on the Natchez Trace. In 1969, he voluntarily enlisted in the United States Army, completing the Infantry Officer Candidate Course at Fort Benning, Georgia and achieving the rank of 1st Lieutenant. He served in Korea and received the Army Commendation Medal for meritorious performance of duty.

### Fred Alvin Anderson, III

Fred Alvin Anderson, III, 72, of Gloster, died April 26, 2014. A graduate of University of Mississippi School of Law, he was admitted to practice in 1966. He was an attorney for the Amite County Board of Education, attorney for the town of Gloster and 14 years as Gloster alderman. He served as a board member of Deposit Guaranty National Bank in Jackson, and Mississippi Chemical Corporation in Yazoo City. He sat on the board of the Amite County Co- Op and served as trustee for Field Memorial Community Hospital for over 20 years. He was an appointed representative to the Mississippi Forestry Commission.

### Edward L. Atkinson

Edward L. Atkinson, 83, of Yantis, TX, died October 14, 2014. A graduate of the University of Mississippi School of Law, he was admitted to practice in 1956. He also graduated from the Graduate Law School of Southern Methodist University where he received a master's degree in Oil and Gas Law. He practiced law in Texas approximately 45 years. He was a partner in the Perryton firm of Lemon, Close, Atkinson and Shearer for 27 years. After retiring from the legal practice in 1995, he raised Angus cattle on pasture land in Wood County, TX.

### Joe M. Buchanan

Joe M. Buchanan, 82, of Indianola, died February 1, 2015. A graduate of Mississippi College School of Law, he was admitted to practice in 1966. Buchanan practiced civil and criminal defense law from 1966 until retirement in 2008. Buchanan was involved in various social and community activities, including the Indianola Little League Baseball Commissioner, Cub Scout Pack Leader, Golden Glove Boxing Judge and past member of Lions Club.

### O. Winston Cameron

O. Winston Cameron, 92, of Winchester, VA, died January 12, 2015. A graduate of the University of Mississippi School of Law, he was admitted to practice in 1947. Cameron joined the Army Air Force in 1942. He served with the 20th Photo Intelligence

Detachment of the 9th Air Force in the ETO, landing in France on D-Day +16 and accumulating several battle ribbons before V E Day. He was awaiting orders for the Pacific Theatre when the war ended. He began his law practice in Meridian in 1948 with his father's firm where he practiced law for 5 decades. He sang in the choir at St. Paul's Episcopal Church for many years and also served as the Cantor at The Temple Beth Israel in Meridian. He was a Cub Scout and Boy Scout leader and was awarded the Silver Beaver. He served in many civic capacities including President of the Kiwanis Club, President of the Symphony League, President of the Lauderdale County Bar Association, attorney for the Board of Merchants and Farmer's Bank, and was a founding board member at Lamar School.

### Robert Franklin Cooper, Jr.

Robert Franklin Cooper, Jr., 101, of Memphis, TN, died January 12, 2015. A graduate of the University of Louisville School of Law, he was admitted to practice in 1946. Cooper was a member of the Hinds County Bar Association, American Bar Association, Federal, and United States Supreme Court and was named in the first edition of Who's Who in American Law. He was recognized as a 50 Year Member of the Bar. Cooper joined the Federal Bureau of Investigation as a Special Agent and retired from the Bureau in 1967. He was assigned to its offices in Pittsburg, Detroit, Oklahoma City, Boston, and Washington D.C. where he served under J. Edgar Hoover. He then served in New Orleans, and in 1957 was assigned to the Jackson, MS office. Upon retirement from the FBI he joined First National Bank, (now Trustmark) in Jackson. While in New Orleans he served the Prytania Street Presbyterian Church as Chairman of its Board of Deacons and later as a Ruling Elder. After moving to Jackson, he joined First Presbyterian Church and again served in both of those capacities. Cooper had served as president of the FBI's Society of Former Agents, Mississippi Chapter as well as the North Jackson Kiwanis Club. He was a member of the MS Law Enforcement Officers Association and its Estate Planning Council. He was a long time member of the Jackson Chamber of Commerce, Capital Club and a charter member of the River Hills Club.

### Lawrence C. Corban, Jr.

Lawrence C. Corban, Jr., 85, of Biloxi, died August 04, 2014. A graduate of the University of Mississippi School of Law, he was admitted to practice in 1953. He served in the U.S. Army during the Korean Conflict, where he was stationed in Germany. He was a past President of the Harrison County Bar Association, and a Fellow of the Mississippi Bar Foundation. By appointment of the Mississippi Supreme Court, Corban served 2 terms on the complaint Tribunal. He also served as a member of the Bi-racial Committee for the Biloxi School District, by appointment of the United States District Court. He was a member of First United Methodist Church, Biloxi, which he served as a Sunday School

*Continued on next page*

Teacher, Lay Leader, and through several positions on the Administrative Board. He served as Chairman of Administrative Board for many years. Corban was a 50-year member and Past President of the Biloxi Rotary Club. He was recognized as a Paul Harris Fellow. He served as President of the Biloxi Chamber of Commerce, and later was a charter member of the separate Biloxi Bay Chamber of Commerce. Corban was a Thirty-Third Degree Mason, having membership in the Gulfport Scottish Rite Bodies, Biloxi York Rite Bodies, and Joppa Shrine Temple, and was a Past Master of Magnolia Lodge No. 120, F.&A.M., Biloxi. He was also a member of the American Legion, and serving on the Biloxi City Library Board, the Board of Directors of Howard Memorial Hospital, the Biloxi Salvation Army Advisory Board, the Board of Directors of the Biloxi Chapter of the American Red Cross, the Board of Directors of the Moore Community House, and as President of the Biloxi Jaycees.

### Richard M. Edmonson, Jr.

Richard M. Edmonson, Jr., 51, of Madison, died January 15, 2015. A graduate of the University of Mississippi School of Law, he was admitted to practice in 1988. Edmonson had practiced law at Markow Walker for 24 years where he was a partner. He served as president of the Madison County Bar in 2011. He was a member of the Jackson Metro Cyclist & Tri-County Mountain Bike Association, the Riverside Hunting Club and coached soccer. He attended Madison United Methodist Church where he was a member of the New Covenant Sunday School Class and had been a former member of Broadmeadow Methodist Church.

### E. Allen Gardner

E. Allen Gardner, 84, of Memphis, TN, died October 17, 2014. A graduate of the University of Mississippi School of Law, he was admitted to practice in 1958. He joined the Air Force and served in the Korean War. He represented Webster County in the MS House of Representatives before moving to Memphis where he practiced law for over 50 years. Allen was a member of the Memphis Jaycees, the Lion's Club, and the Rotary.

### Elbert Earl Haley, Jr.

Elbert Earl Haley, Jr., 62, of Brandon, died January 29, 2015. A graduate of Mississippi College School of Law, he was admitted to practice in 1979. He was a member of the Rankin County Bar Association. He was a writer and member of Poets Anonymous. He served in the U. S. Navy.

### Ralph L. Holland

Ralph L. Holland, 86, of Tupelo, died December 5, 2014. A graduate of Mississippi College School of Law, he was admitted to practice in 1949. He served on active duty in the US Air Force Reserves during the Korean War. Holland practiced law for more than 55 years. In his early career, he served as Assistant U.S.

District Attorney in Oxford from 1955-56. He moved to Tupelo to practice with Sam E. Lumpkin and later James Hugh Ray, and spent the rest of his career as a member of the firm known previously as Holland, Ray, Upchurch, and Hillen, P.A.

### Ernest E. "Wyn" Howard, III

Ernest E. "Wyn" Howard, III, 71, of Metairie, LA, died March 26, 2014. A graduate of the University of Mississippi Law School, he was admitted to practice in 1968. He worked several years in Dallas then moved his family to New Orleans. Howard served throughout the 1970's and 1980's in a variety of executive capacities with McMoRan and its successor company, Freeport-McMoRan Inc. Howard also acted as CFO, Chief Exec VP and a director of Freeport-McMoRan Copper & Gold Inc. In the 1990's he was President, CEO and a director of FM Properties Inc.

### Larry L. Johnson

Larry L. Johnson, 76, of Jackson, died October 14, 2014. A graduate of the University of Mississippi School of Law, he was admitted to practice in 1962. He was a residential real estate developer, founder of The Landmark Companies, and oil and gas investor.

### Donice V. Knight

Donice V. Knight, 80, of Laurel, died January 17, 2015. A graduate of Mississippi College School of Law, he was admitted to practice in 1974. He served in the United States Army as an Army Surveyor. He served the people of Jones County as Circuit Clerk and Chancery Clerk for 16 years. After his terms in office, he was Assistant Director to the Mississippi Highway Department Commissioner. He later practiced Law at Abernathy, Strickland & Knight Attorney at Law. Knight was a Master Mason of the Masonic Lodge No. 414 in Laurel and a member of the Hamasa Shrine of Meridian. Knight was a Life-Time Member of the American Legion Post No. 11 where he served as an Executive Officer. He was President of the Mississippi Circuit Clerks Association and co-author of the Mississippi Handbook for both Circuit and Chancery Clerks. He was a member of The Kiwanis Club of Laurel, the United States Civil Defense Council, and a founder of Dixie Golf Club.

### Roy N. Lee

Roy N. Lee, 99, of Forest, died January 21, 2015. A graduate of the Cumberland School of Law, he was admitted to practice in 1939. Lee served 16 years on the Mississippi Supreme Court and retired as chief justice in 1993. Governor Cliff Finch appointed Lee to fill a vacancy on the Supreme Court in March 1976. He was elected to a full term later that year and won another term in 1984. He became chief justice in 1987. The state Supreme Court says Lee and his father, Percy Mercer Lee, are the only father and son who have both served as chief justice.



## IN MEMORIAM

### E. Michael Marks

E. Michael Marks, 79, of Jackson, died September 29, 2014. A graduate of Mississippi College School of Law, he was admitted to practice in 1964. He practiced for over 50 years. Marks was a member and usher for St. Peter's Cathedral in Jackson.

### Ray Hillman Montgomery

Judge Ray Hillman Montgomery, 79, of Canton, died December 14, 2014. A graduate of Mississippi College School of Law, he was admitted to practice in 1970. He was a longtime volunteer and supporter of the March of Dimes and served on the national board of Easter Seals for eight years. He was a Mason, Wahabi Shriner, and lifelong member of Canton First Baptist Church. Montgomery was elected Tax Assessor of Madison County and served 8 years in that position. He was a practicing attorney in Canton, elected to Mississippi State Senate serving 2 terms, and elected and served as County Judge. He was elected and served as Chancery Judge until his retirement. In retirement, he was appointed by the Supreme Court of Mississippi as a special Chancellor and continued to hear special cases until recently.

### E. Don Moore

E. Don Moore, 91, of Ridgeland, died December 28, 2014. A graduate of Mississippi College School of Law, he was admitted to practice in 1948. He served as a radio operator with the U.S. Army Air Corps in Burma during World War II, flying on C-47 cargo planes in and out of Japanese-held jungles and over the "hump" to China. He was awarded the Distinguished Flying Cross with two oak leaf clusters and the Air Medal with three oak leaf clusters. In 1978, after 26 years with Zurich-American Insurance Companies, he retired as Corporate Senior Vice President and embarked on a second career by forming and serving as Chairman and CEO of Mississippi American Life Insurance Company (MALICO). Moore was a charter member of Broadmoor Baptist Church. Moore served as church attorney and trustee in Broadmoor's early years, as a Deacon, and Sunday School teacher for more than fifty years. He was a Little League manager, league commissioner and President of the Servian Club.

### J. Harbour Mounger

J. Harbour Mounger, 61, of Jackson, MS, died October 26, 2014. A graduate of the University of Mississippi School of Law, he was admitted to practice in 1980. He first worked as a Certified Public Accountant for Deloitte-Touche in Memphis and later, after earning his law degree, worked in private practice.

### George L. Phillips

George L. Phillips, 65, of Hattiesburg, died January 26, 2015. A graduate of the University of Mississippi School of Law, he was admitted to practice in 1973. Former Gov. Haley appointed

Phillips director of the state Bureau of Narcotics and later as Commissioner of Public Safety. Phillips served as U.S. Attorney for the Southern District of Mississippi from 1980 to 1994. Phillips served on the Executive Committee of the American Quarter Horse Association the past several years. Phillips would have become the association's president in March. Phillips was originally a county prosecuting attorney in Hattiesburg before being appointed in 1980 as U.S. Attorney, then the youngest in the nation. During his tenure, he helped develop the Law Enforcement Coordinating Committee, a program that became mandated for each U.S. Attorney's Office. When he stepped down 14 years later, he was the most senior U.S. Attorney in the nation. After that time, he served as special counsel to U.S. Sen. Thad Cochran for six years. In 2008, he was appointed the Mississippi State Director for USDA Rural Development, his last position of public office.

### Suzanne Newton Saunders

Suzanne Newton Saunders, 67, of Jackson, died January 15, 2015. A graduate of Mississippi College School of Law, she was admitted to practice in 1976. Saunders practiced for several decades in both federal and state courts as a trial lawyer in a large firm and then her own smaller firms. During her legal career she served on various committees of the Bar and the American Bar Association. This included her chairmanship of the Mississippi Bar disaster legal assistance committee during the 1979 Easter flood of the Pearl River. A former member of Covenant Presbyterian Church in Jackson and First Presbyterian Church in Canton, Saunders was a member of Fondren Presbyterian Church.

### David Rowe Sparks

David Rowe Sparks, 68, of Tupelo, died November 29, 2014. A graduate of the University of Mississippi School of Law, he was admitted to practice in 1972. Sparks served his country in the U.S. Army and Army Reserves from 1968-1974. Sparks was a practicing attorney in General Law in Tupelo for over 42 years until his death. He was a former president of the Lee County Bar Association and a recipient of the Mississippi Bar's Lawyer Citizenship Award in 2013. Sparks served for many years on the Medical Ethics Committee of the North Mississippi Medical Center. He was District Counsel of the Town Creek Master Water Management District in Lee, Pontotoc, Prentiss and Union Counties. Sparks was one of the founding leaders in Faith Haven serving on its first Board and later chairing the Board. He was active in the Gardner-Simmons Home for Girls and was a former board president of Tupelo Community Theatre. Very active in the Episcopal Diocese of Mississippi where he served on the Executive Committee, the Finance Committee, the Bishop Search Committee and on the Board of Camp Bratton Green, Sparks was faithful to the All Saints Parish in Tupelo where he

*Continued on next page*

served multiple terms as senior warden and vestryman as well as verger, Diocesan lay reader and on the Priest Search Committee.

### John C. Underwood, Jr.

John C. Underwood, Jr., 66, of Jackson, died October 13, 2014. A graduate of the University of Mississippi School of Law, he was admitted to practice in 1972. He served as a Judge Advocate General and in the National Guard. Underwood clerked for the Mississippi Supreme Court Presiding Justice Henry Lee Rodgers and served as special assistant to the Attorney General A.F. Summer, enjoying an extensive practice before the state supreme court. Underwood entered private practice in 1977 and founded Underwood Law Firm in 1981. Underwood wrote and edited several articles, chapters and books on Mississippi foreclosure law. He frequently spoke at bar association events, legal seminars and law schools. A founding member of St. Stephen's Reformed Episcopal Church, Underwood was currently serving in his second term as senior warden.

### Michael J. Vallette

Michael J. Vallette, 60, of Ocean Springs, died February 6, 2015. A graduate of Mississippi College School of Law, he was admitted to practice in 1980. He was a longtime member of the Old Biloxi Marching Club and various Mardi Gras Associations over the years. Vallette was a member of the Mosaic Church in Ocean Springs.

### Robert Hamilton Weaver

Robert Hamilton Weaver, 83, of Jackson, died February 3, 2015. A graduate of the Vanderbilt University Law School, he was admitted to practice in 1959. In 1954, Weaver was commissioned as an ensign in the U.S. Navy. He served for three years aboard both the USS Monterey and the USS New Jersey. Weaver joined the Jackson law firm of Watkins, Pyle, Edwards and Ludlam. Weaver was a member of the Board of the Peoples Bank and Trust (now Renasant Bank) for many years. He served on the Investment and Executive Committees and was Chair of the Trust Committee until his retirement at age 72. He was an active member of the Hinds County Forestry Association and the Mississippi Forestry Association, where he served on the Board of Directors and chaired the Environmental Committee. He was a member of both the River Hills Club and Jackson Yacht Club. He was a longtime member of Galloway Memorial United Methodist Church.

### Larry Whitmal Wood

Larry Whitmal Wood, 73, of Lena, died November 1, 2014. A graduate of Mississippi College School of Law, he was admitted to practice in 1968. Wood was a member of the MS Association of Petroleum Land Men.

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# LAWYERS HELPING LAWYERS

## It's Official – Your LJAP Stands Alone

On January 15, 2015, the Supreme Court of Mississippi issued an Order establishing The Mississippi Bar Lawyers and Judges Assistance Program as an entity separate from the Court's disciplinary agents. The Court also issued Rules governing the operations of the program. Assistance through the program under these Rules remains confidential and voluntary. The Rules may be viewed at <http://courts.ms.gov/rules/msrules.html>

The Supreme Court's Order marks a giant step forward for LJAP. The program staff and volunteers are extremely excited about the new possibilities ahead. Recent years have seen marked increases in apparent recognition of program as a viable resource and confidence in its services and support.

During the 2013-2014 Bar Fiscal Year, Your LJAP responded to 123 new inquiries for assistance. This represents a 36% increase over the year before. The great majority of these inquiries are “self-

referrals.” While we call it a “self-referral” it is often at the urging of the attorney's colleagues and loved ones. We believe this is due in large part to the positive work of Your LJAP seen in the lawyer community and the confidential nature of our services.

Since its inception as an all-volunteer group to its current status as a full time professionally staffed “broad-brush” program, the program's chief objective has always been to provide confidential assistance. Before last week's Order, however, this objective was often met with significant suspicion, conscious avoidance, or active resistance due to LJAP's designation as a disciplinary entity. It was frequently very difficult to convince struggling lawyers or those concerned about them that LJAP's attempts to assist were simply an attempt to assist and not a disciplinary issue. That impediment, at its minimum, wasted valuable time, time which might have afforded a lawyer a

quicker movement into recovery and health. LJAP staff and volunteers have become aware after the fact that impediment at its extreme, on more than one occasion, cost an attorney a career, his health, or even his life, because he or those concerned about him believed to reach out to LJAP would jeopardize his license. While stories of attorneys arriving at interventions with rule books and representation can be amusing years later, assuming the attorney survived and is now in recovery, we are haunted by stories of opportunities tragically lost.

If you have any question about LJAP's new status, or if you or someone you know may be in need of assistance, please contact us. ■

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**Guidelines  
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**Judicial Excellence Award**

The Judicial Excellence Award recognizes a judge who has exceeded the fall of the judicial office. The recipient should be an exceptional county, circuit, chancery or state appellate judge who is an example of judicial excellence, a leader in advancing the quality and efficiency of justice and a person of high ideals, character and integrity. To be eligible, a judge must be serving as a county, circuit, chancery or appellate judge. Judges on senior status are eligible if they continue to be active on the bench.

Nominations shall be reviewed by the Executive Committee of The Mississippi Bar. The Executive Committee shall make its recommendations to the Board of Commissioners at its Spring Board Meeting. Upon approval of the Board, award recipients shall be notified by the Executive Director of the Bar. All awards shall be presented at the next Annual Meeting of the Bar following their selection by the Board of Commissioners.

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