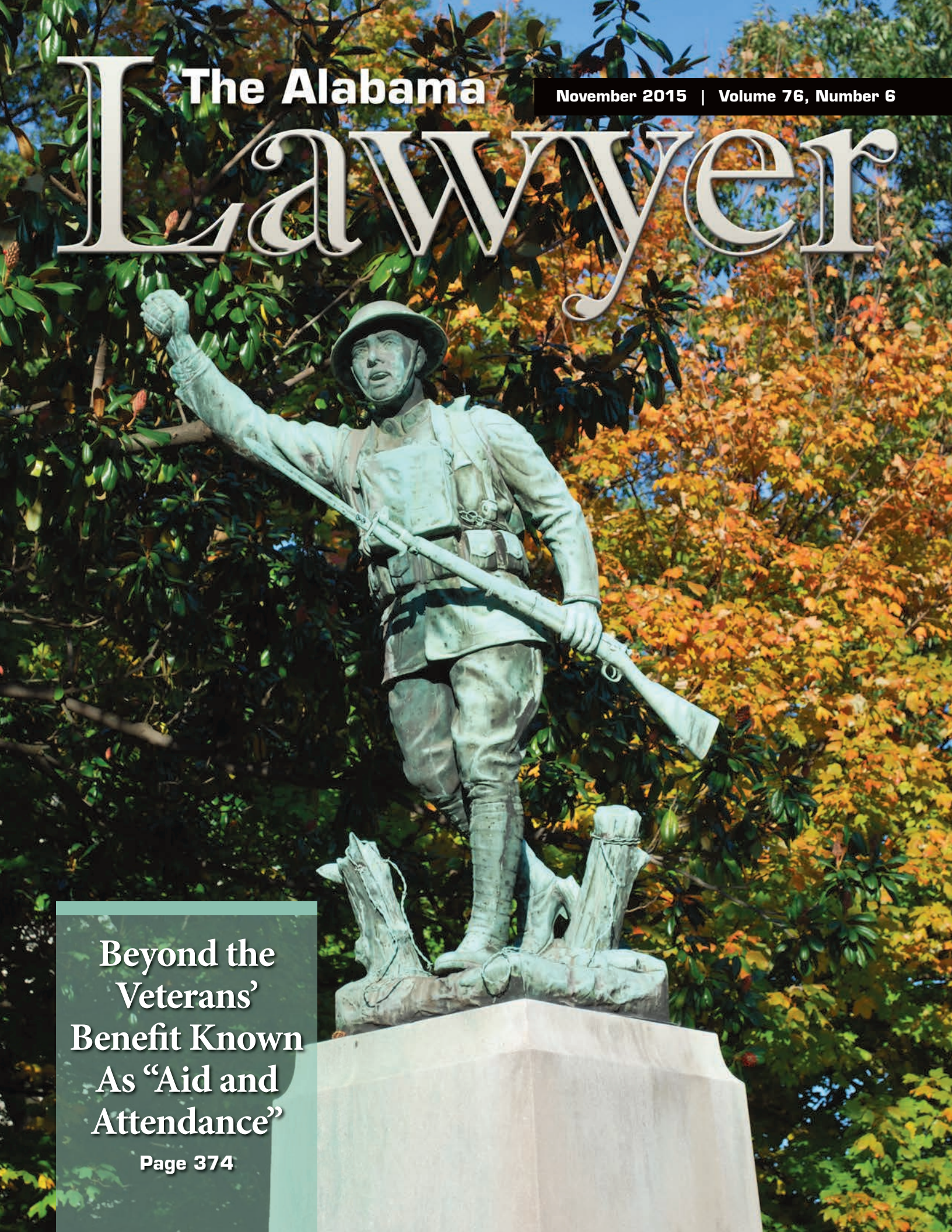
The Alabama Lawyer

November 2015 | Volume 76, Number 6



Beyond the Veterans' Benefit Known As "Aid and Attendance"

Page 374

Is your practice more demanding than ever?

The best malpractice insurance takes no time to find. AIM makes it easy.

Dedicated to insuring practicing attorneys.

Attorneys Insurance Mutual of the South®

200 Inverness Parkway
Birmingham, Alabama 35242

Telephone 205-980-0009
Toll Free 800-526-1246
Fax 205-980-9009

www.AttysInsMut.com

Scan for Application

"Insuring and Serving Practicing Attorneys Since 1989"

THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

ALABAMA CHAPTER

WWW.ALMEDIATORS.ORG


Phil Adams
OPELIKA


Beverly Baker
BIRMINGHAM


Danny Banks
HUNTSVILLE


William Coleman
MONTGOMERY


Reggie Copeland
MOBILE


Sam Crosby
DAPHNE


Charles Denaburg
BIRMINGHAM


Charles Fleming
MOBILE


Stevan Goozee
BIRMINGHAM


Arthur Hanes
BIRMINGHAM


Bernard Harwood
TUSCALOOSA


Braxton Kittrell
MOBILE


Debra Leo
BIRMINGHAM


Rodney Max
BIRMINGHAM


Boyd Miller
MOBILE


Larry Moore
FLORENCE


William Ratliff
BIRMINGHAM


Ben Rice
HUNTSVILLE


Allen Schreiber
BIRMINGHAM


Kenneth Simon
BIRMINGHAM


Fern Singer
BIRMINGHAM


Clarence Small
BIRMINGHAM


Harold Stephens
HUNTSVILLE


Glynn Tubb
DECATUR


Michael Upchurch
MOBILE


Marty VAN TASSEL
BIRMINGHAM


Michael WALLS
BIRMINGHAM


Brad Wash
BIRMINGHAM

Check preferred available dates or schedule appointments online directly with the state's top neutrals

www.ALMediators.org is free, funded by our members

The National Academy of Distinguished Neutrals is an invitation-only association of over 900 top-rated premier mediators & arbitrators throughout the US, and proud Neutral Database Partner to the national defense (DRI) & plaintiff (AAJ) bar associations. For more info, see www.nadn.org/about

CLE ALABAMA
Advancing your practice

Last Chance Seminars for 2015

DECEMBER

2 Alabama Update *Tuscaloosa*
4 Estate Planning *Birmingham*
10 Taking and Defending Depositions *Birmingham*
11 Tort Law Update *Birmingham*
16 Business and Complex Litigation *Birmingham*
17 Employment Law *Birmingham*
18 Alabama Update *Birmingham*
21 Trial Skills *Birmingham*

Save the Date! Start 2016 off right with one of our great spring programs.

JANUARY

22 Professionalism *Tuscaloosa*

FEBRUARY

19 Banking Law *Birmingham*
26 Elder Law *Birmingham*

MAY

6-7 City & County Government *Orange Beach*
13 Professionalism *Tuscaloosa*

Keep Your Library Updated with Our BEST SELLING PUBLICATIONS

McElroy's Alabama Evidence is the complete and final authority regarding Alabama evidence issues for judges and lawyers alike. **The new Supplement will be available in early 2016. Pre-order your copy now!**

Gamble's Alabama Rules of Evidence is a must-have resource, designed as a reference to objections, responses to objections, and practice pointers for use in trial proceedings.

Alabama Property Rights and Remedies by Jesse P. Evans, is a comprehensive work that covers an array of real property litigation topics, including most of the common rights and remedies that attorneys will encounter in their practice.

Alabama Probate Law and Procedure: The Administration of Estates by Thomas A. Nettles IV, is a valuable tool for attorneys new to the area of probate, and also serves as a quick reference aid for seasoned attorneys. Illustrative cases and suggested pleadings forms are included.

For more information or to register, visit CLEalabama.com or call 800.627.6514 or 205.348.6230

CHECK OUT OTHER OPPORTUNITIES FOR YEAR-END CLE

Webcasts: Most of our live seminars will be webcast. Watch the seminar as it happens from your own computer.

On-Line, On Demand: Visit CLEalabama.com for 24/7 access to over 200 online programs and teleconferences.

THE UNIVERSITY OF ALABAMA
SCHOOL OF LAW

The Alabama Lawyer

November 2015 | Vol. 76, No. 6

On The Cover

This monument and plaque to World War I soldiers stand at the entrance of Linn Park, at the foot of Birmingham's main street, 20th Street North.

FEATURES

facebook.com/AlabamaStateBar
@AlabamaStateBar
@AlabamaStateBar
youtube.com/TheAlabamaStateBar
flickr.com/AlabamaStateBar

ADVERTISERS

ALABAMA STATE BAR
415 Dexter Avenue
Montgomery, AL 36104
(334) 269-1515 • (800) 354-6154
FAX (334) 261-6310
www.alabar.org

ALABAMA STATE BAR STAFF

Executive Director.....Keith B. Norman
Director of Personnel and Operations.....Diane Locke
ASB Foundation Assistant/
Executive Assistant .....Ann Rittenour
Assistant Executive Director.....Edward M. Patterson
Director of External Relations and
Projects/Annual Meeting .....Christina Butler
Administrative Assistants for External Relations
and Projects .....Mary Frances Garner
Marcia N. Daniel
Director of Digital Communications.....J. Eric Anderson
Director of Information Technology.....Dolan L. Trout
Programmer .....Larry D. Pratt
Information Systems Manager .....O. Hunter Harris
Digital Communications Content Manager.....Kelley Lee
Director of Publications .....Margaret L. Murphy
Director of Regulatory Programs .....Angela Parks
Membership
Administrative Assistant.....Cathy Sue McCurry
Regulatory Programs
Administrative Assistant.....Doris McDaniel
Director of Admissions.....Justin C. Aday
Admissions Administrative Assistants.....Crystal Jones
Sonia Douglas
Director of Finance.....Merinda Hall
Senior Financial Assistant.....Gale Skinner
Financial Assistant.....Kristi Neal
Graphic Arts Director .....Roderick Palmer
Receptionist.....Stephanie Oglesby
Director of Service Programs .....Laura A. Calloway
SP Administrative Assistant .....Kristi Skipper
Lawyer Referral Service Representative.....John Dunn
Volunteer Lawyers Program Director .....Linda Lund
VLP Assistant .....Katherine L. Church
Intake Specialists.....Deborah Harper
Carrie Black-Phillips
Alabama Lawyer Assistance Program
Director .....Robert B. Thornhill (334-224-6920)
ALAP Case Manager .....Shannon Knight
ALAP Administrative Assistant .....Sandra Dossett
Alabama Law Foundation, Inc. Director .....Tracy Daniel
ALF Administrative Assistants .....Sharon McGuire
Sue Jones
Access to Justice Coordinator .....Emily Strickland
Alabama Center for Dispute Resolution
Director .....Judith M. Keegan (334-269-0409)
ADR Assistant .....Patsy Shropshire

ALABAMA STATE BAR CENTER FOR PROFESSIONAL RESPONSIBILITY STAFF

General Counsel .....J. Anthony McLain
Secretary to General Counsel.....Julie Lee
Assistant General Counsel .....Jeremy W. McIntire
Assistant General Counsel.....Mark B. Moody
Assistant General Counsel .....John E. Vickers, III
Complaints Intake Coordinator .....Kim Ellis
Disciplinary Clerk.....Bonnie Mainor
Client Security Fund Coordinator .....Laurie Blazer
Paralegals/Investigators.....Carol M. Wright
Robyn Bernier
Carol Mott
Receptionist .....Sherry Langley

THE FINKLEA GROUP
Creative solutions for your marketing strategies
The Alabama Lawyer
GRAPHIC DESIGN

davisdirect
ready. print. go >>
The Alabama Lawyer
PRINTING

Gregory H. Hawley, Birmingham.....Chair and Editor
ghawley@joneshawley.com
Linda G. Flippo, Birmingham .....Vice Chair and Associate Editor
lflippo@whitearnolddowd.com
Wilson F. Green, Tuscaloosa .....Vice Chair and Associate Editor
wgreen@fleenorgreen.com
Margaret L. Murphy, Montgomery.....Staff Liaison and Director of Publications
margaret.murphy@alabar.org

Robert A. Huffaker, Montgomery...Chair and Editor, 1983-2010

The Alabama Lawyer (USPS 743-090) is published six times a year by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Periodicals postage paid at Montgomery, Alabama and additional mailing offices. POSTMASTER: Send address changes to *The Alabama Lawyer*, P.O. Box 4156, Montgomery, AL 36103-4156.

COLUMNS

CONTRIBUTORS

Gregory C. Buffalow *earned his B.A. from the University of Alabama, where he was elected to Phi Beta Kappa, his law degree from the University of Alabama School of Law and an LL.M. (general) from New York University. He is a member of Warhurst & Buffalow in Mobile, and his practice involves civil and maritime litigation and insurance coverage. He is the Mobile correspondent for the American Protection and Indemnity Association, and a member of the Maritime Law Association. He is admitted to the Alabama State Bar and the State Bar of Texas.*

William N. Clark *is a graduate of the United States Military Academy at West Point and the University of Alabama School of Law. He clerked for the Hon. Walter P. Gewin, United States Court of Appeals for the Fifth Circuit. He has practiced in the areas of white collar criminal defense, criminal defense, family law, civil litigation and professional licensing with Redden, Mills, Clark & Shaw LLP. He is a past president of the Birmingham Bar Association and the Alabama State Bar, a member of the American Law Institute and a Fellow in the American College of Trial Lawyers.*

Carl K. "Trey" Dowdey, III *received his undergraduate degree from the University of Virginia and graduated from Cumberland School of Law. He is counsel at Carr Allison, representing employers on workers' compensation and related labor and employment matters. He also serves as a lieutenant colonel in the U.S. Army Reserves, assigned as the staff judge advocate at the 87th U.S. Army Support Command (East) in Birmingham. He has been an active member of the Alabama State Bar Military Law Committee for more than seven years, and is scheduled to graduate from the Army War College in 2016.*

Douglas I. Friedman *practices with Friedman Law Firm PC in Mountain Brook, where he represents veterans in disability claims before the VA and Social Security. He writes and speaks on veterans' issues across the country.*

Adam K. Israel *is an associate at Balch & Bingham LLP in the Birmingham office where he has practiced since 2010. His practice involves financial services litigation, general commercial litigation and appellate litigation in both federal and state courts. He graduated, magna cum laude, from the University of Alabama School of Law and, magna cum laude, from Birmingham-Southern College, where he was elected to Phi Beta Kappa. Israel clerked for the Hon. William M. Acker, Jr., senior United States District Judge for the Northern District of Alabama, before joining Balch & Bingham.*

(Continued on page 364)

CONTRIBUTORS

Continued from page 363

John J. "Jack" Park, Jr. *is of counsel with Strickland Brockington Lewis LLP in Atlanta. He has worked as an Army JAG officer; for what is now Bradley, Arant, Boult Cummings; in the Alabama Attorney General's Office; as special assistant to the inspector general for the Corporation for National and Community Service; and as a visiting legal fellow in the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation. He served as chair of the Military Law Committee for several years. Park graduated from the University of Virginia and from Yale Law School.*

J. Casey Pipes *is a shareholder at Helmsing, Leach, Herlong, Newman & Rouse PC in Mobile. He graduated from the University of Alabama School of Law and Washington & Lee University. He is a member of the council of the Alabama Law Institute, a fellow of the American Bar Foundation and a member of the Counselors of Real Estate.*

Richard J.R. Raleigh, Jr. *is a shareholder with Wilmer & Lee PA in Huntsville and is the immediate past president of the Alabama State Bar. He is a member of the Alabama Law Institute and served on the the ALI committee that drafted the new* Alabama Code *Section 8-1-1(b) (restrictive covenants). He represents businesses and individuals in corporate, commercial, labor/employment and government contract litigation matters in state and federal courts. Before joining Wilmer & Lee, he served as a U.S. Army Judge Advocate.*

Judge Stephen G. Smith *graduated from the University of Alabama and from the University of Alabama School of Law. He has served as district judge for Geneva County since 2011. Judge Smith also serves as a lieutenant colonel in the Alabama Army National Guard, assigned as staff judge advocate at the 135th Expeditionary Sustainment Command in Birmingham.*

R.F. "Ben" Stewart, III *is a founding partner of Nolan Stewart PC, an elder law and estate planning practice with offices in Jefferson and Shelby counties. He is also an accredited attorney with the U.S. Department of Veterans Affairs and a member of the Alabama State Bar's Elder Law Section. He is a 1984 graduate of Cumberland School of Law and received his LL.M. (taxation) from the University of Florida in 1985.*

Will Hill Tankersley *is a partner at Balch & Bingham LLP in its Birmingham and Montgomery offices. He is the founder and first chair of the Alabama State Bar Intellectual Property Section. He served on the drafting committees for the 11th Circuit Copyright and Trademark Pattern Jury Instructions and is currently working with the Alabama Pattern Jury Instruction Standing Committee on jury instructions for trade secrets cases. He was the chair of the Alabama Law Institute project to draft a revised* Alabama Code *Section 8-1-1(b) (restrictive covenants). Before law school, he was a soldier.*

ARTICLE SUBMISSION REQUIREMENTS

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

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

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

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

2016 ALAJ Mid-Winter Conference

January 21-22, 2016

Learn how to prepare your case to win!

Would you buy a car without test driving it? For some reason we often try our cases without test driving them. Come to the Greg Cusimano Symposium and watch a real focus group in action. Discovery pointers that will help you win your case, and avoid losing. Sometimes learning what a potential juror thinks is more significant than what you think is important. Often times, we as lawyers are wrong in what we deem relevant or material in a case. Come to the Greg Cusimano Symposium and find out how to be more prepared for your next trial!

Thursday/Friday
PROGRAM FORMAT

"Rapid-fire"
CLE PRESENTATIONS

What Do You Seek?

The Westin - Downtown Birmingham

ALABAMA ASSOCIATION for JUSTICE

For Additional Information: alabamajustice.org | 334.262.4974

Lee H. Copeland

When a lawyer dies, why is the funeral service most always a packed house?

I recently attended the funeral of an attorney who was a member of a local church. The head usher said that one of his jobs at the church was to help at all the church's funerals. He then said–"When a lawyer dies, it always is one of the church's biggest funerals–the lawyers show in droves." And, he is right. The question is why?

As a general rule, lawyers are more than members of the same profession–they are truly colleagues. They know and understand the traumas, victories and tolls that the practice of law produces. There is a kinship among other attorneys, because they have been living and working in the same arena.

One of the world's most renowned paintings is on the ceiling of the Sistine Chapel. In the principal panel, God is reaching down from the heavens with His finger extended and man is reaching up with his finger extended. The fingers do not physically touch in the painting–and that is what makes it fascinating. It is in that space, that synapse, that the world explores God's relationship with man and man's relationship with God. That image has always haunted me in the sense that in such a small area, lots of life and decisions, both good and bad, are being played out.

Our synapse as lawyers is in the courtroom arguing a case, on the phone negotiating a lease or in an email thread trying to find a time to meet. Because lawyers are in an adversarial role with each other–that space is where we live and work as professionals. So, given the fact that we are always in each other's "space," why do lawyers show up in such large numbers for another lawyer's funeral? I think it is because we start as colleagues and end up as comrades with each other–respecting the profession and respecting those who practice within its synapse.

Leadership Forum CLE Getaway

The ASB Leadership Forum Section is planning a fun event for all of the members of the Alabama State Bar. It has negotiated a great rate at Callaway Gardens for December 3–5, 2015. The "Family Fun & Football Holiday Getaway" will have plenty of CLE credits for your end-of-the-year needs, as well as all of the offerings of Callaway Gardens–Fantasy in Lights, Santa's Christmas Village, train rides, golf, nature trials and more. All of the information for this getaway can be found at *www.alabar.org*.

Bar Exam Passage Rates

On the ASB website and to be published in the January *Alabama Lawyer* are the bar exam passage rates of the three accredited and two unaccredited law schools in the state. There appear to be some changes from prior years to this July's results for some of the schools. The state bar is

Continued from page 367

actively working with the law schools, as well as with the supreme court, to find out if the most current results represent the beginnings of a trend or are merely a blip in the one-year results. The leadership of your state bar is mindful of the exam results and wants every law school in our state to succeed and thrive.

Alabama State Bar Staff

Your Alabama State Bar has approximately 52 employees (46 "regular" state bar employees and six others who work for various bar-related programs). Those 52 employees essentially make up approximately 10 companies. Just a few examples of the companies working together under one roof are: (of course) a law firm that handles hundreds and hundreds cases each year; an IT division that processes millions of bytes of data on a monthly basis; a publisher to bring you *The Alabama Lawyer* and the *Addendum*; and a "welcoming center" that reviews approximately 1,400 applications each year (for the bar exam, for reciprocity, as a UBE transfer or as a law student). There are benefit divisions that create, educate and provide different benefits to its members, along with financing, public service and external relations. Of course, these are not the actual names of the division in the state bar. My point is that our bar staff has many functions and plays many roles. As each of you know, our bar is integrated and that means that we have both a regulatory and associational function, serving approximately 18,000 members. Our bar staff does more with the dollars that we have than any other bar staff in the country. We consistently are on the forefront of proposing plans, ideas and programs that other bar associations emulate and we do so with a smaller bar staff than our peers. I have said it before and will repeat it–I think we have the greatest bar staff in the country.

One area in which we do not always do a good job is in educating our members about exactly what the bar does. If the state bar is always viewed as that place where you "get into trouble," we have failed in our essential purpose. The Alabama State Bar has a great website (*www.alabar.org*) and I invite you to explore it. We stand ready to help. | AL

I hope all is well. Take care–Lee

Gregory H. Hawley
ghawley@joneshawley.com

Local Hero: Your Neighborhood Veteran

Your *Alabama Lawyer* Editorial Board tries to provide a healthy combination of news and articles, with sufficient variety to interest all lawyers. This November edition has several articles that revolve around issues of consequence to veterans. We added a cover photograph that serves as a reminder of the world war that raged on 100 years ago and of the cease fire that became the armistice that became Veterans' Day–at the 11th hour of the 11th day of the 11th month in 1919. We hope that the cover underscores the interesting articles that revolve around veterans' issues.

If you are like me, you frequently encounter veterans. The servicemen and women who have done stints in Iraq or Afghanistan or other areas of conflict seem to be everywhere. You see them too. Sometimes it is obvious that they served, but often one does not know unless it comes up in conversation. They are your cashier or clerk at the big box store, or on the venire at the courthouse, or are a brother or sister or son or daughter of someone with whom you work. When it is obvious, it can be a vivid reminder of the cost–the sacrifice–that we often forget. Last week, I saw an attractive young couple leaving church on Sunday. He was tall, slim, athletic. Only after the crowd thinned did I notice his stainless steel lower leg. It was a jarring reminder of the cost of war-time service.

We also see news stories about the Greatest Generation–the World War II generation–whether it is human interest stories about trips to the WWII Memorial in Washington, or reunion groups of shipmates or battle anniversaries, or tributes in obituaries as local heroes pass from us.

Of course, we have also seen positive and negative news stories about the treatment of veterans at VA hospitals and clinics, as well as those regarding the expansion of cemeteries for veterans.

Your law practice probably has little to do with military or veterans' issues. As a citizen who has been served by these folks, though, we hope that you will enjoy and learn from the thoughtful articles in this issue. | AL

Keith B. Norman
keith.norman@alabar.org

The Times They Are A-Changin'… Again

In 1964, Bob Dylan released the album, "The Times They Are A-Changin'," featuring the song by the same title. Most "Baby Boomers" are probably familiar with the lyrics of this song, which has been recorded and released by a number of groups since then. The first of its five verses reads:

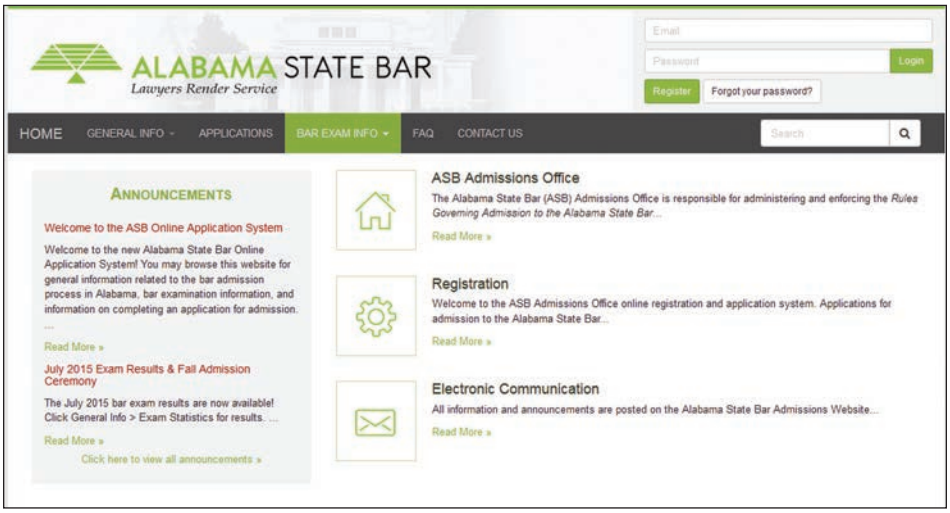
"Come gather 'round people
Wherever you roam
And admit that the waters
Around you have grown
And accept it that soon
You'll be drenched to the bone
If your time to you is worth savin'
Then you better start swimmin'
or you sink like a stone
For the times they are a-changin'"

From adopting the use of the Multistate Performance Test (MPT) and Multistate Essay Exam (MEE), to fully implementing the Uniform Bar Exam (UBE) and the online Alabama law course for bar examinees, the Alabama State Bar continues to make strides in the area of admissions. The latest change involves the law student registration and bar examination application process. The student registration and the application for the bar exam are now web-based and must be completed online. They are accessed via a new admissions portal on the bar's website. Admissions Director **Justin Aday** and the admissions staff have worked diligently with ILG Admissions Software Company over the last year to develop

the web-based application interface and payment facility that will not only streamline the previously tedious application process, but create a paperless environment for completing, filing, receiving and reviewing bar applications and supporting documents.

The admissions staff will no longer have to deal with walls of filing cabinets filled with paper applications, or spend days copying files of those applicants who have been referred to the Character and Fitness Committee for a hearing. All files and supporting documents will be saved as electronic images that are easily viewable from a computer, laptop or tablet. In addition, the admissions staff will no longer be required to process the payments for out-of-state applicants who must file a character report prepared by the National Conference of Bar Examiners (NCBE). Payment for these reports will now be made directly to the NCBE. Once the NCBE completes the reports, they will be forwarded electronically to the admissions department and included with an applicant's electronic application. This will save our staff an enormous amount of time.

This new web-based system became operational in September for those submitting their applications by the October 1 deadline for the February 2016 bar exam. All who apply to take the bar exam, including "Millennials," will now find a process that is less cumbersome and more convenient. Not only has the new electronic filing improved our admissions operations,



but it has also resulted in a more efficient processing of bar exam fees by the finance department. Paper applications that were previously destroyed only after an applicant successfully completed the bar exam have been eliminated altogether. Because these have been eliminated, the membership department no longer has to scan them into our document management system or re-enter a new admittee's information in the bar's membership database. Admission files and other information can be transferred or stored simply with the push of a button.

The new web-based bar application and law student registration constitutes real "changes" to the bar's admission operations. For those of us at the bar who are a part of the Dylan generation, technological changes are occurring quickly so we are paddling as fast as we can to keep our heads above water! | AL

Restoration of Portrait of Judge Alta L. King

By William N. Clark

Presiding Jefferson County Circuit Judge Houston Brown,

as one of his last official acts, asked retired Jefferson County Circuit Judge Tom King, Jr. and presiding Probate Judge Alan L. King if they would like to rehang the portrait of Judge Alta L. King, their grandfather, in what had been Judge Alta King's courtroom from 1947-1969. They readily agreed, and on June 30, 2015, the ceremony was held in the courtroom now occupied by Circuit Judge Bentley Patrick.

The courtroom was full, including a surprising number of lawyers who had practiced before Judge Alta King. Judge Brown began the ceremony by introducing Judge Tom King and his family. Judge Brown noted that Tom and Alan's father, the late Tom King, Sr., had served as an Alabama state senator and was a leader in the community. Judge Brown noted that when Judge Alta King retired in 1969, he was presented with a plaque from the Birmingham Bar Association ("BBA") by the late L. Drew Redden, then president of the BBA. The plaque read: Circuit Judge Alta L. King (1947-1969) "The Judge with a Heart."

Judge Brown's reference to Drew Redden was followed by comments from Bill Clark, a partner of Drew Redden's, and, like him, a past president of both the BBA and the Alabama State Bar. Bill explained the close relationship between Drew Redden and the King family. Tom

King, Sr. and Drew had both served in the Philippines during World War II, were in college together and fraternity brothers at the University of Alabama and remained close friends over the years.

Judge Brown then spoke about one of Judge King's most famous cases that was a testament to his courage, strong sense of justice and fairness for all. In 1957, Judge Edward Aaron (not a judge, but that was his name), an African-American, was kidnapped and castrated by four white men, all Ku Klux Klan members, one of whom was cyclops of the local chapter. In a September 16, 1957 article in *Time* magazine, one of the men responded with a racial epithet to a question about why they had picked Aaron, saying that they had just picked an African-American at random. The hooded men took him to a deserted shack, castrated him with razor blades and then poured turpentine on the wound. The men were charged with mayhem and tried and convicted before all-white male juries. Judge Alta King courageously gave all four 20-year sentences, the maximum under Alabama law.

The November 1, 1957 edition of *The Birmingham News* reported:

> In passing sentence on the 31-year old Klan cyclops, Judge Alta King told the defendant, "There has never been a case in all my years of law practice and 10 years on the bench that has shocked me as this one has. I'm sorry. There's no pleasure for me in sending a man to prison . . . but there's just no justification for your act from the testimony presented in the case . . .Because of the very seriousness of this I do not think anything but the maximum would suffice. I would not be true to my responsibility as a law enforcement officer if I gave you less. Therefore, I sentence you to 20 years."

The rehanging of Judge Alta King's portrait is a well-deserved recognition of Judge King's dedication to the rule of law and the service of four generations of his family, who have served and continue to serve their community.

The *Birmingham Bar Bulletin*, fall 2015 issue (*http://bhambar-bulletin.com/fall_2015/#/1*), described in detail the ceremony and the restoration of the portrait of the Judge Alta King, which we commend to all ASB members. A video of the portrait rehanging ceremony, photos and other tributes to Judge King are available on YouTube (search Alta L. King). | AL

Beyond the Veterans' Benefit Known as "Aid and Attendance"

By R.F. "Ben" Stewart, III and Douglas I. Friedman

According to the Department of Veterans' Affairs, more than 413,000 veterans live in Alabama. Of these, more than 317,000 are wartime veterans.[1] In the November 2013, *Alabama Lawyer,* William G. Nolan wrote an article about the benefit known as "aid and attendance." The article described the tax-free benefit that assists qualifying wartime veterans and their surviving spouses with unreimbursed medical expenses, such as in-home care or assisted facility expenses. This article reviews recent developments in the area of "aid and attendance" and will highlight a handful of the many other VA benefits that may be available to veterans and their families.

Improved Pension–Aid and Attendance Update

The 2013 *Alabama Lawyer* article noted that federal legislation, pending at that time, sought to impose limitations on eligibility, including a look-back on all transfers made by a veteran or his/her spouse within the three-year period immediately preceding filing of a claim. Although the look-back bill failed to pass Congress, the Department of Veterans' Affairs has decided to implement the rules through its rule-making authority. On January 23, 2015, the Department issued proposed regulations to 38 CFR 3.276.[2] The period for public comments ended March 24, 2015. More than 900 comments were made and published on *www.regulations.gov*. About 95 percent of the comments opposed the new rule.[3] Many groups, including the National Academy of Elder Law Attorneys, question whether the VA has the authority on its own to implement the look-back period without legislation.[4]

Veterans' Disability Compensation Benefits

Overview

The Department of Veterans' Affairs provides disability benefits for veterans who suffer an injury or disease while serving in the military. The requirements are threefold: 1) an injury or event in the service, 2) a current medical condition and 3) a medical nexus between the two. Note that VA disability compensation differs from the VA Improved Pension "Aid and Attendance" benefit which is needs-based and does not have to be related to a service-connected injury while in military service. While the three requirements are simply stated, the rules are often arcane and complex–as well as counter-intuitive.

Many veterans may be surprised to find out that they are eligible for disability benefits.

In general, VA benefits are excellent. A 100 percent disability rating qualifies for about $2,800 per month tax-free. VA disability benefits include the same cost-of-living increases as Social Security, and if the veteran is married and/or has dependent minor children, he will receive a modest additional benefit for them.

Most disability benefits, however, are not 100 percent, but are partial benefits. For example, a 10 percent rating would provide about $125 per month in 2015. The rating percentage depends on the severity of the medical condition.

For an injury to qualify, it must have occurred during active duty. It does not have to occur during combat, however. So, if the veteran falls down a flight of stairs and hurts his back–while he is on active duty–the back injury will be covered.

For a disease to qualify, it must usually have started during military service. For example, if the veteran is diagnosed with diabetes while on active duty, the veteran will be compensated.

Reserve and National Guard duty may qualify as active duty, but there are many restrictions that greatly limit the availability of benefits.

There is no time limit for applying for benefits, but benefits will usually be payable only from the date of the application. If the service-connected medical condition worsens later, the veteran can apply for an increase in benefits.

Presumptions

Benefit calculations are particularly complicated for Vietnam veterans. For example, veterans who "served" in Vietnam between January 9, 1962 and May 7, 1975 are eligible for several benefits. "Served in Vietnam" generally means that the veteran had his boots on the ground in Vietnam–even for a short period of time–such as to change planes. If a veteran "served" in Vietnam, and later suffers from one or more of a long list of diseases–such as ischemic heart disease, various cancers and diabetes–the veteran is eligible for benefits.

The VA's rationale for this coverage presumes that the Vietnam veteran has been exposed to Agent Orange and presumes that certain diseases were the result of that exposure. Research shows that individuals exposed to Agent Orange have higher incidence of these diseases. Because of the VA's presumption, proof of exposure is not required. Instead, the veteran must prove that he or she was on the ground in Vietnam. So, a cook who never left Saigon can apply for benefits with the same presumption as a foot soldier who sprayed Agent Orange in the jungle.

These presumptions can result in interesting conclusions. For example, a veteran who smokes three packs of cigarettes a day, who served in Vietnam at age 20 and who then gets lung cancer at age 55 is covered.

Proving that the veteran "served" on the ground in Vietnam is often harder than it would appear. Many veterans served temporarily, without corresponding records. Others disembarked from ships in Vietnam harbors. In general, a veteran's statement that he served in Vietnam is not enough by itself. Corroborating records and "buddy" statements from other veterans are usually required, especially at the initial levels of claim review–and this corroboration can take many hours to find–if indeed it can be found at all.

There are also presumptions for other locations and periods of service, such as the Persian Gulf and Korea. Service in these war zones carries presumptions much like the Vietnam presumptions, but the presumptions cover different diseases.

Another quirky rule is that if certain medical conditions arise within a year after discharge, the veteran is still covered. Psychosis would be an example. Symptoms of these diseases are presumed to take a long time to develop, so a soldier may be sick without actually discovering it until later.

Effective Date of Benefits

In addition, there are special rules that govern the effective date of benefits. It can take hours of reviewing a claim file just to figure out when the benefits should begin. In some cases, the usual "date of the application" rule may not apply. For example, a government record discovered years after a claim is denied may be offered as evidence to reopen the case. If the record leads to an award in the reopened case, the effective date is the date of the original claim.

Procedural Rules

If a claim is denied, or if the rating is lower than expected, the veteran may appeal the decision. The first appeal is within the VA Regional Office in Montgomery.[5] The next appeal is to the Board of Veterans' Appeals in Washington, D.C. The board conducts most hearings by video, though its members usually travel to the regional offices several times each year to conduct in-person hearings. If the claim is still denied, the next appeal is to the Court of Appeals for Veterans' Claims, which is a limited jurisdiction federal court that hears only veterans' claims. Appeals from the Court go to the Federal Circuit Court of Appeals.

The procedural rules can also be daunting. There are elections required in connection with the appeals process, some of which result in shorter waiting times than others, and some which provide *de novo* review by a more experienced VA

employee but longer waiting times. One size does not fit all, so the veteran must decide the best course of action before appealing a claim.

One should note that each different medical condition or injury is a separate claim. So, a veteran who is injured in a parachute jump when his arm gets tangled in the risers and falls awkwardly to the ground may have separate claims for his shoulder, wrist, knee and hip. Some of these claims may be awarded, while others are denied or remanded. It is not unusual to file many claims at the same time, and then see some go up to the Court, while others are remanded by the board for more development at the Regional Office.

It is often difficult to figure out the procedural posture of these cases. It is important to decide which claims are the most important, and how to get those claims expeditiously adjudicated.

Veterans' Healthcare Benefits

The Veterans' Health Administration is home to the United States' largest integrated healthcare system, consisting of 150 medical centers, nearly 1,400 community-based outpatient clinics, community living centers, vet centers and domiciliaries. Together, these healthcare facilities and the more than 53,000 independent licensed healthcare practitioners who work within them provide comprehensive care to more than 8.3 million veterans each year.[6] Unfortunately, the VA healthcare system has recently been under the microscope because of the highly publicized revelation that veterans were enduring long delays while waiting for medical care. As a result, the VA has been the subject of intense scrutiny by both the VA Inspector General and Congress.

Alabama hosts four VA medical centers, which are located in Birmingham, Montgomery, Tuscaloosa and Tuskegee. Additionally, there are two outpatient clinics in Dothan and Selma, along with 13 community-based outpatient clinics throughout the state.

Individuals who served in the active military, as well as National Guard and reserves who were called to active duty by federal order, may be eligible for VA healthcare benefits. Not all veterans, however, are eligible to enter the healthcare system.[7] Veterans who enlisted after September 7, 1980 or entered active duty after October 16, 1981 have a minimum duty requirement. They must have served 24 continuous months or the full period for which they were called to active duty in order to be eligible for VA healthcare. There are some exceptions to the minimum duty requirements. Each VA hospital has a patient advocate (PA)–so any veteran who thinks he should be receiving care, and is not, should contact the PA.

Each year the VA determines, based on its budget and other resources, which priority groups will be enrolled for the following year. If a veteran received medical care from the VA during the previous year, an application for enrollment for the following year will usually be automatically processed.[8] Certain veterans may be afforded enhanced eligibility status[9] such as:

- A former prisoner of war
- A Purple Heart medal recipient
- A Medal of Honor recipient
- A veteran who has a service-connected disability of 10 percent or more
- A veteran who was discharged from the military because of a disability, early out or hardship
- A veteran who served in a theater of operations for five years post-discharge

It is important to decide which claims are the most important, and how to get those claims expeditiously adjudicated.

- A veteran who served in the Republic of Vietnam from January 9, 1962 to May 7, 1975
- A veteran who served in the Persian Gulf from August 2, 1992 to November 11, 1998
- A veteran who was stationed or resided at Camp Lejeune for 30 days or more between August 1, 1953 and December 31, 1987
- A veteran who was found by the VA to be catastrophically disabled
- A veteran whose previous year's household income is below the VA's national income or geographical adjusted thresholds

Covered Services

Veterans who are enrolled in the healthcare system are able to receive hospital inpatient care, outpatient care, extended care services and other services included in the VA's "medical benefits package." Some of the more popular benefits include pharmacy services, free eyeglasses and free hearing aids.

Veterans who are enrolled in the healthcare system are able to receive hospital inpatient care, outpatient care, extended care services and other services included in the VA's "medical benefits package."

The VA will provide medications that are prescribed by VA healthcare providers in conjunction with VA medical care. For most veterans, these medications will only cost $8 for a 30-day prescription. In certain circumstances, the VA will fill prescriptions prescribed by a non-VA provider. Hearing and vision medical services are available for certain veterans who are in the healthcare system. Certain qualified veterans may also receive free dental care.

Nursing Home Care

The VA's nursing home programs include VA-operated nursing home care units (community living centers), contract community nursing homes and state-owned nursing homes. Alabama has four state-owned VA nursing homes. These facilities are:

- Bill Nichols State Veterans' Home, Alexander City
- William F. Green State Veterans' Home, Bay Minette
- Floyd E. "Tut" Fann State Veterans' Home, Huntsville
- Colonel Robert L. Howard State Veterans' Home, Pell City

These facilities are up-to-date, clean, well-run and affordable. Because the Veterans' Health Administration pays the state veterans' homes an annually adjusted rate per day ($102.38 in 2015) for each veteran in the nursing home, the veteran's cost to stay in the nursing home is substantially less than a private facility. Alabama facilities offer both domiciliary (assisted-living) as well as skilled nursing care. To be eligible for care from any Alabama state veterans' home, the veteran must meet the following eligibility requirements:[10]

- Must be honorably discharged from military service with a minimum of 90 days of service, of which one day was during a wartime period.
- Must meet qualifications as set forth by the U.S. Department of Veteran Affairs criteria for skilled nursing care or domiciliary/assisted-living.
- Must have been a resident of the State of Alabama during the immediate past 12 months.
- Must have had a medical examination by physician within 90 days of admission.
- Other veterans who do not have wartime service may be admitted to the nursing home on a space-available basis.

Burial Benefits

Burial benefits include a gravesite in any one of the 131 national cemeteries, opening and closing of the grave, perpetual care, a government headstone or marker, a burial flag and a Presidential Memorial certificate at no cost to the family. Additionally, some veterans may also be eligible for burial allowances. Spouses and dependents may also be buried in a national cemetery at no cost. Certain burial benefits are also available for veterans buried in a private cemetery.

In Alabama, there is one state veterans' cemetery and three national cemeteries. The Alabama state veterans' memorial cemetery at Spanish Fort sits on more than 120 acres of land in Baldwin County. Mobile National Cemetery is the state's oldest, having been established in 1865 after the Port of Mobile fell to the Union. The cemetery is closed to new interments. The other two national cemeteries are Fort Mitchell National Cemetery in Fort Mitchell and the Alabama National Cemetery in Montevallo. Any veteran

desiring to be buried in one of the state or national cemeteries should make arrangements in advance.

Conclusion

There is a sign hanging from the ceiling in the claims department of the VA Regional Office in Montgomery that reads: "Award if you can, deny if you must, and give the benefit of the doubt to the veteran." Despite the upbeat phrase, the system is simply overloaded with claims from aging veterans, along with the more than two million younger veterans returning from Iraq and Afghanistan, approximately half of whom are filing disability claims–most of which are psychological. While modern medicine saves more lives from combat injuries than in previous wars, the result is that soldiers who would have died in previous wars instead return with psychological injuries.

Our veterans deserve the best treatment we can afford. They should be awarded the benefits that they deserve–no more and no less. | AL

Endnotes

1. *http://www.va.gov/vetdata/Veteran_Population.asp.*
2. *https://www.federalregister.gov/articles/2015/01/23/2015-00297/net-worth-asset-transfers-and-income-exclusions-for-needs-based-benefits.*
3. *https://www.regulations.gov* Search RIN 2900-A073.
4. *http://cqrcengage.com/naela/VAproposedreg.*
5. There is only one official VA office for all of Alabama, though many veterans do not understand that their local DAV or VFW office is not a VA office.
6. *http://www.va.gov/health/aboutVHA.asp.*
7. The Veterans' Health Care Eligibility Reform Act of 1996 clarified that an eligible veteran does not have an unqualified right to VA hospital care. Rather, the right to care is specifically dependent upon resources and funding available to the VA.
8. VA Eligibility Reform Employee Handbook (June 1998).
9. *http://www.va.gov/HEALTHBENEFITS/apply/veterans.asp.*
10. *Alabama Code* 31-5A-8.

Attendees and Cumberland Law School Dean Henry C. Strickland, III at the 26th annual Alabama Military Law Symposium held July 31 and August 1 at Cumberland School of Law. The event has also been held at the law schools at the University of Alabama and Jones School of Law at Faulkner University.

The Alabama Military Law Symposium 1990-2015

By Judge Stephen G. Smith, Carl K. "Trey" Dowdey, III and John J. "Jack" Park, Jr.

Overview and History

On July 31 and August 1, 2015, the Alabama State Bar's Military Law Committee hosted its 26th annual Military Law Symposium at Cumberland School of Law. Over the past 25 years, the world, the committee and the attendees have witnessed the fall of the Berlin Wall; the 9-11 attacks; military deployments to such places as the Balkans, Kuwait, Iraq and Afghanistan; a resurgent Russia; global terrorism; cyberwarfare and the rise of China as a military and economic power. The symposium has provided a forum to consider the legal aspects and ramifications from such volatile, uncertain, complex and ambiguous events such as those, as well as the effects of statutory changes, on the activities of the attendees.

The attendees are typically and primarily current or former Army Judge Advocate officers, from the active and reserve components (National Guard and U.S. Army Reserves). This is not surprising because the Army is the largest service, with the largest presence in Alabama. Even so, the symposium draws judge advocates from the Air Force, the Navy

and the Marines, as well as civilian military attorneys and other bar members with an interest in military law.

The symposium started in August 1990, when several military attorneys proposed a two-day military law MCLE event to be held at the University of Alabama School of Law. Then-state bar President Alva C. Caine, who was also a former military member, endorsed the concept, but Col. (retired) Bill Tucker played a large role in the planning. In 1990, Tucker was in the middle of the Army War College, a professional course of study and master's degree program for America's senior military leaders. Tucker was impressed with the late Col. Otto Chaney (retired). Chaney taught at the Army War College in Carlisle, Pennsylvania and wrote a biography of Marshal Georgy Zhukov, who commanded Soviet armies and operations during World War II. Tucker invited Chaney to speak and, with help from Jimmy Walsh and others, the symposium came into being.

Since the initial event, the Alabama Military Law Symposium has been held annually in August at one of the state's law schools. For 25 years, it has addressed some of the most pressing military law issues, while providing MCLE credits to active, reserve and National Guard judge advocates from all services, as well as to retirees and other bar members with an interest in military law. The symposium is open to all law students or attorneys with an interest in military law and military history.

More importantly, the symposium has provided judge advocates from various Army components and other services the chance to meet and interact. Sometimes, a meeting at the symposium paid off in future assignments or work; reserve component judge advocates drilled with active component judge advocates and prior meetings paid dividends. The symposium has also solidified the relationship between the Army and the Air Force communities in Alabama, drawing on the expert faculty at the Air University War College at Maxwell Air Force Base for guest speakers.

The Symposium's Content

The symposium typically offers about seven hours of Alabama MCLE credit. The planners have filled those hours with various legal experts and speakers. Some speakers made presentations based on their job experience, while others made presentations on certain areas of subject matter expertise or shared lessons learned from direct military experience (such as legal lessons learned by deployed judge advocates in Operations Iraqi Freedom and Enduring Freedom).

Speakers have included members of Congress, judges, senior Army judge advocate leaders and Alabama State Bar presidents. Congressmen Robert Aderholt and Artur Davis have addressed the symposium, as well as state and federal judges, including Judge Joel Dubina, Judge Scott Coogler, Associate Justice Bernard Harwood, then-Justice Tom Woodall and Judge Bill Bostick. Army judge advocate generals have also travelled to speak at the symposium, including then-Army Judge Advocate General Lieutenant General Scott Black (ret.), Major General Dan Wright (ret.) and Brigadier General John Miller. We have also been joined by former presidents of the Alabama State Bar, including Alyce Manley Spruell and Richard Raleigh.

At one symposium, after Saddam Hussein's forces had been routed in 2003, the entire range of lawyers in active military judge advocate roles appeared. A young judge advocate captain who rode with the 3d Brigade of the 3d Infantry Division all the way to Baghdad recalled his time at the front end of the Army's push. A colonel, who was the senior lawyer for the regional command at Qatar, talked about his legal experience at the command headquarters. Finally, Admiral Jane Dalton (ret.), the prior legal advisor to the chair of the Joint Chiefs of Staff, talked about the view from Washington, D.C. Their presentations ranged from the tactical to the operational theater to the strategic level, seamlessly summarizing the role of judge advocate lawyers in that portion of the conflict.

More generally, the symposium has offered the attendees the opportunity to learn and discuss recent developments in international and domestic law and policy. Over the past 25 years, the military has repeatedly deployed around the world, with the most noteworthy including deployments to the first Gulf War in 1990, the Balkans in the later 1990s and, after the attacks of September 11, 2001, to Afghanistan and Iraq. Those deployments drew on all the capabilities of the active, reserve and National Guard forces, which ultimately led to substantive changes in military law and national policy.

In addition, the Alabama National Guard was activated in response to Hurricane Katrina in 2005 and the 2011 tornadoes that hit Tuscaloosa. In August 2011, after those tornadoes, the Military Law Committee presented a $500 check to help resupply Cottondale Elementary School, which is now the Alberta School of Performing Arts. Tuscaloosa's Mayor Walter Maddox and Representative Bill Poole joined Principal Brenda Parker for the presentation.

Legal Changes

The wholly volunteer U.S. Armed Forces have weathered a blistering pace of change over the past 25 years, from the post-1991 Gulf War draw-down, to the post 9-11 military force increases and multiple deployments to the Middle East, to the new reality of fiscal constraints on the Department of Defense, sequestration and another military draw-down. The Alabama judge advocates, their families, their law firms, their civilian clients and the judiciary have felt the impact from almost 14 years of continuous military conflict. Accordingly, speakers have discussed how to respond to significant changes in federal law, state law and significant policy changes during this time. The military developed and repealed the "Don't Ask, Don't Tell" policy, Congress enacted amendments to the Servicemembers Civil Relief Act ("SCRA") and the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), Alabama adopted the Emergency Management and Assistance Compact and the 2012 National Defense Authorization Act allowed DOD and individual states to coordinate disaster response with a single, "Dual-Status Commander."

Colonel (ret.) William J. Baxley, 2015 Bank-Roe award recipient, honored for his career of military service and public service to the state and nation. The award is named for the late Major Bert Bank and the late Sergeant Major Bill Roe for their military service and public service during WWII and Vietnam, respectively.

In addition to those major statutory and policy developments, symposium speakers have addressed the following subject areas:

Significant Developments–Between 1990 and 2015, there have been major changes in the way the American military performs its mission, and symposium speakers have discussed the legal implications of those changes. Speakers such as Peter Singer from the Brookings Institution and Steven Bucci from the Heritage Foundation talked about changes like the increasing presence and status of civilian contractors on or near a battlefield, the use of drones for military (and civilian) purposes, irregular or asymmetric warfare, terrorist threats, counterinsurgency operations, the recent Iranian nuclear deal, ISIS, China as a rising power and the challenges of cybersecurity and cyberwarfare.

Lessons Learned–The deployment of Reserve and National Guard units to conflict zones overseas and in response to natural disasters here in the United States is a stressful event. Commands need to be ready to go, commanders need to know the limits on their legal authority and soldiers need to have their affairs in order. With each mobilization and deployment, lessons are learned, and those who have learned them have passed them on to those who will go in the future.

In addition, when high-profile disasters occur, military lawyers are frequently called on to conduct an investigation. The story of the investigation and its twists and turns can inform the actions of future investigators. At one symposium, General Patrick Finnegan talked about the investigation that followed after a Navy jet clipped a cable at Cavalese, Italy, cutting it and causing a cable car to fall, killing several private citizens.

Alabama Law–Many of the attendees are reserve and guard judge advocate lawyers who also have private practices. As such, the symposium's planners have also recruited speakers who have talked about such subjects as bankruptcy law, insurance law, real property law and ethics.

The World Situation–The American military serves around the world, so an understanding of potential danger zones is important, especially from an increasingly joint military, where Army, Air Force, Navy, Marines and the Coast Guard work together, hand in hand. Speakers from the Air War College at Maxwell Air Force Base have frequently shared their expertise, talking about recent events and countries in the Middle East, East Asia, Russia and India-Pakistan.

Military Legal History and Military History–In the 1980s and 1990s, a spy ring in Europe disclosed to the Soviets our deployment plans in the event of a Soviet invasion, and a warrant officer in Berlin gave thousands of pages of documents to the Soviets. At one symposium, LTC Stu Herrington (ret.), a counter intelligence officer, described how the perpetrators were caught.

In 1954, Governor Gordon Persons activated the Alabama National Guard and sent it to Phenix City to clean it up. At one symposium, two lawyers who were involved in that action, former Governor and Attorney General John Patterson and Joe Cassady, an attorney from Enterprise, told the attendees about this important piece of Alabama and Alabama National Guard history.

The Bill Roe-Bert Bank Award

Since 2006, the Sergeant Major Bill Roe-Major Bert Bank Award has been presented annually to an attorney who has contributed significantly to the State of Alabama as a military attorney. It is named for two noteworthy Alabama lawyers: the late Bill Roe, a Birmingham attorney and combat veteran of Vietnam who was awarded the Silver Star for bravery, and the late Bert Bank, a Tuscaloosa attorney, member of the Alabama legislature and businessman, who was a survivor of the Bataan "Death March" in World War II.

This year's recipient was Birmingham attorney and former Alabama Attorney General and Lieutenant Governor William J. Baxley, who is also a retired colonel in the Judge Advocate General's Corps in the Alabama Army National Guard.

Baxley has been a popular and frequent presenter at the symposium, speaking on historical subjects like his prosecution of those responsible for the bombing of the 16th Street Baptist Church. He has also spoken about the Nuremburg War Crimes Trials and the Spanish-American War.

Conclusion

For over 25 years, the Alabama State Bar's Military Law Committee has hosted its Military Law Symposium. Speakers have come from the ranks of Alabama lawyers and from the wide world of the American military. Junior captains have grown up, and senior judge advocates have retired. As the military's mission has changed, the symposium has evolved and changed, but its purpose of bringing military components and services together has stayed constant. We welcome interested readers to join us for our 26th symposium next year. | AL

Veterans' Treatment Courts

As many know, some veterans from the wars in Iraq and Afghanistan have returned home after serving in a combat zone and have had great difficulty readjusting to civilian life. When combined with mental health issues, substance abuse, family turmoil, unemployment and homelessness, the difficulty in readjusting has led many veterans to end up incarcerated and in the criminal justice system. According to *JusticeforVets.org*, the number of veterans being treated for mental illness or substance abuse disorders has increased 38 percent since 2004.

In 2011, with the encouragement of the Alabama State Bar's Military Law Committee and ASB leadership, the Alabama Department of Veterans Affairs and Administrative Office of Courts partnered to establish the **Alabama Veterans' Treatment Court Task Force** with the mission of developing statewide guidelines for veterans' treatment courts. Since that time, the Administrative Office of Courts has provided grant funding to assist with the establishment of these courts across the state. According to Denise Shaw, the drug court/mental health court/Veterans' Treatment Court specialist with the Administrative Office of Courts, veterans' treatment courts are currently operating in 21 judicial circuits or municipal courts in Alabama.

In 2011, the task force also selected Shelby County to serve as the pilot program. Circuit Judge Bill Bostick took charge of that effort, and he explains, "Our goal in establishing a veterans' court was to ensure that veterans involved with the criminal justice system have access to the services and treatment they are eligible for by virtue of the service they rendered." He reports that the county has seen a "significant reduction" in recidivism among the program's participants and that the veterans in the program have improved the quality of their lives.

The first class of justice-involved veterans graduated from Shelby County's Veterans' Treatment Court in November 2013. To date, 138 justice-involved veterans have appeared on the court's docket, and 26 have graduated. Twenty justice-involved veterans are now active in the program. The rest, who have neither graduated nor are currently active, have transferred out of the program for various reasons, including ineligibility due to the charges involved, district attorney discretion and a transfer initiated by the participant or defense attorney.

Those results stem from the fact that veterans' treatment courts follow the adult drug court model in that they require regular court appearances and mandatory treatment programs with an emphasis on individualized care in a structured environment. Veterans' treatment courts, like adult drug court programs, also provide for sanctions and accountability for failure to meet the requirements of the program. One goal of our Veterans' Treatment Court is to link the veterans with the programs, benefits and services they have earned through their service. | AL

Alabama Enacts Major Revision of *Alabama Code* 8-1-1

By Will Hill Tankersley, Richard J.R. Raleigh Jr., J. Casey Pipes and Adam K. Israel

"To advise a client on the enforceability of a non-compete agreement under Alabama law is to flirt with malpractice."

–Anonymous Alabama lawyer

Introduction

For generations, Alabama lawyers who addressed issues related to non-corporate agreements have contended with a vague statute (*Ala. Code* § 8-1-1) ("Restrictive Covenant Act"), conflicting case authority, dramatic shifts in the controlling legal standard and trial courts that feel free to "blue pencil" agreements in ways that no one could have anticipated, turning wholly unenforceable covenants into enforceable covenants or vice versa.

As a result, it was notoriously difficult to advise clients as to the enforceability of restrictive covenants, even in situations where there appeared to be a reported case directly on point. For years, without clear legislative guidance, the Alabama Supreme Court struggled to develop a coherent set of analytical tools for restrictive covenant cases. Among other areas, the question of whether a restriction is "total" or only "partial" restraint, and the degree to which other elements of enforceability (e.g. "protectable interest" and "professional" status) apply to "partial" restraints, have been grafted onto Alabama's restrictive covenant jurisprudence.

With no clear guidance from the legislature, the Alabama Supreme Court's interpretation of the Restrictive Covenant Act shifted dramatically. For example in *Sevier Insurance Agency v. Willis Corroon Corp.*,[1] the Alabama Supreme Court was presented with two cases involving insurance brokers who had allegedly violated identical covenants in two different jurisdictions (Montgomery County and Jefferson County). In the Jefferson County case, the trial court held that the covenant was a valid "partial" non-solicitation agreement and granted declaratory relief for the former employer. In the Montgomery County case, the covenant was held to be an invalid "total" restraint (non-compete agreement). On appeal, the supreme court initially reversed the Montgomery ruling and upheld the Jefferson County result. On rehearing, the Alabama Supreme Court reached the exact opposite result, reversing the Jefferson County holding upholding the covenant and affirming the Montgomery County holding invalidating the covenant. The Alabama Supreme Court ultimately held that, contrary to prior Alabama law, non-solicitation agreements were "total" restraints subject to the restrictions of *Ala. Code* § 8-1-1–an argument that neither party raised. Eight years later, the Alabama Supreme Court reversed *Sevier* and announced a new standard that a restrictive covenant was not a "total" restraint unless the bound party was prevented "from practicing her trade or profession."[2]

History of Alabama's Restrictive Covenant Law

"It is the public policy of Alabama that contracts restraining employment are disfavored."[3] Alabama's restrictive covenant law has its roots in English common law. "During the Middle Ages, English courts found all restraints on trade to be void and unenforceable, including post-employment covenants not to compete."[4] This is because covenants in restraint of trade violated the customary rules of the craft guilds. During the 15th and 16th centuries, "craft guilds were the dominant vehicles of economic activity in England."[5] The guilds were divided among master craftsmen, journeymen and apprentices.[6] "The goal of the apprenticeship system was to provide the master craftsman with a small labor force, and provide young men with a means of technical training to introduce them to the skills of the given trade."[7] "The relationship between apprentice and master was a contractual one: the master agreed to provide essential training to the apprentice in exchange for low-wage labor over a given period of time, usually seven years. At the end of the contractual period, the apprentice would be free, as a journeyman, to practice his trade, eventually becoming a master."[8]

However, "[f]reedom of contract emerged as capitalism became the predominant policy concern during the eighteenth and nineteenth centuries. As a result, English courts began issuing decisions which allowed limited restraints on trade."[9] Although the courts retained the presumption against the enforceability of restrictive covenants that had developed in the common law, they began applying a "rule of reason" in the enforcement analysis.[10] Under the "rule of reason," the inquiry was whether there was "some essential economic or business purpose"[11] for the agreement and whether the restrictive covenant "appeared to be made upon good and adequate consideration."[12] Over the next century, the English common law "rule of reason" evolved into an interest-balancing analysis. For example, "[i]n *Horner v. Graves*, the English court found that the element of reasonableness was not limited only to the consideration stated in the contract, but also its potential impact on the public welfare."[13]

Beginning in the early 19th century, American courts adopted the common law "rule of reason" in their analysis of restrictive covenants and began upholding contracts in restraint of trade "if the restraints [were] reasonable under the circumstances, ancillary to a valid transaction or relationship, and limited in duration and geographic scope."[14] It is against this legal landscape that Alabama adopted its first set of restrictive covenant statutes.

Chapter 272, article 7, § 6826 of the 1923 *Alabama Code* set out the general common law presumption against contracts in restraint of trade that persists today. According to § 6826, "Every contract by which any one is restrained from exercising a lawful profession, trade, or business of any kind, otherwise than is provided by the next two sections, is to that extent, void."[15] Sections 6827 and 6828 set out two exceptions to this general rule. First, § 6827 permitted "[o]ne who sells the goodwill of a business" to "agree with the buyer to refrain from carrying on a similar business within a specified county, city, or a part thereof, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business therein."[16] Section 6828, which, except for minor editorial changes, is identical in all material respects to the current version of *Ala. Code* § 8-1-1(c), allowed partners, "upon or in anticipation of a dissolution of the partnership, [to] agree that none of them will carry on a similar business within the same county, city, or town where the partnership business has been transacted, or within a specified part thereof."[17]

The Alabama legislature amended § 6827 in 1931 to extend the enforceability of restrictive covenants to the employee-employer relationship and to specifically permit non-solicitation agreements (the statute previously only mentioned agreements "to refrain from carrying on or engaging in a similar business").[18] Beginning on July 23, 1931, amended § 6827, which is identical in all material respects to the current version of *Ala. Code* § 8-1-1(b), stated:

Exception in Favor of Purchaser and Employers–One who sells the good will of a business may agree with the buyer, and one who hires as an agent, servant, or employee may agree with his employer, to refrain from carrying on or engaging in a similar business and from soliciting old customers of such employer within a specified county, city, or a part thereof, so long as the buyer or any person deriving title to the good will from him, and so long as such employer carries on a like business therein.[19]

Sections 6826-6828 were recodified without material alteration in the 1940 *Code*[20] and again in the *Code* of 1975.[21]

Alabama Law Institute Committee Actions to Revise the Restrictive Covenant Act

Alabama is blessed with the superb Alabama Law Institute ("ALI") and its executive director, Othni Lathram. In 2011, the ALI took on the task of providing clarity and predictability to this contentious and confusing area of Alabama law. The ALI convened a committee of judges, law professors and leading practitioners in the field ("Committee"). The committee set a high bar for itself by adopting principles to guide its revision of the Restrictive Covenant Act.[22]

The ALI Committee did not view its role to be the elimination of restrictive covenants. Businesses routinely enter into such covenants with employees, sellers of businesses and other businesses.[23] However, the committee was very much aware that without limitations, such covenants can become very one-sided and unnecessary restrictions at a time (i.e. post-employment) when the bound party is likely receiving nothing of value from the enforcer. Conversely, businesses must have the reasonable assurance that properly crafted and supported covenants consistently will be enforced.

The ALI effort to re-codify and clarify the proper application of Alabama's Restrictive Covenant Act began with the selection of the committee chair and an advisory committee.[24] The committee was convened in late 2011 and met for the better part of two years going through all of the reported Alabama cases on restrictive covenants, reviewing articles about Alabama restrictive covenant

jurisprudence and reviewing the restrictive covenant statutes of other states. In fall 2013, the committee completed its initial drafting work and presented a draft statute to the ALI Executive Committee and then at the ALI annual meeting, both of which approved the draft proposed legislation.

In 2014, bill sponsors **Rep. Chris England** (D-Tuscaloosa) and **Sen. Phil Williams** (R-Guntersville) shepherded the bill in their respective chambers of the Alabama Legislature as HB 241 and SB 270. During the legislative process, an industry group sought to have time to review and consider the language of the proposed Act. As a result, the Act was tabled for nearly a year while the ALI committee chair and executive director met with the industry group, answered questions and responded to concerns. Representative England and Senator Williams re-introduced the Act in the 2015 legislative session, skillfully navigating it through the legislative process. On June 11, 2015, the governor signed the Act into law. It will take effect January 1, 2016.

Section-by-Section Description of the New Act

Section 1. (a) Every contract by which anyone is restrained from exercising a lawful profession, trade, or business of any kind otherwise than is provided by this section is to that extent void.

Section 1(a) retains the historical starting point for the analysis of contracts restraining trade–that they are void. Rather than stopping at that statement and relying on judicially crafted exceptions and caveats, the new code section says that they are void except as provided in this section.

> ***(b)Except as otherwise prohibited by law, the following contracts are allowed to preserve a protectable interest:***
>
> ***(1) A contract between two or more persons or businesses or a person and a business limiting their ability to hire or employ the agent, servant, or employees of a party to the contract is permitted where the agent, servant, or employee holds a position uniquely essential to the management, organization, or service of the business.***
>
> . . .

Section 1(b) then goes on to identify certain situations in which a contract is allowed to restrain trade or business, but only if the contract preserves a protectable interest. Just because a contract is entered into in the context of one of the enumerated, permissible fact situations, does not result in automatic enforcement. Unless there is a protectable interest being preserved by the contract, it will be unenforceable. The phrase "protectable interest" is defined in Section 2.

Section 1(b) also contains a proviso that cautions that some of these types of contracts may be prohibited by other laws, and this new code section is not intended to repeal or change those other laws. One example may be antitrust laws.

Section 1(b)(1) pertains to contracts between people or businesses that prohibit any of the parties to the contract from hiring an agent, servant or employee of the other party. While this section expands the scope of permissible "no-hire" agreements beyond technical employees, the class of people who cannot be hired away by another party is limited to those who are "uniquely essential" to certain aspects of the business. It is anticipated that only those people whose job functions are very important and very difficult to replicate would fit within this definition.

> ***(b)Except as otherwise prohibited by law, the following contracts are allowed to preserve a protectable interest:***
>
> . . .
>
> ***(2) An agreement between two or more persons or businesses or a person and a business to limit commercial dealings to each other.***
>
> . . .

Section 1(b)(2) allows contracts that limit commercial dealings to each party to the contract. Examples of contracts that fall within this exception include requirements contracts,[25] output contracts[26] or exclusive provider contracts,[27] among others.

> ***(b)Except as otherwise prohibited by law, the following contracts are allowed to preserve a protectable interest:***
>
> . . .
>
> ***(3) One who sells the good will of a business may agree with the buyer to refrain from carrying on or engaging in a similar business and from soliciting customers of such business within a specified geographic area so long as the buyer, or any entity deriving title to the good will from that business, carries on a like business therein, subject to reasonable time and place restraints. Restraints of one year or less are presumed to be reasonable.***
>
> . . .

Section 1(b)(3) allows contracts in connection with the sale of the good will of a business to prohibit the seller from competing with the buyer in a similar business or soliciting customers for a certain amount of time. This continues previous Alabama statutory law, but a reasonableness component regarding the time and place restriction is also added. One time aspect is that the buyer, or its successors, must still be carrying on a like business, and the other is that the duration must be reasonable. The statute declares that a time period of one year or less is presumed to be reasonable. There is also a geographic component that must also be reasonable, but no statutory guidance was provided as to a presumptively reasonable geographic area.

> ***(b)Except as otherwise prohibited by law, the following contracts are allowed to preserve a protectable interest:***
>
> . . .

(4) An agent, servant, or employee of a commercial entity may agree with such entity to refrain from carrying on or engaging in a similar business within a specified geographic area so long as the commercial entity carries on a like business therein, subject to reasonable restraints of time and place. Restraints of two years or less are presumed to be reasonable.

(5) An agent, servant, or employee of a commercial entity may agree with such entity to refrain from soliciting current customers, so long as the commercial entity carries on a like business, subject to reasonable time restraints. Restraints of 18 months or for as long as post-separation consideration is paid for such agreement, whichever is greater, are presumed to be reasonable.

. . .

Section 1(b)(4) allows contracts between persons and commercial entities that prohibit the person from carrying on or engaging in a similar business. Section 1(b)(5) allows contracts between persons and commercial entities that prohibit the person from soliciting current customers of the commercial entity following separation. Both of these sections allow the person subject to the restraint to be an agent, servant or employee of the commercial entity, which broadens Alabama law to cover independent contractors or those who may not technically be employees. This section also preserves the Alabama law that the individual must be an agent, servant or employee at the time of contract formation, as opposed to being a prospective or a former agent, servant, or employee.[28] This subsection also requires the time and place restriction to be specified and to be reasonable, and in the instance of engaging in a similar business, a duration of two years or less is presumed to be reasonable. In the instance of soliciting customers, the duration of 18 months or for so long as any post-separation consideration is being paid is presumed reasonable.

(b) Except as otherwise prohibited by law, the following contracts are allowed to preserve a protectable interest:

. . .

(6) Upon or in anticipation of a dissolution of a commercial entity, partners, owners, or members, or any combination thereof, may agree that none of them will carry on a similar commercial activity in the geographic area where the commercial activity has been transacted.

Section 1(b)(6) allows contracts in connection with the dissolution of a commercial entity between the partners, owners or members to agree not to carry on a similar commercial activity in the geographic area where the previous commercial activity had been transacted. The purpose of this section is similar to that of § 1(b)(3).

Section 2. (a) A protectable interest includes all of the following:

(1) Trade secrets, as defined in Section 8-27-2, Code of Alabama 1975.

(2) Confidential information, including, but not limited to, pricing information and methodology; compensation; customer lists; customer data and information; mailing lists; prospective customer information; financial and investment information; management and marketing plans; business strategy, technique, and methodology; business models and data; processes and procedures; and company provided files, software, code, reports, documents, manuals, and forms used in the business that may not otherwise qualify as a trade secret but which are treated as confidential to the business entity, in whatever medium provided or preserved, such as in writing or stored electronically.

(3) Commercial relationships or contacts with specific prospective or existing customers, patients, vendors, or clients.

(4) Customer, patient, vendor, or client good will associated with any of the following:

a. An ongoing business, franchise, commercial, or professional practice, or trade dress.

b. A specific marketing or trade area.

(5) Specialized and unique training involving substantial business expenditure specifically directed to a particular agent, servant, or employee; provided that such training is specifically set forth in writing as the consideration for the restraint.

(b) Job skills in and of themselves, without more, are not protectable interests.

Section 2 defines a "protectable interest." This includes: (1) trade secrets as they are defined by Section 8-27-2(1); (2) confidential information used in business that does not otherwise qualify as a trade secret; (3) substantial relationships or contacts with prospective or existing customers, patients, vendors or clients; and (4) customer, patient, vendor or client goodwill. The section makes clear that job skills alone are not protectable interests. While the section does not specifically state that the list of four specified protectable interests are the only possible protectable interests, neither does this section indicate a legislative intent to include other protectable interests (e.g. "includes but is not limited to"). Thus, an argument can certainly be made that to be a "protectable interest" it has to fit within the four listed categories.

Section 3. In order to be valid, any contract or agreement executed pursuant to this act shall be reduced to writing, signed by all parties and supported by adequate consideration.

Section 3 requires a contract that restrains trade to be in writing, signed by all parties, and be supported by adequate consideration. This section does not address existing Alabama law concerning whether continued employment constitutes adequate consideration.

Section 4. If a contractually specified restraint is overly broad or unreasonable in its duration, a court may void the restraint in part and reform it to preserve the protectable interest or interests. If a contractually specified restraint does not fall within the limited exceptions set out in subsection (b) of Section 1, a court may void the restraint in its entirety.

Section 4 continues the "Blue Pencil" rule in Alabama. That is, a court may void an overly broad or unreasonable restraint. Section 4 specifically provides that the court may "void the restraint in part and reform it to preserve the protectable interest or interests," but makes clear that the court may void the restraint entirely if it does not fall within the exceptions outlined in § 1(b).

Section 5. The party seeking enforcement of the covenant has the burden of proof on every element. The party resisting enforcement of the covenant has the burden of proving the existence of undue hardship, if raised as a defense.

Section 5 requires a proponent of a contract restraining trade to prove every element necessary to enforce a covenant with the exception of undue hardship. Some confusion existed regarding whether the absence of undue hardship was an element of a proponent's prima facie case. The committee viewed such a formulation as awkward. As a result, the Act makes clear that undue hardship is an affirmative defense to be raised by the party resisting the enforcement of the covenant, if at all. If the resisting party raises undue hardship as a defense, that party has the burden of proof on the issue.

Section 6. (a) The remedies available for breach of an agreement subject to this act are:

(1) Such injunctive and other equitable relief as may be appropriate with respect to any actual or threatened breach.

(2) The actual damages suffered as a result of the breach or lawful liquidated damages if provided in the contract.

(3) Any remedies available in contract law, including attorneys' fees or costs, if provided for in the contract or otherwise provided for by law.

(b) Nothing in this act shall limit the availability of any defense otherwise available in law or equity.

Section 6 addresses remedies for breach of a valid agreement and possible defenses. They are appropriate injunctive and equitable relief, actual damages or lawful liquidated damages if the contract so provides, and any other remedies available in contract law if provided for in the contract or otherwise provided for by law. The section also makes clear that any defense otherwise available in law or equity is still available.

Section 7. Nothing in this act shall be construed to eliminate any professional exemption recognized by Alabama law.

Section 7 codifies the fact that there remain certain professionals who cannot enter into contracts restraining trade, even if they are in a contractual situation otherwise permissible under § 1(b). The types of professionals who are prohibited from entering into an enforceable contract restraining trade are not listed, but the existing Alabama case law identifying such professions will continue to be followed.

Section 8. It is hereby declared that this act expresses fundamental public policies of the State of Alabama. Therefore, this act shall govern and shall be applied instead of any foreign laws that might otherwise be applicable in those instances when the application of those foreign laws would violate a fundamental public policy expressed in this act.

Section 8 declares that the Act "expresses fundamental public policies of the State of Alabama." Thus, in terms of conflict of laws, when the application of foreign laws would violate a fundamental public policy expressed in the act, Alabama's Act will govern over other laws of foreign jurisdictions. This not only codifies existing Alabama law on this point,[29] but it also makes clear that the conflict of laws analysis in this Act applies to the enforcement of restrictive covenants notwithstanding Alabama's usual conflict of laws rules (i.e. lex loci contractus and contractual choice of law jurisprudence).

Section 9. All laws or parts of laws which conflict with this act are repealed, and specifically, Section 8-1-1,* Code of Alabama *1975, is repealed.

Section 9 expressly repeals the current version of § 8-1-1 and other laws that conflict with this new law.

Section 10. This act shall become effective on January 1, 2016, following its passage and approval by the Governor, or its otherwise becoming law.

Section 10 states that the Act becomes effective January 1, 2016. Therefore, this new Act will apply to actions filed after that date, even if the contract at issue was written and entered into prior to January 1, 2016. The Act does not destroy any existing contract rights. In fact, § 1(b) of the Act increases the number of situations beyond those enumerated in the current version of § 8-1-1 under which restrictive covenants may be enforced. Furthermore, the Act brings clarity to the proper application of Alabama's restrictive covenant law, rejecting some judicial applications that were not based on the language of the statute (i.e. the "total" vs. "partial" restraint dichotomy). Therefore, Alabama's Act will apply to all actions filed on or after January 1, 2016.

Conclusion

Thanks to the ALI, the committee and the bill sponsors, Alabama lawyers will have a greater ability to create covenants that fit within Alabama's balanced jurisprudence of allowing reasonable covenants and disfavoring ones that over-reach. The new law will provide greater clarity and less conflict in this fraught area of the law.

In Memoriam: Our friend, **Mike Freeman**, was also on our committee. He had a career-long interest in restrictive covenants, co-authoring two articles on restrictive covenants for this publication. He was an active and valuable member of our committee as long as his health would permit. He passed away at the age of 51, a few months before this Act was passed into law. | AL

Endnotes

1. 711 So. 2d 995 (Ala. 1998).
2. *Ex parte Howell Eng'g & Surveying, Inc.*, 981 So. 2d 413, 423 (Ala. 2006).
3. *Roberson v. C.P. Allen Const. Co.*, 50 So. 3d 471, 474 (Ala. Civ. App. 2010); *see also Robinson v. Computer Servicenters, Inc.*, 346 So. 2d 940, 943 (Ala. 1977) (holding that contracts restraining employment are disfavored "because they tend not only to deprive the public of efficient service, but tend to impoverish the individual.").
4. Brian Kingsley Krumm, *Covenants Not to Compete: Time for Legislative and Judicial Reform in Tennessee*, 35 U. Mem. L. Rev. 447, 450 (2005).
5. Mark A. Glick, Darren Bush and Jonathan Q. Hafen, *The Law and Economics of Post-Employment Covenants: A Unified Framework*, 11 Geo. Mason L. Rev. 357, 360 (2002).
6. *Id.*
7. *Id.*
8. *Id.* at 360-61.
9. Krumm, *supra* note 4, at 451.
10. *Id.*
11. Glick, *supra* note 5, at 365 (citing *Mitchell v. Reynolds*, 24 Eng. Rep. 347 (Q.B. 1711)).
12. *Mitchel*, 24 Eng. Rep. at 349.
13. Krumm, *supra* note 4, at 452 (citing *Horner v. Graves*, 131 Eng. Rep. 284 (C.P. 1831)).
14. *Id.* at 452–53.
15. Ala. Code (1923) ch. 272, art. 7, § 6826.
16. Ala. Code (1923) ch. 272, art. 7, § 6827.
17. Ala. Code (1923) ch. 272, art. 7, § 6828.
18. 1931 Ala. Acts 647.
19. *Id.*
20. Ala. Code (1940) tit. 9, ch. 4, art. 1, §§ 22–24.
21. Ala. Code § 8-1-1 (1975).
22. Governing principles: Provide clarity to the Restrictive Covenant Act while remaining consistent with mainstream Alabama jurisprudence as to such covenants; confirm both the disfavored nature of such covenants, but also confirm the enforceability of restrictive covenants within a narrow scope; provide an exclusive list of covenants that are capable of being enforced; restore the "protectable interest" requirement to the central role of an enforceable covenant; reinforce the unique role of the court in evaluating and, when appropriate, invalidating covenants; provide guidance regarding the minimum requirements for contract formation; reinforce use of the "Blue Pencil" in reforming the geographic and temporal scope of a covenant while making it clear that the court is empowered to strike a covenant that does not preserve one of the enumerated protectable interests; remove the unworkable "total" and "partial" restraint analysis; eliminate antiquated and illogical limitations as to the work arrangements that can carry a restrictive covenant; such as, excluding independent contractors from the reach of a restrictive covenant; clarify which party (plaintiff or defendant) bears the burden of showing the presence or absence of "undue hardship" in a restrictive covenant case; confirm the continued viability of the full scope of the "professional" exemption as it exists under current Alabama law; clarify the remedies available for breach of a covenant; and confirm that Alabama's restrictive covenant jurisprudence is the public policy of the State of Alabama, not to be replaced by inconsistent law from another jurisdiction.
23. There is a lively debate as to whether the economic success of states forbidding restrictive covenants account for some portion of those states' economic success. *See, e.g.*, David A. Price, *Does Enforcement of Employee Noncompete Agreements Impede the Development of Industry Clusters?*, Fed. Reserve Bank of Richmond Econ. Brief EB14-11 (Nov. 2011), available at https://www.richmondfed.org/~/media/richmondfedorg/publications/research/economic_brief/2014/pdf/eb_14-11.pdf.
24. Will Hill Tankersley, chair; Hon. Eric G. Bruggink; Prof. Jerome Dees; Michael ("Mike") D. Ermert; Prof. Jill Evans; Michael D. Freeman (deceased); William ("Bill") D. Hasty; Prof. Harry Hopkins; Justice J. Gorman Houston, Jr.; Adam K. Israel; Hon. David A. Kimberley; Rebekah McKinney; J. Casey Pipes; Rep. William ("Bill") S. Poole; Richard ("Rich") J.R. Raleigh, Jr.; Stephen W. Shaw; Alfred ("Buddy") F. Smith, Jr.; Ashley E. Swink Fincher; Phillip ("Phil") W. Williams, Jr.; James ("Jim") C. Wilson, Jr.
25. A "requirements contract" is a contract in which "the buyer expressly agrees to buy all of his requirements of a stated item from the seller." *Water Works Bd. of Town of Bear Creek v. Town of Bear Creek*, 70 So. 3d 1186, 1190 (Ala. 2011).
26. An output contract is a contract in which a seller agrees to sell the buyer all of the product they produce in a given period of time. *See, e.g.*, *Hargrave v. Davis-Hunt Cotton Co.*, 321 So. 2d 178, 178 (Ala. 1975) ("This appeal involves a 'cotton output' contract between the Davis-Hunt Cotton Company, Inc. [appellee] and Gene Hargrave [appellant]" under which "Hargrave agreed to sell Davis-Hunt all of the cotton he produced during 1973, and ginned before December 16, 1973, at a price of 30 cents per pound.").
27. *See, e.g.*, *Se. Cancer Network, P.C. v. DCH Healthcare Auth., Inc.*, 869 So. 2d 452, 456–58 (Ala. 2003).
28. *See Pitney Bowes, Inc. v. Berney Office Solutions*, 823 So. 2d 659, 662 (Ala. 2001) ("Absent the employee-employer relationship when the agreement is executed, the agreement is void. Id. The voidness of the agreement in this case did not disappear when Pitney employed Morris almost a month after the signing. Morris did not re-execute the agreement after Pitney employed him.").
29. *Cherry, Bekaert & Holland v. Brown*, 582 So. 2d 502, 506 (Ala. 1991) ("While parties normally are allowed to choose another state's laws to govern an agreement, where application of that other state's laws would be contrary to Alabama policy, the parties' choice of law will not be given effect and Alabama law will govern the agreement.").

STOKES | McNUTT

STOKES, McNUTT & PARTNERS

Advertising Momentum for Your Firm

We Will Grow Your Firm.

Advertising – App Development – Augmented Reality

Brand Building – Client Data – Content Development

Creative Strategy – Consistent Communication

Customer Service – Digital Marketing – Direct Mail

Email Design & Distribution – Event Marketing

Graphic Studio – Immediate Project – Law Firm Definition

Media Planning – Radio & Television – Video Production

Social Media Engagement – Website Design – Marketing

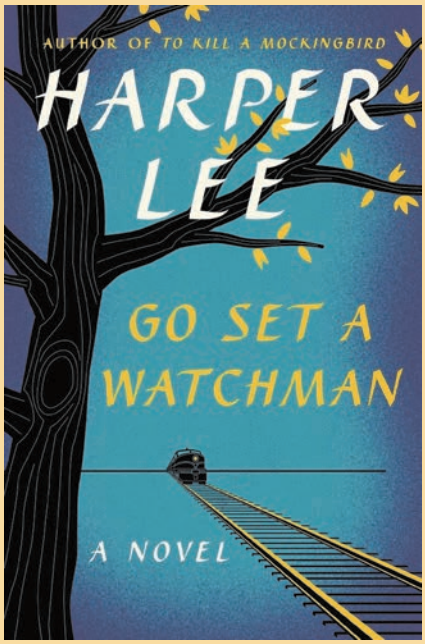
We're proud to work with the Alabama State Bar and its digital communications team, and we will work hard to support you as a member. Give us a call to grow your firm @ 1-844-7Stokes and receive a FREE 30 Minute Strategy Session and 10% on all of our advertising services with this ad.

Visit **StokesMcNutt.com/Law** to download the complimentary white paper, *The Seven Most Effective Law Firm Marketing Strategies*, written by our Founder & Strategy Partner, Ford Stokes.

law@stokesmcnutt.com
Office: (334) 332-8340

stokesmcnutt.com

Mobile: (404) 775-0194
Toll Free: 1-844-7Stokes



Go Set a Watchman

By Harper Lee (Harper 2015)

Reviewed by Gregory C. Buffalow

In the short run, the news and controversy surrounding Harper Lee's first novel, *Go Set a Watchman* (whether publication was authorized, whether it was a first draft that should not have been published),[1] are more interesting than the book itself. The best parts of the book are the retro dust jacket and the flashback scenes featuring the main characters as children, Scout (Jean Louise Finch), Jem, her brother, and Dill, the Truman Capote-inspired character who spent his summers next door. A fair portion of the dialogue is tedious, notably the small talk between Scout and her would-be fiancé, Henry Clinton, and an unlikely argument between Scout and her father, Atticus Finch, concerning states' rights, the Tenth Amendment and the prevailing views in fictional Maycomb County, Alabama in the 1950s.

Who am I to judge, though? Here it should be remembered that *Watchman* is a first draft[2] that evolved into a masterpiece, *To Kill a Mockingbird,* with the benefit of a good editor who encouraged a re-write set 20 years earlier and told from the perspective of Scout as a child,[3] leaving Atticus Finch's shining armor untarnished. While early, spoiler reviews of *Watchman* at the time of first publication revealed an Atticus much different than the *Mockingbird* version, who had been a Klansman[4] and was the presiding member of the Maycomb White Citizen's Council in *Watchman*, these facts may not necessarily be taken at face value. In *Watchman* there are also are suggestions (although obviously debatable as excuses) that Atticus had joined merely as a matter of political expediency, and to get better acquainted with his enemies. Atticus's brother, Dr. Jack Finch, attempts to reassure Scout, "You're making a big mistake if you think your daddy's dedicated to keeping the Negroes in their places," *Watchman*, p. 108.

Atticus as Klansman could be based on Hugo Black, Alabama native and longstanding, liberal member of the U.S. Supreme Court, who survived the discovery, after he had been confirmed as associate justice, that he had once been an Alabama Klan member. Black managed to save his judgeship and

avoid impeachment in a radio address to the nation explaining his regret, stating that as an ambitious young lawyer and politician he had been a "jiner," *i.e.*, one who joined many organizations to build clientele and political base, but without necessarily embracing the views of the organization.[5]

On the whole, *Watchman* is worth reading. Discussion of Atticus Finch's law practice and the contrast between his genuine defense of the trial in *Mockingbird* and lesser effort planned for a different accused and different facts in *Watchman* may be of interest to Alabama lawyers. Portions of the book involving discussions between Scout and Calpurnia anticipate themes which have been more fully developed in *The Help*, a novel published in 2009 by Mississippi writer and University of Alabama graduate Kathryn Stockett. These consider the complex relationships and genuine feelings between African-American nannies and the white children they reared, and the damage inflicted on some of those relationships during the Civil Rights movement.

Southern humor and self-mockery are not lacking. Other portions involving Aunt Alexandra's observation that Henry Clinton was trash because "he licks his fingers when he eats cake," *Watchman*, p. 177, invariably coughs without covering his mouth, and picks his nose when he thinks no one is looking are reminiscent of the late Mobile native Maryln Schwartz's 1991 book, *A Southern Belle Primer: Why Princess Margaret Will Never Be a Kappa Kappa Gamma*, noting that Princess Margaret would never make the cut because she was seen smoking in mixed company at a Texas society function during a U.S. tour, and what's even worse, lit her own cigarette. There is also entertaining treatment of Southern intolerance, *e.g.*, a near schism in the Maycomb Methodist Church when a new minister "tries to make us sing the Doxology like we were all in Westminster Abbey," *Watchman*, p. 98, and tolerance for eccentrics, *e.g.*, Finkley Sewell, who was not prosecuted although he "disinterred his own grandfather and extracted all of his gold teeth to pay off a mortgage," *Watchman*, p. 191; and Mrs. E.C.B. Franklin, who walked three miles to town every Saturday wearing a crocheted tam, dress, drawers, stockings–everything. The in-state reader will also be amused by local references to Montgomery–"the Elite Eat Shop" (most likely the Elite Restaurant), Levy's and A. Nachman–and to Mobile–Hammels and Jitney Jungle.

There is a good balance between serious themes and comic relief, when needed, and plenty of contradictions, all of which should qualify *Go Set a Watchman* as decent Southern literature worth reading. | AL

Endnotes

1. See, Alter and Kovaleski, "After Harper Lee Novel Surfaces, Plots Arise," *N.Y. Times*, Feb. 8, 2015; Kovalski, Alter and Howard, "Harper Lee's Condition Debated by Friends, Fans and Now State of Alabama," *N.Y. Times*, March 10, 2015; OpEd, Nocera, "The Harper Lee 'Go Set a Watchman Fraud,'" *N.Y. Times*, July 23, 2015.
2. Kakutani, Books of the Times, "Review: Harper Lee's 'Go Set a Watchman' Gives Atticus Finch a Dark Side," *N.Y. Times*, July 9, 2015.
3. *Id.*
4. *Id.*
5. Hamilton, *Hugo Black: the Alabama Years* (1972).

Alabama Lawyers' Hall of Fame

Judicial Award of Merit

Local Bar Award of Achievement

Alabama Lawyers' Hall of Fame

May is traditionally the month when new members are inducted into the Alabama Lawyers' Hall of Fame which is located at the state judicial building. The idea for a hall of fame first appeared in 2000 when Montgomery attorney Terry Brown wrote state bar President Sam Rumore with a proposal that the former supreme court building, adjacent to the state bar building and vacant at that time, should be turned into a museum memorializing the many great lawyers in the history of the state of Alabama.

The implementation of the idea of an Alabama Lawyers' Hall of Fame originated during the term of state bar President Fred Gray. He appointed a task force to study the concept, set up guidelines and then to provide a recommendation to the board of bar commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004. Since then, 50 lawyers have become members of the hall of fame. The five newest members were inducted May 1, 2015.

A 12-member selection committee consisting of the immediate past president of the Alabama State Bar, a member appointed by the chief justice, one member appointed by each of the three presiding federal district court judges of Alabama, four members appointed by the board of bar commissioners, the director of the Alabama Department of Archives and History, the chair of the Alabama Bench and Bar Historical Society, and the executive secretary of the Alabama State Bar meets annually to consider the nominees and make selections for induction.

Inductees to the Alabama Lawyers' Hall of Fame must have had a distinguished career in the law. This could be demonstrated through many different forms of achievement–leadership, service, mentorship, political courage, or professional success. Each inductee must have been deceased at least two years at the time of their selection. Also, for each year, at least one of the inductees must have been deceased a minimum of 100 years to give due recognition to historic figures as well as the more recent lawyers of the state.

The selection committee actively solicits suggestions from members of the bar and the general public for the nomination of inductees. We need nominations of historic figures as well as present-day lawyers for consideration. Great lawyers cannot be chosen if they have not been nominated. Nominations can be made throughout the year by downloading the nomination form from the bar's website and submitting the requested information. Plaques commemorating the inductees are located in the lower rotunda of the judicial building and profiles of all inductees are found on the bar's website at *https://www.alabar.org/membership/alabama-lawyers-hall-of-fame/2014-lawyers-hall-of-fame/*.

Download an application form at *https://www.alabar.org/assets/uploads/2014/08/Lawyers-Hall-of-Fame-Nomination-Form-2016-fillable.pdf* and mail the completed form to:

Sam Rumore
Alabama Lawyers' Hall of Fame
P.O. Box 671
Montgomery, AL 36101

The deadline for submission is March 1, 2016.

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, 2016**. 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.

Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's 2016 Annual Meeting at the Sandestin Golf and Beach Resort–Baytowne Wharf.

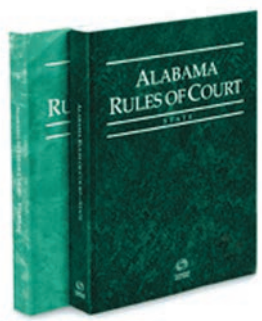
Local bar associations compete for these awards based on their size-large, medium or small.

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

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

To be considered for this award, local bar associations must complete and submit an award application by May 6, 2016. Applications may be downloaded from *www.alabar.org* or obtained by contacting Christina Butler at (334) 269-1515 or *christina.butler@alabar.org*. | AL

Books for Sale: *Alabama Rules of Court–State*



The 2014 *Alabama Rules of Court–State* books are for sale at $20 each, and a limited number of 2013 *Alabama Rules of Court–State* books are for sale at $10 each. These are available for purchase in the Supreme Court and State Law Library, by cash or check only. Please mail a check or money order, made payable to **AL Supreme Court and State Law Library**, to:

Alabama Supreme Court and State Law Library
ATTN: Public Services–Book Sale
300 Dexter Ave.
Montgomery 36104
Contact any Public Services staff member at (334) 229-0563 with questions.

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

For more information about the institute, visit www.ali.state.al.us.

Special Legislative Sessions

Given recent events, the topic of extraordinary or special legislative sessions has been on everyone's mind. This year has been unique in recent history because we had two special sessions. The rules and limitations applicable to special sessions are different in many respects to the normal legislative process and lead to interesting maneuvering, posturing and procedure. While the topic is still one of recent history, I thought it would be interesting to provide a primer on how special sessions work and the particular rules and procedures that come into play for them.

How and for What May a Special Session Called?

Only the governor has the authority to call the legislature into special session. This power is granted pursuant to Section 122 of the Official Recompilation of the Constitution of Alabama of 1901:

> The governor may, by proclamation, on extraordinary occasions, convene the legislature at the seat of government, or at a different place if, since their last adjournment, that shall have become dangerous from an enemy, insurrection, or other lawless outbreak, or from any infectious or contagious disease; and he shall state specifically in such proclamation each matter concerning which the action of that body is deemed necessary.

This provision gives the governor the right to call the legislature into session by proclamation. There is no requirement of any specific amount of notice to be given and if necessary the governor has the authority to choose a location different than Montgomery if the circumstances require it.

The proclamation issued by the governor is often referred to as "the call" and must specifically enumerate the circumstances that require the calling of the special session. While Section 122 speaks of "extraordinary occasions," the truth is that there is no strict limit for what such a session may be called. The Alabama Supreme Court has opined that there is no authority for the judicial branch to question the exercise of authority to call in the legislature.[1] However, the governor does not have the authority to set an agenda by calling a special session during a regular session of the legislature as everything that would be included in the call can already be considered.[2] However, if the legislature is in a "lengthy recess" of the regular session, the governor may convene a special session during that recess.[3]

Duration of Special Sessions

Included in the governor's proclamation will be a day and time certain for the convening of the special session. Section 76 of the Official Recompilation of the Constitution of Alabama of 1901 provides that a special session shall be limited to 12 legislative days and 30 calendar days. This means that the legislature has 30 days to complete whatever work it deems fit and that during those 30 days the house and senate may actually go into session for the consideration of legislative business on 12 of those days. It is important to take note when considering the timing and duration of a special session that the legislature may convene and hold committee meetings without actually going into session and, thereby, using one of the 12 available legislative days. It is also important to note that it takes a minimum of five legislative days for a bill to complete the entire legislative process and be enacted. The five-day minimum assumes that a bill is able to receive final passage in one house on the third day and that the journal is still open in the second house to allow for it receive a first reading in that body.

Limitations on What May Be Considered

When the governor issues the proclamation calling the special session he must also enumerate what issues the legislature is supposed to address. However, once in session, the legislature is free to consider any matter whatsoever. Items listed in the call do enjoy an advantage. Section 76 provides no legislation not enumerated in the proclamation may be considered except by a two-thirds vote of each house. This means that items in the proclamation can be passed by a simple majority while those outside of the call require the higher vote count. While this standard seems high, please note that the requirement for the majority or two-thirds vote is of those present and voting, not of the elected membership.[4] Also worth noting is the that while these provisions apply to pending legislation, they do not apply to proposed constitutional

Continued from page 397

amendments which continue to be governed by Section 284 of the Constitution that requires a vote of three-fifths of the full membership of each body.[5]

Other Issues

Other than those provisions addressed above, the operation of a special session is in every other respect the same as if the legislature was in regular session. This means, for example, that even in a special session a bill that would raise revenue must originate in the house of representatives.[6] Given the number of revenue bills that were considered during the 2015 Special Sessions, this provision was often in play and is actually more expansive that it appears at first pass. For example, bills that would decrease revenue, amend existing tax law or affect the availability of particular deductions fall within the scope of this restriction.[7] However, a bill that raises revenue in a manner that is incidental to providing for the general welfare or a regulatory scheme is not affected by this prohibition.[8]

While this column is not a definitive list of all procedural issues that can arise, it is a start to laying out the basic framework. Hopefully, we have exhausted the need for such sessions in 2015, but this can be helpful in understanding the basic rules of the road for special sessions going forward. | AL

Endnotes

1. Opinion of the Justices, 30 So.2d 391 (Ala. 1947).
2. Opinion of the Justices, 152 So.2d 247 (Ala. 1963).
3. Id.
4. Opinion of the Justices, 152 So. 901 (Ala. 1934).
5. Opinion of the Justices, 84 So.2d 767 (Ala. 1956).
6. Section 70, Official Recompilation of the Constitution of Alabama of 1901.
7. See, e.g., *Glasgow v. Aetna, Ins. Co.*, 223 So.2d 581 (Ala. 1969); *Sizemore v. Krupp Oil Co., Inc.*, 597 So.2d 211 (Ala. Civ. App. 1992); and Opinion of the Justices, 190. So. 824 (Ala. 1939).
8. See, e.g. *Beeland Wholesale Co. v. Kaufman*, 174 So. 516 (Ala. 1937) and Opinion of the Justices N. 324, 511 So.2d 505 (Ala. 1987).

1.95% & 20¢ per transaction | No swipe required | No equipment needed

Helping law firms get paid.

IOLTA guidelines and the ABA Rules of Professional Conduct require attorneys to accept credit cards correctly. We guarantee complete separation of earned and unearned fees, giving you the confidence and peace of mind that your transactions are handled the right way.

www.LawPay.com/alabar | 866.376.0950

LAWPAY®
CREDIT CARD PROCESSING

AffiniPay is a registered ISO/MSP of BMO Harris Bank, N.A., Chicago, IL

Wade Hampton Baxley

Beall Dozier Gary, Jr.

Solomon S. Seay, Jr.

Wade Hampton Baxley

Wade Hampton Baxley, 71, died March 5. He is survived by his sons, Hamp (Emily) and Keener (Mary Katharine), four grandchildren, Mallory, Payne, Hampton and Mary Frances, and his brother, Bill (Marie). He was preceded in death by his wife of 47 years, Joan Morris Baxley.

Wade will be remembered for his warmth, his wit and his commitment to service. He was born in Dothan on November 1, 1943, the son of Judge Keener Baxley and Lemma Rountree Baxley. He graduated from Dothan High School in 1961, the University of Alabama in 1965 and the University of Alabama School of Law in 1968. While in college, he was a member of the Kappa Sigma Fraternity.

Upon his admission to the bar, he clerked for Judge Aubrey M. Cates, Jr. of the Alabama Court of Appeals for a year before beginning a successful private practice in Dothan in 1969 with the firm now known as Ramsey, Baxley & McDougle. He served as city attorney for the City of Dothan from 1973 through 1981. He was counsel for the Dothan-Houston County Airport Authority and a member of the Houston County Personnel Board for more than 30 years. During his career, he helped to build a prestigious law firm, with a significant focus upon insurance defense litigation.

Wade was very active in his local, state and national bar associations. He served as president of the Houston County Bar Association. In 1999, he was elected president of the Alabama State Bar, after serving on the Board of Bar Commissioners for more than 12 years. He was a member of the American Bar Association, serving on its board of governors from 2003 to 2006. He also served for many years as the Alabama State Delegate to the ABA House of Delegates. He served as president of the Alabama Defense Lawyers Association in 1996 and was a member of the Association of Defense Trial Attorneys. He was on the boards of trustees of the Farrah Law Society and the Alabama Law Foundation. He was a Fellow of the American Bar Foundation and the Alabama Law Foundation.

Wade was active in community and charitable organizations. He was a lifelong member of the First United Methodist Church in Dothan. He was a member of the Dothan-Houston County Rotary Club. He served as president of the Kiwanis Club. He served as president of the Houston County Division of the American Heart Association.

To know Wade Baxley was to love him. His enthusiasm for life was remarkable. He loved God. He loved his family. He loved the practice of law. He loved politics. He loved sports. He loved golf. He loved the beach. He loved his community. Perhaps most obviously he loved the people around him. He was a constant and true friend to many. He was the consummate jokester, cajoler and heckler. He took as well as he gave. He brought out the best in people: the desire to do the right

things in the right way all in the name of goodness and justice. For Wade, justice required care for the poor, the downtrodden and the outcast of our society. He was an intelligent, skillful and devoted lawyer who was passionately committed to the public good. Those of us who knew him are lucky to have learned from his good example.

He will be missed.

–D. Taylor Flowers, Dothan

Beall Dozier Gary, Jr.

On May 10, 2015, the Alabama State Bar lost, much too soon, a member who had carved out a distinguished career in both law and business. Beall Dozier Gary, Jr., known much better as "Nap," died of a heart attack during a morning run near his home in White Hall, Virginia, leaving behind a loving family, a legacy of professional success and an enormous cadre of friends across the country.

Born in Birmingham on July 19, 1958, Nap was educated at Indian Springs School, Duke University, where he served as president of Sigma Alpha Epsilon (and, at least in his own recounting, was instrumental in the recruitment of Duke basketball legend Mike Gminski) and the Washington University School of Law, where he serve as associate managing editor of the *Washington University Law Quarterly*. Returning to Birmingham upon graduation in 1982, he was admitted to the Alabama State Bar and began his legal career as an associate at the firm then known as North Haskell Slaughter Young & Lewis. Concentrating in corporate and securities law, Nap became a partner in the firm, handling complex transactions in the financial services, transportation and healthcare industries, among others.

In 1986, Nap left what was by then the Haskell Slaughter firm to join the legal services department at HealthSouth Corporation, where he ultimately became senior vice president and assistant corporate counsel and functioned as the general counsel of the company's surgery center division. In 2004, he moved to the business side of the company, serving as senior vice president–corporate development until his departure in 2005.

After a break to fulfill a lifelong ambition to hike the Appalachian Trail (no, really, that's what he did; nothing about Argentina at all), Nap joined Regent Surgical Health, LLC, one of the country's leading developers and managers of ambulatory surgical centers. At Regent, he rose to become president, chief operating officer and a member of the company's board of directors. During his Regent tenure, he also served as president of the Ambulatory Surgery Center Association and the Ambulatory Surgery Foundation. At the time of his death, he was one of the best known–and most highly regarded–figures in the outpatient surgery industry.

Nap enjoyed great success in both law and business. And yet, those were not the successes that brought him the greatest joy, or by which he will be best remembered. In the days following the news of his death, many of us were struck not only by the number of Nap's friends who shared their grief on Facebook and through private messages, not only by the fact that so many of them came–literally from all over the country–to his memorial service, but by the many strands of Nap's relationships they represented–those of us who knew him from the law; those who were in school with him; those who knew him from the surgery center industry; those who knew him as a runner, or a hiker, or a mountaineer. So many people, from so many walks of life, and all of us convinced that we knew him and he knew us at our very core–because he did.

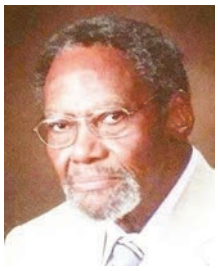
Nap had the gift of friendship. Some people are connectors–people who can find the common ground with anyone they encounter, from all walks of life, and build bridges. Nap was a connector. Those of us who struggle to let people into our lives and to find our way into the lives of others can only envy people like Nap, for whom it seemed to be like breathing. He found as much joy in sharing a water bottle with a stranger on the road as he did a round of beers with old friends or a glass of champagne at a closing dinner with movers and shakers.

As his brothers and sisters in the bar, we remember Nap and the family he loved–his wife Amy, their children Emily, Britt and David, his mother and his siblings who survive him. And we do him honor by remembering this great lawyer with his great gift for friendship, and by trying to take that gift and make it our own.

–William W. Horton, Birmingham

Continued from page 401

Solomon S. Seay, Jr.



"An oak of righteousness." That is how his longtime pastor eulogized Solomon S. Seay, Jr., comparing him to the prophet Isaiah in his passionate pursuit of justice.

At Sol's death on September 11, the bar and the bench in Montgomery County and the state of Alabama mourned the falling of a towering pillar in the pantheon of America's greatest generation of civil rights lawyers.

His legacy can best be appreciated in the context of the times which ushered in his birth and prevailed in Alabama for nearly two decades after he became a licensed lawyer. These were times bonded by the ominous reign of *Jim Crow* laws and customs strictly enforcing racial segregation in every arena. Alabama did not recognize black citizens as entitled beneficiaries of the rights, remedies, privileges and immunities guaranteed in its intentionally racist constitution or in the United States Constitution.

At the onset of the Great Depression, Sol's father labored in Butler County as a pastor in the African Methodist Episcopal Zion Church and as head of a church-owned school. His mother Carrie was a "Madison" from Montgomery County, a direct descendant of former slaves who purchased a plantation with sizeable acreage. Her cotton-farming father, General P. Madison, developed the property as Madison Park, an economically self-sustaining and proudly black community. He was the revered patriarch summoned reliably by all for any need. On December 2, 1931, a determined Carrie drove herself from Greenville to her birthplace, arriving just in time for her multi-talented father to midwife her first-born son.

Pastoral assignments dictated the family's residences after Greenville: Whistler, near Mobile; Greensboro, North Carolina; and Knoxville, Tennessee, where Sol graduated high school in 1948. At every juncture he witnessed unforgettably cruel displays of racism and just as memorable exemplars of courageous resistance.

While parental example indisputably contributed much to mold Sol's character, he attributed to a junior high classroom teacher the defining edges which cemented his choice to become a civil rights lawyer. As the class began each morning with a recitation of the Pledge of Allegiance, he marveled at her consistent repetition of the last line with a variation she neither commented on nor insisted that the students mimic: "…one nation under God, indivisible, with liberty and justice for those who got the guts to grab it."

Before matriculating at Livingstone College in Salisbury, North Carolina, Sol had a "high-paying" summer job in Connecticut's tobacco farms. During summer breaks until his 1952 graduation, he worked in steel mills around Youngstown, Ohio.

Sol applied only to the law school at Howard University, a choice triggered by two realities. First, the law school at the University of Alabama barred black students. Second, for an aspiring civil rights lawyer, Howard was an unmatched training ground; the best and the brightest teams of lawyers, professors and scholars assembled there to plot the legal destruction of racial segregation. They were then focused on public education and welcomed students to the strategy sessions which ultimately culminated in the Supreme Court's landmark ruling in *Brown v. Board of Education.*

Sol eagerly settled in at Howard, a private institution, with generous financial aid from a state determined to maintain segregation in its public universities, whatever the cost *(See* Code of Alabama 1958, Tit. 52, §40(1)). His legal studies were interrupted for two years by Uncle Sam's draft notice, a disappointment somewhat ameliorated when Ettra Spencer, a Texas native in college at Howard, accepted his marriage proposal.

Honorably discharged as a well-tested pugilist, Sol confidently completed law school in 1957 and came home ready to wage war on segregation. His first battle was the bar examination from which the all-white graduates at the Capstone were fully exempted (a "diploma privilege" extended from 1875 until 1964, when integration loomed). He sat with 18 other non-exempt graduates for three days of essays, and he emerged victorious.

Sol joined a small but hugely dedicated cadre of black lawyers then practicing in the state: only two in Montgomery, one in Mobile and five in Birmingham, including the pioneering Arthur Shores, licensed in 1937.

Another trailblazing lawyer whose spirit certainly inspired Sol's journey was Arthur Madison, his maternal great-uncle. A Columbia Law graduate, Madison practiced in New York before being admitted to the Alabama bar in early 1938. He then practiced in Montgomery until his bold efforts in 1944 to register blacks to vote resulted in his arrest under an

Alabama statute making it a misdemeanor to represent a person without his consent. He attempted to have the law ruled unconstitutional, but the white power structure pressured successfully for his disbarment a year later.

Sol quickly established himself as a shrewd and fearless civil rights litigator, successfully challenging Montgomery's segregated parks; representing besieged Freedom Riders; securing the rights of peaceful protestors; ending criminal prosecutions of students protesting segregated public facilities; and saving from electrocution or wrongful conviction countless defendants made vulnerable by their race and lack of financial means in a criminally unjust maze.

After partnering in 1964 with Fred Gray (a firm shortly expanded to include Charles Langford), Sol amassed an enviable string of victories in landmark federal decisions which desegregated Alabama's bus terminal facilities, public schools at every level, the Alabama Legislature, the Alabama Board of Education, the governing bodies in scores of cities and counties and "practically every aspect of" the Alabama Cooperative Extension Service, a career lawsuit which spanned 25 years.

The landscape of public education has been permanently altered at every level in Alabama because of Sol's persistence in this arena. *Lee v Macon*, the lawsuit filed only to desegregate Macon County's public high school, expanded as the most effective vehicle for statewide desegregation. Sol managed the litigation in 99 still-segregated school systems, pitting him in frequent and contentious bouts with recalcitrant school boards, superintendents, administrators and fellow lawyers. When illness slowed him after 24 years of continuous representation, monitoring issues remained in at least one school system. With the same dogged determination in *Knight v. State of Alabama*, another case protracted nearly 25 years, Sol tackled race-based inequities, funding disparities and other vestiges of racial segregation in Alabama's system of higher education.

Venerated widely as a highly respected attorney, Sol championed criminal justice, racial justice, equal opportunity and non-discriminatory treatment in voting rights, employment and every branch of government.

With little fanfare, he mentored another generation of difference-making lawyers, admonishing them to adopt a fighting spirit and to maximize preparation. His journey is a priceless guide, and I was honored to help him share it for posterity in *Jim Crow and Me: Stories from my Life as a Civil Rights Lawyer*, Solomon S. Seay, Jr., with Delores R. Boyd (NewSouth Books, 2008).

Sol's beloved Ettra died in 2006, and two children predeceased them. His memories are cherished by a large and loving family, including daughter Sheryl, a speech pathologist; son Quinton, a lawyer; five grandchildren and five great-grandchildren. | AL

–Judge Delores R. Boyd, Montgomery

Bald, Geoffrey Sean
Springfield, VA
Admitted: 1998
Died: July 22, 2015

Booker, Wiltshire Marion
Birmingham
Admitted: 1949
Died: July 28, 2015

Gilliland, Floyd Ray, Jr.
Pike Road
Admitted: 1993
Died: August 8, 2015

Goodloe, James William, Jr.
Point Clear
Admitted: 1967
Died: July 6, 2015

Otts, Lee McMillan
Brewton
Admitted: 1949
Died: July 8, 2015

Pemberton, John William
Montgomery
Admitted: 1953
Died: July 22, 2015

Pryor, Calvin Caffey
Montgomery
Admitted: 1958
Died: July 5, 2015

Rawson, Hubert Eugene, Jr.
Hoover
Admitted: 1959
Died: June 30, 2015

Stamp, Leon Frederick, Jr.
Mobile
Admitted: 1981
Died: July 11, 2015

Taber, John Abercrombie
Fairhope
Admitted: 1964
Died: July 13, 2015

Turk, Harold Preston
Glencoe, KY
Admitted: 1998
Died: July 29, 2015

Wilson F. Green

By Wilson F. Green

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

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.*

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Probate; Bond

***Rogers v. Hansen*, No. 1140257 (Ala. Aug. 14, 2015)**

The court dismissed the appeal of a personal representative on movant's motion to remove the PR, for PR's failure to post the bond required by *Ala. Code* 12-22-24. Under that section, "[n]o appeal can be taken from any order of the probate court removing an executor or administrator unless the applicant gives either a cash bond or a bond with at least two good and sufficient sureties, payable to the probate judge and in the amount fixed by him, not less than the amount of his bond as executor or administrator. . . " The PR argued that the nature of the challenge was in the form of a will contest, which was not raised in the circuit court within six months of admission of the will to probate, and that such failure created a want of subject matter jurisdiction. The court rejected that argument.

State Agent Immunity

***Ex parte Walker*, No. 1131448 (Ala. Aug. 28, 2015)**

Inmate working in a DOC work release program sued his DOC carpentry supervisor for injuries sustained in fall from scaffolding on DOC worksite. The circuit court denied summary judgment to the supervisor, who was claiming state-agent immunity. The supreme court granted mandamus relief and directed dismissal, reasoning that the supervisor's role in the injury required use of discretionary authority in allocation of resources and materials.

Arbitration

***Troy Health & Rehab. Center v. McFarland*, No. 1140090 (Ala. Aug. 28, 2015)**

In a plurality opinion, the court reversed the circuit court's denial of arbitration of wrongful death claims; PR failed to offer substantial evidence that decedent was mentally incompetent when he signed a POA conferring on Mashburn the authority to transact his affairs (Mashburn later signed the arbitration agreement).

Taxation; Exhaustion of Administrative Remedies

***Bonedaddy's of Lee Branch, LLC v. City of Birmingham*, No. 1131338 (Ala. Sept. 4, 2015)**

Under *Russell Petroleum, Inc. v. City of Wetumpka*, 976 So. 2d 428 (Ala. 2007), actions for recovery of municipal sales taxes are subject to the Taxpayer Bill of Rights (TBOR), and municipality's failure to comply with the TBOR notice requirements in conjunction with assessment against individual operator deprived the circuit court of subject-matter jurisdiction over that aspect of a tax enforcement action.

Wills and Trusts

***Butler v. Butler*, No. 1140683 (Ala. Sept. 18, 2015)**

Provisions in a decedent's family trust did not constitute a "contract," for purposes of *Ala. Code* § 43-8-250, under which decedent agreed not to revoke her "pour-over will" (under which the assets of her estate poured over into the trust). Such a contract under section 43-8-250 was not present because neither trust nor will contained "material provisions" under which decedent agreed not to revoke the will.

Arbitration

***Chen v. Russell Realty, LLC*, No. 1140651 (Ala. Sept. 18, 2015)**

In a panel opinion joined by three justices, the court held that the trial court failed to compel arbitration in the manner provided in the agreement (the agreement required mediation then arbitration; trial court ordered only mediation then entered default judgment).

Same-Sex Marriage and Adoption Rights; Full Faith and Credit

***Ex parte E.L.*, No. 1140595 (Ala. Sept. 18, 2015)**

The court refused to grant full faith and credit to the judgment of a Georgia trial court, which had granted parental rights to a non-biological parent whose relationship to the children arose from a long-term same-sex relationship with the biological parent. The court reasoned that the Georgia court entering the judgment lacked subject-matter jurisdiction because the Georgia court's adoption did not terminate the rights of the biological parent, as required by Georgia law (even though *Ga. Code Ann.* § 19-8-18(e) bars any challenge to adoption decrees, even jurisdictional challenges, filed more than six months after the decree is entered). Justice Shaw dissented, contending that the issue was not one of subject-matter jurisdiction of the Georgia court, but rather of its merits, and that the merits of the judgment of adoption was not a proper subject of inquiry on domestication of the judgment.

Continued from page 405

Immunity

***Cooper v. Zeigler*, No. 1140303 (Ala. Sept. 18, 2015)**
State DOT director sued in his official capacity was entitled to section 14 immunity on takings and related claims arising from landowners' allegations that DOT was exceeding scope of easements by refusing to allow landowners in the I-65 peninsula (north of Montgomery) the right to construct buildings on the lands.

Insurance

***Sentinel Insurance Company, Ltd. v. Alabama Municipal Insurance Corporation*, No. 1130841 (Ala. Sept. 25, 2015)**
Plain language of AMIC policy's "other insurance" provision stated that if other insurance was available on a "covered auto," (which was present), the AMIC insurance would be primary; thus, in inter-carrier dispute, AMIC held primary coverage on accident.

Discovery

***Ex parte Newby*, No. 1140315 (Ala. Sept. 25, 2015)**
In action against ALFA for bad faith by its insureds relating to the handling of underlying litigation against the insureds, insureds subpoenaed Newby, who, at the time of the matters in question, was the CEO of ALFA. The trial court denied a motion to quash the subpoena. In a plurality opinion, the supreme court denied mandamus relief, holding that the petitioner offered no evidence before the trial court to establish his lack of knowledge or involvement in any matter relating to the case.

From the Alabama Court Of Civil Appeals

Ore Tenus

***Tracker Marine Retail, LLC v. Oakley Land Co., LLC*, No. 2140505 (Ala. Civ. App. July 31, 2015)**
Trial court, presented with conflicting expert testimony, had sufficient evidence from which to conclude that defendant tenant's activities on leased premises caused discharge of "hazardous materials" under a commercial lease.

Spoliation; Premises Liability

***Russell v. East Ala. Healthcare Auth.*, No. 2140075 (Ala. Civ. App. Aug. 21, 2015)**
Trial court properly granted summary judgment in premises liability case. As to spoliation issue, video surveillance recording was recorded over in continuous loop every 40 days, and owner first received notice of possible litigation 10 months after incident, well after recording was already destroyed. Testimony concerning a "lump" in the rug immediately before the fall did not constitute substantial evidence that owner was or should have been aware of hazardous condition.

New Trial Motions

***Tyler v. Davis*, No. 2140388 (Ala. Civ. App. Aug. 21, 2015)**
The CCA reversed the trial court's grant of a motion for new trial to a PI plaintiff involved in an MVA. Plaintiff's mother was awarded damages of about $19,000 in medical expenses incurred on the plaintiff's injuries. Jury awarded plaintiff $100 in damages for pain and suffering. The trial court granted plaintiff's motion for new trial, reasoning that the verdict for pain and suffering in light of the medicals was the result of prejudice and improper. The CCA reversed, reasoning that in light of the evidence concerning plaintiff's multiple additional subsequent accidents (and a prior accident), the jury could have determined that her pain was the result of other accidents.

Municipal Courts; Appeals

***City of Montgomery v. Mark G. Montiel, P.C.*, No. 2140392 (Ala. Civ. App. Aug. 21, 2015)**
There was no appellate jurisdiction in an appeal by the municipality from the circuit court's adjudication of a penalty in favor of Montiel's entity, because under *Ala. Code* § 12-14-71, municipality could appeal only to the court of criminal appeals, and then only in the case of invalidation of an ordinance.

Fraud; Savings Clause for Statute of Limitations

***Dodd v. Consolidated Forest Products, LLC*, No. 2140506 (Ala. Civ. App. Aug. 21, 2015)**
The CCA reversed a dismissal of fraud-based claims on a Rule 12 motion, holding that under *DGB, LLC v. Hinds*, 55 So. 3d 218, 224-26 (Ala. 2010), Dodd sufficiently alleged misrepresentations which may have prevented him from discovering

the alleged fraud. The reasonableness of reliance on those representations is not at issue on a motion to dismiss.

Contracts; Ambiguity

***Allied Company of the Wiregrass, Inc. v. City of Dothan*, No. 2140190 (Ala. Civ. App. Aug. 28, 2015)**

Contract term regarding "powder coating" on fencing was ambiguous in light of industry standards, and thus summary judgment was inappropriate on whether goods conformed to contract in action for non-payment.

GAL Fees

***Roberts v. Roberts*, No. 2140426 (Ala. Civ. App. Sept. 4, 2015)**

GAL fee in a divorce action, awarded under *Ala. Code* § 26-2A-52, and Rule 17, *Ala. R. Civ. P.*, is not subject to the $70 per-hour standard in *Ala. Code* § 15-12-21(b).

Judgment Domestication; Forum Selection Clause

***Medical Transcript v. Walker Rural Health*, No. 2130901 (Ala. Civ. App. Sept. 4, 2015)**

In domestication of judgment action, the court held that under NJ law (which governed the parties' contract), a valid forum-selection clause expands the personal jurisdiction of a court to include a signatory who would not otherwise have sufficient minimum contacts with the state.

Workers' Compensation

***Ex parte Ward International*, No. 2140747 (Ala. Civ. App. Sept. 11, 2015)**

In comp action, the circuit court compelled employer to pay for medication to treat erectile dysfunction which, according to treating and prescribing physician, was the result of repeated use of narcotic analgesics for treatment of lower

Continued from page 407

back pain. Employer petitioned for mandamus, arguing that *Ala. Admin. Rule* 480-5-5-.15(15) limited compensability of ED drugs to six specified instances, and then only to five per 30 days, which the circuit court's order exceeded in both respects. The CCA denied the writ, holding that under *Overnite Transp. Co. v. McDuffie*, 933 So. 2d 1092, 1098 (Ala. Civ. App. 2005), the rule (which was promulgated under § 25-5-293) could not alter the statutory duty to pay for all reasonable medical expenses causally related to the accident, pursuant to section 25-5-77(a).

From the Eleventh Circuit Court of Appeals

Public Schools; Section 1983

***Hill v. Cundiff*, No. 14-12481 (11th Cir. August 13, 2015)**

"Jane Doe," an eighth-grade student at Sparkman Middle School, was allegedly raped in a bathroom after school officials decided to use her as bait in a sting operation to catch CJC, another eighth-grade student, in the act of sexual harassment. On appeal, Doe argued the district court erred in (1) granting summary judgment to the Madison County School Board on her Title IX sexual harassment claim and (2) granting summary judgment to the board, principal Blair, assistant principals Terrell and Dunaway and teacher's aide Simpson on section 1983 equal protection claims. In a 75-page opinion, the Eleventh Circuit affirmed the grant of summary judgment to the board and Terrell on Doe's § 1983 equal protection claims, but reversed the grant of summary judgment to the board on Doe's Title IX claim and to Blair, Dunaway and Simpson on Doe's § 1983 equal protection claims.

Arbitration; Review of Awards

***Johnson v. Directory Assistants, Inc.*, No. 14-15631 (11th Cir. Aug. 20, 2015)**

The Court vacated the district court's vacatur of an arbitral award, holding: (1) the initial pleading seeking vacatur was improperly brought as a free-standing complaint rather than by motion, as contemplated by section 6 of the FAA, but the nature of relief sought was clear so as to allow treatment of the pleading as being in compliance with section 6; (2) the arbitrator's prior adjudication of disputes involving DAI, speculative argument about the number of other disputes handled involving DAI and the arbitrator's conducting of an *ex parte* hearing after Johnson refused participation in the arbitration, did not create reasonable impression of partiality needed to demonstrate arbitral bias; (3) award not subject to vacatur for failure to postpone hearing, given circumstances of Johnson's refusing to participate due to vague allegations of "problems in the industry" (this was a women's reproductive health clinic), and given that mere difference of opinion on handling of procedure is not enough to vacate for failure to adjourn the hearing; (4) arbitrator did not fail to receive relevant evidence.

TCPA

***Murphy v. DCI Biologicals Orlando LLC*, No. 14-10414 (11th Cir. Aug. 20, 2015)**

Murphy brought TCPA class action against DCI (a plasma center) based on two text messages it sent to him. Issue in case was whether Murphy consented to receive texts under a pre-2012 FCC interpretation of consent. The first stated: "You will receive MMS messages from DCI Biologicals on short code 76000. Reply STOP to 99000 to cancel." Murphy did not reply. Forty minutes later, Murphy received a second message, soliciting him to return and give plasma. The district court dismissed, holding that it lacked jurisdiction under the Hobbs Act to consider Murphy's challenge to the FCC interpretation. The Eleventh Circuit affirmed.

FDCPA; Debt Collector Defined

***Davidson v. Capital One Bank USA, N.A.*, No. 14-14200 (11th Cir. Aug. 21, 2015)**

Davidson brought putative FDCPA class action claiming that CapOne was a "debt collector" as to accounts in default when CapOne acquired them from HSBC. Held: CapOne was not a "debt collector" because its principal business is not the collection of debts.

Indian Gaming

***State of Alabama v. PCI Gaming Authority*, No. 14-12004 (11th Cir. Sept. 3, 2015)**

The state sued PCI, the operator of Tribal gaming operations, claiming that the operations constituted a public nuisance and seeking to enjoin them as being in violation of Alabama law. The district court dismissed the action on tribal immunity. The Eleventh Circuit affirmed.

Fair Housing

***City of Miami v. Bank of America Corp.*, No. 14-14543 (11th Cir. Sept. 1, 2015)**

***City of Miami v. Wells Fargo Bank*, No. 14-14544 (11th Cir. Sept. 1, 2015)**

***City of Miami v. Citigroup, Inc.*, No. 14-14706 (11th Cir. Sept. 1, 2015)**

City sued lenders under the Fair Housing Act, claiming that lenders steered minority borrowers to high-cost and predatory loans secured by real property, causing minority-owned property to fall into unnecessary or premature foreclosure, depriving the city of tax revenue and forcing it to spend more on municipal services (such as police, firefighters, trash and debris removal, etc.) to combat the resulting blight. The district court dismissed on three grounds: the city lacked statutory standing under the FHA because it fell outside the statute's "zone of interests," the city had not adequately pled that lenders' conduct proximately caused the harm sustained by the city and, finally, the city had run afoul of the statute of limitations and could not employ the continuing violation doctrine. The Eleventh Circuit reversed, holding: (1) city has constitutional standing to pursue its FHA claims, and that the "zone of interests" for the Fair Housing Act extends as broadly as permitted under Article III of the Constitution, including covering the city's claim; (2) although the FHA contains a proximate cause requirement, it is based on common-law tort causation, and the city has adequately alleged proximate cause; and (3) the "continuing violation doctrine" can apply to the city's claims, if they are adequately pled. There are three separate opinions in these cases, but the BAC case is the lead case containing the most detailed discussion of the issues.

FLSA

***Schumann v. Collier Anesthesia, P.A.*, No. 14-13169 (11th Cir. Sept. 11, 2015)**

CRNA students, who were required by Florida law to participate in clinical curricula to obtain degrees and designation as CRNAs, brought class action for unpaid wages and overtime for their clinical hours. Utilizing a DOL standard which had reduced to a formulaic test the facts of *Walling v. Portland Terminal Co.*, 330 U.S. 148, 67 S. Ct. 639 (1947), the

Continued from page 409

district court determined that the SRNAs were not "employees" of defendants and entered summary judgment for defendants. The Eleventh Circuit held that the DOL test was not necessarily controlling because it simply interpreted the Supreme Court decision, and that the judiciary was in just as legitimate a position to interpret the *Walling* test. The Court modified the *Walling* multi-factor test to be tailored to the specific type of internship in issue and remanded for further factual development in light of its holding.

Copyright; Fair Use

***Katz v. Google, Inc.*, No. 14-14525 (11th Cir. Sept. 17, 2015)**

Raanan Katz (minority owner of the Miami Heat basketball team and infamous tycoon) holds the copyright to a candid photograph of himself in which his tongue protrudes askew from his mouth. Chevaldina copied the photo into several scathing blog posts she wrote about Katz and his business practices. Katz sued Chevaldina for copyright infringement. The district court granted summary judgment based on fair use. The Eleventh Circuit affirmed.

Fourth Amendment

***Moore v. Pederson*, No. 14-14201 (11th Cir. Sept. 16, 2015)**

In the absence of exigent circumstances, the government may not conduct the equivalent of a *Terry* stop inside a person's home. However, because the law on this point was not clearly established in the circuit before this case, the Court affirmed summary judgment on qualified-immunity grounds the deputy, who reached into plaintiff's home to arrest and handcuff him when, in the course of a *Terry* stop, plaintiff declined to identify himself.

Public Employment; First Amendment Retaliation

***Ezell v. Wynn*, No. 13-15851 (11th Cir. Sept. 23, 2015)**

Deputy sheriff sued sheriff under section 1983, alleging that she was demoted and transferred in retaliation for deputy's supporting opponent in election. The district court granted summary judgment to sheriff, holding that notwithstanding department policy prohibiting discriminatory or retaliatory actions based on political patronage, Circuit precedent allowed sheriffs to take such actions against deputies. The Eleventh Circuit affirmed.

RECENT CRIMINAL DECISIONS

From the Alabama Supreme Court

Forcible Compulsion

***Higdon v. State*, 2015 WL 4162930 (Ala. July 10, 2015)**

The court overruled *Ex parte J.A.P.,* 853 So. 2d 280 (Ala. 2002), that had allowed the proof of "forcible compulsion" by an implied threat only in cases involving adults who exercised positions of domination and control over the child victim. Under *Higdon*, for proof of an implied threat a jury may now consider, from the child victim's perspective, the difference in age or physical maturity between the defendant and the victim, the defendant's exercise of authority or control over the victim, and other such factors, regardless of the defendant's age.

Municipal Ordinance Violation

***Ex parte Tulley*, No. 1140049 (Ala. Sept. 4, 2015)**

The court reversed the defendant's conviction for carrying a pistol on a premises not his own, holding that the city ordinance that made the violation of *Ala. Code* § 13A-11-52 a municipal offense and defined its punishment did not negate the statute's unconstitutional failure to provide for punishment.

From the Court of Criminal Appeals

Sexual Abuse of Child; Confrontation Clause

***D.L.R. v. State*, CR-13-1530 (Ala. Crim. App. Aug. 14, 2015)**

The state's evidence was sufficient to convict the defendant of sexual abuse of a child less than 12 years old in violation of *Ala. Code* § 13A-6-69.1, because it showed that the defendant subjected the victim to the touching of his sexual or other intimate parts. While the defendant must be the person who "subjects" the victim to "sexual contact," any touching of the sexual or other intimate parts of a person will suffice if the touching is caused by the defendant and the person touched is not married to the defendant. Admission of the victim's out-of-court statements did not violate confrontation clause; victim

had testified and her failure to recall her out-of-court statements concerned the effectiveness of the cross-examination rather than the opportunity to cross-examine.

Variance in Indictment

***Hall v. State*, CR-14-0627 (Ala. Crim. App. Aug. 14, 2015)**

Under *State v. Roffler*, 69 So. 3d 225, 229–31 (Ala. 2010), an indictment's allegation of the medium of exchange is immaterial when describing stolen funds. Held: there was no material variance between the theft indictment's allegation of stolen "United States currency" and the proof at trial that the defendant had stolen a check.

Prior Inconsistent Statement

***Collins v. State*, CR-13-1199 (Ala. Crim. App. Aug. 14, 2015)**

Defendant's accomplice denied gang involvement in the home invasion, but had previously indicated to a cellmate that he had implicated the defendant in order to cover for a fellow gang member. The court reversed the defendant's burglary, robbery and attempted murder convictions, finding that the trial court erred by excluding the evidence of the prior inconsistent statement under *Ala. R. Evid.* 613.

Ineffective Assistance

***Ervin v. State*, CR-12-1890 (Ala. Crim. App. July 10, 2015)**

Trial counsel's conflict of interest with regard to his representation of his client as to one offense extended to his representation of the same client in an unrelated offense, thus preventing him from effectively negotiating a plea agreement pertaining to both the unrelated offense and the offense giving rise to the conflict, and leading to ineffective assistance. | AL

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

About Members

John Adam Chavez announces the opening of **Chavez Law Firm LLC** at 420 20th St. N, Ste. 2200, Birmingham 35203. Phone (205) 379-1043.

Among Firms

Brodowski & McCurry LLC in Huntsville announces that **Emily J. Young** joined as an associate.

Jacquelyn D. Tomlinson and **Dana M. Delk** announce the opening of **Delk & Tomlinson Attorneys at Law LLC** in Montgomery.

F&B Law Firm PC announces that **Ryan G. Blount** is a shareholder.

Gaines, Gaines & Rasco PC announces that **Gregory C. Morgan** joined as an associate.

Harrison, Gammons & Rawlinson PC in Huntsville announces that **Andrea Gullion** joined as an associate.

Hodges Trial Lawyers PC announces that **John M. Plunk** joined as of counsel.

Richard S. Jaffe, Michael P. Hanle, Michael W. Whisonant, Jr. and **Brett H. Knight** announce the opening of **Jaffe, Hanle, Whisonant & Knight PC** at 2320 Arlington Ave. S, Birmingham 35205. Phone (205) 930-9800.

Junkin, Pearson, Harrison, Junkin & Pate LLC announces former partner **Samuel W. Junkin** was appointed circuit judge for the 24th Judicial Circuit, and the firm name is now **Pearson, Harrison & Pate LLC**, with offices in Tuscaloosa, Fayette and Carrollton.

Klasing & Williamson PC announces that **Warren Burke, Jr.** is a stockholder and the firm name is now **Klasing, Williamson & Burke PC.**

Joe Leak and **Mike Douglas** announce the formation of **Leak & Douglas PC** at the John Hand Building, 17 20th St. N, Ste. 200, Birmingham 35203. Phone (205) 977-7099.

Maynard Cooper & Gale announces that **Sujin Kim** joined the Mobile office.

McKenzie Laird PLLC of Nashville announces that **Whitney L. Haley** joined as an associate.

Morris, Cary, Andrews, Talmadge & Driggers LLC announces that **Brittney S. Bragg** joined as an associate in the Montgomery office.

Rosen Harwood PA announces that **Keren E. McElvy** joined the firm.

Rumberger, Kirk & Caldwell announces that **Craig Hymowitz** joined the firm as of counsel.

The **Tuscaloosa Association of REALTORS®** announces that **Shay V. Lawson** joined as its executive vice president. | AL

OFFERED TO ALABAMA STATE BAR MEMBERS

THE BBA INTERACTIVE LEGAL FORMS CD

Produced by the Solo/Small Firm Practitioner Section of the Birmingham Bar Association

FEATURING MORE THAN **125** LEGAL FORMS

AREAS OF LAW INCLUDE:

- Commercial/Business
- Domestic Relations
- Workers' Compensation
- Consumer Law
- Tort Law
- General Practice
- Attorney/Client Contracts

ONLY $55.00

Send check to: Birmingham Bar Association
2021 2nd Avenue North
Birmingham, Alabama 35203
Please note "Solo Forms" on check;

Questions? E-mail info@birminghambar.org

J. Anthony McLain

Cards, Cads and Ads–Various Advertising Issues Addressed

The Office of General Counsel regularly receives various requests for informal opinions concerning the requirements and limitations imposed upon attorney advertising by Rules 7.1, 7.2 and 7.3 of the *Rules of Professional Conduct*. The Disciplinary Commission has determined that it would be beneficial to consolidate into one formal opinion those informal advertising opinions which appear to be of profession-wide interest. Accordingly, RO-2003-01 will address those questions set forth below.

QUESTION ONE:

Are an attorney's business cards considered advertising? May an attorney leave his business cards in the offices of other professionals such as doctors and accountants?

ANSWER, QUESTION ONE:

The business cards of an attorney can constitute advertising if the cards are distributed to the public in such a way as to, or with the intent to, directly solicit prospective clients. Direct solicitation of prospective clients is governed by Rule 7.3 of the *Rules Professional Conduct*. Paragraph (a) of that rule provides as follows:

"Rule 7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. *A lawyer shall not permit employees or*

agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule. The term 'solicit' includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) of this rule." (Emphasis supplied)

In formal opinion RO-91-17, the Disciplinary Commission concluded that it was impermissible for an attorney to participate in a Welcome Wagon sponsorship whereby the attorney's brochure and other advertising material would be distributed by a Chamber of Commerce employee to new residents in the community. The Commission determined that such participation would constitute solicitation by an agent acting on the lawyer's behalf in violation of Rule 7.3 of the *Rules of Professional Conduct*. Additionally, the Office of General Counsel has held in various informal opinions that attorneys may not leave their business cards or other advertising materials in bars and nightclubs, doctors' offices or the offices of bail bondsmen because to do so would constitute face-to-face solicitation by an agent. It is, therefore, the opinion of the Disciplinary Commission that it would be ethically impermissible for an attorney to provide business cards to other professionals for distribution to their clients, customers or patients.

QUESTION TWO:

May an attorney print an advertisement for legal services on the exterior of prescription bags which a pharmacy will disperse to customers?

ANSWER, QUESTION TWO:

The Disciplinary Commission is of the opinion that the ethical concerns discussed in RO-91-17, cited in the previous question, are equally applicable to this inquiry. The Commission determined that attorney participation in Welcome Wagon sponsorships is prohibited because such participation constitutes solicitation by an agent. In this instance, the pharmacist would be soliciting on behalf of the attorney in much the same manner, and to the same extent, as the Chamber of Commerce employee in RO-91-17. Furthermore, the attorney is obviously paying the pharmacist for the right to place his advertisement on the prescription bags. The fact that the attorney's advertisement is on the pharmacist's prescription bags constitutes, or could readily be construed to constitute, an endorsement or recommendation of the attorney by the pharmacist. Rule 7.2 (c) provides, in pertinent part, that "[a] lawyer shall not give anything of value to a person for recommending the lawyers services . . . ." Accordingly, it is the opinion of the Disciplinary Commission that it would be ethically improper for an attorney to place an advertisement for legal services on the exterior of a prescription bag or on any other item which is to be distributed to the public by a third party.

QUESTION THREE:

Is an offer to provide legal services on a pro bono basis subject to the rules governing advertising and solicitation?

ANSWER, QUESTION THREE:

Rule 7.3 of the *Rules of Professional Conduct* governs attorney solicitation of prospective clients. Paragraph (a) of that rule provides, in pertinent part, as follows:

"Rule 7.3 Direct Contact with Prospective Clients

(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, *when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain*.

* * *

The term 'solicit' includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) of this rule." (Emphasis supplied)

It is the opinion of the Disciplinary Commission that when attorneys provide, free of charge, their time, advice or other legal services for a charitable or eleemosynary purpose, the motive for offering those services is not one of "pecuniary gain" within the meaning of the above-quoted rule. Accordingly,

Continued from page 415

offers to provide such services need not comply with the requirements of subdivision (b)(2) of Rule 7.3 and need not contain the disclaimer required by Rule7.2(e). The Commission's opinion is consistent with, and supported by, the decisions of the United States Supreme Court in *NAACP v. Button*, 371 U.S. 415 (1963), upholding the right of NAACP attorneys to solicit potential clients in civil rights litigation and in *In re Primus*, 436 U.S. 412 (1978), upholding the right of an ACLU attorney to send a solicitation letter to a woman who had been sterilized as a condition of Medicaid eligibility.

QUESTION FOUR:

Must written communications sent to former or existing clients for the purpose of soliciting representation of those clients in matters wholly unrelated to the existing or previous representation comply with the direct-mail solicitations requirements of Rule 7.3?

ANSWER, QUESTION FOUR:

Direct mail solicitation of prospective clients is governed by Rule 7.3 of the *Rules of Professional Conduct*. Paragraph (a) of that rule provides, in pertinent part, as follows:

> "A lawyer shall not solicit professional employment from a prospective client *with whom the lawyer has no familial or current or prior professional relationship*, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain." (Emphasis supplied)

It is the opinion of the Disciplinary Commission that the above-quoted language exempts written communication directed to former or existing clients from the requirements of Rule 7.3 regardless of whether the communication relates to the existing or prior representation or is for the purpose of soliciting the recipient as a client in a new and unrelated matter. To the extent language in RO-93-02 may be interpreted to indicate otherwise, it is the intent of the Commission to reject such an interpretation and to modify the language of RO-93-02 consistent with this opinion.

QUESTION FIVE:

The Comment to Rule 7.3 contains the following provision which has generated some confusion regarding the correct interpretation and application thereof:

> "General mailings to persons not known to need legal services, as well as mailings targeted to specific persons or potential clients, are permitted by this rule. However, these mailings constitute advertisement and are thus subject to the requirements of Rule 7.2 concerning delivery of copies to the general counsel, record keeping, inclusion of a disclaimer, and performance of the services offered at the advertised fee."

Does this provision mean that such mailings need not comply with the requirements of Rule 7.3?

ANSWER, QUESTION FIVE:

The Disciplinary Commission is of the opinion that this portion of the Comment does not mean that such mailings need not comply with the requirements of Rule 7.3. The Comment says that such mailings are "permitted" by the rule. It does not say that such mailings are "exempt" from the Rule. The correct interpretation, in the opinion of the Disciplinary Commission, is that such mailings are permitted provided those mailings comply with the requirements of Rule 7.3 and also provided they comply with the requirements of Rule 7.2. Any mailing which is a "written form of communication directed to a specific recipient with whom the lawyer has no familial or current or prior professional relationship" must comply with Rule 7.3 and with Rule 7.2. The only exception to this requirement is that discussed in the previous question, i.e., written communication sent to former or existing clients or family members.

QUESTION SIX:

Another provision in the Comment to Rule 7.3 about which questions have been raised regarding the meaning thereof is the following:

> "Communications not ordinarily sent on an unsolicited basis to prospective clients are not covered by this rule."

ANSWER, QUESTION SIX:

This comment refers to communications which have been solicited by the recipient. For example, if someone who needs legal assistance and, in the process of attempting to determine which attorney to employ, contacts one or more attorneys asking for information on their background and

experience, the response to such a request need not comply with the Rule governing direct mail solicitation. Conversely, communications which are sent to prospective clients on an unsolicited basis must comply with the rule.

QUESTION SEVEN:

A lawyer proposes to publish an advertisement which contains the following language: "Experienced, Driven & Knows the System–The Lawyer You Choose Makes a Difference." Is this language permissible?

ANSWER, QUESTION SEVEN:

It is the opinion of the Disciplinary Commission that such "comparative" language is directly contrary to the intent and purpose of the disclaimer required by paragraph (e) of Rule 7.2, i.e., "No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers." The message conveyed to the public by comparative advertisements, either directly or by implication, is that the advertising attorney does, in fact, provide legal services of greater quality than other attorneys. Such advertisements are, therefore, ethically impermissible.

QUESTION EIGHT:

An attorney proposes to send a brochure to prospective clients with a cover letter worded as follows:

> "Enclosed is a courtesy copy of my firm's July/August 2003 newsletter. I hope that you find it informative. If you would like to receive additional copies of the newsletter in the future, please take a moment to complete and return the enclosed postcard to me, and I will see to it that additional copies are sent to you."

Continued from page 417

Must the cover letter and brochure comply with the requirements of Rule 7.3 of the *Rules of Professional Conduct* which govern direct mail solicitation of prospective clients by attorneys?

ANSWER, QUESTION EIGHT:

Paragraph (a) of Rule 7.3 provides as follows:

> "(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule. The term 'solicit' includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) of this rule."

It conclusively appears that the proposed cover letter and brochure are "written form[s] of communication directed to a specific recipient." It further appears that the intended recipient is someone "with whom the lawyer has no familial or current or prior professional relationship." Accordingly, it is the opinion of the Office of General Counsel that the letter and brochure must comply with Rules 7.2 and 7.3. As discussed in response to Question Four, written communication sent to former or existing clients or family members are exempt from all advertising and solicitation requirements.

QUESTION NINE:

An attorney proposes to send a calendar to prospective clients that would have printed on it the attorney's name, address, telephone number, fax number and a sketch of the attorney's office building. Must this proposed calendar comply with Rule 7.3?

ANSWER, QUESTION NINE:

It is the opinion of the Disciplinary Commission that the proposed calendar is not a "written form of communication" within the meaning of Rule 7.3 and, therefore, need not comply with the requirements thereof. However, if the calendar includes any reference to the attorney's areas of practice, it must contain the disclaimer as required by Rule 7.2(e).

QUESTION TEN:

May advertisements contain "success stories" about cases the attorney has successfully litigated and amounts recovered on behalf of clients? May advertisements contain "client testimonials" relating favorable comments from satisfied clients?

ANSWER, QUESTION TEN:

Rule 7.1 of the *Rules of Professional Conduct* provides, in pertinent part, as follows:

> "A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:
>
> * * *
>
> (b) is likely to create an unjustified expectation about results the lawyer can achieve . . . ."

The Comment to the above-quoted provision expands upon this prohibition:

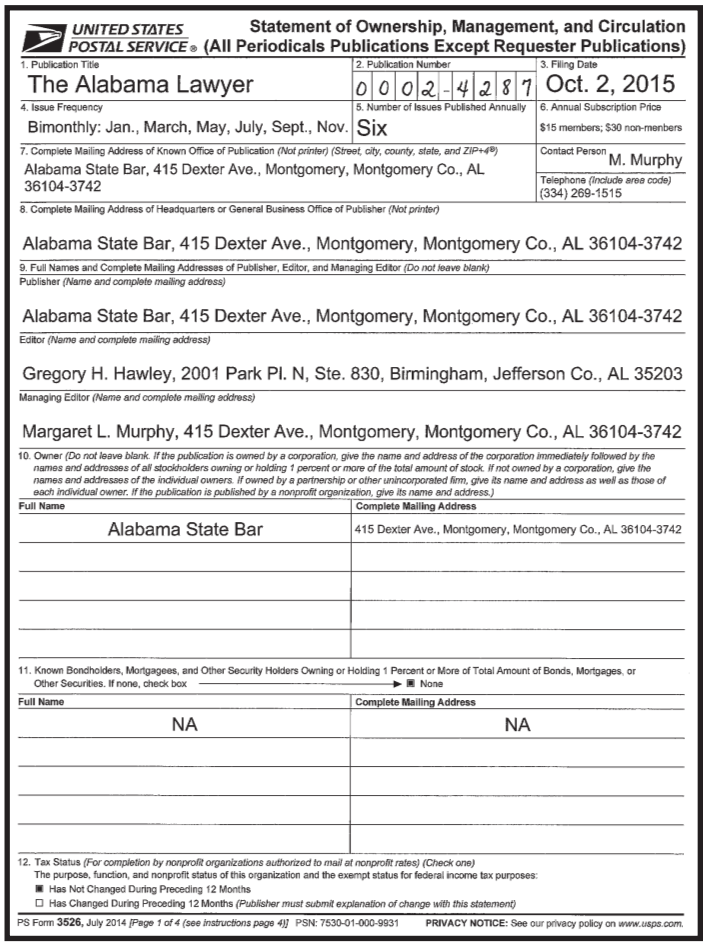
> "The prohibition in paragraph (b) of statements that may create 'unjustified expectations' would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements."

In a recent informal opinion, the Office of General Counsel approved an advertisement which included those elements expressly prohibited in the Comment, i.e., references to successful litigation, information concerning amounts recovered and favorable comments from satisfied clients. However, the General Counsel's opinion was predicated on the fact that the advertisement contained the following disclaimer:

> "These recoveries and testimonials are not an indication of future results. Every case is different, and

regardless of what friends, family, or other individuals may say about what a case is worth, each case must be evaluated on its own facts and circumstances as they apply to the law. The valuation of a case depends on the facts, the injuries, the jurisdiction, the venue, the witnesses, the parties, and the testimony, among other factors. Furthermore, no representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."

The Disciplinary Commission concurs in the opinion of the General Counsel that such "success story" and "testimonial" advertisements are permissible, provided such permission is expressly conditioned upon the inclusion of an explicit, comprehensive and appropriately worded disclaimer and provided, of course, that the statements made in the advertisements are true and accurate. [RO-2003-01] | AL



UNITED STATES POSTAL SERVICE® **Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)**

1. Publication Title	2. Publication Number	3. Filing Date
The Alabama Lawyer	0 0 0 2 - 4 2 8 7	Oct. 2, 2015
4. Issue Frequency	5. Number of Issues Published Annually	6. Annual Subscription Price
Bimonthly: Jan., March, May, July, Sept., Nov.	Six	$15 members; $30 non-members

7. Complete Mailing Address of Known Office of Publication *(Not printer) (Street, city, county, state, and ZIP+4®)*: Alabama State Bar, 415 Dexter Ave., Montgomery, Montgomery Co., AL 36104-3742 — Contact Person: M. Murphy; Telephone *(Include area code)*: (334) 269-1515

8. Complete Mailing Address of Headquarters or General Business Office of Publisher *(Not printer)*: Alabama State Bar, 415 Dexter Ave., Montgomery, Montgomery Co., AL 36104-3742

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor *(Do not leave blank)*
Publisher *(Name and complete mailing address)*: Alabama State Bar, 415 Dexter Ave., Montgomery, Montgomery Co., AL 36104-3742
Editor *(Name and complete mailing address)*: Alabama State Bar, 415 Dexter Ave., Montgomery, Montgomery Co., AL 36104-3742
Managing Editor *(Name and complete mailing address)*: Gregory H. Hawley, 2001 Park Pl. N, Ste. 830, Birmingham, Jefferson Co., AL 35203

Margaret L. Murphy, 415 Dexter Ave., Montgomery, Montgomery Co., AL 36104-3742

10. Owner *(Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)*

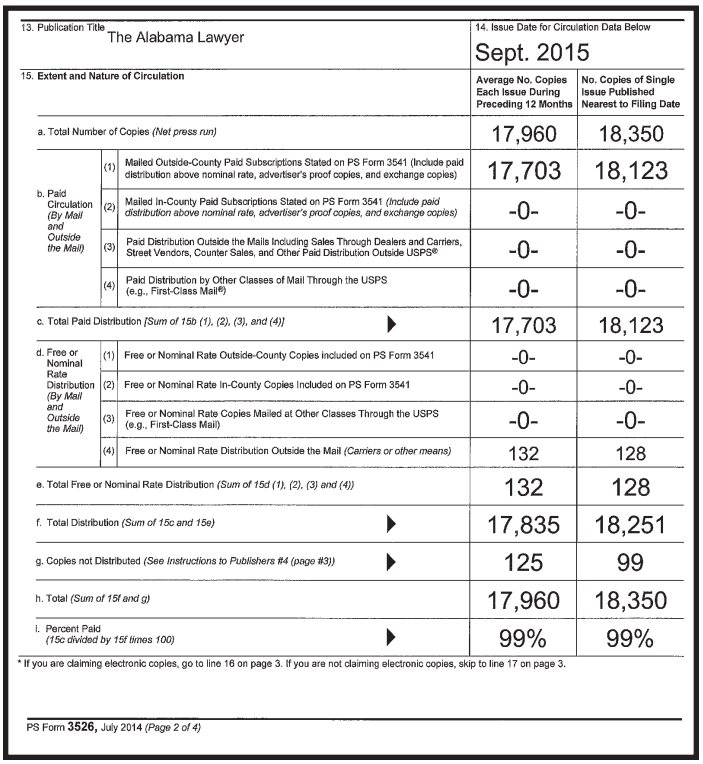
Full Name	Complete Mailing Address
Alabama State Bar	415 Dexter Ave., Montgomery, Montgomery Co., AL 36104-3742

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box → ■ None

Full Name	Complete Mailing Address
NA	NA

12. Tax Status *(For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)*
The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:
■ Has Not Changed During Preceding 12 Months
□ Has Changed During Preceding 12 Months *(Publisher must submit explanation of change with this statement)*

PS Form **3526**, July 2014 *(Page 1 of 4 (see instructions page 4))* PSN: 7530-01-000-9931 **PRIVACY NOTICE:** See our privacy policy on *www.usps.com*.

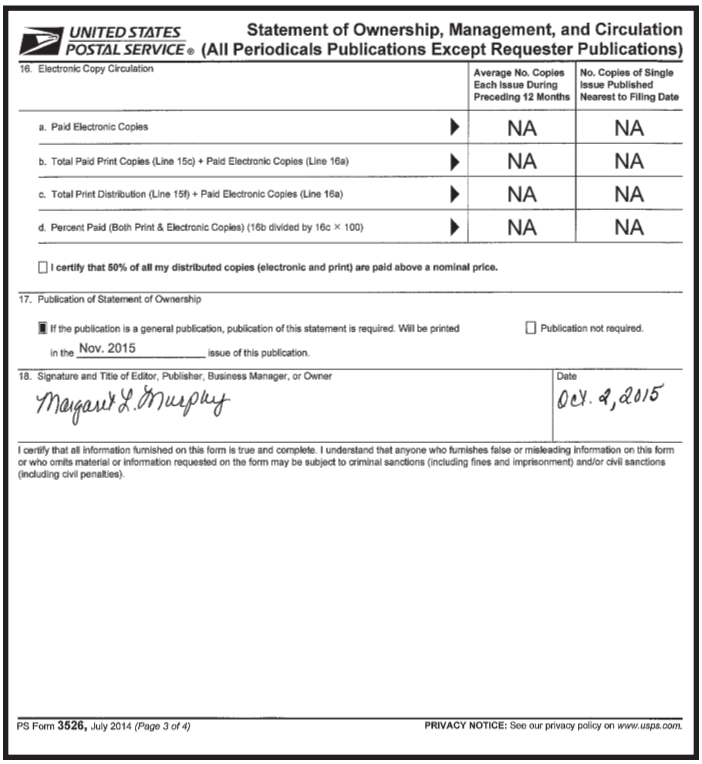


13. Publication Title: The Alabama Lawyer — 14. Issue Date for Circulation Data Below: Sept. 2015

15. Extent and Nature of Circulation			Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies *(Net press run)*			17,960	18,350
b. Paid Circulation *(By Mail and Outside the Mail)*	(1)	Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	17,703	18,123
	(2)	Mailed In-County Paid Subscriptions Stated on PS Form 3541 *(Include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)*	-0-	-0-
	(3)	Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	-0-	-0-
	(4)	Paid Distribution by Other Classes of Mail Through the USPS (e.g., First-Class Mail®)	-0-	-0-
c. Total Paid Distribution *[Sum of 15b (1), (2), (3), and (4)]* ▶			17,703	18,123
d. Free or Nominal Rate Distribution *(By Mail and Outside the Mail)*	(1)	Free or Nominal Rate Outside-County Copies included on PS Form 3541	-0-	-0-
	(2)	Free or Nominal Rate In-County Copies Included on PS Form 3541	-0-	-0-
	(3)	Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g., First-Class Mail)	-0-	-0-
	(4)	Free or Nominal Rate Distribution Outside the Mail *(Carriers or other means)*	132	128
e. Total Free or Nominal Rate Distribution *(Sum of 15d (1), (2), (3) and (4))*			132	128
f. Total Distribution *(Sum of 15c and 15e)* ▶			17,835	18,251
g. Copies not Distributed *(See Instructions to Publishers #4 (page #3))* ▶			125	99
h. Total *(Sum of 15f and g)*			17,960	18,350
i. Percent Paid *(15c divided by 15f times 100)* ▶			99%	99%

* If you are claiming electronic copies, go to line 16 on page 3. If you are not claiming electronic copies, skip to line 17 on page 3.

PS Form **3526**, July 2014 *(Page 2 of 4)*



UNITED STATES POSTAL SERVICE® **Statement of Ownership, Management, and Circulation (All Periodicals Publications Except Requester Publications)**

16. Electronic Copy Circulation	Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Paid Electronic Copies ▶	NA	NA
b. Total Paid Print Copies (Line 15c) + Paid Electronic Copies (Line 16a) ▶	NA	NA
c. Total Print Distribution (Line 15f) + Paid Electronic Copies (Line 16a) ▶	NA	NA
d. Percent Paid (Both Print & Electronic Copies) (16b divided by 16c × 100) ▶	NA	NA

□ **I certify that 50% of all my distributed copies (electronic and print) are paid above a nominal price.**

17. Publication of Statement of Ownership
■ If the publication is a general publication, publication of this statement is required. Will be printed in the Nov. 2015 issue of this publication. □ Publication not required.

18. Signature and Title of Editor, Publisher, Business Manager, or Owner: Margaret L. Murphy — Date: Oct. 2, 2015

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties).

PS Form **3526**, July 2014 *(Page 3 of 4)* **PRIVACY NOTICE:** See our privacy policy on *www.usps.com*.

Notices

- Notice is hereby given to **John Newman Hester,** who practiced in Irondale and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated May 22, 2015, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2014. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 15-576]

- Notice is hereby given to **Stephen Frederick Humphreys,** who practiced in Birmingham and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated May 22, 2015, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2014. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 15-578]

- Notice is hereby given to **Adam Michael McCord,** who practiced in Thompsons Station, Tennessee and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated May 22, 2015, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2014. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 15-583]

- Notice is hereby given to **Joseph Handley Rogers, III,** who practiced in Vestavia and whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar, dated May 19, 2015, he has 60 days from the date of this publication to come into compliance with the 2015 Mandatory Annual Client Security Fund Assessment. Noncompliance with the Mandatory Annual Client Security Fund Assessment shall result in a suspension of his license. [CSF No. 2015-649]

- Notice is hereby given to **William Robert Sickler,** who practiced in Birmingham and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated May 27, 2015, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2014. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 15-592]

Transfers to Disability Inactive Status

- Huntsville attorney **James Barry Abston** was transferred to disability inactive status pursuant to Rule 27(c), *Ala. R. Disc. P.*, effective June 26, 2015, by order of the Disciplinary Board of the Alabama State Bar. The order was issued pursuant to Abston's request to be transferred to disability inactive status. [Rule 27(c), Pet. No. 2015-992]

- Montgomery attorney **Debra Haynes Poole** was transferred to disability inactive status pursuant to Rule 27(c), *Ala. R. of Disc. P.*, effective July 1, 2015, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the May 19, 2015 order of Panel II of the Disciplinary Board of the Alabama State Bar in response to Poole's petition submitted to the Office of General Counsel requesting to be transferred to disability inactive status. [Rule 27(c), Pet. No. 2015-807]

Disbarment

- Birmingham attorney **William Gilmore Gantt** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective July 8, 2015. Gantt consented to disbarment, after admitting to engaging in a pattern of overbilling or fraudulently billing clients. [Rule 23(a), Pet. No. 2015-918]

Continued from page 421

Suspensions

- Birmingham attorney **Ralph Bohanan, Jr.** was interimly and summarily suspended from the practice of law in Alabama pursuant to Rules 8(c) and (e), and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective May 13, 2015. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing that Bohanan's continuing conduct was causing or likely to cause immediate and serious injury to a client or to the public, and that he failed to respond to requests for information from a disciplinary authority during the course of a disciplinary investigation. [Rule 20(a), Pet. No. 15-760]

- Pine Apple attorney **Edward Feagin Tracy** was suspended from the practice of law in Alabama for 91 days by order of the Supreme Court of Alabama, effective July 1, 2015. The supreme court entered its order based upon the Disciplinary Commission's order suspending Tracy. On June 12, 2015, the Disciplinary Commission accepted Tracy's conditional guilty plea and ordered that he be suspended for violating Rules 1.5(c), 1.8(a), 3.3(a)(2), 3.4(c), 7.1, 7.4, 7.5 and 8.4(a), (d) and (g), *Ala. R. Prof. C.* Tracy was hired to represent clients' in a legal dispute regarding a settlement and, later, a dispute with an insurance company due to a fire. Tracy issued settlement payments to the clients in cash and failed to provide them with settlement statements outlining his fees and expenses. Tracy also began obtaining short-term cash loans from the clients. In addition, Tracy had three different IOLTA accounts from different financial institutions during the time he represented the clients, where he made electronic and cash withdrawals without maintaining adequate records. Tracy made personal payments, including a child support check to the mother of his child, directly from his trust account, causing a check to bounce due to insufficient funds. Additionally, Tracy's firm name is Southern Legal Group, P.C., indicating more than one lawyer practices with the firm, when, in fact, Tracy is the only member of the Southern Legal Group, P.C. Also, Tracy undertook representation of a client in a divorce case wherein Tracy took possession of a tractor belonging to both parties of the pending divorce. The second party filed for the theft of the tractor with his insurance company and was later paid $10,000, but was unaware that Tracy had possession of the tractor. Tracy did not disclose to the court, the opposing party or opposing counsel his knowledge of the whereabouts of the tractor. Tracy made an improper claim for half of the insurance proceeds that had been paid by the insurance company on the tractor. [ASB Nos. 2013-1879, 2015-211 and 2015-283] | AL


free•dom:
noun
the power to determine action without restraint.
free•dom court re•porting:
proper noun
a company that gives you more freedom by handling your legal support needs.
FREEDOM
FREEDOMREPORTING.COM
Feel the Freedom Difference
www.freedomreporting.com
Toll Free: 1-877-373-3660
Local: 205-397-2397
Fax: 205-397-2398

Periodical Postage
Paid
Montgomery, AL