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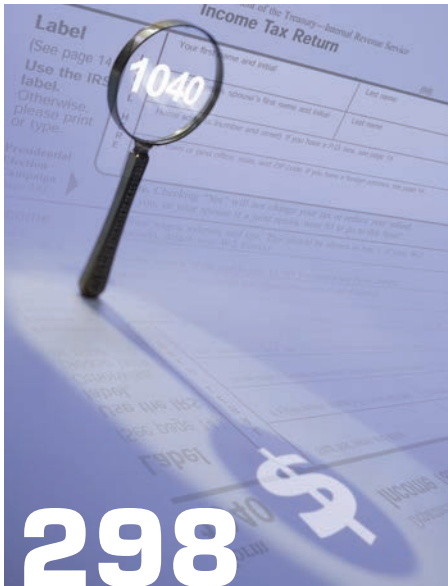
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ON THE COVER


Pictured on the cover are 2014-15 Alabama State Bar President Richard J.R. Raleigh, Jr. and wife Shannon, with their children, six-year-old twins Sarah Medders and Tripp.

–Photo by Erin Cobb, certified professional photographer, www.ericcobb.com, (256) 656-1500

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Gilbert B. Laden is a solo practitioner in Mobile. He is certified as a specialist in Social Security Disability Law by the National Board of Social Security Disability Advocacy.

He has been in private practice since 1980 and was previously a staff attorney with Georgia Legal Services. Laden obtained a degree in chemistry from Emory University and a law degree from Mercer University. He has had a lifelong hearing loss, which is severe-to-profound.



Jeff Patterson practiced law inside the Alabama Department of Revenue for more than 13 years, where he litigated hundreds of corporate and individual

tax cases. In 2006, he formed his own firm in Montgomery in which he now represents taxpayers who are located within Alabama and other states.

CONTRIBUTORS



Katherine T. Powell practices in Birmingham with Butler Snow LLP. She is a 2004 graduate of the University of Georgia and a 2007 graduate of Cumberland School of Law, where she was an associate justice on the

Moot Court Board. She is a volunteer with the Birmingham Bar Association Volunteer Lawyers Program and recently joined the editorial board of *The Alabama Lawyer*.



Christopher Terrell is an associate general counsel at HealthSouth Corporation. Prior to joining HealthSouth, he was a partner at Balch & Bingham LLP, where he practiced healthcare law and labor and employ-

ment law. Terrell's practice focuses on medical staff and governing body bylaws, certificates of need, the Americans With Disabilities Act, patient privacy, internal investigations and other healthcare regulatory issues.

CORRECTION

In the July issue, **Angie Cameron's** bio contained incorrect information. We apologize for the error. Cameron is a member of the health care section at Burr & Forman LLP. She earned her bachelor's degree, cum laude, from the University of Alabama and her law degree, magna cum laude, from the University of Alabama School of Law. In law school, she served as editor-in-chief of the *Journal of the Legal Profession*. She is a member of the Birmingham Bar Association and the Alabama and Mississippi state bars.

ARTICLE SUBMISSION REQUIREMENTS

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) 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.



Richard J.R. Raleigh, Jr.
rraleigh@wilmerlee.com



An Exciting Time to Get on Board!

I am excited about this year, and I appreciate all of the offers of support and help from lawyers and judges throughout the state. We are facing changing times. The legal practice is slow to change, but outside economic, business and societal forces are pushing change upon us. Recent reports indicate slower growth in large law firms.¹ Mergers have increased in recent years.² At the same time, there has been a growth in online legal services—alternatives to hiring lawyers for certain services, like forming corporations and drafting wills. Technology keeps changing. We deal with issues related to electronically-stored information, social media and cyber-security. The pace of change, at times, seems overwhelming.

Today, more than ever before, the practice of law is varied and, in many places, very specialized. At the same

time, lawyers are changing jobs more frequently, switching firms, going from private practice to in-house counsel and vice versa, taking time off to raise a family and later returning to practice, and changing the location of their practice—with some moving from one state to another. Members of our bar face different challenges. Solos and small firm lawyers confront issues different than those faced by lawyers in large firms in metropolitan areas.

These are challenging times, but they are exciting! As always, the leadership of the bar is needed. With fewer attorneys serving in our legislature, the Alabama State Bar needs to lead the discussion as our state government ponders important issues such as court funding, judicial reallocation and judicial selection. Our bar should be an integral part of the discussion as our Alabama law schools assess and modify their courses and

programs to educate future lawyers, and as they prepare new lawyers to enter the changing legal workforce environment.

What is the role of the ASB? It is a mandatory bar which means all attorneys in Alabama have to be members. This is not true in all states. Our recent presidents, particularly **Anthony “AJ” Joseph**, set a goal to focus on and support meaningful benefits to our membership so that we earn their involvement like voluntary bars must do. We need to earn each member’s support and provide valuable benefits, particularly now in these changing times. As President Joseph said, the bar needs to be relevant.

Thank you to AJ. Thank you for your leadership—leadership by example. Thank you for your careful consideration of difficult and complex issues. And, thanks to **Cassandra** for sharing AJ with us. Thanks to **Aaron, Kevin** and **Justin** for sharing your dad with us. The Alabama State Bar is grateful for the sacrifices each of you has made.

I am proud to represent the bar, and I am proud to be the first graduate of our bar’s **Leadership Forum** to serve as bar president. But, what is it that we have done on our own? What have we accomplished—of any value—that we have done without its being God’s will, and without the support of many others? I owe a great deal to others. I express my sincere gratitude to you all for your confidence in me. I am very grateful for the generous support of many past presidents who encouraged me. And, thank you to the **Board of Bar Commissioners** for their wonderful support and encouragement.

In particular, I thank **Sam Crosby, Alyce Spruell** and **Pam Pierson** for their continual encouragement. Thank you to **Tom Methvin** for getting me even more involved, specifically with the Volunteer Lawyers programs. Thanks to **Jim Pratt** for providing focus on the Leadership Forum (particularly your support of the LF Alumni Section), the **Governmental Liaison Committee** and **Access to Justice**. Thank you to **Mark White** and **Alyce Spruell** for including me on your executive councils. And, thanks to **Phillip McCallum** for your encouragement and enthusiastic support.

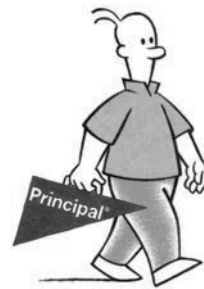
Thank you, **Tony McLain**. Thank you to our staff of bar professionals and to everyone who serves our membership of the Alabama State Bar. They support our Board of Bar Commissioners and bar leaders. Our highly professional and enthusiastic staff deserve a great deal of praise, and our gratitude.

Thank you to the lawyers of my firm, **Wilmer & Lee**, for supporting me and allowing me this opportunity to serve. Thanks for your support! Those of you who spend time serving

the bar understand how much the support of your firm means. I am very grateful to have friends like these. In particular, thanks to past president and my partner, **Dag Rowe**, for your encouragement and guidance.

My sincere gratitude goes to my wonderful wife, **Shannon**, and my six-year-old twins, **Sarah Medders** and **Tripp**, for being so understanding and supportive. Serving as president-elect and president of the Alabama State Bar is very rewarding, but it is also very time-consuming and I could not do it without the support of my family.

I look forward to serving the bar in this new capacity. It is an honor to be a member of this bar, and to work with you all and to learn from so many outstanding colleagues as we try to render service to Alabama lawyers, the courts and Alabama citizens who depend on us all for legal advice and counsel.



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As I explained briefly at the annual meeting, this year we will focus on transitioning lawyer issues. My goal for the upcoming year is to focus the bar on helping "Lawyers in Transition." This includes several groups:

- New lawyers as they transition from law school to the practice of law (and this will require us to continue to support the law schools in this state, and the several new deans that we have the joy of welcoming this year);
- Lawyers returning to practice from time off from the full-time practice of law;
- Lawyers transitioning from private practice to in-house practice or vice versa;
- Veterans—military lawyers exiting active duty and entering private practice; and
- Lawyers transitioning from practice to retirement.

Each of these groups will quickly come to realize what the **Future of the Legal Profession in Alabama Task Force** recently explained to the Board of Bar Commissioners—and what Leadership Forum Class X heard this year from many of their speakers—the practice of law is changing. Things are different from practicing 20 years ago and even 10 years ago, and there are new difficulties. We will support them in these transitions.

Our Future of Legal Profession Task Force will conduct strategic planning, while the bar updates its strategic plan. Our last five-year strategic plan "expired" about five years ago. We need to review where we've been, consider the challenges our bar will face in the future and set goals to achieve success in the future.

We will focus on getting Leadership Forum alumni involved, and we will support young lawyers in their practice. I want us to focus on a "year of basics"—CLEs and programs that will support transitioning lawyers in their practice on a daily basis. There is a role for our various bar sections, and definitely a role for local bars with mentoring.

We will support the programs which have, in my opinion, improved the public's perception of lawyers in Alabama in the last 10 years. While I harbor no misconception that everyone loves lawyers today, programs like the Leadership Forum, the Volunteer Lawyers Program and the ASB **Governmental Liaison Committee** and **Legislative Mediation** program have made fans out of the many people we've helped. Legislators frequently make positive comments, thanking the

bar for assistance we've provided. Each year, Pro Bono Celebration Week focuses on the good done by so many Alabama volunteer lawyers in their communities throughout the state. The Alabama State Bar will continue to work hard on these important programs.

The bar will also focus on helping our nation's veterans and their families. In the years since 9/11, there has been a dramatic increase in the number of veterans, particularly those with combat experience. Our troops are returning home and trying to find their places in society. Veterans' reintegration is a key priority for federal and state governments, educational institutions and employers. The Alabama State Bar can and should address this as an access-to-justice issue and a service-to-our-members issue. We will support the veterans' treatment courts, and we will work with others on reintegration issues. The Alabama State Bar Volunteer Lawyers Program and the local VLPs—the **Madison County Volunteer Lawyers Program**, the **Birmingham Bar Volunteer Lawyers Program**, the **Montgomery County Volunteer Lawyers Program** and the **South Alabama Volunteer Lawyers Program**—will continue to support veterans and their families by providing legal assistance, including work at clinics organized by the Alabama Department of Veterans Affairs.

Finally, the bar will work with and support others in the state, supporting our circuit and district judges' associations, our district attorneys, the Administrative Office of Courts, the Alabama Supreme Court leadership and the legislature, as we all tackle difficult issues facing our state—veterans issues, court costs, filing-fee disparities and judicial allocation, to name just a few. The Alabama State Bar will certainly be interested in, and will continue to be a part of discussions related to court funding and judicial reallocation. Everyone agrees that our courts need to be adequately funded and each judicial circuit needs the personnel necessary to handle cases before their courts in a timely manner. How to do this, given the present fiscal constraints, is challenging, and something all parties need to work on together.

As always, the Alabama State Bar will continue to find ways to support lawyers, as we all continue to render service to our clients and our communities. I look forward to this exciting year. | AL

Endnotes

1. "The NLJ 350," *The National Law Journal*, July 6, 2013.
2. "Big Firm Tie-Ups Keep 2013 Mania Alive," *The AmLaw Daily*, Dec. 12, 2013.



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The Fruits of Their Labors

After toiling in the vineyards of ethics and bar admissions for a major part of their careers, **Jim Sumner** and **Dorothy Johnson** are retiring. Jim has served as executive director of the Alabama Ethics Commission for 17 years and will step down October 1. Dorothy's retirement became effective this past August after 22 years of service in the Alabama State Bar Admission's Department, the last 21 as its director.



Sumner



Johnson

Jim's journey to the helm of the Ethics Commission began in the Attorney General's Office as chief of staff, and then from there to an executive role with the Alabama Hospital Association. After his stint at the hospital association, Jim worked for more than a decade for the University of

Alabama System as assistant to the vice chancellor for external affairs before accepting the Ethics Commission position. For most of his time as executive director, Jim dealt with extreme vacillations in legislative appropriations for the agency and encountered very little interest from the legislature in strengthening Alabama's ethics rules that were acknowledged by the National Conference of State Legislatures to be among the weakest in the nation.

Yet, Jim's dogged persistence eventually paid off. While the agency is still understaffed for the volume of reports to be processed and the number of complaints that must be investigated, he was able to engineer the replacement of a "paper-driven" agency with one that operates electronically. From online filing of lobbyist reports and the statements of economic interest of government employees and elected officials to the posting of ethics opinions online, the Ethics Commission website

truly permits transparency and access that never before existed. There is no doubt that this has increased the efficiency of the small commission staff.

In addition, Jim has been a crusader to tighten the ethics laws, to obtain subpoena power and to secure a stable annual appropriation for the agency. In 2010, the state legislature finally passed major reforms to strengthen the state's ethics laws and provided the commission with the investigative tools and budgetary protections that have enhanced the agency's ability to fulfill its mission as the state's ethics watchdog.

Without question, Jim has done a tremendous job during his tenure at the Ethics Commission, despite the many challenges. Jim has persevered and will leave the agency in far better condition than when he arrived. He can take pride in knowing that his long labors have indeed borne fruit.

Dorothy Johnson began her career at the Alabama State Bar in June 1992 after her husband Dennis's retirement from the Navy and their return home to Montgomery. Dorothy worked with Norma Robbins as the admission department's first full-time assistant. Less than a year later, when Norma decided to retire, **Reggie Hamner**, who was then executive director, asked Dorothy to lead the admissions department. Thankfully, Dorothy accepted the challenge and never looked back.

During her 21 years leading admissions, Dorothy has worked tirelessly with the volunteer members of the Board of Bar Examiners and those of the multiple panels of the Character and Fitness Committee to carry out the myriad responsibilities of the department. Because of Dorothy's excellent operations and administrative abilities, each year the department has been able to timely process upwards of 1,000 bar applications, review hundreds of law student registrations and prepare more than 100 character and fitness hearings with just two staff members. In addition to these and other responsibilities that are carried out, a multi-day bar examination has been given every February and July.

As department head, Dorothy has welcomed nearly 12,000 new bar members. In addition, several major initiatives that have restructured the bar exam and the admission process have occurred on her watch, including a major revamping of the bar exam,¹ a cut score analysis,² the implementation of an online bar examination application and, most recently, the adoption of the Uniform Bar Examination and the replacement of the written Alabama component of the bar exam with an online Alabama law curriculum.³ Because

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of these reforms and other changes, our state is a leader among all jurisdictions for the testing and licensing of lawyers. In recognition of her outstanding service in this field, Dorothy received the **Bar Administrator of the Year Award** from her colleagues at the National Conference of Bar Examiners this past August.

In retirement, Dorothy will have more time to spend with Dennis and their two grown children, Melissa, a lawyer, and Gregory, an engineer. After conducting a national search for Dorothy's successor, **Justin Aday**, a Montgomery lawyer and a native of Colbert County with an outstanding administrative background, was hired. He joined the state bar staff in January and had the opportunity to work with Dorothy for seven months, and through two cycles of the bar examination, before her retirement.

Dorothy has left a lasting legacy. The Alabama State Bar is a stronger organization and the admission process is better because we were blessed with Dorothy's exemplary skills, leadership and dedication. Thank you, Dorothy.

Law School Debt Update

Sixty-nine percent of those taking the July 2014 bar examination for the first time had educational debt. The average debt was \$109,408. | [AL](#)

Endnotes

1. Executive Director's Report, "The New Alabama State Bar Exam," *The Alabama Lawyer*, July 2003, pp. 216-217.
2. Executive Director's Report, "Cut Score Study Concludes Final Phase of Comprehensive Bar Examination Review," *The Alabama Lawyer*, March 2007, pp. 104-105.
3. Executive Director's Report, "The Latest Changes to the Bar Exam," *The Alabama Lawyer*, November 2013, p. 368.

CLE Program Remembers Beloved Lawyer and Raises Funds for Fellowship in His Honor

On October 3, Samford University's Cumberland School of Law



and the Alabama Fellows of the American College of Trial Lawyers will present the Jere F. White, Jr. Trial Advocacy Institute. The Trial Advocacy Institute serves as the primary fundraising event for the Jere F. White, Jr. Fellows Program at Cumberland.

Prior to his death October 3, 2011, Jere and his wife, Lyda, established the fellows program. The program seeks to recruit outstanding students with strong academic credentials and also a history of leadership and commitment to service, thereby promoting the development of lawyers who share the ideals that were so important to Jere. Each year, the fellows program provides one entering Cumberland School of Law student a full-tuition scholarship, an annual stipend, tuition and lodging at the law school's Cambridge, England Study Abroad Program and several mentoring opportunities.

This year's institute promises to be a unique continuing legal education program with giveaways such as **two tickets to the Iron Bowl Football Game** and **two tickets to the SEC Championship Football Game**. ESPN broadcaster, attorney and best-selling author **Jay Bilas** is the keynote speaker. The CLE program offers an outstanding range of presenters

and moderators and is preapproved for credits in Alabama, Louisiana, Mississippi, Georgia and Tennessee. Institute details and registration are available at <http://cumberland.samford.edu/cle>.

Jere will long be recognized as one of the most outstanding lawyers in the country. More importantly, he will be remembered as a great person, friend and mentor. A graduate of the University of Georgia and Cumberland School of Law, Jere was a founding member of Lightfoot, Franklin & White LLC in Birmingham. He held himself and others to the highest standard of the practice of law. A third-generation lawyer, he was truly a lawyer's lawyer. He cherished his relationships with the bench and lawyers on both sides of the bar. Jere balanced his success as a lawyer with an even stronger devotion to his faith, family, friends and community.

Gifts can be made to the Jere F. White, Jr. Fellows Program at <http://cumberland.samford.edu/> by clicking "Giving" and checking "Designations" and then selecting "Jere F. White Fellows Program." Gifts can also be made by check made out to "Cumberland School of Law" with "White Fellows" in the memo line and sent to Attention David Hutchens, Cumberland School of Law, Samford University ROBH 209, 800 Lakeshore Dr., Birmingham 35229. | [AL](#)

ALABAMA STATE BAR
2014 ANNUAL MEETING
 ★ AND LEGAL EXPO ★

2 0 1 4

AWARD RECIPIENTS

ASB PROFESSIONALISM AWARD



ASB General Counsel Tony McLain visits with close friend Tony Williamson at President Raleigh's Julyfest Saturday. Earlier that morning, Tony was surprised as the first recipient of the Alabama State Bar Professionalism Award. Subsequent awards will be known as the J. Anthony "Tony" McLain Professionalism Award. This award recognizes an attorney for distinguished service in the advancement of professionalism. McLain began his career with the state bar in 1988 as assistant general counsel and was named general counsel in

1995. He is responsible for overseeing the operations of the Center for Professional Responsibility, which investigates and prosecutes bar complaints, issues ethics opinions to lawyers, represents the bar in state and federal litigation and provides legal advice to the bar's governing body, the Board of Bar Commissioners.

VOLUNTEER LAWYERS PROGRAM PRO BONO AWARDS



President Anthony Joseph with VLP Pro Bono awards recipients Jeff Smith, Matthew Ward and James Walter, Jr., and Jeanne Rasco, chair of the Pro Bono Public Service Committee

Jeff Smith is the recipient of the Al Vreeland Pro Bono Award. As president of the Tuscaloosa County Bar, Smith established a monthly legal clinic that provides counsel to the poor and disadvantaged in that area. He helped set up and organize the clinic, recruited new volunteer attorneys and developed a partnership with the University of Alabama School of Law. Smith is a regular volunteer at the clinic and has been a Volunteer Lawyers Program volunteer since 2004. Over the last year, he personally assisted 12 clients and currently has four open and active pro bono cases. Smith practices in Tuscaloosa with Rosen Harwood PA.

Siniard, Timberlake & League PC of Huntsville is the recipient of the Pro Bono Firm/Group Award. Since 2010, the firm's attorneys have been dedicated to giving support to those in need through the Madison County Volunteer Lawyers Program. They have provided legal assistance to 25 clients in a wide variety of areas. They regularly attend clinics and other events and are ready, willing and able to lend a hand when asked.

Michael Timberlake joined the Madison County VLP Board of Directors in 2012. In 2013, he was asked to chair the program's major fundraiser. Through his work, and that of the lawyers and staff at Siniard Timberlake, the fundraiser, "Pro Bono Brews," expanded and reached outside of the legal community, raising over \$20,000.

Matthew Ward, a student at the Thomas Goode Jones School of Law, is the recipient of the Pro Bono Law Student Award. Ward has been a strong advocate for pro bono legal services. He is a frequent volunteer at the Montgomery County Pro Bono Clinic. In addition, Ward has encouraged other students to participate in the clinic. Last year, Ward also served as president of the Public Interest Law Foundation at Jones and, in that role, sought different ways to recognize students involved in public interest. He also oversaw the annual "Bid for Justice Auction," a fundraiser providing stipends to students working in unpaid public interest jobs during the summer. Ward also worked in the Jones School of Law legal clinics. Beyond his course work, he volunteered his time over Christmas break to make sure all clients served during the fall were able to have their needs met between semesters.

James N. Walter, Jr. is the recipient of the Mediation Award. He regularly provides pro bono mediation for both the Montgomery County district and circuit courts. In the last year, Walter provided more than 25 hours of assistance pro bono. He meets with the public at court and helps resolve disputes before there is a "loser." The provision of pro bono mediation allows judges to better manage their dockets, spending their limited time on more complicated cases. Walter practices in Montgomery with Capell & Howard.

FIFTY-YEAR MEMBERS



Fifty-year members: Byrd R. Latham, Richard M. Jordan, William P. Powers, III and John Ray Warren

JEANNE MARIE LESLIE SERVICE AWARD



Kim Davidson of Birmingham, recipient of the Jeanne Marie Leslie Service Award, and Robert Thornhill, Alabama Lawyer Assistance Program director

This award honors a state bar member, a volunteer or a committee member who has shown exemplary dedication to assisting those in need in the area of substance abuse or mental health. Jeanne Marie Leslie was the first director of the Alabama Lawyer Assistance Program and served in that capacity for 14 years, until her death in 2012.

Kim Davidson is a family law attorney based in Birmingham. Davidson has served on the Alabama Lawyer Assistance Program Committee since 2010.

She is a graduate of the Birmingham School of Law.

CHIEF JUSTICE'S PROFESSIONALISM AWARD



Alabama Supreme Court Chief Justice Roy Moore and retired Circuit Judge Joseph A. Colquitt, University of Alabama School of Law, Tuscaloosa, recipient of the Chief Justice's Professionalism Award

This award was created jointly by the Chief Justice's Commission on Professionalism and the Alabama State Bar. It recognizes a judge or lawyer for his or her outstanding contribution in advancing the professionalism of the legal profession in Alabama.

Judge Colquitt received his undergraduate degree in 1967 and his law degree in 1970 from the University of Alabama. In 1987, he received the M.J.S. degree from the University of Nevada in Reno.

Judge Colquitt was a circuit judge in the Sixth Judicial Circuit of Alabama from 1971 to 1991 and served four terms as presiding judge. He also served on the Executive Committee of the Alabama Circuit Judges' Association.

From 1974 to 1991, Judge Colquitt was an adjunct faculty member at the University of Alabama School of Law before joining the law school on a permanent basis in 1991. In addition, he is a faculty member at the National Judicial College in Reno, Nevada. He regularly teaches at judicial colleges and seminars, and has taught at the Russian Legal Academy in Moscow.

Judge Colquitt was a member of the drafting committee for the *Alabama Rules of Evidence*, edited the *Alabama Pattern Jury Instructions—Criminal* and is the author of *Alabama Law of Evidence* and *Alabama Criminal Trial Practice Forms*.

JUDICIAL AWARD OF MERIT



Judge Edward E. Carnes, U.S. Court of Appeals, 11th Circuit, and recipient of the Judicial Award of Merit, and President-elect Rich Raleigh

The Judicial Award of Merit is the highest honor given by the Alabama State Bar to a sitting judge, whether state or federal court, trial or appellate, who has contributed significantly to the administration of justice in Alabama.

Judge Carnes attended the University of Alabama where he graduated in the top of his class from the school of commerce and business in 1972. He graduated with honors from Harvard Law School in 1975. That same year, he was admitted to the Alabama State Bar and began his legal career at the Alabama Attorney General's Office. He argued more than 150 appeals, including three before the United States Supreme Court.

After almost 20 years of advocacy at the Alabama Attorney General's Office, he was appointed to the Eleventh Circuit Court of Appeals in 1992, and he has served as a judge on that court for more than 20 years. He often lectures on appellate advocacy and effective writing. In spring 2014, he taught an advanced course for judges in the Master of Judicial Studies Program at Duke Law School. He became Chief Judge August 1, 2013.

PRESIDENT'S AWARD



Several of the President's Award recipients, including Daniel Johnson, Robert Lockwood, Othni Lathram and Alyce Spruell, with President Joseph

The President's Award is presented to members of the bar who best exemplify the Alabama State Bar motto, "Lawyers Render Service" and in recognition of their exemplary service to the profession. The recipients are chosen by the President Joseph are:

David R. Boyd, Balch & Bingham LLP, Montgomery
David G. Hymer, Bradley Arant Boult Cummings LLP, Birmingham

Daniel F. Johnson, Lewis Brackin Flowers & Johnson, Dothan
Othni J. Lathram, Alabama Law Institute, Tuscaloosa
Robert C. Lockwood, Wilmer & Lee PA, Huntsville
George M. (Jack) Neal Jr., Sirote & Permutt PC, Birmingham
Hon. John E. Ott, Chief U.S. Magistrate Judge, Northern District

Barry A. Ragsdale, Sirote & Permutt PC, Birmingham
Alyce M. Spruell, Rosen Harwood PA, Tuscaloosa

MAUD MCLURE KELLY AWARD



Ernestine Sapp, Tuskegee, recipient of the Maud McLure Kelly Award
Maud McLure Kelly was the first woman admitted to the practice of law in Alabama. In 1907, Kelly's performance on the entrance exam at the University of Alabama Law Department merited her

admission as a senior, the second woman ever to have been admitted to the school.

Ernestine Sapp practiced law in Tuskegee for more than three decades, representing clients in civil rights matters, specifically in the area of education rights for children with special needs. She was the first African American to graduate from Jones School of Law. Sapp was also the first African American woman to serve on the Alabama Trial Lawyers Executive Committee and on the National Trial Lawyers minority caucus, as well as being the first Alabamian elected vice president of the National Bar Association.

Sapp's numerous contributions to local, state and national bar activities and her involvement in her community have created a positive impact on the future of Alabama's female attorneys.

AWARD OF MERIT



Rocky Watson, state bar vice president; Judge John Carroll, former dean, Cumberland School of Law, and recipient of the Award of Merit; President Joseph

The Award of Merit is the highest honor given by the Alabama State Bar to a lawyer, and serves to recognize outstanding constructive service to the legal profession in Alabama.

Judge John L. Carroll received his undergraduate degree from Tufts University and holds law degrees from the Cumberland School of Law at Samford University and Harvard University. Judge Carroll served as a United States Magistrate Judge in the Middle District for more than 14 years. Prior to becoming a judge, Judge Carroll was a professor of law at Mercer University School of Law in Georgia. Before entering academia, he was the legal director of the Southern Poverty Law Center in Montgomery.

Judge Carroll has twice argued before the United States Supreme Court and also has combat military service in the United States Marine Corps.

Judge Carroll is a member of the Board of Trustees of the American Inns of Court and a member of the boards of directors of the American Judicature Society, the Sedona Conference and the Alabama Civil Justice Foundation. He is a fellow of both the American Bar Association and the Alabama State Bar, an academic fellow of the International Society of Barristers and an elected member of the American Law Institute.

LOCAL BAR AWARDS OF ACHIEVEMENT



Those accepting the Local Bar Achievement awards were Robin Burrell, president, Birmingham Bar Association; Edward Freeman, II, president, Bessemer Bar Association; Daniel White, president, Escambia County Bar Association; and William Lee, president, Houston County Bar Association.

The awards recognize local bar associations for their outstanding contributions to their communities. Associations compete for these awards based on their size—large, medium or small. Criteria used to judge the contestants includes the degree of participation by the bar in advancing programs to benefit the community, the quality and extent of the impact of the bar's participation on the community and the degree of enhancements to the bar's image in the community.

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WEDNESDAY

JULY 9, 2014



Judge Verin's questions and comments during the plenary brought a smile to President-elect Rich Raleigh!



As the sun goes down, members gather on the Sunset Deck for the annual Membership Reception and Beach Party.



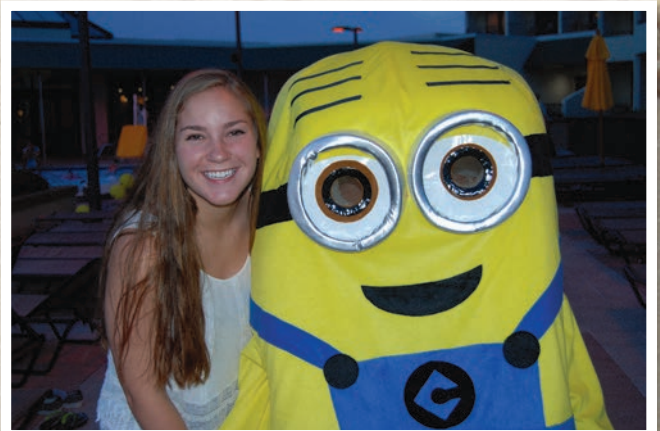
Relaxing poolside during the reception are Wendy and Jeff Patterson with their sons, Ian and Brock, of Montgomery.



Friendly faces and regular attendees Mary Jane and Michael Oakley at the opening plenary, "Musical Chairs at the Bar: How to Keep a Seat in the Future of Law Practice"



Sandra Ingram Speakman, presenter at "Veterans and Our ASB: How Your Local Bar Can Learn the ABC's of Starting and Supporting a Veteran's Court from Alabama Judges and Lawyers"



Along with great food and a gorgeous sunset was the popular Make-a-Minion Craft Activity.

THURSDAY JULY 10, 2014



Creating order out of chaos are Women's Section members Jamie Durham, Allison Skinner and Sherrie Phillips, getting ready for the Silent Auction.



Comprehensive Investigative Group exhibitor Jeff Hammock visits with an attendee and a future James Bond.



Still smiling after discussing some of the pros and cons of the future of college athletics are ASB President Anthony Joseph; SEC Executive Associate Commissioner/GCO Greg Sankey; Vanderbilt University Athletic Director David Williams, II; Auburn University Offensive Coordinator Rhett Lashlee; former University of Alabama football player/ Battle Plan Capital VP of Operations Will Lowery; and moderator William H. King, III.



Attendee and past President Alyce Spruell visits with several exhibitors, including Zve Farmer (far right) of Principal Financial Group.



Saving the universe, competing for prizes and, of course, having a snack, at the #TeenGreenRoom!



FRIDAY JULY 11, 2014



Enjoying the award-winning wines of the Carneros della Notte winery are Larry and Arnita Foster with ISI employees Matt Sinderman and Doug Johnson.



Dennis Johnson, Dorothy Johnson, director of admissions, and Cassandra Joseph get in a quick visit at the President's Closing-Night Celebration. Dorothy retired in August after 22 years of service to the ASB.



Even the youngest attendees appreciate the music of "4 Barrel Funk."



A queen and her court! Visiting at this year's past presidents' breakfast were, front row, left to right, Spud Seale, Alva Caine, former Chief Justice Sonny Hornsby, Alyce Spruell, Phillip McCallum, Wade Baxley and Sam Crosby. In the back row, left to right, were Tom Methvin, Mark White, Doug McElvy, Johnny Owens, Jim Pratt, Boots Gale and Fred Gray.



With an overview of the legislative process and explanation of the bar's involvement are Sen. Phil Williams, Ted Hosp, Sen. Cam Ward, past President Jim Pratt, governmental liaison Suzy Edwards, past President Phillip McCallum and Rep. Chris England.



Judging by the blue frosting, the ISI-sponsored cupcake decorating was a hit!



A winning combination—the music of Robert Thornhill and the "Brandy and Cigar After-Party"

SATURDAY

JULY 12, 2014



The soon-to-be past president thinks everything is just ducky!



"AJ Cool J"—if you have to ask, you wouldn't understand!



It's official—AJ's out and Rich is in.



David Holt, Grand Prize trip winner, with Charlotte Bass Gardner and Bill Bass of ISI



A group effort—President-elect Lee Copeland, President Rich Raleigh and past President Anthony Joseph



For her hard work keeping the president on track at the office, legal assistant Laura Cato is thanked by AJ and immediate past President Phillip McCallum.



Behind every successful president are patient family members. AJ's support group included wife Cassandra, son Aaron, sister-in-law Sabrina Simon, mother-in-law Marietta Andry and brother-in-law Kenneth Simon.



See you next year!

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Presidential Election Campaign page 14

Income

W-2

1040

Your first name and initial

Last name (99)

Home address (number and street). If you have a P.O. box, see page 14.

Last name

Town or post office, state, and ZIP code. If you have a foreign address, see page 14.

Checking "Yes" will not change your tax or reduce your refund. Do you, or your spouse if a joint return, want \$3 to go to this fund?

Total wages, salaries, and tips. This should be shown in box 1 of your W-2 form(s). Attach your W-2 form(s).

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SEARCH

TAXES

INCOME TAX



Alabama Taxpayers Gain Independent Tax Tribunal

By Jeff Patterson

Introduction to Act 2014-146

Currently, Alabama taxpayers who desire to challenge an action of the Alabama Department of Revenue (ADOR) have two appeal options—administrative and judicial—in most situations.¹ The administrative-appeal option is exercised by filing an appeal with a division within the ADOR itself, known as the Administrative Law Division, which is staffed by the ADOR with a chief administrative law judge and support personnel. In lieu of appealing to the Administrative Law Division, a taxpayer may appeal directly to the circuit court of the county in which the taxpayer resides or has a principal place of business, or to the Montgomery Circuit Court, at the option of the taxpayer.²

On March 11, 2014, however, Governor Robert Bentley signed House Bill 105 into law (Act 2014-146), which will abolish the ADOR's Administrative Law Division, effective October 1, 2014, and will replace it with an executive-branch agency known as the "Alabama Tax Tribunal" that will not be a part of the organizational structure of the ADOR. The title of Act 146 is the "Taxpayer Fairness Act,"³ and its stated purpose is "[t]o increase public confidence in the fairness of the state tax system...."⁴

Specifics of the Act

Current provisions concerning administrative appeals are contained within Chapter 2A of Title 40, which is known as the "Alabama Taxpayers' Bill of Rights and Uniform Revenue Procedures Act." Act 146 amends and supplements Chapter 2A, and adds Chapter 2B, which creates the Alabama Tax Tribunal and addresses its operation.⁵

Changes to Chapter 2A

The following discussion highlights some of the more prominent changes to the Alabama Taxpayers' Bill of Rights. In addition to inserting definitions and references to the tribunal, Act 146 requires the ADOR's Taxpayer Advocate⁶ to review (at the request of the tribunal) final orders of the Alabama Tax Tribunal that were not appealed, if newly-discovered evidence exists that could not have been discovered by due diligence within the time for filing an application for rehearing. In such a situation, the Taxpayer Advocate may propose relief for the taxpayer, subject to approval by the ADOR's commissioner or assistant commissioner.⁷

The Act also grants any self-administered local tax jurisdiction (meaning a locality that chooses to not have the ADOR administer its local taxes) the same authority currently possessed by the commissioner of the ADOR regarding installment payments by delinquent taxpayers.⁸ Thus, self-administered localities will have authority to enter installment-payment agreements with delinquent taxpayers, if such an "agreement will facilitate collection of such tax."⁹

Current provisions of Alabama's Taxpayers' Bill of Rights authorize the ADOR commissioner to issue revenue rulings, at the request of taxpayers, which describe the application of Alabama's tax laws and regulations to the taxpayer's set of facts. Revenue rulings are binding upon the government as to that particular taxpayer and that taxpayer's fact situation.¹⁰ Act 146 will require the ADOR attorney, who has been assigned to review a revenue ruling request, to consult with the taxpayer or the taxpayer's representative, if requested, prior

to issuing the ruling.¹¹ In such a situation, the taxpayer could discuss the factual or legal questions or concerns of the ADOR attorney, and then would have the option of withdrawing the ruling request.

Generally, the time limit for entering a preliminary assessment of tax is three years from the due date of the return or three years from the date of filing, whichever is later, or within three years of the due date of the tax if no return is required.¹² Act 146 will extend the statute of limitations for the entry of a preliminary assessment by a self-administered locality, if 1) the ADOR has audited a taxpayer and has entered a final assessment for sales, use, rental or lodgings tax; 2) the taxpayer owes the same type of tax to the locality for the same periods; and, 3) the taxpayer has not voluntarily contacted the locality or the locality's private auditing firm prior to the date of entry of the ADOR's final assessment. Then, the statute of limitations will not expire until six months from the final assessment date or 60 days following the date that the ADOR provides a copy of the final assessment to the locality, whichever is earlier.¹³ However, any taxes assessed by a self-administered locality during the extended period will be limited to the items addressed in the ADOR's final assessment.

A more subtle, but important, change that is made by the act concerns the time limit within which a taxpayer may seek review of a preliminary assessment with the ADOR. (Taxpayers have no right to appeal a preliminary assessment to the ADOR's Administrative Law Division or to circuit court. *See* § 40-2A-7(b)(4)a., limiting the review to a conference with the ADOR.) Currently, the taxpayer has 30 days from the date that the assessment was entered to petition the ADOR for an internal review.¹⁴ When the act takes effect,

however, the taxpayer will have 30 days from the date that the assessment was *mailed* or personally *served*, whichever is earlier, to request a review.¹⁵ This change will eliminate situations where an assessment is entered, thus triggering the beginning of the petition period, but is not mailed to a taxpayer until several days later, thus costing the taxpayer precious appeal time. The act makes this same change to the time period within which a taxpayer may appeal a final assessment.¹⁶

Another important addition for taxpayers, especially publicly-traded companies, allows for an appeal to be taken to the tribunal or to circuit court of a preliminary assessment that has not been withdrawn or made final by the ADOR within five years from its date of entry.¹⁷ Taxpayers in general do not want unresolved tax issues to linger for years, but public companies are especially desirous of a resolution within a reasonable time because of their obligation to report any such potential liability to the public and to their shareholders. Although Act 146 simply could have provided for the voiding of a five-year-old preliminary assessment, it at least allows taxpayers the right to move such an assessment outside of the ADOR for resolution.

Currently, the Taxpayers' Bill of Rights requires taxpayers who appeal a final assessment to circuit court to pay the amount of the assessment, including penalties and interest, or, among other things, to show that the taxpayer has a net worth of \$100,000 or less.¹⁸ The act increases that threshold to \$250,000,¹⁹ obviously meaning that many more taxpayers will be able to gain judicial review of a final assessment without having to first pay the assessment.

Chapter 2B— Creation and Operation of the Alabama Tax Tribunal

As stated, the purpose of the Alabama Tax Tribunal is to “increase public confidence in the fairness of the state tax system,” and it seeks to do so by providing “an independent agency with tax expertise to resolve disputes between the Department of Revenue and taxpayers, prior to requiring the payment of the amounts in issue or

Another important addition for taxpayers, especially publicly-traded companies, allows for an appeal to be taken to the tribunal or to circuit court of a preliminary assessment that has not been withdrawn or made final by the ADOR within five years from its date of entry.¹⁷

the posting of a bond . . .”²⁰ The tribunal will be a part of the executive branch of government, and “shall be separate from and independent of the authority of the Commissioner of Revenue and the Department of Revenue.”²¹ Although the tribunal will not come into existence until October 1, 2014, its chief judge will be appointed by July 1, 2014 to begin the steps necessary to allow the tribunal to function properly.²²

The tribunal shall have one chief judge, and may have as many as two associate judges, but no more than three judges in total.²³ Tribunal judges will be appointed by the governor for a six-year term, but the act provides that the ADOR’s administrative law judge shall become the tribunal’s initial chief judge.²⁴ Each judge must devote his or her full-time work to the tribunal, and is prohibited from engaging in other gainful employment or holding public office. But, a judge may passively own business interests and earn income from certain incidental activities,

unless such activities conflict with the judge’s duties to the tribunal.²⁵

The tribunal’s principal office will be in Montgomery, and hearings before the tribunal shall be conducted at that office. But the tribunal has the authority to hold hearings throughout the state, “with a view toward securing to taxpayers a reasonable opportunity to appear before the Alabama Tax Tribunal with as little inconvenience and expense as practicable.”²⁶

The jurisdiction of the tribunal shall be broad, with Act 146 expanding its jurisdiction well beyond that of the ADOR’s current Administrative Law Division. Subject, of course, to judicial review and to our state constitution, “the Alabama Tax Tribunal shall be the sole, exclusive, and final authority for the hearing and determination of questions of law and fact arising under the tax laws of this state. The Alabama Tax Tribunal shall have jurisdiction to hear and determine all appeals pending before the Department of Revenue’s Administrative Law Division on October 1, 2014, and all subsequent appeals filed with the Alabama Tax Tribunal pursuant to Chapters 2A, 27, and 29 of this title, Chapters 6, 7A, 8, 13, and 20 of Title 32, relating to motor vehicles, or Section 40–2B–1(g)(2), relating to self-administered counties and municipalities.”²⁷

There are notable exceptions, though. Specifically, the jurisdiction of the tribunal will extend to only those self-administered localities that choose to participate. Also, as is the case currently with the ADOR’s Administrative Law Division, taxpayers will retain the right to appeal a final assessment or refund denial directly to circuit court, thus bypassing the tribunal. And the tribunal’s jurisdiction will not extend to the assessment of ad valorem taxes, except as to appeals from final assessments of the valuation of property of public utilities.²⁸

As with the current administrative appeal procedures in the Taxpayers’ Bill of Rights, a taxpayer will be able to appeal to the tribunal without having to pay the assessment or post an appeal bond.²⁹ The two exceptions to this provision concern the appeal of a denied refund claim and the appeal of a “jeopardy” assessment, which is entered when the ADOR believes that the taxpayer designs to quickly depart from the state and which requires the posting of a bond even for an administrative appeal.³⁰

Because the Alabama Tax Tribunal will be an executive-branch agency, it will not possess the power to declare a statute unconstitutional on its face. It will, however, have the authority to declare a statute unconstitutional in its application to a particular taxpayer. The act provides other methods by which a taxpayer may challenge the facial constitutionality of a statute, including a declaratory action in court.³¹

Unlike current provisions of the Taxpayers' Bill of Rights, Act 146 will allow parties—including taxpayers—to conduct formal discovery at the administrative level through written interrogatories, requests for production of documents, depositions and requests for admissions. However, the act first directs parties to accomplish discovery informally, and to stipulate to all matters possible. And, the act authorizes a tribunal judge to issue subpoenas.³² Presently, the ADOR—and not its Administrative Law Division—possesses summons and subpoena power, but taxpayers have no discovery rights at the administrative level. *See* § 40-2A-7(a)(4).

During hearings, the tribunal will not be bound by the rules of evidence that apply in circuit court civil cases, but rules concerning legal privileges will apply.³³ As to issues of fact, the taxpayer will bear the burden of persuasion, by a preponderance of the evidence, except that the ADOR shall bear the burden as to an assertion of fraud and in other cases mandated by law.³⁴

In deciding a taxpayer appeal, the tribunal “shall grant such relief, invoke such remedies, and issue such orders as it deems appropriate to carry out its decision.” But, the decision must be rendered within nine months of the date of the last submission of briefs or the date of the hearing, if no briefs are submitted.³⁵ If the tribunal’s decision is not appealed timely, the decision will finally decide the matters in controversy, and shall have the same force and effect as a circuit court judgment.³⁶

The exclusive remedy for review of an appealable order of the tribunal, by either party, will be by appeal to circuit court. Specifically, the appeal must be filed within 30 days of the date of entry of the order being appealed, and a copy of the appeal must be submitted to the tribunal. In circuit court, the appeal will proceed as a trial de novo, except that the tribunal’s order will be presumed correct, and the burden will be upon the appellant to prove otherwise.³⁷

Act 146 shall apply to all proceedings that are commenced in the tribunal on or

after October 1, 2014. And, the act also shall apply to administrative appeals that were filed prior to that date, if those appeals have not been finalized by then.³⁸

What the Alabama Tax Tribunal Means To Taxpayers

The overarching purpose of Act 146 is to create the perception of fairness in the minds of Alabama taxpayers, by providing an administrative-appeal forum that is separate from and independent of the very agency that has taken action against the taxpayer. And for Alabama taxpayers, that separateness and independence is the meaning of the new Alabama Tax Tribunal. | AL

Endnotes

1. *See* Code of Ala. § 40-2A-7(b)(5) and (c)(5), authorizing an appeal from the entry of a final assessment or from a denial, in whole or in part, of a refund petition, to the ADOR’s administrative appeals division or to circuit court, at the option of the taxpayer. With certain exceptions, assessments of ad valorem taxes are not appealable to the administrative appeals division. *See* § 40-2A-2(2).
2. § 40-2A-7(b)(5)b. 1. If a taxpayer first appeals to the Administrative Law Division, either party—the taxpayer or the ADOR—may appeal an adverse administrative ruling to circuit court. § 40-2A-9(g).
3. Act 146, Section 2.
4. Act 146, Section 1.
5. Act 146 takes effect October 1, 2014, except for the provision concerning the appointment of a chief judge to the tribunal, which takes effect July 1, 2014. *See* Act 146, Section 8.
6. The Taxpayer Advocate is an employee of the ADOR who formally reviews taxpayer inquiries and complaints, and who has authority to propose relief beyond normal statutory provisions. Such relief is subject to approval, however, by the ADOR commissioner or assistant commissioner. *See* § 40-2A-4(b)(1).
7. *See* Act 146, Section 3 (amending § 40-2A-4(1)).
8. *See* Act 146, Section 3 (supplementing § 40-2A-4(b)(6)).
9. § 40-2A-4(b)(6)a.
10. § 40-2A-5(a).

11. Act 146, Section 3.
12. § 40-2A-7(b)(2).
13. Act 146, Section 3 (adding § 40-2A-7(b)(2)k.)
14. § 40-2A-7(b)(4)a.
15. Act 146, Section 3.
16. Act 146, Section 3 (amending § 40-2A-7(b)(5)a. and b.1.).
17. Act 146, Section 3 (adding § 40-2A-7(b)(4)c.).
18. § 40-2A-7(b)(5)b.2.(i) and (v).
19. Act 146, Section 3.
20. Act 146, Section 4 (adding § 40-2B-1(a)).
21. Act 146, Section 4 (adding § 40-2B-1(b)(1) and (2)).
22. Act 146, Section 4 (adding § 40-2B-1(b)(3)).
23. Act 146, Section 4 (adding § 40-2B-1(c)(1)).
24. Act 146, Section 4 (adding § 40-2B-1(c)(2) and (3)).
25. Act 146, Section 4 (adding § 40-2B-1(d)(3)).
26. Act 146, Section 4 (adding § 40-2B-1(e)(1) and (2)).
27. Act 146, Section 4 (adding § 40-2B-1(g)).
28. Act 146, Section 4 (adding § 40-2B-1(g)). If a locality divests the Alabama Tax Tribunal of jurisdiction concerning taxes which that locality administers, the locality must provide an appeals process that functions “in a manner similar to the procedures prescribed for appeals to the Alabama Tax Tribunal.” § 40-2B-1(g)(2)f.
29. Compare § 40-2A-7(b)(5)b.2. with Act 146, Section 4 (adding § 40-2B-1(g)(3)). Note: Act 146 has two subparagraphs denominated as § 40-2B-1(g)(2), one on page 58 of the act and the other on page 61.
30. *See* Act 146, Section 4 (adding § 40-2B-1(g)(3)). *See also* §§ 40-29-90(e) and -91(e) as to the posting of an appeal bond.
31. Act 146, Section 4 (adding § 40-2B-1(g)(5)).
32. Act 146, Section 4 (adding § 40-2B-1(j)).
33. Act 146, Section 4 (adding § 40-2B-1(k)(4)).
34. Act 146, Section 4 (adding § 40-2B-1(k)(7)).
35. Act 146, Section 4 (adding § 40-2B-1(l)(1) and (2)).
36. Act 146, Section 4 (adding § 40-2B-1(l)(4) and (6)).
37. Act 146, Section 4 (adding § 40-2B-1(m)(1), (2), and (4)).
38. Act 146, Section 5.



Coping with Hearing Loss:

This Can Happen to Any of Us

By Gilbert B. Laden

We lawyers are taught the importance of effective communication.

The emphasis is on speaking and writing, e.g., persuading a jury or judge of the merits of a client's position. Perhaps you may need to convince opposing counsel of why your client is overwhelmingly in the right. We hone our speaking and writing skills. We go to seminars. Then, at some point after we become experts at what we do, we become stymied. Our hearing has worsened. We miss a few words. Our confidence is affected. What did the witness say? The judge? The other lawyer? Unfortunately, we do not get brochures or email for seminars on what to do about a hearing loss.

Some lawyers have congenital hearing loss, which may have occurred during the prenatal period or during the birth process itself. Sometimes a hearing loss is due to an illness during infancy. Most

hearing loss, however, occurs through the aging process. Such individuals are “late-deafened” adults. It is only natural. Our eyesight may also diminish. We lose a step physically. The gradual loss of hearing can be daunting, though.

There are a number of statistics to put hearing loss into perspective. The *Hearing Loss Association of America* (HLAA) represents individuals with hearing loss. The *Alexander Graham Bell Association for the Deaf* is another advocacy group. The HLAA provides a wealth of information on hearing loss at www.hearingloss.org, including links to statistics sources and other information:

- Approximately 20 percent (48 million) of American adults report some degree of hearing loss
- Only one of five people who could benefit from a hearing aid actually wears one
- Hearing loss prevalence nearly doubles with each decade of age¹

While the presence of sign language interpreters is a welcome sight, the reality is that they serve only a small segment of the hearing-impaired community. The vast majority of people with hearing loss

depend upon oral communication. A vital component to that communication is a hearing aid. The most important thing to realize about a hearing aid is that it is not a substitute for normal hearing. It will not be as helpful as one would like it to be in social settings such as the bar association holiday party, or meetings, or conferences. It is a critical piece of assistive technology, though. There is an adjustment period. Many people tend to give up on them due to impatience, unrealistic expectations, not conveying to the dispenser problems which may be able to be fixed and, sometimes, vanity.

One feature of a hearing aid, which many do not use or are unaware of, is the telecoil, sometimes called a t-switch. It relies on electromagnetic waves and operates as a uni-directional microphone, which essentially blocks out background noise. It is a boon to comprehension for use of a hearing aid-compatible or telecoil-compatible telephone, which wired telephones (“land lines”) are mandated to be. Wireless telephones, i.e., cellular telephones, presented a challenge, because they were originally exempt from FCC regulations for compatibility.²

Fortunately, the FCC worked out a settlement with telephone and hearing aid manufacturers for a phasing in of telecoil compatibility of cell phones. Cell phones are required to be rated according to the American National Standards Institute (ANSI). A M3/T3-rating meets the ANSI standard; M4/T4 exceeds it.

Another piece of technology is the assistive listening device (ALD) or assistive listening system (ALS). The ALD is small and portable. The ALS is for large facilities, such as a courtroom. The ALD or ALS works best with a telecoil as it essentially pipes the sound directly into the hearing aid, which enhances clarity. Many public facilities, such as courtrooms or theaters, offer devices. These range greatly in quality, though. One can employ notetakers or utilize Communication Access Realtime Translation (CART), which provides realtime captioning of spoken presentations.

There is Bluetooth technology. Some hearing aids come equipped for Bluetooth. It will allow you to connect audio devices to the hearing aids. In the event your hearing aid does not have Bluetooth capability, there is a wired option, a HATIS device.⁶ HATIS offers a wired device that works in conjunction with the telecoil switch on a hearing aid. It can be plugged into a smartphone or tablet to pick up sounds. It also has a wireless device for Bluetooth-equipped hearing aids.

There is the Alabama Telephone Relay Service (ATRS), which is a third-party service. One of the speakers uses a TTY (TeleTYpewriter or Text Telephone) or TTD (Telecommunication Device for the



Depending on the degree of hearing loss and your adaptive skills, you can still be effective. Your preparation for trial will now include anticipating where your hearing loss may come into play.

Deaf). The third party “translates” the message on both ends. It is a valuable service for hearing- or speech-impaired individuals. The drawback is that it is slow, as it takes time for the message to be conveyed.

There are a number of factors which may affect the ability to hear even with a hearing aid or other technology:

- The distance from a speaker (the closer you are to the client or the witness, for example, the better)
- Lighting, especially on the speaker’s face rather than behind the speaker
- The ability to guess and fill in gaps (risky in a professional situation)
- Nonverbal communication (facial expressions and other body language, tone of voice), which requires good eyesight and being alert
- Lip-reading or speech-reading (there is no such thing as being able to lip-read 100 percent due to visual similarities in the physical formation of words, but the range can vary)⁷
- The number of people speaking
- Background noise
- Acoustics
- The speaker and his topic (how well the speaker enunciates, the presence of an accent, the vocabulary and the hearing-impaired listener’s knowledge of the subject matter)

Living with a hearing loss requires coping mechanisms. It is important to

be alert. That can be aided by getting a good night’s sleep, watching one’s diet, exercising regularly and minimizing alcohol intake. Think about it. If you are tired, you cannot pay attention as well. You get distracted. That is why social events at night can be a triple whammy: you are tired, it is dark and you may be drinking alcohol.

Modern technology can be helpful in other ways. Communication by email has proven to be effective for us all, even with a hearing loss. Social media is another tool.

The reality may be you cannot do the things you used to do. Perhaps your hearing loss is too great to deal with the courtroom. You still have a lifetime of accumulated skills and experience that can translate to being an effective advocate in other settings. It can be frustrating, but it is not an insurmountable obstacle.⁸ With the advent of the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act, there is legal support for those seeking accommodation.⁹

So, you are a trial lawyer and still want to be in the courtroom. Depending on the degree of hearing loss and your adaptive skills, you can still be effective. Your preparation for trial will now include anticipating where your hearing loss may come into play.

There are some suggestions. Just as a baseball player will want to know the quirks of a baseball field, e.g., where does that ball tend to carom off the Green Monster in Fenway Park, or a basketball player needs to be aware of the dead spots on the hardwood at an arena, a lawyer needs to envision where he will be in the courtroom. Does it have a decent assistive listening system? Can I try it out ahead of time? How far will I be from the witness stand or the jury box? Am I allowed to shorten the distance between them? Will I be able to see opposing counsel's face? Does the judge enunciate clearly? Will the microphone block his or her face?

You may need an associate in the second chair. Work out an arrangement for that person to communicate effectively and quickly. Whispering will not do.

You also need to be in good physical shape. It enables you to get up, move around as needed to maximize your ability to listen and understand and be alert and attentive.

The reality may be that your hearing loss is too much to overcome. All is not lost. Explore other types of courtroom work that may be less stressful. Not all adjudicative settings are alike, judicial or administrative. Consider involvement in the preparation of cases or doing transactional work.

In the office, make sure you have the best telephone system you can to optimize your ability to hear. Consider asking the speaker to take off a headset and speak directly into the phone. (Be nice with your request!) Communicate with your staff and colleagues. They may want to help, but simply do not know what to do.

It is difficult to maintain a conversation with someone while walking down a hallway or if the individual keeps talking as he or she walks away without your being able to see the person's face. Gently, tell people, so they will get in the habit of accommodating you.

Being assertive does not mean being aggressive. You do not want people to dread coming into contact with you or to avoid you altogether. A low-key, pleasant tone will hold you in good stead. Take the initiative and put yourself in the best possible position to maximize your ability to hear.

At board or firm meetings, similarly to a courtroom setting, you need to figure out where is the best place to sit. You may not be able to hear everyone with the same degree of clarity. If you sit at the end of a table and face the chair, you will not be able to see faces of the other attendees, because they are facing the chair as well. So, you may want to sit on the side of the table a few seats from the chair where you can hear the chair and still see the faces of the others. Be mindful of lamplight or the daylight coming in from windows, as you want it behind you and not facing you. It can distract you from seeing faces.

Let us not forget about meetings with clients. Fortunately, one-on-one conferences are much easier to deal with, but it does require forethought. Distance and lighting are the two keys. Think about the set-up in the room where you meet with clients. Shorten the space between you and the client, and, it bears repeating, use lighting effectively. The end result will be a bond between you and your client, who will appreciate your confidence and knowledge and realize that your hearing loss is not a detriment.

I speak from the perspective of someone with a lifelong hearing loss. I did not get my first hearing aid, a body aid, until I went into the first grade. I did not get my first behind-the-ear model until the third grade. My first-grade teacher was concerned that I was "not going to make it," and told my mother. Because my

speech was so poor, I had to undergo six years of speech therapy. I sat in the front of the class in elementary school. I learned to lip-read from my countless hours of speech therapy—I had to learn mechanically how to form sounds, so I watched my speech therapist's mouth. I also realized how important my eyes were. What I saw, what I picked up nonverbally, was crucial.

Somehow, I got through it. Thank goodness for the support of my family, friends, teachers and others. I went to school in an era of less legal protections and less sensitivity and awareness than are available today.

Fortunately, I developed coping mechanisms, society has changed and I have managed to have a fulfilling career. I am mindful of my shortcomings, but I can be proud and grateful for what I have been able to do throughout a 37-year career. I look forward to more years of productivity.

I hope I have provided some useful information, and, yes, encouragement to those of you confounded by a hearing loss. In the end, a hearing loss will make you a different lawyer. It may make you a better lawyer. It can make you a more empathetic lawyer, one better able to connect with people. You can still be confident. Dealing with this adversity is no different from dealing with others. You can grow from it and move on just as you would from any other life event. | AL

Endnotes

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2. Federal Communications Commission, *Hearing Aid Compatibility for Wireless Telephones* (2013), available at <http://www.fcc.gov/guides/hearing-aid-compatibility-wireless-telephones>.
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9. John F. Stanton has written an excellent, in-depth article on the importance of the ADA and technology in leveling the playing field for deaf lawyers. John F. Stanton, *Breaking the Sound Barriers: How the Americans with Disabilities Act and Technology Have Enabled Deaf Lawyers to Succeed*, 45 Val. U. L. Rev. 1185 (2011), available at <http://scholar.valpo.edu/vulr/vol45/iss3/9>.



Conducting an Internal Investigation:

Recognizing and Resolving Key Issues from an Internal and External Perspective

By William Athanas and Christopher Terrell

At 4:30 one Friday afternoon, Jason Lane, an attorney, receives a call from his neighbor, Tim Donovan.

Donovan is also the president of Acme, Inc., an Alabama corporation that makes industrial tubing which it markets and sells to various construction companies, contractors and state and local governments. Donovan tells Lane that earlier in the week, Acme fired its long-time accounts payable clerk, Susan Thompson, after determining that roughly \$15,000 had been paid the previous month to apparently fictitious entities via checks she had issued. After learning of her planned termination, Thompson became upset and responded to Acme's in-house counsel by threatening to report to "the feds" Acme's longstanding practice of paying kickbacks to local government officials in return for agreements to award Acme contracts for public works construction projects, followed by Acme's recording those payments as "contracting expenses." Donovan expresses great concern and asks for an immediate plan of action.

While this scenario presents an array of challenging questions and potential traps for the unwary, all are driven by one threshold issue: do Thompson's allegations have any merit? To answer that question, an

internal investigation must be conducted, because until it is answered, both internal and external counsel will be handicapped significantly in advising Acme.

In any internal investigation, certain procedural and substantive issues must be addressed and resolved to instill confidence in the investigation's results. Perception is reality in this context: an investigation considered to be a sham will be disregarded (or worse, potentially used as evidence against the company in subsequent civil and criminal litigation), whether that result was intended or that assessment is accurate. With the Acme hypothetical as a backdrop, this article endeavors to explore the range of issues implicated when an attorney undertakes an internal investigation by (1) identifying the primary areas of concern counsel faces when a corporate client learns of allegations of misconduct, (2) understanding the most significant strategic and ethical hazards that typically arise and (3) recommending practical strategies to overcome challenges presented.¹

Procedural Issues

An internal investigation typically consists of three stages. The first involves assessing the reported conduct, determining the proper scope of review, preserving

key evidence and developing an investigative plan. The second involves gathering and analyzing information to determine whether, and to what extent, further expansion of the inquiry is appropriate. The third entails final determination of the nature and scope of any misconduct, appropriate remediation and the obligation or prudence of self-disclosing the matter to government enforcement agencies or regulators. In theory, these stages stand separate and distinct. In practice, however, they are interdependent, such that decisions made in one stage often have a dramatic and immediate impact on others. The discussion below considers some of the more significant issues presented, and offers suggestions to address them.

a. Determining Who Will Conduct the Investigation

The majority of internal investigations are appropriately conducted either by in-house counsel, compliance officers or human resources personnel. These investigations stem from relatively higher-frequency, lower-impact matters such as improper use of company facilities,

expense account impropriety and lower-value theft. In certain situations, however, the failure to outsource the investigation can cast doubt on the legitimacy of the process. Two scenarios are most common: where the allegations are lodged against senior management, either directly or by implication; and where the allegations, if proven true, would expose the company to criminal or regulatory sanctions.²

The involvement of outside counsel is essential in the Acme scenario. Thompson has not only alleged conduct amounting to a serious crime, her assertion almost certainly implicates the company's senior management. The internal vetting of her claims—either by individuals alleged to have participated in or, at a minimum, possessed knowledge of the activity in question—would be inherently suspect, as it would amount to the accused investigating themselves (or having those who report to them do so). Under those circumstances, it is prudent not only to secure outside counsel, but also to ensure that such counsel's independence could not be called into question.

b. Determining the Investigation's Scope

As a general principle, the contours of an internal investigation should correlate to four key dimensions of the underlying allegations: the time period, geographic scope, financial impact and number of individuals involved. At the outset, counsel should design an investigative plan to gather evidence relevant to the underlying allegations. The first determination investigating counsel should undertake is whether the activity in question is ongoing. Occasionally, the impropriety of certain activity might not be clear on its face, thus complicating the decision about whether to cease what may, in fact, be innocuous conduct. Where, as in the Acme scenario, the wrongfulness of the conduct is readily apparent, bringing it to a halt should be top priority.

Applying theory to practice demonstrates the challenges which can often occur when a less-than-detailed allegation is made, and highlights the need to gather as much information as possible about the accusation in order to construct an investigative plan that is at once suitably comprehensive and appropriately tailored. In the Acme scenario, counsel will be challenged to some degree based on the relatively generic

nature of Thompson's allegation. Thompson referenced the company's "longstanding practice" of paying kickbacks but provided no specifics about the length of time this conduct supposedly occurred. She failed to identify which individuals orchestrated, carried out or were aware of such conduct, just as she left unidentified the financial impact (whether in terms of kickbacks paid or ill-gotten gains realized) which resulted. Finally, her bare-bones assertion provided no indication of the geographic breadth of this activity, so that counsel could know to look for quarantined pockets of impropriety, systemic misconduct or even something in between.

Faced with such a broad allegation, one possibility is that counsel simply embark on a no-stone-left-turned investigation, one which searches far and wide without regard for cost or collateral impact.³ Far more frequently, however, the better course of action is to seek greater detail regarding the initial allegation. Under this approach, counsel accomplishes at least two purposes: gathering much-needed specifics which better inform the direction and contours of the investigation; and providing tangible evidence to the would-be whistleblower that her allegations have been taken seriously.⁴ In following up with Thompson, counsel would want to know at least the following about the conduct she alleged:

1. How long did it occur?
2. Who came up with the idea to carry it out?
3. Who carried it out?
4. Who was aware that it was being carried out?
5. To whom were payments made?
6. In what amounts?
7. On which contracts did Acme realize a benefit from this conduct?
8. How much of a benefit was realized?
9. Which documents provide evidence relating to conduct?
10. Has anyone taken steps to alter or destroy documents which relate to this conduct?

Counsel can focus the investigation in a far more informed manner armed with as many answers to each of these various questions as possible. Sometimes, however, such follow-up is either not feasible or even possible. In those instances, investigating counsel should proceed by reducing the

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allegations to their core. For example, because Thompson asserted that kickbacks were paid and mischaracterized in Acme's books as "contracting expenses," a review of those entries—and the information purportedly validating them—is an ideal starting point. Counsel will want to scrutinize any expenses Acme recorded and labeled as such on public works contracting projects for a set period (the "longstanding" modifier suggests that three years would be an appropriate starting point), looking specifically at whether the amounts recorded are corroborated, whether by invoices reflecting the amounts claimed or other authentic support, and identifying all involved in the recording of those expenses.

c. Deciding How to Gather Information

Once the initial framework of the investigation is set, counsel needs to determine how to gather information. Two general categories exist: documents (whether in hard copy form or electronically-stored information ("ESI")), and witness interviews. For each, the challenge is to secure and analyze enough information to allow for informed determinations without wasting time, effort and money on matters of minimal significance.

The first step in securing documents is to issue a litigation hold which, at a minimum, ensures that custodians with potentially relevant information are on notice that such material should not be altered or destroyed.⁵ In addition, measures should be taken to ensure that any auto-delete systems in place (e.g., those which cause emails or documents to "roll off" the system after 90 days) are suspended. The failure to take both of these steps will almost certainly draw the government's ire, if and when the investigative process is assessed at a later point, particularly if vital evidence is lost.⁶

Next, counsel should develop a framework which ensures that documents are collected and reviewed in a consistent fashion. The larger the investigation is, the more individuals necessary to conduct it. Without investing time at the outset to ensure that everyone collecting documents is using the same approach, those collection efforts will produce separate groups of documents that are over- or under-inclusive, depending on who undertook to gather them. Perhaps more significantly, the lack of a consistently

applied framework for reviewing the documents will mean that critically important evidence is missed.⁷ To avoid this outcome, investigating counsel should prepare and disseminate to reviewers uniform guidelines explaining the categories of information and types of documents relevant to the inquiry. Particularly where multiple reviewers are involved, focused training at the beginning of the project, distribution of checklists, protocols and other standards (ideally in handbook form to allow for efficient consultation), and regular auditing of performance all serve to maximize the possibility of a consistent approach.

In conducting interviews, counsel must determine: who to interview, in what order and at what point in the process (i.e., whether before or after relevant documents and ESI have been gathered and analyzed). While these decisions are necessarily fact-driven, a few basic rules prove helpful. Counsel should identify the epicenter of the conduct and develop the list of interviewees from there. The list should not be a static record, however—even a moderately effective interview will generate new leads, including the identity of additional interview subjects.

Sequencing of witness interviews can follow one of two approaches: starting at the center of the conduct and moving out, or starting at the outskirts and moving in. As a default position, the authors prefer to begin at the heart of the conduct at issue. This approach not only serves to reduce a wrongdoer's ability to formulate a false explanation and anchor it in the versions attested to by others, but also maximizes the possibility that a full and frank confession by the scheme's architect may serve to reduce dramatically the amount of time, effort and money that would otherwise be necessary to discern the size and shape of the misconduct. For this reason, the authors also prefer to interview witnesses early, even if that means going forward without all potentially relevant documents, on the theory that later acquired evidence can serve as the basis for a follow-up interview.

Applying these principles to the Acme scenario means that counsel will want to secure all documents relating to public contract work, particularly those having an impact on the amounts recorded as "contracting expenses." In addition, counsel will want to interview all of the individuals connected to those entries,

including those who made them, those who submitted information purportedly in support, their respective supervisors and any internal and external auditors who are charged with evaluating the entries' accuracy. Counsel will also want to interview senior management regarding this supposed activity to explore the possibility that genuinely innocuous conduct has been misinterpreted by someone with a less than complete understanding of the facts.

This is common when allegations arise outside of an employee termination scenario. Because most companies of any significant size separate the function of providing goods or services and billing for them, it is common for employees with knowledge about part of the process to make assumptions about the other. For example, healthcare providers frequently provide services to patients under circumstances which do not qualify for reimbursement by Medicare. Employees involved in the provision of those nonqualified services often assume that the company has improperly submitted a claim for such services and raise allegations of impropriety when in fact

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those in the company's billing department, having identified the deficiencies surrounding the particular services, have properly declined to do so. When the possibility exists that uninformed assumptions may have triggered the allegations of misconduct, an investigating attorney serves the client best by paying particular attention to determination of which portions of those allegations stem from personal knowledge, and which do not.⁸

During the course of these interviews, the lawyers conducting them must take pains to make clear where their loyalties lie. In conducting an internal investigation, counsel represents the company and not the individual employees being interviewed in their individual capacity. Counsel who fail to make clear this fact do so at their peril. The most effective means to do so is the issuance of an "Upjohn warning,"⁹ which explains to the interviewee that: a) interviewing counsel represents the company, and not the individual employee; b) because the interviewer is conducting the interview to gather information to provide legal advice to the company, the substance of the interview is protected by the attorney-client privilege; c) that privilege belongs to the company, not the interviewee; d) the interviewee must maintain the confidentiality of the information disclosed during the interview; and e) the company, in its sole discretion, may decide to waive that privilege at some future point.¹⁰ Without such warnings, investigating counsel can engender confusion and leave the company—and themselves—exposed.¹¹

d. Guiding Principles

Beyond ensuring that each internal investigation is fair and thorough, those conducting an inquiry should be mindful of the dangers of the "invisible gorilla" effect and the need for "structured flexibility." The former refers to a well-known psychological experiment designed to measure "inattention blindness," the state of being so focused on a primary task that an unexpected event, even one that should be blatantly obvious, is overlooked.¹² In the internal investigation context, the invisible gorilla effect can result in a lawyer's concentrating so intently on addressing the primary mission (in the Acme case, determining whether Acme paid kickbacks and categorized them as legitimate business

expenses) that readily apparent and perhaps even more troubling conduct is overlooked (e.g., the systematic practice of overbilling on government contracts).

Structured flexibility involves maintaining an appropriate balance between adhering to a plan of attack while also recognizing the need to change course when circumstances dictate. As detailed above, it is essential to develop a plan at the outset of any internal investigation. As information is gathered and assessed, however, it often becomes necessary to modify the scope of the inquiry or focus it in a new direction. Successful investigations require counsel to formulate a strategy at the beginning of the process, but not be enslaved by it as information is gathered. By developing a framework at the outset that allows information to be evaluated in an organized fashion while at the same time preserving the ability to modify slightly or overhaul completely the approach as necessary, depending on what the investigation reveals, counsel will be best positioned for success.

One relatively simple approach mitigates both of these challenges. By assessing the information gathered at regular intervals throughout the course of the investigation—rather than waiting until the end of the process—lawyers can better evaluate the significance of facts gathered thus far, the key questions that remain unanswered and how best to move forward.

Substantive Issues

With this framework in place, investigating counsel should be well-equipped to begin uncovering the truth. In most cases, it is not difficult to determine the underlying factual events. In attempting to determine whether misconduct occurred, however, investigating counsel must ascertain whether those actions were undertaken with improper intent.

The clearest and most compelling marker of improper intent—overt and explicit agreements between wrongdoers planning the scheme—seldom stands out on its own. Instead, counsel is typically required to search for circumstantial evidence of improper purpose from among the mass of information collected in order to identify not only the scope of illicit activity, but to distinguish scheme's generals from its foot

soldiers. Such evidence frequently falls into the following categories:

a. Concealment

Short of an unqualified confession, evidence of concealment is typically the most forceful indicator of intent. That evidence can take several forms. The list below catalogues some of those forms and offers examples relevant to the Acme scenario:

- Efforts to mask involvement in certain activity (e.g., proof that particular individual recorded kickbacks as legitimate "contracting expenses" under different computer username);
- Attempts to destroy documents (e.g., computer forensics showing that a member of senior management attempted to "double delete"¹³ a series of emails which reflected a discussion of the kickback scheme in its infancy);
- Attempts to alter documents, whether by backdating those that purport to reflect transparency or supervisory approval of certain activity (e.g., evidence that a witness created and then backdated a memorandum outlining the recharacterization of kickbacks as "contracting expenses" to suggest that no effort had been made to hide the activity, and that approval to undertake it had been sought and granted) or by removing traces of misconduct (e.g., the creation of a second general ledger which scrubs clean the "contracting expenses" entries);
- Steadfast and unexplained refusals to cooperate with investigative efforts, as well as attempts to cause others to do so the same (e.g., despite repeated attempts and offers to accommodate schedules, the entire accounting department at Acme refuses to be interviewed or provide access to seemingly relevant documents); and
- Efforts on the part of the investigation's subjects to harmonize their explanation of certain events (e.g., when interviewed, several members of senior management recount a meeting with Acme's prior outside counsel where the practice of paying money to contracting officials, and then booking those payments as "contracting expenses," was discussed and approved as lawful).¹⁴

b. Inconsistent Statements

In the words famously attributed to Mark Twain, “If you tell the truth, you don’t have to remember anything.” Applying this adage often proves helpful when seeking to expose efforts to cover up improper conduct by telling falsehoods. Particularly where a witness’s explanation contradicts documentary evidence, other witnesses’ accounts or, most significantly, the witness’s prior statements, identifying and confronting the witness with inconsistencies can bring the witness to the conclusion that the scheme has been uncovered, and compel him or her to come clean.

c. Efforts to Evade Internal Controls

In most companies, internal controls exist to ensure that applicable laws are complied with and/or to prevent the misappropriation of corporate funds. In effect, these internal controls often function as the company’s own “laws” and, thus, behavior calculated to circumvent those restrictions can provide valuable insight on an actor’s motivations. Most often this motivation emerges when an employee expends a vastly disproportionate amount of time and effort for no apparent purpose other than to evade existing protocols. For example, where a company requires dual signatures on checks above a certain amount (e.g., \$5,000), the existence of numerous checks in amounts below that threshold to the same payee within a relatively short period often signals improper intent. The existence of such controls also serves to foreclose the defense customarily offered by wrongdoers—that at all times they acted in good faith, and did not know their conduct was prohibited.

d. Denials Buttressed by “Derivative” Documents

Those engaged in misconduct frequently cannot help but leave behind evidence which documents their actions. Like footprints in the snow, this evidence provides valuable circumstantial proof which not only exposes the conduct, but also, more importantly, reveals the identity of those who carried it out. In searching for such proof, investigating counsel must secure and review the “raw” documents and ESI left in the wake of the scheme.

All too often, complicit actors seeking to cover their tracks create “derivative” documents which purport to reflect the substance of the contemporaneously generated records which detail the misconduct. Such documents often take the form of spreadsheets or other summaries which claim to accurately represent the substance of other documents, which may be voluminous, scattered or both. When investigating counsel receives information of this type, he or she must not simply accept it as an accurate representation of historical events. Rather, the evidence must be scrutinized and its contents compared to the “raw” materials purportedly summarized, in order to ensure that the “derivative” document is a suitable proxy.

In the Acme scenario, for example, such evidence might take the form of a recently generated spreadsheet which purports to document the manner in which “contracting expenses” were recorded and paid. In its original form, such information carries significant value: it serves to memorialize how those payments were treated—and by whom—before the conduct was subject to scrutiny. In order to avoid allowing a wrongdoer to buttress his denials with manufactured evidence, investigating counsel must strive to secure the original documents and exploit them for their greatest value—by contrasting what actually happened with the apocryphal story offered after the fact.


Effective Strategies to Overcome Evasive Tactics

To detect and expose the maneuvers detailed above, counsel should consider utilizing the following techniques:

1. To identify concerted efforts to thwart an investigation’s effectiveness, or to uncover attempts to deter others from cooperating, counsel should be sure to ask each interviewee whether he or she has discussed the issues at hand with other individuals. Incredibly, those who invest great effort to get their sto-

ries straight frequently fail to coordinate what they will say when asked if they have spoken with each other. Questions designed to root out conspiratorial endeavors often serve an equally important purpose by exposing inconsistencies among witnesses about whether they have, in fact, discussed the conduct under investigation.

2. To determine whether acts of concealment stem directly from a specific stimulus (thus revealing the most compelling evidence of improper intent), investigating counsel should endeavor to monitor the conduct of key individuals immediately after the investigative spotlight has been shined. Where possible, watching an individual’s computer activities—specifically, attempts to delete documents or emails—in the period following notification of the investigation’s existence greatly enhances the ability to secure valuable information. Even when the investigation lacks that level of forensic sophistication, close scrutiny of post-notification behavior can often provide valuable insight.



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3. To uncover inconsistencies in witness accounts, investigating counsel can benefit from not simply requesting that a particular witness detail again his version of events and his explanation for certain conduct (particularly where those prior explanations were offered before the investigation began), but also from inquiring of others about what the individual may have said to them previously. Material variations constitute valuable arrows in the quiver when investigating counsel is attempting to expose an interview subject's attempt to deceive.¹⁵

4. To prevent interview subjects from frustrating the interview process, counsel should, whenever possible, eliminate questions which allow for subjective responses. Inquiries in this format very often do nothing to advance the mission at hand, and instead allow the interviewee to invent validation for his or her improper conduct where none actually exists. Even counsel well versed in questioning witnesses in other contexts, such as depositions or trials, will benefit from investing the time necessary to frame proper interview questions calculated to elicit information of maximum value.

This means that investigating counsel should labor to formulate questions which require an answer susceptible to being proven demonstrably true or false. For example, rather than asking an Acme accounting department employee if he took "appropriate" steps before recording certain payments as "contracting expenses," investigating counsel instead should formulate questions designed to ascertain exactly what the employee did, when, on what basis and for what reasons. While this approach is often more cumbersome, there is virtually no comparison between the values of the answers produced.

Conclusion

Any lawyer conducting an internal investigation must understand that those affected by the investigation's findings—both internal and external—will scrutinize not only the final conclusions reached, but also the methods undertaken to arrive at them. Regardless of whether the reviewing party is a whistleblowing

employee, adverse counsel, a board member or a prosecutor, judge or jury, the integrity of the investigative process serves as the means by which any investigation's legitimacy is measured. By recognizing this at the outset, and employing methods which demonstrate the hallmarks of a unbiased, thorough and principled undertaking, counsel can maximize the ability to conduct internal investigations which are valid and confidence-inspiring not only in theory, but also, more importantly, in fact. | AL

Endnotes

1. The authors recognize that a comprehensive examination of all potentially relevant issues would require far more space than this format allows. Those interested in a deeper dive on this topic would be well served by reviewing the American College of Trial Lawyers *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations* (February 2008) (available at http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentID=339) and *Corporate Internal Investigations*, Law Journal Seminars Press (December 2012).
2. To be sure, these categories are not mutually exclusive. One would expect a significant number of instances where allegations made against senior management implicate potential criminal or regulatory sanctions.
3. The most common such impact is disruption of ongoing business activities as information is gathered and the internal grapevine traffic intensifies, but the figurative shrapnel can often extend to other areas. The larger and less guarded the investigative efforts, the more likely that those outside the company—including customers, competitors and, perhaps most importantly, prosecutors and government regulators—are to learn of allegations before an informed determination can be made as to their authenticity.
4. Occasionally, this approach produces another result. Particularly where an employee lodges an allegation of wrongdoing by management upon being threatened with termination (frequently in an attempt to secure the protections that go along with whistleblower status), a follow-up interview regarding those allegations can expose the hallmarks of a concocted charge. These include factual inconsistencies, logical failures and, once in a while, a confession that the allegations have been fabricated.
5. A comprehensive discussion of the steps involved in preparing a litigation hold exceeds the scope of this article. At a minimum, counsel issuing such a mandate must determine the range of information likely to be pertinent to the hold and identify which individuals need receive it. In each case, counsel will be erring on the side of caution, while also attempting to avoid unnecessary expenditure of resources. As part of the process, counsel must recognize the need to coordinate with the company's information technology personnel to help implement and monitor compliance with the hold. Counsel would also do well to consult with counsel well versed in preparing and issuing holds of this type.
6. In theory, the government could pursue an obstruction of justice charge against the company or certain individuals based on such conduct. Such an outcome is less likely in the wake of *Arthur Andersen, LLP v. United States*, 544 U.S. 696 (2005), where the Supreme Court vacated an accounting firm's criminal conviction for certain action taken in subsequent to the Enron failure which resulted in key evidence being lost. Nevertheless, most companies recognize the need to tread lightly in this context to avoid raising even the specter of an intent to impede the search for the truth.
7. This scenario can result not only in ineffective and expensive consequences (e.g., materials needing to be reviewed multiple times), but also in a far more problematic outcome: an investigation evaluator concluding that the failure to install and maintain criteria for reviewing documents was not simple carelessness, but rather an attempt to whitewash the investigation by effectively preventing a suitably comprehensive evaluation of the evidence.
8. In this scenario, where the reporting employee's concerns were borne of a lack of complete understanding regarding the company's operations, circling back to that employee after the investigation has been resolved serves two purposes: it demonstrates to the reporting employee that his or her concerns have been taken seriously and addressed in a timely fashion, and it minimizes the likelihood of additional, uninformed allegations in the future.
9. The label is taken from the Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981).
10. In 2009, the ABA released a report entitled: *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with*

Corporate Employees (available at http://www.acc.com/advocacy/load_er.cfm?csModule=security/getfile&pageid=704931&page=/legalresources/resource.cfm&qstring=show=704931&title=ABA%20UpJohn%20Task%20Force%20Report), which provided a sample warning for use during internal investigations. See *id.* at 3.

11. On this point, counsel are encouraged to review *United States v. Nicholas*, 2009 WL 890633 (C.D. Cal. Apr. 1, 2009), where the district court chastised a law firm for failing to provide the company CFO an Upjohn warning during the course of an internal investigation interview, finding that the firm's "ethical misconduct has compromised the rights of Mr. Ruehle, the integrity of the legal profession, and the fair administration of justice." *Id.* at *7. Although the decision was later reversed by an appellate court in *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009), the district court's ruling remains a cautionary tale for lawyers who conduct internal investigations. Counsel should also review *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 334 (4th Cir. 2005), where investigating counsels' use of "watered-down 'Upjohn warnings'"—advising employee interviewees that the lawyers "could" represent them, "as long as no conflict appeared"—created a "potential legal and ethical mine field" which "should have seemed obvious" to investigating counsel. *Id.* at 340.
12. In the experiment, subjects are asked to watch a video of several individuals in light and dark shirts passing a basketball, and to count the number of passes between a particular team. During the course of the video, a person dressed in a gorilla suit walks through the scene. After the video is completed, the subjects are asked whether they saw anything unusual. Almost half do not report seeing the gorilla. See Christopher Chabris & Daniel Simons, *The Invisible Gorilla: How Our Intuitions Deceive Us* 5-6 (2011).
13. By now, most individuals should understand that deleting emails from one's inbox accomplishes little, particularly when an investigator with even a modicum of forensic knowledge is involved. There remains a belief among many, however, that by "double deleting" emails, that is, deletion from a user's inbox followed by deletion from the user's trash, all traces of the communication are removed. While such efforts almost never accomplish their intended result (removing the email from the system forever), they almost always produce an unintended outcome (tangible evidence of attempted

concealment) which can be invaluable to investigators.

14. The significance of this factor correlates with the degree of the explanation's dubiousness. Uncovering this kind of "synchronicity of implausibility" among the investigation's subjects almost always means that something is afoot, particularly when the proffered explanation is outlandish.
15. A word to the wise on this topic: while it is often helpful to ask an interview subject what he has said to others, it

is almost never advantageous to tell the subject what others have said about him. This sort of cross-pollination of witness accounts usually accomplishes nothing other than to burn cooperative individuals (who may now be subject to retribution for implicating others) and cast doubt on the legitimacy of the investigation (by creating the appearance that counsel engaged in a whitewash by telling some interviewees what others had said in order to manufacture consistency among witness accounts).

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Certification rate*	49.1 percent

CERTIFICATION PERCENTAGES

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Birmingham School of Law	30.3 percent
Cumberland School of Law	70.0 percent
Jones School of Law.....	86.7 percent
Miles College of Law	5.3 percent

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Admittee and father



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and Magistrate Judge T. Michael
Putnam (1979)
Admittee and father



4. Joshua Shay Golden (2014),
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Brandon W. Hall (2013) and
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8. Daniel Steven Dorius (2014) and Hazina Maisha Dorius (2012)
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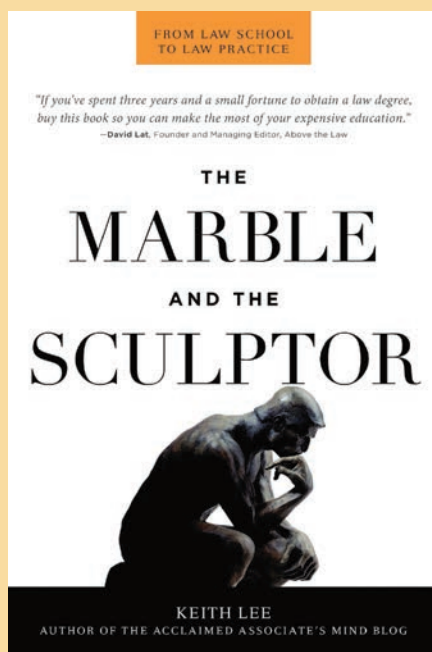
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The Marble and the Sculptor

By Keith Lee

Reviewed by Katherine T. Powell

If you read one part of this book review, read this: *The Marble and the Sculptor* is easy to read and is worth the read.

The author, Keith Lee, also writes the acclaimed “associate’s mind blog¹.” Lee, a 2010 law school graduate, offers advice to help us in making the most of our legal education when the legal industry is in the ever-discussed “state of flux.” Regardless of whether you are just starting out or you have been practicing for 20 years, this book offers a simple and concise perspective on how to be the best lawyers we can.

Scope

The book is organized into four parts, navigating the reader through: (1) the decision to attend law school and attending law school; (2) legal writing; (3) clients and (4) developing yourself as a professional.

Considering or Attending Law School

Part one is geared toward those considering law school or those already attending. Initially, Lee attempts to discourage or at least apply the brakes to anyone thinking of going to law school by offering very realistic and sobering insight into the current profession, the debt-load most law students undertake and the expected payout once a graduate is able to get into the workforce.

Next, the book offers advice to those currently in law school. Lee encourages

students to make the most out of it by taking classes that actually matter, such as trial advocacy or legal practice management, networking with classmates and building relationships. Lee offers these encouragements without pretention, in a genuine effort to get students to realize that their profession begins the first day of law school.

Part one closes with a discussion on the ever-elusive topic of “balance.” Although this section was over-generalized and over-simplified as most discussions on balance are, overall, it rang true and provided a nice reminder of the importance of balance in everything we do.

I particularly enjoyed part one because it was direct, brash and truthful. The advice offered was simple and elementary, but useful and necessary.

Writing and Speaking

Part two outlines fundamental skills that Lee believes an attorney needs to succeed. This section focuses on writing, speaking and working hard to develop the skills to do both well. It opens with a discussion on the importance of “stealing.” This is a particular favorite of mine because it is something I learned early in my practice and still do today, although I refer to it as “pretending.”

The book does not limit the concept of “stealing” to simply using another’s prior brief or contract and revising it to make it applicable to the matter that you are working on, but expands it to include taking another’s ideas, concepts and styles.

Lee encourages the study of successful people, mentors and the like, and for the reader to adopt those individuals' styles as his or her own. In my opinion, "stealing" could have been the only thing Lee discussed in this section and it would have been a valid and worthwhile point for the reader.

Part two continues with a discussion regarding writing, speaking and tips to better your ability to do both. The suggestions provided are practical and useful. Lee says that we should all write often, outside of work, and provides a list of "rules for clear writing." My only hesitation with this section and Lee's suggestions is that it seemed overly-simplified and did not account enough for the growing demands lawyers continuously face which limit our time and ability to "write often."

Finally, part two concludes with a discussion on persuasive and public speaking and offers certain tools, such as raising your energy level prior to speaking in public versus trying to relax, something I had never heard of prior to reading the book but will be useful to me now in my practice.

Overall, part two provides information helpful to our practice. The information was necessary and valuable, even if some of it was a review of we have heard before. I was also introduced to new concepts which gave me an opportunity for thought and growth.

Clients

Part three discusses clients and the idea of being client-focused, not just from an attorney's perspective but from a firm-wide angle. This section opens with a frank discussion about the importance of clients and why they are the reason we exist. It encourages lawyers to be client-focused and even devotes a segment to being a servant to our clients, offering a refreshing change of pace from the ego focus that is rampant in our profession.

Lee encourages the reader to avoid the pitfall of seeing issues solely from a lawyer's perspective and to avoid over-complicating matters. The section continues with valuable lessons regarding clients, such as making sure you get paid and offering quality work.

Finally, it addresses attracting clients and business development with discussions on developing a personal narrative ("branding"), establishing trust and credibility with all you come in contact with, working hard, having passion in what you do and networking. The section closes with "Dan Hull's 12 Rules of Client Service²" offering practical tips on how to provide excellent service to your clients, including "treating your co-worker like he or she is your best client."

I found this part to be one of the most important in the entire book. Being a servant to my clients and putting their needs above my own really resonates with me as a way to grow and be successful.

Professional Development

Part four delves into professional development. It presents a brutally honest perspective on growth and development and emphasizes that a professional path is a journey that takes hard work to get something out of it. Peter Drucker's "Four Universal Entrepreneurial Disciplines" are utilized and outline the importance of running your law practice like a business. Also included is a story about Lee's brutal time training in martial arts in order to illustrate that we need to seek counsel from those who will sharpen us and challenge us to develop successfully and grow in the profession.

This part continues with very short sections offering concise ideas to encourage guarding against the status quo and simply existing in a job. Lee offers tips to excel as a person and, in turn, to develop as a successful attorney. He focuses repeatedly on setting aside your ego, being disciplined and working hard. Additionally, he offers a simple list of mistakes to avoid early in your career, which provided nice reminders.

Additionally, this part emphasizes our own control over our future and development. It stresses that we cannot sit around waiting for things to happen. Lee harps that it is our own "choice" in making our lives and career what we want them to be.

I enjoyed this section because of the emphasis on hard work, personal control over your career and surrounding yourself with people who challenge you. It provided new insight into these timeless ideas.

Conclusion

In the end, I was pleasantly surprised. I was originally skeptical that this book was going to repeat the advice we have all heard countless times before law school, in law school and in the practice of law.

My skepticism was misplaced. The book is well-written, clever and easy to read. The short chapters and sections enable the reader to pick up the book and take 10 minutes to read a section. Those 10 minutes could get the reader thinking about the legal profession, the reader's place in it and the direction we are all heading. That, to me, sounds like 10 minutes well spent. Lee offers a refreshing perspective and thought-provoking ideas throughout the book. I was glad that I read the book and happy to review it. | [AL](#)

Endnotes

1. See here <http://associatesmind.com>.
2. Dan Hull is reported to be a "founding partner of Hull McGuire and the author of the infamous legal blog "What About Clients?" *The Marble and the Sculptor*, pg. 81.

2014 Is the Year of the Deans

Strickland Named Cumberland School of Law's Next Dean

Henry C. Strickland, III was recently named dean of Samford University's Cumberland School of Law. He succeeds John L. Carroll Jr., who was dean for 13 years. Judge Carroll remains on the faculty full-time. The announcement follows a national search.

Strickland joined Cumberland's faculty in 1988 and served as associate dean for academic affairs from 2001-11. He teaches courses in alternative dispute resolution, arbitration, civil procedure, constitutional law and conflict of laws.

Strickland remains active during the summers, traveling to more than 10 cities to teach bar examination prep classes.

"It is truly an honor to serve as the dean of Cumberland Law School," Strickland said. "For more than 150 years, Cumberland has prepared exceptional lawyers who are devoted to serving their clients and their communities. I am excited about working with the outstanding faculty and staff of the law school, Cumberland's devoted alumni and the bar as we meet the challenges of continuing that tradition in the 21st century."

Prior to joining Cumberland, Strickland practiced with a North Carolina firm for three years. He also served as a law clerk for U.S. District Judge Virgil Pittman in the Southern District of Alabama.

A graduate of Presbyterian College, Strickland earned his law degree from Vanderbilt University School of Law in 1983. He graduated in the top 15 percent of his class and was an editor for the *Vanderbilt Law Review*. He is a member of the American Bar Association, the American Arbitration Association's panel of arbitrators and mediators and the Association for Conflict Resolution.

"We spent months reviewing applications and interviewing candidates for the position," said Brad Bishop, professor of law and co-chair of the dean search committee. "[Strickland] is a well-respected faculty member of the law school. He is an outstanding teacher and served as the academic dean for many years. He will be a popular choice with Cumberland faculty, staff, students and alumni."

Cumberland recently celebrated its 50th anniversary as part of Samford University. It is one of 10 academic schools at Samford, the largest privately-supported university in Alabama. Founded in 1847, the law school originally was part of Cumberland University in Tennessee before relocating to Birmingham. Cumberland School of Law's trial advocacy program was ranked sixth by *U.S. News & World Report's* 2015 Best Grad Schools. | [AL](#)



Strickland



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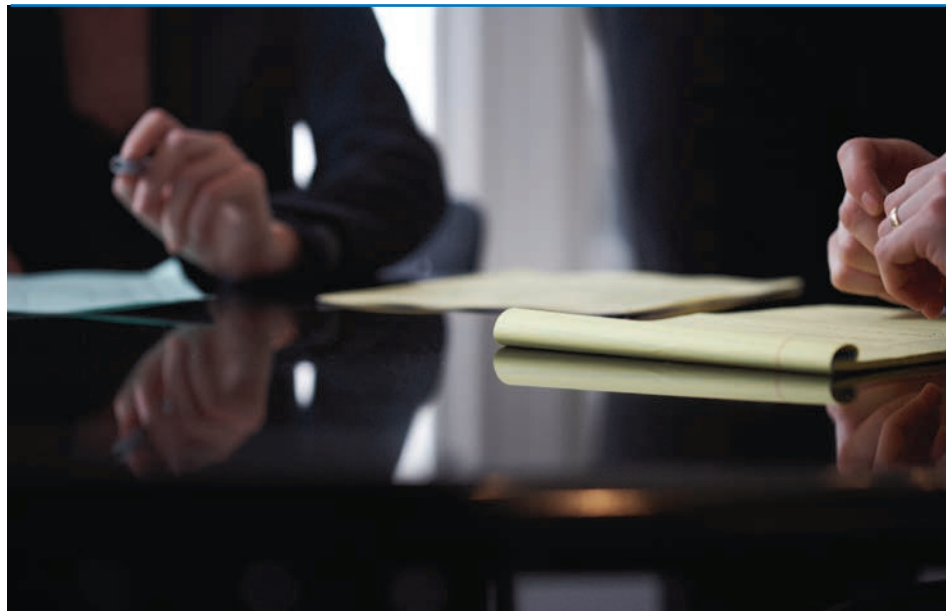
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J. Anthony McLain



A Non-Lawyer May Not Represent A Party in a Court-Ordered Arbitration Proceeding in Alabama

QUESTION:

May a non-lawyer represent a party in a court-ordered arbitration proceeding in Alabama?

ANSWER:

No, absent a federal or state statute allowing such, the representation of a party by a non-lawyer in a court-ordered arbitration proceeding in Alabama would constitute the unauthorized practice of law. Moreover, a lawyer has an obligation to bring the matter of the non-lawyer's representation of a party to the attention of the arbitrator and, where appropriate, to the attention of the court.

DISCUSSION:

The Disciplinary Commission of the Alabama State Bar has been asked to opine on whether the representation of a party by a non-lawyer in a court-ordered arbitration would constitute the unauthorized practice of law by the non-lawyer and, if so, what duties would an attorney involved in the matter as an arbitrator or lawyer have to raise such issue in the arbitration or before the court. By way of background, Canon IV(C) of the *Alabama Code of Ethics for Arbitrators* and the *American Arbitration Association Code of Ethics* provides that “[t]he arbitrator should not deny any party the opportunity to be represented by counsel or by any other person chosen by the party.” Some have interpreted this provision as allowing the representation of a party to an arbitration by a non-lawyer. However, the preamble to the *Alabama Code of Ethics for Arbitrators* also states that all provisions of the *Code* should be read in conjunction with applicable law. In addition, Rule 26 of the *American Arbitration Association Commercial Arbitration Rules and Mediation Procedures* states that a party may be represented by “any other representative of the party’s choosing, unless such choice is prohibited by law.”

As such, the question then becomes whether a non-lawyer may represent a party during an arbitration in Alabama or whether such representation would constitute the unauthorized practice of law. As a starting point, Rule 5.5, *Ala. R. Prof. C.*, provides as follows:

Rule 5.5.
Unauthorized Practice of Law

A lawyer shall not:

- (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
- (2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
 - (b) Subject to the requirements of Rule VII, *Rules Governing Admission to the Alabama State Bar* (Admission of Foreign Attorneys Pro Hac Vice), a lawyer admitted in another United States jurisdiction but not in the State of Alabama (and not disbarred or suspended from practice in that or any jurisdiction) does not engage in the unauthorized practice of law when the lawyer represents a client on a temporary or incidental basis (as defined below) in the State of Alabama. Services for a client are within the provisions of this subsection if the services:
 - (1) are performed on a temporary basis by a lawyer admitted and in good standing in another United States jurisdiction, including transactional, counseling, or other non-litigation services that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice;
 - (2) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding held or to be held in this or in another jurisdiction; or
 - (3) are performed by an attorney admitted as an authorized house counsel under Rule IX of the *Rules Governing Admission to the Alabama State Bar* and who is performing only those services defined in that rule.

- (c) A lawyer admitted to practice in another jurisdiction but not in the State of Alabama does not engage in the unauthorized practice of law in the State of Alabama when the lawyer renders services in the State of Alabama pursuant to other authority granted by federal law or under the law or a court rule of the State of Alabama.
- (d) Except as authorized by these *Rules* or other law, a lawyer who is not admitted to practice in the State of Alabama shall not (1) establish an office or other permanent presence in this jurisdiction for the practice of law, or (2) represent or hold out to the public that the lawyer is admitted to practice law in Alabama.
- (e) Practicing law other than in compliance with this rule or Rule VII or Rule VIII of the *Rules Governing Admission to the Alabama State Bar*, or other rule expressly permitting the practice of law, such as the Rule Governing Legal Internship by Law Students, shall constitute the unauthorized practice of law and shall subject the lawyer to all of the penalties, both civil and criminal, as provided by law.

Rule 5.5 does not state that representing a party in an arbitration is not the practice of law. Rather, Rule 5.5 is, in part, a multi-jurisdictional practice rule that expressly allows attorneys licensed in other states to represent parties in arbitrations taking place in Alabama. In doing so, it does not expressly allow non-lawyers to represent parties in arbitration.

Obviously, if a state or federal statute or law specifically allows a non-lawyer to represent a party during an arbitration, such statute or law would control. However, the Disciplinary Commission is unaware of any Alabama Supreme Court opinion that addresses whether representation of a party during an arbitration proceeding would constitute the unauthorized practice of law. The Disciplinary Commission is also unaware of any law or statute that expressly permits or prohibits the representation of a party by a non-lawyer during an arbitration.

The Supreme Court of Alabama has previously stated that "the specific acts which constitute the unauthorized practice of law are and must be determined on a case-by-case basis." *Coffee Cty. Abstract and Title Co. v. State, ex rel. Norwood*,

445 So. 2d 852, 856 (Ala. 1983). As a starting point, § 34-3-6, *Ala. Code* 1975, which defines the practice of law, provides, in pertinent part, as follows:

- (a) Only such persons as are regularly licensed have authority to practice law.
- (b) For the purposes of this chapter, the practice of law is defined as follows:
 - Whoever,
 - (1) In a representative capacity appears as an advocate or draws papers, pleadings or documents, or performs any act in connection with proceedings pending or prospective before a court or a body, board, committee, commission or officer constituted by law or having authority to take evidence in or settle or determine controversies in the exercise of the judicial power of the state or any subdivision thereof; or
 - (2) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights; or
 - (3) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, does any act in a representative capacity in behalf of another tending to obtain or secure for such other the prevention or the redress of a wrong or the enforcement or establishment of a right; or
 - (4) As a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law.
- (c) Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands, nor from preparing abstracts of title, certifying, guaranteeing or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon, but any such person, firm or corporation engaged in preparing

abstracts of title, certifying, guaranteeing or insuring titles to real or personal property are prohibited from preparing or drawing or procuring or assisting in the drawing or preparation of deeds, conveyances, mortgages and any paper, document or instrument affecting or relating to secular rights, which acts are hereby defined to be an act of practicing law, unless such person, firm or corporation shall have a proprietary interest in such property; however, any such person, firm or corporation so engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles shall be permitted to prepare or draw or procure or assist in the drawing or preparation of simple affidavits or statements of fact to be used by such person, firm or corporation in support of its title policies, to be retained in its files and not to be recorded.

In addition, the Supreme Court of Alabama has repeatedly held that the purpose of § 34-3-6 is to ensure that laymen do not serve others in a representative capacity in areas that require the skill and judgment of a licensed attorney. *Porter v. Alabama Ass'n of Credit Executives*, 338 So.2d 812 (Ala. 1976).

It is the opinion of the Disciplinary Commission that under section (b)(1) of the UPL statute a non-lawyer may not represent a party during an arbitration absent an express federal or state statute or law allow for such. A non-lawyer representative would be making an appearance in a representative capacity. Moreover, it is presumed that during the arbitration, the non-lawyer representative would be introducing exhibits, conducting examination of witnesses, including expert witnesses, objecting to exhibits and making legal arguments on behalf of the party and/or providing legal advice to the party. Such activities generally require the skill and judgment of a licensed attorney and under the UPL statute constitutes the practice of law.

In addition, Rule 5.5, *Ala. R. Prof. C.*, prohibits a licensed Alabama lawyer from assisting “a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.” If a lawyer were to stay silent and allow a non-lawyer to represent a party in an arbitration, that lawyer would be aiding and abetting that non-lawyer in the unauthorized practice of law. As such, a lawyer has an obligation to bring the matter of the non-lawyer’s representation of a party to the attention of the arbitrator and where appropriate, to the attention of the court and the Office of General Counsel. [RO 2014-01] | [AL](#)

Don't Check Out of the Dues Check-Off!

The September dues statement presents bar members with the opportunity to make a \$50 tax-deductible contribution to the Alabama Law Foundation in the form of an opt-out dues check-off.

WHY WE NEED IT—Reduced Income

- IOLTA revenue is down from \$1.3 million six years ago to \$410,000 now.
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WHY WE NEED IT—Increased Need

- Alabama has the seventh-highest poverty rate in America.
- Last year, Legal Services and four Volunteer Lawyer programs closed over 16,000 cases, yet **84 percent of civil legal needs of low-income households went unmet.**

KIDS' CHANCE—College Scholarships for Children of Alabama's Injured Workers

- \$5 out of every \$50 donated will be used for Kids' Chance Scholarships to students who have had a parent killed or permanently disabled in a work-related accident.
- Research shows that in Alabama, college tuition has increased 153 percent just in the last decade. Kids' Chance students are especially vulnerable to the double punch of low income coupled with rising tuition.

Alabama lawyers have always stepped up to help those in need, and the need now is greater than ever. The Alabama Law Foundation would greatly appreciate law firms making the \$50 contribution for each member of the firm.



We put our hands over our hearts and say the Pledge of Allegiance: “Liberty and justice for all.” That is what the Alabama Law Foundation’s grants do—provide justice for all. Here is a chance to put hands and hearts to work.

For information on the Alabama Law Foundation’s programs, check out our website, www.alabamalawfoundation.org. You can also contact the foundation’s executive director, Tracy Daniel, at tdaniel@alabamalawfoundation.org or its president, Tom Oliver, at toliver@carrallison.com.



Wilson F. Green

By Wilson F. Green

Wilson F. Green is a partner in Fleenor & Green LLP in Tuscaloosa. He is a summa cum laude graduate of the University of Alabama School of Law and a former law clerk to the Hon. Robert B. Propst, United States District Court for the Northern District of Alabama. From 2000-09, Green served as adjunct professor at the law school, where he taught courses in class actions and complex litigation. He represents consumers and businesses in consumer and commercial litigation.

By Marc A. Starrett

Marc A. Starrett is an assistant attorney general for the State of Alabama and represents the state in criminal appeals and habeas corpus in all state and federal courts. He is a graduate of the University of Alabama School of Law. Starrett served as staff attorney to Justice Kenneth Ingram and Justice Mark Kennedy on the Alabama Supreme Court, and was engaged in civil and criminal practice in Montgomery before appointment to the Office of the Attorney General. Among other cases for the office, Starrett successfully prosecuted Bobby Frank Cherry on appeal from his murder convictions for the 1963 bombing of Birmingham's Sixteenth Street Baptist Church.



Marc A. Starrett

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Municipalities

***Ex parte Labbe*, No. 1030110 (Ala. June 6, 2014)**

Volunteer Service Act, *Ala. Code* § 6-5-336, barred claims against municipality and mayor for alleged negligence and wantonness of volunteer firefighters

Evidence

***Guyoungtech USA, Inc. v. Dees*, No. 1120505 (Ala. June 6, 2014)**

In workers' comp retaliatory discharge case, mortality tables were improperly admitted into evidence for purposes of establishing permanency of mental anguish, because the mental anguish testimony was too subjective and unsupported by expert medical evidence to establish permanence of injury

Personal Jurisdiction

***Ex parte AutoSource Motors, LLC*, No. 1130255 (Ala. June 13, 2014)**

Utah car dealer who advertised car for sale on generally-accessible website was not subject to specific jurisdiction in Alabama; even assuming that the dealer made statement that buyer could "title the automobile in Alabama" actually constituted a "contact" with the State of Alabama, that sole, isolated contact was insufficient to support a finding of specific personal jurisdiction

Post-Arbitral Relief

***Tucker v. Ernst & Young LLP*, No. 1121048 (Ala. June 13, 2014)**

Arbitrators did not exceed their powers under FAA section 10 in their decision-making, and, in fact, challenger's arguments were repackaged contentions that panel "manifestly disregarded" Alabama law, a now-discarded standard

State Agent Immunity

***Ex parte City of Midfield*, No. 1121211 (Ala. June 13, 2014)**

Peace officer-immunity barred claims for negligence and negligence per se against municipality and officers arising from injuries sustained in high-speed chase. On the current record, however, municipality and decision-makers were not immune from negligent training and supervision claims.

Probate Court Jurisdiction

***Ex parte O.S.*, No. 1121134 (Ala. June 20, 2014)**

The court of civil appeals erred in concluding that circuit courts could exercise general equity powers, under *Ala. Code* § 12-11-31, over action collaterally attacking the probate court's judgment of adoption.

Statute of Limitations

***Ex parte IRMCO*, No. 1130110 (Ala. June 20, 2014)**

This case involves a complex and unusual interpolation between the two-year, then six-year, then back-to-two-year statute of limitations for wantonness, and is the third appeal in

the litigation made the basis of a published opinion (this is a 12-year old mass tort case). The supreme court held: (1) the statute-of-limitations question presented by the current petition was not of the species subject to mandamus review; (2) circuit court did not violate the mandate from IRMCO I and II by denying summary judgment on wantonness, because although a two-year statute of limitations on wantonness claims may have been in place at the time the former employees' claims arose, the six-year statute of limitations adopted in *McKenzie v. Killian*, 887 So. 2d 861 (Ala. 2004), was in place at the time the former employees asserted those claims against the new defendants in the first amended complaint (the first amended complaint did not relate back); but (3) trial court erred by allowing conspiracy claims to go forward because those were dismissed before a prior appeal on statute of limitations grounds, and no appeal had been taken from that dismissal.

Attorneys

***Hall v. Environmental Litigation Group, Inc.*, No. 1130301 (Ala. June 20, 2014)**

Client's claim against firm, contending that attorney's charging administrative fees as expenses violated terms of

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fee contract, was not subject to bar's exclusive jurisdiction and was therefore improperly dismissed

Res Judicata

***Ex parte Webber*, No. 1121443 (Ala. June 27, 2014)**

Claims of plaintiff brought in second circuit court action were barred by res judicata due to prior case in small claims court, even though the current claims in circuit court were beyond the small claims court's jurisdiction, and wife shared "privity" with husband so that identity of parties was established, even though wife was not a party to the first case

Necessary and Indispensable Parties

***Campbell v. Taylor*, No. 1110057 (Ala. July 3, 2014)**

Purported failure to join necessary or indispensable parties does not create a "jurisdictional" defect which might render a judgment void

From the Court of Civil Appeals

Premises Liability

***Burlington Coat Factory of Alabama LLC v. Butler*, No. 2120969 (Ala. Civ. App. June 13, 2014)**

Defendant was entitled to JML for failure to present substantial evidence that brackets were a defective or dangerous condition on owner's premises. *Res ipsa loquitur* is not applicable in premises-liability actions.

Forum Selection Clauses

***DWOC, LLC v. TRX Alliance, Inc.*, No. 2130378 (Ala. Civ. App. June 13, 2014)**

Parent corporation could not enforce forum selection clause contained in contract between plaintiff and subsidiary corporation, where parent corporation did not argue that it was an intended third-party beneficiary of the contract or the forum selection clause

Discovery

***Ex parte Aramark Management Services LP*, No. 2130564 (Ala. Civ. App. June 13, 2014)**

In discovery in workers' comp action involving loss of finder from use of machine, co-employee identified five employees—including himself—whose employment had been suspended or terminated because either they had removed safety devices from the machine in the past or they had known that the safety devices had been removed. Plaintiff sought to depose those employees and sought their complete personnel files;

employer opposed production of the files and moved for protective order under *Ex parte Liberty Mut. Ins. Co.*, 92 So. 3d 90 (Ala. Civ. App. 2012). Trial court denied the motion without even requiring a response from plaintiff. The CCA granted employer's mandamus petition, holding that the trial court had to follow the procedure in *Ex parte Liberty Mut.* for the production of the personnel files. The court cautioned, "Our holding is not to be read as a blanket prohibition of production of the personnel files."

Workers' Compensation; Venue

***Ex parte Blair Logistics, LLC*, No. 2130347 (Ala. Civ. App. June 27, 2014)**

Employee (Chilton County resident) sued employer in Jefferson County (location of Blair's principal office) for workers' compensation benefits arising from injury sustained in Chilton County. Employer answered, denying employment relationship, and sought transfer to Chilton County, which was denied. The CCA denied mandamus relief to the employer, reasoning that the nexus to Jefferson County was sufficiently strong to satisfy the "interests of justice."

Workers' Compensation; Venue

***Ex parte Complete Employment Services, Inc.*, No. (Ala. Civ. App. July 11, 2014)**

Mobile County employer filed compensability action against employee (Clarke County resident) in Mobile County, where employee's injury occurred on job in Clarke County. Mobile Circuit Court granted transfer in the interests of justice to Clarke County, where injury occurred; employer petitioned for mandamus. Held: writ denied; Mobile court had discretion to transfer case to county where injury occurred

From the United States Supreme Court

Patents

***Limelight Networks, Inc. v. Akamai Technologies, Inc.*, No. 12-786 (U.S. June 2, 2014)**

Defendant is not liable for inducing infringement of a patent under 35 U. S. C. section 271(b) when no one has directly infringed the patent under section 271(a) or any other statutory provision

Patents

***Nautilus, Inc. v. Biosig Instruments, Inc.*, No. 13-369 (U.S. June 2, 2014)**

A patent is invalid for indefiniteness if its claims, read in light of the patent's specification and prosecution history, fail to inform, with reasonable certainty, those skilled in the art about the scope of the invention; but definiteness is to be evaluated from the perspective of a person skilled in the relevant art, measured as of the time of the patent application.

Lanham Act

***POM Wonderful LLC v. The Coca-Cola Co.*, No. 12-761 (U.S. June 12, 2014)**

Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C. §§321(f), 331, which prohibits the misbranding of food and drink, but which bars private enforcement, did not bar competitor's section 43(a) Lanham Act claim for false and misleading advertising.

Bankruptcy; IRAs

***Clark v. Rameker*, No. 13-299 (U.S. June 12, 2014)**

Funds held in inherited IRAs are not "retirement funds" within the meaning of the exemption from estate assets in 11 U.S.C. §522(b)(3)(C).

Agency Deference

***Scialabba v. Cuellar de Osorio*, No. 12-930 (U.S. June 9, 2014)**

In an immigration case concerning the aging-out of minor children in active application for legal immigrant status, the plurality opinion of Justice Kagan reasoned that "[w]hen an agency . . . resolves statutory tension, ordinary principles of administrative deference require this Court to defer."

Bankruptcy

***Executive Benefits Ins. Co. v. Arkison*, No. 12-200 (U.S. June 9, 2014)**

Under *Stern v. Marshall*, Article III prohibits Congress from vesting a bankruptcy court with the authority to finally adjudicate certain claims. In this case, the Court held that a "Stern claim"—that is, a claim designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited from proceeding in that way as a constitutional matter—should be handled by having the bankruptcy court issue proposed findings of fact and conclusions of law, and the district court will then review the claim *de novo* and enter judgment.

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Foreign Sovereigns; Post-Judgment Discovery

***Republic of Argentina v. NML Capital, Ltd.*, No. 12-842 (U.S. June 16, 2014)**

Issue: whether the Foreign Sovereign Immunities Act of 1976 immunizes a foreign-sovereign judgment debtor from post-judgment discovery of information concerning its extra-territorial assets, where FISA's "execution immunity" generally shields "property in the United States of a foreign state" from attachment, arrest and execution. Held: FISA does not preclude the requested discovery

Standing; Prior Restraints

***Susan B. Anthony List v. Driehaus*, No. 13-193 (U.S. June 16, 2014)**

Plaintiffs lodged a First Amendment challenge to an Ohio law that criminalizes certain false statements made during the course of a political campaign. The case was dismissed for lack of standing, based on failure to show an imminent threat of prosecution. The Supreme Court unanimously reversed, holding plaintiffs have alleged a sufficiently imminent injury for Article III purposes. The opinions in the case expose ongoing opacity in the law of standing relating to future injury.

First Amendment; Public Employment

***Lane v. Franks*, No. 13-483 (U.S. June 19, 2014)**

Held: (1) the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities; and (2) supervisor was entitled to qualified immunity for individual-capacity claims, because he had a reasonable basis to believe that, when he fired plaintiff, a government employer could fire an employee because of testimony the employee gave, under oath and outside the scope of his ordinary job responsibilities

Tax Enforcement

***U.S. v. Clarke*, No. 13-301 (U.S. June 19, 2014)**

The Supreme Court reversed the Eleventh Circuit (June 19 wasn't a good day for the Eleventh Circuit at the Supreme Court—O for 2), holding that a taxpayer has a right to conduct an examination of IRS officials regarding their reasons for issuing a summons when he points to "specific facts or circumstances plausibly raising an inference of bad faith." The Court rejected the Eleventh Circuit's more permissive test for examining IRS agents.

Securities Law; Presumption of Reliance

***Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317 (U.S. June 23, 2014)**

The Supreme Court refused to overrule *Basic, Inc. v. Levinson*, the 1988 case which created the presumption of reliance in securities fraud cases based on the "fraud on the market" theory. However, the Supreme Court nonetheless reversed the Fifth Circuit's affirmance of the District Court's decision certifying the class, holding that a party invoking the presumption of reliance requires proof of "price impact" directly at the class certification stage, and the Fifth Circuit erred in denying the defendants an opportunity to rebut the presumption of reliance before class certification with evidence of a lack of price impact.

Copyright Law

***American Broadcasting Cos. v. Aereo, Inc.*, No. 13-461 (U.S. June 25, 2014)**

This case essentially kills Aereo, the Barry Diller-backed technology start-up which allows users to access over-the-air programming through tablets and other internet-enabled devices and operates essentially as a cloud-based DVR. The Supreme Court essentially concluded that Aereo's business was indistinguishable from CATV.

ERISA

***Fifth Third Bancorp v. Dudenhoeffer*, No. 12-751 (U.S. June 25, 2014)**

Held: 1) ESOP fiduciaries are not entitled to any special presumption of prudence; and 2) ESOP fiduciaries are subject to the same duty of prudence that applies to ERISA fiduciaries in general, except that they need not diversify the fund's assets

Recess Appointments

***NLRB v. Noel Canning*, No. 12-1281 (U.S. June 26, 2014)**

Certain appointments President Obama made to the NLRB fell outside the scope of the Recess Appointments Clause. The majority reasoned that, in light of historical practice, a recess of more than three days but less than 10 days (the time frame in which the appointments in issue were made) is presumptively too short to fall within the Recess Appointments Clause.

First Amendment; Abortion

***McCullen v. Coakley*, No. 12-1168 (U.S. June 26, 2014)**

The Court invalidated Massachusetts' Reproductive Health Care Facilities Act, which established a 35-foot "no standing"

buffer around abortion clinics,” on First Amendment grounds. The Court held that strict scrutiny test did not apply, since the Act was content and viewpoint-neutral. However, the Court rejected the Act because it is not “narrowly tailored:” rather, it “burden[s] substantially more speech than is necessary to further the government’s legitimate interests.” Ironically, the Supreme Court last year promulgated and began enforcing a buffer zone which applies to the Court building itself: its constitutionality is currently on appeal before the D.C. Circuit.

Corporations Are People, Too (Part Trois)

***Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. June 30, 2014)**

Contraceptive mandate imposed by HHS regulation under the Affordable Care Act violates the Religious Freedom Restoration Act of 1993. To find that the mandate violated RFRA, Justice Alito’s majority opinion concluded that a “person” under RFRA includes a closely-held corporation. The majority insisted that its

holding was narrow and that larger or publicly-traded corporations were not at issue. (It’s Part *Trois* because corporations were first deemed “people” for First-Amendment purposes in *Citizens United*, then in *McCutcheon v. FEC.*)

First Amendment; Unions

***Harris v. Quinn*, No. 11-681 (U.S. June 30, 2014)**

Public-employee union entered into collective-bargaining agreements with the state that contained an agency-fee provision, requiring all bargaining unit members who do not wish to join the union to pay the union a fee for the cost of certain activities, including those tied to the collective-bargaining process. A group of affected non-union employees sued, claiming that this violated the First Amendment insofar as it authorized the agency-fee provision. The Seventh Circuit had upheld the CBA, but the Supreme Court reversed in relevant part, holding that strict scrutiny applied and that the state’s articulated interests were not sufficient to rise to “compelling.”

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From the Eleventh Circuit Court of Appeals

ADA

***Wetherbee v. Southern Company*, No. 13-10305 (11th Cir. June 11, 2014)**

Issue of first impression: whether a claim brought under 42 U.S.C. § 12112(d)(3)(C) requires a plaintiff to prove he is disabled. Following the Seventh and Tenth circuits, the Court answered in the affirmative.

TCPA

***Breslow v. Wells Fargo Bank, NA*, No. 12-14564 (11th Cir. June 9, 2014)**

Under the Telephone Consumer Protection Act, a “called party,” for purposes of § 227(b)(1)(A)(iii), means the subscriber to the cell phone service.

Jailer Immunity (Alabama Law)

***Johnson v. Conner*, No. 12-15228 (11th Cir. June 13, 2014)**

Issue: whether recently amended Alabama statute granting sovereign immunity to jailers, which is silent on retroactivity, applies retroactively or only prospectively. *Ala. Code* § 14-6-1.1 Held: it applies prospectively only

Bankruptcy

***In re Scantling*, No. 13-10558 (11th Cir. June 18, 2014)**

Held: a debtor can “strip off” a wholly unsecured junior mortgage in a so-called “Chapter 20” case

Employment Law

***Adams v. Austal USA LLC*, No. 12-11507 (11th Cir. June 17, 2014)**

Issue: whether an employee may rely on evidence of racial harassment of which he is not personally aware to prove that his work environment was objectively hostile. Held: employee alleging a hostile work environment cannot complain about conduct of which he was oblivious for the purpose of proving that his work environment was objectively hostile

FMLA

***Jarvela v. Crete Carrier Corp.*, No. 13-11601 (11th Cir. June 18, 2014)**

District court properly granted summary judgment to interstate carrier on employee’s claims under the FMLA and

ADA; employer was entitled to enforce safety-based policy, consistent with DOT rules, prohibiting driver with diagnosis of alcoholism from driving

First Amendment

***Brannan v. Finkelstein*, No. 12-15988 (11th Cir. June 18, 2014)**

Whether employer’s motivation in reducing employee’s work was budget-motivated or in retaliation for employee’s testimony could not be resolved on summary judgment

Attorneys; Alabama Law (Question Certified)

***Miss. Valley Title Ins. Co. v. Thompson*, No. 12-16188 (11th Cir. June 19, 2014)**

Issue certified to the Alabama Supreme Court: Does an “attorney agent” who works under contract for a title insurance company provide a “legal service” within the meaning of *Ala. Code* § 6-5-574, when he performs a title search, analyzes documents in the chain of title, forms an unwritten opinion on the status of title based on those documents and then issues a commitment to insure or an insurance policy based on his unwritten opinion?

Arbitration; Waiver

***In re Checking Account Overdraft Lit.*, No. 13-14244 (11th Cir. June 18, 2014)**

Arbitration-friendly federal law recognizes “delegation clauses” (sometimes called “First Options” clauses) that direct an arbitrator to decide the validity of an arbitration agreement. Still, litigants can waive their right to enforce these arbitration provisions. Because KeyBank waited too long to invoke a delegation clause, waiver now bars that path and the district court must decide any threshold questions of arbitrability.

FDCPA

***Cacerces v. McGalla Raymer LLC*, No. 13-12450 (11th Cir. June 26, 2014)**

Collection letter’s tangential reference to potential litigation did not qualify the communication for “legal pleading” status under 15 U.S.C. § 1692g(d), but no FDCPA liability attached because the least sophisticated consumer would not have been misled by the error in the letter, concerning whether the debt collector or the creditor would be entitled to assume validity of the debt.

First Amendment; Public Employment

Hubbard v. Clayton County School Dist., No. 13-12130 (11th Cir. June 27, 2014)

Hubbard sued the District, claiming he was retaliated against by the School District because he made public statements to the press regarding the accreditation investigation of the School District while he was on leave from the District and working with an association of administrators. The district court granted summary judgment to the District. The Eleventh Circuit reversed, holding that under the “practical inquiry” required by *Garcetti v. Ceballos*, 547 U.S. 410 (2006), Hubbard was acting for the association when he made the comments.

Removal and Remand

Goodwin v. Reynolds, No. 13-14621 (11th Cir. July 3, 2014)

“Forum defendant” rule (28 U.S.C. 1441(b)) prevented out-of-state defendants from removing action before an Alabama defendant had not yet been “properly joined and served”

FDCPA

Crawford v. LVNV Funding, Inc., No. 13-12389 (11th Cir. July 10, 2014)

Held: a debt buyer violates the FDCPA when it attempts collection on a debt which is time-barred under the controlling state law.

Trials; Juror Misconduct

Cummings v. Dept. of Corrections, No. 11-13507 (11th Cir. July 8, 2014)

During trial, magistrate judge, without objection from either side and after questioning, allowed sleeping juror to remain on jury. On later challenge, the district court denied new trial, and the Eleventh Circuit affirmed, holding that challenger’s failure to object initially constituted waiver of the issue.

RECENT CRIMINAL DECISIONS

Fourth Amendment; Cell Phones

Riley v. California, No. 13-132, 2014 WL 2864483 (U.S. June 25, 2014)

A search warrant is generally required to support a law enforcement officer’s search of an arrestee’s cell phone.

Probation Revocation

Dunn v. State, No. 1121506, 2014 WL 2535345 (Ala. June 6, 2014)

Defendant’s probation cannot be revoked based solely on hearsay evidence. DNA evidence of the defendant was found on clothing, but only uncorroborated hearsay evidence connected the clothing to the crime.

Capital Murder

Townes v. State, CR-10-1892, 2014 WL 2677634 (Ala. Crim. App. June 13, 2014)

In reversing a conviction of capital murder, the court found plain error in jury instruction that stated intent to kill must be inferred if the fatal act was done deliberately and death could reasonably be expected.

Rule 404(b)

Penn v. State, CR-10-1133, 2014 WL 2677589 (Ala. Crim. App. June 13, 2014)

Instructions limiting use of Rule 404(b) prior bad acts must attach a particular purpose instead of listing multiple possible purposes. The trial court committed plain error when it recited to the jury a “laundry list” of possible purposes.

Miller v. Alabama Fallout

State v. Boyd, CR-13-0489, 2014 WL 2678270 (Ala. Crim. App. June 13, 2014)

Claims based on *Miller v. Alabama*, 132 S. Ct. 2455 (2012) are non-jurisdictional and not subject to retroactive application for juvenile capital offenders.

Sentencing

Mewborn v. State, CR-12-2007, 2014 WL 2678176 (Ala. Crim. App. June 13, 2014)

Initial sentence of 20 years suspended with four years of supervised probation was an illegal sentence because *Ala. Code* § 15-22-50 (1975), bars the suspension of any sentence over 15 years. Because the sentence was illegal, the trial court was also without jurisdiction to revoke probation.

Sexual Misconduct

Williams v. State, CR-12-1385, 2014 WL 2677722 (Ala. Crim. App. June 13, 2014)

Portion of sexual misconduct statute, *Ala. Code* §13A-6-65(a)(3), was unconstitutional in light of the United States Supreme Court’s ruling in *Lawrence v. Texas*, 539 U.S. 558 (2003), which struck down laws which criminalize consensual homosexual activities. | [AL](#)



Susan Bevill Livingston

Hon. Carlton W. Mayhall, Jr.

Hon. Gordon Rosen

Susan Bevill Livingston

Kind. Gracious. Thoughtful. Generous. Good-humored. Intelligent. Hard-working. Principled. Selfless. Inspiring. Fun.

Those were all words that described Susan Bevill Livingston, a beloved long-time partner at Balch & Bingham, who died unexpectedly on February 28, 2014 in Birmingham.

For many, though, the best word to describe Susan was “mentor”—not in the pop-culture, overused corporate sense of the term, but rather in the word’s truest, most sincere sense. With her soft but lilting voice, Susan not only talked the talk but walked the walk.

“Susan’s influence on all of us cannot be overstated,” said Teresa Minor, a partner of Susan’s at Balch & Bingham. “I consider myself blessed to have had the benefit of her wise counsel for the past two decades of my legal career.”

“She inspired many women, including me, to embrace their own definitions of success, to be proud of (not ashamed of) those visions, and to pursue them at their own pace with their own style,” Jennifer Buettner, associate general counsel at Southern Nuclear Operating Company, wrote.

“Susan pushed people to become their own “form”—their own best and highest—and she pushed us to believe our capacity was not simply to be good enough but to be great,” reflected law partner Amy Steindorff.

“Courage to confront difficult issues is one of my own personal ambitions in large part due to watching Susan confidently follow her own heart,” Balch & Bingham attorney Millicent Ronnlund wrote.

“Susan inspired her colleagues to be better lawyers and better people,” declared Susan Han, another Balch & Bingham attorney.

“She was this invisible pillar of support for so many women attorneys,” fellow Balch & Bingham attorney Kimberly Bell said. “The motto she seemed to live by was to treat others as more important than yourself.”

“In Susan, I found a woman who mentored younger women lawyers and was a source of support, counsel and encouragement to all women lawyers at the firm,” observed law partner Kathleen Collier. “I found a woman to whom kindness and thoughtfulness were as natural as breathing and who touched many women lawyers just by doing small things that made them feel special.”

“Susan had a way of making you feel special,” recalled Mary Samuels, one of Susan’s colleagues at Balch & Bingham. “When you spoke to her, she listened—and cared.”

“Susan gave me the confidence to find my voice in an industry where it could have easily been lost,” said Marie Craig, Alabama Power Company Fuel Manager.

“I was able to confide in Susan, and she patiently guided me through the first several years of my career, imparting invaluable wisdom along the way,” remembered Balch & Bingham attorney Gretchen Frizzell.

“She always did the right thing and stood out in a sea of consensus to make sure a minor viewpoint was always considered,” observed Ginny Wilcox, another attorney at Balch & Bingham.



"I will strive to be like her as I grow and develop in my career," Balch & Bingham associate Lauren Thornton said. "And I take comfort in knowing that as long as I'm striving to be even half the woman Susan was, I will have a positive influence on the people around me."

For such women, Susan set a sterling example of accomplishment for them to emulate. As the daughter of the late U.S. Congressman Tom Bevill and Lou Betts Bevill, she attended school at Yorktown High School in Arlington, Virginia. Matriculation and graduation from Ithaca College followed and, in 1977, Susan graduated from the University of Alabama School of Law. She began her legal career as an assistant attorney general for the state of Alabama and later worked as an assistant U.S. Attorney in the Middle District of Alabama.

In 1985, she joined Balch & Bingham to begin a career at the firm that spanned nearly three decades. At Balch & Bingham, she was a partner in the Energy Section, a member of the Management Council and chair of the Diversity Committee. She served on the boards of the Alabama Law School Foundation, the Alabama Law Institute and the Women's Section of the Birmingham Bar Association.

Susan was a graduate of Leadership Alabama, Leadership Birmingham and the MOMENTUM women's leadership program. She was honored in 2003 as one of the *Birmingham Business Journal's* "Top Birmingham Women." Susan also received many honors for the countless hours she devoted to civic causes. Among other things, she served on the boards for the YWCA of Central Alabama, the Girl Scouts of North-Central Alabama and the Legal Aid Society of Birmingham. She also belonged to the Women's Committee of 100, Women's Network and Zonta Club of Birmingham, and was an active member of the Democratic Party. Susan was also a faithful parishioner of the Cathedral Church of the Advent.

A former Girl Scout troop leader, Susan received a Women of Distinction award from the organization in 2004 and, in 2012, received its prestigious Mildred Bell Johnson Award. Perhaps not surprisingly, among her favorite pastimes was paddling, and some of her most enduring friendships developed over 25 years of canoeing, kayaking and camping. Whether on the river or on a challenging hike, Susan loved nature and being outdoors—and selling Girl Scout cookies, as the many colleagues who purchased Thin Mints, Tagalongs or Samoas during cookie season can attest.

Susan is survived by husband James Archibald Livingston, III; daughter Patricia Elizabeth Livingston; sister Patricia Bevill

Warren (Bill); brother Donald Herman Bevill (Karen); her father-in-law and mother-in-law, James A. Livingston, Jr. and Margaret Gresham Livingston; three sisters-in-law, Mary Margaret Livingston Hindman (Brian), Kathy Rutledge (Paul) and Dr. Elizabeth Livingston; her aunts and uncles, Betty Bevill Powell, Rev. and Mrs. Charles F. Betts and Mr. and Mrs. Erwin C. Betts; several nieces, nephews and cousins; and many, many friends—to include everyone who ever crossed paths with her at Balch & Bingham.

—By Balch & Bingham LLP

Hon. Carlton W. Mayhall, Jr.



Born to Carlton W. Mayhall, Sr. and Mary Jones Mayhall in Marianna, Florida, February 11, 1939, 50-year member Carlton W. Mayhall, Jr. lived an honorable life respected by many. At the age of nine, he moved with his parents and brother to the small northwest Alabama town of Haleyville, where he grew to become a man loved by his community, which he likewise loved in return. It was in this small town that he developed a sense of honesty and fairness which remained with him in all aspects of his life. Growing up in the 1940s and 1950s in this closely knit community, he built friendships with the neighborhood children while playing kickball and other games on the streets and neighboring lawns that would continue for his lifetime. He held in high esteem his high school classmates for some 57 years following graduation.

As a teenager, he worked as a disc jockey for the local radio station where he met several well respected men who were a positive influence in his early career. He developed strong professional bonds with these men that lasted many years until their deaths. One such role model is said to have stated, "If I had to leave a million dollars with someone for several years and know it was in good hands, I would pick Carlton Mayhall." He respected those older gentlemen and appreciated the attention they gave to him, fostering in him a desire to help other young adults in the establishment of their emerging careers.

After his graduation from Haleyville High School in 1957, he entered the University of Alabama. Following in the footsteps of his grandfather, Wesley V. Mayhall, his uncles, Clyde E. Mayhall and Judge Roy Mayhall, young Mayhall chose a

career in the legal profession. He entered the University of Alabama School of Law and graduated in 1963 with a stellar academic record. He then returned to his roots in Haleyville, Alabama and opened a solo law practice in an office above the movie theater. It was there he met the love of his life, Martha Knight. They were married in 1968. They began their young lives together in Haleyville and were later blessed with the birth of a son and a daughter.

In 1970, the voters of Winston and Marion counties elected him to serve as Circuit Judge of the 25th Judicial Circuit. His campaign was based upon a promise to restore the recently tarnished reputation of the office to the fairness and dignity the people in the circuit deserved.

When he took office in January 1971, he immediately began to fulfill this promise. He continued to serve the citizens of Winston and Marion Counties with fairness, dignity and honor and was elected to five additional consecutive terms without opposition. Those appearing before him in his court never saw him wearing a robe, for he considered himself no higher or better than anyone else in his community. He was truly a judge of the people, humble in his manner and mindful of those without the ability to help themselves.

In fulfillment of a campaign promise, the Mayhalls moved to Hamilton, Alabama, the county seat of Marion County, where they made their home for the remainder of Judge Mayhall's life.

In addition to his duties as presiding judge of the 25th Judicial Circuit, Judge Mayhall was honored to be elected by the circuit judges in the state of Alabama to serve as president of the Alabama Circuit Judges' Association for the 2000-2001 year. He was also one of two circuit judges appointed by the Alabama Supreme Court to serve on the Court of the Judiciary, a panel of nine formed with the responsibility of trying judges accused of misconduct in office. He served on this panel from 1994 until 2003. He was also appointed by the Alabama Supreme Court to serve on the Pattern Jury Commission and served in this capacity from 1991 to 2003.

During his 31 years on the bench, young attorneys needing general advice on how to handle a matter not coming before him in his court found him to be very approachable. Most young attorneys in his circuit became benefactors of his time and patience in developing their budding skills as he willingly shared his scholarly wisdom.

Early in his career, Judge Mayhall served on the founding Board of Directors of Haleyville's First Federal Savings and Loan, now Pinnacle Bank. From 1982 through 2012, he served on the Board of Directors of First National Bank, Hamilton, Alabama. He cherished the friendships that he built with other board members and officers. His service on

the bank board was an activity he greatly enjoyed. As with all his endeavors, he thoroughly researched and studied laws, regulations and applicable materials in intricate detail. As with his duties on the bench, he took the role of board member very seriously, with great dedication and commitment.

Judge Mayhall retired from the bench in November 2002. Much of his retirement time was spent enjoying family, most notably his grandchildren. It was rare to see Judge Mayhall without his wife, Martha, by his side, content and happy in whatever activity they were involved.

Not only did they show much love and attention to their grandchildren, they were always helping others and giving encouragement and attention to the interests of others. It was not uncommon for them to travel hundreds of miles to see an athletic activity, church youth function or school performance for a grand-nephew, grand-niece or a youth from church whom they had coached.

Judge Mayhall continued to be supportive of others' endeavors throughout his retirement years in a selfless manner.

For those privileged to enjoy Judge Mayhall's eloquent public speaking ability, he usually ended with a quote from Mark Twain by which he chose to live his life, "Always do right; you will gratify some and astonish the rest." Yes, Judge Mayhall lived his life doing right toward others, while gratifying some with his sincere kindness and astonishing the rest with honesty and fairness, which came naturally to him.

Written by Wm. Lee Horn, nephew of Judge Mayhall and recipient of much love, encouragement and cherished advice

Hon. Gordon Rosen

Born in Rochester, New York in 1921, Gordon Rosen grew up in New Mexico, where he worked on a cattle ranch as a boy and gained a life-long interest in riding horses and raising cattle. After obtaining his undergraduate degree from the University of New Mexico, he entered the Navy during World War II, served sea duty from 1943 to 1946 and was honorably discharged. On the recommendation of his older brother, Melvin, a resident of Mobile, he enrolled in the law school at the University of Alabama in 1946, beginning his 68 years as a resident of Tuscaloosa. Upon graduation from the law school in 1949, he entered the private practice of law and eventually founded the law firm now known as Rosen Harwood. In addition to practicing



law and serving as an adjunct professor of law at the University of Alabama School of Law, he served as Tuscaloosa Municipal Judge for 14 years beginning in 1970.

He died at the age of 92 on May 14, 2014 in Tuscaloosa. He is survived by his wife, Ann; daughter Kelli Jetmundsen (Norman); grandsons Jonathan, Nelson and Taylor Jetmundsen; and beloved nieces and nephews.

He was a man of unwavering integrity. Recognized by his peers as an attorney of exceptional ability and character, he was elected president of the Tuscaloosa County Bar Association in 1963, and, in 2005, was one of the first recipients of the Association's Pillars of the Bar award. He was a member of the Tuscaloosa, Alabama and American bar associations and the Alabama Judicial Commission. Judge Rosen's contributions to his community extended far beyond his work as a lawyer, law professor and judge, including such civic involvement as service as a director on the boards of the YMCA, the Salvation Army, Indian Rivers Mental Health Center, the Community Foundation of West Alabama, Black Warrior Council of the Boy Scouts of America and the First National Bank of Tuscaloosa. He was a member and past president of Temple Emanuel and a Mason and a Shriner.

In 1991, Gordon and Ann established the Gordon Rosen Professorship and Scholarship of Law at the University of Alabama School of Law. He had taught real estate law at the law school as an adjunct professor from 1971 until 1982.

He was awarded the Dean Thomas Christopher Outstanding Alumnus Award in 1991 by the Student Bar Association because he had a career that epitomized the true meaning of service to his clients, his law school and his profession.

His repeated generous contributions of his time, talents and financial resources to the good of his community earned him the respect and appreciation of his fellow citizens, and, in 2003, he was awarded the Lifetime Achievement Award by the West Alabama Chamber of Commerce. In 2007, he was installed as a Pillar of West Alabama by the Community Foundation of West Alabama and in 2013 he was inducted into the Tuscaloosa County Civic Hall of Fame.

He became an accomplished quarter horse exhibitor and knowledgeable cattleman. For the last decade, he operated Rosen's XL Cattle Farm near Romulus and served two terms as president of the Tuscaloosa Cattleman's Association, as well as serving on its board of directors. In 2012, Judge Rosen was named the Alabama Beef Cattle Improvement Association's Commercial Producer of the Year.

A modest man despite all of his accomplishments, Judge Rosen made these remarks in connection with his 2007 selection as a Pillar of West Alabama, "My only claim to good judgment, other than marrying my beloved wife, Ann, is the fact that I made the choice to live in Tuscaloosa, Alabama (the best place in the world). I am a true Southerner by choice, not by an accident of birth!" | [AL](#)

Beatty, Hon. Samuel Alston

Birmingham
Admitted: 1953
Died: May 21, 2014

Gambrell, DeAnna Leah

Helena
Admitted: 2001
Died: June 7, 2014

Hendrix, James Austin

Summerdale
Admitted: 1951
Died: June 7, 2014

Ogden, Ellsworth Charles, III

Guntersville
Admitted: 1969
Died: June 5, 2014

Burge, Frank Otis, Jr.

Birmingham
Admitted: 1953
Died: June 13, 2014

Ganus, Gerald Alan

Gardendale
Admitted: 1967
Died: May 13, 2014

Lang, Donald Wayne

Sylacauga
Admitted: 1964
Died: January 27, 2014

Sarris, Phillip James

Vestavia
Admitted: 1964
Died: June 24, 2014

Evans, Emma B. Robinson

Birmingham
Admitted: 2001
Died: January 28, 2014

Grogan, Timothy Michael

Mobile
Admitted: 1975
Died: June 1, 2014

Morring, Carl Augusta, Jr.

Huntsville
Admitted: 1947
Died: April 21, 2014

Sizemore, James Paul

Manhattan Beach, CA
Admitted: 1995
Died: June 16, 2014

Evans, John Gregory

Mobile
Admitted: 1996
Died: June 14, 2014

Heinzman, Richard Ruel

Montgomery
Admitted: 1997
Died: June 30, 2014

Murphy, Patrick Joseph

Pike Road
Admitted: 1999
Died: June 1, 2014

Smith, Herschel David

Hoover
Admitted: 1968
Died: March 26, 2014

Notices

Reinstatements

Transfers to Disability Inactive Status

Disbarments

Suspensions

Public Reprimand

Notices

- **Robert Bozeman Crumpton**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 25, 2014 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 2011-1813 by the Disciplinary Board of the Alabama State Bar.
- **Jeffrey Lang Riley**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 25, 2014 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 2011-1856 by the Disciplinary Board of the Alabama State Bar.
- **Katherine Olivia Whiting**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 15, 2014 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB No. 2013-1117 before the Disciplinary Board of the Alabama State Bar.

Reinstatements

- The Alabama Supreme Court entered an order based upon the decision of the Disciplinary Board, Panel III, reinstating **Donald E. Brutkiewicz, Jr.** to the practice of law in Alabama, effective May 27, 2014. [Rule 28, Pet. No. 14-290]
- Hoover attorney **Brett Scott Sheedy** was reinstated to the practice of law in Alabama, effective April 15, 2014, by order of the Supreme Court of Alabama based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar. On January 13, 2009, an order was entered accepting the surrender of Sheedy's license to practice law. [Rule 28, Pet. No. 2013-693]

Transfers to Disability Inactive Status

- Florence attorney **Ernest Nolen Blasingame, Jr.** was transferred to disability inactive status, effective May 20, 2014, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the May 20, 2014 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to a petition to transfer to disability inactive status filed by the Office of General Counsel. [Rule 27(a), Pet. No. 2014-726]
- Bessemer attorney **Obinna Ken Mbanugo** was transferred to disability inactive status pursuant to Rule 27(a), *Ala. R. Disc. P.*, effective April 3, 2014. [Rule 27(a), Pet. No. 14-516].
- Fairhope attorney **Michael Stephen McGlothren** was transferred to disability inactive status pursuant to Rule 27(b), *Ala. R. Disc. P.*, effective May 21, 2014. [Rule 27(b), Pet. No. 14-734].
- Dothan attorney **John Scott Waddell** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective April

1, 2014, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(c), Pet. No. 2014-468]

Disbarments

- Troy attorney **Randy Scott Arnold** was disbarred from the practice of law in Alabama, effective May 14, 2014, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board, Panel III, of the Alabama State Bar finding Arnold guilty of violations of rules 3.4(c) and 8.4 (a), (d) and (g), *Ala. R. Prof. C.* Arnold admitted that he knowingly failed to make restitution payments or submit quarterly reports as required by an order entered in a separate disciplinary proceeding, and failed to timely pay all costs of the prior proceeding. Arnold's knowing disobedience of an obligation under the rules of a tribunal violated the *Alabama Rules of Professional Conduct*. [ASB No. 2009-1848(A)]
- Bessemer attorney **Timothy Lee Arnold** was disbarred from the practice of law in Alabama, by order of the Supreme Court of Alabama, effective March 31, 2014. The supreme court entered its order based upon the February 25, 2014 order on consent to disbarment of the Disciplinary Board of the Alabama State Bar. Arnold's consent to disbarment was based upon his self-report that he had misappropriated client funds. [Rule 23(a), Pet. No. 2014-279]
- Former Birmingham attorney **Christopher Shawn Linton** was disbarred from the practice of law in Alabama, by order of the Supreme Court of Alabama, with an effective date retroactive to January 24, 2012. The supreme court entered its order based upon the April 2, 2014 order on consent to disbarment of the Disciplinary Board of the Alabama State Bar. Linton's consent to disbarment was based upon multiple pending investigations involving allegations that Linton improperly solicited personal injury clients and mishandled and/or misappropriated client and third-party funds. [Rule 27, Pet. No. 2012-218; Rule 23(a), Pet. No. 2014-510; ASB nos. 2010-866, 2011-927, 2011-930, 2011-2076, 2011-2077, 2012-217, 2012-226, 2012-253, 2012-275, 2012-462, 2012-531 and 2012-554]

Suspensions

- Birmingham attorney **Minerva Camarillo Dowben** was summarily suspended from the practice of law in Alabama by order of the Supreme Court of Alabama, effective April

21, 2014. The supreme court entered its order based upon the April 21, 2014 order of the Disciplinary Commission in response to a petition filed by the Office of General Counsel evidencing that Dowben failed to respond to formal requests for written responses from the Office of General Counsel regarding a disciplinary matter. [Rule 20(a), Pet. No. 2014-579]

- Gadsden attorney **Trenton Rogers Garmon** was suspended from the practice of law in Alabama by order of the Alabama Supreme Court for 91 days, effective April 7, 2014. The supreme court entered its order based upon the decision of the Disciplinary Board, Panel II, of the Alabama State Bar wherein Garmon was found guilty of violating rules 7.3(a) and 8.4(a) and (g), *Ala. R. Prof. C.*

Within one or two days following funeral services for a 13-year-old child who was killed in an automobile accident, Garmon called the child's home identifying himself as "a pastor and an attorney." Garmon tried to establish a relationship with the parents by claiming a connection with the father's cousin, who was not a cousin, but a person whose name was given to Garmon by an individual associated with Garmon's law practice. Garmon had no prior professional or other relationship with the child's family. Garmon stated that he would like to meet the parents to discuss their legal rights. Garmon also made subsequent calls to the mother of the child stating that he had talked to her husband about their legal issues and wanted to set up a meeting. Garmon made no effort to inquire about the parents' need for counseling, their church affiliations or spiritual resources. [ASB No. 11-1689]

- Bessemer attorney **Millard Lynn Jones** was interimly and summarily suspended from the practice of law in Alabama by order of the Supreme Court of Alabama, effective April 23, 2014. The supreme court entered its order based upon the April 23, 2014 order of the Disciplinary Commission of the Alabama State Bar in response to a petition filed by the Office of General Counsel evidencing that Jones failed to fully respond to requests from the Office of General Counsel concerning a disciplinary matter, and Jones's conduct is causing, or is likely to cause, immediate and serious injury to a client and to the public. In addition, Jones has admitted to misappropriating client funds on multiple occasions. [ASB No. 340; Rule 20, Pet. No. 2014-590]
- Birmingham attorney **Patrick Brittain Kenerly** was suspended from the practice of law in Alabama for 120 days, by order of the Supreme Court of Alabama, effective March 21, 2014. The supreme court entered its order based upon the January 30, 2014 order and judgment of Panel II of the Disciplinary Board of the Alabama State Bar,

for violations of rules 5.3(c)(1), 8.1(a) and 8.4(a). The Disciplinary Board found Kenerly guilty of using case runners to improperly solicit personal injury cases, and of providing false information to the bar during the investigation of the matter. [ASB No. 2010-868]

- Bessemer attorney **Dan Cicero King, III** was interimly and summarily suspended from the practice of law in Alabama by order of the Supreme Court of Alabama, effective April 23, 2014. The supreme court entered its order based upon the April 23, 2014 order of the Disciplinary Commission of the Alabama State Bar in response to a petition filed by the Office of General Counsel evidencing that King failed to fully respond to requests from the Office of General Counsel concerning a disciplinary matter, and King's conduct is causing, or is likely to cause, immediate and serious injury to a client and to the public. [Rule 20, Pet. No. 2014-601]
- Hartselle attorney **Robert Earl Long, Jr.** was suspended from the practice of law in Alabama for 180 days by the Supreme Court of Alabama, effective May 8, 2014. The

supreme court entered its order based upon the Disciplinary Commission's acceptance of Long's conditional guilty plea, wherein Long pleaded guilty to violating rules 1.15(a) and 5.3(a), *Ala. R. Prof. C.* Long admitted he failed to properly supervise the office activities of his office assistant and admitted client funds were mismanaged and stolen from his office trust account by his office assistant. [ASB No. 2014-202]

- Former Montgomery attorney **Christopher Bernard Pitts** was suspended from the practice of law in Alabama for one year by the Supreme Court of Alabama, effective January 1, 2014. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Pitts's conditional guilty plea, wherein Pitts pled guilty to violating rules 1.2, 1.7(b), 3.4(b), 8.4(a), 8.4(c) and 8.4(g) in ASB No. 2010-1423; rules 5.5(a)(1), 8.4(a), 8.4(c) and 8.4(g) in ASB No. 2013-1455 and UPL No. 2012-1022; rules 3.3(a)(3), 8.4(a), 8.4(c) and 8.4(g) in ASB No. 2013-1461; 5.5(a)(1), 8.4(a), 8.4(c) and 8.4(g), *Ala. R. Prof. C.*, in ASB nos. 2013-1456 and 2013-1462. Pitts filed a bankruptcy petition on behalf of a married couple without confirming the wife's signature and without her knowledge or consent. On

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more than one occasion, Pitts continued to practice law after his license was suspended in 2010. Pitts filed a Chapter 7 bankruptcy on behalf of himself with false information and a provided a false statement regarding past income. [ASB nos. 2010-1423, 2013-1455, 2013-1456, 2013-1461 and 2013-1462; UPL No. 2012-1022]

- Mobile attorney **Jacqueline Rachel Powell** was suspended from the practice of law in Alabama for 91 days by order of the Disciplinary Commission of the Alabama State Bar, effective May 16, 2014. The suspension was ordered held in abeyance and Powell was placed on probation for two years. The order of the Disciplinary Commission was based upon Powell's conditional guilty plea to violating Rule 1.15, *Ala. R. Prof. C.* In ASB No. 2013-1481, Powell admitted that she failed to employ proper trust accounting procedures and failed to keep accurate trust account records as required by Rule 1.15, *Ala. R. Prof. C.* While on probation, Powell is required to file quarterly trust account reports, submit to a random audit of her trust account, consult with and implement all recommendations of the Alabama State Bar Practice Management Assistance Program and meet with a mentor at least once monthly and seek the mentor's counsel and guidance regarding issues that arise during her practice of law. In exchange for Powell's plea, ASB nos. 2013-529 and 2013-2022 are dismissed. [ASB nos. 2013-529, 2013-1481 and 2013-2022]
- Huntsville attorney **Howell Roger Riggs, Jr.** was suspended from the practice of law in Alabama for 180 days, effective May 7, 2014, the imposition of which was deferred pending a two-year probationary period and payment of restitution to the complainants. On May 7, 2014, the Disciplinary Commission accepted Riggs's conditional guilty plea to violations of rules 1.1, 1.3, 1.4, 1.15(a) and (e) and 8.4(a) and (g), *Ala. R. Prof. C.* In ASB No. 2011-1721, Riggs admitted that he failed to keep his client informed about the status of its case, and failed to retain the unearned portion of the retainer in his trust account, violations of rules 1.4 and 1.15(a) and (e), *Ala. R. Prof. C.* In ASB No. 12-1954, Riggs admitted that he miscalculated the statute of limitations in a case, resulting in the loss of his client's claim, and failed to retain the unearned portion of the client's retainer in his trust account, violations of rules 1.1, 1.3, 1.15(a) and 8.4(a) and (g), *Ala. R. Prof. C.* [ASB nos. 2011-1721 and 2012-1954]
- Tuscaloosa attorney **Jeffrey Lang Riley** was interimly suspended from the practice of law in Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective May 27, 2014. The order of the Disciplinary

Commission was based on a petition filed by the Office of General Counsel evidencing Riley was engaging in activities that were prejudicial to the administration of justice and that his continued practice of law was likely to cause substantial, immediate and serious harm to a client or to the public. [Rule 20(a), Pet. No. 2014-751]

- Monroeville attorney **Leston Curtiss Stallworth** was suspended from the practice of law in Alabama for 91 days by order of the Supreme Court of Alabama, effective April 15, 2014. The supreme Court entered its order based upon the Disciplinary Commission's order on joint stipulation of the parties regarding the revocation of Stallworth's probation. On October 18, 2012, the Disciplinary Commission of the Alabama State Bar accepted Stallworth's conditional guilty plea and ordered that he be suspended from the practice of law in Alabama for 91 days, pursuant to Rule 8(b), *Ala. R. Disc. P.* The suspension was ordered held in abeyance and Stallworth was placed on probation for two years, pursuant to Rule 8(h), *Ala. R. Disc. P.* On September 6, 2013, the Office of General Counsel filed a petition to revoke Stallworth's probation, alleging that Stallworth had committed a number of ethical violations while on probation. On January 6, 2014, the Disciplinary Commission issued an order revoking Stallworth's probation and imposing his original discipline of a 91-day suspension. The revocation of Stallworth's probation was based on Stallworth's filing of a civil suit against an individual for filing a bar complaint against him, a violation of Rule 15, *Ala. R. Disc. P.*, and rules 3.4(c), 3.1(a), 8.4(a) and 8.4(g), *Ala. R. Prof. C.* [ASB nos. 2011-887 and 2012-1076]

Public Reprimand

- Pell City attorney **Dalton Kelly Livingston** received a public reprimand without general publication on March 14, 2014 for violating rules 1.4(b), 1.8(k) and 8.4(a) and (g), *Ala. R. Prof. C.* Livingston met with a husband and wife regarding an uncontested divorce. At the direction of the husband, who paid the attorney's fee, Livingston agreed to represent the wife and make her the complainant in the divorce. While purportedly representing the wife, Livingston failed to meet with her separately from her husband and failed to advise her regarding her right to alimony based on the duration of the marriage. Livingston also failed to require the husband to execute an acknowledgment of non-representation. The divorce settlement agreement Livingston prepared and filed for the parties listed Livingston as counsel for the husband and did not include an award of alimony to the wife. [ASB No. 2011-1483] | [AL](#)



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Thanks go to Barry Matson, deputy director of the Alabama District Attorneys Association, for his assistance with this article.



Matson



Expungement in Alabama

The path allowing for any type of expungement of arrest and criminal records in Alabama has been a long one. For the better part of a decade, **Representative Chris England** and **Senator Roger Bedford**, along with many active members of the bar, have fought to gain passage of legislation to allow for expungement in appropriate circumstances. This effort led to passage of legislation during the 2009 Legislative Session but at that time it was pocket vetoed by the governor. That setback only created further resolve and this past session legislation was passed again and this time was signed into law as Act 2014-292.

Both during the legislative session and since, there have been complaints on both sides of this issue. Some feel this bill does too much and others too little. Some think the list of allowable crimes is too broad and others too narrow. Some think the process is too costly and others too cheap. As most lawyers know, these comments are all the signs of a compromise that is probably very close to the right starting result. This legislation should open the door for an important process in Alabama and, given the level of interest and the nature of the parties involved, it is likely that the process can be tweaked in the future after we get a few years of experience under the current law.

The new act will be a life-changer for many Alabamians. An “arrest record,” even without a conviction, often adversely affects opportunities for employment, credit, education, housing and professional licenses. With the merit of such a law being obvious, the difficulty rested in developing a process that ensured the rights of the person seeking an expungement while respecting the legitimate logistical needs of the multitude of agencies that will be affected by this new process. The Alabama District Attorneys Association (ADAA) was instrumental in bringing together the critical federal, state and local agencies, as well as private industry stakeholders, to make this law a reality.

Act 2014-292 addresses several critical issues that will safeguard the integrity of the expungement process. For the person seeking the expungement, as well as the record-keeper being ordered to expunge a criminal record of arrest, vesting jurisdiction with the circuit court ensures a uniform application of the new law. Further, the central repository of expunged records provision provides an archival process that gives flexibility of access by the courts, as well as statutorily exempt entities.

Given the scope and importance of this act, it is important to provide all lawyers in Alabama with a summary of its key provisions as set forth below. Of course, nothing is a substitute for reading the entirety of the act which can be found on ALISON at www.legislature.state.al.us.

Effective Date

Act 2014-292 became effective July 6, 2014.

Jurisdiction

All petitions for expungement must be filed in the criminal division of the circuit court in the county where the charges were filed.

Scope

The scope of the bill includes violations, misdemeanors and non-violent felonies offenses but not convictions.

A person who has been charged with a misdemeanor criminal offense, a violation, a traffic violation or a municipal ordinance violation may file a petition in the criminal division of the circuit court in the county in which the charges were filed, to expunge records relating to the charge in any of the following circumstances:

- (1) When the charge is dismissed with prejudice;
- (2) When the charge has been no billed by a grand jury;
- (3) When the person has been found not guilty of the charge; or
- (4) When the charge was dismissed without prejudice more than two years ago, has not been refiled and the person has not been convicted of any other felony or misdemeanor crime, any violation or any traffic violation, excluding minor traffic violations, during the previous two years.

A person who has been charged with a felony offense, except a violent offense as defined in Section 12-25-32(14)¹, *Code of Alabama* 1975, may file a petition in the criminal division of the circuit court in the county in which the charges were filed, to expunge records relating to the charge in any of the following circumstances:

- (1) When the charge is dismissed with prejudice;
- (2) When the charge has been no billed by a grand jury;
- (3) When the person has been found not guilty of the charge;
- (4) a. The charge was dismissed after successful completion of a drug court program, mental health court program, diversion program, veteran's court or any court-approved deferred prosecution program after one year from successful completion of the program;
b. Expungement may be a court-ordered condition of a program listed in paragraph a;
- (5) The charge was dismissed without prejudice more than five years ago, has not been refiled and the person has not been convicted of any other felony or misdemeanor crime, any violation or any traffic violation, excluding minor traffic violations, during the previous five years;
- (6) Ninety days have passed from the date of dismissal with prejudice, no-bill, acquittal or nolle prosequi and the charge has not been refiled.

Pleading Requirements

A petition must include a sworn statement made by the person seeking expungement that states the person has satisfied the requirements set out in the act and whether he or she has previously applied for an expungement in any jurisdiction and the outcome of that application.

The petition must include a certified record of arrest, disposition or the case action summary from the appropriate agency for the court record the petitioner seeks to have expunged as well as a certified official criminal record obtained from the Alabama Criminal Justice Information Center,(ACJIC). Instructions for obtaining a certified criminal record from ACJIC can be found at <http://acjic.alabama.gov/page-CriminalHistories>.

The petition should set forth any appropriate grounds for the court to consider, and must specify what criminal charges from the record are to be considered, the agency or department that made the arrest and any agency or department where the petitioner was booked, incarcerated or detained pursuant to the arrest or charge sought to be expunged.

The petition must be served upon the district attorney, law enforcement agency and clerk of the court of the jurisdiction for the records sought to be expunged. The district attorney has the obligation to attempt to notify any victim of the crime at issue.

The district attorney and any victim have the right to file a written objection within 45 days of service.

Fees

In addition to any cost of court or docket fee for filing the petition in circuit court, an administrative filing fee of \$300 shall be paid at the time the petition is filed and is a condition precedent to any ruling of the court pursuant to this act:

- (1) Seventy-five dollars to the State Judicial Administrative Fund;
- (2) Twenty-five dollars to the Alabama Department of Forensic Sciences;
- (3) Fifty dollars to the district attorney's office;
- (4) Fifty dollars to the clerk's office of the circuit court having jurisdiction over the matter, for the use and benefit of the circuit court clerk;
- (5) Fifty dollars to the Public Safety Fund; and
- (6) Fifty dollars to the general fund of the county where the arresting law enforcement agency is located, if the arrest was made by the sheriff's office, to be used for law enforcement purposes, or, if the arrest was made by another law enforcement agency, to the municipality or other entity or state agency funding the law enforcement activity.

Neither the fee nor any associated court costs can be waived. In the case of indigency, the court can establish a payment plan, but the entire fee must be paid prior to an order being issued.

Consideration by the Court

If the victim or the district attorney files an objection, the court hearing the matter must set a hearing and it must be at least 14 days following the filing of the objections.

Whether or not to grant expungement is a discretionary matter for the judge hearing the petition, but the statute does set forth 10 factors for consideration:

- (1) Nature and seriousness of the offense committed;
- (2) Circumstances under which the offense occurred;
- (3) Date of the offense;
- (4) Age of the person when the offense was committed;
- (5) Whether the offense was an isolated or repeated incident;
- (6) Other conditions which may have contributed to the offense;
- (7) An available probation or parole record, report or recommendation;
- (8) Whether the offense was dismissed or nolle prossed as part of a negotiated plea agreement and the petitioner plead guilty to another related or lesser offense;
- (9) Evidence of rehabilitation, including good conduct in prison or jail, in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful business or employment history and the recommendation of his or her supervisors or other persons in the community; and
- (10) Any other matter the court deems relevant, which may include, but is not limited to, a prior expungement of the petitioner's records.

Effect of Court's Determination

When a court grants a petition for expungement, it shall order the expungement of all records in the custody of the court and any records in the custody of any other agency or official, including law enforcement records, except privileged presentence or post-sentence investigation reports produced by the Alabama Board of Pardons and Paroles and its officers, records, documents, databases and files of the district attorney and the Office of Prosecution Services.

After the expungement of records pursuant to the court's order, the proceedings regarding the charge shall be deemed never to have occurred. The court and other agencies shall reply to any inquiry that no record exists on the matter. The petitioner whose record was expunged shall not have to disclose the fact of the record or any matter relating thereto on an application for employment, credit or other type of application.

Exceptions

An individual whose record was expunged shall have the duty to disclose the fact of the record and any matter relating thereto to any government regulatory or licensing agency, any utility and its agents and affiliates, or any bank or other financial institution. In these circumstances, the government regulatory or licensing agency, utility and its agents and affiliates or the bank or other financial institution shall have the right to inspect the expunged records after filing notice with the court.

Obligation of Agencies with Records

Upon receipt of an expungement order, an agency in possession of records subject to the order shall immediately forward

the records to the Alabama Criminal Justice Information Center. The center shall digitally archive the records in a manner prescribed by the Alabama Criminal Justice Information Center Commission and designate the records as protected. Protected records may not be used for any non-criminal justice purpose and may only be made available to criminal justice agencies upon acknowledgement of an investigation or other criminal matter involving the person related to the expungement. Any expunged records that were added to a federal database shall be requested to be removed and not made available within any interstate criminal database.

Covered Records

Records covered by an expungement order include, but are not limited to, arrest records, booking or arrest photographs, index references and all other data relating to the arrest and charge.

Sanctions for Malicious Release of Expunged Records

Any person who maliciously divulges information related to an expungement will be guilty of a Class B misdemeanor.

Immunity Provisions

The act provides immunity for liability resulting from the past record of an individual to any person or business which hires or does business with that individual and is unaware of the past record because it was expunged. The act also provides for immunity for unintentional and accidental release of expunged records and business immunity for actions of employees if the business was unaware of a prior expungement.

Fraudulent Petition for Expungement

Not only must the petition be filed as a sworn document being subject to perjury, but if a petition was granted based on false pretenses made by the petitioner, then that order shall be reversed.

Other Expungement Statutes in Alabama Prior to Act 2014-292

Other Alabama statutes allow adult criminal records to be expunged in very limited circumstances. A summary of the laws governing expungement are as follows:

- *Expunging DNA Records*

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References available. NMLS # 190932

A person convicted of a crime that was reversed may request to have any DNA records expunged. (*Alabama Code* § 36-18-26)

- *Expunging an Inaccurate Criminal Record*

A criminal record may be removed or amended if a mistake or error exists within the record itself. The best way to correct a criminal record is to visit the website of the Alabama Criminal Justice Information Center (ACJIC) and complete a form called *Requests to Review, Challenge, or Appeal Criminal History Record Information*. (*Alabama Administrative Code* § 265X2.03)

If a local criminal record contains inaccurate, incomplete or misleading information, a person should contact the agency where the record is located. The agency may then cause the record to be purged or corrected and the ACJIC will be notified of the changes. (*Alabama Code* §§ § 41-9-645, § 41-9-646)

- *Expungement of Records Regarding Allegations of Child Abuse or Neglect*

If a person was investigated on a report of child abuse or neglect, but there was no conviction, any record of the report or related data must be expunged. (*Alabama Code* § 26-14-3)

This act should be a significant help to eligible persons who are seeking to gain a second chance in their life. No doubt it will take some time for this process to become smooth and efficient, but all of the stakeholders have been working in good faith to ensure that happens. I urge those who engage in the process at any level to keep lawmakers updated on any needed improvements or changes. | [AL](#)

Endnote

1. Section 12-25-32 is the definitional section of the chapter of the code creating the Alabama Sentencing Commission and subsection (14) includes a list of 45 crimes to be included in the definition of a "Violent Offense."



Please email announcements to Margaret Murphy, margaret.murphy@alabar.org.

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.

About Members

S. Scott Hickman announces the opening of **S. Scott Hickman, Attorney at Law LLC** at 2600 7th St., Tuscaloosa 35401. Phone (205) 248-2616.

James P. Pewitt of Birmingham announces the opening of **James P. Pewitt LLC** at 6 Office Park Cir., Ste. 116, Birmingham 35223. Phone (205) 874-6686.

Amanda Walters Porter announces the opening of **Amanda Walters Porter PC** at 201 Temple Ave., S., Fayette 35555. Phone (205) 932-5522.

Sandra B. Reiss announces the opening of **The Reiss Firm LLC**. The mailing address is P.O. Box 660121, Birmingham 35226. Phone (205) 637-1388.

Steven J. Shaw announces the opening of the **Law Office of Steven J. Shaw**. The mailing address is P.O. Box 14037, Huntsville 35815. Phone (256) 382-5515.

John F. Wall, III announces the opening of his practice at 14 Exchange St., Charleston 29401.

H. Bryan Wallace announces the opening of **The Law Firm of H. Bryan Wallace PC** at 205 S. Seminary St., Florence. Phone (256) 740-8333.

Among Firms

The **Alabama Disabilities Advocacy Program** announces that **James A. Tucker** has become executive director.

Zachary D. Alsobrook and **Barbara Agricola McCormick** announce the opening of **Alsobrook & McCormick LLC** in Opelika.

Balch & Bingham LLP announces that **Jeff Wood** joined the firm as a partner in the Washington, DC office.

Boyd, Fernambucq, Dunn & Fann PC of Birmingham announces that **Heather R. Fann** is now a shareholder.

Bryan Brinyark and **Christopher Frederick** announce the opening of

Brinyark & Frederick PC at 31 McFarland Blvd., Ste. 200, Northport 35476. Phone (205) 759-5773.

Andy Campbell and **Jay Guin** announce the opening of **Campbell, Guin, Williams, Guy & Gidiere LLC** in Birmingham and Tuscaloosa.

Citrin Law Firm PC announces that **Jeffrey N. Gale** and **Woodrow Eugene Howard** joined the firm.

Judith S. Crittenden, Laura E. Montgomery, Kelli Hogue Mauro, Paige P. Yarbrough and **Rachel Stewart Martin** announce the opening of **Crittenden Partners** at 1 Independence Dr., Ste. 305, Homewood 35209.

Fish Nelson LLC announces that **Joshua G. Holden** is a named member and the new firm name is **Fish Nelson & Holden LLC**.

Manning & Kass, Ellrod, Ramirez, Trester LLP announces that **Jenifer Champ Wallis** joined the Los Angeles office.

Rosen Harwood PA announces that **Robert Morgan** joined as of counsel and **Jeff Morman** joined as an associate.

Rumberger, Kirk & Caldwell announces that **J. Michael Rediker, Jesse P. Evans, III, Robert Adams, R. Scott Williams, Peter Tepley, Michael Odom** and **Meredith Jowers Lees** joined as partners; **Jennifer B. Kimble** joined as special counsel; **Martin W. Evans** and **Rebecca A. Beers** joined as associates, all in the Birmingham office.

Samford & Denson LLP of Opelika announces that **Andrew D. Stanley** is now a partner.

Sirote & Permutt announces that **Cullen J. Brown** joined the firm in the Huntsville office and **Carl Emmons** joined the Birmingham office.

Stewart & Stewart PC announces that **Greg W. Foster** and **T. Dylan Reeves** have joined the firm. The mailing address is P.O. Box 721, Bessemer 35021. Phone (205) 425-1166.

Synovus Family Asset Management Group in Birmingham announces that **Anna-Katherine Bowman** is now a senior relationship manager. | [AL](#)

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