

The Mississippi

Business Law Reporter

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Section Chair's Corner

By William E. "Bill" McLeod, Esq.

Welcome to the Spring 2011 issue of the Business Law Section Newsletter. Our Newsletter Editor, Stan Smith, as well as our Section Officers and Executive Committee Members have been busy the past several months on various activities to improve our section and the access to information regarding our section and its members.

The Business Law Section Officers and Executive Committee Members met recently to discuss the status of the following activities which are goals for the Business

Law Section during this fiscal year:

1. René Garner is checking with the Board of Governors as to the Model Bylaws for The Mississippi Bar for proposed Amendments to our Section's Bylaws.

2. Ken Farmer is in the process of updating the Mississippi Business Organizations Laws Annotated Reference Book. This reference book will be stored on our Section's Website, and we will offer a free spiral bound hard copy version of the handbook to the Business Law Section Members. Our expected publication date is April/May of 2011.

3. The Business Law Section plans to award scholarships in the amount of \$750 per scholarship to a deserving law student at each of the Mississippi College School of Law and the University of Mississippi School of Law. The scholarships will be awarded during the Spring 2011 Semester.

4. Our Section plans to sponsor a joint CLE Seminar with the Mississippi Secretary of State's office regarding the new LLC Act and other legislative updates. The CLE is tentatively scheduled for 3 hours of CLE credit to be held in April, 2011 at the Mississippi Bar Center. Our Section also plans on

sponsoring a Joint CLE Seminar with the Corporate Counsel Section in July 2011.

5. Our Section plans to co-sponsor the annual CPA Social in May 2011.

6. Cheryn Baker, one of our Executive Committee members, created a Facebook page for our section which currently has 21 members. Cheryn Baker is the Facebook coordinator as well as the Listserv Moderator for our Section.

7. Our next Annual Business Law Section Meeting is scheduled to be held at the Annual Meeting of The Mississippi Bar during the week of July 13-16, 2011. Our Section, together with the Health Law Section, plans to co-sponsor a CLE Seminar at the Annual Meeting. If you have any suggestions for speakers or topics of interest, please contact me or one of our Section Officers or Executive Committee Members.

Many thanks to our Section Officers and Executive Committee Members for your efforts and contributions on behalf of the Business Law Section. Special thanks to Stan Smith for his significant efforts and contributions regarding the publication of this Newsletter, to Ken Farmer with his update of the Mississippi Business Organization Laws Annotated Reference Book, and to Cheryn Baker for our Facebook page.

The deadline for nominees for new Section Officers and Executive Committee Member is approaching. If you have an interest in taking an active role in our Section, please contact me. Also, if you have any questions, or suggestions for improvement for our section please contact me or any of your section officers with your ideas and comments for the section.

I look forward to seeing you at our upcoming CLE programs, our Social, and the Annual Meeting.

Mississippi Secretary of State's 2011 Legislative Proposals: Tax Incentives, Streamlining Real Property Filings, and Protecting Trade Secrets

By Ryan Pratt, Esq., Assistant Secretary of State, Policy and Research Division

Introduction. The Mississippi Secretary of State's Office proposed its legislative agenda to the 2011 General Session of the Mississippi Legislature with three primary goals for the State: create jobs, promote technological innovation, and protect businesses and consumers. Among the proposals are tax credit bills which incentivize job creation and technological advancement, bills to protect trade secrets, and numerous bills to reform and streamline our State's business and real property statutes. These proposals seek to ensure our State is poised for economic growth and development. While this article provides an overview of certain bills, please visit the Policy and Research tab at www.sos.ms.gov for a complete list of the Secretary of State's legislative proposals.

Tax Incentives. *Entertainment District Jobs Tax Credit.* The Mississippi Entertainment District Act authorizes governing boards of local governments to create entertainment districts.¹ Following approval of the entertainment district by the Mississippi Department of Revenue, entertainment-related businesses which construct or renovate entertainment facilities (e.g., theaters, golf courses, museums, zoos) within a designated entertainment district may take an accelerated depreciation for those facilities.²

Mississippi House Bill 1460 proposes to include entertainment districts (and the jobs created therein) in MISS. CODE ANN. § 57-73-1 *et seq.*, known as the Jobs Tax Credit Act.³ This provides an additional incentive for the creation of businesses and new jobs in entertainment districts. House Bill 1460 would make it significantly easier

for businesses in entertainment districts to earn a jobs tax credit for new, full-time jobs they create⁴, encouraging business owners to further develop entertainment facilities.

To determine eligibility for the jobs tax credit established by the Jobs Tax Credit Act, the bill would authorize aggregating all jobs created by entertainment-related businesses in a particular entertainment district.⁵ If the aggregate number of jobs created by those businesses in a given year matches or exceeds the required number for the particular county, the jobs tax credit would be available to every entertainment-related business in the entertainment district.

Digital Development Incentive Bill. Mississippi House Bill 1522 promotes technological growth and investment in Mississippi by incentivizing the development of high-tech, interactive software applications. House Bill 1522 aims to encourage investment in the development of cutting-edge software in Mississippi and to attract innovative software developers to the State. This bill incentivizes the development of interactive software by providing developers a tax credit equal to seven percent (7%) of the funds expended in Mississippi for production costs of a digital interactive application.⁶ Production costs must be expended in Mississippi and may include payroll, costs related to developing and testing the software, and the rental of equipment. Overhead costs, however, are excluded from the credit. Digital interactive applications include the following: (1) educational software or interactive training; (2) military simulation software developed for the

armed forces; (3) developers who create applications for wireless devices such as mobile phones; and (4) technology used to stream video content over the Internet.⁷ The tax credit will not be available for non-interactive applications (such as word processing software), web sites, or products regulated under the Mississippi Gaming Control Act.⁸

College Private Research Incentive Bill. Also promoting technology and innovation, Mississippi House Bill 1464 encourages private investment in Mississippi's colleges and junior colleges by offering a tax credit to companies who enter into written agreements for technology-based research and development. House Bill 1464 provides private companies with a tax credit equal to seven percent (7%) of costs incurred while working with Mississippi educational institutions to perform technology-based research and development.⁹ Eligible costs include payments made to Mississippi institutions to conduct research, as well as any costs needed to secure necessary patent and/or copyright licenses. This bill is beneficial for both educational institutions and businesses. Businesses which enter into written research agreements with colleges in the State may expand their research and development capabilities without significant capital expense. Private investment will reduce the financial strain on colleges and the State and monetize technology in the colleges.

Streamlined Filing and Retrieving Real Property Instruments. While creating new incentives is vital to Mississippi's economic growth, streamlining existing procedures promotes sustained and continuous business activity in the State. With an increasingly regional, national, and even global economy, procedural uniformity is paramount for efficient commerce.

Consequently, in 2009, the Mississippi Legislature created the Task Force to Study Real Property Recordings (the "Task Force").¹⁰ Chaired by the Secretary of State, the Task Force is

comprised of chancery clerks, tax assessors, tax collectors, legislators, computer experts, and individuals in the private sector who regularly work with real property records. The Task Force reviewed the State's current practices, as well as best practices of other states, regarding real property instruments. Specifically, the Task Force focused on formatting standards, indexing and retrieving methods, filing by electronic means, and internet access to filed documents.

Upon conclusion of the study, the Task Force proposed adoption of Mississippi House Bill 599 and Mississippi House Bill 600. House Bill 600 would increase the font size of legal descriptions and the names of the parties from eight (8) point to twelve (12) point in size for any document presented to the chancery clerk for filing.¹¹ Also, the bill would require certain contact information of all parties named in a real property instrument to be included on the first page of the instrument - including the current mailing address, business telephone number, and the current residential telephone number of any grantors, grantees, borrowers, beneficiaries, trustees, or any other party named in the instrument.¹² Identifying information on real property instruments provides chancery clerks the necessary information to provide lien holders with a timely notice of default on real property taxes in accordance with State law.

Furthermore, the Task Force proposed adoption of Mississippi House Bill 599 which would enact the Uniform Real Property Electronic Recording Act ("URPERA"). This proposal provides a user-friendly framework which chancery clerks can utilize electronic filing of real property instruments. URPERA specifies electronic documents with electronic signatures satisfy the legal requirements of filing original, signed real property instruments.¹³ URPERA establishes uniform standards for the electronic filing and retrieval of real property instruments.¹⁴ URPERA authorizes electronic filing and retrieval of such documents, but does not mandate electronic filing.¹⁵ Moreover, URPERA affirms traditional paper

filings may be used along with electronic filings in counties which choose to accept electronic filings and are equipped to do so.¹⁶ Also, Mississippi House Bill 599 creates the Mississippi Electronic Recording Commission to adopt standards to implement URPERA.¹⁷ These standards will ensure chancery clerks have the technological capability required for electronic recording and retrieval, as well as maintain practices consistent with other jurisdictions which adopted URPERA in substantial form.

Protecting Trade Secrets. While technology streamlines filing procedures in chancery courts, Mississippi faces increased litigation regarding disputes over technological innovation and intellectual property. Specifically, businesses and entrepreneurs seek protection of their trade secrets under the Trade Secrets Act, codified at MISS. CODE ANN. §§ 75-26-1, *et seq.*¹⁸ Mississippi Senate Bill 2229 provides additional support to businesses attempting to protect trade secrets and provides guidance to courts adjudicating disputes involving trade secrets.

Clarifying the definitions of “trade secret” and “improper means” provides additional guidance to businesses seeking to protect trade secrets, and offers courts support when determining misappropriation of trade secrets. Senate Bill 2229 would amend MISS. CODE ANN. § 75-26-3(d), by expanding the term “trade secret.” The definition would include examples, including formulas, patterns, compilations, programs, computer software, algorithms, computer programming instructions or code, prototypes, compositions of matter, devices, methods, techniques, designs, improvements, procedures, recipes, models, drawings, processes, financial plans, product plans, lists of actual or potential customers or suppliers, or technical and financial data.¹⁹

Furthermore, Senate Bill 2229 would amend MISS. CODE ANN. § 75-26-3(a), which defines the term “improper means,” to add several examples of the types of activities constituting unlawful

misappropriation of a trade secret. Some of these activities include: violating a duty to maintain secrecy arising out of a fiduciary, employment, or other confidential relationship; espionage through electronic or other means; and, breach or inducement of a breach of a duty imposed by common law, statute, contract, license, protective order, or other court or administrative order.²⁰

Good faith reverse engineering is the method by which someone may lawfully deduce trade secret information by disassembling the formulae or processes of others. In *Marshall v. Gipson Steel, Inc.*, the Mississippi Supreme Court recognized reverse engineering as a proper means to discern a trade secret.²¹ Accordingly, Senate Bill 2229 expounds the definition of “improper means,” the bill specifically excludes from unlawful misappropriation the process of reverse engineering.²²

In addition to clarifying definitions, Mississippi Senate Bill 2229 provides additional safeguards to ensure trade secret information is protected during litigation. The “substantial need” test aims to prevent litigants from abusing discovery to access trade secrets. When a party moves to discover information which may disclose a trade secret, the requested information will be considered discoverable only when the party seeking discovery: (1) sets forth the allegations with particularity; (2) the information sought is relevant to the allegations; (3) the information sought is such that the proponent of discovery will be substantially prejudiced if not permitted access to the information; (4) a good-faith basis exists for the evidence emanating from the trade secret information will be admissible at trial.²³

Conclusion. Fostering economic growth requires pro-active policies to develop a business-friendly environment. First, tax incentives help attract new business and encourage expansion of existing businesses. Second, utilizing electronic capabilities to streamline filing procedures cultivates efficient internal operations and opens

new avenues for business and governmental collaboration. Last, protecting vital trade secret

information guards businesses and consumers from abusive overreaching.

¹ MISS. CODE ANN. § 17-29-1 to -9. (2009).

² *Id.* at § 17-29-7.

³ H.B. 1460, Leg., Reg. Sess. (Miss. 2011).

⁴ The jobs tax credit is equal to 2.5%, 5%, or 10% (depending on the classification of the county in which the job is created as Tier I, II, or III) of payroll for any new jobs created. *See* MISS. CODE ANN. § 57-73-21(1) (2009).

⁵ Miss. H.B. 1460 at §1 (amending MISS. CODE ANN. § 57-73-21 (2009)).

⁶ H.B. 1522, Leg., Reg. Sess. (Miss. 2011).

⁷ *Id.* at § 1.

⁸ *Id.*

⁹ H.B. 1464, Leg., Reg. Sess. (Miss. 2011) at § 2.

¹⁰ H.B. 489, Leg., Reg. Sess. (Miss. 2009) (enrolled).

¹¹ H.B. 600, Leg., Reg. Sess. (Miss. 2011) at § 2(b)).

¹² *Id.* at § 1 (amending MISS. CODE ANN. § 89-5-24(2) (2009)) and § 2 (amending MISS. CODE ANN. § 27-3-51(2)(b) (2009)).

¹³ H.B. 599, Leg., Reg. Sess. (Miss. 2011) at § 3.

¹⁴ *Id.* at § 4.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at § 5.

¹⁸ MISS. CODE ANN. § 75-26-1 to -19 (2009).

¹⁹ S.B. 2229, Leg., Gen. Sess. (Miss. 2011) at § 1 (amending MISS. CODE ANN. § 75-26-3(d) (2009)).

²⁰ *Id.* at § 1 (amending MISS. CODE ANN. § 75-26-3(a)).

²¹ *Marshall v. Gipson Steel, Inc.*, 806 So.2d 266, 272 (Miss. 2002).

²² Miss. S.B. 2229 at § 1 (amending MISS. CODE ANN. § 75-26-3(a)).

²³ *Id.* at §4 (amending MISS. CODE ANN. § 75-26-11 (2009))

A Compliance Primer for Starting Nonprofits

By Cory T. Wilson, Esq.

There are thousands of nonprofit organizations on file with the Mississippi Secretary of State's Office, and thousands more file organizational papers with the State every year. The growth of nonprofits in Mississippi mirrors the growth of the sector nationally. Chances are, if you practice business law for any period of time, you will come across a nonprofit organization that will need help forming, or . . . trying to get back on track after failing to follow the law either at formation, or afterwards.

Generally, nonprofits are formed the same way, using the same forms, as other Mississippi corporations. There are a couple requirements particular to nonprofits, the most important of which is that nonprofits must state their purpose before articles of incorporation will be accepted by the Secretary of State. In recent months, Secretary of State Delbert Hosemann has paid particularly close attention to this requirement. Boilerplate language that may have passed before will likely be insufficient. Make sure your articles state as precisely as possible what the organization will be doing that qualifies it as a nonprofit under Mississippi law.

Nonprofits are corporations, too! Nonprofits are required to have an organizational meeting after incorporation to complete the organization of the corporation. There is often a misconception that nonprofits may have fewer obligations and formalities than "for-profit" corporations. But they are just like other corporate entities: they should have directors, bylaws, minutes, and the other trappings of the corporate form in order to be compliant. The organizational meeting must take place within two years of the date of incorporation, or the corporate charter is

void. Fiduciary duties, as well as keeping and maintaining records, are as important as they are with other corporations.

While every registered charity in Mississippi may be a nonprofit, not every nonprofit is a charity. Critically, forming a nonprofit with the Secretary of State does not permit the nonprofit to begin legally raising money. Another misconception is that once articles are filed, a charity is formed and ready to go. Charitable solicitations are governed by Mississippi's Charitable Solicitation Law, MISS. CODE ANN. § 79-11-501, *et seq.* Nonprofit incorporation filings are handled by one Secretary of State Division (Business Services), while charities registration and regulation is overseen by another Division (Securities & Charities). It is a two-stop process: before any funds are solicited, a nonprofit charity must be registered in both places and file two sets of forms, each for its specific purpose.

Finally, the Secretary of State's Office is not the Department of Revenue, or the IRS. Once you have formed a nonprofit and registered it as a charity, if it will raise funds, the organization still must gain tax exempt status. Many folks—including more than a few lawyers—will interchangeably refer to a corporation as a "nonprofit," a "charity," and a "501(c)(3)." But nothing filed with the Secretary of State confers on a nonprofit any tax exemption or any deductibility of donations. And, no state agency can confer federal 501(c)(3) tax-exempt status! To gain tax exemption, the corporation must register with the Mississippi Department of Revenue and apply for an exemption. It also must apply with the Internal

Revenue Service for an appropriate exemption under federal tax law.

These steps are critical if the nonprofit charity plans to solicit donations and allow those donations to be deductible, depending upon each donor's individual circumstances. Additionally,

following these proper steps will help ensure that the organization does not incur certain types of unintended tax liability. Finally, following each of these steps is key as well to avoiding fines for illegal solicitations, maintaining the corporate form, and remaining in compliance under Mississippi law.

The Mississippi Rules Of Professional Conduct And Social Networking With Clients And Potential Clients

By Adam Kilgore, Esq.

With the advent of social networking and its growing impact on our personal and professional lives, comes several questions about a lawyer's ethical responsibilities in dealing with clients and potential clients in the social networking arena. Do the advertising rules apply to social networking? Are there other rules of professional conduct we as lawyers must keep in mind when engaging in social networking? Does the use of social networking for law practice purposes constitute solicitation? How far can a lawyer go in commenting on a pending case or a case that is concluded?

While these questions cannot be answered fully, the Mississippi Rules of Professional Conduct (MRPC) do provide some guidance and place certain ethical responsibilities on lawyers that must be kept in mind while engaging in social networking, both from a business and personal standpoint.

Do the advertising rules apply to social networking?

The MRPC do not specifically address social networking and only make mention of "Internet Web pages viewed via a Web browser" in the section titled "Information About Legal Services," generally referred to as the "advertising rules" which are located in Rule 7.1-7.7, MRPC. Because web sites are considered "advertising," it is advisable that a lawyer review these rules when establishing a website or engaging in social networking.

Rule 7.2(a), MRPC, defines an advertisement as "an active quest for clients involving public or non-public communication and lists several examples of communication that constitute advertising including "computer-accessed

communication." While website content is not required for submission as part of the mandatory submission requirement set out in Rule 7.5, MRPC, lawyers must remember that such communication is still governed by the advertising rules.

Rule 7.1, MRPC, states the primary consideration for lawyers when it comes to advertising: "[a] lawyer shall not make or permit to be made a false, misleading, deceptive or unfair communication about the lawyer or the lawyer's services." Each lawyer should make sure that the information that they set forth in an advertisement, or in this instance, the information that they set forth in the social networking setting is not "false, misleading, deceptive or unfair."

Are there other rules of professional conduct lawyers must keep in mind when engaging in social networking?

Rule 7.4 (d), MRPC, states that "[a]ny factual statement contained in any advertisement or written communication or any information furnished to a prospective client"... shall not be "directly or inherently false or misleading; potentially false or misleading; fail to disclose material information necessary to prevent the information supplied from being actually or potentially false or misleading; be unsubstantiated in fact; or, be unfair or deceptive." Lawyers may also be required by The Mississippi Bar to provide proof to support a statement or claim made in a written communication. *See* Rule 7.5(e), MRPC.

Lawyers should also be cautious in holding themselves out as an expert in a particular field of law without the proper certification in support. Rule 7.6 (a), MRPC, only allows a lawyer to state that they are certified or designated in a field of law if

such certification is from an accredited American Bar Association entity.

Does the use of social networking for law practice purposes constitute solicitation? The answer to this question is very fact dependent. As indicated previously, there is not a Mississippi Rule of Professional Conduct that addresses social networking. However, the Rules do address what a lawyer can and cannot do from a solicitation of clients perspective. The MRPC prohibit a lawyer from soliciting employment in person, by telephone, or by email from a person “with whom the lawyer has no family, close personal or prior professional relationship when a significant motive of the lawyer’s doing so is the lawyer’s pecuniary gain.” *See* Rule 7.3(a), MRPC.

A lawyer may send a solicitation letter to a prospective client “known to be in need of legal services in a particular matter” even if the lawyer has no personal or prior professional relationship. The solicitation letter shall include the words “solicitation material” on the outside of the envelope or at the beginning and end of any recorded communication. *See* Rule 7.3(c), MRPC and Ethics Opinion 158: https://www.msbar.org/ethic_opinions.php?id=419

A lawyer may not initiate contact with any individual who has made known to the lawyer that he or she does not wish to be solicited. *See* Rule 7.3(b), MRPC.

A lawyer “shall not give anything of value to a person for recommending a lawyer’s services” except for the payment of reasonable costs of advertising or the usual charges associated with a lawyer referral service. *See* Rule 7.2(i), MRPC.

A lawyer may properly advertise for clients on television, radio or by mail or other media. *See* Rules 7.1, 7.2, 7.4 and 7.5, MRPC, and the Policies and Procedures for Submitting Lawyer Advertising: https://www.msbar.org/2_policies_procedures_lawyer_advertising.php

While it is debatable as to whether interacting in a social network setting could constitute solicitation, lawyers are advised to keep these rules and ethics opinions in mind to make sure that such interaction does not cross over into improper solicitation.

How far can a lawyer go in commenting on a pending case or a case that is concluded?

Lawyers should be wary of comments they make about their cases or their clients in the social networking setting. Lawyers should remember that online activity is not private and that you represent this profession. Comments about how you “got treated” in a certain court or how big a “jerk” the lawyer on the other side was at a deposition are unprofessional and could come back to haunt you.

You should also be cautious about comments you make regarding a client’s case to insure that you do not breach confidentiality. Rule 1.6(a), MRPC, states that “a lawyer shall not reveal information relating to the representation of a client...” Remember that all client information is confidential. While posting is not a good idea, if you feel you must, you should seek the client’s consent. Hypothetical or anonymous posts do not protect you from liability or discipline. Always consider what is in the client’s best interests.

Other questions to consider regarding social networking:**Should you “friend” other lawyers and opposing counsel?**

- Does this create a conflict of interest?
- Appearance of conspiracy?
- Public scrutiny?
- Professionalism

Should you “friend” Judges and law clerks?

- Does this create a conflict of interest?
- Appearance of impropriety on part of judge?
- Cause for appeal?
- Risk of Ex Parte Communication?
- Professionalism

Should you “friend” clients and potential clients?

- Disclosure of confidential information?
- Over-accessibility
- Blurring the line: client or friend?
- Professionalism

The Ten Most Important Changes to Revised Articles 3 and 4 of the Uniform Commercial Code

By W. Rodney Clement, Jr., Esq.

Part I of the following article appeared in Volume 1, Issue 3 of The Mississippi Business Law Reporter.

No area of the law is changing more rapidly than the law of payments. Recent new technologies include mobile payments by cell phone, prepaid debit cards, virtual currencies, digital precious metals currencies and electronic purses. The portions of the Uniform Commercial Code (“UCC”) that govern payment are Article 3 (Negotiable Instruments), Article 4 (Bank Deposits and Collections), and Article 4A (Funds Transfers). The National Conference of Commissioners of Uniform State Laws adopted amendments to these articles in 2002. The Mississippi legislature, in Senate Bill 2419, passed in the 2009-2010 legislative session and signed by the governor on April 13, 2010, adopted these amendments with a few Mississippi-specific twists. These changes became effective on July 1, 2010. This article summarizes the ten most important substantive changes made by Senate Bill 2419 to Articles 3, 4 and 4A (“2010 Amendments”).

Remotely created checks. The 2010 Amendments introduce the concept of remotely created checks (a/k/a pre-authorized drafts, demand drafts, telechecks) and change the traditional obligations of paying and depositary banks. New Section 75-3-103(16) defines a remotely created check as “a check that is not created by the paying bank and that does not bear a signature applied, or purported to be applied, by the person on whose account the check is drawn.” In other words, the customer authorizes the payee to draw a check on the customer’s account and does not sign the check. Instead of a signature, the check contains a statement that the customer authorized the check, or the check bears the customer’s printed or typed name. Once created, the item is sent through the

banking system in the same manner as a signed check: the check is deposited in a bank (“depository bank”) and presented for payment to the bank at which the customer has its account (“payor bank”). For example, a customer may authorize a monthly payment of a mortgage note or an insurance premium. Because the customer does not sign the check, the possibility for fraud is higher than for signed checks. The 2010 Amendments change the transfer and presentment warranties for remotely created checks. Under the common-law, the payor bank usually takes the risk of fraud and generally does not have the right to seek reimbursement from the depository bank. Under the 2010 Amendments, as modified by the Federal Reserve Board in Regulation CC, 12 CFR § 229.34, in the case of an unauthorized remotely created check, the depository bank warrants that a remotely created check is authorized by the customer. MISS. CODE ANN. §§ 75-3-416(a)(6), 75-3-417(a)(4), 75-4-207(a)(6), and 75-4-208(a)(4). The effect of this change is that if the customer claims that the remotely created check was not authorized, the payor bank will recredit the customer’s account and then seek reimbursement from the depository bank for breach of warranty. The reason for the reallocation of the liabilities is the belief that the depository bank is in a better position than the payor bank to determine whether a remotely created check is authorized or not. Comment 8 to the Section 3-416. Banks have some protection from the Federal Trade Commission (“FTC”)’s Telemarketing Sales Rule, which requires telemarketers to maintain records of a customer’s authorization to issue the remotely created check and to provide them to the customer’s bank on request. 16 CFR § 310.3(a)(3). One difference between the uniform version of Article 3 and the version adopted by the Mississippi legislature is that, rather than use the term “remotely created consumer item”, which applied

only to consumer checks, the Mississippi version uses the term “remotely created check”, which was the term used by the Federal Reserve in Regulation CC, and applies to consumer and non-consumer transactions.

Electronic media. The 2010 Amendments make many changes to reflect new technology. Article 1, which Senate Bill 2419 also amended, includes new definitions of basic terms such as “writing,” “signed” and “record,” and these terms are incorporated by reference into Articles 3, 4 and 4A. For example, “writing” is defined as including “printing, typewriting or any other intentional reduction to tangible form;” “signed” is defined as including “using any symbol executed or adopted with present intent to adopt or accept a writing”; and “record” is defined as “information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.” In most cases, the 2010 Amendments replace “writing” with “record.” Comment 9(a) to Section 9-102 gives examples of “records” that are not “writings”: magnetic media, optical discs, digital voice messaging systems, electronic mail, audio tapes, and photographic media. New Section 75-3-602(f) regarding payment and new Section 75-3-604(c) regarding discharge of an instrument, expand the definition of “signed” for purposes of those sections to include “an electronic symbol, sound or process.” The use of electronic records in the UCC must be read together with the federal Electronic Signatures in Global and National Commerce (also known as E-SIGN) Act, 15 USC 7001, *et seq.*, and Mississippi’s version of the Uniform Electronic Transactions Act, MISS. CODE ANN. § 75-12-1 to -39 (2002 & Supp. 2010), which contain the same definition of “record” as the UCC. In 2002, the Mississippi Attorney General opined that a voice mail could be a “record” under the Uniform Electronic Transactions Act. Opinion to Bearman, Op. Miss. Att’y Gen. No. 2002-0161, 2002 WL 1057931 (April 19, 2002). The rationale of this opinion arguably would apply to the definition of “record” in the UCC.

Relaxing limitations on enforcing lost notes. The problems of mortgage loan servicers being able to document ownership of promissory notes underlying residential mortgages has received much judicial and media attention. The 2010 Amendments broaden the circumstances in which a person not in possession of a promissory note can enforce the note. Prior to the 2010 Amendments, Section 75-3-309(a) provided that “a person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred,…” The 2010 Amendments made the following change to Section 75-3-309(a): “a person not in possession of an instrument is entitled to enforce the instrument if (1) the person seeking to enforce the instrument: (i) was entitled to enforce the instrument when loss of possession occurred; or (ii) has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred …” Comment 2 to Section 3-309 explains the change as follows: “A transferee of a lost instrument need only prove that its transferor was entitled to enforce, not that the transferee was in possession at the time the instrument was lost. The protections of subsection (a) should also be available when instruments are lost during transit, because whatever the precise status of ownership at the point of loss, either the sender or the receiver ordinarily would have been entitled to enforce the instrument during the course of transit.”

Meeting the midnight deadline with digital images. If a depositary bank accepts a check drawn on a payor bank, the depositary bank transmits the check to the payor bank for settlement, and the payor bank makes an initial settlement with the depositary bank, the payor bank can revoke the settlement under Section 75-4-301 and recover payment if the payor bank returns the check to the depositary bank before midnight of the day after the payor bank receives the check. If the payor bank misses the midnight deadline, the initial settlement becomes final and the payor bank loses its right of chargeback against the depositary bank. Former

Section 75-4-301(a) required that the original check itself be returned to meet this midnight deadline. The 2010 Amendments revised Section 75-4-301(a)(2) to allow the payor bank to return an “image” of the check to the depository bank rather than the original if the depository bank and the payor bank have an agreement to this effect. Comment 8 to Section 4-301 states in part that this change is “designed to facilitate electronic check-processing.” This change is consistent with existing Section 75-4-110, which permits presentment of an item to be made with an image of an check rather than the original, the Check Clearing in the 21st Century Act, 12 USC § 5003 enacted in 2003, and changes made to Regulation CC in 2004, 12 CFR § 229.30.

Death of the payment rule. The “payment rule” is a vestige of the origins of negotiable instruments, when the obligor of the note hand-delivered the note to the holder. Under the common law, it was the responsibility of the obligor to know who held his note and to whom to make payments. One author has described the payment rule as follows: “In substance, this rule holds that once an instrument has been delivered to an assignee, one who makes a payment on the debt represented by the instrument to anyone other than the possessor of the instrument does so at his or her peril.” Dale A. Whitman, *Reforming the Law: The Payment Rule as a Paradigm*, 1998 Brigham Young University Law Review 1169, 1171. This rule was reflected in former Section 75-3-602(a)(1), which provided in relevant part that an instrument is paid to the extent that payment is made to “a person entitled to enforce the instrument.” The problem with applying this rule in today’s economy is that promissory notes, particularly residential mortgage notes, are often sold multiple times without the knowledge of or notice to the obligor. As a result, the Restatement of Mortgages and the Restatement of Contracts have disavowed the payment rule. The UCC was one of the last bastions of the payment rule. The 2010 Amendments replaced the payment rule with new Section 75-3-602(b), which provides in relevant part that “a note is paid to the extent

payment is made by or on behalf of a party obliged to pay the note to a person that formerly was entitled to enforce the note only if at the time of the payment the party obliged to pay has not received adequate notification that the note has been transferred and that payment is to be made to the transferee.” New Section 75-3-602(b) also specifies the details of an adequate notice and provides that a transferee of a note is deemed to have notice of any payments made by the obligor after the date that the note is transferred but before notice is given to the obligor. Whether the payment rule still applies to non-negotiable notes remains to be seen.

Limiting status of accommodation parties. The 2010 Amendments contain good news and bad news for accommodation parties. The definition of an accommodation party in Section 75-3-419(a) remains the same: “If an instrument is issued for value given for the benefit of a party to the instrument (“accommodated party”) and another party to the instrument (“accommodation party”) signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party ‘for accommodation.’” The former version of Section 75-3-419(d), which also was not changed by the 2010 Amendments, provided that if the signature of a party to an instrument is accompanied “by words indicating unambiguously that the party is guaranteeing collection rather than payment of the obligation,” the signer was only obligated to pay the instrument if the holder could not satisfy the judgment from the other party to the instrument. The former version of Section 75-3-419(d) did not address what happened if the signature was not accompanied by “by words indicating unambiguously that the party is guaranteeing collection rather than payment.” New Section 75-3-419(e) addresses this question and provides that if the signature of a party only states that the party guarantees payment, or “in some other manner that does not unambiguously indicate an intention to guarantee collection rather than payment,” the signer is not treated as an accommodation party, but

is obligated to pay the instrument according to its terms. In other words, the intent to be an accommodation party, or to limit the guaranty to one of collection only, must be clear. This is, of course, the bad news for persons who seek to be considered accommodation parties. The good news is that under the 2010 Amendments, if a person is an accommodation party, he has an enhanced remedy against the accommodated party. New Section 75-3-419(f) adds a new sentence: “In proper circumstances, an accommodation party may obtain relief that requires the accommodated party to perform its obligations on the instrument.” Since the accommodation party was already entitled to reimbursement from the accommodated party under former Section 75-3-419(e) and common law, and this right to reimbursement continues under new Section 75-3-419(f), this new sentence presumably authorizes a court to grant injunctive or other relief to the accommodation party. For non-negotiable notes, which are not governed by the UCC, Mississippi’s statutes regarding principals and sureties will continue to provide the governing law. MISS. CODE ANN. §§ 87-5-1 to -13 (1999 & Supp. 2010).

Secondary obligors. Section 75-3-605, which addresses circumstances in which endorsers and secondary obligors are discharged, has been completely rewritten. According to the Official Comments to Section 3-605, the revisions are intended to adopt the policies of the Restatement of Suretyship and Guaranty, which was promulgated in 1995. Concepts from the Restatement of Suretyship and Guaranty already have been incorporated in the current Mississippi versions of Article 1 and Article 9. The 2010 Amendments added new definitions of principal and secondary obligors. A “principal obligor” is defined in new Section 75-3-103 as “the accommodated party or any other party to the instrument against whom a secondary obligor has recourse.” A “secondary obligor” is defined as “(i) an endorser or an accommodation party, (ii) a drawer having the obligation described in Section 75-3-414(d)[cause of action for breach of transfer warranty], or (iii)

any other party to the instrument that has recourse against another party to the instrument pursuant to Section 75-3-116(b)[contribution between parties having joint and several liability].” In addition to other changes, new Section 75-3-605 changes the rule regarding discharge of the obligation of the secondary obligor when the primary obligor is discharged. Under former Section 75-3-605(b), discharge of the obligation of a principal obligor did not discharge the obligation of a secondary obligor. Under new Section 75-3-605(a), the secondary obligor is discharged to the same extent as the principal obligor, unless the release preserves recourse against the secondary obligor.

Elimination of time limit on proceeding against endorser. If an instrument is dishonored, one who endorsed the instrument is obligated to pay the amount due on the instrument. Prior to the 2010 Amendments, under Section 75-3-415(e), if the instrument was a check, and the check was not presented for payment within or given to a depository bank for collection within thirty days after the endorsement, the liability of the endorser was discharged. The 2010 Amendments made a non-uniform change to Article 3 by deleting Section 75-3-415(e). The effect of this change presumably is that the liability of an endorser is subject only to the three-year general statute of limitations. It appears that Mississippi is the only state that has made this change to Section 3-415.

Right of contribution against discharged co-debtor. The 2001 Amendments deleted former Section 75-3-116(c), which provided, “Discharge of one (1) party having joint and several liability by a person entitled to enforce the instrument does not affect the right under subsection (b) of a party having the same joint and several liability to receive contribution from the party discharged.” The reason for this change is not clear. Mississippi law other than the UCC provides for a continuing right of contribution among joint debtors after discharge of one debtor by their common creditor. MISS. CODE ANN. § 85-5-1 (1999 & Supp. 2010).

Statutes of limitations on non-negotiable notes. In addition to the 2010 Amendments, Senate Bill 2419 added a new statute that makes the statute of limitations on non-negotiable notes the same as the statute of limitations on negotiable notes, which is six years. This statute has been codified as new Section 15-1-81 of the Mississippi Code, and becomes effective on July 1, 2012. Prior to this change, the statute of limitations for negotiable notes was the six-year statute of limitations in Section 75-3-118(a), while the statute of limitations for non-negotiable notes was the general three-year statute of limitation in Section 15-1-49. The difference in the two statutes of limitations arose when the general statute of limitations was changed from six years to three years in 1990 and did not represent a policy that negotiable notes are entitled to a longer statute of limitations than non-negotiable notes. Having different statutes of limitations for negotiable and non-negotiable notes caused problems, because whether a note was negotiable or non-negotiable was is often not apparent, and one holding a note, therefore, may not be able to know which statute of limitations governed.

One non-uniform provision of Mississippi's version of Article 3 that was carried forward and not changed is Section 75-3-204(a). The last sentence of this section contains non-uniform language authorizing blanket endorsements of promissory notes representing student loans insured by a governmental entity. The purpose of this non-uniform provision is to facilitate the secondary market in student loans.

Another Mississippi variation from the uniform version of Article 3 is that the 2010 Amendments did not include subsections (e) and (f) of the uniform version of Section 3-305. Section 3-305 establishes the basic holder in due course doctrine, which is that a holder in due course takes free of certain defenses that the obligor of the instrument had against the original holder of the note. Subsection (e) of the uniform version of Section 3-305 provides that in consumer transactions, if law other than Article 3 requires that

an instrument include a statement that the rights of a holder are subject to defenses that the issuer of the instrument can assert against the original payee, the instrument has the same effect as if the instrument included such a statement. According to Comment 6 to Section 3-305, Subsection (e) is intended to reflect the FTC holder in due course rule, adopted in 1975 and codified in 16 CFR § 433.2. The FTC holder in due course rule creates an exception to the UCC holder in due course doctrine in consumer credit sales and purchase money transactions, and requires certain specified language to this effect in instruments in consumer transactions. The effect of Subsection (e) of the uniform version of Section 3-305 is that instruments subject to the federal rule are treated under Article 3 as if they had the language required by the FTC holder in due course rule, even if the language is omitted. Subsection (f) of the uniform version provides that Section 3-305 is subject to other laws that establish a different rule for consumer transactions. The reason for omitting these two subsections from Mississippi's new Section 75-3-305 is not clear. A failure to adopt a portion of a uniform act usually indicates a conflict with an existing important state policy, but it is not apparent that any state policy is being served by this non-uniformity.

As alternatives to traditional checks proliferate, the UCC arguably is becoming less relevant to the law of payments. *See generally* Stephanie Heller, *An Endangered Species: The Increasing Irrelevance of Article 4 of the UCC in an Electronics-Based Payments System*, 40 Loyola L.A. L. Rev. 513 (2006-07). For example, the use of automated clearing house (ACH) debits or "Echecks" as an alternative to paper checks is increasing. When a consumer authorizes a person to use the information on the check to make an electronic funds transfer from the consumer's account rather than a remotely created check, this electronic transfer will be governed by Regulation E of the Federal Reserve Board, 12 CFR § 205.3, rather than the UCC. However, even in these transactions, the UCC remains relevant to fill in gaps in other laws. For example, Regulation E only

applies to consumers, who are defined for purposes of the regulations as natural persons. In addition, while Regulation E limits the consumer's liability for unauthorized Echecks, Regulation E does not address the respective liabilities of the consumer's bank and the person initiating the Echeck for the unauthorized payment. Under Article 4A, the consumer's bank may be able to avoid any liability to the person initiating the electronic funds transfer if the consumer's bank has adopted reasonable security procedures under MISS. CODE ANN. § 75-4A-202(c). In addition, while the 2010 Amendments expressly apply only to negotiable instruments, Mississippi courts have stated that the terms of the UCC are persuasive authority in interpreting other financial instruments. *DeJean v. DeJean*, 982 So.2d 443, 447 (Miss. Ct. App. 2007).

Banks and other lenders should like the new warranties on remotely created checks, the relaxation of the requirement of possession of lost notes, the limitation on accommodation parties, the extended statutes of limitation on non-negotiable notes, and the elimination of the thirty-day period for proceeding against endorsers. Consumers and borrowers benefit from the elimination of the payment rule and the new rules regarding secondary obligors. Everyone should benefit from the changes in the 2010 Amendments that recognize and incorporate new technology. Given the rapid innovations in methods of payment, we can anticipate that additional changes will be coming to the Mississippi law of payments soon.

Promotions and Sweepstakes: How To Ensure That All Bets Are Off In Mississippi

By Christopher Pace, Esq.

Businesses commonly use promotions, giveaways, and sweepstakes to increase sales and profitability and to build awareness about a new product or service. Such marketing devices appeal to our innate desire to “get something for nothing” or almost nothing. Before kicking off a promotional campaign or contest, however, businesses should first ensure that they are not, in fact, launching an illegal lottery or prohibited gambling operation.

Although gambling is legal in Mississippi if conducted within a state licensed casino, other gambling activities, including lotteries, constitute criminal acts.¹ Under Mississippi law, such illegal “gambling” or “lotteries” involve any activity in which each of the following three elements are present:

1. the award of a prize;
2. determined on the basis of chance or luck; and
3. where consideration is required to be paid.²

A prize can be anything of value offered to a promotion participant. The element of chance or luck will be present if the promotion winner is randomly determined (*i.e.*, a participant’s skill is not a factor). The payment of “consideration” will arise from the payment of money or giving something else of value for the opportunity to participate in the promotional activity and win a prize.

All three of the above elements - a prize, chance, and consideration - must be present for a promotion or other activity to constitute a lottery or illegal gaming. To operate a lawful promotional

activity, the promoter must, therefore, eliminate at least one of the three elements. Because promotions, giveaways and sweepstakes generally include the elements of chance and award of a prize, the element of consideration can most easily be eliminated to avoid a violation of Mississippi law.

Avoiding Lotteries and Illegal Gambling

A promotion which is entirely free poses no legal risk. An entirely free promotion requires no payment or degree of effort by a participant for entry. Most promotions, giveaways, and sweepstakes, however, are designed to increase sales and profitability of the business in general or of a particular product or service. In such “pay-to-play” promotions, the most frequently used method for eliminating the element of consideration is provide an alternative method for participants to enter the promotion for free. This method is commonly referred to as a free alternative method of entry, or “AMOE.” Although the validity of AMOEs varies from state-to-state as a means of eliminating consideration in promotions and sweepstakes, AMOEs have been accepted by the Mississippi Supreme Court as a “significant indicator that there [is] no consideration for the chance to win.”³

For example, a bank may launch a vacation giveaway to attract new checking customers. During the month of April, each person who opens a new \$9-per-month umbrella checking account will be registered to win a free, all-inclusive beach vacation package. The winner is randomly selected from among all of the promotion participants who opened a new checking account. In this instance, the promotion would arguably constitute illegal gambling or a lottery. All three elements are present: a prize (the vacation package), chance (the random selection of the winner), and consideration

(the monthly checking account service fee). The bank could easily render the promotion legal by providing an AMOE. An AMOE for this type of promotion could simply be the ability to submit free, mail-in entry forms or to register for free on the bank's website. By allowing participants to enter the vacation giveaway promotion without having to pay to open a new account, the element of consideration may be eliminated.

Importance of the "Official Rules". An AMOE may be used to remove the element of consideration, provided that persons who request free entry into a promotion are able to obtain free entry by following the prescribed procedures in the promotion's "official rules."⁴ Although published "official rules" may not be required, such rules not only inform participants of the promotion terms and conditions, but also provide protection to the business sponsoring the promotion. All material terms of the promotion should ideally be disclosed, including, but not limited to, eligibility requirements, deadlines, entry methods, odds of winning, prize descriptions, etc. More importantly, the existence of an AMOE should be disclosed in a clear and conspicuous manner. For this reason, the phrase "NO PURCHASE NECESSARY" routinely appears in official rules and other promotion materials. AMOE participants must also be afforded equal rights under the terms of the promotion. This means that the same deadlines, rules and restrictions applicable to participants who enter via an AMOE must also apply to other

participants. AMOE participants must have the same chances of winning as other participants. Any substantive difference between the rules applicable to AMOE participants and those applicable to other participants could invalidate the AMOE.

Conclusion. Promotions, giveaways, and sweepstakes can be very effective methods to increase sales and profitability, promote a brand, or build awareness about a product or service. Such promotional activities, however, are subject to restrictions under Mississippi law which prohibit illegal gambling and lotteries. It is, therefore, essential that businesses take care to structure their promotional activities to ensure compliance with such laws, including, but not limited to, offering free alternative methods of entry for promotions which require some type of purchase or entry fee. Careful drafting of official promotion rules will help to ensure such compliance and protect the business sponsoring the promotion.

¹ MISS. CODE ANN. § 97-33-1.

² MISS. CODE ANN. §§ 97-33-1 and 75-76-3(6); see also *Knight v. State*, 574 So.2d 662, 669 (Miss. 1990) (citing BLACK'S LAW DICTIONARY, 611 (5th ed. 1979), Op. Miss. Att'y Gen. 1991 WL 577980 (August 19, 1991) (citing *Knight v. State*, 574 So.2d at 669).

³ *The Mississippi Gaming Commission v. Treasured Arts, Inc.*, 699 So. 2d 936, 941 (Miss. 1997)

⁴ *Id.* at 940.

About the Editor

Stanley Q. Smith is a shareholder at Watkins Ludlam Winter & Stennis, P.A. A graduate of the University of Mississippi (1976 B.B.A. in Accounting; 1979 J.D.), Stan was employed by the Houston, Texas, office of Arthur Andersen & Co. prior to attending law school. Stan concentrates his law practice in the areas of communications and public utilities law. Stan is admitted to all state and federal courts in Mississippi, the United States Fifth Circuit Court of Appeals, and the United States Tax Court. He is a current member of the American Bar Association's National Advisory Panel, and he has twice served as President of the Associate Members of the Alabama-Mississippi Telecommunications Association. Stan has been a speaker at national communications conferences on the topic of the Low Income Program of the federal Universal Service Fund. He handles matters involving wireline and wireless communications, including certificates, transfers of authority, corporate restructures, rates and tariffs, utility pole attachments for power and communications carriers; cable franchises; water and sewer services; and gas and electric issues. Stan is a member of the Board of Deacons of First Baptist Church of Jackson and the Board of Directors of the Booster Club of St. Andrew's Episcopal School.



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Articles should be arranged in the following order: (i) article title, (ii) author's name, (iii) acknowledgement of assistance, if applicable or desired, and (iv) text of the article. All contributions should be submitted in MS Word format.

A short biographical statement should also be provided at the time the article is submitted. The statement should include, at a minimum, the author's (i) current position, (ii) practice areas, (iii) professional affiliations. A head and shoulder photograph of the author(s) in color is requested but not required.

Contributors to This Issue



William E. "Bill" McLeod

Bill practices in the areas of wills, trusts, estate planning, probate, business entity formation (including the formation of tax-exempt organizations), as well as sales, mergers, acquisitions and other business transactions, and tax controversy matters. He is a member of the Mississippi Bar, (Member, Trusts & Estates, Taxation and Business Law Sections, Chair (2010-11), Chair of Taxation Section (1999-2000), Mississippi Society of Certified Public Accountants and the American Institute of Certified Public Accountants. Bill received his B.B.A. in Accounting in 1988 from Millsaps College. Bill worked for KPMG Peat Marwick from 1988-1990. Bill received his J.D. from the University of Mississippi, School of Law in 1993, where he was the Associate Editor of Casenotes of the Mississippi Law Journal. He received his LL.M. in Taxation from the University of Florida, College of Law in 1994.

Cory Wilson

Cory T. Wilson served as Chief of Staff to Secretary of State Delbert Hosemann from January 2008 to January 2011; he practices law with the Willoughby Law Group, PLLC, in Ridgeland and works in public policy through Fidelis Policy Group, LLC, in Jackson.



Ryan Pratt

Ryan Pratt joined the Mississippi Secretary of State's Office in January 2011, and currently serves as Assistant Secretary of State, Policy and Research Division. Ryan was previously an associate at Butler, Snow, O'Mara, Stevens, and Cannada, PLLC, where he practiced governmental and public finance law. A native of Jackson, Ryan received a Bachelor of Arts degree in Psychology from the University of Mississippi and a Juris Doctorate from the University of Mississippi School of Law, where he was Managing Editor of the *Mississippi Law Journal*. Ryan is an adjunct professor of legal writing at the Mississippi College School of Law and is a 2010 graduate of Leadership Mississippi. Ryan and his wife Loren live in Madison County where he is an ex-officio member of the Madison County Chamber of Commerce board of directors.

W. Rodney Clement, Jr.

Rod Clement graduated from Millsaps College and Washington & Lee University School of Law. He is the author of *Enforcing Security Interests in Personal Property in Mississippi*, 67 *Miss. Law Journal* (Fall 1997), *Revised Article 9 and Real Property*, 36 *Real Property, Probate & Trust Journal* 513 (Fall 2001), and other articles. He is a partner in the Jackson, Mississippi office of Bradley Arant Boult Cummings LLP.



Christopher Pace



Chris is an attorney with Watkins Ludlam Winter & Stennis, P.A. His practice is focused in the areas of gaming and resorts law and economic development and incentives law, as well as complex financings and other business transactions. He routinely represents the firm's gaming clients in regulatory, licensing, commercial, finance and real estate matters. Chris' experience also includes assisting private developers and local governmental entities to develop and finance economic development projects in Mississippi, such as new manufacturing facilities, warehouse and distribution centers, roads and other infrastructure improvements. Chris received a B.B.A. in Economics from the University of Southern Mississippi. He also holds a MBA from Mississippi College and received his J.D. from Mississippi College School of Law, where he served as executive editor of the *Mississippi College Law Review*. He is a regular contributor to the Mississippi Gaming Law blog at <http://www.msgaminglaw.com>.

Adam Kilgore



Adam Kilgore is General Counsel for The Mississippi Bar where his duties include reviewing all Bar complaints, conducting investigations regarding Bar complaints, prosecuting attorney discipline cases, handling appeals before the Supreme Court of Mississippi, and serving as Bar liaison for the Board of Bar Commissioners, Committee on Professional Responsibility, and the Ethics Committee. Adam is a member of The Mississippi Bar, National Organization of Bar Counsel, Capital Area Bar Association and the Professional Responsibility Section of the American Bar Association.

Adam earned his Bachelor of Science in Business Administration with a concentration in Communications from Mississippi College in 1992, and graduated from Mississippi College School of Law in 2000 where he was a member of the Moot Court Board. Upon graduation Adam served as a law clerk at the Supreme Court of Mississippi for Chief Justice Edwin Lloyd Pittman. Adam has worked at The Mississippi Bar since 2002, serving as Assistant General Counsel for two years prior to becoming General Counsel in 2004..

Member News

Cheryn Baker joined Hancock Bank on December 1, 2010, where she is acting as Corporate Counsel in the Bank's Legal Department located in Gulfport, Mississippi. Previously Cheryn worked for the Mississippi Secretary of State's Office in Jackson, Mississippi where she served as the Assistant Secretary of State for the Division of Policy & Research. Cheryn's contact information is:

Cheryn N. Baker
 Corporate Counsel
 Hancock Bank Legal Department
 P. O. Box 4019
 2510 14th St., 6th Floor (39501)
 Gulfport, MS 39502
 Phone: 228-822-4314
 Fax: 228-563-5759
Cheryn_baker@hancockbank.com

Mike Bush is now located in the Jackson office of Phelps Dunbar. Mike's contact information is:

F. M. Bush, III
 Phelps Dunbar LLP
 4270 I-55 North (39211-6391)
 P. O. Box 16114
 Jackson, MS 39236-6114
 Direct No.: 662-690-8136
 Office No.: 601-352-2300
 Cell: 917-885-3031
 Facsimile: 601-360-9777

Rod Clement is now with the Jackson office of Bradley Arant Boulton Cummings. Rod's contact information is:

Rod Clement
 Bradley Arant Boulton Cummings, LLP
 One Jackson Place
 188 E. Capitol Street, Suite 400
 Jackson, MS 39201
 Phone: 601-592-9944
 Fax: 601-592-1444
 Email: rclement@babbc.com

Mary Nichols of Gulfport was elected to the Mississippi Board of Bar Commissioners, 2nd Circuit Court District, for the 2011-14 term.

“Lawyers in the Arts”: Four section members are featured in the Winter 2010-11 issue of The Mississippi Lawyer as “Lawyers in the Arts.” They are:

Cheryn Baker of Brandon – dancer
 Doug Jennings of Jackson – musician
 Paul Newton of Gulfport – musician
 Otis Tims of Tupelo – actor

Jimmy Milam can now be contacted at:

James T. Milam, Esq.
 P. O. Box 1153
 Tupelo, MS 38802
jimmy.milam@gmail.com

Section Leadership

Chair

William E. McLeod
 McLeod & Associates, P.A.
 10 Professional Pkwy
 Hattiesburg, MS 39402-2636
 Phone: (601) 545-8299
 Fax: (601) 545-8298
 Email: bmcleod@eptaxlaw.com

Vice-Chair

James T. Milam
 P. O. Box 1153
 Tupelo, MS 38802
 Phone: (662) 690-8141
 Fax: (662) 842-3873
 Email: jimmy.milam@gmail.com

Secretary/Treasurer

Henry N. Dick III
 Page Mannino Peresich & McDermott
 P. O. Drawer 289
 Biloxi, MS 39533-0289
 Phone: (228) 374-2100
 Fax: (228) 432-5539
 Email: henry.dick@pmp.org

Past Chair

William S. Mendenhall
 Baker Donelson Bearman Caldwell & Berkowitz
 P. O. Box 14167
 Jackson, MS 39236-4167
 Phone: (601) 969-4647
 Fax: (601) 714-9947
 Email: bmendenhall@bakerdonelson.com

Executive Committee Members

Joyce Hall (08/2008 – 07/2011)
 Watkins & Eager PLLC
 P. O. Box 650
 Jackson, MS 39205-0650
 Phone: (601) 965-1982
 Fax: (601) 965-1901
 Email: jhall@watkinseager.com

Cheryn N. Baker (08/2009 – 07/2012)
 Corporate Counsel
 Hancock Bank Legal Dept.
 P. O. Box 4019
 Gulfport, MS 39502
 Phone: (228) 822-4314
 Fax: (228) 563-5759
 Email: Cheryn_baker@hancockbank.com

Kenneth D. Farmer (08/2010 – 07/2013)
 YoungWilliams P.A.
 P. O. Box 23059
 Jackson, MS 39225-3059
 Phone: (601) 948-6100
 Fax: (601) 355-6136
 Email: kfarmer@youngwilliams.com

Newsletter Editor

Stanley Q. Smith
 Watkins Ludlam Winter & Stennis
 P. O. Box 427
 Jackson, MS 39205-0427
 Phone: (601) 949-4863
 Fax: (601) 949-4804
 Email: stansmith@watkinsludlam.com

A Special Thank You

Rene' Garner
 Section and Division Coordinator
 Phone: 601-355-9226
 Fax: 601-355-8635
 Email: rgarner@msbar.org

The Business Law Section of the Mississippi Bar is on facebook!

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**The Business Law Section
of the Mississippi Bar has a
listserv.**



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- **Don't send meaningless messages with no content.** Messages such as "thanks for the information" or "me, too" to individuals--not to the entire list. Do this by using your e-mail application's forwarding option and typing in or cutting and pasting in the e-mail address of the individual to whom you want to respond.
- **Do not send administrative messages through the listserve.** Messages such as "remove me from the list", should be directed to Rene' Garner at rgarner@msbar.org
- **Use caution when discussing products.** Information posted on the listserve is available for all to see, and comments are subject to libel, slander, and antitrust laws.
- **Use virus detection/protection software.** Make sure you have and use virus detection/protection software on your PC. If you receive a email that has a virus please post a message to the listserve immediately with "WARNING VIRUS" in the subject line followed by an explanation.

- **Do not send attachments through MB Listserves.** Many virus are spread by way of attachments. If you wish to send an attachment to someone please email directly and DO NOT POST to listserve .

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