

The Alabama Lawyer

January 2015 | Volume 76, Number 1

The Affordable
Care Act,
One Year Later

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What You Need to Do This Year— R.E.S.T.

I hope you're having a happy and productive new year. If your "to-do" list looks like mine, maybe you think that resting is not how you need to start your new year, but please allow me to explain. A speaker at the first Alabama State Bar Leadership Forum Alumni Section reunion, Gen. George Casey, Jr. (USA, ret.), gave this advice: "Each day you need to R.E.S.T. That is, you need to Read, Exercise, Sleep and Think."

Read

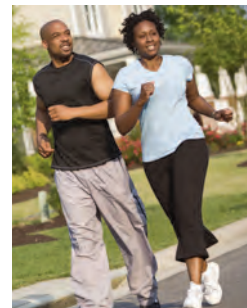
Each day, you should try to **read** something that is of interest to you, but is not work-related. Our speaker was not suggesting that we all read deposition transcripts when we get home at night. If you enjoy reading biographies, read biographies. If



you enjoy reading crime novels, do that. Forget social media. Pick up a book. It stimulates your mind, reduces stress, increases your knowledge, expands your vocabulary and improves your memory. There are many other benefits as well. Plus, if you get a book from the local library, it is free entertainment!

Exercise

Next, each day, do your best to **exercise**. The physical benefits of exercise are clear, and most people know there are mental health benefits as well. They include reducing stress, alleviating anxiety and preventing cognitive decline, among others. We're all busy, and this takes time, but every time I hit the gym, I come back recharged!



Sleep

You need to get a good night's **sleep**. Experts say that an adult should get about seven to eight hours of sleep per night.¹ The military has long studied the effect of poor sleep quality and inadequate quantity. We all know that with less sleep, we are not as alert. Recently the Army's surgeon general stated, "If you have less than six hours of sleep for six days in a row you have a cognitive impairment of 20 percent—that you are cognitively impaired as if you had a .08 percent alcohol level."² She continued, "We never will allow a soldier in our formation with a .08 percent alcohol level, but we allow it every day to make those complex decisions." *Id.* Poor sleepers score lower on



measurements for social and family health.³ So, get a good night's sleep!

Think

Finally, General Casey suggested that each day we need to **think**. It is important to do short-term and long-term planning. And, it is important to push aside the papers for a bit and think, particularly if you have a specific problem or difficulty. Include time on your calendar to do this. If you feel like you have been working non-stop, take a walk or a break and *just think*. It takes some time for the mind to settle down, so give yourself enough time, go to a place where you will not be interrupted and *just think*. These days, I spend quite a bit



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of time driving from Huntsville to Montgomery. Often, I will cut off the radio and give myself time to consider what I have coming up, pray or otherwise just reflect.

I try to follow this good advice and R.E.S.T. each day. Of course, I do not always succeed, but when I do, I end up being more productive.

Finally, as we all begin this new year, I ask you to commit to take one pro bono case. If you aren't already, become a VLP volunteer. There's a huge unfulfilled need in Alabama for civil legal services for persons living in poverty. Please consider helping.

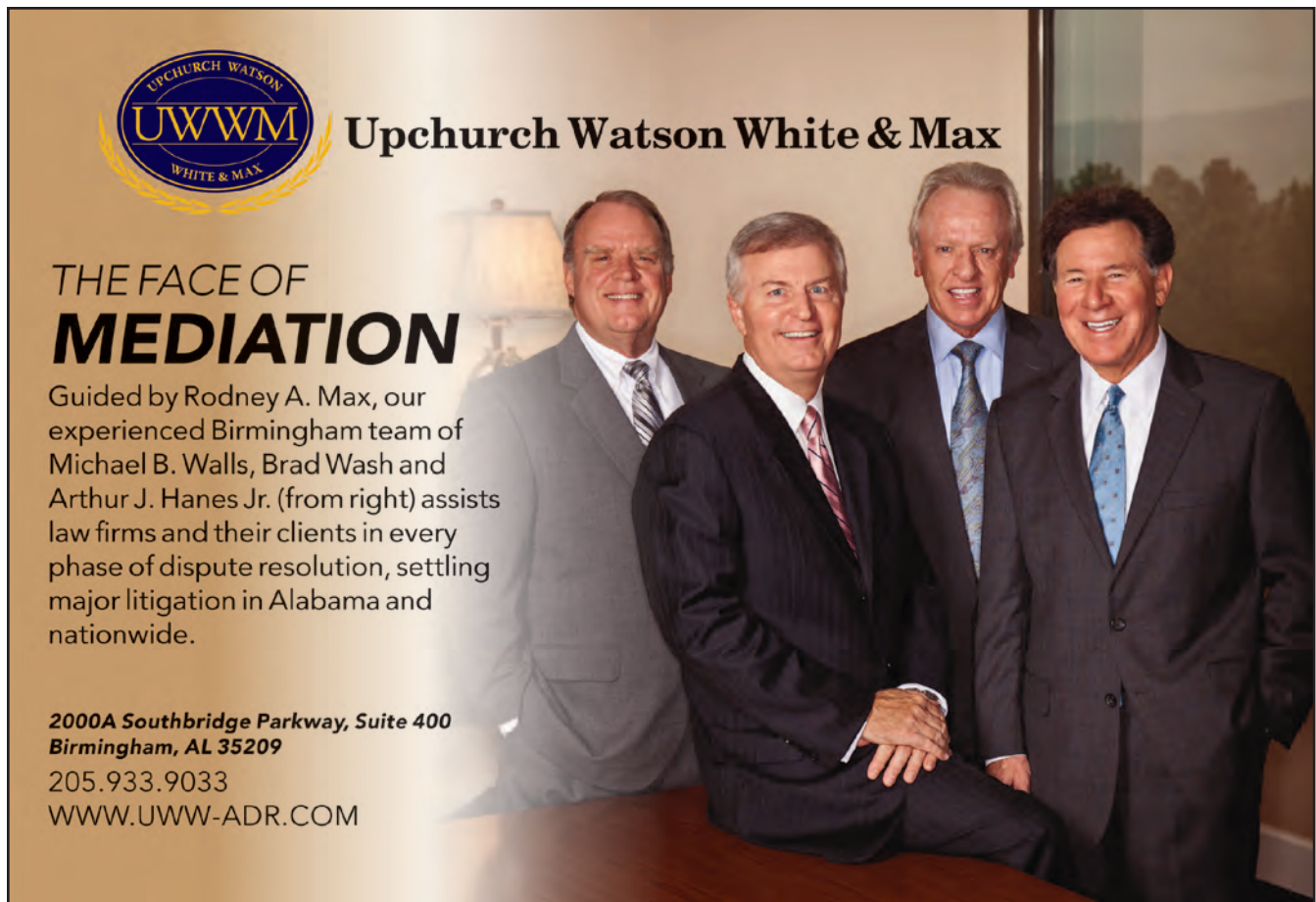
There is also a large need for legal assistance to veterans. So, if you want to focus your pro bono efforts on helping veterans and their families, the American Bar Association has a terrific program for training attorneys to help with veterans' cases—Veterans' Claims Assistance Network. For more information or to sign up, see militaryprobono.org.

Remember our motto—**Lawyers Render Service**—and find somewhere in which you can help.

I hope you have a wonderful and very prosperous year, filled with many blessings. | [AL](#)

Endnotes

1. Mayo Clinic. <http://www.mayoclinic.org/healthy-living/adult-health/expert-answers/how-many-hours-of-sleep-are-enough/faq-20057898>.
2. Bryant Jordan, "Army Surgeon General: Sleepy Soldiers as Impaired as Drunk Soldiers." *Military.Com News* (October 15, 2014). <http://www.military.com/daily-news/2014/10/15/army-surgeon-general-sleepy-soldiers-as-impaired-as-drunk.html>.
3. Ailshire JA, Burgard SA. "Family Relationships and Troubled Sleep among U.S. Adults: Examining the Influences of Contact Frequency and Relationship Quality." *J Health Soc Behav.* 2012;53(2):248-262.



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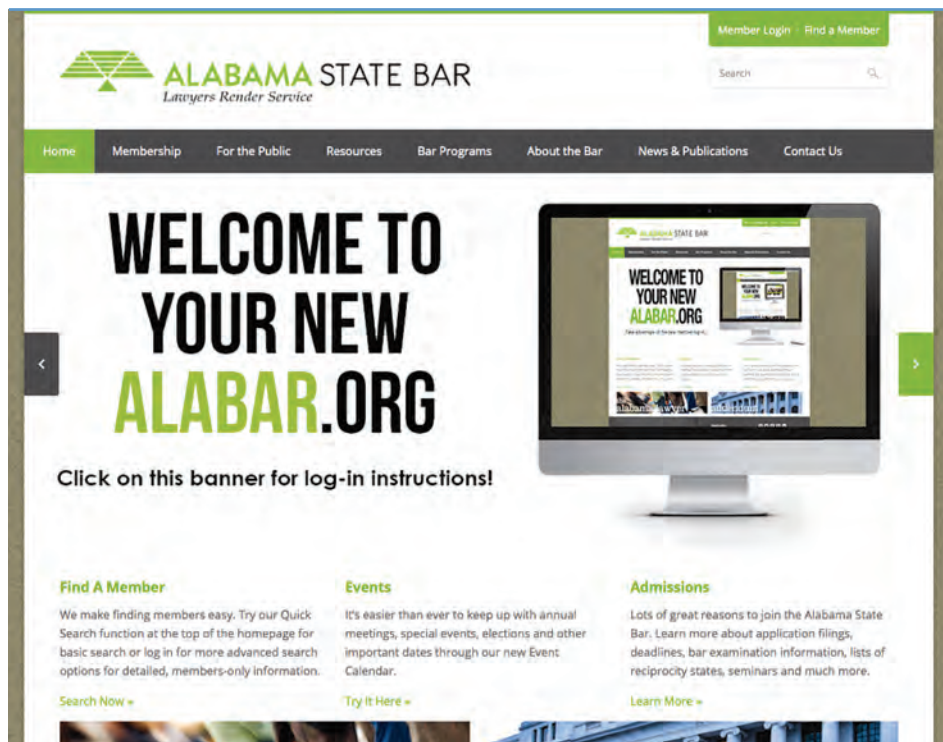
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The New Website and Consolidated Fee Statement Are Well Received

This past September saw the culmination of several years of work with the unveiling of the new ASB website at www.alabar.org and the introduction of a consolidated fee and reporting statement. Based on your responses, both the website and the consolidated statement have been well received.

The Digital Communications Committee (the "Committee"), chaired by **Cleve Poole** of Greenville, worked closely with bar staff to develop parameters for the content and design of a new website with improved navigation and functionality that would be accessible across multiple digital platforms. The committee and staff worked with a consultant to develop a website that is not only aesthetically attractive but incorporates added functionality in a user-friendly design. A new feature, "My Dashboard," allows each member to

log in and have a quick and ready reference of their ASB information, including the number of earned CLE credits, section membership, CSF compliance and other important information about a member's status with the ASB. The committee will continue to add content and other features to the website so that it can be every member's professional portal to all bar-related information and services, including important ones like Casemaker. Kelley Lee, who joined our staff last year as the digital communications content manager, keeps the website information relevant and our social media outlets current.

The consolidated fee statement and report form sent to all members in September, replacing the single purpose invoice form used previously, has had a very positive impact on member renewals. Although our overall number

of license/special membership renewals and CSF payments are roughly the same as last year, we have observed a significant increase in those members who are renewing online. As of the writing of this article (second week of November), 6,277 licenses/special memberships have been renewed online compared to 4,133 during the same period last year. This is a 51 percent increase. Of the online renewals, 44 percent were made by e-check and 56 percent by credit card. In 2013, roughly 83 percent of the online renewals were by credit card and 17 percent by e-check. With the new consolidated invoice, members can also renew their section memberships. This has resulted in a 28 percent increase in the number of members joining sections this year as compared to last year.

As intended, the consolidated fee statement has made it easier and more convenient for busy lawyers to take care of their membership renewals, Client Security Fund assessments, section dues and contributions to the Alabama Law

Foundation. With recent enhancements to the online trust account certification interface, Alabama lawyers are now able to handle all of these matters at one time instead of dealing with them in a piecemeal fashion throughout the year. Likewise, decreased fees, including a lower credit card fee and no charge for utilizing an e-check, have made the online process less costly to use than ever before. Online payments allow the membership department to operate more efficiently and mail out license and special membership cards more quickly than when processing the traditional paper checks and invoices.

As we begin a new year, we will be adding content and additional functionality to the ASB site. We will also be tweaking the consolidated fee statement and our online payment interface. If you have any suggestions for enhancements to either the website or the consolidated fee statement, please let me know at keith.norman@alabar.org. I look forward to hearing from you.. | [AL](#)

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Description

The director of the Office of Indigent Defense Services shall have responsibility over a major division in the Department of Finance that governs the provision of defense services to indigent persons. Supervision is exercised over a staff of personnel including accountants, clerical and/or attorney positions. The director shall work independently, determining his/her own procedures and making major work decisions. The director shall operate under the general direction of the finance director.

Examples of Work Performed

- Administer and coordinate the operations of the office and all divisions within the office and supervise compliance among the local indigent defense advisory boards with rules, procedures, regulations, and standards adopted by the office which meet the goals set forth in Act 2011-678;
- Develops and improves programs to provide legal representation to indigents;
- Develop policies and procedures for the determination of indigency and partial indigency;
- Prescribe minimum experience, training and other qualifications for appointed counsel, contract counsel and public defenders in all types of cases, including capital cases;
- Provide caseload management and develops performance standards for various counsel;
- Monitor performance of all counsel (appointed, contract and public defender) and provide recommendations to the local indigent defense advisory boards on necessary changes to systems;
- Establish criteria for independent, competent and efficient representation of clients whose cases present conflicts of interest;
- Determine the methods of providing indigent defense service in the appellate courts;
- Participate in training on the various delivery systems to attorney and circuit judges;

- Coordinate the services of the office with any federal, county, private or other programs established to provide assistance to indigent persons entitled to representation and consult with professional organizations concerning the implementation and improvement of programs for providing indigent services;
- Prepare and submit annually to the finance director a proposed budget for the provision of statewide indigent defense services, and prepare and submit an annual report containing pertinent data on the operations, costs and needs of the state's indigent defense system and other information to the Chief Justice of the Alabama Supreme Court, to the Alabama Legislature and to the governor;
- Coordinate the development and implementation of rules, policies, procedures, regulations and standards to carry out the provisions of the office and comply with all applicable laws and standards;
- Maintain proper records of all financial transactions related to the operation of the office;
- Provide and compensate attorneys, experts and other practitioners who provide services related to legal representation of indigents;
- Establish procedures for the recoupment of fees, expenses, salaries and other expenses;
- Apply for and accept on behalf of the office funds that may become available from any source, including government, nonprofit or private grants, gifts or bequests;
- Provide for the training of attorneys and other staff involved in the legal representation of persons subject to the provisions of this office;
- Ensure that the expenditures of the office are not greater than the amounts budgeted or available from other revenue sources; and
- Perform other duties as may be deemed necessary to fulfill the obligations of the office or as assigned by the finance director.

Minimum Qualifications

- Graduation from an accredited school of law;
- Possess a license in good standing to practice law from the Alabama State Bar at the time of application and, if awarded the position, will obtain and maintain an active license of general membership with the Alabama State Bar.



Special Requirements

- Extensive travel may be required;
- Possession of a certificate of admission to the bar of the Supreme Court of Alabama.

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The salary will be commensurate with experience. Benefits include participation in the State Employees' Health Insurance Program and the Retirement Systems of Alabama.

Application

Submit a resume with a cover letter of no more than two pages explaining why you would like this position and why you believe you are qualified for it to:

Keith B. Norman
 Executive Director
 Alabama State Bar
 P.O. Box 671
 Montgomery AL 36101-0671

The deadline for applications is February 6, 2015.

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, 45 lawyers have become members of the hall of fame. The five newest members were inducted May 2, 2014.

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 <http://www.alabar.org/membership/alabama-lawyers-hall-of-fame/>.

Download an application form at <https://www.alabar.org/assets/uploads/2014/08/Hall-of-Fame-Nomination-Form-2015.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, 2015.

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 13, 2015**. 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.

Notice of Election and Electronic Balloting

Notice is given here pursuant to the *Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners*.

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits:

- 2nd Judicial Circuit
- 4th Judicial Circuit
- 6th Judicial Circuit, Place 2
- 9th Judicial Circuit
- 10th Judicial Circuit, Place 1
- 10th Judicial Circuit, Place 2
- 10th Judicial Circuit, Place 5
- 10th Judicial Circuit, Place 8
- 10th Judicial Circuit, Place 9
- 12th Judicial Circuit
- 13th Judicial Circuit, Place 2
- 15th Judicial Circuit, Place 2
- 15th Judicial Circuit, Place 6
- 16th Judicial Circuit

- 18th Judicial Circuit, Place 2
- 20th Judicial Circuit
- 23rd Judicial Circuit, Place 2
- 24th Judicial Circuit
- 27th Judicial Circuit
- 29th Judicial Circuit
- 38th Judicial Circuit
- 39th Judicial Circuit

Additional commissioners will be elected for each 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits will be determined by a census on March 1, 2015 and vacancies certified by the secretary no later than March 15, 2015. All terms will be for three years.

Nominations may be made by petition bearing the signatures of five members in good standing with principal offices



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in the circuit in which the election will be held or by the candidate's written declaration of candidacy. **Nomination forms must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 24, 2015).**

Nomination forms may be sent to:

Keith B. Norman
 Secretary
 Alabama State Bar
 P.O. Box 671
 Montgomery AL 36101
elections@alabar.org
 Fax (334) 261-6310

It is the candidate's responsibility to ensure the secretary receives the nomination form by the deadline.

As soon as practical after May 1, 2015, members will be notified by email with a link to the Alabama State Bar website that includes an electronic ballot. *Members who do not have Internet access should notify the secretary in writing on or before May 1 requesting a paper ballot.* A single written request will be sufficient for all elections, including run-offs and contested president-elect races during this election cycle. **Ballots must be voted and received by the Alabama State Bar by 5:00 p.m. on the third Friday in May (May 15, 2015).**

At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 1, 4 and 7. **Petitions for these positions which are elected by the Board of Bar Commissioners are due by April 1, 2015.**

Election rules and petitions for all positions are available at www.alabar.org.

William D. "Bill" Scruggs, Jr. Service to The Bar Award

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the William D. "Bill" Scruggs, Jr. Service to the Bar Award **through April 15, 2015.** Nominations should be prepared on the appropriate nomination form available at www.alabar.org and mailed to:

Keith B. Norman
 Executive Director
 Alabama State Bar
 P.O. Box 671
 Montgomery AL 36101

The Bill Scruggs Service to the Bar Award was established in 2002 to honor the memory of and accomplishments on behalf of the bar of former state bar President Bill Scruggs. The award is not necessarily an annual award. It must be presented in recognition of outstanding and long-term service by living members of the bar of this state to the Alabama State Bar as an organization.

Nominations are considered by a five-member committee which 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.

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 2015 Annual Meeting at the Grand Hotel Marriott Resort & Spa in Point Clear.

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

The following criteria are 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 June 1, 2015. Applications may be downloaded from www.alabar.org or obtained by contacting Christina Butler at (334) 269-1515 or christina.butler@alabar.org. | [AL](#)



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The Alabama State Bar strives to provide relevant and useful information to lawyers. *The Alabama Lawyer* has been published every other month since the January 1983 issue (it was quarterly before that). In December 1995, the Alabama State Bar started printing the *Addendum*, whose purpose was to share timely information in between the publication of the *Lawyer*. Beginning with the October 2008 issue, the *Addendum* went online to provide immediate access to information. As we approach a

decade of an online *Addendum*, we are asking ourselves whether it is valuable and relevant in its current online form or whether it should be changed.

To help answer this question, we formed a small committee of the Editorial Board comprised of **Allison Skinner (chair), Sherrie Phillips, Joi Monteil, Marc Starrett** and **Jason Tompkins**. In the coming weeks, the committee will send a survey to you. Please take the time and complete the survey. We want to make sure we are providing the most effective communication possible that meets your needs in “real time.” If you have other ideas about the *Addendum*, please contact me or Margaret Murphy, state bar publications director, margaret.murphy@alabar.org. | AL

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“Regulatory Takings”

Claims under the Alabama Constitution

Following *Town of Gurley v. M&N Materials, Inc.*

By George W. Royer, Jr. and David J. Canupp

Prior to December 21, 2012, the Alabama Supreme Court

had never addressed the issue of whether a regulatory taking—i.e., governmental action which operates by executive or legislative action to restrict the use of property—can constitute the basis for a cognizable claim of inverse condemnation under the *Alabama Constitution of 1901*. In the case of *Town of Gurley v. M&N Materials, Inc.*, 143 So. 3d 1 (Ala. 2012) (as modified on denial of rehearing), the Alabama Supreme Court addressed for the first time the question of whether such a right of action exists. The authors of this article served as appellate counsel for the Town of Gurley in the *M&N* case.¹ This article will address the background of inverse condemnation in Alabama, the *M&N* opinion and the current status of regulatory takings claims under the Alabama Constitution.

Inverse Condemnation Under Alabama Law

Generally, the exercise of the power of eminent domain is accomplished through the statutorily regulated process of condemnation. See, e.g., *State Dep’t of Transp. v. McLelland*, 639 So. 2d 1370 (Ala. 1994). However, “inverse condemnation is the taking of private property for public use without formal condemnation proceedings and without just compensation being paid by a governmental agency or entity which has the right or power of condemnation.” *McClendon v. City of Boaz*, 395 So. 2d 21, 24 (1981). In *Ex parte Carter*, 395 So. 2d 65, 67 (Ala. 1980), the Supreme Court of Alabama observed that “an action claiming inverse condemnation is very limited and [] all elements must be present.”

The difference between formal condemnation proceedings and “inverse condemnation” was explained by the Alabama Supreme Court in *Jefferson County v. Southern Natural Gas Co.*, 621 So. 2d 1282 (Ala. 1993), by reference to a United States Supreme Court decision on the subject, as follows:

In *United States v. Clarke*, 445 U.S. 253, 100 S. Ct. 1127, 63 L. Ed. 2d 373 (1980), the United States Supreme Court explained the difference between formal condemnation proceedings and inverse condemnation proceedings. A formal condemnation proceeding is a legal action brought by a condemning authority, such as the Government, in the exercise of its power of eminent domain. “Inverse condemnation” refers to a legal action against a governmental authority to recover the value of property that has been taken by that governmental authority without exercising its power of eminent domain—it is a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when the taking authority has not initiated condemnation proceedings. Condemnation proceedings require affirmative “taking” action on the part of the condemning authority; the particular action required depends on the particular statute applicable. However, in inverse condemnation actions, a governmental authority need only occupy or injure the property in question; when that occurs and the property owner discovers the encroachment, the property owner has the burden of taking affirmative action to recover just compensation.

621 So. 2d at 1287.

The right of action for inverse condemnation is not found in the *Alabama Code*. Although inverse condemnation claimants frequently cite the *Alabama Eminent Domain Code*, Ala. Code § 18-

The property must have been: (1) “taken, injured, [or] destroyed,” and (2) the taking, injury or destruction must have been related to the governmental entity’s “construction or enlargement of its works, highways, or improvements.”

1A-1, *et seq.* (AEDC), as the source of the right to maintain an inverse condemnation action, it does not appear that the AEDC provides a basis for an inverse condemnation claim. The AEDC specifically states that it “does not confer the power of eminent domain” and, instead, provides only “standards for the acquisition of property by condemnors” and “supplements the law of this state relating to the acquisition of property and to the exercise of the power of eminent domain.” *Id.* At § 18-1A-2. The commentary to Section 18-1A-2 of the AEDC specifically provides that the AEDC does not purport to regulate inverse condemnation actions in Alabama except to provide for the recovery of attorneys’ fees for successful inverse condemnation claimants.

Subsection (a) establishes that this *Code* is conceived primarily as a procedural statute. . . .

* * *

Subsection (b) makes it clear that this Alabama Eminent Domain Code (hereinafter referred to as “AEDC” or “this Code”) is intended to supplement and not displace other provisions of law dealing with the substantive powers of land acquisition and eminent domain. . .

* * *

This AEDC does not purport to supply rules for inverse condemnation actions (except as provided in section § 18-1A-32).² The extent to which its provisions may be applicable in inverse condemnation actions is intended to be determined by judicial construction in the light of other applicable state law.

(emphasis added). There are no appellate decisions in Alabama that have held that the AEDC provides a statutory basis of a claim for inverse condemnation.³

Most of the reported cases involving inverse condemnation claims against municipalities have been brought under § 235 of the *Alabama Constitution of 1901*, which provides in pertinent part as follows:

Municipal and other corporations and individuals invested with the privilege of taking property for public use, *shall make just compensation, to be ascertained as may be provided by law, for the property taken, injured, or destroyed by the construction or enlargement of its works, highways, or improvements, which compensation shall be paid before such taking, injury or destruction.*

(emphasis added).

Section 235 thus has two principal clauses which materially restrict its scope of operation. In order for a governmental action to be compensable under § 235, two separate and distinct elements must both be present. The property must have been: (1) “taken, injured, [or] destroyed,” and (2) the taking, injury or destruction must have been related to the governmental entity’s “construction or enlargement of its works, highways, or improvements.” Section 235 has also been restricted by judicial interpretation. For example, the supreme court has stated that a property owner “does not bring himself within the protection of § 235 of the *Constitution of Alabama 1901*, unless he shows that he is an ‘abutting owner’” to the improvements under construction. *Markstein v. City of*

Birmingham, 243 So. 2d 661, 662 (Ala. 1971) (quoting *Hall v. Atlanta, B.&A.R.R. Co.*, 158 Ala. 271, 48 So. 365 (Ala. 1908)). The supreme court has further said that under § 235, “damages to be recoverable, must be to property, and *not* for a mere personal inconvenience *or injury to business.*” *Thompson v. City of Mobile*, 199 So. 862, 865 (Ala. 1941) (emphasis supplied).

The supreme court has further made it clear that § 235 applies only to property taken or injured in connection with the “construction or enlargement” of a municipality’s physical “public works, highways or improvements.” On this point, the supreme court has stated:

The right of recovery of compensation by the property owner, under the provisions of Section 235 of the Constitution, is confined of course, *to where the municipality is engaged in the construction or enlargements of the works, highways, or improvements of the City.*

(emphasis supplied). *City of Birmingham v. Graves*, 76 So. 395, 395 (Ala. 1917) (emphasis supplied). The supreme court has noted this requirement in the context of the damages recoverable in an inverse condemnation action brought under § 235. See, e.g., *City of Tuscaloosa v. Patterson*, 534 So. 2d 283, 286 (Ala. 1988) (holding that in an inverse condemnation action under § 235, “[t]he burden is on the property owner to prove the existence and extent of the damage to his property, and the measure of damages is the difference between the value of the property *before the work was done* and the value afterwards.”) (emphasis supplied); *Mahan v. Holifield*, 361 So. 2d 1076, 1079 (Ala. 1978) (“Damages recoverable under section 235 of our Constitution, however, are *only those capable of being ascertained at the time the city’s works are being constructed or enlarged.*”) (emphasis supplied).

The second constitutional basis for inverse condemnation claims in Alabama is contained in Article I, § 23, *Alabama Constitution of 1901*. Section 23 provides, in relevant part, that “private property

shall not be taken for, or applied to, public use, unless just compensation be first made therefor.” Prior to the Alabama Supreme Court’s decision in *Willis v. University of North Alabama*, 826 So. 2d 118 (Ala. 2002), the supreme court had held on several occasions that in inverse condemnation actions under § 23, “a governmental authority need only occupy *or injure* the property in question.” *Foreman v. State*, 676 So. 2d 303, 305 (Ala. 1995) (emphasis added). See also *Barber v. State*, 703 So. 2d 314 (Ala. 1997) (same, citing *Foreman*). Injury could simply be, under those cases, a diminution in value. In *Willis*, however, the supreme court specifically overruled *Foreman* and *Barber* on that point and held that a claim solely of diminution in value is not sufficient to sustain an inverse condemnation action under § 23. Rather, to have a maintainable claim under Section 23 a property owner is required to show that the owner’s property was “*physical[ly] take[n] . . . or . . . appl[ied] to public use.*” 826 So. 2d at 121. (emphasis added).

In *Willis*, the plaintiff alleged that the construction by the University of North Alabama of a parking deck across the street from the plaintiff’s property had resulted in a decrease in the value of his property. The plaintiff filed an inverse condemnation action alleging a violation of § 23 contending that the devaluation of his property constituted an “injury” to his property which was compensable in an inverse condemnation under § 23. The trial court granted summary judgment. In its consideration of the summary judgment motion, “the trial court assumed that Willis’s property was *injured* (‘the size, location, and eventual operation of the parking deck [did] substantially reduce the value of [Willis’s] property.’)” 826 So. 2d at 121. (emphasis in original). However, in granting the summary judgment, the trial court held that “since no portion of Willis’s property was ‘taken,’ or applied to public use by UNA, UNA was not required to compensate Willis under § 23 of the Constitution.” *Id.* The supreme court affirmed the summary judgment on

the basis granted by the trial court, and in so holding, specifically overruled the prior line of cases that had held that “injury” as that term was utilized in § 23 included simply diminution in value without an actual physical taking of the land. *Id.*

Supreme Court’s Decision in *M&N Materials, Inc. v. Town of Gurley*

Facts Applicable to M&N’s Claims

M&N Materials, Inc. was formed in 2003. At that time, it acquired 160 acres of mountain property adjacent to the

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town limits of Gurley, Alabama to be used as a rock quarry. By June 2004, it had acquired an additional 109 adjoining acres for use in connection with the quarry. M&N's proposed quarrying operations generated a great deal of controversy in the area and local citizens contacted their legislative representatives voicing opposition to the proposed quarry. On February 26, 2004, the legislature passed Act No. 2004-19 directing the town to hold a referendum on the issue of whether it should annex M&N's property. A referendum accordingly was conducted on April 13, 2004 and the annexation proposal passed by a majority vote.

Following the annexation, M&N applied for a business license, and its application was denied. Additionally, because the land lacked a zoning classification after the

annexation, the town imposed a moratorium on development pending selection of a zoning classification. In the course of these events, M&N ended up reaching an agreement with Vulcan Lands, Inc. under which Vulcan acquired an option to purchase the property for \$3.75 million. Ultimately, Vulcan Lands let the option expire but paid M&N \$1 million for the property; Vulcan Construction Materials, LP then applied for a business license but that application was denied as well.

Following this, M&N sued the Town of Gurley, claiming that the town's actions constituted a "regulatory taking" of its land. M&N's original lawsuit asserted regulatory takings claims under the Fifth Amendment to the United States Constitution and §§ 23 and 235 of the *Alabama Constitution of 1901*. M&N claimed the following actions, together or separately, constituted a regulatory taking:

- (1) The initial annexation of the property on April 16, 2004;
- (2) The failure to issue a business license in response to M&N's April 21, 2004 application;
- (3) The moratoria placed on the issuances of business licenses thereafter on May 4, 2004 and August 4, 2004;
- (4) The denial of a business license to Vulcan on January 18, 2005; and
- (5) The zoning of the property for agricultural use on January 18, 2005.

M&N's federal claims were ultimately dismissed and the state constitutional regulatory takings claims were tried to a jury in Madison County Circuit Court. The circuit court granted judgment as a matter of law at the close of the case as to the inverse condemnation claim under § 23. The dismissal of the § 23 claims was based upon the holding of *Willis* that such claims are only cognizable where there has been a physical injury to property. The case was submitted to the jury against the town as an inverse condemnation case under § 235.


On February 22, 2011, the jury rendered a verdict in favor of M&N and against the town in the amount of \$2,750,000. On August 5, 2007, the circuit court entered a judgment pursuant to the jury verdict against the town in the amount of \$2,750,000. In addition, the circuit court awarded pre-judgment interest in the amount of \$966,493.15, and litigation expenses of \$1,200,169.20, for a total judgment amount of \$4,916,662.30.

The Appeal

The town filed an appeal to the supreme court. M&N cross-appealed the trial court's order dismissing the § 23 claim. The circuit court stayed the judgment pending the appeal. On December 21, 2012, the supreme court reversed and rendered the judgment entered by the circuit court on the § 235 claim and affirmed the dismissal of the § 23 claim on M&N's cross-appeal.

■ THE SECTION 235 CLAIM

On appeal, as it had done in the circuit court, M&N argued that a regulatory takings claim was cognizable under § 235. M&N "encourage[ed] [the Supreme Court] to look to federal case law concerning regulatory 'takings' under the final clause of the Fifth Amendment to the United States Constitution, often referred to as the 'Just Compensation Clause' in interpreting § 235." *M&N*, 143 So. 3d at 13. As it had also done in the circuit court, "[t]he Town argue[d] that, under the plain language of § 235) that the property must be 'taken, injured, or destroyed by the construction or enlargements of its works, highways or improvements . . .') an inverse condemnation claim based upon a municipal corporation's regulatory 'taking' of property is not sustainable." *Id.* at 12 (emphasis in original). The supreme court noted the town's argument "that under § 235 there are essentially two requirements that must be met in order to maintain an inverse-condemnation claim: the party alleging that its property has been taken pursuant to inverse condemnation must prove, first, that the property has been



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...only “injury” to property in the form of diminution in value was sufficient to maintain a successful claim under § 23.

‘taken, injured or destroyed’ and, second, that the property has been *physically* disturbed.” *Id.* (emphasis in original).

In reversing and rendering the trial court judgment which had been rendered in favor of M&N, the supreme court stated that it found “the Town’s argument persuasive.” *Id.* at 13. The court in *M&N* squarely held that administrative or regulatory action of a municipality which restricts land use cannot be the basis for a “regulatory taking” claim under § 235. The court stated:

As set forth in our long-standing precedent, *the taking, injury, or destruction of property must be through a physical invasion or disturbance of the property, specifically “by the construction or enlargement of [a municipal or other corporations] works, highways, or improvements,”* not merely through administrative or regulatory acts.

Id. (emphasis added).

In holding that § 235 could not support a regulatory takings claim, the supreme court rejected M&N’s argument that federal case law construing the Fifth Amendment should be looked to by the supreme court in interpreting § 235. In so doing, the court stated: “The language used in the Just Compensation Clause is not similar to the language in § 235. The Just Compensation Clause provides that ‘private property [shall not] be taken for public use without just compensation.’ Therefore, the precedent interpreting the Just Compensation Clause should not aid our interpretation of the substantially different § 235.” 143 So. 3d at 13.

The supreme court’s decision in *M&N* had been presaged by its decision two weeks before in *Housing Auth. of Birmingham Dist. v. Logan Properties, Inc.*, 127 So.3d 1169 (Ala. 2012). In *Logan Properties*, a landowner had argued that it had suffered an injury compensable under § 235 “because its property was identified for acquisition and/or condemnation by [the Housing Authority] and because that fact made it more difficult to renovate, lease, or otherwise use the property, thus

decreasing its market value.” 127 So. 3d at 1176. No physical injury to the plaintiff’s property was alleged. The supreme court rejected the plaintiff’s contention that it had suffered an injury compensable under § 235 without a direct, tangible physical to the property. The court stated:

The requirement that the taking or injury result from the “construction or enlargement of . . . works, highways, or improvements”—projects that themselves have a tangible physical effect on property—suggests that any injury or taking must also be of a physical nature. Logan Properties’ assertion that it has suffered a taking or injury merely because its property was identified for acquisition and/or condemnation by [the Housing Authority] and because that fact made it more difficult to renovate, lease, or otherwise use the property, thus decreasing its market value, therefore fails in the absence of any evidence of a physical injury to that property.

* * *

It is undisputed that [the Housing Authority] caused no “direct physical disturbance” to property owned by Logan Properties; accordingly, the trial court erred by failing to grant [the Housing Authority’s] motions for a judgment as a matter of law.

Id. at 1176-1177 (emphasis added).⁴

The supreme court’s decision in *M&N* that a claim of a regulatory taking is not compensable under § 235 was rendered by a unanimous 8-0 vote of the court.⁵

■ THE SECTION 23 CLAIM

As noted above, M&N also asserted a claim under § 23 of the Constitution. This claim was dismissed by the trial court prior to submission of the case to the jury on the basis of *Willis v. University of North Alabama*, 826 So. 2d 118 (Ala. 2002). M&N cross-appealed from the dismissal of its § 23 claim.

The supreme court affirmed the circuit court’s dismissal of the § 23 claim. The court reviewed its decision in *Willis* and noted that it was “significant to the holding in *Willis*” that the court in that case overruled the previous decisions of *Foreman v. State*, 676 So. 2d 303 (Ala. 1995) and *Barber v. State*, 703 So. 2d 314 (Ala. 1997) which had held that only “injury” to property in the form of diminution in value was sufficient to maintain a successful claim under § 23. 143 So. 3d at 15. The court in *M&N* stated that “it is clear, under the plain language of § 23 and under *Willis*, that the trial court properly held that § 23 does not apply in this case.” *Id.* The court held that § 23 was inapplicable because “M&N has complained only of administrative and/or regulatory actions taken by the Town.” *Id.* The court stated that “*Willis* makes clear that § 23 applies when a physical taking of the property in question has occurred” and that “M&N does not allege that there was a physical taking of the property in question.” *Id.* at 15-16.

The decision in *M&N* regarding whether a regulatory takings claim was maintainable under § 23 was a 7-1 decision. Justice Murdock dissented and felt that *Willis* was distinguishable. 143 So. 3d at 18-19. Justice Murdock stated that the only issue before the court in *Willis* was whether “governmental action that resulted in a mere ‘injury’ to property as opposed to an outright physical taking of it, was sufficient to sustain a claim to inverse condemnation under § 23.” *Id.* at 19. He noted that “no issue was presented in *Willis* as to whether a ‘regulatory taking’ would be prohibited by § 23.” *Id.* Justice Murdock was of the view that § 23, because of the similarity of its wording to the Fifth Amendment to the

United States Constitution, should provide a remedy to a landowner who has been the subject of a regulatory taking by a local governmental entity. *Id.* at 19-22. Because Justice Murdock concluded that “*Willis* did not involve, as does the present case, a regulatory action by which the government directly and formally imposed restrictions upon the use of the plaintiff’s property,” he could not conclude that “*Willis* [was] dispositive of the issue of the potential application of § 23 in the present case.” *Id.* at 19.

■ THE DECISION IN *M&N V. TOWN OF GURLEY* ON REHEARING

Following the December 21, 2012 decision by the supreme court, M&N filed an application for rehearing. M&N was joined by many business and lobbying groups as *amici* on its application for rehearing. The court scheduled and heard oral arguments on the rehearing application on May 8, 2013. On September 27, 2013, the supreme court ruled on the application for rehearing. The court, as it had done in its opinion on original deliverance, denied the application for rehearing insofar as the town’s appeal on the § 235 claim was concerned on an 8-0 vote. However, the court splintered badly on its decision on rehearing with regard to M&N’s cross-appeal from the dismissal of its § 23 claim. More than 100 pages of concurring and dissenting opinions were issued by the justices in connection with the denial of rehearing on the § 23 issue.

Prior to the release of the decision of the court on rehearing, the chief justice appointed former Justice Patti Smith to participate in the decision of the court. When the court’s decision on rehearing on the cross-appeal of M&N on the § 23 claim was rendered, it was apparent that there had been a 4-4 split on whether to grant rehearing on that issue. (Justice Main, as he had done on original submission, also recused himself on rehearing). Justice Smith sided with the four justices who were in favor of denying rehearing. Rehearing on the § 23 issue was denied by a 5-4 vote with Chief Justice Moore and Justices Parker, Shaw, Stuart and former

We note that the plain language of § 23 prevents the State, not municipalities from taking property without just compensation.

Justice Smith voting to deny rehearing. Justices Murdock, Bolin, Wise and Bryan dissented from the denial of rehearing.

A total of six concurring and dissenting opinions were written in connection with the denial of rehearing on the § 23 claim. Chief Justice Moore, along with Justice Parker and Justice Shaw, authored concurring opinions. Justice Stuart concurred in Justice Shaw’s concurring opinion. Justices Bolin and Bryan authored dissenting opinions. Justice Wise concurred in Justice Bolin’s opinion. Justices Bolin and Wise concurred in Justice Bryan’s dissenting opinion. Justice Murdock modified his original dissenting opinion on the § 23 claim so as to address some of the arguments made in the concurring opinions on rehearing.

The majority opinion authored by Justice Parker on original deliverance was also modified on rehearing. The modification consisted of a significant addition to the opinion, which came by means of the addition of footnote 6 to the court’s majority opinion. Footnote 6 dealt with the applicability of § 23 to municipalities. In his concurring opinion on rehearing, Justice Parker made clear his view that § 23 only applied to the state and not to municipalities. 143 So. 3d at 46-48. The majority opinion was modified on rehearing to reflect Justice Parker’s view that § 23 was applicable only to the state. The majority opinion, as modified, contained the following language in newly added footnote 6:

We note that the plain language of § 23 prevents the State, not municipalities from taking property without just compensation. See Art. I, § 36,

Ala. Const. 1901 (“[W]e declare that everything in this Declaration of Rights is excepted out of the *general powers of government*, and shall forever remain inviolate.”)

Id. at 14 n.6. (first emphasis added; second emphasis in original).⁶ Modification of the original opinion on rehearing by the addition of footnote 6 was approved by Justices Moore, Parker, Shaw, Stuart and Smith. However, in their dissenting opinions, Justices Murdock, Bolin, Wise and Bryan all indicated their view that § 23 did apply to municipalities. Since Justice Smith was appointed specially only for this case and Justice Main did not participate, it is uncertain whether the statement contained in footnote number 6 of the majority opinion that “the plain language of § 23 prevents the State, not municipalities from taking property without just compensation,” will continue to be the law in future cases.

The justices also were equally divided on the issue of whether the physical injury requirement of *Willis* should continue to control cases brought under § 23. A majority of the court, by voting to deny rehearing, voted to affirm the original holding in *M&N* that because there was no physical taking of the property in question, *Willis* precluded the regulatory taking claim of *M&N* under § 23. However, although Justices Bolin and Wise had voted with the majority on original deliverance that *Willis* controlled and precluded a § 23 regulatory takings claim, they changed their position on rehearing. Justice Bolin, in an opinion in which Justice Wise joined, stated that the holding in *Willis* that § 23 required a physical taking of property was “wrongly decided and should be overruled.” 143 So. 3d at 53. Justice Bryan also agreed in a separate dissenting opinion that *Willis* should be overruled. Justice Bryan stated that he disagreed with Justice Murdock that *Willis* was distinguishable from this case. Instead, Justice Bryan stated that he “would simply overrule *Willis*.” *Id.* at 55. Justices Bolin and Wise joined in Justice Bryan’s opinion.⁷ As a consequence, there

are currently four votes on the court (Justices Murdock, Bolin, Bryan and Wise) who would hold that § 23 permits a regulatory taking claim. Justices Moore, Parker, Shaw and Stuart, based upon their positions on rehearing in *M&N*, would hold that it does not. Justice Main's views on the issue are unknown because he did not participate in the court's decision.

Summary

In summary, the following can be said as a result of the court's decision in *M&N*: That § 235 cannot support a regulatory takings claim is now clearly established. A unanimous 8-0 vote of the court, both on original deliverance and rehearing in *M&N*, has established that to be the law. However, the applicability of § 23 to regulatory takings claims involving municipalities is uncertain for future cases. First, the court is evenly divided on the issue of whether § 23 applies to municipalities in the first instance. Justices Moore, Parker, Shaw and Stuart are of the view that it does not. Justices Murdock, Bolin, Wise and Bryan are of the opposite view and would hold that § 23 can be used as the basis of a regulatory takings claim against municipalities. Justice Main's opinion on this point is unknown. Second, the court appears to be evenly divided on the issue of whether a physical taking under *Willis* is required in a § 23 claim. Four justices appear to believe that *Willis* continues to be good law and requires a physical taking before a § 23 claim can be made out. Three justices recognize the applicability of *Willis* and would overrule it on this issue, while one believes that § 23 can, consistently with *Willis*, be utilized as the basis of a regulatory takings claim. Again, because Justice Main did not participate in the court's decision in *M&N*, his view on these issues is unknown. Whether the court will honor the rule of *stare decisis* and follow the majority opinion in *M&N* that § 23 is inapplicable to municipalities and requires a physical injury to property, or whether, in future cases in which Justice Main participates, the court will

depart from the holding of *M&N*, is uncertain. | AL

Endnotes

1. Birmingham attorney Angela Shields also served as appellate counsel for the town on this appeal.
2. Section Ala. Code 18-1A-32 provides in pertinent part: The judgment and any settlement in an inverse condemnation action awarding or allowing compensation to the plaintiff for the taking or damaging of property by a condemnor shall include the plaintiff's litigation expenses.
3. Although there has been no Alabama appellate opinion holding that the AEDC provides a right of action for inverse condemnation, Justice Bolin in his dissent from the denial of rehearing in *Town of Gurley v. M&N Materials, Inc.*, 143 So.3d 1, 46 (Ala. 2012), appears to believe that such a right of action exists under the AEDC. Justice Bolin stated in his dissenting opinion that he was of the view that Ala. Code § 18-1A-32 provides a property owner with a remedy for inverse condemnation when a governmental entity with the power of eminent domain "defaults on its obligation to commence a condemnation proceeding." Justice Bolin stated his view that the remedy "is in the nature of a derivative action available to a property owner." Justice Bolin stated that "Section 18-1A-32 Ala. Code 1975, wisely provides a property owner with a remedy when such abuses occur." Justice Bolin stated that it was his "judgment" that M&N "properly availed itself of the state-law remedy provided by § 18-1A-32 in its complaint." Justice Bolin was joined by Justice Wise in his dissenting opinion in *M&N*.
4. The supreme court in *Logan Properties* did note one additional claim that would be maintainable under § 235 which might technically not involve direct physical injury to property. The Court stated that: "[W]e have noted that § 235 is applicable in cases where an authorized entity engaged in 'the construction or enlargement of its works, highways or improvements' interferes with a nearby property owner's right to access to his or her property." 127 So.3d at 1175.

5. Justice Main recused and did not participate in the court's decision.
6. The majority opinion stated in footnote 6 that although § 23 operated only as a limitation on the state from taking property without just compensation, § 23 was held to be applicable in this case because the property owned by M&N had been annexed by legislative action. The court stated: "In this case, the legislature enacted Act No. 2004-19, which annexed the at-issue property. Therefore, § 23 is applicable because of the legislature's involvement with the Town's annexation of the at-issue property." 143 So. 3d at 10 n. 6.
7. Most recently, in *Ex Parte Alabama Department of Transportation*, 143 So. 3d 730, 741-42 (Ala. 2013), Justices Bolin, Wise and Bryan have reiterated their view in concurring opinions in that case that *Willis* was wrongly decided and should be overruled. *Id.*

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The shift in terms resolves
some discrepancies between
the **hub and spokes**
of the current code and aligns Alabama
nomenclature with that of Delaware
and other states.

NEW AND IMPROVED:
Alabama's Limited Liability
Company Law of 2014

By Jack West

Introduction

Effective January 1, 2015, Alabama will have a new law governing limited liability companies. Designed to clarify, improve and augment the existing law, the Alabama Limited Liability Company Law of 2014 (the “2014 Law”) will replace the current law with Chapter 5A of the *Business and Nonprofit Entities Code* and make corresponding amendments to the “hub” provisions in Chapter 1 of Title 10A.¹ As Alabama’s LLC law has not been significantly updated since 1997, the 2014 Law, drafted by the Alabama Law Institute (ALI), makes material changes, and practitioners will find a more comprehensive and navigable statute. Alabama will now have some of the most developed laws governing LLCs in the country.

The ALI’s prefatory Reporter’s Note identifies seven noteworthy features of the act, including an emphasis on the contractual nature of limited liability companies, the change to a notice-filing system for documents filed with the secretary of state, an express covenant of good faith and fair dealing and the addition of series provisions. Though the 2014 law gives parties to a limited liability company agreement increased flexibility to govern the entity through contract, default provisions supply clearer rules governing members and the entity in the event of unthoughtful drafting.

This article charts the most significant changes made by the 2014 law and highlights its advantages—provisions that existing LLCs may wish to opt into in 2015. Embracing the terminology of the 2014 law, this article refers to an LLC’s “certificate of organization” (formerly articles of organization) and its “limited liability company agreement” (formerly operating agreement). The shift in terms resolves some discrepancies between the hub and spokes of the current code and aligns Alabama nomenclature with that of Delaware and other states.

Modification to The General Provisions Governing LLCs

While the new act is significantly longer than the present law, its expansion makes the rules for forming and operating LLCs clearer, rather than imposing additional requirements. The revised law contains more defined terms that clarify the statutory framework and eliminate prior discrepancies. The additional terms supplant conflicting definitions contained in the hub with regard to LLCs.² The act also clarifies issues such as formation and amendment.

The ALI's focus on freedom of contract principles has resulted in a decreased number of statutory requirements.³ For example, less information is required in a certificate of formation, articles of dissolution are now optional and a simplified statute allows for greater flexibility to ensure and indemnify members and managers. Under the new law's relaxed requirements concerning the execution of documents, signatures of members generally are not needed. Any writing to be filed under the chapter may be signed by an agent, including an attorney-in-fact, and powers of attorney do not need to be delivered to the filing officer.⁴

The 2014 law explicitly allows the use of LLCs for non-profit purposes;⁵ the comment warns, though, that in such instances "careful attention to drafting of the limited liability company agreement will be required to meet the tax requirements of the various taxing authorities."⁶ This grant of nonprofit status, when coupled with the new provisions discussed below, allows planners to design a single entity with separate profit and nonprofit components.

Formation and Notice Filing

Before the new law was enacted, some Alabama-based businesses formed in other states due to more favorable LLC laws. Businesses that form elsewhere must subsequently qualify to do business in Alabama, deal with the administrative hoop-jumping of multiple filings, maintain good standing in each state, potentially file tax returns in each state and understand multiple sets of state laws. The update of Alabama's LLC law positions the state to attract domestic entity formations that would otherwise be siphoned off by states with more developed statutes.

The revised act smoothes the formation process by giving more certainty to the effects of filings and greater flexibility in the timing and adoption of an LLC agreement. Present law requires a company's certificate of formation to contain substantive governing provisions such as a process for admitting additional members, the election of a manager-managed structure and the entity's period of duration. The LLC agreement and the certificate of formation currently constitute a company's governing documents.

By contrast, the 2014 law does not require an LLC's certificate of formation to contain any substantive statements. Rather, the filing of a certificate of formation functions only as notice of the mandatory facts contained in the certificate—company name, address of registered office, name of registered agent, a statement that the company has at least one member and an optional statement that the company may have one or more series of assets. Thus, the LLC agreement becomes the entity's sole governing document, and all statements previously required to originate in a certificate of formation should now appear in the LLC agreement.

Though the new law permits a certificate of formation to include any other information the members decide to publish, the insertion of additional statements, such as a purpose statement, creates a risk of conflict between the certificate and the LLC agreement and generally should be avoided.⁸ Surplus information in the certificate does not override any provision in the LLC agreement governing members and transferees and does not modify the LLC agreement's scope, function, and limitations.⁹

Unlike current law, the new statute mandates that every LLC have an LLC agreement, whether "written, oral or implied," but the law prescribes flexible timing for the adoption of the agreement.¹⁰ Members may enter into the LLC agreement at any time, whether before, after or contemporaneously with the filing of the certificate of formation, and the agreement may be made effective as of any date provided in the agreement.¹¹

Expanded Purpose Language and No Statutory Right to Bind

Two noteworthy features of the 2014 law include its more expansive "purpose" language and its express rejection of any statutory right to bind the entity. To provide rules for LLCs that are not strictly set up to "do business," the new law contains broader language designed to envelop alternative LLC applications. As the ALI's introductory comment explains, the new law speaks in terms of an LLC's "activities and affairs" rather than strictly its business purposes.¹² This remodeling acknowledges the common practices of using LLCs as vehicles for estate planning or asset protection.

Rather than retain the convoluted agency provisions detailing situations in which the acts of members or managers do or do not lawfully bind a company, the new act jettisons those provisions in favor of a company-designated agent scheme. According to the new law, "[a]gency powers can arise under the terms of the limited liability company agreement, by consents of the members...or under the law of agency."¹³ This simplified agency regime reflects the drafters' intent to allow contracting members to set up an adaptable "governance structure" rather than a traditional member- or manager-managed framework.¹⁴ The 2014 law does nothing to interfere with an existing entity's member- or manager-managed election, yet generates opportunities for creative control arrangements. As the comment suggests, various

governing authorities within one entity may be created, each having its own limited powers in particular areas. Taken together with the new series provisions, members, managers, agents and assets can be freely combined and compartmentalized within a single entity.

Series

The most dramatic change made by the new law is the addition of provisions throughout the act, and specifically new Article 11, allowing for the formation of series LLCs. Though series LLCs have been in existence in other states for nearly two decades, formation data reveals that organizers in states offering the form have been hesitant to embrace series LLCs.¹⁵ Despite extensive commentator fascination with series LLCs, unanswered questions hanging over the form have generally dissuaded organizers from choosing it over the creation of multiple LLCs. Alabama's passage of the 2014 law makes it the 14th U.S. jurisdiction to adopt series LLC legislation and positions the state to attract more domestic formations.

A. What are series?

Because of the relatively small number of series LLCs currently in existence (and the form's absence from current Alabama law), many practitioners may be unfamiliar with series or cell structure concepts and the advantages that series can afford.¹⁶ A series LLC permits its owner(s) to establish one or more designated "series of assets" within an LLC.¹⁷ Each series may have separate members identified with that series, appoint independent management, hold distinct assets and have a unique business purpose. Owners must first become members of the series LLC before being associated with individual series. The hallmark feature of series LLCs is the presence of "internal limited liability shields" surrounding each series and isolating the assets and liabilities of one series from those of other series or the series LLC itself. Therefore, the debts and liabilities of one series are enforceable only against the assets of that particular series and not against the assets of other series or the series LLC generally.

B. Does a series stand alone?

Given the description above, one may wonder whether series are treated as entities separate from the overarching series LLC under state law. Questions regarding the "entityness" of an individual series, and at what point a particular set of powers should be considered a juridical person, have received much attention.¹⁸ Prior series LLC statutes have not always clearly delineated the status of series in relation to the series LLC, but it is now generally recognized that while a series LLC is a single state law entity with divisions or cells (series) that enjoy certain powers, series are not themselves discrete entities.¹⁹

In particular, the comment to Alabama's new law explains that series have "entity-like powers and characteristics," the implication being that series are not actual entities and cannot exist in the absence of a series LLC.²⁰ Once a company elects to form series in its certificate of formation, the powers wielded by series approach those of an independent entity, but Alabama law does not recognize them as such.²¹ A series may sue and be sued in its own name, enter into contracts as a series, hold and convey title to assets and

grant liens and security interests in those assets.²² Individual series may directly hold assets in the name of the series if records are maintained in such a way that the assets can be reasonably identified with a particular series.²³ This documentation requirement ensures that creditors have full knowledge of the location of assets. Series may also be dissolved and reinstated without affecting the status of the series LLC.²⁴ Series may not enter into fundamental transactions such as mergers and conversions.

C. Potential uses for series

In some instances, the option of the series form may obviate the need to create multiple entities where a business seeks to cor- don off liability for distinct assets or separate lines of business. Firms may also find such a structure advantageous in containing the initial and ongoing administrative costs associated with formation, qualification and maintenance of multiple entities, since series are created through the LLC agreement and not by filing with the state. Costs saved by consolidated filings, however, must be weighed against the expenditures and effort required to keep particularized records to account for the assets of each series.

As with the original LLC form, series LLCs may be used across a spectrum of businesses and industries, including manufacturing, transportation, real estate and investment activities. A business planner could structure a series LLC such that some series hold only individual assets while others shelter entire operations. In addition to the main LLC agreement, each series may have a separate written agreement among members associated with that series, which could interlock with or diverge from the master agreement in some respects.

Real estate ventures have proved a popular use for series LLCs since a series may be formed to hold each newly acquired property, eliminating the need to create multiple single-member LLCs to afford liability protection for each property.²⁵ Similarly, a new series might be formed to acquire the new company plane or executive condominium. In one of the few reported cases concerning a series LLC, a Delaware company formed a series A and a series B, dedicating the latter to holding assets and liabilities associated with the family boat, while the main LLC continued to handle the general household affairs and investments of the family.²⁶ When litigation ensued over boat repairs, Maine's federal district court found that the series was not an entity that could pursue litigation independent of the series LLC, but was instead a "series of interest" under the Delaware statute, which, at that time, did not specify that a series could pursue litigation on its own. Under Alabama's new law, a series may bring suit autonomously.

D. Taxation of series

Since the inception of series-type entities, a primary concern plaguing the form has been series' designation for federal and state taxation purposes.²⁷ Though the characteristic of limited liability favors separate tax treatment, there was, for some time, no authority guaranteeing that series would be taxed independently of each other or of the overarching LLC.²⁸ Instead of separate treatment, taxing authorities could alternatively collapse a series LLC and tax it as a single partnership.

1. Federal Taxation

In the fall of 2010, the U.S. Treasury issued proposed regulations clarifying the treatment of series for federal tax purposes.²⁹

The Treasury skirted the state-law “entityness” problem discussed above and promulgated a manageable framework for the payment of federal taxes, under which a series LLC and its constituent series are treated as discrete taxable entities whether or not series qualify as distinct entities under state law.

The proposed regulations stipulate that each series and the series LLC must file a return for each taxable year, and series generally qualify as “eligible entities” that can elect their own tax classification under the check-the-box regulations.³⁰ Questions concerning how series may be treated for employment taxes purposes and associated employee benefits persist.³¹ At this time, it is unclear when the proposed regulations may be finalized.

2. State Taxation

The area of state taxation of series LLCs remains murky.³² How strictly state departments of revenue will conform to the federal tax classification is yet to be seen. Roughly half a dozen states have issued guidance, with some mirroring federal treatment and some departing from it. For instance, though California does not have a series LLC statute, it has recognized the form and indicated that for purposes of its state franchise tax and fee, each series will be treated as a separate LLC.³³ Therefore, each series of a foreign series LLC must file its own return and pay a separate annual tax and fee in California. Conversely, Texas has issued a letter ruling stating that a series LLC and its individual series will be considered a single taxpayer for state margin tax purposes.³⁴ The series LLC will also register as a single entity in Texas and only have to pay one filing fee.

In an effort to gauge the positions of state taxing authorities nationwide, the American Bar Association Section of Taxation queried the department of revenue or similar body of each state regarding the taxation of series LLCs.³⁵ Thirty-two states had responded to the survey as of December 2013, and 23 of those indicated that they would follow the federal proposed regulations by treating series and series LLCs as separate taxable entities with the ability to elect their tax classification. No state responding to the survey expressly declined to follow the Treasury’s rules, but Alabama and five other states remain undecided. Alabama announced that the proposed regulations would be considered a significant factor but would not be dispositive of the state’s tax treatment of series LLCs.³⁶

E. Uncertainties regarding series

Another major concern is the recognition of the series-level liability shield in non-series jurisdictions. No guarantee exists that states without series legislation will respect foreign series as distinct from a series LLC. State courts in jurisdictions without series legislation will find a dearth of precedent to guide them.³⁷

Series LLCs must also face the crucible of bankruptcy.³⁸ Whether a series may file bankruptcy separate from a series LLC presents a question that goes to the heart of the series form. If bankruptcy courts prohibit series from filing independently, the series LLC and its other series could be dragged into the bankruptcy estate, allowing creditors access to assets outside of the single series attempting to file—essentially defeating the internal protection intended by the statutes.

Whether a series may file for bankruptcy independently turns on its status as a “person” under the *Bankruptcy Code*. Section 109(a) of the *Bankruptcy Code* provides that only persons may be debtors in bankruptcy. While corporations and partnerships

clearly qualify as persons, the question of whether a series meets that definition remains unanswered. Though the clear legislative intent of series statutes supports separate filing, federal bankruptcy courts are by no means compelled to resolve the question in favor of independent filing.³⁹

F. Practical concerns when using series

Alabama practitioners interested in using the series LLC form should proceed with caution. Though not an exhaustive list, the following are a few items to keep in mind.

The mechanics of formation and filing must anticipate the creation of series within the LLC. Both the certificate of formation and the LLC agreement should state the LLC’s power to form series and conform to the provisions of the new law. The process for registering a series LLC or individual series to do business in other states varies from state to state.⁴⁰ Some states, like Florida, require each series to apply for a separate certificate of authority as if it were a true LLC. Others, such as Illinois and Kansas, have particular forms that should be filed before a series conducts business in the state.

Series LLCs face the same veil-piercing concerns as regular LLCs. To protect against veil-piercing, each series should have a distinguishable name. Something as simple as “My LLC, Series A” may suffice. Some states require that the full name of the series LLC appear in the name of each series.⁴¹ Contracts entered into by the series should be signed on behalf of the legal name of that series. It is not advisable for series to co-own assets with each other or with the series LLC. Records identifying exactly which assets are owned by which series should be kept, and individual bank accounts should be opened for each series. Keeping each series adequately capitalized also helps reduce the likelihood that internal shields will be pierced.

Hesitancy and uncertainty regarding the use of series today is much like the concerns expressed over the use of the standard LLC form a few decades ago. Whether series LLCs rise to prominence or not, Alabama has joined the ranks of states enabling their use and will help resolve unanswered series questions.

Phase-In of the Law

The 2014 law contains a phase-in provision. Until January 1, 2017, the new law only governs LLCs formed in 2015 or later and pre-existing LLCs that opt into the 2014 law. LLCs formed before 2015 wishing to take advantage of the new provisions may amend their organizational documents to state their intent to be governed by the 2014 law. All Alabama LLCs will be governed by the new law in 2017; however, an LLC formed before 2015 will not be required to amend its certificate of formation if that certificate contains the information required by the 2014 law.

Conclusion

Alabama’s Limited Liability Company Law of 2014 revamps the LLC form and resolves numerous questions raised by the prior act. The emphasis on freedom of contract principles and the inclusion

of more default provisions has produced clearer rules and increased flexibility, making the formation and operation of LLCs easier. The addition of series provisions makes Alabama and Tennessee the only southeastern states offering the series LLC form. Because of unresolved issues surrounding series LLCs, practitioners should proceed with caution when forming these entities. However, regional businesses stand to benefit from the improved law, and future businesses may be more apt to file in the state given the law's clarity and expanse. Though the act will not govern all Alabama LLCs until 2017, owners and practitioners should consider the revised law and decide whether to opt in in 2015. | AL

Endnotes

1. Alabama's Business and Nonprofit Entities Code contains general provisions applicable to various entity types in Chapter 1 of Title 10A, often referred to as the code's "hub." Chapters applicable to specific entity forms, such as LLCs, are the corresponding "spokes" of the code.
2. ALA. CODE § 10A-5A-1.02. Unless noted, all Alabama statutes cited become effective January 1, 2015.
3. See ALA. CODE §§ 10A-5A-1.06(a), 1.08 and the reporter's note for policy statements promoting the principles of freedom of contract and the enforceability of LLC agreements.
4. ALA. CODE § 10A-5A-2.04(b).
5. ALA. CODE § 10A-5A-1.04.
6. Comment to ALA. CODE § 10A-5A-1.04.
7. Compare new ALA. CODE § 10A-5A-2.01 with current ALA. CODE § 10A-5-2.02 (1975).
8. See ALA. CODE § 10A-5A-2.01(a)(6) and corresponding comment.
9. See comment to ALA. CODE § 10A-5A-2.01.
10. ALA. CODE § 10A-5A-1.02(e).
11. ALA. CODE § 10A-5A-2.01(d).
12. See also the definition of "limited liability company agreement" in ALA. CODE § 10A-5A-1.02(k).
13. Comment to ALA. CODE § 10A-5A-3.02.
14. See ALA. CODE § 10A-5A-4.07 and corresponding comment.
15. See J. Leigh Griffith & James E. Long, Jr., *Series LLCs—December 2013 Update on Recent State Legislative and Taxation Developments*, 55 BNA Tax Mgmt. Mem. 83, 88 (March 24, 2014).
16. For a history of the development of series structures across various entity-types, see Thomas E. Rutledge, *Again, for Want of a Theory: The Challenge of the 'Series' to Business Organization Law*, 46 Am. Bus. L.J., 311, 313 (2009). For a thorough overview of series and a chart mapping similarities and differences between various state series statutes, see written materials accompanying *Business Entities: 2014 Update*, Live ALI CLE (Feb. 18, 2014), available as Westlaw document SERIES LLCs, VCAO218 ALI-ABA 57.
17. ALA. CODE §§ 10A-5A-11.01, 11.02 allows a complying LLC to establish "one or more designated series of assets that: has separate rights, powers, or duties with respect to specified property or obligations of the limited liability company or profits and losses associated with specified property or obligations; or has a separate purpose or investment objective."
18. See, e.g., Rutledge, *supra* note 14, at 320-25 ("[w]hile a series may have some of the characteristics of a legal entity, it is open to dispute whether a series does or does not itself rise to that level").
19. See the preamble to Proposed Treas. Reg., REG-119921-09, Series LLCs and Cell Companies, 75 Fed. Reg. 55,699 (Sept. 14, 2010).
20. Comment to ALA. CODE § 10A-5A-11.01.
21. ALA. CODE § 10A-5A-11.02(b)(3).
22. ALA. CODE § 10A-5A-1.04(d).
23. ALA. CODE § 10A-5A-11.03.
24. ALA. CODE §§ 10A-5A-11.08, 11.15.
25. See generally written materials accompanying *Using Series LLCs in Real Estate*, Live ALI CLE (October 2, 2013).
26. *GxG Mgmt., LLC v. Young Bros. & Co., Inc.*, 2007 WL 551761 (D. Me. Feb. 21, 2007). Maine's district court grappled with the distinction between the series LLC and Series B, finding that the series LLC could maintain the action on behalf of Series B and that the series was "simply the listed legal owner and the entity whose assets would be responsible for satisfying any obligations that were incurred by the Captain Kidd IV." *Id.* at *8. Though the court used the word "entity" to describe Series B in the previous quotation, it clarified in a subsequent ruling that "the unique relationship between a Delaware LLC and its series does not create a truly separate legal entity capable of independently pursuing its own legal claims." *GxG Mgmt., LLC v. Young Bros. & Co., Inc.*, 2007 WL 1702872 (D. Me. June 11, 2007).
27. See Michael W. McLoughlin and Bruce P. Ely, *The Series LLC Raises Serious State Tax Questions but Few Answers Are Yet Available*, 16 J. Multistate Tax'n & Incentives 6, 10 (Jan. 2007).
28. See McLoughlin & Ely, *supra* note 24, at 10.
29. Proposed Treas. Reg., REG-119921-09, Series LLCs and Cell Companies, 75 Fed. Reg. 55,699 (Sept. 14, 2010).
30. *Id.*
31. For a host of questions pertaining to series LLCs and employment tax concerns, see Griffith and Long, *supra* note 13, at 91.
32. See Michael W. McLoughlin and Bruce P. Ely, *Guidance on Series LLCs: Will the States Soon Follow?*, 20 J. Multistate Tax'n 7 (Jan. 2011) for commentary on the impact of the proposed regulations on state taxation.
33. California 2008 Limited Liability Company Tax Booklet, p. 7, Section F; FTB Pub. 2256 p. 4 (Rev. 9-2009).
34. Texas Policy Ltr. Rul. 201005184L (May 5, 2010) (released Sept. 2011).
35. For an in-depth description of the state survey conducted by the ABA Section of Taxation, see Griffith and Long, *supra* note 13, at 93.
36. See Griffith & Long, *supra* note 13, at 94.
37. The Fifth Circuit recently passed on an opportunity to develop the law applicable to series LLCs, particularly the relationship between a series LLC and its individual series. See generally Allen Sparkman, *Fifth Circuit Misses Opportunity to Bring Clarity to Series LLC Questions*, Business Law Today (Apr. 2014).
38. See generally Shannon L. Dawson, *Series LLC and Bankruptcy: When the Series Finds Itself in Trouble, Will It Need Its Parent to Bail It Out?*, 35 Del. J. Corp. L. 515 (2010).
39. Dawson, *supra* note 35, at 521.
40. For an overview of series registration requirements by state, see CLE materials, *supra* note 14. When in doubt, contact the applicable secretary of state's office.
41. See, e.g., 805 Ill. Comp. Stat. 180/37-40 (2007).



The Shrimp Boat *Deborah Ann's* Catch of Sunken Treasure

By Alex F. Lankford, III

Deborah Ann, Inc. v. 300 pounds of silver coins, a chest, etc., et al.
U. S. District Court, (S.D. Ala.), *Civil Action No. 7661-P*

On a February morning several years ago, the fishing vessel *Deborah Ann* was dragging for shrimp

in about 275 feet of water on the edge of the 100 fathom curve, about 35 miles southwest of Southwest Pass, Louisiana in the Gulf of Mexico. The weather was good, the seas calm. The nets “bogged” or became mired in one huge mud ball so heavy the ship’s tackle could not lift the nets. The crew found it necessary to wash out the nets by circling the vessel, hauling them in and then dumping out the mud on deck before dragging could be resumed. When the crew started washing the mud overboard, they discovered a number of silver coins and some mushy, rotted material which looked like ship timbers. The crew told the captain that they had caught treasure, but the captain did not believe them until he went aft and saw the silver coins himself. After determining the position of the first drag, he immediately ordered the nets put back overboard in an effort to locate more coins.

In the process of bringing in the nets from the second drag, the cable on the winch became fouled and almost parted. Since the *Deborah Ann* did not have a cable clamp onboard, it was incapable of pulling in her net, so the captain called for the assistance of a nearby vessel, the *Miss*

Kristy. When the *Miss Kristy's* captain saw the coins on the deck of the *Deborah Ann*, he refused to render assistance unless the *Deborah Ann* captain and crew would agree to give the *Miss Kristy* and her crew whatever coins were found in the net after it was raised off the bottom. After extracting this agreement from the reluctant captain of the *Deborah Ann*, the crew of the *Miss Kristy* assisted (by use of a cable clamp it had aboard that vessel) in putting on board the net of the *Deborah Ann*. This second drag yielded an additional 789 coins, all of which were taken aboard the *Miss Kristy*. Both vessels then proceeded to their home port of Bayou La Batre, Alabama.

On the way in to port, the crews of both vessels decided to keep their find a secret. The crew of the *Deborah Ann* stopped counting at 3,000 coins, and estimated that there probably were that many more coins which had not been counted.

Upon arrival at Bayou La Batre, the crews unloaded the fish and shrimp catch from both vessels, and shared with the owners, without mention of the treasure hidden aboard in each vessel’s shower room. During the hours of darkness, the crews secretly removed the coins from both vessels.

The following day, they took the coins in burlap oyster sacks in the back of a pick-up truck to a Mobile lawyer’s office, who, at first, said he did not have time to talk to them, since he was due in court in about 15 minutes. When he saw the coins, however, he decided he could be a little late to court! He had them placed in safe deposit

boxes at a local bank. According to the crew, they were advised by the lawyer to say nothing of the coin catch until he could determine who was entitled to the ownership of same. The lawyer then proceeded to contact the Smithsonian Institute, National Geographic Society and known treasure salvors to determine the value of the coins. (Both captains testified that neither they nor anyone else to their knowledge returned to the scene of the find in an attempt to recover more coins, but on the subsequent two voyages of the *Deborah Ann*, she burned about 4,500 gallons of fuel for each voyage and didn't bring in any "product" worth more than \$2,000 per voyage, far below the value of the usual catch for that location and time of year).

Within a very few days, rumors in the small town of Bayou La Batre were rampant that either one or both of the vessels had caught treasure consisting of gold, silver and diamonds valued in the millions of dollars. When confronted with the rumors, the captains and crews of both vessels denied to the owners that anything of value had been caught. Meanwhile, much to the consternation of the bank officials, oxidation of the coins had eroded out the bottoms and sides of the safe deposit boxes, so that when the coins were later seized by the U.S. Marshal, the banker held only the face of the safe deposit drawer in his hand due to the corrosion! The coins had to be washed in fresh water and placed in plastic bags.

Finally, on May 8, the secret could not be kept any longer: Peanuts Lowry, one of the crewmen, appeared on television (slightly inebriated) and told how indeed the coins had been caught.

The owner of the *Deborah Ann* was in my office the next morning. He said he didn't have enough money to pay our legal fees, and suggested we get paid our fees in coins. We settled on our getting one-third of the coins recovered as our fee. Shortly thereafter, as attorneys for the *Deborah Ann*, we met with the crew's lawyer and rejected his demand to settle on the basis of two-thirds of the coins to the crew and one-third to the owner (just the opposite of what the written share agreement provided). We immediately filed an admiralty salvage action against the coins, *in rem*, and had them seized by the U.S. Marshal. In a separate action, we also sued the captains and crews *in personam*, seeking an accounting of the coins and asserting bad faith and forfeiture of salvage rights. The

owner of the *Miss Kristy* later filed a similar complaint, claiming that he was entitled to all the coins, since they were caught by his vessel. (Both crews had spread the rumor that the *Miss Kristy*, not the *Deborah Ann*, had caught the coins.) The State of Louisiana also intervened and asserted a claim that the coins belonged to it on the ground that they were found in its territorial waters, and that the necessary permit to salvage the treasure had never been secured. All parties answered, denying the material allegations made by the others.

Issues Raised by The Pleadings

Were the coins the proper subject of salvage and, if so, who was entitled to what? Were the coins found within the territorial waters of Louisiana? If so, what difference did that make? Was the owner or the crew of the *Miss Kristy* entitled to any of the 789 coins caught in the net of the *Deborah Ann* on the second drag? Did the captain of the *Deborah Ann* have the authority to make the alleged agreement with the captain of the *Miss Kristy*? Was this agreement between the captains obtained under duress and, therefore, void? Did the written agreement between the owner and the captain of the *Deborah Ann*, providing for the sharing of the "entire catch" 60/40 (owner/captain, crew), include these coins? Did the captains and crews forfeit their salvage rights due to bad faith and fraud?

Prior to trial, the State of Louisiana voluntarily dismissed its complaint after we filed a motion for summary judgment supported by unimpeachable affidavits that the site of the find was in international waters, not those of Louisiana.

Settlement of the Case

On the day of the trial, after all parties had announced "ready," and as a result of a conference called by the court, the litigation was settled by awarding the coins as follows: of the 789 coins claimed by the owners and crew of the *Miss Kristy*, 50 percent to the owners of the *Deborah Ann*, nine percent to the owner of the *Miss Kristy* and 41 percent to the crew of the *Miss Kristy*; as to the balance caught by the *Deborah Ann* during the first drag (later inventoried to be about

3,850 coins), 60 percent to the owner of the *Deborah Ann* and 40 percent to her crew.

The coins were heavily tarnished and encrusted, and, in many instances, lumped and fused together. The Archeology Department of the University of South Alabama was made the court-appointed custodian to clean and inventory the coins. The coins were presoaked in a solution to remove corrosion and to separate those coins which were fused together. Then they were placed in electrolysis. Afterwards, they were washed with a fine brush and hand-cleaned. Comparison of weights before and after cleaning revealed a minimum of coin weight loss.

An assay of the coins revealed a 95 percent silver and five percent copper content. In 1771, the Bust dollar appeared, detail of which is as follows:

First, on the face of the coin: the bust of King Charles of Spain and the following Latin words: "Charles III by the Grace of God." On the reverse: King of the Spains and the Indies. Coat of Arms of Spain bearing the castles of Castille, the lions of Leon and the Twin Pillars of Hercules said to be guarding the Straits of Gibraltar; eight reales.



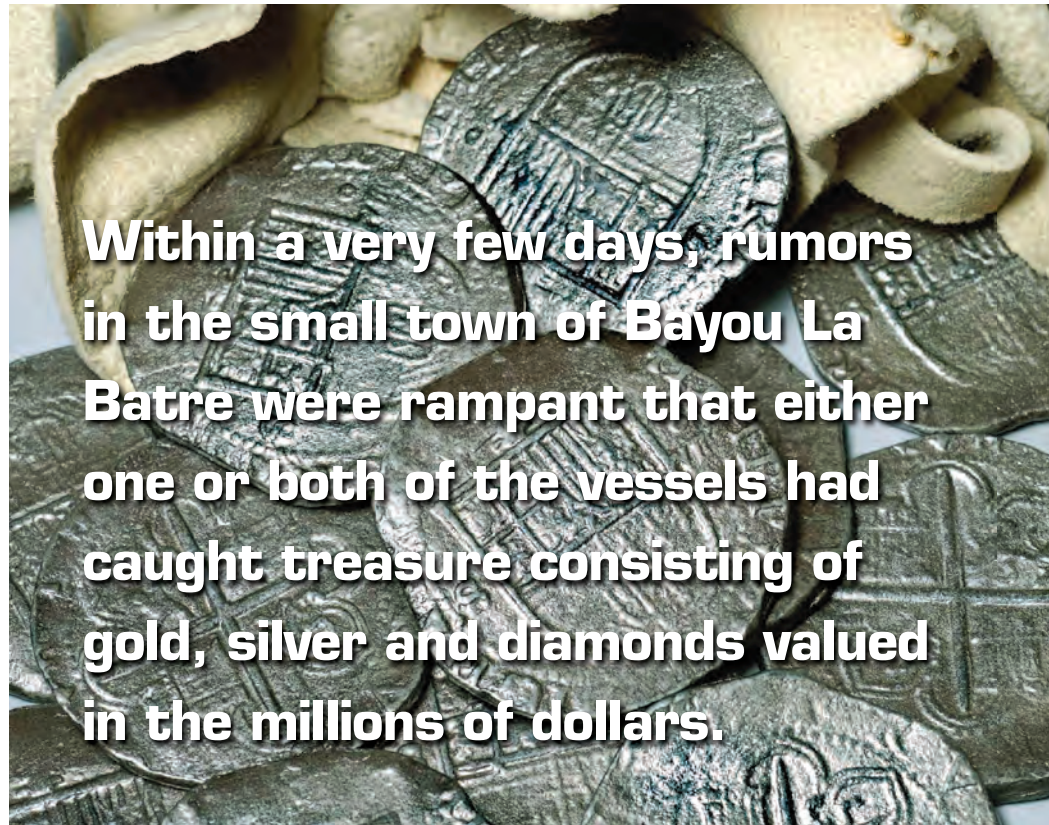
Silver Age of New Spain

The Silver Age of New Spain covered the period of approximately 1570 to 1820. During this time, the royal monarchs of Spain reaped a fantastic harvest of silver and other precious metals from the Americas, a very large portion of which consisted of silver. After being mined by Indian slaves, the silver was minted into coins in Mexico. The principal coin was the “piece of eight” or eight reales, which in 1857 was worth a little more than one United States dollar. From 1732 to 1771, the eight real coin had the Pillars of Hercules on one side and two globes on the other side, and thus was known as the Pillar Dollar. In 1771, “Bust” dollars appeared, which had a coat of arms on one side, and the bust of the King of Spain on the reverse. The 1783 eight real coin portrayed the bust of Charles (Carlos) III, who became King of Spain in 1759. The coins caught by the *Deborah Ann* were minted at the Casa de Moneda in Mexico City and bear the mint mark “M.”¹

Transport of the Coins from Mexico to Spain

Spanish law required that both specie and bullion be transported in Spanish ships only, and, further, that these ships could travel only from one Spanish port to another. There was considerable jealousy by Spain’s neighbors of her great wealth, and, as a result, Spanish treasure ships became fair game for pirates and privateers of many nations. Consequently, such vessels would proceed on an annual voyage from Vera Cruz, Mexico to convoy near Havana, and then proceed in convoy with armed escort to either Sevilla or Cadiz.

It is very probable that the Spanish vessel laden with these coins was bound from Vera Cruz to Havana. There is considerable data which reveals that on this first leg of the voyage to Spain, a number of vessels were lost due to plundering by pirates or destruction by wind and sea. One coin bears the earliest date of 1749, and the latest dated coin is 1798. Of the coins inventoried, more than 95 percent were Carlos III eight reales or “pieces of



Within a very few days, rumors in the small town of Bayou La Batre were rampant that either one or both of the vessels had caught treasure consisting of gold, silver and diamonds valued in the millions of dollars.

eight” “Bust dollars,” of which 90 percent bear the date 1783. Based on these dates, we can assume that the vessel probably sank in the late 1700s or early 1800s.

Present Market Value of a Piece Of Eight

What is the present day market value of a Spanish piece of eight? It depends on the condition, but:

- As contraband, the crew was selling them in Bayou La Batre for \$200 each.
- On eBay, +\$200 each
- At one time, *USA Today* advertised same for sale for \$50 each (but there was a rumor that the captain of the *Deborah Ann* sold the true coordinates of where the coins were found to a venture capital group from Florida who sent hard-hat divers down and recovered coins said to have come from a Spanish vessel named *El Cazador*, which were shown in quarter-page ads in *USA Today*, same dates, pieces of eight).

Conclusion

Was the vessel carrying these coins set upon by pirates or rovers, burned and sunk before her cargo could be gotten off, or was she driven off course and destroyed by a hurricane? No one will ever know. It is intriguing that, after over 200 years, the Gulf returned these coins in remarkably good condition to the nets of a modern shrimper where they immediately became the subject of this traditional admiralty salvage case. One thing is for sure—no shrimper out of Bayou La Batre or any other port will ever find a more interesting catch in his net! | AL

Endnote

1. Ferdinand and Isabella, by ordinance of June 13, 1497, decreed:
“. . . that the assayers shall mark the coins with a sign or mark or which must be recorded with the notary of the mint, said mark or sign to be kept in the notary's book so that . . . if any gold or silver coin is found of low fineness, the sign or mark borne by such coin, will serve to identify the assayers responsible for the error, who shall then be punished accordingly.”
The assayer for these pieces of eight was:

“FF” 1772, 1777-1785
Francisco de Ribas Augusto.



The Affordable Care Act, One Year Later

By Michael J. Velez

More than four years after the Affordable Care Act's (ACA)¹ passage, two years after the United States Supreme Court upheld its constitutionality² and one year following initial open enrollment, the spirited debate on the ACA continues.³ After all that time, it is still too early to understand fully the ACA's long-term impact on the delivery and payment of American healthcare. It will take more time to receive the statistically meaningful data necessary to determine the ACA's lasting effects on healthcare costs, uninsured levels and healthcare providers' ability to service the increased demand for care.

This article addresses the more immediate effects on healthcare of the ACA and its implementation, utilizing the ACA's objectives of increased affordability and access to healthcare to guide the discussion, while addressing employer reactions and Alabama specific impacts.

Premium Impact and Accessibility

The ACA reduced health plan premiums for some individuals and families, and increased premiums for others. The ACA's impact on premiums varies based on several factors, including:

- Preclusion of waiting periods and health underwriting for pre-existing medical conditions. Consumers now have access to healthcare coverage regardless of their health conditions, and premiums cannot vary based on an individual's health status.
- Premiums under the ACA are determined by the metallic plan you choose—bronze, silver, gold or platinum—county of residence, the number and ages of your family members and whether they use tobacco.
- The ACA requires member-level rating. Pre-ACA, Blue Cross® and Blue Shield® of Alabama⁴ offered one single premium and one family premium no matter the number of family members. The ACA now requires that each family member on a policy be rated based on age, address and tobacco use. These individual rates are then added together to calculate the family's premium. As a result, larger families may experience higher premiums.
- The ACA limits how much insurers can vary premiums based on an individual's age to a ratio of 3:1, down from a typical pre-ACA ratio of 5:1. This means that the premium rates for older adults cannot exceed more than three times the rate of a younger person.
- The ACA requires the inclusion of additional benefits. Nationally, less than two percent of pre-ACA plans covered all of the ACA's 10 essential health benefits.⁵

- The ACA's medical loss ratio rule (MLR) requires health insurers to spend at least 80 percent (individual and small employer health plans) or 85 percent (large employer health plans) of premium dollars on patient care and initiatives to improve quality of care, or refund the difference to customers.
- Provision of premium cost subsidies under the ACA for those who qualify
- The ACA also imposes a number of new fees and taxes.

A. Premium subsidies and affordability

The ACA's subsidies, in the form of tax credits, significantly offset 2014 health plan premium costs for some Alabama consumers and families. Upon the conclusion of the ACA's first open enrollment period, around 97,870 Alabama residents enrolled in health insurance marketplace plans. About 85 percent of those consumers received financial assistance.⁶ To be eligible to receive premium tax credits in 2014, an individual's annual income had to be less than \$46,680 and a family of four's annual income less than \$95,400.

The Alabama residents who received 2014 tax credits had a premium that averaged 77 percent less than the full premium.⁷ Tax credits reduced their premiums, on average, from \$334 to \$76 per month⁸—the eighth-lowest premium cost of the 36 Federally Facilitated Marketplace (FFM)⁹ states, which include Alabama. After the application of tax credits, 73 percent of Alabama exchange consumers had premiums of \$100 or less, while 53 percent had premiums of \$50 or less.¹⁰ Alternatively, unsubsidized health plan premiums were found to have increased nationally from 2013 to 2014 for all age groups studied.¹¹ Younger men received a 78.2 percent premium increase, the largest among the groups analyzed, while older men experienced the smallest increase, 22.7 percent.¹²

Whether subsidies will continue to reduce premiums in the future for FFM plan holders is currently in question. On July 22, 2014, in *Halbig v. Burwell*,¹³ a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit ruled that the ACA, by its terms, limits subsidy offerings to “state-run exchanges,” not those run by the federal government. At the time of this article's writing, this 2-1 ruling is on appeal by the government to the full court, with argument scheduled in December 2014.

Contradicting the *Halbig* court's ruling just two hours later, a second three-judge panel of the United States Court of Appeals for the Fourth Circuit, in *King v. Burwell*,¹⁴ unanimously ruled that consumers may receive subsidies from the Federally Facilitated Marketplace. Plaintiffs decided not to appeal *en banc* to the Fourth Circuit but instead appealed directly to the United States Supreme Court. On September 30, 2014, in a third subsidy challenge case, *Pruitt v. Burwell*,¹⁵ the United States District Court for the Eastern District of Oklahoma sided with *Halbig* and ruled that providing tax credit subsidies to FFM plan recipients goes beyond the ACA's authority. Finally, the United States District Court for the Southern District of Indiana, in *Indiana v. IRS*,¹⁶ has a similar subsidy challenge pending.

As these divergent rulings work through the legal system, they may contribute to a circuit split that may make the Supreme Court more likely to accept the issue. If so, the Supreme Court's ultimate decision will have significant consequences for the ACA.

If the Court upholds *Halbig*, around 4.6 million people in the 36 FFM states, including Alabama, who received subsidies in 2014, would lose them, at least going forward.¹⁷ If the subsidies fall, thereby reducing health insurance affordability for some, the viability of the individual mandate may come into question.

B. Narrowing provider networks

One strategy that some insurance carriers implement to reduce premiums under the ACA is to utilize limited or narrow provider networks. The theory goes that the more patient volume a carrier sends its network, the less the providers charge for their services. While the ACA did not birth this practice of narrowing networks, it appears to have accelerated network-shrinking as a means to reduce costs.

Conversely, some insurance companies, including Blue Cross and Blue Shield of Alabama, emphasize network access and offer broad provider networks, while still reducing premiums through operating efficiencies and by helping their members better manage their health.¹⁸ Providing customers the right to choose their own doctors, hospitals and health care remains a priority for certain carriers and seems more in line with the spirit of the ACA.

C. Health care accessibility

Narrow networks diminish the accessibility to health care promoted by the ACA, especially when accounting for the previously suppressed demand from the recently uninsured. In addition to offering broad provider networks, some insurers have expanded their sales channels. Blue Cross and Blue Shield of Alabama recently partnered with Alfa Insurance[®] to further expand access to Blue Cross and Blue Shield of Alabama individual marketplace plans, utilizing Alfa agents located throughout Alabama.

D. Medical loss ratio refunds

The MLR rule compels health insurers to refund customers if at least 80 percent or 85 percent (depending on plan type) of their premiums are not used to pay for their medical care or quality initiatives. In 2014, 10,342 Alabamians collectively received \$990,323 in 2013 MLR refunds,¹⁹ for an average return per Alabamian of around \$96. None of the MLR refunds paid in 2012 (first year MLR refunds payable), 2013 or 2014 were paid by Blue Cross and Blue Shield of Alabama. As one of the most efficient health insurers in the industry, in 2013, Blue Cross and Blue Shield of Alabama paid approximately 92 cents of every premium dollar to customers in healthcare benefits, seven cents to operating expenses and less than one penny to income.

Employers' Response To ACA

Now that companies have had some time to digest the ACA, most employers are continuing their commitment to offer health care benefits, focusing on better health care cost controls, avoiding the 2018 so-called “Cadillac” tax on rich benefit plans and increasing employee accountability. One year into the ACA's implementation, a myriad of employer surveys reflect how corporate stakeholders are altering their health care strategies in response to the ACA.

A. “Pay or play?”

Health benefits continue to be very important to companies and workers. Thus far, the ACA has not significantly changed that emphasis. As most employees highly value their health benefits, it is not a surprise that the vast majority of employers seem opposed to dropping health insurance coverage any time soon. A September 2014 Towers Watson employers survey found that 87 percent will not stop subsidizing worker health insurance benefits in 2015 and 83 percent in 2016.²⁰

Ninety-nine-and-one-half percent of the employers surveyed have no plans to discontinue providing health benefits and “dump” their employees onto the exchange, with 91 percent not inclined to drop part-time employees’ health plans.²¹ Similarly, a 2013 Mercer survey found that 94 percent of large employers are committed to offering health coverage for five years.²² As for small employers that offer coverage to their employees, those with less than 50 employees and the most financially challenged to provide health benefits, only 34 percent say they are “likely” or “very likely” to drop worker health benefits in five years or less.²³

Alternatively, some small employers have elected to drop coverage as it is cheaper for them to pay the tax than to provide ACA-compliant health benefits. Companies should do the math before deciding to drop coverage. Employers with 100 (transitional rule for 2015) or more full-time-equivalent employees that elect to drop employee health benefits would be assessed a \$2,000 per employee penalty under the ACA.²⁴ Unlike health insurance premiums, the ACA penalties are not tax deductible. If an employer provides a “make whole” payment to assist an employee purchase a marketplace plan, that additional payment would trigger payroll taxes.²⁵

B. Health care cost reductions

There are many strategies that employers use to reduce employee health care expenses, including cost shifting, utilizing consumer-directed plans, adopting price or utilization management strategies and holding employees more accountable for making healthy choices. The ACA also appears to have motivated more companies to self-fund their employees’ healthcare benefit plans.

While self-funded plans incur risk, the cost savings and benefit design flexibility outweigh that risk for many companies. Sixty-two percent of employers in the Towers Watson survey expect the 18 percent “Cadillac” excise tax will “moderately” or “strongly influence” their health care strategies before the excise tax goes into effect in 2018.²⁶ Fifty-four percent of employers expect to trigger the excise tax by 2020 if no changes are made to their health benefits.²⁷

C. Value-based reimbursement, not Volume-based

The ACA has accelerated a shift from fee-for-service, provider payments based on the quantity of services, to value-based payment models, which focus more on quality, outcomes and provider accountability. Shifting the emphasis of care to outcomes is expected to increase quality of care while reducing employers’ healthcare costs. Fourteen percent of the companies in the Towers Watson survey will adopt value-based payment models in their 2015 benefit plans, with another 34 percent considering this transition by 2017.²⁸

D. Private exchanges

Private exchanges have arisen pursuant to the ACA and help employers manage their health care spending while allowing their workers to better tailor their health benefits. Consumers desire choice, price and coverage transparency, customized products and an easy way to shop for coverage. Private exchanges have recently emerged to fill these needs and are becoming more common. The employees of a company utilizing a private exchange may shop and choose the health plan that best meets their health needs and budget.

While employer interest in private exchanges is growing, many companies seek confirmation that private exchanges can deliver more savings over the traditional employer-managed model. Twenty-eight percent of companies in the Towers Watson survey investigated transitioning their workers’ health benefits to a private exchange.²⁹ Blue Cross and Blue Shield of Alabama will offer a private exchange—the Alabama Blue Exchange—in early 2015.

E. Second open-enrollment period

The second open-enrollment period began November 15, 2014, and ends February 15, 2015, and is expected to go smoother from a technological standpoint than the initial enrollment period. Unlike the initial enrollment period, this second enrollment must retain current participants while drawing new ones. The Congressional Budget Office forecasts that 13 million people will purchase marketplace plans in 2015. For perspective, around 7.3 million people of the eight million or so who enrolled in the marketplace in 2014 were paying premiums last August. Open-enrollment 2015 may present different challenges as there may not be as much previously unmet demand for coverage as last year. Of course, consumers are better educated about the ACA this year. Consumers needed to enroll³⁰ in a marketplace plan by December 15, 2014, in order for coverage to be effective January 1, 2015.

Insurer Competition, Marketshare and Profits

Promoting competition among health insurers to reduce premium costs is also one of the ACA’s aims. According to the American Medical Association (AMA), Alabama has the least competitive health insurance market of any state, which the AMA imputes to Blue Cross and Blue Shield of Alabama’s high market share.³¹ However, high market share does not at all necessarily result in higher premiums for consumers.

The Robert Wood Johnson Foundation and the Urban Institute jointly studied 10 states, including Alabama, to ascertain the correlation of market share to premium cost. The study concluded that the ACA has resulted in increased competition and lower premiums. As to Alabama, the report opined that despite the “dominance” of Blue Cross and Blue Shield of Alabama, “premiums are surprisingly low throughout the state; BCBS[AL] did not exercise the market power that it [allegedly] has.”³² The report noted that Alabama had low premiums even though Blue Cross and Blue Shield of Alabama was the sole marketplace insurer in 64 of Alabama’s 67 counties in 2014.

Criticizing health insurers for rising health plan premiums has become somewhat of a sport over the last few years, but the reality is that insurer profits constitute a nominal part of U.S. health spending. Carriers spend premium revenue on patients' medical services, medications and new medical procedures. Most health insurance companies' profits are small, about 3.2 percent versus the 16.67 percent net profit margin of the healthcare sector as a whole, with drug companies running net profit margins of around 20.80 percent.³³ Reducing insurer profits will do little to decrease our nation's healthcare spending.

Conclusion

At the conclusion of the first year of the ACA's implementation, consumers, employers and health insurers know more about the ACA than ever before. While the ACA and health care industry will continue to evolve, there is so much more to learn about the ACA and its aftereffects over the next few years.

How the ACA evolves going forward is largely up to our politicians. Can they work together to improve the ACA, including its inadvertent consequences? There is little doubt that the ACA will mature. Let's hope the changes will further the ACA's goals of providing more consumers access to affordable, quality health care. | AL

Endnotes

1. The Patient Protection and Affordable Care Act, Pub. L. 111-148, enacted on March 23, 2010 and the Health Care and Education Reconciliation Act of 2010, Pub. L. 111-152, enacted on March 30, 2010, are collectively referred to as the Affordable Care Act.
2. The Court upheld the constitutionality of the individual mandate, the crux of the appeal, and ruled that Congress properly increased funding to expand Medicaid, but that the United States could not "coerce" states to expand Medicaid programs by withholding existing Medicaid programs' federal funding if a state elected not to expand its Medicaid program.
3. Four years from passage, public opinion of the ACA persists to be more negative (47 percent) than positive (35 percent). Even so, a majority of people desire to fix the ACA (63 percent) over repealing and replacing it (33 percent). Kaiser Family Foundation, *Kaiser Health Tracking Poll: August-September 2014*, pp. 1, 5.
4. Since 1936, Blue Cross and Blue Shield of Alabama has been committed to providing Alabamians access to quality, affordable health care by offering the largest network of hospitals, physicians, pharmacies and other providers in Alabama. Blue Cross and Blue Shield of Alabama is an independent licensee of the Blue Cross and Blue Shield Association.
5. Kev Coleman, *Almost No Existing Health Plans Meet New ACA Essential Health Benefit Standards* (March 7, 2013), available at <http://www.healthpocket.com/healthcare-research/infostat/few-existing-health-plans-meet-new-aca-essential-health-benefit-standards>.
6. Department of Health and Human Services ASPE Research Brief, *Premium Affordability, Competition, and Choice in the Health Insurance Marketplace*, p. 23 (June 18, 2014).
7. *Id.*
8. *Id.*
9. The ACA requires each state to stand a health care exchange on its own, in partnership with the federal government or to participate in the FFM operated by our federal government. In 2014, 36 states, including Alabama, participated in the FFM.
10. Department of Health and Human Services ASPE Research Brief, *Premium Affordability, Competition, and Choice in the Health Insurance Marketplace*, p. 26 (June 18, 2014).
11. Kev Coleman, *Without Subsidies Women & Men, Old & Young Average Higher Monthly Premiums with Obamacare* (October 29, 2014), available at <http://www.healthpocket.com/healthcare-research/infostat/obamacare-2014-premiums-higher-than-pre-reform-market>.
12. *Id.*
13. No. 14-5018.
14. No. 14-1158.
15. No. CIV-11-30-RAW.
16. No. 1:13-CV-1612.
17. Larry Levitt and Gary Claxton, *The Potential Side Effects of Halbig*, Kaiser Family Foundation (July 31, 2014).
18. Blue Cross and Blue Shield of Alabama is committed to ensuring customers receive the highest quality medical care at an affordable price. Some initiatives implemented to help influence health care costs and premiums include encouraging members to adopt healthier lifestyles, partnering with doctors and hospitals to implement programs that improve health care quality and negotiating prices with hospitals and physicians to keep costs for medical treatments as affordable as possible.
19. www.CMS.gov, *2013 MLR Refunds by State* (2013).
20. Towers Watson, *2014 Health Care Changes Ahead Survey*, p. 3 (September 2014).
21. *Id.*
22. Mercer, *Mercer's National Survey of Employer-Sponsored Health Plans* (2013).
23. *Id.*
24. For 2015, subtract 80 from the number of full-time equivalent (FTE) employees and then multiply that number by \$2,000 to calculate the penalty. In 2016 and beyond, subtract 30 from the number of FTEs for penalty calculation purposes.
25. In order for employees to be eligible for subsidies on the individual exchange, companies cannot increase a worker's salary through a tax-exempt savings account, like an HRA.
26. Towers Watson, *2014 Health Care Changes Ahead Survey*, p. 5 (September 2014).
27. *Id.*
28. *Id.* at p. 6.
29. *Id.* at p. 7.
30. While the ACA allows people to automatically renew their 2014 coverage for 2015, consumers with changed incomes should reapply to determine the extent of subsidy eligibility and avoid any potential tax surprises later.
31. American Medical Association, *Competition in Health Insurance, A Comprehensive Study of U.S. Markets* (2014).
32. John Holahan, *Will Premiums Skyrocket in 2015?*, p. 3, Robert Wood Johnson Foundation and Urban Institute (May 2014); John Holahan and Linda Blumberg, *Marketplace Competition & Insurance Premiums in the First Year of the Affordable Care Act*, pp. 4, 15, Robert Wood Johnson Foundation and Urban Institute (August 2014).
33. <http://biz.yahoo.com/p/5qpm.html>.

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The Alabama Bar Exam— The Course on Alabama Law

By Daniel F. Johnson

In July 2011, the Supreme Court of Alabama began administering the Uniform Bar Exam (the “UBE”) for candidates for law licensure, joining a growing number of states doing so. Alabama has long enjoyed membership in the National Conference of Bar Examiners (the “NCBE”), which created and developed the UBE. The UBE is nothing more than a single, common licensing test used jointly by several states. As of August 2014, 14 states have adopted the UBE.¹

The UBE is a three-part test produced and regularly updated by the NCBE for its member states who choose to use it. It includes the Multistate Bar Examination (that gargantuan 200-question, multiple-choice test taken by almost every lawyer living today in Alabama and everywhere else in America), the Multistate Essay Examination (six essay questions developed for each bar exam to test basic knowledge of “entry-level” legal subject matters, e.g., contracts, torts, domestic relations, criminal law, etc., along with the ability to write and analyze) and the Multistate Performance Test (a pair of practical legal problems which test an applicant’s ability in a mock setting to organize and write about real-life legal situations). The NCBE requires that each of the 14 “UBE states” administer all three of these test components for every bar exam. Of course, the UBE only serves as a complement to the rigorous character-and-fitness criteria long employed by the Alabama State Bar as part of its admissions process to make sure that the legal profession continues to be as honorable as possible.

Throughout the United States, two principles serve as the underpinnings of bar examination. First, and foremost, it is essential that the bar exam protect the public, i.e., the consumers of legal services, as it is designed to ensure that new attorneys will be minimally competent as they enter the practice of law, so as to professionally serve their clients. To that end, the UBE’s three components are developed and perpetually refined by groups of professional test designers under the auspices of the NCBE. Moreover, the results of any given examination are uniformly and nationally scaled and calibrated by the NCBE to assure the reliability of bar exam results over time. The notion of the UBE is premised on the idea that such a professionally developed test is the best available resource to qualify persons for the life-long practice of law.

Second, the bar exam, like any good test, is intended to fairly and equally treat its takers. The bar exam is not supposed to be

tricky or arbitrarily exclusive. Any well-educated and otherwise qualified law school graduate should be able to pass it.

The UBE honors both maxims, while energizing the new lawyer’s capacity for work in more than one state. As Erica Moeser, the NCBE’s longtime president, explains: “The National Conference of Bar Examiners is promoting the concept of a uniform test because it believes an individual who performs to an acceptable level on a high-quality licensing test has attained valuable currency that should be accepted in other jurisdictions.”²

In short, the UBE recognizes that today’s graduating law student needs the ability to live and practice in more than one state, given the tight market for legal jobs and the increasing speed with which the practice of law is crossing state borders. By adopting the UBE, the Alabama Supreme Court has made it easier for graduates from Alabama’s accredited law schools to live and work elsewhere, and it invites new lawyers educated in the other UBE states to consider living and working in Alabama.

Consistent with the two primary goals of the bar exam, in August 2013, the Alabama Supreme Court eliminated the requirement in its rules that the bar exam include separate Alabama essays, commencing with the July 2014 bar exam.³ In that context, one of the common misconceptions in the legal community about the UBE is that it somehow precludes the evaluation of a given bar examinee’s knowledge of state-specific law. However, the NCBE encourages states that want to offer the UBE to undertake the design and administration of their own separate state-specific testing and learning methods, *in addition to the UBE itself*.

Accordingly, while the Alabama Supreme Court discontinued the longstanding use of the six Alabama-specific essays, the court reiterated the importance that every person newly-licensed to practice law in Alabama be schooled in the nuances of Alabama law. Specifically, the court promulgated this rule:

...Course on Alabama Law. Before being admitted to the practice of law in Alabama, all applicants shall complete a course on Alabama law, the content and delivery of which shall be determined by the Board of Bar Examiners.⁴

Thus, as a complement to the UBE, and under the leadership of **Justice Michael Bolin** of the Alabama Supreme Court, Keith Norman of the Alabama State Bar and the chair of the Board of Bar Examiners, **David Hymer** of Birmingham, the board created the Alabama Curriculum Committee to develop the “Course on Alabama Law” (the “Course”).

I agreed to chair the committee, and **Robert Lockwood** of Huntsville agreed to serve as the committee's vice chair. **Lynn Reynolds** of Birmingham agreed to serve as secretary. In turn, we invited a blue-ribbon group of attorneys from throughout Alabama with significant expertise in legal subjects of special importance to the state to serve on the committee. Committee members include: **Wade Baxley**, Dothan; **Judge Ben Bowden**, Andalusia; the **Hon. Bill Bowen**, Birmingham; **Beau Byrd**, Birmingham; **Professor Tim Chinaris**, Montgomery; **Judge Patrick Davenport**, Dothan; **Augusta Dowd**, Birmingham; **Kendall Dunson**, Montgomery; **Professor Bryan Fair**, Tuscaloosa; the **Hon. Bernard Harwood**, Tuscaloosa; **Hope Marshall**, Birmingham; **Rebekah McKinney**, Huntsville; **Kathy Miller**, Mobile; **Professor Thurston Reynolds**, Montgomery; **Dean Corky Strickland**, Birmingham; **Dean Charles Nelson**, Montgomery; and **Chris Weller**, Montgomery. From the Alabama State Bar, Tony McClain, the state bar's general counsel, Dorothy Johnson and Justin Aday, both from the Office of Admissions, and Dolan Trout and Eric Anderson with the bar's Digital Communications department, also worked constantly and energetically with the committee.

The committee faced two primary challenges: (1) What subjects should constitute the curriculum for the course and (2) how should the course be presented to applicants for practice?

First, the committee designated the following subjects to constitute the curriculum for the course: civil procedure, wills and trusts/probate, torts, real property, family law, criminal law, alternative dispute resolution and Alabama constitutional law. The committee chose these subjects because members believe there are facets of each of them that are unique to Alabama and that any new attorney in Alabama should know.

Second, the committee decided that the course would be best presented as a series of videotaped lectures by experts for each of the listed subjects, utilizing an Internet-based platform. (5) The committee then developed an outline for each of the subjects. The outlines also served as the scripts for the lectures to be videotaped. The committee's members volunteered countless hours to draft and edit the outlines.

Utilizing the services of a professional video production company, Broadview Media in Montgomery, the committee ultimately produced 15 separate videos to constitute the course. Some of the committee's members volunteered to present lectures for taping, and the committee asked other experts to tape presentations too. The videotaped lectures are:

- Introduction–Justice Michael Bolin
- A History of the Alabama State Bar–Keith Norman
- Civil Procedure/Part One–Judge Bernard Harwood, Tuscaloosa
- Civil Procedure/Part Two–Chris Weller, Montgomery
- Civil Procedure/Part Three–Dean Corky Strickland, Birmingham
- Wills & Trusts/Probate–Holly Sawyer, Dothan
- Torts–Kendall Dunson, Montgomery
- Real Property/Part One–Jesse Evans, Birmingham
- Real Property/Part Two–Beau Byrd, Birmingham
- Real Property/Part Three–Lynn Reynolds, Birmingham
- Family Law–Judge William Bell, Huntsville

- Alabama Constitution–Professor Howard Walthall, Birmingham
- Criminal Law/Part One–Mark White, Birmingham
- Criminal Law/Part Two–Augusta Dowd, Birmingham
- Alternative Dispute Resolution–Charles Fleming, Mobile

Under the leadership of Robert Lockwood, the committee then contracted for the services of an Internet-based, online educational service, ScholarLab, to host the videos for viewing by takers of the bar exam. Each video posted on ScholarLab's site includes a lecture and accompanying slides, along with some "hurdle questions" designed not to test but rather to assure that the viewer of the lecture is paying attention and can accurately answer queries about the content of the given instruction.

There are many benefits to the online approach. ScholarLab charges \$3 per bar examinee to view the course online, so the approach is economical (and much less expensive than the development of essay questions for the bar exam). More importantly, the online content can be continuously refined and amended as the law in Alabama changes, ensuring for candidates for law licensure an ever-fresh introduction to the practice of law in Alabama.

To be eligible to view the course online, a candidate for law licensure must sit for the bar exam. In lieu of the old Alabama essay questions, the course was first made available to the 522 students taking the July 2014 bar exam (the first to be eligible to watch the videos). Of that number, 493 students successfully and timely completed the viewing of the videos in advance of the Alabama Supreme Court's customary swearing-in ceremony for new lawyers in October 2014. Of course, it is important to remember that not every person eligible to watch the videos ultimately passed the Alabama Bar Exam in July, but every person who passed the bar exam in July must also have watched the course as a pre-requisite to obtaining a law license.

Alabama's Board of Bar Examiners believes that by adopting the UBE in this state and coupling it with the development and delivery of the new online course on Alabama law, the Alabama State Bar has created a novel and better way to qualify new lawyers to practice law in Alabama. Through the hard work of the Alabama Board of Bar Examiners and its Curriculum Committee's members and lecture presenters, this new course is a reality. The Alabama State Bar has developed a model for exposing new lawyers to needed scholarship that can serve as an example for the bar examination community nationwide, and its membership can be proud to have taken the lead yet again in the administration of the process of admission to the practice of law. | [AL](#)

Endnotes

1. The other 13 UBE states are Alaska, Arizona, Colorado, Idaho, Minnesota, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Washington, Wyoming and Utah.
2. Erica Moeser, "Both Graduates and Employers Would Benefit from the Uniform Bar Examination," *NALP Bulletin*, March 2010.
3. The Supreme Court of Alabama, Rule VI (B), *Rules Governing Admission to the Alabama State Bar*, August 15, 2013.
4. *Id.*
5. The State Bar of Arizona had already developed a similar series of videos, and with the encouragement of then-Chief Justice Rebecca White Berch of the Arizona Supreme Court, its staff granted unfettered access to the committee to consider using such a platform in Alabama.

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ALABAMA STATE BAR

JULY 2014 Bar Exam

STATISTICS OF INTEREST

Number sitting for exam	522
Number passing exam (includes MPRE-deficient and AL course-deficient)	337
Number certified to Supreme Court of Alabama	316
Certification rate*	60.5 percent

CERTIFICATION PERCENTAGES

University of Alabama School of Law	93.8 percent
Birmingham School of Law	18.3 percent
Cumberland School of Law	77.8 percent
Faulkner University Jones School of Law.....	62.5 percent
Miles College of Law	0.0 percent

**Includes only those who have satisfied the following admission requirements: (1) passage of the Academic Bar Exam; (2) passage of the MPRE; and (3) completion of the online course on Alabama law.*

For full exam statistics for the July 2014 exam, go to <https://www.alabar.org/assets/uploads/2014/08/JULY-2014-Detailed-Statistics-Website-Publish.pdf>.

ALABAMA STATE BAR
FALL 2014
Admittees

Nathaniel Callistus Abell
Kathleen Elizabeth Adams
James Mark Adams, Jr.
Sara Elyn Adams
Levi Leo Alexander
John Robison Alford, Jr.
Emory Grissom Allen
Katherine Elizabeth Amos
David Daniel Anthony
Victoria Laine Applewhite
Christopher Bryant Armbrester
Ambrey Michelle Auten
Joseph Hansen Babington
Paul Douglas Bagley
Courtney Elizabeth Bailey
Julia Blair Barber
Jared Kyle Barron
Madeline Margaret Barter
Kenneth John Baumann, Jr.
David Reid Beasley
Lucas Christopher Bedia
Stephanie Elizabeth Berger
Russell Scott Beverly
Brian Thomas Bird
Allen Brooks Blow
Abby Chelsea Bracewell
John Benjamin Bradley
David Porter Bradley, Jr.
Thomas McLean Bramlett
Joshua King Brasfield
Seth Roland Brooks
John Paul Bruno
Thomas Winchester Hendrick
Buck, Jr.
Hannah Shea Burcham
Heather Alison Burns
Steven Michael Buse
David Anthony Butler

Christen Denise Butler
Ann Winslow Butts
Joseph Poole Callaway
Jordan Hall Campbell
Douglas Hunter Carmichael
Katelyn Ann Carr
Julie Diane Carter
Douglas Matthew Centeno
Alex James Chaney
Matthew Clifford Chavers
Brett Jared Chessin
Laura Summerford Chism
Virginia Gayle Chouinard
Steven Russell Yancey Chumbler
Robert Tyler Clark
Matthew James Clark
Katherine Ruth Clements
Raynor Wesley Clifton
Kasey Lewis Coan
Joshua David Cochran
John Francis Cockrell
Seth Adam Cohen
Patrick Albright Coleman
Cedrick Demond Coleman
Eric Dewone Coleman
Reed Morgan Coleman
Freddy Lynn Collins
Chelsey Morgan Collins
Haley Linden Colson
David Tyler Conrad
Courtney Danielle Cooper
Meryl Lindsay Cowan
Berkley Jade Criswell
Adam Bobby Culbert
John Robert Davidson, Jr.
Matthew Aaron Davis
Dana Michelle Delk

Tristin Tucker Derrick
Matthew David Donze
Christopher Jason Doty
Deirdra Lanora Drinkard
Jodi Corilla Dykes
Joseph Martin Echols, III
Robert Ashton Emerson
Hannah Elizabeth Faulkner
James Daniel Feltham, Jr.
John Hunter Fikes
Charles Maximillian Fleischmann
Jonathan Ben Ford
Morgan Brooke Franz
Jacob Joel Franz
Christopher Knox Friedman
Jeffrey Edwin Friedman, Jr.
Joseph Andrew Fulk
Kathleen Michelle Fuller
Caroline Elizabeth Gabriel
Britni Terrell Garcia
Elena Kay Gaudin
Morgan Henry Gearhart
Aly Lauren George
Edward James Gillespie
Jake Michael Gipson
Jeremiah Michael Glassford
Kimberly Phillips Gloss
Lance Leroy Goodson, Jr.
Jessica Alyese Gordy
Stephanie Jo Gossett
Joshua Joseph Gotlieb
Arienna Litha Grody
Brandy Kay Grondin
Marcus Everette Gross
Zachary Laine Guyse
Joshua Cain Hagler
Rebecca Elizabeth Hall

Melissa Hamilton
Charles Ellis Hamm
Nicholas Coty Hand
Wesley Alec Harbuck
Elizabeth June Harkins
Benjamin Phillip Harmon
Jacob Calhoun Harper, IV
Ginger Lowery Harrelson
Mark Edward Harris
Daniel Brian Harris
William Paul Harris
Joshua Louis Hartman
Malory Hatfield
Hunter Allen Hawley
Keri Sullivan Henley
Joshua Robert Hess
Ethan Daniel Hiatt
Jacob Wayne Hill
Andrew Hamilton Hill
Elizabeth Anne Hilley
James Everett Hoagland
Jonathan Paul Hoffmann
Kristina Morgan Sanders
Hofferber
Caylan Marie Holland
Sarah Elizabeth Holland
Steven Brett Holsombeck
Priscilla Todd Hosford
Matthew Patterson Howell
Sara Elizabeth Howell
James Michael Hubbard
Valerie Chalean Hughes
John Jameson Hughston
Brandon Allen Jackson
Ana Deborah Jimenez-Gregory
Natalie Theresa Johnston
Eleanor G Jolley
Brittney Faith Hardison Jones

Carolyne Blair Jones	Ryan Ray Moore	Virginia Broughton Reeves	Christopher Andrew Thagard
Spencer Wade Jones	Mac Mitchell Moorer, Jr.	Preston Young Register	Louise Tharaud Brasher
Noah Patrick Jones	David Graham Mosley	Jevon Abraham Reinke	Abbey Lee Thompson
William Paul Joslin	Christina Marie Mullikin	Julien Mitchell Relfe	Christopher Ronald Thompson
Beom Soo Jung	Laura Winnette Mullins	Valentina Restrepo	Adam Elliott Tice
Jessica Marie Kennedy	John Frank Nakamura	Ashley Rose Rhea	Nina Marie Towle
Ian Philip Kennedy	Jackson McGinnis Neal	Christopher Leo Richard	Jonathan David Townsend
Kelly Lynn Kesner	Matthew Douglas Nelson	Blake Tucker Richardson	Andrew Mark Townsley
Brian Gene Kim	Megan Marie Nix	Arthur Shaw Richey	Anna Elizabeth Traylor
Allen Christian King	Jack Merrell Nolen, III	Mary Cathryn Rillo	William David Tuck
Lauren Emerson Kloess	La Brenda Monche Norman	Kevin James Roak	Anna Genevieve Turner
Lisa Marie Grant Lanier	Jessica Fawn Nwokocha	James Hunter Robinson	Anna Frances Twardy
Michael Rowden Lasserre	Edward Asbury O'Neal	Jane Louise Robinson	Natalie Renee' Vann
Henry Andrew Lawrence, III	Joseph Michael Oaks	Franklin Taylor Rouse	Robert Parker Varner, Jr.
Jason Edward Lee	Benjamin Doyle Odendahl	Emily Myers Ruzic	Jaclyn Michelle Vidusic
John Harman Leech, Jr.	Abisola Adebola Olaleye	Brooke Ellen Sanchez	Kimberly Kay Vines
David William Lewis	Andrew Scott Olds	Katie Brooke Sanders	Thomas Oliver Walker, II
Zachary Robert Lewis	Jennings Lambert Owens, III	Wanda Kayla Schoen	Matthew James Ward
Desirae Lafay Lewis	Melissa Lynn Padgett	Melissa Christine Schultz-Miller	Ann Elizabeth Watford
Thomas Avery Littrell, IV	Bruce Dean Page, Jr.	Andrew Robert Schwartz	Thomas Patrick Watson
Evan Austin Loftis	Nicholas Andrew Palerino	Katherine Elizabeth Scissum	William Robert Weaver
Felicia Teanna Long	Todd Panciera, Jr.	Brittany Samantha Scott	Daniel Scott Weber
Casimir Christian Lukjan	Jacob Lee Parnell	Eric Martin Scott	Daniel Carter Weeks
Andrew Lee Maddox	Evan Nicholas Parrott	Paul Andrew Seckel	Grafton Moore Weinacker
Joshua Clay Maddox	Stephen Colmery Parsley	Jeanne Sarah Segil	Samuel James Weisgarber
Philip Daniel Mahoney	Umang Gurusharan Patel	Nicholas Jameson Shabel	Katherine Lynn Weldon
Thomas Bacon Majors, IV	Whitney Deanne Payton	John Houston Shaner	Brian Jeffrey Wells
Dylan Hall Marsh	Rebecca Faith Perdue	Sabrina Mansoor Sharifali	Russell Gray West
Colby Lee Mathews	Benjamin William Perry	Charles Gavin Shepherd	Calvin James Whaley
William Kirkland Mattei	Richard Monroe Phillips	Erica Floyd Shumate	Lauren Ashley White
Sara Elizabeth Carroll Matthews	Thomas Forrest Phillips	Allison Paige Sidbury	Priscilla Katherine Williams
Blakeman Ashley Walker May	Sean David Phinney	Laterrica Katrice Simmons	Joshua Troy Williams
Jonathan Frank Mayhall	Jeanetta Pleasant	William James Sinor	Carl Christian Williams
Sherri Lee Mazur	Brandon Francis Poticny	Melissa May Sinor	Benjamin Sanders Willson
Maurice Peraze McCaney	Brandi Nicole Powe	Paul Michael Sloderbeck	Robert David Windsor
Lauren Kristian McCullough	Camille Elizabeth Preston	Nathan Wayne Smart	Jonathan David Wohlwend
Aaron Tero McCurdy	Brendan Ohara Prince	Caitlyn Terrell Smith	Thomas Riley Wolfe
Lindsey Ruth Meadows	John Ryan Proctor	Austin Katherine Smith	Wendy Wai-Ting Wong
Garrett Clark Miller	Sumner Riddick Pugh, IV	Tyler Johnson Smith	Katherine Elizabeth Wright
Preston Daniel Miller	Michael Shane Quinn	Clifton Ryan Sprinkle	Timothy Allen Wyatt
Jonathan Lowell Mills	Leirin Michael Ragan	Kenneth Ballard St. John	Emily Jane Young
Michael Blake Milner	Wesley Joel Rainer	Alexa Rose Stabler	Wesley Kyle Young
David Christopher Minton	Emily Elizabeth Randolph	Claire Frances Stamm	Robert Rylee Zalanka
Jessica Ann Mohr	Christopher Ryan Reader	Jamie Ballew Stewart	Megan Elizabeth Zingarelli
Trevor Allan Moore	Jami LaRon Allen Reedy	Shaun Evan Styers	Glenn Harold Zuercher
Megan Beth Moore	Tyler James Reeves	Michael Paul Taunton	

LAWYERS IN THE FAMILY



1. Virginia Reeves (2014), John Reeves (2014) and Grady Reeves (1998)
Admittee, husband and father-in-law

2. Abbey Lee Thompson (2014), Neil C. Johnston, Jr. (2012) and Neil C. Johnston, Sr. (1978)
Admittee, fiancé and (future) father-in-law

3. John Jameson Hughston (2014), James D. Hughston (1980), Hon. Harold V. Hughston, Jr. (1981), Harold V. Hughston, III (2008) and Hughston Nichols (2006)
Admittee, father, uncle, cousin and cousin

4. Reed Morgan Coleman (2014) and Randall Morgan (1974)
Admittee and father

5. Jackson Neal (2014) and George M. Neal, Jr. (1977)
Admittee and father

6. Julie Diane Carter (2014) and Huel Carter (1981)
Admittee and father-in-law

7. Madeline Margaret Barter (2014) and James Francis Barter, Jr. (1982)
Admittee and father

LAWYERS IN THE FAMILY



8. Seth Cohen (2014) and Ross Cohen (1978)
Admittee and father

9. Thomas Riley Wolfe (2014) and Gary P. Wolfe, Sr. (1980)
Admittee and father

10. Jamie Stewart (2014) and Dain Stewart (2013)
Admittee and husband

11. Rebecca Elizabeth Hall (2014), Bill Hall (1985), Judge Karen Hall (1985) and Judge Ruth Ann Hall (1990)
Admittee, father, mother and aunt

12. William David Tuck (2014) and Jeffery Neal Lucas (2003)
Admittee and father-in-law

13. Sara Elizabeth C. Matthews (2014) and William B. Matthews, Jr. (1982)
Admittee and father

14. Allen C. King (2014) and M. Christian King (1982)
Admittee and father

15. Jay Friedman (2014) and Jeff Friedman (1986)
Admittee and father

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16. William Sinor (2014) and **Melissa Sinor** (2014)
Husband and wife co-admittees



17. Natalie Vann (2014) and **Jim Vann** (1981)
Admittee and father



18. Tristin Tucker Derrick (2014) and **Tommy E. Tucker** (1977)
Admittee and father



19. Lindsey Meadows (2014) and **Pat Meadows** (1978)
Admittee and father



20. Joseph Hansen Babington (2014) and **Joseph P.H. Babington** (1988)
Admittee and father



21. D. Matthew Centeno (2014) and **Douglas J. Centeno** (1982)
Admittee and father



22. Kenneth Ballard St. John (2014) and **Thomas Edwards Sanders** (2009)
Admittee and stepfather



23. Erica Floyd Shumate (2014), **John Floyd** (1987), **Jane Floyd** (1993) and **Jack Floyd** (1953)
Admittee, father, grandmother and grandfather

LAWYERS IN THE FAMILY



24. Brittney Hardison Jones (2014), Justin Jones (2013) and Edward Hardison, I (1998)
Admittee, husband and father

25. John Nakamura (2014), Susan Lebourg (1979) and Patrick Nakamura (1978)
Admittee, mother and father

26. Thomas Buck, Jr. (2014) and Thomas Buck (1979)
Admittee and father

27. Megan Zingarelli (2014) and John Zingarelli (1983)
Admittee and father

28. Katelyn Carr Buchanan (2014) and Charles Carr (1977)
Admittee and father

29. Henry A. Lawrence, III (2014) and Randall B. James (1983)
Admittee and father-in-law

30. Mary Cathryn Rillo (2014) and Liz Campbell (1991)
Admittee and mother

31. Kasey Coan (2014) and Christina Coan (2013)
Admittee and wife

LAWYERS IN THE FAMILY

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.



32

32. Elizabeth Howell (2014), Sara Howell (1987) and Kevin Howell (1983)
Admittee, mother and father



33

33. Alex J. Chaney (2014) and Judge Kim J. Chaney (1986)
Admittee and father



34

34. Desirae Lewis (2014) and Bill Lewis (2004)
Admittee and brother



35

35. Preston Register (2014) and Patrick Jones (1998)
Admittee and father-in-law



36

36. Daniel Faulkner (2014) and **Hannah Faulkner** (2014)
Cousin and admittee

Recognizes 65th Anniversary of Admittance

On October 6, 2014, **Colonel Harold Howell** was surprised by the Autauga County Bar Association with a luncheon honoring his 65th year as a practicing attorney. Members of the Autauga County Bar Association, circuit judges from the 19th Judicial Circuit and Colonel Howell's family, including children from Delaware and Tennessee, gathered in the Autauga County Courthouse to celebrate this milestone. There was even a cake featuring his iconic hat.

September 15, 1949 found 27-year-old war veteran Harold Howell raising his right hand and vowing to uphold the laws of the State of Alabama and the integrity associated with being an attorney of law. Colonel Howell, as he is affectionately known, is more than just a steward of the law, though.

Colonel Howell served in the United States Navy from June 1942 to September 1945, earning a Purple Heart at Okinawa after his destroyer was hit by a Kamikaze. In addition to serving in other major battles in the Pacific, Colonel Howell also fought at Iwo Jima and Guadalcanal and served as a torpedo man on two different destroyers during World War II. Upon leaving the Navy, Colonel Howell returned to Alabama and graduated from the University of Alabama with his Juris Doctorate degree. He then enlisted in the United States Air Force and served as a JAG Officer from December 1950 through September 1975, receiving the Outstanding Meritorious Service Medal for his service.

Colonel Howell entered private practice in 1975 with his son, George Howell, and they remained partners for 34 years until



George took a medical retirement in 2009. Sixty-five years later, at the young age of 92, Colonel Howell continues to work daily ensuring his clients are represented with integrity and honesty.

Colonel Howell has five children, 12 grandchildren, 21 great-grandchild-

dren and another great-grandchild "in the hangar."

He's actively involved with Glynwood Baptist Church serving as a Sunday school teacher and deacon emeritus. Additionally, Colonel Howell has been, and continues to be, a strong advocate for the Alabama Teen Challenge Program which focuses on evangelizing to young people with life-controlling problems initiating a discipleship process enabling the student to function in society by applying spiritually-motivated Biblical principles to relationships in the family, church, vocation and community.

In addition to a commemorative plaque from the Autauga County Bar Association, Colonel Howell received a commendation from Governor Robert Bentley, a commendation from the City of Prattville, a colonel's coin from the Alabama Veterans' Court and numerous letters of gratitude from the Alabama Supreme Court, Alabama Court of Civil Appeals, Alabama Court of Criminal Appeals and Alabama State Bar.

At our September county bar association meeting, Colonel Howell announced he had finally, at the age of 92, discovered the two single most important things in life—"inhale and exhale!"

The Nineteenth Judicial Circuit is proud to serve with Colonel Howell. | AL

—Autauga County Bar Association



J. Anthony McLain



May Attorney Pay Advertising Expenses Of Another Attorney in Exchange for Referrals from Attorney Whose Services Are Advertised?

QUESTION:

The Disciplinary Commission has determined that it would be appropriate to give further consideration to the conclusions reached in RO's 92-23 and 93-23 which address the issue of whether an attorney may pay the advertising expenses of another attorney in exchange for referrals from the attorney whose services are advertised.

ANSWER:

An arrangement whereby advertising expenses are paid by someone or some entity other than the lawyer whose services are being advertised would, in the opinion of the Disciplinary Commission, violate Rule 7.1 of the *Rules of Professional Conduct*, in that advertising under such circumstances would constitute "a false or misleading communication about the lawyer or the lawyer's services." Additionally, payment of advertising expenses in exchange for referrals violates the prohibition in Rule 7.2(c) against a lawyer giving "anything of value to a person for recommending the lawyer's services."

DISCUSSION:

Rule 7.1 of the *Rules of Professional Conduct* provides as follows:

"Rule 7.1 Communications Concerning a Lawyer's Services

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:

- (a) Contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;
- (b) Is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the *Rules of Professional Conduct* or other law;
- (c) Compares the quality of the lawyer's services with the quality of other lawyer's services, except as provided in Rule 7.4; or
- (d) Communicates the certification of the lawyer by a certifying organization, except as provided in Rule 7.7."

It would appear obvious that any potential client who calls the telephone number listed in the above-described advertisement scheme would be misled as to which attorney they would be dealing with and who would be representing them in their particular legal matter. While the referral concept is obviously an acceptable one in this state, advertisement by means of this type of conduit whereby one attorney or firm avoids direct participation in the advertising, other than funding the same, misleads the public as to what attorney or attorneys a potential client will be dealing with and which attorney will ultimately serve as the client's legal representative.

Further, the lawyers involved in open referrals must ensure the client is aware of the referral system, division of fees, degree of participation of the attorneys involved, etc., as mandated by Rule 1.5 of the *Alabama Rules of Professional Conduct*.

The purpose of the rules is to protect the public. Any advertising scheme which would circumvent full disclosure of relevant information to the consuming public violates not only the rules themselves, but their spirit and purpose as well.

Strict adherence to applicable rules would not allow such an advertising and referral arrangement. The circuitous referral concept envisioned therein is not a plan structured as to prevent misleading the public while maintaining the integrity of the representation of the client.

Other rules of professional conduct would be impacted, or potentially impacted, by this type of advertising and referral arrangement. First, the fact that one attorney would be paying the advertising expenses of a second attorney in exchange for referrals means that the second attorney would be receiving something of value in return for a referral or recommendation of the first attorney's services. This is clearly violative of Rule 7.2(c), which provides, in pertinent part, that "[a] lawyer shall not give anything of value to a person for recommending the lawyer's services"

Furthermore, Rule 1.10 deals with vicarious disqualification of lawyers associated in a "firm." Whether a group of lawyers constitutes a "firm" for purposes of this rule is a factual question. The Comment to Rule 1.10 notes that a group of lawyers could be considered a "firm" in one context of the rule, but not in another. If lawyers are associated in the practice of law in some way, the exact relationship can be immaterial for the purposes of disqualification under Rule 1.10. In light of the provisions of Rule 1.10, and the construction which has been placed thereon, there would appear to be a distinct possibility that attorneys or firms who participate in such an advertising arrangement would inherit one another's conflicts of interest and thereby would be vicariously disqualified from any matter in which the other had a conflict.

Based upon the above, it is the opinion of the Disciplinary Commission of the Alabama State Bar that it is ethically impermissible for one attorney to pay the expense of advertising the services of a second attorney in exchange for the referral of cases by the second attorney. To the extent that RO-92-23 or RO-93-23 may be inconsistent with the conclusions stated herein, they are to be considered as modified in conformity herewith. | [AL](#)

[RO-99-01]



Wilson F. Green

By Wilson F. Green

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

By Marc A. Starrett

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



Marc A. Starrett

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Limited Partnerships

Cadence Bank, N.A. v. Goodall-Brown Associates, L.P., No. 1111422 et al. (Ala. Sept. 19, 2014)

One of the five appeals in this case concerned whether an Alabama limited partnership lacked standing to pursue claims once it had dissolved; the supreme court answered that question in the negative, noting that (1) standing is determined as of commencement of the action, and the act triggering dissolution had not occurred at time of commencement and (2) in any event, under *Ala. Code* § 10A-9-8.03, a limited partnership continues after dissolution for wind-up affairs, and litigation is one wind-up activity.

Decedent's Estates; Spousal Elective Shares

Ferguson v. Critopolous, No. 1130486 (Ala. Sept. 19, 2014)

Under *Ala. Code* § 43-8-90(a), "[i]f a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision be reasonably proven. The issue in the case is how courts should evaluate the second exception enumerated in the statute—that the testator provided for the spouse outside the will with the intent that the transfers be in lieu of a testamentary provision. Ultimately, the court announced an eight-factor test to be used in determining the intent of the testator.

Door-Closing Statute

CAG MLG, L.L.C. v. Smelley, No. 1130659 (Ala. Sept. 19, 2014)

Failure to qualify to do business in Alabama is a challenge to capacity, not standing; capacity need not be affirmatively pleaded, but rather is a waivable affirmative defense.

Slayer's Statute

Willingham v. Matthews, No. 1130890 (Ala. Sept. 19, 2014)

Based on the plain language of the Slayer's Statute, *Ala. Code* § 43-8-253(a), the statute applies only to the estate of the murdered decedent, not the estate of the party who feloniously and intentionally killed the decedent.

AEA; "Political Activities" and Payroll Deductions of Dues (Part Three)

White v. John, No. 1111554 (Ala. Sept. 26, 2014)

The court reversed the trial court's grant of preliminary injunction, which barred the state comptroller from implementing regulations prohibiting payroll deduction of AEA and

ASEA dues on grounds that the regulations were not promulgated properly using notice and comment as required by the state APA. The court reasoned that, under the plain language of various statutes governing such matters, payroll deductions were prohibited for organizations engaged in "political activities," in which the plaintiffs were undisputedly engaged, and, therefore, the same prohibition would be effective with or without the injunction.

Tax Sale Redemptions; Excess Proceeds

Ex parte First United Security Bank, No. 1120302 (Ala. Sept. 26, 2014)

In *First Union National Bank of Florida v. Lee County Commission*, 75 So. 3d 105 (Ala. 2011), the court held that "owner" in *Ala. Code* § 40-10-28 meant "the person against whom taxes on the property were assessed," 75 So. 3d at 117, and that the term "owner" does not include a mortgagee who has not foreclosed on its mortgage. The issue in this case was whether "owner" includes a mortgagee who has foreclosed before the demand for excess funds is made. The court answered in the affirmative.

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Peace Officers; Damage Caps

Alabama Municipal Insurance Corporation v. Allen, No. 1121006 (Ala. Sept. 26, 2014)

Issue: whether the \$100,000 cap of § 11-47-190, *Ala. Code* 1975 applies when a peace officer, acting outside his employment, is sued in the officer's individual capacity. Held: The cap does not apply to individual capacity suits.

Abatement; Third-Party Actions

Ex parte Sundy, No. 1121140 (Ala. Sept. 26, 2014)

Abatement statute did not bar assertion of third-party claims in separate actions by identical defendant against identical third party, because actions were brought by different plaintiffs

Arbitration; Waiver and Non-Signatory Law

Anderton v. The Practice-Monroeville, P.C., No. 1121417 (Ala. Sept. 26, 2014)

Party seeking to compel arbitration did not waive right due to prior district court action, because movant was not a party to the prior district court action. Movants were entitled to compel arbitration of the claims as non-signatories, under the "equitable estoppel" method of allowing non-signatory enforcement. The court reasoned that non-signatory enforcement is a question of "substantive arbitrability," which is typically a question for the court, but since the parties adopted AAA rules, which reserves such questions to the arbitrator. Three justices dissented.

Warranty

Barko Hydraulics, LLC v. Shepherd, No. 1121479 (Ala. Sept. 26, 2014)

In a plurality *per curiam* decision, the court concluded: (1) identification of an existing defect is not essential to recovery upon an express warranty claim; rather, it is sufficient if, either directly or by permissible inference, that the product was defective in its performance or function or that it otherwise failed to conform to the warranty, (2) whether product had not been maintained as warranty provided was a fact question and (3) whether warranty had expired when hydraulics failed was a fact question, because evidence showed defects were manifest within four months of purchase, and repeated repair efforts failed before ultimately there was a complete failure of the systems. However, jury verdict for damages was reversed because the trial court improperly submitted mental anguish damages to the jury.

Rule 60

Gray v. Bain, No. 1130378 (Ala. Sept. 26, 2014)

Although Rule 60 authorizes relief from a judgment based on "mistake," judgments entered as a result of settlements

may be reopened only when fraud or mutual mistake is shown.

Administrative Law; Standing

Ex parte Alabama Rivers Alliance, No. 1130393 (Ala. Sept. 26, 2014)

Party lacked standing to appeal the Environmental Commission's decision to the trial court because that party was not aggrieved by the commission's decision; appellant received all the relief it requested from the commission.

Venue; Estates

Taylor v. Estate of Harper, No. 1130587 (Ala. Sept. 26, 2014)

Ala. Code § 43-8-162 provides five possible venues for actions for the probate of wills. Section 43-8-21 establishes venue when a probate proceeding may be maintained in more than one place in Alabama. In this case, two actions were filed on separate wills in proper venues. Under § 43-8-21, the first-filed action took precedence.

Sovereign Immunity

Ex parte Jackson County Board of Education, No. 1130738 (Ala. Sept. 26, 2014)

County school board enjoys absolute immunity under Article I, Section 14 of the *Alabama Constitution*

UIM; Opt Out

Ex parte Electric Insurance Company, No. 1130820 (Ala. Sept. 26, 2014)

UIM carrier exercised its right to opt out within a reasonable time, which occurred before the final day on which the scheduling order allowed Electric to amend its answer.

AEMLD; Duty to Warn

Yanmar America Corporation v. Nichols, No. 1130214 (Ala. Sept. 30, 2014)

In a plurality opinion by Justice Bolin (four judges joining), the court reversed a judgment on jury verdict in an AEMLD case against an American affiliate of a foreign manufacturer of a "gray market" product not intended for sale in the U.S. The court reasoned that although not the manufacturer or seller of the product ultimately used, distributor undertook a duty to warn, and that duty extended to anticipated users. However, liability for such a duty to warn is governed by Restatement (Second) of Torts § 324A, which applies only to the extent that the alleged negligence of the defendant exposes the injured person to a greater risk of harm than had previously existed. Because plaintiff never saw the safety

warnings, any failure to include more specific information regarding the hazards of operating a gray-market tractor could not possibly have increased the risk of use.

Juvenile Courts; Parental Rights

***Ex parte L.J.*, No. 1121462 (Ala. Sept. 30, 2014)**

Juvenile courts have jurisdiction over a termination-of-parental rights petition when the grounds for the petition do not involve a child alleged to have committed a delinquent act, to be dependent, or to be in need of supervision. Justice Bolin, in an important concurrence, stated his view that Act 2014-350 establishes that the juvenile courts have jurisdiction over all petitions seeking the termination of parental rights, even as between the parents.

Public Employment; Non-Tenured Teachers

***Nelson v. Megginson*, No. 1121301 (Ala. Sept. 30, 2014)**

Though they were non-tenured, plaintiffs who were terminated as teachers adequately stated a breach-of-contract claim under the existing board policy and the principles in *Belcher v. Jefferson County Board of Education*, 474 So. 2d 1063 (Ala. 1985).

Rule 60(B) Relief; Due Diligence Required

***Ex parte Anderson*, No. 1121181 (Ala. Sept. 30, 2014)**

To obtain relief from judgment for fraud under Rule 60(b)(3), the party seeking relief must establish due diligence, a requirement created by federal case law (and adopted in this case).

Insurance; Claims Processes and Appraisals

***Baldwin Mut. Ins. Co. v. Adair*, No. 1100872 (Ala. Sept. 30, 2014)**

Circuit court erred by ordering BMIC to engage in the contractually-mandated appraisal process before the insureds satisfied their respective contractual post-loss obligations and before BMIC had sufficient information on which it could decide whether it disagreed with the respective claims of the insureds.

Probate Court Jurisdiction; Wrongful Death

***Kirksey v. Johnson*, No. 1130385 (Ala. Oct. 17, 2014)**

Held: (1) probate court lacked subject-matter jurisdiction over interpleader action concerning proceeds of wrongful death case, because the interpleaded funds are not part of the decedent's estate and (2) although a probate court has subject-matter jurisdiction over a petition to vacate its discharge of an administrator ad litem, in this case the only basis for doing so was to attempt to correct the alleged improper distribution of

the wrongful-death-settlement proceeds—a matter over which the probate court lacked jurisdiction, and the probate court's appointment of the county administrator and its "reopening" of the decedent's estate—when no letters of administration have been issued—were also based on its attempt to oversee the distribution of the wrongful-death-settlement proceeds, which the probate court has no authority to do. The lead opinion commanded a majority as to issue (1) but a plurality as to issue (2).

Pretrial Extrajudicial Statements; Attorney Regulation

***Ex parte Wright*, No. 1130537 (Ala. Oct. 17, 2014)**

The supreme court directed vacatur of certain protective orders prohibiting plaintiff's counsel from any extrajudicial statements concerning the pending litigation and directing plaintiff's counsel to remove from their website and social media all characterizations and descriptions of the case. The supreme court reasoned that the trial court's protective order constituted an impermissible prior restraint and was not narrowly tailored to reach only those extrajudicial statements which could materially prejudice the proceedings.

Medical Liability; Causation

***Kraselsky v. Calderwood*, No. 1130902 (Ala. Oct. 17, 2014)**

In medical liability wrongful death case, summary judgment for defendants affirmed for want of substantial evidence that administration of Demerol proximately caused death

Redemption of Real Property

***Givianpour v. Curtain*, No. 1130098 (Ala. Oct. 24, 2014)**

The supreme court reversed the trial court's dismissal of a redemptioner's complaint for redemption. The supreme court reversed, holding: (1) the rent charge on redemptionee's statement for redemption constituted an unlawful charge, (2) such an unlawful charge, over which there is a bona fide disagreement, constitutes a valid excuse for failure to tender the redemption amount or to pay it into court and (3) payment of the amount not in dispute is not required to invoke the jurisdiction of the circuit court to settle the disputed amount.

Real Party in Interest; Timeliness of Substitution; Judicial Estoppel

***Ex parte Jackson Hospital & Clinic, Inc.*, No. 1130342 (Ala. Nov. 7, 2014)**

The timeliness of substitution of a bankruptcy trustee for plaintiff (due to filing of bankruptcy) was a matter within the trial court's discretion. The court affirmed summary judgment for defendant as to claims over amount owed to creditors based

on judicial estoppel; plaintiff admitted in pleadings that she knew of her cause of action well before the bankruptcy filing.

Arbitration

Regions Bank v. Neighbors, No. 1130219 (Ala. Nov. 14, 2014)

Arbitration agreement unmistakably reserved scope and arbitrability questions to the arbitrator, and, thus, denial of arbitration was improper.

From the Alabama Court Of Civil Appeals

Discovery

Barney v. Bell, No. 2121048 (Ala. Civ. App. Oct. 10, 2014)

On rehearing, the court held: (1) trial court's denial of motion to strike deposition testimony was not error, where motion to strike was premised upon contradiction with admissions made for lack of timely response to requests for admissions under Rule 36; trial court has discretion to excuse matters deemed admitted for lack of timely response; (2) lawyers did not retain excessive fee on third-party recovery, where contract called for 50 percent of recovery as fees, because carrier agreed to pay its proportionate share of fees on any subrogated recovery; but (3) genuine issue of fact precluded summary judgment for attorneys on claim under the Legal Services Liability Act that lawyers took excessive fee by failing to refund to client the workers' comp fees. On this latter point, the court held "that a claim against an attorney for allegedly retaining excessive fees arises under the ALSLA."

Statute of Limitations: "Continuous" vs. "Permanent" Trespass

Webb v. Knology, Inc., No. 2130172 (Ala. Oct. 10, 2014)

Placement of cables underneath property constituted a permanent trespass, not a continuous trespass, and, therefore, the statute of limitations began running from the initial trespass date.

Collection of Judgments

J&C Truck Driving School, Inc. v. Ingram, No. 2130252 (Ala. Civ. App. Oct. 24, 2014)

Judgment creditor who files a contest of a judgment debtor's claim of exemption is entitled to a hearing on the issue, under *Ala. R. Civ. P.* 64B.

Appellate Procedure; Alafile

ADOR v. Frederick, No. 2130711 (Ala. Civ. App. Oct. 24, 2014)

Notice of appeal filed solely through the AlaFile system is not a proper notice of appeal.

Rights of First Refusal; Allocation

P&N Kissimmee I, LLC v. Regions Bank, No. 2130405 (Ala. Civ. App. Nov. 7, 2014)

When a third party offers to purchase property burdened with a right of first refusal as part of a larger transaction involving other, unburdened property, the third party may allocate a bona fide price to the burdened property that establishes the amount that must be offered to the holder of the right of first refusal. The CCA held there was a genuine issue of fact with regard to the true purchase price of the loan and, thus, whether Regions misrepresented or suppressed that price and breached the right-of-first-refusal provision.

Workers' Compensation; Situs of Employment (two cases)

1. Ex parte Dalton Logistics, No. 2130892 (Ala. Civ. App. Nov. 7, 2014)

The Act did not afford a remedy to an employee injured on a worksite in North Dakota.

2. Ex parte Lost River Oilfield Services, LLC, No. 2131069 (Ala. Civ. App. Nov. 14, 2014)

Because injury occurred in Texas, where the employee's work was principally centered, Alabama law would not apply unless the employee could allege and prove that Texas law was inapplicable to the claim (which the employee did not allege).

From the United States Supreme Court

Qualified Immunity

Carroll v. Carman, No. 14-212 (U.S. Nov. 10, 2014)

In a *per curiam* opinion, the Court summarily reversed the Third Circuit's grant of qualified immunity to officers sued for an allegedly illegal search of a residence, where the officers claimed that they did not need a warrant due to the "knock-and-talk" exception.

Pleading Standards

Johnson v. City of Shelby, No. 13-1318 (U.S. Nov. 10, 2014)

The Court summarily reversed the dismissal of a complaint for its failure to cite 42 U.S.C. § 1983 therein. The Court

reasoned that the complaint satisfied the short and plain statement requirement, and that the *Twombly* and *Iqbal* standards did not require specific invocation of statutes, but rather addressed the sufficiency of factual allegations.

From the Eleventh Circuit Court of Appeals

Public Pensions

***Taylor v. City of Gadsden*, No. No. 13-13885 (11th Cir. Sept. 16, 2014)**

Constitutional “contracts clauses” impair the power of the state legislature and Congress, and do not speak to municipalities, which are bodies politic and corporate.

Civil RICO

***Ray v. Spirit Airlines, Inc.*, No. 13-15681 (11th Cir. Sept. 23, 2014)**

Airline Deregulation Act did not preempt civil RICO claims arising from alleged misrepresentations of airfares and user fees.

Injunctions; Right of Appeal

***Mamma Mia’s Trattoria, Inc. v. Bersin Bagel Group LLC*, No. 13-12798 (11th Cir. Sept. 30, 2014)**

Order clarifying an existing injunction does not modify or grant an injunction, and, thus, is not an appealable interlocutory decision.

Arbitration; Failure of Selected Arbitrator And “Integral Provision” Doctrine

***Inetianbor v. CashCall, Inc.*, No. 13-13822 (11th Cir. Sept. 30, 2014)**

The Court affirmed the district court’s refusal to compel arbitration under a contract which selected the Cheyenne River Sioux Tribal Nation as the arbitrator, where the nation advised that it would not involve itself in the arbitral process. Following its prior decision in *Brown v. ITT Consumer Fin.*

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Corp., 211 F.3d 1217, 1222 (11th Cir. 2000), which the Seventh Circuit has rejected as inconsonant with section 5 of the FAA, the Court reasoned that the selection of the tribe was “integral” to the arbitration agreement itself.

TCPA; Hobbs Act

Mais v. Gulf Coast Collection Bureau, No. (11th Cir. Sept. 29, 2014)

The district court granted partial summary judgment to TCPA plaintiff, holding that a 2008 FCC ruling interpreting the “prior express consent” exception conflicted with the statute. The Eleventh Circuit reversed, holding that the Hobbs Act, 28 U.S.C. § 2342, deprives federal district courts of jurisdiction to invalidate FCC orders by giving exclusive power of review to the courts of appeals.

RESPA

Bates v. JP Morgan Chase Bank, N.A., No. 13-15340 (11th Cir. Sept. 30, 2014)

Held: (1) although HUD regulations are enforceable terms of the contract, the breach of which might give rise to a breach-of-contract claim, that claim was not cognizable in this case for lack of damages and (2) creditor’s answer to QWR was adequate under RESPA because it provided the borrower with a written explanation of the reasons for which the servicer believes the account of the borrower is correct.

Associational Standing; Discrimination; Standing for Injunctive Relief

McCollum v. Orlando Regional Medical Center, No. 13-12118 (11th Cir. Oct. 3, 2014)

The threshold for associational standing under both the Rehabilitation Act and the ADA is the same: non-disabled persons have standing to seek relief under either statute only if they allege that they were personally excluded, personally denied benefits or personally discriminated against because of their association with a disabled person.

Mass Torts; Lone Pine Orders

Adenolfe v. United Technologies Corp., No. 12-16396 (11th Cir. Oct. 6, 2014)

In a mass tort case, while a motion to dismiss the case was pending, the district court entered a *Lone Pine* order requiring plaintiff to come forward with factual evidence and expert evidence supporting the claims. The district court eventually granted the motions to dismiss. The Eleventh Circuit reversed, reasoning that the entry of a *Lone Pine* order cannot impose pseudo-summary judgment requirements.

Eleventh Amendment

Lane v. Central Ala. Comm. College, No. 12-16192 (11th Cir. Oct. 8, 2014)

Public employee’s complaint seeking reinstatement of his position constitutes prospective injunctive relief that falls within the scope of the *Ex parte Young* exception to Eleventh Amendment immunity.

Preemption; HIPAA

Murphy v. Dulay, No. 13-14637 (11th Cir. Oct. 10, 2014)

Florida statute requiring pre-suit actions by an individual plaintiff before he may bring a medical liability action was not preempted by the Health Insurance Portability and Accountability Act (“HIPAA”) and its accompanying regulations, 45 C.F.R. §§ 164.508, 164.512.

Causation; Rule 403

Aycock v. R.J. Reynolds Tobacco Co., No. 13-14060 (11th Cir. Oct. 16, 2014)

The district court improperly excluded defendant’s evidence of decedent’s alcohol abuse as potential alternative cause of death; such evidence was highly probative, and so the district court erred in excluding the evidence also under Rule 403, because the danger of unfair prejudice was not as high as the extreme probative value.

Arbitration; “First Options” Arbitrability And AAA Rules

U.S. Neutraceuticals LLC v. Cyanotech Corp., No. 13-12863 (11th Cir. Oct. 30, 2014)

Parties’ invocation of AAA rules (which reserves issues of arbitrability to the arbitrator) in their agreement constituted clear and unmistakable evidence that parties intended arbitrator to decide questions of arbitrability.

TCPA; Chevron Deference

Palm Beach Golf Center-Boca, Inc. v. John G. Sarris DDS, P.A., No. 13-14013 (11th Cir. Oct. 30, 2014)

FCC memorandum opinion and order construing the meaning of “sender” in the TCPA was entitled to *Chevron* deference, even though the interpretation was not in a formal rulemaking proceeding. Under the FCC’s interpretation, defendant was a “sender” of the fax even though a third-party marketer actually sent the fax, because fax was sent on behalf of defendant.

Eleventh Amendment; County School Boards

Walker v. Jefferson County Board of Educ., No. 13-14182 (11th Cir. Nov. 4, 2014)

The Court reaffirmed *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1511 (11th Cir. 1990), which held that school boards in Alabama are not arms of the state and, therefore, not entitled to Eleventh Amendment immunity.

FLSA; Pleading

Calderon v. Baker Concrete Constr. Inc., No. 14-10090 (11th Cir. Nov. 14, 2014)

A “statement of claim” required by local rules supplementing the complaint is not a pleading and cannot be used to oust the plaintiffs from court based on lack of jurisdiction, when the face of the complaint alleged a claim invoking federal jurisdiction.

Eleventh Amendment (Georgia Law)

Lightfoot v. Henry County School Dist., No. 13-14631 (11th Cir. Nov. 10, 2014)

Georgia school district was not an “arm of the state” entitled to Eleventh Amendment immunity.

RECENT CRIMINAL DECISIONS

From the Alabama Supreme Court

Double Jeopardy

State v. Kelley, No. 1130271 (Ala. Sept. 26, 2014)

Prior conviction for hindering prosecution under *Ala. Code* § 13A-10-43 did not preclude subsequent prosecution for capital murder arising from the same circumstances.

Brady

State v. Ellis, No. 1121390 (Ala. Sept. 30, 2014)

State violated *Brady* and the trial court’s discovery order by failing to produce interviews and statements regarding the victim.

From the Court of Criminal Appeals

Electronic Solicitation

Rosier v. State, CR-13-0736 (Ala. Crim. App. Oct. 3, 2014)

In a matter of first impression, the court held that the defendant’s attempt to contact children by contacting a person whom he believed to be their mother constituted electronic solicitation of a child in violation of *Ala. Code* § 13A-6-122.

Evidence

Brown v. State, CR-13-0083 (Ala. Crim. App. Oct. 3, 2014)

Recording of defendant’s telephone call made from jail was properly authenticated by the testimony of officers who were able to identify the defendant’s voice. One officer could identify the defendant’s voice because he had taken an oral statement from him, while another officer testified that the same voice was recorded on all calls using the defendant’s PIN.

Split Sentence Act

Holley v. State, CR-12-2023 (Ala. Crim. App. Oct. 3, 2014)

Defendant’s sentence under the Split Sentence Act was illegal because, having been convicted of first-degree sexual abuse of a child under the age of 12, he was ineligible under the statute’s 2005 amendment prohibiting probation for any sexual offense involving a child.

Split Sentence Act

Taylor v. State, CR-13-1090 (Ala. Crim. App. Oct. 3, 2014)

Split Sentence Act is inapplicable to sentences greater than 15 years’ imprisonment; thus, the trial court’s application of the act to the defendant’s sentence of 18 years’ imprisonment constituted an illegal sentence.

Probation Revocation; Hearsay

English v. State, CR-13-1264 (Ala. Crim. App. Oct. 3, 2014)

The court reversed the defendant’s probation revocation because the state failed to produce non-hearsay evidence to corroborate the testimony of a police officer, thus leaving only hearsay evidence as the basis for revocation.

IFP; Rule 32

Ex parte Brown, CR-13-0105 (Ala. Crim. App. Sept. 19, 2014)

In reviewing a Rule 32 petitioner’s request to proceed *in forma pauperis*, the trial court did not err in considering the deposits made into his inmate account for the 12 months preceding the filing of the request. | [AL](#)



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YLS Update

As the 2014-15 president of the Alabama State Bar Young Lawyers' Section, I'm taking this opportunity to re-acquaint you with the YLS and announce a number of exciting changes to our section! The YLS consists of all Alabama lawyers who, as of July 1, 2014, were 36 years old or younger or had been licensed to practice in Alabama for three years or less. The YLS offers its members a number of privileges, providing great networking opportunities, hosting low-cost CLE's specifically relevant to young lawyers and coordinating numerous events by which members have the chance to serve both their communities and the Alabama State Bar.

Last year, **W. Christopher Waller, Jr.** from Montgomery did an amazing job as president, and our section would not be in the great state it's in today without his leadership. His shoes will be impossible to fill! Fortunately, the YLS has been blessed with an incredible, forward-thinking Executive Committee whose tireless work has yielded significant results over the remainder of the year.

This year's officers are:

S. Hughston Nichols, vice president (Birmingham)

Charles E. Tait, secretary (Mobile)

J. Parker Miller, treasurer (Montgomery)

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The most significant change that the YLS will be making this year is that our annual spring CLE, traditionally held at the Sandestin Golf & Beach Resort, is coming home to Alabama in 2015! The appropriately renamed **Orange Beach Seminar** will be held at the **Perdido Beach Resort May 14-16**. If you've never been to the YLS CLE, it is a fantastic chance to reunite with law school friends, network with lawyers of different practice areas and locations, interact with judges from around

the state, experience a meaningful CLE targeted at young lawyers and have a great time at the beach! Hotel rooms are filling up fast for that weekend, so go ahead and get registered today. Additional information about the CLE can be found on the YLS page at www.alabar.org and at www.facebook.com/ASByounglawyers.

In addition to hosting the Orange Beach Seminar, the YLS will also conduct a number of events this spring, all providing YLS members with opportunities to get involved. Our award-winning **Minority Pre-Law conferences** will take place in Montgomery, Birmingham, Huntsville and, for the first time ever, Mobile. Additionally, we will conduct the spring **Bar Admission Ceremony** and provide disaster relief assistance, if necessary, through our **FEMA Assistance Program**.

I am also excited to announce a new division of our section, the **YLS Student Division!** Students at Alabama law schools now have the opportunity to join our section to become more

connected with the state bar, network and be mentored by young lawyers and explore new job opportunities.

Finally, recognizing that traditional methods of communication are simply no longer an effective way to connect with the millennial generation of young lawyers, the YLS now places a heavy emphasis on reaching out to its members through its social media platforms, so be sure to look for updates on YLS events on our Facebook, Twitter and Instagram accounts, all of which can be found via [@ASByounglawyers](https://www.facebook.com/ASByounglawyers). And, thanks to the state bar's leadership and assistance, our website has moved from alabamayls.org to the YLS section page at <https://www.alabar.org/membership/sections/young-lawyers>.

For more information on getting involved in the YLS or helping out with any of our upcoming events, contact any of our executive committee members or send an email to ASByounglawyers@gmail.com. | [AL](#)

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– Henry Ford.



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Gordon Freeborn Bailey, Jr.

**Lois Gwenett Hillestad
DaGian**

Thomas Reed Robinson

Gordon Freeborn Bailey, Jr.

Gordon Freeborn Bailey, Jr. (“Chips”), accomplished attorney, beloved family man and friend, passed away peacefully at his home in Atlanta on November 5 after a courageous yearlong battle with cancer. He was 70.

Mr. Bailey, son of Gordon Freeborn Bailey, Sr. and Carridelle Gordon Bailey, was born July 24, 1944 in Huntsville. He grew up in Mobile, and graduated from Murphy High School in 1962. In 1966, he graduated from Birmingham-Southern College where he was a member of Sigma Alpha Epsilon (social fraternity) and Omicron Delta Kappa (honorary) and editor of *Southern Accent* (college yearbook). In 1967, he married Elizabeth Anne Paulk, to whom he would remain happily married for the rest of his life (more than 47 years). He graduated from the University of Alabama School of Law in 1969, after which he served as a captain in the U.S. Army JAG Corps in Washington, DC, from 1969-1973. He then returned to Alabama to practice law in Anniston, where he and Anne raised their children and lived for 34 years before moving to Atlanta in 2007.

During his distinguished legal career, Mr. Bailey was recognized at the local, state and national levels for his work in family law. As an original member of the Alabama Child Support Enforcement Committee, he co-authored the Alabama Uniform Parentage Act of 1984. He was a past president of the Eastern Regional Interstate Child Support Association (ERICSA), served as president of the ERICSA in 1986 and served on its board, including as an honorary life member for close to 25 years. He served as chair of the Family Law Section of the Alabama State Bar and of the Supreme Court’s Advisory Committee on Child Support Guidelines and Enforcement.

In 2002, the Alabama Child Support Association established the Gordon F. Bailey, Jr. “Attorney of the Year Award” honoring him for his more than 25 years of service. In 2006, he was named Lawyer of the Year by the Family Law Section of the Alabama State Bar. In 2008, he received the Gewin Award for his ongoing commitment to continuing legal education.

Mr. Bailey loved life and was known for his trademark positive disposition and outlook. He loved being around people and making them smile and laugh. He enjoyed life’s simple pleasures and was a great storyteller. He loved convertibles, jukeboxes, bowties, swimming pools, boats and the beach. His favorite movie was “Seems Like Old Times.” He loved music, especially rock-and-roll beginning with the “golden oldies” of the 1950s and 1960s. He played trumpet, piano and guitar and joined his first band while in high school. Throughout his life, he loved to play his guitar and sing for others, especially his children and grandchildren. On Christmas mornings, he woke up his kids by playing “Reveille” on his trumpet. He loved sports. He played tennis



with his own unique style and was known around Anniston for his wicked slice forehead. He loved basketball and especially enjoyed “March Madness” tournament games of which he attended many with his family. He loved football and was a dedicated, lifelong fan of the Alabama Crimson Tide. (His conversations from August to January were primarily about Crimson Tide football.) Most of all, he loved his family and was a wonderful husband, father and grandfather.

Mr. Bailey is survived by family members who will miss him dearly, including his beloved wife, Anne Paulk Bailey; children Gordon Freeborn Bailey, III (Lynn), Edward Clark Bailey (Gaby) and Allison Bailey Clarke (Caleb); grandchildren Cecilia, Fiona, Palmer, Virginia Cate, Paige, Alex, Dutch, Mia and Bettie; and sister Martha Bailey Hightower (Tommy). Donations may be made to the Peachtree Road United Methodist Church in Atlanta or Gordon F. Bailey Law Fund, University of Alabama School of Law, Attn: Candice Robbins, Box 870382, Tuscaloosa 35487. “Great man, loved people, lived life!”

—Published in The Atlanta Journal-Constitution on
Nov. 9, 2014

Lois Gwenett Hillestad DaGian

Lines from the American poet Emily Dickinson perfectly describe the life Gwen DaGian chose to live both before and after her diagnosis with terminal cancer: “Because I could not stop for Death, He Kindly stopped for me.”¹ Gwen’s life was centered on her daily commitment to family, to friends and to the people she served, both as a registered nurse and as a practicing attorney. When confronted with her medical diagnosis, rather than cherish fleeting time for her own “bucket list,” Gwen courageously maintained her professional service as the RN Consultant to Henry County, Alabama’s Health Care Authority, including a nursing home and two assisted-living facilities, as well as her representation of indigent and juvenile clients. Until the last few weeks of her life, she continued to be an indomitable champion for those individuals who had no voice of their own—the elderly, the abused, the child. Rather than accept a prognosis with her cancer of less than six months to live, Gwen pushed on for almost four years before the ravaging cancer finally summoned Death to stop for her on May 21, 2014.



Gwen was born May 30, 1955 in Baker Hill, Alabama. A graduate of the University of South Dakota School of Law, Gwen practiced law in Abbeville with her husband, Gregory A. DaGian. A “steel magnolia” from Alabama and a “ragin’ cajun” from Louisiana made an interesting and formidable law firm here in Abbeville. With her first career as a registered nurse, Gwen brought the attributes of the nursing professional into her second career as an attorney. Gwen’s legal representation of clients epitomized the highest of ethical standards, the compassion of a humanitarian counselor and an unparalleled commitment to justice. She lived and practiced the ideals of our justice system; regardless of the client or the case, she never compromised her professional standards for legal expediency, financial gain or public opinion. With a keen intelligence, a dogged pursuit of justice and a sweet tenderness in handling abused and neglected juvenile victims, Gwen was a fierce client advocate, both in and out of the courtroom.

While practicing law, Gwen also continued her work as a registered nurse by serving as the RN Consultant to the Henry County Health Care Authority and through her teaching professional education seminars sponsored by the Alabama Board of Nursing. In recognition and appreciation of her dedication to nursing home and assisted living residents, the Henry County Health Care Authority’s Board of Directors established and named an annual scholarship fund in her honor—the *Gwenett Hillestad DaGian Excellence in Nursing Scholarship*.

Gwen’s clients remember her as their “courtroom hero and life coach.” She was a fierce advocate for their legal rights and an equal counselor for their practical needs. Gwen’s nursing home families remember her as their “compassionate angel” who, though employed as a consultant, not a floor nurse, sat by the bed of their loved ones ministering to both body and spirit during medical crises and fleeting life moments. Gwen’s fellow attorneys remember her as one whose word and advice were more valuable than currency—one whose sense of truth and justice was admired and emulated. Gwen’s friends remember her humor, her warmth, her compassion during their times of trouble, her selfless giving even while in the midst of her own pain. Gwen often read and spoke of heroes who lived to serve others, such as Mother Teresa of Calcutta. She never thought of herself in such terms. The lives Gwen touched are innumerable; she was a hero in the truest sense of the word to so many who knew her and were fortunate enough to fall within the circle of her life.

Gwen is survived by her husband, Gregory A. DaGian; her brother, Hilburn Otto Hillestad and family, Marietta; her brother, Danny Ryon Hillestad (Debbie) and family, Auburn; and loving relatives and friends, too many to number and name.

Those of us who practice law in Henry County desperately miss Gwen, both as an irreplaceable member of our bar and as a cherished friend. She inspired us, she challenged us, she loved us, she touched our lives and we are all better attorneys and people for having known her.

—Gunter & Danzey PC

Endnote

1. "Because I Could Not Stop for Death," *Poems: Series 1*, Emily Dickinson (1890, published posthumously).

Thomas Reed Robinson

A consummate gentleman, reserved, self-effacing and kind, Thomas Reed Robinson served his family, his country, his community and the Huntsville-Madison County Bar with compassion, commitment and integrity. Tom died September 4 at age 67 with the same grace and dignity with which he lived his life. He faced each day of his battle with cancer with great strength of character and good humor, devoid of bitterness, resentment or fear.



Tom was a native of Huntsville where he was born June 7, 1947. He graduated from the University of Alabama and then its law school, where he received his J.D. degree in 1971. After serving four years on active duty as a Judge Advocate with the United States Air Force, he earned his LL.M. at New York University School of Law in 1976. He remained in the Air National Guard following active duty where he rose to the rank of colonel during his 25 years' service.

Upon graduation from NYU, Tom returned to Huntsville where he joined the firm of Lanier Shaver & Herring. He became a highly respected member of the Madison County legal community and was elected to serve as president of Lanier Ford Shaver & Payne PC, where he continued his active and successful practice until his retirement in 2012.

Tom is survived by his wife of 43 years, Anne Kerrigan Robinson; daughter Margaret Robinson Lichty (Peter); son

Thomas Reed Robinson, Jr. (Elizabeth); grandchildren Anne Lichty, Charles Lichty and Rosemary Robinson; his twin brother, Charles Grigg ("Gig") Robinson (Ellen); his sister, Nancy Gordon Robinson and many nieces and nephews.

Tom's brother, children and grandchildren knew him as a loving, quiet and gentle man. His widely-known reputation for being quite frugal (to say the least) was well-earned with respect to the luxuries (some would say, necessities) he denied himself. Tom's frugality stopped there, though. He was always supportive, giving and generous in assuring that nothing of value or importance was denied to his family.

Tom's wise counsel was regularly sought out by his partners, who always benefitted from his advice and example. His long-time partner, J. R. Brooks, remembers, "I always liked to discuss my cases with Tom—my jury argument and the legal positions I planned to take—because he was truly the embodiment of the 'reasonable man.' For the law, that designation is an ideal, the model by which conduct should be measured and judged. For Tom, it was just the way he lived his life." Another partner, Woody Sanderson, recalls, "Tom stepped in and tried my first case with me when it became apparent that I was in over my head with a difficult case. Things didn't always go well in that case, but you could not have known that from Tom's demeanor. He was calm and unruffled throughout. Tom was never employed as a teacher. But the life lessons he taught every day—patience, humility, kindness, honesty—shaped and influenced the lives of everyone he knew."

Away from the office, Tom tirelessly gave of his time to a number of civic, cultural and charitable organizations, including the Harris Home for Children, New Futures, Inc., the Historical Preservation Foundation and the Huntsville Museum of Art. He quietly assumed leadership roles with every organization he served and guided each toward fulfillment of its mission. Tom was never interested in the attention earned from his good service and was always quick to credit others for successes for which he was most instrumental.

As much as the term "servant leader" may be overused and misapplied, it perfectly describes the life lead by Tom Robinson. He left a great legacy for his many devoted friends and the family he loved so dearly. All who knew him mourn the loss of this most reasonable man.

—Lanier Ford Shaver & Payne PC

Alexander, Howard Cobb

Montgomery
Admitted: 1951
Died: October 13, 2014

Blackwood, Ronnie Hugh

Pinson
Admitted: 1991
Died: September 9, 2014

Breland, Hon. Edwin DeWitt, Sr.

Decatur
Admitted: 1952
Died: July 31, 2014

Bruckel, William Joseph, Jr.

Severna Park, MD
Admitted: 1990
Died: July 17, 2014

Burns, Gary Franklin

Gadsden
Admitted: 1958
Died: August 14, 2014

Burton, Hilary Coleman

Huntsville
Admitted: 1954
Died: October 2, 2014

Carnes, T.J.

Albertville
Admitted: 1954
Died: October 2, 2014

Conrad, David Stephen

Mobile
Admitted: 1966
Died: September 3, 2014

Daniel, Joseph C.

Florence
Admitted: 1988
Died: September 22, 2014

Gentry, Whitney Leigh Norris

Vestavia
Admitted: 2008
Died: February 15, 2014

Hall, Theresa Daniel

Union Springs
Admitted: 2004
Died: August 13, 2014

Harvey, William Byron

Theodore
Admitted: 1971
Died: July 31, 2014

Huckaby, James Cicero, Jr.

Santa Rosa Beach
Admitted: 1986
Died: September 24, 2014

Ingram, Hon. Kenneth Frank

Ashland
Admitted: 1963
Died: October 24, 2014

Leonard, Tiffany Lane Threlkeld

Birmingham
Admitted: 2007
Died: September 28, 2014

Letford, William Donald

Montgomery
Admitted: 2000
Died: October 10, 2014

Masterson, Sean Dale

Moulton
Admitted: 1994
Died: September 27, 2014

Mbanugo, Obinna Kenneth

Birmingham
Admitted: 2006
Died: September 30, 2014

McMaken, Hon. Michael Edward

Mobile
Admitted: 1976
Died: September 7, 2014

Moore, Louis Poe

Fayette
Admitted: 1951
Died: September 1, 2014

Morrow, Conley Vann

Montgomery
Admitted: 2012
Died: July 29, 2014

North, James Little

Birmingham
Admitted: 1965
Died: September 7, 2014

Palmer, Lucinda Elizabeth

Millbrook
Admitted: 2002
Died: October 23, 2014

Pearson, Hon. J. Richmond

Birmingham
Admitted: 1958
Died: October 22, 2014

Perry, Jasper Dane

Florence
Admitted: 2003
Died: September 18, 2014

Screws, Euel Augustus, Jr.

Montgomery
Admitted: 1958
Died: November 1, 2014

Steele, Patta Ann

Eutaw
Admitted: 1982
Died: September 14, 2014

Thompson, William

Lincoln
Admitted: 1970
Died: September 28, 2014

Waits, Myron Bruce, Jr.

Auburn
Admitted: 1966
Died: June 28, 2014

Younger, Hon. Thomas Newman

Huntsville
Admitted: 1957
Died: September 10, 2014

Reinstatement

Transfer to Disability Inactive Status

Disbarments

Suspensions

Public Reprimands

Reinstatement

- The supreme court entered an order based upon the decision of Disciplinary Board, Panel III, reinstating **Trenton Rogers Garmon** to the practice of law in Alabama, effective October 29, 2014. Garmon's reinstatement is probationary for 18 months. Conditions of probation are that: (1) Garmon must submit and have approved by the Office of General Counsel a practice plan that shall include a mentor; (2) Garmon must submit quarterly reports concerning his law practice which must be approved by his mentor and (3) Garmon shall commit no further violations of the *Alabama Rules of Professional Conduct*. [Rule 28, Pet. No. 14-1146]

Transfer to Disability Inactive Status

- Florence attorney **Lance Ryan Thomason** was transferred to disability inactive status by order of the Supreme Court of Alabama, effective August 15, 2014. The supreme court entered its order based upon the August 15, 2014 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to a letter submitted by Thomason to the Office of General Counsel requesting to be transferred to disability inactive status. [Rule 27, Pet. No. 2014-1278]

Disbarments

- Daphne attorney **John William Parker** was disbarred from the practice of law in Alabama, effective January 1, 2013, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Parker's consent to disbarment, in which he acknowledged that there were pending investigations into his ethical conduct as a lawyer involving allegations of multiple violations of the *Alabama Rules of Professional Conduct* which, if proven, would be grounds for disbarment. Parker acknowledged engaging in conduct which violated the *Alabama Rules of Professional Conduct*. [Rule 23, Pet. No. 14-1231; ASB nos. 12-726, 12-1458, 12-1480 and 12-2052]

- On September 18, 2014, **Lance William Parr**, an Alabama attorney who is also licensed to practice law in Tennessee, received identical and reciprocal discipline in the form of disbarment, pursuant to Rule 25(a), *Ala. R. Disc. P.* On or about November 14, 2013, the Supreme Court of Tennessee entered an order of enforcement, disbarring Parr from the practice of law in Tennessee for violating Rules 1.1, 1.3, 1.4, 1.15, 3.2, 3.4 and 8.4(a) and (d). According to a press release issued by the court, Parr neglected his cases, failed to communicate with clients and opposing counsel, demonstrated incompetence and abandoned his law practice. [Rule 25(a), Pet. No. 2014-154]

years. The order of the Disciplinary Commission was based upon May's conditional guilty plea to violating Rules 1.15(a) and (e), *Ala. R. Prof. C.* In ASB No. 2013-2105, May admitted that he failed to employ proper trust accounting procedures and failed to keep accurate trust account records as required by Rules 1.15(a) and (e), *Ala. R. Prof. C.* [ASB No. 2013-2105]

- Tuscaloosa attorney **Steven Wesley Money** was suspended from the practice of law in Alabama for 45 days, by order of the Supreme Court of Alabama, effective October 27, 2014. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Money's conditional guilty plea, in which Money pled guilty to violating Rules 1.15(a), (e) and (f), *Ala. R. Prof. C.* Money was appointed to represent a client on criminal charges of trafficking marijuana, and subsequently requested a mental health evaluation for the client. The mental health assessment was unfavorable for the client; therefore, Money suggested that the client obtain an independent evaluation. Money received approximately \$1,200 from the client and her mother to prepare for obtaining an evaluation. According to bank records, Money received \$700 from the client; however, the client stated that her mother also gave Money approximately \$500 in cash at the same time. Prior to the independent evaluation, the client entered into a plea agreement with the prosecutor, and requested a refund of the monies that had been paid to Money. In his written response to the bar, Money admitted that the funds were not deposited into his trust account. Money also admitted that he had been depositing client funds and unearned fees into his operating account, and

Suspensions

- Jonesville, Louisiana attorney **Zane Nasif Brown**, formerly of Birmingham, was suspended from the practice of law in Alabama, effective September 3, 2014, for noncompliance with the 2013 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 14-607]
- Birmingham attorney **Irene Michelle Graves** was suspended from the practice of law in Alabama, effective September 3, 2014, for noncompliance with the 2013 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 14-611]
- Hamilton attorney **Robert Scott Hunt** was suspended from the practice of law in Alabama for 91 days by order of the Disciplinary Commission of the Alabama State Bar, effective September 22, 2014. The suspension was ordered held in abeyance and Hunt was placed on probation for two years. The order of the Disciplinary Commission was based upon Hunt's conditional guilty plea to violating Rules 1.15(a) and (e), *Ala. R. Prof. C.* In ASB No. 2013-1782, Hunt admitted that he failed to employ proper trust accounting procedures and failed to keep accurate trust account records as required by Rules 1.15(a) and (e), *Ala. R. Prof. C.* [ASB No. 2013-1782]
- Birmingham attorney **Edward Eugene May** was suspended from the practice of law Alabama for 91 days by order of the Disciplinary Commission of the Alabama State Bar, effective August 13, 2014. The suspension was ordered held in abeyance and May was placed on probation for two

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had used the operating account for both business and personal transactions. [ASB No. 2013-723]

- Alabaster attorney **Laurie Boston Sharp** was suspended from the practice of law in Alabama for 91 days by the Supreme Court of Alabama, effective October 1, 2014. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Sharp's conditional guilty plea, wherein Sharp pleaded guilty to violating Rules 1.3, 1.4(a), 1.4(b), 3.2, 8.4(a), 8.4(c) and 8.4(g), *Ala. R. Prof. C.* Sharp admitted she failed to adequately communicate with her client after she filed his civil case. Sharp failed to schedule any depositions. After an order was entered granting summary judgment as to count 2 of the complaint and Sharp was allowed 30 days to file an alias summons and complaint, as well as perfect service on the defendant, she failed to do so. Sharp also failed to notify her client that the court entered another order granting summary judgment in favor of the defendant and against the plaintiff as to all remaining counts. Sharp also admitted she failed to respond to the bar complaint until August 12, 2013, even after receiving several extensions. [Rule 20(a), Pet. No. 2013-1402; ASB No. 2013-342]
- Birmingham attorney **Sheena Faye Whitaker** was suspended from the practice of law in Alabama, effective September 3, 2014, for noncompliance with the 2013 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 14-619]

agreed to file suit for \$1,500, which was paid in October 2012. In January 2013, Abbott informed the complainant that a court date was set for February 2013.

Subsequently, the complainant learned that the lawsuit had not been filed and the court date did not exist. [ASB No. 2013-709]

- On October 31, 2014, Dothan attorney **Mark Hampton Baxley** received a public reprimand with general publication for multiple violations of Rules 1.7(a) and (b), 4.1(b) and 4.3(a), *Ala. R. Prof. C.* In 2006, Baxley was hired to represent a client in the formation of two real estate investment corporations. In 2008 and 2009, Baxley was hired to perform numerous title searches for his client on parcels of land, owned by various property owners. Baxley was then asked to prepare deeds, transferring the property from the property owners to the client, in exchange for a loan which was secured by the property. Baxley prepared and notarized the deeds on behalf of the parties, and notarized notes prepared by his client memorializing the initial loan amount and repayment terms. The repayment term of the loans stated that at the time the notes were paid in full, the deeds would be delivered back to the property owners. However, Baxley subsequently recorded the deeds on behalf of his client. On several occasions, once the deeds had been recorded, Baxley's client applied for loans to be secured by the various properties, and Baxley was hired by lending companies to conduct a title search and render a title commitment. When rendering the title opinions to the lending companies, Baxley failed to disclose that the "Borrower" was a current client, failed to disclose the client's agreement with the property owners and failed to disclose the existence of the notes on the properties. During the investigation of the matter by the Alabama State Bar, Baxley stated that he had not read the notes prior to notarizing them, and was therefore unaware of their contents. [ASB No. 2012-1503]
- Fort Payne attorney **Sherry Ann Weldon Dobbins** received a public reprimand without general publication September 19, 2014, for violating Rules 8.4(a), 8.4(c) and (g), *Ala. R. Prof. C.* In or about May 2007, Dobbins notarized a signature on a warranty deed outside the presence of the signer and without verifying his signature. [ASB No. 2011-925]

Public Reprimands

- On October 31, 2014, Eufaula attorney **Lance Eric Abbott** received a public reprimand without general publication for violating Rules 1.3, 1.4(a) and (b), 1.16(d) and 8.4(a) and (g), *Ala. R. Prof. C.* In May 2012, Abbott was hired for \$350, plus filing fee, to pursue a temporary restraining order against an individual who was picketing the complainant's business and posting libelous accusations on social media websites. The complainant was unhappy with the limited scope of the court's order on the temporary restraining order and requested that Abbott file a defamation/libel lawsuit against the individual. Abbott

- Montgomery attorney **Adler Rothschild** received a public reprimand without general publication on September 19, 2014, for violating Rule 8.4(g), *Alabama Rules of Professional Conduct*. Rothschild met with a female client in his office concerning a divorce action. While she was in his office waiting for the petition to be drafted, Rothschild told her he needed her picture for his files. Rothschild then took two pictures of the complainant, asking her to pose with her shoulders back for the second one. As the client was leaving his office, Rothschild asked her whether or not she would like to make quick, easy money by posing nude and then gave her his business card, which was labeled "Photography by Nik," "Discreet, Sexy, Glamor, Nudes." [ASB No. 2012-1292]

- Birmingham attorney **Charlene Irvette Stovall** received a public reprimand without general publication on September 19, 2014, for violating Rules 8.4(d) and (g), *Ala. R. Prof. C.*, by decision of the Disciplinary Commission on February 12, 2014. On November 2, 2007, the Client Security Fund paid a claim to a complainant in the amount of \$1,646.80. In spite of multiple opportunities provided to her, Stovall failed to reimburse the Client Security Fund for payment made on this claim filed against her. Stovall was also ordered to re-pay the Client Security Fund \$1,646.80 within 60 days of the receipt of this reprimand. [ASB No. 2012-506] | [AL](#)

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Alabama Law Institute 2014: The Year in Review

The members of the Alabama State Bar are a generous, engaged and highly-skilled group. They have a tremendous dedication and commitment to improving the state in which they live and practice. It is that spirit that makes it such a joy to report on the work of the Alabama Law Institute each year.

In fiscal year 2014, more than 200 lawyers from every corner of Alabama donated 4,845 hours of time working on Law Institute drafting committees. This time does not include the time spent by the Law Institute Council and membership reviewing, commenting on and improving those drafts prior to submission to the Alabama Legislature for consideration.

The remarkable consistency of the dedication of the lawyers and legislators who help the Law Institute fulfill its mission is tremendous. The three pillars of the Law Institute—code revision, legislative service and education—continue to thrive thanks to the many lawyers, legislators and local officials who help make each year better than the last. It is with a spirit bolstered by the work of so many that humbles me as I have the great honor of reporting on the work of the Law Institute in 2014.

2014 Legislation

The Alabama Legislature passed four institute-prepared bills during the 2014 legislative session:

- **Revised Limited Liability Act of 2015 (Act 2014-144)**
Sponsored by **Representative Paul DeMarco** and **Senator Rodger Smitherman**
- **UCC Article 9 Amendments (Act 2014-374)**
Sponsored by **Senator Cam Ward** and **Representative Mike Jones**
- **Title 10A Merger and Conversion Amendments (Act 2014-293)**
Sponsored by **Senator Arthur Orr** and **Representative Bill Poole**
- **Uniform Partition of Heirs Property (Act 2014-299)**
Sponsored by **Senator Jerry Fielding** and **Representative Marcel Black**

Code Revision Projects

The institute continues its core mission to simplify and improve the laws of Alabama through a systematic process of considering, drafting and reviewing proposed legislation for presentment to the legislature. This work ensures that many critical areas of our law that would otherwise never be on anyone else's agenda get the attention and work that they need.

Amendments to the Condominium Act

The chairs of the committee are **John Plunk** and **Carol Stewart** and **Melinda Sellers** serves as reporter.

Alabama's Condominium Act was passed in 1990; since that time, issues have been raised needing clarification. These amendments will not be a complete revision of the current law, but only clarification of it.

Alabama Business and Nonprofit Entities Code

The chair of this committee is **Jim Wilson**.

This committee has already submitted two proposals to the Alabama Legislature that have been adopted to improve and clarify Title 10A and continues a systematic review of ways to improve this area of the law. In addition, this committee has undertaken a review of the latest revisions to the Model Business Corporation Act. Any suggestions for areas to cover or issues are welcome to be submitted for consideration.

Nonprofit Corporation Act

The chair of the committee is **L.B. Feld** with **Professor Jim Bryce** serving as reporter.

Alabama's Model Nonprofit Act was adopted in 1984 and followed the 1964 Model Nonprofit Act drafted by the American Bar Association. Since then, the Nonprofit Act has twice been revised by the ABA with the third edition adopted in August 2008.

Subsequent to the passage of the *Alabama Business and Nonprofit Entities Code* in 2009, the committee reviewed the Nonprofit Act in light of the need to make changes to incorporate the new Nonprofit Corporation Law into the *Alabama Business and Nonprofit Entities Code*. The committee is working to ensure that the changes in the Model Act recommended by the American Bar Association are compatible with Alabama's *new Alabama Business and Nonprofit Entities Code* effective 2011. All revised entities will become a part of the *Entities Code*.

Uniform Interstate Family Support Act

The chair of the committee is **Julia Roth** with **Penny Davis** serving as reporter.

The 2008 Uniform Interstate Family Support Act (UIFSA) amendments modify the current version of the UIFSA's international provisions to comport with the obligations of the United States under the 2000 Hague Convention on Maintenance.

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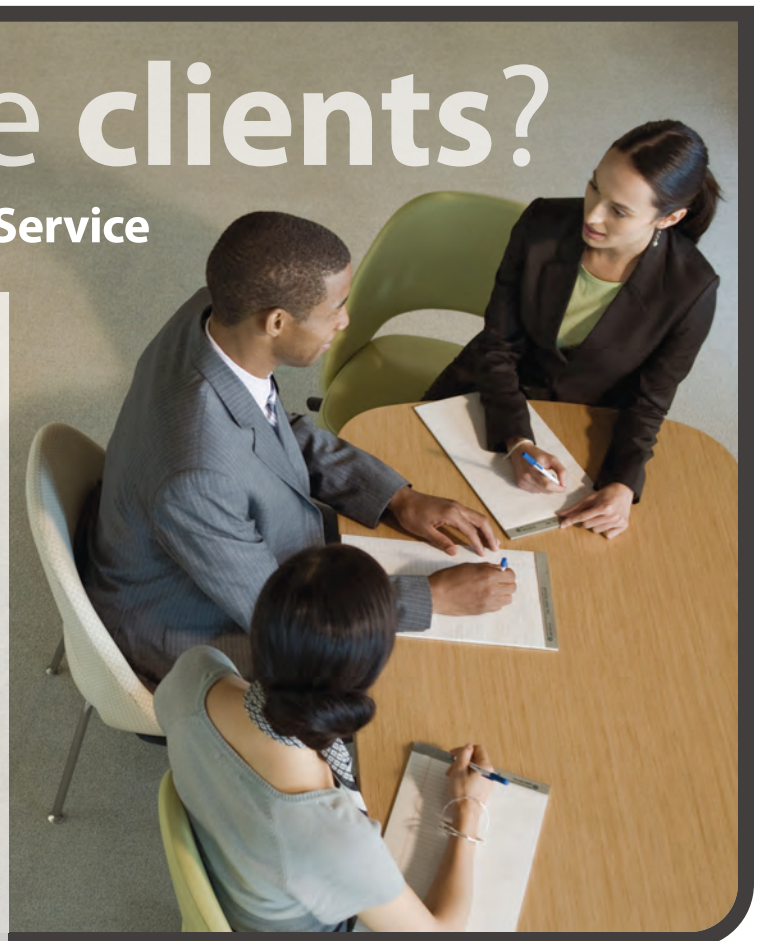
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The UIFSA provides uniform rules for the enforcement of family support orders by setting basic jurisdictional standards for state courts and by determining the basis for a state to exercise continuing exclusive jurisdiction over a child support proceeding. It establishes rules for determining which state issues the controlling order in the event of proceedings initiated in multiple jurisdictions. It further provides rules for modifying or refusing to modify another state's child support order.

In order for the United States to fully accede to the Hague Convention it is necessary to modify the UIFSA by incorporating provisions of the Convention that affect existing state law. Section 7 of the UIFSA provides for the guidelines and procedures for the registration recognition enforcement and modification of foreign support orders from countries that are parties to the Convention. Enactment of the amendment to the UIFSA will improve the enforcement of American child support orders abroad and will assist many children residing in the United States in their efforts to receive the financial support due from parents, wherever the parents reside.

Legislation before Congress to ratify the Convention provides that the new amendments of the UIFSA must be enacted in

every jurisdiction within two years after the enactment of federal implementing legislation as a condition for continued receipt of federal funds for state child support programs. If that legislation is enacted as presented, the failure to enact this amendment by that date will result in the loss of significant federal funding. The committee is closely watching Congress for any action to ratify the convention.

Alabama Criminal Code Review

The chair of the committee is **Judge Howard Hawk** with **Bill Bowen** serving as reporter.

The *Alabama Criminal Code* became effective in 1980. Since that time, there have been numerous amendments, additions and changes. A new *Criminal Code* committee was formed in 2009.

This review will be conducted with the goal of ensuring the *Criminal Code* is as effective and efficient as possible. The committee is reviewing the chapters one at a time with a goal to propose a comprehensive revision and simplification of the law.



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Standing Committee on Family Law

This committee is chaired by **Dean Noah Funderburg** with **Penny Davis** as reporter.

This committee, formed in 2013, is studying a wide array of topics that need to be addressed in the laws of Alabama as they relate to family law. These include grandparent visitation, custody laws, issues related to military deployment and many more. The formation of this committee will allow the institute to more systematically and continually improve this area of the law and serve as a better resource to the legislature as they consider these issues.

Standing Trust Committee

This committee is chaired by **Leonard Wertheimer** with **Fred Daniels** serving as reporter.

In 2012, the law institute created a Standing Trust Committee to assist the Alabama Legislature in staying abreast of the evolving changes in the area of trust law. The first area addressed by the committee was the development of a unitrust law for Alabama. In 2013, the legislature adopted a committee recommendation and enacted a bill that updated the Alabama Principal and Income Act to provide for the establishment of unitrusts in Alabama.

The committee has recently completed work on a statute that would invalidate payable on death designations, such as beneficiary designations, in certain circumstances upon divorce. This is similar to Alabama's law that invalidates certain provisions of a will concerning a former spouse upon the divorce of the parties.

The committee is only reviewing two additional issues—first, a trust-decanting statute, which is a method of fixing a broken or dysfunctional trust by moving its assets into a new trust and, second, the notion of asset protection trusts.

Uniform Asset-Freezing Orders Act

This committee is chaired by **Judge John Carroll** who also served as reporter for the National Conference of Commissioners on Uniform State Laws Committee.

The Uniform Asset-Freezing Orders Act (UAFOA) creates a uniform process for the issuance of asset-freezing orders, freezing the assets of a defendant and imposing collateral restraint on nonparties, such as the defendant's bank, in order to preserve assets from dissipation, pending judgment.

Right of Publicity Study Committee

This committee is chaired by **Will Hill Tankersley**.

The right of publicity can be defined as the right to control the commercial use of one's identity. The right of publicity evolved from the general principles of invasion of privacy that prohibit using a person's name or likeness to gain a benefit. The elements typically comprising the right of publicity are referred to as the name, image and likeness of every person. The right of publicity presumes that everyone, regardless of fame, has a right to prevent unauthorized use of their name or image to sell products. This right has also been held to prohibit any implication that a person endorses a product (without the person's permission).

Legislative Services

During the 2014 Legislative Session, the institute again provided legal services to a number of legislative committees and to individual legislators. In addition to the institute staff, outside lawyers were hired to assist with nine legislative committees.

The 2014 Session also saw the continuation of the Legislative Intern Program with more than 20 upper-level college students participating. In 2013, the institute updated this program by partnering with a number of universities to offer classes covering state government and the legislative process so that students can get a full semester of class credit for participating in the internship program. The second year of these partnerships saw a good deal of growth in opportunities for students to get this expanded academic credit.

The third year of the legislative law clerk program was a huge success with students from Alabama, Cumberland and Jones schools of law participating and providing research assistance on legislative issues.

Education Services

In 2014, the institute continued its longstanding partnership with the Alabama Probate Judges Association by facilitating four training seminars for probate judges and their clerks. Additionally, institute staff spoke at many education programs for judges, lawyers and local officials throughout Alabama.

It is important to understand that none of this work would be possible without the tremendous support of the Alabama Legislature and the membership of the Alabama State Bar. That support makes the work of the institute and its many diligent supporters practical and important and not merely an intellectual exercise. | [AL](#)



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

About Members

Mary Sharon Beaver announces the opening of her office. The mailing address is P.O. Box 352, Town Creek 35672. Phone (256) 349-9812.

Jonathan Edward Moody announces the opening of **Law Office of Jonathan Edward Moody**. The mailing address is P.O. Box 43302, Birmingham 35243. Phone (205) 903-4295.

Frank Myers, Jr. announces the opening of his office at 3000 Riverchase Galleria, Ste. 750, Hoover 35244. Phone (205) 212-1000.

Emily J. Young announces the opening of her office at 301 East Holmes Ave., Ste. 100, Huntsville 35801. Phone (256) 319-2770.

Fuller Hampton LLC announces that **J. Clay Maddox** joined as an associate in the Alexander City office.

Gamble, Gamble & Calame LLC announces that **D. Graham Mosley** joined as an associate.

Hagwood Adelman Tipton announces that **Christopher L. Shaeffer** is now a shareholder in the Birmingham office.

Hand Arendall LLC announces that **Carolyn B. Jones** joined as an associate and **Christine Harding Hart** rejoined as an associate, both in the Mobile office.

Hare & Clement PC announces that **Brennan C. Ohme** joined the firm.

Jones & Moses of Northport announces that **Hunter C. Hodges** joined as an associate.

The Love Law Firm LLC of Hoover announces **Paul M. Sloderbeck** joined as an associate.

Maples, Tucker & Jacobs LLC of Birmingham announces that **J. Thomas Walker** joined as an associate.

Marsh, Rickard & Bryan PC announces that **Dylan H. Marsh** and **J. Ben Ford** joined as associates.

Maynard Cooper & Gale PC announces that **Joey A. Chbeir** joined the firm.

Miller, Christie & Kinney PC announces that **Patrick W. Franklin, Stacey Lovett Roth** and **Garrett C. Miller** joined as associates.

Tamika R. Miller and **Ashley N. Smith** announce the opening of **Miller Smith LLC** at 445 Dexter Ave., Montgomery 36104. Phone (334) 625-6959.

Phelps, Jenkins, Gibson & Fowler LLP announces that **Austin K. Smith** joined as an associate.

Republic Title of Texas Inc. announces that **Kevin Hays** joined as senior vice president and residential counsel.

Sirote & Permutt PC announces that **Clayton H. Garrett** joined the Mobile office and **Joshua Gotlieb, W. Wesley Hill** and **Arthur S. Richey** joined the Birmingham office.

Smith, Spires & Peddy PC announces that **Henry A. Lawrence, III** joined as an associate. | [AL](#)

Among Firms

The United States Senate confirmed **Gordon Tanner** to the position of general counsel of the **Air Force**.

Beverly Baker, Debra Leo and **Fern Singer** announce the formation of **Arbitrations Investigations Mediations Solutions (AIMS)**.

Baker Donelson announces that **Wendy Padilla-Madden** is now a member of the firm.

Bradley Arant Boulton Cummings LLP announces that **Colin T. Dean** joined as an associate and **J. Mark Adams, Jr., Julie Carter, J. Hunter Robinson, Emily Ruzic** and **Anna Twardy** joined as first-year associates in the Birmingham office. **Virginia Broughton Reeves** joined the Montgomery office as a first-year associate. **Amandeep S. Kahlon** rejoined the Birmingham office as an associate.

Carr Allison announces that **Jessica Mohr** joined the Birmingham office as an associate.

Christian & Small LLP of Birmingham announces that **Bill D. Bensinger** joined as a partner.

R. Champ Crocker LLC announces that **Anna M. Sparks** joined as an associate.

Ely & Isenberg LLC announces that **Susan Haygood McCurry** is now a partner in the Auburn office.

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

About Members

This section announces the opening of new solo firms.

Among Firms

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

free•dom:

noun

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