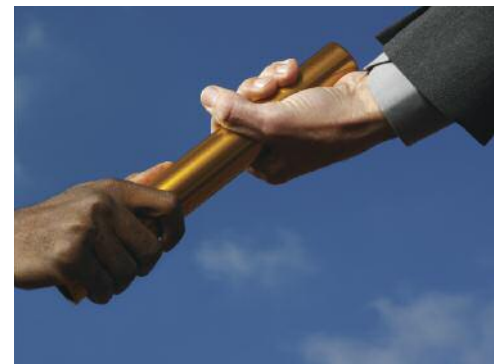




**Navigating the Ethical
Maze of E-Discovery in
Light of the Recent
California Bar Ethics Opinion**

Page 106



**Shifting the Burden:
Municipal Workers and
Establishing Evident
Partiality in Alabama Based
Upon a Failure to Disclose**

Page 118

How Does Your Malpractice Insurer Treat You When You Have A Claim?



**You can do better,
call AIM today.**

**We understand
the practice of law.
We were formed
by attorneys to
serve attorneys.**



**Attorneys Insurance Mutual
of the South®**

**200 Inverness Parkway
Birmingham, Alabama 35242**

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

www.AttysInsMut.com

“Insuring and Serving Practicing Attorneys Since 1989”

Copyright 2013 by Attorneys Insurance Mutual of the South®

Scan for Application





THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

ALABAMA CHAPTER

www.ALMEDIATORS.ORG



Phil Adams
OPELIKA



Beverly Baker
BIRMINGHAM



Danny Banks
HUNTSVILLE



William Coleman
MONTGOMERY



Reggie Copeland
MOBILE



Sam Crosby
DAPHNE



Charles Denaburg
BIRMINGHAM



Charles Fleming
MOBILE



Stevan Goozee
BIRMINGHAM



Arthur Hanes
BIRMINGHAM



Bernard Harwood
TUSCALOOSA



Braxton Kittrell
MOBILE



Debra Leo
BIRMINGHAM



Rodney Max
BIRMINGHAM



Boyd Miller
MOBILE



Larry Moore
FLORENCE



William Ratliff
BIRMINGHAM



Ben Rice
HUNTSVILLE



Allen Schreiber
BIRMINGHAM



Kenneth Simon
BIRMINGHAM



Fern Singer
BIRMINGHAM



Clarence Small
BIRMINGHAM



Harold Stephens
HUNTSVILLE



Glynn Tubb
DECATUR



Michael Upchurch
MOBILE



Marty VAN TASSEL
BIRMINGHAM



Michael WALLS
BIRMINGHAM



Brad Wash
BIRMINGHAM

OCTOBER 2015						
Sun	Mon	Tue	Wed	Thurs	Fri	Sat
			1	2	3	
	6	X	8	9	10	
	13	X	X	X	X	
	20 PM	21	X	X	X	
	27 X	28 PM	29	30	31	

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

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

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



Lower rates on life insurance, thanks to you. All of you.

Now, Alabama State Bar members have access to life insurance at a group rate.

Did you know that 67% of Americans say they need life insurance but think it's too expensive? Well, thanks to our strong membership, we were able to use our purchasing power to get all our members a discounted rate on life insurance.

You can get \$500,000 of coverage for less than \$2.50 a day.

How do you figure out how much life insurance you need? A good rule of thumb is to multiply 60% of your income times the number of years until retirement. So look at your age on the chart below to see some of the different types of coverage available to you. Getting life insurance is easier than you think. Just call right now and we'll get you started in a few minutes.

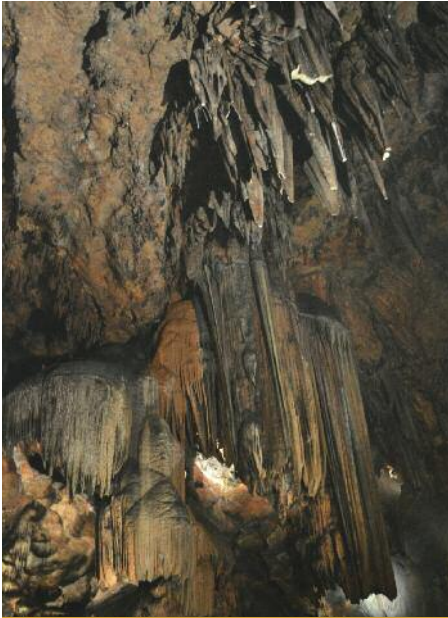
Benefit Amounts and Quarterly Premiums						
Age	\$250,000		\$500,000		\$1,000,000	
	Male	Female	Male	Female	Male	Female
30-34	\$28.13	\$22.50	\$54.00	\$43.20	\$108.00	\$86.40
35-39	\$43.13	\$34.38	\$82.80	\$66.00	\$165.60	\$132.00
40-44	\$72.50	\$57.50	\$139.20	\$110.40	\$278.40	\$220.80
45-49	\$111.25	\$89.38	\$213.60	\$171.60	\$427.20	\$343.20
50-54	\$171.25	\$148.75	\$328.80	\$285.75	\$657.60	\$571.20

Rates shown are the quarterly term life premiums for non-smokers. Other payment modes are available. Please call ISI at 1-888-ISI-1959 with any questions.

Go to: www.startprotecting.com/C4560
 Explore Plan Options • Calculate rates • Apply online



Metropolitan Life Insurance Company, New York, NY
 L0116451652[exp0118][All States][DC]



On The Cover

Stalactites in DeSoto Caverns, Childersburg. Stalactites are icicle-shaped formations that hang from the ceiling of a cave formed by precipitation of minerals from water dripping through the cave ceiling.

—Photo by Noelle M. Buchannon,
The Finklea Group

FEATURE ARTICLES

President-Elect Profile

Augusta S. Dowd

90

The Mobile City Government Case:

1975-1982

By David A. Bagwell

94

Navigating the Ethical Maze of E-Discovery in Light of the Recent California Bar Ethics Opinion

By Marcus R. Chatterton and Elizabeth J. Flachsbart

106

Shifting the Burden:

Municipal Workers and Establishing Evident Partiality in Alabama Based upon a Failure to Disclose

By Rebecca A. Beers

118



C O L U M N S

President's Page

88

Executive Director's Report

92

The Appellate Corner

128

Memorials

135

Important Notices

136

Legislative Wrap-Up

140

Bar Briefs

142

Opinions of the General Counsel

144

YLS Update

148

About Members, Among Firms

150

Disciplinary Notices

152



facebook.com/AlabamaStateBar



[@AlabamaStateBar](https://twitter.com/AlabamaStateBar)



[@AlabamaStateBar](https://www.instagram.com/AlabamaStateBar)



youtube.com/TheAlabamaStateBar



flickr.com/AlabamaStateBar

ADVERTISERS

ABA Retirement Funds91

AlaServe, LLC133

Attorneys Insurance Mutual
of the South82

Cain & Associates105

Davis Direct.....146

J. Forrester DeBuys, III105

The Finklea Group145

Freedom Court Reporting155

Gilsbar Pro156

ISI84

LawPay.....87

The Locker Room.....93

National Academy of
Distinguished Neutrals83

OnBoard Search & Staffing151

Professional Software Corporation105

Stokes McNutt.....139

2AB, Inc.143

ALABAMA STATE BAR

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

ALABAMA STATE BAR STAFF

Executive DirectorKeith B. Norman
Director of Personnel and OperationsDiane Locke
ASB Foundation Assistant/
Executive AssistantAnn Rittenour
Assistant Executive Director.....Edward M. Patterson
Administrative Assistants for External Relations
and ProjectsMary Frances Garner
Marcia N. Daniel
Director of Digital CommunicationsJ. Eric Anderson
Director of Information TechnologyDolan L. Trout
Information Systems Manager.....O. Hunter Harris
Digital Communications Content ManagerKelley Lee
Director of PublicationsMargaret L. Murphy
Director of Regulatory ProgramsAngela Parks
Membership
Administrative Assistant.....Cathy Sue McCurry
Regulatory Programs
Administrative AssistantDoris McDaniel
Director of Admissions.....Justin C. Aday
Admissions Administrative AssistantsCrystal Jones
Sonia Douglas
Director of Finance.....Merinda Hall
Senior Financial Assistant.....Gale Skinner
Financial AssistantKristi Neal
Graphic Arts Director/
Building SuperintendentRoderick Palmer
ReceptionistStephanie Oglesby
Director of Service ProgramsLaura A. Calloway
SP Administrative AssistantKristi Skipper
Lawyer Referral Service Representative.....John Dunn
Volunteer Lawyers Program DirectorLinda Lund
VLP AssistantKatherine L. Church
Intake SpecialistsDeborah Harper
Carrie Black-Phillips
Alabama Lawyer Assistance Program
DirectorRobert B. Thornhill (334-224-6920)
ALAP Case Manager.....Shannon Knight
ALAP Administrative Assistant.....Sandra Dossett
Alabama Law Foundation, Inc. DirectorTracy Daniel
ALF Administrative AssistantsSharon McGuire
Sue Jones
Access to Justice CoordinatorEmily Strickland
Alabama Center for Dispute Resolution
DirectorJudith M. Keegan (334-269-0409)
ADR AssistantPatsy Shropshire

ALABAMA STATE BAR CENTER FOR PROFESSIONAL RESPONSIBILITY STAFF

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

Gregory H. Hawley, BirminghamChair and Editor
ghawley@joneshawley.com
Linda G. Flippo, BirminghamVice Chair and Associate Editor
lflippo@whitearnold.com
Wilson F. Green, TuscaloosaVice Chair and Associate Editor
wgreen@fleenorgreen.com
Margaret L. Murphy, MontgomeryStaff Liaison and
Director of Publications
margaret.murphy@alabar.org

Robert A. Huffaker, MontgomeryChair and Editor, 1983-2010

BOARD OF EDITORS

Melanie M. Atha, Birmingham • Marc J. Ayers, Birmingham • David A. Bagwell, Fairhope • Jennifer M. Bedsale, Birmingham • H. Lanier Brown, II, Birmingham • Henry L. (Max) Cassidy, Jr., Fairhope • W. Lloyd Copeland, Mobile • Cason Crosby Cheely, Daphne • Kira Y. Fonteneau, Birmingham • Sara Anne Ford, Birmingham • Amy M. Hampton, Alexander City • Walter E. McGowan, Tuskegee • Rebecca Keith McKinney, Huntsville • Jeffrey R. McLaughlin, Guntersville • James R. Moncus, III, Birmingham • Joi T. Montiel, Montgomery • Anil A. Mujumdar, Birmingham • Sherrie L. Phillips, Montgomery • Katherine T. Powell, Birmingham • Allison O. Skinner, Birmingham • Marc A. Starrett, Montgomery • M. Chad Tindol, Tuscaloosa • Jason B. Tompkins, Birmingham • David G. Wirtes, Jr., Mobile

OFFICERS

Lee H. Copeland, MontgomeryPresident
J. Cole Portis, MontgomeryPresident-elect
Richard J.R. Raleigh, Jr., HuntsvilleImmediate Past President
R. Cooper Shattuck, TuscaloosaVice President
Keith B. Norman, MontgomerySecretary
S. Hughston Nichols, BirminghamYoung Lawyers' Section President

BOARD OF BAR COMMISSIONERS

1st Circuit, Halron W. Turner, Chatom • 2nd Circuit, J. Levi Nichols, Luverne • 3rd Circuit, Christina D. Crow, Union Springs • 4th Circuit, Jana Russell Garner, Selma • 5th Circuit, Charles G. Reynolds, Lanett • 6th Circuit, Place No. 1, Terr Olive Tompkins, Tuscaloosa; Place No. 2, Robert Hays Webb, Tuscaloosa • 7th Circuit, William H. Broome, Anniston • 8th Circuit, Emily L. Baggett, Decatur • 9th Circuit, Dana Jo Grimes, Ft. Payne • 10th Circuit, Place No. 1, Leslie R. Barineau, Birmingham; Place No. 2, John A. Smyth, Birmingham; Place No. 3, Barry A. Ragsdale, Birmingham; Place No. 4, Robert G. Methvin, Birmingham; Place No. 5, Augusta S. Dowd, Birmingham; Place No. 6, Teresa G. Minor, Birmingham; Place No. 7, Allison O. Skinner, Birmingham; Place No. 8, Brannon J. Buck, Birmingham; Place No. 9, Erik Stephen Heninger, Birmingham • Bessemer Cutoff, L. Kenneth Moore, Bessemer • 11th Circuit, Ralph E. Holt, Florence • 12th Circuit, Thad Yancey, Troy • 13th Circuit, Place No. 1, C. Zackery Moore, Mobile; Place No. 2, Frederick G. Helmsing, Mobile; Place No. 3, Clay A. Lanham, Mobile; Place No. 4, Juan C. Ortega, Mobile; Place No. 5, James Rebarchak, Mobile • 14th Circuit, James R. Beaird, Jasper • 15th Circuit, Place No. 1, George R. Parker, Montgomery; Place No. 2, Les Pittman, Montgomery; Place No. 3, Flynn Mozingo, Montgomery; Place No. 4, C. Gibson Vance, Montgomery; Place No. 5, Jeffery C. Duffey, Montgomery; Place No. 6, David Martin, Montgomery • 16th Circuit, Donald R. Rhea, Gadsden • 17th Circuit, Taylor Thomas Perry, Demopolis • 18th Circuit, Place No. 1, William Randall May, Birmingham; Place No. 2, Mark S. Boardman, Chelsea; Place No. 3, Anne Malatia Glass, Birmingham • 19th Circuit, Robert L. Bowers, Clanton • 20th Circuit, R. Cliff Mendheim, Dothan • 21st Circuit, James Eric Coale, Brewton • 22nd Circuit, Manish H. Patel, Andalusia • 23rd Circuit, Place No. 1, Tazewell T. Shepard, Huntsville; Place No. 2, John A. Brinkley, Huntsville; Place No. 3, Rebekah Keith McKinney, Huntsville; Place No. 4, M. Clay Martin, Huntsville • 24th Circuit, Audrey Oswalt Strawbridge, Vernon • 25th Circuit, J. Daryl Burt, Winfield • 26th Circuit, F. Patrick Loftin, Phenix City • 27th Circuit, Clint L. Maze, Arab • 28th Circuit, Place No. 1, Allan R. Chason, Bay Minette; Place No. 2, Sam W. Irby, Fairhope • 29th Circuit, Steven D. Adcock, Talladega • 30th Circuit, Erskine R. Funderburg, Pell City • 31st Circuit, Tom Heffin, Tuscumbia • 32nd Circuit, Jason P. Knight, Cullman • 33rd Circuit, Lee F. Knowles, Geneva • 34th Circuit, Sharon Hindman Hester, Russellville • 35th Circuit, Tommy Chapman, Evergreen • 36th Circuit, Christy Williams Graham, Moulton • 37th Circuit, Roger W. Pierce, Auburn • 38th Circuit, Matthew C. Mitchell, Scottsboro • 39th Circuit, Donald Ben Mansell, Athens • 40th Circuit, Gregory M. Varner, Ashland • 41st Circuit, Scott L. McPherson, Oneonta

AT-LARGE BOARD MEMBERS

Diandra S. Debrosse, Birmingham • R. Cooper Shattuck, Tuscaloosa • Meredith Shay Peters, Andalusia • Rebecca G. DePalma, Birmingham • Alicia F. Bennett, Chelsea • Kira Y. Fonteneau, Birmingham • Jeanne Dowdle Rasco, Huntsville • Monet McCorvey Gaines, Montgomery • Ashley Swink Fincher, Southlake, TX

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

The Alabama Lawyer is the official publication of the Alabama State Bar. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Advertising rates will be furnished upon request. Advertising copy is carefully reviewed and must receive approval from the Office of General Counsel, but publication herein does not necessarily imply endorsement of any product or service offered. *The Alabama Lawyer* reserves the right to reject any advertisement. Copyright 2016. The Alabama State Bar. All rights reserved.





PAYMENT PROCESSING, EXCLUSIVELY FOR ATTORNEYS.

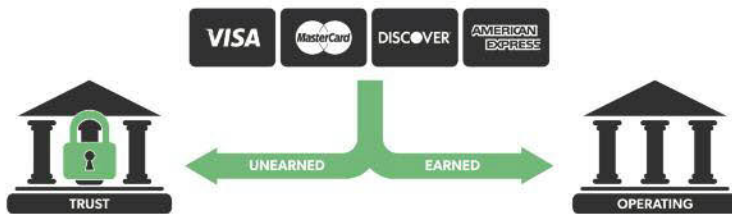


ALABAMA STATE BAR
Proud Member Benefit Provider

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

Helping law firms get paid.

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



www.LawPay.com/alabar | 866.376.0950

LAWPAY[®]
CREDIT CARD PROCESSING



Lee H. Copeland

P R E S I D E N T ' S P A G E



*Robert B. Thornhill, director,
Alabama Lawyer Assistance Program*

Alabama Lawyer Assistance Program

As you know, our state bar is an integrated bar, one that functions both as the statutory entity that governs the practice of law and as an associational group that promotes continuing legal education, professional development and social opportunities. There are many programs of the bar, some good and some which could be better. One particular program that has worked very well is the Alabama Lawyer Assistance Program (ALAP). Although many view the program as you would view an odd uncle or aunt who is brought out only on holidays, the point is that this program has positively affected many, many lawyers. *The membership who works with this group is more dedicated to their mission than any other group in our entire bar.* If you see one of them, please thank them for their service.

Many of our membership may not realize that the rates of addiction and depression among attorneys is roughly double that of the general population. Undiagnosed and untreated depression is a major underlying cause for suicide among attorneys. Untreated addiction can also lead to suicide. In Alabama, we had at least five attorneys who took their lives in 2015. Beyond this tragic fact lay the broken homes, lost professions, worsening health problems and profound sadness that inevitably accompany these maladies.

The ALAP consists of three full-time staff and a committee of voluntary and dedicated attorneys throughout the state who are passionate about providing assistance. The ALAP is headed by Robert Thornhill. Robert has been with the bar for more than three years. Before that, he worked as the clinical coordinator for the Alabama Physicians Health Program. He has a bachelor's degree in

psychology and a master's in counseling and human development. He is a licensed professional counselor, certified alcohol and drug abuse professional and a master's level addiction professional. Our bar is lucky to have someone of Robert's character and abilities for this very difficult job.

The ALAP is committed to this kind of service because many of them have been the recipient of this kind of assistance and experienced the life-changing results of genuine recovery. The ALAP provides support, referral for evaluation and treatment, when appropriate, and a monitoring program for accountability following completion of evaluation or treatment. The program has played a central role in the lives of many attorneys who have been guided to recovery.

Recently there has been more focus on the issue of cognitive impairment as the life expectancy of our population continues to increase and attorneys tend to work longer. Forms of dementia, such as Alzheimer's disease, are becoming more prevalent in our profession. The ALAP is equipped to assist with these challenges and can provide support and recommendations for referral when needed.

Meeting of the Law Schools' Deans

Recently, several members of the state bar met with the deans and other officials of our five Alabama law schools. This is the second time the bar has hosted such a meeting. One purpose of the meeting is find out what our bar can provide the law schools in terms of assistance and information the schools need to recruit and educate future members of our profession. As a result of this meeting, it is anticipated that the state bar will provide to the law schools more information concerning the results of the two annual bar exams. And the bar plans on lending whatever assistance it can to the schools to provide employment for the schools graduates. Frankly, these meetings should have been taking place for years and I am hopeful that they will continue.

LegalZoom Litigation

As many of you are aware, there are various lawsuits being brought across the country, both by and against, providers of legal services such as LegalZoom. The thrust of all the lawsuits—although different in some respects—is that these providers of legal services are not authorized to practice law in a particular state.

The lawsuits are the result of the technical ability to deliver traditional legal services (wills, deeds, contracts, etc.) to a vast number of people at a price that (by many) is considered below market. Of course, the problem is that these companies are providing legal advice and are not licensed to do so.

The recent resolution between North Carolina State Bar and LegalZoom is one that may be repeated in other states. It is important that our bar be prepared for these issues that will be made to our unauthorized practice of law statutes.

Sections of the Bar

Sections facilitate networking, communications and sharing of information among our bar members with the goal of promoting understanding and consistent application of the law to serve their clients. Section membership is open to lawyers who have an interest in a particular area of law by completing an application on the bar's site (www.alabar.org) and the payment of annual dues. Sections are chartered by the Board of Bar Commissioners and must operate according to their bylaws approved by the board and the bar's policies governing sections.

Currently, there is a major focus on section administration, governance and reorganization. Our members are responding. There are 7,400 section members, a 20 percent increase from last year. The bar is responding to the actual and felt needs of section members by continuing to expand its services to sections. Look for additional information in the months to come.

Some of the most recent success stories of activity and increased membership are the Solo & Small Firm section (525 members), the In-House Counsel & Government Lawyers section (421 members), the Election, Ethics & Government Relations section (216 members) and the Young Lawyers' Section (483 members). It is important to note, though, that many of our sections have large memberships and consistently outstanding leadership year after year.

The bar has 31 sections. Some date back to the 1930s and some were chartered in the past year. Task forces are periodically appointed to consider whether additional sections should be created. The sections of the ASB are Administrative Law; Appellate Practice; Bankruptcy & Commercial Law; Business Law; Business Torts & Antitrust Law; Communications Law; Construction Industry; Criminal Justice; Disabilities Law; Dispute Resolution; Elder Law; Elections, Ethics & Government Relations; Environmental Law; Family Law; Federal Court Practice; Government Contracts; Health Law; In-House Counsel & Government Lawyers; Intellectual Property, Entertainment & Sports Law; International Law; Labor & Employment Law; Leadership Forum Alumni; Litigation; Oil, Gas & Mineral Law; Real Property, Probate & Trust; Senior Lawyers; Solo & Small Firm; Taxation Law; Women's Section; Workers' Compensation Law and Young Lawyers' Section.

I encourage you to look at the sections and their goals and consider joining one or two!





P R E S I D E N T - E L E C T P R O F I L E

Augusta S. Dowd

Pursuant to the Alabama State Bar's Rules Governing the Election of President-elect, the following biographical sketch is provided of Augusta S. Dowd. Dowd was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 2016-17 term and she will assume the presidency in 2017.

Augusta S. Dowd

Born and raised in Birmingham, Augusta graduated from the University of the South (Sewanee) and Vanderbilt University School of Law, where she served as articles editor for the *Vanderbilt Law Review*. After graduating from law school in 1982, Augusta clerked for the Honorable Seybourne H. Lynne of the Northern District of Alabama. Augusta began her law practice in 1983 in Birmingham with Lange, Simpson, Robinson & Somerville, where she practiced until her third child was born in 1990. Augusta spent most of the 1990s at home with her children before returning to the practice of law in 2000 to join the firm that eventually restructured in 2003 to become White Arnold & Dowd PC. She became managing lawyer when the firm restructured, and she continues to hold that position.

With more than 25 years' experience as a trial lawyer, primarily in civil and complex litigation and white-collar criminal defense, Augusta practices in federal and state courts, as well as in administrative and regulatory proceedings and arbitrations. She represents both plaintiffs and defendants in a broad spectrum of cases including business, civil, class action, complex litigation, personal injury, mass

tort, pharmaceutical, environmental tort and whistleblower actions. Augusta has extensive experience representing defendants in white-collar crime and criminal environmental matters. She also handles executive severance and compensation matters.

Committed to our state bar's ideal that "lawyers render service," Augusta has been meaningfully involved in bar activities on both the local and state level. She was a member of the Birmingham Bar Association's ("BBA") Executive Committee (2004-2007) and Diversity Task Force (2006-2007) and is a Fellow of the Birmingham Bar Foundation. Augusta also served on one of the BBA's grievance panels and as one of the co-chairs of the BBA's Grievance Committee in 2009-2010. She created the original course template for and led the inaugural class of the BBA's Future Leaders Forum. Since 2009, Augusta has served as an Alabama State Bar Commissioner representing the 10th Judicial Circuit (Jefferson County) and on a state bar Disciplinary Committee. In 2011, the Board of Bar Commissioners appointed Augusta to one of the two lawyer positions on the Judicial Inquiry Commission, where she is now

serving her second term. She is a member of the Atticus Finch Society, as well as a Fellow of the Alabama Law Foundation. Augusta is a member of the American Board of Trial Advocates, where she served as president (2015) of the Alabama Chapter. She is also a member of the International Academy of Trial Lawyers, a long-standing member of the American Bar Association and a Fellow of the American Bar Foundation. Augusta is a member of the Women's White Collar Defense Association, the National Association of Women Lawyers and the Advanced Safety Engineering and Management Industry Advisory Council. She has served as an adjunct professor at the University of Alabama School of Law, where she instructed students in advanced civil procedure.

Augusta has long held an AV-rating from Martindale-Hubbell. She has been named to multiple "best of" lists, including: *The Best Lawyers in America* (2007-Present); *B-Metro Magazine*, Top Women Attorneys (2015); Mass Tort Lawyer of the Year, Best Lawyers in America (2011); *Alabama Super Lawyers* (2008-2015); cover and featured article, *Super Lawyers Magazine/Alabama* (2012); *Super Lawyers*, Top 10 Lawyers in Alabama (2011); *Super Lawyers*, Top 25 Women

Lawyers in Alabama (2008-Present); *Super Lawyers*, Top 50 Lawyers in Alabama (2008-Present); and *Birmingham Business Journal's* "Who's Who in Law and Accounting" (2011-2013). She was recognized as one of the "Top Ten Women in Business in Birmingham" (2006) and named to the Birmingham Multiple Sclerosis Leadership Class of 2007. Augusta is a member of the Alabama Committee of the Newcomen Society, and she is a graduate of both Leadership Birmingham (2007) and Momentum Women's Leadership (2010).

Active in the Birmingham community, over the course of her career Augusta has volunteered her time and talents on behalf of multiple charitable, educational and religious organizations. Her current service focuses on the YWCA of Central Alabama, where she has been a member of the board of directors since 2010, and the Episcopal Diocese of Alabama, where she has served as assistant chancellor to the Bishop of the Episcopal Diocese of Alabama since 2009.

Augusta and her husband, David D. Dowd, III, a corporate attorney and partner at Burr & Forman LLP, have been married since 1982. They have three children: Bevan (29), Grace (27) and David IV (25). ▲

A different kind of retirement plan.



The **ABA Retirement Funds Program** is different from other providers. It was established to meet the unique needs of the legal community.

- As a not-for-profit corporation led by volunteer lawyers, we ensure decisions are made in the best interest of law professionals who are saving for retirement.
- We leverage the size and scale of the legal community and our member clients to make retirement plans affordable for firms of all sizes, even solos.
- We provide law firms with the most comprehensive protection from fiduciary liability under ERISA.

Find out what many law firms like yours already know. It's good to be different.



The ABA Retirement Funds Program is available through the Alabama State Bar as a member benefit.

Please read the Program Annual Disclosure Document (April 2015), as supplemented (September 2015), carefully before investing. This Disclosure Document contains important information about the Program and investment options. For email inquiries, contact us at: joinus@abaretirement.com.

Securities offered through Voya Financial Partners, LLC (Member SIPC).

The ABA Retirement Funds Program and Voya Financial Partners, LLC, are separate, unaffiliated companies and are not responsible for one another's products and services. CN1029-19104-1117 - 2015



Contact an ABA Retirement Funds Program Regional Representative today.

866.812.1510

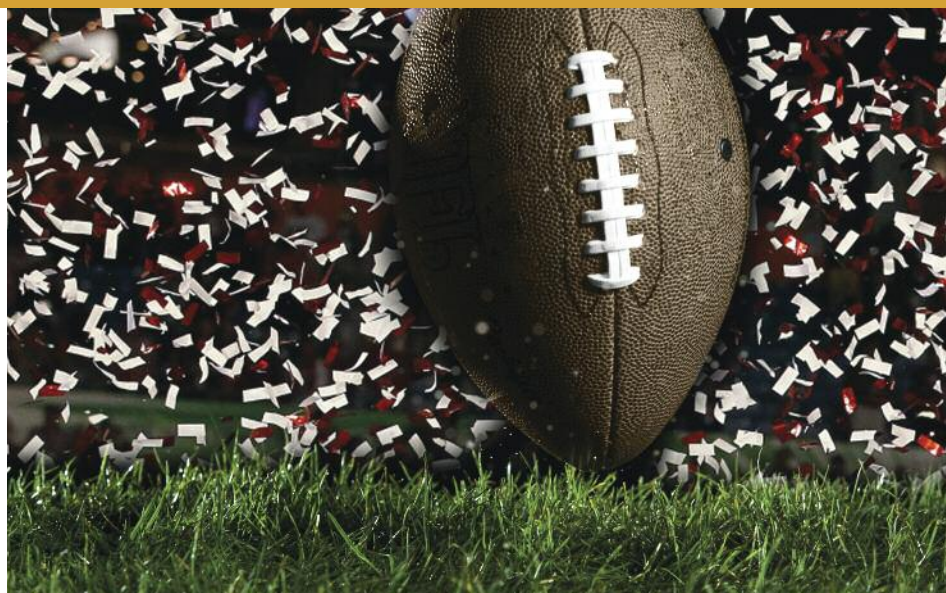
www.abaretirement.com

joinus@abaretirement.com



EXECUTIVE DIRECTOR'S REPORT

Keith B. Norman
keith.norman@alabar.org



Yea Alabama!

I am writing this a day after the Alabama Crimson Tide defeated the Clemson Tigers to claim its 16th National Championship overall and its 11th in the modern poll era. Of the last seven football championships, six of those championships have involved teams from Alabama. That is impressive.

For the past seven years, the American Bar Association's Standing Committee on Pro Bono and Public Service has sponsored the **National Celebration of Pro Bono** to both enhance and expand local efforts to increase access to justice for all. Although this effort is national in scope, the annual celebration has provided an opportunity for local and state bar associations across the country to pursue, among other things, the following goals:

- Recruiting more pro bono volunteers and increasing legal services to poor and vulnerable people;
- Mobilizing community support for pro bono;
- Fostering collaborative relationships;
- Recognizing the pro bono efforts of America's lawyers.

The celebration took place in October with the 2015 theme, "And Justice for All."

Several years ago, the state bar's Pro Bono and Public Service Committee decided to extend the pro bono celebration from a week to the entire month of October. Lawyers across the state have participated in numerous programs and activities in communities that not only

promote our profession's support of pro bono work, but also acknowledge its benefit for Alabama's neediest citizens who have civil legal needs and are unable to afford a lawyer.

Alabama lawyers not only are dedicated to pro bono, but also are as successful as our college football teams. This past year, bar associations in Alabama swept all other bars in the country in the recognition they received for their pro bono efforts. In the category of 500 or fewer members, the **Tuscaloosa County Bar Association** received first place. For bars with more than 500 but fewer than 5,000 members, the **Montgomery County Bar Association** tied for first place. And, for bars with more than 5,000 members, the **Alabama State Bar** received the first-place award.

Alabama lawyers are serious about rendering pro bono service and, as these awards prove, they are working hard to strengthen the volunteer lawyer programs (VLPs) statewide and

increase the ranks of volunteer lawyers who are taking time to represent Alabamians unable to afford an attorney. The University of Alabama is this year's college football national champion. Alabama's volunteer lawyers are pro bono national champions as well. If you are not a member of a VLP, join the winning tradition and sign up to volunteer with one of the VLPs listed below.

Birmingham Bar VLP

Attn: Nancy Yarbrough
Birmingham Bar Center
2021 2nd Ave. N
Birmingham 35203-3703
(205) 250-5798
nyarbrough@vlpbirmingham.org

Madison County VLP

Attn: Nicole Schroer
P.O. Box 2913
Huntsville 35804-2913
(256) 539-2275
nschroer@vlpmadisoncounty.com

Montgomery County VLP

Attn: Mike Martin
P.O. Box 72
Montgomery 36101
(334) 265-0222
mikem36111@yahoo.com

South Alabama VLP

Attn: Ariana Moore
56 St. Joseph St.
Ste. 312
Mobile 36602
(251) 433-6693
ariana@savlp.org

Alabama State Bar VLP

Attn: Linda Lund
P.O. Box 671
Montgomery 36101
(334) 269-1515
linda.lund@alabar.org



SUIT UP.

Two Expertly Fitted Suits **\$895**

Save over **\$300**

Two tropical-weight wool suits made with outstanding quality and detail, ideal for year-round wear.

1717 Carter Hill Rd.
Montgomery, AL | 334.262.1788
Mon-Sat 9am-6pm

127 East Magnolia Ave.
Auburn, AL | 334.321.4962
Mon-Sat 10am-6pm

THE LOCKER ROOM

TLR

www.TLRclothiers.com



The Mobile City Government Case: 1 9 7 5 - 1 9 8 2

By David A. Bagwell

“Executive Summary”

[sic: are lawyers “executives”?]

More than 40 years ago, in 1975, black plaintiffs filed suit in federal court in Mobile, claiming that the city commission form of government of Mobile, adopted in 1911 with three commissioners elected at-large, unconstitutionally operated to dilute the voting power of black voters. They cited Fifth Circuit precedent from two years before [as you know before 1981 we were in what we now call “the old Fifth Circuit”] suggesting that only a discriminatory *effect* was required to be proved, not a discriminatory *intent*. Just before trial, the Supreme Court decided *Washington v. Davis*, 426 U.S. 229 (1976), which seemed to me clearly to require proof of discriminatory intent rather than effect. After trial, on an effect basis rather than intent, Judge Virgil Pittman held that the at-large election feature of the commission form of government violated the Fourteenth and Fifteenth amendments. As a remedy, since the commission form would not work with single-member districts, he ordered a change in the form of government to a mayor-council form. *Bolden v. City of Mobile*, 423 F.Supp. 384 (S.D. Ala. 1976). The Fifth Circuit affirmed, *Bolden v. City of*

Mobile, 571 F.2d 239 (5th Cir. 1978). The U.S. Supreme Court reversed, and in a fiercely split opinion, *City of Mobile v. Bolden*, 446 U.S. 55 (1980), a plurality of the Court wrote that under the Fourteenth and Fifteenth amendments and Section 2 of the Voting Rights Act, a discriminatory *effect* was not enough to make out a case, but rather a discriminatory *intent* was required. Two years later, though, in 1982, Congress amended Section 2 of the Voting Rights Act to say specifically that a discriminatory *effect* was all that was required under the Act, which mooted the Constitutional issue in voting cases. The Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986) stated the current tests under Section 2.

The First Hundred Years: 1810-1911

For about 100 years, from the time that Mobile came into the United States as a part of the former Spanish West Florida [1810 to 1815 or so, depending on how you figure it] to 1911, Mobile almost always had a form of government which today we would call “Mayor/Council.” There were many small changes, but that’s essentially correct.

The Galveston Hurricane And the City Commission Form of Government

Galveston had a huge hurricane in 1900 which killed 6,000-12,000 people [usually averaged out as 8,000], discussed in the wonderful 1999 book *Isaac's Storm*, named after the weatherman who tried hard to predict it and warn people. http://en.wikipedia.org/wiki/Isaac_Cline

After the complete destruction of Galveston in the hurricane, the old mayor/council form of government was deemed insufficient to bring the city back, so to do that Galveston adopted the city commission form of government, under which there were three "commissioners," who assigned themselves executive duties, normally (1) finance, (2) public safety [police and fire] and (3) public services [utilities], and normally rotated the mostly-ceremonial mayor position. http://en.wikipedia.org/wiki/City_commission_government

The commission form of government became the darling of political scientists during the height of progressivism in the 1900-1920 period, and Des Moines, Iowa became the first city outside Texas to adopt it, and plenty of others did, too [now, Portland, Oregon, one of the most liberal cities in the U.S., is the last remaining big city to have a commission form, and in 2007 voted down an attempt to change it].

The foremost
historian scholar
of the Alabama
Constitution of
1901, Dr. Malcolm
McMillan of
Auburn, wrote
that, "The Consti-
tution of 1901
eliminated the
Negro voter."³

The Complete Elimination of Black Voters in Alabama: 1893-1901

During the populist revolt-era governor elections in Alabama in 1892 and 1894, the black belt planters who ran Alabama became terrified that black voters would make common cause with poor white populist voters, and outvote the planters' "Bourbon aristocracy" which, along with the L&N railroad, ran Alabama.

Between 1893, with the passage of The Sayre Election Law¹ in Alabama [named for Judge Anthony D. Sayre, the father of Zelda Sayre, Mrs. F. Scott Fitzgerald], and 1901, with the passage of the Alabama Constitution of 1901, black voters were entirely eliminated in Alabama. This was the stated goal of

the 1901 Constitution, according to what the chair of the Constitutional Convention of 1901 said from the chair at the beginning of the Convention, as reported in the PROCEEDINGS: "And what is it that we want to do? Why it is within the limits of the Federal Constitution, to establish white supremacy in this state?"²

And it worked. The foremost historian scholar of the Alabama Constitution of 1901, Dr. Malcolm McMillan of Auburn, wrote that, "The Constitution of 1901 eliminated the Negro voter."³ [It is also true, though irrelevant here, that, "Negroes were not the sole target of disfranchisement,"⁴ and that "[s]upposedly designed to disfranchise the Negro, the poll tax and other deterrents had disenfranchised more whites than Negroes."⁵]

Mobile's Adoption of The City Commission Form of Government In 1911, after Complete Disfranchisement of Blacks Had Occurred

In the first *Bolden* trial, when plaintiffs did not agree that proof of discriminatory intent was essential, plaintiff's expert historian agreed with defendants that Mobile's adoption of the commission form of government in 1911 was to clean up corruption and to eliminate the "Boss Tweed" "ward heeler" aspects of the alderman form of government and that "racial discrimination *per se* was not a motivating factor." Plaintiffs' witnesses Joe Langan and Robert Edington agreed.

Confusion about the Applicable Law, 1960s To 1975

We all remember that in *Reynolds v Sims*⁶ the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment required numerical equality among legislative districts, and that in *Gomillion v Lightfoot*⁷ they held that racial gerrymandering violated the Fifteenth Amendment.

Well, what about a "racial dilution" case, a claim that in large single-member districts blacks and other minorities are often outvoted by racial and other majorities? In the late 1960s and the early 1970s the Supreme Court had a few cases dealing with multi-member districts, mostly in the legislative area and mostly dealing with the remedy phase, and it clearly did not like multimember districts. The courts weren't nearly as clear, though, as they ought to have been on

the important question whether multimember districts were unconstitutional only upon proof of discriminatory *intent*, or whether on the other hand proof of discriminatory *effect* sufficed as proof of unconstitutionality. Some of the cases used the phrase "designedly or otherwise," which was less than clear. Justice Holmes wrote in *THE COMMON LAW* that "even a dog can distinguish between being tripped over and being kicked," but the cases in the 1960s and the 1970s seemed not to focus on the distinction between the two, sort of blindly blundering through without noticing the issue.

The old Fifth Circuit in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973)(en banc) adopted an *effects* test for racial dilution cases rather than an *intent* test. It was a very complicated test, involving so-called "primary factors" [lack of access, unresponsiveness, tenuous state policy, present effects from past discrimination] and so-called "enhancing factors" [large districts, majority vote requirement, anti-singleshot voting requirement, residence requirement]. In actual operation the test presented a nightmare. The Supreme Court had its chance back then but muffed it; the Supreme Court affirmed *Zimmer* but the affirmation was "without approval of the constitutional views expressed by the Court of Appeals," *East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 638 (1976)(per curiam), see *Bolden* note 16. So, in the Fifth Circuit we seemed stuck with the *Zimmer* factors and discriminatory effects as sufficient for unconstitutionality.

The year after *Zimmer* Judge Frank Johnson in the Middle District of Alabama—back then he was generally thought to be the gold standard for civil rights judges—decided *Yelverton v. Driggers*, 370 F. Supp. 612 (M.D. Ala. 1974), a case against the City of Dothan's commission form of government, and he applied an effects test, and found that the commission form operated unconstitutionally. And, yet, on the remedy side, he declined to change the city's form of government to a single-member commission form or mayor-council, and

instead gave the city a period of time in which to provide improved services to the black areas of town. He reasoned that if the black section of town had its own single-member commissioner, he would simply be outvoted by the two white commissioners, and so be helpless. In short order, the white commissioners had gold-plated the black area of town [confession: I was Judge Johnson's law clerk during that case, but the remedy was entirely his idea, not mine].

Rumblings in Mobile

The Mobile 1969 city election was a major watershed in Mobile politics. Longtime white moderate Joe Langan had always before held a coalition of veterans, moderate whites and black voters, but in the 1969 election several events concurrently caused his defeat, he thought. First, his black support was shattered because of a black voter boycott of the election led by Noble Beasley [who died in 2014], thought by some to have threatening aspects at the polls. Second, Langan's moderate white support faded because he was increasingly believed by conservative whites to be "unsound on the race issue." And, third, Hurricane Camille hit just before the election, and Langan's wealthy Springhill supporters were fooling with their damaged and destroyed wharves on Mobile Bay and did not vote. Langan lost to Joe Bailey [who died in 2014 at age 103]. Bivariate regression analysis of the 1969 election results showed an incredible correlation between race and vote.

In about 1971, Mayor A.J. Cooper⁸ of the City of Prichard submitted to the *Alabama Law Review* an article dealing with racial dilution. It was not accepted for publication, but it seemed clear that at some point a lawsuit would be filed against the Mobile City Commission form.

As Bob Dylan had sung, in the early to middle 1970s it did not take a weatherman to know that sooner or later a lawsuit would be filed to challenge the constitutionality of the commission form of government.

Bolden Case Is Filed in 1975

More than 40 years ago, in 1975, several outstanding black citizens of Mobile—including Wiley Bolden, the first named plaintiff whose name was to be etched in the opinions' names—filed a class action lawsuit. They claimed that the at-large commission form of government operated to dilute the votes of black voters—a minority of voters—and that it violated Section 2 of the Voting Rights Act of 1965⁹ and was unconstitutional under the Fourteenth and Fifteenth amendments, and that the remedy was to order a change in the form of the city government to a single member plan, either a single-member districted commission plan or a mayor/council form with council elections from single-member districts.

The plaintiffs' law firm was then named Crawford, Blacksher, Figures & Brown, which was then the only racially-mixed law firm in Mobile. The main lawyers in the case were James U. ["Jim"] Blacksher, Larry Menefee and Greg Stein of Mobile, who would soon form their own firm, Blacksher, Menefee and Stein. Assisting was Ed Still of Birmingham, and on the pleadings were lawyers from the NAACP Legal Defense Fund, Inc. [known back then as "The Inc. Fund" to differentiate it from the NAACP proper]; they took no role in the lawsuit itself.

Defendants included the City of Mobile and its three commissioners, a disparate group indeed. To boil it down way too much, Lambert Mims was sort of the white Baptist commissioner, Bob Doyle was sort of the white Springhill Catholic and Episcopalian commissioner and Gary Greenough was sort of the white University of South Alabama/New South commissioner.

Fred Collins of Collins, Galloway & Smith was the city attorney and was an expert in municipal law. At his recommendation, the city hired Charlie Arendall of the Hand, Arendall firm as special counsel, and Steve Sheppard—then an assistant city attorney but now a

plastic surgeon—was assigned to the case. I was a young associate at Hand, Arendall where I had been for two years, and once I told Charlie about my experience with the law in the field and of Judge Johnson’s *Yelverton v. Driggers* case, Charlie put me to work on the lawsuit.

The *Washington v. Davis* Decision

Just five weeks before trial, on June 7, 1976, the U.S. Supreme Court decided *Washington v. Davis*, 426 U.S. 229 (1976), which was destined to have a great impact. We lawyers for the city immediately read the case to say that for constitutional claims, discriminatory *intent* was a required element of proof, not just discriminatory *impact*. And, because there were no black voters in Mobile in 1911 to eliminate, we figured we should win.

Our 42-page [legal paper, 8 ½ x 14; remember that?] brief for the city, filed one month after *Washington v. Davis*, hammered home *Washington v. Davis* and heavily emphasized the need to prove discriminatory intent in the 1911 adoption of the commission form of government, and that the Fifth Circuit’s *Zimmer v. McKeithen* effects elements were at least much less meaningless, and maybe irrelevant.

The Trial of the *Bolden* Case

On July 12, 1976, five weeks after *Washington v. Davis*, the trial started. Plaintiffs called 24 witnesses and defendants called 13. The witnesses included black people, white people, historians, political scientists,

The witnesses
included
black people,
white people,
historians,
political scientists,
lawyers,
statisticians and
ordinary citizens.

lawyers, statisticians and ordinary citizens. There was extensive fascinating testimony about the political history of Mobile, and its present.

The Issue of The City’s Filing of Plans For a Proposed Remedy

At the end of the trial, the Court ordered both sides to submit proposed plans for single member districts.

Plaintiffs on September 8 submitted three different plans for nine single-member districts.

It has come to be thought by some that the City did not submit any

plan at all, but I don’t think that is correct. I do not have easy access to the docket sheet, which along with the 80 or so boxes from the clerk’s file, is in storage in some GSA warehouse right next to the Ark of the Covenant.

I have in my files a photostatic copy of a document styled “Proposed Plans of Defendants,” with five different suggestions about a remedy if the City lost, though we objected to being required to participate in an involuntary change in the city’s form of government, and *none of these suggestions* involved a mayor-council form of government. My personal file copy was signed by Charlie Arendall and the certificate of service was signed by me on September 7, the same day that the City filed post-trial briefs. Was this actually filed, or not?

My *memory* is vague after almost 40 years, but my *memory* is that in a conference in Judge Pittman’s chambers we handed him our “Proposed Plans of Defendants”

“[T]his opportunity”

of which Judge

Pittman said we did

not avail ourselves

means to me that we

did not avail ourselves

of the “opportunity” to

submit a proposed

single-member

district mayor-council

plan, not that we had

thumbed our nose at

the Court by submit-

ting nothing at all.

while he was sitting at his desk, rather than filing it with the clerk. I do not know whether there is any entry on the docket sheet for this “filing” if indeed it was actually filed [if it had not been filed I doubt I would have kept a copy]. Judge Pittman in his opinion said this about the proposed plans:

The court requested the plaintiffs and defendants to draft and present to the court proposed single-member districts for councilmen under a mayor-council plan. The defendants chose not to avail themselves of this opportunity.

“[T]his opportunity” of which Judge Pittman said we did not avail ourselves means to me that we did not avail ourselves of the “opportunity” to submit a proposed single-member district mayor-council plan, not that we had thumbed our nose at the Court by submitting nothing at all.

The Court of Appeals said, “The City refused to come forward with a plan, forcing the District Court to fashion a remedy,” *Bolden v. City of Mobile*, 571 F.2d 239, 246 (5th Cir. 1978).

In the Supreme Court [*City of Mobile v Bolden*, 446 U.S. 55 (1980)], Justice Blackmun in concurrence said about this particular issue that the Court of Appeals had in part based its affirmance on the City’s “noncooperation with the District Court’s request for the submission of proposed municipal government plans that called for single-member districts for councilmen, under a mayor-council form of government,” and wrote that “I . . . believe that the city’s failure to submit a proposed plan to the District Court was excused by the fact that the only proposals the court was interested in receiving were

variations on a mayor-council plan utilizing single-member districts.”

The Opinion in The Trial Court

Roughly three months after trial, on October 21, 1976, Judge Pittman handed down his opinion, now reported as *Bolden v. City of Mobile*, 423 F.Supp. 384 (S.D. Ala. 1976), some 30 pages in the West reporter. He held that the at-large commission form of government in Mobile was unconstitutional. Boiling down 30 pages into a couple of sentences is difficult, but Judge Pittman importantly held (1) that “the statute on its face was neutral” since in 1911 when the commission form of government was adopted, “the legislature in 1911 was acting in a race-proof situation,” since blacks had been completely disfranchised by the 1901 constitution, (2) “[s]ince the Voting Rights Act of 1965, blacks register and vote without hin-

drance,” (3) *Washington v. Davis* was not a major case imposing a requirement of a showing of discriminatory intent rather than effect, and if the Supreme Court had thought that, it could have said so when they affirmed *Zimmer v McKeithen* [the Fifth Circuit’s *en banc* effects test race dilution case] a few months before *Washington v. Davis*, and so the effects test of *Zimmer* still applied, and (4) applying the *Zimmer* effects test to the facts in Mobile, the operation of the at-large commission form of government was unconstitutional. Since the commission form would not work if the commissioners were elected from single member districts [Does Springhill get the police commissioner? Does

Cottage Hill get the garbage trucks? Does down-the-bay get the finance slot?], he ordered the imposition of a mayor-council government, but stayed the remedy pending appeal.

The newspaper vociferously attacked Judge Pittman, much beyond what seemed reasonable, even to me as a defense lawyer, and even if he were wrong.

The Affirmance by the Court of Appeals

The city appealed.

Meanwhile I changed firms and was no longer in the case. About that time the city hired a lawyer to handle the appeal, which clearly would go to the Supreme Court. The city hired a very famous municipal lawyer named Charles S. Rhyne of the D.C. firm Rhyne & Rhyne, to handle the appeals, especially that to the Supreme Court if necessary. Mr. Rhyne's firm sent a series of very large legal bills to the City, and the *Mobile Register* began to refer to that firm as "Wine and Dine."

The Fifth Circuit affirmed Judge Pittman in *Bolden v. City of Mobile*, 571 F.2d 239 (5th Cir. 1978). They completely rejected the City's argument that *Washington v. Davis* required a showing of intentional discrimination, writing that:

The city ardently asserts that since the 1911 plan was enacted under "race-proof" circumstances, it is immune from Constitutional attack. Blacks had been effectively disfranchised by the Alabama constitution in 1901, and therefore the at-large plan is said to have been adopted in a context where racial considerations could not have been relevant. . . .the city would have us interpret *Washington v. Davis* and [*Village of Arlington Heights v. Metropolitan Housing Dev'p Corp.*, 429 U.S. 252 (1977)] to require a showing of intentional discrimination in the enactment of the plan. We squarely reject this contention¹⁰

The Court of Appeals stuck strongly to its *Zimmer v. McKeithen* discriminatory effects test, and affirmed Judge Pittman.

City of Mobile Case in The Supreme Court

The so-called "Wine & Dine" firm took the case to the Supreme Court. It was argued twice, first on March 19, 1979, and second on October 29, 1979. I was appointed U.S. Magistrate in the spring of 1979. The Supreme Court issued its opinion on April 22, 1980. As it happened, I was in the Supreme Court chamber that day with a bunch of new judges, but we did not get there until *after* the opinion was announced and I did not know it had been announced until in those pre-computer days I read in the *Washington Post* that it had been announced with incredible bitterness between and among the judges in open court. I took the subway to the Supreme Court and got a hard copy of the opinion, which I still have 36 years later. It was reported at *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

The nine justices produced six separate opinions, with no majority opinion. Justice Stewart wrote a four-member plurality opinion in which Chief Justice Burger and Justices Powell and Rehnquist joined. Justice Blackmon concurred "in the result" and Justice Stevens concurred "in the judgment." Three separate dissents were filed by Justices Brennan, White and Marshall.

Justice Stewart's plurality opinion for the four covered three main points, and in note 21 left a fourth hanging.

First, on the statutory claim, he wrote that the Voting Rights Act provisions added nothing to the Fifteenth Amendment, and so he went to the constitutional issues.

Second, on the Fifteenth Amendment claim, the plurality said that "[o]ur decisions have made clear that

action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose,” and “none has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation.”

And, he wrote, “[h]aving found that Negroes in Mobile ‘register and vote without hindrance,’ the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case.”

Third, on the Fourteenth Amendment claim, the plurality held that proof of purpose was also required there:

Despite repeated Constitutional attacks upon multimember legislative districts, the Court has consistently held that they are not unconstitutional per se . . . [cites omitted]. We have recognized, however, that such legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities. [cites omitted]. To prove such a purpose, it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers.[cite omitted]. A plaintiff must prove that the disputed plan was “conceived or operated as [a] purposeful device[] to further racial discrimination” [cite omitted].

This burden of proof is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection Clause of the Fourteen Amendment.

But, fourth, a big caveat on the issue of “intentionally discriminatory maintenance” was in the plurality’s footnote 21, which noted that several attempts to change the form of government had been made [at least one attempt sought a change to a mayor-council form] and had failed, and “[w]hether it may be possible ultimately

to prove that Mobile’s present governmental and electoral system has been retained for a racially discriminatory purpose, we are in no position now to say.” Most of the rest of the plurality opinion just crossed swords with the dissent.

Justice Blackmun concurred “in the result.” He wrote that he was “inclined to agree with Mr. Justice White” that, assuming proof of intent was required, the findings of the district court supported an inference of intent.”¹¹ But he concurred in the result because he thought that even if the plaintiffs had made out a case of intentional discrimination, the district court’s remedy—changing the form of the city’s government from commission to mayor-council—was an abuse of discretion. As discussed above, he said that the city’s refusal to submit a single-member mayor-council plan was justified, the only justice who addressed the issue of the city’s plan.

Justice Stevens filed an opinion concurring “in the judgment.” His opinion seems a little unfocused and talked a lot about *Gomillion v. Lightfoot* and gerrymandering. A fair statement of his concurrence is that there are both good and bad reasons to favor continuing the commission government; undoubtedly some white racists want to continue it just to keep black voters down, but, he wrote, we just cannot have a workable system where that fact invalidates a form of government, so he concurred.

Justice Brennan dissented in a short single paragraph which said that he agreed with Marshall that discriminatory effect alone sufficed but that, even if it did not, the record supported a finding of discriminatory intent.

Justice White dissented. He reviewed the details of the trial court’s fact findings and concluded that they were in accord with past precedent and, echoing the odd usage of Justice Blackmon,¹² that “the findings of the district court support an inference of purposeful discrimination in violation of the Fourteenth and Fifteenth Amendments.”

Justice Marshall dissented. He based his dissent on the language from “*Fortson v. Dorsey*, 379 U.S. 433 (1965), the first vote-dilution case to reach this Court,” which said that if “designedly or otherwise,” a multimember district “would operate” to minimize the voting strength of racial or political elements,” then it is unconstitutional, and that is not an intent-based test.

What Happened After the Supreme Court Opinion?

First, on remand in 1982, Judge Pittman held a new trial and, with very extensive new historical evidence, on April 15, 1982, found that “invidious racial reasons” were a “substantial and significant part” of the plan, and he found an intent to discriminate in the original adoption of the commission plan in 1911, and otherwise, and that it was maintained with a discriminatory purpose, and was unconstitutional under the *Bolden* tests.¹³ Looking to the 1983 election, he said that if the legislature didn’t fix it, he would. A consent decree was reached and approved by the Court on April 7, 1983.

Second, two of the plaintiffs’ lawyers in the case, Jim Blacksher and Larry Menefee, wrote a law review article about the case in the *Hastings Law Journal*.¹⁴ It was cited several times by the Supreme Court in *Thornburg v. Gingles*¹⁵ in 1986, which essentially adopted their law review article as a Constitutional test, certainly a wonderful accolade for any authors.

The “right” question, as the Report emphasizes repeatedly, is whether “as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.”

Third, two years after the Supreme Court’s decision in *Bolden* and about 10 weeks after Judge Pittman’s ruling on remand in *Bolden*, in 1982, Congress amended Section 2 of the Voting Rights Act so that in Voting Rights cases [the only area in which the Act applied] proof of discriminatory intent was not required, but just proof of discriminatory impact.¹⁶ The U.S. Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986) said about it that:

The Senate Report which accompanied the 1982 amendments elaborates on the nature of § 2 violations and on the proof required to establish these violations.[fn7] First and foremost, the Report dispositively rejects the position of the plurality

in *Mobile v. Bolden*, 446 U.S. 55 (1980), which required proof that the contested electoral practice or mechanism was adopted or maintained with the intent to discriminate against minority voters.[fn8] See, e. g., S. Rep., at 2, 15-16, 27. The intent test was repudiated for three principal reasons—it is “unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities,” it places an “inordinately difficult” burden of proof on plaintiffs, and it “asks the wrong question.” *Id.*, at 36. The “right” question, as the Report emphasizes repeatedly, is whether “as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.”[fn9] *Id.*, at 28. See also *id.*, at 2, 27, 29, n. 118, 36.

When no showing of intentional discrimination has been made, “a sufficiently large minority population” means greater than 50 percent of the voting-age population.

Fourth, in 1985, the legislature passed *Ala. Code* §11-44C-1, which is locally still called “The Zoghby Act” after its author, Mary Zoghby. That statute authorized an election on May 14, 1985 to choose between the consent decree in Judge Pittman’s court on April 7, 1983 and a form of government under Alabama law as a “Class 2 Municipality” under §11-44C-1 et seq. The voters approved the statutory form so that’s where we are in Mobile.

Outside Mobile, though, the firefight continues.

What Is the Rule Now?

Consider the case dealing with the Alabama House of Representatives and Senate electoral districting, *Alabama Legislative Caucus v. State of Alabama*, 988 F. Supp.2d 1285 (M.D. Ala. 2013)(three-judge Court), *reversed*, ___ U.S. ___, 135 S.Ct. 1257, 191 L.Ed. 2d 314 (2015)(reversed on racial gerrymandering claim, but racial dilution claim not reached; “[t]he District Court remains free to reconsider [the racial dilution] claims should it find reconsideration appropriate”). Here’s what the three-judge court said the rule is now, after Congress in 1982 amended Section 2 of the Voting Rights Act to make *Bolden* irrelevant in *voting* cases:

A. Vote Dilution

“A plaintiff claiming vote dilution under § 2 must initially establish that: (i) the racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (ii) the group is politically cohesive; and (iii) the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.” *Reno v. Bossier Parish Sch. Bd.*, 520 U.S.

471, 479, 117 S. Ct. 1491, 1498 (1997) (internal quotation marks omitted); *see Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S. Ct. 2752, 2766-67 (1986). The Supreme Court first established these conditions in *Gingles*, when it interpreted for the first time the 1982 revisions to section 2 of the Voting Rights Act. *See Gingles*, 478 U.S. at 50-51, 106 S. Ct. at 2766-67. “When applied to a claim that single-member districts dilute mi-

nority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice.” *Johnson v. De Grandy*, 512 U.S. 997, 1008, 114 S. Ct. 2647, 2655 (1994). When no showing of intentional discrimination has been made, “a sufficiently large minority population” means greater than 50 percent of the voting-age population. *Bartlett v. Strickland*, 556 U.S. 1, 15, 18-19, 129 S. Ct. 1231, 1244-46 (2009) (plurality opinion). And the first *Gingles* condition should not be read to define dilution as a failure to maximize. *De Grandy*, 512 U.S. at 1016, 114 S. Ct. at 2659; *see also id.* at 1017, 114 S. Ct. at 2660 (“One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast. . . . Failure to maximize cannot be the measure of § 2.”).

The Supreme Court in reversing did not opine upon the accuracy of that statement, and so neither do I. Upon remand from the Supreme Court the case has been extensively briefed. If you are interested, you might wish to examine the extensive briefing in the trial court, available of course in the Middle District of Alabama on the PACER system. ▲

Endnotes

1. D. Bagwell, "The Magical Process": *The Sayre Election Law of 1893*, 25 ALABAMA REVIEW 83 (1972), which gets cited in occasional federal voting cases such as *Harris v. Siegelman*, 695 F. Supp. 517 (M.D. Ala. 1988).
2. OFFICIAL PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF ALABAMA 1901, Vol. I, page 8.
3. M. McMILLAN, CONSTITUTIONAL DEVELOPMENT IN ALABAMA: A Study in Politics, the Negro, and Sectionalism 354 (1955).
4. S. HACKNEY, POPULISM TO PROGRESSIVISM IN ALABAMA 148 (1969); McMillan at 268.
5. McMillan at 354.
6. 377 U.S. 533 (1964).
7. 364 U.S. 339 (1960).
8. Mr. Cooper now has an office in Daphne.
9. The original Section 2 more or less restated the Fifteenth Amendment, as the Supreme Court held in 1980 in *Bolden*, as discussed below, and was originally 42 U.S.C. 1973(c). It was amended in 1982 to overrule *Bolden*, PL 97-205 (Act of June 29, 1982), 96 Stat. 135, and it is now 52 U.S.C. §10301.
10. 571 F.2d at 245-46.
11. A good edit might have re-phrased it that the facts supported a proper inference of intent, and that the inference supported the findings of the District Court, but, hell. They are on the Supreme Court and obviously I am not.
12. See note 10.
13. *Bolden v. City of Mobile*, 542 F. Supp. 1050 (S.D. Ala. 1982).
14. Blacksher & Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden*, 34 Hastings L. J. 1 (1982).
15. 478 U.S. 30 (1986).
16. PL 97-205 (Act of June 29, 1982), 96 Stat. 135, and it is now 52 U.S.C. §10301, see discussion in *Thornburg v. Gingles*, 478 U.S. 30 (1986) and *Chisom v. Edwards*, 839 F.2d 1056, 1061-63 (5th Cir. 1988)(Frank Johnson, J.).

David A. Bagwell



David A. Bagwell is a solo lawyer in Fairhope. He is 70 and is trying to retire. He may be reached by electrons sent to david@bagwellesq.com, or by telephone at (251) 928-2970. Forty years ago, in 1975-76, he was one of the lawyers in the *Bolden Mobile city government litigation in the District Court only*, but after that he changed firms and withdrew from the case before all the appeals were briefed and argued.

CONSTRUCTION & ENGINEERING EXPERTS

Forensic engineering and investigative inspection work for Commercial buildings, Residential, & Industrial facilities.

- Construction delay damages
- Construction defects
- Structural issues
- Foundations, settlement
- Sinkhole Evaluations
- Stucco & EIFS
- Toxic Sheetrock & Drywall
- Electrical issues
- Plumbing & Piping Problems
- Air Conditioning Systems
- Fire & Explosion Assessments
- Roofing problems
- Flooding & Retention Ponds
- Engineering Standard of Care issues
- Radio & Television Towers

CONTACT: HAL K. CAIN, PRINCIPAL ENGINEER
 CAIN AND ASSOCIATES ENGINEERS & CONSTRUCTORS, INC.
 HALKCAIN@AOL.COM • WWW.HKCAIN.COM
 251.473.7781 • 251.689.8975



J. FORRESTER DeBUYS, III
 (de-bweez)

Agent, New York Life Insurance Company
 CLU®, ChFC®, AEP®

INDIVIDUAL AND BUSINESS INSURANCE PRODUCTS AND CONCEPTS

FOR INDIVIDUALS

- Life Insurance
- Fixed Annuities *
- Disability Insurance **
- Long Term Care Insurance

FOR BUSINESSES

- Key Person Coverage
- Buy-Sell Agreement Funding
- Deferred Compensation
- Group Life and Disability Insurance **

* Issued by New York Life Insurance and Annuity Corporation (A Delaware Corporation)

** Products available through one or more carriers not affiliated with New York Life, dependent on carrier authorization and product availability in your state or locality.

2311 Highland Avenue South, Suite 100
 Birmingham, Alabama 35205
 (205) 918-1515

CHILD SUPPORT CALCULATION SOFTWARE

For Alabama

Alabama Support Master™

Uses 2009 Guidelines
 Prepares and prints forms
 CS-41, CS-42, CS-43, and CS-47

Includes Interest and Arrearage
 Calculator

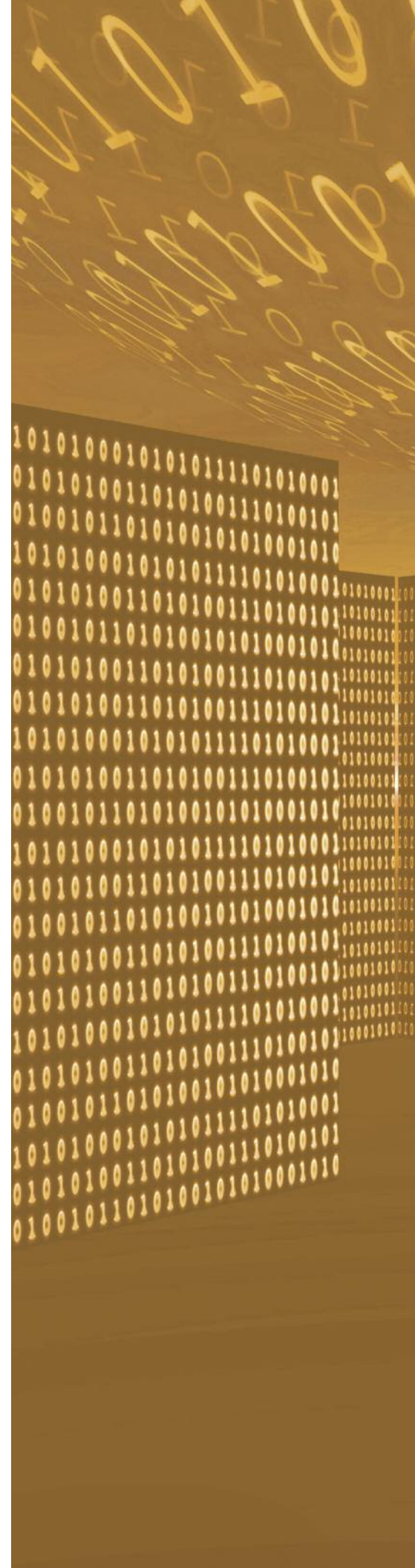
Since 1989
 Professional Software
 Corporation

POB 716 Mount Vernon, IN 47620
 812-781-1422

marc.edwin.hawley@gmail.com

www.SupportMasterSoftware.com

FREE DEMO

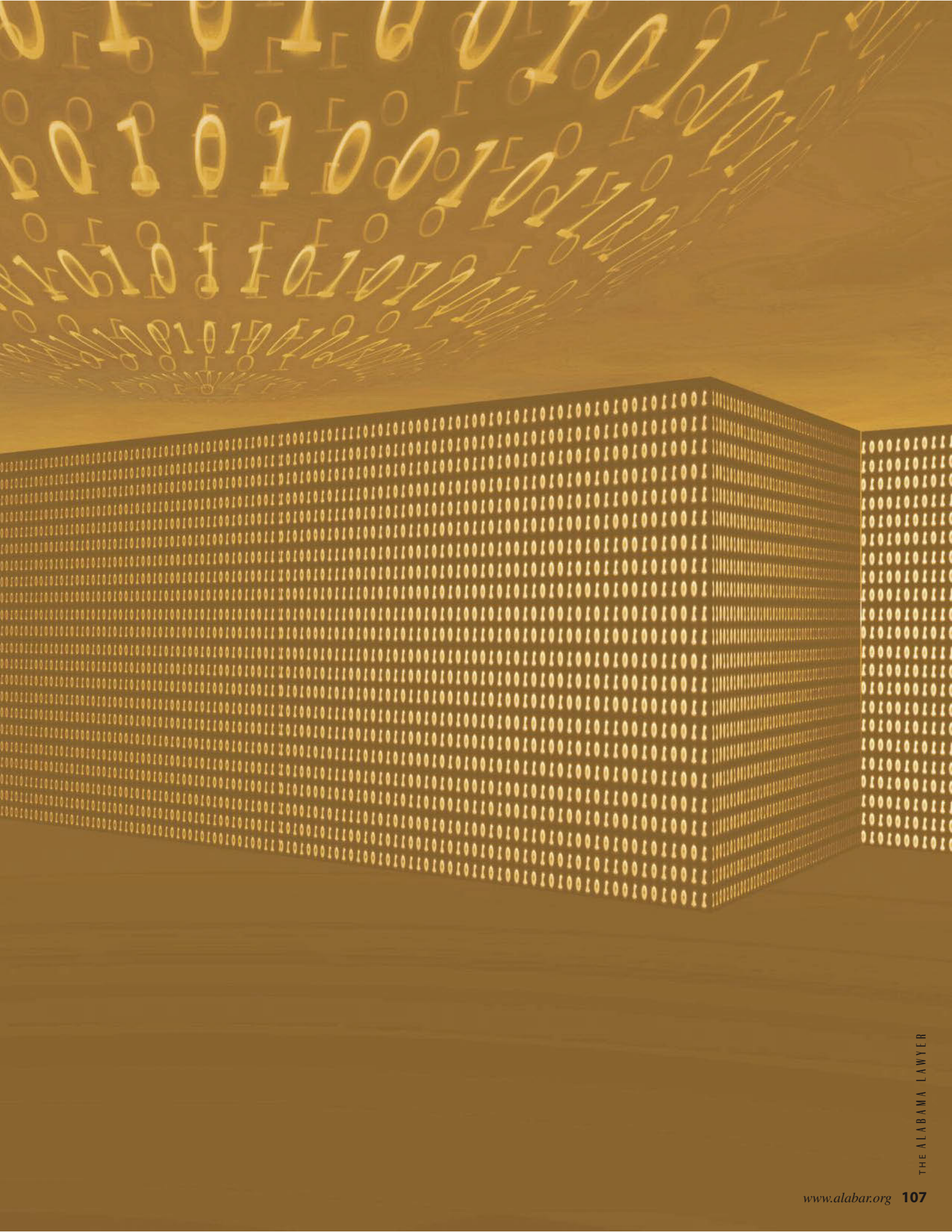


Navigating the Ethical Maze of E-Discovery in Light of The Recent California Bar Ethics Opinion

By Marcus R. Chatterton and Elizabeth J. Flachsbart

Last summer, the State Bar of California issued groundbreaking Formal Opinion 2015-193¹ explaining that the ethical duties of competence and confidentiality require proficiency in e-discovery. Although this opinion is the first of its kind around the country, it is part of a greater movement in the legal profession recognizing that, while understanding and practicing e-discovery was once a “cutting-edge skill,” it is now fundamental to the practice of law. In 2012, for example, the American Bar Association updated

Model Rule of Professional Conduct 1.1 on competence to include a requirement that lawyers keep abreast of “changes in the law and its practice, including the benefits and risks associated with relevant technology.”² Lawyers who fail to appreciate the importance of preserving, collecting and producing electronically-stored information (“ESI”) are putting their practice, their cases and even their own pockets at risk on a daily basis. This article will examine the recent California ethics opinion as well as real cases to illustrate the potential ethical risks at each stage of the e-discovery process.



California Bar Ethics Opinion 2015-193

The State Bar of California's Formal Opinion 2015-193 emphasizes that a lawyer's age-old duty of competence must evolve with changing technologies.³ Today, nearly every case involves some form of evidence stored electronically—in databases, email servers, cell phones, social media networks, the cloud and more. The California bar makes it clear that it is no longer an option for lawyers to plead ignorance in the face of new technology. Instead, the modern duty of competence requires a lawyer, at the outset of every new case, to assess the e-discovery needs of the case.⁴ The lawyer then must decide if he is capable of handling the e-discovery burden. If, after conducting that assessment, he finds that the e-discovery demands are beyond his ability, the California bar offers him three options: (1) acquire the skills necessary to handle the e-discovery, (2) consult or associate with a lawyer or technology expert who possesses the requisite knowledge or (3) decline the representation.⁵ Understanding electronic discovery is so essential that even a lawyer who is an expert in the legal issues of the case may risk an ethical violation by accepting the representation, if he is not also equipped to handle the ESI.

a. California Bar's Nine Essential E-Discovery Skills

Many lawyers today may still be asking themselves what exactly it means to “handle” e-discovery. The California bar lists nine essential skills which a lawyer, either on his own or in conjunction with a more knowledgeable colleague, must be able to perform in order to competently manage his client's e-discovery:

- Initially assess e-discovery needs and issues, if any;
- Implement/cause to implement appropriate ESI preservation procedures;
- Analyze and understand a client's ESI systems and storage;
- Advise the client on available options for collection and preservation of ESI;
- Identify custodians of potentially relevant ESI;
- Engage in competent and meaningful meetings and confer with opposing counsel concerning an e-discovery plan;
- Perform data searches;
- Collect responsive ESI in a manner that preserves the integrity of that ESI; and
- Produce responsive non-privileged ESI in a recognized and appropriate manner.⁶

The California bar uses a hypothetical situation to illustrate the obligations and risks related to these nine skills. In the hypothetical, Attorney represents Client in a case against the client's chief competitor.⁷

The other side demands e-discovery, but Attorney refuses, causing a frustrated judge to order the parties to come to a joint agreement on e-discovery.⁸ The parties agree to a plan whereby a vendor selected by opposing counsel will conduct a search of the client's network using agreed-upon search terms.⁹ Opposing counsel also offers a claw-back agreement for any inadvertently produced, privileged ESI.¹⁰

Client informs Attorney that all ESI on its network has already been shown to Attorney in hard-copy form.¹¹ Relying on this, Attorney allows the vendor direct access to the client's network without any supervision or further instruction.¹² Following the search, Attorney receives an email copy of all the data retrieved by the vendor's search.¹³ Believing that it will match the hard-copy documents he has previously reviewed, he saves the file to his computer without opening it.¹⁴

A few weeks later, Attorney receives a letter from opposing counsel accusing him of spoliation.¹⁵ Unable to figure out how to open the file of data from the search, Attorney hires an e-discovery expert who informs him that there are large holes in the produced data due to the client's ongoing document deletion routine.¹⁶ The expert also discovers that the broad search terms led to a number of both privileged and proprietary, irrelevant documents being produced.¹⁷

The California bar noted that the lawyer in the hypothetical potentially breached his ethical duties of

competency and confidentiality multiple times in his theoretical case. Although fictional, the California bar's hypothetical is a reality for many lawyers. Real lawyers have made costly, accidental missteps in preserving, collecting and producing ESI. What follows is a look at the ethical pitfalls waiting around the corner of each of these stages of discovery, as demonstrated by real cases and the California bar hypothetical.

Preserving ESI

Four of the California bar's nine essential e-discovery skills involve preservation of electronic data: implementing appropriate ESI preservation measures, understanding a client's ESI systems and storage, advising the client on collection and storage of ESI and identifying custodians of potentially relevant ESI. The latter three skills are essentially preparation skills which allow a lawyer to issue the "appropriate ESI preservation measures" contemplated by the first skill. One of the most common and important preservation measures is a litigation hold.

A litigation hold is a "directive issued to, by or on behalf of a client to persons or entities associated with the client who may possess potentially relevant documents (including ESI) that directs those custodians to preserve such documents, pending further direction."¹⁸ The duty to preserve relevant documents, and thus the

duty to issue a litigation hold, is triggered as soon as a party "reasonably anticipates litigation," which can occur far in advance of an actual complaint.¹⁹ At that point, the lawyer must familiarize himself with the client's data retention procedures so that he may take appropriate steps to ensure that any potentially relevant documents will be preserved for litigation.²⁰ In addition to issuing a litigation hold to all custodians of relevant documents, the lawyer must also ensure that the client adequately halts the routine or automatic deletion of responsive data—either by suspending its auto-delete policies,²¹ or preserving a sound copy of all ESI that is within the scope of the litigation hold. Failure to issue a litigation hold, as well as failure to enforce it, may subject a lawyer to sanctions.

a. Duty to Issue Litigation Hold

Even absent bad faith, a party can be sanctioned for failing to issue a litigation hold. Take, for example, the plaintiffs in *Fidelity National Title Insurance Co. v. Captiva Lake Investments, LLC*.²² Fidelity genuinely believed it did not need to issue a litigation hold, given that the company had a "document collection procedure" in place.²³ As a result of the lack of litigation hold and the client's failure to understand its own document policy, unknown numbers of emails were deleted from the client's system.²⁴ The Eastern District of Missouri found that the failure to issue the litigation



The duty to preserve relevant documents, and thus the duty to issue a litigation hold, is triggered as soon as a party "reasonably anticipates litigation," which can occur far in advance of an actual complaint.



Importantly, even though the court found it unlikely that the inadequate litigation hold actually resulted in the destruction of any relevant documents, it still allowed the defendant to take depositions, at the plaintiff's expense, to determine if any such destruction had occurred.

hold, in and of itself, was sufficient to show the necessary intent to impose sanctions.²⁵ As a result, despite the absence of bad faith, the court issued an adverse inference instruction for the deleted documents, ordered Fidelity to pay half the cost of the consultant appointed by the court to inspect the company's computer system and required Fidelity to pay attorney's fees for the cost of the sanctions motion.²⁶

In another case, the general counsel of the plaintiff company, Scentsy, Inc., did not issue a written litigation hold, but instead gave verbal instructions to certain individuals in custody of relevant information and requested that they not delete documents.²⁷ These conversations took place around the time the complaint was filed.²⁸ The court determined that this oral litigation hold was both "late and imprecise."²⁹ Importantly, even though the court found it unlikely that the inadequate litigation hold actually resulted in the destruction of any relevant documents, it still allowed the defendant to take depositions, at the plaintiff's expense, to determine if any such destruction had occurred.³⁰ The court also warned that if any destruction was revealed, it would consider dismissing the plaintiff's claims entirely.³¹


b. Duty to Monitor Compliance with Litigation Hold

A lawyer's obligations to preserve evidence do not stop after the litigation hold is issued. Instead, the lawyer is ethically

obliged to ensure that the litigation hold is actually being followed by the document custodians.

For example, Samsung Electronics promptly issued a litigation hold to some of its employees seven months prior to a complaint being filed, once it became clear that Apple, Inc. would likely file a patent infringement lawsuit.³² Despite the prompt issuance (and the absence of bad faith on Samsung's part), Samsung was sanctioned because it failed to follow up on its litigation hold to ensure that its measures were implemented.³³ In support of its decision to issue sanctions, the court described Samsung's errors as follows:

In light of its biweekly automatic destruction policy, Samsung had a duty to verify whether its employees were actually complying with the detailed instructions Samsung claims it communicated to them. As far as the court can see, Samsung did nothing in this regard. Samsung failed to send litigation hold notices in August 2010, beyond a select handful of employees, when its duty to preserve relevant evidence arose. Samsung provided no follow-up, and instead waited to send such notices and to follow up with individual employees for seven more months, after Apple filed its complaint. And again, at all times, Samsung never checked whether even a single Samsung custodian was at all in



compliance with the given directives, while at all times the 14-day destruction policy was in place. This is more than sufficient to show willfulness.³⁴

As a result of this failure to monitor compliance with the litigation hold, among other problems, the court issued an adverse inference instruction against Samsung.³⁵

The Sedona Conference³⁶ gives the following suggestions as strategies to help monitor compliance with legal holds:

Organizations should develop ways to regularly monitor a legal hold to ensure compliance. Some tools to accomplish this may include requiring ongoing certifications from custodians, negative consequences for noncompliance and audit and sampling procedures. Organizations may also consider employing technological tools, such as legal hold automation software and dedicated “legal hold” servers to facilitate employee compliance with the legal hold and to track compliance.³⁷

The bottom line is that a lawyer does not pass the responsibility to preserve documents to his client once he issues a litigation hold. Instead, he must remain actively involved, potentially providing training or auditing, to ensure the hold is followed, or else both the lawyer and the client may suffer sanctions.

c. Scope of Litigation Hold

In today’s world, the computer is only the beginning of electronic evidence. As such, the duty to preserve evidence goes far beyond a client’s hard drive. In one employment discrimination case, the defendant alleged that the plaintiff had deleted Facebook posts where she claimed to love her job.³⁸ Plaintiff’s counsel argued that the posts were not relevant, and that even if they were, the posts were innocuously deleted by a 22-year-old girl who would not have known not to delete them.³⁹ The court rejected both arguments and issued an important reminder to lawyers in the social media age:

[I]t is of no consequence that Plaintiff is young or that she is female and, therefore, according to her counsel, would not have known better than to delete her Facebook comments. Once Plaintiff retained counsel, her counsel should have informed her of her duty to preserve evidence and, further, explained to Plaintiff the full extent of that obligation.⁴⁰

Similarly, the duty to preserve includes text messages and other information stored on a party’s cell phone.⁴¹ Lawyers, therefore, must now be in the business of educating their clients on the importance of electronic evidence. While some clients may intuitively understand the importance of preserving corporate documents, they may find it harder to believe that

they are not permitted to update and clean out their personal cell phone and social media accounts as they are accustomed to doing on a daily basis.

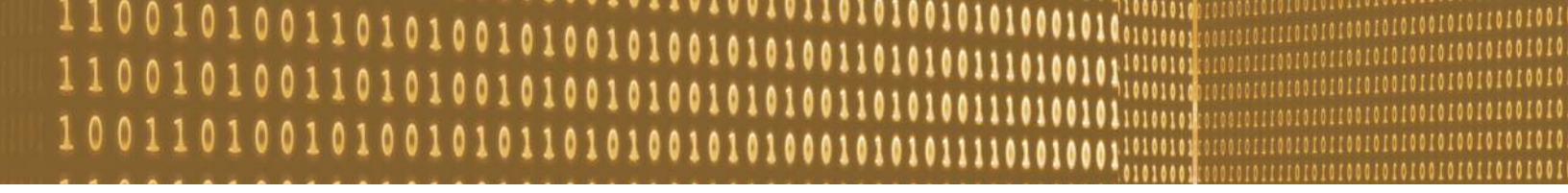
The preservation of evidence, while only the beginning of the e-discovery process, is no small feat for a lawyer. To comply with his ethical duties, the lawyer must understand his client’s electronic storage, contact custodians of documents in order to mandate preservation and monitor compliance with such directions—and do all these things across all mediums of ESI. Once a lawyer has successfully preserved evidence, he then must tackle the cumbersome task of sorting the relevant documents in preparation for production.

Collecting ESI

The broad scope of the duty to preserve, combined with the massive capacity for electronic storage, can result in the accumulation of enormous amounts of documents in the wake of a litigation hold. Once these documents have been safely preserved, a lawyer’s next hurdle is sorting the documents to ensure that all relevant documents are located while also protecting any privileged documents.

a. Recommendations of California State Bar

Three of the nine core duties listed in the California Bar opinion implicate the process of sorting documents for production: “engage



in competent and meaningful meet and confer with opposing counsel concerning an e-discovery plan,” “perform data searches” and “collect responsive ESI in a manner that preserves the integrity of that ESI.” The lawyer from the California bar’s hypothetical made numerous mistakes on this front. First, he met with opposing counsel to determine appropriate search terms for his client’s database even though he lacked an appreciation of the potential harm that broad or incorrect terms could cause. The lawyer then allowed the vendor unfettered access to his client’s network, failing to monitor the vendor or even review the data the vendor gathered.

The California bar ethics committee points out that a minor remedial measure—hiring an e-discovery expert to consult on the case—could have prevented the lawyer’s harmful mistakes.⁴² An expert could have helped devise search terms that were more appropriately targeted, counsel the client on the implications of allowing a vendor to search the client’s network and supervise the vendor’s searches.⁴³ This illustration highlights a tension inherent in the California bar’s opinion. On the one hand, lawyers are encouraged to bring in outside consultants and vendors when the lawyer alone is not equipped to handle the e-discovery demands of a case. On the other hand, an lawyer’s ethical liability and responsibility may only be compounded by the outsiders, as the lawyer now must monitor those

contractors in addition to his client, all while remaining ultimately liable for any potential e-discovery mistakes or violations. With so much potential for ethical missteps, it is critical that lawyers make good decisions regarding who should conduct searches and how the search should be conducted. Once those decisions are made, it is imperative that the lawyer actively supervise the subsequent searches.

b. Ethical Considerations Regarding E-Discovery Vendors

When faced with large-scale document review, a lawyer must decide whether to hire an outside vendor. In-house e-discovery can be cost-efficient, time-efficient and help minimize a client’s risk by eliminating outside vendors.⁴⁴ Despite these benefits, many cases will still require an outside expert or vendor, either because of the client’s lack of technological proficiency or the sheer volume of documents to be sorted. Even if a lawyer hires an expert or outside vendor, his ethical obligations are not absolved. Instead, the lawyer’s duty to supervise requires that he remain actively involved with the vendor, ensuring that the search is complete and appropriately limited.

The case of *HM Electronics, Inc. v. R.F. Technologies, Inc.*⁴⁵ illustrates the dangers of handing over the reins to third-party vendors. Defense counsel LeClairRyan LLP in *HM Electronics* hired an outside firm to handle e-discovery.⁴⁶ The outside firm used broad search

terms, resulting in every email with the word “confidential” being withheld as privileged.⁴⁷ Because the defendant company’s email signature included a confidentiality phrase on the footer of every email, the vendor withheld nearly every email as privileged.⁴⁸ LeClairRyan did not review even a sample of the withheld documents.⁴⁹ Yet, LeClairRyan’s lead lawyer vehemently asserted before the court on multiple occasions that all responsive, non-privileged documents had been produced.⁵⁰

Once it became clear that more than 375,000 pages of ESI had been inappropriately withheld, the court looked to defense counsel to explain how the errors could have happened under their watch. The following exchange between defense counsel O’Leary and the court highlights the woefully inadequate level of supervision:

MS. HERRERA: Did your client conduct an ESI search for communication[s]?

MR. O’LEARY: Everything has been produced.

MS. HERRERA: Well, that’s not really my question.

MR. O’LEARY: That’s my response, though. We produced everything when we did that by checking computers.

MS. HERRERA: I’d like to understand the methodology you did conduct.

MR. O’LEARY: I didn’t conduct the ESI search, so I don’t know the methodology.

They were told to look for documents on their computer. They did so and we produced them. * * * [T]hey obviously conducted the search and produced what they had.⁵¹

Despite the fact that O’Leary has practically no understanding of the search being conducted by the outside firm, he resolutely declares to the judge that all documents have been produced.⁵² These declarations were in violation of *Federal Rule of Civil Procedure* 26(g), which requires a lawyer to make a “reasonable inquiry” into the completeness and correctness of discovery responses before signing off on them.⁵³ The court concluded that O’Leary violated his ethical duties by representing that all documents had been produced, when in reality he had not even looked at the client’s ESI data.⁵⁴

When O’Leary attempted to pass the blame off to the paralegals at the outside firm for not informing him that privileged documents needed further review, the court responded with a scathing reminder:

This excuse shows LeClair-Ryan attorneys did not, and still do not, comprehend that it is their duty to become actively engaged in the discovery process, to be knowledgeable about the source and extent of ESI, and to ensure that all gathered data is accounted for, and that these duties are heightened-not diminished-when there is a transition between

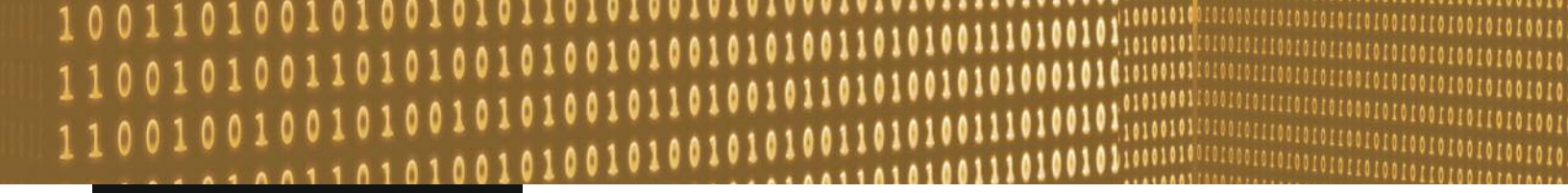
firms or other personnel critical to discovery. As lead counsel, Thomas O’Leary and LeClairRyan LLP should have asked the paralegals at the temporarily-involved firm about the privilege review, including whether one was conducted, what privilege review methodology was used, the amount and type of documents withheld as privileged and the updating of the privilege log.⁵⁵

As a result of the multiple discovery infractions, the court awarded plaintiff compensatory sanctions against LeClairRyan and Thomas O’Leary personally for all costs and fees expended during the discovery dispute.⁵⁶ In addition, the court granted plaintiff’s request for issue sanctions and an adverse inference instruction.⁵⁷

Ultimately, the name of the game with e-discovery vendors is delegate, but verify. Vendors can be an excellent tool to help expedite discovery and guide a lawyer through an otherwise unmanageable maze of documents. It is the lawyer, though, not the vendor, who must answer to the client and to the court. Accordingly, the lawyer must take an active role in both understanding the searches being performed and monitoring the results of the searches. He must be certain never to certify the completeness of discovery responses without a “reasonable inquiry” under *Federal Rule of Civil Procedure* 26(g), or else he may find himself personally liable for court-imposed sanctions.⁵⁸



He must be certain never to certify the completeness of discovery responses without a “reasonable inquiry” under *Federal Rule of Civil Procedure* 26(g), or else he may find himself personally liable for court-imposed sanctions.



Ultimately, the court found the defense counsel negligent for failing to produce the document in native format or color TIFF in order to preserve the document's original qualities.

Producing ESI

In the wake of appropriately supervised searches, the lawyer's next challenge is to properly produce responsive documents. Although seemingly the end of the e-discovery road, the production stage is no less rife with potential ethical pitfalls than the first two stages. In particular, when producing responsive documents, lawyers should be aware of two key ethical issues: (1) the format of production and (2) the protection of privileged documents.

a. Producing Documents in Appropriate Format

The State Bar of California lists "Collect[ing] responsive ESI in a manner that preserves the integrity of the ESI," among the nine necessary e-discovery skills. When handling electronic documents, merely opening or copying a document may change the modification date or other elements of metadata. Further, some documents may lose important original color and formatting if they are produced in formats besides their native form. Some courts have taken the approach that altering the form or metadata of a document is a sanctionable offense.

*Coquina Investments v. Rothstein*⁵⁹ illustrates the importance of producing documents in a format that preserves the integrity of the document. The defendants in *Coquina* produced a key Customer Due Diligence (CDD) form in

black and white PDF format to the plaintiffs.⁶⁰ The CDD form was kept in the normal course of business on an electronic database.⁶¹ In its native format, the document was in color and had a red banner across the top reading "HIGH RISK."⁶² Once printed in as a PDF, it became black-and-white and the "HIGH RISK" header was barely legible.⁶³ Also, text that had appeared horizontally on the original document was printed in a compressed, vertical column and all metadata, such as archive and editing information, was lost.⁶⁴ The PDF version was entered into evidence at trial.⁶⁵

Ultimately, the court found the defense counsel negligent for failing to produce the document in native format or color TIFF in order to preserve the document's original qualities.⁶⁶ The defendant was determined to have been willful in allowing the production error to continue despite knowledge of the look of the original form.⁶⁷ The court held that the plaintiff had suffered prejudice as a result of the production, based mostly on speculation that the jury may have been more convinced by the bright red banner or other qualities of the original document.⁶⁸ Accordingly, the defendant and its lawyer were ordered to pay the plaintiff's fees and costs from the sanctions motions.

Although the court in *Coquina Investments* ultimately ensured that the documents were produced in native form, the best practice for lawyers who want to receive

documents unaltered and with all metadata included, is to negotiate for native production in their joint conference with opposing counsel. Generally, a producing party is only required to produce documents in one format. *Federal Rule of Civil Procedure* 34(b) requires documents to be produced in the form that they are kept in the normal course of business.⁶⁹ However, a joint agreement by the parties can override the mandate of *FRCP* 34(b).⁷⁰ Thus, if a lawyer needs documents in a different format, he should attempt to get the producing party to agree to the terms at the outset.

b. Producing Privileged Documents

The risk of accidentally producing privileged material is particularly dangerous in the world of e-discovery due to the large volume of documents and involvement of third-party vendors. Many lawyers rely on claw-back provisions and *Federal Rule of Evidence* 502(b),⁷¹ which allows certain inadvertent disclosures to not act as a waiver of privilege, for protection in the event of inadvertently disclosed documents. *Alabama Rule of Evidence* 510(b)(2) is identical to *FRE* 502(b) and likely can offer similar protection of privilege in the event of inadvertent disclosure, but only if the listed conditions are met.⁷² Thus, lawyers engaged in electronic discovery need to be well versed in the requirements of *Federal Rule*

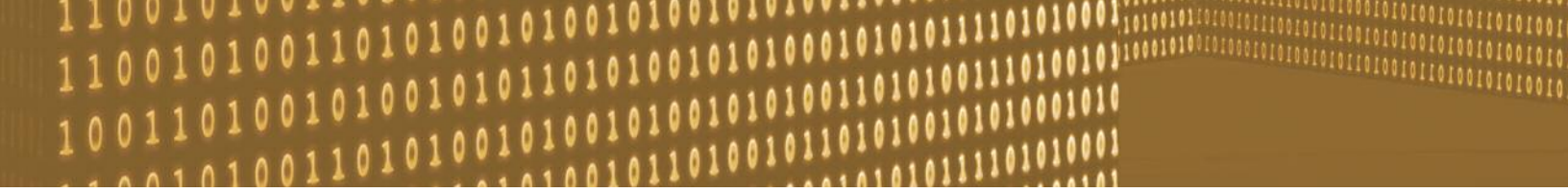
of Evidence 502(b) and *Alabama Rule of Evidence* 510(b), or else risk waiving privilege even when disclosure is accidental.

Take, for example, the case of *Kilopass Technology Inc. v. Sidense Corp.*⁷³ Plaintiff Kilopass produced more than 55,000 electronic documents, including over 1,100 that turned out to be privileged.⁷⁴ The defendant sought a declaration by the court that Kilopass had waived attorney-client privilege with respect to the 1,100 documents.⁷⁵ Kilopass argued that it met the *FRE* 502(b) requirements for preservation of privilege in the event of inadvertent disclosure but the court disagreed.⁷⁶ Even though both parties conceded that the disclosure was inadvertent and that Kilopass took reasonable steps to correct the error, the court found that Kilopass's pre-production procedures did not meet the standard for "reasonable steps to prevent disclosure."⁷⁷ Accordingly, Kilopass had waived attorney-client privilege for the 1,100-plus documents.⁷⁸

Kilopass described its screening procedures as follows:

As is done in most major patent litigation cases involving large scale productions, in order to screen for privileged documents, Kilopass's law firm, SNR Denton, contracted with a vendor to have electronic documents searched and sorted for privilege. The vendor uses Relativity, which is a hosted document review

platform with analytical software tools. To this end, SNR Denton requested that Kilopass provide it with a list of lawyers and law firms used in the past. SNR Denton then provided this list of law firms and lawyers to its vendor to screen the documents electronically for potentially privileged documents. Kilopass's vendor screened the documents for privilege electronically but mistakenly did not run the search across all production batches of documents. For example, individual documents within privileged document families were not picked up in the electronic search. Also, the list of law firms provided by Kilopass did not include some law firms such [sic] Wilson Sonsini and others that had provided some early corporate work for Kilopass. After receiving the production batches from its vendor just days before the production was due, Kilopass's attorneys and paralegals conducted spot checking on various privilege search terms in various batches of documents that were queued up for production in Concorde, another electronic document review platform. However, it would appear that the vendor mistakenly did not run all of the privilege search terms provided by SNR Denton and that the production batches that contained the



large majority of the privileged documents inadvertently produced escaped manual screening due to the tight timeline for production.⁷⁹

In denouncing Kilopass’s efforts as unreasonable, the court noted in particular the high proportion of privileged documents among those produced (nearly one in 50); the fact that the mistakes were made by the vendor, law firm and client alike; and the fact that reasonable spot-checking immediately prior to production would have caught many of the obviously-privileged documents.⁸⁰

The lesson from *Kilopass* is that a claim of “inadvertent disclosure” is not enough to protect accidentally produced, privileged documents. Unless the lawyer has taken reasonable steps on the front end to prevent the inadvertent disclosure, he will be deemed to have waived the privilege, despite his reasonable efforts to correct the error on the back end.

i. California Bar Opinion on Duty of Confidentiality

The California bar also cautions against over-reliance on claw-backs or *FRE* 502(b).⁸¹ The lawyer in the California bar’s hypothetical has an uphill battle in attempting to enforce the claw-back provision he arranged with opposing counsel. Not only did that lawyer’s careless search and lackluster supervision of the e-discovery vendor lead to production of privileged documents, but it also led to the distribution of

highly proprietary, irrelevant documents into the hands of his client’s chief competitor.⁸² The claw-back clause he negotiated, as with most claw-backs, does not address non-privileged documents. Even for the privileged documents it is intended to protect, opposing counsel will have ample ammunition to argue that the lawyer did not take reasonable steps to prevent the disclosure:

Attorney took no action to review Client’s network prior to allowing the network search, did not instruct nor supervise Client prior to or during Vendor’s search, participated in drafting the over-broad search terms, and waited until after Client was accused of evidence spoliation before reviewing the data—all of which could permit Opposing Counsel viably to argue Client failed to exercise due care to protect the privilege, and the disclosure was not inadvertent.⁸³

While the ethics opinion does not state for certain whether the lawyer in the hypothetical has waived privilege and lost the ability to reclaim the proprietary documents, it does conclude, at the very least, the client and lawyer will now likely have to litigate these issues.⁸⁴

Conclusion

While electronic discovery was once the brave new frontier, it is

now the reality of everyday legal practice. The ABA update to the model rules, the California bar’s recent ethics opinion and cases from around the country make it clear that the expectations of lawyers have evolved with the new technologies. A lawyer’s duty of competency now includes proficiency in preserving, collecting and producing ESI. Lawyers who ignore this evolution risk violating their ethical obligations and suffering damaging sanctions in their cases. ▲

Endnotes

1. State Bar of Cal. Standing Comm. on Prof’l Responsibility & Conduct, Formal Op. No. 2015-193 3-4 [hereinafter Op. No. 2015-193].
2. MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 8 (2012).
3. Op. No. 2015-193, at 3.
4. *Id.*
5. *Id.*
6. *Id.*, at 3-4.
7. *Id.*, at 1.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 2.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 3 n.6.
19. *Zublake v. UBS Warburg LLC*, 229 F.R.D. 422, 431 (S.D.N.Y. 2004).
20. *See id.* at 432.
21. *See EEOC v. JP Morgan Chase Bank, N.A.*, 295 F.R.D. 166, 173 (S.D. Ohio 2013) (issuing sanctions despite defendant’s claim that documents were lost due to routine document purging, given that defendant was on notice of litigation and thus should have issued a litigation hold to preserve documents).

22. No. 4:10-CV-1890(CEJ), 2015 WL 94560 (E.D. Mo. Jan. 7, 2015).
23. *See id.* at *2.
24. *See id.*
25. *See id.*
26. *See id.* at *7.
27. *Scentsy, Inc. v. B.R. Chase, LLC*, No. 1:11-cv-00249, 2012 WL 4523112, at *8 (D. Idaho Oct. 2, 2012).
28. *See id.*
29. *Id.*
30. *Id.* at *9.
31. *Id.*
32. *See Apple Inc. v. Samsung Elec. Co.*, 881 F. Supp. 2d 1132, 1147 (N.D. Cal. 2012).
33. *See id.* at 1150.
34. *See id.* at 1147.
35. *See id.* at 1151.
36. The Sedona Conference (TSC) is a charitable, 501(c)(3) non-partisan research and educational institute dedicated to the advancement of law and policy in the areas of antitrust law, complex litigation and intellectual property rights. *See* <https://thesedonaconference.org/faq>.
37. SEDONA CONFERENCE, COMMENTARY ON LEGAL HOLDS: THE TRIGGER & THE PROCESS 16 (2007).
38. *Painter v. Atwood*, No. 2:12-cv-0215-JCM-RJJ, 2014 WL 1089694 (D. Nev. Mar. 18, 2014).
39. *See id.*
40. *Id.*
41. *See, e.g., id.; Calderon v. Corporacion Puertorriquena de Salud*, 992 F. Supp. 2d 48 (D.P.R. 2014) (holding that deletion of select text messages evidenced an awareness that litigation was pending and thus was in violation of the duty to preserve).
42. Op. No. 2015-193, at 4-5.
43. *Id.* at 5.
44. *See generally* HBR CONSULTING & EXTERRO, SEEING THE BIG PICTURE: WHY LEGAL DIRECTORS ARE BRINGING E-DISCOVERY IN HOUSE (2015), available at <http://www.exterro.com/resources/why-legal-directors-are-bringing-e-discovery-in-house>.
45. No. 12cv2884-BAS-MDD, 2015 WL 4714908 (S.D. Cal. Aug. 7, 2015).
46. *Id.* at *9.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at *10.
51. *Id.* at *8.
52. *Id.*
53. FED. R. CIV. P. 26(g).
54. *HM Electronics*, 2015 WL 4714908 at *13.
55. *Id.*, at *26.
56. *Id.*, at *31.
57. *Id.*, at *32.
58. *See id.; Play Visions, Inc. v. Dollar Tree Stores, Inc.*, 2011 WL 2292326 (W.D. Wash. June 8, 2011) (holding firm and lead counsel jointly and severally liable for \$136,168.41 in damages after counsel signed off on discovery documents without making a reasonable inquiry into their completeness).
59. No. 10-60786-Civ, 2012 WL 3202273 (S.D. Fla. Aug. 3, 2012).
60. *Id.* at *4.
61. *Id.*
62. *Id.*
63. *Id.* at *5.
64. *Id.*
65. *Id.* at *4.
66. *Id.* at *14.
67. *Id.*
68. *Id.*
69. FED. R. CIV. P. 34(b).
70. *See Melian Labs Inc. v. Trilogy LLC*, No. 13-cv-04791-SBA(KAW), 2014 WL 4386439 at *2 (N.D. Cal. Sept. 4, 2014) (explaining that a joint stipulation by the parties overrules the requirements of FED. R. EVID. 34(b)).
71. FED. R. EVID. 502(b). This Rule provides that inadvertent disclosure of privileged documents does not waive privilege if "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error . . ." FED. R. EVID. 502(b).
72. ALA. R. EVID. 510(b).
73. No. C10-02066 SI, 2012 WL 1534065 (N.D. Cal. May 1, 2012).
74. *Id.*, at *2.
75. *Id.*
76. *Id.*
77. FED. R. EVID. 502(b)(ii).
78. *Kilopass*, 2012 WL 1534065, at *3.

79. *Id.*, at *2.
80. *Id.*, at *3.
81. Op. No. 2015-193, at 6.
82. *Id.*
83. *See id.*
84. *See id.* at 7.

Marcus R. Chatterton



Marcus R. Chatterton is an associate in the Birmingham office of Balch & Bingham LLP. He co-chairs the Copyright Subcommittee of the Intellectual Property Committee in the American Bar Association's Section of Litigation. Volunteer activities include serving as a member of the Alabama State Bar Digital Communications Committee and the Birmingham Bar Association Technology Committee. Chatterton served in the United States Marine Corps from 1995-2004. He is a graduate of Auburn University and the University of Alabama School of Law, magna cum laude, where he was on the managing board of the Alabama Law Review, and a member of the Order of the Barristers and the National Trial Advocacy Team.

Elizabeth J. Flachsbart




Elizabeth J. Flachsbart is an associate in the Birmingham office of Balch & Bingham LLP. She received her B.A. from the University of Alabama in economics and her J.D. from Washington & Lee School of Law. Prior to law school, she taught high school math in Lowndes County as part of the charter corps of Teach For America in Alabama.



Shifting the Burden:

Municipal Workers and Establishing Evident Partiality in Alabama Based upon a Failure to Disclose

By Rebecca A. Beers



In Alabama, seeking and obtaining vacatur of an arbitration award just got a little easier. In April 2015, the Alabama Supreme Court broke with the Eleventh Circuit Court of Appeals and joined what the court termed as the “majority” view in setting the standard for what a litigant must establish to meet the “evident partiality” standard under the Federal Arbitration Act and to obtain vacatur in cases where arbitrators have failed to disclose potential ties or relationships with parties to the arbitration and/or their lawyers. While this standard in Alabama was a

bit unclear prior to April, in *Municipal Workers Compensation Fund v. Morgan Keegan, et al.*,¹ the Alabama Supreme Court made it clear that, where the forum’s rules require it, arbitrators must undertake a thorough conflict check and disclose all conflicts and relationships with the parties and their counsel or the award rendered will be subject to vacatur in post-arbitration proceedings if an undisclosed conflict gives rise to a reasonable impression of partiality, regardless of whether or not the arbitrator had knowledge of the conflict. A litigant in Alabama no longer bears the burden of having to prove that an arbitrator was actually biased or that the arbitrator’s failure to disclose a conflict or relationship was knowing and intentional. The burden has shifted to the arbitrator to make a full and fair disclosure of all conflicts and relationships with the litigants and their lawyers.

This article will briefly explain the background of the “evident partiality” standard and an arbitrator’s disclosure duties, the competing standards related to conflict non-disclosure cases, the standard that the Alabama Supreme Court set out in *Municipal Workers* and, going forward, what that standard means for arbitrators and litigants in arbitrations in Alabama.

Evident Partiality and The Arbitrator’s Duty to Disclose

The Federal Arbitration Act² provides four grounds for vacatur of an arbitration award, and the second of those four grounds requires an arbitration award to be vacated “where there was evident partiality or corruption in the arbitrators”³ What constitutes “evident partiality” has been the subject of frequent litigation. In 2003, in *Waverlee Homes, Inc. v. McMichael*, the Alabama Supreme Court adopted the “reasonable impression of partiality” standard, stating that to rise to the level of evident partiality, a litigant must establish, through credible, admissible evidence, facts which give “rise to an impression of bias that is direct, definite, and capable of demonstration” rather than a “mere appearance of bias that is remote, uncertain, and speculative.”⁴ Courts—including Alabama courts—have found that a reasonable impression of an arbitrator’s partiality can arise in two contexts: through the arbitrator’s conduct and statements (an “actual bias” case) and through the arbitrator’s failure to disclose conflicts and relationships with the parties and their counsel (a “nondisclosure” case).

The seminal case discussing an arbitrator’s inherent duty to disclose is the United States Supreme Court’s opinion in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, in which Justice Hugo Black delivered

the majority opinion discussing the balance between preserving the streamlined and cost-effective nature of the arbitration forum and affording the arbitrating litigants the “elementary requirements of impartiality taken for granted in every judicial proceeding.”⁵ In *Commonwealth Coatings*, the Court reversed the trial court’s affirmance of the arbitration award in which the relationship between a litigant and an arbitrator was not disclosed, and the Court observed, “[w]e can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.”⁶ This requirement is founded in the principle that arbitration litigants should be able to select their arbitrators intelligently, which requires full and fair disclosure from the arbitrators.⁷ While *Commonwealth Coatings* appears to recognize an independent duty on the part of arbitrators to disclose actual or perceived conflicts to litigants that likely arises out of the Federal Arbitration Act,⁸ the Supreme Court and other federal and state courts have also recognized that private arbitration forums have set out their own rules which require arbitrators to discover and disclose actual or perceived conflicts or relationships with litigants and their counsel.⁹

The Duty to Disclose and The Duty to Investigate

It is a well-accepted proposition that, where an arbitrator knows of a conflict or a material relationship with a party or that party’s counsel and fails to disclose it, a reasonable person would conclude that that arbitrator was evidently partial and any award rendered would be subject to vacatur. Therefore, while most federal and state courts have recognized that arbitrators bear the burden of disclosing relationships and conflicts that may give rise to an impression of partiality to litigants

and their counsel, distinct differences of opinion arise regarding the relationships and conflicts that must be disclosed. Is an arbitrator required only to disclose known conflicts and relationships? Must the arbitrator undertake the equivalent of a lawyer's "conflict check" to discern relationships that may give rise to an impression of bias of which the arbitrator herself is unaware?

The majority of courts to address situations in which arbitrators have failed to disclose these relationships and potential conflicts have generally determined that the arbitrator's failure to disclose these facts alone—where the facts are non-trivial—may be sufficient, in and of itself, to establish evident partiality warranting vacatur under the Federal Arbitration Act. These cases do not require a litigant to establish that an arbitrator knew of these non-trivial facts and failed to disclose them. Rather, the act of failing to disclose these conflicts and relationships alone may be sufficient—that is, the arbitrator's failure to undertake a reasonable investigation to determine the existence of and then disclose conflicts and relationships may be sufficient to establish evident partiality on its own.¹⁰ These undiscovered and undisclosed conflicts and relationships, however, cannot be trivial and must, on their own, give rise to a direct and definite impression of bias. The seminal opinion in this line of cases is the Ninth Circuit's opinion in *Schmitz v. Zilveti*, in which that court found that the arbitrator's failure to investigate and disclose a particular conflict (where arbitral forum required such an investigation) that gave a reasonable impression of bias constituted evident partiality because the arbitrator had

In contrast, the Eleventh Circuit has required actual knowledge of these conflicts and relationships in order to warrant vacatur for evident partiality.

constructive knowledge of the conflict due to the forum's duty to investigate.¹¹

In contrast, the Eleventh Circuit has required actual knowledge of these conflicts and relationships in order to warrant vacatur for evident partiality. That is, even if there exists a direct conflict that clearly gives rise to a direct and definite impression of bias, evident partiality is not established and vacatur is not appropriate unless the arbitrator actually knew of this conflict and failed to disclose it to the litigants and their counsel.¹² The Eleventh Circuit has explicitly rejected the Ninth Circuit's "constructive knowledge" theory in *Schmitz* and held that the law in the Eleventh

Circuit "is that an arbitration award may be vacated due to the 'evident partiality' of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists."¹³ A later panel of the Ninth Circuit observed that it was "aware of only one court of appeals that has adopted a per se rule that a finding of evident partiality is precluded by an arbitrator's lack of 'actual knowledge of the information upon which [an] alleged conflict was founded,'" and that is the rule adopted in the Eleventh Circuit.¹⁴

Therefore, while the Eleventh Circuit explicitly requires arbitrators only to disclose relationships and conflicts of which they have actual knowledge in order to avoid a finding of evident partiality, other circuits acknowledge that evident partiality may be established where there exist facts or a conflict that may

give rise to a reasonable impression of bias and the arbitrator failed to investigate and disclose this information, even when the arbitrator may not have had actual knowledge of this information.

Municipal Workers and Alabama's Break With the Eleventh Circuit

Prior to the Alabama Supreme Court's opinion in *Municipal Workers*, the standard of review for nondisclosure cases in Alabama courts was murky and undefined.¹⁵ Only two major decisions discussed the "nondisclosure" brand of "evident partiality" cases. The first—*Waverlee*—was unclear in whether it was a nondisclosure or actual bias case, but it adopted the "reasonable impression of partiality" standard for cases in which vacatur was being sought based upon "evident partiality," relying both upon Eleventh Circuit precedent and also citing the Ninth Circuit's case in *Schmitz*.¹⁶ In the second case—*Lexington Insurance*—the court was interpreting specific provisions of the parties' arbitration agreement relating to the arbitrator selection process.¹⁷ However, in doing so in its discussion of nondisclosure of conflicts, the court again relied upon the Ninth Circuit's

The trial court had found that the arbitrators in question had failed to make disclosures which were required by the arbitral forum but that this nondisclosure did not constitute evident partiality requiring vacatur of the arbitration award.

Schmitz decision.¹⁸ Despite citing both Eleventh Circuit and Ninth Circuit cases that take diametrically opposite views of what constitutes evident partiality in a nondisclosure context, neither *Waverlee* nor *Lexington Insurance* directly addressed what standard Alabama would adopt in nondisclosure cases. The supreme court's opinion in *Municipal Workers* filled that void.

While it would not have been unreasonable to assume that Alabama would stand with the federal circuit in which it sits, the Alabama Supreme Court in *Municipal Workers*, in somewhat of a surprise, adopted the reasoning of the Ninth Circuit (and other circuits reaching similar conclusions). In *Municipal Workers*, the appellant, Municipal Workers Compensation Fund, argued that the trial court's refusal to vacate the arbitration award at issue should be reversed because, *inter alia*, two arbitrators on the three arbitrator panel had failed to disclose significant information, which for one arbitrator, included the fact that his employer (for which he was a vice president and partner) had business ties to one of the appellees and its counsel.¹⁹ The trial court had found that the arbitrators in ques-

tion had failed to make disclosures which were required by the arbitral forum but that this nondisclosure did not constitute evident partiality requiring vacatur of the arbitration award.²⁰ On appeal,

the appellees relied on Eleventh Circuit precedent, asserting that, for the arbitrator whose firm had the undisclosed business ties to the appellee and its counsel, there was no evidence that the arbitrator had actual knowledge of these business ties and then intentionally failed to disclose them.²¹ The appellant, Municipal Workers, argued that the arbitrator's failure to disclose these significant business ties, compounded by the fact that the arbitrator was under a duty to investigate and disclose any conflicts pursuant to the rules of the arbitral forum, gave rise to a reasonable impression of partiality which constitutes evident partiality under the FAA, justifying vacatur.²²

The Alabama Supreme Court reviewed the decisions of both the Ninth Circuit and the Eleventh Circuit, as well as other case law from across the country and its two prior decisions that touched on the issue of arbitrator nondisclosure as a brand of evident partiality under the FAA, and concluded the following:

We believe the holding in *Schmitz* is the better view and conclude that the “reasonable-impression-of-partiality” standard constituting an “evident partiality” under 9 U.S.C. § 10(a)(2) may be satisfied even though an arbitrator lacks actual knowledge of the facts giving rise to the conflict of interest when the arbitrator was under a duty to investigate in order to discover possible conflicts and failed to do so. In such a situation the arbitrator will be deemed to have constructive knowledge of the conflict of interest, and the failure to disclose the conflict may result in a “reasonable impression of partiality.”²³

In adopting what it characterized as “the majority view in the federal courts,” the Alabama Supreme Court spurned the Eleventh Circuit's actual knowledge requirement and found that because the arbitrator at issue had had the duty under the rules of the

forum to conduct an investigation into ties with the parties and their counsel and because such a search would have revealed what it termed to be significant ties with one of the parties and its counsel, the facts created a reasonable impression of partiality under its prior standard in *Waverlee* that constituted evident partiality under the FAA.²⁴ The court found that the arbitrator had constructive knowledge of the conflict, and that fact, combined with the nature of the conflict itself, gave a reasonable impression of partiality.²⁵ Thus, under *Municipal Workers*, in Alabama, an arbitrator's actual knowledge of a conflict is not required to find evident partiality in an award issued by an arbitrator who has a conflict that gives rise to a reasonable impression of partiality.²⁶

Practical Implications of *Municipal Workers*

A federal district court, in relying on Alabama law and vacating an arbitration award, observed the following about the Alabama Supreme Court's opinion in *Municipal Workers*:

The Supreme Court of Alabama has now firmly joined the courts who find that the purpose of the Federal Arbitration Act can best be satisfied, not by placing on a complaining party the heavy burden of demonstrating actual bias or a knowing nondisclosure, but to place upon applicants for the powerful position of arbitrator the relatively light burden of carefully examining their own backgrounds and revealing all facts that might cause a party to doubt their impartiality. In other words arbitrators must ascertain the relevant facts about their potential impact in the selection procedure in favor of disclosure. The arbitrator does not pass on his own qualifications. The parties do.²⁷

This observation makes clear how the burden has shifted in Alabama with regard to arbitrator disclosure after *Municipal Workers*. Now, the burden is on the arbitrator to know the rules of the forum in which he or she is arbitrating and to make all required disclosures, including undertaking a thorough search or conflict check that will reveal any conflicts or business relationships that would implicate a reasonable impression of partiality. The burden is no longer on litigants to demonstrate that the arbitrator had knowledge of any significant conflicts or relationships—rather, litigants must only show that such conflicts or relationships exist and that the arbitrator was under a duty to discover and disclose them.

For litigants and their counsel, this somewhat opens up “evident partiality” challenges to unfavorable arbitration awards. Without the actual knowledge requirement, a litigant can make a strong challenge to an arbitration award if the litigant discovers the existence of an undisclosed relationship that rises to the level of giving a reasonable impression of partiality. To avoid having a favorable arbitration award be susceptible to such a challenge, litigants can conduct their own conflict checks and inquiries on the front end of the arbitration to ensure that the arbitrator has not overlooked or failed to discover a conflict or relationship that

This decision enables litigants in most arbitrations to choose their arbitrators intelligently and relieves them of the burden of proving that an arbitrator knew of a significant conflict and yet failed to disclose it in seeking vacatur of an arbitration award based on evident partiality.

could prove to be dangerous in post-arbitration proceedings. Alerting the arbitrator and the other parties to these relationships and potential conflicts prior to the issuance of an arbitration award will serve to save the parties both time and money in avoiding taking an arbitration all the way to an award, only to have it overturned in post-arbitration proceedings because the arbitrator failed to discover and disclose a relationship that a party could have detected on the front end. So, while the burden may now lie with the arbitrator to conduct his or her own investigation to disclose all potential conflicts and relationships, it may be a more prudent course for litigants to shoulder that same burden voluntarily to avoid cost and expense down the road.

Finally, it is still unclear in Alabama whether or not there exists a burden on arbitrators to conduct such an investigation that is independent of any re-

quirements that may exist under the rules of the arbitral forum. As previously noted, the United States Supreme Court in *Commonwealth Coatings* hinted that the FAA may imply such a duty,²⁸ but subsequent courts have explicitly avoided making such a finding, even when interpreting the FAA.²⁹ While arbitration forums such as the American Arbitration Association and Financial Institution Regulatory Authority

(FINRA) Dispute Resolution have their own rules and regulations that require arbitrators to conduct their own conflict checks and to disclose any relationships or potential conflicts,³⁰ many arbitrations in Alabama are private arbitrations that are more informal and without a set of rules and regulations that would impose duties on potential arbitrators to discover and disclose these conflicts. The Alabama Supreme Court's opinion in *Municipal Workers* explicitly stated that actual knowledge of a conflict was not needed "when the arbitrator was under a duty to investigate in order to discover possible conflicts and failed to do so."³¹ The court did not find that Alabama arbitrators are under an independent duty to discover conflicts but instead based its holding on the fact that the arbitrator in question was duty-bound to conduct such an investigation and disclose his findings pursuant to the FINRA Dispute Resolution rules which governed the arbitration at issue.³² Therefore, there may not be an independent duty to investigate and disclose conflicts, and so actual knowledge of a conflict may be required in a nondisclosure case where there are not contractual obligations to investigate and disclose. If litigants would like to arbitrate their claims but would like to choose their arbitrators intelligently, then their counsel, when drafting contracts that provide for private arbitration under Alabama law, should either provide a written duty to investigate and disclose conflicts or incorporate the rules of an arbitral forum that does require conflict investigation and disclosure.

Conclusion

The Alabama Supreme Court's decision to eschew Eleventh Circuit precedent and adopt the Ninth Circuit's standard in arbitrator nondisclosure cases was surprising, yet in line with a majority of courts. The practical implication of *Municipal Workers* is that

now, in most cases, arbitrators bear the burden of conducting a thorough conflict check and investigation into potential conflicts and relationships and of disclosing their findings to litigants in arbitration. This decision enables litigants in most arbitrations to choose their arbitrators intelligently and relieves them of the burden of proving that an arbitrator knew of a significant conflict and yet failed to disclose it in seeking vacatur of an arbitration award based on evident partiality. ▲

Endnotes

1. *Municipal Workers Compensation Fund, Inc. v. Morgan Keegan & Co.*, No. 1120532, ___ So. 3d ___, 2015 WL 1524911 (Ala. Apr. 3, 2015). An application for rehearing of this cause was overruled on September 30, 2015.
2. 9 U.S.C. § 1, *et seq.*
3. 9 U.S.C. § 10(a)(2).
4. *Waverlee Homes, Inc. v. McMichael*, 855 So. 2d 493, 508 (Ala. 2003).
5. *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 145 (1968).
6. *Id.* at 149.
7. *Id.* at 151 (White, J., concurring) ("And it is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award.").
8. *Id.* at 150 ("We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.").
9. *See id.* at 149 (quoting from the American Arbitration Association's rule requiring arbitrators "to disclose any circumstances likely to create a presumption of bias" or which an arbitrator "believes might disqualify him as an impartial Arbitrator"). *See also, e.g., Schmitz v. Zilveti*, 20 F.3d 1043, 1049 (9th Cir. 1994) ("In this case, Conrad had a duty to investigate the conflict at issue. Section 23(a) & (b) of the NASD Code requires arbitrators to 'make a reasonable effort to inform themselves of any' existing or past financial, business, [or] professional ... relationships [that they or their employer, partners, or business associates may have] that are likely to affect impartiality or might reasonably create an appearance of partiality or bias.").
10. *See Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S.*, 492 F.3d 132, 138 (2d Cir. 2007) (declining to create a free-standing duty to investigate on the part of arbitrators but concluding that "the absence of actual knowledge" of a conflict is not dispositive of evident partiality, requiring arbitrators to investigate potential conflicts or disclose their failure to investigate where the arbitrator

- knows that a potential conflict may exist); *ANR Coal Co. v. Cognetrix of N.C., Inc.*, 173 F.3d 493, 499 n.4 (4th Cir. 1999) (declining to impose a duty to investigate upon arbitrators but finding that evident partiality may be established if it can be shown that an arbitrator failed to undertake an investigation where that investigation would have revealed non-trivial facts that demonstrate statutory grounds for vacatur); *Schmitz*, 20 F.3d at 1049 (finding that because the arbitration forum's rules required the arbitrator to make a reasonable effort to inform himself of conflicts and because he failed to disclose a conflict, the arbitrator had constructive knowledge of the conflict, whether or not he had actual knowledge of the relationship, and therefore, the constructive knowledge and the existence of the conflict established evident partiality under *Commonwealth Coatings*).
11. *Schmitz*, 20 F.3d at 1049.
 12. *See Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1341 (11th Cir. 2002) ("As we noted earlier, *Gianelli Money Purchase Plan & Trust* holds that one scenario under which an arbitration award could be vacated would be if 'the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists.' . . . This standard can be further distilled into three key elements: (1) the arbitrator must be aware of the facts comprising a potential conflict, (2) the potential conflict must be one that a reasonable person would recognize and (3) the arbitrator must fail to disclose the conflict.) (quoting *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998)) (citation omitted).
 13. *Gianelli Money Purchase Plan & Trust*, 146 F.3d at 1312 (citations omitted).
 14. *New Regency Prods., Inc. v. Nippon Herald Films, Inc.*, 501 F.3d 1101, 1109 (9th Cir. 2007) (quoting *Gianelli Money Purchase Plan & Trust*, 146 F.3d at 1313).
 15. Alabama courts rely upon and interpret the FAA in their review of arbitration awards where the facts underlying the arbitration involve interstate commerce and there is a contract requiring arbitration. *See Hereford v. D.R. Horton, Inc.*, 13 So. 3d 375, 379 (Ala. 2009) (finding that arbitration proceedings in Alabama are governed by the FAA where there is a contract calling for arbitration and the contract evidences a transaction involving interstate commerce) (citing *Title Max of Birmingham, Inc. v. Edwards*, 973 So. 2d 1050, 1052 (Ala. 2007)).
 16. *Waverlee*, 855 So. 2d at 508.
 17. *Lexington Ins. Co. & Chartis, Inc. v. S. Energy Homes, Inc.*, 101 So. 3d 1190, 1205 (Ala. 2012).
 18. *Id.*
 19. *Municipal Workers*, 2015 WL 1524911, at *5, *21.
 20. *Id.* at *5.
 21. *Id.* at *22.
 22. *Id.*
 23. *Id.* at *27 (quoting *Schmitz*, 20 F.3d at 1048-49).
 24. *Id.*
 25. *Id.* at *28.
 26. What is required, however, is that the undisclosed conflict rise to the level of giving a reasonable impression of partiality. In *J. Don Gordon Construction, Inc. v. Brown*, No. 1131129, ___ So. 3d ___, 2015 WL 3537497, at *4-6 (Ala. June 5, 2015), the Alabama Supreme Court addressed a party's challenge to an arbitration award on evident partiality grounds, basing the claim on the fact that the arbitrator had been co-counsel with other lawyers from the firm representing one of the other parties on two separate occasions and had not disclosed that fact to the parties. The Alabama Supreme Court, in noting that the firm in question was large, that the arbitrator had not retained the firm or been retained by them and that the arbitrator had not communicated with the lawyer in question, found that this relationship, despite being undisclosed, did not rise to the level of giving a reasonable impression of partiality, as there was no direct relationship, financial or otherwise, between the arbitrator and counsel for the party. *See id.* at *6. Therefore, despite the nondisclosure, there was no evident partiality.
 27. *Mendel v. Morgan Keegan & Co.*, No. 13-AR-1630-S, 2015 WL 3385058, at *7 (N.D. Ala. May 26, 2015). An appeal is pending in this action. *See Morgan Keegan & Co. v. Mendel*, No. 15-12801 (11th Cir. June 23, 2015).
 28. *See note 9 supra.*
 29. *See note 11 supra.*
 30. Indeed, the court in *Municipal Workers* found that FINRA's rules imposed a duty upon the arbitrator in question to conduct a conflict check and make subsequent disclosures and that the arbitrator had obviously failed to do so. *See Municipal Workers*, 2015 WL 1524911, at *27-28.
 31. *Id.* at *27.
 32. *Id.*

Rebecca A. Beers



Rebecca A. Beers is an associate with Rumberger, Kirk & Caldwell PC in Birmingham, where she practices commercial litigation, with a focus on securities, casualty and employment law. She also has wide-ranging experience litigating all aspects of arbitration law in the federal and state courts of Alabama, including pre- and post-arbitration disputes.

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 and 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.



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

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

According to the Department of Veterans Affairs,

more than 41,000 veterans live in Alabama. Of these, more than 117,000 are wartime veterans.¹ In the November 2013, *Alabama Lawyer*, William C. Nidan wrote an article about the benefit known as "aid and attendance." The article described the tax-free benefit that assists qualifying wartime veterans and their surviving spouses with unreimbursed medical expenses, such as in-home care or assisted facility expenses. This article reviews recent developments in the area of "aid and attendance" and will highlight a handful of the many other VA benefits that may be available to veterans and their families.

Improved Pension-Aid and Attendance Update

The 2013 *Alabama Lawyer* article noted that federal legislation, pending at that time, sought to impose limitations on eligibility, including a look-back on all transfers made by a veteran or his/her spouse within the three-year period immediately preceding filing of a claim.

Although the look-back bill failed to pass Congress, the Department of Veterans Affairs has decided to implement the rules through its rule-making authority. On January 23, 2013, the Department issued proposed regulations to 38 CFR 3.276.² The period for public comments ended March 24, 2013. More than 900 comments were made and published on www.regulations.gov. About 91 percent of the comments opposed the new rule. Many groups, including the National Academy of Elder Law Attorneys, questioned whether the VA has the authority on its own to implement the look-back period without legislation.³

Veterans' Disability Compensation Benefits

Overview

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

www.alabar.org | THE ALABAMA LAWYER 375



Wilson F. Green

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



Marc A. Starrett

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

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Reformation of Instruments

***U.S. Bank, N.A. v. Shepherd*, No. 1140376 (Ala. Nov. 20, 2015)**

Notwithstanding the holding of *Beasley v. Mellon Fin. Servs. Corp.*, 569 So. 2d 389, 394 (Ala. 1990), under which mutual mistake is not available if the parties correctly understand the contents of the document when executed, reformation was available as a matter of law, where both parties testified that the intent before closing was to encumber a different parcel from what both parties knew the documents executed at closing actually encumbered. This is a panel decision joined by four justices, with one concurring in the result.

Statutory Construction (Mandatory vs. Directory)

***Howard v. Cullman County*, No. 1140748 (Ala. Dec. 4, 2015)**

The requirement in *Ala. Code* § 40-7-42, that “[t]he county commission, at the first regular meeting in February in each year, shall levy the amount of general taxes required for the expenses of the county for the current year[,]” is merely directory and not mandatory. Thus, the commission’s imposition of a tax without complying with the statute does not affect the legality of the tax. The distinction between directory vs. mandatory statutes is that “the failure to follow a directory provision does not affect the essential power granted to a public official or a public body in a particular statute, but officials still may be compelled to perform the directory duty in the future.” This is a panel decision joined by three justices; two concurred in the result.

Statutory Construction; Municipal Law

***City of Pike Road v. City of Montgomery*, No. 1140487 (Ala. Dec. 11, 2015)**

Under *Ala. Code* § 11-40-10(a), a municipality’s police jurisdiction for municipalities exceeding 6,000 citizens extends three miles from its boundaries (it is 1.5 miles otherwise); a municipality can prove its population under this section only by relying on either (1) the last decennial census or (2) its own municipal census, which could be conducted under *Ala. Code* §§ 11-47-90 through -95. This is a plurality opinion with a deeply-divided court splintering on questions of statutory ambiguity and analogous statutes to be read *in pari materia* with the subject act.

State Agent Immunity

***Johnson v. Reddoch*, No. 1121481 (Ala. Dec. 18, 2015)**

Among other holdings, because immunity determinations under *Cranman* are almost exclusively summary-judgment determinations given their factually-intensive requirements, the trial court erred by dismissing the money-damage claims in a Rule 12 motion. This is a panel opinion joined by four justices; one concurred in the result.

Arbitration; Arbitrability Questions

***Federal Insurance Company v. Reedstrom*, No. 1141153 (Ala. Dec. 18, 2015)**

"[A] trial court considering a motion to compel arbitration should resolve both waiver and non-signatory issues unless the subject arbitration provision clearly and unmistakably indicates that those arguments should instead be submitted to the arbitrator[.]" In this case, the arbitration agreement invoked AAA Commercial Rules, under which the arbitrator has power to determine her own jurisdiction, and thus invocation of AAA rules is a clear and unmistakable indicium that the parties reserved arbitrability issues to the arbitrator.

Wills and Estates

***Hardy v. Hardin*, No. 1130612 (Ala. Jan. 22, 2016)**

Substantial evidence supported probate court's conclusion that will offered for probate outside the five-year limitations of *Ala. Code* § 43-8-161 was not admissible into probate. Under *Christian v. Murray*, 915 So. 2d 23 (Ala. 2005), the fraud necessary to trigger application of limitations tolling under section 43-8-5 is a fraud upon the court itself; an alleged fraud upon a party is not fraud upon the court.

Zoning

***Ex parte Chesnut*, No. 1140731 (Ala. Jan. 22, 2016)**

The court reversed the court of civil appeals' affirmance of the circuit court's upholding of a zoning board's decision as to whether a lot on which a residence was to be constructed was "developed" or "undeveloped." Though these terms were not defined in the zoning ordinances or other administrative material, and though courts generally defer to an agency's interpretation of its own ordinance, the interpretation in this instance was unreasonable.

Venue

***Ex parte Jim Burke Automotive, Inc.*, No. 1141266 (Ala. Jan. 22, 2016)**

Under *Ala. Code* § 6-3-7, the place of "injury" where venue against a corporation is proper is where the alleged wrongful act occurred, not where the damages resulted.

From the Alabama Court of Civil Appeals

JML Procedure

***Henley v. State Farm Mut. Auto. Ins. Co.*, No. 2140560 (Ala. Civ. App. Dec. 4, 2015)**

The circuit court erred by granting UM carrier's JML motion, which was interposed while the plaintiff was still on the stand during the presentation of the plaintiff's case. A JML cannot be granted unless and until a party has been "fully heard" on the issue, and thus granting the JML during the presentation of the plaintiff's case violated the terms of Rule 50(a)(1).

Tax Sale Redemption

***Wall to Wall Properties, Inc. v. Wells Fargo Bank, N.A.*, No. 2140837 (Ala. Civ. App. Dec. 4, 2015)**

Redemptioneer (Wells) was not required to notify redemptionee (Wall) of the issuance of a certificate of redemption, because the filing of the certificate constituted constructive notice of the redemption.

Materialmen's Liens

***Inline Electric Supply Company, Inc. v. Eskildsen* (Ala. Civ. App. Dec. 11, 2015)**

The record lacked evidence from which the trial court could have determined the unpaid balance of the original contract properly the subject of a materialman's lien, or of the amount that should have been deducted from that balance for expenses needed to complete the construction project.

Landlord-Tenant

***Turner v. Dee Johnson Properties*, No. 2140875 (Ala. Civ. App. Jan. 8, 2016)**

Tenant's complaint sufficiently alleged that in order to defeat a Rule 12(b)(6) motion, landlord had knowledge of a defect (in the flooring of a front porch) which caused damage to tenant.

(Continued from page 129)

Malicious Prosecution; Equitable Tolling

McConico v. Patterson, No. 2140939 (Ala. Civ. App. Jan. 8, 2016)

Although grand jury's indictment would generally suffice to establish a presumption of probable cause, the complaint sufficiently alleged that defendants knew that former magistrate had misappropriated no funds, which, if proven, would overcome the probable cause presumption by demonstrating that the indictment itself was procured through fraud or misconduct. Because claim for malicious prosecution did not accrue until actual *nol prosee* of the indictment, that claim was timely. Remaining claims were not subject to equitable tolling, however, because the complaint did not allege fraudulent concealment of the causes of action.

Shareholder Rights

Pearson v. The Westervelt Company, No. 2140546 (Ala. Civ. App. Jan. 8, 2016)

Under both Alabama and Delaware law, shareholder failed to prove a "proper purpose" for seeking corporate records; trial court's conclusion that the request was actually interposed for purposes of harassment was subject to the *ore tenus* standard.

Evidence; Experts

Renasant Bank v. Clark, No. 2140653 (Ala. Civ. App. Jan. 8, 2016)

Circuit court acted within its discretion in refusing to admit valuation evidence from a bank officer, because he was not sufficiently familiar with rental market conditions. However, circuit court abused its discretion in refusing to admit testimony from real estate agent who had both sold and leased similar commercial properties in the area; she had sufficient expertise to form an opinion as to market conditions and a reasonable rental value.

Landlord-Tenant; Duty to Third Parties

Berg v. Nguyen, No. 2140774 (Ala. Civ. App. Jan. 8, 2016)

Although there was evidence that landlord knew that tenant's pack of pit bulls were escaping from premises and were menacing, there was no evidence that landlord knew that specific dog which attacked third party was a threat, and

thus summary judgment to landlord on third-party's claim for negligence was proper.

FELA

Putnam v. Norfolk Southern Railway Company, Inc., No. 2140873 (Ala. Civ. App. Jan. 15, 2016)

The CCA reversed the trial court's summary judgment to railroad on FELA claim arising from worker's hearing loss, reasoning that substantial evidence called into question (1) the actual noise levels at the yard where worker was employed, (2) the efficacy of the hearing protection provided by employer and (3) the reliability of the ratings of the noise protection itself.

CONs

Brookwood Health Services, Inc. v. SHPDA, No. 2140766 (Ala. Civ. App. Jan. 22, 2016)

The court affirmed the CON review board's issuance of a CON to Trinity Medical Center for establishing a new cancer center at Grandview in Birmingham, based on the CONRB's finding of substantial unmet need.

Litigation Accountability Act

Wagnon v. Gravelle, No. 2140580 (Ala. Civ. App. Jan. 22, 2016)

Under *Cain v. Strachan*, 68 So. 3d 854 (Ala. Civ. App. 2011), and authorities cited therein, a trial court lacks jurisdiction to award fees under the Alabama Litigation Accountability Act when the ALAA motion is not filed until after summary judgment is entered.

Workers' Compensation

Ex parte Lowe's Home Centers, LLC, No. 2140855 (Ala. Civ. App. Jan. 22, 2016)

The trial court made a compensability determination and ordered payment of medical benefits and unspecified amount of TTD benefits. Employer filed a Rule 59(e) motion, which was eventually denied. Employer appealed. The CCA held that the appeal was improper because the judgment was non-final, but that treated as a mandamus petition, the petition was untimely because the Rule 59 motion did not toll the presumptive 42-day time period for seeking relief by mandamus, and that employer did not offer an explanation as to why relief was sought outside the 42-day period.

From the United States Supreme Court

Statutory Construction; Voting Rights

Shapiro v. McManus, No. 14-990 (U.S. Dec. 8, 2015)

Given 28 U.S.C. § 2284(a)'s three-judge requirement, a single district court judge is not empowered to adjudicate a case challenging the constitutionality of apportionment of congressional districts.

Arbitration; Class-Action Waivers

DirectTV, Inc. v. Imburgia, No. 14-462 (U.S. Dec. 14, 2015)

The Supreme Court reversed judgments of the California state courts, which had held that because the arbitration agreement was contained within a contract which invoked California substantive law, California's law prohibiting enforcement of class-action waivers within arbitration agreements applied and rendered the waiver unenforceable; because the arbitration agreement itself invoked the FAA,

the FAA preempts California law, and class-action waivers are specifically enforceable under the FAA.

Class Actions; Offers of Judgment

Campbell-Ewald Co. v. Gomez, No. 14-857 (U.S. Jan. 20, 2016)

An unaccepted offer of judgment for the entire amount of damages potentially recoverable on the plaintiff's individual claim (in this case, for statutory damages recoverable on a claim brought under the Telephone Consumer Protection Act) does not moot the plaintiff's individual claim or the putative class action asserted therewith.

ERISA; Subrogation

Montanile v. Board of Trustees of National Elevator Industry Health Benefit Plan, No. 14-723 (U.S. Jan. 20, 2016)

Section 502(a)(3) of ERISA authorizes only a suit for "equitable relief." Once the ERISA-plan participant wholly dissipates a third-party settlement fund on non-traceable items, the plan fiduciary may not bring suit under §502(a)(3) to attach the participant's separate assets.



Alabama Center for
Dispute Resolution

P.O. Box 671
Montgomery, AL 36101
(334) 269-0409

Need a private judge for a quick resolution of
a domestic relations, contract or tort case?

Read profiles of private judges and get information at www.alabamaprivatejudges.org.

(Continued from page 131)

From the Eleventh Circuit Court of Appeals

SSI Benefits

Washington v. Commissioner, No. 15-10413 (11th Cir. Dec. 1, 2015)

A claimant generally has a right to present new evidence at each stage of review. Adopting a test from other circuits, the Court concluded that “whether evidence meets the new, material, and chronologically relevant standard” is a question of law subject to our *de novo* review.” Thus, failure to consider such evidence is legal error and requires reversal.

Administrative Law

Cahaba Riverkeeper v. EPA, 14-13508 (11th Cir. Nov. 30, 2015)

EPA’s interim order on a petition to withdraw Alabama’s authority to administer the National Pollutant Discharge Elimination System program (NPDES) was not immediately reviewable under 33 U.S.C. § 1369(b)(1)(D), because the agency had not made a “determination” with respect to Alabama’s program.

ADEA

Villareal v. R.J. Reynolds Tobacco Co., No. 15-10602 (11th Cir. Nov. 30, 2015)

Held: (1) section 4(a)(2) of the ADEA, 29 U.S.C. § 623(a)(2), authorizes disparate impact claims by applicants for employment; though the statute is ambiguous, the EEOC’s interpretation of the statute to cover claims is reasonable and requires deference; and (2) Villarreal was entitled to equitable tolling of the ADEA’s limitations period.

Labor; Arbitration; Appeals

United Steel et al Union, AFL-CIO v. Wise Alloys, LLC, No. 14-15744 (11th Cir. Dec. 8, 2015)

Employer’s appeal of the order compelling arbitration was untimely, since “orders compelling arbitration on a complaint

seeking specific performance of an arbitration provision under the LMRA are final and appealable.” Arbitrator had authority to construe the CBA’s timeliness provisions; arbitrator did so when characterizing the union’s grievance as a continuing violation; and arbitrator had the authority to uncover an ambiguity in the CBA and resolve it by reference to the parties’ past practices.

Cybersquatting

Jysk Bed ‘n Linen d/b/a By-Design Furniture v. Dutta-Roy, No. 13-15309 (11th Cir. Dec. 16, 2015)

The Court affirmed an injunction of the district court under the Anti-Cybersquatting Consumer Protection Act, § 43(d) of the Lanham Act, 15 U.S.C. § 1125(d)(1)(A), under which a person is liable for “register[ing]” a domain name confusingly similar to a protected mark. The Court held that a re-registration is a “register[ing]” under section 43(a), but acknowledged there is a circuit split on that issue.

Bankruptcy

In Re: NICA Holdings, Inc., No. 14-14685 (11th Cir. Dec. 17, 2015)

An assignee of an assignment for the benefit of creditors (under Florida law) may not file a voluntary bankruptcy petition on behalf of the assignor without explicit authorization to do so.

Employment

Liebman v. Metropolitan Life Ins. Co., No. 14-13197 (11th Cir. Dec. 18, 2015)

The proper inquiry in an ADEA case is whether the replacement worker is substantially younger; in this case, the seven-year difference in age created a fact question (the Court cited cases showing that even three years could be enough). The Court also held that MetLife’s contention that Liebman was “not qualified” was contested by substantial evidence, because he had been in the position for nine years, and longevity in the position creates substantial evidence of being qualified.

First Amendment

Buerhle v. City of Key West, No. 14-15354 (11th Cir. Dec. 29, 2015)

Although tattooing is protected First Amendment expression, the city has the right to impose reasonable time, place

and manner restrictions on business operations of parlors. In this case, however, the city failed to show that the ordinance was a reasonable time, place and manner restriction.

Labor

Quinlan v. Secretary, USDOL, No. 14-12347 (11th Cir. Jan. 8, 2016)

A court may impute a supervisor's knowledge of a subordinate employee's conduct violating OSHA standards to his employer, when the supervisor himself is simultaneously involved in violative conduct.

Right of Publicity

Rosa & Raymond Parks Institute for Self Development v. Target Corp., No. 15-10880 (11th Cir. Jan. 4, 2016)

The story of Rosa Parks is a matter of public interest, as to which Michigan law recognizes a qualified privilege as against an asserted right of publicity, thus allowing Target to sell and profit from books and movies concerning the story. Furthermore, a plaque depicting Parks and other civil rights icons was an artistic expression of opinion on a matter of public interest, and was also privileged.

Qualified Immunity

Perez v. Suszczyński, No. 14-13619 (11th Cir. Jan. 12, 2016)

District court properly denied summary judgment to officer in excessive force case on qualified immunity; there was substantial evidence that officer fatally shot decedent in the back while he was compliant and non-resisting, which, if proven, would violate clearly established law.

Black v. Wigington, No. 15-10848 (11th Cir. Jan. 22, 2016)

Police officers who mistakenly searched plaintiffs' trailer because they thought it belonged to someone else (during which the officers found large amounts of contraband, leading to arrest and temporary incarceration of one plaintiff) were entitled to qualified immunity: "[t]he evidence from the Blacks' trailer provided probable cause for the arrest warrants. It does not matter whether that evidence was discovered in compliance with the Fourth Amendment because the exclusionary rule does not apply in a civil suit against police officers."



RECENT CRIMINAL DECISIONS

From the United States Supreme Court

Death Penalty; Right to Jury Trial

Hurst v. Florida, No. 14-7505 (U.S. Jan. 12, 2016)

Florida's capital punishment sentencing scheme, under which an advisory jury makes a recommendation of whether to impose the death penalty which the trial judge then reviews but determines for herself whether the requisite aggravating factors are present, violates the Sixth Amendment's right to jury trial. Under *Apprendi v. New Jersey*, 530 U. S. 466, 494 (2000), any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an "element" that must be submitted to a jury. The Court had applied *Apprendi* in the capital punishment context in *Ring v. Arizona*, 536 U. S. 584 (2002), striking down a procedure similar to Florida's, "because the state allowed a judge to find the facts necessary to sentence a defendant to death." Florida's scheme is similar and suffers from the same defect. This case could have significant impact on death penalty litigation in Alabama, given Alabama's procedure.

Death Penalty

Kansas v. Carr, No. 14-449 (U.S. Jan. 20, 2016)

The Eighth Amendment does not require capital-sentencing courts to instruct a jury that mitigating circumstances need not be proved beyond a reasonable doubt. Further, the

(Continued from page 133)

Eighth Amendment did not require severance of the Carrs' joint sentencing proceedings, because the Eighth Amendment is inapposite when a defendant's claim is, at bottom, that evidence was improperly admitted at a capital-sentencing proceeding.

From the Court of Criminal Appeals

"Stand Your Ground" Defense

Harrison v. State, No. CR-13-0429 (Ala. Crim. App. Dec. 18, 2015)

Under the "Stand Your Ground" provisions of the self-defense statute, *Ala. Code* § 13A-3-23, defendant asserting immunity from prosecution is entitled to opportunity to prove that claim by a preponderance of the evidence at a pretrial hearing before the court.

Fuller v. State, No. CR-14-0368 (Ala. Crim. App. Dec. 18, 2015)

If a person enters a situation engaged in an unlawful activity—in this case, a felon in possession of a firearm—that contributes to the altercation in any manner, he is not entitled to the "Stand Your Ground" defense from criminal liability.

Probable Cause

James v. State, No. CR-14-1132 (Ala. Crim. App. Dec. 18, 2015)

Defendant's detention and resulting search and seizure of drugs from his vehicle in a truck stop parking lot was unlawful because it arose from an uncorroborated anonymous tip that prostitutes and armed persons were at the truck stop. The facts conveyed in the anonymous tip were not verified by the officer's own observations, were not reliable and were not sufficient to supply probable cause or reasonable suspicion to order the defendant out of the vehicle.

Interrogation

Largin v. State, No. CR-09-0439 (Ala. Crim. App. Dec. 18, 2015)

Capital murder defendant's conversation with police investigator, a family friend, did not constitute an interrogation under *Miranda*. The investigator asked no questions about the crime, and, though he hoped defendant would make an incriminating statement, defendant's actions did not indicate that he felt coerced into engaging in the conversation.

Capital Murder; Unborn Child

Phillips v. State, No. CR-12-0197 (Ala. Crim. App. Dec. 18, 2015)

The killing of a woman who was eight weeks pregnant constituted the killing of "two or more persons" under the capital murder statute, *Ala. Code* § 13A-5-40; a "person" under the criminal homicide and assault statutes includes an unborn child *in utero* at any stage of development, regardless of viability.

Presumptive Sentencing Standards

Abro v. State, No. CR-14-0059 (Ala. Crim. App. Dec. 18, 2015)

Trial court's departure from the non-prison dispositional recommendation of the presumptive sentencing standards of *Ala. Code* § 12-25-34.2, and to instead sentence the defendant to prison, was error for failure (in light of defendant's prior criminal history) to follow the requirements of the *Presumptive and Voluntary Sentencing Standards Manual*.

Split Sentencing

Williams v. State, No. CR-14-0612 (Ala. Crim. App. Dec. 18, 2015)

Trial court's resentencing defendant to a split sentence comporting with the requirements of *Ala. Code* § 15-18-8(a), and then immediately modifying that sentence to reduce the confinement period to two years pursuant to *Ala. Code* § 15-18-8(c), was an error of law requiring reversal of the defendant's guilty plea. ▲



MEMORIALS

Buffalow, Gregory Curtis

Mobile
Admitted: 1979
Died: December 4, 2015

Burdett, Russell Lee

Demopolis
Admitted: 1981
Died: December 10, 2015

Conwell, William Wells, Sr.

Ashville
Admitted: 1953
Died: October 22, 2015

Croomes, Edgar Steven

Athens
Admitted: 1980
Died: May 11, 2015

Davis, Hon. John Walter, III

Montgomery
Admitted: 1972
Died: December 9, 2015

Green, Howard Albert

Spanish Fort
Admitted: 1981
Died: March 25, 2015

Hairston, William Burton, Jr.

Birmingham
Admitted: 1950
Died: December 24, 2015

Hall, Hon. James Edwards, II

Florence
Admitted: 1987
Died: April 7, 2015

Harp, Jimmie Gary, Jr.

Gadsden
Admitted: 1991
Died: July 22, 2015

Hill, Hoyt William

Opelika
Admitted: 1960
Died: November 21, 2015

Hobbs, Hon. Truman McGill, Sr.

Montgomery
Admitted: 1948
Died: November 4, 2015

Nachman, Merton Roland, Jr.

Montgomery
Admitted: 1949
Died: November 24, 2015

Newton, Alexander Worthy

Birmingham
Admitted: 1957
Died: December 25, 2015

Strickland, Parrish Lee

Panama City, FL
Admitted: 2003
Died: October 28, 2015

Toler, Desmond Burton

Mobile
Admitted: 1966
Died: November 24, 2015

Vickers, Richard William

Pelham
Admitted: 1983
Died: December 15, 2015

Wilson, Hon. James Edward

Jasper
Admitted: 1949
Died: October 21, 2015

Wilson, Tommie Jean

Pell City
Admitted: 1984
Died: March 6, 2015

Yelverton, Richard Dean

Mobile
Admitted: 1984
Died: December 31, 2015

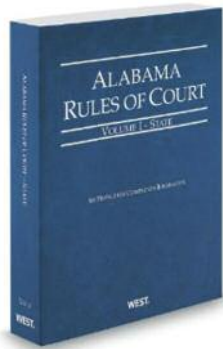
Yost, Michael Allen

Trussville
Admitted: 1982
Died: December 1, 2015



IMPORTANT NOTICES

- ▲ **Books for Sale: 2013 *Alabama Rules of Court–State***
- ▲ **Local Bar Award of Achievement**
- ▲ **J. Anthony “Tony” McLain Professionalism Award**
- ▲ **William D. “Bill” Scruggs, Jr. Service to the Bar Award**
- ▲ **Notice of Election and Electronic Balloting**



Books for Sale: 2013 *Alabama Rules of Court–State*

The 2013 *Alabama Rules of Court–State* books are for sale at \$10 each. These are available for purchase in the Supreme Court and State Law Library by cash or check only. Note: All rule changes and effective dates are available at <http://judicial.alabama.gov/rules/Rules.cfm>.

Please mail a check or money order, made payable to AL Supreme Court and State Law Library, to:

AL Supreme Court and State Law Library
ATTN: Public Services–Book Sale
300 Dexter Ave.
Montgomery AL 36104

Contact any Public Services staff member at (334) 229-0563 with questions.

Local Bar Award of Achievement

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

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

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

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

To be considered for this award, local bar associations must complete and submit an award application by May 6, 2016. Applications may be downloaded from www.alabar.org or obtained by contacting Ed Patterson at (334) 269-1515 or ed.patterson@alabar.org.

J. Anthony "Tony" McLain Professionalism Award

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the J. Anthony "Tony" McLain Professionalism Award through **April 15, 2016**. 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 purpose of the J. Anthony "Tony" McLain Professionalism Award is to honor the leadership of Tony McLain and

to encourage the emulation of his deep devotion to professionalism and service to the Alabama State Bar by recognizing outstanding, long-term and distinguished service in the advancement of professionalism by living members of the Alabama State Bar.

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.

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, 2016**. 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.

(Continued from page 137)

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 Members of the Board of Bar Commissioners* that the election of these officers will be held beginning Monday, May 16, 2016 and ending Friday, May 20, 2016.

On the third Monday in May (May 16, 2016), members will be notified by email with a link to an electronic ballot. Members who wish to vote by paper ballot should notify the secretary in writing on or before the first Friday in May (May 6, 2016) requesting a paper ballot. A single written request will be sufficient for all contested elections (president-elect and commissioner) and run-offs, if necessary. All ballots (paper and electronic) must be voted and received by the Alabama State Bar by 5:00 p.m. on the Friday (May 20, 2016) immediately following the opening of the election.

Nomination and Election of Board of Bar Commissioners

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

- 1st Judicial Circuit
- 3rd Judicial Circuit
- 5th Judicial Circuit
- 6th Judicial Circuit, Place 1
- 7th Judicial Circuit
- 10th Judicial Circuit, Place 3
- 10th Judicial Circuit, Place 6
- 13th Judicial Circuit, Place 3
- 13th Judicial Circuit, Place 4
- 14th Judicial Circuit
- 15th Judicial Circuit, Place 1
- 15th Judicial Circuit, Place 3
- 15th Judicial Circuit, Place 4
- 23rd Judicial Circuit, Place 3

- 25th Judicial Circuit
- 26th Judicial Circuit
- 28th Judicial Circuit, Place 1
- 32nd Judicial Circuit
- 37th 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, 2016 and vacancies certified by the secretary no later than March 15, 2016. All terms will be for three years.

A candidate for commissioner may be nominated by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Nomination forms and/or declarations of candidacy must be received by the secretary of the Alabama State Bar no later than 5:00 p.m. on the last Friday in April (April 29, 2016).

Election of At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 2, 5 and 8. Applications for these positions, which are elected by the Board of Bar Commissioners, are due by April 1, 2016.

Submission of Nominations

Nomination forms, declarations of candidacy forms and applications for at-large commissioner positions must be submitted by the appropriate deadline and addressed to:

Keith B. Norman
Secretary, Alabama State Bar
P.O. Box 671
Montgomery AL 36101

These forms may also be sent by email to elections@alabar.org or by fax to (334) 261-6310.

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

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

STOKES, M^CNUTT & PARTNERS*Advertising Momentum for Your Firm*

We Will Grow Your Firm.

Advertising – App Development – Augmented Reality

Brand Building – Client Data – Content Development

Creative Strategy – Consistent Communication

Customer Service – Digital Marketing – Direct Mail

Email Design & Distribution – Event Marketing

Graphic Studio – Immediate Project – Law Firm Definition

Media Planning – Radio & Television – Video Production

Social Media Engagement – Website Design – Marketing

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

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



LEGISLATIVE WRAP - UP

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

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

Back to Basics

This year the legislature began on the first Tuesday in February. The legislature generally meets in session on Tuesday and Thursday of each week. Wednesdays are usually reserved for committee meetings.

Since 1978, the Alabama Law Institute has published *The Legislative Process: A Handbook for Alabama Legislators*. At the start of the current regular session in February, we were proud to present each legislator with a copy of the latest version, the Eleventh Edition. Copies of this book are available through the institute for those interested in better understanding the process.

Legislative Action

General Requirements of Bills

The Alabama Constitution provides that no law may be enacted except by bill. Thus, the process by which a law is enacted actually begins with the preparation of a bill, which is a proposal to make a new law, or to amend or repeal an existing law, drafted in the proper form. To draft a bill in such a way that it will both accomplish its intended purpose and meet the requirements of the legal system involves a number of technicalities and may be quite a difficult undertaking.

The Process

There is a basic formula or process whereby a bill can become enacted into law. This process is the same whether it is a bill of general application, a local law or a constitutional amendment:

1. It must be introduced by a legislator in either the house or the senate. Once it is introduced, the presiding officer assigns the bill to a committee. This is known as the bill's first reading.
2. It must be placed on the committee agenda for consideration. Each body of the legislature has a number of standing committees. These committees are generally broken down by subject matter. The committee process is where the bulk of work on a bill is done. Interested members of the public have an opportunity to attend and be heard before the committee. The committee has the option of amending or substituting the bill in order to make changes. If the committee desires to give the bill a favorable report, the bill is reported back to the full body. This constitutes the second reading.
3. The next step is for the bill to be considered by the entire legislative body of one of the chambers. After the second reading, the bill is placed on the regular order

calendar, but with more than 1,000 bills being introduced, it is usually necessary for a bill to get on a special order calendar to get considered. The special order calendar is one prepared by the rules committee and is a list of bills that take precedence for a given legislative day. Once a bill gets before the full body it is debated, can be amended, and is ultimately voted on. This constitutes a third reading.

4. If the bill is passed by the house of origin, the bill must follow the same process in the second house. The bill is transmitted and received by the second house and receives its first reading.
5. Next, it must be sent to committee in the second house to be considered again as in the first house. If viewed favorably by the committee, the bill is referred back to the second house, possibly with further amendments, for a second reading.
6. The second house will also place the bill on a regular order calendar and the rules committee of the second house may select it for a special order calendar. When the bill is considered by the second house, it has receives its third reading.
7. When both houses have passed the bill, it is sent to the governor for signing. If the second house amends the bill, it must concurred on by the first house or it must go to a conference committee. It is not until after the governor has signed the bill that it becomes law.

Each of these steps occurs on a separate calendar day. It is possible for steps three and four to occur on a single day, meaning it takes at least five calendar days to pass a bill.

Votes Necessary

With some exceptions required by the constitution, a house of the legislature may pass bills by a simple majority of voting members, assuming the presence of a quorum. Exceptions to the simple majority vote requirement include the following instances:

- To pass a bill over the governor's veto (or override a line item veto of an appropriation bill) requires a majority vote of all the members elected to each house.
- To pass a bill or resolution proposing a constitutional amendment requires a three-fifths vote of all the members elected to each house.
- To pass legislation at a special session on a subject not included in the governor's call requires a two-thirds vote of a quorum.
- To pass legislation before the budgets are submitted to the governor, the legislative body must first approve a "budget isolation" resolution by a three-fifths vote of a quorum.

Governor's Action

Sign

When the bill reaches the governor he may sign it and thus complete its enactment into law.

Veto

On the other hand, if the governor objects to the bill, he may veto it, in which case he must return it to the house in which it originated, with a message explaining his objections. He may suggest amendments that will remove his objections, if such amendments are possible. The bill is then reconsidered, and, if a majority of the members elected to each house agree to the executive amendments, it is returned to the governor for his signature.

Overriding a Veto

If both houses cannot agree to the amendments proposed by the governor, or if he proposes no amendments, the bill may be passed by a vote of a majority of the members elected to each house, notwithstanding the governor's veto.

Passage without Governor's Signature

Whenever the governor fails to return a bill to the house in which it originated within six days after it is presented to him, Sundays excepted, it becomes a law without his signature, unless the return was prevented by recess or adjournment. In that case, the bill must be returned within two days after the legislature assembles, or the bill becomes law without the governor's signature.

Pocket Veto

Bills that reach the governor less than five days before the end of the session must be approved by him within 10 days after adjournment. Bills that are not approved within that time do not become law, and are said to be "pocket vetoed."

Item Veto

In Alabama, the governor has the power to approve or disapprove any item or items of an appropriation bill without vetoing the entire bill.¹ In an item veto, only the parts of the bill approved become law; the item or items disapproved do not become law unless they are re-passed over the governor's objection. The governor does not have the authority to item-veto an appropriation bill after the legislature has adjourned *sine die*.² ▲

Endnotes

1. Ala. Const., art. V, § 126.
2. *Hunt v. Hubbert*, 588 So. 2d 848 (Ala. 1991).



BAR BRIEFS

- The **American Board of Trial Advocates** (“ABOTA”) announces that **Frank M. Wilson** of Birmingham, **Ralph W. Hornsby, Jr.** of Huntsville, **C. Gibson Vance** of Montgomery, **L. Peyton Chapman, III** of Montgomery, **Joseph L. Reese, Jr.** of Birmingham and **Christopher J. Zulanis** of Birmingham were recently selected for induction into membership at the Alabama Chapter’s Annual Meeting.

Membership into the American Board of Trial Advocates is by invitation only following a rigorous nomination and voting process. There are approximately 7,300 members of ABOTA in the United States; only 109 attorneys in Alabama are members.

ABOTA is a national association of experienced trial lawyers and judges dedicated to the preservation and promotion of the civil jury trial right provided by the Seventh Amendment to the U.S. Constitution. ABOTA works to uphold the jury system for educating the American public about the history and value of the right to trial by jury. To be considered for participation in the Alabama Chapter, one must have tried to conclusion a minimum of 10 civil jury trials, be nominated by an existing member and be approved by 75 percent of those members voting on membership. Criteria evaluated include exceptional jury trial skills, civility, professionalism and integrity.

- The **Alabama Fellows of the American College of Trial Lawyers** announces that **Michael L. Bell** of Birmingham, **Brian P. McCarthy** of Mobile and **Michael E. Upchurch** of Mobile were recently inducted into the fellowship.

The college strives to improve the standards of trial practice, the administration of justice and the ethics, civility and collegiality of the trial profession.

Invitation to fellowship is extended only after careful investigation of those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality.

Lawyers must have at least 15 years of trial experience before they can be considered for fellowship and membership in the college cannot exceed 1 percent of the total lawyer population of any state or province.

- **DRI** announces that **Laura E. Proctor** recently became president of the national organization at its annual meeting in Washington, DC. With 22,000 members, the 55-year old DRI is one of the three most prominent professional organizations of attorneys in the country and the largest to exclusively represent defense bar attorneys. Proctor is the first in-house counsel to serve as DRI president, and the third woman to hold that office.



Proctor

She has been a member of its board of directors since 2007. She is active in several other DRI committees, including

DRI's Corporate Counsel Committee, of which she is a founding member. Proctor has also been the chair for DRI's Alternative Dispute Resolution Committee and DRI's Young Lawyers' Committee. She is a member of the International Association of Defense Counsel and the Tennessee Defense Lawyers Association.

Proctor is the associate general counsel for Louisiana-Pacific Corporation in Nashville. She is a fourth-generation graduate of the University of Alabama School of Law, where she earned her J.D. in 1992. Upon graduation, she served as the first law clerk for the Honorable Ira DeMent, United States District Court, Middle District of Alabama. ▲

Collect, Preserve, Analyze

Digital forensics services for both civil and criminal litigation.

Digital Forensics Services

- E-Discovery / Data Acquisition
 - Digital Collection and Imaging
 - Data Preservation
 - Evidence / Data Discovery

- Litigation Services
 - Data Analysis
 - Forensic Reporting
 - Expert Testimony

Data Recovery



2AB, Inc.

FORENSICS DIVISION

Encase® Certified Examiner (EnCE®)

P.O. Box 335 | Helena, AL 35080 | 205.621.7455

forensics.2ab.com



OPINIONS OF THE GENERAL COUNSEL

J. Anthony McLain



Lawyer Who Has Formerly Represented Client May Not Represent Another Person in Same or Substantially Related Matter where Present Client's Interests Are Materially Adverse to Former Client

QUESTION:

"The purpose of this letter is to request a formal opinion from your office regarding whether my law firm should be disqualified from representing the Plaintiff Corporation A in litigation.

"I believe that all of the relevant facts are set out in the following documents which are enclosed:

- "1. Complaint filed by Corporation A against Corporation B and Mr. Jones for damages arising from an alleged breach of equipment lease and on a personal guaranty.
- "2. Answer and counterclaims of Corporation B and Jones.
- "3. Amendment to answer and counterclaims.
- "4. Corporation A's answer to counterclaims.
- "5. Appearance of Lawyer A as counsel for Corporation A.
- "6. Defendant's Objection to Appearance of Attorney, with attached Exhibits A, B and C.
- "7. Letter from Lawyer X to Judge Rite, with referenced attachments.

"8. Response of Lawyer A's firm in opposition to Defendants' 'Objection to Appearance of Attorney' with attached Exhibits 1 through 6.

"Judge Rite has asked that I request this opinion from your office. Enclosed is a copy of the order which I am submitting to Judge Rite which I expect will be signed shortly."

ANSWER:

The documents submitted with your request for opinion show that your firm is presently representing Corporation A against Corporation B and Mr. Jones. Corporation B is in the business of designing and providing printed business forms. Jones is the president and sole stockholder. This lawsuit was filed on and deals with an alleged breach of an equipment lease/purchase agreement by Corporation B and Jones. There is a counterclaim and a third-party complaint as well. The lease agreement was entered into on July 29, 1988. Corporation A is claiming damages in the amount of \$9,320 as a result of the breach.

During 1991, Lawyer A's partner ("Partner") represented Jones when he was considering the formation of another corporation which would offer consulting services to the same clientele that Corporation B serviced. Partner met with Jones on one occasion and with his accountant on another. Prior to this, Partner had never had any dealings with either

man. Partner met with the accountant, Mr. Smith, and sent a letter the next day confirming "the key points we examined." In August, Partner met with Jones about forming the new company. The next day, he sent Jones a four-page letter setting out "the essential facts you imparted to me together with my recommendations for further consideration." After that, there was no further contact between Partner and Jones or the accountant. At the end of August, Partner sent a bill for his services. Partner has submitted an affidavit of his association with Jones and all documents from his file are attached as exhibits. There is no question that Jones was a client of Partner's for a brief period of time and that he obtained information in the course of the representation which would be confidential under Rule 1.6(a).

Since Jones is a former client of Lawyer A's firm, Rule 1.9 must be addressed when another member of the firm represents another party in a lawsuit against Jones. Any member of the firm is disqualified under Rule 1.10 if Partner himself would be disqualified by any type of conflict of interest. Rule 1.9(a) provides that a lawyer who has formerly represented a client may not represent another person in "the same or a substantially related matter where the present client's interests are materially adverse to the former client." In determining whether two matters are "substantially related," the scope and subject of the two matters must be examined. The issues

Proud graphic designer of
The Alabama Lawyer
magazine for over 25 years.



THE FINKLEA GROUP
INC
Creative solutions for your marketing strategies

Design and Marketing Services

Logos	Trade Show Exhibits
Websites	Publication Design
Brochures	Media Kits
Product Catalogs	Billboards
Print Ads	P.O.P. Displays
Product Packaging	Professional Portfolios
Sales Support Material	

300 North Dean Road, Suite 5-193 • Auburn, AL 36830
334.799.7843 • www.taplink.com



(Continued from page 145)

involved must be very closely connected. Partner's representation of Jones appears to have been brief and limited in scope as opposed to an ongoing representation of Jones's business. If the trial court finds from the facts before it that Corporation A's suit is substantially related to the issues of Partner's prior consultation, then the firm is precluded from representing Corporation A against Jones in the instant case. If the finding is otherwise, then Rule 1.9(b) must be addressed.


Rule 1.9(b) is directed to the protection of client confidences gained by a lawyer during the former representation. Public information or information generally known is not encompassed in the rule. There is a presumption that a lawyer has gained confidential information in the prior representation of a client. That can be rebutted by the lawyer. There is also the presumption that if a lawyer possesses confidential information that he will potentially use it in a way adverse to the former client. In that sense, if the confidential information is in any possible way disadvantageous to the former client, the lawyer is disqualified.

If it is found that Partner could use the information he gathered during his short representation of Jones, in any adverse way, or that he would have an advantage because of his acquired knowledge, then he and the firm are disqualified from representing Corporation A. If an analysis of the information reveals that it could not be used by Partner, in any way, in the Corporation A case, then the firm is not disqualified.

The Disciplinary Commission is not going to make any factual or other findings determinative of this question. There is a motion to disqualify pending in the trial court and those matters are for the court to decide. The commission would point out that the "appearance of impropriety" is not the standard at this time and, that, in and of itself, does not require a disqualification. That term is not used in the *Rules of Professional Conduct*. The application of such a standard tends to result in blanket disqualification because it does not take the actual relationship, if any, between the subject matter of the two representations into account. [RO-1994-13] ▲

MASTERS OF OUR DOMAIN



 d a v i s d i r e c t



You don't have to take our word for it. We have the certification to prove it. IDEAlliance® recently certified Davis Direct as the only G7 Master printer in Alabama. This means your print job is produced according to the highest color standards in the industry, with the same crisp, clear, consistent quality from proof to finished piece when you print with Davis Direct.

Call us at 334.277.0878 or visit us online at davisdirect.com.

SAVE the DATE

2016 Annual Meeting

BAYTOWNE WHARF
June 22 - 25

Chance Corbett is an associate director in the Auburn University Department of Public Safety. His responsibilities include leading the Emergency Management Program for Auburn University which includes planning for and managing emergencies and disasters that affect Auburn University.



Corbett received his bachelor's degree in criminal justice and master's degree in education from Troy University. He is a POST-certified law enforcement officer, nationally registered paramedic and certified firefighter. He is also a certified emergency manager with the International Association of Emergency Managers.

Prior to working for Auburn University, Corbett served seven years as the Homeland Security/EMA director for Russell County and has more than 24 years of public safety experience, many in the law enforcement field. Corbett is a member of numerous national public safety and emergency management organizations.

During his career as a fulltime law enforcement officer, Corbett spent more than six years as a member of a local SWAT team, including

serving as the team leader for over three years. He is a senior instructor for the Alabama Law Enforcement Agency and teaches an advanced active shooter training program to law enforcement officers. Corbett leads the efforts to teach Active Shooter Response Training to the students and employees of Auburn University as well as other schools and organizations as needed.



Featuring the "**WingNuts**" Friday, June 24 at the Presidential Dinner and Young Lawyers'/Leadership Forum sections party, with lead singer **District Judge Alan Furr**, 30th Judicial Circuit, Pell City



Hughston Nichols
hnichols@hwnn.com



Section Busy with Meetings, Conferences and Seminars

In February, the Young Lawyers' Section of the Alabama State Bar sent four delegates to the **American Bar Association Young Lawyers' Division** mid-year meeting in San Diego. Later that month, YLS officers and executive committee members held their annual winter meeting at the Grand Hotel in Point Clear.

Upcoming events include the **Minority Pre-Law Conferences**, which will take place this spring in Birmingham, Montgomery, Huntsville and Mobile. The conferences are award-winning programs designed to introduce 11th- and 12th-grade students to the American civil and criminal justice system. The program provides students with a unique opportunity to talk one on one with practicing minority lawyers. During the program, students

also have an opportunity to view a simulated trial, performed by practicing attorneys. This experience is designed to give students a better understanding of how courts of the United States resolve legal conflicts and the roles judges, lawyers, juries and witnesses play in the system. Through participating in the mock trial as jurors, students gain an insider's perspective on courtroom procedure. The program includes a luncheon with a keynote speaker and break-out sessions where the students are able to discuss the mock trial and the legal profession with attorneys in a small-group setting. There is no charge to students participating in the pre-law conferences, thanks to the generous support of our sponsors. For more information on dates and times, or if you

are interested in becoming a sponsor, contact **Latisha Davis** at lrld@ajlaw.com or (251) 405-1300.

The largest YLS event of 2016 will be our **Orange Beach Seminar** May 20-21 at The Caribe. The Orange Beach CLE is the largest seminar held in Alabama specifically targeted to young lawyers. In 2015, after moving the seminar to Orange Beach, attendance nearly doubled. We expect similar growth this year. The CLE is crafted each year to offer a broad range of topics that all young lawyers should have a working knowledge of, regardless of their specialized area of practice. On Friday May 20, we will welcome judges from circuits around the state along with appellate judges. Our panel of judges will include **Judge Sarah H. Stewart** (Mobile), **Judge James F. Hughey, III** (Birmingham) and **Judge Eugene W. Reese** (Montgomery). From the Alabama Court of Civil Appeals, **Judge W. Scott Donaldson** will discuss effective writing for the trial and appellate courts. Saturday, we will hear from several speakers, including an ethics presentation. There

will also be a welcome reception, golf tournament, beach party each day and cocktail reception and silent auction.

Not only is this a fantastic CLE aimed at the practice development of your firm's young lawyers, it is a tremendous opportunity for them to meet judges in front of whom they may practice and network with others from around the state. This is a must-attend event for all young lawyers in Alabama.

Book your room by calling The Caribe at (251) 980-9000 or (888) 607-7020 and referencing "ASB Young Lawyers CLE" to receive a reduced rate. For additional information, or for sponsorship opportunities, contact **Robert Shreve** at rshreve@lchclaw.com or (251) 694-9393.

Be sure to keep up with the YLS through <https://facebook.com/ABSyounglawyers>, <https://twitter.com/absyounglawyers> and <https://instagram.com/asbyounglawyers>. For more information on getting involved in the YLS or helping out with any of our upcoming events, contact me or any of our executive committee members. ▲



Need more clients?

Join the ASB Lawyer Referral Service

WHY JOIN?

- Expand your client base
- Benefit from our marketing efforts
- Improve your bottom line

OVERVIEW OF THE PROGRAM

- Referrals in all 67 counties
- Annual fee of \$100
- Maximum percentage fee of \$250 on fees between \$1,000 and \$5,000
- Professional liability insurance required for participation

Sign me Up!

Download the application at
www.alabar.org
or email LRS@alabar.org.



ABOUT MEMBERS, AMONG FIRMS

Please email announcements to
margaret.murphy@alabar.org.

About Members

Rebekah Graham announces the opening of **Rebekah L. Graham LLC** at 117 Jefferson St. N, Huntsville 35801. Phone (256) 273-0833.

Katie Cameron O'Mailia announces the opening of **O'Mailia Law PLLC** at 312 Scott St., Montgomery 36104. Phone (334) 721-3767.

Among Firms

Baker Donelson announces that **Sharonda Childs, Clay Johnson, Sam Pierce** and **David L. Silverstein, Jr.** joined the Birmingham office.

Balch & Bingham LLP announces that **M. Stanford Blanton** is the managing partner and **Millicent W. Ronnlund** is a partner in the Birmingham office.

Battle & Winn LLP announces that **Adam Plant** is a partner.

Bradley Arant announces that **Tiffany J. deGruy, Ginger Carroll Gray, J. Thomas Richie, Brad Robertson, Whitt Steineker** and **William T. Thistle, II** are partners in the Birmingham office.

Burns, Brashier & Johnson LLC of Birmingham announces that **Jessica Johnson** joined as a partner.

Carr Allison announces that **Evan Baggett, Matt Dorius** and **Heather Houston** are shareholders, **Melissa Sinor** joined as an associate and **Rob Arnwine** joined as counsel. Baggett, Dorius, Sinor and Arnwine are in the Birmingham office and Houston is in Mobile.

Dominick Feld Hyde PC announces that **Vincent J. Schilleci, III** joined as a shareholder.

F&B Law Firm PC announces that **Lisa W. Overton** is associated with the firm.

Fish Nelson & Holden LLC announces that **Karen Cleveland** and **Ashleigh Hunnicutt** joined as associates.

Fuller Hampton LLC announces the opening of a Clanton office and that **J. Clay Maddox** is a senior associate there.

B.L. Harbert International LLC announces that **David R. Hume, Jr.** joined as legal counsel.

FordHarrison LLP announces that **Wesley C. Redmond** joined the Birmingham office as partner.

Heninger Garrison Davis announces that **Jeff Leonard**, of Birmingham and Atlanta, is a partner.

Hill, Hill, Carter, Franco, Cole & Black PC announces that **James E. Beck, III** is a shareholder and **Alicia F. Bennett, E. Dianne Gamble** and **Dana B. Hill** joined the firm. The firm also announces the opening of offices in Louisville and Birmingham.

Huie, Fernambucq & Stewart announces that **Jennifer Reid Egbe** and **Jeremy Gaddy** are partners in the firm.

Maynard Cooper & Gale announces **Alvin Hope, Jon Levin, Rob Ozols** and **Trice Stabler** are shareholders.

McCollum & Wilson PC in Auburn announces that **D. Carter Weeks** joined as an associate.

Morris, Haynes, Wheelles, Knowles & Nelson announces that **Matthew G. Garmon** and **Taylor A. Pharr** joined as associates in the Birmingham and Alex City offices, respectively.

Rosen Harwood PA announces that **Brooke M. Nixon** is a shareholder.

Starnes Davis Florie LLP announces that **Will Davis, Jordan Gerheim** and **Cole Gresham** are partners.

Thornton, Carpenter, O'Brien, Lazenby & Lawrence of Talladega announces that **Lee Sims** is a partner and the firm name is now **Thornton, Carpenter, O'Brien, Lawrence & Sims.** ▲



ONBOARD
SEARCH & STAFFING

Your firm is only as good as the talent of your lawyers. For the absolute best legal talent on the market, turn to OnBoard Search & Staffing.

- ❖ **Partner Level Searches**
- ❖ **Associate Searches**
- ❖ **In-House Searches**
- ❖ **Contract (hourly) Lawyers**
- ❖ **Consulting**

www.OnBoardSearch.com

855-SEARCH-2
(855-732-7242)

All inquiries are strictly confidential.

Richard G. Brock, Esq at richard@onboardsearch.com



DISCIPLINARY NOTICES

- ▲ Reinstatements
- ▲ Transfers to Disability Inactive Status
- ▲ Disbarments
- ▲ Suspension
- ▲ Public Reprimands
- ▲ Miscellaneous

Reinstatements

- Prattville attorney **Richard Dale Lively** was reinstated to the practice of law in Alabama effective October 6, 2015, by order of the Supreme Court of Alabama based upon the decision of Panel II of the Disciplinary Board of the Alabama State Bar. On May 18, 2012, Lively's license to practice law was suspended for six months and, in a plea agreement in other matters, his license was also suspended on November 17, 2012 for 90 days. [Rule 28, Pet. No. 2014-1235]
- Bessemer attorney **Brion Dejon Russell** was reinstated to the practice of law in Alabama, effective August 19, 2015, by order of the Supreme Court of Alabama. The supreme court's order was based upon the decision of Panel III of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Russell on September 19, 2014. [Rule 28, Pet. No. 2014-1474]

Transfers to Disability Inactive Status

- Birmingham attorney **Gloria Lowell Brown Collins** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective November 10, 2015, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the November 10, 2015 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to Collins's petition submitted to the Office of General Counsel requesting to be transferred to disability inactive status. [Rule 27(c), Pet. No. 2015-1604]
- Mobile attorney **David Graham Kennedy** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective November 9, 2015, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the November 9, 2015 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to Kennedy's petition submitted to the Office of General Counsel requesting to be transferred to disability inactive status. [Rule 27(c), Pet. No. 2015-1595]

Disbarments

- Huntsville attorney **Betsy Ellen Berman** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective October 23, 2015. The supreme court entered its order based on the Disciplinary Board's order accepting Berman's consent to disbarment, in which Berman admitted to fraudulently issuing a title commitment and closing protection letter. [Rule 23(a), Pet. No. 2015-1537]
- Tuscaloosa attorney **Laurie Ames Brantley** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective October 20, 2015. The supreme court entered its order based on the Disciplinary Board's order accepting Brantley's consent to disbarment, based upon allegations that Brantley misappropriated client funds. [Rule 23(a), Pet. No. 2015-1499]
- Centreville attorney **Thomas Michael Hobson, Sr.** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective October 28, 2015. The supreme court entered its order based on the Disciplinary Board's order accepting Hobson's consent to disbarment, based upon allegations that Hobson mishandled client funds. [Rule 23(a), Pet. No. 2015-1563]

Suspension

- Birmingham attorney **William David Nichols** was suspended from the practice of law in Alabama for two years by order of the Supreme Court of Alabama, effective December 14, 2014. The supreme court entered its order based on the Disciplinary Commission's order accepting Nichols's conditional guilty plea, wherein Nichols admitted to the unauthorized practice of law while suspended from the practice of law in Alabama. [ASB No. 2014-342]

Public Reprimands

- On October 30, 2015, Fairhope attorney **Curtis Ray Hussey** received a public reprimand with general publication for violations of Rules 1.4(a) and (b), 5.4 and 8.4(a) and (g), *Ala. R. Prof. C.* A complaint was filed against Hussey by a Mississippi resident after he retained a company, Home Solutions, to provide loan modification services. Home Solutions, a non-lawyer-owned company, subsequently charged the complainant \$3,600 to represent him in negotiations with his mortgage company. Home Solutions sent the complainant a number of documents that indicated



You take care of your clients, but who takes care of **YOU?**

For information on the Alabama Lawyer Assistance Program's **Free and Confidential** services, call **(334) 224-6920.**

Alabama Lawyer Assistance Program

(Continued from page 153)

that Hussey, who was also licensed in Mississippi, would be providing legal services during the loan-modification process. After Home Solutions apparently failed to provide any meaningful services to the complainant, the complainant's home was foreclosed upon. Subsequently, the complainant filed a grievance against Hussey. In response to the complaint, Hussey denied ever agreeing to work for or with Home Solutions. However, it was discovered that Home Solutions was an off-shoot of a company called Foundation Business Solutions, LLC, which was an off-shoot of the Danielson Law Group of Utah. Hussey did have a relationship with both the Danielson Law Group and Foundation Business Solutions whereby Hussey agreed to provide legal services to their clients. These services consisted primarily of reviewing files of clients located in Mississippi and Alabama. Hussey's involvement with both entities allowed the entities to undertake representation of Mississippi and Alabama clients and to charge upfront fees when providing loan-modification services. Despite the fact that Hussey was to act as local counsel for Mississippi and Alabama clients, Hussey had very little contact, if any, with the clients. In associating with these various entities, Hussey negligently allowed his status as a Mississippi and Alabama attorney to be used by these entities in an apparent attempt to defraud their customers and to collect fees in violation of federal law. [ASB No. 2014-195]

- On October 30, 2015, Centre attorney **Evan Walter Smith** received a public reprimand without general publication for violations of Rules 1.3 and 8.4(g), *Ala. R. Prof. C.* In March 2012, Smith undertook to defend a restaurant and its owners in a workers' compensation claim. The plaintiff subsequently filed a Fair Labor Standards Act suit in federal court in April 2012. Each of the defendants was properly served with the complaint in June 2012. However, the defendants failed to file an answer and a default was entered against the restaurant and its owners by the clerk of court. As a result, the court issued a default judgement against Smith's clients. In September 2012, after a writ of garnishment had been issued, Smith filed a motion to set aside the default judgment. As grounds, Smith argued that the clients did not fully comprehend English and mistakenly believed that the complaint was related to the ongoing workers' compensation claim in state court. After the court denied Smith's motion, Smith filed a renewed

motion to set aside default judgment reasserting that his clients mistakenly believed the federal complaint was related to the state complaint. Later, another motion to set aside the default judgment was filed in October 2013. In this motion, Smith admitted that the failure to file an answer to the federal complaint was based upon his own negligence and admitted that his clients had delivered a copy of the federal complaint to him and that he informed the clients that he would file an answer on their behalf. Smith also admitted that he placed the complaint in his coat pocket and forgot the matter until the clients notified him of the garnishment. [ASB No. 2014-718]

- Montgomery attorney **Charles Ted Turnipseed, Jr.** received a public reprimand without general publication on October 30, 2015 and was instructed to pay a \$750 administrative fee pursuant to Rule 33, *Ala. R. Disc. P.*, for violating Rules 8.4(a) and (g) and 8.1(a), *Ala. R. Prof. C.* In or about October 2011, the complainant hired Turnipseed to represent him in a matter seeking compensation for inadequate accommodations provided to his son by the Montgomery Public Schools. On or about October 2, 2013, the complainant telephoned Turnipseed. After Turnipseed first denied that he cursed his client in his initial response to the bar, he later admitted conducting a very "unprofessional" telephone call with the client wherein he did, in fact, curse at the complainant. With this conduct, Turnipseed violated Rule 8.1(a), *Ala. R. Prof. C.*, by knowingly making a false statement of material fact and Rules 8.4(a) and (g), *Ala. R. Prof. C.*, by engaging in conduct adversely reflecting on his fitness to practice law. [ASB No. 2013-1827]

Miscellaneous

- By order of the Supreme Court of Alabama, Birmingham attorney **Michael Kevin Abernathy** was removed from disability inactive status, effective September 29, 2015, and the previous Rule 20 interim suspension reinstated, effective September 29, 2015. The supreme court entered its order based upon the Disciplinary Board's order finding that Abernathy was not suffering from a disability that made it "impossible to adequately defend himself" on disciplinary charges. [Rule 27(c); Pet. No. 2015-980] ▲

Video Streaming

Connect to the witness across the country
or the globe!



FREEDOM

FREEDOMREPORTING.COM

Feel the Freedom Difference

Visit Us Online At:

www.freedomreporting.com

1 - 877 - 373 - 3660 toll free



Stronger. Faster. Competitive.

With over 50 years of experience, GilsbarPRO is the exclusive administrator for the CNA Lawyers Professional Liability Program in the State of Alabama. CNA is the largest underwriter of lawyers malpractice insurance in the United States and is A-rated by A.M. Best. This combination is your best alternative for peace of mind in today's challenging environment.

Expect Nothing Less. Call The PROs Today.

800.906.9654 • gilsbarpro.com

CNA

GilsbarPRO 

One or more of the CNA insurance companies provide the products and/or services described. The information is intended to present a general overview for illustrative purposes only. It is not intended to constitute a binding contract. Please remember that only the relevant insurance policy can provide the actual terms, coverages, amounts, conditions and exclusions for an insured. All products and services are subject to change without notice. CNA is a registered trademark of CNA Financial Corporation. Copyright (c) 2013 CNA. All rights reserved.

