

# The Alabama Lawyer

May 2014 | Volume 75, Number 3



## 2014 ANNUAL MEETING

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Meeting highlights inside – Register at [www.alabar.org/annual-meeting2014](http://www.alabar.org/annual-meeting2014)

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## ANNUAL MEETING FAMILY EVENTS • JULY 9-12, 2014

### WEDNESDAY, JULY 9<sup>TH</sup>

6:30 pm  
**Opening Reception and  
Beach Party**

Family Photo-ops  
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7:00 pm  
**Make-a-Minion Craft  
Activity during Beach Party**  
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9:00 pm - 11:00 pm  
**YLS Hospitality Suite**  
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### THURSDAY, JULY 10<sup>TH</sup>

6:00 pm  
**Law School Receptions**

**Teen Green Room**  
Open for Teens (13 and up)

6:00 pm - 8:30 pm  
**Children's Pajama Party &  
Movie Night (12 and under)**  
**'Despicable Me'**  
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9:00 pm - 11:00 pm  
**YLS Hospitality Suite**  
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### FRIDAY, JULY 11<sup>TH</sup>

2:00 pm - 4:00 pm  
**YLS Wine Tasting**  
featuring Carneros della  
Notte Winery  
YLS Hospitality Suite  
*Sponsored by ISI ALABAMA*

7:00 pm - 9:00 pm  
**President's Reception**

8:00 pm - 9:00 pm  
**Cupcake decorating for  
Children during Reception**  
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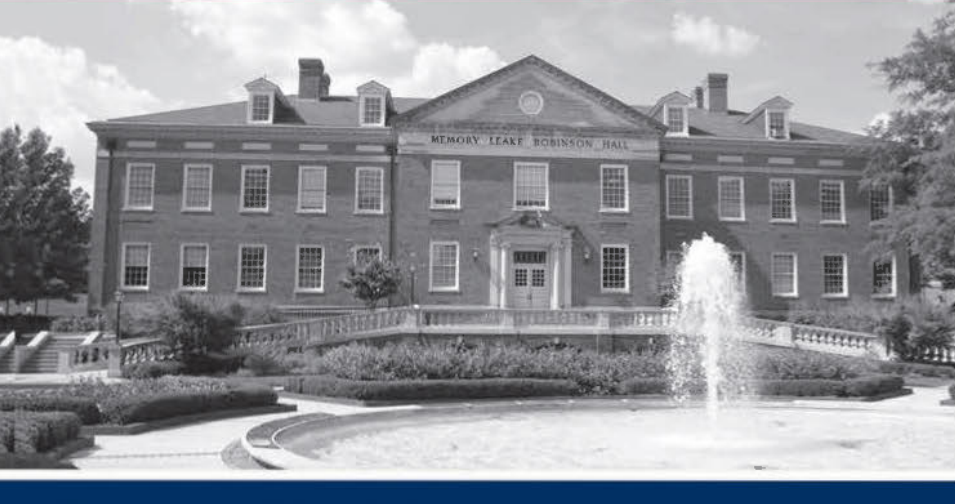
9:00 pm - 10:00 pm  
**Brandy and Cigar After-party**

### SATURDAY, JULY 12<sup>TH</sup>

9:15 am  
**Grand Convocation**

**Grand Prize Drawing**  
upon  
Annual Meeting conclusion  
*Compliments of ISI ALABAMA*





Cumberland School of Law is indebted to the many Alabama attorneys and judges who contributed their time and expertise to planning and speaking at our continuing legal education seminars during 2013. We gratefully acknowledge the contributions of the following individuals.

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The Alabama State Bar is back at the beach this year! Join us July 9–12 at the Hilton Sandestin Beach Golf Resort & Spa. See meeting highlights inside and register at [www.alabar.org/annual-meeting2014](http://www.alabar.org/annual-meeting2014).

Photo of a Great Blue Heron on the jetties near the Destin Bridge by Noelle M. Buchannon, The Finklea Group



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Alabama State Bar members are encouraged to submit articles to the editor for possible publication in *The Alabama Lawyer*. Views expressed in the articles chosen for publication are the authors' only and are not to be attributed to the *Lawyer*, its editorial board or the Alabama State Bar unless expressly so stated. Authors are responsible for the correctness of all citations and quotations. The editorial board reserves the right to edit or reject any article submitted for publication.

The *Lawyer* does not accept unsolicited articles from non-members of the ASB. Articles previously appearing in other publications are not accepted.

All articles to be considered for publication must be submitted to the editor via email ([ghawley@joneshawley.com](mailto:ghawley@joneshawley.com)) in Word format. A typical article is 13 to 18 letter-size pages in length, double-spaced, utilizing endnotes and not footnotes.

A brief biographical sketch and a recent color photograph (at least 300 dpi) of the author must be submitted with the article.



**Anthony A. Joseph**

*ajoseph@maynardcooper.com*

What's behind **Door Number 1** could probably get the job done;

What's behind **Door Number 2** [could be] something special for you;

What's behind **Door Number 3** could be a [shopping spree];

All you got to do is choose;

Either way, you do not lose!

*"Door #1" lyrics by Sweat, Keith D./Levert, Gerald E./Nicholas, Edwin L.*



## Behind Door Number... Is the Best Annual Meeting Ever Because You Truly Can Have It All

In the '70s, Monty Hall hosted the television game show "Let's Make a Deal." During the show, Hall would give a contestant the opportunity to select a prize hidden behind one of three doors. The prizes could range from a brand new car, to a toaster, to a goat. No kidding—a real live, garbage-eating goat. The prizes were all over the board. Pick correctly, and you were cruising away in a new car; pick incorrectly, and you could be leaving the studio trying to figure out what to do with a goat that was now chewing on your pants. What an intriguing dilemma:



Each of the three doors carried the possibility of something good, bad or mediocre. Whatever the choice, you had a one-in-three chance of being a winner.



On the other hand, coming to the ASB 2014 Annual Meeting is a win-win proposition for any Alabama lawyer. Behind door number one is all of the CLE you will need for the entire year. Behind door number two are interesting discussions on a variety of legal topics. Behind door number three is the opportunity to network and expand your professional contacts. Behind door number four is where a multitude of professional awards and recognitions are given and specialty meetings are conducted. And, behind door number five is the prospect of participating in all or a portion of the prizes behind the other four doors while still



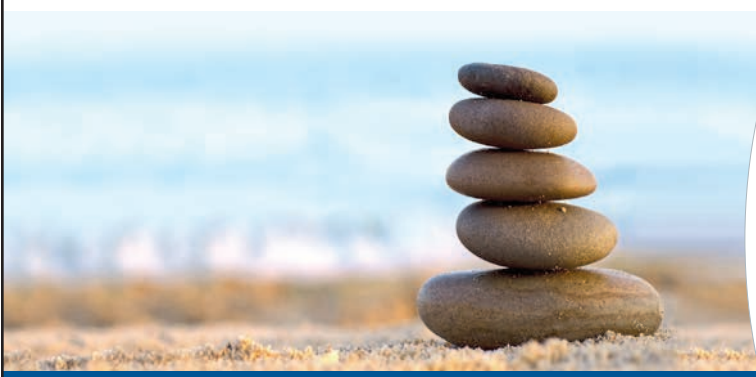
having time to spend with the family, on the beach and/or at the pool, on the golf course or engaged in a number of other activities. That's right. You *can* learn, mingle and have fun, all at the annual meeting!

The combination at one venue makes the ASB annual meeting a wonderful place to gather.

This year's annual meeting will be in sunny Sandestin at the Hilton Sandestin Beach Golf Resort & Spa July 9 through 12. If you have never attended an annual meeting, I promise that it will be a family-friendly environment with activities for *everyone*. Besides the substantive programs and meetings, there will also be time for relaxing and recharging.

Attending the annual meeting gives you the opportunity for professional and social fellowship with lawyers from all over

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Please visit the ABA Retirement Funds Booth at the upcoming Alabama State Bar Annual Meeting for a free cost comparison and plan evaluation.  
July 9-12, 2014 Hilton Sandestin Beach Golf Resort & Spa, Sandestin, FL

the state. It also provides MCLE updates and information about cutting-edge technology from a wide variety of exhibitors and other sponsors. And, during the Bench & Bar Luncheon, it gives the legal community the opportunity to recognize the many accomplishments of ASB members, and to celebrate the great services rendered by lawyers across Alabama.

The content for the annual meeting is unique and cannot be replicated or duplicated elsewhere. It brings together a diversity of practitioners, judges, academics and other interested stakeholders with varying interests and perspectives that will help facilitate the rule of law and fair administration of justice.

This year's theme is "Makin' It Relevant, Makin' It Fun," which piggybacks this year's overall theme of "Relevancy [Being] the Cornerstone that Binds Us." The annual meeting breathes life into this concept by creating an opportunity to

bring value to all our members in tangible and intangible ways. More importantly, attending the annual meeting is an opportunity to talk with old friends and make new ones. While technology has its place and has made our practices more efficient, it tends to distance personal relationships. Nothing can ever replace face-to-face time, or being part of an in-person group dynamic. That one-on-one contact advances professionalism and civility. Interaction outside of the courtroom, boardroom and classroom adds significant value to the profession.

Please accept this as your personal invitation to attend the 2014 ASB Annual Meeting. From my experience, I would be remiss if I did not caution you that attending the annual meeting is addictive. With the combination of offerings, you will learn, be engaged, be inspired and have fun. Go ahead—open any door. You are guaranteed to be a winner.

See you at the beach! | AL



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The graphic is split vertically into two halves. The left half is dark blue and features the Facebook logo and the URL [www.facebook.com/alabamastatebar](http://www.facebook.com/alabamastatebar). The right half is light blue and features the Twitter logo and the handle [@AlabamaStateBar](https://twitter.com/AlabamaStateBar). In the center, the text "Join the conversation" is written in large, white, 3D-style letters. At the bottom, it says "Like us on Facebook and follow us on Twitter."



**Lee H. Copeland**

**Pursuant to the Alabama State Bar's Rules Governing the Election of President-elect, the following biographical sketch is provided of Lee H. Copeland.**

**Copeland was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 2014-15 term and will assume the presidency in July 2015.**

Lee grew up in Montgomery, graduating high school from Montgomery Academy. He attended college at the University of Alabama and graduated from the University of Alabama School of Law. Active in both undergraduate and law school, Lee was president of his undergraduate fraternity, Sigma Alpha Epsilon, and in law school was on the winning moot court team, as well as being named the Outstanding Oral Advocate for Moot Court competition. He also was on the law school's National Trial Court Team. Following graduation, he clerked with Judge Truman M. Hobbs, Sr., United States District Court for the Middle District of Alabama.

After his clerkship, Lee joined Copeland, Franco, Screws & Gill, where his father had been one of the firm's founders. The firm was founded in 1947 and has produced three federal judges and one state court judge. It has also produced three past presidents of the Alabama State Bar.

Lee's current practice is almost entirely litigation and mediation. Lee handles a wide variety of legal matters, both corporate and individual. His litigation practice includes products liability, malpractice and a host of general commercial claims. He is active in local and state level bar activities, having served as president of the Montgomery County Bar Association and being recently re-elected to the ASB Board of Bar Commissioners. He has served on more than a dozen election committees for local and statewide judges. Lee has volunteered his time for many charitable groups in Montgomery, including as president of the board of Goodwill of Montgomery and president of Montgomery Hospice. He is the current president of Red Cross of Central Alabama.

Lee is married to the former Jessica Crenshaw of Birmingham. They have two children, Hall and Albert, ages 29 and 24, respectively. Lee and his family attend the Episcopal Church of the Ascension. | [AL](#)



**Keith B. Norman**

*keith.norman@alabar.org*



## Legal Internships: Helping Law Students Become Practice-Ready

This past January, the American Bar Association's Task Force on the Future of Legal Education released its much-anticipated report. The report examines current problems and conditions in American legal education and offers recommendations that are intended to be workable and, it is hoped, have a chance of broad acceptance.<sup>1</sup> The task force report is in direct response to the pressures affecting the legal education system in this country including the price of legal education, the large amount of student debt, consecutive years of sharply falling applications and the dramatic changes, possibly structural, in the job market for law school graduates.

The price of a legal education has been rising at twice the rate of inflation.<sup>2</sup> Concomitant with this increase has been the equally large increase in student debt.<sup>3</sup> The student debt-load of law graduates taking the Alabama Bar Examination is a graphic example of this troubling trend. In July 1998, the average for those examinees who had student debt, roughly 60 percent of all taking the bar exam that year, was \$50,418. By July 2013, 70 percent of the examinees had debt and the average debt had increased to \$102,650. This is a 104 percent increase in 15 years. By comparison, the consumer price index rose only 43 percent during the same time.

Employment for recent law graduates has been equally problematic. During the past decade, roughly one-third of law school graduates nationwide have not obtained jobs as lawyers.<sup>4</sup> Over the last few years, this percentage has passed 50 percent,<sup>5</sup> and legal employment prospects for the next few years are not very encouraging. The U.S. Bureau of Labor projects that there will be about 22,000 law job openings annually through 2020 (counting departures and newly-created jobs).<sup>6</sup> Although total law school enrollment in 2013 numbered a little more than 40,000, enrollment has decreased by 24 percent since 2010. Nonetheless, law schools are anticipated to graduate more than 40,000 students a year for the foreseeable future.<sup>7</sup>

In examining current problems and conditions with legal education and developing workable recommendations, the task force report concentrates on and discusses five specific areas. These include **pricing and funding of legal education, accreditation, innovation, skills and competencies and broader delivery of law-related services.** In the area of skills and competencies, the report acknowledges:

The principal purpose of law school is to prepare individuals to provide law-related services. This elementary fact is often minimized. The profession's calls for more attention to skills training, experiential learning and the development of practice-related competencies have been well taken. Many law schools have expanded such opportunities for students, yet there is a need to do much more. The balance between doctrinal instruction and focused preparation for the delivery of legal services needs to skirt still further toward developing the competencies required by people who will deliver services to clients.

With the twin problems of high student debt and fewer legal jobs, today's graduating law student is entering a profession that is far different from the one most of us experienced upon leaving law school. Today's new lawyer, working in a large firm, a small firm or as a solo practitioner, must be able to handle client matters competently and skillfully from the start—hence, the need for law students to leave law school “practice-ready” or “client-ready.”

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The task force concluded its report with specific recommendations directed to all of the legal profession's stakeholders for dealing with the factors and forces that the report describes are affecting legal education. Among the six suggestions for **state supreme courts, state bars and regulators of lawyers and law practice** is the specific suggestion to "reduce the number of doctrinal subjects tested on the bar examinations and increase the testing of skills." No doubt, many law schools have increased the number of practical skill programs they offer to law students. Yet, many of these offerings lack the experiential component of actually dealing with a live client and that client's legal problem.

In Alabama, we are fortunate to have a way to help address the lack of experience among law grads and that is the **Legal Internship by Law Students Rule**. A student is eligible to become a legal intern at the conclusion of his or her second year in law school. (A copy of the rule follows this article.) This rule, adopted in 1987 and amended in 2009, is administered by the Alabama State Bar in cooperation with law schools and attorneys sponsoring the interns. Its purpose:

...is to help the Bar discharge its responsibility to provide competent legal services for all persons, and to encourage law schools to provide senior law students with practical training during the period of their formal education, and to establish procedures to govern student internships and supervision by sponsoring attorneys.

Although this rule does not resolve all the issues articulated by the task force report with respect to "skills and competency," it does help address some of the competency and experiential concerns. Furthermore, it brings together the courts, the practicing bar, law schools and law students to inculcate future members of the legal profession with practice skills, ethical responsibility and professionalism. Under the rule, an eligible law student, with a client's permission and the supervising attorney present, may appear in any civil or criminal matter in any court or before any administrative tribunal in Alabama. Not only is a student intern allowed to make court appearances, but also may provide any related services on a client's behalf that are approved by the client, the sponsoring attorney and the court or tribunal.

The mechanics of the rule are relatively straightforward. First, the law student must register with the state bar<sup>8</sup> and be enrolled in a law school with a faculty member to counsel eligible and certified interns. Second, the student must have completed at least 54 hours of legal studies. Third, the law school dean must complete a form certifying that the intern candidate possesses good character and competent legal ability and is adequately trained to perform as a legal intern. Fourth, the student intern must be introduced to the court or tribunal by an attorney admitted to practice in that court. Fifth, the student intern must complete forms certifying his or her agreement to abide by the *Rules of Professional Conduct* and supporting the federal and state constitutions. Finally, the student intern may not be paid by the client for whom he or she renders service, but may be paid a wage or salary by an employing lawyer, law firm, government office or other entity providing legal services. Both the law school dean and sponsoring attorney provide appropriate certifications to the Alabama State Bar as noted in the rule. A student intern remains eligible to practice under the provisions of this rule until the results of the July bar exam are announced following the student intern's third year.

Last year's Alabama State Bar survey of law school graduates who recently passed the bar exam found that nearly two-thirds of those who provided written comments were



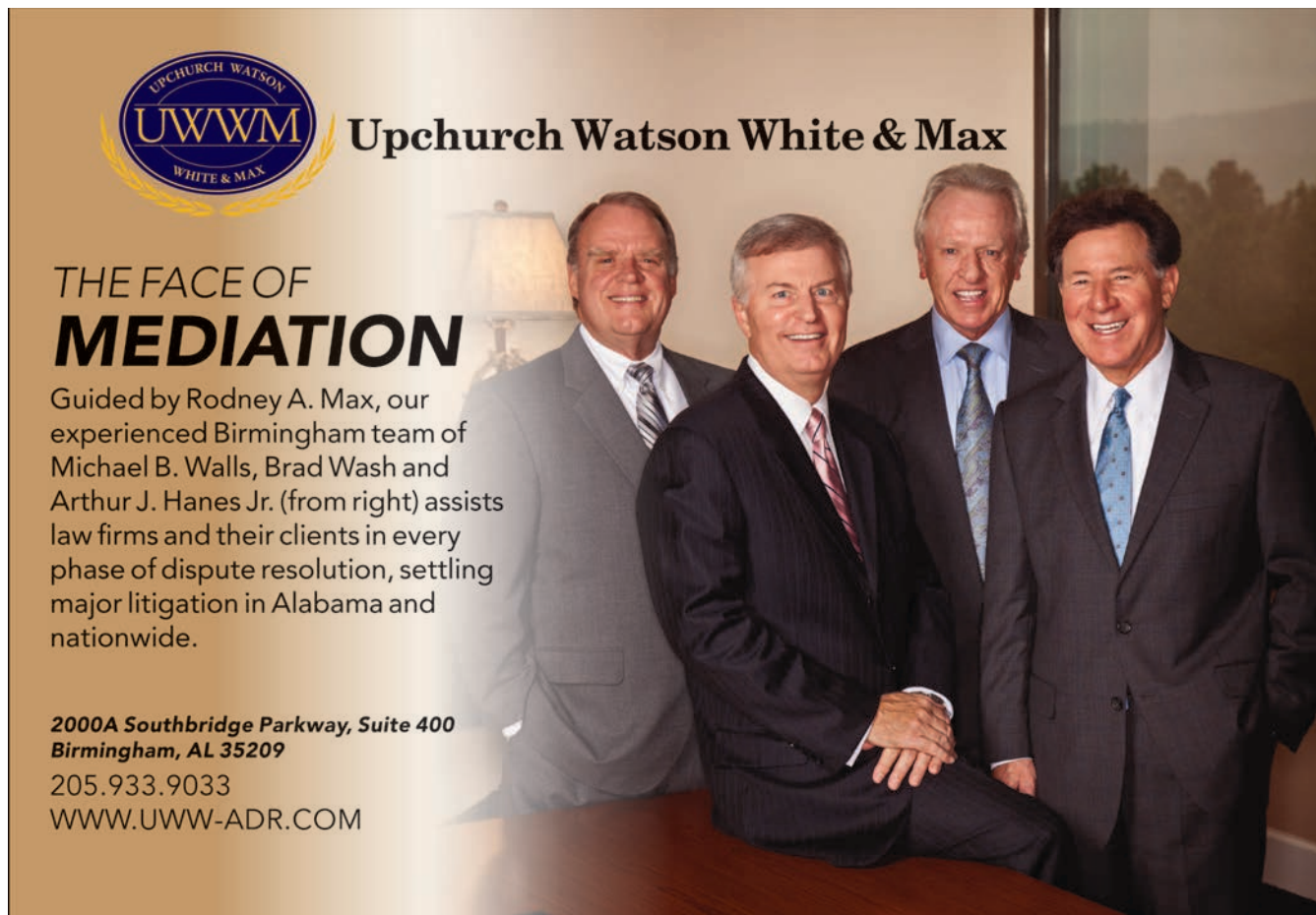
## STUDENT DEBT


For the February 2014 bar examination, 61 percent of the first-time examinees had student debt that averaged \$98,797.

very concerned about the dearth of opportunities for legal employment and existing economic conditions (i.e., debt and expenses). A number of the comments specifically addressed the need for obtaining legal experience. The following was typical in this regard: "...Any opportunity to gain legal experience will be a great tool for any law grad." Yet, the Legal Internship Rule has been largely underutilized since its adoption. Except for legal interns who have worked regularly in some of the district attorneys' offices across the state, very few have used the rule to work in private law firms or other government offices. In today's current practice environment and with the need for experiential training, the Legal Internship Rule provides law schools and the practicing bar with an immediate way to implement practical skills training that all new law students so desperately need (and want) to help them become "practice-ready." | [AL](#)

## Endnotes

1. The task force report is posted at [www.americanbar.org](http://www.americanbar.org). Search for "Task Force on Legal Education Report and Recommendations."
2. *New York State Bar Journal*, "The Mismatched Economics of Legal Education," September 2013, p. 14.
3. *See id.* Also, see generally, *The Alabama Lawyer*, "Survey of New Admittees Regarding Law Student Debt and Post-Law School Employment," May 2011, pp. 4-8.
4. *See* "The Mismatched Economics of Legal Education." *Id.*, p. 15.
5. *See id.* *See also* "24 Percent of JDs Who Passed the Bar in 2000 Aren't Practicing Law, Survey Finds," [www.abajournal.com](http://www.abajournal.com), posted February 8, 2014.
6. *See id.*, pp. 14-15.
7. *See id.*, p. 15.
8. The law student must have submitted the student registration which allows the bar to conduct a preliminary character and fitness review. Law students are encouraged to do this within the first 60 days of their law school matriculation. There is no charge for students registering during their first 60 days in law school. Late registration could delay a law student's being certified as an intern at the conclusion of his or her second year.



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# In the Supreme Court of Alabama

SEPTEMBER 19, 2006

## ORDER

It is ordered that the Alabama Rule for Legal Internship by Law Students be amended to read in accordance with the appendix attached to this order;

It is further ordered that this amendment is effective September 19, 2006.

It is further ordered that the following note from the reporter of decisions be added to follow the Alabama Rule for Legal Internship by Law Students:

"Note from the reporter of decisions: The order amending the Alabama Rule for Legal Internship by Law Students, effective September 19, 2006, is published in that volume of *Alabama Reporter* that contains Alabama cases from So. 2d."

Nabers, C.J., and See, Lyons, Harwood, Woodall, Stuart, Smith, Bolin, and Parker, JJ., concur.

## APPENDIX

### Alabama Rule for Legal Internship by Law Students

#### I. Purpose

The purpose of this rule is to help the Bar discharge its responsibility to provide competent legal services for all persons, and to encourage law schools to provide senior law students with practical training during the period of their formal education, and to establish procedures to govern student internships and supervision by sponsoring attorneys.

#### II. Appearance before Court or Tribunal

A. An eligible law student may appear as a student intern in any civil or criminal matter in any court or before an administrative tribunal in this state if the person on whose behalf he or she is appearing has consented in writing to that appearance and the sponsoring attorney, who shall also be the attorney of record in the court or tribunal, has approved the appearance in writing.

B. The certification of the client and the sponsoring attorney shall be submitted to the court or tribunal of appearance, which shall enter an order allowing the appearance. The certification shall be made a part of the record of the court or tribunal in the

case or proceedings for which the student intern shall provide services on behalf of the client.

- C. The sponsoring attorney shall personally supervise and oversee at all times any such student intern who shall appear before any court or administrative tribunal, and in any case tried before a jury the licensed attorney of record shall be present in court at all times during the trial of the case.
- D. A student intern may also appear in any criminal matter on behalf of the state with the written approval of the prosecuting attorney or his or her authorized representative.

#### III. Services

- A. A student intern may make court appearances and provide any related services on behalf of the client that are approved by the client, the sponsoring attorney, and the court or tribunal.
- B. In addition, a student intern may engage in other services, under the supervision of a member of the Alabama State Bar, including:
1. Preparation of pleadings and other documents to be filed in any matter, but such papers must be signed by the attorney of record.
  2. Preparation of briefs, abstracts and other documents to be filed in appellate courts of this state, but such documents must be signed by the attorney of record.
- C. A student intern shall be authorized to interview, advise and negotiate for a client while rendering assistance to the sponsoring attorney.

#### IV. Requirements and Limitations

In order to perform any services pursuant to the rule, the student intern must:

- A. Be registered as a law student with the secretary of the Board of Commissioners of the Alabama State



Bar (hereinafter "Secretary") and duly enrolled in any school of law from which a graduate of such school is qualified and authorized to stand for the State of Alabama Bar Examination, provided such school of law has a full-time faculty member or a full-time administrator who is a graduate of a school of law supervising the certification of students and assigned the duties of supervising and counseling eligible and certified students. The registration requirements herein shall be satisfied by compliance with Rule I.A of the *Rules Governing Admission to the Alabama State Bar*. If a student desires to participate under this rule and does not intend to seek admission to the Alabama State Bar, the student must register in accordance with Rule I.A; however, the penalty imposed for failure to register within 60 days of entry into law school shall not be applicable to the student.

- B. Have completed legal studies amounting to at least four (4) semesters (not less than 54 semester hours), or the equivalent if the school is on some basis other than a semester basis.
- C. Be certified in writing by the dean of his or her law school as being of good character and competent legal ability, and as being adequately trained to perform as a legal intern.
- D. Be introduced to the court in which he or she is appearing by an attorney admitted to practice in that court.
- E. Certify in writing that he or she has read and will abide by the *Alabama Rules of Professional Conduct* and also subscribe to an oath that he or she will support the constitutions of the United States and the State of Alabama and will faithfully perform the duties of a student intern. The certificate and oath are to be filed with the secretary.
- F. Neither ask for nor receive any compensation or remuneration of any kind for specific services from the person on whose behalf he or she renders services; provided, however, that the student *intern* may be paid a set salary or hourly wage by an employing lawyer, law firm, government office or other entity providing legal services.

- G. The sponsoring attorney shall certify to the court or tribunal that he or she will fulfill his or her responsibilities as sponsoring attorney as set forth in this rule.

#### **V. Certification**

The certification of a student by the law school dean:

- A. Shall be filed with the secretary and shall remain in force and effect as long as he or she continues as a student in good standing, and after graduation from law school may remain in force and effect until the results of the next Alabama bar examination are announced.
- B. May be withdrawn by the dean at any time by mailing a notice to that effect to the secretary.
- C. May be terminated by the Board of Commissioners of the Alabama State Bar at any time. Notice of the termination shall be filed with the secretary and with the dean of the law school in which the student is enrolled.
- D. The secretary shall maintain a continuous register of all law students currently certified as legal interns. This register shall include all pertinent information required under this rule.

#### **VI. Attorney's Responsibility**

The member of the bar to whom the eligible student intern is assigned and under whom the student intern does any of the things permitted by this rule shall:

- A. File an appropriate certificate as sponsoring attorney of a law student intern with the secretary.
- B. Assume personal professional responsibility under the *Alabama Rules of Professional Conduct* for the student intern's work.
- C. Secure the prior written consent of the client for the services actually to be performed in court by the student intern and keep the client advised of the services being performed by the student intern.
- D. Supervise the activities and services of the student intern, all of which shall be performed under the member's direction and with his or her knowledge and approval. | [AL](#)



# The Dodd-Frank Act and The Changing Landscape of Alabama Mortgage and Foreclosure Litigation

*By Matthew F. Carroll*

In January 2014, a number of new federal regulations

governing residential mortgage loan origination and mortgage loan servicing become effective. Those rules instituted major changes from the current law in Alabama governing the obligations that lenders and mortgage servicers owe to residential borrowers. They also created several new causes of action that borrowers may assert for breach of those obligations. In total, the new federal regulations changes are likely to have far-reaching ramifications for lenders, home-buyers and others involved in this area of the economy.

This article provides a brief overview of the current state of Alabama law in this area as well as some of the recent changes in this area of law.

## Current Protections for Mortgage Borrowers in Alabama

Litigation arising out of the recent mortgage crisis demonstrated that borrowers in default have limited defenses to a creditor's foreclosure on their mortgaged property under Alabama law. Among other things, the Alabama courts have rejected the argument that a mortgage servicer owes the mortgagor any duty of care in the servicing of his mortgage in the absence of personal injury or property damage.<sup>1</sup> They have confirmed that wrongful foreclosure is a narrow cause of action under Alabama law, which applies only where the borrower can show that the foreclosing party commenced the action for some purpose other than to secure the debt that is owed.<sup>3</sup> Finally, the courts have held that alleged



violation of federal consumer statutes and regulations (e.g., Real Estate Settlement Procedures Act ["RESPA"], 12 U.S.C. §2601 *et seq.* and the Fair Housing Act) do not constitute a defense in an ejectment action following a nonjudicial foreclosure.<sup>2</sup>

In addition, the Alabama courts have long held that a bank's duty to its borrower is purely contractual absent special circumstances, and have rejected the argument that a lender owes a duty to its borrower to determine if the borrower truly has the ability to repay a loan.<sup>4</sup> In *Flying J Fish Farm v. Peoples Bank of Greensboro*, for example, the Alabama Supreme Court held as a matter of law that a bank could not be liable to a business borrower on the theory that it had negligently loaned the borrower more money than the borrower could repay. In doing so, the court noted that a bank's loan-approval policies are generally intended solely for the bank's benefit.<sup>5</sup>

The new federal regulations will have an impact on all of these holdings.

## The Dodd-Frank Amendments to TILA and RESPA

In July 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Act") was signed into law. Dodd-Frank amended a number of federal consumer protection statutes affecting mortgage borrowers, including RESPA and the Truth in Lending Act (TILA), 15 U.S.C. §1631, *et seq.* It also created a new federal agency, the Consumer Financial Protection Bureau ("CFPB"), to promulgate regulations interpreting and enforcing both the requirements of Dodd-Frank and pre-existing federal consumer financial protection statutes.

Under Dodd-Frank, most of the statutory amendments to the TILA related to residential mortgages were to automatically go

into effect January 21, 2013 unless the CFPB promulgated regulations related to those amendments by that date. On January 10, 2013 the CFPB responded, announcing a series of new implementing regulations. The majority of those new regulations, including the TILA and RESPA rules that are the subject of this article, became effective in January 2014.

## Mortgage Loan Origination and The New Ability to Repay Cause of Action

Most significantly, sections 1411, 1412 and 1414 of the Dodd-Frank Act add new Section 1639c to the Truth in Lending Act ("TILA"), 15 U.S.C. §1631 *et seq.* This provision prohibits lenders from making a

“residential mortgage loan” unless the lender “makes a reasonable and good faith determination, based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance and assessments.”<sup>6</sup> In doing so, Dodd-Frank represents a substantial departure from the current Alabama rule that a lender does not owe its borrower a duty to ensure that he or she has the ability to repay a loan, at least as that rule is applied to consumer mortgage borrowers.

The act gives borrowers a private right of action under the TILA if a creditor fails to evaluate the borrower’s ability to repay as provided by the statute (*i.e.*, the “Ability to Repay Rules”). The borrower’s potential remedies for such a violation include actual damages (*e.g.*, loss of down payment), recovery of all finance charges and fees paid by the consumer, costs of any action and reasonable attorney’s fees.<sup>7</sup> The statute of limitations for such claims is three years from the date of the violation.<sup>8</sup>

In addition, the statute expressly provides that a borrower may assert the lender’s violation of this provision as a defense in any action following a nonjudicial foreclosure. This rule appears to limit those recent Alabama cases holding that violations of federal statutes are not a defense to an ejectment action following a non-judicial foreclosure.<sup>9</sup> The defense is not absolute; the statute provides that the defense is by way of recoupment or setoff to the creditor’s claim. Thus, the creditor may still proceed with the ejectment if its claim exceeds the recovery resulting from any successful counterclaim by the borrower for violation of the Ability to Repay Rules (including the borrower’s damages, costs of action and a reasonable attorney’s fee). There is no statute of limitations for such claims when asserted as a counterclaim in a foreclosure action.<sup>10</sup>

Dodd-Frank, along with the CFPB’s implementing regulations (Regulation Z, 12 C.F.R. part 1026), provides guidelines on what a creditor must consider in making a reasonable and good-faith calculation of the borrower’s ability to repay. At a minimum, the lender must consider the following eight criteria: (1) the consumer’s current or reasonably expected income or assets, (2) past employment history and current, ongoing employment status, (3) monthly mortgage payment for loan, (4)

monthly payment on any simultaneous loans secured by the same property, (5) monthly payments for property taxes and insurance that the lender requires the consumer to buy, as well as any homeowner’s association dues, (6) debts, alimony and child-support obligations, (7) monthly debt-to-income ratio or residual income; and (8) credit history.<sup>11</sup> The creditor may consider additional criteria if it chooses.

In evaluating these criteria, the creditor is not entitled to simply rely on information provided by the borrower. The statute provides that a creditor must verify the amounts of income or assets that it relies on to determine repayment ability by reviewing “reasonably reliable” third-party information, such as tax returns, payroll receipts and/or bank records. This requirement is designed to safeguard against borrower fraud.<sup>12</sup>

## The Fraud Conviction Defense

Dodd-Frank provides that a creditor will have a defense to a claim under the Ability to Repay Rules if the borrower “has been convicted of obtaining by actual fraud such residential mortgage.”<sup>13</sup> The full scope of this defense is likely to be hammered out in future litigation. Attorneys for borrowers will almost certainly contend that Congress’s express reference to a “criminal conviction” in this provision precludes creditors from asserting borrower misrepresentation or unclean hands as a defense to an action under the Ability to Repay Rules absent such a finding. Creditors will most likely argue that the rule does not preclude other equitable defenses to a claim where the borrower has engaged in misconduct.<sup>14</sup>

## The Qualified Mortgage Exception

Dodd-Frank establishes an important exception to the Ability to Repay Rule for “Qualified Mortgages.” The statute, however, leaves some ambiguity concerning the scope of this exception. The CFPB’s Ability to Repay regulations seek to resolve this ambiguity by creating several categories of

qualified mortgages and outlining specific criteria that a mortgage must meet to fall within the exception. For example, Regulation Z, Section 1026.43(2)(4) creates a general “qualified mortgage” category. A loan will fall into this category where, among other things, the creditor made the loan based on information that is verified and documented, the “total points and fees” payable in connection with the loan does not exceed 3 percent of the total loan amount (for loans over \$100,000), the loan not include any interest-only payments and the creditor complied with the CFPB’s guideline that the consumer’s total monthly debt payments, when compared to his or her total monthly income at the time of consummation of the loan, not exceed 43 percent.<sup>15</sup>

The statute creates two subcategories of qualified mortgages: “higher-priced qualified mortgages” and “not high-priced qualified mortgages.” Subject to certain exceptions discussed below, a loan will be a higher-priced qualified mortgage if it is a first-lien mortgage and the interest rate on the loan at the time it was set was 1.5 percentage points or more over the Average Prime Offer Rate (“APOR”) at the time, as published by the Federal Reserve Board. It will be a “not higher-priced qualified mortgage” if it is first-lien mortgage and the interest rate is not 1.5 percentage points or more over the APOR.<sup>16</sup>

If a creditor can show that the loan in question meets the criteria for a “not higher-priced qualified mortgage,” that creates an irrebuttable presumption that the creditor complied with its statutory requirements under the TILA with respect to the Ability to Repay provisions. This is a complete defense. A borrower will lose his TILA claim against his creditor even if he could produce evidence that the creditor in fact failed to make a good-faith determination of his or her repayment ability.

If the creditor shows that the loan met the criteria for a “higher-priced qualified mortgage,” that creates a rebuttable presumption that the lender has complied with the statutory Ability to Repay requirements. The borrower, however, may still be able to rebut that presumption by demonstrating that, based on the information that was available to the creditor at the time the mortgage was made, the borrower did not have enough residual income left to meet living expenses after paying their mortgage and other debts.

## The Loan Originator Rule

In addition to the new Ability to Repay Rule, Dodd-Frank also amended the TILA to prohibit certain forms of compensation for loan originators. Section 129B(c)(2)(A) (the “Loan Originator Rule”) of the TILA now prohibits loan originators from being compensated based on “terms of the transaction.” This includes any right or obligation of the parties in the loan transaction except the amount of credit extended. For example, the amount of a loan originator’s compensation cannot be dependent on generating loans with higher interest rates or based on the type of collateral underlying the loan (e.g., different rates based on detached dwellings versus condominiums.) Originator compensation based on overall loan volume, long-term portfolio performance and/or fixed rates remains permissible.

In addition to the prohibition on certain types of compensation, the act creates a general prohibition on an originator “steering” a consumer to any loan that provides greater compensation for the originator unless it is also “in the consumer’s interest.” The rule applies to most “closed-end consumer credit transactions secured by dwelling.”

“Loan originator” is defined broadly under the act and includes: “a person, who in expectation of direct or indirect compensation . . . performs any of the following activities: takes an application, offers, arranges, assists a consumer in obtaining or applying to obtain, negotiates, or otherwise obtains or makes an extension of consumer credit for another person; or through advertising or other means of communication represents to the public that such a person can or will perform any of these activities.”<sup>17</sup>

The potential remedies under the TILA for a violation of the new Loan Originator Rule are similar to those for violation of the Ability to Repay Rule. They include actual damages, including the borrower’s down payment, or up to three times the compensation paid to the loan originator, and reasonable attorney’s fees. In addition, a claim for violation of this provision may be asserted as a defense to an ejectment action, by way of set off or recoupment. The statute of limitations for an affirmative claim under the Loan Originator Rule is three years and there is no statute of limitations if the violation is asserted by way of counterclaim in a foreclosure action.

## New Requirements for Loan Servicers in The Mortgage Foreclosure Process

Dodd-Frank Section 1463 added new sections 6(k), 6(l) and 6(m) to RESPA, 12 U.S.C. §2605, that impose a number of new requirements on companies that service mortgages for both responding to written requests for information from borrowers and for force-placed insurance. The amendment also gives the CFPB broad authority to impose additional regulations on mortgage servicers consistent with the consumer protection goals underlying Dodd-Frank.

The CFPB has responded to this statutory mandate by promulgating a series of new rules under RESPA’s implementing regulation, Regulation X, that loan servicers must comply with before they may foreclose on a consumer mortgage in default. In particular, the bureau’s regulations now require a mortgage servicer to take affirmative steps to pursue loss mitigation (“Loss Mitigation Rules”) with a borrower when his or her loan is secured by a property that is the borrower’s principal residence.<sup>18</sup> The servicer must also comply with a strict timeline in offering these loss mitigation options and in responding to requests for loss mitigation by the borrower. The regulations provide that borrowers may enforce these new requirements through RESPA’s existing civil liability provisions.

## Loss Mitigation Rules

Regulation X Section 1024.39<sup>19</sup> provides that a servicer shall “make a good faith effort” to establish live contact with a delinquent borrower not later than the 36<sup>th</sup> day of the borrower’s delinquency and, after establishing contact, inform the borrower about the availability of loss mitigation options if appropriate.<sup>20</sup> In addition, the servicer must provide the delinquent borrower with written notice within 45 days of the borrower’s delinquency. The regulation identifies certain information

that the written notice must contain, including a brief description of examples of loss mitigation options that may be available from the servicer.<sup>21</sup>

The notice must also contain a telephone number which will connect the borrower to a servicer employee or representative assigned to handle his or her delinquency. Regulation X, Section 1024.40 (12 C.F.R. part 1024.40) provides that a servicer must have policies and procedures that are designed to maintain continuity of contact between the delinquent borrower and specific personnel assigned to assist the borrower.

The personnel assigned to a borrower must be prepared to provide him or her with accurate information about (1) loss mitigation options that are available; (2) actions the borrower must take to be considered for lost mitigation, including steps the borrower must take to submit a complete loss mitigation package; (3) the status of any loss mitigation application the borrower has submitted to the servicer; and (4) the circumstances under which the servicer may make a referral to foreclosure. Further, the regulation requires that the assigned personnel must continue to maintain contact with the delinquent borrower from the first contact until such time as the borrower has made two consecutive mortgage payments in accordance with the terms of any permanent loss mitigation agreement.<sup>22</sup>

Subsection 1024.41, in turn, provides a strict timeline that servicers must follow before initiating either a judicial or non-judicial foreclosure based on a borrower’s failure to make a scheduled payment. At a minimum, a servicer must wait 120 days from the date of the borrower’s delinquency before making the first notice or filing required by the applicable state law to initiate any judicial or non-judicial foreclosure process.<sup>23</sup> If a borrower chooses to pursue one of the loss-mitigation options offered by the servicer and submits a loss-mitigation application within the initial 120 days from the first delinquency, the time may be extended.

The regulation includes a prohibition on dual tracking, or simultaneously discussing loss mitigation with the borrower while also initiating foreclosure proceedings. Instead, the servicer cannot file the notices necessary to initiate either a judicial or nonjudicial foreclosure until one of three things has occurred: (1) the servicer has sent notice to the borrower that he or

she is not eligible for loss mitigation and all appeals of that decision have been concluded, (2) the borrower has rejected all loss-mitigation options offered by the servicer or (3) the borrower fails to perform under an agreement on a loss-mitigation option.<sup>24</sup>

The requirements under subsections 1024.39 through 1024.41 are a departure from Alabama foreclosure law. Under Alabama law, a creditor's rights and duties in foreclosure in this state are largely controlled by the power-of-sale provision in the parties' agreement(s), plus the statutory provisions of *Alabama Code* [1975] §35-10-11, *et seq.* That statute requires the foreclosing party publish notice of the sale for three separate weeks in a local newspaper before it may conduct a foreclosure sale.<sup>25</sup> The CFPB's regulations state that state law will be preempted to the extent it conflicts with servicers' new obligations under RESPA.<sup>26</sup>

## RESPA's Private Right of Action

Regulation X, Subsection 1024.41 also provides that delinquent borrowers may enforce their rights under section 1024 through RESPA's private right of action provision, Section 6(f) (12 U.S.C. §2605(f)). Among other things, Section 6(f) provides for "any actual damages" to the borrower for a RESPA violation, certain statutory damages if the borrower demonstrates a pattern and practice of noncompliance with the statute and a reasonable attorney's fee if the borrower prevails. There is a split of authority among district courts whether "any actual damages" under RESPA includes damages for mental anguish.<sup>27</sup> At least one court in Alabama has held that they are recoverable. Other courts have held that the "actual damages" enumerated in this provision are limited to pecuniary damages.<sup>28</sup> No federal appellate court has yet addressed the issue.

The new Loss Mitigation Rules are silent on a number of important issues which are likely to be resolved by the courts in some future litigation. One of those is whether a borrower may assert a servicer's violation of the CFPB's Loss Mitigation Rules as a defense to an ejectment action following a nonjudicial foreclosure. As discussed above, the Alabama courts have rejected borrowers' attempts

to assert alleged violations of other RESPA provisions as a defense to an ejectment action. Neither Dodd-Frank's RESPA amendments nor the CFPB's new regulations expressly address whether a different rule applies with respect to RESPA's Loss Mitigation Rules. This is in contrast to Dodd-Frank's TILA amendments, which expressly provide that a borrower may assert a violation of the Ability to Repay Rules as a defense in a foreclosure and/or ejectment action.

Another question that the regulation leaves open is whether injunctive relief is available as a remedy for a violation of the Loss Mitigation Rules. Nothing in RESPA expressly identifies injunctive relief as a remedy available for private actions under the act.<sup>29</sup> Citing this omission, the majority of courts that have considered this issue have held that injunctive relief is not available for violation of RESPA, at least as related to other types of violations under the act. The courts have instead held that a borrower's remedies are limited to the express terms of Section 6(f), which only identifies monetary damages and attorneys' fees.<sup>30</sup> This limitation is significant, because it can be difficult to show that a homeowner suffered monetary damages as a result of a violation of some of the more technical RESPA requirements. The availability of injunctive relief as a remedy, however, would open the door to more suits based on such violations.

Loan servicers are likely to argue that Dodd-Frank did not change either the unavailability of RESPA as a defense under Alabama law or of injunctive relief as a remedy in private actions under the act, citing Congress's failure to expressly address these issues in the amendments. On the other hand, borrowers may argue that Congress gave the CFPB a mandate to adopt other regulations consistent with the consumer protection purposes of the act and that allowing a borrower to assert a violation of the Loss Mitigation Rules as a defense in a foreclosure action and to pursue injunctive relief as a remedy for such a violation are necessary in order to effectuate the statute's underlying purpose.

Regardless of how the courts resolve these and other issues, it is clear that the new Loss Mitigation Rules under RESPA will mark a substantial change from current Alabama foreclosure law.

## Exemptions to The New Rules For Certain Community Lenders, Small Servicers and Certain Transactions

The CFPB has created a number of exceptions to both its Ability to Repay and Loss Mitigation rules. Regulation Z, Section 1026.43(e)(5), for example, establishes special, less stringent criteria by which certain loans originated and held in portfolio by "small creditors" will fall under the qualified mortgage exception to the Ability to Repay Rule.<sup>31</sup> Under the regulation, "small creditors" are those that had total assets of less than \$2,000,000,000 at the end of the preceding calendar year and, together with all affiliates, extended 500 or fewer first-lien mortgages during the preceding calendar year.<sup>32</sup> Other exceptions apply to loans that meet definitions for qualified mortgages promulgated by the Veterans' Administration or other federal agencies and to certain types of balloon loans.

In addition, the CFPB excludes certain types of home loans from the Ability to Repay regulations entirely. This includes open-ended home-equity lines of credit, timeshare plans, construction loans, bridge loans and reverse mortgages. The CFPB concluded that application of the rules to such transactions would be inconsistent with the underlying purpose of the statute.<sup>33</sup>

The CFPB's new RESPA regulations exempt "small servicers" and statutory housing finance agencies from many of its Loss Mitigation Rules. This includes the requirements that a servicer must offer loss mitigation options to a delinquent borrower and that it must establish continuity of contact.<sup>34</sup> Small servicers, however, are still prohibited from making the first notice or filing for any judicial or non-judicial foreclosure process unless the borrower is more than 120 days delinquent.<sup>35</sup> A delinquent borrower may still assert a civil action pursuant to RESPA section 6(f) if the small servicer violates this rule.

A "small servicer" is generally defined under the regulations as a "servicer that services 5,000 or fewer [covered] mortgage loans, for all of which the servicer

(or affiliate) is the creditor or assignee.”<sup>36</sup> In other words, to qualify for the small-servicer exception, the servicer and its affiliates must service less than 5,000 loans that it owns or originated. The CFPB’s regulations, however, construe “affiliate” broadly. For example, in its regulatory comments, the CFPB has indicated that a credit union will not qualify for the small-servicer exception if it has an affiliate relationship with a credit union service organization (“CUSO”) and the credit union and the CUSO together service in excess of 5,000 loans.

A practitioner should study the applicable regulations carefully before filing a case asserting a violation of either the Ability to Repay or Loss Mitigation rules to confirm that it does not fall into one of the many exceptions.

## Conclusion

The purchase of a home represents, by far, the single largest financial transaction that most Alabamians will ever enter. In the past, the state and federal rules governing those transactions were neither comprehensive nor consistent. The Dodd-Frank amendments, including those discussed here, represent a substantial step in trying to create new, uniform federal standards that will apply to consumers across the country. The changes, however, mark a substantial departure from the existing law in Alabama governing this significant area of everyday life. In short, the Alabama common law/statutory law rulebook for mortgage and foreclosure litigation has changed to an Alabama common law/Alabama statutory law/federal statutory/federal regulatory law rulebook. | [AL](#)

## Endnotes

1. *Selman v. CitiMortgage*, C.A. No. 12-0441-WS-B, 2013 U.S. Dist. Lexis 37017, \* 17-18 (S.D. Ala. March 5, 2013).
2. *Selman*, 2013 U.S. Dist. Lexis 37017, \*26 (S.D. Ala. March 5, 2013).
3. In *Douglas v. Troy Bank & Trust Company*, the Alabama Court of Civil Appeals explained:  

Moreover, to the extent that the Douglases appear to contend that claimed violations on the part of the bank of the federal Real Estate Settlement Procedures Act, codified at 12 U.S.C. § 2601 *et seq.*, vitiate the bank’s right to seek ejectment, we note our recent holding in *Coleman v. BAC Servicing*, 104 So. 3d 195 (Ala. Civ. App. 2012), to the contrary; in that case, we said that a foreclosing entity’s violations of another federal statute, *i.e.*, the Federal Housing Act, pertaining to loss mitigation “may not be raised as a defense to an ejectment action following a nonjudicial foreclosure.”  
 2012 Ala. Civ. App. LEXIS 230 (internal citation omitted).
4. *Brabham v. American Nat’l Bank of Union Springs*, 689 So.2d 82, 88 (Ala. Civ. App. 1996) (“The gist of the Brabhams’ argument is that the supreme court has tacitly recognized that a mortgagee owes a fiduciary duty to a mortgagor. We do not agree.”); *Forester v. Bank of America, N.A.*, 2012 U.S. Dist. Lexis 111346, 2012 WL 3206471 (S.D. Ala. Aug. 7, 2012) (“Alabama law does not recognize a general fiduciary duty owed by a mortgagee, like BAC, to a mortgagor, like Forester, by virtue of the mortgagee extending a mortgage loan.”).
5. 12 So. 3d 1185, 1194-95 (Ala. 2008).
6. 15 U.S.C. §1639c(a)(1).
7. 15 U.S.C. §1640(a)(1)-(4).
8. 15 U.S.C. §1640(e).
9. 15 U.S.C. §1640(k)(1).
10. 15 U.S.C. §1640(k)(1).
11. 15 U.S.C. §1639c(a)(3).
12. 15 U.S.C. 1639c(a)(4).
13. 15 U.S.C. 1640(i).
14. It is unclear the extent to which these provisions would preclude an *in pari delicto* defense. The federal courts have previously held that *in pari delicto* can constitute a defense to certain federal statutory claims even where the defense does not appear cognizable under the literal terms of the statute. *See, e.g., Rogers v. McDorman*, 521 F.3d 381 (5th Cir. 2008); *Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1152-56 (11th Cir.), cert denied, *Laddin v. Reliance Trust Co.*, 549 U.S. 811, 127 S.Ct. 45, 166 L.Ed. 19 (2006). The courts reason that it would be absurd to allow a guilty participant in a scheme to profit by virtue of his own wrongdoing. A similar argument could be made in cases involving particularly egregious borrower fraud, even if that fraud did not ultimately result in criminal conviction.
15. To determine if a loan meets qualified mortgage status, the creditor must analyze whether the loan meets one of the definitions of “qualified mortgage” in 12 C.F.R. §1026.43(e)(2), (e)(4), (e)(5), (e)(6) or (f). In addition, other federal agencies have authority to define qualified mortgage standards for the types of loans they insure, guarantee or administer.
16. If it is a second or subordinate mortgage, it will be a higher-priced qualified mortgage if the annual percentage rate at the time the mortgage was set exceeds the APOR by 3.5 percent or more.
17. 12 C.F.R. §1026.36.
18. 12 C.F.R. §1024.30(c)(2).
19. 12 C.F.R. §1024.39.
20. 12 C.F.R. §1024.39(a).
21. 12 C.F.R. §1024.39(b)(2).
22. 12 C.F.R. §1024.40(a)(2).
23. 12 C.F.R. §1024.41(f)(1).
24. 12 C.F.R. 1024.41(f)(2).
25. *See Ala. Code* [1975] §35-10-11, *et seq.*
26. 12 C.F.R. §1024.5(c).
27. Compare *Ploog v. Homeside Lending*, 209 F.Supp.2d 863 (N.D. Ill. 2002) with *Katz v. Dime Sav. Bank*, 992 F.Supp. 250, 255-56 (W.D.N.Y. 1997).
28. *Rawlings v. Dovenmuehle Mortgage, Inc.*, 64 F.Supp.2d 1156 (M.D. Ala. 1999).
29. *See* 12 U.S.C. §2605(f).
30. *See, e.g., Stincer v. Home America Mtg., Inc.*, No. 1:12-CV-1647-RWS (N.D. Ga. May 11, 2012) (“Plaintiffs have failed to establish a likelihood of success on the merits of their claim because injunctive relief is not available under the FDCPA or under RESPA.”); *Gray v. Central Mtge. Co.*, No. 10-00483 RS, 2010 WL 1526451, \*3 (N.D. Cal. April 14, 2010) (none of the remedies in 12 U.S.C. 2605(f) “would permit an injunction against foreclosure”); *St. James v. JP Morgan Chase Bank Corp.*, No. 10-CV-1893-IEG POR, 2010 WL 3703315, \*2 (S.D. Cal. Sep. 15, 2010) (“the remedy for a violation of RESPA is monetary damages and costs, not injunctive relief”); *but see Chung v. NGBI, Inc.*, No. C 09-04878, 2010 WL 841297 (N.D. Cal. Mar. 10, 2010) (Patel, J.) (holding that injunctive relief was not available under RESPA to stop a foreclosure sale, but might be available to enforce other rights under the act).
31. Loans originated by small creditors under sections 1026.43(e)(5) and 1026.43(e)(6) may receive either the conclusive safe harbor or the rebuttable presumption protection available to other qualified mortgages, but the criteria for determining under which subcategory loans originated under these sections fall into are different from other loans.
32. 12 C.F.R. §1026.43(e)(5).
33. 12 C.F.R. §1026.35(e).
34. 12 C.F.R. §1024.30(b)(1).
35. 12 C.F.R. §1024.41(j).
36. 12 C.F.R. §1026.41(e)(4)(ii).





# Choice-of-Law Issues in Shareholder Litigation Involving Alabama-Based Corporations Organized Under the Laws of Other States

By Stephen D. Wadsworth

Imagine meeting someone for the first time.

The stranger informs you that she is from Wilmington, Delaware. You ask her about the town and are surprised to learn that she has never actually been there and doesn't know of anyone who has. Despite her lack of contact with the state, she insists that she is a Delawarean. While this fact scenario would be unusual in the real world, it is very common in commercial litigation.

Many Alabama-based business entities are incorporated under the laws of other states, commonly Delaware, Nevada or Wyoming. These foreign business entities often have no contact with the state of incorporation beyond the incorporation itself. Most or all of the investors live in Alabama. In many circumstances, most of the companies' business is conducted in Alabama and the surrounding states. When a dispute arises among the shareholders or members of the company, the action giving rise to the dispute likely occurred in Alabama. This phenomenon

is not unique to Alabama business entities. Indeed, the practice is so common that Delaware is home to more business entities than people.<sup>1</sup>

Litigation involving business entities incorporated in another state can involve complex choice-of-law issues. As a general rule, the liability of a business entity's directors, officers<sup>2</sup> or majority shareholder<sup>3</sup> to the minority shareholders or the company is determined by the law of the state of incorporation. This rule is commonly referred to as the "Internal Affairs Doctrine."<sup>4</sup> Alabama courts traditionally apply the Internal Affairs Doctrine in cases affecting a plaintiff "solely in his capacity as a member of the corporation, whether it be as stockholder, director, president, or other officer, and is the act of the corporation whether acting in stockholder's meeting, or through its agents, [or] the board of directors . . ."<sup>5</sup> Thus, in many shareholder and derivative suits, the law of the state of incorporation applies. Because of Delaware's position as a corporate haven, attorneys who frequently litigate commercial and derivative claims should invest in a good treatise of Delaware law, such as Jesse A. Finkelstein and R. Franklin Balotti's *Delaware Law of Corporations & Business Organizations*, to help navigate Delaware's well-developed law.

An excellent article concerning Alabama's Internal Affairs Doctrine and how it is applied appeared in this publication in March 2011.<sup>6</sup> This article will not duplicate their work by addressing the general rule. Instead, this article examines the exceptions to the Internal Affairs Doctrine where Alabama law governs claims involving the internal affairs of a corporation incorporated in another state. The article then discusses examples to demonstrate how choice-of-law decisions are made in scenarios common in commercial litigation.

Under the *Restatement (Second) Conflicts of Law*—which Alabama courts follow on issues of director, officer and majority shareholder liability<sup>7</sup>—there are two exceptions in which Alabama law applies to shareholder disputes involving corporations incorporated in a foreign state: (1) “in a situation where the corporation does all or nearly all, of its business and has most of its shareholders in that other state and has little contact, apart from the fact of its incorporation, with the state of incorporation;” and (2) where there is a directly “applicable local statute.”<sup>8</sup> This article examines each of these exceptions in turn.

## The “More Significant Relationship” Exception to The Internal Affairs Doctrine

The first important exception to Alabama's Internal Affairs Doctrine involves cases in which Alabama has “a more significant relationship” to the claims or parties “in which event the local law of the other state will be applied.”<sup>9</sup> The Restatement discusses the scope of the exception in the comments. Comments c of §§ 306 and 309 state that the “local law of the state of incorporation will be applied” (1) “[i]n the absence of an applicable local statute” in the state of incorporation or (2) “in a situation where the corporation does all or nearly all of its business and has most of its shareholders in that other state and has little contact, apart from the fact of its incorporation, with the state of incorporation.”<sup>10</sup>

It is important to note that the Restatement does not require that all, or even a majority, of a business entity's members or shareholders reside in Alabama for this exception to apply. The question the parties and the court should assess is whether Alabama's interest is sufficiently dominant to override the general rule which would cause Alabama law to apply. When considering whether Alabama has a sufficiently dominant interest which justifies applying Alabama law, the trial court should consider:

- (1) the needs of the interstate and international systems;
- (2) the relevant policies of the forum; (3) the relevant policies of other interested states and the relative interests of

The first important exception to Alabama's Internal Affairs Doctrine involves cases in which Alabama has “a more significant relationship” to the claims or parties “in which event the local law of the other state will be applied.”

those states in the determination of the particular issue; (4) the protection of justified expectations; (5) the basic policies underlying the particular field of law; (6) certainty, predictability and uniformity of result; and (7) ease in the determination and application of the law to be applied.<sup>11</sup>

Of these factors, the drafters of the Restatement consider the first, second, fourth, sixth and seventh factors to be the most important in determining choice of law questions in the realm of commercial litigation.<sup>12</sup>

To simplify the choice-of-law issues frequently encountered in commercial litigation, the Restatement provides two examples to illustrate the scope of the exception to the Internal Affairs Doctrine.

The Alpha Corporation is incorporated in Delaware. It does no business in Delaware and has few shareholders there. Majority Shareholder Bob is domiciled in

Georgia along with most of Alpha's other shareholders. Bob would owe Minority Shareholder Carl—an Alabama resident—fiduciary duties under the laws of Alabama and Georgia but not under Delaware law. An Alabama court would be justified in applying Alabama law to fiduciary duty claims Carl brought against Bob because it would not be contrary to the policy of the states where Alpha does business and where the majority of its shareholders reside.<sup>13</sup> By contrast, if Alpha did 20 percent of its business in Delaware, 40 percent in Alabama and 20 percent in Georgia with shareholders scattered throughout those states, Alabama's interest would not be sufficiently dominant to impose its law over Delaware law.<sup>14</sup>

While the Restatement is clear that it views this exception to be “the unusual case”<sup>15</sup> and courts have described it as “narrowly drawn,”<sup>16</sup> it is applicable in a significant amount of small business litigation in Alabama. Alabama is home to only a few publicly-traded corporations. Many of Alabama's closely held entities—even those registered in other states—do most or all of their business in Alabama. The owners of these businesses are Alabamians who may well have never even been to the state of incorporation. Under these circumstances, Alabama law should be applied to govern questions concerning an entity's internal affairs including:

- Who the shareholders of a corporation are;<sup>17</sup>
- The right of the shareholder to participate in the administration of the affairs of the corporation;<sup>18</sup>
- The right of the shareholder to participate in the division of profits;<sup>19</sup>
- The right of the shareholder to participate in the distribution of assets on dissolution and his rights on the issuance of new shares;<sup>20</sup>
- The right of a trustee to vote shares in a voting trust;<sup>21</sup>

- The liability and obligations of a majority shareholder to the corporation and to the minority shareholders;<sup>22</sup> and
- The existence or extent of a director's or officer's liability to the shareholders or the corporation.<sup>23</sup>

This interpretation of the Internal Affairs Doctrine resolves the purportedly “contradictory” choice-of-law results found in two Alabama cases, *Stroud v. John M.*

*Cockerham & Assoc.*,<sup>24</sup> and *Galbreath v. Scott*.<sup>25</sup> In *Galbreath*, the Alabama Supreme Court used Alabama law to determine the liability of a majority shareholder of a Florida corporation.<sup>26</sup> In *Stroud*, under similar circumstances, the court applied Virginia law to determine liability.<sup>27</sup> This “contradiction” was first identified by the Northern District of Alabama in *In re*

*Chalk Line*.<sup>28</sup> Some commenters have suggested that the attorneys in *Galbreath* simply failed to request the application of Florida law.<sup>29</sup> While this is one plausible explanation, the results in *Galbreath* and *Stroud* may be resolved without that assumption.

The *Stroud* case involved a Virginia corporation—John M. Cockerham & Associates—with its principal place of business in Huntsville, Alabama. Public records indicate that the company maintained offices in Virginia and Alabama.<sup>30</sup> While many shareholders lived in Alabama, others were geographically dispersed.<sup>31</sup> John M. Cockerham & Associates did work for government entities with offices dispersed across the United States. Given this geographic diversity, an Alabama court should apply the law of the state of incorporation under the Internal Affairs Doctrine.<sup>32</sup>

By contrast, the *Galbreath* case involved a Florida corporation which held as its only asset “a lease to coal lands in DeKalb County, Alabama.”<sup>33</sup> The Florida company held no assets and conducted no business in Florida. There were only two shareholders, Louise Galbreath and H.K. Scott.<sup>34</sup> Galbreath was a resident of Florida.<sup>35</sup> Scott was a resident of Boaz, Alabama.<sup>36</sup> Under the Restatement view, a trial court presented with these facts could correctly apply Alabama law given Alabama's sufficiently dominant interest in the relationship.<sup>37</sup>

In summary, when evaluating a case involving the internal affairs of a corporation incorporated in another state, the general rule is that law of the foreign corporation applies. But, if research indicates that the company has little or no contact with the state of incorporation, primarily Alabama shareholders, a predominantly Alabama business base, predominantly Alabama office locations and Alabama is the location of the alleged wrongdoing, be aware that Alabama law may be still be applicable.

## Specifically Applicable Statutes

The second exception to the Internal Affairs Doctrine is one in which Alabama has a directly “applicable local statute.”<sup>38</sup> When one exists, Alabama law will govern claims brought pursuant to

In summary, when evaluating a case involving the internal affairs of a corporation incorporated in another state, the general rule is that law of the foreign corporation applies.

these laws, even if the Internal Affairs Doctrine applies generally and the law of the state of incorporation governs most of the claims before the court.<sup>39</sup> A review of all applicable local statutes is beyond the scope of this article. Instead, this article will present case studies of three commonly litigated, seemingly-applicable statutes.

First, shareholder requests to inspect corporate books and records generally allow a shareholder to seek remedies under both Alabama law and the law of the state of incorporation regardless of which states' substantive law applies to the claims before the court.

Second, Alabama's prohibition against depreciating stock with the intent to buy is a uniquely Alabama statutory remedy which governs stock transactions even if the corporation is organized under the law of another state.

Third, *Alabama Rule of Civil Procedure* 23.1 is a procedural rule that many attorneys incorrectly assume governs foreign corporations even after the Internal Affairs Doctrine has been invoked. These three statutes demonstrate the different outcomes and expectations attorneys confront in business tort and shareholder disputes concerning foreign corporations.

### A. Alabama Law Expressly Provides for a Shareholder to Pursue a Request to Inspect The Books and Records of a Corporation under Both Alabama Law and the Law of the State of Incorporation

One of the greatest tools in commercial litigation is the statutory right most states provide shareholders in a business entity to inspect the company's records. Under Alabama law, these requests are governed by *Alabama Code* § 10A-2-16.02 *et seq.* Under this statute, shareholders must file suit in “the circuit court in the county where the corporation's principal office . . . is located for an order to permit inspection and copying of the records demanded.”<sup>40</sup> This statute is explicitly applicable to both domestic and “foreign corporation[s] with its principal office” in Alabama.<sup>41</sup> A shareholder's right to inspect corporate records “are much more expansive” than a litigant's right to discovery.<sup>42</sup> Inspection “must be exercised at reasonable . . . times . . . and must not be exercised for idle curiosity, or for improper or unlawful purposes. *In all other respects the statutory right is absolute.*”<sup>43</sup> The suggestion that inspection may lead to further “ill-advised and hurtful litigation” is not a valid legal reason to deny a shareholder's right to inspection.<sup>44</sup>

Pre-suit requests to inspect corporate books and records are a good way to obtain the facts needed to draft and maintain a derivative suit.<sup>45</sup> A plaintiff usually has the option to enforce his inspection rights under Alabama law, the law of the state of incorporation or both.

Pursuing the claim under Alabama law has its advantages. For example, the Alabama inspection statute grants a penalty of up to 10 percent of the value of the shares owned by the shareholder,<sup>46</sup> along with the shareholder's costs and attorney's fees.<sup>47</sup> These

remedies are unavailable under most other state statutes.<sup>48</sup> The threat of fines is a useful weapon in convincing reluctant majority shareholders, directors or officers to allow a disgruntled minority shareholder to have access to the records that may later be used to prove liability on other charges.

If the records you seek belong to a Delaware corporation, it may be worthwhile to seek relief under both Alabama and Delaware law simply because Delaware law concerning books and records requests is more developed than Alabama law.<sup>49</sup> Delaware law has expressly found more proper purposes for inspection, including valuing a shareholder's share<sup>50</sup> and investigating alleged wrongdoing in preparation of filing a derivative suit.<sup>51</sup> Indeed "[t]here is no shortage of proper purposes under Delaware law" to inspect corporate books and records.<sup>52</sup> While an Alabama court would likely find the same purposes proper under Alabama law, Alabama's case law is less developed. Accordingly, when the choice is offered, it is beneficial to file under both the Alabama and Delaware inspection statutes to combine the strength of Delaware's case law, and strong list of proper purposes, with the threat of Alabama's penalties.

### **B. Directly Applicable Alabama Statute Forbidding Depreciating the Value of Shares with the Intent to Buy**

Another directly applicable<sup>53</sup> Alabama statute is one of the most striking under-utilized statutes in commercial litigation—*Alabama Code* § 10A-2-8.32—which states:

No president, director or managing officer of any corporation, by whatsoever name or title he or she may be known or called, shall do or omit to do any act, or shall make any declaration or statement in writing, or otherwise, with the intent to depreciate the market value of the stock or bonds of the corporation, and with the further intent to enable the president, director or other managing officer, or any other person, to buy any stock or bonds at less than the real value thereof.<sup>54</sup>

In short, the statute forbids corporate fiduciaries from taking actions or making statements with the intent of later acquiring shares from shareholders at less than its actual value. This statute is an old Alabama statute predating the adoption of the *Model Business Code*, dating to a criminal provision in the 1940 *Alabama Code*.<sup>55</sup> It sets forth a "more specific statutory expression of the general fiduciary duty owed by directors and officers to shareholders under other provisions of the Alabama Business Corporation Act."<sup>56</sup> The justification for this statute is that members of closely-held business organizations are vulnerable "especially in buy-out negotiations, when often there is no real market for their shares."<sup>57</sup>

**Accordingly, when the choice is offered, it is beneficial to file under both the Alabama and Delaware inspection statutes to combine the strength of Delaware's case law, and strong list of proper purposes, with the threat of Alabama's penalties.**

Courts have recognized that violation of this formerly criminal provision gives rise to a civil remedy.<sup>58</sup> "The measure of damages is the difference between the real and the depreciated value of the stock at the time the defendant perpetrates the wrongfully depreciating act."<sup>59</sup> In other words, if the fiduciary offered to buy shares he knew, should have known or believed to be worth \$3,500,000 for \$2,500,000, the shareholder receiving the offer would be entitled to the difference between the offers—\$1,000,000—as damages. The minority shareholder is entitled to this remedy even if the sale was not consummated.<sup>60</sup> It is no defense to this statute that the minority shareholder was aware of enough facts to put him on notice that the offer to buy the stock was low.<sup>61</sup> It is also no defense that both sides are engaged in settlement buy-out negotiations.<sup>62</sup>

Given how often this statute is implicated in shareholder disputes, it is surprising that it has only been addressed in three published decisions.<sup>63</sup> Often during shareholder disputes, a majority shareholder may offer to

buy out the dissenter. Often, the fiduciary's first offer for the shares is well below the fair value for the shares—a value the fiduciary would not accept for his own shares. The fiduciary may do this in bad faith, knowing that there is no readily-available market for the minority interest of a closely-held business entity and that the minority shareholder may well accept any price he can get to get out of a relationship that is souring. Giving the fiduciary the benefit of the doubt, he may view it as savvy business to leave himself negotiating room by making a low first offer for the minority's shares with the hope of ultimately getting the best price he can for the shares. Regardless of the motivation, the majority shareholder has violated the above statute forbidding a fiduciary from making any statement depreciating corporate stock with the intent to buy.

To avoid liability under the statute, the fiduciary should take pains to ensure that the offer is a good faith, fair value—as opposed to fair market value—assessment of the shares when offering a price for the minority interest. Fair value is the minority shareholder's "proportionate interest in the company as an ongoing concern" with no discounts for minority status or lack of marketability.<sup>64</sup> This is different from "fair market value" which may be defined "the sum arrived at by fair negotiation between an owner willing to sell and a purchaser willing to buy, neither being under pressure to do so."<sup>65</sup> The differences between the two is important because "[a]ny rule of law that gave the shareholders less than their proportionate share of the whole firm's fair value would produce a transfer of wealth from the minority shareholders to the shareholders in control. Such a rule would inevitably encourage corporate squeeze-outs."<sup>66</sup> Essentially, the right to purchase the shares by considering discounts which would no longer apply when the transaction is complete "would allow the majority who approved the transaction to later buy out with a net gain what the minority dissenters have lost, granting the majority an

unfair windfall.”<sup>67</sup> Any offer for less than fair value triggers the protection of this specific Alabama statute even if the Internal Affairs Doctrine is otherwise applicable. While the actions proscribed by the statute are likely actionable under the laws of other states, the statute itself has no known counterpart and represents a unique protection granted to Alabama shareholders and shareholders in Alabama corporations.

### **C. Requirements to Bring a Derivative Suit under Rule 23.1s Governed by the Law Of the State of Incorporation If the Internal Affairs Doctrine Applies**

A counterintuitive application of the Internal Affairs Doctrine may be found in the pre-suit derivative demand requirements found in *Alabama Rule of Civil Procedure* 23.1. Under the Internal Affairs Doctrine, the court should look to the law of the state of incorporation “as the source of *substantive* law governing claims regarding that corporation’s internal affairs.”<sup>68</sup> By contrast, “the law of the forum state governs *procedural* matters.”<sup>69</sup> Intuitively, then, many lawyers assume that the pre-suit demand made upon a corporation should be governed by *Alabama Rule of Civil Procedure* 23.1. The significant number of cases in which Alabama appellate courts have applied *Alabama Rule of Civil Procedure* 23.1 to derivative claims against foreign corporations has done nothing to clear up this confusion.<sup>70</sup> This assumption is incorrect. If the Internal Affairs Doctrine applies and foreign substantive law governs the shareholder’s claims, the foreign Rule 23.1 or equivalent also applies.

A recent Alabama Supreme Court decision has solidified this rule of law. In *Schrushy v. Tucker*, the Alabama Supreme Court examined Delaware Chancery Court Rule 23.1 and held that the rule was substantive law, not procedural law, because it goes to a plaintiff’s standing to bring the derivative suit.<sup>71</sup> This holding is consistent with Delaware’s interpretation of its own law which states that the demand requirement is not a “mere formalit[y] of litigation, but [a] structure[] of substantive law.”<sup>72</sup> Alabama similarly views its own Rule 23.1 as substantive rather than procedural.<sup>73</sup> As a result, the demand and pleading requirements of the state of incorporation, not the forum state, applies to determine the right of the plaintiff to sue derivatively on behalf of the corporation in cases where the law of the state of incorporation is applicable.

In the case of Delaware, this distinction is not entirely without difference. Both states’ rules require: (1) allegations that the plaintiff or plaintiff’s predecessor in interest was a shareholder at

**Attorneys should familiarize themselves with the law of the state of incorporation before bringing or defending against a derivative action if the facts of the case show that the Internal Affairs Doctrine is likely to apply because *Alabama Rule of Procedure* 23.1 does not meet the “specific statute” exception to the Internal Affairs Doctrine.**

all relevant times to the complaint; (2) allegations pleaded with particularity demonstrating a pre-suit demand on the directors or reasons why such a demand would be futile; and (3) that the court’s approval must be obtained before an action may be dismissed.<sup>74</sup>

The similarities end here. Under Alabama Rule 23.1, the complaint must be verified.<sup>75</sup> In Delaware, the complaint need not be verified.<sup>76</sup> Further, under Alabama law, the plaintiff must make some showing that he will “fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association.”<sup>77</sup> Delaware has no similar requirements in its Rule 23.1, although Delaware case law requires the derivative plaintiff to be “qualified to serve in a fiduciary capacity as a representative of a class, whose interest is dependent upon the representative’s adequate and fair prosecution.”<sup>78</sup> Under Delaware law, derivative plaintiffs must also file an affidavit within 10 days of filing the complaint stating that the plaintiff has not received or been promised any form of compensation in exchange for prosecuting the derivative action.<sup>79</sup> No counterpart to this rule exists in Alabama.

Further, Delaware law is more stringent than Alabama law when it comes to pre-suit demand. Alabama courts permit plaintiffs to identify certain communications as pre-suit demands while hedging that “[e]ven if these demands were not sufficient, the trial court correctly determined

that any further demand would be futile.”<sup>80</sup> By contrast, Delaware courts take allegations of pre-suit demands as a tacit admission that a demand would not be futile.<sup>81</sup> Thus, when bringing a claim derivatively against Delaware corporations, an attorney should decide early in the process whether a pre-suit demand will be made or whether to plead demand futility.

States have different rules regarding the bringing of a derivative suit. Attorneys should familiarize themselves with the law of the state of incorporation before bringing or defending against a derivative action if the facts of the case show that the Internal Affairs Doctrine is likely to apply because *Alabama Rule of Civil Procedure* 23.1 does not meet the “specific statute” exception to the Internal Affairs Doctrine.

## **Conclusion**

Choice of law in commercial litigation and business torts is not always straightforward. Before filing or answering a complaint, attorneys should determine which state’s law applies by researching: (1) where the company is incorporated; (2) where the company’s

offices are; (3) where the company's shareholders live; (4) where the company conducts business; and (5) where the action underlying the tort occurred. This analysis will allow the attorney to develop prudent offensive and defensive strategies going forward and prevent mistakes that could cost the client a lot of money. | AL

## Endnotes

1. See Leslie Wayne, *To Delaware, With Love*, N.Y. TIMES, June 30, 2012, at BU1 (noting that Delaware had 945,326 corporate entities and 897,934 residents), available at <http://www.nytimes.com/2012/07/01/business/how-delaware-thrives-as-a-corporate-tax-haven.html?pagewanted=all&r=0>, [online the same article is titled *How Delaware Thrives as a Corporate Tax Haven*] (last visited October 10, 2013).
2. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 309 (cited in *Ex parte Bentley*, 50 So. 3d 1063, 1072-73 (Ala. 2010)).
3. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 306 (cited in *Ex parte Bentley*, 50 So. 3d at 1071-74).
4. Alabama law defines an entity's internal affairs as "the rights, powers, and duties of its governing authority, governing persons, officers, owners, and members; and (2) matters relating to its membership or ownership interests, other than the right of members or owners to inspect entity records." ALA. CODE § 10A-1-1.13.
5. *Ellis v. Mut. Life Ins. Co. of N.Y.*, 187 So. 434, 443 (Ala. 1939).
6. See generally Jay M. Ezelle & C. Clayton Bromberg, Jr., *The Internal Affairs Doctrine in Alabama*, 72 ALA. LAW. 142 (2011).
7. *Massey v. Disc Mfg., Inc.*, 601 So. 2d 449, 454-55 (Ala. 1992) (quoting RESTATEMENT (SECOND) CONFLICT OF LAWS § 309); see also *Ex parte Bentley*, 50 So. 3d at 1070-74 (quoting *In re Chalk Line Mfg., Inc.*, No. 93-42773(11), 1994 WL 394978 (N.D. Ala. July 26, 1994) (quoting in turn RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 306 and 309).
8. RESTATEMENT (SECOND) CONFLICT OF LAWS § 306, comments A & C (quoted in *Ex parte Bentley*, 50 So. 3d at 1070-74).
9. *Massey*, 601 So. 2d at 454-55 (quoting RESTATEMENT (SECOND) CONFLICT OF LAWS § 309); see also *Ex parte Bentley*, 50 So. 3d at 1070-74 (quoting *In re Chalk Line Mfg., Inc.*, No. 93-42773(11), 1994 WL 394978 (N.D. Ala. July 26, 1994) (quoting in turn Restatement (Second) Conflict of Laws §§ 306 and 309); see also RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 303-06, 309 (all of which include the same exceptions).
10. See the comments to RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 303-06, 309, all of which contain similar exceptions.
11. RESTATEMENT (SECOND) CONFLICT OF LAWS § 6 (incorporated by reference into RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 303-06, 309).
12. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302, comment c (incorporated by reference into the comments of RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 303-06, 309).
13. RESTATEMENT (SECOND) CONFLICT OF LAWS § 306, Illustration 2.
14. RESTATEMENT (SECOND) CONFLICT OF LAWS § 306, Illustration 1.
15. See RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 303-06, 309.
16. *In re Chalk Line Mfg., Inc.*, No. 93-42773(11), 1994 WL 394978, at \*5 (N.D. Ala. July 26, 1994).
17. RESTATEMENT (SECOND) CONFLICT OF LAWS § 303.
18. RESTATEMENT (SECOND) CONFLICT OF LAWS § 304.
19. *Id.*
20. *Id.*
21. RESTATEMENT (SECOND) CONFLICT OF LAWS § 305.
22. RESTATEMENT (SECOND) CONFLICT OF LAWS § 306.
23. RESTATEMENT (SECOND) CONFLICT OF LAWS § 309.
24. 620 So. 2d 643 (Ala. 1993).
25. 433 So. 2d 454 (Ala. 1983).
26. *Galbreath*, 433 So. 2d at 457.
27. *Stroud*, 620 So. 2d at 646-47.
28. *In re Chalk Line Mfg., Inc.*, No. 93-42773(11), 1994 WL 394978, at \*3 (N.D. Ala. July 26, 1994) (asserting that two Alabama cases involving whether the Internal Affairs Doctrine "applies to a majority shareholder's breach of duty to the minority . . . fail to provide a clear answer, and in fact, suggest contradictory results") (citing *Stroud*, 620 So. 2d 643 (Ala. 1993) and *Galbreath*, 433 So. 2d 454 (1983)).
29. Jay M. Ezelle & C. Clayton Bromberg, Jr., *The Internal Affairs Doctrine in Alabama*, 72 ALA. LAW. 142, 144 (2011) (suggesting that "[t]he likely explanation is that the parties failed to seek the application of foreign law").
30. See Technical Report RC-77-3 U.S. Army Total Risk Assessing Cost Estimate (Trace) Guidelines (Dec. 31, 1976), available at [www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA036327](http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA036327) (last visited October 7, 2013) (noting place of business for Cockerham & Associates as Hopewell, Virginia).
31. The author acknowledges the gracious help of Doug Martinson, II, one of the attorneys representing John M. Cockerham in the *Stroud* case for information concerning John M. Cockerham & Associates' office locations, geographic scope of work and shareholders' states of residence.
32. RESTATEMENT (SECOND) CONFLICT OF LAWS § 306, Illustration 1.
33. *Galbreath v. Scott*, 433 So. 2d 454, 455 (1983).
34. *Id.*
35. See Florida Secretary of State Filing Information for C & G Excavating, Inc., available at <http://search.sunbiz.org/Inquiry/CorporationSearch/SearchResultDetail/EntityName/domp-461456-f59a6922-3622-4164-b6ac-3e953a343dab/C%20%26%20G%20Excavating/Page1> (last visited October 8, 2013) (listing Ms. Galbreath's home address as Leesburg, Florida).
36. The author acknowledges the gracious help of Robert W. Hanson, attorney for H.K. Scott in the *Galbreath* case for information concerning Mr. Scott's residence.
37. See RESTATEMENT (SECOND) CONFLICT OF LAWS § 306, Illustration 2.
38. RESTATEMENT (SECOND) CONFLICT OF LAWS § 306, comment C.
39. *Id.*
40. ALA. CODE § 10A-2-16.04.
41. See *id.*; see also ALA. CODE § 10A-2-16.02(a).
42. *Hillman v. Douglas Eng'g Co., Inc.*, 702 So. 2d 156, 159 (Ala. Civ. App. 1997).
43. (emphasis in original) (quoting *Ex parte Miles*, 318 So. 2d 697, 700 (Ala. 1975)).
44. *Loveman v. Tutwiler*, 199 So. 854, 856 (Ala. 1941).
45. See *King v. Verifone Holdings, Inc.*, 12 A.3d 1140, 1146 (Del. 2011); see also *Rales v. Blanchard*, 634 A.2d 927, 934 n.10 (Del. 1993) (holding that a books and records request was one of "many avenues available" to obtain discoverable information for use in litigation).
46. ALA. CODE § 10A-2-16.02(c).
47. ALA. CODE § 10A-2-16.04(c).
48. See, e.g., DEL. CODE tit. 8, § 220.
49. The Delaware inspection statute grants exclusive jurisdiction

- to the Delaware Court of Chancery. DEL. CODE tit. 8, § 220(c). There is a split of authority as to whether this divests courts outside of Delaware of jurisdiction to hear complaints concerning shareholder inspection rights. *Compare Anderson v. Children's Corner, Inc.*, CV106011812S, 2011 WL 925442, at \*3 (Conn. Super. Ct. Feb. 15, 2011) (declining "to find that the Delaware legislature was divesting sister states with jurisdiction to hear a claim under the statute"); and *Midway Airlines, Inc. v. Carlson*, 628 F. Supp. 244, 245 (D. Del. 1985) (holding the federal court had jurisdiction to hear counterclaims under § 220); and *Sachs v. Adeli*, 804 N.Y.S.2d 731, 733 (N.Y. App. Div. 2005) (holding that similar language contained in 6 Del. Code § 18-305(f) did not divest the Court of jurisdiction); and *In re Halter*, 05-98-01164-CV, 1999 WL 667288, \*6 (Tex. App. Aug. 27, 1999) (holding that the trial court had jurisdiction to hear complaints brought under § 220); with *Lynch v. Basinger*, CIV. 12-637 RBK/KMW, 2012 WL 6213781, at \*5 (D.N.J. Dec. 12, 2012) (court lacked jurisdiction to hear claim); and *Yale S. Corp. v. Eclipse Servs., Inc.*, 10-CV-0337-CVE-FHM, 2010 WL 2854687, \*3 (N.D. Okla. July 19, 2010) (court lacked jurisdiction to hear claim); and *Reserve Solutions Inc. v. Vernaglia*, 438 F. Supp. 2d 280, 289 (S.D.N.Y. 2006) (court lacked jurisdiction to hear claim); and *Foti v. W. Sizzlin Corp.*, 64 Va. Cir. 64, at \*1 (Va. Cir. Ct. 2004) (court lacked jurisdiction to hear claim); and *Synchron, Inc. v. Kogan*, 757 So. 2d 564, 565 (Fla. Dist. Ct. App. 2000) (court lacked jurisdiction to hear claim). There is no Alabama authority on point. In the author's view, an Alabama court should maintain jurisdiction in light of the totality of Alabama case law. *Forsyth v. Cent. Foundry Co.*, 198 So. 706, 709 (Ala. 1940) (refusing to dismiss claim that statutorily was the "exclusive jurisdiction" of a United States district court when it had jurisdiction over other related claims); *Ex parte Bentley*, 50 So. 3d 1063, 1074 (Ala. 2010) (holding that "the 'internal-affairs doctrine' as applied in this State does not deprive the trial court of jurisdiction over the claims in the underlying action").
50. *Kortum v. Webasto Sunroofs, Inc.*, 769 A.2d 113, 124 (Del. Ch. 2000) (holding that "normally the only way" for a minority shareholder in a closely held corporation to value his or her shares "is by examining the appropriate corporate books") (quoting *Helmsman Mgmt. Servs., Inc. v. A&S Consultants, Inc.*, 525 A.2d 160, 165 (Del. Ch. 1987)).
  51. *See King v. Verifone Holdings, Inc.*, 12 A.3d 1140, 1146 (Del. 2011); see also *Rales v. Blanchard*, 634 A.2d 927, 934 n.10 (Del. 1993) (holding that a books and records request was one of "many avenues available" to obtain discoverable information for use in litigation).
  52. *Melzer v. CNET Networks, Inc.*, 934 A.2d 912, 917 (Del. Ch. 2007).
  53. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302, comment e (noting that the law of the state where the stock transaction occurred should apply in transactions involving all or a substantial amount of company stock). (incorporated by reference into the comments of RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 303-06, 309).
  54. Ala. Code § 10A-2-8.32.
  55. *Fulton v. Callahan*, 621 So. 2d 1235, 1246 (Ala. 1993).
  56. *Id.* at 1246-47. Other commenters have suggested that this provision is "a separate statutory oppression claim under Alabama law." See Andrew P. Campbell & Caroline Smith Gidiere, *Shareholder Rights, the Tort of Oppression and Derivative Actions Revisited: A Time for Mature Development?*, 63 ALA. LAW. 315, 320 (2002).
  57. *Fulton*, 621 So. 2d at 1247.
  58. *Brooks v. Hill*, 717 So. 2d 759, 762-63 (Ala. 1998); *Fulton*, 621 So. 2d at 1245-47; *Belcher v. Birmingham Trust Nat'l Bank*, 348 F. Supp. 61, 145-47 (N.D. Ala. 1968).
  59. *Fulton*, 621 So. 2d at 1246.
  60. *Id.*
  61. *Id.*
  62. *Id.*
  63. *Brooks*, 717 So. 2d at 762-63; *Fulton*, 621 So. 2d at 1245-47; *Belcher*, 348 F. Supp. at 145-47.
  64. *See Ex parte Baron Servs., Inc.*, 874 So. 2d 545, 550 (Ala. 2003) (quoting *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1144 (Del. 1989)); For a fuller treatment of the law concerning "fair value" appraisals see generally Caroline Smith Gidiere, *What Is "Fair Value" Under Alabama's Dissenting Shareholder Statute?*, 62 ALA. LAW. 186 (2001).
  65. *See Ex parte Baron Servs., Inc.*, 874 So. 2d at 550 (quoting *Mt. Carmel Estates, Inc. v. Regions Bank*, 853 So. 2d 160, 166 (Ala. 2002)).
  66. *Offenbecher v. Baron Servs., Inc.*, 874 So. 2d 532, 537 (Ala. Civ. App. 2002) (quoting John J. Oitzinger, *Fair Price and Fair Play Under the Montana Business Corporation Act*, 58 MONT. L.R. 407, 420-21 (1997)).
  67. *Ex parte Baron Servs., Inc.*, 874 So. 2d at 550 (quoting Bobbie J. Hollis II, *The Unfairness of Applying Lack of Marketability Discounts to Determine Fair Value in Dissenters' Rights Cases*, 25 J. CORP. L. 137 141-42 (1999)).
  68. *Scrushy v. Tucker*, 70 So. 3d 289, 298 (Ala. 2011) (emphasis in original) (quoting *In re Verisign, Inc., Derivative Litig.*, 531 F. Supp. 2d 1173, 1214 (N.D. Cal. 2007)).
  69. *Scrushy*, 70 So. 3d at 298 (emphasis in original) (quoting *Chaplake Holdings, Ltd. v. Chrysler Corp.*, 766 A.2d 1, 5 (Del. 2001)).
  70. *See, e.g., Ex parte Morgan Asset Mgmt., Inc.*, 86 So. 3d 309, 321 (Ala. 2011) (dismissing complaint under Alabama Rule of Civil Procedure 23.1 for failure to make pre-suit demand on Maryland corporation); *Ex parte Regions Fin. Corp.*, 67 So. 3d 45, 48-49 (Ala. 2010) (same); *Ernst & Young, LLP v. Tucker*, 940 So. 2d 269, 288 (Ala. 2006) (applying Alabama Rule 23.1 to derivative action concerning HealthSouth, a Delaware corporation domiciled in Alabama); *Shelton v. Thompson*, 544 So. 2d 845, 848 (Ala. 1989) (applying Alabama Rule 23.1 to Colonial Bancgroup, a Delaware corporation domiciled in Alabama).
  71. *Scrushy*, 70 So. 3d at 298-301.
  72. *Tandycrafts, Inc v. Initio Partners*, 562 A.2d 1162, 1166 (Del. 1989) (quoted in *Scrushy*, 70 So. 3d at 302).
  73. *Stallworth v. AmSouth Bank of Alabama*, 709 So. 2d 458, 463 (Ala. 1997) (citing *Blasband v. Rales*, 971 F.2d 1034 (3d Cir. 1992)).
  74. *Compare* ALA. R. CIV. P. 23.1 with DEL. CH. R. 23.1.
  75. ALA. R. CIV. P. 23.1.
  76. *See White v. Panic*, 793 A.2d 356, 365 (Del. Ch. 2000).
  77. ALA. R. CIV. P. 23.1.
  78. *Youngman v. Tahmoush*, 457 A.2d 376, 379 (Del. Ch. 1983).
  79. DEL. CH. R. 23.1(b).
  80. *James v. James*, 768 So. 2d 356, 360 (Ala. 2000).
  81. *See Spigel v. Buntrock*, 571 A.2d 767, 775 (Del. 1990).



### Local Bar Award of Achievement

### Reappointment of Incumbent Magistrate Judges

## Local Bar Award of Achievement

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

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

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

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

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

## Reappointment of Incumbent Magistrate Judges

The current term of United States Magistrate Judge Wallace Capel is due to expire December 12, 2014. The current term of United States Magistrate Judge Terry F. Moorner is due to expire January 2, 2015. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of magistrate judges to a new eight-year term.

The duties of a magistrate judge position include: (1) conduct of most preliminary proceedings in criminal cases; (2) trial and disposition of misdemeanor cases; (3) conduct of various pretrial matters and evidentiary proceedings on delegation from judges of the district court; (4) trial and disposition of civil cases upon consent of the litigants; and (5) examination and recommendation to the judges of the district court in regard to prisoner petitions and claims for Social Security benefits.

Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be directed to:

Chair, Merit Selection Panel  
c/o Debra P. Hackett, clerk  
U.S. District Court  
P.O. Box 711  
Montgomery AL 36101

**Comments must be received by May 20, 2014.** | [AL](http://AL)





Adams



Alvis



Ayers



Bearden



Nabers



Niemeyer

- Balch & Bingham announces the election of **Amy Davis Adams**, a partner in the Birmingham office, as a Fellow of the American College of Trust and Estate Counsel.
- Christian & Small partner **LaBella S. Alvis** was appointed to serve on the board of directors of the International Academy of Trial Lawyers at the annual meeting in Kailua-Kona, HI.
- Bradley Arant Boult Cummings LLP announces that partner **Marc James Ayers** has been appointed to serve on the Alabama Advisory Committee on the U.S. Commission on Civil Rights.
- **Bennett L. Bearden** was honored for his leadership in water policy in Alabama. Bearden is director of the Water Policy and Law Institute at the University of Alabama.
- The Justice Department awarded Assistant U. S. Attorney **Todd A. Brown** the Attorney General's Award for Fraud Prevention.
- Bradley Arant Boult Cummings LLP announces that partner **William C. Byrd, II** has been elected as a Fellow of the American College of Mortgage Attorneys.
- Maynard Cooper & Gale announces that **Drayton Nabers** has been appointed director of the Frances Marlin Mann Center for Ethics and Leadership at Samford University.
- Hand Arendall LLC announces that member **Michael C. Niemeyer** was recently elected president of the Baldwin County Bar Association.
- **James A. Yance**, the University of South Alabama's first undergraduate alumnus to serve as chair pro tempore of the USA Board of Trustees, has been honored with a life-sized portrait on campus and the title of chair pro tempore emeritus. He has served more than 30 years with Cunningham, Bounds, Yance, Crowder & Brown in Mobile. | [AL](#)



Yance



# *Frye and Lafler:* New Rights or Old Responsibilities

By John J. Davis and Barr D. Younker, Jr.

Both the legal profession and the public have greatly anticipated several recent decisions

of the United States Supreme Court. This year's term saw great interest in issues regarding gay marriage and the Voting Rights Act of 1965, but two decisions from the Court's 2011-12 term, *Missouri v. Frye* and *Lafler v. Cooper*<sup>1</sup>, marked what some have called a dramatic shift in the Court's attention to the performance of criminal defense attorneys outside the courtroom. In both cases, the Supreme Court addressed the issue of ineffective assistance of counsel during the plea bargaining process. While many have proclaimed this to be a dramatic change in the Court's focus on the performance of counsel, the *Rules of Professional Responsibility* and the ABA standards that address the representation of criminal defendants already require professional and effective assistance of counsel.

## **The *Strickland v. Washington* Standard for Reviewing Ineffective Assistance of Counsel Claims**

On September 20, 1976, David Leroy Washington launched a week-long crime spree in the state of Florida. Washington's crime spree left three people dead, several maimed and one victim in a permanent comatose, vegetative state. Remarkably, Washington, who was caught soon after his final crime, was brought to trial within two months of his surrender to the police. Washington pleaded guilty to three charges of capital murder as well as several other crimes. On December 6, 1976, Washington was sentenced to die for his crimes.

What began with this simple murder conviction later led to the most important U.S. Supreme Court case regarding the standard to be applied in cases involving claims of ineffective assistance of counsel—*Strickland v. Washington*<sup>2</sup> (1984). The standard created in *Strickland* stood immutable for 26 years. However, in 2010, the Supreme Court rendered a series of decisions that modified the *Strickland* standard to include matters “collateral” to the adjudication of guilt in criminal cases.

Some legal observers believe that we now have entered a “slippery slope” where the potential scope of ineffective assistance of counsel claims has grown into something that would be unrecognizable to the framers of the U.S. Constitution.

## Background: The Sixth Amendment Right to Counsel

The Sixth Amendment to the U.S. Constitution states:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, **and to have the assistance of counsel for his defense.**” (emphasis added)

The words in bold are generally referred to as the “Assistance of Counsel Clause” of

the Sixth Amendment. In *United States v. Van Duzee* (1891)<sup>3</sup>, the Supreme Court articulated that the original understanding of the “Assistance of Counsel Clause” was that the defendant had a right to employ counsel or to obtain the voluntary services of counsel. The Court, in *Gideon v. Wainwright* (1963)<sup>4</sup>, extended the original interpretation of the Sixth Amendment to include the provision of legal services to indigent defendants. In *McMann v. Richardson* (1970)<sup>5</sup>, the Supreme Court extended the reach of the clause further and articulated that the Sixth Amendment “right to counsel is the right to the effective assistance of counsel.” As such, “ineffective assistance of counsel” occurs when the performance of the defendant’s attorney was so poor that it deprived the client of the right guaranteed under the clause. The Supreme Court cautioned, however, that with respect to advice, the issue of whether the defense counsel provided adequate representation depends not on whether a court would consider the advice right or wrong, but on whether that advice was “within the range of competence demanded of attorneys in criminal cases.”<sup>6</sup>

The Supreme Court, in an opinion written by Justice O’Connor, found that counsel’s conduct in *Washington* at and before the defendant’s sentencing hearing was not unreasonable and, even assuming it was unreasonable, respondent suffered insufficient prejudice to warrant a setting aside of the death sentence.<sup>7</sup> The Court thus established, for the first time, a two-pronged test<sup>8</sup> for finding the right to effective assistance of counsel has been denied:

1. Counsel’s performance must be deficient, requiring a showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed defendant by the Sixth Amendment. That is, did counsel’s representation fall “below an objective standard of reasonableness.”<sup>9</sup>
2. The deficient performance prejudiced the defense, requiring a showing that, but for counsel’s errors, there is a “reasonable probability” that the result of the proceeding would have differed.<sup>10</sup>

Further, the Court stated, “The Sixth Amendment right to counsel is the right to the effective assistance of counsel, and

the benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.”<sup>11</sup> It is within the paradigm of the “proper functioning of the adversarial process” where the *Strickland* standard lies.

The Court has historically limited the Sixth Amendment to effectiveness directly related to defense against prosecution of the charged offense. With regard to the competence of legal advice, the Court has limited the inquiry to advice at trial, post-indictment interrogations and lineups<sup>12</sup>, and in general advice at all phases of the prosecution.<sup>13</sup>

The Court, prior to 2010, did not extend the constitutionality regarding advice beyond those matters germane to the criminal prosecution at hand, meaning “the sentence that the plea will produce, the higher sentence that conviction after trial might entail and the chances of such a conviction.”<sup>14</sup> “Defense” was further interpreted to mean “defense at trial, not defense in relation to other objectives that may be important to the accused.”<sup>15</sup>

## Padilla: A New Fork in the Road

The Supreme Court followed up *Strickland* with its decision in *Hill v. Lockhart* (1985).<sup>16</sup> In *Lockhart*, the defendant pleaded guilty in an Arkansas court to charges of first-degree murder and theft of property. Later, the defendant filed a habeas corpus petition alleging that his guilty plea was involuntary because his counsel had misinformed him that, if he pleaded guilty, he would become eligible for parole after serving a third of his sentence, when, in fact, parole eligibility would not accrue until the defendant, as a “second offender,” had served one-half of his sentence. The Supreme Court found that it was unnecessary to determine whether erroneous advice by counsel as to parole eligibility is constitutionally ineffective assistance of counsel, finding that the defendant, as to the second prong (prejudice) under *Strickland*, failed to allege that had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial.<sup>17</sup>

There was nothing inconsistent with the Court’s ruling in *Lockhart* in light of *Strickland*. Simply put, the second prong of

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the test was not pleaded sufficiently by the defendant and, as such, ineffective assistance of counsel was not found. However, the Court's implication that the "erroneous advice by counsel as to parole eligibility" might amount to ineffective assistance of counsel (had prejudice been alleged) foreshadowed a willingness by the Court to consider in future cases the competency of advice in matters "collateral" to the "proper functioning of the adversarial process."

In 2010, the U.S. Supreme Court expanded the reach of ineffective assistance of counsel claims with a decision in *Padilla v. Kentucky*.<sup>18</sup> *Padilla* involved a lawful permanent resident who plead guilty to drug distribution charges in Kentucky. While counsel's performance with regard to the adjudication of guilt phase of the case or with regard to advice to his client regarding the direct consequence of a guilty plea were not faulted, the Supreme Court found that counsel's failure to properly inform the defendant of the "collateral" consequences of a conviction, in that case, the risk of deportation, qualified as ineffective assistance of counsel.

### **Frye and Lafler: The Court Shifts Its Focus outside of The Courtroom**

On March 21, 2012, the Supreme Court issued a pair of decisions that further expanded the right to effective assistance of counsel and, as one observer put it, "[l]ike Rip Van Winkle, has at last awoken from its long slumber and sees the vast field it has left all but unregulated."<sup>19</sup> Galin Frye was arrested by Missouri authorities for driving with a revoked license. This was not Frye's first offense and he was looking at a possible four-year prison term for his felony offense. The prosecutor offered Frye two different plea deals that ranged from a three-year sentence with 10 days in jail to a misdemeanor plea with a 90-day sentence. Frye's attorney did not advise him about either offer from the state. Frye then compounded matters by getting arrested again for driving with a revoked license just a few days before his preliminary hearing. Frye decided to plead guilty with no underlying plea agreement and received a three-year prison sentence.<sup>20</sup>

In another case, Blaine Lafler pointed a gun at a woman's head and fired, but the shot missed. Lafler then pursued his victim and eventually was able to shoot her in the buttock, hip and abdomen.<sup>21</sup> Lafler's

## **The holdings in these cases elevate the right to effective assistance of counsel into a freestanding constitutional right, and that right is no longer dependent or conditioned or based upon whether or not a criminal defendant received a fair trial.**

victim fortunately survived and Michigan authorities made two plea offers to Lafler. One contained a sentence recommendation of 51 to 85 months. The other, made the first day of trial, offered a significantly less favorable deal and was also rejected by Lafler on the advice of his counsel. It was later revealed that Lafler's attorney incorrectly advised him that he could not be convicted of intent to murder his victim because he shot her below the waist. Lafler was, in fact, convicted at trial and received a mandatory minimum sentence of 185 to 360 months imprisonment.

While the Supreme Court's decisions finding that both Galin Frye and Blaine Lafler received ineffective assistance of counsel have been properly described as groundbreaking, the Court's decisions were predictable in some ways. In *Hill v. Lockhart*, the Court, within a year of its decision in *Strickland*, extended the reach of its holding in *Strickland*.<sup>22</sup> Moreover, the results in *Frye* and *Lafler* were surely telegraphed by some of the language contained in the Court's opinion in *Williams v. Taylor*.<sup>23</sup> The Court acknowledged that the *Strickland* test provided sufficient guidance for resolving almost all ineffective assistance of counsel claims, but "[t]here are situations in which the overriding focus on fundamental fairness may affect the analysis."<sup>24</sup> In *Frye*, the Court specifically found, as a general rule, that defense attorneys have a duty to communicate formal offers

from prosecutors to accept pleas on terms and conditions that may be favorable to the defendant and that when a defense lawyer allows such a plea offer to expire without advising his client or allowing him to consider it, that attorney does not render effective assistance of counsel.<sup>25</sup>

In *Lafler*, the Supreme Court addressed a situation in which it was conceded that Lafler's attorney was ineffective based upon his obviously incorrect advice to his client that he could not be convicted of attempted murder simply because he shot the victim below the waist. The Court also found that Lafler had received ineffective assistance of counsel because, even though he received a trial free from "constitutional flaw," he was prejudiced by his attorney's deficient performance.<sup>26</sup> The Court went on to explain that it could no longer accept the argument that fair trials remove any deficient performance by a defendant's counsel that occurred during the plea bargaining process because to do so "[i]gnores the reality that criminal justice today is for the most part a system of pleas, not a system of trials." Specifically, the Court pointed out that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas.<sup>27</sup> Interestingly, the Court did not order that the defendants in *Frye* and *Lafler* receive specific relief, but instead remanded their cases back to state courts to be analyzed under procedures and standards that are perhaps better explained and properly the subject of a separate article.

### **The Impact of Frye and Lafler**

Although it is clear from prior decisions that the U.S. Supreme Court has taken a more expansive view of the 6<sup>th</sup> Amendment's right to effective counsel, the Court's decisions in *Frye* and *Lafler* constitute a dramatic change in criminal procedure. The Court based its opinions on its finding that "the reality is that plea bargains have become so central to the administration of the criminal justice system..." and further found that plea bargaining, due to the fact that between 94 and 97 percent of all criminal convictions result from pleas, is the criminal justice system.<sup>28</sup>

The holdings in these cases elevate the right to effective assistance of counsel into a freestanding constitutional right, and that right is no longer dependent or conditioned or based upon whether or not a criminal defendant received a fair trial. This is especially astounding in light

of the fact of the Court's prior holding that "[t]here is considerable doubt that the 6<sup>th</sup> Amendment itself, as originally drafted by the framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense."<sup>29</sup>

As further evidence as to how groundbreaking and expansive the Court's decisions in *Frye* and *Lafler* are, one need only review some of the observations by proponents of the Court's decisions. One writer hails the decision as no longer limiting the right to counsel to protecting the fairness and adequacy of the trial and opening a "new era" in jurisprudence.<sup>30</sup> This same author quotes another law professor who contends that the 6<sup>th</sup> Amendment guarantee to counsel "[s]hould be, a radically different guarantee than that contemplated by the framers."<sup>31</sup>

The root of the proponents' beliefs in an expansive reading of the 6<sup>th</sup> Amendment's right to counsel is perhaps best summarized and addressed by the Honorable Jed Rakoff in his analysis of *Frye* and *Lafler* in his insightful essay for the *Yale Law Journal*.<sup>32</sup> Rakoff explains *Frye* and *Lafler* as reactions to the increased criminal penalties imposed on defendants by both state and federal legislatures since the 1960s. In Rakoff's view, increased penalties such as mandatory minimum sentences, sentencing guidelines, as well as three-strikes laws and sentencing enhancements, have put defense counsel in situations where they are required to negotiate plea bargains so as to reduce their clients' exposure to being sentenced for long periods of incarceration for their offenses. The combination of these circumstances, according to Rakoff, has shifted the resolution of most criminal cases from the courtroom to the prosecutor's office. Rakoff correctly points out that the Court's decisions in *Frye* and *Lafler* do nothing to address the "front-end loading" of the criminal justice system, but may, in fact, make the situation worse by pushing defense lawyers toward urging their clients to take the first plea that is offered.<sup>33</sup> Furthermore, as also pointed out by Rakoff, experienced and effective defense lawyers generally do not accept the first plea offer and instead take the time to investigate and prepare their client's defense, which often leads to a better plea offer. Ironically, *Frye* and *Lafler*

## Many in the criminal justice system feel as though the Court's decisions in *Frye* and *Lafler* have opened a "new era" in jurisprudence.

have altered the standard of performance for criminal defense lawyers who, before the decisions were issued, could have been held deficient for failing to investigate their clients' cases, but now might be considered deficient for having failed to accept a favorable plea bargain for their client. The end result, Rakoff forecasts, will be that defendants who are less than scrupulous will, like many criminal defendants do, try to have it both ways by both claiming their lawyers did not spend the proper amount of time preparing their case and/or the attorney failed to properly advise them as to the acceptance or declination of the state's plea offer.<sup>34</sup>

Judge Gerard Lynch of the United States Court of Appeals for the 2<sup>nd</sup> Circuit takes an opposing view to his colleague, Jed Rakoff. He contends that the decisions in *Frye* and *Lafler* are "no big deal."<sup>35</sup> Judge Lynch shares the view of the majority of the Supreme Court that "[t]he actual system of justice is not the one we read about in civics books and thrill to in the occasional real or fictional courtroom drama."<sup>36</sup> He further summarizes the court's view that, since approximately only 5 percent or less of cases go to trial, limiting the right to effective assistance of counsel to those few defendants in effect excludes the remaining 95 percent from competent representation.<sup>37</sup> Judge Lynch further acknowledges that most criminal defendants plead guilty because they are indeed guilty and the prosecution can prove it. Moreover, he contends that, because of the severe penalties that most criminal defendants face, the "bargains" that they receive are not really "discounts" from the sentences that they end up with because our system of justice "[i]s designed to produce pleas in large part by threatening defendants who go to trial

with extreme sentences."<sup>38</sup> Judge Lynch concludes his analysis by not predicting any earth-shattering disruptions in the criminal justice system and that the courts will eventually find a way to address and properly dispose of the claims that will follow the Court's decisions in *Frye* and *Lafler* the same way that they address other claims of ineffective assistance of counsel.

## New Rights or Pre-Existing Responsibilities

Many in the criminal justice system feel as though the Court's decisions in *Frye* and *Lafler* have opened a "new era" in jurisprudence.<sup>39</sup> Justice Scalia, in his biting dissent, accused the Court's majority of creating a whole new field of constitutionalized plea bargaining law.<sup>40</sup> Furthermore, Justice Scalia also points out that the implications of the Court's decisions will very likely directly affect prosecutors in the future by creating "rules" that govern their behavior in plea bargaining cases in the future.<sup>41</sup> Justice Scalia's dissent, whether one agrees with it or not, highlights not only unanticipated consequences that may likely arise from the Court's decision, but also addresses the implications of the Court's declaration that plea bargaining is the criminal justice system.<sup>42</sup>

It should be noted that defense counsel, as well as the prosecution, already have responsibilities with regards to their activities both inside and outside the courtroom, specifically, the *Alabama Rules of Professional Conduct*. Those rules state in the preamble that lawyers have "special responsibility for the quality of justice," that "in all professional functions a lawyer should be competent, prompt and diligent."<sup>43</sup> But the *Rules of Professional Conduct* do not stop there. Rule 1.1 defines competent representation as requiring legal knowledge, skill, thoroughness and preparation, *reasonably* necessary for the representation. Rule 1.4 requires attorneys to keep their clients reasonably informed about the status of their case and to explain matters to the extent reasonably necessary so as to permit their client to make informed decisions. The attorneys for the accused in *Frye* and *Lafler* ran afoul of these provisions by either not communicating with their client and/or giving less than knowledgeable legal advice. In addition to the *Rules of Professional Conduct*, the American Bar Association has developed

guidelines for the appointment and performance of defense counsel in capital cases as well as general standards for professional conduct and performance of attorneys who represent criminal defendants. These standards are not merely academic. They have been cited by the United States Supreme Court, federal appellate courts, as well as Alabama courts in past.<sup>44</sup> The Supreme Court in *Strickland* stated that the ABA standards were ones which the Court had long referred to as “guides to determining what is reasonable.”<sup>45</sup> Those standards, particularly the defense function standards, caution attorneys not to carry workloads so excessive that they interfere with the rendering of quality representation.<sup>46</sup> The authors believe that attorneys carrying excessive workloads are oftentimes responsible for the perception amongst indigent clients that his or her attorney did not spend the proper amount of time or effort on his or her case.

These standards set a much higher standard than the rules of professional responsibility. For example, Standard 4.1 requires defense counsel to investigate his client’s case regardless as to whether the client has admitted to committing the crime and/or has stated the desire to plead guilty.<sup>47</sup> Both the Alabama State Bar’s *Rules of Professional Responsibility* as well as the *Professional Standards for Defense Counsel* set forth by the ABA require that attorneys who represent criminal defendants act in a reasonable, diligent and professional manner during their representation—whether inside or outside the courtroom. Attorneys who abide by these requirements can be assured that their performance will never be found to be deficient so as to constitute ineffective assistance of counsel.

The circumstance in which a violation of the *Rules of Professional Responsibility*, as well as failing to adhere to the ABA *Standards for Criminal Defense Representation*, is not a hypothetical one at all. The Supreme Court actually addressed such an occurrence in a case originating in Alabama. In *Maples v. Thomas*, the Supreme Court addressed the claim of Alabama death row inmate Cory Maples that he had been abandoned by his attorneys on appeal.<sup>48</sup> More specifically, Maples was represented by two volunteer attorneys from one of America’s most prestigious law firms. Unfortunately for Maples, the two attorneys left their employment at the firm and their subsequent employment


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prohibited them from representing him any further. The attorneys not only failed to inform Maples of the fact they no longer represented him, but they also disregarded Alabama law by failing to seek the trial court’s leave to withdraw from Maples’s case.<sup>49</sup> When no lawyer from the firm entered an appearance and when no action was taken by Maples’s Alabama attorney, the 42-day period in which Maples had to file a timely notice of appeal ran out. The facts in this case compelled the Supreme Court to find that Maples was entitled to relief upon his claim in spite of the fact that well-settled law holds defendants were bound by their attorney’s failure to meet a filing deadline.<sup>50</sup> The Court further noted that in *Holland v. Florida* it had recently found that an attorney’s unprofessional conduct can sometimes be an “extraordinary circumstance” that may justify relief for a prisoner who would not otherwise be entitled to any relief under the law.<sup>51</sup> It should be evident to even the casual observer of U.S. Supreme Court decisions that the Court is increasing its focus on the professional behavior of attorneys not only in the courtroom, but in other areas of representation as well.

### Advice for the Future

As shown above, attorneys who represent criminal defendants should strive at

all times during their representation to be professional, competent and diligent with regards to that representation. However, a small note of caution is perhaps advised here. For decades our society has been reminded by many in the healthcare industry as to the cost of defensive medicine. This, of course, refers to the practice of doctors ordering expensive and oftentimes unnecessary tests and procedures for their patients in order to avoid potential liability from a malpractice lawsuit. Likewise, defense counsel should resist the temptation to engage in defensive lawyering simply to avoid a claim of ineffective assistance of counsel. The wisdom of the California Court of Appeals in *People v. Eckstro*<sup>52</sup> is particularly relevant here. The court, after rebuking appellate counsel for raising what it believed to be totally meritless claims of ineffective assistance of trial counsel, set out to describe what it believed to be two types of attorneys that represent criminal defendants. The first attorney filed every conceivable motion on behalf of his client and created a paper trail from which it



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would be hard to find that the attorney committed any maleficence whatsoever. The court observed that while this attorney does everything “by the book,” that he usually loses because he files every conceivable motion and “presents issues *ad nauseum*.”<sup>53</sup>

The second attorney described by the court is one who is much more effective. He reduces issues to simple terms, is miserly with motions and objections and “[h]as an instinct for jugular...” This attorney, the court noted, ignores the trivial, focuses on the meritorious issues and “[i]s as effective as the attorney in the first category is ineffective.”<sup>54</sup> It is this kind of attorney that, as members of the bar, we would want representing us were we to ever be charged with a crime or any other matter in which we needed legal representation. This attorney is not ineffective and is the type of attorney that all who are members of the bar should strive to emulate. | [AL](#)

## Endnotes

1. *Missouri v. Frye*, No. 10-444, Slip Op. (U.S. Mar. 21, 2012) and *Lafler v. Cooper*, No. 10-209 (U.S. Mar. 21, 2012).

2. *Strickland v. Washington*, 466 U.S. 668 (1984).
3. *United States v. Van Duzee*, 140 U.S. 169, 173 (1891); “The object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to them; but it was not contemplated that this should be done at the expense of the government.”
4. *Gideon v. Wainwright*, 372 U.S. 335, 344-345 (1963).
5. *McMann v. Richardson*, 397 U.S. 771 n.14 (1970).
6. *Id.* at 771.
7. *Strickland*, 466 U.S. at 699. The Court found counsel’s decision to rely on the colloquy was a “strategic choice.”
8. *Id.* at 687.
9. *Id.* at 688.
10. *Id.* at 694.
11. *Id.* at 685.
12. *Massiah v. United States*, 377 U.S. 201, 205-206 (1964)
13. *Moran v. Burbine*, 475 U.S. 412, 430 (1986)
14. Quoting Justice Scalia in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010)(Scalia, J, dissent)
15. Quoting the concurring opinion in *Rothgery v. Gillespie County*, 554 U.S. 191, 216 (2008)(Alito, J. concurring)
16. *Hill v. Lockhart*, 474 U.S. 52 (1985).
17. *Id.* at 60.
18. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).
19. Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 Harv.L.Rev. 150 (2012).
20. *Missouri v. Frye*, No. 10-444, Slip Op. (U.S. Mar. 21, 2012).
21. *Lafler v. Cooper*, No. 10-209, Slip Op. (U.S. Mar. 21, 2012).
22. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).
23. *Williams v. Taylor*, 529 U.S. 362, 391 (2000).
24. *Id.*
25. *Missouri v. Frye*, No. 10-444, Slip Op. at 9 (U.S. Mar. 21, 2012).
26. *Lafler v. Cooper*, No. 10-209, Slip Op. at 7 (U.S. Mar. 21, 2012).
27. *Lafler v. Cooper*, No. 10-209, Slip Op. at 11 (U.S. Mar. 21, 2012).
28. *Missouri v. Frye*, No. 10-444, Slip Op. at 7 (U.S. Mar. 21, 2012).
29. *Scott v. Illinois*, 440 U.S. 367, 370 (1979).
30. Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, Journal of Constitutional Law.
31. *Id.*
32. Jed S. Rakoff, *Frye and Lafler: Bearers of Mixed Messages*, 122 Yale L.J. Online 25 (2012).
33. *Id.*
34. *Id.*
35. Gerard E. Lynch, *Frye and Lafler: No Big Deal*, 122 Yale L.J. Online 39 (2012).
36. *Id.*
37. *Id.*
38. *Id.*
39. Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, Journal of Constitutional Law.
40. *Lafler v. Cooper*; No. 10-209, Slip Op. at 1 (U.S. Mar. 21, 2012).
41. *Id.* at 2.
42. *Lafler v. Cooper*, Slip Op. at 11 (U.S. Mar. 21, 2012).
43. *Alabama Rules of Professional Conduct*, preamble: A Lawyer’s Responsibilities.
44. See *Rompilla v. Beard*, 545 U.S. 374 (2005), *Presley v. State*, 2005 Ala.Crim.App. Lexis 52 (Feb. 25, 2005).
45. *Strickland v. Washington*, 466 U.S. at 688.
46. ABA Criminal Justice Section Standards, Defense Function, Standard 4-1.3(e).
47. ABA Criminal Justice Section Standards, Defense Function, Standard 4-4.1(a).
48. *Maples v. Thomas*, 132 S.Ct. 912, 913 (2012).
49. *Id.*
50. *Id.* at 914-915.
51. *Id.* at 915.
52. *People v. Eckstrom*, 43 Cal.App.3d 996, 1002 (1974).
53. The authors cannot resist pointing out that while filing every conceivable motion is an identifying factor of a less than effective attorney at trial, so is raising every conceivable issue on appeal. Even though most legal experts and appellate judges almost universally declare that no case usually has more than two or three good appealable issues, the appellate courts of this state routinely see briefs that raise between five and 10 issues from a single proceeding. This not only clogs the judicial system, but it clearly irritates appellate court judges and cannot be helpful to the client’s case.
54. *Id.* at 1002-1003.

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## **RECENT CIVIL DECISIONS**

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

#### **Discovery**

##### ***Ex parte Michelin North America, Inc.*, No. 1120330 (Ala. Jan. 24, 2014)**

In a complex mandamus involving discovery in a tire separation products case, the supreme court disallowed a plaintiff's effort to conduct a videotaped plant inspection at the plant where the tire was manufactured, even though the tape would admittedly assist the plaintiff in presenting her case, because of its exposure of defendant's trade secrets. As to discovery directed to other tire sizes and manufacture locations and time periods, the trial court did not exceed its discretion in ordering discovery of those items. The trial court had discretion to disregard excess burden argument made for the first time on a motion for protective order, filed after the original motion to compel the discovery had been granted.

#### **Intentional Interference with Business Relations; Refusals to Deal**

##### ***Alabama Psychiatric Services, P.C. v. A Center for Eating Disorders, LLC*, No. 1110703 (Ala. Jan. 24, 2014)**

Mere refusal to deal is not evidence of an intentional interference with a business relationship, because Alabama courts cannot force a company to do business with another company.

#### **Zoning**

##### ***The City of Alabaster et al. v. Shelby Land Partners, LLC & Alabaster Land Co.*, No. 1120677 (Ala. Jan. 24, 2014)**

In zoning challenge, burden is on the landowner to demonstrate that the existing zoning bears no substantial relationship to the city's interests in promoting health, safety, wellness and morals, and that landowners failed to make that showing. The case contains a succinct concurrence by Justice Murdock (joined by Justice Shaw) clarifying the law in this area.



**Marc A. Starrett**

## Expansion of Mandamus Review

**Ex parte U.S. Bank, No. 1120904 (Ala. Feb. 7, 2014)**

**Ex parte Hodge, No. 1121194 (Ala. Feb. 7, 2014)**

These cases mark the most comprehensive restatement of the law to date concerning the availability of civil mandamus to challenge interlocutory trial court orders. *U.S. Bank* involved an outcome-determinative, threshold choice-of-law issue. *Hodge* involved the four-year period of repose in medical malpractice, under *Ala. Code* § 6-5-482(a), where the claim may not have accrued or been discoverable (because the plaintiff had not experienced any deleterious effects from the alleged wrongful act). *U.S. Bank*, authored by Justice Bolin, helpfully synthesizes the extant grounds for seeking civil mandamus relief, finding over 20 issues for which the court will conduct mandamus review. Both cases discussed the “lack of adequate remedy by appeal” element required to demonstrate entitlement to mandamus relief. In both cases, the court concluded that the additional expense of litigation in the trial court, which would be incurred absent immediate appellate review, justified the court’s consideration of the issues by mandamus. This latter holding is the most significant and groundbreaking aspect of these cases—until these cases, a litigant’s exposure to additional litigation cost did not demonstrate that the litigant lacked adequate relief by appeal. One other interesting note: In *Hodge*, the majority noted that immediate appellate review by mandamus would be needed in situations where a Rule 5 certification of an issue would be unavailable, because Rule 5 requires an unsettled question of law, whereas the petitioner in mandamus must demonstrate a “clear legal right to relief”—thus necessitating a settled question of law.

## Wills

**Ex parte Ricks, No. 1120260 (Ala. Feb. 7, 2014)**

In a plurality opinion, the court held that once the proponent introduces the probate proceedings in a will contest in the circuit court, including the judgment admitting the will to probate, the validity of the will is *prima facie* sustained, and it is then the duty of the contestant to produce evidence countermanding the will’s validity.

## Rule 59(E) Motions; Discretion of Trial Court to Consider New Legal Argument

**Alfa Mut. Ins. Co. v. Culverhouse, No. 1121127 (Ala. Feb. 14, 2014)**

A trial court has discretion to consider, in a Rule 59(e) motion, a legal argument made for the first time in the Rule 59(e) motion, even where the proponent of the argument

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does not offer any explanation as to why the argument was not made before the earlier dispositive ruling.

## Probate and Conservatorships

**Beam v. Taylor, No. 1120678 (Ala. Feb. 14, 2014)**

Under *Ala. Code* § 26-2-2, a party seeking to transfer a conservatorship proceeding from probate to circuit court must file a petition in the circuit court to transfer, and the circuit court must grant that motion, before the circuit court acquires jurisdiction over the conservatorship. In this case, the circuit court never acquired jurisdiction over a conservatorship proceeding because this procedure had not been followed, and thus, there was no appellate jurisdiction. Additionally, the administrator *ad colligendum* was not the proper party to file a removal petition under *Ala. Code* § 26-2-2, absent special equity.

## Standing; Immunity

**Ex parte Aull, No. 1120641 (Ala. Feb. 14, 2014)**

The decedent’s estate lacked standing to pursue a claim for injunctive relief regarding police Taser procedures for lack of any concrete interest.

## Longshoremen

**Groton Pacific Carriers, Inc. v. Jackson, No. 1120613 (Ala. Feb. 14, 2014)**

Under the controlling legal standard for determining work-er status, there was a genuine issue of material fact as to whether they were actually “longshoremen” under federal law. The opinion (authored by Justice Main) contains an excellent compendium of law on this issue.

### State Immunity (Rehearing, Part Deux)

**Health Care Authority for Baptist Health v. Davis (Ala. May 13, 2013, modified on denial of rehearing Feb. 28, 2014)**

In denying the second petition for rehearing, the court modified its May 13, 2013 opinion, in which the court had reversed its original-submission opinion conferring Section 14 immunity on Baptist Hospital in Montgomery because of its administrative affiliation with UAB and denied immunity. The significant modification appears to be the addition of a lengthy footnote (5), which distinguished a number of prior cases relating to immunity conferred on public hospitals.

### Ore Tenus Rule; Adverse Possession

**Ex parte Cottrell, No. 1111006 (Ala. Feb. 28, 2014)**

When a plaintiff seeking to quiet title establishes peaceable possession, the burden then shifts to the defendant to demonstrate valid legal title. Upon that demonstration, the burden shifts back to the plaintiff to show superior title by adverse possession or a better deed.

### Arbitration; Waiver

**Kenamer v. Ford Motor Credit Co., No. 1120689 (Ala. Feb. 28, 2014)**

The assignee of an auto contract waived the right to compel arbitration of the consumer's claims by filing and prosecuting to judgment post-repossession deficiency action in district court. The dealer (who was joined as a counterclaim defendant in the circuit court appeal) was not subject to waiver defense, since the actions of the assignee were not attributable to dealer. Even though piecemeal litigation would now be required, the FAA requires piecemeal litigation when some claims are arbitrable but others are not.

### Venue; Forum Non Conveniens

**Ex parte State Farm Mut. Auto. Ins. Co., No. 1121338 (Ala. Feb. 28, 2014)**

A resident of Clarke and Mobile counties (plaintiff) sued the tortfeasor defendant (Baldwin resident) and SF, her UM carrier, arising from an accident in Mobile County. The suit was filed in Clarke County. SF moved to transfer to Mobile County under *forum non conveniens*, attaching the affidavit of the investigating officer (resident of Mobile County) as to convenience. The trial court denied transfer, but the supreme court granted mandamus relief under the "convenience of parties and witnesses" prong of section 6-11-21.1.

### Personal Jurisdiction

**Ex parte Merches, No. 1120965 (Ala. Mar. 14, 2014)**

An out-of-state defendant received a phone call from the plaintiff for her employer in Tennessee, after which she contacted law-enforcement authorities in Alabama, then subsequently called the plaintiffs back and allegedly agreed to provide certain money. The circuit court denied the defendant's personal jurisdiction challenge. The supreme court granted mandamus relief, holding that these contacts, even though related to the claims in issue, were insufficient to satisfy the "purposeful availment" standard.

### Bail Bonds; Standing and Immunity

**Poiroux v. Rich, No. 1120734 (Ala. Mar. 14, 2014)**

In action challenging the fees assessed on bail bonds pursuant to *Ala. Code* § 12-19-311(a)(1)a ("the filing fee") and § 12-19-311(a)(1)b ("the back-end fee"), bail bonding companies had standing to seek injunctive relief to challenge the legality of the filing fees.

### Municipal Liability; Caps

**Morrow v. Caldwell, No. 1111359 (Ala. March 14, 2014)**

In an 8-0 opinion (by the venerable and deathless Justice *Per Curiam*), the court held that the \$100,000 cap on cities and counties does not apply to city and county employees who are sued in their individual capacities.

### Estates; Personal Representative Compensation

**Wehle v. Bradley, No. 1101290 (Ala. Mar. 14, 2014)**

The daughters challenged the reasonableness of \$1.9 million compensation paid to PRs in the administration of a \$35+million estate, under *Ala. Code* § 43-2-848(a). The court affirmed in part the award of fees, applying the ore tenus rule and a multi-factor analysis.

## From the Alabama Court Of Civil Appeals

### Attorneys' Fees; Decedent's Estates

**Keeling v. Keeling, No. 2120612 (Ala. Civ. App. Jan. 17, 2014)**

*Ala. Code* § 43-2-354 allows an estate's PR to recover "costs" against an estate claimant who unsuccessfully pursues a claim against the estate. The court of civil appeals

held, in a case of first impression, that “costs” do not include attorneys’ fees, but that the award of costs under the statute is mandatory.

### Rule 54(B)

**McDowell v. Hunt Oil Company, No. 2120902 (Ala. Civ. App. Jan. 24, 2014)**

Another Rule 54(b) certification “bites the dust” (with apologies to John Deason): Claims remaining pending in the trial court (over the ownership of certain mineral interests and rights) were intertwined with the claims made the subject of the dispositive ruling.

### Workers’ Compensation; Out-of-State Accident

**Ex parte Southern Erectors, Inc., No. 2130164 (Ala. Civ. App. Feb. 21, 2014)**

A workers’ comp action, based upon an injury the employee received in a work-related accident occurring in Kansas while he was employed by the defendant, was ordered dismissed for a lack of subject-matter jurisdiction.

### Workers’ Compensation; “Employee” Status

**Brown v. Dixie Contracting Co., No. 2120655 (Ala. Civ. App. Mar. 14, 2014)**

The court reversed the trial court’s determination of “independent contractor” status because the indicia of rights of control—(1) direct evidence demonstrating a right or an exercise of control, (2) the method of payment for services, (3) whether equipment is furnished and (4) whether the other party has the right to terminate the employment—all suggested an employee status.

### Civil Forfeitures (Two-For-One)

**Williams v. State, No. 2121004 (Ala. Civ. App. Mar. 7, 2014); Hall v. State, No. 2120818 (Ala. Civ. App. Mar. 7, 2014)**

In *Williams*, the court invalidated a civil forfeiture on the basis that the “mere proximity” of controlled substances to cash did not satisfy the state’s burden of proof. In *Hall*, the court held that a seven-week delay between the initial seizure and commencement of civil forfeiture, without explanation from the state, failed the promptness requirement.

## From the United States Supreme Court

### CAFA; Mass Actions

**Mississippi ex rel. Hood v. AU Optronics Corp., No. 12-1036 (U.S. Jan. 14, 2014)**

A suit by a state brought on behalf of its citizens, where the state is the only named plaintiff, does not constitute a “mass action” under CAFA, 28 U.S.C. § 1332(d)(11), and therefore is not removable.

### Personal Jurisdiction; Corporations

**Daimler AG v. Bauman, No. 11-965 (U.S. Jan. 14, 2014)**

A foreign parent corporation was not amenable to a suit in California for injuries allegedly caused by the conduct of a subsidiary that took place entirely outside the United States, solely because other corporate affiliates were operating continuously in California.

### Transportation

**Air Wisconsin Airlines v. Hoeper, No. 12-315 (U.S. Jan. 27, 2014)**

Under the Aviation and Transportation Security Act, airlines and their employees are immune from civil liability for reporting suspicious behavior, but pursuant to 49 U.S.C. § 44941(b), that immunity is not available for disclosures “made with actual knowledge that the disclosure was false, inaccurate, or misleading” or “with reckless disregard as to the truth or falsity of that disclosure.”

### FLSA

**Sandifer v. U.S. Steel Corp., No. 12-417 (U.S. Jan. 27, 2014)**

The time that petitioners spent donning and doffing their protective gear was not compensable under the FLSA.

### Personal Jurisdiction

**Walden v. Fiore, No. 12-574 (U.S. Feb. 25, 2014)**

A tort action was filed in Nevada arising out of allegations against a Georgia police officer who searched the plaintiffs at a Georgia airport, seized a large amount of cash and allegedly drafted a false probable cause affidavit in support of the funds’ forfeiture. Held: The Georgia defendant lacked the “minimal contacts” with Nevada.

## Pre-Trial Seizures

### **Kaley v. US, No. 12-464 (U.S. Feb. 25, 2014)**

When challenging the legality of a 21 U.S.C. section 853(e)(1) pre-trial asset seizure (which requires a determination of probable cause), a criminal defendant who has been indicted is not constitutionally entitled to contest a grand jury's determination of probable cause to believe the defendant committed the crimes charged.

## Securities Law

### **Chadbourne & Parke LLP v. Troice, No. 12-79 (U.S. Feb. 26, 2014)**

The Securities Litigation Uniform Standards Act of 1998 (SLUSA) forbids the bringing of large securities class actions based on state law as to a "covered security." Held: The SLUSA does not preclude the plaintiffs' state-law class actions, which allege that the defendants helped Allen Stanford and his companies perpetrate a Ponzi scheme by falsely representing that uncovered securities (certificates of deposit in Stanford International Bank) that plaintiffs were purchasing were backed by covered securities.

## Sarbox

### **Lawson v. FMR LLC, No. 12-3 (U.S. March 4, 2014)**

The whistleblower protection provisions of the Sarbanes-Oxley Act of 2002, contained in 18 U.S.C. § 1514A, include employees of a public company's private contractors and subcontractors when they report covered forms of fraud.

## Bankruptcy

### **Law v. Siegel, No. 12-5196 (U.S. March 4, 2014)**

The Bankruptcy Court exceeded the limits of its authority when it ordered that the \$75,000 protected by the debtor's homestead exemption be made available to pay the bankruptcy trustee's attorney's fees, which were incurred by the trustee in overcoming the debtor's fraudulent misrepresentations.

# From the Eleventh Circuit Court of Appeals

## Mortgages; Flood Insurance

### **Faez v. Wells Fargo Bank, NA, No. 13-10230 (11th Cir. Feb. 10, 2014)**

FHA loans contain a covenant requiring borrowers to insure their homes against flood loss to the extent required

by HUD. Issue: Whether the covenant unambiguously permits mortgage lenders to require their borrowers to obtain flood insurance beyond the amount the agency requires. Held: The covenant sets a minimum, but not a maximum, amount which the lender may require, and therefore the borrower's claim that the lender breached the covenant by requiring more insurance than required by the federal standard is not viable.

## Arbitration; Novation

### **Dasher v. RBC Bank, No. 13-10257 (11th Cir. Feb. 10, 2014)**

When, under state law, parties agree to supersede an old contract by forming a new one, basic contract principles require examining the new agreement for evidence of the parties' intent regarding obligations in the old contract (such as arbitration). The parties' silence on arbitration in the new contract provides no evidence that they agreed to be bound to arbitrate their disputes.

## Bankruptcy; Chapter 13

### **In re Brown, No. 13-10260 (11th Cir. Feb. 14, 2014)**

The Eleventh Circuit affirmed the district court's affirmance of the bankruptcy court's refusal to confirm a Chapter 13 Plan for the debtor, where the debtor's primary (really only) reason for filing a Chapter 13 was to finance the attorneys' fees incurred from filing the bankruptcy, and where the debtor would be much better off simply filing a Chapter 7.

## CAFA; Value of Declaratory Relief

### **South Florida Wellness, Inc. v. Allstate Ins. Co., No. 14-10001 (11th Cir. Feb. 14, 2014)**

Issue: Whether the Class Action Fairness Act's \$5,000,000 amount-in-controversy requirement can be satisfied if the plaintiff seeks only declaratory relief. Held: Pure declaratory relief, if valued over \$5 million, could support the CAFA jurisdiction.

## ERISA

### **Fuller v. SunTrust Banks, Inc., No. 12-16217 (11th Cir. Feb. 26, 2014)**

Action against ERISA fiduciaries for malfeasance in connection with the selection of certain plan investments was barred by the applicable six-year statute of limitations, because "the date of the last action which constituted a part of the breach" alleged in Count 2 was when the committee defendants selected the investments.

## RICO

***Simpson v. Sanderson Farms, Inc.*, No. 13-10624 (11th Cir. March 7, 2014)**

The RICO claim was brought by former workers contending that the employer's hiring of illegals depressed wages of legal workers. The district court dismissed the complaint for failure to allege facts demonstrating that the hiring of illegals proximately caused depressed wages. The Eleventh Circuit affirmed, reasoning that "the only wage data even mentioned in the amended complaint show[ed] that the plaintiffs actually received increasing wages at the plant. In attempting to plead injury nonetheless, the plaintiffs have presented only a conclusory market model that is stated at a very high order of abstraction. That model does not permit the plausible inference of injury, nor does it plausibly establish that the defendants' alleged violations of § 1546 directly caused the plaintiffs' wages to become depressed."

## RECENT CRIMINAL DECISIONS

### From the Alabama Supreme Court

#### Confrontation Clause

***Ware v. State*, No. 1100963, 2014 WL 210106 (Ala. Jan. 17, 2014)**

Without determining whether a DNA profile report is "testimonial" for purposes of Sixth Amendment analysis under *Crawford v. Washington*, 541 U.S. 36 (2004), the confrontation clause was nonetheless satisfied by the defendant's cross-examination of a forensic scientist who had reviewed and maintained the report.

#### Rule 32

***Walker v. State*, No. 1121407, 2014 WL 210102 (Ala. Jan. 17, 2014)**

The appellate court has jurisdiction to entertain the defendant's appeal from a new sentence after a Rule 32 proceeding.

## From the Court of Criminal Appeals

#### Rule 30 Appeals

***Ex parte State*, CR-11-1718, 2014 WL 272320 (Ala. Crim. App. Jan. 24, 2014)**

In a trial *de novo* under Rule 30, the circuit court is not statutorily authorized to dismiss the defendant's appeal on the ground that the district court failed to timely transmit its record for the appeal.

#### Evidence; Preservation of Error

***Smith v. State*, CR-12-1146, 2014 WL 502348 (Ala. Crim. App. Feb. 7, 2014)**

The state's evidence that the defendant's victims were killed by multiple gunshots, and that one had been tied up, was sufficient to show the defendant's intent to kill. The defendant's failure to obtain an adverse ruling on motion for a mistrial barred an assignment of error on appeal.

#### Evidence

***Trimble v. State*, CR-12-0914, 2014 WL 502350 (Ala. Crim. App. Feb. 7, 2014)**

In attempted murder case, the danger of unfair prejudice did not substantially outweigh the probative value of the state's evidence that the defendant had previously attacked and threatened his victim.

#### Miranda

***State v. Richards*, CR-12-1823, 2014 WL 590229 (Ala. Crim. App. Feb. 14, 2014)**

The defendant was not entitled to *Miranda* warnings because he was not "in custody" when he voluntarily accompanied arson investigators to answer questions briefly regarding a fire and was not restrained in any manner during the questioning. | [AL](#)

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References available



**Thomas Eugene Buntin, Jr.**

**Walter Ryland Byars**

**Michael D. Freeman**

## Thomas Eugene Buntin, Jr.

Thomas Eugene Buntin, Jr., age 84, died March 10, 2014. He is survived by his beloved wife of 38 years, Sandra Tanner Pruitt Buntin; children Julia Elizabeth Buntin; Thomas Eugene Buntin, III (Kathy); Ellen Buntin Davidson (Toby); Catherine Buntin Johnson (Robert); Rosemary Buntin Gillespy (Gerald); Charles Douglas Buntin (Amy); Bradley Hugh Pruitt (Jennifer); and Christopher Mark Pruitt; sister Eloise Buntin Hovater; 19 grandchildren; and one great-grandchild.



Tommy will be remembered for his warmth, humility and decency. He was born in Dothan on April 29, 1929, the son of Thomas Eugene Buntin and Eleanor Neely Buntin. He graduated high school from Marion Military Institute. He served his country in the United States Army, 31<sup>st</sup> Dixie Division, from 1950 through 1952. He graduated from the University of Alabama where he was a member of the Sigma Nu fraternity. He received his law degree from the University of Alabama in 1955. He was a member of the Phi Alpha Delta legal fraternity and received several awards for scholastic achievement. He began his legal career in Dothan with his father in the firm of Buntin & Buntin, though his father died shortly thereafter.

For five decades, Tommy went about the practice of law with the care, intelligence and meticulousness it deserves. He tried cases, searched titles, closed real estate loans, settled disputes and gave wise counsel, all while adhering to the highest ethical standards. Over the years, he was a patient mentor to scores of young Dothan lawyers.

He was a member of the American Bar Association, the Alabama State Bar, for which he served on several statewide committees, the Houston County Bar Association, for which he served as president, the Alabama Defense Lawyers Association and the Defense Research Institute. He was a fellow of the American College of Mortgage Attorneys, a charter member of the Farrah Law Society and the Alabama Bar Institute and a member of the Council of Alabama Law Institute. He also served on the advisory committee for the United States District Court, Middle District.



Tommy was active in community affairs serving as chair of the March of Dimes, president of the Dothan Jaycees and as a member of the Industrial Development Board of Dothan, the Board of Directors of the Dothan Area Chamber of Commerce and the Benevolent and Protective Order of the Elks. He was an avid, and somewhat accomplished, golfer and provided tireless, committed leadership on behalf of the Dothan Country Club serving as president for three terms.

Tommy was ordained a deacon in the Presbyterian Church in 1957 and served his church as a Sunday school teacher, as well as church treasurer. He was a devoted member of Evergreen Presbyterian Church the last 14 years of his life.

One of the most important soul-healing pastimes of Tommy's life was spending time at his beach cottage overlooking St. Andrew Bay. That mystical place spoke to him and nourished him in a profound way. Perhaps it captured and contained for him all that was joyful and rejuvenating in his life: his God, his family, his fellow man and the awesome beauty of creation. Perhaps it explains why in his final days he was frequently heard to say, "I've had a good life." He did have a good life and we will miss him.

—D. Taylor Flowers, Dothan

## Walter Ryland Byars

Born and raised in Birmingham, Alabama, Walter Byars earned his law degree from the University of Alabama in 1952. After serving in the United States Navy, Walter began his legal career in private practice in Troy and then moved to Atlanta to join the legal department of Southern Bell Telephone and Telegraph Company. Walter returned to Alabama in 1959 to serve as the phone company's general attorney for Alabama. In 1968, Walter joined the Montgomery firm of Steiner Crum & Baker (later Steiner Crum & Byars). During his 60 years of practice, Walter led the Pike County and Montgomery County bar associations and the Alabama State Bar, served



as the city attorney for Montgomery and became a life member of the Alabama Law Institute and American Bar Foundation. Walter was also a regular attendee at the Alabama State Bar Annual Meeting, never missing a chance to see old friends and colleagues.

Walter considered all Alabama lawyers to be part of his extended family. His election as Alabama State Bar president was one of the great political campaigns of all time, and when he was elected by only a slim margin of victory, he proclaimed the result "a mandate from the people!" His service to our bar was not limited to his term as president. Walter always was willing to assist in any matter and render counsel and advice, even without request.

Walter Byars never saw a dog or a boat he did not like. There was no fish he could not catch, no person he could not charm and no lawsuit he could not win. Confidence without arrogance is rare, but Walter struck the balance well. Walter's legal career was exceptional in both breadth and depth. During his decades of practice, Walter excelled in areas as varied as real estate, regulatory and banking work, election disputes, corporate law and trial and appellate litigation. His explanations of defeats competed with his explanations of victories in intensity, cunning and legal scholarship. When he finished the explanation, there was no doubt his cause was more noble and his client more worthy—regardless of the actual outcome of the case.

Devoted is the word that comes to mind to describe Walter's relationship with his fraternity, Sigma Chi. He continued to support and counsel his *lota lota* chapter his entire life. He received the first Lifetime Achievement from his chapter and national recognition as a Significant Sig.

Walter's wife of 63 years, Mickey, their children, Debra, Ryland, Becky and Baxter, and his eight grandchildren brought true joy into Walter's life. All of them enjoyed and, on occasion, endured his counsel and advice on life, love and any other topic he considered necessary. Walter enjoyed true love as well as true friendship with his family.

My first meeting with Walter Byars occurred in the company of Bob Esdale and Alex Newton. The three were closer than brothers, and their bonds of friendship and camaraderie never wavered. For reasons unknown to me, they

embraced me when I was a new lawyer. They decided I would be the beneficiary of their advice and guidance going forward. While that was scary at times, it also proved to be an amazing resource of experience and knowledge. When their advice occasionally differed, it gave me a front-row seat for some of the best “intellectual” debates imaginable. Walter would always carefully explain to me afterwards that he was the brains of the trio.

Whether he was our friend, family, lawyer, leader, mentor or adversary, Walter acted and reacted with an amazing display of wit and, yes, even charm. We all are better lawyers and better people for knowing him as part of life’s journey. He will be greatly missed.

—*J. Mark White, White Arnold & Dowd, Birmingham*

## Michael D. Freeman

Michael D. Freeman—“Mike” to his friends, and he counted everyone he met as a friend—was a man larger than life.

Mike earned a bachelor’s degree from the University of Alabama in 1984, graduated from the University of Alabama’s School of Law in 1988 and joined the firm of Balch & Bingham LLP in Birmingham that same year. Over the course of the next 25 years at Balch & Bingham, Mike rose from associate to the head of the firm’s environmental litigation practice and a role as a trusted advisor to the firm’s largest clients. During his career, Mike carved out a hard-earned reputation as a nationally recognized environmental and energy litigator.

Mike’s professional accomplishments in the courtroom were complemented by a fierce devotion to his clients and a fiery competitive streak. It was a streak, however, both stoked and tempered by a joy for fair, hard-fought competition. For Mike, competition was fun and, for Mike, it was fun to compete. Even in the most challenging situations and when fighting for the highest stakes, it was clear that Mike, with his booming voice, hearty laugh and infectious grin, was having fun doing the job that he loved.



Given the joy that practicing law brought him, it was not surprising that Mike invested much time and self in improving and nurturing his chosen profession. He chaired the American Bar Association’s Environmental Litigation and Toxic Torts Committee, was a Fellow of the American, Alabama and Birmingham Law foundations, served on the Executive Committee of and as the treasurer for the Birmingham Bar Association, was a member of the Board of Trustees of the Legal Aid Society of Birmingham and performed pro bono work in support of the Birmingham Bar Association Volunteer Lawyers Program.

Mike’s generosity of his time and spirit reached beyond the field of law. He supported King’s Home both financially and with pro bono legal services. He raised funds for the Vestavia Hills school system, the American Heart Association, the Vestavia Hills Soccer Club (for which he also served as a team manager) and the YMCA Strong Kids Campaign. As a generous patron of the United Way of Central Alabama, Mike’s efforts earned him recognition in the United Way’s Tocqueville Society. Mike also found time to serve as a member of the Vestavia Hills Park & Recreation Foundation Board.

Nevertheless, Mike reserved his greatest love and enthusiasm for his family—his wife, Sherri, their sons, Tucker and Trevor, and their daughter, Julia. Indeed, many would say that his love for his family and his commitment to them were Mike’s defining characteristics. If Mike’s office was quiet, it was only because he was cheering his children’s accomplishments on the volleyball court or soccer field, sharing his love of Alabama football or reveling in a successful fishing trip with them.

Mike was living life full-bore in the spring of 2013 when he and his family learned that he had been diagnosed with a very rare form of lethal cancer known as blastic plasmacytoid dendritic cell neoplasm, or BPDCN. In his usual inimitable manner, Mike refused to accept defeat in the face of such a grim diagnosis.

Instead, Mike not only attacked his cancer with his characteristic vigor and optimism but even began developing a website, [www.bpdcn.net](http://www.bpdcn.net), to enable others to benefit from the hard-earned first-hand knowledge that he was acquiring in

his fight. And, for a time, it seemed that Mike had won his battle with BPDCN. He even returned to work, perhaps a little shorter of breath but with an even greater zest for life—as if a greater zest for life was even possible for Mike.

On January 17, 2014, however, the insidious cancer succeeded in claiming Mike's life, if not his spirit. As his friends, family, colleagues and clients gathered shoulder to shoulder a few days later to remember Mike, one truth was clear to them all. If Mike was a man larger than life, then his spirit is

certainly larger than death. And, as long as people remember to put others above self and ethics above material gain and family and friends above all else, Mike's spirit will endure in those who were blessed to know him.

In honor of Mike, a scholarship is being established at the University of Alabama School of Law. Donations may be made to the Law School Foundation, Box 870382, Tuscaloosa 35487, reference "Mike Freeman Scholarship."

—Balch & Bingham LLP

**Cherner, Hon. Marvin**

Birmingham

Admitted: 1951

Died: February 28, 2014

**Childress, David Wayne**

Tuscaloosa

Admitted: 1966

Died: December 25, 2013

**Cohen, Isaac Eli**

Montgomery

Admitted: 1939

Died: January 31, 2013

**Creveling, Robert Wharton**

Birmingham

Admitted: 1962

Died: January 9, 2014

**Drennen, Hon. Francis Arnold**

Birmingham

Admitted: 1942

Died: February 24, 2014

**Greene, Hon. George Roy**

Phenix City

Admitted: 1975

Died: January 1, 2014

**Haigh, Thomas Edward**

Troy

Admitted: 1975

Died: February 21, 2014

**Hedeen, Scott Kendall**

Dothan

Admitted: 1982

Died: December 21, 2013

**Holliday, Hon. Sandy Sanford**

Roanoke

Admitted: 1978

Died: January 29, 2014

**Howard, Barbara McNair**

Montgomery

Admitted: 1991

Died: December 2, 2013

**Hunt, James Leonard**

Tuscumbia

Admitted: 1962

Died: December 17, 2013

**Lassiter, Joe Frank, III**

Birmingham

Admitted: 2002

Died: February 19, 2014

**Livingston, Susan Betts Bevil**

Birmingham

Admitted: 1977

Died: February 28, 2014

**Sforzini, Richard Henry, Jr.**

Little Rock, Arkansas

Admitted: 1977

Died: December 19, 2013

**Williams, Homer Darden**

Birmingham

Admitted: 1957

Died: January 2, 2014

### Transfers to Disability Inactive Status

### Disbarments

### Suspensions

### Public Reprimands

## Transfers to Disability Inactive Status

- Gadsden attorney **John Phillip Coble** was transferred to disability inactive status by order of the Disciplinary Board, Panel I, effective January 23, 2014. On February 19, 2014, the supreme court entered a notation of Coble's transfer to disability inactive status on their roll of attorneys. [Rule 27(b), Pet. No. 2014-196]
- Tuscaloosa attorney **Glen Farris Harvey** was transferred to disability inactive status pursuant to Rule 27(b), *Alabama Rules of Disciplinary Procedure*, effective January 17, 2014. [Rule 27(b), Pet. No. 2014-186]

## Disbarments

- Former Tuscaloosa attorney **Byron Edwin House** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective January 22, 2014. The supreme court entered its order based upon the December 16, 2013 order by Panel I of the Disciplinary Board of the Alabama State Bar accepting House's consent to disbarment. House consented to disbarment based upon pending bar investigations concerning House's mishandling or misappropriating client funds on multiple occasions. [Rule 23, Pet. No. 2013-812; ASB nos. 2011-1595, 2011-1720, 2012-257, 2012-403, 2012-414, 2012-464, 2012-469, 2012-478, 2012-503, 2012-1056, 2012-1373 and 2012-1497]
- Dothan attorney **Frederick Mitchell McNab** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama on January 9, 2014, effective December 17, 2013. The supreme court entered its order based upon the December 17, 2013 order by Panel I of the Disciplinary Board of the Alabama State Bar accepting McNab's consent to disbarment. McNab consented to disbarment based upon a pending bar investigation that McNab mishandled or misappropriated client funds on multiple occasions. [Rule 23, Pet. No. 2013-2198 and Rule 20(a), Pet. No. 2013-2078]

- Birmingham attorney **Angela Denise Parker** was disbarred from the practice of law in Alabama, by order of the Supreme Court of Alabama, effective January 6, 2014. The supreme court entered its order based upon the November 18, 2013 order on consent to disbarment of the Disciplinary Board of the Alabama State Bar. Parker consented to disbarment based on a pending investigation concerning allegations that Parker paid or attempted to pay court personnel to remove failure to appear writs from court files. [Rule 23(a), Pet. No. 2013-2042; ASB No. 2013-1470]

## Suspensions

- Birmingham attorney **Bradley Ryan Overton** was summarily suspended from the practice of law in Alabama, by order of the Supreme Court of Alabama, effective November 20, 2013. The supreme court entered its order based upon the Disciplinary Commission's order granting the Office of General Counsel's petition for summary suspension, based on Overton's failure to appear for a public reprimand with general publication before the Alabama State Bar's Board of Bar Commissioners. [Rule 20(a), Pet. No. 2013-2068]
- On November 1, 2013, Daphne attorney **John William Parker** was suspended from the practice of law in Alabama by order of the Alabama Supreme Court for 91 days, retroactive to July 1, 2013. Parker was already suspended as of the effective date of this suspension as a result of discipline imposed in ASB nos. 10-1093 *et al.* On November 1, 2013, the Disciplinary Commission of the Alabama State Bar accepted Parker's conditional guilty plea to violations of rules 1.2(a), 1.4(b), 1.5(c), 1.15(a), (e), and (j), 8.1(a) and (b), and 8.4(a), (c) and (g), *Ala. R. Prof. C.* Parker pleaded guilty to charges that he settled a case without his clients' authority and failed to abide by his clients' decisions regarding their case; that he failed to counsel his clients regarding settlement offers and failed to explain the matter to the extent reasonably necessary to permit his clients to make informed decisions regarding the representation; that he failed to provide his clients with a written contingency-fee agreement; that he failed to hold property of his clients separate from his own; that he failed to keep complete records of his account funds; that he failed to produce trust account records at the request of the Office of General Counsel; that he failed to respond to requests for information from the Office of General Counsel; and that he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and other conduct that adversely reflected on his fitness to practice law. Parker was ordered to make restitution to the complainant in the amount of \$18,500. [ASB No. 11-1549]
- Montgomery attorney **William Henry Robertson, V** was interimly suspended from the practice of law in Alabama by order of the Supreme Court of Alabama, effective December 18, 2013. The supreme court entered its order based upon the December 18, 2013 order of the Disciplinary Commission of the Alabama State Bar in response to a petition filed by the Office of General Counsel evidencing that Robertson's conduct is causing, or is likely to cause, immediate and serious injury to a client or to the public. [Rule 20(a), Pet. No. 2013-2207]
- Rockford attorney **Frank Selman Teel** was suspended from the practice of law in Alabama for 90 days, by order of the Supreme Court of Alabama, effective December 10, 2013. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Teel's conditional guilty plea, wherein Teel pled guilty to violating rules 1.8(b), 1.11(a), 1.11(b) and 4.2, *Ala. R. Prof. C.* At the expiration of the 90-day suspension, Teel will automatically be reinstated to practice law in Alabama. In 2009, while serving as a part-time assistant district attorney in Coosa County, Teel was asked to attend a press conference involving three individuals who had been arrested for the burning deaths of two individuals and the severe burning of a third victim. After the press conference, Teel agreed to represent the third victim in a civil suit regarding his injuries. After being retained, Teel obtained a copy of the ABI file related to the criminal matter for use in the civil case. During this time, Teel also gained access to two of the co-defendants in the criminal case who were being held in the county jail. Teel interviewed both men regarding their roles in the burnings without obtaining the consent of their criminal defense lawyer prior to speaking with them. [ASB No. 2010-921]
- Spanish Fort attorney **John Perry Thompson** was suspended from the practice of law in Alabama for 91 days, effective December 19, 2013, which suspension was deferred pending successful completion of a two-year probationary period. On December 19, 2013, the Disciplinary Commission accepted Thompson's conditional guilty plea to

violations of rules 1.3, 8.1(a) and (b) and 8.4(a) and (g), *Ala. R. Prof. C.* Thompson admitted that he did not timely file an appellant's brief in an appointed criminal matter, and subsequently failed to correct the deficiency within the time provided by the court's notice. Thompson further admitted that he failed to respond to requests for information from a disciplinary authority, resulting in a summary suspension, and that when he did respond to the bar's requests for information, his responses included false or misleading information. [ASB No. 13-745]

have a viable case, failed to inform her he allowed the statute of limitations to expire and failed to provide the client with a complete copy of her file. Carter then made cash payments to the client totaling approximately \$3,000 due to his failure to properly represent this client. With this conduct, Carter violated Rule 1.2 by failing to abide by the client's wishes to file a negligence lawsuit. He also violated Rule 1.3 by willfully neglecting a legal matter entrusted to him by allowing the statute of limitations to expire. Carter violated rules 1.4(a) and (b) by failing to keep his client reasonably informed regarding the status of her case as well as failing to explain she did not have a viable case and that he allowed the statute of limitations to expire. Carter violated Rule 1.5(c) by failing to obtain a signed written contingency fee contract from his client. Carter violated Rule 1.8(e) by providing financial assistance to his client after allowing the statute of limitations to expire resulting in the dismissal of her case. Carter violated Rule 1.16(d) because he failed to provide his client a complete copy of her file upon termination. Lastly, with this conduct, Carter violated rules 8.4(a), 8.4(c) and 8.4(g) because he violated a rule of professional conduct, engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and engaged in conduct adversely reflecting on his fitness to practice law. [ASB No. 2012-1178]

## Public Reprimands

- Fultondale attorney **Huel Malone Carter** received two public reprimands with general publication on January 10, 2014 for violating the *Alabama Rules of Professional Conduct* in two separate cases.

In ASB No. 2012-338, Carter was reprimanded for violating rules 4.1 and 8.4(a), (c) and (g). On September 2, 2010, during his representation of a client in a personal injury action, Carter requested UAB Hospital reduce a bill for services provided to his client. Based upon Carter's representations, UAB agreed to reduce its bill and accept one-third of the final settlement as payment. Contrary to this agreement, Carter issued a check to UAB for less than one-third of the final settlement. When contacted about the shortage, Carter misrepresented the settlement amount. With this conduct, Carter violated Rule 4.1 by making a false statement of material fact to a third person. Additionally, with this conduct, Carter violated rules 8.4(a), 8.4(c) and 8.4(g) because he violated a rule of professional conduct, engaged in conduct involving dishonesty, fraud, deceit or misrepresentation and engaged in conduct adversely reflecting on his fitness to practice law. [ASB No. 2012-338]

In ASB No. 2012-1178 Carter was reprimand for violating rules 1.2, 1.3, 1.4(a) and (b), 1.5(c), 1.8(e), 1.16(d), and 8.4(a), (c) and (g). In March 2005, Carter agreed to represent a client in a personal injury case wherein he failed to obtain a signed written contingency fee agreement from the client, failed to file a negligence lawsuit on behalf of his client thereby allowing the statute of limitations to expire, failed to keep his client reasonably informed regarding the status of her case, failed to inform her she did not

- On January 10, 2014, Pelham attorney **Kevin Mark McCain** received a public reprimand without general publication for violating rules 1.3, 1.4(a), 1.4(b) and 8.4(g), *Ala. R. Prof. C.* In February 2009, McCain was hired to represent a client concerning a personal injury claim. In August 2009, McCain informed the client that he was ready to file suit. Thereafter, the client was unable to contact McCain, and subsequently contacted the bar and discovered McCain had been transferred to disability inactive status. In June 2011, McCain was reinstated. After repeated attempts to contact McCain without success, the client terminated representation in February 2012. In March 2012, McCain returned the file to the client. After providing the file to another attorney, the client learned that the statute of limitations had expired on any potential claim. In McCain's response to the bar, he asserted the error in calculating the statute of limitations was based on his initial research of the case, and later learned and advised the client that the statute had run. McCain also informed the client of his illness and intent to stop practicing law, and informed the client to seek other counsel;

however, McCain did not advise the client, in writing, that he had been transferred to disability inactive status. [ASB No. 2012-1428]

- Birmingham attorney **Cynthia Hooks Umstead** received a public reprimand without general publication on January 10, 2014 for violating rules 8.1(b) and 8.4(a) and (g), *Alabama Rules of Professional Conduct*. On May 11, 2012, the Office of General Counsel received notification Umstead's trust account was overdrawn. Umstead failed or refused to respond to repeated requests from the Office of General Counsel for an explanation. With this conduct, Umstead violated Rule 8.1(b) by failing or refusing to respond to a lawful demand for information from a disciplinary authority. Additionally, Umstead violated rules 8.4(a) and 8.4(g) because she violated a rule of professional conduct and engaged in conduct adversely reflecting on her fitness to practice law. [ASB No. 2012-1017]

- Mobile attorney **Richard Russell Williams** received a public reprimand without general publication on January 10, 2014 for violating Rule 1.3 [diligence] of the *Ala. R. Prof. C.* In September 2009, Williams was retained to represent a husband and wife in a dispute with a contractor. During the course of the representation of these clients, Williams failed to file the required certificate of readiness by the deadline imposed by the court. Additionally, because Williams waited seven months to file the motion to reinstate the case, the motion was denied as being filed outside the four-month window allowed by Rule 60(b)(1), *Ala. R. Civ. P.* With this conduct, Williams violated Rule 1.3 [diligence], *Ala. R. Prof. C.*, by failing to file the required certificate of readiness by the deadline set by the court and by failing to file a motion to reinstate the case within the four-month window allowed. [ASB No. 2012-788] | [AL](#)

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# Required Notice to Client When Attorney Leaves Law Firm

## QUESTION:

"This will follow up on the recent telephone call which I made to your office. I had some questions concerning a client who is a lawyer here in Alabama. I will refer to him as Mr. Lawyer. Mr. Lawyer has left the law firm with which he worked for approximately two and a half years. While Mr. Lawyer was with the firm, a number of clients entered into contracts with the firm because of their friendship/relationship with Mr. Lawyer. In other words, Mr. Lawyer 'brought' these clients into the firm. In one instance in question, the client came to the firm for other reasons, but Mr. Lawyer was primarily responsible for handling that file and as a result has established a strong friendship with the client.

"Mr. Lawyer has now voluntarily left the firm. His questions, and mine, concern his obligations and rights to those clients which he 'brought' to the firm and whose matters are still pending. He has similar questions regarding the one client who he did not 'bring' to the firm.

"The firm may or may not be a partnership. My best information regarding the manner in which the firm is structured is as follows: The firm was owned by an individual lawyer's professional corporation (John Doe PC) and the law firm did business as Doe, Jones and Smith. Mr. Lawyer was not named in the law firm name. The four most senior attorneys, including Mr. Lawyer (as well as Doe, Jones and Smith), received in the form of compensation a draw plus a percentage of the firm revenue after a certain amount of money was made, for example \$1,000,000. (The youngest attorney, number five and most recently employed, was on salary only.) Mr. Lawyer was told by Mr. Doe this was the amount of anticipated revenue for a year. However, if the law firm exceeded the anticipated revenue, Mr. Lawyer



would receive the agreed-upon percentage. Likewise, if the law firm's revenue was less than anticipated, Mr. Lawyer would not receive a percentage until the anticipated amount of revenue was reached, e.g. \$1,000,000.

"All contracts with regard to clients, including those which were 'brought' into the firm by Mr. Lawyer and in the one instance where the client was not 'brought' by Mr. Lawyer, were between client and Doe, Jones and Smith. All of the client files are on a contingency fee contract with Doe, Jones and Smith.

"Several weeks ago, Mr. Lawyer submitted his resignation from Doe, Jones and Smith. Prior to leaving the law firm, Mr. Lawyer telephoned several of his clients and informed them he was leaving. Some of these clients expressed an interest in Mr. Lawyer's continuing to work on their case.

"Please render an opinion as to the ethical considerations in the following conduct:

"(1) Is it permissible for Mr. Lawyer to contact these clients and explain to them that they have the right to select their own attorney and that they have basically three options, (a) for the client's file to remain with Doe, Jones and Smith, (b) for the client to continue to be represented by Mr. Lawyer in his new law practice and (c) for the client to take his file to some other lawyer?"

"(2) In the event the client would like for Mr. Lawyer to continue to represent them, is it permissible for Mr. Lawyer to draft a letter to Doe, Jones and Smith, for the client's signature, notifying Doe, Jones and Smith of the client's decision and requesting the client file be provided to Mr. Lawyer?"

"(3) Upon being notified by a client that an attorney's services are no longer desired and Mr. Lawyer will be representing them, is it permissible for the firm to contact the client?"

## ANSWER:

(1) Mr. Lawyer may contact the clients so affected and inform them that they have the right to designate where their files should go including: (a) staying with Doe, Jones and Smith; (b) going with Mr. Lawyer in his "new" law practice; or (c) taking the file(s) to any other lawyer.

(2) If the client wants Mr. Lawyer to continue handling their legal matters, Mr. Lawyer, upon request of the client, may draft a letter to Doe, Jones and Smith, for the client's signature, notifying Doe, Jones and Smith of the client's decision and requesting transfer of the client's file to Mr. Lawyer.

(3) Upon being notified by a client that a lawyer's services are no longer desired and that Mr. Lawyer is now representing the client, the former lawyer, absent a specific request not to do so, may contact the client.

## DISCUSSION:

The Disciplinary Commission has previously held that the files of a client belong to the client. In RO-86-02, the commission reasoned that the materials in the file are furnished by or for the client and therefore are the client's property. Building on this foundation, it would then follow that the files belong wherever the client wishes for them to belong. If the client directs that the files be in the possession of a particular lawyer or law firm, then they should be in the possession of that individual. The only exception would be in that instance where the lawyer is asserting a valid "attorney's lien" for services rendered for the client.

The client has the right to counsel of his/her own choosing. If the client selects a lawyer, the client has the obvious right to terminate that relationship. If substitute counsel is obtained, new counsel may prepare for the client's formal notification of the termination of that relationship with previous counsel as well as a request that the client's file be surrendered to new counsel. This all assumes the complete absence of any intentional interference by substitute/new counsel with the previous contractual relationship, or fraud, deceit or misrepresentation in inducing such termination of the previous lawyer-client relationship and/or creation of the "new" lawyer-client agreement.

Finally, absent this same intentional interference, fraud, etc., the former lawyer may continue contact with the client unless the client objects thereto. If the client objects to such contact, the former lawyer's failure to accede to the desires of the former client would be considered as vexatious and/or harassing and, therefore, unethical. The former lawyer, however, could obviously contact the former client for certain, justifiable reasons, e.g., payment for services rendered. [RO 1991-06] | AL



**Othni J. Lathram**  
olathram@ali.state.al.us

For more information about the institute, visit [www.ali.state.al.us](http://www.ali.state.al.us).

## 2014 Legislative Session Recap

The 2014 Legislative Session flew by extremely quickly. The legislature adjourned *sine die* on April 3, which is almost a month earlier than the last possible day allowed by law. Despite the early adjournment, the legislature made use of all 30 legislative days allowed by law. Historically, the normal legislative schedule is to be in session on Tuesdays and Thursdays and to have a full day of committee meetings on Wednesdays, with an occasional week of being in session all three days. This year the legislature held eight three-day weeks and only three two-day session weeks.

Despite the blistering pace of business, the session was a productive one based on the numbers. In total, 1,103 bills were introduced and received a first reading and a total of 269 passed both houses and were transmitted to the Governor. Of those 269 bills that passed both houses, 84 were local bills and 22 were sunset bills involving only one agency or board.

Despite this being an election year, the legislature considered a number of significantly important and substantive bills. As of the date of the writing of this article, 141 bills have been acted upon by the Governor, thereby becoming law and being assigned act numbers. The Governor still has a week to consider the remaining legislation, sign it or allow it to die via a pocket veto. Below is not an exhaustive list, but merely a sampling of the more interesting pieces of legislation which likely have a broad impact.

## Alabama Law Institute Legislation

### **HB2-Act 2014-144: Revised Limited Liability Act of 2015**

*Representative Paul DeMarco and Senator Rodger Smitherman*

This act substantially improves and modernizes Alabama's LLC Law. The primary focus of the act was to recognize that LLCs are contractual entities. This was the first significant and systematic improvement to Alabama LLC Law since 1997.

### **SB28-UCC Article 9 Amendments**

*Senator Cam Ward and Representative Mike Jones*

Amends UCC Article 9 Provisions to bring them in line with 47 other states related to information contained on filings relating to the debtors name.

### **SB61-Title 10A Merger and Conversion Amendments**

*Senator Arthur Orr and Representative Bill Poole*

Amends the merger and conversion provisions of the *Business Entities Code* to allow for greater clarity and continuity

## **SB162–Uniform Partition of Heirs Property**

*Senator Jerry Fielding and Representative Marcel Black*  
Establishes the Alabama Uniform Partition of Heirs Property Act that changes the procedures for actions related to the division and sale of property that qualifies as heir property

## Public Benefit Reforms

### **SB63–TANF Drug Testing**

Provides for drug testing of TANF recipients who have been convicted of a crime related to drug use or possession in the past five years

### **SB114–Public Assistance Fraud**

Provides for penalties and defines what constitutes fraud in obtaining public benefits

### **SB115–Employment Search**

Requires persons receiving certain public benefits to show proof of job search

## Election Law

### **HB9–Alabama Informed Voter Act**

This legislation creates the Fair Ballot Commission that would review and approve ballot language for constitutional amendments. The bill would further provide for the posting of information on proposed constitutional amendments in advance of them appearing on a ballot.

### **HB64 (Act 2014-6)–Absentee Voting**

This bill changes the deadlines for qualification and certification of candidates and for the printing and distribution of ballots. The bill also allows the use of federal write-in absentee ballots by overseas voters.

## Civil Procedure

### **HB64 (Act 2014-124)–Sovereign Immunity**

This bill codifies the standards by which state employees, including education employees, are entitled to sovereign immunity.

### **HB107–Workers’ Compensation**

Increases the maximum allowed amount for burial expenses

### **HB376–Juvenile Court Jurisdiction**

Clarifies that Juvenile Court has exclusive jurisdiction for the termination of parental rights

### **HB543–Judicial Recusal**

This bill repeals the current judicial recusal statute and replaces it with the new test. The new statute creates a rebuttal presumption that recusal should under certain circumstances where a party or attorney has contributed a significant percentage of the campaign contributions received by a judge.

## State and Local Government

### **HB20–Inventory of State-Owned Real Property**

This bill requires the finance department to develop and maintain a website that shows an inventory of state agency facilities and lands.

### **HB24–Contractor Prompt Pay**

This bill amends the prompt pay for public works contracts to require payment within 35 days of the submission of appropriate documentation or within 10 days of the receipt of funds in the case of projects involving federal funds.

### **HB30–Administrative Procedures Act Amendments**

These amendments to the Administrative Procedures Act allow for an agency that has submitted a rule for consideration to withdraw that proposed rule without action of the Legislative Council. The bill also clarifies the definition of covered agencies to exclude any boards of plans administered by public pension systems.

### **HB82–Debt Collection**

This allows for counties and municipalities to set off debts owed as a result of administrative and judicial proceedings against income tax returns.

### **HB97–Tax Collection**

This allows the revenue department to suspend the collection of taxes and fees where the cost of collection is higher than the amount collected.

**HB105–Taxpayer Bill of Rights**

This creates an independent tribunal to replace the Administrative Law Division of the Department of Revenue.

**HB108–Online Tax Filings**

Requires the Department of Revenue to develop an online electronic filing system to allow for the filing of business personal property returns

**SB36–Ethics Revolving Door**

Amends the revolving door provision of the ethics act so that lobbying by a former legislator is prohibited as to the entire legislature and not just the body where the member served

**SB59–Purchasing**

Allows for the purchasing of certain items from vendors not on statewide contract where savings can be achieved

**SB173–Disclosure**

Requires disclosure of certain information related to the purchase of real property by governmental bodies and entities

## Real Property

**HB46–Subdivision Regulation**

This bill amends the law as it relates to municipal subdivision developments to allow parties to enter into an agreement for the sale of a lot in a proposed subdivision. The bill also provides that a county engineer may authorize a developer to pre-sale lots under certain circumstances.

**SB291–Landlord Tenant Act Amendments**

Amends the Landlord Tenant Act to allow for a longer period of time to return deposits and to provide that a landlord may deem property abandoned if electric service has been terminated for seven consecutive days

## Family Law

**HB48–Adoption Tax Credit**

This bill provides a \$1,000 tax credit for certain qualified adoptions.

## Criminal Law

**HB54 (Act 2014-239)–Interference with Public Safety Communications**

This bill criminalizes the interference, damage, or destruction of public safety communications. The crime is classified as a Class C felony.

**SB2–Kelly’s Law**

Provides that the murder of a person who is under a protection order issued against the defendant is a capital offense

**SB89–Boating under the Influence**

Conforms the penalty for DUI and BUI for criminal negligent homicide or assault in the first degree

**SB108–Expungement**

Provides for the sealing of arrest records for persons not convicted of a crime under certain circumstances

**SB151 (Act 2014-275)–Bestiality**

Creates and defines the crime of bestiality which is a Class A Misdemeanor

**SB332–Comprehensive Criminal Proceeds Forfeiture Act**

Establishes a uniform procedure for the forfeiture of property connected to the commission of felony crimes

## Abortion

**HB494–Waiting Period**

Increases the waiting period for an abortion to 48 hours following the provision of initial information

**HB494–Parental Consent**

Changes the procedure followed by a physician in ensuring that parental consent exists for a minor seeking an abortion. The bill also modifies the procedure for judicial bypass for a minor who does not have consent.

Complete copies of the above pieces of legislation or any other legislation considered during the 2014 Regular Session can be found at <http://alisondb.legislature.state.al.us>. | AL



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

### About Members

**Aaron L. Dettling** announces the opening of **Aaron L. Dettling, Lawyer LLC** with offices at 5809 Feldspar Way, Ste. 111, Hoover 35244. Phone (205) 988-3119.

**Richard Frankowski** announces the opening of **The Frankowski Firm LLC** at 231 22<sup>nd</sup> St. S., Ste. 203, Birmingham 35233. Phone (205) 390-0399.

**David Bence** and **Stacy Bence** announce the opening of **Bence Law Firm LLC** at 544 E. Glenn Ave., Ste. B, Auburn 36830. Phone (334) 539-5000.

**Benton & Centeno LLP** announces that **Samuel C. Stephens** joined as an associate.

**Bressler, Amery & Ross PC** announces that **A. Inge Selden, III, Carole G. Miller, Stephen E. Brown, Janell M. Ahnert, Audrey Y. Dupont, Andrea M. Greene, Rima Hartman, Joshua D. Jones, Kathryn Dietrich Perreault, Stuart D. Roberts,** and **Bradley B. Rounsaville** joined as partners in the Birmingham office.

**Burr & Forman LLP** announces that **David W. Proctor** and **Angela C. Cameron** joined as partners, **Richard J. Brockman** as of counsel and **Maggie Lester** as an associate, all in the Birmingham office.

**Chambless Math Carr PC** of Montgomery announces that **Jeremy D. Cobb** joined as an associate.

**Conrad & Barlar** announces that **Kristine K. McCulloch** became a partner and the firm name is now **Conrad Barlar & McCulloch**.

**eLab Solutions** announces that **David Vance Lucas** joined as general counsel.

**Gaines, Gault, Hendrix PC** announces that **Michael E. Eldridge** joined as an associate in the Birmingham office.

### Among Firms

The **Alabama League of Municipalities** announces that **Tenee' R. Johnson** joined as assistant general counsel.

The **Supreme Court of Alabama Clerk's Office** announces that **John Bradley Medaris** and **Doy Leale McCall, III** joined as staff attorneys.

**Armbrecht Jackson LLP** announces that **Steven C. Pearson** became a partner and **S. Gaillard Ladd** and **Lindsay Schafer Hurt** joined the firm.

**Baker Donelson** announces that **S. Nathan Gordon** joined the firm's Birmingham office.

**Balch & Bingham LLP** announces that **Deborah Hembree** joined the firm as counsel in the Birmingham office.

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

#### About Members

This section announces the opening of new solo firms.

#### Among Firms

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

**Hale Sides LLC** announces that **Jesse R. Cash** joined as an associate in the Birmingham office.

**Jones Walker** announces that **Mac B. Greaves** and **William W. Horton** joined as partners and **Sarah Canzoniero Blutter, Anna-Katherine Bowman, Monica Nelson Fischer** and **Daniel J. Martin** joined as special counsel, all in the Birmingham office.

**Maynard Cooper & Gale PC** announces that **John Neiman** and **Matthew W. Stiles** joined as shareholders and **Matthew J. Cannova** joined as an associate, both in the Birmingham office, and that **Bryan A. Thames** joined the Mobile office.

**Morris, Haynes, Hornsby, Wheelers & Knowles** announces that **Emily Hornsby Nelson** is now a partner.

**Courtney Clanton Murchison** and **Lenae Spain Simpson** announce the opening of **Murchison & Simpson LLC** at 323 E. Glenn Ave., Ste. B, Auburn 36830. Phone (334) 329-7434.

**Natter & Fulmer PC** of Birmingham announces that **Joyce K. Baker** joined the firm.

**PowerSouth Energy** announces that **Patrick McCalman** joined as manager of legal affairs.

**Tanner & Guin LLC** announces that **Hannah B. Lansdon** is a member.

**Tobias & Comer LLC** announces that it merged with **Jason S. McCormick PC** and the firm name is now **Tobias, McCormick & Comer LLC**.

**Waller Lansden Dortch & Davis LLP** announces that **Kristen Larremore** joined as an associate in the Birmingham office.

**Watson Graffeo PC** of Huntsville announces that **Zachary H. Champion** joined as an associate. | [AL](#)

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*– Henry Ford.*



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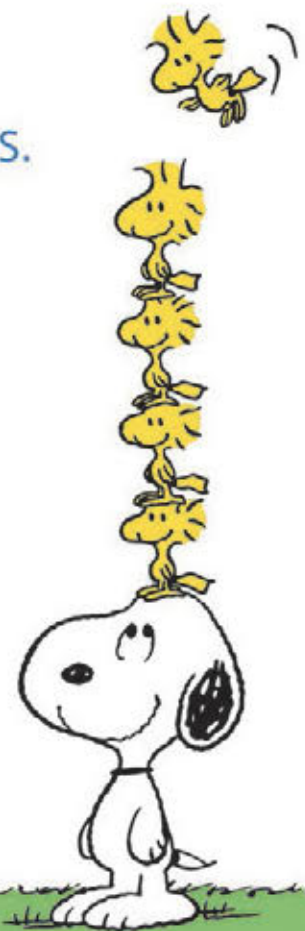
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<sup>1</sup> For association members and their spouses or domestic partners who are under the age of 65. The amount of spouse, domestic partner or dependent coverage may vary by state laws and is subject to the limits imposed by the individual states.

<sup>2</sup> Insured members with at least \$20,000 of coverage may receive up to 80% (to a maximum of \$500,000, whichever is less) if they are diagnosed with a terminal illness with a life expectancy of 24 months or less. Living benefits are subject to certain exclusions, which are listed in the Certificate of Insurance. Receipt of living benefits may be taxable.

Like most group life insurance policies, MetLife insurance policies have certain exclusions, limitations, reductions of benefits and terms for keeping them in force. A MetLife representative can provide you with costs and complete details.

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