

# The Guardian

The Newsletter of the Alabama Criminal Defense Lawyers Association

October/November/December 2009

## FOUR CORNERS SEMINARS – Five Locations in 2009

Join ACDLA members at the annual Four Corners in Anniston, Dothan, Huntsville, Mobile and Tuscaloosa for the latest insights on:

- Ethics
- Crawford Decisions
- Traffic Stops
- 4 04b

Advance registration is advised at ALL locations, as handout materials are limited. Four Corners is free to 2010 ACDLA members and registration fees are \$175 for all others. Not a member? Save money! *Join ACDLA for one year's membership at \$185 and get in free to this event!*

*This event has been approved by the Mandatory Continuing Legal Education Commission for a total of four (4) CLE hours, including one (1) hour of Ethics.*

### DECEMBER 4, 2009

- **Dothan (LaQuinta Suites – formerly Comfort Inn, 3593 Ross Clark Circle)**
  - **Tuscaloosa, Tuscaloosa Co. CH Annex, 2501 7th Street (behind CH)**
- 12:30 – 4:30 p.m. – (Check-in Noon all locations)

### DECEMBER 11, 2009

- **Anniston (Calhoun Co., Judge Laird's CR)**
  - **Huntsville (Madison Co. CH, CR 1,)**
  - **Mobile (Governmental Plaza-Ceremonial CR)**
- 12:30 – 4:30 P.M. – (Check-in Noon all locations)

### TO REGISTER:

Use the application form attached. **YOU MUST SUBMIT DUES PAYMENT TO COMPLETE YOUR PRE-REGISTRATION FOR FREE CLES.** Email: [annscooper@bellsouth.net](mailto:annscooper@bellsouth.net)  
Fax Form To: 1-866-665-7522

**REGISTRATION FEE: Free to all 2010 ACDLA members. Make all checks payable to ACDLA, P.O. Box 1147, Montgomery, AL 36101. Visa and MasterCard accepted. Save money and join ACDLA for one year, get in free! Dues must accompany this form to complete your seminar pre-registration.**

### INSIDE THIS ISSUE:

President's Column	2
From My Perspective	3
IT Corner	4
Webb Kicks Off Membership Campaign	4
Prosecution of Prenatal Conduct	5
Authentication of Computer Based & Digital Evidence	6
Primer on the Admission of 404(b) Evidence	7
2010 Membership Application	9
Member Get a Member Campaign	10
Billy Moore to Keynote DP Seminar	11
ACDLA Board of Directors Contact Information	Back Cover

### 2009 ACDLA Four Corners Registration Form

Name(s): \_\_\_\_\_  
Firm: \_\_\_\_\_  
Address: \_\_\_\_\_  
City/State/Zip: \_\_\_\_\_  
Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_  
Email: \_\_\_\_\_

I am interested in registering \_\_\_\_\_ person(s) for the following seminar: (Check one)

- \_\_\_\_\_ Dothan Seminar – December 4, 2009 (12-4:30 p.m.)  
LaQuinta, 3593 Ross Clark Circle
- \_\_\_\_\_ Tuscaloosa Seminar – December 4, 2009 (12-4:30 p.m.)  
Tuscaloosa Co. CH Annex
- \_\_\_\_\_ Anniston Seminar – December 11, 2009 (12-4:30 p.m.)  
Calhoun Co. CH
- \_\_\_\_\_ Huntsville Seminar – December 11, 2009 (12 -4:30 p.m.)  
Madison Co. CH
- \_\_\_\_\_ Mobile Seminar – December 11, 2009 (12:30-4:30 p.m.)  
Mobile Govt. Plaza-Ceremonial CR

### Method of Payment: (Check one)

- \_\_\_\_\_ I'm a 2010 ACDLA Member. I'm Free!
- \_\_\_\_\_ My dues payment is enclosed. \$\_\_\_\_\_

### 2010 Dues Rates:

- \$100 – New Lawyer (member of Bar less than 3 years)
- \$185 – Regular (member of Bar 3 years or more)
- \$600 – Presidents Club
- \$7,500 Lifetime (\$1,500 1<sup>st</sup> installment; \$1,000 for additional 6/yr or \$7,000 (lump sum)

I am not a member of the judiciary or employed in a prosecutorial role.

Signature: \_\_\_\_\_ (Please be sure to complete name, address and other contact information at top of this form.)

**Important Note: ACDLA is a 501(c)(6) non-profit organization. Approximately 20 percent of these dues ARE NOT tax deductible as business expenses because they related to lobbying & political expenses.**

- \_\_\_\_\_ **Seminar Only, Check Enclosed**  
(Make all checks payable to ACDLA. \$175 pp)
- \_\_\_\_\_ **Visa/MasterCard** Card Number: \_\_\_\_\_

Name on Card: \_\_\_\_\_  
Billing Address: \_\_\_\_\_  
Expiration Date: \_\_\_\_\_ Signature: \_\_\_\_\_

**FAX: 1-866-665-7522**  
**MAIL: ACDLA, P.O. BOX 1147, MONTGOMERY, AL 36101**

# President's Column

*By Kathryn King, Attorney at Law, Cullman, AL*



*ACDLA President  
Kathryn King*

Dear Members:

I want to start this column by congratulating Patrick Mahaney and Hays Webb for putting together a fantastic DUI seminar in September. People came from all over the state to Tuscaloosa to hear some of Alabama's top DUI defenders. Nearly 100 criminal defense lawyers packed the auditorium at the Tuscaloosa County Courthouse Annex. The response was so great

that plans are already underway for a 2010 DUI seminar. Next fall, we will host it at the Beau Rivage Hotel in Biloxi, Mississippi. In addition to a good seminar turnout, ACDLA grew by five new members at this event.

I also want to thank everyone who participated in the recent on-line CLE survey. We are keeping all recommendations on date and location in mind as we plan for 2010. In response to your preferences, we will conduct a six-hour "Drug Crimes, Drug Searches" Seminar in Huntsville in April, 2010. We want to serve the needs of the membership. In order to continue to offer additional CLE events, we need good turnouts and attendance. Look for more information on the Huntsville event coming up after the Death Penalty Seminar.

Speaking of which, our annual, "Loosening the Death Belt" Death Penalty Seminar is coming January 29 & 30. Everyone is probably aware by now that the Circuit Judges' Association voted to follow the ABA guidelines for capital representation. One of the recommendations of the ABA is that every lawyer who handles capital cases must have at least twelve hours in capital litigation training every two years. The ACDLA death penalty seminar is a great place to get that training. The speakers will be knowledgeable and interesting, and you will come away from the seminar with a renewed passion for capital case defense and also with the knowledge that you are surrounded by Brothers and Sisters with the same sense of purpose. 2010 membership renewal notices have been mailed. If you know someone who has not renewed, remind him or her to get their renewal in to Ann. We have already begun our "Member Get a Member" campaign. The Board has challenged every

board member to get two new members this year. Hays Webb was the first to bring in a new member, and he has the T-shirt to prove it. There is a T-shirt waiting for every member who gets a new member to join. Your name will also be put into a drawing for a free CLE. In order to continue to grow and to provide more services to members, we need to continue to increase our membership. It is vitally important that each and every one of us works hard to convince other criminal defense attorneys to join our organization. There is power in numbers.

The legislative process begins early this year, since it is an election year. The next legislative session will begin January 12, 2010. ACDLA will be supporting the "Expungement" bill again this year. Scott Mitchell, the Chief Justice's legislative liaison, attended our last Board meeting. He informed us that every agency is facing large budget cuts next year. The Chief Justice will be introducing bills aimed at reducing the prison population. One is a bill that would prohibit revocation of parole for mere technical violations. She also plans to introduce a bill that would make it a misdemeanor to possess marijuana for personal use, regardless of whether it is a first conviction. Mr. Mitchell said that AOC would also be introducing the Indigent Defense Commission bill again. The legislative committee will keep itself and the membership informed about these bills and any others relevant to criminal defense. Look for Ann's notices about upcoming legislative committee meetings. All members are urged to participate in and to attend committee meetings.

I want to urge all of you, again, to participate in this organization. Get involved with a committee, attend meetings and seminars, share your knowledge with others on the listserve, donate documents to the document library, and urge other attorneys to join with us. Ours is one of the few areas of law where we all face a common opponent and can help each other tremendously.

As your President, if I can be of service to you, please do not hesitate to call on me. I look forward to seeing you all at our many 2010 events.

**Kathryn King**  
**kaking@hiwaay.net**

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The ACDLA welcomes articles of interest from qualified professionals. Submit articles by email to:

**annscooper@bellsouth.net**

ACDLA will also consider for publication articles which have appeared elsewhere. ACDLA reserves the right to select and edit material for publication.

The views expressed by authors are not necessarily the views of the ACDLA nor is the printing of advertising meant to imply an endorsement of those services or products.

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**Guardian Deadlines**

March 15, 2009  
June 15, 2009  
September 15, 2009  
December 15, 2009

Send camera-ready copy with payment to the ACDLA office.

To order resources, send a note on your letterhead describing the specific item you would like to order with your check to:

ACDLA  
PO Box 1147  
Montgomery, AL 36101

Please notify the ACDLA office immediately of any changes in your contact information. If you are not on the ACDLA email discussion group and you would like to be, please send your name and email address to  
**annscooper@bellsouth.net**

# FROM MY PERSPECTIVE

*By Ann S. Cooper, Executive Director*

## FOUR CORNERS – FIVE LOCATIONS

If you haven't already done so, don't forget to sign up for one of the FREE Four Corners Seminars offered in five locations around Alabama on December 4 and 11, 2009. The events will be held in Anniston, Dothan, Huntsville, Mobile and Tuscaloosa. Complete registration details are found in this edition of *The Guardian*. It is highly advised that you pre-register. Just pay your 2010 dues and send in your registration form OR call the ACDLA office at 334/272-0064 with your payment and registration. The seminar offers four (4) CLEs, including one hour of Ethics.

## MEMBER GET A MEMBER – WIN FREE T-SHIRTS AND A CLE

On October 1, ACDLA officially kicked off its third annual "Member Get a Member" Campaign. Members sponsoring "new" members will receive a free campaign t-shirt and for each additional new member sponsored, the member's name goes into a drawing for to win a FREE CLE of that member's choice in 2010. The drawing will be held in Birmingham at the 2010 Death Penalty Seminar. You do not need to be present to win. Simply tear out the 2010 membership application found in this issue of *The Guardian* and write your name in the upper right hand corner. Be sure the new member applying uses that form so that you can be given credit for the membership. We'll take care of the rest on this end. Let's get going and get growing! There are many new membership services we can offer if we have the financial support that growth brings.

## 2010 LEGISLATIVE SESSION – LET'S STAND TOGETHER TO SUPPORT EXPUNGEMENT

According to Amy Herring, ACDLA's lobbyist, the 2010 Regular Session of the Alabama Legislature will begin on January 12, 2010. Many organizations are already pre-filing their bills for the legislative session. ACDLA's legislative priority this year will be the "Expungement" bill. We will re-introduce the legislation from last year as early as possible and work hard to get passage as quickly as possible. Your support and involvement will be necessary if we are to pass this bill. If it becomes law, Expungement would be a win-win situation for you and your clients. Be sure to get involved with efforts to get this passed. If the economy does not improve and more tax revenues are not generated in 2010, the 2011 budget may carry some of the biggest cuts in Alabama history. Expungement may become the additional service you need to offset delayed indigent defense funds in 2011.

Speaking of indigent defense funds, the Chief Justice's new legislative liaison, Scott Mitchell, is reporting that the Chief Justice will once again re-introduce the IDC (Indigent Defense Commission Bill) in 2010. Your ACDLA Board has NOT taken a stand to support this legislation in the coming session. The Board recognizes there are many members with diverse opinions on this controversial legislation.

Let's stand together this year for something positive. Let's get behind the Expungement bill in 2010. Your clients need an opportunity for a second chance and you will be adding an important new service for your firm.

## NEW ONE DAY CLES – TWO MORE IN 2010

The one-day CLE offered in September on DUI was a great success. Nearly 100 criminal defense lawyers from around Alabama attended the event held in Tuscaloosa. Special thanks to Patrick Mahaney (Montgomery) and Hays Webb (Tuscaloosa) for their outstanding support and willingness to commit time to design a quality training opportunity for ACDLA members. Because of this success, ACDLA will offer two more one-day seminars in 2010. Huntsville will be the site for April, 2010. The tentative topic will be "Drug Crimes, Drug Searches." Watch for details to come. ACDLA will open up the October event in Biloxi at the Beau Rivage. The seminar will be held on Friday, October 8 and anyone wanting to stay over for the weekend may do so. Mississippi Criminal Defense Lawyers will also be invited to participate. "Advanced DUI Defense Techniques" will be offered which will feature challenges to current technology (i.e. blood and breath alcohol testing, etc.)

## "LOOSENING THE DEATH BELT" – COMING JANUARY 29 & 30, 2010 – CALL NOW FOR HOTEL

ACDLA's annual death penalty seminar will be held in Birmingham at the DoubleTree Hotel in downtown Birmingham on January 29 & 30, 2010. Watch for details coming soon. The keynote speaker will be exonerated and now minister Billy Moore from Rome, Georgia. You won't want to miss this unique training opportunity. Approximately 12 CLEs will be awarded. Mark your calendar now and call the hotel right away for your room. Discounts will drop in early January. Call the DoubleTree at 1-205-933-9000 and ask for the Alabama Criminal Defense Lawyers rate of \$119 single or double, plus tax.

## 2010 DUES STATEMENTS HAVE BEEN MAILED

ACDLA has mailed two 2010 dues statement reminders since this issue of *The Guardian*. We hope you will continue your support of ACDLA and if you have not already paid your dues, that you will do so right away. Don't forget, Four Corners Seminars will offer four (4) FREE CLEs to all 2010 members. A membership application may be found in this issue of *The Guardian* if you need one.

Thank you for your continued support of ACDLA and its programs. Let's work together to make 2010 our best year yet for growth and excellence. I look forward to seeing you all at many of our upcoming events.

If you have questions about ACDLA events or services, please do not hesitate to call or write.

**Ann Cooper**  
**annscooper@bellsouth.net**

# IT CORNER

By Mel Cooper, Jr., Montgomery, AL

## Five Tips for Using Search Engine Marketing to Grow Your Law Practice

“Search engine marketing”, or *SEM*, is a marketing discipline that is focused on helping you grow your law practice online by improving the search engine ranking of your firm’s website. This is important, especially for the highly competitive criminal defense profession, because more new clients are searching for legal services online than ever before. If you’re an attorney who specializes in DUI defense, for example, then you want to be sure that your firm’s website is displayed on the *first page* of a search results listing when someone searches for “dui attorney”. And if your site *doesn’t* appear on the first page – or even the second page – then you’d be well advised to find out why and do something about it. Otherwise, having a website at all becomes a waste of money – even if you’re only paying a few dollars a month for hosting fees. Even worse, another attorney who’s getting a first page search ranking is likely getting the new clients that you should be getting.

So, how does a lawyer go about getting a first page search engine ranking? Here are five tips on how you can improve your chances of getting a first page ranking when a potential client is looking for the services you’re offering.

### 1. Include relevant and valuable content on your firm’s website.

Keep in mind that search engine software agents, or “bots”, periodically visit your website to determine the **relevancy** and **value** of your site to its intended topic. Your site, or even just a single page on your site, that is devoted to the topic of, say, “criminal defense cases involving illegal drug possession” should contain plenty of useful content on that subject (and *only* that subject). Avoid including content on DUI defense, traffic offense, juvenile law, or any other subject not directly related to the main topic of a site or page. Keep your information pithy and concise. And whatever you do NEVER, EVER borrow content from another firm’s website. Pirating content from other sites reduces the value of the information on your site and, more importantly, risks getting your site permanently banned from being ranked at all.

Since many criminal defense attorneys handle a variety of cases, from personal injury to juvenile law to traffic offense cases, it’s a

good idea to create separate web pages for each type of case. In addition, you should research keywords (discussed in the next tip) specific to each case type and incorporate them into the content for each page. Meta tags for each page should include Descriptions, Titles, and Keywords specific to the topic of each page as well.

### 2. Use keywords in your content that your clients are likely to use to find your website.

Avoid the temptation to simply *brainstorm* possible keywords without any evidence that your keywords are what potential clients are actually using. Google offers an extremely handy *Keyword Tool* that can tell you what keywords are being used to find the services that you provide. The *Keyword Tool* can also give you reliable clues about other related keywords that may never have occurred to you otherwise. Plus, the Google Keyword Tool is free for anyone to use.

Here’s an example of a clue I found recently when researching the keyword “dui attorney”. It turned out that another keyword, “drunk driving attorney”, was being used frequently enough to justify rewriting a page for a client that included that new keyword in addition to the original keyword. Now, the client will start getting results on *two* keywords instead of just one – a difference of several thousand searches per month!

Once you have a list of keywords that you know are being used in actual searches you should use those keywords strategically in your website content. “Keyword stuffing”, or overloading your content with keywords, only triggers warning flags among the search engine bots so this should be avoided at all costs. Your content should sound natural when read out loud and be free of any misspellings or improper grammar which can also jeopardize your search ranking.

### 3. Use Pay-per-Click advertising to get a first page ranking in less than five minutes!

Pay-per-click (PPC) advertising allows you to “bid” on one or more keywords in order to promote your website on a first page

*Continued on page 8*



## Hays Webb Kicks Off “Member Get a Member” Campaign

*(At Left) ACDLA District 6 Vice President Hays Webb from Tuscaloosa proudly receives the first t-shirt of the “Member Get a Member” campaign recently in Montgomery. Membership Chairman Richard Keith (at right) presented the shirt at a recent ACDLA Board meeting. You can win one of these fine 100 percent cotton shirts too. Just send in a new member with your name on the membership application form in the upper right hand corner. In addition to a free t-shirt, for each new member signed up, your name goes into a drawing where you could win a FREE CLE of your choice. The drawing will be held at the Death Penalty seminar in Birmingham on January 29 & 30, 2010.*

# THE PROSECUTION OF PRENATAL CONDUCT

By Carmen Howell and Paul Young, *Enterprise, AL*

In 2006, the Alabama Legislature created a new crime entitled “Chemical endangerment of exposing a child to an environment in which controlled substances are produced or distributed.” The crime constitutes a Class C felony if a “responsible person” knowingly, intentionally, or recklessly causes or permits a child to be exposed to, to ingest or to inhale, or to have contact with a controlled substance, chemical substance, or drug paraphernalia. § 26-15-3.2(a), *Code of Alabama*, 1975. The crime is elevated to a Class B felony if there is serious physical injury to the child, and Class A if death is involved. *Id.* Obviously, the statute was intended to apply to children exposed to the harmful vapors and chemicals associated with methamphetamine laboratories. However, some prosecutors are interpreting this statute much more broadly to include exposing a fetus to a controlled substance ingested by the pregnant mother. This misapplication of the law is far outside the intent of the legislature, and is also poor public policy for a number of reasons.

The chemical endangerment statute is included in Title 26, Chapter 15, which is appropriately called “The Alabama Child Abuse Act.” § 26-15-1, *Code of Alabama*, 1975. Although the chemical endangerment statute fails to define “child”, § 26-14-1.3 defines “child” as “*any person under the age of 18 years.*” It is logical to infer from Chapter 14, which directly precedes the chapter on child abuse, that the legislature intended for the word “**child**” to mean a **living person** under the age of 18. Furthermore, Chapter 14 governs the reporting of child abuse or neglect, and in cases involving prenatal exposure, it is used as the authority for the hospital’s report to DHR and DHR’s report to law enforcement. There is nothing in the plain language of § 26-15-3.2 to indicate that the legislature intended for the word “child” to include a fetus, especially when the statute is read in conjunction with other chapters in Title 26.

Of the twenty-two jurisdictions with similar statutes that have considered this issue, only one, South Carolina, has determined that a fetus is included in the definition of “child.” The jurisdictions rejected the prosecution’s interpretation of the term “child” as including a fetus. These courts, using the rule of lenity, mandated that the most favorable construction of the law be afforded to the defendant. Likewise, due process would require that a defendant be informed of what conduct is prohibited under the law. The overwhelming majority of appellate courts have decided that the women being prosecuted could not possibly have known that their conduct was criminal under those statutes which are similar to Alabama’s.

One of the most compelling arguments in favor of Alabama defendants in these prenatal exposure cases is that the Alabama legislature considered amending the statute in 2008. Representative Jeff McLaughlin introduced House Bill 723 in an attempt to expand the definition of “child” to include a fetus, and to also create a rebuttable presumption of guilt if both the mother and the child tested positive for the same controlled substance not prescribed by a physician. The House debated the amendment on

April 17, 2008, during which numerous representatives questioned the wisdom of criminalizing prenatal conduct. Representative McLaughlin stated that he would be “surprised” if district attorneys in this state actually used this statute to charge and imprison women who could not overcome drug addiction during pregnancy. But this is exactly what is happening. The Alabama House, by majority vote, declined to pass the amendment; however, some Alabama prosecutors remain undeterred by this and continue to indict new mothers whose babies test positive for controlled substances not otherwise prescribed by a physician. These prosecutions will undoubtedly create a whole host of problems when it comes to handling such a complex social problem.

There are many public policy arguments against punishing women for prenatal conduct. The prosecution of mothers for prenatal drug use clearly creates a slippery slope for other arguments involving prenatal conduct which may be detrimental to the unborn. Will the next endeavor of the prosecution be to punish new mothers for smoking, drinking alcohol, or using caffeine during their pregnancies? Then too, is the prosecution of such women the message the state really wants to send? A pregnant woman with a drug addiction now must make a choice between carrying the pregnancy to full term and risking prosecution under the chemical endangerment statute, or terminating her pregnancy through abortion. It is hard to fathom why prosecutors in a conservative, predominantly pro-life state, would create a situation where pregnant women with drug addictions would be better off choosing abortions rather than carrying their pregnancies to term. Those women that do not choose to end their pregnancies may forego prenatal care and hospital deliveries, which is alarming since these babies are at the most risk for complications and premature birth.

Prosecutors, under the ethical rules, are charged with the duty of promoting justice. It is not their duty to create new crimes nor manipulate existing laws to fit any agenda, whether personal or political. If the goal truly is to help pregnant women with addictions and to help their unborn, then the last thing the state should be doing is encouraging the avoidance of health care or the termination of pregnancies.

As defense attorneys for three of these women who are caught in this legal conundrum, we have filed motions to dismiss the charges. These motions, which have not yet been ruled upon by the trial courts, and which are too lengthy for this publication, are predicated upon the arguments recited in this article. If you are charged with defending a “chemical endangerment” case involving prenatal conduct, please call or email us and we will be happy to provide you with a copy of these motions. ●

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# AUTHENTICATION OF COMPUTER-BASED AND DIGITAL EVIDENCE

By Brian M. White, Attorney, Decatur, AL

My understanding of computers and technology generally is characterized by having been educated before wide-spread ownership of personal computers. Since most judges I practice around are older than me, they are probably likewise limited. Because of this, many lawyers like me have much to learn about the reliability and admissibility of computer-based evidence and digital media evidence. Such knowledge will give us the power to educate judges when we need to admit this kind of evidence and when we challenge the admissibility of this kind of evidence by the state.

This variety of evidence is not new in 2009, but lately it has become ubiquitous – emails, text messages, computer chatlogs, digital photographs, digital audio and video. The old means of authenticating documents and photographs are not completely adequate for these times.

The special problems posed by digital photography are a good way to describe the need for more elaborate steps to authenticity and admissibility. Manipulation of analog photographs has been usually viewed as a claim of the desperate defendant who has nothing else to work with. Manipulation of digital photographs is far less detectable and easier, cheaper and quicker to accomplish. With digital photographs there is no loss of quality between generations of duplicates. So, is it enough now to simply have a witness say that a photograph adequately and fairly depicts the scene of the crime? Doesn't chain of custody issues become more important as the probability of manipulation has become more real? Does the "silent witness" rule have any role to play with digital media?

Rather than taking a photograph at face value, one must be concerned with data available in a digital file that is not depicted in a photograph. Metadata, which has been defined as data about data, can be obtained from digital cameras. The metadata can include the size of the image, date and time of the photograph, the file size and location, focal length and ratio, and even where the photo was taken when the camera is equipped with GPS. When the file is moved from a camera to a computer, new metadata are created concerning that computer file – when it was created, where it is stored, when it was opened last and when it was edited last.

It has been suggested that authenticity of a digital photograph can be established by use of "hash values". A file in its original state (preferably a "read only" file) can be marked with a unique algorithm or hash value. The hash value will be changed by even the slightest alterations. It is possible then to take the digital photograph file proffered as evidence and compare it to the hash value of an original image file to satisfy the foundation for authenticity.

In case it is not abundantly clear, the need for experts has increased dramatically. Old dogs don't know these tricks. Even if you are a computer-smart lawyer, a computer expert is still vital so that someone can provide testimony to support the admission or challenge the admission of evidence through the unique attributes that will either authenticate the proffered evidence or reveal that an image has been manipulated.

Courts and secondary authorities are beginning to deal with the

question whether traditional evidentiary foundations are adequate for computer-based evidence or what is sometimes called electronically stored information (ESI). These developments tend to concern how elaborate a showing is required to authenticate ESI and whether more hoops should be required for the business records exception to hearsay [Ala.R.Evid. 803(6)] and the similar public records and report exception [Ala.R.Evid. 803(8)].

Both Rule 803(6) and 803(8) have a concluding foundational step concerning whether there is a lack of trustworthiness in the method, process, circumstances or source of the information. Sometimes the question is whether, with this variety of evidence, the proponent must establish trustworthiness or whether the burden is on the opponent to prove a lack of trustworthiness. In Alabama, according to the comments to 803(6), the opponent has the burden of establishing a lack of trustworthiness. Does the burden on the opponent continue to be fair when the "method or circumstances of preparation" for computer-based information is tightly controlled by the proponent; it assumes an ability of criminal defendants to have affirmative knowledge of sometimes proprietary information about the businesses computer operations. It's not like criminal defendants have much opportunity to discover irregularity in the methods or processes that produce a business' data compilations. Consider the battles fought over the "source codes" for the Draeger and the anomalies discovered in the exceptional instances when this information has been made available to a defendant.

A notable case in the area of evidentiary foundations for computer-based evidence is *In re Vee Vinhnee*, 336 B.R. 437 (B.A.P 9th Cir. 2005), a case involving an adversary proceeding in a bankruptcy wherein American Express tried to have a large debt excepted from discharge. The court was not satisfied that the custodian of records witness' knowledge of the methods and processes used to produce and store the data used to produce monthly statements. Citing the complexities of "ever-developing computer technology" and "the more complicated variations on the authentication problem", the court adopted an eleven-step evidentiary foundation. This evidentiary foundation was borrowed adopted from the influential *Evidentiary Foundations* by Edward J. Imwinkelreid, saying that his suggested foundational steps were the "prism" through which computer-based evidence should be viewed. The steps required in the *Vinhnee* case are:

1. The business uses a computer.
2. The computer is reliable.
3. The business has developed a procedure for inserting data into the computer.
4. The procedure has built-in safeguards to ensure accuracy and identify errors.
5. The business keeps the computer in a good state of repair.
6. The witness had the computer readout certain data.
7. The witness used the proper procedures to obtain the readout.

*Continued on page 10*

# PRIMER ON CHALLENGING THE ADMISSION OF 404(B) EVIDENCE

By Ashley Cameron, Attorney, Mobile, AL

Rule 404(b) of the *Alabama Rules of Evidence* states:

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of the trial, or during the trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

This is identical to the *Federal Rules of Evidence*, and in 1978, the Fifth Circuit set out a two-prong test to determine whether so-called 404(b) evidence should be admitted. *United States v. Beechum*, 582 F.2d 898 (in banc), cert. denied, 440 U.S. 920 (1979). First, the extrinsic evidence must be relevant to some issue other than the defendant's character. *United States v. Williams*, 816 F.2d 1527, 1531 (11th Cir. 1987) Second, the evidence must possess probative value that is not substantially outweighed by undue prejudice. *Id.* at 1532. As with all evidence, collateral evidence must also comply with Rule 403. *Id.*

The first step in fighting potential 404(b) evidence is to request notice if the state intends to use any collateral evidence. See *R. 404(b)*. The easiest way to do this is to incorporate it into a motion to produce to be filed at the inception of the case. Although nothing in the rule requires it, request for this notice should be in writing.

The prosecution is then required to give you the "general nature" of the evidence. See *R. 404(b)*. It is important to note that this evidence is "prima facie inadmissible." See *Ex parte Cofer*, 440 So.2d 1121 (Ala.1983) It is the State's burden to show that the collateral evidence has some other purpose than the defendant's conformity with his character. See *Cofer*, supra. The list included in the rule is not exhaustive, but is thorough. Also, the purpose for which the State claims it is using the evidence must be a real and genuine issue in the case. See *Cofer*, supra. For instance, in a rape case where the defendant acknowledges the sex act but claims it was consensual, identity is not at issue and other crimes, wrongs or acts should not be admitted for this alleged purpose.

Once the prosecution provides the general nature of the evidence, one should file a Motion in Limine with the court to exclude such evidence and request a hearing on the matter. At the hearing, the State has the burden to show that the other purpose is relevant and also that it is reasonably necessary to the government's case. *Campbell v. State*, 718 So.2d 123, 128 (Ala.Crim.App. 1997). One's research should be based on the purpose for which the State claims it intends to introduce the evidence, as with different purposes there are different tests.

The similarities between the current charges and the 404(b) evidence necessary to be admissible depend on the reason for its use. For the evidence to be used for identity or for common scheme or plan, the similarities have to almost reach the level of a signature crime, e.g. a red scarf at the scene of two different homicides where

both victims were stabbed numerous times in the heart. Motive, opportunity or intent would require less similarity.

Identity and common scheme or plan 404(b) evidence will only be admitted if both are "signature crimes having the accused's mark and peculiarly distinctive modus operandi so that they may be said to be the work of the same person." *Baker v. State*, 780 So.2d 677,679 (Ala.2000), quoting *Bighames v. State*, 440 So.2d 1231,1233 (Ala. Crim.App 1983). *Baker* goes on to say that the circumstances of the prior crime and the current one must "exhibit such a great degree of similarity that anyone viewing the two offenses would naturally assume them to have been committed by the same person." *Id.*, quoting *Ex parte Arthur*, 472 So.2d 665, 668 (Ala.1985).

Much less is required of evidence purporting to show intent. In *Williams*, supra, the court found that the admission of evidence two rapes committed by the defendant were properly admitted in his assault prosecution. The court applied the *Beechum* test and held that the information was relevant on the issue of intent—that the defendant intended to rape the assault victim also, but she escaped. *Id.* at 1532. While similarities existed (he approached the women and attempted to engage them in conversation before attacking them), there were also plenty of differences. The court held that for purposes of intent, the similarities were sufficient. *Id.*

Contrast that with *Brasher v. State*, where the Court overturned the admission of evidence of sexual relations with a five year old in the trial of what would now be Rape in the Second Degree of thirteen year old. 30 So.2d 31 (Ala.1947). There the Court determined that the purpose for which the evidence was to be admitted was to prove identity. *Id.* at 33. They stated that the similarities between the two were insufficient for that purpose. *Id.* Further, they held, "Such testimony in its final analysis shows nothing more than that the defendant's character is bad or that he is morally deficient." *Id.* at 34. While this case is obviously prior to Alabama's adoption of the codified Rules of Evidence, it contains some excellent language for use by the defense to prohibit the use of 404(b) evidence. Quoting the Supreme Court of Oregon, it states:

To admit testimony that the defendant at other times and places, and under wholly disconnected circumstances, had committed like offenses with parties not named in the indictment, all for the purpose of making it appear that the accused has the bent of mind adapted to such actions, would cloud the issue and confuse the jury. *Id.* at 35.

Even if the State satisfies the Court that the stated use of the evidence is at issue and that the evidence is useful in establishing that fact, the evidence may still be excluded if its probative value is substantially outweighed by undue prejudice. "Such evidence has an almost irreversible impact on the minds of a juror." *Potts v. State*, 500 So.2d 1318 (Ala.Crim.App. 1986). The evidence must not only be relevant, "it must be plain, clear, and conclusive, before its probative value will be held to outweigh its potential prejudicial effects."

*Continued on page 10*

## IT CORNER *Continued from page 4*

search listing immediately. *Google Adwords*, the most popular PPC ad program, costs nothing to set up and is chock full of helpful tools to help you launch your PPC ad campaign.

Basically, here's how *Google Adwords* works:

First, you decide what keywords you want to use in your Adwords campaign using the *Keyword Tool*. Google sets a minimum bid price of .05 cents for each keyword that you select. However, other Adwords advertisers may have already bid the price up (beyond the minimum bid price) for one or more of the keywords you've selected. In those cases you would have to meet or exceed the current bid price to be assured of a first page ranking.

Here's an example of a keyword I researched for a lawyer in Florida. The keyword was "fort lauderdale criminal attorney" and the current bid price was \$20.80. I would then bid \$20.85 to have my small Google ad (which includes a link to the lawyer's website) appear on the first page when anyone performed a Google search using the keyword I bid on.

It's important to understand that the lawyer in Florida doesn't pay for the privilege of appearing on the first page listing. He only pays the bid price for the keyword (\$20.85) to Google if someone actually **clicks on his ad and lands on his website**. This is like having an ad in the Yellow Pages of the phone book, but only paying a few dollars every time someone calls the office in response to the ad. In fact, it should be no surprise that Yellow Page print advertising is on a downward spiral while PPC ad sales are rocketing upward – even during a down economy.

### 4. Use a website address that includes your keyword.

There has been lot of debate in recent years about the effectiveness that a domain name such as "alabama-dui-lawyer.com" has on search engine ranking. But if the keyword "alabama dui lawyer" is used strategically in the content of the website then such a domain name would definitely improve the site's search engine ranking. At the end of the day, domain names are very cheap to register and it makes sense to leverage a domain name strategy that incorporates keywords that are also used in the site's content. Keyword-rich domain names can be used very effectively for "landing pages" when incorporated into a *Google Adwords* or other PPC advertising strategy.

### 5. Leverage keyword-rich blogs and directories to improve your site's search ranking.

Starting a blog on *Wordpress*, *Blogger*, or any number of other blogging sites costs nothing, but can have a very positive impact on your website's search ranking. With a little discipline, you can write a keyword-rich blog each month that always contains a link back to your website. This link becomes a valuable "inbound link" that naturally increases the popularity of your site. Most of the free blogging sites are considered "trusted" sites, meaning they automatically get Google's attention whenever any new content is added. Instead of waiting months for a search bot to visit your site, the blogging sites are crawled much more frequently – sometimes within hours of adding new content.

Legal directories offer another great opportunity for you to include your website address in your professional listing which, in turn, becomes an inbound link back to your website. Anytime you have an opportunity to include the URL of your website in an online directory of any kind it can have a very positive effect on the search engine visibility of your firm's website. ●

*For more information about Search Engine Marketing please visit the author's website at <http://melcooper.com/searchenginemarketing>*

# ACDLA 2009-2010 CLE CALENDAR MARK THE DATES!

## DECEMBER 4, 2009

**Four Corners Seminars** – Dothan & Tuscaloosa  
4 FREE CLEs to 2010 ACDLA members  
Topics: Ethics, Crawford Decisions, 404b and Traffic Stops

## DECEMBER 11, 2009

**Four Corners Seminars** – Anniston, Huntsville & Mobile  
4 FREE CLEs to 2010 ACDLA members  
Topics: Ethics, Crawford Decisions, 404b and Traffic Stops

## JANUARY 29 & 30, 2010

### "Loosening the Death Belt" – ACDLA's Annual Death Penalty Seminar

DoubleTree Hotel – Birmingham, AL– 12 CLEs, includes 1 hour Ethics

Topics: MI/MR Ineffective Assistance Issues, False Confessions, Faulty Forensic Evidence (Ballistics), Mistaken Eyewitness and much, much more!  
Call DoubleTree 1-205-933-9000 and ask for the ACDLA rate of \$119 single or double.

Watch for complete registration details coming soon. Pre-registration is advised.

## APRIL 30, 2010

### "Drug Crimes, Drug Searches" – The Westin – Huntsville, AL -

A one-day 6 Hour CLE focusing on all aspects of this topic. Includes Possession, Distribution, Trafficking, Manufacturing, Drug Conspiracy, Search Warrants, Dealing with Drug Agents and Undercover informants, Drug Offenses and the Application of the AL Habitual Offender Act, Cross Examination, Plea Bargaining and much more.

## JUNE 17-19, 2010

### "Justice Must Be Won: Summer Seminar & Annual Meeting" – Pensacola Beach, FL

Pensacola Beach Hilton – 12 CLEs

Topics: "What Works in Alabama: How to Win in Court"

Watch for complete registration details coming soon.

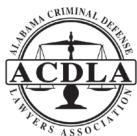
## OCTOBER 8, 2010

### "Advanced DUI Defense Techniques"

Another look at DUI defense from an advanced perspective of scientific evidence.

Beau Rivage Hotel, Biloxi, MS – 6 CLEs

Watch for complete registration details coming soon.



# MEMBERSHIP APPLICATION

## 2010 New Member/Membership Renewal

- \$100 – New Lawyer**  
(Member of bar less than 3 yrs)
- \$185 – Regular**  
(Member of the bar 3 yrs or more)

- \$600 – Presidents Club**  
(Free Registration – Summer Seminar)
- \$7,500 – Lifetime membership**  
(\$7,000 lump sum or \$1,500/ then \$1000/yr;  
no more dues or registration fees for events!)

**IMPORTANT: ACDLA is a 501(c)(6) non-profit organization. Approximately 20 percent of these dues ARE NOT tax deductible as business expenses because they relate to ACDLA's lobbying and political expenses.**

**Check membership category above. Complete this form and fax it toll-free to:** (866) 665-7522. Or, you may print and mail this form, along with your check, to: ACDLA, PO Box 1147, Montgomery, AL 36101.

Name: \_\_\_\_\_ Address: \_\_\_\_\_  
 City: \_\_\_\_\_ State: \_\_\_\_\_ Zip: \_\_\_\_\_  
 Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ E-mail: \_\_\_\_\_

### Declaration of Employment:

I am not employed in any way by a law enforcement agency, a District Attorney or as a full time judge.

Signature: \_\_\_\_\_

### Authorization to Communicate:

I give ACDLA permission to communicate with me via US mail or by electronic format (including email and facsimile) information regarding membership, CLE events and other information related to criminal defense work.

Signature: \_\_\_\_\_

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Signature: \_\_\_\_\_

**This membership will expire on December 31, 2010.**

### OPTIONAL LEGISLATIVE PROGRAM CHECKOFF:

Legislative efforts cost money. If you can make a separate donation to ACDLA for its 2010 lobbying activities, please include this donation with your dues:

- I wish to make an additional donation (above dues) this year to the ACDLA legislative program.**

\_\_\_\_\_ \$75    \_\_\_\_\_ \$100    \_\_\_\_\_ \$150    \_\_\_\_\_ \$200    \_\_\_\_\_ \$250 or more    \_\_\_\_\_ Other

**IMPORTANT NOTE:** These funds WILL NOT be used for political campaigns, only to offset legislative program expenses. Please make all checks payable to ACDLA, P.O. Box 1147, Montgomery, AL 36101. Visa and MasterCard are accepted. Just complete the form below.

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**FAX THIS FORM TOLL-FREE TO:** Ann Cooper at 866-665-7522

**FOR QUESTIONS, COMMENTS:** Call Ann Cooper at 334/272-0064 – Email: annscooper@bellsouth.net

## AUTHENTICATION OF COMPUTER-BASED AND DIGITAL EVIDENCE

*Continued from page 6*

8. The computer was in working order at the time the witness obtained the readout.
9. The witness recognizes the exhibit as the readout.
10. The witness explains how he or she recognizes the readout.
11. If the readout contains strange symbols or terms, the witness explains the meaning of the symbols or terms for the trier of fact.

The court elaborated on Step 4 by saying:

The "built-in safeguards to ensure accuracy and identify errors" in the fourth step subsume details regarding computer policy and system control procedures, including control of access to the database, control of access to the program, recording and logging of changes, backup practices, and audit procedures to assure the continuing integrity of the records.

*Vinhnee*, 336 B.R. at 446.

This standard puts back onto the proponent of the evidence the burden to establish the trustworthiness of the methods and circumstances of preparation of the business record. It recognizes that the old foundations for paper records that worked for the "shop-book" rule that eventually became 803(6) might not be fair for computer data. Because computers create enormous convenience for a business, one may view this foundation as fair, even though more witnesses may be required, when a business seeks to have a computer record admitted at trial. When the State uses these complex business records, fundamental rights of the defendant to due process may require that the State be put to this more exacting foundation for admissibility.

Whether or not a more stringent standard like the one in *Vinhnee* ever becomes the law in Alabama, knowledge of these foundational steps and the complexities of computer-based evidence generally will arm the defendant in a criminal case with the means to keep out untrustworthy evidence or may allow a defendant to make a stronger showing for the believability of his evidence when this kind of evidence is part of the defense case.

Given my confession of being simple in this area of knowledge, it will not surprise anyone that almost nothing in this article represents original thought. To be in the know on the evidentiary issues surrounding computer-based evidence and digital evidence look as some of the following:

*In Re Vinhnee*, 336 B.R. 437 (B.R.P. 9th Cir. 2005); *Loraine v. Markel American Insurance*, 241 F.R.D. 534 (2007); *Evidentiary Foundations*, by Edward J. Imwinkelried (5th ed.), *The "Authenticity Crisis" in Real Evidence*, 15 Prac.Litigator No. 6; *Admitting Computer Evidence after In Re Vinhnee: A Stricter Standard for the Future?*, Cooper Offenbecher, 4 Shidler J.L. Com. & Tech. 6 and *Digital Manipulation and Photographic Evidence: Defrauding the Courts a Thousand Words at a Time*, Zachariah B. Perry, 2009 U. Ill. L.J. Tech. & Policy 175; *The Admissibility of Electronic Evidence at Trial: Courtroom Admissibility Standards*, 34 Cumb.L.Rev. 95 (2003-2004).

The hardcore lover of evidence law will enjoy *U.S. v. Safavian*, 435 F.Supp. 2nd 36 (D.D.C. 2006). This is an Abramoff-related prosecution wherein the defense challenged the admissibility of emails. The opinion is a great example of limited admissibility and the "wave theory of admissibility" talked about by Dean Charles Gamble. ●

## PRIMER ON CHALLENGING THE ADMISSION OF 404(B) EVIDENCE

*Continued from page 7*

*Campbell*, supra at 128. In fact, *Beechum* points out that there is a danger inherent in the admission of "extrinsic offense evidence...that the jury may convict the defendant not for the offense charged but for the extrinsic offense." *Id* at 914. Also, the more evidence, stipulation or inference that is present in the prosecution's case, the less probative the collateral evidence becomes. *See id.*

If the Court rules in favor of the State after a hearing on a motion in limine to exclude the evidence of other crimes, wrongs, or acts, one should still object at trial when it is introduced and renew the objection at every opportunity and at the close of the state's case. ●

### MEMBER GET A MEMBER CAMPAIGN FREE T-SHIRTS AND A DRAWING FOR A FREE CLE!

Did you know, the number one way that members first learn about their membership association is from another member? Did you know by simply getting members to join you are eligible for a free t-shirt and door prize entries for a FREE CLE?

On October 1, ACDLA kicked off its third annual "Member Get a Member" Campaign. Last year approximately 47 new members joined ACDLA because a fellow member invited them to join.

If you sponsor a new member today, you will receive a free campaign t-shirt. For each additional member sponsored, your name goes into a drawing for a FREE CLE of your choice. The drawing will be held at the 2010 Death Penalty Seminar in Birmingham, Alabama at the DoubleTree Hotel. You need not be present to win.

For your convenience, please use the 2010 Membership Application found in this issue. Simply write your name on the upper right hand corner of the application and make sure the new member uses that application when they sign up so that you may be properly credited for the membership.

The campaign will run through December 31, 2009.

QUESTIONS? Contact Ann Cooper at [annscooper@bellsouth.net](mailto:annscooper@bellsouth.net) or call 1-334-272-0064

The Alabama Criminal Defense Lawyers Association presents....

## BILLY MOORE

Former Death Row Inmate and Minister

Keynote Speaker – *“2010 Loosening the Death Belt”*

January 29 & 30, 2010



Former death row inmate William "Billy" Neal Moore is a story of forgiveness and redemption. After spending nearly 17 years on Georgia's death row, the prisoner-turned-Pentecostal preacher says he is living proof that a wasted life can be revived and serve the good of humanity.

Moore was 22 years old when he wound up on Georgia's death row after being convicted for the 1974 robbery murder of a 77-year-old man. Moore asked for and received forgiveness from the victim's family. He was within 72 hours of his execution when, through the efforts of the victim's family he was spared from a sentence of death and ultimately paroled.

Mr. Moore will keynote ACDLA's 2010 "Loosening the Death Belt" Seminar on January 29 in Birmingham at the DoubleTree Hotel. Watch for more details coming soon on this powerful two-day capital case training opportunity.

Make your hotel reservations now. We expect a sell out. Call the DoubleTree at 205-933-9000 and ask for the ACDLA rate of \$119 single or double. "These discounted rooms will be dropped January 15, 2010.

**Loosening the Death Belt • January 29 & 30, 2010 • DoubleTree Hotel, Birmingham, AL  
12 CLEs, includes 1 hour Ethics**

**"MI/MR Ineffective Assistance Issues"**

**"False Confessions"**

**"Faulty Forensic Evidence - Ballistics"**

**"Mistaken Eyewitness"**

**"Police and Prosecutorial Misconduct"**

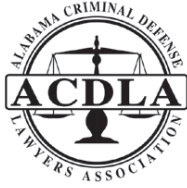
**"Appellate Responsibility of Defense and Preservation of Record"**

**"Ethics Issues or Avoiding Malpractice"  
and much, much more!**

***Complete registration information coming soon. Mark the dates but call the hotel now!***

***DoubleTree Hotel, 808 South 20th St., Birmingham, AL***

***Questions? Contact Ann Cooper at 334-272-0064 or via email to [annscooper@bellsouth.net](mailto:annscooper@bellsouth.net)***



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