

Brandy

From: mt4au@charter.net
Sent: Tuesday, February 05, 2013 7:06 PM
To: brandyisenhour@gmail.com
Subject: proposed ethics rule 257x4-02ABCR

Hi Brandy,

I am writing to vote AGAINST this proposed ethics rule. I do wish this to pass. Please count me as voting NO as I am not able to be there.

Thanks
Melinda Thornbury 198

Brandy

From: Kimberly Duckett <kimberlyduckett@aol.com>
Sent: Tuesday, February 05, 2013 5:12 PM
To: brandyisenhour@gmail.com

I am opposed to the ethics rules in that I feel the \$100 gift rule will be very hard to enforce. It will ultimately cost the court reporters more money because we will have to have auditors to verify the money that is being spent.

I do not feel that impartiality has been or is a problem. In my eighteen years of court reporting I have never heard of or been accused of not being impartial. This rule is very vague.

Kim Duckett

TAYLOR & TAYLOR
ATTORNEYS AT LAW
2130 HIGHLAND AVENUE
BIRMINGHAM, ALABAMA 35205
TELEPHONE: (205) 558-2800
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TED TAYLOR
LEAH O. TAYLOR
RHONDA PITTS CHAMBERS
TEDFORD TAYLOR
TAMMY SMITH

PRATTVILLE OFFICE
114 EAST MAIN STREET
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January 31, 2013

Hon. Aubrey Ford, Jr.
Alabama Board of Court Reporting
Post Office Box 241565
Montgomery, Alabama 36124

Dear Judge Ford:

I am submitting my written comments regarding the proposed Rule and Regulation change to Chapter 257-X-4-.02 ABCR Ethics. I have concerns about Section 8. That provision purports to limit the aggregate amount of gifts, rewards or incentives that a court reporter could give to his or her clients or customers to \$100 a year.

The Rule fails to provide clear notice and convey sufficient warning as to whether it applies to court reporting firms or solely individual court reporters. The overall Rule speaks in terms of the "licensee" or the "member."

The words "indirectly" and "recipient" are vague and ambiguous because they are undefined, and the face of the Rule does not clarify what constitutes a court reporter's "indirectly" making a gift, nor does it clarify whether the word "recipient" refers to an attorney, an entire law firm, or both.

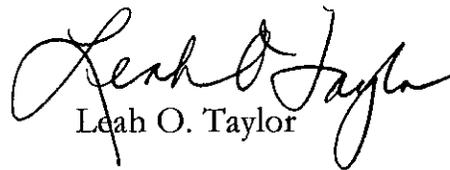
For example, if the Court Reporting Firm of Adams & Baker hypothetically provided a holiday lunch to a law firm that cost \$200.00, has the rule been violated as the firm is a "recipient" of something of value in excess of \$100.00? Or if four members of the firm attended, were there four recipients who only each received something of value in the amount of \$50.00? What if the value of the lunch were \$75.00 and shortly thereafter a member of the law firm received a \$25.00 gas card for scheduling a deposition with Adams & Baker? And in addition to those issues is the critically important question of whether Adams & Baker's act of providing such a lunch was an

Hon. Aubrey Ford, Jr.
January 31, 2013
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indirect giving by certified court reporters of Adams & Baker who take depositions for the law firm which received the lunch?

Finally, the proposed Ethics Rule does not state the penalties for any violation.

Very truly yours,


Leah O. Taylor

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Honorable Aubrey Ford, Jr.
Alabama Board of Court Reporting
Post Office Box 241565
Montgomery, Alabama 36124



Dear Judge Ford:

I write to comment on the proposed addition of Chapter 257-X-4.02 to the Alabama Board of Court Reporting's Rules and Regulations dealing with Ethics. Most of the provisions of the ethical rule are much needed. The only objection that I have is to paragraph (8) which states:

Refrain from giving, directly or indirectly, any gift or anything of value to attorneys or their staff, other clients or their staff, or any other persons or entities associated with any litigation, which exceeds \$100 in the aggregate per recipient each year. Nothing offered in exchange for future work is permissible, regardless of its value. Pro bono services as defined by the NCRA Guidelines for professional Practice or by applicable state and local laws, rules and regulations are permissible in any amount.

I cannot help but perceive this Paragraph as an effort to halt the community service that Mike and Mickey Turner of Freedom Court Reporting have been providing for years. Freedom Court Reporting has sponsored hundreds of events – not just for lawyers but for Alabama citizens from all walks of life. I have served on several committees that organized seminars, receptions and charity fund raisers. We would not have been able to have those events if it were not for the generosity of Mike and Mickey Turner. The Turners have never asked for anything in return for their generosity.

I ask that the Board consider deleting Paragraph (8) – “the Freedom Court Reporting Rule” – in its entirety from the Proposed Rule and Regulation Amendment to Chapter 257-X-4-.02.

Very truly yours,

A handwritten signature in black ink that reads "Rhonda P. Chambers". The signature is written in a cursive style.

Rhonda P. Chambers

February 5, 2013

Via Hand Delivery
Hon. Aubrey Ford, Chairman
Alabama Board of Court Reporting
2011 Berry Chase Place
Montgomery, AL 36117

RE: Comments on Proposed Rule 257-X-4-.02

Dear Judge Ford:

Thank you for the opportunity to share comments on behalf of my clients at the public hearing held by the Alabama Board of Court Reporting last Friday. I hope you and other members of the Board found the public hearing, and comments from both proponents and opponents of the proposed regulation to be helpful in your further deliberations.

As you requested during the meeting of the Board held after conclusion of the public hearing, I have prepared this brief letter to discuss those aspects of our objections to the proposal which rest purely on legal grounds. We thank you for this additional opportunity to share our input with you and the other members of the Board.

As far back as June of 2009, the Board's newsletter contained an article entitled "ABCRCR's Role in 'Gifting'" which explained the legal limitations on the ACBR's ability to enact Proposed Rule 257-X-4-.02.. In part, that article read "We have discovered the real regulation of [gifting] is covered under the jurisdiction of the State Bar, and ABCRCR has notified them of this fact. The enabling act of the ABCRCR does not address this matter at all." Further, the article stated that, for ABCRCR to have jurisdiction of this issue, legislation would be required to provide the Board with the authority to license court reporting firms.

The article goes on to state that the Board was given no authority under state law to sanction court reporting firms, only individuals, and to set forth that adoption of the NCRA ethical standards as Rules and Regulations could cause an extreme burden for individual licensees.

As you and the remainder of the Board are aware, there has been no legislative change to provide the Board with the authority referenced above. To the contrary, legislation was introduced during the Regular Session of the Alabama Legislature in 2012, but failed to receive any favorable consideration.¹

¹ A copy of Senate Bill 472 from the 2012 Regular Session of the Alabama Legislature, together with the legislative history of SB 472 are attached hereto as Exhibit A, and as found on the Legislature's website (www.legislature.state.alabama.us).

As with all administrative agencies, the Board is limited in the rules and regulations it may create. It can do only what the Legislature has given it the power to do. An administrative agency may not take action that the Legislature has not authorized it to take. *Ex parte State Health Planning & Dev. Agency*, 855 So.2d 1098, 1103 (Ala. 2002) (“administrative agencies are creatures of the Legislature, which serves as the source of their authority and sets their relevant boundaries”); *Kids’ Klub, Inc. v. State Dep’t of Human Resources*, 874 So.2d 1075, 1090 (Ala.Civ.App. 2003).²

In determining whether the adoption of this proposed rule would go beyond the jurisdictional limits of the enabling statute, we look to that very statute, Ala. Code §34-8B-5: The board shall have all of the following duties and responsibilities:

- (1) Act on matters concerning competency licensure only and the process of granting, suspending, reinstating, and revoking a license.
- (2) Establish a procedure for the investigation of complaints against licensed court reporters and for the conduct of hearings in which complaints are heard.
- (3) Set a fee schedule for granting licenses and renewals of licenses subject to the Alabama Administrative Procedure Act.
- (4) Maintain a current register of licensed court reporters and a current register of temporarily licensed court reporters. Registers shall be matters of public record.
- (5) Maintain a complete record of all proceedings of the board.
- (6) Adopt continuing education requirements no later than October 1, 2007. . . .
- (7) Determine the content of and administer examinations to be given to applicants for licensure as certified court reporters and issue numbered licenses to applicants found qualified.
- (8) Maintain records of its proceedings and a register of all persons licensed by the board which shall be a public record and open to inspection.

Clearly, none of these enumerated powers confer the authority to adopt the rule proposal before us today. Subsequently, in §34-8B-7, the Board is authorized to promulgate rules necessary to implement the specific Code chapter. Nothing in the Code chapter, however, allows for the regulation of business practices as the current proposal attempts to do.

This legislative language should be compared with that from statutes authorizing some other agencies of similar jurisdiction:

The Alabama Board of Examiners in Marriage and Family Therapy was established by Ala. Code §§34-17A-1, *et seq.* Within that enabling statute, in Ala. Code § 34-17A-2, the Legislature established that one purpose of the Board was to ensure that the public is protected from the unprofessional, improper, unauthorized and unqualified practice of marriage and family therapy. Further, in Ala. Code § 34-17A-4 can be found a listing of prohibited acts.

² Copies of the cited cases are attached hereto as Exhibits B and C, respectively.

The State Board of Respiratory Therapy was established by Ala. Code §§34-27B-1, *et seq.* Within that enabling statute, in Ala. Code § 34-27B-1, the Legislature stated that one purpose of the Board was to protect from unprofessional or unethical conduct by persons licensed to practice respiratory therapy.

The Alabama Licensure Board for Interpreters and Transliterators was established by Ala. Code §§34-16-1, *et seq.* Within that enabling statute, in Ala. Code § 34-16-4, the Legislature expressly authorized the Board to establish a procedure to investigate complaints concerning the violation of ethical practices for licensed or permitted interpreters.

Conversely, the enabling act of this Board clearly states that the Board is intended to establish and maintain a standard of competency for individuals engaged in court reporting and to protect the public and litigants whose rights to personal freedom and property are affected by the competency of court reporters. Further, the enabling statutes provide in the listing of duties of the Board that they all “[a]ct on matters concerning competency licensure only” The proposed regulation, clearly, is not concerned with the regulation of competency.

When the contrasting language of these differing statutes cited above is considered, a couple of canons of statutory construction come into play. First, it must be presumed that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are clear and unambiguous, as is the case here, inquiry into the matter is deemed to be complete. Therefore, this Board’s jurisdiction is limited to matters concerning competency licensure only.

Secondly, since this particular enabling statute is silent as to the authorization of any sort of ethical codes or standards, it must be noted that many courts – including the United States Supreme Court – have placed emphasis on such a statutory silence, when that silence contrasts with a consistent pattern in other statutes. See *Meyer v. Holley*, 537 U.S. 280 (2003). Such emphasis would plainly lead to the conclusion that, had the Legislature intended to authorize action by the Board relating to ethical codes and standards, such would have been expressly authorized.

Additionally, as discussed at length during the public hearing, the proposal is overreaching and vague. Here, we are presented with language that would arguably restrict First Amendment rights of court reporters by preventing them from making campaign contributions in judicial races. It would prevent court reporters from supporting activities of the Alabama State Bar. It could bar a court reporter from hiring legal representation regarding matters such as corporate formation, or to defend a lawsuit relating to a traffic incident. It lacks definitions of important terms such as “gift” or “anything of value.” It would clearly lead to uncertain resolution and could lead to unfounded complaints.

Hon. Aubrey Ford, Chairman
February 5, 2013
Page Four

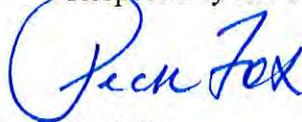
Proponents of the proposal have cited its similarity to provisions found within the Code of Professional Ethics (COPE) of the National Court Reporting Association (NCRA), a voluntary membership trade association as opposed to a state licensing board. In fact, the crux of this conflict, paragraph 8 of the proposed regulation, is identical with Provision 8 of COPE. Yet even this cannot erase the concerns about the vagueness of the proposal, or to the lack of jurisdiction for this board to adopt such a proposal.

NCRA's Constitution and Bylaws expressly provides that one of the purposes of the organization is the promotion of lawful and proper professional ethics. Respectfully, no such purpose or authority is granted to this Board through its enabling statute. Further, NCRA policy allows for the issuance of advisory opinions relating to the interpretation of COPE by its Committee on Professional Ethics. No such procedure is authorized under this Board's enabling statute. Even there, however, NCRA's interpretation of provision 8 of COPE, relating to "gift-giving" has been subject to an evolving interpretation: Advisory Opinion 13 was initially issued, then rescinded in 2005; Advisory Opinion 27 was issued, then rescinded in 2009; Advisory Opinion 45 was originally issued in 2009, and amended in 2011; and Advisory Opinion 46 was first issued in 2011 and revised in 2012. Even the profession's voluntary membership trade association has been unable to have a constant and firm interpretation of the language proposed here, and those advisory opinions would not serve as binding precedent for interpretations in Alabama. Rather, this matter would necessitate submission to the courts regarding complaints brought under this vague umbrella, and would subject individual court reporters and the Board to unnecessary legal fees and expenses.

For all of these reasons, we believe this matter is not ripe for adoption, and urge it be rejected by the Board.

Should you have any further questions or comments, please feel free to contact me at 334.420.0793.

Respectfully submitted,



Peck Fox

PF/brr
Enclosures
cc: Members of the Board

EXHIBIT A

1 SB472
2 139431-1
3 By Senator Keahey
4 RFD: Judiciary
5 First Read: 05-APR-12

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SYNOPSIS: Existing law provides for the licensure of court reporters.

This bill would provide for professional standards of practice, firm registration, renewal, and reinstatement of the license of a court reporting firm.

This bill would provide grounds for denial, suspension, or revocation of a certificate or license of a court reporter; to provide for rates; and to provide fines.

A BILL
TO BE ENTITLED
AN ACT

Relating to court reporters, to provide for professional standards of practices; to provide for firm registration; to provide for renewal and reinstatement of licenses of court reporting firms; to provide grounds for denial, suspension, or revocation of a certificate or license

1 of a court reporter; to provide for registration; and to
2 provide for fines.

3 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

4 Section 1. This act shall be known as the Ethics for
5 Court Reporters Act.

6 Section 2. As used in this act, the following terms
7 shall have the following meanings:

8 (1) ABCR. The Alabama Board of Court Reporters.

9 (2) ACRA. The Alabama Court Reporters Association.

10 (3) ADHERING TO THE SPIRIT OF THE RULE. Adherence to
11 the spirit as well as the letter of the rule regarding
12 incentives by avoiding the appearance of impropriety.

13 Repeatedly giving gifts valued at significantly under the one
14 hundred dollar (\$100) aggregate limit to the same recipient in
15 order to avoid the one hundred dollar (\$100) aggregate limit
16 would violate the spirit of the provision and be
17 impermissible. Elaborate or complicated schemes to obfuscate
18 the value of incentives offered or to direct gifts to a single
19 recipient through different staff members from the same firm
20 in order to avoid exceeding the limits specified in this act.

21 (4) CERTIFICATE. A certified court reporter's
22 certificate issued under this act.

23 (5) CERTIFIED COURT REPORTER or COURT REPORTER. A
24 person who is technically qualified, registered, and certified
25 by the ABCR under this act to practice court reporting.

26 (6) COURT REPORTING FIRM. An entity which, for
27 compensation, provides or arranges for the services of a court

1 reporter, shorthand reporter, or transcriptionist or provides
2 referral services for court reporters in this state. A court
3 reporting firm may include any corporation, firm, partnership,
4 sole proprietorship, or other business entity providing or
5 arranging for court reporting services, shorthand reporting
6 services, or transcription services.

7 (7) CREDITS. Anything that may be exchanged by the
8 recipient for something of value or an accumulative-value
9 gift, value-oriented gift, gift, incentive, reward, or any
10 thing of value to attorneys, clients, or their representatives
11 or agents.

12 (8) DESIGNATED REPRESENTATIVE OF A COURT REPORTING
13 FIRM. The person designated to act as the representative of a
14 court reporting firm.

15 (9) FIRM REGISTRATION. Any person or entity that
16 employs certified court reports, shorthand reporters,
17 transcriptionists, or engages independent contractors to
18 provide court or shorthand reporting services, including
19 transcription. A firm shall be required to register any
20 affiliate office under a separate registration number and pay
21 a registration renewal fee.

22 (10) GIFT. As broadly defined in the rules governing
23 the United States Congress, includes any accumulative-value
24 gift, value-oriented gift, gift, incentive, reward, item,
25 gratuity, favor, entertainment, hospitality, or other item
26 having monetary value. This includes points or credits that
27 may be exchanged by the recipient for something of value.

1 (11) GRATUITY. Any accumulative-value gift,
2 value-oriented gift, gift, incentive, reward, or any thing of
3 value to attorneys, clients, or their representatives or
4 agents. This includes points or credits that may be exchanged
5 by the recipient for something of value.

6 (12) INCENTIVES. Any gift, reward, or any thing of
7 value to attorneys, clients, or their representatives or
8 agents. This includes points or credits that may be exchanged
9 by the recipient for something of value.

10 (13) LICENSE. A license issued under this act to
11 conduct business as a court reporting firm.

12 (14) LICENSEE. A person to whom a license has been
13 issued as Certified Court Reporter or a designated
14 representative of a court reporting firm.

15 (15) NCRA. The National Court Reporters Association.

16 (16) ONE HUNDRED DOLLAR (\$100) AGGREGATE LIMIT. Such
17 incentives that do not exceed one hundred dollars (\$100) in
18 aggregate value, per recipient, per year and are nominal in
19 value and are permissible.

20 (17) PERSON. Without limitation, individuals,
21 partnerships, corporations, political subdivisions, and all
22 other legal entities. The term person shall not in any way
23 pertain to state, county, municipal, or city institutions but
24 shall be deemed to include any individual, firm, partnership,
25 corporation, or other entity not licensed to practice court
26 reporting in the State of Alabama.

1 (18) POINTS. Anything that may be exchanged by the
2 recipient for something of value or an accumulative-value
3 gift, value-oriented gift, gift, incentive, reward, or any
4 thing of value to attorneys, clients, or their representatives
5 or agents.

6 (19) PRACTICE OF COURT REPORTING. Reporting, in this
7 state, by use of voice writing or any system of manual,
8 mechanical, or digital shorthand and court reporting
9 transcription.

10 (20) REWARDS. Any accumulative-value gift,
11 value-oriented gift, gift, incentive, reward, or any thing of
12 value to attorneys, clients, or their representatives or
13 agents. This includes points or credits that may be exchanged
14 by the recipient for something of value.

15 Section 3. (a) A court reporter shall refrain from
16 giving, directly or indirectly, any gift or any thing of value
17 to attorneys or their staff, clients or their staff, or any
18 other persons or entities associated with any litigation.
19 Nothing offered in exchange for future work shall be
20 permissible, regardless of its value. Pro bono services as
21 defined by the NCRA Guidelines for Professional Practice or by
22 applicable state and local laws, rules, and regulations shall
23 be permissible in any amount.

24 (b) Incentives shall not be given by individual
25 court reporters, court reporting firms, or any entity or
26 individual engaged in providing services to attorneys or their
27 staff, either directly or indirectly, in the state, other than

1 the receipt of compensation for reporting services. The
2 persons or entities shall include, but not be limited to,
3 attorneys, employees of attorneys, clients, witnesses,
4 insurers, underwriters, or any agents or representatives
5 thereof. A court reporting firm shall not undertake any action
6 that constitutes unprofessional behavior under any statute,
7 rule, or regulation now or hereafter in effect which pertains
8 to court reporting firms. In conducting their practices, court
9 reporting firms shall observe and be bound by such statutes,
10 rules, and regulations to the same extent as a person holding
11 a license pursuant to this act.

12 Section 4. Transcripts of proceedings shall follow
13 Rule 29 of the Alabama Rules of Judicial Administration.

14 Section 5. (a) A shorthand reporting firm may not
15 assume or use the title or designation court recording firm,
16 court reporting firm, shorthand reporting firm, or any
17 abbreviation, title, designation, words, letters, sign, card,
18 or device tending to indicate that the firm offers services of
19 a court reporting firm, unless the firm is registered with
20 ABCR.

21 (b) ABCR may enforce this section against a firm,
22 its affiliate office, or both, if the firm or affiliate office
23 is not registered with the board, by seeking an injunction or
24 by filing a complaint in the circuit court of the county in
25 which the firm or affiliate office is located. An action for
26 an injunction shall be in addition to any other action,
27 proceeding, or remedy authorized by law. The county or

1 district attorney or counsel designated and empowered by the
2 board shall represent the board.

3 (c) Each court reporting firm shall appoint one
4 person affiliated with the court reporting firm to act as the
5 designated representative for the firm. The person appointed
6 shall:

7 (1) Hold a Certified Court Reporter (CCR)
8 certificate.

9 (2) Pass an examination administered by ACRA, which
10 is the equivalent of the written knowledge test taken for
11 licensure of a CCR.

12 (d) ACRA shall administer an examination to
13 determine whether a designated representative of a court
14 reporting firm understands:

15 (1) The ethics and professionalism required for the
16 practice of court reporting.

17 (2) The obligations owed by a court reporter to the
18 parties in any reported proceedings and the obligations
19 created by the provisions of this act and any regulation
20 adopted thereto.

21 Section 6. (a) A license as a court reporting firm
22 shall expire on September 30 of each year and may be renewed
23 if, before that date, the licensee submits to the ABCR an
24 application for renewal on a form prescribed by ABCR.

25 (b) The board shall adopt regulations requiring a
26 designated representative of a court reporting firm who does
27 not hold a CCR certificate to participate in continuing

1 education or training as a condition to the renewal or
2 reinstatement of a license. If a designated representative of
3 a court reporting firm fails to comply with the requirements,
4 ABCR may suspend or revoke the license of the licensee.

5 (c) A license that expires pursuant to this section
6 may be reinstated if the applicant does all of the following:

7 (1) Complies with subsection (a).

8 (2) Submits to ABCR the required fee for
9 reinstatement.

10 Section 7. (a) ABCR may refuse to issue or renew or
11 may suspend or revoke any certificate or license if a court
12 reporter, in performing or attempting to perform any act, has
13 failed to do or has done any of the following:

14 (1) Willfully failed to take full and accurate
15 stenographic notes of a proceeding.

16 (2) Willfully altered any stenographic notes taken
17 at a proceeding.

18 (3) Willfully failed to accurately transcribe
19 verbatim any stenographic notes taken at any proceeding.

20 (4) Willfully altered a transcript of stenographic
21 notes taken at any proceedings.

22 (5) Willfully violated gifting rule as defined to
23 include any accumulative-value gift, value-oriented gift,
24 gift, incentive, reward, item, gratuity, favor, entertainment,
25 hospitality, or other item having monetary value, including
26 points or credits that may be exchanged by the recipient for
27 something of value.

1 (6) Demonstrated unworthiness or incompetency to act
2 as a court reporter in such a manner as to safeguard the
3 interests of the public.

4 (7) Professionally associated with or loaned his or
5 her name to another for the illegal practice by another of
6 court reporting, or professionally associated with any natural
7 person, firm, copartnership, or corporation holding itself out
8 in any manner contrary to this act.

9 (8) Except as otherwise provided in subdivision
10 (11), willfully violated any of the provisions of this act or
11 the regulations adopted by ABCR to enforce this act.

12 (9) Violated any regulation adopted by ABCR relating
13 to any of the following:

14 a. Unprofessional conduct.

15 b. Agreements for the provision as a court reporter
16 or ongoing services which relate to the practice of court
17 reporting.

18 c. The avoidance of a conflict of interest.

19 d. The performance of the practice of court
20 reporting in a uniform, fair, and impartial manner and
21 avoiding the appearance of impropriety.

22 (10) Failed within a reasonable time to provide
23 information requested by ABCR as the result of a formal or
24 informal complaint to ABCR, which would indicate a violation
25 of this act.

1 (11) Failed without excuse to transcribe
2 stenographic notes of a proceeding and file or deliver to an
3 ordering party a transcript of the stenographic notes:

4 a. Within the time required by law or agreed to by
5 verbal or written contract.

6 b. Within a reasonable time required for filing the
7 transcript.

8 c. Within a reasonable time required for delivery of
9 the transcript.

10 Section 8. A firm registration shall be required for
11 all firms operating in the state regardless of where they may
12 be domiciled and regardless of firm size. A firm registration
13 shall not be required for an independent contractor and
14 employee, or both, working for a registered firm or firms.

15 Section 9. Violations to the Court Reporting Ethics
16 Act shall be classified as a business offense. The fines shall
17 be tiered according to the number and severity of the
18 violation. The first offense shall be five thousand dollars
19 (\$5,000), second offense shall be ten thousand dollars
20 (\$10,000), and the third offense shall be twenty-five thousand
21 dollars (\$25,000). After three offenses, violators shall have
22 their individual license and firm registration to practice
23 court reporting in the state suspended for a period of two
24 years. These fines shall be imposed by ABCR and the Ethics
25 Commission.

1 Section 10. This act shall become effective
2 immediately following its passage and approval by the
3 Governor, or its otherwise becoming law.

History for SB472 (Regular Session 2012)

Date	Body Amend/Subst	Matter	Committee	Nay	Yea	Abs	Vote
04/05/2012	S	Read for the first time and referred to the Senate committee on Judiciary	JUDY				

EXHIBIT B

Page 1098

855 So.2d 1098 (Ala. 2002)

Ex parte STATE HEALTH PLANNING AND DEVELOPMENT AGENCY. (In re State Health Planning and Development Agency

v.

LithoMedTech of Alabama, LLC). Ex parte Prime Lithotripter Operations, Inc., and Prime Medical Services, Inc. (In re Prime Lithotripter Operations, Inc., and Prime Medical Services, Inc.

v.

LithoMedTech of Alabama, LLC,

and

Prime Lithotripter Operations, Inc., and Prime Medical Services, Inc.,

v.

UroVenture, LLC, et al.)

1011707, 1011708.

Supreme Court of Alabama.

November 22, 2002.

Rehearing Denied March 14, 2003.

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Mark D. Wilkerson and Keith S. Miller of Brantley, Wilkerson & Bryan, P.C., Montgomery, for petitioner State Health Planning and Development Agency.

John T. Mooresmith, John C. Morrow, Cary Tynes Wahlheim, and Jennifer L.

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Griffin of Burr & Forman, L.L.P., Birmingham, for petitioners Prime Lithotripter Operations, Inc., d/b/a Tennessee Valley Lithotripsy, and d/b/a Alabama Lithotripsy Services; and Prime Medical Services, Inc.

Lenora W. Pate, Kaye K. Houser, and Charles R. Driggars of Sirote & Permutt, P.C., Birmingham, for respondents UroVenture, LLC, et al.

Thomas T. Gallion III, Constance C. Walker, and Jamie A. Johnston of Haskell, Slaughter, Young & Gallion, L.L.C., Montgomery, for respondents

LithoMedTech of Alabama, LLC.

HOUSTON, Justice.

The central issue in these appeals is whether vendors that provide mobile lithotripsy [1] equipment to hospitals are providing a "health service" requiring a "certificate of need" ("CON") under Ala.Code 1975, § 22-21-263(a)(4). The Court of Civil Appeals answered this question in the negative, holding that "the health-care facilities and HMOs [health maintenance organizations] that provide health services must seek CON review in connection with providing such a service[; however, the] sellers or vendors of equipment that health-care facilities and HMOs use in order to provide such services need not obtain a CON." *Prime Lithotripter Operations, Inc. v. LithoMedTech of Alabama, LLC*, 855 So.2d 1085, 1095-96 (Ala.Civ.App.2001). We granted the petitions for writs of certiorari filed by the State Health Planning and Development Agency ("SHPDA") and by Prime Lithotripter Operations, Inc., d/b/a Tennessee Valley Lithotripsy and Alabama Lithotripsy Services, and its parent corporation, Prime Medical Services, Inc. (hereinafter collectively referred to as "Prime Medical"). We affirm the judgment of the Court of Civil Appeals.

For a detailed discussion of the facts and procedural posture of these cases, see *Prime Lithotripter Operations, Inc.*, 855 So.2d at 1087-91. As an initial matter, we note that we agree with the Court of Civil Appeals that this case presents a matter of first impression. 855 So.2d at 1093.

Prime Medical and SHPDA contend that the sale or lease of mobile lithotripsy equipment is a "new institutional health service" under Ala.Code 1975, § 22-21-263(a)(4), and that vendors of the equipment would therefore need to acquire a CON. Section 22-21-263(a)(4) provides, in pertinent part:

"(a) All *new institutional health services* which are subject to this article and which are proposed to be offered or developed within the state shall be subject to review under this article. No institutional health services which are subject to this article shall be permitted which are inconsistent with the State Health Plan. For the purposes of this article, *new institutional health services shall include any of the following:*

"....

"(4) *Health services* proposed to be offered in or through a health care facility or health maintenance organization, and which were not offered on a regular basis in or through such health care facility or health maintenance organization within the 12 month period prior to the time such services would be offered...."

(Emphasis added.)

The definition in 22-21-263(a)(4) of "new institutional health services" builds on the

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following definition of "institutional health services" provided in Ala.Code 1975, § 22-21-260(9): "health services provided in or through health care facilities or health maintenance organizations, including the entities in or through which such services are provided." (Emphasis added.) "Health services" are defined in Ala.Code 1975, § 22-21-260(8) as follows:

"Clinically related (i.e., diagnostic, curative, or rehabilitative) services, including alcohol, drug abuse, and mental health services customarily furnished on either an in-patient or out-patient basis by health care facilities, but not including the lawful practice of any profession or vocation conducted independently of a health care facility and in accordance with applicable licensing laws of this state."

(Emphasis added.)

The Court of Civil Appeals reached its conclusion by interpreting that statutory language as follows:

"Section 22-21-263 defines 'new institutional health services' in terms that contemplate either the provision of a new service or the acquisition of some physical facility or equipment that will enable a health-care facility or an HMO to provide a service. In other words, facilities or organizations that provide those health services are the focus of the certification requirements. Nothing in § 22-21-263 or any other provision of this article requires an entity that merely seeks to sell or lease equipment to a health-care facility (for that facility to then use in providing a service) to obtain a CON.

"The definition of 'institutional health service' in § 22-21-260(9) uses the clause 'including the entities through which such services are offered.' However, that clause refers to the 'health-care facilities or Health Maintenance Organizations,' which obviously are 'entities.' The term 'health services' does not include 'entities.' Although the definition is unartfully written, what the Legislature was attempting to communicate was the idea that an 'institutional health service' is a service provided in or through a health-care facility or an HMO, and that the health-care facility or HMO includes, for this purpose, those 'entities' who contract with or are affiliated with the health-care facility or HMO to be the direct provider of the service to the patient. In other words, a health service will be considered as provided in or through a given health-care facility or an HMO (therefore potentially subjecting that health-care facility or HMO to the CON requirement) even if the direct deliverer of the services to the patient is a physician's professional corporation ('P.C.'). If that P.C. is the 'entity in or through

which' the health-care facility provides a service to its patients. Because UroVenture and LithoMedTech are not providing a service, but only a piece of equipment, then they are not an 'entity' referred to in the clause 'including entities in or through which such services are provided.'

"We conclude that the health-care facilities and HMOs that provide health services must seek CON review in connection with providing such a service. The sellers or vendors of equipment that health-care facilities and HMOs use in order to provide such services need not obtain a CON."

Prime Lithotripter Operations, Inc., 855 So.2d at 1095-96.

We find the Court of Civil Appeals' reasoning interpreting § 22-21-263 to be sound. However, Prime Medical and SHPDA argue that the question of how to interpret the statutes at issue should be

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viewed with the presumption that SHPDA's interpretation is correct.

" " " It is settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute. " " " *QCC, Inc. v. Hall*, 757 So.2d 1115, 1119 (Ala.2000) (quoting *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 256-57, 115 S.Ct. 810, 130 L.Ed.2d 740 (1995), quoting in turn other cases); see also *Hulcher v. Taunton*, 388 So.2d 1203, 1206 (Ala.1980) ("Interpretations of an act by the administrative agency charged with its enforcement, though not conclusive, are to be given great weight by the reviewing court.").

SHPDA, the agency charged with enforcing Alabama's CON laws, has interpreted the phrase "entities in or through which such services are provided" from § 22-21-260(9) to include "vendors of equipment which are providing services which are necessary to and a vital part of the provision of the health care service in question either to the health care facility, the health maintenance organization or the physicians who are directly providing the care to the patients." SHPDA's brief at 27. Prime Medical and SHPDA contend that this interpretation is "evidenced by the express terms of Ala. Admin. Code r. 410-1-4-.01(1)(d), which specifically includes 'health services to be provided by vendors or lessors of equipment' in the definition of 'new institutional health services' which are subject to review." *Id.* at 27-28. Prime Medical and SHPDA argue that because this interpretation is reasonable it is entitled to great deference, especially given the fact that SHPDA has applied this construction of the statutory language to require a CON for the purchase of mobile lithotripsy equipment for over 10 years. [2] See *Farmer v. Hypo Holdings, Inc.*, 675 So.2d 387, 390 (Ala.1996) ("We have

previously stated that because the legislature is presumed to be aware of how an administrative agency has interpreted a statute, the subsequent reenactment of the statute without material change is an indication that the legislature approves the agency's interpretation." We disagree.

The traditional deference given an administrative agency's interpretation of a statute appropriately exists (1) when the agency is actually charged with the enforcement of the statute and (2) when the interpretation does not exceed the agency's statutory authority (i.e., jurisdiction). See *Ex parte Jones Mfg. Co.*, 589 So.2d 208, 210 (Ala.1991) ("An administrative regulation must be consistent with the statutes under which its promulgation is authorized.... An administrative agency cannot usurp legislative powers or contravene a statute.... A regulation cannot subvert or enlarge upon statutory policy."). The latter condition follows from the understanding

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that administrative agencies are creatures of the Legislature, which serves as the source of their authority and sets their relevant boundaries. Because an administrative agency may not expand its own jurisdiction by its interpretation of a statute (or by any other means), courts deciding whether to give deference to an agency's interpretation of a statute must first determine whether the agency's interpretation is operative within the agency's particular sphere of statutory authority.

Here, the Court of Civil Appeals, in interpreting the relevant statutes, properly did not give deference to SHPDA's interpretation. See *Prime Lithotripter Operations, Inc.*, 855 So.2d at 1096. We agree with the Court of Civil Appeals' holding that, although § 22-21-263(a)(4) provides for CON review of certain "institutional health services," the sale or lease of mobile lithotripsy equipment does not constitute such a "service," but rather constitutes the mere providing of equipment for *others* (who are subject to CON review) to provide the actual service. Therefore, because the sale or lease of mobile lithotripsy equipment falls outside the SHPDA's particular sphere of statutory authority, any SHPDA interpretation that would bring the acts of selling or leasing mobile lithotripsy equipment into that sphere is invalid and is not entitled to deference. [3]

Based on the above, we adopt the reasoning of the Court of Civil Appeals and affirm its judgment.

1011707--AFFIRMED.

1011708--AFFIRMED.

SEE, BROWN, JOHNSTONE, HARWOOD, WOODALL, and STUART, JJ., concur.

MOORE, C.J., concurs in the result.

LYONS, J., recuses himself.

Notes:

[1] Lithotripsy is a noninvasive surgical procedure that eliminates kidney stones by bombarding them with shock waves.

[2] Respondents LithoMedTech and UroVenture suggest that past CON review of mobile lithotripsy equipment was pursuant to Ala.Code 1975, § 22-21-263(a)(2), which includes in the definition of "new institutional health services" the following:

"Any expenditure by or on behalf of a health care facility or health maintenance organization which ... is a capital expenditure in excess of one million five hundred thousand dollars (\$1,500,000) for major medical equipment except for magnetic resonance imaging equipment only, which shall be reviewable regardless of the expenditure...."

LithoMedTech and UroVenture note that, in the past, the limit in the statute on a capital expenditure was \$500,000, an amount far less than it is today, and that the cost of obtaining mobile lithotripsy equipment was far more than it is today. Thus, in the past, the statute was triggered, making the sale of mobile lithotripsy equipment that cost more than \$500,000 subject to CON review.

[3] In its brief to this Court, Prime Medical also raises the issue whether the State Health Coordinating Council was a necessary party to its action under Ala.Code 1975, § 41-22-10. However, this argument was not listed as a grounds for certiorari review, and it is therefore beyond the scope of our review.

EXHIBIT C

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874 So.2d 1075 (Ala.Civ.App. 2003)

The KIDS' KLUB, INC.

v.

STATE DEPARTMENT OF HUMAN RESOURCES.

2010453.

Court of Civil Appeals of Alabama.

June 20, 2003.

Rehearing Denied Sept. 12, 2003.

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Sharon E. Ficquette, asst. atty. gen., Department of
Human Resources.

PER CURIAM.

The Kids' Klub, Inc. (hereinafter "KK"), operates a child-care facility in Decatur. Before April 1998, KK had a daytime-care license and a nighttime-care license. Following a March 26, 1998, incident in which a child was left unattended in the KK facility after it had closed for the evening, the State Department of Human Resources ("DHR") suspended KK's nighttime-care license. DHR also notified KK that it was seeking to permanently revoke KK's nighttime-care license. DHR prevailed in KK's administrative appeals and in its appeal to the circuit court. KK then appealed to this court.

The record indicates that KK usually operated its nighttime-care facility until 12:30 a.m. Sheila Hines

enrolled her daughter, Martena Lashe Haley ("the child"), in the KK nighttime-care program in September 1997. The child was in the care of KK on the evening of March 26, 1998; at that time, the child was 23 months old.

The record indicates that after approximately 8:30 p.m. on the evening of March 26, 1998, [1] Tiffany Billings and Barbara Bolden were the only KK employees remaining in the facility. Billings testified that she had approximately 18 children in her care at that time; it is not clear how many children Bolden, who was working in the infant or toddler room on the night of March 26, 1998, had in her care. Bolden testified that when all of the infants in her care, except for the child, had been picked up from the KK facility by their parents, she decided to go home for the night. Bolden testified that before she left the KK facility, she informed Billings, who was working in another room, that the child was asleep in a crib in the nursery. Bolden's time card indicates that she clocked out for the night at approximately 10:04 p.m. on March 26, 1998.

Billings testified that she did not recall Bolden's informing her that the child was still in the nursery. When Bolden left the KK facility, Billings had four children in her classroom in the KK facility. Billings testified that approximately an hour after Bolden left, the parents of those four children picked up their children. Billings stated that she looked around the facility, saw no children, locked the facility, and left for the night. Billings's time card indicates that she clocked out at approximately 11:36 p.m. on the night of March 26, 1998. It is undisputed that when Billings left the KK facility, the child was still alone in the nursery.

Hines testified that she left her place of employment at approximately 11:25 p.m. on the evening of March 26, 1998, and that she drove to the KK facility to pick up the child. Hines estimated that it took her approximately 15 minutes to drive from her place of employment to the KK facility. When Hines arrived at the KK facility, she found the facility dark and locked. Hines testified that she knocked on the door to the facility and that nobody answered. Hines then left to go to a friend's house to telephone the KK facility; she also verified that no friend or family member had picked the child up from the KK facility. Hines stated that when she realized that no friend or family member had retrieved the child and when her telephone

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call to the KK facility went unanswered, she returned again to the facility to knock on the door. When again no one answered Hines's knock, she telephoned the police. Hines stated that the police advised her to return home and wait there for them to arrive.

Marlene Perry, the director or manager of KK, testified that the police telephoned her at approximately 11:50 p.m. on the night of March 26, 1998, to inquire whether a child had been left at the KK facility. Perry testified that she arrived at the KK facility at approximately 12:20 a.m. and that she found the child asleep in a crib in the KK nursery. Perry immediately called Bolden and Billings and told them to return to the KK facility.

Mike Landrum, the police officer who investigated the March 26, 1998, incident, testified that he arrived at the KK facility at 12:54 a.m. Landrum testified that when he arrived, he saw Perry at the facility. Landrum also stated that when he investigated to ensure that the child was safe, he saw two other workers, presumably Bolden and Billings, inside the KK facility. Landrum testified that Hines arrived at the KK facility approximately 15 to 30 minutes after he arrived. [2]

KK and a DHR social worker each reported the March 26, 1998, incident to DHR; Beverly McDaniel investigated the incident on behalf of DHR. McDaniel is a child-development consultant whose responsibility it is to oversee the licensing of child-care centers; to consult with licensees regarding their compliance with DHR regulations, found at Rule 660-5-25-.05, Ala. Admin. Code, entitled the "Day Care Licensure-Minimum Standards for Day Care Centers and Nighttime Centers" (hereinafter referred to as "the Minimum Standards"), [3] for the operation of child-care facilities; [4] and to investigate complaints regarding noncompliance with the Minimum Standards. McDaniel testified that because she could not travel to the KK facility until March 30, 1998, she spoke by telephone to Perry concerning certain changes KK could implement in the interim to ensure the safety of the children in its care and to prevent a recurrence of the March 26, 1998, incident.

During the course of her investigation of the March 26, 1998, incident, McDaniel discovered, among other things, that Bolden was only 18 years old; the Minimum Standards require that all child-care workers with the responsibility of caring for children must be 19 years old and have a high-school diploma or a GED certificate. See Rule 660-5-25-.05(5)(a)3., Ala. Admin. Code (governing staff qualifications). Perry, who had hired Bolden to work at KK, explained that she had taken note only of the year, and not of the month, in which Bolden was born, and, therefore, that she had mistakenly assumed that Bolden was 19 years old.

Following McDaniel's investigation, DHR notified KK by certified letter dated April 2, 1998 ("the charge letter" or "the April 2, 1998, charge letter"), that it was immediately suspending and moving to revoke KK's nighttime-care license. The

charge letter set forth 14 grounds upon which DHR had relied in reaching its decision to move to revoke KK's nighttime-care license.

KK requested a hearing following its receipt of the charge letter. DHR appointed a hearing officer, and the hearing officer received documentary evidence and testimony over a two-day hearing conducted on July 2, 1998, and July 22, 1998. On July 30, 1998, the hearing officer specifically found that DHR had proven 6 of the 14 grounds for revocation, and the hearing officer entered an order revoking KK's nighttime-care license.

On August 13, 1998, KK requested a fair hearing pursuant to § 38-7-9, Ala.Code 1975. The fair-hearing officer ("the FHO") conducted a record review of the prior proceedings, and, on October 5, 1999, the FHO affirmed the hearing officer's decision to revoke KK's nighttime-care license. KK appealed to the Morgan Circuit Court, which affirmed the administrative orders revoking KK's nighttime-care license. KK then appealed to this court.

On appeal, KK argues a number of issues that can be distilled into the following seven contentions: (1) that DHR had stated no legal grounds to order a summary, or emergency, suspension of KK's nighttime-care license as of April 2, 1998; (2) that the charge letter did not comply with the notice requirements of § 41-22-12(b), Ala.Code 1975; (3) that the hearing officer failed to confine the evidence presented during the administrative hearing to the allegations listed in the charge letter; (4) that the hearing officer admitted hearsay evidence without making findings purportedly required by § 41-22-13(1), Ala.Code 1975; (5) that DHR regulations authorizing the revocation of KK's license are beyond the scope of DHR's enabling legislation, are ultra vires, and are, therefore, void; (6) that the decision to revoke KK's license was not supported by substantial evidence or legal authority; and (7) that the circuit court erred by prohibiting KK from engaging in discovery directed to an alleged ex parte contact between the FHO and a supervisor at DHR.

Standard of Review

This court reviews the circuit court's judgment applying no presumption of correctness, "since that court was in no better position to review the order of the [hearing officer] than we are." *State Health Planning & Res. Dev. Admin. v. Rivendell of Alabama, Inc.*, 469 So.2d 613, 614 (Ala.Civ.App.1985). However, this court and the circuit court must apply a presumption of correctness to the agency's decision, "especially where the subject matter is peculiar to the field of competence that has been entrusted to the agency by the Alabama Legislature." *State Dep't of Human Res. v. Gibert*, 681 So.2d 560, 562 (Ala.Civ.App.1995). Thus, as stated in the Child Care Act of 1971, § 38-7-1 et seq., Ala.Code 1975, this court and the circuit court must determine

whether the agency's decision "was illegal, capricious, or unsupported by the evidence." § 38-7-9, Ala.Code 1975. See also *Kid's Stuff Learning Ctr., Inc. v. State Dep't of Human Res.*, 660 So.2d 613 (Ala.Civ.App.1995). The reviewing courts may not substitute their judgment for that of the agency. *Colonial Mgmt. Group, L.P. v. State Health Planning & Dev. Agency*, 853 So.2d 972 (Ala.Civ.App.2002); *State Health Planning & Dev. Agency v. Baptist Health Sys., Inc.*, 766 So.2d 176 (Ala.Civ.App.1999); *State Dep't of Human Res. v. Gibert*, supra. " 'This holds true even in cases where the testimony is generalized, the evidence is meager, and reasonable minds might differ as to the correct result.' " *Colonial Mgmt. Group, L.P. v. State Health Planning & Dev. Agency*, 853 So.2d at 975 (quoting *Health Care Auth. of*

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Huntsville v. State Health Planning Agency, 549 So.2d 973, 975 (Ala.Civ.App.1989)). Also, an agency's interpretation of its own rules and regulations controls if that interpretation is reasonable, even if another, perhaps more reasonable, interpretation is advanced. *State Dep't of Human Res. v. Gibert*, supra; *State Health Planning & Dev. Agency v. Baptist Health Sys., Inc.*, supra.

Further, because this case falls within the purview of the Alabama Administrative Procedure Act, § 41-22-1 et seq., Ala.Code 1975 ("the AAPA"), we must also keep in mind the standard of review provided by the AAPA.

Pursuant to § 41-22-20(k), Ala.Code 1975, we note that:

"(k) Except where judicial review is by trial de novo, the agency order shall be taken as prima facie just and reasonable and the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact, except where otherwise authorized by statute.... The court may reverse or modify the decision or grant other appropriate relief ... if substantial rights of the petitioner have been prejudiced because the agency action is any one or more of the following:

"(1) In violation of constitutional or statutory provisions;

"(2) In excess of the statutory authority of the agency;

"(3) In violation of any pertinent agency rule;

"(4) Made upon unlawful procedure;

"(5) Affected by other error of law;

"(6) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

"(7) Unreasonable, arbitrary, or capricious, or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion."

I. Grounds for the Summary Suspension of KK's Nighttime-Care License

Before the hearing officer, KK attempted to demonstrate that after McDaniel's March 30, 1998, inspection of its facility, it implemented the changes and safety measures McDaniel recommended. Therefore, it maintained in the circuit court that it had remedied any "dangerous" situation and, therefore, it argued, there was no basis for DHR's emergency suspension of its nighttime-care license. KK does not make that argument before this court; therefore, we do not address it.

On appeal, KK asserts that DHR was without authority to summarily suspend its nighttime-care license because, it contends, DHR cited improper legal authority for that suspension. [5] At the beginning of the April 2, 1998, charge letter, DHR notified KK that it was immediately suspending KK's license pursuant to § 41-22-19(d), Ala.Code 1975, and that it was also seeking to revoke KK's license. In the next paragraph in the charge letter, DHR cites as the statutory authority for the *suspension and revocation* of KK's nighttime-care license § 38-7-8, § 38-7-9, and § 41-22-19, Ala.Code 1975.

KK argues on appeal that DHR was not authorized under § 41-22-19(d), Ala.Code 1975, to order a summary suspension of its license effective April 2, 1998, without affording KK a hearing, because, KK claims, there was no situation that presented a "danger to the public health, safety, or

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welfare." Section 41-22-19(d) provides, in pertinent part:

"(d) If the agency finds that *danger to the public health, safety, or welfare* requires emergency suspension of a license and states in writing its reasons for that finding, it may proceed without hearing or upon any abbreviated hearing that it finds practicable to suspend the license. The suspension shall become effective immediately, unless otherwise stated therein. The suspension may be effective for a period of not longer than 120 days and shall not be renewable.... When such summary suspension is ordered, a formal suspension or revocation proceeding under subsection (c) of this section shall also be promptly instituted and acted upon."

(Emphasis added.)

KK contends that § 38-7-11, Ala.Code 1975, rather than § 41-22-19(d), is applicable because it deals specifically with hazards to the safety or well-being of children in a child-care facility. Section 38-7-11 specifically authorizes DHR to inspect any child-care facility that is operating under a license. In pertinent part,

that statute provides:

"If any such inspection of a licensed or approved child-care facility discloses any condition, deficiency, dereliction or abuse which is, or could be, hazardous to the health, the safety or the physical, moral or mental well-being of the children in the care of the child-care facility being inspected, the same shall at once be brought to the attention of [DHR], and [DHR] shall have the power to revoke without notice the license or approval or six-month permit of such child-care facility. In this event, the child-care facility shall not operate during the pendency of any proceeding for fair hearing or judicial review, except under court order."

§ 38-7-11, Ala.Code 1975 (emphasis added).

We need not decide this issue because a decision favorable to KK would provide it no practical relief. As the FHO's decision states, the summary suspension of KK's license expired as a matter of law shortly after the hearing officer rendered its decision revoking KK's nighttime-care license. Therefore, any consideration of whether the summary suspension was proper is moot. *See Elf v. Department of Pub. Health*, 66 Conn.App. 410, 419 n. 7, 784 A.2d 979, 986 n. 7 (2001) (finding a similar argument moot because the license of a day-care-home operator had already been revoked and, therefore, "a finding that the summary suspension was improper would afford her no practical relief").

II. Charge Letter: Compliance with the Notice Requirements of § 41-22-12(b), Ala.Code 1975

On appeal, KK maintains that DHR's April 2, 1998, charge letter did not cite to applicable legal authority for each of the individual charges listed in that charge letter, as required by § 41-22-12, Ala.Code 1975. Section 41-22-12(a), Ala.Code 1975, requires that in a contested case the agency must notify all parties of the hearing. That notice must include:

"(1) A statement of the time, place, and nature of the hearing;

"(2) A statement of the legal authority and jurisdiction under which the hearing is held;

"(3) A reference to the particular sections of the statutes and rules involved; and

"(4) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is

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served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement shall be furnished."

§ 41-22-12(b), Ala.Code 1975.

Section 38-7-8, Ala.Code 1975, provides nine grounds for the revocation of the license of a child-care facility. That section provides:

"[DHR] may revoke ... the license ... of any child-care facility ... should the [licensee] ...:

"(1) Consistently fail to maintain standards prescribed and published by [DHR];

"(2) Violate the provisions of the license issued;

"(3) Furnish or make any misleading or any false statements or report to [DHR];

"(4) Refuse to submit to [DHR] any reports or refuse to make available to [DHR] any records required by [DHR] in making investigation of the child-care facility for licensing purposes; provided, however, that [DHR] shall not revoke or refuse to renew a license in such case unless it has made a written demand on the person, firm or corporation operating the facility requesting such report or reports and such person, firm or corporation fails or refuses to submit such records for a period of 10 days;

"(5) Fail or refuse to submit to an investigation by [DHR];

"(6) Fail or refuse to admit authorized representatives of [DHR] at any reasonable time for the purpose of investigation;

"(7) Fail to provide, maintain, equip and keep in safe and sanitary condition premises established or used for child care as required under standards prescribed by [DHR], or as otherwise required by any law, regulation or ordinance applicable to such facility;

"(8) Refuse to display its license or permit; or

"(9) Fail to maintain financial resources adequate for the satisfactory care of children served in regard to upkeep of premises and provisions for personal care, medical services, clothing, learning experience and other essentials in the proper care, rearing and training of children."

The April 2, 1998, charge letter alleged that KK had violated § 38-7-8(1) by "consistently fail[ing] to maintain the standards prescribed and published by [DHR]." In its charge letter, DHR also maintained that KK had violated subsection (2) of § 38-7-8 by "violat[ing] the provisions of its license." The charge letter also accused KK of violating § 38-7-8(3) by furnishing or making misleading or false statements to DHR.

In *Mobile County Department of Human Resources v. Mims*, 666 So.2d 22, 27 (Ala.Civ.App.1995), this court

stated:

"[N]otice of charges does not require the specificity of pleadings filed in a court of record, nevertheless, the requirement of due process limits the agency to a consideration of only those charges that it has included within the instrument that it has called upon a respondent to answer. *White Way Pure Milk Co. v. Alabama State Milk Control Board*, 265 Ala. 660, 93 So.2d 509 (1957). The charges must be sufficiently specific to apprise [the licensee] of the allegations against [it]. *Williams v. City of Northport*, 545 So.2d 65 (Ala.Civ.App.1989). Additionally, the complaint must allege facts that, if proven, are sufficient to establish the essential elements of the charges. See 2 Am.Jur.2d *Administrative*

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Law § 371 (1962); see also *Federal Trade Commission v. Gratz*, 253 U.S. 421, 40 S.Ct. 572, 64 L.Ed. 993 (1920), and *Williams*, 545 So.2d 65."

A. Consistent Failure to Maintain Standards

In that part of the charge letter in which DHR alleged that KK had consistently failed to maintain compliance with the Minimum Standards, DHR alleged that KK had violated the Minimum Standards in part by: (1) failing to provide staff supervision of children on two occasions: August 13, 1992, when a DHR social worker discovered unsupervised sleeping toddlers, and March 26, 1998, when the child was left unsupervised and locked in the KK facility (see Rule 660-5-25-.05(7)(a)2.(i)); (2) failing to maintain the appropriate child/staff ratios and groupings (see Rule 660-5-25-.05(7)(a)1. and Rule 660-5-25-.05(8)(d)2.(i) and (ii)); (3) failing to provide qualified staff because, at the time of the March 26, 1998, incident, one of the KK employees involved in that incident was not yet 19 years old, as is required by Rule 660-5-25-.05(5)(a)3. and Rule 660-5-25-.05(8)(b)1.; and (4) failing to free staff who were working with children from other duties, such as mopping or leaving the room to let parents in through the locked front door of the KK facility (see Rule 660-5-25-.05(7)(a)2.(ix)). The hearing officer, in reaching its decision, found that the evidence supported DHR's allegations as to the first three of the above-listed charges.

In support of each of the above-listed charges contained in the charge letter, DHR cited in the charge letter applicable provisions of the Minimum Standards. Therefore, as to those charges, we cannot agree with KK's argument that the charge letter did not contain appropriate references to supporting legal authority.

B. Violation of Provisions of KK's License

At the administrative hearing, DHR took the position that, by violating DHR regulations found in the Minimum Standards, KK had "violated the provisions of its license," thereby authorizing DHR to revoke KK's

license pursuant to § 38-7-8(2), Ala.Code 1975. KK has not argued on appeal that a violation of the Minimum Standards does not constitute a violation of the provisions of its license; in fact, in its brief on appeal, KK did not mention the phrase "provisions of the license," and its brief does not contain any citation to § 38-7-8(2), Ala.Code 1975. Therefore, KK is deemed to have waived any argument it might have asserted with regard to that issue. *Robino v. Kilgore*, 838 So.2d 366 (Ala.2002) (appellant deemed to have waived an issue it failed to argue in its appellate brief); *Ex parte Riley*, 464 So.2d 92, 94 (Ala.1985) (The "failure to argue an issue in brief to an appellate court is tantamount to the waiver of that issue on appeal."); *Boshell v. Keith*, 418 So.2d 89, 92 (Ala.1982) ("When an appellant fails to argue an issue in its brief, that issue is waived.").

In alleging in its charge letter that KK had violated § 38-7-8(2), Ala.Code 1975, DHR maintained that KK had failed to ensure that its staff had access to the staff's and children's files (see Rule 660-5-25-.05(4)(c)); that the staff's and children's files did not contain current information (see Rule 660-5-25-.05(4)(c)); and that there was no daily, or nightly, schedule of activities for the children (see Rule 660-5-25-.05(7)(b)3.(i)(I)). DHR also maintained that, in violation of § 38-7-8(2), KK's staff failed to ensure that the child was not signed out of the facility and that KK's staff had not reviewed sign-out sheets to ensure that children were properly signed out of the KK facility (see Rule 660-5-25-.05(4)(g));

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DHR also contended that KK had failed to properly orient or train its staff (see Rule 660-5-25-.05(5)(c)). In its decision, the hearing officer determined only one of those charges to be supported by the evidence presented at the hearing; the hearing officer determined that KK had violated the Minimum Standard provision requiring that each child be signed out each day upon his or her departure from the child-care facility.

The April 2, 1998, charge letter correctly cites provisions of the Minimum Standards in support of each of the allegations it made against KK with regard to the alleged violations of § 38-7-8(2), Ala.Code 1975. Therefore, we conclude that DHR properly supported with citations to appropriate legal authority the charges it made against KK in its charge letter alleging violations of § 38-7-8(2), Ala.Code 1975.

C. Misrepresentations to DHR

In the charge letter, DHR also alleged that KK had violated § 38-7-8(3), Ala.Code 1975, by furnishing false or misleading statements to DHR. DHR made three allegations under this subsection, but the hearing officer found only one to be substantiated by the evidence. That charge related to KK's maintaining on file signed statements by staff members that falsely verified that the

staff members had read the Minimum Standards. We conclude that that charge is also supported by a proper citation in the charge letter to supporting legal authority, i.e., Rule 660-5-25-.05(4)(c)3.(ii)(VII), Ala. Admin. Code.

Given the foregoing, we conclude that the April 2, 1998, charge letter was legally sufficient to apprise KK of the charges against it, as required by § 41-22-12(b), Ala.Code 1975, and that it properly supported its charges by citations to appropriate legal authority.

III. Admission of Evidence Outside the Allegations Listed in the Charge Letter

KK argues that the hearing officer erred by allowing Billings to testify during the administrative hearing regarding certain incidents that, it contends, were not set forth in the charge letter. Specifically, KK maintains that the circuit court erred in allowing Billings to testify regarding the number of children in her care on various occasions; that testimony was arguably relevant to the inquiry whether KK had violated the child/staff ratios required by the Minimum Standards in Rule 660-5-25-.05(7)(a)1. and (8)(d)2.(i) and (ii).

Billings testified that on one occasion she and another child-care worker had responsibility for 50 children. Shortly after that testimony, KK objected, referencing the fact that it had, during DHR's examination of an earlier witness, objected to that witness's testimony pertaining to the issue whether KK had maintained proper child/staff ratios. In that earlier objection, KK had argued that although the April 2, 1998, charge letter alleged that KK had failed to maintain the child/staff ratios required by the Minimum Standards, the charge letter referenced only one specific incident: the incident on March 26, 1998, when the child was left alone in the nursery unsupervised. In response to that objection, the hearing officer stated:

"To prevail in this hearing, [DHR is] going to have to prove these allegations and these issues. I would not hold [DHR] so tightly that [it] cannot attempt to shore up [its] case by bringing out similar incidents. [DHR] can put all sorts of violations on. But if it has nothing to do with proving one of these allegations in [the charge letter], [DHR] cannot prevail. I am not saying that [DHR] can never say that something like this has happened in the past."

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KK responded by asserting that if it had had notice of the child/staff-ratio issue, it "would have had an opportunity to deal with it." We note that Billings testified on July 2, 1998, during the first day of the administrative hearing. The administrative hearing was continued until 20 days later, July 22, 1998. KK made no attempt to present evidence addressing or contradicting Billings's testimony regarding child/staff-ratio problems

during the second day of the administrative hearing.

The hearing officer overruled the objection KK posed during Billings's testimony, and Billings then briefly testified regarding two other occasions during which KK had violated the child/staff ratios set forth in the Minimum Standards. However, it is not entirely clear whether those violations occurred after 7:00 p.m., which would make them relevant to the nighttime-care license, or earlier in the day.

In arguing that it did not have proper notice of DHR's allegation that it had not maintained the child/staff ratios required by the Minimum Standards, KK cites only *Mobile County Department of Human Resources v. Mims*, supra. In that case, DHR charged Mims, a high-school teacher, with abuse; the charges arose, in part, out of sexually inappropriate remarks Mims allegedly made to one of his students. Our supreme court concluded that those remarks were outside the statutory definition of "sexual abuse." Therefore, it concluded that DHR's charge letter accusing Mims of sexual abuse of the child was not sufficiently specific to apprise Mims of the charges against him. *Mims*, 666 So.2d at 27.

We find this case to be distinguishable from *Mims*. The allegation at issue--that KK failed to maintain proper child/staff ratios--is not outside the statutory or regulatory provisions cited in support of the allegation. KK contends that because DHR specifically mentioned only one incident in which KK had allegedly failed to maintain proper child/staff ratios, DHR did not provide KK notice that other, allegedly similar incidents might be referenced by that charge. However, the charge at issue is set forth in the same section of the charge letter that contains four other, similar allegations. Those allegations pertain to KK's alleged failure to maintain proper supervision of the children in its care; its failure to free the staff who are caring for children from other duties, as required by the Minimum Standards; and its failure to provide qualified staff, specifically, its hiring an 18-year-old and placing her alone in a classroom supervising infants and toddlers. Even assuming that KK did not have proper notice from the specific portion of the charge letter alleging that it had "fail[ed] to maintain" appropriate child/staff ratios, the charge alleging that it had hired an underage staff member to supervise children should have indicated to KK that the child/staff ratios were in question for any time that the underage staff member was on duty and supervising children. See Rule 660-5-25-.05(5)(a)3. (providing that to be qualified to be a child-care worker or teacher with "primary responsibility" for caring for children, the staff member must be "at least 19 years of age").

In this portion of the opinion, we decide only that the April 2, 1998, charge letter sufficiently apprised KK that DHR was alleging that it had failed to maintain proper child/staff ratios, and, therefore, that the hearing officer could allow Billings's testimony on that matter

into evidence. As we discuss later in this opinion, however, most of Billings's testimony as to this issue was vague and may not, by itself, provide appropriate support for a determination that KK violated the required child/staff ratios.

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IV. Admission of Hearsay

In order to prove its allegation that, on August 13, 1992, KK violated the Minimum Standards by failing to supervise sleeping toddlers, DHR submitted into evidence its Exhibit 4, a letter written to KK by Melinda Adams, the DHR licensing consultant who, following her August 13, 1992, inspection of the KK facility, authored a deficiency report on KK. That letter sets forth the deficiencies Adams noted in her August 1992 inspection. KK contends on appeal that the hearing officer erred by admitting DHR's Exhibit 4 into evidence without making the findings that, it says, are required by § 41-22-13(1), Ala.Code 1975. That section provides, in pertinent part:

"In contested cases:

"(1) The rules of evidence as applied in nonjury civil cases in the circuit courts of this state shall be followed. When necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible thereunder may be admitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs."

§ 41-22-13, Ala.Code 1975 (emphasis added).

The record reveals that Adams was available to testify at the administrative hearing and that DHR, in fact, planned to call her as a witness. However, because of time constraints, the parties agreed to admit DHR's Exhibit 4 in lieu of her testimony. When DHR offered Exhibit 4, KK objected on the ground that the Minimum Standard deficiencies noted in Adam's letter were "not clearly associated with a nighttime issue." KK made no other objection to the admission of Exhibit 4 into evidence. Thus, it did not object on the basis of hearsay, and it did not request that the hearing officer make findings, assuming such findings are required, that the evidence contained in Exhibit 4, although allegedly hearsay, was of a type admissible under § 41-22-13(1), Ala.Code 1975. When the hearing officer admitted Exhibit 4 into evidence, KK's attorney stated only "with our objection"; he cited no basis for that objection. It would be reasonable to assume, however, that in making that general objection, KK was relying on the same ground on which it had originally objected, i.e., whether the deficiencies detailed in Adams's letter were related to a nighttime event.

Even assuming, however, that KK intended to object to the admission of Exhibit 4 on grounds different from

those it had already stated, it did not state any other specific grounds as a basis for that objection. In order to predicate error on the allegedly mistaken admission of evidence, Rule 103(a)(1), Ala. R. Evid., requires an objection "stating the specific ground of objection, if the specific ground [is] not apparent from the context ." Further,

"Rule 46, Ala. R. Civ. P., requires that a party state his grounds for any objection that he makes if he wishes to preserve as error the [circuit] court's overruling of his objection. When the grounds for an objection are stated, this impliedly waives all other grounds for the objection to the evidence, and the objecting party cannot predicate error upon a ground not stated in the [circuit] court but raised for the first time on appeal."

" *Nichols v. Southeast Property Management, Inc.*, 576 So.2d 660, 662 (Ala.1991)."

Hall v. Duster, 727 So.2d 834, 837 (Ala.Civ.App.1999). Given KK's failure to object to the admission of DHR's Exhibit 4 on the basis of hearsay, we conclude that KK failed to preserve a hearsay argument with regard to the admission of that exhibit.

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V. Whether the DHR Regulations Relating to the Operation of Child-Care Centers are Ultra Vires

KK contends that the Minimum Standards relating to the operation of nighttime-care centers are ultra vires and therefore void. It bases its argument on the difference in the definitions of "nighttime center" contained in the Minimum Standards and in the Child Care Act.

Rule 660-5-25-.05(3)(n), Ala. Admin. Code, defines "nighttime center" as "[a] child-care facility which is established to receive *twelve or more* children for care after 7 p.m." (Emphasis added.) The Child Care Act, which authorizes DHR to enact the Minimum Standards, defines a "nighttime center" as "[a] facility which is established to receive *more than 12* children for nighttime care." § 38-7-2(12)(a), Ala.Code 1975 (emphasis added). If an agency promulgates rules or acts outside its jurisdictional limits as established by the enabling statute, the agency is said to be functioning ultra vires. See William F. Fox, Jr., *Understanding Admin. Law* § 17 (3d ed.1997).

KK maintains that the Minimum Standards are invalid because the Child Care Act allowed DHR to formulate regulations only for child-care facilities that receive "more than 12" children, but DHR purports to regulate, through the Minimum Standards, facilities caring for "12 or more" children. "It is settled law that the provisions of a statute will prevail in any case in which there is a conflict between the statute and a state agency regulation." *Ex parte Crestwood Hosp. & Nursing Home, Inc.*, 670 So.2d 45, 47 (Ala.1995). Therefore, the

definition of "nighttime center" as it appears in Rule 660-5-25-.05(3)(n) may well be void insofar as it applies to a child-care center that receives *exactly* 12 children; given the facts of this case, however, we need not decide that issue in this opinion. KK does not fall within the narrow category of a child-care facility established to receive 12 and only 12 children. An appellate court may reverse, modify, or grant relief from an agency action "if the court finds that ... substantial rights of the petitioner have been prejudiced because the agency action is ... (2) [i]n excess of the statutory authority of the agency." § 41-22-20(k), Ala.Code 1975. Even assuming that KK has demonstrated that Rule 660-5-25-.05(3)(n) as it applies to a child-care facility established to receive exactly 12 children is ultra vires, or beyond DHR's statutory authority, it has failed to demonstrate that its substantial rights have been prejudiced by the application of the Minimum Standards to it, a child-care facility that undisputedly receives more than 12 children. Therefore, we conclude that KK has failed to demonstrate error as to this issue.

VI. Whether the License Revocation Was Correct and Supported by Substantial Evidence

In its decision, reached after an administrative hearing in which it heard testimony and received documentary evidence, the hearing officer set forth a lengthy factual history of this case under the heading "Findings of Fact." In that section, the hearing officer also made several conclusions that resolved some of the factual disputes at issue. At the end of the "Findings of Fact" section of the administrative decision, the hearing officer stated:

"There was conflicting testimony presented on some of the facts, but, *in summary*, I make the following factual findings:

"1. Staff supervision was not provided at all times, as evidenced by the fact that a twenty-three month old nighttime-care child was left locked in the [KK] Center in a crib, unattended,

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for over one hour during the late hours of March 26 and the early morning hours of March 27, 1998. I find that this placed the child in imminent danger.

"2. There were child/staff ratio violations at the [KK] Nighttime Center.

"3. A [KK] Nighttime Center staff member who was charged with the responsibility of looking after the children was under age nineteen. This staff member was Barbara Nicole Bolden.

"4. Some [KK] staff members made false or misleading statements when they signed that they had

read the Minimum Standards, when in fact they had not.

"5. There were some Minimum Standards violations committed by [KK] as far back as 1992.

"6. DHR's investigation revealed that staff did not review the sign-out sheets to see that all children had been signed-out. This was obviously the case when Tiffany Billings left the facility with [the child] locked in the [KK] Center. [KK] presented evidence to show that [the child] was signed out *after* the police came and [Hines] picked up her child in the early morning hours of March 27, 1998; however, this is not evidence that the [KK] Center routinely reviewed sign-out sheets."

(Emphasis added.)

Also in its administrative decision, the hearing officer made the following conclusions of law:

"[DHR] has the statutory authority to revoke or refuse to renew the license of any child-care facility should that facility 'consistently fail to maintain minimum standards prescribed and published by the Department.' § 38-7-8, Ala.Code 1975.

"The Minimum Standards ... state[]: 'All children shall have staff supervision at all times.' This was clearly violated on March 26-27, 1998, when a twenty-three-month-old child was left in a crib, unattended, [and] locked in the [KK] Center. Also, as far back as August 13, 1992, the DHR representative observed sleeping toddlers unsupervised.

"The Minimum Standards ... give[] the following child/staff ratio 'for Sleeping Children':

Age of Children

Child/Staff Ratio

3 weeks " 6 months

1 adult to 6

6 months " 1 year

1 adult to 10

1 year " 2 1/2 years

1 adult to 15

2 1/2 years " 4 years

1 adult to 20

4 years and older

1 adult to 30

"According to the credible testimony of [KK] employee Tiffany Billings, at least some of these ratios were being

violated.

"The Minimum Standards ... state[], 'Child care workers or teachers who have primary responsibility for the care of groups of children shall be at least 19 years of age and shall have a high-school diploma or general education diploma (GED).' Further, '[d]uring hours when children are normally sleeping, the child/staff ratio for sleeping children shall be met by staff persons meeting at least the child-care worker qualifications.' Barbara Bolden, who was assigned to work in the toddler room on March 26, 1998, was only 18 years of age.

" CONCLUSION

"[DHR] proved by a preponderance of the evidence that a twenty-three-month-old child was left unsupervised and locked in the [KK] Nighttime Center during the late evening hours of March 26 and early morning hours of March 27,

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1998. This clearly placed the child in imminent danger. This, along with the other violations of the [KK] Center, as enumerated, warrants the suspension of the nighttime license and the revocation of the license."

(Emphasis added.)

For purposes of analysis of KK's arguments pertaining to whether the evidence supports the findings made in the hearing officer's decision, we address the arguments in the order of the "summarized" factual findings as set forth in that decision. In doing so, we also consider the other factual findings contained in that administrative decision, as well as the evidence in the record.

A. Staff Supervision

KK argues that the evidence does not support the hearing officer's findings that KK did not adequately supervise the children in its care. Initially, we note that KK does not dispute that the March 26, 1998, incident occurred. In that incident, a child was left unsupervised in the KK nursery for approximately one and one-half hours after Bolden left the child alone in the nursery but during the time that Billings was still in the KK facility. That child was later locked in the KK facility, alone and unattended, for approximately one hour after Billings closed the facility and left on the night of March 26, 1998. Also, as the hearing officer noted in the administrative decision, DHR issued a deficiency report against KK in 1992, and one of the charges in that deficiency report was that KK had violated that provision of the Minimum Standards requiring that "[a]n adult must be in each room of sleeping children ages 3 weeks to 4 years." See Rule 660-5-25-.05(8)(d)2.(iv)(III). When Bolden left the child alone in the KK nursery to go home on the night of March 26, 1998, the Minimum Standards

were again violated because Billings was in another classroom.

On appeal, KK continues to argue vehemently, as it did at the administrative hearing, that although the Minimum Standards require that children be supervised "at all times," see Rule 660-5-25-.05(7)(a)2.(i), the term "supervision" is not defined in the Minimum Standards. Therefore, KK argues, it cannot be held responsible for any alleged inadequate supervision of children. KK took issue with DHR's interpretation of Rule 660-5-25-.05(7)(a)2.(i) that the rule requires staff to be present at all times to supervise the children in a child-care facility's care. DHR takes the position that another staff person should supervise the room if a child-care worker supervising a group of children has to leave the room for any reason. KK cross-examined the DHR witnesses at length regarding their perceptions of the reasonableness of DHR's interpretation of Rule 660-5-25-.05(7)(a)2.(i); that questioning included a plethora of hypothetical inquiries. The DHR witnesses, however, maintained that DHR's interpretation of the rule requiring that children in a child-care facility be supervised at all times required the constant presence of a qualified child-care worker.

Deference must be given an agency's interpretation of its own rules. *Ex parte Board of School Comm'rs*, 824 So.2d 759 (Ala.2001). "An agency's interpretation of its own rule or regulation must stand if it is reasonable, even though it may not appear as reasonable as some other interpretation." *State Health Planning & Dev. Agency v. Baptist Health Sys., Inc.*, 766 So.2d at 180-81. See also *Ex parte Board of School Comm'rs*, supra.

KK has failed to persuade this court that DHR's interpretation of Rule 660-5-25-.05(7)(a)2.(i) as requiring the

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constant presence of a child-care worker to supervise children in the care of a child-care facility is not a reasonable construction of that rule.

Another basis for a finding of inadequate supervision is the evidence that the staff had to leave children unattended while the staff members retrieved snacks or cleaning supplies, went to the bathroom, or unlocked the facility's front door to admit parents, because there was no one else to supervise the class. The hearing officer noted that Billings and Bolden stated that it was the practice of the KK staff to leave children alone in the classroom in order to unlock the KK front door to admit parents seeking to pick up their children after 7:00 p.m. The hearing officer was unable to determine whether that specific situation resulted in the staff's inadequate supervision of the children in their care. However, in the next section of the administrative decision, the hearing officer found that Billings occasionally left children

"unattended" to go to the kitchen to retrieve snacks or for "some other reason."

B. Child/Staff-Ratio Violations

The evidence also supports the hearing officer's conclusion that there had been child/staff-ratio violations at the KK facility.

Billings testified regarding several incidents in which she alleged that she and another child-care worker were left with 50-54 children and an occasion in which she alleged that she supervised 36 children alone for approximately 2 hours. The hearing officer referenced that testimony in its findings of fact. KK contends that that testimony could not support the hearing officer's finding that KK had violated the child/staff ratios, because, it maintains, that testimony was vague regarding the time of day those alleged violations occurred. We note that KK did not object on that basis. It objected only on the basis that it allegedly had no notice that the maintenance of child/staff ratios would be an issue at the administrative hearing; this issue has been addressed earlier in this opinion. Even assuming, however, that KK properly preserved an objection related to the *timing* of the alleged child/staff-ratio violations and that the hearing officer improperly considered that evidence, we must conclude that, given the other evidence and findings, that error was harmless. Rule 45, Ala. R.App. P.

In the findings of fact in the administrative decision, the hearing officer also discussed previous child/staff-ratio problems discovered by a DHR social worker during an August 13, 1992, inspection of the KK facility; those deficiencies are set forth in DHR's Exhibit 4, which, as we discussed earlier in this opinion, was properly admitted into evidence. In reaching its decision, the hearing officer also noted the extensive testimony regarding the fact that the KK nighttime staff routinely left the children in their care alone in a classroom while the staff retrieved snacks from the kitchen or left the classroom to unlock the front door of the KK facility to admit a parent who had arrived after 7:00 p.m. to pick up a child.

Further, as the hearing officer found, Bolden, who was admittedly not 19 years old when she was hired or when the March 26, 1998, incident occurred, had been working at the KK facility for some time. According to Bolden's testimony, she alone was responsible for supervising the infant or toddler room on the night of March 26, 1998. Bolden also testified that her regular shift caused her to work for some portion of the nighttime hours. DHR took the position, at the administrative hearing and in its report based on McDaniel's March 30, 1998, investigation, that because she was not deemed a qualified

should not be counted as a staff member in determining the child/staff ratios maintained by KK. We agree with that position, and we conclude that the evidence pertaining to the KK staff leaving children unattended supports the hearing officer's conclusion that "[t]here were child/staff ratio violations at the [KK] Nighttime Center."

C. Unqualified Staff

The Minimum Standards, in defining the required qualifications of child-care workers with primary responsibility for caring for children, mandate that a child-care worker must be at least 19 years old. Rule 660-5-25-.05(5)(a)3. KK does not dispute that Bolden was not yet 19 years old when she began working at the KK facility or at the time of the March 26, 1998, incident. KK maintains that Bolden had experience babysitting children and that she was "almost" 19 at the time of the March 26, 1998, incident. [6] KK also contends that the hearing officer did not expressly find that Bolden was "primarily responsible" for supervising children and that that term is not defined in the Minimum Standards. Bolden testified, however, that she alone supervised the children in the infant or toddler room on the night of March 26, 1998, and her testimony indicated that she had supervised that room alone on previous occasions during nighttime hours when the ratio of children to staff members allowed another child-care worker to leave the infant or toddler classroom. It cannot be seriously argued that Bolden, as the sole child-care worker in a classroom, was not "primarily responsible" for supervising the children in that classroom. The hearing officer's finding that KK had employed an unqualified child-care worker is clearly supported by the evidence.

D. False or Misleading Statements to DHR

Pursuant to the authority of § 38-7-8(3), Ala. Code 1975, DHR may revoke the license of a child-care facility that "[f]urnish[es] or make[s] any misleading or false statements or report[s] to the department." The hearing officer determined that KK employees had made false and misleading statements when they signed statements that indicated they had read the Minimum Standards. It is undisputed that those employees, Billings and Bolden, had not read the Minimum Standards.

Rule 660-5-25-.05(4)(c)3.(ii)(VII) requires that the director of a child-care facility must maintain in a staff member's file "[w]ritten and signed verification stating that staff members have read the *Minimum Standards*." Another rule, which deals with the training required of child-care workers, also requires that a copy of a signed statement verifying that a staff member has read the Minimum Standards must be kept in that staff member's employment file. See Rule 660-5-25-.05(5)(c)2.(iii).

Bolden and Billings each testified that during their orientation at KK, Perry handed them a number of papers

related to their employment to sign. One of the documents was a statement indicating that they had each read the Minimum Standards (that document is hereinafter referred to as "the verification statement"). Neither Bolden nor Billings was provided a copy of the Minimum Standards; the Minimum Standards do not explicitly require

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that a child-care facility provide a staff member a copy of the Minimum Standards when the facility asks the staff member to sign the verification statement. Billings testified that she understood that she had to sign the verification statement in order to maintain her employment and that she signed it and returned it to Perry even though she knew she had not read the Minimum Standards. Both Bolden and Billings returned the verification statement, along with other employment-related documents, during their orientation sessions. DHR maintained that the aforementioned rules require the child-care facility to ensure, or make some effort to ensure, that its staff members have actually read and have had an opportunity to become familiar with the Minimum Standards.

KK maintains that under the Minimum Standards it was required only to maintain, in its staff member's files, signed verification statements indicating that the staff members had read the Minimum Standards. KK insists that there is no requirement in the Minimum Standards that a child-care facility's staff members *actually read* the Minimum Standards; according to KK, the Minimum Standards demand only that a child-care worker sign a statement verifying that he or she has done so. KK further maintains that it cannot be held to be the guarantor of its employee's truthfulness, and that the Minimum Standards place no responsibility on a child-care facility to ensure that its employees read the Minimum Standards.

We cannot adopt such a narrow construction of the Minimum Standards as the one advanced by KK on this issue. Such an interpretation would render ineffective the requirement that a child-care facility maintain the verification statements in its employees' files. Also, we cannot say that DHR's interpretation is unreasonable. See *State Dep't of Human Res. v. Gibert*, supra; *State Health Planning & Dev. Agency v. Baptist Health Sys., Inc.*, supra. It is clearly reasonable to interpret regulations that require a child-care facility to maintain the verification statements as requiring the staff member who signed that verification statement to have, in fact, actually read the Minimum Standards. Further, the child-care facility, as the employer, is in the best position to ensure the truthfulness of that statement and, thereby, the safety of the children in its care.

Also, the evidence in this case supports a conclusion that KK knew or should have known that its staff members' signatures on those verification statements

were false. KK did not provide its staff members with copies of the Minimum Standards; a copy of the Minimum Standards was at the front desk, but it is not clear that Bolden or Billings understood that. KK is correct that there is no requirement in the Minimum Standards that a child-care facility provide its employees with copies of the Minimum Standards. However, both Bolden and Billings returned the signed verification statements almost immediately to Perry; thus, the evidence supports the conclusion that Bolden and Billings did not have an opportunity to find and read the Minimum Standards before signing those verification statements, and that that would be obvious to KK.

KK also argues that even assuming KK should be responsible for its staff's failure to read the Minimum Standards, it did not "furnish or make" a misleading or false statement to DHR. See § 38-7-8(3). KK is correct that it did not furnish the verification statements to DHR in the form of a report that might be required under Rule 660-5-25-.05(4)(d). However, during the course of McDaniel's investigation of the March 26, 1998, incident, those verification statements, which KK concedes were false,

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were provided to DHR, and they were used as evidence in the administrative hearing.

E. Violations in 1992

The hearing officer determined that some violations of the Minimum Standards were discovered during DHR's August 13, 1992, inspection of KK's facility. We have already determined that the 1992 deficiency report, which has been referenced in this opinion as DHR's Exhibit 4, was properly admitted into evidence. That report noted three violations, all of which arose out of the same inspection on one date--August 13, 1992. According to the deficiency report resulting from the August 13, 1992, inspection, DHR noted the following violations of the Minimum Standards: that a posted menu was not dated; that one staff member was impermissibly supervising two rooms of sleeping children ages 3 weeks to 4 years, even though the Minimum Standards require that a staff member must be present in each room of sleeping children; and that although two staff members were required to be present in the KK facility after 9:00 p.m. if 9-12 children were present, only one staff member was present. In response to the August 1992 deficiency report, KK sent a letter to DHR indicating that it had corrected *all three* deficiencies noted in that deficiency report.

In paragraph five of its "findings of fact," the hearing officer noted that KK had committed some violations of the Minimum Standards "as far back as 1992." In the "conclusions of law" section of its decision, the hearing officer again cited one of those

violations--sleeping toddlers left unsupervised--as another example, in addition to the March 26, 1998, incident, of KK's violation of the provision of the Minimum Standards requiring it to maintain staff supervision of the children in its care.

On appeal, KK makes a few brief arguments related to its contention that the August 1992 deficiency report was deficient in several aspects. It did not make those arguments before the hearing officer or the circuit court. Also, it does not appear that KK made those arguments in 1992; therefore, those arguments are not now timely raised. In fact, KK's letter in response to the August 1992 deficiency report did not dispute or challenge any of the findings in that report; it stated only that the deficiencies had been corrected.

F. Review of Sign-Out Sheets

The Minimum Standards require that "[t]he center shall require the custodial parent/guardian or other designated person to sign children out at each departure from the center." Rule 660-5-25-.05(4)(g). DHR interpreted that standard as requiring a child-care facility to review a sign-out sheet on a daily basis to ensure that all children had been signed out upon their departure from the child-care facility. The hearing officer agreed, and it found in the administrative decision that it did not appear that KK had regularly reviewed the sign-out sheets to ensure compliance with the Minimum Standards.

With regard to parents' signing children out of the KK facility, Billings testified that the sign-out sheet was posted near the door to the infant or toddler room in which she worked. Billings testified that the child-care workers were supposed to check to ensure that parents had signed the sign-out sheets when they picked up their children, but she later contradicted that testimony by stating that she had never been instructed to check the sign-out sheet to ensure that all the children in her care had been picked up and signed out of the KK facility. She stated that some parents did sign their children out each night, but that others did not. Therefore, Billings testified, by simply reviewing

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a sign-out sheet maintained by KK, a KK employee would not have been able to determine whether all of the children had been picked up from the KK facility. In addition to the foregoing evidence, KK's attorney questioned the DHR witnesses extensively regarding whether those witnesses thought it was reasonable for a child-care facility to be responsible for ensuring that a parent signed a child out of the facility; those witnesses responded affirmatively.

The remaining testimony concerning sign-out sheets pertained to whether Hines signed the KK facility's sign-out sheet after she picked up the child in the early

hours of the morning after the March 26, 1998, incident. McDaniel testified that although representatives of KK had stated during her investigation on March 30, 1998, that KK had a sign-out sheet for the evening of March 26, 1998, she was not shown that sign-out sheet. Landrum and Perry each testified that Hines signed the sign-out sheet in the early hours of the morning following the March 26, 1998, incident, after she picked up the child. KK has not alleged, and it cannot be said, that the child could have been signed out on that sign-out sheet before the child was locked inside the KK facility on the evening of March 26, 1998. We note that Perry testified that the sign-out sheet that purportedly contained Hines's signature from the early hours of the morning following the March 26, 1998, incident was misplaced during the course of this litigation.

In its decision, the hearing officer determined that it was clear that on the evening of March 26, 1998, Billings did not review the sign-out sheets before she left for the evening and locked the child in the KK facility. The hearing officer also found that although the evidence indicated that Hines signed the child out after the March 26, 1998, incident, "[that] was not evidence the [KK staff] routinely reviewed the sign-out sheets."

KK argues on appeal, as it did extensively at the administrative hearing, that DHR's interpretation of Rule 660-5-25-.05(4)(g) is incorrect. KK argues that that rule does not explicitly require even the use of a sign-out sheet, and that it does not require a child-care facility to conduct a review of a sign-out sheet to ensure that children have been properly signed out of a facility upon their departure from the facility.

As stated earlier, however, an agency's interpretation of its rules and regulations is entitled to deference, and it must stand if it can be said to be reasonable. *Ex parte Board of School Comm'rs*, supra; *State Health Planning & Dev. Agency v. Baptist Health Sys., Inc.*, supra. The Minimum Standards mandate that the child-care facility "shall require" a parent, guardian, or custodian to sign a child out of the child-care facility. Rule 660-5-25-.05(4)(g). The use of the word "shall" is considered presumptively mandatory. *Ex parte Achenbach*, 783 So.2d 4 (Ala.2000) (citing *Hornsby v. Sessions*, 703 So.2d 932, 939 (Ala.1997)).

We cannot agree with KK's argument that it had no responsibility to have a sign-out sheet or to review that sign-out sheet to ensure that the parents had complied and signed their children out when they left the KK facility. A review by the child-care facility of the sign-out sheets would seem to be the only means to ensure the required compliance with Rule 660-5-25-.05(4)(g). Further, the KK staff's review of a properly maintained sign-out sheet before closing the facility for the night would be one method by which to prevent an occurrence such as the March 26, 1998, incident. The Minimum Standards

regulate child-care facilities in a

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manner designed to protect the children in the care of those facilities; the interpretation of Rule 660-5-25-.05(4)(g) advocated by KK and by the dissent would defeat that purpose. KK and the dissent's interpretation also renders Rule 660-5-25-.05(4)(g) nothing more than a requirement that child-care centers generate meaningless paperwork. We cannot agree with an interpretation that would construe Rule 660-5-25-.05(4)(g) as requiring merely that the sign-out sheets be filled out and maintained, but not that the child-care-facility staff review them to ensure the safety of the children in the facility's care by verifying that each child was picked up by an appropriate person. Even in contending that Rule 660-5-25-.05(4)(g) does not require a child-care facility to review sign-out sheets to ensure compliance with the Minimum Standards, which would operate to safeguard the children in the child-care facility's care, the dissent acknowledges that DHR's interpretation of the rule "might accord with common sense and safe practice." 874 So.2d at 1106.

The dissent cites *Bradberry v. Director, Office of Workers' Compensation Programs*, 117 F.3d 1361 (11th Cir. 1997), in support of its assertion that DHR had no official policy with regard to the review of sign-out sheets; it implies that deference is due an agency's interpretation of its own regulations only when the agency has made a written interpretation of its regulations or has a long-standing policy on an issue. The standard of review of an agency action set forth in *Bradberry* is similar to that contained in the Alabama precedent already cited in this opinion. See *Ex parte Board of School Comm'rs*, supra; *State Health Planning & Dev. Agency v. Baptist Health Sys., Inc.*, supra. In context, *Bradberry* states:

"We have held previously that '[i]t is well-established that courts must defer to an agency's consistent interpretation of its own regulation unless it is plainly erroneous or inconsistent with the regulation.' *Lollar [v. Alabama By-Products Corp.]*, 893 F.2d [1258,] 1262 [(11th Cir. 1990)] (internal quotation marks omitted). Such deference is due *particularly* when the agency 'has made a written interpretation of the regulation or has maintained a longstanding policy of the subject.' *McKee v. Sullivan*, 903 F.2d 1436, 1438 n. 3 (11th Cir. 1990). However, we need not defer to a 'mere litigating position.' *William Bros., Inc. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987) (finding no deference due when the Director adopted a novel litigating position on the definition of 'coal mine dust'); see also *McKee*, 903 F.2d at 1438-39 n. 3 (finding no deference due the Director's view on the evidence required to prove death when the agency cites only two district court cases to establish its position)."

117 F.3d at 1366 (emphasis added).

In *Idaho Department of Health & Welfare v. United States Department of Energy*, 959 F.2d 149, 152 (9th Cir. 1992), the United States Court of Appeals for the Ninth Circuit also expressed a similar standard of review, stating, "[I]f an agency's interpretation is a reasoned and consistent view of its regulations, we will not substitute our own interpretation for that of the agency's." In that case, however, the court concluded that, given the appellant agency's longstanding practices and the "extreme position" it had taken in the litigation before the court, as distinguished from litigation the agency had previously been involved in, the appellant agency's interpretation was entitled to no deference because that interpretation was merely a litigation position. 959 F.2d at 153.

In this case, there is no evidence that DHR's interpretation of Rule 660-5-25-.05(4)(g)

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was merely a position taken during the course of this litigation. Contrary to the assertion made in the dissent, the testimony of McDaniel regarding the sign-out sheets and the position taken by DHR, both below and on appeal, are not inconsistent and do not indicate that DHR had "no official policy with regard to sign-out sheets prior to this litigation." 874 So.2d at 1107. The dissent quotes a portion of McDaniel's testimony in which she acknowledged that the language of Rule 660-5-25-.05(4)(g) does not explicitly require a child-care facility to review sign-out sheets. However, the portion of McDaniel's testimony that immediately precedes that portion quoted by the dissent indicates that McDaniel interpreted Rule 660-5-25-.05(4)(g) as requiring a review of the sign-out sheets by a child-care facility's staff.

"Q. [BY ATTORNEY FOR KK]: [T]he charge letter, page 3, says the investigation also revealed the staff did not review the sign-out sheet to see that all of the children had been signed out. That is Tiffany Billings did not review something. Isn't that the shorthand way of saying it?

"A. That is correct.

"Q. I mean, Tiffany Billings should have, before she cut the lights out; cut the alarm on; locked the door; clocked out and locked the door on March 26 or 27, how late at night there it was, that is her fall down, right? Her fall down. She should have reviewed that sign-out sheet, right?

"A. If she knew to.

"Q. Yes or no. Should she have reviewed it or not?"

"A. Yes, she should have.

"Q. And she did not, right?"

"A. That is correct.

"Q. And that was Tiffany Billings's failure, correct?"

"A. Tiffany was employed by the center.

"Q. But that is Tiffany, the human being's, responsibility that she failed to fulfill?"

"A. I would say that it would be the day-care center's responsibility because they hired that person."

Immediately following that testimony, the attorney for KK asked McDaniel to identify the specific language in Rule 66-5-25-.05(4)(g) that required a child-care facility's staff to review sign-out sheets. The exchange between KK's attorney and McDaniel quoted in the dissent indicates McDaniel's response to the line of questioning pertaining to whether the specific language of the Minimum Standards explicitly mentions the review of the sign-out sheets.

Thus, the record indicates that McDaniel's interpretation of Rule 660-5-25-.05(4)(g) was the same as that advanced by DHR. The testimony quoted in the dissent indicates that McDaniel acknowledged that there was no explicit requirement in the Minimum Standards that a child-care facility's staff review the sign-out sheets, but that she and DHR interpreted the rule as requiring a child-care center to review the sign-out sheets to ensure that parents had complied. Further, in her testimony, Debbie Thomas, the DHR supervisor in charge of child-care licensing, also advanced the interpretation of Rule 660-525-.05(4)(g) advocated by DHR on appeal. Thomas stated that "[if] a parent fails to sign out, then the center is not meeting the [Minimum Standards]," and that "[i]f one child does not sign out, you would not be meeting the [Minimum Standards]." Thus, the record indicates that DHR has maintained a consistent interpretation of Rule 660-5-25-.05(4)(g).

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Given the foregoing, we cannot say that DHR's interpretation of Rule 660-5-25-.05(4)(g) as placing the responsibility of compliance with that rule on the licensed child-care facility is unreasonable. *Ex parte Board of School Comm'rs*, supra; *State Health Planning & Dev. Agency v. Baptist Health Sys., Inc.*, supra. Moreover, given the evidence from the administrative hearing, we cannot say that the hearing officer's determination that KK failed to routinely review sign-out sheets was incorrect.

G. Consistent Failure to Maintain Minimum Standards

KK also maintains in its brief on appeal that DHR failed to demonstrate that it "consistently failed" to maintain the standards prescribed by DHR. See § 38-7-8(1). We note that in making its argument on this issue, KK acknowledges what it contends is its only violation of the Minimum Standards: leaving the child alone and locked in the KK facility on the night of March 26, 1998. We have already determined that the evidence supports a conclusion that KK committed violations other than the one it acknowledges in this argument. Thus, KK asks this court to reweigh the evidence before the hearing officer and substitute our judgment for that of the agency, which the applicable standard of review does not allow this court to do. See *Colonial Mgmt. Group, L.P. v. State Health Planning & Dev. Agency*, supra. See also *Bradberry v. Director, Office of Workers' Comp. Programs*, supra; *Idaho Dep't of Health & Welfare v. United States Dep't of Energy*, supra.

KK also argues that the failure of DHR to define in the Minimum Standards the phrase "consistent failure" renders the hearing officer's decision "arbitrary" and justifies a reversal. KK is correct that the Minimum Standards do not explicitly define the phrase "consistent failure." In its brief on appeal, KK invites this court to define the phrase "consistent failure." In doing so, KK has not advocated any definition of that phrase and has performed no research to assist this court in defining the phrase. The dissent, in its words, "[t]iptoe[s] around traditional principles" of this State's well-settled precedent by advocating the reversal of the circuit court's and the hearing officer's decisions based on its creation of an argument for KK and its interpretation of the term "consistent failure." 874 So.2d at 1108. See *McLemore v. Fleming*, 604 So.2d 353 (Ala.1992) (holding that it is not the function of the appellate courts to create arguments for an appellant); *Spradlin v. Spradlin*, 601 So.2d 76, 79 (Ala.1992) (an appellate court may not "create legal arguments for a party based on undelineated general propositions unsupported by authority or argument"); *Gonzalez v. Blue Cross/Blue Shield of Alabama*, 760 So.2d 878, 883 (Ala.Civ.App.2000) ("It is well established that it is not the function of an appellate court to create, research, or argue an issue on behalf of the appellant."). Given that KK has failed to properly present this court with an argument on this issue, we decline KK's request that this court perform its legal research and create an argument on its behalf.

We have carefully examined the record on appeal with regard to the arguments advanced in KK's brief on appeal on the issue whether the administrative decision was supported by the evidence in the record. We conclude that KK has failed to demonstrate that the evidence does not support the revocation decision.

VII. Alleged Bias of FHO

KK also contends in its brief on appeal that the FHO who reviewed the hearing officer's administrative

decision was biased because the FHO allegedly had been contacted by a DHR representative during

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the course of these, or possibly other, proceedings. [7] KK argues that the circuit court should have allowed it to engage in discovery to determine the extent of any possible ex parte communications between DHR and the FHO and to determine any potential bias of the FHO.

In its appellate briefs, KK has not directed this court to any evidence in the record indicating that it objected before the FHO to any possible bias on the part of the FHO. Also, KK made no reference in its motion before the circuit court to any pleading or motion it presented to the FHO on the issue of his possible bias. The record includes almost 2,200 pages of pleadings, motions, testimony, and evidence. It is not the duty of this court to search an appellate record for evidence to support an appellant's contentions of error. *Jenkins v. Landmark Chevrolet, Inc.*, 575 So.2d 1157 (Ala.Civ.App.1991); *Johnson v. Life Ins. Co. of Alabama*, 581 So.2d 438 (Ala.1991). See also Rule 28(a)(10), Ala. R.App. P. (providing that an appellant's argument must contain citations to the parts of the record upon which the appellant relies). However, out of an abundance of caution, we examined the record with regard to this issue. The record indicates that the FHO was asked to review an appeal of DHR's denial of a nighttime-care license for an entity known as "Kids' Klub II." Our review of the record with regard to this issue revealed only a March 5, 1999, letter on behalf of Kids' Klub II, written by the same attorney representing KK in this matter, stating that Kids' Klub II waived the recusal of the FHO with regard to its appeal; that letter requested that the FHO disclose any ex parte communications he might have had with representatives of DHR. However, the March 5, 1999, letter to the FHO was made in regard to Kids' Klub II, and it contains no reference to KK or its appeal that was also at that time pending before the FHO. Our review of the record has failed to disclose that KK raised any issue related to the FHO's possible bias before the FHO that would provide the FHO the opportunity to consider the issue. Thus, for all that appears in the record on appeal, KK first alleged possible bias on the part of the FHO in the circuit court and only after the FHO had returned a decision that was unfavorable to it. Therefore, we cannot say that KK has demonstrated that the circuit court erred in denying KK's request to conduct discovery regarding any possible bias on the part of the FHO.

VIII. Conclusion

Given the foregoing, we conclude that KK has failed to demonstrate that the evidence in the record did not support the findings of fact and the conclusions in the administrative decision and that it has failed to show any legal error in the administrative decision or in the circuit court's judgment that warrant a reversal. Therefore, we

cannot say that the circuit court erred in determining that the administrative decision was not "illegal, capricious, or unsupported by the evidence." See § 38-7-9, Ala.Code 1975; *Kid's Stuff Learning Ctr., Inc. v. State Dep't of Human Res.*, supra.

AFFIRMED.

THOMPSON, J., concurs.

YATES, P.J., and PITTMAN, J., concur in the result.

CRAWLEY and MURDOCK, JJ., dissent.

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CRAWLEY, Judge, dissenting.

I dissent because I believe the hearing officer erred by determining that DHR complied with the notice requirements of § 41-22-12(b) and by concluding that the license revocation was supported by substantial evidence.

I. Whether DHR Complied With the Notice Requirements

KK argues that DHR's "charge letter" failed to provide it with the legal authority and factual basis for its charges. I agree, but only with respect to section D of the charge letter, which alleged that KK had "violated the provisions of its license" by not adhering to five Minimum Standards having to do with access to files, activity schedules, sign-out sheets for children, and staff orientation and training.

At the administrative hearing, DHR took the position that, by violating DHR regulations found in the Minimum Standards, KK had "violated the provisions of its license," thereby authorizing DHR to revoke its license pursuant to § 38-7-8(2). In other words, DHR contended that the Minimum Standards are "the provisions of the license" that a licensee is required to meet. That contention is erroneous as a matter of law.

Based on a reading of the applicable statutory provision and DHR's own regulations, it is clear that the "provisions of a license" are those portions of the license authorizing a certain type of child-care facility and specifying the number and age range of children to be served at that facility. Section 38-7-4, Ala.Code 1975, provides:

"If, upon ... examination of the facility and investigation of the persons responsible for care of children, the department is satisfied that the facility and the responsible persons reasonably meet standards prescribed for the type of child-care facility for which application is made, the department shall issue a license or an approval in the proper form, designating on said license or approval the type of child-care facility and, except for a

child-placing agency, the number of children to be served at any one time."

(Emphasis added.) Rule 660-5-25-.05(12)(e), Ala. Admin. Code, entitled "Provisions of the License," states:

"1. Licenses issued by [DHR] to day care centers and nighttime centers are valid for two years from the date of issuance, unless revoked by [DHR] or voluntarily surrendered by the licensee.

"2. The number of children in the center at any given time shall not exceed the number specified on the license.

"3. The age range of the children served shall not vary from the limits specified on the license.

"4. The license is not transferable from one individual or group or corporation to another, nor from one building to another."

The record contains a copy of a license, signed by Martha Nachman, DHR Commissioner, on February 3, 1997, stating that the license was to be in force for a period of two years, from October 13, 1996, to October 13, 1998. The license states:

"This is to certify that The Kids' Klub, Inc., is hereby granted this license to conduct and maintain The Kids' Klub, Inc. Nighttime as a nighttime center for 45 children, ages 1 week-12 years at 1920 Central Parkway, Decatur, County of Morgan, State of Alabama."

Three blank spaces on the form contain designations for "Type of Child Care Facility," "Number [of children]" and "ages [of children]." Those blanks were filled with the words emphasized above. Accordingly, the provisions of KK's license

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were that it was to be (1) a nighttime center, (2) for 45 children, and (3) the ages of the children served by the facility could range from 1 week to 12 years. DHR neither alleged nor proved that KK violated those provisions. Because the charge letter erroneously equated a failure to adhere to *any* of the Minimum Standards with a violation of the "provisions of the license," the charge letter was, in that respect, legally insufficient to state any ground for revocation under 38-7-8(2).

I do not believe that KK has waived any argument with respect to whether DHR proved that, by violating the Minimum Standards, KK thereby violated the "provisions of [its] license." Relying on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), and other authorities, KK argues that it was denied the due process of law guaranteed by § 41-22-12(b)(3) and (4). KK argues that, because the charge letter gave it no reference to the statutory, regulatory, or factual basis for believing that it

violated the "provisions of [its] license," it was, therefore, unable to defend against that portion of the charge.

II. Whether the License Revocation was Supported by Substantial Evidence

The hearing officer made the following factual findings:

"1. Staff supervision was not provided at all times, as evidenced by the fact that a twenty-three month old nighttime child care child was left locked in the [KK] Center in a crib unattended for over one hour during the late hours of March 26 and early morning hours of March 27, 1998. I find that this placed the child in imminent danger.

"2. There were child/staff ratio violations at the [KK] Nighttime Center.

"3. A [KK] Nighttime Center staff member who was charged with the responsibility of looking after the children was under age nineteen. This staff member was Barbara Nicole Bolden.

"4. Some [KK] Staff made false or misleading statements when they signed that they had read the *Minimum Standards* when in fact they had not.

"5. There were some *Minimum Standard* violations committed by [KK] as far back as 1992.

"6. DHR's investigation revealed that staff did not review the sign-out sheets to see that all children had been signed out. This was obviously the case when Tiffany Billings left the facility with [the child] locked in the Center. [KK] presented evidence to show that [the child] was signed out after the police came and [Hines] picked up her child in the early morning hours of March 27, 1998; however, this is not evidence that the Center routinely reviewed the sign-out sheets."

The hearing officer's first factual finding is undisputed. The child was left unattended for approximately one hour on the night and early morning of March 26-27, 1998. That event clearly violates the Minimum Standards requirement that there be staff supervision of all children at all times.

The hearing officer's third finding of fact--that Barbara Bolden, an 18-year-old, was unqualified to be a child-care worker according to the Minimum Standards--is also supported by the evidence. Throughout these proceedings, DHR has taken the position that, because Bolden was an *unqualified* child-care worker, there was, in fact, *no* child-care worker supervising the children assigned to Bolden. Thus, DHR claims, KK violated the child/staff-ratio requirements of the Minimum Standards because Bolden, who was not an adult, could not be counted in determining the ratio of

adults to children.

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To the extent that the hearing officer's second finding of fact--that there were "child/staff ratio violations at the [KK] Nighttime Center"--was based upon Bolden's not being an adult, the second finding is supported by the evidence. However, to the extent that the second finding was based upon Tiffany Billings's testimony as to other ratio violations not alleged in the charge letter, it is, in my opinion, not supported by substantial evidence. As the main opinion states, "most of Billings's testimony as to this issue was vague and may not, by itself, provide appropriate support for a determination that KK violated the required child/staff ratios." 874 So.2d at 1088.

The hearing officer's fourth factual finding is based upon section C(1) of DHR's charge letter. Section C(1) states:

"The Code of Alabama 1975, Section 38-7-8(3), states that the Department may revoke the license of any child care facility that furnishes or makes any misleading or false statements to the Department.

"1. The investigation by the Department's representative revealed that staff members had on file at the center, signed statements verifying that they had read the *Minimum Standards*; however, when those same staff persons were interviewed by the Department's representative, they acknowledged signing the statements, but denied ever having seen or read the *Minimum Standards*."

The fourth finding of fact states:

"4. Some [KK] Staff made false or misleading statements when they signed that they had read the *Minimum Standards* when in fact they had not."

"Reading the *Minimum Standards*" is mentioned twice in the DHR regulations. First, Rule 660-5-25-.05(4)(c)3.(ii)(VII) states that the director of every child-care facility shall maintain records on the staff, including "[w]ritten and signed verification stating that staff members have read the *Minimum Standards*." Second, Rule 660-5-25-.05(5)(c)1., Ala. Admin. Code, states that all "[c]hild-care workers shall obtain at least 4 clock hours of training each year." Rule 660-5-25-.05(5)(c)2. states:

"Training shall be provided through, but need not be limited to, the following means:

"(i) Staff communications at planned scheduled meetings;

"(ii) Materials concerning child growth and development/early childhood education, available for,

and used by staff; and

"(iii) Reading of the *Minimum Standards for Day Care Centers and Nighttime Centers: Principles, Regulations, and Procedures*. A signed statement verifying that the staff member has read the *Minimum Standards* shall be placed in each staff member's file."

At the administrative hearing, Barbara Bolden and Tiffany Billings testified that they had signed statements indicating that they had read the *Minimum Standards*. Both conceded, however, that they had not read the *Minimum Standards*. The evidence is undisputed that KK retained the signed statements in Bolden's and Billings's files.

The interpretation of an administrative regulation is a question of law. *United States v. Bruno's, Inc.*, 54 F.Supp.2d 1252 (M.D.Ala.1999). I conclude that, as a matter of law, the fourth factual finding states neither a violation of the provision of the *Minimum Standards* charged nor a ground to revoke KK's license under § 38-7-8(3).

The ground for license revocation stated in § 38-7-8(3) has three components.'The

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licensee must (1) "furnish or make" (2) a "misleading or ... false statement[] or report" (3) to DHR. The subsection (3) basis for revocation is concerned with reporting requirements rather than record-keeping requirements. See William F. Fox, *Understanding Administrative Law* § 20[A] and [B] at 110 (3d ed.1997) (distinguishing between record keeping and reporting requirements). Compare Rule 660-5-25-.05(5)(d)(outlining the content of monthly and other reports to DHR). The false statements Bolden and Billings signed were not furnished or made by KK to DHR. The fact that the false statements "came to light" as a consequence of McDaniel's investigation does not constitute KK's "furnish[ing] or mak[ing]" the statements to DHR.

By placing the signed statements in Bolden's and Billings's files, KK did what it was required to do under the second sentence of Rule 660-5-25.05(5)(c)2.(iii). A violation of that regulation was the only charge DHR leveled against KK with regard to "reading the *Minimum Standards*." I agree with the main opinion that the *Minimum Standards* do require a licensee to see that its employees are knowledgeable about the *Minimum Standards*. That requirement--that a licensee ensure that its employees are familiar with the *Minimum Standards*--is found in subsections (i) and (ii), and in the first sentence of subsection (iii), of Rule 660-5-25-.05(5)(c)2., all of which relate to training employees. The requirement is not found in the second sentence Rule 660-5-25-.05(5)(c)2.(iii), which relates to record keeping of employees' statements. DHR charged

KK with a violation of the second sentence of subsection (iii). The undisputed evidence established that KK did not violate the record-keeping requirement. Simply put, DHR should have charged KK with a violation of the requirement stated in the first sentence of Rule 660-5-25-.05(5)(c)2.(iii) (that KK failed to provide in-service training to Bolden and Billings "through reading the Minimum Standards").

I disagree with the main opinion that DHR's failure to charge a violation of the appropriate subsection can be cured by a tortured construction of the inappropriate subsection that was charged. In construing an agency regulation, a reviewing court is not at liberty to alter an existing regulation to require something more than the stated requirement because it determines that an "expanded" requirement is a good idea or is what the agency intended to charge. "If a violation of a regulation subjects private parties to criminal or civil sanctions, a regulation cannot be construed to mean what an agency intended but did not adequately express." *Phelps Dodge Corp. v. Federal Mine Safety & Health Review Comm'n*, 681 F.2d 1189, 1193 (9th Cir. 1982) (quoting *Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976)). I would hold that the hearing officer erred by equating the false statements by Bolden and Billings to false and misleading statements by KK to DHR.

The hearing officer's fifth factual finding--"that there were some Minimum Standards violations committed by [KK] as far back as 1992"--is not supported by the evidence insofar as it implies that DHR proved more than one 1992 violation. The hearing officer relied on only one violation in 1992, that of "sleeping toddlers unsupervised on August 13, 1992."

The hearing officer's sixth factual finding--"that staff did not review the sign-out sheets to see that all children had been signed out" before they closed the center for the night--although supported by the evidence, states no violation of the Minimum Standards and is, as a matter of law,

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not a basis for license revocation. The only DHR regulation relating to "sign-out sheets" is found at Rule 660-5-25-.05(4)(g):

" *Transportation Provided by Parent(s), Guardian(s) or Other Designated Person(s)*. Children being transported by parent(s), guardian(s) or other designated person(s) shall be accompanied into and out of the center by this parent, guardian or other person. *The center shall require the custodial parent/guardian or other designated person to sign children out at each departure from the center.*"

(Second emphasis added.)

Although it might accord with common sense and

safe practice to have a regulation requiring staff members, before they close and lock the center for the night, review the sign-out sheets to see that all children have departed, there is no such requirement in the Minimum Standards. DHR consultant Beverly McDaniel conceded that fact at trial. Although McDaniel testified that Billings "should have" reviewed the sign-out sheets before she locked the center and left for the night on March 26, 1998, McDaniel candidly admitted that the Minimum Standards do not require such a review. McDaniel was asked, "Where [in the Minimum Standards] does it say that [an employee] had a responsibility to review the sign-out sheet as you've alleged in the charge letter?" McDaniel answered, "*The standards do[] not address that.*" (Emphasis added.) McDaniel further testified:

"Q. [On cross-examination by counsel for KK]: And you agree with me, do you not, that the Minimum Standards do not require any nighttime staff member to review anything before a child leaves the facility?"

"A. Yes, sir.

"Q. You agree with me, right?"

"A. Yes, sir."

McDaniel also testified that Billings "should have" checked the cribs in the infant room to see that all children had been picked up before she left for the night, but DHR did not charge KK with violating any provision of the Minimum Standards requiring a crib check or a room check, presumably because there is no such requirement. The provision of the Minimum Standards that KK violated on March 26, 1998, was the requirement that children not be left unsupervised. McDaniel's testimony regarding what Billings "should have" done with respect to checking sign-out sheets, rooms, or cribs boils down to the fact that Billings left a child unsupervised. To guard against leaving a child unsupervised, there may have been any number of prudent but not, strictly speaking, "required" actions that Billings could have or should have taken. DHR charged the greater offense--leaving a child unsupervised and alone on March 26-27, 1998--in two separate sections of the charge letter: section A and section B(2). Then, in other sections of the charge letter, DHR attempted to parse the greater offense into what DHR considered its component parts: failing to check the parental sign-out sheets (section D(4)); failing to have "current file information available to night staff for the 23-month-old child left in the center" (section D(2)); and sending a misleading "memorandum to parents" about the events of March 26-27, 1998 (section C(3)). [8] Failing to check parental sign-out sheets is not a violation of the

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Minimum Standards, and McDaniels admitted that fact.

In reference to this issue, the main opinion states that "an agency's interpretation of its rules and regulations is entitled to deference, and it must stand if it can be said to be reasonable." 874 So.2d at 1097. What constitutes the "agency's interpretation" of Rule 660-5-25-.05(4)(g) regarding sign-out sheets--McDaniel's testimony, or DHR's argument on appeal? The two are inconsistent. I think the conflict between McDaniel's testimony and DHR's argument on appeal makes it clear that DHR had no official policy with regard to sign-out sheets prior to this litigation. Deference to agency interpretation is due "when the agency has made a written interpretation of the regulation or has maintained a longstanding policy on the subject." *Bradberry v. Director, Office of Workers' Comp. Programs*, 117 F.3d 1361, 1366 (11th Cir. 1997) (quoting *McKee v. Sullivan*, 903 F.2d 1436, 1438 n. 3 (11th Cir. 1990)). However, a reviewing court owes no deference to an agency's interpretation of its own regulation "when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position." *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995).

Moreover, even if, despite the lack of an official DHR policy regarding sign-out sheets, the deference-to-agency-interpretation rule were pertinent, it would not be applicable here for another reason. The "plain-meaning" rules of statutory construction apply to the interpretation of administrative regulations. See *State Personnel Bd. v. Wallace*, 682 So.2d 1357 (Ala.Civ.App.1996). *Accord Akins v. United States*, 194 Ct.Cl. 477, 439 F.2d 175, 179 (1971). It is well established that a reviewing court's deference to an agency's construction of its own regulation is due "only when the plain meaning of the [regulation] itself is doubtful or ambiguous.... Deference to agency interpretations is not in order if the [regulation's] meaning is clear on its face." *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C.Cir. 1984). The meaning of the sign-out regulation at issue in this case is clear: the center is required to have parents sign out their children, not to have employees check the sign-out sheets.

"The 'plain meaning' rule of construction is ... not a linguistic straightjacket, but rather a safeguard against exotic interpretations which have the effect of depriving those regulated of a fair opportunity to conform their conduct to the law." *Getty Oil Co. v. Department of Energy*, 569 F.Supp. 1204, 1209 (D.Del.1983). The main opinion's construction of the DHR regulation relating to sign-out sheets is, to say the least, an "exotic" interpretation. The interpretation is alarming because it indicates the court's willingness to validate an after-the-fact rationale for agency action that would deny a regulated entity the "opportunity to conform [its] conduct to the law." See *id.*

Considering the findings and conclusions of the hearing officer that are supported by substantial evidence

and relevant legal authority, the following grounds for revoking KK's nighttime child-care license remain:

1. In March 1998, KK employees left a sleeping child unattended for approximately one hour in KK's closed and locked center.

2. In January 1998, KK hired an underage child-care worker whose being assigned to supervise children resulted in a violation of child/staff-ratio regulations.

3. In August 1992, KK failed to properly supervise sleeping toddlers.

Page 1108

As I have previously discussed, DHR presented no evidence to support its revocation action under either subsection (2) (allowing revocation if the licensee violates the "provisions of the license issued") or (3) (allowing revocation if the licensee furnishes or makes any misleading or false statements or report to DHR) of § 38-7-8. If the revocation action is to be upheld, it must be under subsection (1) of § 38-7-8 (allowing revocation if the licensee "[c]onsistently fail[s] to maintain standards prescribed and published by [DHR]"). I do not think that the three legally and factually valid bases for seeking revocation mentioned above constitute a "consistent failure" by KK to maintain standards prescribed by DHR.

The Minimum Standards do not define "consistent failure." The two DHR witnesses who testified at the administrative hearing provided different interpretations of the phrase. McDaniel testified that one violation of the Minimum Standards that involves a lack of supervision of children can constitute a "consistent failure." Her supervisor, Debbie Thomas, stated that, if every time a DHR representative visits a child-care facility, the representative finds a violation of the Minimum Standards, then the licensee has "consistently failed" to maintain standards. *Merriam-Webster's Collegiate Dictionary* includes, among its definitions for the word "consistent," the following:

"marked by harmony, regularity, or steady continuity: free from variation or contradiction ...: showing steady conformity to character, profession, belief, or custom."

Id. at 246 (10th ed.2002).

In the present case, the evidence established that DHR issued KK's first nighttime-care license in 1992. DHR representatives visited KK's facility only twice in seven years, once in 1992 and once in 1998. In the intervening years, DHR neither visited nor inspected the facility and did not note any complaints regarding the facility. Section 38-7-5(a), Ala.Code 1975, provides that a child-care license is valid for two years from the issue date. Section 38-7-4, Ala.Code 1975, provides that DHR shall issue a renewal license if it is "satisfied that the facility and the responsible persons reasonably meet

standards prescribed." Therefore, when DHR issued KK a renewal license in 1994, it must have been satisfied that KK had reasonably complied with the Minimum Standards.

A "consistent failure" implies a course of conduct that is regular and chronic, not occasional and sporadic. *Cf. Wadena Implement Co. v. Deere & Co.*, 480 N.W.2d 383, 388 (Minn.Ct.App.1992)(holding that a manufacturer did not have good cause for terminating its business relationship with an agricultural equipment dealer under a statutory standard allowing for termination if the dealer " 'consistently fails to meet the manufacturer's market penetration requirements' " because the dealer's failure to meet the requirements "must occur over a number of intervals before the 'consistently fails' standard for termination can be met").

If a student failed math during one reporting period in his sixth-grade year, then made acceptable grades during his seventh-, eighth-, ninth-, tenth-, and eleventh-grade years, but failed math again during two reporting periods in his senior year, his parents would hardly be justified in complaining that he had "consistently failed" math. I fail to see how any reasonable interpretation of the phrase "consistently fails," in the context of complying with regulatory standards, could encompass three instances of noncompliance, the first instance separated from the second and third instances by six (compliant)

Page 1109

years. Only a consistent failure to comply with the Minimum Standards--not a one-time, albeit potentially dangerous, failure to comply with the Minimum Standards--authorizes license revocation under § 38-7-8(1). "[A]dministrative action cannot subvert or enlarge upon the statutory policy.... Administrative implementation cannot deviate from the principle and policy of the statute." *McCrary v. Wood*, 277 Ala. 426, 431, 171 So.2d 241, 247 (1965) (quoting *Abelson's, Inc. v. New Jersey State Bd. of Optometrists*, 5 N.J. 412, 424, 75 A.2d 867, 873 (1950)).

KK has strenuously argued to this court that there is no definition of the phrase "consistent failure" in DHR's regulations; that DHR's own witnesses differed as to the meaning of the phrase; and, citing *Wadena Implement Co. v. Deere & Co.*, supra, that its own shortcomings do not amount to the "consistent failure" required by § 38-7-8(1). This dissent is not "creating an argument for KK" by advancing an interpretation of the statutory phrase "[c]onsistently fail to maintain standards." It is taking the argument that KK does make to its logical conclusion.

Tiptoeing around traditional principles of regulatory interpretation, the main opinion wrongly bases its finding that KK "consistently failed" to comply with the

Minimum Standards on the inexcusable incident that took place on March 26-27, 1998. However, as the Alabama Supreme Court observed almost a century ago in the criminal context,

"It matters not that the prisoner may have been guilty of the most revolting crime known to our laws.... It is vain for us to write in our Constitution [a provision for due process of law,] if our government cannot or will not enforce it. A law not enforced is no law at all."

State ex rel. Attorney General v. Jinwright, 172 Ala. 340, 343-44, 55 So. 541, 42 (1911).

The evidence in this case supports a determination that KK sporadically failed to comply with the Minimum Standards, but not a determination that it "consistently failed" to do so. I would therefore hold that the decision to revoke KK's license was "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." See § 41-22-20(k)(6).

MURDOCK, J., concurs.

Notes:

[1] Some of the events surrounding the incident in which the child was left unattended and locked alone in the KK facility occurred in the early hours of the morning of March 27, 1998. However, because the events leading to the incident began on March 26, 1998, for the purposes of this opinion, we refer to the incident as the "March 26, 1998, incident."

[2] The record indicates that the delay in Hines's arrival might have been attributable to a miscommunication with the police about where Hines should wait for news of the child.

[3] Effective January 22, 2001, Rule 660-5-25-.05 was repealed; it was replaced with Rule 660-5-26.

[4] Section 38-7-7(a), Ala.Code 1975, of the Child Care Act of 1971, requires DHR to "prescribe and publish minimum standards for licensing and for approving all child-care facilities."

[5] KK does not contend in its brief to this court that DHR failed to cite in the April 2, 1998, charge letter appropriate supporting authority for its decision to seek to revoke KK's nighttime-care license.

[6] Bolden's birth date is June 3, 1979; she turned 19 a few months after the March 26, 1998, incident.

[7] The record indicates that DHR instituted a "Child Abuse and Neglect" proceeding against Donna Kelley, the owner of KK. Also, Mitchell Kelly, as president of "Kids' Klub II," appealed DHR's denial of Kids' Klub II's application for a night-time care license. Those

proceedings were pending at the same or approximately the same time as this case.

[8] The hearing officer found that the charges in sections D(2) and C(3) of the charge letter were not substantiated by the evidence.

WHITAKER, MUDD, LUKE & WELLS, L.L.C. ATTORNEYS AND COUNSELORS AT LAW		
	2011 4 TH AVENUE NORTH BIRMINGHAM, ALABAMA 35203 <u>tax id# 26-1495518</u> (205) 639-5300 TELECOPIER (205) 639-5350	
		<i>pluke@wmslawfirm.com</i>

February 4, 2013

Via Facsimile & Email:

Alabama Board of Court Reporting
 Aubrey Ford, Jr. Chair
 c/o Brandy L. Isenhour, Operations Manager

Post	Office	AL	Box	241565
Montgomery,				36124-0066
(334) 215-7232				
(334) 215-7231	Fax			
brandyisenhour@gmail.com				

Re: Alabama Board of Court Reporting
 Proposed Rule No.: 257-X-4-.02
 Our File No. : 7011.1

Dear Judge Ford:

We appreciate the opportunity presented by the Alabama Board of Court Reporting for us, on behalf of our client, to present information and positions to the Board regarding the enactment of proposed Rule 257-X-4-.02. As this Board is certainly aware from our earlier correspondence of January 30, 2013, our Firm has been retained to represent the interest of Birmingham Reporting Service, Inc., as such interest may arise and as an entity which would be substantially affected by the passage or enactment of proposed Rule 257-X-4-.02. Because we attempted to limit our statements pursuant to the request of the Board to less than five minutes and also because of the fact that we attempted to avoid redundancy in the presentation of information, we wanted to take this opportunity to provide the Board with this follow up correspondence outlining the positions presented by our Firm on behalf of Birmingham Reporting Service at Friday morning's hearing. We also adopt by reference the position stated by Joe Paul Moore, who serves as one of the principals of Birmingham Reporting Services, Inc. and also the positions presented by attorney, Peck Fox.

As was stated in our presentation to the Board, we believe that the enactment of the proposed Rule is beyond the statutory authority granted to the Board by the State Legislature. As the Board is certainly aware, as a creation of the State Legislature, this Board's actions are limited to the scope of authority granted to it by the State Legislature itself. A review of the legislative findings made in connection with the creation of this Board by the Alabama State Legislature reveals that in their findings, the State Legislature found that a Board should "be **established to prescribe the qualifications of court reporters and to issue license** to persons who demonstrate their ability and fitness for the licenses. This Chapter is intended to **establish and maintain a standard of competency** for individuals engaged in the practice of court reporting and for the protection of the public, in general, and for litigants **whose rights to personal property are affected by the competency of court reporters.**" Alabama Code Section 34-8B-1 (emphasis supplied).

In addition to the legislative finding, the state legislature also outlined the duties of the Alabama Board of Court Reporting. These included the following:

- (1) Act on matters concerning **competency licensure only** and the process of granting, suspending, reinstating and revoking a license.
- (2) Establish a procedure for the investigation of complaints against licensed court reporters and for the conduct of hearings in which complaints are heard.
- (3) Set a fee schedule for granting licenses and renewals of licenses subject to the Alabama Administrative Procedure Act.
- (4) Maintain a current register of licensed court reporters and a current register of temporarily licensed court reporters. Registers shall be matters of public record.
- (5) Maintain a complete record of all proceedings of the Board.
- (6) Adopt continuing education requirements no later than October 1, 2007. Requirements shall be implemented no later than January 1, 2008 and shall include all courses approved by the Alabama State Bar for continuing legal education.
- (7) Determine the content of and administer examinations to be given to applicants for licensure as certified court reporters and issue numbered licenses to applicants found qualified.
- (8) Maintain records of its proceedings and a register of all persons licensed by the Board which shall be a public record and open to inspection.

See Alabama Code Section 34-8B-5

As can be seen from review of this Code Section, there is no grant of authority to this Board to enact a Code of Conduct or Rules of Ethics nor is it authorized to issue any rules or regulations to control competition, advertising or marketing by court reporting firms. Conversely, our review of other statutes enacting other Boards to govern various professions demonstrates that if the legislature intended to grant the power to impose rules such as the one in question upon the profession, the legislature would have specifically granted the power to do so. For example, the Alabama Legislature has specifically granted authority to a number of Boards to promulgate or make Rules of Professional Conduct or Cannons of ethics. See, e.g., Section 34-1-3(m) Accountants; 34-1a-3 Alarm System Installers; 34-2-39(d) Architects; 34-8a-16 Counselors; 34-11-35(a) Engineers. While the list of statutes granting specific authority to issue Rules of Professional Conduct or Codes of Ethics is not exhaustive, it is demonstrative of the fact that had the legislature intended to grant this power it would have included the power specifically within the statute itself. However, in this instance, no such power has been granted to this Board nor does the implementation of a rule such as the proposed rule in question further the purposes of the Chapter under which this Board was created which was to act on matters concerning competency. As a result, it is the position of Birmingham Reporting Services, Inc. that the enactment of the proposed rule is outside the authority granted to this Board by the State Legislature. This is further supported by the fact that was a prior attempt to have the same rule in question enacted by the Alabama Legislature.

Similarly, the Transmittal Sheet for Notice of Intended Action which has been submitted in accordance with the applicable filing requirements of the Administrative Procedure Division of a Legislative Reference Service indicate that the absence of this Rule would significantly harm or endanger the public health, welfare or safety. However, a review of the legislative findings as a part of the enactment of the statute which created this Board does not demonstrate that the legislature found that the Profession of Court Reporting effects the public health, safety and welfare. Rather, the code section in question simply states it is for the protection of the public in general and for litigants whose rights of personal freedom and property may be affected by the **competency** of court reporters. However, if the Board looks one chapter further in Title 34 of the Code of Alabama, it would discovery that in Section 34-9-1 et seq., the legislature undertook to create the dental board for the State of Alabama. As a part of their legislature findings, they specifically found that the practice of dentistry effects the public health, safety and welfare and that accordingly, it should be subject to regulation. Without a legislative finding that the Profession of Court Reporting has an effect on the public health, welfare or safety, the question answered on the transmittal sheet for notice of intended action must be answered in the negative. It would be beyond the scope of this Board's authority to itself make a determination that the legislature did not make and to base its proposed rule on findings which were not made by the legislative body which created it. It is further interesting to note that when the legislature chose to regulate dentistry, they also specifically enacted multiple code sections related to advertising, referral services, prohibited act and a variety of other areas which governed the manner in which dentist may market or advertise their services. Clearly, had the legislature intended to do so with court reporting, they could have enacted similar code sections.

Finally, a review of Section 34-8B-4 establishes the composition of the Alabama Board of Court Reporting. As this Board is aware, it is comprised of four court reporters who are certified by ABCR, NCRA or NVRA along with two members of the Alabama State Bar and one additional member. In this case, it would appear that any person on this Board who is either a court reporter or had a familial or other relationship with a court reporter would be faced with an inherit conflict of interest in voting on a provision such as the rule in question. Clearly, as evidenced by the statements at the public hearing, the effect of this rule would alter the method and manner through which certain court reporters and court reporting firm currently do business. As a result, the implementation of such a rule could either positively or negatively affect the financial status of persons on this Board who are either court reporters or who may have some special relationship with the court reporter such as a family member who is involved in the profession. Because the enactment of this Rule might have a financial effect on certain members of the Board and their families, it would appear that by voting on the proposed ethics rules would be in violation of proposed ethics rules numbers two and three since it could give rise to an appearance of impropriety or a potential conflict of interest. While Birmingham Reporting Service and its counsel have the strongest faith that the members of this Board will act in accordance with their statutory authority and with the best interest of the court reporting profession in mind, it would seem that the best course of action with regard to issue whether it might be even an arguable conflict of interest such as this one would be to allow the legislature to resolve questions as they relate to the proposed rule.

Again, we appreciate your time and your consideration of the position taken by our client, Birmingham Reporting Service, Inc. Should the Board need any additional information from us, we would appreciate you letting us know and will be glad to provide whatever information may be requested.

Sincerely,
WHITAKER, MUDD, LUKE & WELLS, L.L.C.

K. Phillip Luke

K. Phillip Luke

KPL/lhb

cc: Birmingham Reporting Service

February 1, 2013

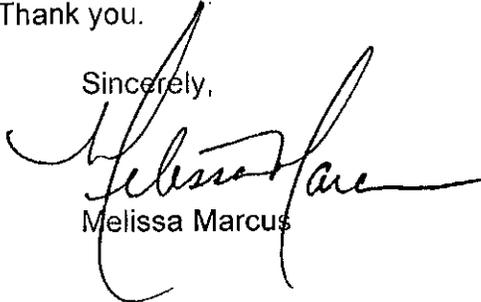
Honorable Aubrey Ford, Jr.
Chair of the Board
Post Office Box 241565
Montgomery, Alabama 36124

Re: Proposed Rule & Regulation Amendment

Dear Sir:

This letter is meant to express my opposition to the Proposed Rule & Regulation Amendment prohibiting court reporters from supporting legal associations as vendors, awarding points, etc. I oppose this amendment and ask that you not allow this amendment to be passed. Thank you.

Sincerely,

A handwritten signature in black ink, appearing to read "Melissa Marcus", written in a cursive style.

Melissa Marcus

//mm



Brandy

From: Paula McCaleb <paulamccaleb@gmail.com>
Sent: Monday, February 04, 2013 9:38 AM
To: Brandy L. Isenhour
Subject: Fwd: Proposed Rule No. 257-X-4-.02

Begin forwarded message:

From: Janet Stamps <janetstamps@freedomreporting.com>
Subject: Proposed Rule No. 257-X-4-.02
Date: February 1, 2013 11:54:41 AM CST
To: "paulamccaleb@gmail.com" <paulamccaleb@gmail.com>

Dear Mr. McCaleb:

My name is Janet Stamps and I am one of the schedulers at Freedom Court Reporting. I am aware of Proposed Rule Number 257-X-4-.02. I am against the passage of that proposed rule. I do not believe that the proposed rule has anything to do with our performance as licensed court reporters nor do I believe it has anything to do with our integrity as such. I urge the ABCR not to pass the proposed rule.

Sincerely,
Janet Stamps
Scheduling Department
2015 Third Avenue North
Birmingham, AL 35203
Phone: (205) 397-2397
Fax: (205) 397-2398
Toll Free: 1-877-373-3660
www.freedomreporting.com



Brandy

From: Paula McCaleb <paulamccaleb@gmail.com>
Sent: Monday, February 04, 2013 9:39 AM
To: Brandy L. Isenhour
Subject: Fwd: Proposed Rule and Regulation Amendment 257-X-4-.02 ABCR ETHICS

Begin forwarded message:

From: Susan Sims <susan.sims56@gmail.com>
Subject: Proposed Rule and Regulation Amendment 257-X-4-.02 ABCR ETHICS
Date: February 1, 2013 9:43:02 AM CST
To: paulamccaleb@gmail.com

Susan Sims
615 Mermont Drive
Trussville, AL 35173

February 1, 2013

Hon. Aubrey Ford, Jr.
Chairman of the Board
P. O. Box 241565
Montgomery, AL 36124

RE: Proposed Rule and Regulation Amendment 257-X-4-.02 ABCR ETHICS

Dear Mr. Ford:

I would like to express my opposition to the proposed rule and regulation amendment listed above. I do not feel that this amendment is ethical as it tries to limit a company's right to market its product.

Thank you,

Susan Sims

January 31, 2013

Alabama Board of Court Reporting
Honorable Aubrey Ford, Jr., Chairman
Post Office Box 241565
Montgomery, Alabama 36124-0066
(334)215-7232
(334)215-7231 Fax
brandyisenhour@gmail.com

Re: Alabama Board of Court Reporting
Proposed Rule No.: 257-X-4-.02

Dear Judge Ford:

My name is Shannon P. Yost, and I am licensed by the Alabama Board of Court Reporters ("ABCR") as a court reporter. I am currently in good standing with the ABCR.

I was recently made aware after the current Alabama Court Reporter Association's annual convention held on January 24-26, 2013 that ABCR is proposing a passage of Proposed Rule Number 257-X-4-.02.

Due to the last-minute nature of being made aware of this proposed rule, I will be unable to attend. However, I wanted to make certain that my voice was heard concerning this matter.

I am against the passage of the proposed rule. I do not believe that the proposed rule has anything to do with my qualifications as a licensed court reporter nor do I believe it has anything to do with my integrity as such and has everything to do with jealousy or lack of financial means within our industry.

I feel it would be a disservice to court reporters, our clients, and future clients to be unable to "thank" them with yearly gifts, sponsorships, et cetera for their continued loyalty to our profession.

I urge the ABCR not to pass the proposed rule.

Sincerely,

/s/ Shannon P. Yost
Certified Court Reporter

Brandy

From: Paula McCaleb <paulamccaleb@gmail.com>
Sent: Monday, February 04, 2013 9:42 AM
To: Brandy L. Isenhour
Subject: Fwd: To Honorable Aubrey Ford, Jr. - Proposed Rule and Regulation Amendment

Begin forwarded message:

From: "Kacie Davis" <KDavis@Princelaw.net>
Subject: To Honorable Aubrey Ford, Jr. - Proposed Rule and Regulation Amendment
Date: January 31, 2013 1:00:39 PM CST
To: <paulamccaleb@gmail.com>

Honorable Aubrey Ford, Jr.,

I am writing this email to let you know that I **oppose** the pasting of this Amendment which would prohibit court reporters from supporting legal associations as vendors, awarding points, etc.

Thanks,

Kacie Davis, Legal Assistant †
Prince Glover & Hayes
1 Cypress Point, 701 Rice Mine Road N
Tuscaloosa, AL 35406
(205) 345-1234
(205) 752-6313 facsimile
www.princelaw.net
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Alabama Board of Court Reporting
Honorable Aubrey Ford, Jr., Chairman
Post Office Box 241565
Montgomery, Alabama 36124-0066
(334) 215-7232
(334) 215-7231 Fax
brandyisenhour@gmail.com

January 31, 2013

Re: Alabama Board of Court Reporting
Proposed Rule No.: 257-X-4-.02

Dear Judge Ford:

My name is Carolyn Cleckler, and I am licensed by the Alabama Board of Court Reporters (ABCR) as a court reporter. I am currently in "good standing" with the ABCR.

I am aware of Proposed Rule Number 257-X-4-.02, and I am against the passage of that proposed rule. I do not believe that the proposed rule has anything to do with my qualifications as a licensed court reporter nor do I believe it has anything to do with my integrity as such. I urge the ABCR not to pass the proposed rule.

Sincerely,

Carolyn Cleckler

TAYLOR & TAYLOR
ATTORNEYS AT LAW
2130 HIGHLAND AVENUE
BIRMINGHAM, ALABAMA 35205
TELEPHONE: (205) 558-2800
FACSIMILE: (205) 558-2860

TED TAYLOR
LEAH O. TAYLOR
RHONDA PITTS CHAMBERS
TEDFORD TAYLOR
TAMMY SMITH

PRATTVILLE OFFICE
114 EAST MAIN STREET
PRATTVILLE, ALABAMA 36067
TELEPHONE: (334) 385-2221
FACSIMILE: (334) 361-6104

January 31, 2013

Honorable Aubrey Ford, Jr.
Alabama Board of Court Reporting
Post Office Box 241565
Montgomery, Alabama 36124

Dear Judge Ford:

I write to comment on the proposed addition of Chapter 257-X-4.02 to the Alabama Board of Court Reporting's Rules and Regulations dealing with Ethics.

I have always considered the decision of who I hire as a court reporter to be a free enterprise business decision. Proposed Section 8, which seeks to limit the amounts that the court reporter can give to me or my staff as gifts, impermissibly infringes on my right to choose a court reporter.

I object to Section 8 of the proposed Rule.

Very truly yours,


Ted Taylor

Email: martin@copelandfranco.com

January 31, 2013

VIA EMAIL TRANSMISSION

Alabama Board of Court Reporting (BrandyIsenhour@gmail.com)
2011 Berry Chase Place
Montgomery, AL 36117

RE: Proposed Rule

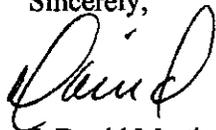
To Whom It May Concern:

I am a practicing lawyer and currently serve as President of the Montgomery County Bar Association. I am writing in reference to the Proposed Rule which provides "nothing offered in exchange for future work is permissible, regardless of its value." One possible interpretation of this rule would be that it would preclude court reporters from being sponsors or vendors at any local Montgomery County Bar Association function.

I am writing to express my concern regarding that Rule because of the beneficial relationship the Montgomery County Bar Association has had with many court reporting firms through the years. Those firms have been very gracious and have assisted the Montgomery County Bar Association in providing services to our members and to the community by sponsoring various events, including Continuing Legal Education events, social events to recruit lawyers to provide volunteer legal services to the poor, and our annual charity event which benefits a local charitable organization. I would therefore urge the Board to not adopt the proposed Rule.

I appreciate your consideration of my concerns.

Sincerely,



J. David Martin

JDM/mfm

COPELAND, FRANCO, SCREWS & GILL, P.A.

444 South Perry St. Montgomery, AL 36104 • P.O. Box 347 Montgomery, AL 36101-0347
334.834.1180 Fax 334.834.3172 copelandfranco.com

Alabama Board of Court Reporting
Honorable Aubrey Ford, Jr., Chairman
Post Office Box 241565
Montgomery, Alabama 36124-0066
(334) 215-7232
(334) 215-7231 Fax
brandyisenhour@gmail.com

Re: Alabama Board of Court Reporting
Proposed Rule No. 257-X-4-.02

Please accept my sincere request for you to vote No to the Proposed Rule and Regulation Amendment. At the beginning, when applying for a charter for the Alabama Board of Court Reporting, we agreed with the original writers of the Bill to the formation of the Board as long as it was to govern Competency Only of court reporters. That agreed-upon language is contained in the charter language as passed by the Alabama Legislature.

This current Amendment is a breach of that agreement, and attempts to add oversight on topics other than competency of court reporters, which in my view violates the charter of the Board of Court Reporting. The practice of honoring an agreement is the core of ethical behavior.

Some of the proposed rules are just common sense for any court reporter and are practiced by court reporters as a part of their training in schools.

After reporting nearly forty years and currently working with around 100 Alabama court reporters, I can say all the reporters I have ever been associated with have been fair and impartial and provided comparable services to all parties to the highest levels human beings can attain.

Re #2) Are you asking court reporters to police conflicts of interest of lawyers or parties in a case? And who are you asking them to disclose that conflict to?

What is the penalty if they fail to recognize a conflict?

Re#7) What are unlawful agreements with other reporters on the fees to any user? Is this referring to the Sherman Antitrust Act?

What would be an example of a lawful agreement versus an unlawful agreement?

Re#8) This language on its face precludes giving anything of value to any attorneys or their staff, "other clients" or their staff, or any other persons or entities associated with any litigation which exceeds \$100 in the aggregate per recipient per year.

What would comprise "other clients"? How could a reporter know if persons or entities are associated with any litigation without trying to do a litigation check on everyone you may be associated with or donating to for any cause? How would reporters have access to that information?

Why would it be unethical for reporters to donate to charities that are associated with litigation? We as reporters donate to Volunteer Lawyers Organizations as much as we possibly can. They are all associated with litigation and legal issues as their main purpose. Reporters support legal organizations of all kinds, along with non-legal charities that lawyers are involved in, many times more than in the aggregate of \$100 per entity per year. What is unethical about such practices?

What is unethical about a reporter marketing their business?

Lawyers and legal staff and most of the citizens of the United States receive marketing promos and reward points and other types of advertising from a myriad of sources, including airlines, hotels, rental car companies, grocery stores, etc and these business all compete in the open market on price, value and services offered

the same as a court reporter would. What is unethical about marketing your services if you want to spend your income that way versus putting the extra dollars in your pocket for your own spending money? In the land of the free and the home of the brave, each American should have the right to spend their income to market their business if they so choose.

I have heard some reporters say the marketing items should go to the litigant – which is ridiculous – the litigant is paying a fair charge for services received and has no claim to a reporter's fairly earned income - with which they may choose to take a vacation with or buy a client a gift with. We all choose what to do with our fairly earned income and if there are some reporters who want to spend their fairly earned income on themselves, that is what they should do. If there are other reporters who prefer to spend some of it on their clients, that is what they should do.

I urge you to vote No to this Proposed Rule.

Sincerely,

/s/Mickey Turner
Court Reporter

Brandy

From: Clark Court Reporting AOL <clarkcourtrptg@aol.com>
Sent: Wednesday, January 30, 2013 1:11 PM
To: brandyisenhour@gmail.com
Subject: FW: Please Vote No

From: Ed Clark [<mailto:ebc@phm-law.com>]
Sent: Wednesday, January 30, 2013 12:25 PM
To: tammy@clarkcourtreporting.net
Subject: Please Vote No

I would ask that you vote NO on paragraph 8 of the proposed Ethics amendment during you Feb. 1, 2013, meeting.

Thank you

Ed Clark
Paralegal

PORTERFIELD

HARPER MILLS MOTLOW & IRELAND

22 Inverness Center Parkway
Suite 600
Birmingham, AL 35242
(205) 980-5000
(205) 949-3733 Direct
(205) 949-3777 Fax

www.phm-law.com

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Brandy

From: Debby Holmes <debby@assetlaw.com>
Sent: Wednesday, January 30, 2013 10:13 AM
To: brandyisenhour@gmail.com
Subject: ABRC Proposed Ethics Amendment No. 8

Dear Ms. Isenhour:

Please note that I am NOT in favor of ABRC Proposed Ethics Amendment No. 8. I wanted to express my opinion to you even though you have no vote on this matter.

Thank you.

Deborah P. Holmes, PP, PLS
Duke Law Firm, P.C.
1572 Montgomery Highway, Suite 205
Birmingham, Alabama 35216-4520
Telephone: (205) 823-3900
Fax: (205) 823-2630
debby@assetlaw.com

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Brandy

From: Paula McCaleb <paulamccaleb@gmail.com>
Sent: Thursday, January 31, 2013 7:21 AM
To: brandyisenhour@gmail.com
Subject: Fwd: Proposed Rule 257-X-4-.02

Another one for Ben to see

Paula McCaleb
President

Sent from iPad

Begin forwarded message:

From: "Drum, David" <ddrum@Sirote.com>
Date: January 30, 2013, 5:04:00 PM CST
To: "'paulamccaleb@gmail.com'" <paulamccaleb@gmail.com>
Subject: Proposed Rule 257-X-4-.02

It has come to my attention that the Board is considering a proposed rule and regulation amendment. After hearing about the arbitrary nature of the rule, I looked further into it. Thus, I read proposed rule 257-X-4-.02 ABCR Ethics. I take particular concern with paragraph 8.

After careful consideration, I am of the conclusion that much of its content is quite bizarre and serves no purpose beyond curbing business-conscious reporters' promotional and marketing activities in a broad and arbitrary fashion. In fact, I find it quite difficult to even fathom to potential reach of its restrictions; for instance, it is difficult to understand what it means to state that "*nothing offered in exchange for future work is permissible, regardless of its value.*" Furthermore, I can envision that many reporters relationships with attorneys, staff, and "*other clients or their staff or any other persons or entities associated with litigation.*" Whose litigation? Any? What does it mean to be "associated with litigation"? Clearly, there is something driving the party or parties who are pushing this amendment and I can say, without hesitation, that it does not appear to be concern for the public or parties to litigation. I find it interest that this proposed paragraph (8) has found itself buried in other provisions that already address any concerns that this provision could even purport to curtail – e.g., paragraph (1), (2), (3) etc. Additionally, as an attorney, I take great offense with any notion that my judgment and respect for the legal process could be impaired or swayed by "anything of value" exceeding \$100.

I see no possible way in which aspects of this rule would protect the public, let alone any party "associated with litigation." It only seems to be an arbitrary restriction pushed by disgruntled parties wishing to restrict promotion, marketing, and advertising by successful reporters who seek to show care and appreciation to clients and persons associated with litigation. Ultimately, attorneys and courts select the better reporters they can trust; showing appreciation in this respect only occurs with that selection. I see no way in which those activities this rule purports to restrict could create any problems.. I am not aware of such restrictions in other states or how the relationship between the reporters, the courts, the attorneys, or the parties could in anyway be improperly influenced by gifts or rewards. In such a situation both sides' lawyers are fully overseeing the process. This is not a situation involving an area in which undue influence or bribes could lead to the attorneys overlooking problems or hiring unacceptable reporters. The situation is inherently confrontational and polices itself in that

regard. Furthermore, paragraph (8) could harm the public and create burdens on parties. For instance, "giving anything of value" could encompass anything, even if related to the court reporting services. By providing additional but related services or products with the court reporting service, successful court reporters with concern for clients' needs may actually enhance the experience for the parties involved and create a smoother process for the attorneys and parties.

Ultimately, paragraph (8) seems like nothing more than an attempt to restrict free enterprise and curtail activities of successful court reporters – those whose success comes from their ability to meet and exceed clients' needs (in all aspects). This may include assisting with sponsoring of seminars or functions. Strong court reporters (who are needed in our legal system) should be free to market not only their services but themselves through marketing, advertising, and additional service offerings that better serve clients and the public. Most likely, I suspect, paragraph (8) has been buried into a proposed rule by those frustrated with their lack of success or anger with the success of better quality reporters who are able to provide benefits to customers and the parties involved....regardless of whether they are hired by the benefactor or recipient of the marketing materials, promotional events or otherwise. The breadth of that provision is mind boggling and is not even directed at activities that should be regulated in such a manner...namely marketing of a service and the people involved in that service. I am strongly opposed to restricting the manner in which businesses market and brand themselves, whether it be through speech or promotion.

I urge you to reflect on any purpose this overbroad and capricious paragraph (8) serves. I further urge you to consider the parties pushing for it to pass and their motivations. I then urge you to vote against it.

Thank you.

David

David W. Drum

Attorney at Law



Sirote & Permutt, PC

2311 Highland Avenue South Birmingham, AL 35205

T: 205-930-5105 F: 205-212-3874

ddrum@sirote.com www.sirote.com

Alabama Florida

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Brandy

From: Clark Court Reporting AOL <clarkcourtrptg@aol.com>
Sent: Wednesday, January 30, 2013 1:11 PM
To: brandyisenhour@gmail.com
Subject: FW: Dear Ms. August

From: Debbie Rutherford [<mailto:dsrutherford@bellsouth.net>]
Sent: Wednesday, January 30, 2013 12:30 PM
To: tammy@clarkcourtreporting.net
Subject: Dear Ms. August

Please vote NO to paragraph 8 of the proposed Ethics amendment. If it were not for our court reporters supporting out legal seminars, we could not have them at all. They help us to provide CLE for our members and to the attorneys. PLEASE VOTE NO!!!!!!!!!!!!

Deborah S. Rutherford
Paralegal to David P. Shepherd
P. O. Box 454
913 Plantation Boulevard
Fairhope, AL 36532
(251) 928-4400 (phone)
(251) 928-0185 (fax)

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January 30, 2013

Alabama Board of Court Reporting
Honorable Aubrey Ford, Jr., Chairman
Post Office Box 241565
Montgomery, AL 36124-0066
(334) 215-7232
(334) 215-7231 Fax
brandyisenhour@gmail.com

Re: Alabama Board of Court Reporting
Proposed Rule No.: 257-X-4-.02

Dear Judge Ford:

My name is Timothy T. Casey and I am licensed by the Alabama Board of Court Reporters (“ABCR”) as a court reporter, license number 301. I am currently in “good standing” with the ABCR.

I am aware of Proposed Rule Number 257-X-4-.02. I am against the passage of that proposed rule. I do not believe that the proposed rule has anything to do with my qualifications as a licensed court reporter nor do I believe it has anything to do with my integrity as such. I urge the ABCR not to pass the proposed rule.

Sincerely,

/s/Timothy T. Casey

January 30, 2013

Alabama Board of Court Reporting
Honorable Aubrey Ford, Jr., Chairman
Post Office Box 241565
Montgomery, AL 36124-0066
(334) 215-7232
(334) 215-7231 Fax
brandyisenhour@gmail.com

Re: Alabama Board of Court Reporting
Proposed Rule No.: 257-X-4-.02

Dear Judge Ford:

My name is Shana Cooper Leake and I am licensed by the Alabama Board of Court Reporters (“ABCR”) as a court reporter. I am currently in “good standing” with the ABCR.

I am aware of Proposed Rule Number 257-X-4-.02. I am against the passage of that proposed rule. I do not believe that the proposed rule has anything to do with my qualifications as a licensed court reporter and nor do I believe it has anything to do with my integrity as such. I urge the ABCR not to pass the proposed rule.

Sincerely,

/s/ Shana Cooper Leake

January 30, 2013

Alabama Board of Court Reporting
Honorable Aubrey Ford, Jr., Chairman
Post Office Box 241565
Montgomery, AL 36224-0066
(334)215-7232
(334)215-7231 Fax
Brandyisenhour@gmail.com

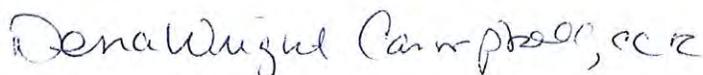
Re: Alabama Board of Court Reporting
Proposed Rule No.: 257-X-4-.02

Dear Judge Ford:

My name is Dena Wright Campbell, and I am licensed by the Alabama Board of Court Reporting ("ABCR") as a court reporter. My license number is 34, and I am currently in "good standing" with the ABCR.

I am aware of Proposed Rule number 257-X-4-.02. I am against the passage of that proposed rule. I do not believe that the proposed rule has anything to do with my qualifications as a licensed court reporter, and I do not believe it has anything to do with my integrity as such. Therefore, I strongly urge the ABCR not to pass the proposed rule.

Sincerely,



Dena Wright Campbell, CCR

January 30, 2013

Alabama Board of Court Reporting
Honorable Aubrey Ford, Jr., Chairman
Post Office Box 241565
Montgomery, AL 36124-0066
(334) 215-7232
(334) 215-7231 Fax
brandyisenhour@gmail.com

Re: Alabama Board of Court Reporting
Proposed Rule No.: 257-X-4-.02

Dear Judge Ford:

My name is Kelly Jackson and I am a licensed by the Alabama Board of Court Reporters (“ABCR”) as a court reporter. I am currently in “good standing” with the ABCR.

I am aware of Proposed Rule Number 257-X-4-.02. I am against the passage of that proposed rule. I do not believe that the proposed rule has anything to do with my qualifications as a licensed court reporter nor do I believe it has anything to do with my integrity as such. I urge the ABCR not to pass the proposed rule.

Sincerely,

Kelly Jackson
NAME

Brandy

From: Paula McCaleb <paulamccaleb@gmail.com>
Sent: Thursday, January 31, 2013 7:16 AM
To: brandyisenhour@gmail.com
Subject: Fwd: Opposition to Proposed Rules and Regulation Amendments

Paula McCaleb
President

Sent from iPad

Begin forwarded message:

From: Margaret Gaddy <margaret.gaddy@gmail.com>
Date: January 30, 2013, 2:03:48 PM CST
To: paulamccaleb@gmail.com
Subject: Opposition to Proposed Rules and Regulation Amendments

Hello,

I am an Alabama licensed attorney and I have a concern regarding your proposed rule and regulation amendments, specifically 257-X-4-.02 ABCR ETHICS part 8. I personally do not feel that this rule is necessary or beneficial to any involved party. The quality of a court reporting firm's work underlies an attorney's decision to hire them, not whether that court reporter gives gifts to clients regularly. Part of the way that court reporters get their name out to the public is through gifts such as the ones you intend to prohibit. This is also a very effective way to thank clients for their loyalty. I totally understand the aspect of prohibiting gifts in exchange for future work, but disallowing gifts to say thank you or to publicize the firm in any way does not have any benefit, in my opinion. I hope that you will consider any and all opposition that you receive to this proposed rule very carefully and weigh the negative impact it might have on court reporting firms.

Thank you,
Margaret Gaddy

--

Margaret Summerford Gaddy

Brandy

From: Paula McCaleb <paulamccaleb@gmail.com>
Sent: Thursday, January 31, 2013 7:18 AM
To: brandyisenhour@gmail.com
Subject: Fwd: ABCR Proposed Rule No. 257-X-4-.02

More of the same....

Paula McCaleb
President

Sent from iPad

Begin forwarded message:

From: Vicki Coutts <vickigt1@hotmail.com>
Date: January 30, 2013, 3:23:46 PM CST
To: "paulamccaleb@gmail.com" <paulamccaleb@gmail.com>
Subject: ABCR Proposed Rule No. 257-X-4-.02

January 30, 2013

Alabama Board of Court Reporting
Honorable Aubrey Ford, Jr., Chairman
Post Office Box 241565
Montgomery, AL 36124-0066

Dear Judge Ford:

My name is Vicki Thompson Coutts, and I am licensed as a court reporter by the Alabama Board of Court Reporters. I am currently in good standing with the ABCR.

I would like to voice my concerns regarding Proposed Rule Number 257-X-4-.02.

I do not feel that the proposed rule has anything whatsoever to do with my

qualifications as a licensed court reporter, nor do I believe my integrity as a court reporter has anything to do with the items addressed by this proposed rule.

With these thoughts in mind, I strongly urge the Board NOT to pass the proposed rule.

Sincerely,

Vicki Thompson Coutts
25595 Gray Stone Drive
Madison, AL 35756

Brandy

From: Paula McCaleb <paulamccaleb@gmail.com>
Sent: Thursday, January 31, 2013 7:19 AM
To: brandyisenhour@gmail.com
Subject: Fwd: Amendment to Alabama Board of Court Reporting

Paula McCaleb
President

Sent from iPad

Begin forwarded message:

From: Local Lawyers <jan@locallawyers.com>
Date: January 30, 2013, 4:28:01 PM CST
To: paulamccaleb@gmail.com
Cc: Mike Turner <miketurner@freedomreporting.com>
Subject: **Amendment to Alabama Board of Court Reporting**

FYI: I am not a court reporter, but I think this amendment to prevent court reporter companies from sponsoring legal events and giving gifts to their clients is a bad idea.

Respectfully,
Jan

Jan Walsh, Founder & President
Jan@LocalLawyers.com

LocalLawyers.com

Toll Free: 1.888.LAW.0520, Ext. 700
Phone: 205.968.9723
Cell: 205.410.5765
Fax: (866) 335-0307

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Brandy

From: Paula McCaleb <paulamccaleb@gmail.com>
Sent: Thursday, January 31, 2013 7:20 AM
To: brandyisenhour@gmail.com
Subject: Fwd: Fw:

Paula McCaleb
President

Sent from iPad

Begin forwarded message:

From: "Donna Winters" <dwcourtreporter@charter.net>
Date: January 30, 2013, 4:28:37 PM CST
To: <paulamccaleb@gmail.com>
Subject: Fw:

----- Original Message -----

From: [Donna Winters](#)
To: [Donna Winters](#)
Sent: Wednesday, January 30, 2013 4:25 PM

January 30, 2013

Alabama Board of Court Reporting
Honorable Aubrey Ford, Jr., Chairman
Post Office Box 241565
Montgomery, AL 36124-0066
(334) 215-7232
(334) 215-7231 Fax
brandyisenhour@gmail.com

Re: Alabama Board of Court Reporting
Proposed Rule No.: 257-X-4-.02

Dear Judge Ford:

My name is Donna Winters, and I am licensed by the
Alabama Board of

Court Reporters ("ABCR") as a court reporter. I am currently in "good standing" with the ABCR.

I am aware of Proposed Rule Number 257-X-4-.02. I am AGAINST the passage of that proposed rule. I do not believe that the proposed rule has anything to do with my qualifications as a licensed court reporter nor do I believe it has anything to do with my integrity as such. I urge the ABCR NOT to pass the proposed rule.

Sincerely,

Donna Winters
(205) 799-8941

January 30, 2013

Alabama Board of Court Reporting
Honorable Aubrey Ford, Jr., Chairman
Post Office Box 241565
Montgomery, AL 36124-0066
(334) 215-7232
(334) 215-7231 Fax
brandyisenhour@gmail.com

Re: Alabama Board of Court Reporting
Proposed Rule No.: 257-X-4-.02

Dear Judge Ford:

My name is Tara Staggs Gristina, and I am licensed by the Alabama Board of Court Reporters ("ABCR") as a court reporter. I am currently in "good standing" with the ABCR.

I am aware of Proposed Rule No. 257-X-4-.02. I am against the passage of that proposed rule. I do not believe that the proposed rule has anything to do with my qualifications as a licensed court reporter, nor do I believe it has anything to do with my integrity as such. I respectfully urge the ABCR not to pass the proposed rule.

Sincerely,

Tara Staggs Gristina

Sheri G. Connelly, RPR
905 10th Court SW
Alabaster, Alabama 35007

January 31, 2013

Honorable Aubrey Ford, Jr., Chairman
Alabama Board of Court Reporting
Post Office Box 241565
Montgomery, AL 36124-0066

Re: Proposed Rule No.: 257-X-4-.02

Dear Judge Ford:

I am a court reporter in good standing with the Alabama Board of Court Reporters. My certification number is 439.

I have been informed that Proposed Rule Number 257-X-4-.02, will be voted on Friday, February 1. I am against the passage of that proposed rule. Specifically, I disagree with subparts six, seven, and eight of the proposed rule. Paragraphs six and seven of the proposed rule are both vague and therefore could easily be misconstrued. Paragraph eight does not affect my ability to be a good court reporter and violates our ability to participate in the free enterprise system.

Furthermore, I am unaware of the particulars for how ABCR publishes its information regarding rule changes, but I do not believe proper notice of this potential change was given. I did not receive notice of this hearing until a few days ago.

These three sections have no relation to my qualifications as a licensed court reporter and I urge ABCR to not ratify these changes.

Sincerely,



Sheri G. Connelly, RPR
ABCR # 439



MONTGOMERY COUNTY BAR ASSOCIATION
P.O. BOX 72
MONTGOMERY, AL 36101-0072
334-265-4793

Alabama Board of Court Reporting
P.O. Box 241565
Montgomery, AL 36124-0066

Dear Madam/Sir:

The Montgomery County Bar Association has a long cooperative relationship with Freedom Court Reporting. We appreciate their professionalism and their involvement in the community. Freedom Court Reporting has helped sponsor events such as our annual Bench and Bar Conferences for several years. Without their sponsorship, providing these events for our members would be very difficult. Also, they recently sponsored an excellent seminar for our members on using the iPad effectively in law practice and in the courtroom. This was extremely helpful to our members. Many who could not attend this seminar asked if we could have a repeat of it. This would not be possible without their generosity.

We have benefitted from other court reporting firms, also, and therefore appeal that this amendment not be passed.

Sincerely,
Dot Robinson

Administrative Assistant
Montgomery County Bar Association

*Talley Brathovd, Certified, PP, PLS
Legal Assistant to:
Anna M. Williams, Attorney at Law
Suite A, The Brent~Lee Building
12761 Highway 90
Post Office Drawer 446
Grand Bay, Alabama 36541-0446
(251) 865-3665 telephone
(251) 865-3650 facsimile
talley@gulfcoastattorneys.com*

January 31, 2013

Hon. Aubrey Ford, Jr., Chairman

aubrey.ford@alacourt.gov

Ms. Sabrina Lewis - Vice Chairman

sabrina.lewis@bellsouth.net

Ms. Lois Robinson, Secretary

loisrob@aol.com

Mr. William M. Dawson

bill@billdawsonlaw.com

Ms. Suzanne B. Frazier

suzanne.frazier@alacourt.gov

Ms. Tammy C. August

tammy@clarkcourtreporting.net

Mr. Robert G. Esdale

graham.esdale@beasleyallen.com

{B0562200}

Page -2-

Page 2

Ms. Paula McCaleb, Executive Director

paulamccaleb@gmail.com

Ms. Brandy Isenhour, Operations Manager

brandyisenhour@gmail.com

Dear ABCR Members:

After a review of the proposed change, in re: 257-X-4-.02 ABCR ETHICS, I believe that item number 8. will strangle not only the ability of Court Reporters to advertise and support other associations it will limit other associations from being able to raise awareness and inhibit their growth among the legal community. As a member of AALS, the legal professional association to which I belong, we depend on the contributions of Court Reporters, as well as others to support, inform and update our organization and its members of the new technology and other changes in the Court Reporting portion of the legal profession that are available.

It is also my belief that if the change is made as stated, Court Reporters will also be barred from attending and supporting any association, political campaign, and or any other activity except for the amount not to exceed \$100.00 in the aggregate per recipient each year.

As a Certified Professional Paralegal and having worked in the legal profession for the past twenty years, I believe that all legal professionals should be held to a higher standard and support any and all efforts to maintain those standards. However, I do not believe that this change will allow for free enterprise nor do I believe that it will improve the quality of Court Reporting.

After all, I haven't seen any television commercials and billboards by Court Reporters that make me wonder why I have worked in the legal profession for the past 20 years. I can not say the same for some of the commercials and billboards I have seen allowed by attorneys.

Page -3-

Page 3

Please consider the consequences of this change very carefully and look at the long-term results.

Sincerely,

Talley Brathovd, Certified, PP, PLS



... the association for legal professionals
www.alabama-als.org

January 31, 2013

Hon. Aubrey Ford, Jr., Chairman

aubrey.ford@alacourt.gov

Ms. Sabrina Lewis - Vice Chairman

sabrina.lewis@bellsouth.net

Ms. Lois Robinson, Secretary

loisrob@aol.com

Mr. William M. Dawson

bill@billdawsonlaw.com

Ms. Paula McCaleb, Executive Director

paulamccaleb@gmail.com

Ms. Suzanne B. Frazier

Suzanne.frazier@alacourt.gov

Ms. Tammy C. August

tammy@clarkcourtreporting.net

Mr. Robert G. Esdale

graham.esdale@beasleyallen.com

Ms. Brandy Isenhour, Operations Manager

brandyisenhour@gmail.com

Dear ABCR Members:

My name is Debbie Rutherford. I am the President of AALS, an association for legal professionals. AALS is a state organization comprised of county chapters. AALS teamed with our national organization, NALS, are committed to the delivery of quality legal services through continuing education and increased professionalism, promoting a standard for members and recognition in the legal profession through the certification program and providing networking opportunities for members.

The purpose of this letter is to respectfully request that you vote NO to ¶8 of the Proposed Amendment to Chapter 257-X-4-.02 of the ABCR Rules and Regulations. The basis for this request is grounded on several facts.

{B0562200}

In 2012, a like minded bill of the ABCR proposed amendment was submitted to the Alabama Senate Judicial Committee. After a hearing, the State Senate found the proposed bill to be outrageous and it was rejected. In addition, an Attorney General's opinion years ago found no conflict with the reward system.

Our chapters have limited budgets, more so now with today's economy. Our state organization and our local chapters hold conferences and events to raise money for our scholarship funds and to provide monetary assistance to our members to further their continuing legal education. We appreciate the assistance and sponsorship that has been extended to our organization and its members by our court reporter friends and *sisters in law*. Without the sponsorship of the court reporters and their agencies, our coffers would diminish. Our members would suffer greatly as many would be unable to attend educational conferences without the monetary assistance provided by our organization.

Once again, on behalf of AALS and its members, I respectfully request that you vote NO to paragraph 8 of the proposed Ethics amendment. Thank you for your time.

Respectfully,

Debbie Rutherford

Debbie Rutherford
AALS President

From: "Drum, David" <ddrum@Sirote.com>

Date: January 30, 2013, 5:04:00 PM CST

To: "'paulamccaleb@gmail.com'" <paulamccaleb@gmail.com>

Subject: Proposed Rule 257-X-4-.02

It has come to my attention that the Board is considering a proposed rule and regulation amendment. After hearing about the arbitrary nature of the rule, I looked further into it. Thus, I read proposed rule 257-X-4-.02 ABCR Ethics. I take particular concern with paragraph 8.

After careful consideration, I am of the conclusion that much of its content is quite bizarre and serves no purpose beyond curbing business-conscious reporters' promotional and marketing activities in a broad and arbitrary fashion. In fact, I find it quite difficult to even fathom to potential reach of its restrictions; for instance, it is difficult to understand what it means to state that "*nothing offered in exchange for future work is permissible, regardless of its value.*" Furthermore, I can envision that many reporters relationships with attorneys, staff, and "*other clients or their staff or any other persons or entities associated with litigation.*" Whose litigation? Any? What does it mean to be "associated with litigation"? Clearly, there is something driving the party or parties who are pushing this amendment and I can say, without hesitation, that it does not appear to be concern for the public or parties to litigation. I find it interest that this proposed paragraph (8) has found itself buried in other provisions that already address any concerns that this provision could even purport to curtail – e.g., paragraph (1), (2), (3) etc. Additionally, as an attorney, I take great offense with any notion that my judgment and respect for the legal process could be impaired or swayed by "anything of value" exceeding \$100.

I see no possible way in which aspects of this rule would protect the public, let alone any party "associated with litigation." It only seems to be an arbitrary restriction pushed by disgruntled parties wishing to restrict promotion, marketing, and advertising by successful reporters who seek to show care and appreciation to clients and persons associated with litigation. Ultimately, attorneys and courts select the better reporters they can trust; showing appreciation in this respect only occurs with that selection. I see no way in which those activities this rule purports to restrict could create any problems.. I am not aware of such restrictions in other states or how the relationship between the reporters, the courts, the attorneys, or the parties could in anyway be improperly influenced by gifts or rewards. In such a situation both sides' lawyers are fully overseeing the process. This is not a situation involving an area in which undue influence or bribes could lead to the attorneys overlooking problems or hiring unacceptable reporters. The situation is inherently confrontational and polices itself in that regard. Furthermore, paragraph (8) could harm the public and create burdens on parties. For instance, "giving anything of value"

could encompass anything, even if related to the court reporting services. By providing additional but related services or products with the court reporting service, successful court reporters with concern for clients' needs may actually enhance the experience for the parties involved and create a smoother process for the attorneys and parties.

Ultimately, paragraph (8) seems like nothing more than an attempt to restrict free enterprise and curtail activities of successful court reporters – those whose success comes from their ability to meet and exceed clients' needs (in all aspects). This may include assisting with sponsoring of seminars or functions. Strong court reporters (who are needed in our legal system) should be free to market not only their services but themselves through marketing, advertising, and additional service offerings that better serve clients and the public. Most likely, I suspect, paragraph (8) has been buried into a proposed rule by those frustrated with their lack of success or anger with the success of better quality reporters who are able to provide benefits to customers and the parties involved...regardless of whether they are hired by the benefactor or recipient of the marketing materials, promotional events or otherwise. The breadth of that provision is mind boggling and is not even directed at activities that should be regulated in such a manner...namely marketing of a service and the people involved in that service. I am strongly opposed to restricting the manner in which businesses market and brand themselves, whether it be through speech or promotion.

I urge you to reflect on any purpose this overbroad and capricious paragraph (8) serves. I further urge you to consider the parties pushing for it to pass and their motivations. I then urge you to vote against it.

Thank you.

David

David W. Drum

Attorney at Law



Sirote & Permutt, PC

2311 Highland Avenue South Birmingham, AL 35205

T: [205-930-5105](tel:205-930-5105) F: [205-212-3874](tel:205-212-3874)

ddrum@sirote.com www.sirote.com

Alabama Florida

vCard | confidentiality notice

The information contained in this e-mail and any attachments to it may be legally privileged and include confidential information. If you are not the

January 31, 2013

Alabama Board of Court Reporting
Honorable Aubrey Ford, Jr.
Chairman
P.O. Box 241565
Montgomery, AL 36124-0066

RE: Alabama Board of Court Reporting
Proposed Rule No. 257-X-4-.02

Dear Judge Ford:

My name is Debbie McCune and my role with Freedom Court Reporting is Client Services/Marketing. I call on our clients daily for the company and for our court reporters, etc.

With respect to Proposed Rule No. 257-X-4-.02, I am writing to oppose said proposed rule change that will prohibit court reporters from providing anything of value to lawyers or legal entities. Furthermore, I do not believe that the proposed rule has anything to do with a court reporter's qualifications as a licensed reporter and strongly urge the ABCR **not** to pass the proposed rule.

Sincere Regards,

Debbie McCune
Client Services/Marketing
Freedom Reporting – Freedom Litigation Support Services
2015 3rd Avenue North, Birmingham, AL 35203
Phone: (205) 397-2397, Ext. 119
IPhone: (205) 937-9860
Fax: (205) 397-2398
Toll Free: 1-877-373-3660
www.freedomreporting.com

WHITAKER, MUDD, LUKE & WELLS, L.L.C.
ATTORNEYS AND COUNSELORS AT LAW

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tax id# 26-1495518

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TELECOPIER (205) 639-5350

bmudd@wmsslawfirm.com

January 30, 2013

Alabama Board of Court Reporting
Brandy L. Isenhour, Operations Manager
Post Office Box 241565
Montgomery, AL 36124-0066
(334) 215-7232
(334) 215-7231 Fax
brandyisenhour@gmail.com



Re: Alabama Board of Court Reporting
Proposed Rule No.: 257-X-4-.02
Our File No. : 7011.1

Dear Ms. Isenhour:

This is to advise that our firm has been retained by Birmingham Reporting Service, Inc., (“BRS”) as the interests of that entity may arise, and as an entity which will be substantially affected by the passage or enactment of proposed rule 257-X-4-.02.

We hereby place you and the members of the Alabama Board of Court Reporting (the “ABCR”), pursuant to Alabama Rules of Administrative Procedure (as adopted by the ABCR via Rule 257-X-5-.07), of our desire to present oral data, views, or arguments during the scheduled February 1, 2013 hearing in Montgomery, Alabama concerning

proposed Rule 257-X-4-.02. My law partner, Phillip Luke, may be present on my behalf and this notice is, accordingly, issued on his behalf as well.

The purpose of this letter is, in part, to clearly indicate or identify the rule-making proceeding which is the subject matter of this letter- that being the February 1, 2013 open hearing concerning Proposed Rule 257-X-4-.02.

We would like to point out that the ABCR is a body or entity with specified powers as set forth in Sections 34-8B-1 through 18, Code of Alabama (1975), as amended. The ABCR is not empowered to change or alter Alabama statutory law via the promulgation and/or passage of rules. That is exactly what the ABCR appears to do via the passage and/or approval of Proposed Rule 257-X-4-.02. The subject proposed rule is contrary to the clear mandates of Sections 34-8B-1 through 18, Code of Alabama, as amended.

Furthermore, we would like to make sure that the record of the ABCR includes the following comments as they relate to the subject proposed rule and BRS:

- * The absence of the proposed rule will not significantly harm or endanger the public health, welfare or safety of the people of Alabama, nor to those who are not residents of this state and who are involved in legal proceedings in the state and federal court systems of the State of Alabama;
- * The proposed rule has no rational relationship to the public health, safety, and welfare of the citizens of Alabama nor to those who are not residents of this state and who are involved in legal proceedings in the state and federal court systems of the State of Alabama;
- * The promulgation of the Proposed Rule is improper as it has no reasonable and/or rational relationship to the stated legislative intent of the Alabama Statutes that govern the ABCR. More specifically, the Board has 8 specific statutory duties as set forth in Section 23-8B-5, Code of Alabama, (1975) as amended. Nowhere in that statute is there reference to a duty to set forth or outline a code of ethics for court reporters, nor set forth and establish a rule which restricts free trade by and between court reporters,

-
- * The real outcome and results of the proposed rule have no valid relationship to the stated goal of the ABCR, which is to promote the skill, art, and practice of court reporting in order to assure that court reporters possess the necessary skills and qualifications, to establish a prescribed the qualifications of court reporters and to issue licenses to persons who demonstrate their ability and fitness for the license;
 - * The proposed rule, if enacted, will violate the right of BRS to compete with other licensed court reporting entities and result in a violation of the constitutional right of Freedom to engage in competitive commerce and engage in free trade, due to an arbitrary and capricious rule which the ABCR has no power to implement and enact;
 - * The ABCR is, in effect, trying to implement new rules which are outside the legislative authority of the ABCR, and which are statutory in nature, which the ABCR does not have the legal authority to implement.

Pursuant to the Administrative Rules of the ABCR, we formally request that copies of any and all documents/data in the possession of the ABCR, and which the ABCR is relying upon to establish the necessity of Proposed Rule 257-X-4-.02, be supplied to the undersigned in advance of the February 1, 2013 open hearing. In the alternative, any and all such documentation/data can be made available to the undersigned for examination prior to the February 1, 2013 hearing. This request is also made pursuant to the Freedom of Information Act.

With best wishes, I remain,

Yours very truly,

Whitaker, Mudd, Luke & Wells, L.L.C.

WILLIAM A MUDD

William A. Mudd
WAM/wam



Sirote & Permutt, PC
2311 Highland Avenue South
Birmingham, AL 35205-2972

PO Box 55727
Birmingham, AL 35255-5727

January 31, 2013

VIA E-MAIL & US MAIL

Hon. Aubrey Ford, Jr.
Chairman
Alabama Board of Court Reporting
Post Office Box 241565
Montgomery, AL 36124

Re: Opposition to Proposed Rule and Regulation Amendment

Dear Mr. Ford:

I am writing to oppose the proposed rule change that will prohibit court reporters from providing anything of value to lawyers or legal related entities.

The proposed rule change is overly broad and will unfairly restrict appropriate practices by court reporters. Additionally, because of its breadth, this restriction will prevent court reporters from sponsoring legal events whether through contributions, prize or other legitimate donations. Court reporting firms have been very supportive of events sponsored by bar associations and other legal organizations. If this rule change is implemented, it will have the effect of harming legal organizations throughout the State.

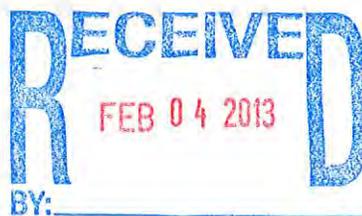
Please do not adopt this rule change.

Very truly yours,

A handwritten signature in blue ink that reads "Robert R. Baugh".

Robert R. Baugh
FOR THE FIRM

RRB/jp



Robert R. Baugh
Attorney at Law
rbaugh@sirote.com
Tel: 205-930-5307
Fax: 205-212-3860

CAROLYN CLECKLER
Official Court Reporter
Twenty-Ninth Judicial Circuit
Post Office Box 541
Talladega, Alabama 35161
(256) 761-2102, Ext 1256
Fax: (256) 362-8688

Alabama Board of Court Reporting
Honorable Aubrey Ford, Jr., Chairman
Post Office Box 241565
Montgomery, Alabama 36124-0066
(334) 215-7232
(334) 215-7231 Fax
brandyisenhour@gmail.com

January 31, 2013

Re: Alabama Board of Court Reporting
Proposed Rule No.: 257-X-4-.02



Dear Judge Ford:

My name is Carolyn Cleckler, and I am licensed by the Alabama Board of Court Reporters (ABCR) as a court reporter. I am currently in "good standing" with the ABCR.

I am aware of Proposed Rule Number 257-X-4-.02, and I am against the passage of that proposed rule. I do not believe that the proposed rule has anything to do with my qualifications as a licensed court reporter nor do I believe it has anything to do with my integrity as such. I urge the ABCR not to pass the proposed rule.

Sincerely,


Carolyn Cleckler

January 31, 2013



The Honorable Aubrey Ford, Jr.
Chair of the Board
Alabama Board of Court Reporting
P. O. Box 241565
Montgomery, AL 36124

RE: ABCR Proposed Rule and Regulation Amendment

Dear Judge Ford:

After reading over the contents of the above referenced proposal I am at a loss to understand the purpose of Amendment Number 8. It would appear to me that even though the business of court reporting has the highest of ethical standards, why someone would want to curtail the ability to market it as a business is beyond my understanding. As I ride through towns, look at magazines, read newspapers, etc. there are advertisements for law firms everywhere which means to me that advertising on their part should not interfere with their ethical standards so why would the same not hold true for court reporting firms.

I hope that you will carefully consider this proposal and see fit to permit court reporting firms to market and continue to grow their businesses. These opportunities continue to provide incomes for court reporters and their support staff, employees of these firms, and revenue for the State of Alabama.

Thanking you for your consideration, I am

Sincerely,

A handwritten signature in black ink that appears to read "Kathy Carpenter". The signature is written in a cursive, flowing style.

Kathy Carpenter

January 31, 2013



Honorable Aubrey Ford, Jr.
Chair of the Board
Alabama Board of Court Reporting
P. O. Box 241565
Montgomery, AL 36124

RE: ABCR Proposed Rule and Regulation Amendment

Dear Mr. Ford:

I am writing to oppose Amendment Number 8 of the above referenced proposal. Apparently some court reporters in our State do not recognize this as a business and are continually trying to stop the free enterprise of marketing to grow your business. If an owner is willing to put monies made back into the business to make it grow, and others choose not to do so; that should not hinder those who would do this and who should have the freedom to do so. I am not sure that any business can grow to its full potential if it is not allowed to market itself and that goes against the grain of what this country has been based on since its inception. Even attorneys and doctors are allowed to advertise in an attempt to grow their businesses and are permitted to have entire marketing staffs, so I am not sure what those that propose this amendment are attempting to do.

I appreciate your consideration.

Sincerely,

A handwritten signature in black ink that reads "Terry B. Marx". The signature is written in a cursive style with a long horizontal line extending to the left.

Terry B. Marx
11535 Sipsey Valley Road N
Buhl, Al 35446

Kacie Davis

From: Kacie Davis
Sent: January 31, 2013 1:01 PM
To: 'paulamccaleb@gmail.com'
Subject: To Honorable Aubrey Ford, Jr. - Proposed Rule and Regulation Amendment
SentFromSession: KACIELAPTOP.kacie.1/31/2013 8:00:31 AM

Honorable Aubrey Ford, Jr.,

I am writing this email to let you know that I oppose the pasting of this Amendment which would prohibit court reporters from supporting legal associations as vendors, awarding points, etc.

Thanks,

Kacie Davis, Legal Assistant †
Prince Glover & Hayes
1 Cypress Point, 701 Rice Mine Road N
Tuscaloosa, AL 35406
(205) 345-1234
(205) 752-6313 facsimile
www.princelaw.net
www.princegloverblog.com



David W. Drum
1008 Palmetto Street
Homewood, AL 35209

Honorable Aubrey Ford, Jr.
Alabama Board of Court Reporters, Chairman
PO Box 241565
Montgomery, AL 36124



Your Honor:

It has come to my attention that the Board is considering a proposed rule and regulation amendment. After hearing about the arbitrary nature of the rule, I looked further into it. Thus, I read proposed rule 257-X-4-.02 ABCR Ethics. I take particular concern with paragraph 8.

After careful consideration, I am of the conclusion that much of its content is quite bizarre and serves no purpose beyond curbing business-conscious reporters' promotional and marketing activities in a broad and arbitrary fashion. In fact, I find it quite difficult to even fathom the potential reach of its restrictions; for instance, it is difficult to understand what it means to state that *"nothing offered in exchange for future work is permissible, regardless of its value."* Furthermore, I can envision that many reporters' relationships with attorneys, staff, and *"other clients or their staff or any other persons or entities associated with litigation."* Whose litigation? Any litigation? What does it mean to be "associated with litigation"? Clearly, there is something driving the party or parties who are pushing this amendment and I can say, without hesitation, that it does not appear to be concern for the public or parties to litigation. I find it interest that this proposed paragraph (8) has found itself buried in other provisions that already address any concerns that this provision could even purport to curtail – e.g., paragraph (1), (2), (3) etc. Additionally, as an attorney, I take great offense with any notion that my judgment and respect for the legal process could be impaired or swayed by "anything of value" exceeding \$100.

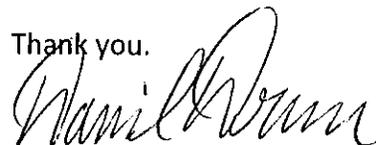
I see no possible way in which aspects of this rule would protect the public, let alone any party "associated with litigation." It only seems to be an arbitrary restriction pushed by disgruntled parties wishing to restrict promotion, marketing, and advertising by successful reporters who seek to show care and appreciation to clients and persons associated with litigation. Ultimately, attorneys and courts select the better reporters they can trust; showing appreciation in this respect only occurs with that selection. I see no way in which those activities this rule purports to restrict could create any problems.. I am not aware of such restrictions in other states or how the relationship between the reporters, the courts, the attorneys, or the parties could in anyway be improperly influenced by gifts or rewards. In such a situation both sides' lawyers are fully overseeing the process. This is not a situation involving an area in which undue influence or bribes could lead to the attorneys overlooking problems or

hiring unacceptable reporters. The situation is inherently confrontational and polices itself in that regard. Furthermore, paragraph (8) could harm the public and create burdens on parties. For instance, "giving anything of value" could encompass anything, even if related to the court reporting services. By providing additional but related services or products with the court reporting service, successful court reporters with concern for clients' needs may actually enhance the experience for the parties involved and create a smoother process for the attorneys and parties.

Ultimately, paragraph (8) seems like nothing more than an attempt to restrict free enterprise and curtail activities of successful court reporters – those whose success comes from their ability to meet and exceed clients' needs (in all aspects). This may include assisting with sponsoring of seminars or functions. Strong court reporters (who are needed in our legal system) should be free to market not only their services but themselves through marketing, advertising, and additional service offerings that better serve clients and the public. Most likely, I suspect, paragraph (8) has been buried into a proposed rule by those frustrated with their lack of success or anger with the success of better quality reporters who are able to provide benefits to customers and the parties involved....regardless of whether they are hired by the benefactor or recipient of the marketing materials, promotional events or otherwise. The breadth of that provision is mind boggling and is not even directed at activities that should be regulated in such a manner...namely marketing of a service and the people involved in that service. I am strongly opposed to restricting the manner in which businesses market and brand themselves, whether it be through speech or promotion.

I urge you to reflect on any purpose this overbroad and capricious paragraph (8) serves. I further urge you to consider the parties pushing for it to pass and their motivations. I then urge you to vote against it.

Thank you.



David W. Drum

AL Bar #ASB-6413-L040

GA Bar #412478

FL Bar #084968

February 1, 2013



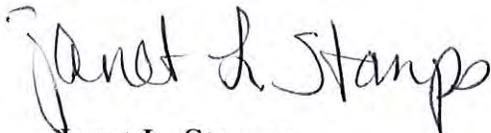
Alabama Board of Court Reporting
Honorable Aubrey Ford, Jr., Chairman
Post Office Box 241565
Montgomery, AL 36124-0066

Re: Alabama Board of Court Reporting
Proposed Rule No.: 257-X-4-.02

Dear Judge Ford:

My name is Janet Stamps and I am one of the schedulers at Freedom Court Reporting. I am aware of Proposed Rule Number 257-X-4-.02. I am against the passage of that proposed rule. I do not believe that the proposed rule has anything to do with our performance as licensed court reporters nor do I believe it has anything to do with our integrity as such. I urge the ABCR not to pass the proposed rule.

Sincerely,


Janet L. Stamps

Morgan Black

From: Morgan Black
Sent: January 31, 2013 1:56 PM
To: 'paulamccaleb@gmail.com'
Subject: Opposition to Amendment

SentFromSession: PGH-LT-03.morgan.1/31/2013 1:48:23 PM

Honorable Aubrey Ford, Jr.,

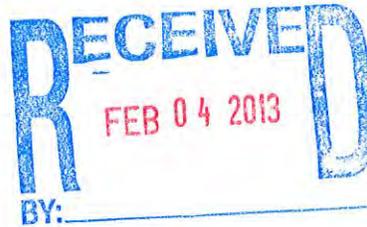
I am writing this email to let you know that I **oppose** the passing of the Amendment which would prohibit court reporters from supporting legal associations as vendors, awarding points, etc.

Thank you,

Morgan S. Black
Legal Assistant †



(205) 345-1234
(205) 752-6313
mblack@princelaw.net
www.princelaw.net
www.princegloverblog.com



Lynn Shirley

Subject: FW: To Honorable Aubrey Ford, Jr. - Proposed Rule and Regulation Amendment
SentFromSession: PGH-WS-04.lynn.1/31/2013 8:27:49 AM

From: Lynn Shirley
Sent: January 31, 2013 12:02 PM
To: 'paulamccaleb@gmail.com'
Subject: To Honorable Aubrey Ford, Jr. - Proposed Rule and Regulation Amendment

Honorable Aubrey Ford, Jr.,

I am writing this email to let you know that I **oppose** the passing of this Amendment which would prohibit court reporters from supporting legal associations as vendors, awarding points, etc.

Thanks,

Lynn Shirley, Paralegal



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