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# Lawyer



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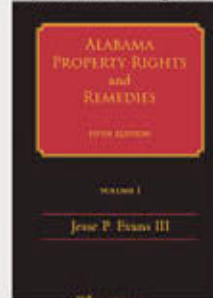
- 9 Healthcare Law — *Birmingham*
- 16 Bankruptcy Law Update — *Birmingham*
- 28 Alabama Update Montgomery — *Montgomery*
- 30 Tort Law Update — *Birmingham*

## DECEMBER

- 6 Administrative Law — *Birmingham*
- 7 Estate Planning — *Birmingham*
- 14 Effective Legal Negotiation & Settlement with Charles Craver — *Birmingham*
- 18 Employment Law — *Birmingham*
- 19 **The Alabama Rules of Evidence: A Day with Charles Gamble and Friends** — *Birmingham*
- 20 Alabama Update Birmingham — *Birmingham*

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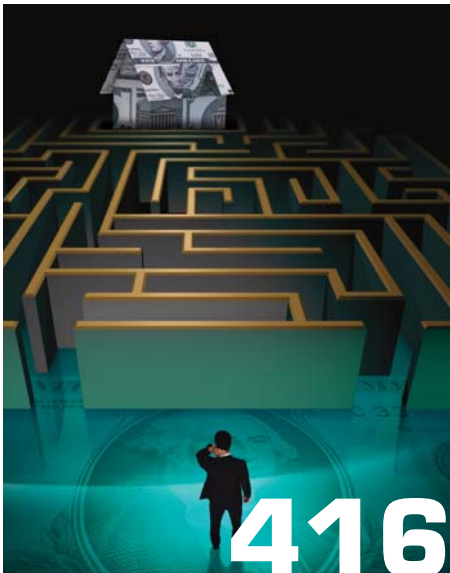
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416



436



434

## FEATURES

**386** Thornhill Hired to Direct Lawyer Assistance Program

**390** Note from the Editor

**Property Sold for Unpaid Taxes: Owners Beware**

*By Gregory H. Hawley*

**412** BOOK REVIEW: *The Transformative Years of The University of Alabama Law School: 1966-1970*

**By Daniel John Meador**

*Reviewed by Robert L. Potts*

**416** Alabama Tax Certificate Investors Beware: Negotiating through the Labyrinth of, and Important Limitations to Recovering Money in, the Redemption Process

*By Gary E. Sullivan*

**424** Money for Nothing: Who Is Entitled to the Excess Paid at a Tax Sale?

*By William S. Hereford and James H. Haithcock, III*

**432** Depression

*By an Alabama lawyer*

**434** Are You Ready for Private Judging?

*By Wendy B. Crew, Judge R.A. "Sonny" Ferguson, Jr. and Dean J. Noah Funderburg*

**436** The Limited Scope of Contributory Negligence in AEMLD-Crashworthiness Cases

*By J. Greg Allen, J. Cole Portis, Benjamin E. Baker, Dana G. Taunton, Stephanie S. Monplaisir, David G. Wirtes, Toby D. Brown, George M. Dent, III, David H. Marsh, Bruce McKee, Larry W. Morris, and Clay Hornsby*



## ON THE COVER

*Properties sold for unpaid taxes: Who are the winners and losers in the process, and what rights does each have?*

# ADVERTISERS

ABA Retirement Funds.....409

ACDLA .....415

Alabama Mediation Center.....411

The University of Alabama  
School of Law .....439

Attorneys Insurance Mutual  
of the South.....378

CLE Alabama.....380

Cumberland School of Law .....395

Cain & Associates Engineers .....423

Davis Direct .....445

J. Forrester DeBuys, III.....419

Expedited Process Serving, LLC .....399

The Finklea Group.....447

Freedom Court Reporting.....391

Gilsbar Management Services, LLC .....456

Law Pay .....451

The Locker Room .....449

PNC Bank .....455

Professional Software Corporation .....419

Upchurch Watson White & Max .....407

Westlaw/Thomson Reuters .....379 & 387

Willoughby .....423

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PRINTING

## COLUMNS

### 384 President's Page

*Have you given back? Join the ranks of those who have*

### 388 Executive Director's Report

*The Rule of Law Suffers When Our Judicial System Is Not Adequately Funded*

### 392 Memorials

### 394 The Appellate Corner

### 400 Important Notices

*Judicial Award of Merit*

*Administrative Order Re: Policies and Procedures for Electronic Filing*

### 402 CLE Corner

*Change Can Be Good*

### 404 Disciplinary Notices

### 444 Opinions of the General Counsel

*A Little Ignorance Goes a Long Way*

### 448 Legislative Wrap-Up

*Extensive Work and Time Volunteered Equal Major Code Revisions*

### 452 About Members, Among Firms

### 453 Classified Ads



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**Robert L. Potts** is a member of the University of Alabama Law School Class of 1969, the first class to matriculate all three years while Dean Dan Meador was there. Potts's subsequent career has included a clerkship with U.S. Northern District of Alabama Chief Judge Seybourn H. Lynne, an LL.M. from Harvard Law School, several years in private practice, and public service as general counsel for the University of Alabama System, as president of the University of North Alabama, as chancellor of the North Dakota University System, and as chancellor and interim president of Arkansas State University. He also served as chair of the Alabama Board of Bar Examiners and of the National Conference of Bar Examiners.

## CONTRIBUTORS



**Wendy B. Crew** is a 1983 graduate of Cumberland School of Law and received a certificate in International Law from King's College, London. She is a fellow in the American Academy of Matrimonial Lawyers and the International Academy of Matrimonial Lawyers.



**Judge R.A. "Sonny" Ferguson, Jr.** practices in Birmingham with Christian & Small LLP. He is a graduate of Auburn University and Cumberland School of Law. He served as a circuit judge for the 10th Judicial Circuit, Domestic Relations Division from 1995-2011 and received the Judge of the Year Award in 2007 from the state bar's Family Law Section.



**Gary E. Sullivan** is a member of Sullivan & Gray LLC in Tuscaloosa, and he serves as a lecturer at the University of Alabama School of Law. His practice and scholarly interests focus on creditor rights, commercial law, bankruptcy and real estate. At the law school, Sullivan has previously taught courses including Advanced Commercial Law and Trial Advocacy I & II. He currently teaches courses in legal writing and transactional drafting. Sullivan thanks law student Spencer Mobley (class of 2012) for his assistance in researching and writing.

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## Have you given back? Join the ranks of those who have

Nothing epitomizes the Alabama State Bar's motto, "Lawyers Render Service," better than the pro bono efforts of Alabama lawyers. We are blessed to have over 4,000 lawyers participating in the Volunteer Lawyers programs around the state, and our lawyers continually receive state and national recognition for their pro bono work. In this issue, I will highlight some of the Alabama State Bar's programs and recognize the recent accomplishments of our outstanding volunteer lawyers.



*A client is helped by a "Justice Bus" volunteer during Pro Bono Celebration Week, October 21–27.*



*Montgomery attorney Nikki Rothschild visits with several students from Jones Law School during a "Justice Bus" stop in Lowndes County.*

During Pro Bono Celebration Week, October 21 through October 27, Alabama again led the nation. The bar's Pro Bono Celebration Task Force, led by **Jeanne Rasco**, planned a number of legal clinics, CLEs and other events specifically designed to deliver legal services to low-income Alabamians. This year, the task force dispatched its first "Justice Bus" to rural areas of our state. The Justice Bus transported





ASB President Phillip McCallum and past President Sam Crosby (third and fourth from left) joined other volunteers from the South Alabama Volunteer Lawyers Program on the "Justice Bus."



"Justice Bus" volunteers from the Birmingham Volunteer Lawyers Program

lawyers from Huntsville, Birmingham, Montgomery and Mobile to outlying areas to reach rural citizens.

The American Bar Association continually recognizes Alabama as a leader in the Pro Bono Celebration Week. Last year, Jeanne and **Professor Jeff Baker** of Jones School of Law specifically developed and videotaped a CLE program for the ABA that is being used nationally. This year, the task force videotaped a number of JUST stories for use by the ABA. These are short interviews with Alabama lawyers describing the impact of pro bono work on their lives and the lives of their clients. I encourage you to listen to some of these compelling stories at [www.alabar.org](http://www.alabar.org).

Alabama lawyers and firms are also regularly recognized on the national level for their pro bono efforts. In August 2011, the American Bar Association awarded **Henry Callaway** its prestigious *Pro Bono Publico* award. For many years, Henry has been a leading figure in the pro bono movement in Alabama and nationally. This summer, **Bradley Arant Boulton Cummings** was awarded the *American Bar Association Death Penalty Representation Project's Exceptional Service Award*. Led by the firm's Pro Bono co-chair, **Chris Christie**, Bradley Arant lawyers have represented 22 death row inmates and spent more than 1,000 hours on cases for condemned killers who have no right to appointed counsel at the latter stages of their appeals.

The Alabama State Bar also has a rich tradition of honoring lawyers who fulfill our motto through pro bono work. At this year's annual meeting, the **Hon. J. Scott Vowell, presiding judge, 10th Judicial Circuit, Birmingham**, and **Birmingham Bar Association Past President Gregory H. Hawley** received the *Al Vreeland Award* for outstanding pro bono service by an attorney. Judge Vowell and Greg dedicated countless

hours to revitalizing the **Birmingham Volunteer Lawyers Program**. Under their leadership and direction, the BVLP went from handling 300 cases in 2009 to handling more than 1,000 in 2011.

The firm of **Beasley Allen Crow Methvin Portis & Miles PC** of Montgomery was this year's recipient in the *firm/group category*. Beasley Allen attorneys regularly accept pro bono from the Alabama State Bar Volunteer Lawyers Program and maintains 100 percent participation in the program. **Beasley Allen** has also established a competitive grant of \$10,000 awarded annually to an organization that promotes pro bono activity in Alabama.

In the *law student category*, the **students of the University of Alabama** received the award for their efforts in response to the devastation to the community by the April 27<sup>th</sup> tornadoes. More than 300 hours of pro bono services were provided by student volunteers, and this response was particularly inspiring, given the fact that a significant number of them were directly affected by the tornadoes.

**D. Robert Stankoski** of Fairhope was given the pro bono award in the *mediation category*. Robert's commitment to the **Baldwin County District Court Small Claims Mediation Program** is immeasurable. From 2010-2012, he supervised the program and was responsible for scheduling all 15 of the program's mediators to ensure that they were available for each small claims docket. He spent approximately 10 hours per week coordinating volunteers via a master calendar, updating **Baldwin County District Judge Jody W. Bishop** on the status of volunteer availability and creating a master statistical summary.

And, finally, I am excited to announce the winner of this year's *Harold Albritton Pro Bono Leadership Award*. This

award was established by the Alabama State Bar Board of Bar Commissioners in 2012, and was presented to and named for **Judge Harold Albritton**.

Judge Albritton was president of Alabama State Bar when the Volunteer Lawyers Program began. This year the award will be presented to **Sam Crosby**—one of my all-time favorite Alabama lawyers! During his term as president of the Alabama State Bar, Sam worked to ensure funding for access to justice by using increased pro hac vice fees to support this effort and working for approval of the mandatory IOLTA rule. Sam also brought the **“Wills for Heroes”** project to Alabama.



*Sam Crosby (left) receiving the Harold Albritton Pro Bono Leadership Award from President Phillip McCallum*

There are countless attorneys throughout the state who perform pro bono services on a daily basis without any recognition. Many lawyers agree to represent clients who come to their offices and cannot afford to pay them for their services. Their stories are equally as inspiring as the few that I have shared with you in this article and their efforts should be acknowledged. I

thank and recognize all of the lawyers of our bar who perform pro bono work. Your efforts communicate to the public that “lawyers render service.” | [AL](#)

## Thornhill Hired to Direct Lawyer Assistance Program

Robert B. Thornhill of Montgomery has been named director of the Alabama Lawyer Assistance Program (ALAP).

Created in 1985, the ALAP provides legal professionals with assistance for problems associated with drug, alcohol, gambling, suicide prevention, difficulties resulting from depression, and other mental health issues.

Thornhill graduated from Troy University at Montgomery with an undergraduate degree in psychology and a graduate degree in counseling and human development. He is a licensed professional counselor, a certified alcohol and drug abuse professional and a master's level addiction professional. He is also credentialed as an internationally-certified alcohol and drug counselor.

With the ALAP, his responsibilities will include educational outreach and confidential assistance to impaired lawyers, judges and law students, as well as to their families. He will maintain relationships within the legal community and



*Thornhill*

with treatment providers to develop educational programs, recruit and train volunteer lawyers to assist with program services and work with other local bars statewide that have similar programs.

As a member of the state bar staff, he will serve as liaison to the Lawyer Assistance Committee and will be the primary contact for the American Bar Association's Commission on Lawyer Assistance Programs.

Before joining the state bar, Thornhill was a clinical coordinator of the Alabama Physician Health Program, which serves doctors and veterinarians facing substance abuse or other mental health issues. He was also employed in the Montgomery office of Bradford Health Services as a primary and adolescent counselor.

His professional activities include two terms on the board of the Alabama Alcohol and Drug Abuse Association and one term as secretary, plus memberships in both the Alabama Counseling Association and the Alabama Mental Health Counselors Association.

A well-known local musician, he has performed in Montgomery for many years, at times accompanied by his sons.



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**Keith B. Norman**

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# The Rule of Law Suffers When Our Judicial System Is Not Adequately Funded

Long ago, John Adams observed ours was a government of laws and not of men. For Americans, the Rule of Law has been fundamental to our nation's growth and progress. According to some, the Rule of Law is this country's greatest export to the world. The very quality of our lives depends on the Rule of Law. From brushing our teeth in the morning (food and product safety laws), traveling to the office (traffic safety laws), until we turn out the lights to go to sleep at night (utility laws), the Rule of Law has an undeniable impact on our lives and livelihood. It is the glue that holds together our society.

As lawyers, we recognize that our judicial system is the bulwark of the Rule of Law. Presently, a lack of adequate funding, especially over the last several years, has weakened state courts and resulted in a hollowing-out of our judiciary. The National Center for State Courts (NCSC) reports that over the last three years 27 states have increased fines and fees, 23 have reduced operating hours and nine have delayed or reduced jury trials. According to the

NCSC, 95 percent of all cases are filed in our state courts.

In Alabama, our court system is in a fragile condition because of recent cuts and recurrent underfunding. In addition to limiting hours of operation, delaying or canceling jury trials and raising fees, our state's judicial system has been forced to lay off personnel. In fact, our court system never recovered from the massive layoffs that occurred in 2002 before the most recent round of funding cuts. Since personnel costs account for more than 90 percent of the judicial system's operation cost in Alabama, there is little else that can be cut besides personnel when legislative appropriations are inadequate. The measures taken in Alabama to cope with budget cuts have had a two-fold effect of both limiting the access of parties to our courts and severely delaying citizens and businesses alike in having their cases heard. Justice is a fundamental tenet of the Rule of Law. And, as we all know, justice delayed is justice denied.

It is telling to look at the case filings and the funding numbers to see just

how much “hollowing” has occurred in our state’s judicial system. In 2002, cases filed in all Alabama courts totaled 909,445.<sup>1</sup> By 2011, case filings had risen to 1,125,784, or a 23.8 percent increase in nine years. Unfortunately, appropriations have not kept pace with the increasing workload the judiciary has experienced during the same time period. As the chart clearly shows, General Fund appropriations for the judicial branch have nose-dived since 2008. While the General Fund appropriations to operate the executive and the legislative branches of government have decreased, the chart reflects that cuts to the judicial branch’s General Fund appropriations have been deeper. Plainly, our state’s budgetary woes have affected each branch and every executive agency. Unfortunately, it appears that the judicial system has been treated more like a “state agency” rather than a separate, co-equal branch of government.

Understandably, the economy has made it necessary for cuts to be made across state government, but the judicial branch has experienced a constant struggle to receive adequate and stable funding since Alabama citizens ratified the Judicial Article in 1973 creating a unified judicial system. Despite a lack of funds to pay for new technology, our judicial system has made great strides in improving the efficiency of its overall operations including the introduction of automation, e-filing and systematic case management. The supreme court’s recent mandate requiring electronic filing of civil cases in all state courts on October 1 is the latest example of these efforts. *(For more information on this, see page 401 of this issue.)*

If the past is any indication, I am not optimistic that the judicial system will receive the stable and necessary funding in the future to fully meet its needs to improve citizen access or reduce case delays that inadequate funding and cuts to the judicial budget have caused. After all, a court fraught with delays or otherwise inaccessible is of little service to citizens who expect and depend on courts to be open and available to handle their cases. Interestingly, a recent study commissioned by the State Bar of Georgia<sup>2</sup> reveals that inadequately staffed and equipped courts actually cost that state hundreds of millions of dollars because courts are unable to handle filed cases in a more expeditious fashion.

As officers of the court, lawyers must protect the judiciary and the Rule of Law. A judiciary weakened by chronic underfunding cannot fulfill its crucial role as a co-equal branch of government and serve as a reliable check on the exercise of power by the other two branches of government. A judiciary compromised by funding shortages threatens the Rule of Law and jeopardizes our freedoms. Because the judiciary does not have a natural constituency, it is incumbent on

each of us as lawyers to accept the responsibility to ensure that access to our courts and the services they render do not continue to erode. I encourage each of us to use our understanding of the importance of the Rule of Law as well as our unique abilities of persuasion to advocate whenever and wherever possible of the need for adequate and stable funding of our judicial system. | AL

## Alabama Judicial System General Fund Appropriations


2002	2008	Δ%	2012	Δ%	2013	Δ%
<b>Judicial Branch</b>						
\$136,002,190	\$171,771,722	(+26.4)	\$125,565,269	(-26.9)	\$98,804,251*	(-21.3)
<b>Legislative Branch</b>						
\$38,202,155	\$47,473,837	(+24.3)	\$37,798,670	(-20.4)	\$33,441,849	(-11.5)
<b>Executive Branch</b>						
\$1,203,391,730	\$1,832,602,424	(+52.3)	\$1,729,556,949	(-5.6)	\$1,666,167,801	(-3.8)

Source: Alabama Legislative Fiscal Office State General Fund Comparison Sheets

\*This figure does not include a \$25,000,000 conditional appropriation.

## Endnotes

1. Filing figures are taken from the respective annual reports of the Alabama Unified Judicial System.
2. *The Economic Impacts on the Georgia Economy of Delays in Georgia’s State Courts Due to Recent reductions in Funding for the Judicial System*, The Washington Economics Group, Inc. (2010).



# Education Debt Continues to Climb

More than 80 percent of those taking the July 2012 bar exam had education debt. The average debt was \$101,115. For graduates of in-state law schools the individual average debt was: Alabama, \$81,862; Birmingham, \$43,486; Cumberland, \$122,862; Jones, \$120,839; and Miles, \$67,200. For out-of-state candidates, the individual average debt was \$124,362.



**Gregory H. Hawley**  
*ghawley@whitearnolddowd.com*



## Property Sold for Unpaid Taxes: Owners Beware

Property taxes are vitally important to local governments and remain the predominant source of revenue for cities, counties and school districts. The authority of local governments to sell property for taxes recognizes the importance of an enforcement mechanism to collect the much-needed taxes. When a tax sale occurs, however, the need for government revenue conflicts with the interest of private owners. Thus, property tax sales represent the crossroads of the tension between a government's need for revenue and an individual's property rights.

Most states, Alabama included, have laws authorizing property tax sales. Until about 20 years ago, tax sales were primarily attended by a few local bidders seeking to acquire real property. Only a small percentage of the properties offered for sale were actually sold. In the 1980s and early 1990s, however, financial investors recognized that buying properties for taxes presented an attractive investment opportunity. In contrast to the local bidders of the past, the investors are not seeking the real property, but, instead, are

anticipating a redemption that creates a return on their investment.

As a result of the dramatic increase in properties sold for taxes, there has also been a corresponding increase in the number and variety of legal disputes involving properties sold for taxes. The most alarming consequence, depicted on the cover of this *Alabama Lawyer*, is that a tax sale could cause someone to lose his or her property for an amount far less than the actual value of the property.

Two articles in this edition address many of the issues arising from a tax sale. The first article, by Gary Sullivan, provides an overview of the tax sale process and redemption rights. The second article, authored by Will Hereford and Jay Haithcock, focuses more narrowly on the consequences created when a purchaser at a tax sale pays more for the property than the taxes owed. When this occurs, the excess, or amount exceeding the taxes, is held by the county treasurer, subject to competing and conflicting interest to the funds.

We hope that lawyers across the state will appreciate this primer on property tax sales. | [AL](#)

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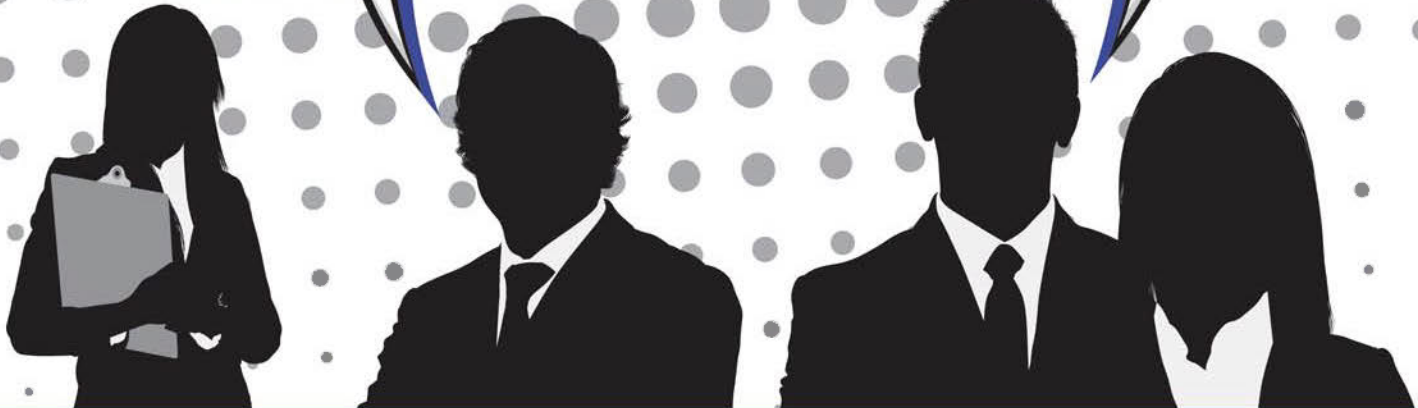
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**William Harvey Elrod, Jr.**

## William Harvey Elrod, Jr.

“Highly intelligent” is an attribute often used in describing attorneys, but in the instance of William Harvey Elrod, Jr., additional identifiers of “gifted,” “razor sharp,” “super brain,” “unusually bright,” etc., are very appropriate. His memory was phenomenal.

Harvey, one of identical twins born to William Harvey Elrod and Sidney Allison Elrod of Opelika, died July 19, 2012. He served in the United States Army during World War II in the Philippines and New Guinea and then graduated *cum laude* from Birmingham Southern College and the University of Michigan Law School. After working as a Deputy Attorney General for the State of Alabama under the Hon. Richmond Flowers from 1963 to 1967, he moved to Decatur and practiced with the Hon. Robert Hutson.

At 6' 4", with piercing brown eyes and an authoritative voice, his was a commanding presence in the courtroom and had to be toned down occasionally to avoid intimidating witnesses. He had the strength of his convictions and the courage to be eccentric in his habits, such as never to be noted outdoors without his hat, wool suit with vest and a raincoat over his arm. Clients, friends, employees, judges, and lawyers appreciated his wit and compassion for folks from all walks of life. Most of all, Harvey loved and was respected for his vast knowledge and constant interest in the law.

He took meticulous pride in perfecting his written pleadings and briefs. Harvey was honored to present oral argument to the United States Supreme Court in 1983. He amazed people not only with his knowledge of the law, but on a variety of subjects, i.e., geological makeup of all of the United States and the history of just about everything. While he loved football, he rarely went to a game but followed the universities of Michigan and Alabama on the radio or television. He spent most of his leisure researching in law libraries, reading his collection of legal classics and appreciating the beauties of nature by driving to his favorite spots in north Alabama to view the flowers or the changing colors of the leaves in the fall. He had a special fondness for cats, not only his own pets, but feeding strays as well, and taking them for veterinarian care when needed. His absence will be felt as a loss by the legal community in Decatur.

—*Bingham D. Edwards, Decatur*

**Drummond, Elbert Allen**  
Jasper  
Admitted: 1969  
Died: July 30, 2012

**Long, Hon. Francis A., Sr.**  
Florence  
Admitted: 1985  
Died: August 18, 2012

**Owen, Brig. Gen. James R.**  
Bay Minette  
Admitted: 1950  
Died: June 17, 2012

**Williams, Albert Dozier**  
Birmingham  
Admitted: 1967  
Died: July 3, 2012

**Harris, Robert Huel**  
Decatur  
Admitted: 1954  
Died: August 2, 2012

**McLeod, Grover S.**  
Birmingham  
Admitted: 1952  
Died: August 17, 2012

**Robison, Robert Griffin**  
Dothan  
Admitted: 1967  
Died: July 26, 2012

**Wilson, Joseph Wheeler, II**  
Birmingham  
Admitted: 1965  
Died: July 30, 2012

**Holmes, Richard Willis**  
Huntsville  
Admitted: 2004  
Died: August 12, 2012

**Mercer-Mattson, Angelia L.**  
Pace, FL  
Admitted: 2002  
Died: May 18, 2012

**Rudd, Steven Michael**  
Birmingham  
Admitted: 1991  
Died: June 26, 2012

**Jones, Lawrence Lea**  
Orange Beach  
Admitted: 1997  
Died: July 31, 2012

**Ott, Jobe Thomas**  
Montgomery  
Admitted: 1995  
Died: August 25, 2012

**Shinault, Jerome P.**  
Mobile  
Admitted: 1954  
Died: July 5, 2012



# ASB Member Benefits



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- EasySoft

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- Rocket Matter

- Ruby Receptionists

- Verizon Wireless

## **PRACTICE MANAGEMENT RESOURCES**

- Practice Management Assistance Program

- Clio

- CoreVault

- EasySoft

- Rocket Matter

- Ruby Receptionists



**Marc A. Starrett**

### **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.*

### **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.*



**Wilson F. Green**

This issue follows the same three-part outline as last issue: first, some upcoming cases of interest which the U.S. Supreme Court has just accepted for review since last issue; second, recent civil decisions from the Alabama appellate courts and the Eleventh Circuit since last issue; and, third, recent criminal decisions.

## Upcoming Cases Recently Accepted by the U.S. Supreme Court for the 2012 Term

### ***Already, LLC v. Nike, Inc.*, No. 11-982**

Whether a federal district court is divested of Article III jurisdiction over a party's challenge to the validity of a federally registered trademark if the registrant promises not to assert its mark against the party's then-existing commercial activities

### ***Bailey v. U.S.*, No. 11-770**

Whether, pursuant to *Michigan v. Summers*, 452 U.S. 692 (1981), police officers may detain an individual incident to the execution of a search warrant when the individual has left the immediate vicinity of the premises before the warrant is executed

### ***Clapper v. Amnesty Int'l. USA*, No. 11-1025**

Whether Article III standing to seek prospective relief is found where respondents (a) proffered no evidence that the United States would imminently acquire their international communications using 50 U.S.C. 1881a-authorized surveillance, and (b) did not show that an injunction prohibiting Section 1881a-authorized surveillance would likely redress their purported injuries

**Georgia-Pacific West v. Northwest EDC, No. 11-347**

Whether the Ninth Circuit should have deferred to the EPA's longstanding position that channeled runoff from forest roads does not require a permit, and erred by requiring the EPA to regulate the same as industrial wastewater runoff requiring an NPDES permit

**Maracich v. Spears, No. 12-25**

Whether lawyers who obtain, disclose or use personal information solely to find clients to represent in an incipient lawsuit—as opposed to evidence for use in existing or potential litigation—may invoke the litigation exception of the Driver's Privacy Protection Act, 18 U.S.C. §§ 2721-2725

**Missouri v. McNeely, No. 11-1425**

Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream

**The Standard Fire Ins. Co. v. Knowles, No. 11-1450**

Whether, when a named plaintiff attempts to defeat a defendant's right of removal under the Class Action Fairness Act of 2005 by filing with a class action complaint a "stipulation" that attempts to limit the damages he "seeks" for the absent putative class members to less than the \$5 million threshold for federal jurisdiction, and the defendant establishes that the actual amount in controversy, absent the "stipulation," exceeds \$5 million, the "stipulation" is binding on absent class members so as to destroy federal jurisdiction

**Vance v. Ball State Univ., No. 11-556**

Whether the "supervisor" liability rule for Title VII liability under the *Faragher/Ellerth* standard (i) applies to harassment by those whom the employer vests with authority to direct and oversee their victim's daily work, or (ii) is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victim



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## Recent Civil Decisions of Note from the Alabama Appellate Courts

### Forum Selection; Waiver

#### ***Ex parte Spencer*, No. 1110319 (Ala. Sept. 28, 2012)**

Defendant's active litigation of case for two years after filing an answer which invoked a contractual forum selection clause as a defense evinced an intent by defendant to abandon its right to enforce the clause, constituting a waiver.

### Punitive Damages; Wrongful Death

#### ***Boudreaux v. Pettaway*, No. 1100281 (Ala. Sept. 28, 2012)**

The court affirmed a judgment for plaintiff on jury verdict of \$4 million (the trial court had remitted the verdict from \$20 million) in a medical malpractice wrongful death action filed against anesthesiologist. The court held, in relevant part: (1) *Ala. Code* § 6-11-27(a)'s wrongful-death exemption for the heightened standard for allowing punitive damages against a principal is not unconstitutional under *BMW v. Gore*; (2) the *Gore* factors can be applied analogically in wrongful death actions; (3) trial court did not err in considering, post-judgment, contents of defendant's insurance claim files compelled from insurance carrier, because having raised the issue regarding whether the proposed punitive damages would have an excessive financial impact on the defendant, trial court acted within its discretion in considering the non-attorney-client privileged portions of the claim file *in camera*; and (4) trial court could consider a potential bad-faith and/or negligent-failure-to-settle claim against the defendants' liability-insurance carrier in assessing whether the punitive-damages award was beyond the defendants' ability to pay. The holding was 8-1; Justice Murdock dissented as to the last holding.

### Arbitration

#### ***Regions Bank v. Baldwin County Sewer Service LLC*, No. 1101508 (Ala. Sept. 21, 2012)**

Under New York law, the general language of a merger clause in a contract containing no arbitration agreement, but a forum-selection and jury waiver clause, was insufficient to establish any intent of the parties to revoke a broad arbitration agreement found in earlier contracts.

### Common Fund Doctrine

#### ***Ex parte State Farm Mut. Auto. Ins. Co.*, No. 1110088 (Ala. Sept. 21, 2012)**

Insurer was obligated to pay common fund attorneys' fees to its insured on medical payments subrogation recoveries obtained for her insurer by the injured insured on her personal injury claims against third-party tortfeasor.

### State Immunity

#### ***Harris v. Owens*, No. 1110421 (Ala. Sept. 21, 2012)**

Claims for back pay and benefits against university officials were barred by Section 14 immunity.

### Will Contests; Timeliness

#### ***Ex parte Floyd*, No. 1111241 (Ala. Sept. 21, 2012)**

Pre-suit letter to court and counsel indicating intention to challenge will did not constitute a pleading complying with *Ala. Code* § 43-8-190 for a will contest. Moreover, only a fraud upon the court will trigger the tolling provision of section 43-8-5 for the timing of filing a will contest.

### Venue; Domestic Law

#### ***Ex parte Vest*, No. 1110192 (Ala. Sept. 14, 2012)**

Although section 6-5-440 does not bar a child custody modification proceeding filed in the correct venue, a responding party in an action filed in the wrong venue can move for a transfer based on the primacy of the venue in which the original proceeding was held.

### Statutes of Limitation; Fraudulent Concealment

#### ***Jett v. Wooten*, No. 1110731 (Ala. Sept. 14, 2012)**

*Ala. Code* § 6-2-3, which applies generally to all statutes of limitation and specifically to legal-services liability claims, allows action which is fraudulently concealed to be brought within two years of discovery that the act of concealment was fraudulent.

### Evidence; Relevance

#### ***Woods v. Hayes*, No. 1100750 (Ala. Sept. 7, 2012)**

Evidence of the nature and extent of the injuries was irrelevant to fraudulent transfer claim regarding collection of judgment on the injuries, and admission of such evidence likely resulted in prejudice.

### Section 14 Immunity; Attorney's Fees

#### ***Ex parte Bentley*, No. 1110321 (Ala. Aug. 24, 2012)**

Section 14 immunity bars any claim for attorney's fees against a state or state agency.

## Arbitrator Selection

### ***Lexington Ins. Co. v. Southern Energy Homes, Inc.*, No. 1091617 (Ala. Aug. 17, 2012)**

Judicial appointment of arbitrator under 9 U.S.C. § 5 applies only in the event of a default in the selection method provided in the arbitration agreement, which method was not properly followed by the parties, rendering the trial court's invocation of section 5 authority improper.

## Relation Back; Fictitious Parties

### ***Patterson v. Consolidated Alum. Corp.*, No. 1110633 (Ala. Aug. 17, 2012)**

Plaintiff failed to seek amendment of the complaint promptly to substitute a named party for a fictitious party, and, therefore, the amendment did not relate back.

## Relation Back; Fictitious Parties

### ***Ex parte Nail*, No. 1110742 (Ala. Aug. 17, 2012)**

Plaintiff exercised "due diligence," which is merely "ordinary" diligence, in ascertaining identity of fictitious party. Plaintiff is not required to engage in "detective work" outside the discovery process in order to establish due diligence.

## Trusts; Attorneys' Fees

### ***Regions Bank v. Lowrey*, No. 1101541 (Ala. Aug. 10, 2012)**

Trustee defending fiduciary duty claims was entitled to employ counsel under *Ala. Code* § 19-3B-816(a)(24) and (28). When a trustee defends itself against attacks concerning the management of trust assets, the trustee is entitled to recover its litigation expenses, including attorney fees, from the trust.

## Relation Back

### ***Ex parte Noland Hosp. Montgomery*, No. 1110240 (Ala. Aug. 10, 2012)**

Plaintiff's failure to conduct any discovery on the identity of fictitiously named party was fatal to employing fictitious party relation back.

## Workers' Compensation

### ***Ex parte Caldwell*, No. 1110513 (Ala. July 20, 2012)**

The court of civil appeals impermissibly reweighed conflicting evidence regarding causation, which is prohibited by *Ex parte McInish*, 47 So. 3d 767 (Ala. 2008).

## Deceased Parties

### ***Maclin v. Congo*, No. 2110546 (Ala. Civ. App. Sept. 7, 2012)**

Suing a party who was deceased at the time suit was commenced is a void act and does not invoke the jurisdiction of the court, thus rendering the action a nullity uncurable by amendment to the complaint.

## Foreclosure; Ejectment

### ***Thomas v. Wells Fargo Bank, NA*, No. 2101153 (Ala. Civ. App. Aug. 31, 2012)**

### ***Douglas v. Troy Bank & Trust*, No. 2110053 (Ala. Civ. App. Aug. 24, 2012)**

Two additional entries in the never-ending saga of cases discussing the contours of foreclosure and ejectment law

## Punitive Damages; Nominal Damages

### ***Engineered Cooling Service, Inc. v. Starr Service, Inc.*, No. 2110178 (Ala. Civ. App. Aug. 10, 2012)**

Award of \$30,000 in punitive damages with only nominal compensatory damages was appropriate notwithstanding the ratio issues which might arise. A single-digit multiplier for compensatory to punitive damages would not have a deterrent effect in cases where nominal damages were awarded.

## Workers' Compensation; "Pain Exception"

### ***Gold Kist, Inc. v. Smith*, No. 2110274 (Ala. Civ. App. Aug. 10, 2012)**

The court reversed the trial court's PT finding based on the "pain exception." Evidence failed to satisfy this "exceedingly high standard" because plaintiff herself testified that she only used her pain medications "occasionally" and she could get around with a cane on an everyday basis.

## Wrongful Death; Fees to Personal Representative

### ***Rodgers v. McElroy*, No. 2110364 (Ala. Civ. App. Aug. 10, 2012)**

*Ala. Code* § 43-2-848(b) authorizes personal representative prosecuting wrongful death action to be compensated. Fee in issue represented nine percent of the recovery on the death claim before fees to counsel, but was not reviewable for failure to preserve excessiveness issue for appeal.

## Statute of Frauds; Sale of Goods; Fraud

### ***Brenda Darlene, Inc. v. Bon Secour Fisheries, Inc.*, No. 2110687 (Ala. Civ. App. Aug. 10, 2012)**

Shrimp contracts were subject to UCC statute of frauds and failed for lack of sufficient writing. Fraud claim cannot be based on an alleged oral agreement which falls within the statute of frauds.

## Workers' Compensation; Causation

***Mercy Logging LLC v. Odom*, No. 2101061 (Ala. Civ. App. July 27, 2012)**

Employer's injuries were not causally linked to the employment because he was not "reasonably fulfilling the duties of his employment or engaged in doing something incident to it."

## Recent Civil Decisions from the Eleventh Circuit

### ADA; Eleventh Amendment

***Ross v. Jefferson County Dept. of Health*, No. 11-14258 (11th Cir. Sept. 17, 2012)**

Eleventh Amendment immunity bars claims of disability discrimination under the ADA as asserted against defendant.

### FELA

***Strickland v. Norfolk Southern Rwy. Co.*, No. 11-15589 (11th Cir. Aug. 27, 2012)**

The district court granted summary judgment to defendant in FELA case on the basis that injured plaintiff could not identify the rail car containing the allegedly faulty handbrake which caused plaintiff's injuries. The Eleventh Circuit reversed, reasoning that plaintiff's failure to identify the specific railcar containing the allegedly ineffective handbrake was not fatal to plaintiff's claim, and that plaintiff's deposition testimony concerning his effort to apply braking pressure was sufficient to withstand summary judgment.

### FDCPA; Offers of Judgment

***Zinni v. ER Solutions*, No. 11-12413 (11th Cir. Aug. 27, 2012)**

Settlement offers of judgment for full statutory damages did not divest the district court of subject matter jurisdiction.

### Arbitration; Class-Action Waivers

***Pendergrast v. Sprint-Nextel Corp.*, No. 09-10612 (11th Cir. Aug. 20, 2012)**

Class-action waivers within consumer arbitration agreements are enforceable as against state-law unconscionability challenges post-*Concepcion*.

### Arbitration; Wrongful Death

***Entrekin v. Internal Medicine Associates of Dothan, PC*, No. 11-10730 (11th Cir. Aug. 9, 2012)**

Under Alabama law, wrongful death claims brought by a PR of an estate are subject to an arbitration agreement executed by the decedent with the healthcare provider.

### Securities; Loss Causation

***Hubbard v. BankAtlantic Bancorp, Inc.*, No. 11-12410 (11th Cir. July 23, 2012)**

To succeed in a fraud-on-the-market case, mere decline in price after truth is revealed to the public is insufficient. The plaintiff must also offer evidence sufficient to allow the jury to separate portions of the price decline attributable to causes unrelated to the fraud, leaving only the part of the price decline attributable to the dissipation of the fraud-induced inflation.

### Class Actions; Collateral Attack

***Juris v. Inamed Corp.*, No. 10-12665 (11th Cir. July 6, 2012)**

The court upheld the preclusive effect of a prior non-opt-out class action and enjoined prosecution of a class member's competing action.

### Arbitration; Class Actions

***In re Checking Acct. Overdraft Lit.*, No. 11-14318 (11th Cir. July 6, 2012)**

Under *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), unconscionability attacks were unsound based on lack of class-action procedures within consumer arbitration clause. Even though fee-shifting provision was unconscionable, that provision could be blue-penciled and extracted under common-law severability principles, as well as under the severability provision in the arbitration agreement.

## Recent Federal and State Criminal Decisions

### Fourth Amendment, DNA

***Maryland v. King*, No. 12A48, 2012 WL 3064878 (July 30, 2012)**

The chief justice individually stayed the state court's judgment reversing a rape conviction on the ground that the collection of DNA during an unrelated arrest violated the Fourth Amendment.

### Habeas Corpus; Mens Rea

***Shelton v. Dept. of Corr.*, No. 11-131515, 2012 WL 3640966 (11th Cir. Aug. 24, 2012)**

Reversing the granting of habeas relief, the court concluded that the state court did not unreasonably apply federal law in upholding a statutory amendment that altered a controlled substance offense's *mens rea* from an element to an affirmative defense.

## Habeas Corpus; Invocation of Miranda

***Owen v. Fla. Dep't of Corr.*, 686 F. 3d 1181 (11<sup>th</sup> Cir. 2012)**

Defendant's statements regarding not wanting to "talk about it," made approximately 30 minutes apart during a "give-and-take discussion of the evidence[,]," did not unequivocally invoke the right to remain silent.

## Immigration

***U.S. v. Alabama*, Nos. 11-14532, 2012 WL 3553503 (11<sup>th</sup> Cir. Aug. 20, 2012)**

Federal law preempted the Alabama immigration statute's provisions criminally punishing the hiring of illegal immigrants and work solicitation. Other provisions, such as one criminally punishing the immigrant's application for a driver's license, were not preempted.

## Restitution

***Heupel v. State*, CR-11-1205, 2012 WL 3641390 (Ala. Crim. App. Aug. 24, 2012)**

The court reversed the trial court's restitution judgment directing the repayment of cash not proven to have been stolen.

## Apprendi

***Lightfoot v. State*, CR-11-0376, 2012 WL 3641413 (Ala. Crim. App. Aug. 24, 2012)**

The court remanded for resentencing because the firearm enhancement of the sentence under *Alabama Code* (1975) § 13A-12-231(13) was not proven to the jury as required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The enhanced term of incarceration was harmless, but, in light of the extension of *Apprendi* to fines in *Southern Union v. U.S.*, 132 S. Ct. 2344 (2012), the enhanced fine was not harmless.

## Voluntary Sentencing Guidelines; Habitual Offender

***Sistrunk v. State*, CR-11-1027, 2012 WL 3641393 (Ala. Crim. App. Aug. 24, 2012)**

The trial court erred in issuing a "hybrid" sentence between the term suggested by the Alabama Sentencing Reform Act and that required by the Alabama Habitual Felony Offender Act.

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## Eavesdropping; Federal Wiretap

***Cable v. State*, CR-11-0061, 2012 WL 3641418 (Ala. Crim. App. Aug. 24, 2012)**

Electronic surveillance evidence obtained by a federal agent pursuant to the Wiretap Act, 18 U.S.C. § 2510, was admissible in state court. The surveillance did not constitute "eavesdropping" as prohibited by *Alabama Code* (1975) § 13A-11-31, and the federal court's alleged failure to properly unseal the evidence did render it inadmissible.

## Assault

***C.L.F. v. State*, CR-10-1887, 2012 WL 3641424 (Ala. Crim. App. Aug. 24, 2012)**

A juvenile's insult to a second juvenile, resulting in the second juvenile's attack of a third person, was insufficient to constitute third-degree assault under *Alabama Code* (1975) § 13A-6-22.

## "Rape Shield;" Ala.R.Evid. Rule 412

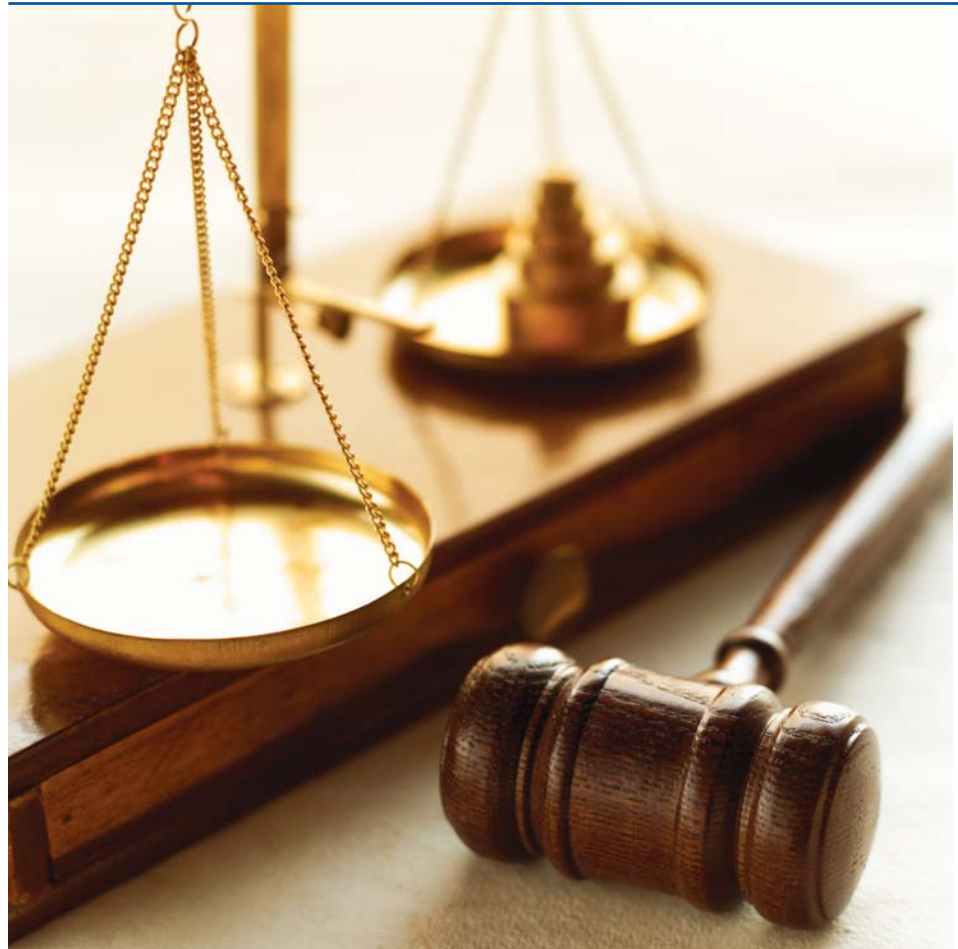
***D.W.H. v. State*, CR-10-0831, 2012 WL 3641436 (Ala. Crim. App. Aug. 24, 2012)**

The court reversed the defendant's sodomy convictions due to the erroneous exclusion of evidence of the victim's sexual history. The evidence fell within *Ala.R.Evid.* Rule 412's exception permitting the admission of evidence of the victim's sexual activity with third persons to rebut physical evidence offered to prove the offense.



### Judicial Award of Merit

### Administrative Order Re: Policies and Procedures for Electronic Filing



## Judicial Award of Merit

The Alabama State Bar Board of Bar Commissioners will receive nominations for the state bar's Judicial Award of Merit through March 15, 2013. Nominations should be mailed to:

Keith B. Norman, secretary  
Board of Bar Commissioners  
P.O. Box 671  
Montgomery, AL 36101-0671

The Judicial Award of Merit was established in 1987. The award is not necessarily an annual award. It must be presented to a judge who is not retired, whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation.

Nominations are considered by a three-member committee appointed by the president of the state bar, which then makes a recommendation to the board of bar commissioners with respect to a nominee or whether the award should be presented in any given year.

Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement.



## IN THE SUPREME COURT OF ALABAMA

# Administrative Order for Policies and Procedures For Electronic Filing

Whereas, pursuant to Article VI, Section 149, of the Constitution of Alabama, the Chief Justice of the Supreme Court of Alabama is the administrative head of the judicial system; and

Whereas, Section 12-2-30(b)(7), *Code of Alabama* 1975, authorizes and empowers the Chief Justice, “[t]o take affirmative and appropriate action to correct or alleviate any condition or situation adversely affecting the administration of justice within the state;” and

Whereas, Section 12-2-30(b)(8), *Code of Alabama* 1975, authorizes and empowers the Chief Justice “[t]o take any such other, further or additional action as may be necessary for the orderly administration of justice within the state, whether or not enumerated [in the law].”

It is therefore ordered and directed that effective October 1, 2012, all documents filed by any party represented by an attorney shall be filed electronically through the AlaFile application in all civil divisions of the circuit and district courts including: Circuit Civil (CV); District Civil (DV); Small Claims (SM); Domestic Relations (DR); and Child Support (CS). Documents may still be filed in open court at the trial judge’s discretion. If documents are filed in open court, the attorney filing the document is responsible for filing the document electronically through AlaFile on the same day. Additional details and instructions may be found in the “Administrative Policies and Procedures for Electronic Filing in the Civil Divisions of the Alabama Unified Judicial System.”

Most documents that are filed in a case can be filed electronically. Document types that are not available will be listed on the <http://efile.alacourt.gov/> website and should be filed

conventionally. As additional document types become available for electronic filing, the Administrative Director of Courts (ADC) may expand the scope of the mandate for electronic filing by directive.

A hardship exception allowing an attorney to file in paper may be obtained for an attorney who cannot file electronically due to exceptional circumstances. Requests for an exception should be submitted to the ADC for consideration and approval or disapproval by the ADC.

Effective October 1, 2012, all orders rendered by the judge assigned to a case in one of the civil divisions including: Circuit Civil (CV); District Civil (DV); Small Claims (SM); Domestic Relations (DR); and Child Support (CS) shall be rendered electronically by the judge through the AlacourtPlus application.

A hardship exception allowing a judge to file an order in paper may be obtained for a judge who cannot file electronically due to exceptional circumstances. Requests for an exception should be submitted to the Administrative Director of Courts for consideration and approval or disapproval jointly by the Administrative Director of Courts and the Chief Justice.

Pursuant to *Ala. Code* § 12-17-94 and Rule 4 of the Rules of Judicial Administration, the Circuit Clerk serves as the custodian of court records. In the past, case files have been maintained in paper, electronically or both. Effective October 1, 2012, a circuit clerk who maintains a complete copy of the case file documents in an electronic format shall not be required to maintain a duplicate paper copy of the case file or be required to print any portion thereof.

This administrative order does not prevent the Presiding Judge of a Judicial Circuit from entering an administrative order requiring electronic filing of documents by attorneys or electronic filing of orders by judges in other divisions of the circuit or district courts in that Judicial Circuit.

Done this 6th day of September 2012 | AL

*Charles R. Malone, Chief Justice*



**Angela Parks**

*angela.parks@alabar.org*



## Change Can Be Good

Four years ago, while I was interviewing for my position here at the bar, our assistant executive director, Ed Patterson, asked me if I would be willing to consider a revision of the MCLE rules. I said yes, and I got the job, although I don't really know if there was a connection between the two. So, once I unpacked my desk accessories, I got to work. I actually read the rules. Having practiced in Birmingham for several years before coming to Montgomery, I knew *only* the basics: that you were required to earn 12 MCLE hours annually, and one of those hours had to be in ethics. The finer details of our MCLE rules were unknown to me. I quickly saw that our rules, originally approved in 1982, had become somewhat disorganized. With all due respect to my predecessors and prior MCLE Commission members, the tweaking and tinkering of the past had ceased to be helpful, and a wholesale revision was in order, if only

to reflect the new technologies that have insidiously crept into our lives over the last few years.

And so began a two-year re-drafting process. At first, led by **MCLE Commission Chair Maibeth Porter** and later by **Chair Harold Stephens**, the MCLE commissioners and I engaged in a painstaking process of reviewing and revising each rule and regulation in an organized fashion, to create a quality work product that clearly gave program sponsors and Alabama attorneys the information necessary to fulfill their respective MCLE responsibilities. The Board of Bar Commissioners approved our final product in November 2011, and the Supreme Court of Alabama approved the new rules in April 2012, to become effective for the 2013 compliance year.

Before anyone panics, we haven't done anything crazy. The basics are unchanged: You must still earn 12 MCLE hours annually, and one of those

hours must be in ethics; and you can still carry over a maximum of 12 hours annually, including one hour in ethics. The things that have changed, hopefully, make MCLE compliance easier for attorneys and increase the quality of their MCLE course choices. In fact, aside from some badly needed reorganization, there really are only a handful of substantive changes to the terms of the MCLE rules.

There are no substantive changes to Rule 1.

Rule 2 seeks only to simplify the existing MCLE exemptions. (This was done primarily for the benefit of our IT folks.)

A new regulation under Rule 3 now allows MCLE credit for authoring a significant law review article published in a national law journal.

Rule 4 was about to collapse under the weight of all the topics it tried to cover. It has been divided into new rules 4 (sponsors), 5 (programs) and 6 (credits), mostly for organizational purposes. There are no substantive changes in the new Rule 4 or the new Rule 6. The new Rule 5 clarifies the limitations and requirements of online programming, given advances in tech-

nology, and establishes a bright line between live and remote programs. This should make it easier and cheaper for attorneys to view live webcasts without reducing the number of hours that may be earned through on-demand programs.

Rule 5 became new Rule 7, without substantive changes.

Rule 6 became new Rule 8, which now includes a way to monitor and curb the chronic abuse of deficiency plans.

Rule 9, the supreme court's required course on professionalism, has been reduced from a six-hour course to a three-hour course.

The complete text of the new rules can be found at [www.alabar.org/cle](http://www.alabar.org/cle). As you begin to work with these new rules, we hope you will agree that these changes will make MCLE compliance easier and more productive for all of us.

*The author expresses her thanks to all of the members of the MCLE Commission between 2008 and 2011 who assisted with this project, and especially to former MCLE Chair Maibeth Porter. Special thanks go to current MCLE Chair Harold Stephens. | AL*



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## Notices

### Reinstatement

### Transfers to Disability Inactive Status

### Surrender of License

### Disbarments

### Suspensions

## Notices

- Notice is hereby given to **Joshua Steven Bearden**, who practiced in Mobile and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 14, 2012, he has 60 days from the date of this publication (November 2012) to come into compliance with the 2012 Mandatory Annual Client Security Fund Assessment. Noncompliance with the assessment shall result in a suspension of his license. [CSF No. 2012-864]
- Notice is hereby given to **Jerald DeWayne Crawford**, who practiced in Andalusia and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 14, 2012, he has 60 days from the date of this publication (November 2012) to come into compliance with the 2012 Mandatory Annual Client Security Fund Assessment. Noncompliance with the assessment shall result in a suspension of his license. [CSF No. 2012-898]
- **Howard Wayne East**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of November 15, 2012 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 09-1825, 09-2010 and 2010-1109, by the Disciplinary Board of the Alabama State Bar.
- Notice is hereby given to **Jill Marie Gould**, who practiced in Andalusia and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 14, 2012, she has 60 days from the date of this publication (November 2012) to come into compliance with the 2012 Mandatory Annual Client Security Fund Assessment. Noncompliance with the assessment shall result in a suspension of her license. [CSF No. 2012-923]
- Notice is hereby given to **Woodrow Eugene Howard, III**, who practiced in Mobile and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 14, 2012, he has 60 days from the date of this publication (November 2012) to come into compliance with the 2012 Mandatory Annual Client Security Fund Assessment. Noncompliance with the assessment shall result in a suspension of his license. [CSF No. 2012-990]
- Notice is hereby given to **Kristofor Wyatt Kavanaugh**, who practiced in Northport and whose whereabouts are unknown, that pursuant to an

order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 14, 2012, he has 60 days from the date of this publication (November 2012) to come into compliance with the 2012 Mandatory Annual Client Security Fund Assessment. Noncompliance with the assessment shall result in a suspension of his license. [CSF No. 2012-1000]

- **Eileen Robinson Malcom**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of November 15, 2012 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB nos. 2010-1716 and 2010-1810 by the Disciplinary Board of the Alabama State Bar.
- Notice is hereby given to **Mollie Hunter McCutchen**, who practiced in Andalusia and whose whereabouts are

unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 14, 2012, she has 60 days from the date of this publication (November 2012) to come into compliance with the 2012 Mandatory Annual Client Security Fund Assessment. Noncompliance with the assessment shall result in a suspension of her license. [CSF No. 2012-872]

- Notice is hereby given to **Janis Nettles Taylor**, who practiced in Andalusia and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated June 14, 2012, she has 60 days from the date of this publication (November 2012) to come into compliance with the 2012 Mandatory Annual Client Security Fund Assessment. Noncompliance with the assessment shall result in a suspension of her license. [CSF No. 2012-960]

## Reinstatement

- The supreme court entered an order based upon the decision of the Disciplinary Board, Panel II, reinstating **Robert Foster Tweedy** to the practice of law in Alabama, effective July 25, 2012. Tweedy's reinstatement is probationary for three years. Conditions of probation are that Tweedy must comply with the general rules governing Mandatory Continuing Legal Education, i.e. 12 hours per year, including 2012, and Tweedy shall have a period of 24 months to enroll in and attend an additional 60 hours of remedial CLE, with not less than 15 hours of such continuing education each six months. Tweedy must submit to the Office of General Counsel his overall remedial CLE plan. Tweedy must take at least six hours in each of the four practice areas in which he plans to return and must complete those six hours prior to accepting legal employment in each such area, and Tweedy must certify such completion to the Office of General Counsel. Tweedy must provide the Office of General Counsel with the name of one or more proposed successors, one of whom must be approved by the Office of General Counsel, and who must agree to

serve and to meet the reporting requirements set forth as part of Tweedy's practice plan submitted with his Rule 28 petition, and Tweedy must remain under contract with the Alabama Lawyer Assistance Program during the period of his probation. [Rule 28, Pet. No. 11-1968]

## Transfers to Disability Inactive Status

- Hoover attorney **Timothy Paul Brunson** was transferred to disability inactive status pursuant to Rule 27(b), *Alabama Rules of Disciplinary Procedure*, effective August 17, 2012, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(b), Pet. No. 2012-1530]
- Dadeville attorney **Michael Alan Mosley** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective June 27, 2012, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(c), Pet. No. 2012-1155]

- Birmingham attorney **Alfred Turenne Newell, IV** was transferred to disability inactive status, effective April 9, 2012, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the April 9, 2012 order of Panel III 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(b), Pet. No. 2011-317]
- On June 22, 2012, Birmingham attorney **James Stewart Robinson** was interimly suspended from the practice of law in Alabama, effective immediately, pursuant to Rule 20(a)(2)(i), *Ala. R. Disc. P.* On July 10, 2012, Robinson was transferred to disability inactive status by order of the Supreme Court of Alabama. The supreme court entered its order based upon the July 10, 2012 order of Panel II 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, pursuant to Robinson's written request seeking same. [Rule 20(a), Pet. No. 2012-1260 and Rule 27(c), Pet. No. 2012-1339]

state court to one count of securities fraud and two counts of omission or misrepresentation in the sale of securities, all Class C felonies. On August 29, 2011, Burdette was sentenced to a term of 20 years, split to serve five years followed by five years' supervised probation or until restitution is paid in full. [Rule 22(a), Pet. No. 2011-1270]

- Former Birmingham attorney **Joseph Nathaniel Harden** was disbarred from the practice of law in Alabama, effective July 10, 2012, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the July 10, 2012 order of consent to disbarment of Panel II of the Disciplinary Board of the Alabama State Bar. Harden consented to disbarment based upon an investigation concerning his mishandling of client funds. [Rule 23(a), Pet. No. 2012-1267; CSP 2012-279]
- Birmingham attorney **James Patrick Logan** was disbarred from the practice of law in Alabama, effective April 16, 2012, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the April 16, 2012 order of Panel III of the Disciplinary Board of the Alabama State Bar. In ASB No. 2006-191(A), Logan failed to file an answer to formal charges and, as a result, by default, was found guilty of violating rules 3.3(a)(3), 3.4(b), 8.4(a), 8.4(c), 8.4(d), and 8.4(g), *Alabama Rules of Professional Conduct*. After Logan failed to appear at the hearing to determine discipline, the Disciplinary Board ordered that Logan be disbarred. [ASB No. 2006-191(A)]
- Montgomery attorney **Leon David Walker, III** was disbarred from the practice of law in Alabama by order of the Alabama Supreme Court, effective July 25, 2012. The supreme court entered its order based upon the decision of the Disciplinary Board, Panel II, of the Alabama State Bar wherein Walker was found guilty of violating rules 1.1, 1.2(d), 1.3, 1.4(a), 1.4(b), 1.7(b), 1.15(b), 1.15(c), 3.3(a)(1), 8.1(a), and 8.4 (a), (c) and (g), *Ala. R. Prof. C.* In ASB No. 07-104(A), a client retained Walker in March 2005 to represent her in a sexual harassment claim. During the representation, Walker failed to respond to discovery, including requests for admissions, and failed to communicate with the client about the discovery issues and the resulting sanctions imposed by the court. Walker

## Surrender of License

- Birmingham attorney **Don Eugene Siegelman** was disbarred from the practice of law in Alabama, effective June 7, 2012, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Commission of the Alabama State Bar accepting Siegelman's surrender of his license and consent to disbarment, based upon his felony convictions in the United States District Court for the Middle District of Alabama. [Rule 23(a), Pet. No. 12-1185 and Rule 22(a), Pet. No. 09-1261]

## Disbarments

- The Supreme Court of Alabama adopted the June 1, 2012 order of the Alabama State Bar Disciplinary Commission disbarring Trussville attorney **Cary Alan Burdette** from the practice of law in Alabama, effective July 5, 2012. On June 22, 2011, Burdette pled guilty in

failed to take any corrective action for his deficient performance and conceded substantive issues without discussing them with the client. In addition, Walker did not reasonably respond to the client's requests for information regarding the status of the matter and, when he did communicate with her, he did not give her complete and accurate information.

In ASB No. 08-188(A), Walker was retained by a client to represent her in a divorce. During the proceedings, the client threatened that if her husband did not agree to pay her \$2,000,000 in cash and ignore an ante-nuptial agreement, she was going to contact the FBI, the DEA and the IRS to report her husband's alleged involvement in criminal activity. These threats were made at the behest and with the encouragement of Walker, solely to obtain an advantage in the divorce proceeding. During the representation,

issues arose concerning Walker's relationship with his client. When testifying relative to those issues, Walker made material misrepresentations of fact about his residence, the nature of the relationship and the date the relationship began. During the course of the bar's investigation of the matter, Walker also made material misrepresentations of fact to investigators.

In ASB No. 10-249, a company made a \$10,000 cash advance and a \$20,000 cash advance to Walker's client against the client's anticipated recovery in a pending workers' compensation action. Walker actively participated in each of the cash advances. Walker signed an "Attorney Acknowledgment," in which he acknowledged the cash advance to his client; acknowledged that the advance created a lien against the file and any recovery in the action; promised to contact the company to determine the actual



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payoff amount of the lien when the proceeds from the workers' compensation action were distributed; promised to send a check in the amount necessary to satisfy the lien to the company no later than the day he disbursed funds to his client; and promised to provide periodic updates to the company on the status of the case. Walker did not remit any of the proceeds of the workers' compensation settlement to the company as agreed. During the course of the investigation of the matter by the local grievance committee, the investigator requested that Walker produce documentation to support his claim that he notified the company of the settlement. Walker did not provide the information or otherwise follow up with the investigator. [ASB nos. 07-104(A), 08-188(A) and 10-249]

approximately \$600,000. As the common-law wife, the client was entitled to 50 percent of the settlement. Pursuant to the contingency fee agreement, Clem was entitled to 50 percent of the settlement for attorney's fees. The attorney's lien was to be satisfied, in part, from Clem's share of the settlement; however, Clem deducted the attorney's fee from the client's portion of the settlement proceeds. Clem also required his client to sign a general liability release regarding his representation of the client in order to receive her portion of the settlement, failed to maintain an IOLTA trust account as required by the *Alabama Rules of Professional Conduct* and made personal payments directly from his trust account using a debit card. In addition to the five-year suspension, Clem is ordered to make restitution to his client in the amount of \$52,500. [ASB No. 2010-1386]

## Suspensions

- Huntsville attorney **James Kenneth Brabston** was intermly suspended from the practice of law in Alabama, effective May 22, 2012, by the Disciplinary Commission of the Alabama State Bar. The Disciplinary Commission entered its order in response to a petition filed by the Office of General Counsel evidencing that Brabston's conduct is causing, or is likely to cause, immediate and serious injury to a client or to the public. [Rule 20(a), Pet. No. 2012-1065]
- Mobile attorney **James Steven Clem** was suspended from the practice of law in Alabama for five years, by order of the Supreme Court of Alabama, effective April 24, 2012. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Clem's conditional guilty plea, wherein Clem pled guilty to violations of rules 1.4(a), 1.4(b), 1.5(a), 1.5(e), 1.8(h), 1.15(a), 1.15(g), and 8.4(g), *Ala. R. Prof. C.* In ASB No. 2010-1386, Clem was retained to represent a client in 2004, regarding claims relating to the wrongful death of the client's common-law husband. Clem later filed a wrongful death suit on behalf of the client, as administratrix of her husband's estate. Clem subsequently associated another attorney to act as lead counsel in the matter. In 2006, the lead counsel withdrew from the matter and filed an attorney's lien for his fees and expenses. In late 2007, the wrongful death suit settled for approximately \$600,000. As the common-law wife, the client was entitled to 50 percent of the settlement. Pursuant to the contingency fee agreement, Clem was entitled to 50 percent of the settlement for attorney's fees. The attorney's lien was to be satisfied, in part, from Clem's share of the settlement; however, Clem deducted the attorney's fee from the client's portion of the settlement proceeds. Clem also required his client to sign a general liability release regarding his representation of the client in order to receive her portion of the settlement, failed to maintain an IOLTA trust account as required by the *Alabama Rules of Professional Conduct* and made personal payments directly from his trust account using a debit card. In addition to the five-year suspension, Clem is ordered to make restitution to his client in the amount of \$52,500. [ASB No. 2010-1386]
- On July 6, 2012, the Supreme Court of Alabama affirmed the five-year suspension of Tuscaloosa attorney **Tessie Patrice Clements**. Clements appealed the decision of the Disciplinary Board findings that in ASB No. 2007-241(A), Clements violated rules 1.4(a), 3.3(a)(1), 3.3(a)(3), 8.4(a), 8.4(b), 8.4(c), 8.4(d), and 8.4(g), *Ala. R. Prof. C.* Clements represented clients regarding discrepancies in a real estate contract. Later, the clients learned their case was dismissed. The clients also discovered affidavits in their file bearing their signatures which were forged by Clements and filed by Clements with the court and served upon opposing counsel. In ASB No. 2009-1741(A), Clements was found guilty of having violated rules 3.3(a)(1), 4.1(a), 8.4(a), 8.4(b), 8.4(c), and 8.4(g), *Ala. R. Prof. C.* Clements filed a falsified fee declaration with the State of Alabama whereby she received attorneys' fees to which she was not entitled. The Disciplinary Board also ordered Clements to reimburse \$1,008 to the Alabama Office of the Comptroller. [ASB nos. 2007-241(A) and 2009-1741(A)-SC 1101167]
- Tuscaloosa attorney **Donnis Cowart** was suspended from the practice of law in Alabama for 91 days, the imposition of which was deferred pending a two-year probationary period. On July 3, 2012, Panel I of the Disciplinary Board accepted Cowart's conditional guilty plea to violations of rules 1.8(a)(1)-(3), 1.8(b) and 5.5, *Ala. R. Prof. C.* Cowart admitted that he entered into a business transaction with



a client without compliance with Rule 1.8(a)(1)-(3), *Ala. R. Prof. C.*, and that he used information relating to the representation to the disadvantage of the client. Cowart also admitted that he employed a suspended lawyer in violation of Rule 26, *Ala. R. Disc. P.*, and thereby violated Rule 5.5, *Ala. R. Prof. C.* Cowart was ordered to make restitution of \$44,200 to his client. [ASB nos. 10-819 and 11-1535]

- Birmingham attorney **Kelvin Leonard Davis** was interrimly suspended from the practice of law in Alabama, effective April 17, 2012, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the April 17, 2012 order of the Disciplinary Commission of the Alabama State Bar in response to a petition filed by the Office of General Counsel evidencing that Davis's conduct is causing, or is likely to cause, immediate and serious injury to a client or to the public. [Rule 20(a), Pet. No. 2012-669]

- Birmingham attorney **Jack Melvin Glover, Jr.** was suspended from the practice of law in Alabama for 91 days, by order of the Supreme Court of Alabama, effective June 20, 2012. The supreme court entered its order based upon the Disciplinary Board's acceptance of Glover's conditional guilty plea. In exchange for the plea, ASB No. 2009-1119(A) shall be dismissed.

In ASB No. 2010-1021, Glover pled guilty to violating Rule 8.4(g), *Ala. R. Prof. C.* Glover borrowed \$31,500 from a client and was to repay the client \$63,000 within three to five business days. Glover has not repaid any portion of the loan.

In ASB No. 2011-1980, Glover entered a plea of guilty to violating rules 1.15(a) and 8.4(g), *Ala. R. Prof. C.* In February 2010, a client placed \$120,000 in Glover's trust account for an investment with a third party. The funds were to be held in trust until the client authorized their release to the third party. Shortly after the funds

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C12-0201-010 (2/12)

were deposited in trust, Glover transferred or withdrew the funds without first obtaining the client's permission. Prior to petitioning for reinstatement, Glover has been ordered to pay restitution to both clients. [ASB nos. 2009-1119(A), 2010-1021 and 2011-1980]

- Birmingham attorney **Daryl Patrick Harris** was suspended from the practice of law in Alabama by order of the Alabama Supreme Court for two years, effective July 5, 2012. The supreme court entered its order based upon the decision of the Disciplinary Board, Panel I, of the Alabama State Bar wherein Harris was found guilty of violating rules 1.1, 1.3, 1.4(a), 1.4(b), and 8.4 (a), (c) and (g), *Ala. R. Prof. C.*

On July 26, 2011, formal charges were filed against Harris in ASB No. 09-2834. The charges centered on Harris's representation of a client in a 2009 divorce proceeding. Harris was paid a \$500 fee. He filed the divorce in May 2009. Sometime in mid-August 2009, the parties agreed to an uncontested divorce. The parties signed the necessary documents and waited to hear from Harris about their divorce. During the same period of time, the client attempted to contact Harris regarding the status of the matter and left numerous telephone messages, which Harris did not return. The divorce was set for a hearing in November 2009. Harris did not notify the client of the hearing and neither Harris nor the client appeared. The divorce action was dismissed for failure to prosecute.

Harris was served by publication in the January 2012 edition of *The Alabama Lawyer*. Harris did not answer or otherwise respond to the formal charges; the formal charges were deemed admitted, and Harris was adjudged guilty as charged.

A hearing to determine discipline was held before the Disciplinary Board, Panel I. Harris appeared with counsel and testified that he had serious health issues for about 14 months and that between November 2010 and late February 2012, he moved to Providence, Rhode Island to work in a non-lawyer position. The panel found that Harris offered no reasonable explanation for his repeated failure to attend to client matters or for his repeated failure to respond to the bar's numerous attempts to communicate with him. The Disciplinary Board determined that Harris should be suspended for two years and entered an order to that effect dated May 30, 2012. [ASB No. 09-2834(A)]

- On June 13, 2012, Birmingham attorney **Samuel Ray Holmes** was interimly suspended from the practice of law in Alabama pursuant to Rule 20(a), *Ala. R. Disc. P.*, by order of the Disciplinary Commission of the Alabama State Bar. On July 16, 2012, the Disciplinary Commission entered an order dissolving the suspension due to Holmes's having satisfied the requests of the Office of General Counsel. [Rule 20(a), Pet. No. 2012-1197]
- On February 17, 2012, the Supreme Court of Alabama affirmed the suspension of Prattville attorney **Richard Dale Lively** for six months, initially effective March 14, 2011. Lively had appealed the decision of the Disciplinary Board, finding that he had violated rules 1.1, 1.3, 8.4(a) and 8.4(g), *Ala. R. Prof. C.* Lively had been retained by the complainant and others to prepare the necessary paperwork to form an LLC and to record the executed articles with the county probate office as well as the Alabama Secretary of State. Lively prepared the documents but failed to record them. Therefore, when a lawsuit was filed against the complainant, it left him solely responsible. Lively also caused a former employee to submit a false affidavit in his initial response to the bar complaint. On May 18, 2012, the Supreme Court of Alabama issued a certificate of judgment affirming the March 14, 2011 order of Panel I of the Disciplinary Board. [ASB No. 2008-37(A)]
- Mobile attorney **Michael Hilding McDuffie** was suspended from the practice of law in Alabama by order of the Alabama Supreme Court for 91 days, with 30 to serve, effective August 31, 2012. The remaining 61 days of the suspension were suspended and deferred pending successful completion of a two-year probationary period. The supreme court entered its order based upon the decision of the Disciplinary Commission of the Alabama State Bar wherein McDuffie was found guilty of violating Rule 4.2, *Alabama Rules of Professional Conduct*. While representing a client, McDuffie admitted that he communicated about the subject of the representation with a party he knew to be represented by another lawyer in the matter without the consent of the other lawyer and without being otherwise authorized to do so. [ASB No. 10-1702]
- Mobile attorney **Barry Carlton Prine** was suspended from the practice of law in Alabama for 91 days, by order of the Supreme Court of Alabama, effective January 25, 2012,

the date of Prine's previous suspension. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Prine's conditional guilty plea, wherein Prine pled guilty to violations of rules 1.4(a), 1.16(d) and 8.4(a), *Ala. R. Prof. C.* In February 2011, Prine was hired to represent the complainant in seeking a guardianship over the complainant's ex-husband, and was paid \$1,500. Prine was subsequently suspended from the practice of law on April 22, 2011. He failed to adequately communicate with the complainant during the course of representation, and since Prine's suspension, he has made repeated promises to refund the complainant the \$1,500 fee, but has failed to do so. In addition to the 91-day suspension, Prine has been ordered to make restitution to the complainant in the amount of \$1,500.

- Dothan attorney **Deborah Smith Seagle** was interimly suspended from the practice of law in Alabama, effective June 20, 2012, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the June 20, 2012 order of the Disciplinary Commission of the Alabama State Bar, in response to a petition filed by the Office of General Counsel evidencing that Seagle's conduct is causing, or is likely to cause, immediate and serious injury to a client or to the public. [Rule 20(a), Pet. No. 2012-1251]
- McIntosh attorney **Stacey LaShun Thomas** was suspended from the practice of law in Alabama for 91 days, by order of the Supreme Court of Alabama, effective February 13, 2012. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Thomas's conditional guilty plea wherein Thomas pled guilty to violating rules 1.3, 1.4(a), 1.4(b) and 8.4(g), *Ala. R. Prof. C.* Thomas was previously interimly suspended on February 13, 2012 and has not been reinstated.

In ASB No. 2009-1460(A), Thomas owned and operated Pinnacle Title. Thomas's father was an employee of Pinnacle, and closed the sale of a residential property but failed to record the mortgage and deed. Mr. Thomas also failed to satisfy a prior mortgage on the property. Suit was filed against Thomas and her father. Thomas represented her father in the suit, but failed to file a timely answer on his behalf. Subsequently, a default judgment was entered against Thomas and her father. A second suit was filed

against Thomas and her father involving another real estate transaction. Like the previous transaction, the mortgage and deed were not recorded and a prior mortgage on the property was not satisfied after closing. Thomas failed to timely respond to motions for discovery, which led to a judgment being issued against Thomas and her father. Mr. Thomas refinanced his home using Pinnacle Title as the closing company. Money was wired from the lender to Pinnacle's real estate escrow account. Rather than disbursing the loan proceeds to Mr. Thomas, money was left in the account in order to float the account and make payments on other closings or to third parties. Thomas maintained that she was unaware that Pinnacle Title's escrow account was short or that her father used funds from his refinance to fund shortages on the account.

In ASB No. 2012-153, Thomas pled guilty to violating Rule 8.4(g), *Ala. R. Prof. C.* Thomas submitted a check for \$300 to the bar as payment for her occupational license. The check was returned for insufficient funds. Thomas was notified in writing by the Membership Department of the check being dishonored; however, Thomas failed to respond to the Membership Department and the matter was referred to the Office of General Counsel. The Office of General Counsel wrote to Thomas advising her that her dues check had been dishonored, and she had 10 days to tender payment in full. Thomas failed to respond. [Rule 20(a), Pet. No. 2012-306; ASB nos. 2009-1460(A) and 2012-153] | [AL](#)

## MEDIATION SERVICES

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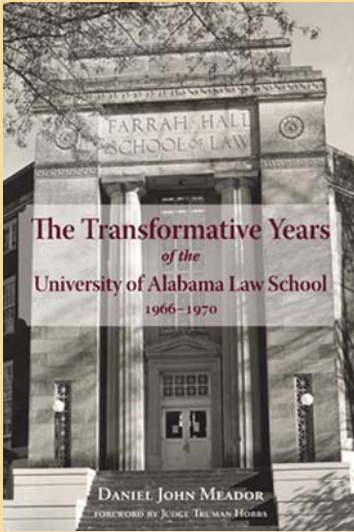


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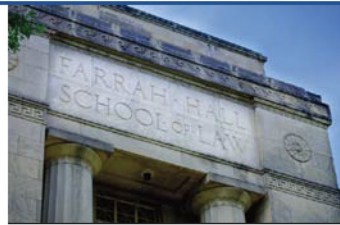
# *The Transformative Years of The University of Alabama Law School: 1966-1970*

*By Daniel John Meador*

**Reviewed by Robert L. Potts**

The University of Alabama School of Law, now one of the top tier law schools in the United States, is an educational gem in our state. Established in 1872, it has a rich history in American legal education, and throughout its 140 years of existence, it has been blessed with many outstanding professors on its faculty, several deans of great distinction<sup>1</sup> and graduates who have rendered outstanding service for our state and nation, and the legal profession.<sup>2</sup> However, during the middle of the last century, after its bulge in enrollment following World War II, it had slipped into complacency.

While it continued to have noteworthy faculty, many of whom were outstanding teachers, and a few of whom regularly published, the scholarly productivity coming from the law school as a whole was minimal. Its admission standards were low. Its students were known more for their antics on the float in the homecoming parade than for their achievements in the classroom, on the *Law Review* or in moot court competitions. Few of its faculty and students were actively involved in national or international law-related organizations. It lacked significant racial, gender or geographical diversity.



Photos by Zach Riggins and Samantha Hernandez, University Relations Photography, University of Alabama

In a nutshell, although the law school had long been accredited by the American Bar Association and was generally viewed as respectable among its Southern peers, it certainly was not outstanding. It had dropped significantly below nationally prominent state law schools in reputation and service. Of course, there were exceptions to this picture, and many of the UA School of Law graduates from this period went on to brilliant careers in law firms, judgeships and other public service. Nevertheless, it is indisputable that by the mid-1960s the University of Alabama School of Law was not achieving its potential in many respects.

It was in this context in 1965 that Dr. Frank Rose, president of the University of Alabama, contacted University of Virginia Law Professor Daniel J. Meador (LL.B. 1951) and asked him to return to his alma mater to “do for the law school what I did for the medical school” at the University of Alabama at Birmingham.

After some initial hesitation,<sup>3</sup> Professor Meador accepted the call and joined the University of Alabama as dean of the law school in July 1966. For the next four years, Dean Meador was the catalyst for remarkable positive change at the law school. He brought with him a vision for greatness that elevated the hopes and aspirations of its existing students, many of the faculty and, especially, the alumni of the school. Nevertheless, he encountered significant obstacles as he sought to implement his reforms. Now, almost a half century later, he has published a new book, D. Meador, *The Transformative Years of the University of Alabama Law School 1966-1970* (NewSouth Books, 2012) which details, from his perspective, his work in Farrah Hall and throughout Alabama during those important years of his deanship. Only 105 pages long, this book is a “must-read” for anyone interested in the history of this law school and in understanding the foundation laid in the late 1960s for the great law school that exists in Tuscaloosa today.

At the time Dean Meador assumed his duties, and throughout American history up to that time, “for better or worse,” much of the public leadership of the nation, including leaders in Alabama, came from the legal profession. In his view, based on the number of law school alumni then in public office, this made the University of Alabama School of Law

“the incubator of Alabama’s public leadership” and highlighted the need to train enlightened new people to assume leadership positions so that the state could achieve its potential. Not expressly stated, but certainly implied, was the fact that many of the leaders then in power in Alabama, including graduates of the law school, were failing the state, especially in the Civil Rights arena.

Immediately upon his arrival, Dean Meador took steps to improve the quality of every area of the law school. This included recruiting new faculty, revising the curriculum, expanding the library, enhancing student life, and involving alumni more intimately in supporting the law school and its programs, especially in raising private support. Not surprisingly, all of these changes, while attracting many allies, also ruffled feathers among those satisfied with the status quo, including some senior members of the law faculty, and, after Dr. Rose’s retirement in 1969, some high-ranking members of the University of Alabama’s new administration. In spite of these obstacles, Dean Meador’s accomplishments during his four-year tenure were significant.<sup>4</sup> He:

- Invigorated the law school foundation and initiated a successful capital campaign, thereby creating a source of significant private financial support for the law school;
- Established the Farrah Law Society as an additional fundraising tool and energized large numbers of law school alumni;
- Reorganized and doubled the size of the law school library collection and upgraded its administration;
- Obtained designation of the law library as a U.S. Government Depository;
- Established a more user-friendly environment for law students by consolidating admissions, student records and a placement office in one convenient location;
- Created the law school’s initial first-year writing and research program;
- Developed a second-year appellate advocacy program;
- Required a third-year seminar for each student;

- Initiated the student-run John A. Campbell Moot Court Competition;
- Added numerous new highly qualified tenure-track and visiting faculty members, enabling the offering of many more elective courses and seminars;
- Implemented the law school's first graduate-degree program, Master of Comparative Law;
- Began a program of inviting nationally and internationally famous legal scholars to give lectures at the law school;
- Spearheaded the transformation of the *Alabama Law Review* into an autonomous journal edited and run by students, but advised on best contemporary editing practices by new professors with recent experience with highly regarded, nationally prominent law reviews;
- Raised admission standards and modernized admission procedures;
- Elevated academic standards and graduation requirements;
- Significantly increased the enrollment of African-American students;<sup>5</sup>
- Expanded student involvement in law school life and changed the student culture at the law school by establishing a well-organized orientation session for incoming students; created several new student committees to provide meaningful input on law school issues; fostered a new bi-monthly student-run newspaper, the *Alabama Law Reporter*, with membership on the editorial staff open to all students; and created a new, inviting student lounge;
- Provided a home and director for the new Alabama Law Institute;
- Redesigned the law school diploma, changed the first professional degree granted from the LL.B. to the J.D. and published the first *Directory of Graduates 1872-1970*;
- Obtained approval for a new law school building and the hiring of the famed New York architect Edward Durrell Stone to design it; and
- Successfully steered the rigorous process required to secure a charter for the law school from the Order of the Coif, the nationally recognized law school honor society.

By 1969, Dean Meador had made considerable progress in achieving his objectives of transforming the law school into a

modern, highly respected training ground for future leaders, and, thus, began to focus on the new building plans. However, with a 1968 change in the university's vice president for academic affairs, momentum for law school initiatives diminished, and central administration approvals for increased funding and the plans for the new building did not come as quickly as Dean Meador wished. As a consequence, the dean commissioned an independent third party to survey the entire law school program and progress, and make a report to President Rose. Unfortunately, that report, which was very positive for the law school, incorporated a suggestion of some junior law faculty members to move the location of the law school to the UAB campus in Birmingham and suggested further study of this issue. Unwisely, Dean Meador endorsed the idea of such a study in his annual dean's report. This suggestion was promptly rejected by the university central administration and may have contributed to his later frosty reception from a new university administration.

A short time later, Dr. Rose resigned as president, and, in the spring of 1969, the board of trustees appointed Dr. David Mathews, one of Dr. Rose's assistants, as the new president. From the beginning, Dean Meador and Dr. Mathews disagreed on the future direction of the law school. Meador perceived Mathews to tell him that the law school should modify its drive toward national excellence and that he should reorient its mission to become a good law school for Alabama, to abandon his drive to recruit excellent out-of-state students and to pay more attention to the desires of the pre-1966 faculty. Meador was unhappy with this advice.

Shortly thereafter, in August 1969, Dean Meador was offered the prestigious James Monroe Professorship at the University of Virginia Law School. After much anguished consideration, he accepted that position and left the University of Alabama, effective June 30, 1970.

As he left, Dean Meador was worried that many of his "reforms" would not survive. Now, he admits that he was unduly pessimistic, and that his hopes and dreams for the law school have largely prevailed. The outstanding deans<sup>6</sup> who have followed him retained most of his reforms and initiatives and have enhanced them.

In retrospect, his unfortunate experience of not surviving the change in the university's presidency, despite his stellar vision and excellent record at the law school over four years, is not unusual in American public higher education. The position of dean of a school or a college within a major university is probably one of the most difficult jobs on a campus out-

side the presidency itself. Unable ethically or politically to appeal directly to the governing board of the institution to “argue his case” for policy changes and new initiatives, a dean is dependent on the university administration to be supportive of his or her views. Without such support, a dean has no effective recourse, other than resignation, if the issues that divide them are fundamental. Likewise, a new president or chancellor wants to build his or her own team with persons who share a vision about the future of the university. Thus, higher education is filled with former deans and other senior administrators who have run into this buzz saw. Fortunately, most universities are resilient, and their boards and administrators want to “do the right thing” and, thus, good ideas and initiatives, if affordable, in the long run usually prevail. Likewise, highly qualified and talented deans and others usually have no trouble landing on their feet elsewhere after one of these troubling episodes.


Thankfully, such was the case with Dan Meador, who remained at the University of Virginia Law School in the Monroe Professorship for many years. He taught generations of great law students in Charlottesville, served as an Assistant United States Attorney General and has published 11 well-received books since he left the Alabama deanship. Alabama is a better state and the University of Alabama Law School is an infinitely better place due to his stellar four years of splendid service to his alma mater. Those of us who were fortunate enough to study at his feet and to be imbued with his grand vision for the law school, lawyer-leaders and the legal profession have profited immensely for his having passed our way. | AL

## Endnotes

1. For the first 25 years of its history, from 1872 until 1897, the law school was led by professors of law, the first being Henderson M. Somerville, generally recognized as the founder of the law school. In 1897, the board of trustees approved a two-year law curriculum and the appointment of a dean, William S. Thorington, who served until 1910. The deans who followed him until the appointment of Dan Meador in 1966 and their years of service were: William B. Oliver (1910-1913); Albert J. Farrah (1913-1944); William M. Hepburn (1944-1950); and M. Leigh Harrison (1950-1966). All of these deans were highly regarded by the Alabama bench and bar and had noteworthy achievements during their respective tenures. See R. McKenzie, *Farrah's Future: The First One Hundred Years of the University of Alabama Law School, 1872-1972*, 25 Ala. L. Rev. 121 (1973).
2. For an excellent history of the law school during its first century of existence, see R. McKenzie, note 1, supra.
3. Meador had recently declined an opportunity to be named dean of the University of Georgia Law School. After earning an LL.M.

at Harvard Law School and clerking for U.S. Supreme Court Justice Hugo Black, he was already establishing himself as a leading national authority on state and federal courts. He probably could have had his pick of available law school deanships at the time had he not decided to return to his alma mater.

4. The listing of Meador's accomplishments during his four years as dean follows the order and contains much of the content he sets out on pages 73-74 in chapter 11 of his book being reviewed in this article, D. Meador, *The Transformative Years of the University of Alabama Law School, 1966-1970* (2012).
5. At the time of Dean Meador's arrival there had never been a black graduate of the law school. Indeed, there were then fewer than 25 black members of the Alabama State Bar. All of them had obtained their legal educations out of state because of Alabama's segregation policies and practices. See Comment, *Negro Members of the Alabama Bar*, 21 Ala. L. Rev. 306 (1969). Dean Meador was successful in enrolling eight black students during his deanship.
6. The deanships of Tom Jones (acting dean), Tom Christopher, Charles Gamble, Nat Hansford, and Dean Ken Randall have enhanced the law school in many respects.



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ALABAMA TAX CERTIFICATE INVESTORS BEWARE:

# Negotiating through the Labyrinth of, and Important Limitations to Recovering Money in, the Redemption Process

By Gary E. Sullivan

## Introduction

Market conditions<sup>1</sup> in the past several years have spawned a boutique industry in Alabama: investors who purchase tax certificates for unpaid *ad valorem* taxes on real property. The statutory interest return of 12 percent per annum attracts much attention. In addition to interest, investors may also be able to recover the value of “improvements,” attorney fees and other costs, depending on the circumstances.

Current Alabama tax sale redemption case law, particularly those cases involving judicial redemption proceedings, lack clarity and consistency. Tax sale purchasers are left without a clear indication of what limitations exist on the nature and amounts recoverable in redemption proceedings. Given the concerns raised by taking a person’s property, the law—both statutory and judicial precedent—should be interpreted or amended to protect landowner and lienholder rights in redemption proceedings. The purpose of this article is to provide an overview of tax sale purchases and redemption in Alabama from the perspective of the limitations on the amounts recoverable in the event of redemption. In framing the interests in play, Part II briefly discusses the foundation and purpose of *ad valorem*

taxation in Alabama. In the event of a tax payer delinquency, Alabama provides for the sale of the land to satisfy the tax obligation. If a tax sale takes place, the right of redemption—statutory or judicial—is triggered. Part III provides a comparison of the redemption procedures that are available to a party capable of redeeming the property. Equally important to the procedures in place for redemption is the impact of void tax sales, discussed in Part IV. Having established the procedural framework of the tax sale process, Part V turns to the limitations on recovery in redemption. Particularly, recovery is limited by statute with respect to interest, attorney fees, and improvements.

Statutory wording and crafty interpretation has led to an interesting question over the status of manufactured homes. Part VI addresses the question to illustrate of the importance of a full understanding of Alabama tax sale and redemption procedure. Manufactured homes provide an example of the often overlooked limitation—what interests are conveyed to a tax sale purchaser? The common mistake with the complicated nature of redemption is to get lost in the details; tax sale investors, and their attorneys, can get turned around, unable to see the forest for the trees.

## Background

When ad valorem taxes become delinquent and are uncollectable, the assessed property may be sold to recoup the unpaid taxes.<sup>2</sup> Despite the desire to collect taxes, particularly in tight-budget times, strict adherence to statutory procedure must be rigorously enforced.<sup>3</sup> Provided that statutory procedure is followed, the governmental revenue interest is fulfilled by the tax sale. Therefore, the remaining competing interests in the redemption of land sold for delinquent taxes are those of the tax sale purchaser and the owner or, as is often the case, the owner's mortgagee. Given the judicial hesitance toward governmental property divestitures, the Alabama legislature has likewise codified statutory procedures for the redemption of land sold for collection of ad valorem taxes.<sup>4</sup> Additionally, the judiciary strictly scrutinizes tax sale procedure to protect landowner and lienholder rights.<sup>5</sup>

The statutory requirements serve as a legislative determination of an equity balance between the competing interests after a tax sale is conducted. The jurisdictional prerequisites for a valid tax deed and marketable title can be thought of as a six-step process:<sup>6</sup> (1) a valid assessment of the land;<sup>7</sup> (2) a report from the tax collector to the probate court stating the inability to collect the assessed taxes;<sup>8</sup> (3) notice to the taxpayer of delinquent taxes;<sup>9</sup> (4) decree of sale from the county's probate judge;<sup>10</sup> (5) execution of the decree of sale;<sup>11</sup> and (6) the issuance of a tax deed.<sup>12</sup> A defect in the process will likely lead to a tax sale being declared void. For a tax sale purchaser, the outcome of a marketable title is thus left vulnerable on two fronts: redemption of the land and a judicial finding of deficiencies in the tax sale procedure.

## Redemption

When ad valorem taxes cannot be collected, property may be sold in a tax sale to recover the value of unpaid taxes. Following a public tax sale which must garner at least the amount of delinquent taxes, a tax sale purchaser receives a certificate of purchase



**For a tax sale purchaser, the outcome of a marketable title is thus left vulnerable on two fronts: redemption of the land and a judicial finding of deficiencies in the tax sale procedure.**

at the time of the sale. Three years later, if no issues arise as to possession or the validity of the tax sale, the tax purchaser receives a tax deed to the land. While this chain of events depicts a rosy scenario, investment in tax sale property is a game of speculation. Owners may redeem rights to their property by depositing with the probate court an amount including tax sale price; any delinquent taxes; costs, fees and interest; insurance paid by the purchaser; and the value of preservation improvements. The redemption process in Alabama is determined largely by statute, and procedures vary, depending on the avenue of redemption pursued by the owner. Under the *Alabama Code*, the individuals entitled to redeem the property sold at a tax sale are the owner, his heirs or personal representative; mortgagees; subsequent purchasers of the property; and other persons having a legal or equitable interest in the land.<sup>13</sup>

## Statutory Redemption

Statutory redemption procedure is dependent upon the identity of the

purchaser at a tax sale. A party seeking to redeem the property sold to the state must make an application to the probate judge in the county where the land is located using a form provided by the land commissioner.<sup>14</sup> In addition to the application, the party must include a deposit equal to the amount of the tax sale price, subsequent tax assessments, interest, costs, and fees.<sup>15</sup> If the land is also located within a municipality, the party must also deposit the amount of unpaid municipal taxes and the value of the taxes that were not assessed due to the state's ownership interest in the land.<sup>16</sup> Unlike the procedure for lands purchased by parties other than the state, the land may be redeemed at any time before the title passes out of state ownership.<sup>17</sup>

Redemption of land purchased by a party other than the state is governed by a time limitation.<sup>18</sup> Land may be redeemed three years from the date of the tax sale.<sup>19</sup> Like the process of redeeming land purchased by the state, the redemptioner must deposit a sum equal to the amount paid by the purchaser at the tax sale, plus any taxes subsequently paid, interest, costs and fees accrued.<sup>20</sup> Mortgagees, however, are treated as a special class. In an effort to protect nonresident mortgagees, the *Alabama Code* provides that mortgagees are entitled to redeem within one year of written notice of the tax sale.<sup>21</sup> As *Alabama Mineral Land Co. v. McFry* states, "[n]o time is specified for the giving of such notice. Clearly it can be given immediately after the tax sale, in which event the one-year provision would run concurrently with the [three]-year limit." Therefore, in the event that the three-year time limitation has elapsed and no notice has been given, the mortgagee is still entitled to redeem.<sup>22</sup>

## Judicial Redemption

Judicial redemption is available to owners who have retained possession of the land sold at a tax sale. Because judicial redemption is limited to owners in possession, it "sounds in equity, not in law."<sup>23</sup> It has been noted that "[t]he purpose of § 40-10-83 is to preserve the right of redemption without limit of time, if the

owner of the land seeking to redeem has retained possession.”<sup>24</sup> Redemption exercised under § 40-10-82 and § 40-10-83 removes the time limitation present in a statutory redemption scheme. If the tax sale purchaser is in possession of the land, the proper avenue for redemption is necessarily statutory.

The requirements for judicial redemption have evolved through common law and been codified in the *Alabama Code*. In order to redeem, the owner—or other party capable of redeeming the property<sup>25</sup>—must file a complaint against the party claiming an interest in the land under a tax title and retain possession of the land.<sup>26</sup> Additionally, there can be no lawsuit pending to “enforce or test [the tax purchaser’s] claim.”<sup>27</sup> Thus, the redemptioner can affect judicial redemption by either filing an original civil action—typically a quiet title action—against the tax sale purchaser or by filing a counter claim in the tax sale purchaser’s ejectment action. Provided that the requirements have been met, the court can then determine the amount necessary to redeem the property.<sup>28</sup> Further, under § 40-10-83, “if the person against whom the taxes were assessed makes a motion to the court before trial, the court may render a judgment against him for the purchase amount, subsequent taxes, and reasonable attorneys’ fees, and the judgment shall be a lien on the land.”<sup>29</sup> By pursuing judicial redemption, the party in possession of the land seeking to redeem the property can


do so without waiting for an ejectment action.<sup>30</sup>

The evolution of case law regarding possession requirements<sup>31</sup> was codified in 2009.<sup>32</sup> As stated in the statute, the “character of possession need not be actual and peaceful, but may be constructive and scrambling.”<sup>33</sup> In instances where there is “no real occupancy of the land, constructive possession follows the title of the original owner and will not be cut off by any possession by the tax purchaser short of adverse possession.”<sup>34</sup> With regards to scrambling possession the court in *Standard Contractors Supply Co. v. Scotch* held that the scrambling possession of the owner and tax sale purchaser simultaneously will not deprive the owner of his or her right to seek judicial redemption.<sup>35</sup>

While judicial redemption removes a time limitation for owners who remain in possession, § 40-10-82 establishes a short statute of limitations in tax deed cases.<sup>36</sup> A three-year time limitation applies from the date that the tax purchaser is entitled to demand a tax deed on the property.<sup>37</sup> A tax sale purchaser becomes entitled to a tax deed three years after the date of the tax sale.<sup>38</sup> Alabama has consistently held that “in order for the short statute period of § 40-10-82 to bar redemption under § 40-10-83, the tax purchaser must prove continuous adverse possession for three years after he is entitled to demand a tax deed.”<sup>39</sup> Therefore, only actual, peaceable possession by the tax sale purchaser,



**By pursuing judicial redemption, the party in possession of the land seeking to redeem the property can do so without waiting for an ejectment action.**



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The burden of proving the compliance with statutory requirements is on the party claiming an interest under the tax title and courts “give a strict construction to such proceedings in determining the question of their regularity and validity.”

shown *at the time of filing the complaint*, can cut off constructive possession by the original owner and trigger the short statute of limitations.<sup>40</sup> Possession by the tax purchaser is considered adverse, and therefore the land “need only be used in a manner consistent with its character.”<sup>41</sup> However, if the owner in possession has relinquished possession, he or she may not wrongfully reenter the property to regain possession as required by judicial redemption.<sup>42</sup>

## ***Impact of Void Tax Sales***

Compliance with the statutory requirements for assessing *ad valorem* taxes and ultimately conducting a tax sale can undermine the tax sale and the tax sale purchaser’s claim of right. As noted, redemption statutes are construed in favor of the redemptioner.<sup>43</sup> The six-step procedure presents a field of landmines for would-be investors. At the outset, the assessment of the tax must be valid. As required by statute, the assessment must be made against the proper party;<sup>44</sup> must sufficiently describe the property assessed;<sup>45</sup> must not be a double assessment<sup>46</sup> and must reflect proper and fair valuation of the property.<sup>47</sup> Provided that the assessment is valid, the tax collector has to file a report with the probate court stating that the collector was unable to collect taxes without a sale of land.<sup>48</sup> Prior to the issuance of a decree of sale from the probate judge,<sup>49</sup> the taxpayer must be noticed of the delinquent taxes.<sup>50</sup> Execution of the decree of sale also must be in compliance with the statutory safeguards.<sup>51</sup> Alabama law is a three-step process to executing the decree of sale: 1) notice the tax sale;<sup>52</sup> 2) conduct the sale;<sup>53</sup> and 3) issue a certificate of purchase.<sup>54</sup> Finally, three years after the date of the tax sale, the purchaser is entitled to a tax deed.<sup>55</sup>

Despite the layers of procedural prerequisites to obtain marketable title, the validity of the tax sale is subject to challenge. In Alabama, “a tax sale is void in the absence of evidence that the requirements of the statutes have been complied with.”<sup>56</sup> The

burden of proving the compliance with statutory requirements is on the party claiming an interest under the tax title and courts “give a strict construction to such proceedings in determining the question of their regularity and validity.”<sup>57</sup> The height of judicial apprehension about the validity of a tax sale is in the three-year window between the issuance of the certificate of purchase and the issuance of a tax deed. If an owner has not sought redemption by that point, it is unlikely that he will do so in the future. Thus, a tax deed issued by the probate judge serves as *prima facie* evidence that the tax sale was valid.<sup>58</sup>

Because a void tax deed confers color of title, a tax sale purchaser can adversely possess property to cut off the original owner’s right of redemption and enforce the short statute of limitations. The short statute of limitations has been held to apply in cases with void tax sales where there has been “actual, open and notorious adverse possession for three years by the tax purchaser or his successor in title.”<sup>59</sup> If the tax sale purchaser does not adversely possess the land, the original owner’s right to redeem remains unaffected, because that owner has retained constructive possession needed to take judicial redemption action.<sup>60</sup>

## ***Limitations on Recovery***

In addition to the possibility of redemption complications, other statutory provisions impose limitations and conditions on the tax purchaser recovering certain amounts. The return on investment of a tax sale purchase is statutorily limited in three key areas: interest, attorneys’ fees and costs of preservation and permanent improvements. A tax sale purchaser is required pay the amount of money which the land was sold for at the tax sale plus 12 percent interest.<sup>61</sup> While 12 percent is a significant improvement over the rate yields for savings accounts, proposed legislation during the 2011 session sought to reduce the interest rate to one percent.<sup>62</sup> The bill, however, was not reported out of committee.

Limitations on attorneys' fees and recovery of investment in improvements are the most frequently litigated issues because of their ambiguity. Attorneys' fees are not available under the statutory redemption scheme.<sup>63</sup> In judicial redemption, attorneys' fees are allowed in limited circumstances: "[w]hen the action is against the person for whom the taxes were assessed or the owner of the land at the time of the sale," a reasonable attorney's fee may be available to the *plaintiff only* in a judicial redemption action.<sup>64</sup> While the tax sale purchaser is often the plaintiff, bringing a suit to eject the landowner, "when a tax-purchaser is the defendant he is not entitled to attorney fees."<sup>65</sup> The attorney's fee provision in § 40-10-83 has been interpreted as providing that "it is only in suits brought by the purchaser at the tax sale that the owner must pay an attorneys' fee."<sup>66</sup>

In 2002, the legislature added preservation and permanent improvements to the class of monies recoverable. The revised statute allows the purchaser at a tax sale to recover the value of preservation improvements made on the property if the property contains a residential structure, or if the value of permanent improvements made to the property are located within an urban renewal or urban redevelopment project area.<sup>67</sup> As defined by the statute, "permanent improvements" are "all repairs, improvements, and equipment attached to the property as fixtures."<sup>68</sup> Preservation improvements are defined as "improvements made to preserve the property by properly keeping it in repair for its proper and reasonable use, having due regard for the kind and character of the property at the time of sale."<sup>69</sup> The recovery for improvements is subject to a strict time limitation. To receive reimbursement for improvements, statutory redemption requires a purchaser's response to a redemptioner's request for improvement figures within 10 days, or improvement value will not be paid.<sup>70</sup> Because this is a relatively new addition to the law of redemption, the contours of the right to recover for improvements is not quite clear.



To receive reimbursement for improvements, statutory redemption requires a purchaser's response to a redemptioner's request for improvement figures within 10 days, or improvement value will not be paid.

## Manufactured Homes

The complexity of redemption gives rise to a question about the status of manufactured homes on land sold at a tax sale. In Alabama there are more than 2.1 million housing units.<sup>71</sup> Of those, over 300,000 are manufactured homes.<sup>72</sup> Making up more than 13 percent of the housing units in Alabama, manufactured homes comprise a significant percentage of Alabama's residences. However, their differences from other types of homes create an interesting situation with tax sale redemption.

The *Alabama Code* defines "real property" as "[l]and and all things thereunto pertaining, all structures, and all things annexed or attached thereto which would pass to a vendee by the conveyance of the land or property."<sup>73</sup> Although the manufactured

home is affixed to the land, the title to a manufactured home is not conveyed with the deed, nor is a description contained in the deed. Under Alabama statute and administrative code, manufactured homes located on land *owned by the manufactured homeowner* are taxed as realty and considered to be improvements to that realty.<sup>74</sup> However, they remain subject to titling requirements as personalty.

Like vehicles, all manufactured homes less than 20 years old must be registered and titled.<sup>75</sup> The owner of the manufactured home may apply to have the title cancelled if it is permanently affixed to property owned by the same owner as the home and subject to no liens.<sup>76</sup> By detitling, the home is subject to treatment as real property.<sup>77</sup> Absent applying to have the title cancelled, however, the home remains personal property under the statute. Because manufactured homes must be titled as personalty, the law protects the interests of manufactured home lienholders.<sup>78</sup>

Faced with the issue of whether a manufactured home was transferred by tax deed to a tax sale purchaser, the Alabama Court of Civil Appeals did not hesitate in finding that it did not. The court stated succinctly that "the redemption statutes apply to the redemption of land, or real property, which [a] manufactured home is not."<sup>79</sup> Additionally, the court found that "the treatment of certain manufactured homes 'as realty' for purposes of ad valorem taxation does not serve to convert them to real property."<sup>80</sup> The ruling echoes the treatment of manufactured homes in other states, such as Tennessee and Indiana. Given the number of manufactured homes in Alabama, the treatment of them as personalty serves as a significant limitation, as a tax purchaser may not invoke the redemption statutes to support any claim for recovering preservation or improvement costs.

## Conclusion

It is likely that the law surrounding tax sales and redemptions will continue to evolve. Meanwhile, attorneys for investors

interested in placing bets by purchasing tax certificates would do well to fully investigate the limitations on the amounts their clients can reasonably hope to recover. | AL

## Endnotes

1. From 2008–2011, many counties in Alabama have experienced a 50 percent or more increase in the number of delinquent ad valorem tax bills that remain unpaid by property owners. During the same period of time, the average interest rate paid on a pass-book savings account has dropped from 4.0 percent to less than 0.8 percent on average.
2. ALA. CODE §40-10-1 (1975) provides that: “The probate court ... may order the sale of lands therein for the payment of taxes assessed on the lands, or against the owners of the lands, when the tax collector shall report to the court that [they]... [were] unable to collect the taxes assessed against the land....”
3. Given the implication of a tax sale, divesting a property owner of his or her property, procedural due process requires that tax sales be conducted in accordance with statutory procedure in order to be deemed valid in the instance of judicial challenge. The Alabama Supreme Court has stated that “in a sale of real property for taxes great strictness is required and the statutory provisions must be rigorously pursued.” *Reuter v. Mobile Bldg. & Const. Trades Council*, 150 So. 2d 699, 700 (Ala. 1963).
4. See ALA. CODE §§40-10-120 through -143 (1975).
5. The court has stated that “the redemption statutes are to be construed most favorably to the redemptioner.” *Reuter v. Mobile Bldg. & Const. Trades Council*, 150 So.2d 699, 702 (Ala. 1963).
6. See Ernest H. Hornsby, “Tax Assessments, Tax Sales, and Tax Deeds in Alabama” 25 Ala. L. Rev. 535, 536 (1973).
7. ALA. CODE §§ 40-7-2 to 47 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
8. ALA. CODE § 40-10-1 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
9. ALA. CODE §§ 40-10-4 to 8, 14 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
10. ALA. CODE §§ 40-10-11, 15-28 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
11. ALA. CODE § 40-10-12 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
12. ALA. CODE §§ 40-10-29 to 30 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
13. ALA. CODE § 40-10-120(a) (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
14. ALA. CODE § 40-10-121 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
15. ALA. CODE § 40-10-121 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
16. ALA. CODE § 40-10-121 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
17. ALA. CODE § 40-10-120 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
18. See William R. Justice, *Redemption of Real Property Following Tax Sales in Alabama*, 11 CUMB. L. REV. 331, 334 (1980); ALA. CODE § 40-10-120 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
19. ALA. CODE § 40-10-120 (West, Westlaw through Act 2011-255 of the 2011 Regular Session). Also, if the land passes out of state ownership, the three-year time limitation applies. See Kilgore v. Gamble, 253 Ala. 334, 336, 44 So. 2d 767, 768 (1950).
20. ALA. CODE § 40-10-120 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
21. *Ala. Mineral Land Co. v. McFry*, 236 Ala. 632, 636, 184 So.192, 194 (1938); ALA. CODE § 40-10-120 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
22. *Ala. Mineral Land Co. v. McFry*, 236 Ala. 632, 636, 184 So.192, 194 (1938).
23. *First Props., L.L.C. v. Bennett*, 959 So. 2d 653, 656 (2006).
24. *O'Connor v. Rabren*, 373 So. 2d 302, 306 (Ala. 1979) (citing *Moorer v. Chastang*, 247 Ala. 676, 26 So. 2d 75 (1946)).
25. Under ALA. CODE §40-10-83 the class of individuals allowed to redeem the land is defined as “the owner of the land at the time of the sale, his or her heir, devisee, vendee or mortgagee.”
26. *Moorer v. Chastang*, 247 Ala. 676, 679-80, 26 So.2d 75, 78 (1946).
27. *Id.*
28. *Id.*
29. William R. Justice, “Redemption of Real Property Following Tax Sales in Alabama,” 11 CUMB. L. REV. 331, 336 (1980).
30. *Morris v. Card*, 135 So. 340, 343 (Ala. 1931).
31. See William R. Justice, “Redemption of Real Property Following Tax Sales in Alabama,” 11 CUMB. L. REV. 331 (1980).
32. 2009 Ala. Acts 937.
33. ALA. CODE § 40-10-82 (West, Westlaw through Act 2011-255 of the 2011 Regular Session); see also *Giardina v. Williams*, 512 So. 2d 1312, 1314 (1987).
34. *O'Connor v. Rabren*, 373 So. 2d 302, 306 (1979) (citing *Tensaw Land & Lumber Co. v. Rivers*, 244 Ala. 657, 15 So. 2d 411 (1943)).
35. *Standard Contractors Supply Co. v. Scotch*, 247 Ala. 517, 519, 25 So.2d 257, 258 (1946) (citation omitted).
36. *Gulf Land Co., Inc. v. Buzzelli*, 501 So. 2d 1211, 1213 (1987) (citations omitted).
37. *Id.*
38. ALA. CODE § 40-10-29 (1975).
39. *Stallworth v. First Nat. Bank of Mobile*, 432 So. 2d 1222, 1224 (Ala. 1983)
40. *Gulf Land Co., Inc. v. Buzzelli*, 501 So. 2d 1211, 1213 (1987) (citations omitted).
41. *O'Connor v. Rabren*, 373 So. 2d 302, 306 (Ala. 1979) (citing *Turnham v. Potter*, 289 Ala. 685, 271 So.2d 246 (1972)).
42. *O'Connor v. Rabren*, 373 So. 2d 302, 306 (Ala. 1979).
43. *Reuter v. Mobile Bldg. & Const. Trades Council*, 274 Ala. 614, 617,

- 150 So.2d 699, 702 (1963).
44. ALA. CODE § 40-7-17 (West, Westlaw through Act 2011-255 of the Regular Session).
  45. ALA. CODE §§ 40-7-16, 40-10-72 (West, Westlaw through Act 2011-255 of the Regular Session).
  46. *Pickler v. State*, 149 Ala. 669, 670, 42 So.1018, 1019 (1906).
  47. ALA. CODE § 40-7-15 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
  48. ALA. CODE § 40-10-1 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
  49. ALA. CODE §§ 40-10-11, 15-28 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
  50. ALA. CODE §§ 40-10-4 to 8, 14 (West, Westlaw through Act 2011-255 of the 2011 Regular Session). In instances where the owner is unknown, the tax delinquency must be published.
  51. ALA. CODE § 40-10-12 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
  52. ALA. CODE § 40-10-12 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
  53. ALA. CODE § 40-10-15 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
  54. ALA. CODE § 40-10-19 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
  55. ALA. CODE § 40-10-29 (1975).
  56. *State ex rel. Gallion v. Graham*, 273 Ala. 634, 636-37, 143 So.2d 810, 812 (Ala.1962) (citations omitted).
  57. *Laney v. Proctor*, 236 Ala. 318, 319, 182 So.37, 38 (1938).
  58. ALA. CODE § 40-10-30 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
  59. *Grice v. Taylor*, 273 Ala. 591, 593, 143 So.2d 447, 449 (1962).
  60. *See Timms v. Scott*, 248 Ala. 286, 287, 27 So. 2d 487, 488 (1946).
  61. ALA. CODE § 40-10-121
  62. S.B. 332, 2011 Leg. Sess. (Ala. 2011); H.B. 388, 2011 Leg. Sess. (Ala. 2011).
  63. ALA. CODE § 40-10-120 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
  64. ALA. CODE § 40-10-83 (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
  65. *State Dep't of Revenue v. Price-Williams*, 594 So.2d 48, 53 (1992) (citing *Morris v. Card*, 223 Ala. 254, 135 So. 354 (1931)).
  66. *Nat'l Fireproofing Corp. v. Hagler*, 226 Ala. 104, 106, 145 So.421, 423 (1932).
  67. ALA. CODE § 40-10-83 (1975); ALA. CODE § 40-10-122 (1975).
  68. ALA. CODE § 40-10-122 (1975).
  69. ALA. CODE § 40-10-122 (1975).
  70. *Ross v. Deutsche Bank Nat'l Trust Co.*, 56 So. 3d 679, 683 (Ala. 2010).
  71. American Community Survey, "Selective Housing Characteristics, Alabama" (2010).
  72. Id.
  73. ALA. CODE § 40-1-1(13) (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
  74. ALA. CODE § 40-11-1 (West, Westlaw through Act 2011-255 of the 2011 Regular Session); ALA.ADMIN.CODE r. 810-4-2.02 (2010).
  75. ALA. CODE § 32-20-20(a) (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
  76. ALA. CODE § 32-20-20(b) (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
  77. ALA. CODE § 32-20-20(b) (West, Westlaw through Act 2011-255 of the 2011 Regular Session).
  78. *See Green Tree-AL v. Dominion Resources*, 2011 WL 3963010 (Ala. Civ. App. 2011).
  79. *Green Tree-AL v. Dominion Resources*, 2011 WL 3963010, \*9 (Ala. Civ. App. 2011).
  80. *Green Tree-AL v. Dominion Resources*, 2011 WL 3963010, \*8 (Ala. Civ. App. 2011).

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# Money for Nothing: Who Is Entitled to the Excess Paid at a Tax Sale?

By William S. Hereford and James H. Haithcock, III

## Section 40-10-28 of the *Alabama Code*,

which is part of the statutory framework governing real property tax sales, addresses who is entitled to excess funds paid by a purchaser at an *ad valorem* tax sale.

According to the Association of County Commissioners of Alabama, section 40-10-28 is “[o]ne of the most confusing statutes in Alabama law.”<sup>1</sup> Indeed, the application of section 40-10-28 has been the focus of numerous lawsuits in recent years.

## What Is an Excess?

When taxes are not paid on real property, the probate court in the county where the property is located can order the sale of the property to satisfy the tax obligation.<sup>2</sup> Pursuant to procedures identified in sections 40-10-1 through -31 of the *Alabama Code*, Alabama county officials offer for sale by public auction thousands of tax-delinquent real properties every year,

with the properties being sold to the highest bidder. The “excess” discussed in this article is the amount paid for a tax-delinquent property that exceeds the minimum bid requirement. The minimum bid is the total of the unpaid taxes, accrued interest and sale-related costs. Following the tax sale, the minimum bid portion of the amount paid by the purchaser is distributed to the various taxing authorities entitled to the taxes. The “excess” portion of the bid is held by the county treasurer to be distributed pursuant to section 40-10-28.

## Who Gets the Excess?

According to section 40-10-28, the excess “shall be paid over to the owner, or his agent or to the person legally representing such owner . . . .” Notwithstanding this seemingly simple directive concerning the payment of the excess, correctly determining who is entitled to the excess can be

extremely complicated. The importance of this issue is better understood when the practical effects of a tax sale are considered.

A tax sale, in effect, splits the real property sold into two estates. One estate is the estate created in favor of the purchaser. This estate includes a right to possession, a right to obtain a deed to the property if it is not redeemed within three years of sale and the right to eventually obtain absolute ownership in the property if it is not redeemed.<sup>3</sup> The other estate consists of those real property rights that remain with the pre-tax sale owner of the property and any other parties having an interest in the property at the time of the sale, such as mortgagees and lienholders. It is this remaining estate, and the various interests in this estate, that are relevant to the topic of this article. The estate of the purchaser at the tax sale does not directly affect who is entitled to the excess. In general terms, the remaining estate consists of the right to redeem the property sold for taxes, the right to challenge the validity of the tax sale and the possessory interest of the occupant at the time of the tax sale (subject to the purchaser's right to seek possession of the property). All parties having an interest in the property before the tax sale have redemption rights and the right to challenge the tax sale.<sup>4</sup>

To redeem property sold for taxes requires the payment of an amount equal to the amount paid by the purchaser at the tax sale (which includes the excess), plus any subsequent taxes the purchaser has paid, and interest on those amounts of 12 percent per annum.<sup>5</sup> If, for example, the purchaser pays an amount creating an excess of \$10,000, the "redemption amount" the owner (or anyone else having a right to redeem) must pay to redeem will include the \$10,000 excess payment held by the treasurer. Thus, the excess funds are closely tied to the right to redeem, and it is clear that recovering the excess is a very important part of the redemption process. However, not everyone entitled to redeem is entitled to the excess funds.

Most properties sold at Alabama tax sales involving an excess payment (perhaps 90 percent or more) are redeemed by the owner of the property within the initial three-year redemption period established by section 40-10-120. With these redemptions, the excess held by the treasurer is typically applied as a credit to the total redemption amount. After a redemption, the county sends the redemption amount, which includes the excess the county has been holding, to the purchaser in exchange for the purchaser's release of its interest in the property. In these circumstances, because the excess is being applied to restore the title for the benefit of all parties who had an interest in the property when it was sold, there is not likely to be an issue of who is entitled to the excess funds.

The controversy concerning who is entitled to the excess arises when either the owner seeks to recover the excess from the county revenue commissioner<sup>6</sup> without redeeming the property or someone other than the owner seeks to recover the excess. Unless a claim to an excess is made by the owner for the purpose of redeeming the

## To redeem property sold for taxes requires the payment of an amount equal to the amount paid by the purchaser at the tax sale (which includes the excess), plus any subsequent taxes the purchaser has paid, and interest on those amounts of 12 percent per annum.

property, the revenue commissioner's decision to release the excess payment exposes it to future challenges from competing interests in the underlying real property. Even if a future challenge is unsuccessful, responding to the challenge is time-consuming and burdensome for revenue commissioners.

There are two primary reasons for this risk faced by revenue commissioners. First, it is not always clear who the "owner" is. If the revenue commissioner releases the excess to a claimant who is not the owner, it faces the risk of being sued by the owner. Second, releasing an excess to an owner who is not redeeming the property prejudices other parties with an interest in the property. When an owner does not redeem, other parties having an interest in the property must either redeem the property (but without the benefit of the excess funds to apply to the redemption amount) or risk the elimination of their interests in the property. A party whose interest in the property is prejudiced by the owner's failure to redeem is a likely candidate to object when they learn that the excess has been

released. Accordingly, even if the revenue commissioner releases an excess to the correct owner, it remains subject to potential claims from other parties with an interest in the property.

Mortgagees, in particular, have a significant interest in property sold for taxes. If property is not redeemed, a mortgagee of the property risks losing all interest in the property securing its loan. Not surprisingly, most of the recent lawsuits in this area involve a mortgagee challenging a revenue commissioner's release of an excess payment to an owner who has not redeemed and does not intend to redeem.

Not all issues involve mortgagees, however. A simple factual situation that can lead to confusion exists where a claimant, who was the owner of the property at the time of the tax sale and has not redeemed, transfers his interest in the underlying property (in effect, his right to redeem) to someone after the tax sale, with neither the owner nor the transferee being aware of the tax sale when the transfer occurs. Section 40-10-28 does not address who gets the excess in these circumstances. If the excess is released to the original owner, then the excess will not be available to the transferee to use to redeem the property from the tax sale.

Another simple situation where applying section 40-10-28 is complicated is where the assessed owner at the time of the tax sale is not the actual owner. This is a situation that often arises when the parties to a real estate transfer do not confirm that the property has been correctly reassessed in the tax assessor's office. When the tax sale occurs, the tax assessor's records still reflect that the assessed owner is the previous owner, and not the actual, current owner. Section 40-10-28 does not identify which of these parties is the "owner" entitled to the excess. This very issue is at the center of a case recently filed against the Lee County Commissioner in *Auburn Bank v. Lee County Commission*, CV-2012-900385.00 (June 14, 2012).

The uncertainty concerning section 40-10-28 prompted the Association of County Commissioners of Alabama (“ACCA”) to propose legislation in this past year’s legislative session that it hoped would more clearly establish who is entitled to the excess funds and the circumstances under which a county treasurer may release the excess.<sup>7</sup> The ACCA’s bill passed both legislative bodies, but was vetoed by the governor’s failure to sign it.<sup>8</sup> The ACCA forecasts that this lack of clarity in the law will lead to additional litigation throughout the state and result in conflicting holdings among the various counties.<sup>9</sup>

This article (i) reviews the existing authority concerning the right to an excess payment and (ii) proposes an analysis for a court to apply to decide between competing claims to an excess. Although we believe this article should help county officials in identifying and addressing potential issues, we do not have a simple solution for addressing the risks they face when presented a claim to an excess.<sup>10</sup>

## Existing Authority

Section 40-10-28 is generally understood to establish that the excess is held by the treasurer for the benefit of the “owner.” That section does not, however, define who qualifies as the “owner.” The Alabama Supreme Court, in *First Union Nat. Bank of Florida v. Lee County Commission, et al.*,<sup>11</sup> (“*First Union*”), clarified the definition to some degree when it held that the term “owner” under section 40-10-28 means the “person against whom taxes on the property are assessed.”<sup>12</sup> This ruling came in response to a mortgagee’s challenge in which it asserted that its status as the legal title-holder to the underlying property (based on Alabama being a “title theory” state) meant it should be considered the “owner” under § 40-10-28, and, thus, entitled to the excess.

The supreme court recognized that there was no explicit definition of “owner” in section 40-10-28, but concluded it was clear from considering other sections of the tax sale statute that the legislature intended “owner” under section 40-10-28 to mean the equitable, and not legal, owner of the property.<sup>13</sup> According to the court, section 40-10-1 uses the term “owner” to refer to “the person or entity against whom the taxes are assessed.”<sup>14</sup> The court also noted that section 40-10-120 references both an “owner” and a “mortgagee” in identifying the parties who are entitled to redeem from a tax sale.<sup>15</sup> The supreme court concluded that the legislature’s listing of both “owner” and “mortgagee” in section 40-10-120 precluded an interpretation of the term “owner” under section 40-10-28 that would include a mortgagee.<sup>16</sup>

In addressing the nature of a mortgagee’s legal title, the court stated that legal title does not equal absolute ownership.<sup>17</sup> According to the court, a mortgagee is a “*mere trustee for the*

The court’s statement that a mortgagee would obtain the right to the excess by foreclosing and acquiring the real property at the foreclosure sale implicitly recognizes that the right to the excess transfers with the equitable owner’s rights in the underlying real property.

equitable” owner, “*who is the real owner.*”<sup>18</sup> The court expounded upon the distinction between legal and equitable title, arguably in dicta, through a discussion of foreclosure sales.<sup>19</sup> It stated that when the failure to pay taxes is a breach of the mortgage agreement, the mortgagee could foreclose and purchase the property at the foreclosure sale, thereby merging the equitable and legal titles.<sup>20</sup> At this point, according to the court, the purchaser at the foreclosure sale would become entitled to the excess funds.<sup>21</sup> The court’s statement that a mortgagee would obtain the right to the excess by foreclosing and acquiring the real property at the foreclosure sale implicitly recognizes that the right to the excess transfers with the equitable owner’s rights in the underlying real property.

The issue of who is entitled to the excess bid was also a central issue in the class action lawsuit styled *Raymond C. Winston et al. v. Jefferson County Alabama et al.*, CV-2007-002297.00 (the “Winston Class Action”) filed in June 2007, with the Circuit Court of Jefferson County. The Hon.

Michael G. Graffeo was tasked with, among other things, determining if the Jefferson County Tax Collector was properly paying excess bids and who was entitled to the thousands of unclaimed excess bids resulting from Jefferson County tax sales during the years of 1999 through 2007.<sup>22</sup> In his order granting summary judgment for the plaintiff class, Judge Graffeo defined “owner” as “the owner of the property immediately before the tax sale.”<sup>23</sup> This definition of owner appears to comport with the conclusion in *First Union* that the “owner” is defined as the person or entity against whom the taxes were assessed.<sup>24</sup>

The issue of ownership of an excess payment was also addressed in an August 16, 2011 Alabama Attorney General opinion (“August 2011 Attorney General opinion”) responding to the following question submitted by the Walker County Revenue Commissioner: “[w]here the original owner of property following a tax sale has conveyed his right, title, and interest in and to the property, could that particular person demand from the county treasurer excess funds received from the tax sale?”<sup>25</sup> The attorney general concluded that the excess should not be paid to the original owner: “[t]he excess funds arising from a tax sale should not be paid to the original owner of the property sold for taxes when the original owner has conveyed all rights to the property to another.”<sup>26</sup> The attorney general’s answer and reasoning are instructive even if the opinion does not establish legal precedent.<sup>27</sup>

The attorney general recognized that its conclusion may seem inconsistent with its opinion letter dated July 26, 1983, in which it stated that “[i]t is apparent from reading § 40-10-28 that the excess arising from the sale of real estate is properly payable to the former owner, *i.e.*, the person who initially failed to pay his taxes on the property.”<sup>28</sup> It distinguished the earlier opinion letter on the basis that the earlier circumstances did not involve the

former owner conveying his rights in the subject property to another before making a claim to the excess payment.<sup>29</sup>

The August 2011 Attorney General opinion focused on the language of the warranty deed in determining whether the original owner transferred the right to the excess payment. The deed provided that the transferor “grants, bargains, sells, and conveys” to the transferee the subject property “together with all and singular the tenements, hereditaments, rights, privileges and appurtenances thereto belonging or in anywise appertaining.”<sup>30</sup> Based on this conveyance language, the attorney general concluded that the owner transferred all rights in the real property, including the right to the excess: “It appears from the language of the warranty deed that the original owner has given up all rights to the property, including the right to receive the excess arising from the prior tax sale.”<sup>31</sup>

Both *First Union* and the August 2011 Attorney General opinion support the conclusion that the right to the excess transfers with the equitable owner’s real property interest. Implicit in this conclusion is that the right to the excess is in the nature of a real property interest. If the right to the excess instead were a personal property right, the right would not automatically transfer with the real property interest, and the Alabama Supreme Court’s discussion in *First Union* concerning the effect of a foreclosure on the right to the excess would not have made sense. Likewise, if the right to the excess was a personal property right, the attorney general would not have been able to conclude, solely on the basis of the warranty deed, that the original owner gave up his right to the excess. Neither the *First Union* Court nor the attorney general, however, explains why the right to an excess transfers with the conveyance of the original owner’s interest in the real property. Without understanding the reason the right transfers, it will be difficult to apply this principle when confronted with the variety of factual scenarios that do not fit neatly within the circumstances previously contemplated.

## The Right to an Excess as an Incident of Real Property Ownership

The concept of property ownership recognizes that there are certain “incidents of ownership” relating to the property. “Incidents of ownership” are generally considered to be separate from the actual property itself, but, nonetheless, deemed by law to accompany the ownership of that property. Well-known “incidents of ownership,” for both real and personal property, include the “right to its possession,

Two other rights that are well recognized as “running with the land” are the right to receive rent arising from the real property and the right to crops growing on the real property.

the right to its use, and the right to its enjoyment.”<sup>32</sup> Incidental ownership rights of real property are commonly said to be “running with the land.”<sup>33</sup> Two other rights that are well recognized as “running with the land” are the right to receive rent arising from the real property and the right to crops growing on the real property.

Under Alabama law, “[o]wnership in fee simple includes the right to the income, rents, and profits from the land.”<sup>34</sup> This right “runs with the land” absent an unambiguous reservation of the right in the conveying instrument.<sup>35</sup> The bankruptcy court in *In re: Davis* recognized this principle in rejecting a debtor’s claim that the rents were personal property exempted from the bankruptcy estate under section 6-10-6 of

the *Alabama Code*.<sup>36</sup> The bankruptcy court held that under Alabama law, rents are not personal property separate from the real estate but are “incidental to the ownership of real estate and pass with the title to the real estate.”<sup>37</sup>

Real property ownership includes the right to the crops growing on the land.<sup>38</sup> Absent the reservation of the right to the crops, the sale of the lands by deed “carries the right to the crops then growing on the lands.”<sup>39</sup> Thus, even though growing crops are on land prior to a conveyance, because the crops are an incident of the real property ownership, the seller of the land does not retain any ownership in the crops unless, by written agreement, the crops are excepted from the conveyance to the purchaser.

Drawing from *First Union*, the August 2011 Attorney General opinion and the body of law relating to incidents of ownership, we submit that the right to an excess payment is an incident to real property ownership.<sup>40</sup> When the right to an excess is understood as an incident of real property ownership, an original owner’s conveyance of its interest in the underlying real property would, as a general rule when the property remains encumbered by the tax sale, transfer the owner’s right to the excess. Under these circumstances where the transferee is receiving property subject to a tax purchaser’s interest, there is an implicit expectation that the excess funds would be available to the transferee to use toward a redemption.

Exceptions to this general rule would include circumstances where the conveying instrument reserves the right to the excess or where it is clear that neither party to the conveyance would have any expectation that the conveyance intended to convey the right to the excess. An example of the latter circumstance is where the original owner, having already redeemed the property from the tax sale, but without recovering the excess payment, then conveys the property. The transferee would not expect to receive the former owner’s right to the excess since the excess is not needed to redeem the property from the sale. Another example is where a former owner chooses not to redeem, and instead issues a quitclaim deed to the tax sale purchaser to avoid being named in the tax sale purchaser’s title-clearing lawsuit. Unless the tax purchaser provided some consideration to the original owner for releasing the claim to the excess, the tax purchaser, in receiving the quitclaim, would not expect to receive the right to recover the excess that it paid to purchase the property.

In proposing that the right to the excess is an incident of real property ownership, we realize that there are differences between the right to an excess and the rights to rents and crops. With respect to rents in particular, the Alabama Supreme Court has held that a purchaser is only entitled to rents that accrue after the purchaser becomes the owner.<sup>41</sup> In contrast, the application of the incident of ownership principle to the right to an excess that is supported by *First Union* and the attorney general opinion provides that a transferee is entitled to the excess regardless of whether the excess existed before or after the transfer. Notwithstanding any differences, however, the similarities are sufficient to conclude that the right to an excess is an incident of real property ownership. The rights to rent, crops and excess funds are all rights associated with real property but are not the real property itself. Further, Alabama legal authority has recognized that each of these rights transfers with the real property.

When this principle is applied to competing claims to an excess, the analysis of who is entitled to the excess is initially reduced to determining if and when there has been a redemption and tracing the original owner's equitable interest in the underlying real property to the holder of that interest at the time the excess is claimed. Thus, even if there are multiple transfers of the equitable title, this approach provides a workable legal framework to determine the proper recipient of the excess funds.

## Consideration of Equitable Principles

We do not maintain that the party identified as the current "owner" should be the party who receives the excess in every scenario. Where there are competing claims to an excess, a court should first determine who has the real property title constituting "ownership" under section 40-10-28. Then, if applying a strict legal analysis would lead to an unjust result, it may be appropriate for a court to consider whether a competing claimant, who is not an "owner" under section 40-10-28, should, based on equitable principles, be entitled to the right to the excess.<sup>42</sup> Circuit courts, having equitable jurisdiction pursuant to *Alabama Code* § 12-11-31, are authorized to mold their decree "so as to adjust the equities of all the parties and to meet the obvious necessities of each situation."<sup>43</sup> Instructive examples of the application of equity to prevent an unjust result are found in the cases of *Ex parte Chrysler First Financial Services Corp.*<sup>44</sup> and *Beasley v. Mellon Financial Services Corp.*<sup>45</sup>

In *Chrysler First*, the Alabama Supreme Court set aside a valid foreclosure sale to allow the home mortgagee to recover insurance proceeds paid into court by the insurer of the underlying home.<sup>46</sup> Five days before the foreclosure sale, a fire had destroyed the home, a fact unknown to the mortgagee when it bid the entire indebtedness secured by its mortgage to purchase the home at the foreclosure

sale.<sup>47</sup> The trial court ruled that the mortgagee, by foreclosing after the fire, elected the foreclosure as its debt recovery remedy over its right to recover the insurance proceeds.<sup>48</sup> The Alabama Supreme Court reversed on the basis that, though the mortgagee had been diligent with respect to knowing the circumstances relating to the property, it was unaware of the loss at the time of the foreclosure sale, and to award the owners the insurance proceeds would be "neither equitable or just."<sup>49</sup> The supreme court concluded that "equity require[d] that the foreclosure sale be set aside and the parties returned to their status quo" prior to the fire to allow the mortgagee "to make an informed election between the two remedies available to it."<sup>50</sup>

A constructive trust is an equitable remedy that may be imposed "on a property in favor of one beneficially entitled thereto against the person who in any way, against the rules of equity and good conscience, has either obtained or holds and enjoys legal title to property that in justice that person ought not to hold and enjoy."<sup>51</sup> In *Beasley*, a borrower obtained a construction loan to build a home, but the home was somehow mistakenly built on a nearby parcel instead of the one mortgaged to the construction lender.<sup>52</sup> The borrower defaulted, which led to the construction lender foreclosing on the mortgaged property, and then learning that the home had been constructed on another parcel.<sup>53</sup> The construction lender filed suit against the borrower and the mortgage holder on the parcel where the home was built, alleging that there was a mutual mistake in the description of the parcels and seeking relief on the theories of reformation and constructive trust.<sup>54</sup> The trial court ruled in favor of the construction lender on both theories, in large part based on the finding that the mortgagee on the parcel where the home was built, which had paid nothing for the home, would be unjustly enriched by retaining title to that parcel since the construction lender had paid for the home.<sup>55</sup> The Alabama Supreme Court agreed that the imposition of the constructive trust was necessary to prevent the mortgagee on the parcel where the home was built from being unjustly enriched at the construction lender's expense.<sup>56</sup>

We have identified two equitable factors from our experience as being relevant to determining who, among competing claimants, is entitled to an excess. The first factor concerns whether the property has been redeemed, and, if it has been redeemed, who paid the redemption price. Alabama law clearly favors the right to redeem so that the title to real property involuntarily sold can be restored to the original owner.<sup>57</sup> If the real property that was sold for taxes has not been redeemed, then it remains likely someone having the right to redeem will want to do so. The party who desires to redeem the property, and thus remove the encumbrance caused by the tax sale, has a compelling position that the right to the excess funds is a right tied to the redemption of the property.

There may be circumstances where the one bearing the burden of redeeming the property or restoring the title is not the same as the one who holds the title of the original owner. For instance, a property may be sold for taxes, and, thereafter, the original owner conveys his interest to a new owner. The new owner insured his title, but the

## Alabama law clearly favors the right to redeem so that the title to real property involuntarily sold can be restored to the original owner.

title company failed to realize the property had previously been sold for taxes. The title company accepts its responsibility to its insured to redeem the property from the tax sale purchaser, and pays such purchaser an amount that includes the excess. In this situation, the party who incurred the expense of restoring title is not the current owner. Applying equitable principles allows a court to consider the merits of the title company's claim to the excess even though the title company is not the owner.

The other equitable factor is the consideration of whether releasing the excess will result in a windfall to a claimant and a loss to someone who may have a competing legal or equitable claim. Clearly, the title company in the previous example would argue that the owner's recovery of the excess would be a windfall to the owner since the owner's title was restored and the owner made whole.

This factor can also be understood by considering a strict application of *First Union's* definition of "owner" as "the person against whom taxes on the property was assessed." A strict application of that definition would result in a windfall to a claimant who was the assessed owner at the time of the tax sale, but not the actual owner. Often the tax assessor's records are not corrected after a real estate transfer by the parties involved in the transfer. If the tax assessor's records do not reflect the new owner as the assessed owner, the tax notices are sent to the old owner, who may ignore the notices. The new owner, without having received a tax notice, or any of the subsequent tax sale notices, fails to pay the taxes. As a result, the property is sold for taxes. In this situation, if equity is not considered, a literal application of the *First Union* definition would result in a windfall to the previous owner. The excess would be released to a person or entity who retained no interest in the property, and the actual, equitable owner would be left with the property encumbered by the tax sale without use of the excess funds to redeem the property. Thus, the assessed owner's recovery would constitute a windfall to that party. By applying equity, a court would consider whether the excess should be subject to a constructive trust in favor of the actual owner.<sup>58</sup>

## Conclusion

The continuous litigation surrounding the right to the excess emphasizes the need for a defined, understandable analysis to resolve these disputes. Treating the right to an excess as incident to real property ownership is consistent with the established law relevant to the issue and provides a framework that can be consistently applied to the various factual scenarios that concern the ownership status of real property. The analysis we recommend involves (i) reviewing title work to trace the ownership of the property from the time of the tax sale until the claim is made, and (ii) determining whether the property has been redeemed, and if it has, when and who redeemed the property. Reviewing this information will identify

By giving notice to interested parties and applying equity before a decision is made, the court will minimize, if not eliminate, the possibility that the revenue commissioner will receive a demand for the excess in the future.

the party currently holding the original owner's equitable interest and other parties who are likely to claim that they will be prejudiced by the release of an excess payment.

To avoid challenges from parties who fit the category of "likely to challenge the release of an excess," such parties should be given notice and an opportunity to assert a claim before a decision is made. Notwithstanding the theory suggested by this article that the right to the excess travels with the original owner's rights in the property, it would be prudent to notify an original owner who has transferred his interest.

In many instances, when all interested parties are notified and the equities of the situation are considered, the parties will be able to agree to the disposition of the excess funds. When the parties are unable to agree, a court should consider the equitable factors set forth above, as well as other equitable factors that may be raised, to reach its decision. By giving notice to interested parties

and applying equity before a decision is made, the court will minimize, if not eliminate, the possibility of the revenue commissioner receiving a demand for the excess in the future.<sup>59</sup> | AL

*The authors appreciate the assistance and contributions of Laura Murphy, third-year law student at the University of Alabama.*

## Endnotes

1. <http://www.alabamacounties.org/legislation/acca-legislation/>
2. *Ala. Code* § 40-10-1.
3. *Ala. Code* §§ 40-10-29, and 40-10-74.
4. *Ala. Code* §§ 40-10-82, -83, -120, and -122.
5. *Ala. Code* §§ 40-10-83 and -122 limit the recovery of interest on the excess payment to the portion of the excess that is less than or equal to 15 percent of the market value of the property.
6. Depending on how a particular county's revenue collection duties are organized, a claim for an excess will be reviewed by the county revenue commissioner, the tax collector or the treasurer. For simplicity, we will refer to these local government offices collectively as the "revenue commissioner."
7. *Excess Payments from Tax Sale, SB 177 by Sen. Ward, HB 177 by Rep. Clouse*, ALABAMA COUNTY COMMISSIONS OF ALABAMA (2012), <http://www.alabamacounties.org/wp-content/uploads/downloads/2012/03/Excess-Payments-Handout-for-web.pdf>.
8. *See Legislative Detail: AL House Bill 177—Regular Session 2012*, LEGISCAN, available at <http://legiscan.com/gaits/view/390943>.
9. *Excess Payments from Tax Sale, SB 177 by Sen. Ward, HB 177 by Rep. Clouse*, ALABAMA COUNTY COMMISSIONS OF ALABAMA (2012), <http://www.alabamacounties.org/wp-content/uploads/downloads/2012/03/Excess-Payments-Handout-for-web.pdf>.
10. We are not suggesting that revenue commissioners should resolve disputes or attempt to consider the equitable factors discussed in this article. We presume that county officials want, and understandably so, to have simple, clear guidelines for

- responding to claims for excess payments so that they can make decisions without subjecting themselves to the risk of future challenges. Achieving those circumstances will likely require legislative changes that are not addressed in this article. Until such guidance is provided, the safest option for revenue commissioners in those less-than-clear situations would be to interplead the funds so a court can determine who should receive the excess.
11. 75 So. 3d 105 (Ala. 2011).
  12. Although the Alabama Supreme Court defined the “owner” as the “person against whom taxes on the property are assessed,” in the rest of its lengthy opinion, it almost exclusively speaks of the owner as the holder of the equitable title, rather than the assessed owner. Thus, we believe the supreme court assumed that the person against whom the taxes was assessed would also be the holder of the equitable title in the property, which is not always the case. Given that the court was not faced with a situation where the assessed owner and actual owner were different, we would caution revenue commissioners from relying on a strict application of the assessed owner definition.
  13. *First Union*, 75 So. 3d at 112.
  14. *Id.* This quote concerning § 40-10-1 is not a direct quote from § 40-10-1, but rather the supreme court’s conclusion. The relevant portion of § 40-10-1 provides as follows:
 

The probate court of each county may order the sale of lands therein for the payment of taxes assessed on the lands, or against the owners of the lands, when the tax collector shall report to the court that he or she or the holder or the holder of a tax lien . . . was unable to collect the taxes assessed against the land . . .
  15. *Id.*
  16. *Id.*
  17. *Id.* at 113.
  18. *Id.* (quoting, with emphasis added, *Loventhal v. Home Ins. Co.*, 20 So. 419, 420 (Ala. 1896)).
  19. *Id.* at 116.
  20. *Id.*
  21. *Id.*
  22. As of October 31, 2008, the Winston Class Action consisted of 1,765 parcels.
  23. See *ORDER: CONFIRMING RULINGS MADE IN OPEN COURT; ON PENDING MOTIONS; and, ON MOTIONS FOR SUMMARY JUDGMENT* entered in the Winston Class Action on August 28, 2008 and reaffirmed in the amended order entered October 27, 2008.
  24. In March 2011, Judge Graffeo appointed William S. Hereford as a special master in the Winston Class Action in order to, among other things, resolve claims to over 850 unclaimed excess bids that remain a part of that case.
  25. Op. Att’y Gen. of AL No. 2011-087 (2011).
  26. *Id.* at p. 3.
  27. *Farmer v. Hypo Holdings*, 675 So.2d 387, 390-91 (Ala. 1996) (Alabama Attorney General opinions are advisory and do not have the effect of law).
  28. *Id.*
  29. *Id.*
  30. *Id.*
  31. *Id.*
  32. 73 C.J.S. Property § 44 (2012).
  33. *Budget Inn of Daphne, Inc. v. City of Daphne*, 789 So. 2d 154, 159 (Ala. 2000) (“Nonpossessory property rights such as covenants and easements are said to run with the land, becoming an incident of ownership, and they are generally not personal.”)
  34. *McGallagher v. Estate of DeGeer*, 934 So. 2d 391, 401 (Ala. Civ. App. 2005).
  35. *Id.*
  36. No. 07-11795-MAM-1, 2007 WL 3231782 \*1 (Bankr. S.D. Ala. 2007).
  37. *Id.*
  38. *Cryar v. Ogle*, 99 So. 157 (Ala. Civ. App. 1923).
  39. *Id.*
  40. The idea that the right to an excess is an incident of the real property ownership was suggested to the authors by attorney William Hairston, III.
  41. *Zeidman v. Homestead Sav. & Mortgage Co.*, 129 So. 281, 282 (Ala. 1930).
  42. Penny A. Davis, TILLEY’S ALABAMA EQUITY § 1.1 (2002) (equitable remedies “were developed to further the ends of justice”).
  43. *Beasley v. Mellon Financial Services Corp.*, 569 So. 2d 389, 393 (Ala. 1990).
  44. 608 So. 2d 734 (Ala. 1992).
  45. 569 So. 2d 389, 394 (Ala. 1990).
  46. 608 So. 2d 734 (Ala. 1992).
  47. *Id.* at 735.
  48. *Id.*
  49. *Id.* at 738.
  50. *Id.*
  51. *Beasley v. Mellon Financial Services Corp.*, 569 So. 2d 389, 394-95 (Ala. 1990).
  52. *Id.* at 391.
  53. *Id.*
  54. *Id.*
  55. *Id.* at 392.
  56. *Id.* at 395.
  57. By jealously protecting redemption statutes in general, Alabama legal opinions demonstrate a public policy favoring the restoration of title to owners whose properties are involuntarily sold. See *Johnson v. Maness*, 1 So. 2d 655, 657 (Ala. 1941) (stating the “law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption . . . is characterized by a jealous and salutary policy”); *Williams v. Pruitt*, 2 So. 3d 862, 865 (Ala. Civ. App. 2008) (restating the court’s policy that “redemption statutes will be liberally construed in favor of redemption . . . [and] the construction in any case of doubt or ambiguity should be in favor of the right to redeem”); *State Dept. of Revenue v. Price-Williams*, 594 So. 2d 48, 52-53 (Ala. 1992) (recognizing that the judicially created redemption method arising from *Ala. Code* § 40-10-83 has been expanded over the years to strengthen the right to redeem from a tax sale).
  58. Our suggestion to consider equitable principles is not intended as a comment concerning whether a revenue commissioner has any responsibility to an actual owner after releasing an excess to the “assessed” owner. The revenue commissioner’s responsibility to the actual owner will involve a number of factors not considered by this article, such as the commissioner’s knowledge, or lack thereof, concerning the actual owner or any dispute involving ownership, and whether the revenue commissioner could rely on a strict application of the *First Union* definition of “owner.”
  59. An initial reaction to the approach suggested in this article is that it takes into account too many factors, thus doing little to simplify the determination of who is entitled to an excess payment. However, our experience in the Winston Class Action has been that this approach significantly simplifies and expedites the process of identifying the proper claimant. By knowing what information is relevant, the information can be gathered rather quickly. When we have that information—the title work and knowledge relating to any redemption—we are able to quickly identify and limit the scope of parties who may have a legitimate claim to the excess funds.

## The holidays are quickly approaching

once again and folks are making plans to spend time with family and friends. While this time of the year can be joyous and exciting, it is also a time of challenge and emotional distress for many of us. The holidays are often accompanied by sadness, grief and despair as memories return of loved ones lost. Others struggle with monetary issues related to our slowed economy and are unable to provide for their families. We are aware that many attorneys are experiencing a significant downturn in work and income with clients unable to pay. Others have their own personal struggles and are trying valiantly to deal with them on their own.

We have recently learned of the suicide of two of our attorneys in the last few weeks. This has shocked and saddened all of us, and caused us to redouble our efforts to remind the legal community that we are here to assist.

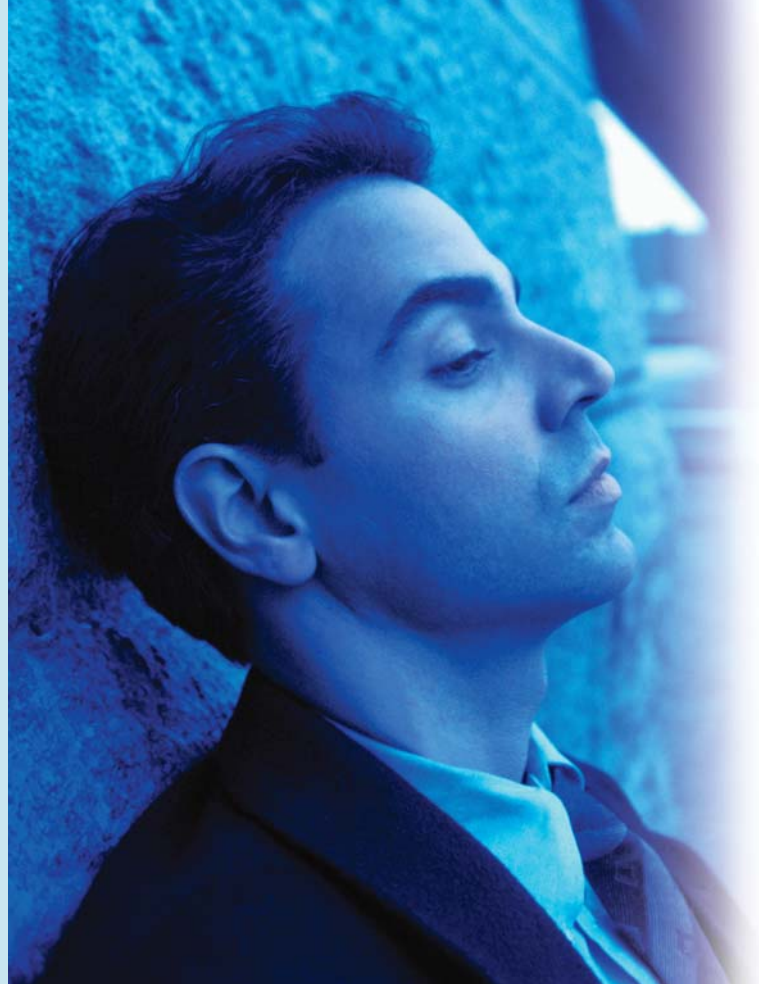
It is important to acknowledge that each year here in Alabama we still have lawyers and judges who die needlessly from an addiction or other mental health-related disorder. These illnesses are treatable and hundreds of Alabama lawyers who have received assistance through the Alabama Lawyer Assistance Program are now active members of their families and successfully practicing law. The old adage that "suicide is a permanent solution to a temporary problem" is certainly true, but oftentimes an individual in the throes of true clinical depression, addiction or some other mental health issue cannot see this truth. It is imperative that we be willing to acknowledge these issues when they arise and reach out to help. I once heard it said that, "A real friend will occasionally risk your wrath to tell you what you need to hear and not what you want to hear!"

There remains a strong stigma associated with mental health issues that sometimes tragically prevents people from seeking the help they desperately need. This stigma also often prevents those who are aware of a family member or colleague who is suffering from exposing the problem and assisting. The truth of the matter is that all of us, to some extent, are emotionally ill as well as frequently wrong! We all fall short of perfect mental health and could all benefit from counseling, therapy or some other form of mental health assistance. It is actually a sign of mental health to acknowledge the need for assistance and seek it!

For all of us life is a series of problems, difficulties, challenges and, sometimes, tragedies. These are painful, sometimes as intense as the very worst kind of physical pain. We want all of our attorneys and judges, as well as their families and colleagues, to know that we are here to assist. The path to discovering true courage and wisdom is through facing our difficulties and walking through them, and this often requires assistance. When we try to avoid our problems through drugs or alcohol, gambling, spending, sex, or other means we cannot help but become more mentally ill. Our problems only compound, and this sometimes results in the ultimate method of avoidance: suicide.

The Alabama Lawyer Assistance Program is a confidential program that provides consultation, intervention, referral for assessment, peer support, monitoring, and many other services. We work to assist lawyers and judges who may be struggling with depression, anxiety, alcohol or substance abuse or addiction, or other mental health issues. If you or someone you care about is struggling please call ALAP at 334-517-2244 for confidential assistance or visit [www.alabar.org](http://www.alabar.org) for additional information.

—Robert B. Thornhill, MS, LPC, CAC  
Alabama Lawyer Assistance Program Director



# Depression

*By an Alabama lawyer*

I hope this description of my trip through depression will help someone else recognize he or she has a problem and seek help before it reaches a crisis.

In school, I succeeded without trying, graduating in the top 10 percent of my high school class and, after a sojourn in the "real" world where I received promotion after promotion, with a 3.9 under-graduate GPA and in the top 10 percent of my law school class. In law school, I also made it to the final round of its voluntary moot court competition and was elected head of the moot court board. At the large law firm in a mid-size Southern city with which I started practicing, I worked on large complicated matters, was known for a keen insight on legal issues and for meeting deadlines, became a partner and was elected to its executive committee. I lived in an expensive house, owned a beach house and had a wonderful daughter.

After 20 years of practice, though, I could no longer focus on work and began missing deadlines. I knew something was wrong but had no idea what it was. I even thought I might have a brain tumor. Luckily, one of my partners suggested I see a psychologist.

A personality profile test revealed that I was depressed, anxious, not thinking rationally and suffering from several other psychological impairments (all brought on by the depression). The clinching symptom was suicidal ideation—knowing how I would commit suicide if I was going to do it. In fact, although I was



never tempted to attempt suicide, I looked for the opportunity every day. Even though the personality profile indicated I was not open to psychoanalysis, I knew I had to have help and gave it a chance. I also started depression medication.

Within two months I felt an emotion for the first time in at least two years, and as perverse as it may sound, I was happy a few weeks later when I had a slight downturn in mood because it made me realize that I was feeling enough better to have a downturn.

However, all still was not well. The anxiety caused me not to be able to sleep or eat—I had lost 15 pounds in six weeks. My initial medication contributed to those symptoms. Because I needed more medication, my psychiatrist added another one that had side effects of drowsiness and increased appetite. My psychiatrist also recognized that, in addition to depression and anxiety, I had attention deficit disorder and began medicating me for it.

During therapy, I recognized that my professional life was contributing to my depression and anxiety so I told my partners about my condition and turned in my resignation. To protect the firm, I suggested that it begin an immediate review of my files and that a partner or partners be assigned to monitor my work until I left. The firm agreed and we began the process of a friendly separation (for which I will forever be grateful to my former partners). During that process, I introduced my partners to each of my clients so that the clients would have a smooth transition regardless of what happened with my future as a lawyer.

Within three or four months, I could tell that the medicine and psychoanalysis were having a long-term effect but I was far from “cured.” Further improvement required “tinkering” with my medication numerous times. Each “tinkering” ran the risk that I would slide backward instead of moving forward. Throughout this entire period, I was receiving psychotherapeutic counseling—weekly at first, then bi-weekly, then monthly and finally every six weeks. Even today, I return every six months for a “check-up.”

Finally, about two years after I started treatment, I had recovered to the point of starting to reduce my medication—but even then; I had not reached maximum recovery. One evening at about the three-year point, I sat down to work on a brief

and did not get up until the brief was finished, six or eight hours later—I could finally concentrate the way I had early in my career. However, I also had realized that I needed periodic breaks to protect my emotional and mental states.

Finally, six years into my treatment, I reached the best emotional state I had ever experienced in my life. I am happier than I have ever been, I again enjoy practicing law and am again good at it, I handle people better than I ever have, I have more business than I ever would have had if I had stayed with the large firm with which I practiced for over 20 years, and most of my former clients are still or again my clients.

What did I learn as a result of this process?

1. Without realizing it, I had been clinically depressed at least four times in my life—once as a teenager, once when my first marriage disintegrated, once when my father died and the extended period just before I sought treatment.
2. If you know how you would commit suicide, you are severely depressed and need treatment even if you are never tempted to commit suicide.
3. Depression and anxiety often go hand in hand, and there are medications that treat them both at the same time. Frequent headaches at work or while thinking about work, your scalp feeling like it is crawling around on your head, knots in your stomach or mental paralysis are among the symptoms of anxiety.
4. Depression and addictions, such as alcohol or drug addiction, frequently go hand in hand and many people with depression end up in jail. I was lucky enough not to have those problems.
5. Treatment works—if you are depressed, you will likely need both medication and psychotherapy. Many people with single-episode depression can discontinue medication once the depressive episode is over but people with multiple episodes of depression will likely have to continue medication all their lives.
6. Although treatment works, it takes a long time—don’t get discouraged.
7. Once you are comfortable doing so, don’t be afraid to talk about your depression (at the same time, I don’t advertise that I suffered from depression). If you

convey that you are comfortable with yourself despite a depressive history, you have nothing to fear. Others will likely be impressed with your recovery, you will likely make some others realize that they do not have to be ashamed of a depressive history and you may make someone else recognize he or she needs treatment. You also will be surprised at how many others have suffered from depression.

8. To recover, I had to become comfortable with myself. For me, that meant I had to learn what was important to me, not what I thought was necessary to impress others. I reached that point when I realized that I could be satisfied living in the worst house I had ever lived in as long as I was comfortable with myself. To get there, I had to give up a law practice that most lawyers would envy; leave a marriage to a wonderful woman who supported me throughout my depression but who is not the right person for me to be married to; face my partners, friends and family and tell them I had a depression problem; learn to take a couple of 10- to 15-minute breaks a day from work; realize that it is better to hire someone else to do many things I could but should not do, such as work on our computers, and to give up control of my mail, desk, to some extent my calendar and some of the work I bring in (giving up control probably was the hardest thing for me to do) to other people I work with; and surround myself with co-workers whom I enjoy being with.

My life is not, and will not be, perfect all the time, but I have learned to accept myself. That allows me to successfully deal with many problems that at one time could have sent me spiraling downward. To get there, it took three years of therapy and six years of tinkering with my medication—but it was worth it. If I had started earlier, it would have taken less time. To stay where I am will take continued medication and the continual application of the coping mechanisms I learned. However, without the major depression I suffered, I never would have felt as good as I now feel. I hope this description of my experiences will help someone else avoid experiencing the depth of depression I experienced. | [AL](#)



# Are You Ready for Private Judging?

By Wendy B. Crew, Judge R.A. "Sonny" Ferguson, Jr. and Dean J. Noah Funderburg

On April 30, 2012, Governor Robert Bentley signed into law

an Act that provides for "private judges" to be utilized in certain non-jury cases in Alabama. The Act became effective July 1, 2012, and is codified at *Ala. Code* §12-17-350 *et seq.* (1975, as amended). Although cases have already been set before private judges, a brief summary of the history of this legislation will promote broader understanding of the application and uses of private judges.

**New, novel option for Alabama**

Last year, a task force created by then current Chief Justice Sue Bell Cobb explored ways to relieve crowded dockets and reduce court costs. The task force seriously considered two options, one familiar and one quite new. The familiar option was arbitration. The novel option was the use of private judges. The private judge option provided the simplest approach for quickly enacting

legislation because it had the added benefit of relieving some of the stress on the state's judicial system. The choice of a private judge is not to replace publicly elected or appointed judges, but, rather, is a vehicle to help enhance our judicial system and provide another option to parties in resolving their legal issues.

The task force, consisting of a trial lawyer, an academician and three judges, sought out specific ways to improve judicial administration in domestic relations cases. Because of the greater certainty about the full application of all laws and procedures, as well as the retention of appeal rights, this task force viewed private judging as a better option than arbitration.

## Embraced by other states

Several states have statutes that provide for private judges. California, Indiana, Colorado, Texas, and Ohio have all implemented some form of this system. As early as the 1970s, the initial concept for a private judge arose from a creative reading of California's referee statute that allowed judges, with the consent of the parties, to refer "any or all issues" to a referee for determination. California has a constitutional provision allowing the appointment of "temporary judges." Initially, the use of a private judge was seen as a limited and seldom-used process. Over time, especially with the rise of other forms of alternative dispute resolution, private judging in California flourished. Because of the numerous advantages it offers, the concept was then embraced by other states.

The method of selecting private judges varies slightly among states, and the type of cases available to be heard by private judges varies as well. Domestic relations cases are generally viewed as one of the best suited for use of private judges, but a variety of other civil, non-jury cases have also proven to be good candidates for private judge resolution.

## Saves time and money

The task force's work produced a bill which sailed through the legislative process and passed on April 24, 2012. The Act became effective July 1, 2012.

Have you ever wondered how Hollywood stars quickly obtain their divorces? They often make use of the private judging system, and, indeed, the concept was originally viewed as a way for the wealthy to buy justice. However, a deeper look at the system reveals a saving of money for all. Parties who have very complicated issues, particularly financial issues, may take six or eight days to try their case. If there are only 10 other cases set on the docket on those days, the complex case will bump cases several months into the future, thus often preventing parents from obtaining child support or other relief. If the large case is in the private judging system, those other cases have a much better opportunity to be heard or resolved. Additionally, when a trial has a specified date to be heard, the lawyers do not have to continually charge their clients to "re-prepare," and the clients will not have to live the nightmare of having the case set for trial and then cancelled, knowing that the same may happen again in three months.

## Similar to traditional system

As the name implies, private judges are, by statute, hired by the parties to preside over their case. One advantage of private judges

is that the parties are able to choose a judge with expertise in the area that is relevant to their particular case. A private judge can be appointed upon the order of the presiding judge of the circuit in which a case is initially filed or is currently pending. This option is available now to cases which were originally filed under the traditional system, so long as both parties agree on the change and on the selection of the private judge. After the appointment, the private judge assumes the position of the judge over all issues of the case. Alabama rules of procedure, evidence and appeal are applied as in the traditional system. The private judge's orders are binding and enforceable, just like those of any circuit or district judge's orders, and are appealable to the court of civil appeals and Alabama Supreme Court.

The state will maintain a roster of retired or former judges, listing their qualifications and experience. Those wishing to serve as private judges are required to meet the statutory experience criteria, pay a fee and register on a yearly basis. The parties and their attorneys will agree on a particular judge and then submit that name for the appointment. The private judge is compensated by a separate employment agreement, much like a mediator or arbitrator, and he or she will set his or her own hourly rate. Once the appointment is made, the private judge will manage the case. This should result in saving time and money—not only for those involved in the private judge case, but also those on the traditional docket.

## More efficient process

The process becomes efficient because the private judge can concentrate his energies and efforts solely on the case before him without the distractions and interruptions presented daily to traditional judges. The hearings and trials can be scheduled at the convenience of the litigants, witnesses and judges, because the private judge's schedule will not be at the mercy of huge dockets. Unused courtrooms may be employed for private judge cases, provided permission is granted by the presiding judge. However, alternatives such as large conference rooms and law school moot court rooms may serve as well.

The Alabama statute applies to non-jury cases founded exclusively on domestic relations, contract, tort or a combination of contract and tort. The State of Alabama cannot be a party to any private judge case. There is a \$100 filing fee paid either to the clerk of the court in which the case is filed and where the request for a private judge is made, or paid at the time of the original filing if the parties request a private judge. The sheriff and clerk of the court shall perform the same duties relating to their offices as are required for the circuit court of the county in which the case is filed. This does not mean that security will be provided by sheriff's deputies for private judge cases held outside the courthouse. Rather, when private judge cases are held in the courthouse, standard courthouse security will be provided.

## Everyone wins

Private judging may not be the answer for every non-jury case, but private judging is designed to save costs and quickly resolve issues. Private judging is a win/win proposition for the parties and the state judicial system. | [AL](#)



# The Limited Scope of Contributory Negligence in AEMLD-Crashworthiness Cases

By J. Greg Allen, J. Cole Portis, Benjamin E. Baker, Dana G. Taunton, Stephanie S. Monplaisir, David G. Wirtes, Toby D. Brown, George M. Dent, III, David H. Marsh, Bruce McKee, Larry W. Morris, and Clay Hornsby



## In the July 2012 issue of *The Alabama Lawyer*,

an advocacy piece was written by several well-respected members of the Alabama State Bar who primarily defend automobile manufacturers in product liability lawsuits. Their article was entitled *Crashworthiness-Based Product Liability and Contributory Negligence in the Use of the Product*.<sup>1</sup> The sole premise of the article was to contend that contributory negligence, no matter the factual situation, is an absolute defense in any AEMLD case. Hence, they proclaimed that “there should never be a difference between available defenses in what some may deem a ‘traditional’ AEMLD case as opposed to a ‘crashworthiness’ case.”<sup>2</sup> In making this argument, though, the authors ignored Alabama precedent

holding that contributory negligence is different in a crashworthiness-based claim. Alabama law is clear. In a crashworthiness case, contributory negligence is not a defense unless the plaintiff negligently uses the product component (usually a safety device such as a seat belt) that plaintiff has alleged caused or enhanced his *injury*. Contributory negligence is not a defense when the plaintiff negligently causes the *accident*.<sup>3</sup> A crashworthiness case, which is also referred to as the “second collision doctrine” or “enhanced injury doctrine,” focuses on whether the alleged defect in a motorized vehicle caused or enhanced the injury, not whether a defect caused the accident.<sup>4</sup> Any other reading of the case law contravenes the very purpose of the AEMLD and crashworthiness doctrine—to protect consumers from unreasonable risk of harm caused by manufacturers placing defective products on the market.

The dispute revolves around the difference between negligence as to the product as a whole (e.g., driving the car) versus negligence as to the defective component or safety feature alleged to have caused or enhanced injury (e.g., miswearing a seat belt). Only the latter is appropriate in crashworthiness—the seat belt should not fail whether the driver, a third party or unavoidable circumstances caused the collision.

The Supreme Court of Alabama created the Alabama Extended Manufacturer's Liability Doctrine (AEMLD) in 1976 when it handed down the simultaneous decisions of *Casrell v. Altec Industries, Inc.*, and *Atkins v. American Motors Corp.*<sup>5</sup> The AEMLD was not a pure strict liability doctrine. Instead, the court adopted a fault-based liability doctrine.<sup>6</sup> “The fault of the manufacturer, or retailer, is that he has conducted himself unreasonably in placing a product on the market which will cause harm when used according to its intended purpose.”<sup>7</sup> The manufacturer's liability was subject to certain limited affirmative defenses, i.e., contributory negligence, assumption of the risk, misuse of the product and lack of causal relation.<sup>8</sup>

In 1985, the Supreme Court of Alabama adopted the “crashworthiness doctrine” with its landmark decision in *General Motors Corporation v. Edwards*.<sup>9</sup> In *Edwards*, the court found that, “while a manufacturer is under no duty to design an accident-proof vehicle, the manufacturer of a vehicle does have a duty to design its product so as to avoid subjecting its user to an unreasonable risk of injury in the event of a collision.”<sup>10</sup> A crashworthiness case is one in which the defect in the product “is not alleged to have caused the collision but only to have caused the injuries suffered therein.”<sup>11</sup> The court noted that:

[C]ollisions are a statistically foreseeable and inevitable risk within the intended use of an automobile, which is to travel on streets, highways, and other thoroughfares, and that, while the user must accept the normal risk of driving, he should not be subjected to an unreasonable risk of injury due to a defective design.<sup>12</sup>



## The plaintiff's negligence relating to accident causation should not bar recovery.



Therefore, a crashworthiness case focuses on the injury and not the accident. The Supreme Court of Alabama noted that the crashworthiness doctrine met “the purpose of the AEMLD, which is to protect consumers against injuries caused by defective products.”<sup>13</sup>

*Edwards* did not create a new cause of action separate from the AEMLD but rather a new theory that could be brought under the AEMLD.<sup>14</sup> The Supreme Court of Alabama recognized that the elements of proof necessary to establish a crashworthiness claim are the same elements necessary to prove an AEMLD claim.<sup>15</sup> That is, regardless of which theory a plaintiff alleges, he must prove that a defect in the

product proximately caused his injury.<sup>16</sup> It is the application of the available defenses, though, which distinguishes a crashworthiness claim from the broader AEMLD claim. In crashworthiness cases, contributory negligence is limited to the plaintiff's failure to use reasonable care in using the product alleged to be defective, such as not properly wearing a defective seatbelt.<sup>17</sup> Defendant motor vehicle manufacturers hotly dispute this established doctrine by arguing that a plaintiff's allegedly negligent driving should always be considered in every crashworthiness case because, after all, “a product is still a product, and negligence is still negligence.”<sup>18</sup> To accept this argument, though, is to completely ignore the essence of a crashworthiness case as set forth in *Edwards*—since accidents are foreseeable, an individual should not be put at a greater risk of injury due to a product component that does not perform as intended in an accident.<sup>19</sup>

### Under *Dennis*, Accident Causation Is Not a Defense To a Crashworthiness Claim

The debate over the application of contributory negligence under the AEMLD began with *Dennis v. American Honda* when the Supreme Court of Alabama held that contributory negligence relating to accident causation would not bar recovery under the AEMLD.<sup>20</sup> In *Dennis*, a motorcyclist suffered permanent brain damage when his motorcycle collided with a log truck.<sup>21</sup> The plaintiff argued that the helmet was defective and did not provide adequate protection.<sup>22</sup> The defendant countered that the plaintiff was driving negligently and did not properly use the motorcycle.<sup>23</sup> The defendant argued that the plaintiff caused his own injuries by causing the accident with the truck,<sup>24</sup> and, thus, that any alleged defect in the helmet did not cause plaintiff's injuries.<sup>25</sup> In holding that the defense of contributory negligence as it applied to accident causation was not a defense to recovery in AEMLD actions, the supreme court stated:

A plaintiff's mere inadvertence or carelessness in causing an accident should not be available as an affirmative defense to an AEMLD action. To allow a plaintiff's negligence relating

to accident causation to bar recovery will go against the purpose of the AEMLD, which is to protect consumers from defective products. The defense of contributory negligence in an AEMLD action should be limited to assumption of the risk and misuse of the product. The plaintiff's negligence relating to accident causation should not bar recovery.<sup>26</sup>

Defense attorneys, however, continually downplay and ignore *Dennis*, and, instead, point to *Williams v. Delta Machinery*,<sup>27</sup> *Haisten v. Kubota Corp.*<sup>28</sup> and *Burleson v. RSR Group Florida, Inc.*<sup>29</sup> to argue that contributory negligence in causing an accident is allowed under the AEMLD. Their reliance is misplaced, primarily because none are crashworthiness cases. In *Williams v. Delta Machinery*, the plaintiff lost his little finger and most of his thumb while pushing a board across an expandable dado blade.<sup>30</sup> The plaintiff sued

under the AEMLD. The jury returned a general verdict in favor of the defendants, and the plaintiff appealed, asking the Supreme Court of Alabama to determine whether the rule in *Dennis* applied.<sup>31</sup> Although the plaintiff did not object to the trial court charging the jury on contributory negligence, the court addressed the "specific holding" of *Dennis* "because there appears to be some confusion."<sup>32</sup> The court attempted to clarify its decision in *Dennis* with the following:

If the contributory negligence instruction had been limited to the plaintiff's failure to exercise reasonable care in his wearing of the helmet (i.e., if it had related to an alleged product misuse), then such an instruction would have been proper under this Court's previous interpretations of the AEMLD . . . The trial error in *Dennis* was in not limiting the contributory negligence

charge to the plaintiff's use of the helmet as opposed to the plaintiff's allegedly negligent operation of his motorcycle.<sup>33</sup>

The *Williams* court held that *Dennis* did not prohibit the use of contributory negligence in that case where the plaintiff's "negligence was predicated solely upon his misuse of products—the table saw and the dado blade—neither of which was a safety device being used as intended by the manufacturer to protect people from negligent acts."<sup>34</sup> Therefore, *Williams* affirmed the holding in *Dennis*: contributory negligence in AEMLD cases is limited to circumstances where the plaintiff has failed to use reasonable care in using the defective product and limited, when the alleged defect is in a safety device, to contributory negligence in the use of the safety device itself. The *Williams* court did nothing to change the *Dennis* rule as it applies to crashworthiness cases.

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“contributory negligence can be a defense to an AEMLD action under certain situations,” and that the only situation appropriate for contributory negligence was one in which the plaintiff fails to use reasonable care with regard to the product alleged to be defective.

In *Haisten v. Kubota Corp.*, a plaintiff sued the tractor manufacturer and distributor when his Kubota tractor rolled over, causing the rotary blade to seriously injure his legs.<sup>35</sup> Haisten argued that the Kubota tractor was defective in design because it did not contain a rollover protection system (ROPS).<sup>36</sup> At trial, the defendants introduced evidence that the plaintiff was negligent in operating the tractor because he was operating the tractor on a sloping bank; when the rear tires started to spin, the plaintiff put the tractor in reverse, causing the tractor to slide further down the slope; and, finally, when the tractor started to overturn, the plaintiff jumped off, causing the rotary blade to injure the plaintiff’s legs.<sup>37</sup> Clearly, this was not a second collision, or an enhanced-injury crashworthiness case. The *Haisten* court affirmed the giving of a contributory-negligence charge in a single paragraph, citing *General Motors v. Saint* for the propositions that “contributory negligence can be a defense to an AEMLD action under certain situations,” and that the only situation appropriate for contributory negligence was one in which the plaintiff fails to use reasonable care with regard to the product alleged to be defective.<sup>38</sup> The *Haisten* court did not address the *Edwards* distinction between a defect “alleged to have caused the collision” and a defect that “subjects its user to an unreasonable risk of injury in the event of a collision.”<sup>39</sup> The *Haisten* court thus did nothing to change the *Dennis* rule as it applies to crashworthiness cases.

Furthermore, both *Williams* and *Haisten* involved separate claims of negligence, in addition to AEMLD claims.<sup>40</sup> The trial courts let both claims go to the jury in both trials, making a contributory negligence charge appropriate in those cases.<sup>41</sup>

In *Burleson v. RSR Group Florida, Inc.*,<sup>42</sup> plaintiff’s decedent Burleson was injured while hanging his revolver in its holster on a gun rack at his home. The revolver fell and fired a bullet into Burleson’s abdomen, killing him. Although Burleson was described by his family at trial as “safety conscious,” on the day of the accident, Burleson had left the gun loaded, with a bullet in the chamber and *with the safety turned off*. Burleson’s estate sued the gun manufacturer alleging that the gun was defective because it lacked an additional

safety device, i.e., an internal passive safety. The gun manufacturer asserted the defenses of assumption of risk and contributory negligence. The trial court granted summary judgment in favor of the gun manufacturer. On appeal, the Supreme Court of Alabama held that Burleson was contributorily negligent as a matter of law in storing the loaded gun and in failing to engage the manual safety when he should have known the gun was loaded. The *Burleson* court explained:

We conclude that Stanley placed himself in danger’s way by *handling the revolver with the manual safety disengaged* and with the cartridge chambered in line with the hammer and the firing pin. Further, as evidenced by [Burleson’s] awareness of the importance of never storing a loaded firearm, much less one with a cartridge chambered in line with the hammer and the firing pin, we conclude that he should have had a conscious awareness of the danger in which he placed himself.<sup>43</sup>

The court of civil appeals analyzed *Burleson* in *Garrie v. Summit Treestands, LLC*.<sup>44</sup> The court noted that the negligence in *Burleson* was *leaving the manual safety disengaged*.<sup>45</sup> It was Burleson’s negligence in regard to a safety device on the gun (leaving the safety disengaged), not in causing the accident (causing the gun to fall), that determined whether Burleson was contributorily negligent. The *Burleson* court never addressed the *Dennis* rule; therefore, the *Dennis* rule again remained unchanged as it applies to crashworthiness cases.

In summary, the Supreme Court of Alabama has never altered the *Dennis* rule as it applies to crashworthiness or other safety device cases. Contributory negligence is allowed as a defense to an AEMLD claim when the plaintiff has negligently used the product, and that negligence is the cause of the plaintiff’s injury, e.g., failure to properly use a seatbelt.<sup>46</sup> In *Williams*, *Haisten* and *Burleson*, contributory negligence was a defense because none of the cases were classic crashworthiness cases. To the extent that *Haisten* could have been analyzed as a crashworthiness case, the court did not do so. In *Dennis*, contributory negligence was not a defense



because the plaintiff was correctly using his helmet even though the plaintiff allegedly was negligently driving his motorcycle and caused the actual accident. Defendants, in essence, argue that a court should ignore the crashworthiness doctrine adopted in *Edwards*. To accept this argument is to disregard two cases vital to crashworthiness analysis: *Culpepper v. Weihrauch*<sup>47</sup> and *General Motors Corp. v. Saint*.<sup>48</sup>

### **Under the Crashworthiness Doctrine, Contributory Negligence Is Not a Defense Unless the Plaintiff Negligently Used the Defective Component That Caused the Plaintiff's Injury.**

A crashworthiness case is one in which the defect in the product does not cause the accident but nevertheless causes the injury. Unlike other AEMLD cases, contributory negligence is available in crashworthiness-based cases *only* when the plaintiff is negligent in regard to a defective safety device or other aspect of the product that causes or increases the plaintiff's injury, and not when the plaintiff's negligence causes the accident.

In *General Motors Corp. v. Saint*, the plaintiff suffered a severe brain injury when, while driving in her automobile, she lost control and hit a tree.<sup>49</sup> She filed suit against GM under AEMLD "claiming that her car was not crashworthy because . . . the seatbelt assembly failed to protect [her] adequately from the enhanced injuries she sustained in the accident."<sup>50</sup> The jury returned a verdict in her favor, awarding \$13 million.<sup>51</sup> GM appealed, arguing that the verdict should be reversed because the trial court failed to charge the jury on contributory negligence in the use of the seatbelt.<sup>52</sup> The supreme court agreed, holding that GM was entitled to a charge on contributory negligence in the use of the seatbelt because GM had presented evidence that the plaintiff was either not wearing her seatbelt or had introduced the slack in her seatbelt herself.<sup>53</sup> The court determined that because there was evidence that the plaintiff failed to use reasonable care *in wearing her seatbelt*, i.e., introduced slack in her seatbelt herself, GM was entitled to a charge of contributory negligence.<sup>54</sup>

*Notably, the plaintiff in Saint crashed her car into a tree, but any negligence in causing the accident was deemed irrelevant. Again, the court did not alter the Dennis rule as it applies in crashworthiness cases.*

In *Culpepper v. Weihrauch*, the plaintiff was injured while taking her handgun out of her car's glove box. The gun fell and fired a bullet into the plaintiff even though the hammerblock safety was on. The hammerblock safety is a device on the gun that is supposed to prevent "drop-fire" accidents like the one in *Culpepper*.<sup>55</sup> The plaintiff sued the manufacturer of the gun, alleging that the hammerblock safety was improperly designed and manufactured.<sup>56</sup> The plaintiff sought summary judgment on the defendant's affirmative defenses of contributory negligence, assumption of the risk and misuse of the product.<sup>57</sup> The defendant conceded that summary judgment should be granted on the assumption of the risk and misuse of product defenses.<sup>58</sup> *The only issue before the court was whether the plaintiff was entitled to summary judgment on the defendant's contributory negligence defense in the use of the product.*<sup>59</sup> The District Court for the Middle District of Alabama, applying this Alabama law, explained that contributory negligence in an AEMLD case could be divided into two categories: "First, the plaintiff's negligence, or failure to use reasonable care, in actually using the product; second, the plaintiff's negligence in causing the accident in which the product is used."<sup>60</sup> After analyzing the case, the court held that the plaintiff was entitled to summary judgment on the contributory negligence defense because that defense was available only as to the plaintiff's "misuse of the hammerblock safety, rather than the handgun."<sup>61</sup> In short, where the alleged defect is in a safety device, or safety fea-

ture, only contributory negligence in the use of the safety device is a defense, not contributory negligence in use of the product as a whole (i.e., handling the gun).<sup>62</sup> The court noted that "to hold otherwise, would permit [the defendant] to introduce evidence going to Culpepper's contributory negligence related to accident causation, and would directly contravene the Supreme Court of Alabama's decision in *Dennis*."<sup>63</sup> *Culpepper* is thus consistent with the later *Burleson* because the failure to engage the manual safety in *Burleson* was contributory negligence in regard to that safety device.

In *Dennis*, *Saint* and *Culpepper*, the product alleged to be defective was a safety device intended to protect the plaintiff from harm. In *Dennis*, the defective product was a helmet. In *Saint*, the defective component was a seatbelt. In *Culpepper*, the defective component was a hammerblock safety. The courts allowed the plaintiff's negligence to constitute contributory negligence only when the plaintiff failed to use reasonable care in handling the defective component. For example, in *Saint*, there was evidence that the plaintiff had created the slack in her seatbelt.

In *Dennis* and *Culpepper*, the alleged defect was not the cause of the accident but the cause of the injury. In *Dennis*, the plaintiff was properly wearing his defective helmet when his negligent operation of his motorcycle caused the accident. The plaintiff's negligence in causing the accident was inadmissible. In *Culpepper*, the plaintiff had properly engaged her safety but allegedly negligently dropped her gun, causing the accident. The court held that the plaintiff's alleged negligence in causing the accident was not a defense under Alabama AEMLD law. Therefore,



...where the alleged defect is in a safety device, or safety feature, only contributory negligence in the use of the safety device is a defense, not contributory negligence in use of the product as a whole...



[C]ollisions are a statistically foreseeable and inevitable risk within the intended use of an automobile, which is to travel on streets, highways, and other thoroughfares, and that, while the user must accept the normal risk of driving, he should not be subjected to an unreasonable risk of injury due to a defective design.

in a crashworthiness-type case, alleged contributory negligence as to accident causation is not an allowable defense. Evidence of the plaintiff's negligence in causing the accident is never appropriate.

The advocacy piece<sup>64</sup> relies heavily on Judge Albritton's order in *Ray v. Ford Motor Co.*, No. 3:07cv175, 2011 WL 6182531, 2011 U.S. Dist. LEXIS 143249 (M.D. Ala. Dec. 13, 2011), for the proposition that contributory negligence in causing the accident is an absolute defense to crashworthiness claims. To the contrary, Judge Albritton recognized that if the claim in *Ray* had been "a proper 'crashworthiness' claim, the Plaintiffs' negligence [would not be] at issue because 'crashworthiness' claims attempt to compensate plaintiffs for the elevated harm caused by the defendant's defective product and not the harm caused by the accident itself."<sup>65</sup> *Ray* is completely irrelevant to the issue of contributory negligence in a crashworthiness case because the court ruled that the case did *not* present a crashworthiness cause of action.<sup>66</sup>

### Conclusion

The application of contributory negligence in AEMLD and crashworthiness cases is distinctly different. If it is a traditional AEMLD case where the injury and the accident are caused by the same defective product, then the plaintiff's negligence in using the defective product is contributory negligence. If it is a crashworthiness case where a defective component causes the injury but not the accident, then plaintiff's negligence in causing the accident is not admissible. If the plaintiff fails to use reasonable care in using the defective component that causes the plaintiff's injury, however, then contributory negligence is available as a defense. Any other reading of Alabama case law allows manufacturers to escape liability for unreasonably dangerous products even when a plaintiff's negligence is completely unrelated to the plaintiff's use of the defective product.

For example, consider the following fact scenarios. John is driving on Highway 231 to visit his girlfriend Mary in Troy. He is driving at 65 mph, the speed limit. He is wearing his seatbelt. John is distracted momentarily. His vehicle leaves the road and hits a tree. His airbag fails to deploy, and John's head hits

the steering wheel with such impact that he is instantly killed. This is a classic crashworthiness case envisioned by *Edwards*. There are two questions to ask in the analysis. First, what is the unreasonably dangerous product that caused John's death? It is the airbag. Second, was John negligent? Yes, but only in being momentarily distracted, not in using the defective product—the airbag. Thus, only his use of the airbag is relevant as to contributory negligence. The airbag did not cause the accident, but it did cause John to have an injury that he would not have had if the airbag had performed as intended. If the manufacturer's design intent is for an airbag to deploy upon impact to protect an occupant, but the airbag fails to do so and causes an injury that would have not have existed but for that failure, then it is completely irrelevant that John was momentarily distracted before the accident.

Now, consider that John is on Atlanta Highway when he sees a flashy billboard and looks away to check it out. He runs through a red light, T-boning another car. John has no injuries from the impact of the collision but is trapped in his car. Within seconds of the impact, his fuel tank bursts into flames, burning John to death. The fuel tank did not cause the accident, but the fuel tank caused John to die in an accident that produced no injury in and of itself. What is the defectively designed product that caused John's death? It is the fuel tank. Was John negligent? Yes, he was, in looking away from the road and running a red light but not in his use of the fuel tank. If the manufacturer's design intent for the fuel tank is to safely hold fuel without bursting into flames after a collision and the fuel tank fails to do so and causes an injury that would not have existed but for that failure, then it is completely irrelevant that John was momentarily distracted before the accident.

The manufacturer in these scenarios designed both the airbag and the fuel tank for the specific purpose of providing protection to John in these very types of accidents. To accept the defendants' argument that John's momentary distraction before the accident bars any recovery is to allow manufacturers to escape liability for placing defective products on the highway that were supposed to prevent the types of

injuries John received and that the manufacturer designed to specifically prevent.<sup>67</sup>

[C]ollisions are a statistically foreseeable and inevitable risk within the intended use of an automobile, which is to travel on streets, highways, and other thoroughfares, and that, while the user must accept the normal risk of driving, he should not be subjected to an unreasonable risk of injury due to a defective design.<sup>68</sup>

This article's interpretation of Alabama's case law is the only interpretation that reconciles all of the cases concerning the application of contributory negligence in AEMLD and crashworthiness cases. Any other interpretation ignores *Edwards*, *Dennis*, *Saint* and *Culpepper*. | AL

## Endnotes

1. D. Alan Thomas, Paul F. Malek and John Isaac Southerland, *Crashworthiness-Based Product Liability and Contributory Negligence in the Use of the Product*, 73 *Alabama Lawyer* 269 (2012).
2. *Id.* at 269-70.
3. See *Dennis v. American Honda Motor Co.*, 585 So. 2d 1336, 1339 (Ala. 1991).
4. *General Motors Corporation v. Edwards*, 482 So. 2d 1176 (Ala. 1976).
5. 335 So. 2d 128 (Ala. 1976); 335 So. 2d 134 (Ala. 1976).
6. See Edward C. Martin, *Alabama's Extended Manufacturer's Liability Doctrine (AEMLD)*, 133 AM. J. TRIAL ADVOC. 984, 990-94 (1990).
7. *Atkins*, 335 So. 2d 134, 140 (Ala. 1976).
8. *Casrell*, 225 So. 2d at 134; *Atkins*, 335 So. 2d at 143.
9. 482 So. 2d 1176 (Ala. 1985).
10. *Id.* at 1181 (citing *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968)).
11. *Id.* at 1182 (emphasis added).
12. *Id.* at 1181 (citing *Larsen*, 391 F.2d at 502-05).
13. *Id.* at 1181-82.
14. *Id.* at 1191.
15. See *Volkswagen of Am. v. Marinelli*, 628 So. 2d 378, 385 (Ala. 1993); APJ 32.07-Design Defect-Elements-Notes on Use (2011 Cumulative Supplement).
16. *Id.*
17. *General Motors v. Saint*, 646 So. 2d 564 (Ala. 1994) (negligence in using allegedly defective seatbelt).
18. Thomas, Malek and Southerland, *supra* note 1, at 269.
19. *Edwards*, 482 So. 2d at 1181 (citing *Larsen*, 391 F.2d at 502-05).
20. 585 So. 2d 1336.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Dennis*, 585 So. 2d at 1339 (emphasis added).
27. 619 So. 2d 1330 (Ala. 1993).
28. 648 So. 2d 561 (Ala. 1994).
29. 981 So. 2d 1109 (Ala. 2007).
30. *Williams*, 619 So. 2d at 1331.
31. *Id.* at 1332-33.
32. *Id.*
33. *Id.* at 1332 (emphasis added).
34. *Id.*
35. *Haisten*, 648 So. 2d at 562.
36. *Id.*
37. *Id.* at 562-63.
38. *Haisten*, 648 So. 2d at 565 (citing *Saint*, 646 So. 2d 564 (Ala. 1994) (emphasis added)).
39. *Edwards*, 482 So. 2d at 1181-82.
40. *Williams*, 619 So. 2d at 1331; *Haisten*, 648 So. 2d at 562.
41. *Id.*
42. 981 So. 2d 1109 (Ala. 2007).
43. *Id.* at 1114 (internal citations omitted) (emphasis added).
44. 50 So. 3d 458, 467-68 (Ala. Civ. App. 2010).
45. *Id.* at 468.
46. See *Saint*, 646 So. 2d at 568.
47. 991 F. Supp. 1397 (M.D. Ala. 1997).
48. 646 So. 2d 564 (Ala. 1994).
49. *Id.* at 565.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 568.
54. *Saint*, 646 So. 2d 564 at 568.
55. 991 F. Supp. at 1398-99.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Culpepper*, 991 F.Supp. at 1399 (citing *Campbell v. Robert Bosch Power Tool Corp.*, 795 F.Supp. 1093, 1097 (M.D. Ala. 1992)).
61. *Id.* at 1401 (emphasis added).
62. *Id.*
63. *Id.*
64. 73 *Ala. Law.* at 271.
65. 2011 WL 6182531, \*1; 2011 U.S. Dist. LEXIS 143249, \*2.
66. Judge Albritton held that "the Plaintiffs' claims in this case do not meet the definition of a 'crashworthiness' claim because the Plaintiffs allege that the Defendant's part caused the accident which resulted in the Plaintiffs' injuries. Therefore, the law governing 'crashworthiness' claims is irrelevant. . . ." 2011 WL 6182531, \*1, 2011 U.S. Dist. LEXIS 143249, \*2. Whether Judge Albritton correctly categorized the *Ray* action as falling outside the law of crashworthiness is a debatable issue that lies beyond the scope of this article. The advocacy piece, 73 *Ala. Law.* at 272-73, also insinuates that *Ray* supports its thesis that an automobile is always to be considered a single product and can never legally be split into component parts. The orders in *Ray* do not declare such a holding; Judge Albritton decided only that the law of crashworthiness did not apply because the component part alleged to be defective was the same part alleged to have caused the accident.
67. Interestingly, Alabama's sister states, with the exception of Georgia, allow for the consideration of a plaintiff's negligence in causing an accident in product liability cases. (Fl. Stat. sec. 768.81; O.C.G.A. § 51-11-7; *Miss. Code Ann.* § 11-7-15; *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973)). However, Mississippi, Tennessee and Florida apply comparative negligence where the plaintiff's actions are not a complete bar to recovery as under Alabama's contributory negligence doctrine. Georgia has adopted comparative fault as well but still excludes any evidence related to accident causation in a strict product liability cases.
68. *Edwards*, 482 So. 2d at 1181 (citing *Larsen*, 391 F.2d at 502-05).



J. Anthony McLain



## A Little Ignorance Goes a Long Way

Ever told someone, “Ignorance of the law is no excuse”? Yet we, within our own profession, are known for not taking care of all those personal matters for ourselves which we, as lawyers, handle for our clients. Do you have a current will, advanced healthcare directive, durable power of attorney or successor plan for your law practice if you’re not able to carry on? Think about it.

The same may be true when we deal with the “Ignorance of the law is no excuse” cliché. Do you know those rules which govern your own conduct as a lawyer? Believe it or not, since you were licensed, there have been some changes to the *Alabama Rules of Professional Conduct* since you last looked at them when preparing for the MPRE.

### **March 26, 2012 Order of the Supreme Court of Alabama**

The Board of Bar Commissioners presented proposed rule changes to the Alabama Supreme Court dealing

with the *Alabama Rules of Professional Conduct*, specifically those governing competence, scope of representation and communication with an opposing party.<sup>1</sup> In a March 16, 2012 order from the supreme court, the court adopted those proposals, and, in synoptic form, they are:

Rule 1.2 [Scope of Representation]—More substantially and significantly defines and allows limited-scope representation of a client. Consent of the client to such limited-scope representation must be confirmed in writing.

Rule 1.1 [Competence]—The competence rule was amended to recognize limited-scope representation, and that competence in such a representation still requires the knowledge, skill, thoroughness and preparation reasonably necessary for such limited-scope representation.

Rule 4.2 [Communication with Person Represented by Counsel]—Adds section (b) which states that a person to whom limited-scope representation is being provided is considered unrepresented

for purposes of Rule 4.2 unless the opposing lawyer has been provided with a written notice of the limited-scope representation.

Rule 4.3 [Dealing with Unrepresented Person]—Adds section (b) which tracks the new Rule 4.2(b), above, as to the requirement of written notice of limited-scope representation, and also provides that a person is deemed to be unrepresented regarding matters not designated in the written notice of limited-scope representation.

### July 16, 2012 Order of the Supreme Court of Alabama

On July 16, 2012, the Supreme Court of Alabama issued an order adopting additional amendments to the *Alabama Rules of Professional Conduct*, which amendments were requested by the Board of Bar Commissioners. Those changes are:

Rule 4.2 [Communication with Person Represented by Counsel]—The court amended the language of Rule 4.2(a).

The previous language of the rule prohibited a lawyer from communicating about the subject of the representation with a *party* the lawyer knew to be represented by another lawyer in the matter. The word *party* has been changed to *person*.

Rule 1.15 [Safekeeping Property]—Adds to section (a), the following: “Any funds while in the lawyer’s trust account that the lawyer is entitled to receive as a fee, reimbursement, or costs shall not be used by the lawyer for any personal or business expenses until such funds are removed from the trust account.”

Under new section (e) of Rule 1.15, a lawyer who practices in Alabama shall maintain all required current financial records for a period of six years after termination of the representation, including, but not limited to:

1. Detailed receipt and disbursement journals;
2. Detailed ledger records for all client trust accounts;
3. Copies of client retainer and compensation agreements as required by Rule 1.5;

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4. Copies of accountings to clients or third persons for trust account disbursements to them or on their behalf;
5. Copies of bills for legal fees and expenses rendered;
6. Copies of records showing disbursements on behalf of clients;
7. Physical or electrical equivalent of all trust-account checkbook registers, bank statements, records of deposit, pre-numbered canceled checks, and substitute checks;
8. Detailed records of all electronic transfers from client trust accounts;

9. Copies of monthly trial balances and quarterly reconciliations of client trust accounts maintained by the lawyers; and
10. Copies of those portions of client files that are reasonably related to client trust-account transactions.

Renumbered “new” Section (f) now requires, with respect to client trust accounts governed by Rule 1.15, that **“Only a lawyer admitted to practice law in this jurisdiction or a person under the direct supervision of the lawyer shall be an authorized signatory or shall authorize transfers from a client trust account.”** This section also requires that receipts be deposited intact, and that withdrawals be made only by check payable to a named payee, and not to cash, or by authorized electronic transfer.

New section (h) requires that upon dissolution of a law firm or of any legal professional corporation, the partners shall make reasonable arrangements for the maintenance of client trust-account records specified in the *Rules*.

Consistent with these amendments, the court also adopted substantial changes to the language of the Comment to Rule 1.15.

**Panic!**

The Supreme Court of Alabama recently adopted a rule of professional conduct which makes Alabama a mandatory IOLTA state. Simply put, all lawyers practicing law in the state of Alabama must certify that their trust accounts are compliant with the provisions of the *Alabama Rules of Professional Conduct* as they relate to lawyer trust accounts.

There are approximately 17,000 lawyers licensed to practice law in Alabama. An initial step in the certification process resulted in lawyers licensed to practice in Alabama being sent several notices informing them of their duty to annually certify that their trust accounts were compliant with the IOLTA rules.

However, a substantial number of these notices went unheeded. As a result, the Office of General Counsel mailed out in excess of 2,200 notices to show cause to lawyers who had failed to certify their compliance with the IOLTA rules and thereby placed their law license at risk of suspension.

To prevent this from occurring each year, lawyers should go ahead and calendar the fact that each year they will have

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to certify that their trust accounts are compliant with the mandatory IOLTA rules. *Lawyers will receive annual notices and the compliance deadline will be June 30<sup>th</sup> of each year.* Failure to certify compliance could result in possible suspension of the lawyer's license to practice law.

## No Need to Panic

Reflective of the advancement in technology, the means by which legal services are rendered today is very much different from the business model of yesterday. Lawyers have immediate access to many different research tools and information resources to assist their representation of clients.

It is incumbent upon lawyers to remain current on changes in the law, both in statute and case opinions, as well as matters of procedure. Likewise, lawyers must ensure

that they are aware of the changes to the canons of ethics which govern their conduct, the *Alabama Rules of Professional Conduct*.

The Office of General Counsel is always available to the lawyers of Alabama who have questions about the *Rules of Professional Conduct* as same apply to their own, individual prospective conduct. Ignorance of the rules is not an excuse. | AL

## Endnote

1. The court also amended Rule 11, *Ala. R. Civ. P.*, recognizing limited-scope representation, and requiring that a lawyer providing such representation include at the end of any such pleading the following notation: "This document was prepared with the assistance of a licensed Alabama lawyer pursuant to Rule 1.2(c), *Alabama Rules of Professional Conduct*." New Rule 87, *Ala. R.*

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— Henry Ford.



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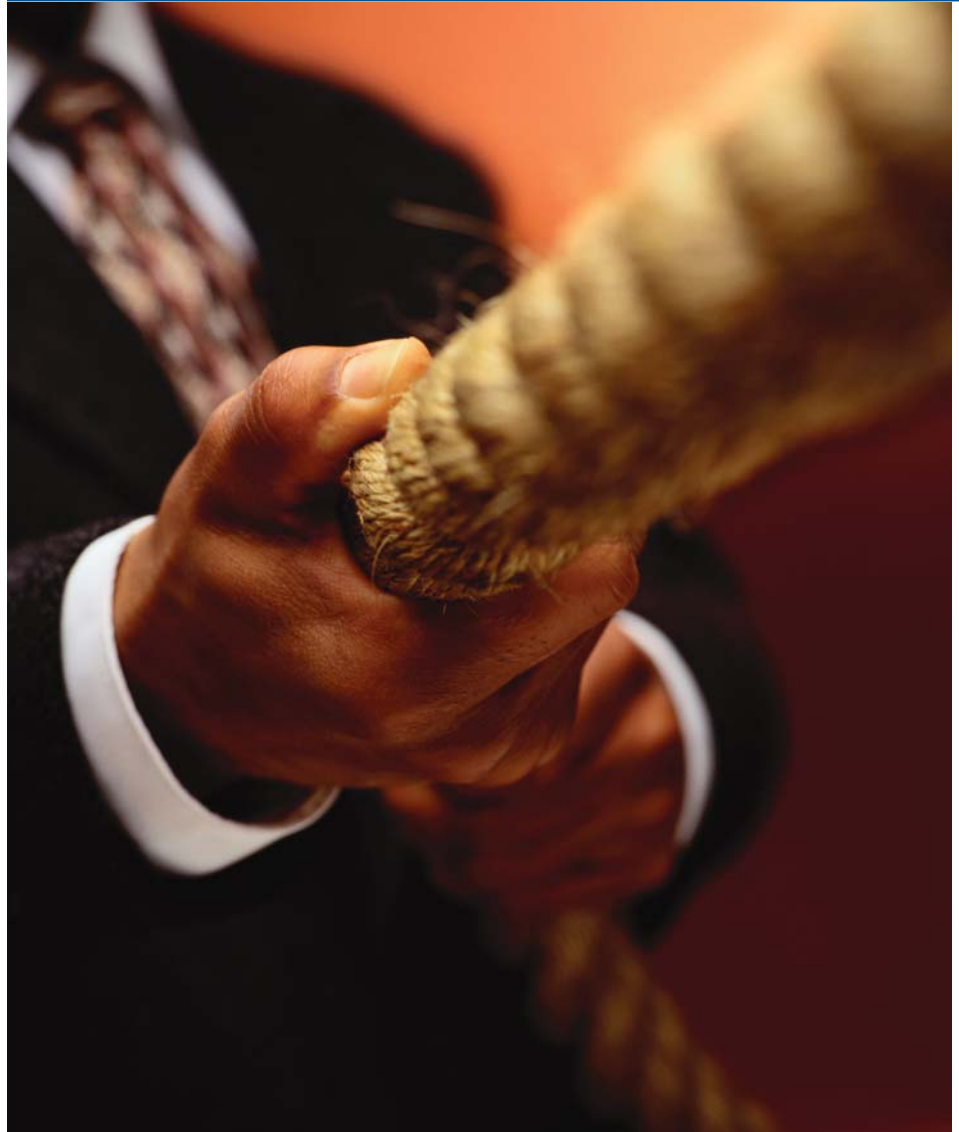
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## Extensive Work and Time Volunteered Equal Major Code Revisions

During the 2012 Legislative Session, the Alabama Legislature passed three major code revisions which were prepared and presented by the Alabama Law Institute: the Alabama Uniform Interstate Deposition and Discovery Act, amendments to the Alabama Uniform Principal and Income Act and the Alabama Foreign Country Money Judgment Recognition Act. Each of these acts was the result of extensive work by a committee of lawyers who volunteered their time to work with the Law Institute to ensure that these projects were appropriate additions to Alabama law and to conform them to Alabama practice and procedure. All three acts will become effective January 1, 2013.



## Alabama Uniform Interstate Depositions and Discovery Act

### HB.399 (Act 2012-518)


The Uniform Interstate Depositions and Discovery Act addresses the need for an efficient and inexpensive procedure that allows parties in civil litigation to depose individuals and conduct discovery in a state other than the trial state.

Currently, this process is handled in Alabama pursuant to Rule 28(c) of the *Alabama Rules of Civil Procedure*. Rule 28 sets forth a process which requires the intervention of a circuit judge. This act would make domestication a function for the circuit clerk.

The act has numerous benefits and economies including:

1. The creation of efficient procedure for the circuit clerk to follow;
2. Decreasing the need for judicial oversight since under the act there is no need to present the matter to a judge before a subpoena can be issued;
3. Clarifying that discovery permitted by the act must comply with the laws of Alabama;
4. Recognizing that Alabama has a significant interest in protecting its residents who become non-party witnesses in an action pending in a foreign jurisdiction from unreasonable or burdensome discovery requests; and
5. Maintaining the notion motions to quash or modify a subpoena will be ruled upon by an Alabama judge.

This act is not meant to preclude any right or obligation imposed by the *Rules of Civil Procedure* or any other applicable Alabama law. It is the intention of this act to supersede and nullify the *Ala. R. Civ. P. 28(c)* requirement for judicial involvement in the issuance of a foreign subpoena under this act. However, the Alabama court retains its judicial role under *Ala. R. Civ. P. 28(c)* to enforce, modify and hear objections to foreign subpoenas. *Alabama Rule of Civil Procedure 28* is unaffected by subpoenas that issue from foreign nations.




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Practitioners should note that the act only provides this mechanism for litigants whose state provides a similar procedure for Alabama residents. This notion of reciprocity was amended into the act by the legislature.

This act was drafted by a committee chaired by Dean John Carroll and sponsored in the legislature by Senator Ben Brooks and Representative Paul DeMarco. Members of the drafting committee were: Joe Aiello, David Byrne, Charles Campbell, Professor Montre' Carodine, Tracy Cary, Hon. Scott Donaldson, Mike Ermert, James Gewin, Bernard Harwood, Todd Harvey, Charles Johanson, Hon. David Kimberley, Richard Ogle, Rep. Bill Poole, Vastine Stabler, Ashley Swink, Will Hill Tankersley, and Sen. Bryan Taylor.

## Amendments to the Alabama Principal and Income Act

### HB.222 (Act 2012-550)

The Uniform Principal and Income Act provides the procedures for trustees administering assets to separate principal from income. Alabama's current law was passed in 2000 and is codified at *Code of Alabama* section 19-3A-101 *et. seq.* The basic purpose of the act is to ensure that the intentions of the trust's creator are followed as closely as possible. The Principal and Income Act has been adopted by 45 states and these most recent amendments have already been adopted by 29 of those states.

This revision continues to distinguish between property that is principal, which will be distributed to remainder beneficiaries (persons entitled to receive when an income interest ends), and property that is income, distributed to income beneficiaries on some regular basis. These amendments update the traditional income and allocation rules so that they can work with modern investment theory and guidance from the Internal Revenue Service.

Improvements to the Uniform Principal and Income Act made by the amendments are:

1. Updates the act to reflect current policy of the Internal Revenue Service and to clarify technical language regarding withholdings;
2. Clarifies allocations of acquired assets, such as those from corporate distributions;
3. Includes an "unincorporated entity" concept to deal with businesses operated by a trustee; and
4. Considers the principles in the Uniform Prudent Investor Act (*Code of Alabama* section 19-3B-901 *et. seq.*), especially the principle for investing for total return instead of for a certain level of income.

*seq.*), especially the principle for investing for total return instead of for a certain level of income.

These amendments also address the imbalances in the tax laws and provide the power to make adjustments between principal and income to correct inequities caused by tax elections or peculiarities in the way the fiduciary income tax rules apply.

This act was drafted by a committee chaired by Leonard Wertheimer and was sponsored by Senator Slade Blackwell and Representative Paul Beckman. The drafting committee was composed of Scott Adams, LaVeeda Battle, Anna Funderburk Buckner, Senator Linda Coleman, Richard Frankowski, William Hairston, Lyman Holland, Professor Tom Jones, Reese Murray, Myra Roberts, Alan Rothfeder, Brian Williams, and Ralph Yeilding.

## Alabama Uniform Foreign-Country Money

This act sets a clear statutory framework for when money judgments will and will not be honored by Alabama courts. Under current Alabama law no statutory framework exists. Instead, recognition is governed under common law by the doctrine of comity. That doctrine begins with the idea that a foreign judgment should be honored in this state so long as the court from which it issued was competent, had jurisdiction over the cause and parties and gave the person an opportunity to defend himself.

This act offers a straightforward statutory procedure whereby a party may go to court to seek recognition and the party against whom the judgment was obtained may seek to block recognition in court. This procedural process, as well as the grounds for refusing recognition, provides Alabama citizens and those with assets in Alabama additional safeguards which do not exist under common law.

Highlights of the act include:

1. Providing a simple court procedure for the enforcement of foreign-country money judgments;
2. Addressing burdens of proof of the parties which are not covered by current law;
3. Establishing the grounds for denying recognition of foreign-country money judgments; and
4. Establishing a statute of limitations for recognition actions.

The increase in international trade in the United States has also meant more litigation in the international context. There will be the potential for more judgments to be

enforced from country to country. This is particularly important as Alabama has attracted a great deal of investment by foreign companies. It is important that these foreign companies know with certainty the rules to which they will be subjected. Thus, this Act is timely because of the continuing increase in international trade and the need for making Alabama a recognized forum for international business.

This act was drafted by a committee chaired by Dean John Carroll and sponsored by Sen. Phil Williams and Rep. Bill Poole. Members of the drafting committee were Joe Aiello, David Byrne, Charles Campbell, Prof. Montre' Carodine, Tracy Cary, Hon. Scott Donaldson, Mike Ermert, James Gewin, Bernard Harwood, Todd Harvey, Charles Johanson, Hon. David Kimberley, Richard Ogle, Rep. Bill Poole, Vastine Stabler, Ashley Swink, Will Hill Tankersley, and Sen. Bryan Taylor.

## Title 10A Revision Project

On January 1, 2013, the *Alabama Business and Nonprofit Entity Code* will mark its two-year anniversary of being effective as Title 10A. Title 10A was an extraordinary undertaking which was chaired by Jim Pruett and for which Prof. Howard Walthall served as reporter. This project was the result of nine years of work by a very dedicated drafting committee. The success of the project is best illustrated by the fact that the *Alabama Code* has become a national model.

As with any project of the magnitude of Title 10A, there have been some quirks and issues which have arisen since practitioners have begun living with this new law. The law institute is currently beginning a project to address any issues that have arisen needing clarification or review. If you are aware of any issues, I welcome your forwarding them, along with any other suggestions or comments. | [AL](#)

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Please e-mail announcements to Margaret Murphy, [margaret.murphy@alabar.org](mailto: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.

## Among Firms

**Richard G. Alexander** announces that **Ruthie F. Alexander** joined him in the opening of **Alexander & Associates** at 56 St. Joseph St., Ste. 1601, Regions Bank Building, Mobile 36602. Phone (251) 438-3666.

**Balch & Bingham LLP** announces that **Jonathan Grayson** joined the firm.

**Blackburn & Conner PC** announces a name change to **Blackburn, Conner & Taupeka PC** and that **Mark H. Taupeka** is now a partner.

**Boardman, Carr, Hutcheson & Bennett PC** announces that **Daniel P. Ogle** became a shareholder.

**Bradley Arant Boulton Cummings LLP** announces that **Jeffrey M. Anderson** rejoined the firm.

**Stephen P. Bussman** announces that **Stanna Crowe Guice** joined the firm. The firm will now be known as **Bussman & Guice PC**.

**Christian & Small LLP** announces that **Thomas L. Krebs** joined the firm as a partner.

**Estes, Sanders & Williams LLC** announces that **Tracy T. Miller** joined the firm.

**Jemison & Mendelsohn PC** announces that **Barbara H. Agricola** joined the firm.

**Lanier Ford** announces that **Jamie M. Brabston** and **Laura W. Harper** are now associated with the firm.

**Ramsey, Baxley & McDougle** announces that **Dustin Byrd** became a partner.

**Satterwhite, Buffalow & Tyler LLC** announces that **Gabrielle E. Reeves** is associated with the firm.

**The Law Office of John Foster Tyra PC** announces that **Patrick W. Dean** joined the firm.

**Wallace Jordan** announces that **Audrey Reitz Channell** and **Laura M. Jackman** became members.

**Webster, Henry, Lyons, White, Bradwell & Black PC** announces that **K. Donald Simms, Frank E. Bankston, Jr.** and **Scott Sasser** joined the firm.

**Wilkins Tipton PA** announces that **Hunter C. Carroll, James M. Smith** and **Christopher L. Shaeffer** joined the firm.

**Zieman, Speegle, Jackson & Hoffman LLC** announces that **Jennifer S. Holifield** became a member and **Lester M. Bridgeman, W. Benjamin Broadwater** and **Brian F. Trammell** became *of counsel*. | [AL](#)



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Attorneys**

**Positions Wanted**

**For Sale or Lease**

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### **Non-profit Staff Attorney**

Statewide non-profit seeks staff attorney in its Montgomery office to provide legal assistance in civil matters. Admission to the Alabama State Bar and computer proficiency required. Experience working with a low-income population preferred. Bilingual encouraged to apply. \$38,000. Excellent benefits. Send cover letter, résumé, references and a recent legal writing sample to [jobs@alsp.org](mailto:jobs@alsp.org). Open Until Filled. EOE.

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**Beginning with the January 2013 issue, classified ads will only appear under "Job/Source" on the state bar's website.**

### Contract Employment-Part-time

Attorney with experience as city attorney and practice of general law seeking part-time, contract employment opportunities. Contact A.V. Callins at [avcallinsllc@gmail.com](mailto:avcallinsllc@gmail.com) or (205) 637-1636.

### Contract Employment-Experienced Litigator

I am a civil litigator with 12 years of experience practicing in Alabama courts. I have a successful solo practice and I am looking to increase my hourly billing with some contract research and writing. I will be happy to discuss terms and rates. E-mail [info@southalabamalegal.com](mailto:info@southalabamalegal.com) or call (251) 654-2640.

### Contract Employment-Full-time

Attorney with 11 years of experience needs regular, full-time contract work between October 1, 2012 and January 24, 2013. Experienced in insurance defense litigation, workers' comp, med mal defense, criminal defense, and domestic cases. Contact [rmac68@aol.com](mailto:rmac68@aol.com).

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