The Alabama Lawyer

November 2014 | Volume 75, Number 6

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The Alabama Lawyer

November 2014 | Vol. 75, No. 6

FEATURES

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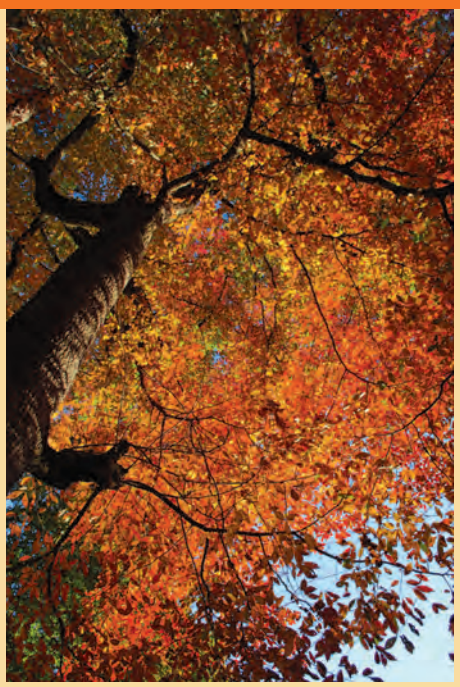

On The Cover

An Alabama Tupelo tree in brilliant fall foliage

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COLUMNS

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Melanie Merkle Atha received her J.D. from Vanderbilt University and her B.A., magna cum laude, in political science from Birmingham-Southern College. Since 2011, she has been practicing collaborative law. She currently serves as co-chair of the American Bar Association Section of Dispute Resolution's Collaborative Law Committee, and is president of Birmingham Collaborative Alliance (BCA), Alabama's first and only collaborative law practice group, of which she is a founding member.

William D. Coleman obtained his undergraduate degree and his law degree from the University of Alabama. In law school, Coleman was an editor of the *Alabama Law Review*, and he graduated in Farrah Order of Jurisprudence (Order of the Coif). He has 40 years of dispute resolution experience, initially in a diverse civil litigation practice on both sides of the fence, including commercial, personal injury, consumer, product liability, fraud and class actions. He has been engaged in an alternative dispute resolution practice for over 25 years. Coleman has served on the Alabama Supreme Court Commission on Dispute Resolution since it was formed in 1994, as president of the Alabama Center for Dispute Resolution, Inc. since 1994 and as chair of the Alabama State Bar Committee on Alternative Methods of Dispute Resolution.

Samuel N. Crosby has practiced with the Baldwin County firm of Stone, Granade & Crosby PC for 36 years, and has been mediating cases for 20 years. He graduated from the University of Virginia with academic distinction and from the University of Alabama School of Law, where he currently serves as a director of the Law School Foundation. He is retired from the United States Naval Reserve JAG Corps. Crosby is a past president of the Alabama State Bar and a recipient of the Chief Justice's Outstanding Leadership Award, the Albritton Pro Bono Leadership Award and the Howell T. Heflin Honor and Integrity Award. His practice includes civil litigation and mediation.

Joel Dillard has practiced for 31 years, as an assistant Attorney General for the State of Alabama and, beginning in 1979, as one of the founding partners of the firm which is now Baxley, Dillard, McKnight, James & McElroy. He represented numerous state administrative boards and commissions during his state service, and also represented them in federal and state trials and appellate proceedings. He graduated from the University of Alabama's School of Commerce and Business, and from the University of Alabama School of Law.

Judge William Gordon has chaired the Supreme Court Commission on Dispute Resolution since September 2012. He retired in 1999 as presiding judge of the Fifteenth Judicial Circuit.

Anne Sikes Hornsby is the associate dean for clinical programs and professor of clinical legal instruction. She oversees the University of Alabama School of Law's seven law clinics and directs its Externship Program. Prior to joining the law school, she was a member of Lightfoot, Franklin & White, where she practiced for nine years.

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(Continued on page 356)

CONTRIBUTORS

(Continued from page 355)

Judith M. Keegan has been the director of the Alabama Center for Dispute Resolution since 1994. She is a graduate of Catholic University's Columbus School of Law and practiced in Maryland before coming to Alabama. She has been a mediator since 1985.

Cynthia Lamar-Hart serves as chair of Maynard Cooper & Gale's trust and estates practice group and fiduciary litigation practice group. She also serves on the firm's executive committee. She has practiced in the areas of wills, estates and trusts and fiduciary litigation since 1989. She regularly represents individuals in the estate-planning process, as well as individual and corporate fiduciaries in the area of estate and trust administration.

Allison O. Skinner is a neutral at Skinner Neutral Services LLC in Birmingham. Skinner is the co-founder of the American College of e-Neutrals. She is an adjunct professor at the University of Alabama School of Law teaching e-discovery and digital evidence and social media and the law. Skinner received her J.D. from the University of Alabama School of Law and her B.A. from the University of Alabama.

Dean Henry C. Strickland is a native of Atlanta and received his undergraduate degree, summa cum laude, from Presbyterian College and his law degree from Vanderbilt University Law School. While at Vanderbilt, he served as articles editor and executive editor of the *Vanderbilt Law Review*. Dean Strickland joined the Cumberland faculty in 1988. He regularly teaches courses on alternative dispute resolution, civil procedure and conflict of laws, and he also has taught courses on constitutional law and remedies. He served as Cumberland's Associate Dean for Academic Affairs from 2001-2011. Since joining the Cumberland faculty, Dean Strickland has continued to serve regularly as an arbitrator and a mediator in programs administered by the American Arbitration Association, the Better Business Bureau and others.

Robert B. Thornhill holds a bachelor's degree in psychology and a master's degree in counseling and human development. He is a Licensed Professional Counselor (LPC), a Master's Level Addiction Professional (MLAP), an Internationally Certified Alcohol and Drug Counselor (ICADC) and a Certified Adolescent Alcohol and Drug Counselor (CAADC). He has worked as a primary therapist at the Lighthouse Counseling Center and Bradford Health Services. Thornhill also served as clinical director of the Alabama Physician Health Program. He has had the opportunity to work as a clinician for the past 17 years. Thornhill currently serves as director of the Alabama Lawyer Assistance Program, providing services to law students, lawyers and judges who may have a problem with substance abuse or another mental health issue.

Dean Matt A. Vega joined the faculty in 2007 of Jones School of Law as an associate professor. He received his B.A., summa cum laude, from Freed-Hardeman University and his J.D. from Yale Law School, where he was executive editor of the *Yale Journal on Regulation* and a member of the Yale Moot Court Board. He is a member of the state bars of Alabama and Tennessee and the American Bar Association. Professor Vega currently teaches business associations, corporate compliance and international business litigation.

ARTICLE SUBMISSION REQUIREMENTS

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

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

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

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

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Persuade Your Neighbors To Compromise Whenever You Can[1]

There are two concepts I am focusing on in this "President's Page"–alternative dispute resolution and pro bono service.

Because much of this issue of *The Alabama Lawyer* is focused on alternative dispute resolution, it is a good time to reflect on the wise advice above given by Abraham Lincoln. Lincoln's career was marked by service to others and his community, even in his early years as a lawyer. He was serving in the Illinois legislature when he was admitted to the Illinois bar.[2] He did not shy away from difficult cases, but he also knew that "the nominal winner is often a real loser–in fees, expenses and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough."[3] Although highly respected as a trial lawyer, Lincoln acted as a mediator and apparently settled more than 1,600 cases over his career.[4] We all have a duty to do what is best for our clients and for society as a whole, and should follow Lincoln's advice to be peacemakers and compromise when possible.

There are many wonderful ADR programs taking place in Alabama. One that deserves mentioning involves foreclosures and mortgage modification and is run by the **Alabama Center for Dispute Resolution** under the direction of Judy Keegan. The center now offers a free foreclosure mortgage modification mediation program to Alabama homeowners. Through April 30, 2015, the center will pay the cost of specially-trained mediators to assist Alabama homeowners and the mortgage-holders with foreclosure and mortgage issues.

The work of the center and the collective efforts of all Alabama lawyers and judges engaged in mediation and arbitration relieve pressure on our courts and help resolve problems more quickly and with less expense. Consider how you can promote compromise and utilize alternative methods for peaceful settlement of disputes.

And, this issue of the magazine also comes out just as we wrap up **Pro Bono Celebration Month**. *Alabama Rule of Professional Conduct* 6.1 Pro Bono Publico Service provides: "A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means." The comments to the rule remind us that "legal assistance in coping with the web of statutes, rules and regulations is imperative for persons of modest and limited means, as well as for the relatively well-to-do" and the "basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer."[5]

ABA *Model Rule of Professional Conduct* 6.1 suggests that lawyers should aspire to render without a fee at least 50 hours of *pro bono publico* legal services per year, with an emphasis that these services be provided to those of limited means or nonprofit organizations serving the poor.[6] Rule 6.1 recognizes that only lawyers have the special skills and knowledge needed to secure access to justice for low-income people, whose enormous unmet legal needs are well-documented.

Our goals for Pro Bono Celebration Month included recruiting more pro bono volunteers and increasing legal services to the poor and vulnerable, mobilizing community support for pro bono, fostering collaborative relationships and recognizing the pro bono efforts of America's lawyers. Thanks to the efforts of **Pro Bono Month Task Force Chair Cassandra Adams, Vice Chair Flynn Mozingo**, state bar **VLP Director Linda Lund** and the rest of the hardworking members of the task force, we accomplished our goals, through volunteer lawyer clinics throughout the state, poverty simulations showcasing the challenges faced by those living at or below the poverty level, award ceremonies recognizing the efforts of our volunteers and fundraisers helping to fill the gap between the need for funds and the funds currently available.

Continued from page 359

The ASB has opened a new chapter of pro bono, focusing attention on civil legal services to veterans and their families. In his Second Inaugural Address on March 4, 1865, in a time of great uneasiness, President Abraham Lincoln said we must "care for him who shall have borne the battle and for his widow, and his orphan."[7] We have a duty to support Alabama veterans, service members and their families. Approximately 415,000 veterans lived in Alabama as of September 2013, and 254,000 reservists and 332,000 National Guard have deployed in support of Operation Enduring Freedom/Operation Iraqi Freedom. Many returning veterans have civil legal problems.

The state bar's **Service Member and Veterans Support Task Force** is working with the Alabama Department of Veterans Affairs, the Governor's AlaVetNet Commission and our volunteer lawyers programs to provide support to these heroes. The ASB's first clinic with the Department of Veterans Affairs in July was a success, and our support of these events will continue. Lawyers have a monopoly on the provision of legal services. Whether it is serving at a local walk-in veterans' legal clinic or taking on a veteran's appeal before the Court of Appeals for Veterans' Claims, there are many ways Alabama lawyers can help.[8] We need to continue to step up to fill the growing need for legal services to veterans, service members and their families.

Please take this opportunity to accept a Volunteer Lawyers Program matter. ASB VLP Director Linda Lund, Madison County VLP Director Angela Rawls, Birmingham VLP Director Nancy Yarbrough, Montgomery VLP Director Mike Martin and South Alabama VLP Director Ariana Moore and their staff continue to do great work with limited resources. Many thanks to them! And, thank you, if you were one of the 4,492 members of Alabama's legal community who donated over 12,000 hours in legal services last year or made generous

financial contributions to legal aid organizations in our state. However, with 17.5 percent of Alabamians living below the federal poverty line, and an estimated one in four of them with civil legal problems, the need is large–in fact, it is overwhelming. According to an American Bar Association study, at least 40 percent of low- and moderate-income households experience a legal problem each year, and yet the collective civil legal aid effort is meeting only about 20 percent of the legal needs of low-income people. Please help us.

It is fall and time for homecomings. "All things on earth point home in old October," declared Thomas Wolfe.[9] So, it is appropriate for us to think of our Alabama home; and about how we can make things better. Whatever your practice focus, consider how you can "[p]ersuade your neighbors to compromise," and make an effort to shoulder more than your share of pro bono work. | AL

Endnotes

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2. Cohn, Henry S., "Abraham Lincoln at the Bar," *Fed. Lawyer*, May 2012 at 52.
3. Hill, Frederick Trevor, "Lincoln the Lawyer," Special ed. New York, NY: Legal Classics Library, 1996., at 102-103.
4. Fraker, Guy C. "Lincoln's Ladder to the Presidency: The Eighth Judicial Circuit," So. Ill. Univ. Press 2012.
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7. President Abraham Lincoln, Second Inaugural Address, March 4, 1865.
8. Vogel, Bryan J. and Bornstein, William, "How Attorneys Can Volunteer to Help Veterans," *Fed. Lawyer*, September 2013, at 52-55.
9. Wolfe, Thomas, "Of Time and the River: A Legend of Man's Hunger in His Youth," Chs. Scribner's Sons, 1935.

Keith B. Norman
keith.norman@alabar.org

The New (and Improved) Judicial Recusal Law

In 1995, the Alabama Legislature passed a judicial recusal statute. That statute, strongly supported by then-Governor Fob James, required the recusal of a jurist if a campaign contribution of a party with a pending case reached a specific financial threshold: $4,000 or more for a judge or justice of an appellate court or $2,000 or more for a circuit judge.[1] Under the provisions of the law, sections 12-24-1, 2 *Code of Alabama* (1975), the Alabama Supreme Court was to adopt rules to implement the provisions of the act.

The original recusal law was never enforced. The primary reason was that the supreme court was unable to fashion the necessary rules to appropriately implement the law as drafted. Moreover, there was disagreement as to whether or not the law was required to be pre-cleared by the U.S. Department of Justice, so it was never pre-cleared. Despite these problems with the law, some lawyers choose to limit their judicial campaign contributions anyway to the threshold amounts included in the statute.

This past April, the Alabama Legislature addressed judicial recusal and judicial campaign contributions for the first time since its adoption of the first recusal statute. The legislature adopted an entirely new law, section 12-24-3, repealing the old law in its entirety and replacing it with a new "rebuttable presumption" standard. Under the new law a rebuttable presumption of recusal occurs when a judge or justice receives a campaign contribution exceeding a specific percentage of total contributions received during the election cycle. The contribution can be from either a party with a pending case or one made at a time when it was reasonably foreseeable that a case could become before the jurist. Those percentages are:

1. 10 percent in a statewide appellate court race;

2. 15 percent in a circuit court race; or

3. 25 percent in a district court race.

The new law defines "party" to include a person who is a party in a lawsuit, that person's immediate family and the person's attorney and the attorney's law firm. The new law also specifies that when a court denies a motion to recuse, that order is appealable. While the appeal of the order is pending, the action in the trial court is delayed.

The new recusal law will not prevent the large sums of money from PACs or third-party issue groups that have flooded judicial campaigns in the past. Despite this fact, the new law should help allay any concern about the impartiality of a judge seeking reelection who receives a campaign contribution from an attorney or a party appearing before that judge.

Casemaker Update

As most of you by now are aware, the state bar has renewed the Casemaker contract for a new three-year term. Several enhanced services have been added that make Casemaker an even better tool for your legal research.

In the July "Executive Director's Report," I informed readers that the Casemaker contract would end soon and asked bar members to share their thoughts with me about continuing to provide an electronic legal library as a member benefit. I received hundreds of emails and letters, particularly from solo practitioners and small firms, stating how important Casemaker is to their practice and urging the state bar to continue providing Casemaker as a member benefit.

Based on these expressions of overwhelming support for Casemaker, we moved forward to negotiate this new contract with enhanced services. I appreciate very much your letting me know how Casemaker has become a valuable part of your practice. | AL

Endnote

1. The original statute did not mention district court judges.

Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's 2015 Annual Meeting at the Grand Hotel Marriott Resort & Spa in Point Clear.

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

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

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

To be considered for this award, local bar associations must complete and submit an award application by June 1, 2015. Applications may be downloaded from *www.alabar.org* or obtained by contacting Christina Butler at (334) 269-1515 or *christina.butler@alabar.org*.

Alabama Lawyers' Hall of Fame

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

The implementation of the idea of an Alabama Lawyers' Hall of Fame originated during the term of state bar President Fred Gray. He appointed a task force to study the concept, set up guidelines and then to provide a recommendation to the board of bar commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004. Since then, 45 lawyers have become members of the hall of fame. The five newest members were inducted May 2, 2014.

A 12-member selection committee consisting of the immediate past president of the Alabama State Bar, a member appointed by the chief justice, one member

appointed by each of the three presiding federal district court judges of Alabama, four members appointed by the board of bar commissioners, the director of the Alabama Department of Archives and History, the chair of the Alabama Bench and Bar Historical Society, and the executive secretary of the Alabama State Bar meets annually to consider the nominees and make selections for induction.

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

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

Download an application form at *https://www.alabar.org/assets/uploads/2014/08/Hall-of-Fame-Nomination-Form-2015.pdf* and mail the completed form to:

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

The deadline for submission is March 1, 2015.

Judicial Award of Merit

The Alabama State Bar Board of Bar Commissioners will receive nominations for the state bar's Judicial Award of Merit through **March 13, 2015**. Nominations should be mailed to:

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

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

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

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

The Supreme Court of Alabama Commission On Dispute Resolution

1994–2014

By Judge William Gordon

Current commission and liaison members include, front row, left to right, Lynn DeVaughn, Hon. Elisabeth French, Michelle Ohme, Hon. Bill Gordon, Judy Keegan and Debra Black Leo; back row, Scott Hoyem, Harold Stephens, Ken Dunham, Hon. Delores Boyd, Bill Coleman, Cheryl Leatherwood, Noah Funderburg, Pete Cobb and Tom Saunders

Not pictured: Charles Boyd, Hon. Scott Donaldson, Hon. Mike Fellows, Karl Kirkland, Hon. Robert Minor, Justice Glenn Murdock, Hon. Lorraine Pringle, Cooper Shattuck and Keith Norman

More than 20 years ago, the Supreme Court of Alabama established the Commission on Dispute Resolution.

In Alabama, alternative dispute resolution was in its infancy but would mature to where, from 1997 through 2013, more than 85,000 disputes have been mediated and over 65,000 settled.

The court charged the commission with many duties and responsibilities related to the orderly and systematic development of statewide alternative dispute resolution. The court recognized that dispute resolution should not be restricted to the judicial system; rather, dispute resolution processes were needed in our communities, schools, work places and state government agencies. The court also required the commission to "[i]mplement and supervise the Center for Dispute Resolution as an alternative-dispute-resolution management, coordination, research, and development office." The commission implemented the center and hired its first and only executive director, Judith Keegan.

In the past 20 years, the commission, with the center and hundreds of volunteers as driving forces, has assisted and witnessed the development of peer mediation programs in the communities and schools; public service announcements featuring mediation, Alabama's first community mediation center, the state bar's Attorney Client Fee Dispute Resolution Program, small claims courts' pro bono mediation programs, the creation of the Governor's Task Force on State Agency ADR, the proclamation of Mediation Week in Alabama, appellate mediation, foreclosure mediation, and many other alternative dispute resolution vehicles to assist the citizens of this state.

The commission, working hand-in-hand with the center, the state bar and interested persons, developed the "Gold Book," a handbook entitled *Alternative Dispute Resolution Procedures in Alabama with Mediation Model* (3rd ed. third printing 2012). Included in the handbook are the *Alabama Code of Ethics for Mediators* (March 1, 1996, as amended) and the *Code of Ethics for Arbitrators* (March 1, 2004). Both codes were developed by the commission and center and apply to any mediator or arbitrator on the center's rosters of mediators and arbitrators.

The commission also issues opinions about mediator and arbitrator ethics and will hear complaints filed against mediators and arbitrators. Commission opinions appear at *http://www.alabamaadr.org/web/about_commission/index.php*. In 20 years, only one formal complaint has been filed against a mediator, and it did not present an issue about a violation of the *Alabama Code of Ethics for Mediators*.

More information about the commission may be found at *www.alabamaadr.org*.

Alternative dispute resolution in Alabama has experienced a remarkable expansion and transformation during the past two decades and the commission looks forward to the next 20. | AL

THE FAMILY MEDIATION PROGRAM:

Helping Parents in Conflict Develop an Action Plan for Raising Their Children

By Judith M. Keegan

Everyone in the mediation world knows that if we need mediation anywhere, it is in divorce, dependency and never-married family cases. Child specialists and the mental health profession tell us that continued fighting and conflict between parents is most detrimental to the health and wellbeing of children. Parents working with a mediator to develop a parenting plan with parental responsibilities, support and child time to present to a judge during proceedings are essential to de-escalating conflict and helping children thrive after separation of the parents. Divorce lawyers cooperate with the mediators in representing their clients, but in collaboration, not litigation, to keep continued conflict in check. Judges always retain control of the case, and make sure the parenting plan is in the best interest of the children. This is why the Family Mediation Program is one of the most exciting projects.

While Alabama has led all other jurisdictions in our appellate mediation success, we have lagged behind in the divorce and family arena. I say this, though judges like Hub Harrington (ret.) of Shelby County, Ben Fuller in Autauga, Jimmy Sandlin (ret.) in Lauderdale County and others were leaders in steering families into mediation so that parents could make individualized plans and decisions for the future of their families.

Moore

In late 2012 and early 2013, the Alabama Center for Dispute Resolution developed and began the Family Mediation Program, a partnership initiated by Roy Moore, chief justice of the Supreme Court of Alabama, in cooperation with Julia Weller, clerk of the court. The chief justice wanted families who were in divorce or child-support situations to have help as they continue to parent and guide their children after the parents are no longer together. The court asked the center to develop a program and provide free mediation to families with children who have limited means because it has a statewide network of trained family mediators. With a small grant from the court, the center pays the mediators. Mediators, in turn, are asked to accept less than their typical hourly mediation rate, and provide some pro bono time to each case. This has ranged anywhere from 30 minutes to several hours per case.

During the first phase of the program, 20 families had mediation assistance in Dallas, Bibb, Wilcox, Houston and Shelby counties. Judges Meigs, Pettaway, Wiggins, Ingram, Harrington, Bostick, Reeves and Conwill ordered those cases to mediation. There were 13 full agreements, three partial agreements and four cases with no agreements. In addition, mediators provided over 40 hours of non-paid assistance to those families.

Phase two of the program is still ongoing and has logged 22 cases, with 20 mediations completed, 13 full agreements, three partial agreements and four with no agreements. So far, mediators have provided 19.35 hours of pro bono time on these cases. Judges Kelly, Bailey and Williams in Montgomery County; Judge Fellows in Lee County; Judges Palmer and Summers in Jefferson County; Judges Wiggins, Meigs and Pettaway in Dallas, Bibb and Wilcox counties; Judge Teel in Clay/Coosa counties; Judge Reynolds in Chilton County; Judge Bush in Elmore County; Judge Fuller in Autauga County; Judges Ingram, Conaway and Moulton in Houston County; Judges Filmore and Quattlebaum in Dale County; Judge Bostick in Shelby County; and Judge Howell in Morgan County are participating. The center is always adding counties as judges and family mediators wish to participate.

There are so many families with children to be helped. In 2012, according to the *Alabama Unified Judicial System Annual Report*, there were 52,385 domestic cases (original and modifications) and 18,870 child support cases filed. The majority of these families do not have the funds to litigate divorce and family issues. Attorneys do make money when they litigate, but they can spend a good deal of time helping their clients resolve issues in mediation cooperatively, and charge to do it. After all, parents will be parenting together for many years–even while living apart. Good examples of collaboration, negotiation and conflict resolution skills can be modeled by lawyers and mediators in mediation.

We have seen such positive results in a short time, and the center remains committed, along with the court, to continuing the program for Alabama families. Chief Justice Moore has said, "I consider the Family Mediation Program one of the most important projects in existence," and I concur. Family law is the place we can all make a difference. | AL

The website www.*uptoparents.org* was developed to help attorneys, mediators and parents work together for the good of the family, with helpful videos and materials.


Adams


Baxley


Beasley


Carr

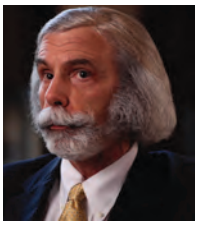

Cunningham


Haney


Jones


Miller


Prince


Segall


Simon


Stephens


Sydnor


Vowell

Perspectives on Mediation from Top Attorneys

By Samuel N. Crosby and Shawn T. Alves

Some of Alabama's top litigators and mediators shared their thoughts and advice about mediation. The contributors are:

Cassandra W. Adams, Birmingham
Wade H. Baxley, Dothan
Jere L. Beasley, Montgomery
Charles F. Carr, Daphne
Robert T. Cunningham, Mobile
F. Michael Haney, Gadsden
G. Douglas Jones, Birmingham
M. Kathleen Miller, Mobile
Robert F. Prince, Tuscaloosa
Bobby Segall, Montgomery
Kenneth O. Simon, Birmingham
H. Harold Stephens, Huntsville
Marda W. Sydnor, Birmingham
Hon. J. Scott Vowell, Birmingham

Contributors were asked to briefly respond to three questions:

1. What is the key to your success in mediation?

ADAMS: I don't give up. It's difficult for anyone, in any situation, to decide to face a problem. Once someone takes the substantial step of deciding to work toward resolution, I work feverishly to find ways to help them resolve the issues. By honoring the parties' decision to try and resolve their dispute through mediation, I am reminded of their courage and that we all are gifted with the ability to appropriately manage our conflict.

BAXLEY: I find that the key is to have patience with the parties and try to convince them that settlement of this litigation at this stage is in their best interest.

I also emphasize that there are substantial risks in taking this case to trial whether the party is a plaintiff or a defendant. That always seems to get their attention. Of course, the real key is having parties and attorneys who are willing to compromise their respective positions to reach a fair and reasonable settlement.

BEASLEY: In the cases that have settled in mediation–and that includes cases settled after the actual session ended–it was usually because of the strength of the plaintiff's case. I have never settled a weak case in mediation. Frankly, I have had to develop more patience in order to cope with the mediation process and that has helped me. The mediator has a tremendous effect on cases settling and it takes a special talent to bring opposing views into accord and bring about a satisfactory resolution of a case.

CARR: I genuinely want my case to settle as soon as possible. Maybe all defense lawyers are the same way but if not it creates a subtle deterrent to succeed at mediation.

CUNNINGHAM: Do not prepare the case for mediation. Prepare the case for trial. Only when you are fully prepared for trial can you expect a successful result in mediation.

HANEY: I believe the key to success in mediation depends very much on the type of case. Where the principal issue is how much it's going to take to resolve a personal injury claim, I think it is very important to have clients with defined goals, but realistic expectations. In other cases that do not simply involve payment, creativity and thinking outside of the box are probably most important.

JONES: The same as the keys to success at trial: preparation. Mediation is simply a different form of putting your client's best foot forward. You have to know the facts and the law that pertains to your case in order to both present your client's side of the dispute and to rebut what you hear from the other side. In addition to preparation, lawyers have to remember the purpose of mediation–not winning as you would at trial but reaching a settlement that is fair for your client. With that, I think that during the mediation lawyers often have to make certain decisions that might be somewhat risky to send a very clear message that you are serious, and reasonable, about getting the case resolved without appearing weak.

MILLER: A good mediator–one who relates well to people and who has trial experience

PRINCE: Managing the expectations of my client, taking seriously the workup and *presentation* of the case at mediation and not assuming I know the other party's valuation, authority or what any particular bid means. Many times bracket invitations have proved to be useful in breaking up "log jams."

SEGALL: First, write a persuasive and reasonably thorough confidential mediation statement. It's important that the mediator fully understand your client's position and arguments, so that he or she can more knowingly discuss your client's position with the opposing side. Secondly, although mediators often counsel against opening statements, I believe a well-planned opening can be key to a successful mediation. It's a lawyer's opportunity to speak directly to the opposing decision-maker. The secret is to persuasively–and with sincerity–state your client's position while remaining conciliatory and avoiding offense. The goal is for the opposing decision-maker to understand that your side has more merit than anticipated and that you will present your side convincingly, and in a likable manner, to the jury. It's a delicate balance, but if successfully negotiated will set a favorable tone for the entire mediation.

SIMON: From a mediator's perspective, I experience the most success when I propose a specific figure to settle the case. Yet, out of respect for the parties' right to self-determination, I suggest a specific figure only under the right circumstances. I don't make a mediator's proposal unless the parties are bogged down and look to me for leadership and direction. I formulate the proposal only after evaluating the facts, strengths and weaknesses of the case, gauging the respective attitudes of the parties regarding settlement generally and anticipating their likely responses to the proposed figure.

STEPHENS: I think that I am perceived by both sides as someone who will work diligently to assist the parties in reaching a successful resolution. The other key to success is to be able to successfully mediate some difficult cases for attorneys and let word of mouth become a good source for referrals.

SYDNOR: Preparation. Since I am defending primarily personal injury cases, by the time I am ready to mediate, I have taken the depositions of the plaintiff and any fact witnesses, I have the plaintiff's full medical history and specific numbers regarding plaintiff's claimed injuries and damages and I either have depositions of the treating physicians or know whether they will relate the injury to the subject accident. If it is a case involving experts, I like to be sure their depositions have been taken before I'm ready to mediate. I spend a lot of time evaluating the case. I run the facts by my law partners and attorneys in the county where the case is pending. I talk to plaintiff's counsel to be sure I understand his or her evaluation of the case. Prior to the mediation, I send relevant materials for the mediator so that he or she can be fully prepared on the facts. Once the mediation starts, I am patient. I have a goal and I work toward it. If a plaintiff has high expectations in a case that is not meritorious of high dollars, I like to negotiate slowly to give the mediator time to help the plaintiff get used to lower numbers. If I have some information that is damaging to the plaintiff's case, for example prior treatment where the plaintiff claimed none at the deposition, I hold it until the parties are within striking distance of settlement. It can close a substantial gap if the plaintiff has not been honest with counsel. I choose mediators who will prepare, have trial experience and will share their opinions with both sides without becoming an advocate for one side or the other. I don't reveal my authority to the mediator unless I need to toward the end, but I also don't misrepresent my client's position. I don't reveal everything to the

mediator because I'm still an advocate. However, I think it's important to be honest and candid with the mediator. It's important that the mediator know you as someone who is honest when you affirmatively represent a position of your client. I don't like drawing lines in the dirt. I don't say that's all I can pay unless I know my client will never pay more.

VOWELL: Success in mediation is more than being able to reach a global settlement of the legal dispute. Mediation can be deemed successful if the process narrows the gap between the plaintiff's demand and the defendant's offer. Mediation can be just one more step in progressing to an ultimate settlement. It can also succeed when it helps define and narrow the issues to be tried. The parties and their counsel should leave feeling that the process has been fair and that they have been heard. They often have a sense of satisfaction even if the case is not settled and I think that can be called success.

A case is more likely to be settled through mediation when the parties voluntarily with a commitment that they will make a good faith effort to settle the case. Often, where mediation is the result of a sua sponte court order or of a standing order requiring that all cases be mediated–when the parties are not committed to the process–it just adds another layer of delay and expense for the parties and accomplishes very little.

It is important for the mediator to allow the parties to reach their own solution to the dispute. The successful mediator finds a balance between being a facilitator and an evaluator. The parties are generally more pleased when the outcome is the result of their reaching an agreement, rather than one which is imposed by the mediator.

I firmly believe in the mediation process. It helps our overburdened trial courts and can result in a speedy and fair disposition of a case. It enables the litigants to conclude their case with a sense that they have been treated fairly and that our system works.

2. At what point in a case is mediation appropriate, and when do you encourage or discourage it?

ADAMS: Any point in a case is appropriate for mediation, but the earlier the better.

BAXLEY: Mediation is more appropriate when the parties have conducted some pretrial discovery and both sides know the strong and weak points of their side of the case. I discourage mediation if the attorneys cannot explain those points to me unless it is a case involving undisputed facts and simple legal issues.

BEASLEY: No case should go to mediation before pretrial discovery is complete and, on occasion, it is better that motions for summary judgment be disposed of first. In many of our cases there is no need for a motion of that sort. As a rule, I don't encourage mediation and prefer that the trial judge or defense lawyer make that decision. Nor do I discourage mediation, even though in certain cases it is a waste of time.

CARR: I want to mediate a case prior to suit being filed. I have one client who has worked with me to mediate 14 out of 16 cases he has sent me and successfully resolved them before suit was filed.

CUNNINGHAM: Mediation is most appropriate after the case is fully prepared for trial. It is a fact of legal life which I neither encourage nor discourage. Having been around long before it existed, though, I see it being used far too often as a poor substitute for going to the mat for your client in the courtroom.

HANEY: For mediation to have any chance of success, both sides have to have adequate information to understand the position of the other side. I encourage mediation when I believe that the other side has complete information and expresses an interest in resolving the case.

JONES: There isn't a one-size-fits-all for this. I talk to my client about mediation as early as possible, regardless of whether I am representing the plaintiff or the defendant, because, to some extent, the client's attitude will dictate when the time is right. Litigation is often such an emotional issue that clients often have to warm up to the idea of a resolution that by the very definition of settlement is short of total victory. Aside from the client's attitude, the facts and circumstances of the case will guide the mediation process. In many cases, a considerable amount of discovery has to take place just to frame the issues and, with others, not so much. A party who is footing the bill for the litigation has to understand that the mediation process can cut litigation costs substantially which can factor into settlement negotiations.

MILLER: It depends on the case–as early as the parties have a good understanding of what the evidence is likely to be at trial.

PRINCE: It is appropriate after all parties know the important facts, contentions and defenses necessary to make a meaningful evaluation (usually after substantive discovery). From a plaintiff's perspective, the closer mediation is to the trial date, the greater the likelihood of success. I discourage mediation based on a cost-benefit analysis when the parties' expressed valuations are too far apart.

SEGALL: Mediations generally are most successful after enough discovery has been completed for the lawyers to understand the other side's case, but while sufficient discovery expense can still be avoided by settlement. I encourage mediation when the other side wants to mediate, and I believe the case ought to settle. I sometimes encourage it when I fear the opposing decision-maker may not be hearing the problems with his or her case. I may encourage it when I believe my side is weak, and I think a good mediator might help resolve the case.

SIMON: Experience shows that mediation has the greatest chance of success after discovery is complete and the key

motions have been decided. Moreover, there are earlier points in the case when mediation should be encouraged, such as before significant attorney fees and expenses are incurred. Empirical research shows that in certain situations the uncertainty created by pending dispositive motions can have a salutary effect on settlement discussions. Nonetheless, mediation seems to have a much lower chance of success when it is the result of a mandatory court order, when the parties are waiting for key rulings and before they have sufficient information to properly evaluate the case.

STEPHENS: The decision about when to mediate is very important but has to be made on a case-by-case basis. I have seen many instances of pre-suit mediation prove successful. If a lawsuit has been filed, it is often helpful for at least the parties to have been deposed prior to going to mediation but certainly not always the case.

SYDNOR: I prefer to mediate after full discovery has been conducted and both sides are operating from a position of knowledge. I encourage mediation well prior to trial. I don't like to mediate too close to trial because by the time I'm getting ready for trial, I don't want to be thinking about case settlement. Negotiating a settlement and trial preparations are two different mindsets. I encourage mediation when the demand is high enough to justify the expense of it and I think the parties would benefit from the process. I discourage mediation in cases that attorneys should be able to settle between themselves.

VOWELL: The point in a case when mediation is appropriate depends on the case. If the facts are not seriously in dispute, it may be worthwhile to mediate before the parties invest time and money in discovery and trial preparation. On the other hand, if the facts are complex and disputed, the lawyers need to learn more about their case before they can comfortably advise the client as to the settlement value of the case. In those cases, it is often better to wait until the case has progressed to the summary judgment stage or near the trial date. The case has to ripen.

3. How do you prepare a client for a mediation session?

ADAMS: I explain the mediation process from beginning to end. Then I encourage my client to participate in the mediation by telling their own story. I also spend a lot of time before the mediation, managing my client's expectations,

which requires being straightforward about the strength of their case.

BAXLEY: I prepare a client for mediation just like I would for a deposition. I clearly explain to them that we are not trying the case before the mediator and that the mediator is not a judge who is making a final decision. I encourage a client to be rational and reasonable when meeting with the mediator and to try and impress the mediator so that he/she will advise the opposing party that my client will be an effective witness for our side of the case if this matter goes to trial.

BEASLEY: I always tell a client to be prepared for lots of waiting and to be patient. I also go through what I expect the client to hear from the mediator and the defense lawyer during the process. I tell the client not to be discouraged if the first offer is a "low-ball" offer, which, in all too many mediations, is the norm, and that it may take some time to get the last offer from the defense. I have always thought mediations would be more successful if first offers were more reasonable. I suppose the same could be said if a demand from our side is outrageously high. I try really hard to make sure the client knows that the mediator is not a judge and will not be making any rulings. I believe that the mediator can only be effective if he or she understands our case and that includes the strengths and the weaknesses. If the mediator doesn't understand the nature of a products case, for example, it will be most difficult for that person to comprehend the technical aspects of such a case. Fortunately, most mediators work hard at their task and that makes the mediations at least bearable when they don't work out.

CARR: I try to teach them to be as open as possible, and I trust the mediator.

CUNNINGHAM: I tell them that most defendants do not have enough sense to pay what their case is really worth, so we should listen politely, but be prepared to go to trial. Sometimes I am wrong.

HANEY: I always emphasize that they will likely be very disappointed with the first offer. I explain that it is the last offer, and not the first, that matters. I also explain that we have to remember that our goal at mediation is to settle the case in a manner that is acceptable to us and not to "beat" the other side.

JONES: The client should help the lawyer prepare, first and foremost. To do that, though, the lawyer has to convince the client to look at the good, the bad and the ugly. Emphasize the strengths but appreciate the weaknesses. The client has to be made to understand that he or she cannot be represented the way they deserve unless the lawyer knows all of the facts. And the lawyer has to get the client to understand the settlement process–the role of the mediator, the role of the lawyers and that the ultimate outcome of a successful mediation is likely to be less than what the client had hoped–but the lawyer for the opposing party is telling their client the same thing. If the client understands that standing on principle is not really part of this process, then the odds are that the mediation will be successful and the case gets resolved.

MILLER: I talk with our client about listening and trying to learn about the strengths and weaknesses of the other party's case and about the weaknesses of their position. My husband, Charlie Fleming, recommends telling your client that you will be overplaying the strengths of the client's case during the mediation and that they should not listen to you!

PRINCE: I explain the "bargaining" process in detail and try to eliminate the chances of any spontaneous reactions from my client to the mediator's comments–offers or otherwise. I compare the usually day-long process to a marathon *vis-à-vis* a sprint, and I try not to overplay the chance of the mediation being successful. I remind my client he or she will be judged by the opposing attorney and adjuster in terms of jury appeal, so I discourage any extremes in dress or appearance. I remind them that it usually pays to be nice because "sugar attracts more flies than vinegar."

SEGALL: I explain the process, the strengths and weaknesses of both sides of the case and the pros and cons of settling. I also discuss what might be a reasonable settlement of the case. I try to prepare my client to understand that settlement requires compromise.

SIMON: Clients are best prepared for mediation when they have a realistic picture of all sides' positions, a clear-eyed assessment of the rigors and uncertainties of trial and an informed view of likely outcomes. Clients need to be aware of the economic costs already incurred and likely to be incurred in the future. They should understand how the negotiation process works, what is and isn't achievable and the need for flexibility throughout the settlement process. Clients also benefit enormously from discussions regarding settlement goals, strategy and tactics, and how success should be defined at the conclusion of the process.

STEPHENS: I always try to confer preferably in a face-to-face meeting in advance of a mediation with my client to review the case's strengths and weaknesses. I think this needs to be a very candid and frank assessment of the case and should include a discussion of key issues related to the matter from both sides' perspective. I also encourage my clients to approach mediation with a positive but open mind as opposed to having lines drawn in the sand prior to the commencement of mediation.

SYDNOR: Since I generally represent large corporations, I often do not have a live person with me at the mediation. Instead, I keep them informed by phone about what's going on. They are prepared for the mediation since I'm required to report and give my analysis weeks prior to the mediation. The more information they have about the case, the better equipped they are to evaluate it. When I do have a corporate representative present, I encourage them to do more listening than talking. I like positive, forward progress and I try to maintain control of that if I can.

We hope some of the counsel given by these litigators and mediators will be helpful in your daily law practice. | AL

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Ethical Considerations in Collaborative Practice

By Melanie Merkle Atha

"The courts of this country should not be the places where resolution of disputes begins. They should be the places where the disputes end after alternative methods of resolving disputes have been considered and tried."

—Justice Sandra Day O'Connor

On January 1, the Uniform Collaborative Law Act ("UCLA") went into effect in Alabama.[1]

This new law defines the legal parameters of this unique form of conflict resolution and outlines mandates for collaborative practice in Alabama.[2] With its enactment, the UCLA strengthens the more widespread use of collaborative practice in Alabama and addresses the needs of the growing collaborative practice community, making guidelines and policies more uniform and accessible.

This article outlines the practice of collaborative law, examines the tenets put into place by the UCLA, addresses ethical concerns implicit in collaborative practice and discusses obligations of the legal community concerning this burgeoning practice.

What is collaborative practice?

Collaborative practice is a voluntary dispute resolution process in which parties settle without resort to litigation.

In collaborative practice:

1. The parties sign a collaborative participation agreement describing the nature and scope of the matter;
2. The parties voluntarily disclose all information relevant and material to the matter that must be decided;
3. The parties agree to use good-faith efforts in their negotiations to reach a mutually acceptable settlement;
4. Each party must be represented by a lawyer whose representation terminates upon the undertaking of any contested court proceeding;
5. The parties may engage mental health and financial professionals whose engagement terminates upon the undertaking of any contested court proceeding; and
6. The parties may jointly engage other experts as needed.[3]

This definition was developed by the International Academy of Collaborative Professionals ("IACP"), the consortium of lawyers, mental health professionals and financial professionals who are dedicated to advancing client centered processes of conflict resolution around the globe.

In brief, collaborative practice is an extra-judicial, structured, interest-based, voluntary approach to resolving conflict outside of traditional legal forums. The defining aspect is the disqualification agreement between the lawyers and the clients: if the case cannot be settled out of court, the lawyer is, by agreement, precluded from representing the client in any traditional legal forum.[4] If the participants have not signed a disqualification agreement, they are not engaged in collaborative practice. In Alabama, this is permitted under limited scope representation rules. *Ala. Rules of Professional Conduct*, 1.2(c).

The collaborative team concept is unique to the process. The "team" is comprised of the parties to the conflict, their lawyers and other trained professionals necessary to the resolution of the particular conflict. The various skills and perspectives of the team members help the clients define and express their needs and interests, brain-storm outcomes, predict ramifications of proposals and come to an agreement which addresses the individual needs of the clients and their situations. The composition of the team will vary depending on the nature of the conflict. The ideal model would include two lawyers: each party being separately represented by his/her own collaboratively trained lawyer. In addition, each party would have a collaboratively trained coach (typically a mental health professional, counselor or social worker) who helps the client work through the emotional issues which may inhibit resolution of the conflict. When children are involved (such as in cases of domestic relations matters), the team also may include a mental health professional who serves as the child's advocate, advancing the child's interests and helping the children through the process. Because nearly all legal conflict involves financial issues, a financial expert serves as a neutral and is engaged to help both parties identify and work through the financial considerations.

Unlike other forms of conflict resolution, during the actual negotiation process, the lawyers position themselves alongside their clients, and despite continually advising and consulting with their client, the lawyers' goal is to step back during the process to allow clients to speak for themselves. The lawyer advocates by empowering his/her client to find his/her own voice.

Information is voluntarily shared by the parties in collaborative practice. There are no formal discovery requests, depositions or subpoenas. The standard for sharing is not relevance; rather, if information is subjectively important to resolution of the conflict, then it must be voluntarily disclosed. The parties simply agree to share information that the parties need in order to come to a mutual understanding of the issues between them.

Communications in collaborative practice are protected by privilege. The Uniform Act provides for privilege against disclosure of "collaborative law communications."[5] Alabama's UCLA is silent on this point, as this provision has been reserved for consideration by the Alabama Supreme Court for enactment by court rule. Generally speaking, the Uniform Act provides that collaborative law communications are not subject to discovery or admissible in evidence.[6] Privileges may be waived by the parties, and are held by all of the participants, including the professionals, to the collaborative process.[7] Exceptions to the privilege include public communications, threats of bodily harm or plans to commit a crime of violence, communications intentionally used to plan a crime or conceal a crime or agreements resulting from collaborative process evidence by a records signed by the parties.[8] For now, as a practical matter in Alabama, the privileges are articulated in the participation agreement between the parties and are enforceable under the law of contract.

The collaborative team typically follows these steps: (1) commit to process, (2) identify interests, (3) develop options, (4) test options against other side's interest, (5) refine and rank interests, (6) develop mutually acceptable options, (7) craft proposal and discuss consequences and (8) reach a lasting agreement.

Although understanding the group model and the steps involved in a collaborative case is essential to understanding what collaborative practice entails, it is vital to the process for the lawyers, the professionals and the clients to understand and espouse the vision and purpose of the collaborative process. For the collaborative lawyer, embracing this vision transforms that of the traditional adversarial role of the lawyer-advocate to a more encompassing role as collaborative lawyer-counselor.

This shift of approach may seem counter-intuitive to many lawyers who have been educated primarily in traditional adversarial representation. However, many lawyers have found that traditional negotiation methods no longer meet all of their client's needs and their own sense of social responsibility. To those and many others who are open to embracing a different mode of conflict resolution, collaborative may be a process that is more aligned with their own values and the values of their clients.

Advantages of Collaborative Practice

From a client perspective, there are several advantages to using the collaborative approach. Collaborative gives the clients the authority to resolve the problems that are inherent in both domestic relations and certain other personal conflicts. It provides clients with the support necessary to create their own resolution rather than deferring to judges to determine the outcome. It can provide the parties an opportunity to explain behavior and, where appropriate, to apologize in a safe environment, thus allowing "emotional due process" which is elusive in litigation. Clients assume responsibility for shaping the outcome of their conflict. The process is forward-looking, rather than blame-assessing.

Collaborative practice can be transformative. Many people perceive collaborative as a more humane way of settling legal disputes. Finally, where clients and counsel acknowledge at the outset that the problems should be resolved out of court, and where they focus their energies toward that end, they save resources which would otherwise be wasted in contentious litigation.

The History of Collaborative

Collaborative begin in 1989 as the birth child of Stuart Webb, a Minnesota domestic relations lawyer who decided that there had to be a better way to resolve family law conflicts.[9] He was disheartened by the level of discord he saw in traditional litigation practice, and vowed to stop going to court.[10] He gathered like-minded lawyers, and they began "collaborating" to resolve those conflicts outside of court. It was their plan that, by agreeing to stay out of court, they would minimize the financial and emotional damages to the parties and to their relationships with their children.[11]

Likeminded individuals in California were drawn to Webb's vision and method of practice. Two years later, collaborative was being practiced through an interdisciplinary model combining the talents of lawyers and professionals in the San Francisco Bay area.

What started as a small network based in California became a movement which established the American Institute of Collaborative Professionals ("AICP"). By the time of the AICP second annual meeting in Chicago, members discussed the state of collaborative legal practice across the country. The nearly-50

practitioners who attended this meeting agreed that the AICP should serve as the umbrella organization for the rapidly-growing movement. By 2001, the first collaborative law statute was passed (in Texas). By July 2009, the first draft of the Uniform Collaborative Law Act ("UCLA") was approved by the Uniform Law Commission. The practice of collaborative had established a strong foothold in world jurisprudence.

Collaborative practice is growing and thriving in Alabama. The Birmingham Collaborative Alliance[12] ("BCA") was formed in May 2011. The founding members included five lawyers, one mental health professional and one financial professional, all of whom had basic training in collaborative. The BCA is a 501 (c)(6) non-profit corporation, and is the first organization of its kind in Alabama. It remains the only such practice group in Alabama. Currently, the BCA has 29 active members, all of whom are trained in collaborative.[13] The BCA's mission is to facilitate collaboration between professionals and clients, train new professionals and educate the public about the availability of the process. To date, all of the collaborated matters in Alabama have been in the area of domestic relations, although inquiries have been received from at least three potential estate-conflict clients.[14] More than 80 Alabama professionals have had basic training in collaborative practice, and the numbers are rapidly growing.

UCLA

The UCLA was first drafted and approved by the Uniform Laws Commission in July 2009.[15] The stated purpose of the UCLA is "to support the continued development and growth of collaborative law by making it a more uniform, accessible dispute resolution option for parties."[16] The final version was adopted by the Uniform Laws Commission in 2010 and is also referred to as "UCLR/A." The UCLR/A gives states the option to enact the statute, to adopt court rules or to adopt a combination thereof, as Alabama has elected to do.[17]

In Alabama, the UCLA enacted on January 1, 2014 endorses the resolution of family law and probate matters through the collaborative law process.[18] The act provides requirements for the collaborative process. It specifically lists the mandates for a required collaborative participation agreement[19] and authorizes emergency orders to address domestic violence issues.[20] Under Alabama's UCLA, the participation agreement is a required signed document which marks the beginning of the collaborative law process.[21] The participation agreement defines the nature and scope of the matter to be collaboratively resolved.[22] As such, it becomes the touchstone of the process to which the professionals and the parties turn to guide their deliberations. The participation agreement must be a signed record stating the parties' intention to resolve a matter through a collaborative law process.[23] This includes identifying the lawyers representing each party and providing a statement by each collaborative lawyer which confirms his or her representation of a party. The agreement must also contain a provision informing the client of the lawyer and law firm's disqualification from representing that client before a tribunal in a proceeding related to the collaborative matter.[24] Finally, the agreement must contain a statement explaining the requirement of voluntary disclosure of information.[25]

How Collaborative Works

A description outlining the steps in a collaborative case provides a clearer idea for a working model of collaborative for both clients and lawyers. In the initial consultation, the collaborative lawyer talks to the potential client about his or her options for resolution of the conflict. Collaborative lawyers are obligated to provide prospective clients with adequate information to allow them to make an informed decision about the risks and benefits of the collaborative process compared to other available processes, such as mediation or litigation, or even "coffee table" negotiation.[26] Educating the potential client about the roles of the professionals involved in the process will also be important for their understanding the process.

The informed consent for this limited scope of representation must be confirmed in writing,[27] and is usually done as a part of the participation agreement. The UCLA codifies the collaborative lawyer's obligations as far as informed consent is concerned.[28] The lawyer is obligated to help the party assess whether or not collaborative is appropriate for the party's conflict, and is obligated to provide the party with information sufficient for the party to make an informed decision about the material benefits and risks of collaborative as compared to the material benefits and risks of other alternatives for resolution.[29] Moreover, the collaborative lawyer must advise the party that if, after signing the participation agreement, a party initiates a proceeding in a tribunal, the process terminates, that participation in collaborative is voluntary and any party may terminate unilaterally with or without cause and that the lawyer (and her firm) may not appear before a tribunal to represent the party in a proceeding related to the collaborative matter.[30] Alabama's UCLA requires that the participation agreement contain a statement explaining the voluntary nature of the disclosure of information.[31]

Therefore, to fulfill the obligation of informed consent, the collaborative lawyer should explain to the clients the shift in the lawyer's role which occurs in collaborative and the necessity of their lawyer's disqualification to represent them if the matter goes to litigation.[32] It is important to explain how the advocacy will look and feel different to the client: it is the difference between standing in front of the client as a shield as in the litigation model, versus standing beside or even behind the client, if that is what the client needs in the collaborative process. An explanation of the transparency of the model and the shift in the expectation of confidentiality is also important. Next, the lawyer should explain that his or her role will be to educate the client about the law rather than predict outcomes, and to help them evaluate the pros and cons of the model for their particular situation. Lawyers must also explain the steps in the process and the client's personal responsibility and obligation to participate. An explanation to the client of the open disclosure policy should be described, as well as the potential ramifications of a client's failure to comply. The lawyer should also explain that the negotiations will be interest-based, as opposed to positional. Finally, it is important to explain that the process is not for every person or every conflict, and to remind the client of his/her other options for resolution of the conflict.

Once the client has elected to engage in the process, the other party will also have to consent to use the process. Therefore, lawyers will need to provide their clients with the resources that they will

need to educate the other party about the process. Providing websites, books, pamphlets or videos may be of help. In certain cases, role-playing with the client about what that conversation with the other party might look and sound like can be helpful. The client should be provided with enough information so that they can be effective in presenting their desires and wishes to the other party. Alternatively, if it is known that the other party is unrepresented, a letter may be addressed to this party providing them with resources and information about the collaborative process and making suggestions for other collaboratively trained lawyers and professionals with whom they might consult. It might be helpful to refer your client to a trusted collaborative neutral such as a health professional or financial expert to discuss the process. The decision to resolve the conflict through collaboration becomes the first truly collaborative decision the parties will make.

Once the clients have both elected to use the collaborative process, then a participation agreement will be drafted by the lawyers. The document must be in compliance with UCLA regulations.[33] This document will become the anchor or touchstone for the process, one which the professionals may need to refer to again and again to remind clients of their commitment to the ideals of collaborative resolution.

When both parties and the lawyers have signed the participation agreement, other professionals are engaged to form the collaborative "team." First, coaches (usually collaboratively trained mental health professionals) are engaged to support the parties through the process. The parties and their lawyers consult to find the most appropriate coaches for the dispute, and the whole team decides whether or not a child advocate needs to be engaged. Next, the whole team decides what financial issues the conflict will present, and then engages appropriate financial professionals to lead management of those. Again, the parties and the lawyers will collaborate to select the best professional to serve the financial neutral role.

Negotiations begin once the team is in place and are conducted in a series of private, face-to-face meetings which the parties and the professionals attend. The issues between the parties are negotiated and resolved, resulting in a final written agreement to which all the parties agree to be bound. Before each meeting, an agenda of issues to be addressed will be created by the professionals (with client direction) and distributed to the team. The word "team" used here should always be understood to include the clients. The agenda should be treated as sacrosanct and should not have items added to it at the last minute. This is to prevent unwelcome "surprises" which might create issues which the parties are not prepared to deal with, thereby derailing the process. Minutes will be kept at each meeting and later distributed to record and preserve progress made, and to memorialize "homework" given to the parties and tasks assigned to the professionals. After each meeting, you will want to debrief with the client to process and reflect on what has occurred and what has been accomplished.

At times, it will be important to explain legal concepts to the clients so that the clients can make well-informed decisions during the negotiation process. It will be important to talk about the substance of the subject matter of the law as it informs the clients of what their legal rights and obligations might be. This conversation generally starts during the initial consult and carries through to ultimate agreement. Understanding and anticipating what your client needs and deciding how best to present these topics to your client can be difficult to discern. For example, in a will contest, it will be important for the client to be educated about the concept of capacity. Questions to ask yourself might include: "Do the parties understand the relatively low threshold for determining testator capacity to make a will?" "Do they understand about judicial discretion and the uncertainty of litigation?" "Do they understand what 'undue influence' really looks like?" Clients will need to be reminded that they are crafting their own resolution, so that the question of "What would the judge do?" becomes moot.

Ethical Considerations

The *Alabama Rules of Professional Conduct*, of course, govern attorney conduct in the practice of collaborative.[34] The IACP has in place its own set of standards for collaborative practice.[35] Where the *Rules of Professional Conduct* and the IACP ethical standards may conflict, the *Rules of Professional Conduct* will control.[36]

Obligations

The *Alabama Rules of Professional Conduct* 1.1[37] and 1.2[38] describe attorney obligations for competent, limited-scope representation. As such, they impose unique ethical concerns about the subject of representation, especially in light of the UCLA. Otherwise said, if collaborative practice is now recognized as a legitimate form of alternative conflict resolution, do lawyers have an ethical obligation to inform their client (when it is appropriate) that collaborative practice is one of their choices for conflict resolution? The simple answer is "yes."

Rule 1.2 (a) provides that lawyers shall abide by our client's decisions concerning the objectives of the representation. The Committee Comments to Rule 1.2 (a) provide that a client also has a right to consult with her lawyer about the means to be used in pursing her objectives. Where a client has as her ultimate objective an out-of-court settlement, the consultation with the client should include, in appropriate circumstances, the lawyer advising the client about the availability of collaborative practice as a means of efficiently settling her claim without resorting to litigation.

Under Rule 1.1, lawyers are required to be competent to handle the matters they undertake for their clients. While Rule 1.1 brings up the ethical mandates concerning general competency, Rule 1.2 underscores how this rule of competency applies to ethical obligations of representation. "(a) A lawyer shall *abide by a client's decisions* concerning the objectives of representation and, subject to

paragraphs (c), (d) and (e), *shall consult with the client as to the means by which they are to be pursued*." In other words, according to Rule 1.2, the means of representation must be discussed with the client. Now that collaborative practice is available in Alabama, all lawyers have the obligation to tell their clients that collaborative practice is an option, if it is applicable to resolution of their case. Thus, in order to fulfill the ethical considerations of competency and obligation found in Rules 1.1 and 1.2, lawyers have an obligation to familiarize themselves with what collaborative practice involves. Further, if a lawyer intends to offer collaborative practice to their clients as a method of conflict resolution, he or she must be prepared to obtain training to do so.

Rule 1.3 of our *Rules of Professional Conduct* deals with the lawyer's obligation of diligence. The Committee Comments provide that "A lawyer should act with commitment and dedication *to the interests of the client* and with zeal in advocacy upon the client's behalf. *A lawyer is not bound, however, to press for every advance that might be realized for a client*." This comment underscores that lawyers are bound to advance their client's interests. Consequently, diligence includes not only an adversarial strategy, but also the vigorous pursuit of the client's interest in reaching a solution that satisfies the interest of all parties. The client can be zealously represented in either setting. If a client's interest is in settling the case, then all methods of achieving settlement should be presented to the client for their consideration, including collaborative practice. Implicit in Rule 1.3 is the lawyer's obligation to help the client determine what are his or her interests and objectives.[39]

Rule 1.4 (b) involves the lawyer's continuing duty of communication, including the obligation to keep his or her client reasonably informed, to include the possibility and availability of more appropriate processes to resolve the dispute than the initial process chosen. The lawyer must communicate to the client all the means available for her conflict resolution.

One of the most widely practiced skills in the practice of law, including in the settlement and resolution of legal conflict, is the skill of negotiation. It is a widely-known fact that most cases settle before going to trial.[40] So, if we know that the vast majority of cases will be resolved short of trial, why then is litigation of legal conflict so often the manner of resolution choice? If most cases settle or otherwise can be resolved short of trial, are we not also obligated to make our clients aware of that fact to help them discern the type of resolution that is best suited to their conflict? Are we not obligated to use our negotiation skills to bring about the client's objective? If the client's stated objective is to avoid the courthouse, should we not be exploring collaborative practice as an alternative?

Rule 2.1 of the *Alabama Rules of Professional Conduct* describes our role as client advisor and speaks to the larger issue of the social responsibility involved in recommending alternative methods of conflict resolution. Rule 2.1 reads:

> In representing a client, a lawyer shall exercise independent, professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law, but to other considerations such as moral, economic, social, and political factors that may be relevant to the client's situation.

Committee Comments to this rule provide:

> Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations such as cost or *effects on other people* are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to *relevant moral and ethical considerations in giving advice*. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied. (The) scope of advice may involve discussing unpleasant facts and alternatives that a client may be disinclined to confront. We can't let that deter us from having the conversation.

As lawyers, we wear many hats. We serve as advisors and counselors to our individual clients and we draw from these skill sets daily in our practice. We make decisions and represent our clients in accordance with legal obligations, in agreement with professional mandates and in alignment with our personal sense of ethical responsibilities. It is these same responsibilities which compel us to empower our clients and serve their interests by informing them and educating them about *all* of the means of conflict resolution which are now at our disposal. With the enactment of the UCLA in Alabama, and the recognition of collaborative practice as a legitimate alternative in conflict resolution, we now have the opportunity and the obligation to introduce and inform our clients about collaborative. Used to its full potential, collaborative practice can be a powerful new tool which looks beyond the conflict at hand and considers the relationships of the parties, moving beyond the resolution of the particular conflict which has brought them to the lawyer's doorstep. When we engage in the collaborative model, we are acting in full accord with moral and ethical considerations which empower our clients and ourselves by offering a more positive means for conflict resolution. As such, we are witness to a reinterpretation of the adversarial paradigm to a paradigm that invites and also includes innovative, humane solutions in response to the needs and interests of our clients. | AL

Endnotes

1. Ala. Code 1975 § 6-6-26 et seq. (2014).
2. Id.
3. International Academy of Collaborative Professionals, *http://www.collaborativepractice.com* (last visited September 2, 2014).
4. Robert F. Cochran, Jr., "Legal Ethics and Collaborative Practice Ethics," 38 Hofstra L. Rev. 537 (2009).
5. "Collaborative law communications" are made to conduct, participate in, continue or reconvene a collaborative law process which occurs after a participation agreement is signed and before the collaborative process ends. Ala. Code. § 6-6-26.01(1).
6. See Rule 17, UCLA *http://www.uniformlaws.org* (last visited September 2, 2014).
7. See Rules 17, 18 UCLA *http://www.uniformlaws.org* (last visited September 2, 2014).
8. See Rule 19, UCLA *http://www.uniformlaws.org* (last visited September 2, 2014).
9. Stuart G. Webb and Ronald D. Ousky, "The Collaborative Way to Divorce," (2006).
10. Id.
11. Id.
12. Birmingham Collaborative Alliance, *www.birminghamcollaborative.com* (last visited September 2, 2014).

13. Id.
14. Records of Birmingham Collaborative Alliance.
15. Lawrence R. Maxwell, Jr., "Update of 2009 Summary of Ethics Rules Governing Collaborative Practice," *http://www.americanbar.org/groups/dispute_resolution.html*.
16. Id.
17. The rules for privileges attached to collaborative communications will be considered by the Alabama Supreme Court sometime this fall.
18. Ala. Code 1975 § 6-6-26.01 (5) (2014).
19. Ala. Code 1975 § 6-6-26.03 (2014).
20. Ala. Code 1975 § 6-6-26.06 (2014).
21. Ala. Code 1975 § 6-6-26.03 (2014).
22. Id.
23. Id.
24. Id.
25. Id.
26. Sherrie R. Abney, "Ethical Considerations for Collaborative Lawyers," *http://www.americanbar.org/groups/dispute_resolution.html* (last visited September 2, 2014)
27. Ala Code 1975 § 6-6-26.13 (2014).
28. Ala. Code 1975 § 6-6-26.13 (2014).
29. Ala. Code 1975 § 6-6-26.13 (2014).
30. Ala. Code 1975 § 6-6-26.13 (2014).
31. Ala. Code 1975 § 6-6-26.03 (2014).
32. Ala. Code 1975 § 6-6-26.08 (2014).
33. Ala. Code 1975 § 6-6-26.03 (2014).
34. In February 2007, the American Bar Association issued Formal Opinion 07-447, endorsing the practice of collaborative law and providing, in essence, that collaborative practice is a permissible limited scope of representation under *Model Rule of Professional Conduct* 1.2. Furthermore, Formal Opinion 07-447 states that Rule 1.7 of the *Model Rules* does not create an unwaivable conflict of interest prohibiting collaboration.
35. *http://www.collaborativepractice.com* (last visited September 2, 2014).
36. The IACP ethical standards are advisory only, and are voluntarily ascribed to by its members. Remarkable among them is Rule 5.5, which prohibits professionals from doing anything to increase conflict between the parties.
37. Rule 1.1 was amended March 26, 2012 by order of the Alabama Supreme Court. "Competence" was expanded to include the provision that one must possess the knowledge, skill, thoroughness and preparedness necessary for any limited-scope role.
38. Rule 1.2 was amended March 26, 2012 by order of the Alabama Supreme Court. Representation may be limited if the limitation is reasonable under the circumstances and the client gives written informed consent.
39. Just by way of example, in Virginia, the comments to their Professional Rule of Conduct Rule 1.3 provide: "Lawyers have long recognized that a more collaborative, problem-solving approach is often preferable to an adversarial strategy in pursuing the client's needs and interests."
40. According to the Administrative Office of Courts, fiscal year 2012 Annual Report and Statistics, of 43,300 cases disposed of in circuit civil courts in Alabama in 2012, only 344 were tried to a jury. This is well less than one percent of the cases being resolved by jury trial.

WE REMEMBER

Robert Ward (1956-2014)

Ward

Robert served as a long-time member of the Alabama Supreme Court Commission on Dispute Resolution as the appointee of the Alabama Lawyers Association. He was also an active member of the Alabama Academy of Attorney Mediators and a member of the Alabama State Court Mediator Roster. Robert was a shareholder in Rushton, Stakely, Johnston & Garrett and secretary treasurer of the Alabama Defense Lawyers Association. He also served on the board of directors for the Boys and Girls Club of Montgomery. He believed in and enjoyed mediating. He made sure young lawyers knew about mediation and its benefits. The mediation community is certainly missing Robert Ward and his smile.

Robert Creveling (1936-2014)

Creveling

Bob received his JD from Emory Law School and started his legal career as a trust officer of the First National Bank of Birmingham. He subsequently spent a long career in the insurance industry before joining the American Cancer Society (ACS) as a planned giving officer. Bob later became director of probate and trust management for the ACS National Office in Atlanta. He moved to Oklahoma City, and spent some of the best years of his life working as the associate chief counsel for ACS.

After retiring, he returned to his home in Birmingham where he practiced as a mediator, was secretary for the Birmingham Bar's ADR Section and served as treasurer of the Alabama State Bar's DR Section. He was mediation coordinator for the Judge John Amari. Bob celebrated 50 years as a member of the Alabama State Bar. Anyone who knew Bob knew he was special. He had great kindness, intelligence and a commitment to peacemaking. We miss him.

Law School ADR Updates:

The Mediation Law Clinic at The University of Alabama School Of Law

By Anne Sikes Hornsby, Associate Dean for Clinical Programs

Donovan

In keeping with the national trend to better prepare law students for practice, the University of Alabama School of Law has offered the Mediation Law Clinic since 2009. Under the supervision of director **Susan M. Donovan**, students in the clinic mediate high-conflict custody battles, long-term marriage dissolutions and a wide variety of family law disputes between primarily pro se parties. Since its inception, more than 50 students have mediated 417 cases with an 80 percent success rate.

The clinic serves a tremendous need in Tuscaloosa County, and among the local domestic relations judges, the clinic is highly regarded. For Circuit Court Judge Philip Lisenby, the clinic is one of the greatest things to happen in his court in many years. Many pro se parties do not know the legal standards or evidentiary requirements, let alone how to make hearsay objections and examine witnesses, and that one place is where the clinic steps in to help. Student mediators, under Donovan's supervision, devote as much time as necessary to gather the information needed to fairly resolve disputes, and they assist the parties in thinking of solutions to elements of the dispute that may be different than those the courts have the power to order. Because there are no trials, there are no rules of evidence to complicate the discussions. Everything discussed is confidential, so if the parties do not reach a settlement, the court is not aware of the negotiations and parties are not prejudiced.

As a learning experience, the Mediation Clinic gives budding lawyers an alternative to the litigation model of resolving legal disputes. Professor Donovan, a devoted family law attorney and mediator, has completed 68 hours of ethics and mediation training in addition to her years in law firm and pro bono practice. She provides her clinic students with over 20 hours of mediation training and substantive family law instruction before they conduct their first mediation. The Alabama Center for Dispute Resolution has approved the clinic course, and upon completion of the clinic, graduation and passing the bar, student mediators are eligible to be listed on the Alabama Mediation Roster. Meanwhile, students who participate in the Mediation Clinic receive valuable, hands-on experience, enhance their understanding of substantive family law and learn to interact with the parties, court personnel, judges and practicing attorneys.

Community Mediation Center Director Cassandra Adams and Cumberland students during a recent mediator practice class

ADR at Samford University's Cumberland School of Law

By Henry C. Strickland, Dean and Ethel P. Malugen Professor of Law

For more than three decades, Samford University's Cumberland School of Law has been providing instruction in Alternative Dispute Resolution (ADR). Beginning with foundational courses such as, "Interviewing, Counseling & Negotiation" and "Alternative Dispute Resolution," the offerings at Cumberland have evolved in a manner that equips law graduates with the fundamentals to immediately integrate ADR skills into their professional practice.

Cumberland has greatly benefitted from the invaluable contributions of alumni and friends, such as alumnus Rodney Max, an early pioneer in ADR practice and one of Alabama's leading mediators and A. H. "Nick" Gaede, an internationally known leader in arbitration and negotiation. Both worked with Cumberland faculty to develop courses in mediation advocacy and arbitration and to expand the negotiation course.

In 2006, Cumberland made a substantial commitment to further the practice of mediation in Alabama and established the Cumberland Community Mediation Center (CCMC). The CCMC provides free and confidential mediation services to those who cannot afford the services of a mediator. Mediations are conducted by trained volunteer mediators and law students, under the supervision of CCMC Director Cassandra Adams. Cases involving neighbor-to-neighbor disputes, business disputes, family/roommate disputes, employer/employee issues and landlord/tenant disagreements have been referred to the CCMC. The CCMC has grown into a valuable resource for the courts to refer cases to mediation, especially those involving self-represented litigants.

Also in 2006, the Rodney Max Mediation Fellowship was endowed. The fellowship recognizes the interest, achievements and scholarship of Cumberland students in the area of mediation. In 2009, Cumberland's mediator practice course was approved by the Alabama Center for Dispute Resolution as satisfying the 20-hour mediation training program for those seeking to become listed on the Alabama Mediator Roster.

Cumberland's ADR program has reached many Cumberland graduates. Approximately 3,300 students have taken one of the many ADR courses since 1990. Nearly 1,600 Cumberland graduates have taken the ADR survey course alone, the mainstay in Cumberland's course offerings. Many more participated in intramural ADR competitions and competed in ABA competitions.

Today Cumberland offers students an array of ADR courses and numerous opportunities to practice and hone ADR skills. Courses include the ADR survey, negotiation, mediation advocacy, mediator practice, arbitration and resolving disputes across cultures (offered regularly in Cumberland's summer study abroad program in Cambridge). Following the format used in ABA competitions, Cumberland conducts three competitions internally each year in negotiation, representation in mediation, arbitration and client counseling. Cumberland also fields teams in each of those areas in annual ABA-sponsored competitions. Cumberland ADR teams have frequently appeared in and won regional finals in these competitions, were national champions in the mediation representation competition and placed third in national negotiation finals.

The most recent effort expands instruction on core skills to assure basic instruction and competency for all enrolled students. Cumberland ran a pilot miniterm last year and will repeat it this year in which first-year students participate in an intensive interviewing and counseling workshop and second-year students participate in an intensive negotiation workshop. In these, students receive classroom instruction on the concepts and dynamics of the subject skill and then participate in multiple simulations to practice the skills. Most importantly, experienced lawyers from the Alabama State Bar observe, critique and provide advice about the students' performance. Last year, approximately 100

students and 60 volunteer instructors participated in the workshops, with every student in the negotiation workshop participating in four substantial negotiation simulations. The goal is to refine the program so that it can be made a requirement for graduation to assure all graduates have basic competency in these essential skills.

Faulkner Law's ADR Programs

By Matt A. Vega, Dean and Professor of Law

Faulkner University's Thomas Goode Jones School of Law offers many opportunities for instruction and involvement in Alternative Dispute Resolution. Faulkner's ADR program was launched by **Professor Ken Dunham**. Dunham joined the Faulkner Law faculty in 1997 after completing two master's degrees in Pepperdine Law School's ADR program. Dunham modeled many aspects of Faulkner's ADR program after Pepperdine's successful program.

Dunham

Faulkner offers a certificate program in ADR. Students in this program examine multiple aspects of ADR theory and skills including effective interviewing and counseling, mediation, arbitration and negotiation. Over the past 15 years, hundreds of Faulkner students have received training in effective dispute resolution techniques.

The capstone of Faulkner's ADR program is the mediation clinic. Students enrolled in the mediation clinic serve as mediators in real cases pending in district courts in the river region. Each year, Faulkner students mediate approximately 120 cases and the settlement rate is about 75 percent. All students successfully completing the mediation clinic program are then eligible for certification as mediators by the Alabama Center for Dispute Resolution. The program also meets the mediator certification requirements of several neighboring states.

Students enrolling in the mediation clinic are required to participate in an intensive training program (affectionately referred to as "mediation boot camp"). Dunham, in conjunction with consultants from Pepperdine's ADR program, carefully developed the training materials. Upon completion of the boot camp program, students mediate several cases a week. Cases are selected from the active dockets of district courts in Montgomery and Autauga counties.

Faulkner Law also provides ADR opportunities in several national competitions. In 2013, for example, Faulkner won the National Championship in the American Bar Association's annual representation in mediation competition in Chicago. Faulkner's award-winning advocacy program continues to offer students opportunities to hone their ADR skill-set in national competitions.

Faulkner Law is proud of its historic commitment to ADR training and grateful for the hard work of Professor Dunham. Dunham will be retiring this December. Yet his commitment to excellence in ADR training will remain. We are strengthening our commitment by adding a new curricular track to our program in advocacy and alternative dispute resolution. Although Dunham's shoes will be hard to fill, we are excited by the number of excellent attorneys and judges who have expressed interest in the mediation clinic and the ADR program. | AL

The Jones School of Law negotiation team topped 109 other teams from 59 law schools to win the 2013 ABA Representation in Mediation Competition.

Free Mortgage Mediation for Homeowners And Lendors

By Allison O. Skinner

Introduction

Alabama was declared one of the states "hardest hit" by the Great Recession and received a $163 million assistance package under the Emergency Economic Stabilization Act of 2008, along with 18 other states and the District of Columbia. See *http://www.hardesthitalabama.com/*.

In 2012, Alabama Attorney General Luther Strange entered into an historic settlement (joining 49 other state attorneys general and the federal government) with the top five mortgage servicers in the country: Ally/GMAC, Bank of America, Citi, JPMorgan Chase and Wells Fargo. See *http://www.nationalmortgagesettlement.com/about*. This settlement is commonly referred to as the "National Mortgage Settlement," from which the Alabama Attorney General received $21,828,276. Last year, General Strange awarded the Alabama Center for Dispute Resolution (ACDR) a $500,000 grant to fund the development of a mediation program focused on foreclosure prevention/mortgage modification.

The ACDR is a non-profit corporation that operates under the supervision of the Alabama Supreme Court and the court's Commission on Dispute Resolution and is based at the offices of the Alabama State Bar. The grant pays for the cost of mediation services for matters involving homeownership issues, including pre-foreclosure, in-foreclosure, post-foreclosure or in bankruptcy. The ability to offer free mediation services to help struggling homeowners is a great service to our state. Any Alabama lawyer who has cases involving homeowner issues and who wants to mediate should act quickly and take advantage of this program.

Getting Started

After General Strange awarded the grant, the ACDR's executive director, Judy Keegan, began studying foreclosure mediation programs across the country. Some state programs are legislatively mandated, while others are voluntary. The first foreclosure mediation program started in Connecticut in 2008 and is one of the few states with statistical data. Since inception through December 2013, the Connecticut program mediated 17,748 cases through its court system. Of the mediated cases, 69 percent resulted in homeowners staying in their homes as a result of the program's facilitating loan mortgage modifications under various government programs, such

as HAMP (Home Affordable Modification Program). However, Connecticut is a judicial foreclosure state and Alabama is a non-judicial foreclosure state. So, how does one make a voluntary mediation program work in a non-judicial foreclosure state?

To answer this, the ACDR held two collaborative meetings with a variety of industry stakeholders to understand the benefits and obstacles of such a program. Here are some of the benefits of mediation to the lender/servicer:

- Reduction in losses
- Reduction in lawsuits
- Reduction in expenses
- Mitigation of legal, reputational and operational risks
- Preservation of property
- Goodwill to the servicer's own employees and communities
- Positive relationship to increase customer base
- Protection of assets
- Improvement of shareholder value
- Participation of regulators

Here are some of the benefits of mediation to the homeowner:

- Ability to keep home
- Simplify the process
- Proactive alternatives
- Promote a well-informed consumer
- Have a voice heard
- Avoid family and/or community displacement
- Provide a vision to the future
- Provide credit accessibility
- Provide a counseling benefit
- Preserve dignity with a graceful exit strategy
- Mitigate grief and anger over loss.

The stakeholder meetings also discussed how to make a mediation program work successfully. As a result of their work, the program is called the Foreclosure Prevention/Mortgage Modification Mediation Program.

Commission members Rebecca Oates, Michelle Ohme and Scott Hoyem

In addition to developing a program, the ACDR also developed a program to train mediators to handle these types of matters. On April 9 and 10 of this year, the ACDR held a two-day training program for more than 50 mediators from 22 counties across the state. Servicers and homeowners must select and mediate a case with a trained foreclosure mediator to be eligible for the grant. A list of qualified mediators is found at *www.alabamaadr.org*. Two representatives from the National Consumer Law Center in Boston taught the first day of the mediator training by providing an overview of the mortgage landscape nationwide and explanations of the various federal mortgage assistance programs. The second day of training included panels from the servicer, homeowner and mediator perspectives.

Timing: When to Mediate?

Whether a matter is pre-foreclosure or in the court system, mediation is available. Early intervention provides the greatest opportunity with the most options, but lawyers should be aware of many deadlines set forth in the guidelines and regulations.

On January 10, 2014, a recently-created federal agency, the Consumer Financial Protection Bureau (CFPB), adopted new servicing rules. *See* 12 C.F. R. 1024. These rules established new deadlines for servicers and homeowners. **Between 31-48 days** after the first missed mortgage payment, the homeowner should receive a first loss mitigation letter from the servicer. *Id.* This period is one of the best times for mediation. **After 45 days** from the first missed payment, the servicer will send an acceleration letter. *Id.* Again, this is another great time for the homeowner to request mediation. Under the new rules, a matter cannot be sent to foreclosure **until the 121st day** after the first missed payment. *Id.* This deadline can be tricky if the homeowner has been submitting partial payments, which are being accepted by the servicers. The homeowner may believe he or she is in good standing because the partial payments are accepted when, in fact, they are being applied, but the account remains delinquent and the clock is ticking. Under the new guidelines, the servicer *must* look at an application for a mortgage modification if the foreclosure sale date is set **more than 37 days**. *Id.* However, if the foreclosure sale is **less than 37 days and more than 15 days**, then the rules dictate that the servicer *may* review the application. *Id.* If the foreclosure sale is set **less than 15 days** at the time of the application, then the servicer does not have to review the application. *Id.*

Under the new rules, the homeowner is only afforded one opportunity for his loan to be considered for all the available options. **Within three days** of submitting the borrower-assistance package, the servicer has to confirm receipt of it. *Id.* Then, **within five days** of receipt, the servicer has to advise the borrower whether

Robert Ward, above, far right, during a recent commission meeting, devoted numerous hours to mediation before his death earlier this year.

there is any missing information. *Id.* The borrower then has **30 days** to provide the missing information. *Id.* The servicer has **30 days** to review a complete application, make a decision and notify the borrower. *Id.* The borrower has **14 days** to accept or reject the offer to modify the loan if the borrower is approved. *Id.* If the borrower's application is denied, then the borrower has **14 days to appeal** the servicer's decision. *Id.* An outline of these deadlines is located on the ACDR's website. Because these are new guidelines, the industry is still learning how to apply the new rules.

Methods to Help The Parties

A variety of options are available to the homeowner to try to keep his/her house. The options vary depending on the borrower's individual circumstances. Options for keeping the house include refinancing, restatement/repayment (catching up) or a modification. For a modification, generally speaking, the servicers conduct a "Waterfall Analysis" to evaluate the available options for the homeowner. The Waterfall Analysis is premised on the borrower's ability to pay 31 percent of his gross income. Calculating this number is not easy and requires evaluating numerous factors.

The Waterfall Analysis:

1. Capitalizing arrearages
2. Reducing the interest rate, but there is a floor
3. Extending the amortization term to 40 years
4. Principal forbearance
5. Payments reduced to 31 percent of the gross income

According to statistics compiled by the National Consumer Law Center, of those homeowners who are 60+ days late on their mortgage payments in Alabama, only half of them, compared to the national average, are seeking a mortgage modification.

Mediation also affords the homeowner a "reality check"–an opportunity to decide whether the best option is a modification or a "cash-for-keys" option. "Cash-for-keys" means the servicer pays the homeowner a certain sum for the homeowner's existing property. Mediation allows the parties to communicate ways the homeowner may have a graceful exit from the home. A graceful exit helps preserve the dignity of the exiting homeowner.

Mediations began May 1 of this year. From May 1, 2014 through August 30, 2014, 62 matters have been opened. Of these 62 matters, 19 have reached conclusion and the remainder are pending resolution. | AL

PRACTITIONER'S TIP

The new servicing guidelines regulate when a servicer is required to review an application for a loan modification:

>37 days from the date of the foreclosure sale = Must Review

<37 and >15 days from the date of the foreclosure = May Review

<15 days from the date of the foreclosure = Not Required to Review

AAA Initiatives in Arbitration in Recent Years

By India Johnson
With an Introduction by William D. Coleman

Introduction

I remember well my first service as a neutral arbitrator–the year was 1986 and I had been appointed to serve as panel chair of a multi-week construction arbitration in Atlanta. Over the course of the hearing I was exposed to some of the best expert witnesses known to the construction industry, all of whom were thoroughly tested by a good cross section of "Who's Who" from the Atlanta construction bar. It was a heady arbitration.

What I remember best, though, and with utmost fondness, was working with a young woman who was the case administrator of the matter for the American Arbitration Association (AAA) in its Atlanta office. Her name was India Johnson, and I don't even recall anyone else located in that office. I expected India to do well, but to become the person in charge of the global leader in conflict management?

Two years ago, India Johnson became the first woman to be selected to lead the then-86-year-old American Arbitration Association, necessitating her relocation from Atlanta to the corporate headquarters in New York. Under India's leadership as president, the AAA has initiated a number of significant changes to make the arbitration rules more user-friendly and to streamline the practice. Her article below highlights several of those changes.

AAA Update

The use of arbitration continues in traditional industries, such as construction, and is growing in new ones, such as biosciences, bitcoins and internet law. As with any established process, calls for improvements to commercial arbitration are a fact of life. In recent years, the AAA enhanced existing rules, launched other completely new rules and improved the facilitation of larger cases.

As with litigation, the complaints about arbitration of business disputes revolve around the time that cases require and the costs, especially the legal fees which include growing discovery costs (including electronically stored information) and motion practice. Thus, the only real cures for time and cost in both litigation and in arbitration is curtailing the costs of the attorneys' time, the experts and discovery costs, along with an expanding motion practice.

The 2013 *Commercial Arbitration Rules* and Enhanced Facilitation of Large Cases

The *Commercial Arbitration Rules* issued October 1, 2013 are an example of enhancements aimed directly at improving the time and costs of arbitration, including encouraging more settlements and guiding arbitrators in better case management. A settlement saves the parties not only the cost of trying the case to a conclusion, but also post-award confirmation/vacatur proceedings or collection proceedings.

Mediation Step–One of the more novel amendments to the 2013 rules was the inclusion of a required mediation step under Rule 9. To avoid delays in the arbitration process, the rule provides that the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings.

Preliminary Hearing–The amended rule suggests that *the parties themselves*, not just their outside attorneys, should be invited to attend the preliminary hearing. New Preliminary Hearing Procedures outline a checklist of items to be considered at the preliminary hearing depending on the size, complexity and subject matter of the dispute.

Pre-Hearing Exchange and Production of Information–R-22 now gives arbitrators more direct control over the exchange of information, stating that "the arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses." R-22 also provides the arbitrator with the authority to require that when documents are to be exchanged in electronic form, they be made available in the form most convenient and economical for the party in possession of the documents.

Enforcement Powers of the Arbitrator–In another new rule, R-23, arbitrators are provided with the broad power to issue orders necessary to accomplish the goals of conducting a fair and efficient arbitration. Willful non-compliance with an arbitrator's order may also result in an arbitrator drawing adverse inferences, excluding evidence, allocating costs or providing an interim award of costs. Arbitrators with more managerial authority and tendencies can keep cases on track better than the adversaries alone.

Dispositive Motions–A new rule, R-33, was included to resolve any doubt that the arbitrator is authorized to hear dispositive motions where the "arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case." Parties must ask for permission to file a motion so that the arbitrator can avoid the time and expense of frivolous motions.

Emergency Measures of Protection–Another new rule, R-38, entitles parties to have an emergency arbitrator hear requests for emergency relief prior to the appointment of the panel that will hear the parties' underlying dispute.

Sanctions–The amended rules contain new provisions regarding the authority of arbitrators to sanction a party.

Other Developments at AAA

The AAA Arbitrator Search Tool–Parties on large complex cases are often given access to the entire AAA arbitrator database to search for and agree upon arbitrators for either a list or for the actual case. The AAA Arbitrator Search Tool is available through a special link the AAA provides to the parties who can then use the Internet to review and consider hundreds of potential arbitrators. This feature is only available on AAA-filed cases.

The Administrative Review Council–The AAA established a seasoned group of internal and external experts, the Administrative Review Council (ARC), for making final decisions on challenges to arbitrators or on locale issues on large complex cases. The ARC process is accessed by the administrators handling the cases and submitting the parties' written contentions to the council. The Administrative Review Council consists of current and former staff experts with many decades of arbitration experience and it is able to quickly turn around a decision. It operates under guidelines that are available to parties at *www.adr.org*.

Out of a recent set of 161 arbitrator challenges argued by parties, the council removed the arbitrator in 70 cases (43 percent of the time) and reaffirmed in 91 cases (57 percent of the time).

Optional Fixed Time and Cost Construction Arbitration for Claims up to $5,000,000

Under the AAA's new *Supplementary Rules for Fixed Time and Cost Construction Arbitration*, parties now can calculate the maximum amount of time to complete the arbitration, number of hearing days, arbitrator costs and administrative fees. The rules are a response to concerns by some that construction arbitration costs may have grown unpredictable. The parties must have agreed to use this supplement before it can be applied, either in a contract or at the time of the claim(s). As an example of how the fixed-fee schedule under the supplementary rules works, for cases in the $250,000 to $500,000 range, the rules prescribe a maximum of 180 days from filing to award, with no more than three hearing days. These rules also include incentives to stay within the timeframes contained in the supplementary rules. Likewise, if the parties fail to comply with other requirements of the rules, the case could be reverted to the regular *Construction Arbitration Rules* and related fees as well.

AAA *Optional Appellate Arbitration Rules*

Businesses and lawyers have complained about the lack of an appellate process. The AAA's new *Optional Appellate Arbitration Rules* were developed to provide for a more expansive review of arbitration awards than the grounds previously available to vacate an award. The parties must have already agreed (or later jointly agree) to use the *Optional Appellate Arbitration Rules*. They are not part of any of the AAA's or the ICDR's arbitration rules. Non-AAA arbitrations, including from other providers or completely ad hoc arbitrations, can be submitted to the Optional Appellate Arbitration Process where the parties agree.

New *Consumer Arbitration Rules* and Consumer Arbitration Clause Registry

Effective September 1, 2014, the AAA established consumer arbitrations under a specific set of standalone rules, rather than under the Supplementary Procedures for Consumer-Related Disputes, which supplemented the *Commercial Arbitration Rules*. Though the consumer caseload at the AAA is relatively small nationwide, a separate, *full set of rules* is simpler and more accessible to the consumers and companies who use them. As with the previous supplementary procedures, the AAA shifts most of the costs to the business involved in consumer cases. However, an arbitrator can reallocate the costs if the arbitrator finds that the claim was filed for purposes of harassment or is patently frivolous.

The *Consumer Arbitration Rules* have been organized into easy-to-follow sections that represent the main stages of the arbitration process, as follows:

- Filing a case and initial AAA administrative steps
- Appointing the arbitrator
- Pre-hearing preparation
- Hearing procedures
- Conclusion of hearing
- Post-hearing
- General procedural rules

Important new elements of the rules are provisions that make information publicly available about consumer arbitrations administered by the AAA. This includes rules establishing a registry of businesses with AAA consumer arbitration agreements and another that provides for the publication of redacted consumer arbitration awards.

Business Notification and Publicly-Accessible Consumer Clause Registry–This Rule (R-12) establishes a publicly-available registry of businesses whose arbitration agreements have been reviewed by the AAA and determined that they materially and substantially comply with the protocol. After the AAA receives the consumer registry fee, reviews the submitted consumer clause and determines it will administer consumer-related disputes filed pursuant to the consumer clause, the business will be included on the publicly-accessible Consumer Clause Registry. The AAA's Consumer Clause Registry (*www.adr.org/consumerclauseregistry*) will contain the name of the business, the contact information and the consumer arbitration clause, along with any related documents deemed necessary by the AAA.

Redacted Publishing of Awards–Paragraph (c) of this rule (R-43) allows the AAA to publish a consumer award rendered under the rules, with the names of the parties and witnesses removed from such an award, unless a party agrees in writing to have its name included in the published award.

While the consumer arbitration caseload at the AAA is fairly small, it is a high-profile area and standalone rules will enhance the process for the parties and the arbitrators. Also, the public information becoming available will improve the transparency of the process.

Conclusion

Legal, business and personal disputes and the laws around them do not stand still, just as cultures and industries do not stand still. Arbitration regularly changes to match the needs of parties and advocates. The AAA, its arbitrators, mediators, staff and board of directors keep moving forward in addressing the needs of end-users. We are open to more suggestions about how to improve the process. And, in fact, we have new features and benefits coming out soon as well, so stay tuned! | AL

ATTORNEY SUICIDE:

A Discussion of Untreated Depression and Suicide

By Robert B. Thornhill

I think it is safe to say that practicing law can be highly competitive and stressful even in the best of circumstances. Symptoms of depression and anxiety are almost impossible to avoid for most attorneys at some point in their career. According to Andrew Kang, an attorney who practiced complex commercial litigation and employment law for 10 years at a large law firm in Boston, "Law school doesn't prepare you for the law firm life. Many attorneys are well suited to an academic life, and are high-achieving, good students. But working within a law firm is entirely different."

Kang eventually made the decision to change career fields and became a licensed therapist. He still works in the legal field, but now as a therapist to attorneys. He added, "Lawyers take on as much as they can. Time management becomes a big issue, which leads to stress and anxiety–not knowing what to do. Lawyers have a hard time dealing with uncertainty, and today's uncertain job market leads to increased stress and depression."[1]

In a report from CNN entitled, "Why Lawyers Are Prone to Suicide" by Patrick Krill, it is noted that the stress of the legal profession is rampant and multi-dimensional. Lawyers are often held in high esteem while simultaneously ridiculed and scorned, taking on the unique roles of both hero and villain in our culture. Additionally, personality traits common to attorneys such as self-reliance, ambition, perfectionism and competitiveness are not generally consistent with the acquisition of healthy coping skills. It is interesting to note that Krill is also an attorney who became a clinician as well as a board-certified, licensed alcohol and drug counselor. He is currently the director of the Legal Professionals Program at Hazeldon Addiction Treatment Center.[2]

In a series of courageous and enlightening posts on "The Faculty Lounge," Charlotte School of Law Professor Brian Clark acknowledged that he suffers from Major Depressive Disorder and Generalized Anxiety Disorder, and provided his own compelling commentary regarding the challenges and difficulties of practicing law. He states in part, "Practicing law is hard. The law part is not that hard (that was the fun part for me), but the business side of law is a bear. Finding clients, billing time and collecting money are just a few aspects of the business of law of which I was not a big fan. Keeping tasks and deadlines in dozens (or hundreds) of cases straight and everything done well and on time is a constant challenge. The fear of letting one of those balls drop is terrifying, especially for the Type-A perfectionist who is always terrified of making a mistake or doing a less-than-perfect job. Forget work-life balance. Forget vacations. Every day out

of the office is another day you are behind." He adds, "Plus, as a lawyer (and especially as a litigator), no matter how good a job you do, sometimes you lose. That inevitable loss is made worse by the emotion that the lawyer often takes on from his or her client. Almost no client is excited to call her lawyer. Clients only call, of course, when they have problems. Those problems can range from the mild (for example, a traffic ticket) to the profound (like a capital murder charge). But whatever the problem, the client is counting on the lawyer to fix it. Every lawyer I know takes that responsibility very seriously. As much as you try to not get emotionally invested in your client's case or problem, you often do. When that happens, losing hurts. Letting your client down hurts. This pain leads to reliving the case and thinking about all the things you could have done better. This then leads to increased vigilance in the next case. While this is not necessarily a bad thing, for some lawyers this leads to a constant fear of making mistakes, then a constant spike of stress hormones that, eventually, wear the lawyer down. The impact of this constant bombardment of stress hormones can be a trigger to a change in brain chemistry that, in time, leads to Major Depression."[3]

According to a two-year study completed in 1997, suicide was responsible for 10.8 percent of all deaths among lawyers in the U.S. and Canada, and was the third leading cause of death!

According to *suicide.org*, a 501(c)(3) non-profit organization, untreated depression is the number one cause for suicide. It is also noted that other untreated mental health issues such as substance abuse disorders and bipolar disorder can account for a significant proportion of suicides. Interestingly, for those who are genetically predisposed to depression, they may become depressed even though they do not appear to be experiencing any significant negative life experiences. These are often the people who die by suicide but did not exhibit any symptoms or appear to have problems.[4]

Among attorneys, the facts and statistics are indeed alarming. Brian Clark reports in his article that lawyers, as a group, are 3.6 times more likely to suffer from depression than the average person. Of 104 occupations, lawyers were the most likely to deal with symptoms of depression. According to a two-year study completed in 1997, suicide was responsible for 10.8 percent of all deaths among lawyers in the U.S. and Canada, and was the third leading cause of death! The suicide rate among lawyers was found to be nearly six times that of the general population.[5]

Depression and suicide have become urgent topics of study and discussion among bar associations and lawyer assistance programs around the country. In addressing these issues there has been significant emphasis placed on the need to increase awareness and provide ongoing education regarding depression, the signs and symptoms of suicidal ideation and practical steps that can be taken to assist those who may be struggling under the weight of undiagnosed or untreated depression.

The following is a definition of depression, how it differs from "normal" emotions, a list of suicide warning signs and suggestions on how you may be able to assist someone who is exhibiting these signs.

What is Depression?

The *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition (DSM-5), indicates that a diagnosis of Major Depressive Disorder can be made if five or more of the following symptoms have been present for at least a two-week period and represent a change from previous functioning, and at least one of the symptoms is either 1) depressed mood, or 2) loss of interest or pleasure.

- Depressed mood most of the day, nearly every day, as indicated by either subjective report or observations made by others
- Markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day
- Significant weight loss when not dieting or weight gain (e.g., a change of more than 5 percent of body weight in a month), or decrease or increase in appetite nearly every day
- Insomnia or hypersomnia nearly every day
- Psychomotor agitation or retardation nearly every day (observable by others, not merely subjective feelings of restlessness or being slowed down)
- Fatigue or loss of energy nearly every day
- Feelings of worthlessness or excessive or inappropriate guilt (which may be delusional) nearly every day
- Diminished ability to think or concentrate, or indecisiveness, nearly every day
- Recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation without a specific plan or a suicide attempt or specific plan for committing suicide

A diagnosis of Persistent Depressive Disorder (Dysthymia) has similar criteria

but refers to depression that remains more or less constant for at least a two-year period.

Summing up the Symptoms

Depressed mood, loss of interest or pleasure, change in appetite or weight, change in sleeping patterns, fatigue or loss of energy, speaking and /or moving with unusual speed or slowness, feelings of worthlessness or excessive or inappropriate guilt, diminished ability to think or concentrate or make decisions, recurrent thoughts of death or suicide, and suicide attempts

Suicide Warning Signs

- Appearing depressed or sad most of the time
- Talking or writing about death or suicide
- Withdrawing from family and friends
- Feeling hopeless
- Feeling helpless
- Feeling strong anger or rage (depression or bipolar as well)
- Feeling trapped–like there is no way out (this is a classic cognitive distortion)
- Experiencing dramatic mood changes
- Abusing alcohol or drugs
- Changes in personality
- Loss of interest in most activities
- Change in sleeping habits
- Change in eating habits
- Poor performance at work or school
- Giving away prized possessions
- Feeling excessive guilt
- Acting recklessly

Source: *suicide.org*

It should be noted that some people who die by suicide do not show any suicide warning signs! For those who are genetically predisposed to depression, they may become depressed even though they do not appear to be experiencing any significant negative life experiences. These are the folks who die by suicide but did not exhibit symptoms or appear to have problems. *Suicide.org*, Suicide Prevention, Awareness and Support, January 2014.

How Can I Help Someone Who May Be Suicidal?

Talk about it! Talk to the person directly, and in person if possible. Talking decreases the likelihood that a person will act on his or her feelings.

There is no "down side" to talking about suicide! (There is no risk that a person who is not contemplating suicide will be prompted to do so after such a talk).

- Find a safe place to meet.
- Remain calm.
- Explain your concern. (Offer assurances of your respect for their privacy, but avoid promising that you will not take action that may be needed to save a life).

- Encourage them to open up to you.
- Listen without judgment! (Give your full attention–true listening is one of the greatest gifts we can give anyone.)
- Ask about recent events; encourage them to talk about their feelings; do not minimize how they are feeling.
- Ask if they are desperate enough to end their life!
- If so, ask if they have a plan (how and where they intend to implement).
- Do not react by saying, "You should not be having these thoughts" or "things cannot be that bad." Their feelings are very real to them. Do not discount or minimize.
- Once again–Give your full attention! Listen well. Take as much time as needed. Be patient. Let your sincerity shine through.
- Talk about available resources–ALAP, friends, family, community agencies, counseling or treatment.
- Assist in making a plan for the next few days.

- Be available to help carry out the plan (phone calls, scheduling appointments with therapist, etc.).

How Can I Help, Continued

Be clear and realistic about your limits (how much time and emotional energy you can devote).

Ask if there is anyone who needs to know about what is going on. (If failure to disclose to this person means a greater risk of suicide you may need to breach a confidence to save a life; secrets cannot be kept if a life is clearly in danger).

If They Have a Plan, Appear Severely Depressed or Suicide Seems Eminent, What Do You Do?

- Do not leave them alone.
- Eliminate access to firearms or other tools, or access to scheduled or illegal drugs.
- Try to get them to seek help immediately from their doctor or nearest ER.
- If unwilling, call 911!
- Talk with them.

A recent study by Rudd, Goulding & Carlisle, exploring the relationship between stigma (discomfort dealing with someone expressing suicidal thoughts) and suicide warning signs found that, although participants recognized the signs of imminent suicide risk as easily as they recognized the signs of imminent heart attack risk, they were significantly less comfortable in responding to suicide risk, less sure how to respond to suicide risk and less hopeful that their response to suicide risk would be helpful compared to heart attack risk

This study found that people "were significantly less likely to access emergency services for a seriously suicidal individual in comparison to someone suffering a heart attack, instead choosing to talk with family and friends first."[7]

Refer to ALAP

The Alabama Lawyer Assistance Program is designed to provide confidential assistance to lawyers, law students and judges. We provide consultation, intervention, referral, monitoring, advocacy, education and many other services. We stand ready to provide assistance for any condition that may result in impairment, including:

- Substance use disorders
- Mental health disorders (depression, anxiety, bipolar disorder, etc.)
- Conditions affecting cognitive functioning (dementia, Alzheimer's, etc.)

Remember, a real friend will occasionally risk your wrath to tell you what you need to hear and not what you want to hear! | AL

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MCLE Deficient?

By Angela Parks, director of regulatory programs, angela.parks@alabar.org

If You Are Chronically MCLE Deficient, Then You Really Should Read This!

Most Alabama lawyers are extremely conscientious about complying with the annual MCLE requirement–a responsibility imposed on all of us by the Supreme Court of Alabama. The requirement is meant to ensure that we all continue to hone our skills and stay updated on changes in the law. Of course, plans can go awry and sometimes problems arise: a sudden illness, a death in the family or a job loss can throw you off track. The Alabama State Bar has ways to help you through those events. One tool is the **MCLE Deficiency Plan**.

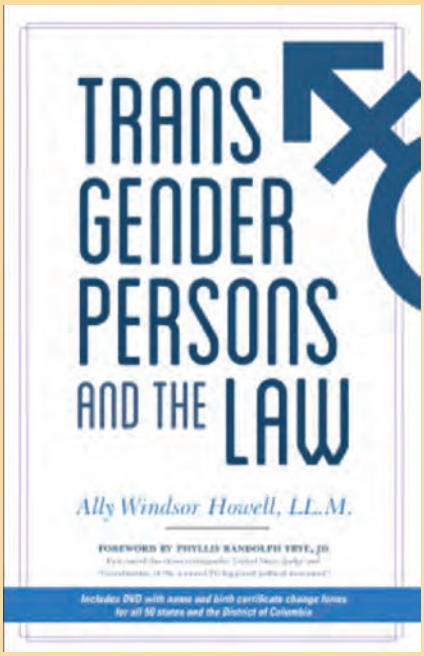
Deficiency plans were designed for attorneys who, because of an unusual and infrequent circumstance, were unable to fulfill their annual 12-hour MCLE requirement on time. Most of the lawyers across this state will never request a deficiency plan during their career, but that is not true for everyone. Slowly but surely, the number of deficiency plans requested each year has been climbing. And the reasons given for these numbers of deficiency plans are increasingly not unusual, unforeseeable or infrequent–often the reason is simply a lack of planning.

The MCLE Commission has become concerned about the number of attorneys who repeatedly request deficiency plans. For some attorneys, a deficiency plan has become a chronic need. In plain terms, the option for a deficiency plan is being abused. This issue was partially addressed in 2011 with the addition of MCLE Rule 8.E, which provides that requests for the approval of successive deficiency plans will not be considered without a showing of good cause.

At the request of the MCLE Commission, on September 19, the Board of Bar Commissioners approved the adoption of MCLE Regulation 8.6, which provides that, "*In order to make a showing of good cause pursuant to MCLE Rule 8.E, after the approval of two successive deficiency plans, an attorney shall appear before a panel consisting of the MCLE Director, a representative of the MCLE Commission, and a representative of the Office of General Counsel to explain why a further deficiency plan should be granted. The attorney shall be notified in writing of the decision of the panel.*" The new regulation becomes effective immediately.

The MCLE Commission has directed that a letter be sent to the attorneys who will be affected this year by the new regulation, to advise them of the new procedure while they still have the balance of the year to take action to avoid another MCLE deficiency. Monitoring deficiency plans in this manner each year will now become a routine part of our annual responsibilities.

If you have had two or more deficiency plans in the past three years, we strongly urge you to make plans now to ensure that you are MCLE-compliant by midnight, December 31, 2014. | AL



Transgender Persons and the Law

By Ally Windsor Howell, LL.M.

Reviewed by Joel Dillard and Cynthia Lamar-Hart

American Bar Association Book Publishing 2013
(316 pp., $129.95)

If you believe that you practice law in an environment where you are unlikely to encounter a transgendered person as a client, witness or fellow lawyer, think again. This remarkable book by Ally Howell features a trove of well-documented facts and conclusions about this subject matter, in addition to legal resources and guidance. She underscores from the outset that, in order to understanding gender identity issues, it is critical to understand as a threshold matter that gender identity is not a choice, but rather now is thought to be genetic in origin, having very little to do with one's physical appearance. She provides documentation for the evolving scientific and psychological understanding of gender identity, establishing that while child development specialists used to consider that gender variant behaviors resulted from parenting styles or abnormal development, they now believe that differences in gender expression are the result of biological or genetic diversity in normal children who simply have unique qualities, just as children who develop left-handedness are normal. Certainly, this remarkable book will most likely change and expand the average practitioner's understanding of the "T" in "LGBT" (the currently acronym for persons who are lesbian, gay, bisexual or transgender) and will serve as a thorough handbook for those who represent members of the transgender community.

Thirty-seven years ago, in the Circuit Court for Montgomery County, Alabama, Joel Dillard defended a bank

in a defamation case, *Jakob v. First Alabama Bank,* 361 So. 2d 1017 (Ala. 1978), *cert den.* 439 U.S. 968 (1978). His opposing counsel in the Circuit Court for Montgomery County, Alabama, in the Alabama Supreme Court and in the United States Supreme Court was a bright, tenacious young man named Allen Howell. Dillard's client in that civil action now has a new identity, and Allen Howell has become a woman–now named Ally–who is the author of this fascinating book.

It begins, scientifically, with an informative chapter entitled "Who or What is a Transgendered Person?" and includes–in additional to a glossary of fascinating terms–quite "readable" explanations. Consider, notably, her felicitous and helpful description of two almost identical terms, "transgendered" and "transgender":

> For example, the terms include transsexuals; cross-dressers (also called transvestites); intersexed persons (also call hermaphrodites); drag queens (gay men who predominantly cross-dress for theatrical purposes); drag kings (lesbians who predominantly cross-dress for theatrical purposes); and an emerging group known as gender-variant persons, or gender queers or gender benders (persons who are either very androgynous in their appearance or who look like effeminate men or masculine women).

Howell helpfully explains that, contrary to popular misconception, "the bottom line is that sexual orientation, being lesbian or gay, has nothing to do with gender identity, and they're really parallel lines," citing a study by the Kaiser Family Foundation. She also cites a compelling *Yale Law Journal* writer's conclusion that "[t]ransgender and transsexual people face a lifetime of inequalities and discrimination, despite often being amongst the most well educated members of society."

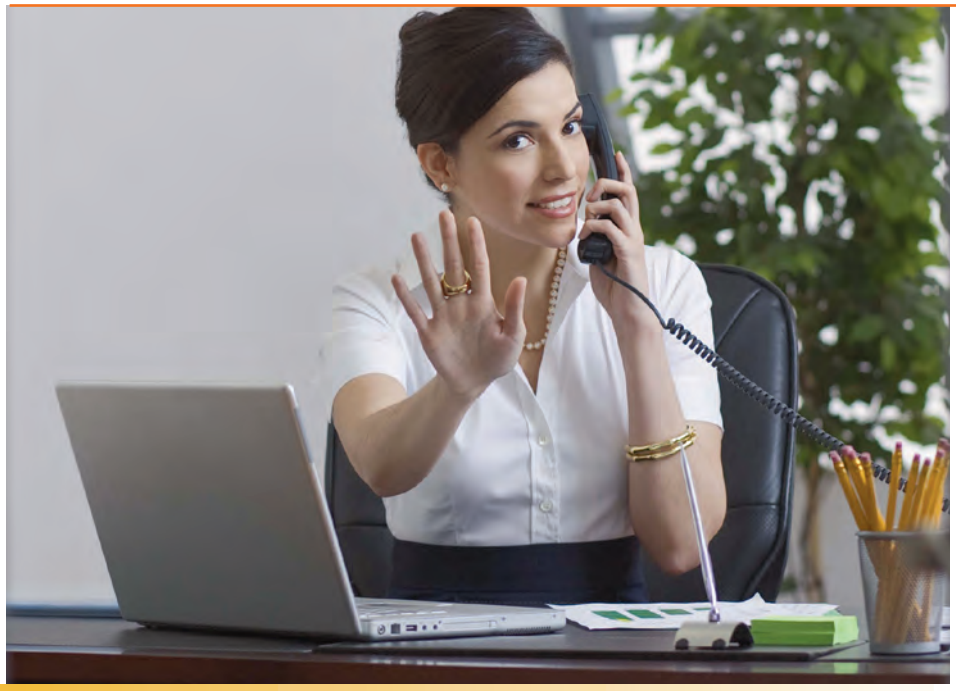
After defining her subject matter, Howell does a thorough job of analyzing, and drawing together for the reader, an exhaustive array of Identification Document, Public Facility Use (public restrooms are a point of beginning), Housing, Military Service and Veterans' Benefits chapters before launching into more detailed subjects: Family Law, Education and Students, Healthcare, Personal Safety, Employment, Immigration and Criminal Justice and Corrections. She provides, via scholarly footnotes and citations to reported decisions, a wealth of information. Who knew, for example, about *McGrath v. Toys "R" Us, Inc.,* 356 F.3d 246 (2nd Cir. 2004), involving an award of $193,551 in attorney's fees to counsel for three employee-taunted preoperative transsexual patrons of a toy store in Brooklyn, after a 10-day trial? Who knew that a circuit court in Florida rendered an 809-page opinion concluding that a marriage between an anatomical female and a female-to-male transsexual was "valid," only to be reversed by a Florida Appellate Court, with review denied by the Florida Supreme Court, *Kantaras v. Kantaras,* 844 So. 2d 155 (Fla.App. 2nd Dist. 2004) *rev. den.* 898 So.2d 80 (Fla. 2005)? Or that a transgendered Cincinnati police officer was awarded $320,511 (plus an award of attorney's fees of $527,888) because "failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind his employer's actions"?

Howell provides a fascinating, lengthy description of the facts and circumstances that underpinned *Schroer v. Billington,* 577 F.Supp.2d 293 (D. DC. 2008), 2009 WL 1543686 (D. DC. 2009), "the largest known award to a transgendered person in a discrimination case" and a "case began under the administration of President George W. Bush but ended under the administration of President Barack H. Obama, whose Justice Department decided in 2009 not to appeal, and to pay the award to Ms. Schroer." These are but four of more than 100 correctly cited, entertainingly explained judicial decisions, statutes and scientific studies Ms. Howell has packed into this readable, informative compendium. Also included are searing statistics, including that transgender individuals living in the United States have a one-in-12 chance of being murdered, compared to a one-in-18,000 chance for the rest of us.

Part hornbook, part science text and part "how-to" guide for lawyers interested in representing transgender clients (or defending clients against their claims), *Transgender Persons and the Law* comes with a CD that includes a complete set of legal forms for all 50 states and the District of Columbia for name changes and, for those jurisdictions that allow it, changes to birth certificates. It also includes searing descriptions of murders and hate crimes committed against the growing, often-misunderstood and increasingly-litigious segment of the population that its title describes.

Ally Howell has come a long way since 1977 when Allen Howell and Joel Dillard faced each other in court. She remains bright and tenacious, but is now also distinguished by her scholarship, in the form of *Transgender Persons and the Law.* It is a compelling source for lawyers that will be a welcome addition to any law firm's library, and compelling reading for anyone interested in this unusual, intriguing subject. | AL

J. Anthony McLain



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

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 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-94-13] | AL

Wilson F. Green

Marc A. Starrett

By Wilson F. Green

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

By Marc A. Starrett

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

This installment also contains our annual preview of cases to be heard by the U.S. Supreme Court beginning in October. The Supreme Court's "Long Conference" will take place in late September, where the Court will consider several months of piled-up certiorari petitions–from which will likely issue a cache of new grants.

Selected Upcoming Cases in the October 2014 United States Supreme Court Term

Alabama Legislative Black Caucus v. Alabama **(13-895) and** ***Alabama Democratic Conference v. Alabama*** **(13-1138)**: Whether Alabama's legislative redistricting plans unconstitutionally classify black voters by race by intentionally packing them in districts designed to maintain supermajority percentages produced when 2010 census data are applied to the 2001 majority-black districts

Alabama Department of Revenue v. CSX Transportation, Inc. **(13-553)**: (1) Whether a state "discriminates against a rail carrier" in violation of 49 U.S.C. §11501(b)(4) when the state generally requires commercial and industrial businesses, including rail carriers, to pay a sales-and-use tax but grants exemptions from the tax to the railroads' competitors and (2) Whether, in resolving a claim of unlawful tax discrimination under 49 U.S.C. §11501(b)(4), a court should consider other aspects of the state's tax scheme rather than focusing solely on the challenged tax provision

***Elonis v. United States* (13-983)**: Consistent with the First Amendment and *Virginia v. Black*, does conviction of threatening another person under 18 U.S.C. § 875(c) require proof of subjective intent to threaten, or it is enough to show that a "reasonable person" would regard the statement as threatening?

***Comptroller of the Treasury of Maryland v. Wynne* (No. 13-485)**: Does the dormant Commerce Clause prohibit a state from taxing all the income of its residents–wherever earned–by mandating a credit for taxes paid on income earned in other states?

***Wellness International Network, Ltd. v. Sharif* (13-935)**: (1) Whether the bankruptcy court has constitutional authority to enter final judgment on a claim that certain property in the debtor's possession belongs to the bankruptcy estate stems from the bankruptcy itself, when resolution of that claim turns on state property law; (2) whether a bankruptcy court may enter a final judgment on a claim that Article III would otherwise preclude it from adjudicating based on implied consent.

***Perez & Nichols v. Mortgage Bankers Association* (13-1041 and 13-1052)**: Whether a federal agency must engage in notice-and-comment rulemaking before it can significantly alter an interpretive rule that articulates an interpretation of an agency regulation

***Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund* (13-435)**: May a plaintiff alleging a violation of section 11 of the 1933 Act plead that a statement of opinion was "untrue" merely by alleging that the opinion itself was objectively wrong, or must the plaintiff also allege that the statement was subjectively false–requiring allegations that the speaker's actual opinion was different from the one expressed?

***Jesinoski v. Countrywide Home Loans, Inc.* (13-684)**: Does the three-year time for exercising rescission under section 1635 of the Truth-in-Lending Act run from consummation of the transaction, or must a borrower file a lawsuit within the three years?

Continued from page 399

***Integrity Staffing Solutions, Inc. v. Busk* (No. 13-433)**: Whether time spent in security screenings is compensable under the FLSA, as amended by the Portal-to-Portal Act

***Young v. United Parcel Service* (No. 12-1226)**: Whether, and in what circumstances, an employer that provides work accommodations to non-pregnant employees with work limitations must also provide work accommodations to pregnant employees who are "similar in their ability or inability to work"

***Mach Mining v. EEOC* (No. 13-1019)**: Whether and how may a court enforce the EEOC's mandatory duty to conciliate discrimination claims before filing suit?

***Warger v. Shauers* (No. 13-517) 721 F.3d 606 (8th Cir. 2013)**: Whether FRE 606(b) permits a party moving for new trial based on juror dishonesty during voir dire to introduce juror testimony about statements made during deliberations that tend to show the dishonesty

***United States v. Wong* (No. 13-1074)**: Whether the six-month time bar for filing suit in federal court under the Federal Tort Claims Act is subject to equitable tolling

***United States v. June* (No. 13-1075)**: Whether the two-year time limit for filing an administrative claim under the Federal Tort Claims Act is subject to equitable tolling

***Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.* (No. 13-640)**: Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy the three-year time limitation in § 13 of the Securities Act for claims of class members?

***Dart Cherokee Basin Operating Co. v. Owens* (No. 13-719)**: Whether a defendant seeking removal under CAFA must include evidence supporting federal jurisdiction in the notice of removal, or simply must supply a "short and plain statement of the grounds for removal"

***Heien v. North Carolina* (No. 13-604)**: Whether a police officer's mistake of law can provide the individualized suspicion that the Fourth Amendment requires to justify a traffic stop

***Yates v. United States* (No. 13-7451)**: Whether defendant's conviction violated due process because he was deprived of fair notice that destruction of fish would fall within 18 U.S.C. § 1519, where the statutory term "tangible object" is ambiguous and undefined

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Personal Jurisdiction

***Ex parte Edgetech I.G., Inc.*, No. 1121291 (Ala. July 25, 2014)**

In granting mandamus relief to an out-of-state defendant and compelling dismissal of action, the court held: (1) the "stream of commerce" test cannot be used to establish general jurisdiction; and (2) as to specific jurisdiction, merely placing the goods in interstate commerce without more was not enough to confer jurisdiction under the test; in this vein, the court noted that *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011), being a plurality opinion, does not change the law governing the "stream of commerce" test.

Punitive Damages; Evidence of Assets

***Gillis v. Frazier*, No. 1120292 (Ala. Aug. 1, 2014)**

The court overruled *Boudreaux v. Pettaway*, 108 So. 3d 486 (Ala. 2012), and held that a punitive damage defendant's potential bad faith or negligent failure to settle claim against its carrier is not an asset to be considered in determining a defendant's ability to pay (Ed: the court did not specify whether that portion of *Boudreaux* allowing plaintiff to obtain discovery of the claims file at the punitive damage phase would survive).

Pharmaceuticals; Warning Claims

***Wyeth, Inc. v. Weeks*, No. 1101397 (Ala. Jan. 11, 2013, on rehearing August 15, 2014)**

Under Alabama law, a brand-name drug manufacturer can be held liable for fraud or misrepresentation (by misstatement or omission), based on statements it made in connection with the manufacture or distribution of a brand-name drug, by a plaintiff claiming physical injury from a generic drug manufactured and distributed by a different company, but using the warnings developed by the brand-name manufacturer.

Punitive Damages; 3:1 Ratio Affirmed

***Target Media Partners Operating Co., LLC v. Specialty Marketing Corporation*, No. 1091758 (Ala. Aug. 29, 2014)**

The court affirmed the trial court's imposition of punitive damages on two fraud-based claims, resulting in a 3:1 ratio of punitive to compensatory damages.

Applications for Rehearing

***Nationwide Retirement Solutions, Inc. v. PEBCO, Inc.*, No. 1120806 (Ala. Aug. 29, 2014)**

In denying the application for rehearing, the court noted that (1) applications for rehearing are not occasions for re-arguing points already decided by the court, unless an issue was "overlooked or misapprehended," (2) arguments may not be made for the first time in rehearing applications and (3) "[w]e cannot be held in error for overlooking or misapprehending points of law or facts that were not argued on original submission[,]" even where a fact in issue was mentioned in the fact section of briefing but not argued.

Forum Non Conveniens

***Ex parte Morton*, No. 1130302 (Ala. Aug. 29, 2014)**

Trial court directed to transfer action from Greene to Jefferson County for *forum non conveniens* in action by Greene County plaintiff against Jefferson County defendant, arising from MVA occurring in Jefferson County where plaintiff was treated in Jefferson County

Immunity

***Ex parte Ruffin*, No. 1130324 (Ala. Aug. 29, 2014)**

Petitioners were entitled to state-agent immunity under *Cranman* and qualified immunity (for federal claims) for their activities as DOC officers in the administration of confinement to mentally ill patients.

Class Certification

***CVS Caremark Corp. v. Lauriello*, No. 1120010 (Ala. Sept. 12, 2014)**

The supreme court affirmed class certification on claims asserted by a previously certified class, alleging fraud in the inducement of a class-action settlement. The court reasoned in part: (1) because the fraud claim was based on a uniform representation made to the entire certified class, the reliance question was not inherently individualized; (2) although subclasses were created in the underlying case in order to mitigate intra-class conflicts, no class conflicts existed in this litigation which rose to the level of undermining class cohesiveness; and (3) trial court acted within its discretion in certifying a (b)(3) class, in light of current Alabama law prohibiting (b)(1) certification in money-damage cases

Continued from page 401

Preliminary Injunctions

***Ex parte B2K Systems, LLC*, No. 1130742 (Ala. Sept. 12, 2014)**

Among other holdings, the court reversed the grant of preliminary injunction (seeking to bar software buyer's use and control of a software code), holding that monetary damages were available to remedy non-payment, and ownership shifts were available as contractual remedies for the alleged wrongful acts, and therefore there was an adequate remedy at law.

From the Alabama Court Of Civil Appeals

Discovery

***Barney v. Bell*, No. 2121048 (Ala. Civ. App. July 18, 2014)**

Trial court's denial of motion to strike deposition testimony was not error, where motion to strike was premised upon contradiction with admissions made for lack of timely response to requests for admissions under Rule 36; trial court has discretion to excuse matters deemed admitted for lack of timely response

Workers' Compensation

***Ex parte LKQ Birmingham, Inc.*, No. 2130610 (Ala. Civ. App. July 25, 2014)**

Employer is not estopped from denying compensability by paying temporary benefits, in light of *Ala. R. Evid.* 409 and *Ala. Code* § 25-5-56.

Estates; Jurisdiction

***Pickett-Robinson v. Estate of Robinson*, No. 2130268 (Ala. Civ. App. August 8, 2014)**

Removal of estate to circuit court was improper and jurisdictionally defective because the will was either not offered to probate or, as was necessary, the probate court had admitted the will to probate

Agency

***Owen v. Tennessee Valley Printing Company, Inc.*, No. 2130139 (Ala. Civ. App. August 8, 2014)**

Newspaper carrier was an independent contractor and not agent of TVPC

New Trial; Damages

***412 South Court Street, LLC v. Alabama Psychiatric Services, P.C.*, No. 2121074 (Ala. Civ. App. August 8, 2014)**

At trial on breach of commercial lease, landlord proved damages in the form of contractual rents owed under commercial lease in an amount exceeding $1 million. Jury found that tenant breached lease agreement but awarded damages of only $12,000–the amount remaining owed for the first year of a five-year lease. The trial court denied landlord's motion for new trial. The CCA reversed, holding that the jury's award for damages was inconsistent with the jury's determination that tenant had breached the lease and that the award of only two months of rent is "'so opposed to the clear and convincing weight of the evidence as to clearly fail to do substantial justice.'"

Premises Liability

***Shirley v. Tuscaloosa County Park & Rec. Auth.*, No. 2130078 (Ala. Civ. App. August 8, 2014)**

The CCA reversed summary judgment for PARA on premises liability claim, holding there was substantial evidence indicating that PARA's officials had actual knowledge that the bleachers were in need of repair, and that someone was likely to fall as a result of the condition of the bleachers.

Workers' Compensation; "Other Apparatus"

***Flanagan Lumber Company, Inc. v. Tennison*, No. 2120911 (Ala. Civ. App. Aug. 22, 2014)**

A walk-in bathtub did not qualify on the facts as an "other apparatus" reasonably necessary for treating an employee's injury, under *Ala. Code* § 25-5-77(a).

Workers' Compensation; Survivor Benefits

***Banks v. Premier Service Company, Inc.*, No. 2120929 (Ala. Civ. App. Aug. 22, 2014)**

Daughter over 18 and not incapacitated was not entitled to death benefits under the act

Workers' Compensation; Termination of Benefits

***Total Fire Protection, Inc. v. Jean*, No. 2130158 (Ala. Civ. App. Aug. 22, 2014)**

Circuit court properly set aside its prior order granting employer's motion to terminate medical benefits guaranteed

under a comp settlement, as having been entered in derogation of employee's due process rights

Rule 41 Dismissal

***Ex parte U.S. Steel Mining Company, LLC*, No. 2130820 (Ala. Civ. App. Aug. 22, 2014)**

Mere passage of time is not a basis for dismissing a case for want of prosecution, and therefore dismissal without notice and giving opportunity for parties to state positions on dismissal was a denial of due process, thus rendering dismissal void under Rule 41. Judge Donaldson concurred specially, noting that under current Alabama law, a judgment of dismissal entered without notice is void, but expressing the view that such judgment should be deemed voidable and thus require vacatur only by way of direct post-judgment motion and appeal, if necessary, rather than by seeking Rule 60 relief.

Workers' Compensation

***Fab Arc Steel Supply, Inc. v. Dodd*, No. 2121061 (Ala. Civ. App. Aug. 29, 2014)**

A "trial court may find that a work-related accident caused a particular injury based on circumstantial evidence even if that injury cannot be objectively or scientifically verified and defined."

Probate Courts; Jurisdiction

***Rush v. Rush*, No. 2121079 (Ala. Civ. App. Sept. 5, 2014)**

Removal of guardianship from probate to circuit court did not comply with *Ala. Code* § 26-2-2 because (1) the probate court had not acted on the petition at the time removal was effected and (2) the petition was not sworn.

Workers' Compensation

***Hooks v. Coastal Stone Works, Inc.*, No. 2130126 (Ala. Civ. App. Sept. 5, 2014)**

A corporate exemption from coverage under *Ala.* Code § 25-5-50(b) remains in effect until it is revoked.

Continued from page 403

From the Eleventh Circuit Court of Appeals

Daubert

***Adams v. Laboratory Corp. of America, Inc.*, No. 13-10425 (11th Cir. July 28, 2014)**

District court's summary judgment based on exclusion of plaintiff's expert was reversed; the district court had excluded based on a finding that expert methodology was unsound, but that conclusion was "manifestly erroneous."

Securities; Adverse Inference and Fifth Amendment

***Coquina Investments, Inc. v. TD Bank*, No. 12-11161 (11th Cir. July 29, 2014)**

Issue: whether an adverse inference could be drawn from a non-party witness' invocation of his Fifth Amendment privilege. The Court adopted a multi-factor test from *LiButti v. United States*, 107 F.3d 110, 123 (2d Cir. 1997) to assess when an adverse inference may be drawn.

Securities; Class Certification

***Local 703 v. Regions Financial Corp.*, No. 12-14168 (11th Cir. August 6, 2014)**

The Eleventh Circuit affirmed in most respects the district court's grant of class certification in a securities fraud case, discussing extensively the legal standards of reliance in securities cases.

IDEA

***Blount Co. Bd. of Educ. v. Bowens*, No. 13-11392 (11th Cir. August 5, 2014)**

The district court did not abuse its discretion in weighing the equities and affirming the determination of a hearing officer, who had concluded that the board violated IDEA by failing to reimburse parent for private education expenses associated with placement of autistic child in private school after public school's options were inadequate

Antitrust; Class Actions

***Lakeland Reg. Med. Ctr. v. Astellas US LLC*, No. 13-12709 (11th Cir. August 15, 2014)**

Denial of class certification was not error because the "direct purchaser" rule barred the tying claim on its merits

Mine Workers

***Sumter v. Sec. of Labor*, No. 13-15360 (11th Cir. August 15, 2014)**

Issue: whether the word "corporation" includes limited liability companies (LLCs) for purposes of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Mine Act). Held: "the terms "corporation" and "corporate operator" as used in § 110(c) of the Mine Act are ambiguous and the Secretary's interpretative bulletin provides a reasonable interpretation of those terms to which we owe *Chevron* deference."

Inconsistent Verdicts

***Connelly v. MARTA*, No. 13-14032 (11th Cir. Sept. 4, 2014)**

To determine whether to grant a judgment as a matter of law, the district court should have considered only the sufficiency of the evidence in support of the verdict, not the consistency of that verdict with another

Daubert

***Chapman v. Proctor & Gamble Distr. Co.*, No. 12-14502 (11th Cir. Sept. 11, 2014)**

Plaintiff sued P&G, claiming that she suffered extended neurological problems caused by zinc-induced, copper-deficiency myelopathy ("CDM") from her use of two to four 68-gram tubes of Fixodent denture adhesive each week for eight years. The district court granted defendants' *Daubert* motions and excluded expert testimony concerning causation, ultimately granting summary judgment to P&G. The Eleventh Circuit affirmed, reviewing extensively its framework for analyzing *Daubert* issues in toxicity cases (there are two different tests, depending on the testimony).

Daubert (Accident Reconstructionist)

***Hughes v. Kia Motor Corp.*, No. 13-10922 (11th Cir. Sept. 12, 2014)**

In an MVA case, the district court disqualified plaintiff's accident reconstruction expert on *Daubert*, finding that his methodology was unsound and that his attempt to falsify some of his testimony also rendered him unqualified. The district court then granted summary judgment to Kia. The Eleventh Circuit affirmed, holding that the expert's statements were conclusory and unsupported by specific methodology.

Black Lung

***Jim Walter Resources, Inc. v. OWCP*, No. 13-13185 (11th Cir. Sept. 12, 2014)**

The Affordable Care Act amended black lung standards to restore a pre-1981 version of the controlling law, under which survivors of dead miners who had been receiving lifetime benefits are themselves entitled to survivor benefits, regardless of whether the survivor can prove that the miner's death was caused by pneumoconiosis. Issue: whether a survivor who was denied benefits under the pre-ACA statutory scheme can submit a subsequent claim for consideration under the post-ACA version of the statute. The administrative law judge and benefits review board answered this question in the affirmative. The Eleventh Circuit affirmed.

RECENT CRIMINAL DECISIONS

From the Alabama Supreme Court

Bail; Capital Murder

***Ex parte Moyers*, No. 1130611 (Ala. Aug. 29, 2014)**

Trial court may deny bail for a defendant charged with capital murder, regardless whether the state intends to seek the death penalty for the offense. To support the denial of bail, the state must present "clear and strong" evidence that the offense has been committed, the defendant is guilty of the offense and the defendant "would probably be punished capitally if the law is administered." However, the court noted that, for purposes of bail, the defendant is presumed guilty and must overcome that presumption before entitled to bail as a matter of right.

From the Court of Criminal Appeals

Juvenile Procedure

***A.E. v. State*, CR-13-0584 (Ala. Crim. App. July 18, 2014)**

Juvenile's challenge to the sufficiency of the state's evidence in a delinquency adjudication must be preserved for appeal by moving for a judgment of acquittal at the conclusion of the state's case, at the close of all evidence or via a post-trial motion. There was no abuse of discretion in permitting the state to recall a witness for testimony regarding venue after it had already presented its case-in-chief.

Miranda; Hearsay

***Shaw v. State*, CR-10-1502 (Ala. Crim. App. July 18, 2014)**

Detective's statement to the defendant, "…at this point you've got to understand that we're detectives and we're going to ask you these questions and that's why we read you that form right there, that's all[,]" was not coercive or otherwise in violation of *Miranda*. Statement by the defendant's mother to her neighbor that "something horrible had happened" and that the defendant "needed to talk to somebody[]" was offered to show why the neighbor went to the home to speak with the defendant, rather than to prove the truth of the matter asserted.

Continuances

***Dove v. State*, CR-13-0711 (Ala. Crim. App. July 18, 2014)**

In a rare finding of an abuse of discretion regarding a continuance, the court reversed the defendant's murder conviction on the ground that the trial court erred in denying his request to continue his trial until the completion of forensic analysis of DNA evidence taken from underneath the victim's fingernails. The court observed that the DNA test results could have been exculpatory, or, if not, would be subject to a challenge by expert testimony, and that the trial court's stated belief that the defendant would be "better off" without the evidence "amounted to an opinion on trial strategy and was in direct conflict with [the defendant's] expressed wishes regarding his defense."

Juvenile Capital Murder

***State v. Loggins*, CR-13-0878 (Ala. Crim. App. July 18, 2014)**

The prohibition against mandatory life-without-parole sentences for juveniles announced in *Miller v. Alabama,* 132 S. Ct. 2455 (2012) is not retroactive to cases pending on collateral review. (Ed: a *cert.* petition has been filed with the U.S. Supreme Court on this issue.) | AL

Alley, John Thomason, Jr.
Auburn
Admitted: 1979
Died: August 1, 2014

Callahan, Nicholas Peter, Jr.
Birmingham
Admitted: 1966
Died: August 27, 2014

Francis, Rick Duran
Birmingham
Admitted: 1983
Died: July 30, 2014

Gallo, Barbara Hefner
Atlanta
Admitted: 1981
Died: January 1, 2014

Hamer, Judy Layne Poore
Bentonville, Arkansas
Admitted: 1992
Died: February 21, 2014

Hicks, Charles Andrew
Mobile
Admitted: 1999
Died: July 17, 2014

Keyes, John James, Jr.
Bessemer
Admitted: 1956
Died: May 24, 2014

Simpson, Fred Bryan
Huntsville
Admitted: 1965
Died: August 5, 2014

Tasheiko, Leonid John
Jacksonville, FL
Admitted: 1994
Died: November 10, 2013

Whitesell, Calvin Mercer
Montgomery
Admitted: 1951
Died: August 16, 2014

Womble, Mickey
Monroeville
Admitted: 1986
Died: April 19, 2014

Samuel Austin Beatty

In the movie "Bucket List" Edward Cole was asked to speak at the funeral of his new best friend. He said, "I hate funerals but I loved Carter." I also hate funerals but I loved Sam Beatty. I also love the way Apple and Sam loved each other, their family and their friends.

My relationship with Sam began in 1962. I was a terrified first-year law student. The reputations of certain law school professors contributed to my fear. Dr. Sam Beatty was rumored to be the "baddest" of them all.

At first, it seemed the rumors were true. I, along with every other law student in Dr. Beatty's classes, took turns getting lashed by his sharp tongue and quick wit while standing naked-like by or on our desks in front of our classmates.

However, we began to realize that Dr. Beatty was not the devil personified—his teaching methodology had a noble purpose. He cared deeply about each one of us and wanted us to learn to think on our feet. He was preparing us to accomplish more than we ever thought we were capable of accomplishing. He knew the road to success for a lawyer was always under construction. He knew that if we jumped off the boat in the first Beatty storm, we would never make it as a lawyer. It was his goal to instill in us the confidence to advocate with the very best.

Many of us stayed in close communication with Sam after law school—seeking his wise counsel or just having fun with him. On one occasion, we reversed roles, and pushed him to achieve a goal beyond what he thought was possible.

In 1976, several former students agreed that Sam would make an excellent member of the Alabama Supreme Court. The only problems were: (1) we hadn't discussed it with him and (2) there were only two days left to qualify.

Ted Taylor and I drove to Tuscaloosa to talk with him. Sam argued that he had never run for public office, was not a politician and just didn't see how he could win. After we made our best ever closing arguments, Sam agreed to try. He signed the qualifying papers that night and we drove to Montgomery and filed them the last day. Dr. Beatty was elected and the people of Alabama benefited greatly from his 12 years of extraordinary service as a justice on the Supreme Court of Alabama.

Shortly after he was sworn in, Justice Beatty was assigned an appeal filed by one of his campaign managers–me! He promptly issued an opinion denying the appeal. We never spoke about it until he brought the subject up at lunch about two months ago—almost 40 years later. Out of the blue, he said, "Ed, I just want you to know I still remember having to vote against you and your client." This says a lot about Sam Beatty's lifetime commitment to following his belief in doing the right thing without regard to personal feelings or relationships.

It is very difficult to explain how much Sam Beatty means to all of us. I will attempt to by paraphrasing a line from Ernest Hemingway in which he was trying to describe what the experiences of living in Paris as a young man meant to him in his lifetime:

> "If you ever had the privilege of having Sam Beatty as your law professor and then as your friend, you will take those experiences with you wherever you go in life because knowing Sam Beatty is like a 'moveable feast.' Even at his 90th birthday celebration, he dominated the room. As always, he was dressed to the nines. He was still sharper mentally than anyone in the room and, true to form, continued to tell the worst shaggy dog stories of the century."

Some wise person once said, "Good memories are like flowers." If this is true, then Sam Beatty left everyone he touched with a beautiful bouquet. He certainly did for me. I loved the man.

Dr. Beatty will always be in a special place in our hearts.

—Ed Hardin

Joseph Carrel Daniel

Joseph Carrel Daniel died September 22 in Florence, Alabama. He was born August 19, 1962 to Carrel Daniel and Martha Jo Terry Daniel.

A graduate of Bradshaw High School, Mr. Daniel obtained his bachelor of science degree from the University of Alabama, where he was a member of Phi Gamma Delta Fraternity, and obtained his juris doctor degree from the University of Alabama School of Law in 1988.

An active member of the Alabama State Bar, he began his career as a corporate attorney at Spain, Gillon, Grooms, Blan & Nettles in Birmingham, followed by a robust practice in estate and trust work in Tampa and Atlanta for AmSouth and Sun Trust Banks. He returned to his beloved hometown of Florence in 1998 and began a practice in criminal defense, juvenile and child dependency. Like his mother, who preceded him in death, Mr. Daniel devoted his career to the relief of suffering of others. True to his baptismal covenant, he strived for justice and peace among all people, and respected the dignity of every human being.

Mr. Daniel was a member of Trinity Episcopal Church, where he served as a lay Eucharistic minister and sang in the choir and shared his gift of music with the community as a member of the Florence Camerata. Mr. Daniel was active in the Cursillo movement of the Episcopal Diocese of Alabama, as evidenced by his son's craftsmanship of the Cursillo symbol, the multi-colored rooster, tattooed on his left leg, signifying God's grace. With great pride, he recently accepted his father's induction into the Limestone County Sports Hall of Fame.

He is survived by his father, Carrel Daniel of Florence; his brother, David Scott Daniel; his son, Joshua Carrel Danie,l and wife Jennifer, and one grandchild, Madeline Grace Daniel; his niece, Martha Eleanor Daniel, and nephew Rufus Townes Daniel; his cousins, Valerie Terry Wesson, Richard Daniel, Gary Daniel, Ralph Daniel, Greta Daniel, Terry Daniel, Wendy Daniel, Rhett Daniel, Julie Weatherford, Christie Weatherford, David Weatherford and Daniel Weatherford; a host of dear friends; and godchildren David Burton Hodges, Jr., Mary Catherine Hodges and Philip Charles Hodges.

Memorial gifts may be made to the Saint Francis Project of Trinity Episcopal Church, P.O. Box M, Florence 35631.

"The golden evening brightens in the west; soon, soon to faithful warriors cometh rest; sweet is the calm of paradise the blest. Alleluia. Alleluia."

—Lisa Hodges, Birmingham

Howard Baillie Warren

I met Howard on the first day of my sophomore year at Gadsden High School in September 1963. Howard was a senior and president of the Student Council. He appeared to me to be calm, organized and polite and showed a glimmer of having a dry wit as he welcomed the incoming class. We became friends.

Howard left Gadsden to attend the University of North Carolina at Chapel Hill, graduated in 1968, enlisted in the U.S. Army that same year and served a tour of duty in Vietnam. I welcomed him to the University of Alabama School of Law in 1971 at the start of my second year of law school, when he returned to Alabama with his wife, Kathleen. Howard distinguished himself as not just a good student, but one good enough to serve on the *Alabama Law Review*, and earn a position after graduation as law clerk to Judge Walter Gewin, U.S. Court of Appeals for the Fifth Circuit.

After his service with Judge Gewin, Howard worked with me at Henley & Northington for a year while Kathleen completed law school. It was in 1975 that he, Kathleen, my wife, Lucy, and I decided to return to Gadsden to start a firm, forming Turnbach & Warren, and thereafter practiced law together, and with other attorneys, for 39 years until Howard's death August 22, 2014.

It is said that a measure of a man is proved by the legacy he leaves behind. My expressions of Howard's legacy would seem biased, but from his peers in our profession came letters written to Howard after his prognosis became terminal. Two were particularly notable, and came from seasoned trial attorneys: " . . . I have yet to meet any lawyer as professional and courteous as you. While you have always been a strong advocate for your clients, you never did anything that would jeopardize or call into question your integrity or commitment to fairness. I have always been so impressed with your ability and desire to aggressively represent your client in such an honest and non-antagonistic manner. Without a doubt, you are one of the 'great ones' when it comes to our profession."

And the second, although addressed to Howard, is a parable to us all: "I want you to know that I truly have enjoyed knowing you through the years, never all that deeply, but enough as a mediator and as an adversary lawyer to know that you are a gem, a rare breed. In the many times that our paths crossed through the last 20+years, you were always the consummate professional, always prompt, always up-to-speed, always patient, always pleasant and always wise. There were times I dreaded having to face you in court–because every one of those characteristics you showed made it that much harder for me to win! That notwithstanding, the strength of your character through the years served as a reminder to me and to many to uphold the nobility of what we do as lawyers, and to treat all people with respect and courtesy. Those lessons, simple as they are, seem to be observed less and less in the reality of the light of day, but they were lessons that you lived and lived well as an example for others."

Howard was devoted to Kathleen; his daughter, Rebecca, and her husband, Mario; their three children, Elena Sophia, Nicolas and Joshua; as well as his son, Josh, who predeceased him; his daughter-in-law, Lauren; and grandson Nathan. He took great joy in simply being with his grandchildren and reveled in talking about them.

Howard maintained his work schedule until six weeks before his death, but visited with us frequently until it came time to go to him. He left a law firm with attorneys and a support staff who not only respected him, but also had a genuine affection for him. He also left a partner who misses him dearly.

—James E. Turnbach,
Turnbach, Warren, Lloyd, Frederick & Smith PC

Notices

- Notice is hereby given to **Stephen Christopher Bridgers**, who practiced in Birmingham and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated April 30, 2014, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2013. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 14-605]

- Notice is hereby given to **Margaret Mary Fullmer,** who practiced in Virginia Beach, Virginia and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated April 30, 2014, she has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2013. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 14-610]

- Notice is hereby given to **Mark Benjamin Huntley,** who practiced in Clanton and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated April 30, 2014, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2013. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 14-610]

- Notice is hereby given to **James Clinton Pittman,** who practiced in Birmingham and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated April 30, 2014, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2013. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 14-614]

- Notice is hereby given to **Justin Miles Strong,** who practiced in Birmingham and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated April 30, 2014, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2013. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 14-617]

- Notice is hereby given to **Rachel Leah Turner,** who practiced in Montgomery and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated April 30, 2014, she has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2013. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 14-618]

- Notice is hereby given to the following members of the Alabama State Bar, whose whereabouts are unknown, that pursuant to an order to show cause of the Disciplinary Commission of the Alabama State Bar dated June 23, 2014, they have 60 days from the date of this publication (November 2014) to come into compliance with the 2014 Mandatory Annual Client Security Fund Assessment. Noncompliance with the Mandatory Annual Client Security Fund Assessment shall result in a suspension of their license.

Angela Paulette Bowers.....CSF No. 2014-900

Irene Michelle Graves.....CSF No. 2014-921

Clifford Eazeb Kerry, Jr. .....CSF No. 2014-938

Davidson Lynn Laning.....CSF No. 2014-942

Donald Gordon Madison.....CSF No. 2014-944

Matthew Tyler McKeever.....CSF No. 2014-950

David Michael Powers.....CSF No. 2014-971

Brian Speegle Royster.....CSF No. 2014-975

Melissa Nadine Tapp.....CSF No. 2014-991

Reinstatements

- The supreme court entered an order based upon the decision of Disciplinary Board, Panel III, reinstating **George William Beasley, Jr.** to the practice of law in Alabama, effective July 1, 2014. [Rule 28, Pet. No. 13-1392]

- The supreme court entered an order based upon the decision of Disciplinary Board, Panel III, reinstating **Che Ree Minor Dudley** to the practice of law in Alabama, effective July 2, 2014. Dudley's reinstatement is probationary for two years. Conditions of probation are that: (1) Dudley, before resuming the practice of law, must submit and have approved by the Office of General Counsel a practice plan that shall include a mentor; (2) Dudley shall successfully complete the Practice Management Assistance Program of the Alabama State Bar within 120 days of the supreme court's order reinstating her license to practice law; (3) Dudley shall be prohibited from performing residential or commercial real estate closings or sales; (4) Dudley cannot engage in the solo practice of law; (5) Dudley shall complete 24 hours of continuing legal education during the first year after reinstatement in the area(s) of law in which she will practice; and (6) Dudley shall commit no further violations of the *Alabama Rules of Professional Conduct*. [Rule 28; Pet. No. 14-101]

Suspensions

- Birmingham attorney **Marc Cyrus Dawsey** was suspended from the practice of law in Alabama for 91 days by the Supreme Court of Alabama, effective May 22, 2014. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Dawsey's conditional guilty plea wherein Dawsey pleaded guilty to violating rules 1.15(j), 5.5(a), 8.4(a) and 8.4(g), *Ala. R. Prof. C.* Dawsey admitted he failed to certify his trust account in 2012, and as a result, his license was initially suspended on October 15, 2012. Between October 15, 2012 and May 22, 2014, Dawsey continued to hold himself out as an attorney; as a result, he practiced law without a license. [ASB No. 2012-2115 and UPL No. 2014-695]

- Jacksonville attorney **Matthew Walter Merrill** was interimly suspended from the practice of law in Alabama by order of the Supreme Court of Alabama, effective May 12, 2014. The supreme court entered its order based upon the May 12, 2014 order of the Disciplinary Commission of the Alabama State Bar in response to a petition filed by the Office of General Counsel evidencing that Merrill had demonstrated a pattern of conduct that was causing, or was likely to cause, immediate and serious injury to a client and to the public, and he was, by his actions, causing great public harm. On May 13, 2014, Merrill was transferred to disability inactive status by order of the Supreme Court of Alabama. The supreme court entered its order based upon the May 15, 2014 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to a letter submitted by Merrill to the Office of General Counsel requesting to be transferred to disability inactive status. [ASB No. 2014-694; Rule 20, Pet. No. 2014-701; Rule 27(c), Pet. No. 2014-725]

- Foley attorney **Stephen Mark Middleton** was summarily suspended from the practice of law in Alabama by order of the Disciplinary Commission of the Alabama State Bar, pursuant to rules 8(e) and 20(a), *Ala. R. Disc. P.*, effective August 14, 2014. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing that Middleton failed or refused to respond to requests for information during the course of disciplinary investigations. [Rule 20(a), Pet. No. 2014-1149]

- Daphne attorney **John Robert Parker** was suspended from the practice of law in Alabama for three years, effective August 13, 2014, with the imposition of the suspension deferred pending a three-year probationary period. On August 13, 2014, the Disciplinary Commission accepted Parker's conditional guilty plea to violations of rules 5.5(a)(2) [Unauthorized Practice of Law] and 8.4(a) and (g) [Misconduct], *Ala. R. Prof. C.*

  Parker admitted that he allowed a suspended attorney, John W. Parker, to work in his office. The suspended lawyer provided Parker with ongoing and essential guidance necessary for Parker to represent clients in a number of

Continued from page 409

cases, including those cases filed by the suspended attorney prior to his suspension in which Parker subsequently undertook representation. Parker allowed the suspended attorney to meet with an expert witness and correspond with opposing counsel regarding substantive legal and settlement issues on behalf of his clients. Parker also shared an email account with the suspended lawyer, through which Parker and the suspended lawyer corresponded with an expert and opposing counsel in Parker's legal matters. The suspended lawyer also used the email account for personal correspondence.

Parker further admitted that he allowed the suspended lawyer to provide legal services to a party for which the suspended attorney was compensated, corresponding with parties and counsel under Parker's signature and on the letterhead of Parker's firm. The suspended lawyer was regularly present in Parker's office, and allowed access to the confidential information of Parker's clients. The suspended attorney had not obtained permission from the Disciplinary Commission to seek employment in the legal profession pursuant to Rule 26, *Ala. R. Disc. P.* Parker admitted that his conduct violated rules 5.5(a)(2) [Unauthorized Practice of Law] and 8.4(a) and (g) [Misconduct], *Ala. R. Prof. C.* [ASB No. 12-1459] | AL

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The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:
X Has Not Changed During Preceding 12 Months
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PS Form 3526, July 2014 (Page 1 of 4 (see instructions page 4)) PSN: 7530-01-000-9931 **PRIVACY NOTICE:** See our privacy policy on www.usps.com.

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17. Publication of Statement of Ownership

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18. Signature and Title of Editor, Publisher, Business Manager, or Owner: Margaret L. Murphy, managing editor — Date: Oct. 10, 2014

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

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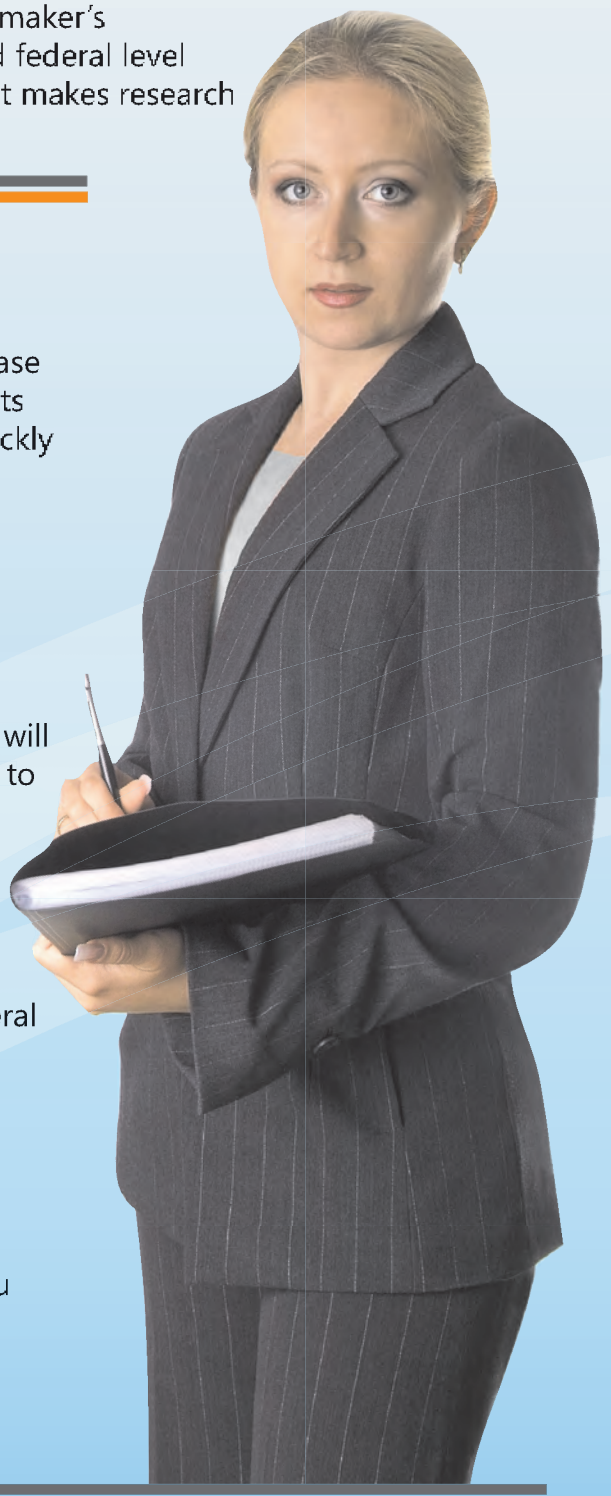

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Elections in Alabama

It's election time again. While we have elections nearly every even year for some offices, every four years the citizens of Alabama have the opportunity to elect all state executive office and legislative offices. This means that as you receive this issue of *The Alabama Lawyer*, the state will be preparing to elect its governor, lieutenant governor, attorney general, secretary of state, treasurer, auditor and commissioner of agriculture. Additionally, all 140 members of the Alabama Legislature will stand for election. The direction the state will take over the next four years will be determined, in large measure, by the outcome of these elections.

Additionally, there will be five proposed statewide amendments to the Alabama Constitution of 1901 appearing on the ballot this year. Over the past several years there has been much written in this space about our constitution, our methods of amending it and efforts over years at reforming it. None of these five amendments were recommended through any systematic process of review or process, but, rather, each was proposed in the legislature, considered, passed and is now on the ballot for consideration by the citizens of the state. A majority of people voting on each amendment voting in the affirmative is necessary for ratification.

This year there is a new tool available for those interested in reading up on the proposed amendments appearing on the ballot. During the 2014 session, the Alabama Legislature created the Fair Ballot Commission through passage of Act 2014-399. Sponsored by **Rep. Steve McMillan** and **Sen. Trip Pittman**, this legislation is geared toward providing interested voters an opportunity to have ready access to plain language information about each statewide constitutional amendment prior to its being voted on. The commission is comprised of the governor, lieutenant governor, speaker of the house, commissioner of agriculture and secretary of state. Additionally, each of these officers appoints one attorney and one non-attorney to the commission. Finally, the schools of public policy at Alabama

State University and Samford University each have one appointment, as does Miles Law School.

The 18-member Fair Ballot Commission is charged with drafting a plain-language summary of the amendment. This summary must include, at a minimum, the authority for its passage, the effect of the measure if passed, the cost and source of funding and the effect if the measure is defeated. Additionally, the commission must include a statement as to whether the amendment will increase, decrease or have no effect on taxes.

The Fair Ballot Commission must complete its work in order to publish its findings at least 60 days prior to the election when the measure appears on the ballot. These statements are available for review at *www.legislature.state.al.us*. Additionally, Act 2014-399 allows for any legislator to write a 300-word statement about the proposed amendment that will be published on the legislature's website.

This year, there are five statewide proposed constitutional amendments. I think lawyers have a unique opportunity and responsibility to be leaders in their communities and have an obligation to understand ballot measures in case others wish to discuss them and gain a better understanding of what they are called to vote on. I will attempt to provide some information on each proposed amendment below, and also implore you to review the work of the Fair Ballot Commission.

Amendment 1

This amendment is named the "American and Alabama Laws for Alabama Courts Amendment" and was sponsored by **Sen. Gerald Allen**. It would prohibit courts from applying or imposing foreign law if doing so would violate rights guaranteed by Alabama law. Foreign law is defined by the amendment to include any law, rule or legal code, used in or established in a jurisdiction outside of the states or territories of the United States.

The amendment applies only to natural persons. Additionally, the amendment would not apply if a person willingly chooses to give up the protections afforded by the amendment.

Amendment 2

This amendment, sponsored by **Sen. Tom Whatley**, relates to the Capital Improvement Trust Fund. The amendment would allow the state to borrow up to an additional $50 million to provide plans, construction and maintenance of National Guard armories in Alabama. The funds would be accessible to the Armory Commission of Alabama.

The amendment further provides that any indebtedness caused by this amendment would have to be repaid within 20 years from proceeds from the Alabama Trust Fund.

Amendment 3

Amendment 3 relates to firearms and was sponsored by **Rep. Mike Jones**. The amendment would reiterate that every citizen of Alabama has a right under the state constitution to keep and bear arms. The amendment further provides that any restrictions on this right would be subjected to strict scrutiny which is the highest standard afforded to constitutional review.

Amendment 4

Amendment 4, sponsored by **Sen. Dick Brewbaker**, would amend the unfunded mandate portion of the Alabama Constitution as it relates to local boards of education. In Section 111.05 of the Official Recompilation of the Constitution of Alabama 1901, there are certain restrictions on the passage of general law or executive orders that would require a new or increased expenditure of local funds. One of the exceptions included in the current provision applies required expenditures by school boards. Proposed Amendment 4 would remove this exception.

Proposed Amendment 4 would affect any of the other exceptions which means that a two-thirds vote by the legislature on a general law would continue to allow for the passage of a law requiring the expenditure. Additionally, a simple majority would continue to be able to pass a general law if the expenditure required by it would be less than $50,000.

Amendment 5

Proposed Amendment 5, sponsored by **Rep. Mark Tuggle**, would amend Section 36.02 of the Official Recompilation of the Constitution of Alabama of 1901 known as the Sportsperson's Bill of Rights. The Sportsperson's Bill of Rights provides that all persons have the right to hunt and fish in Alabama. Proposed Amendment 5 would amend this provision to provide that all persons have the right to hunt, fish and harvest wildlife using traditional methods and that such is the preferred means of managing and controlling wildlife in Alabama. The amendment would further provide that these rights would be subject to reasonable regulations to conserve wildlife and the future of hunting and fishing.

As you can see, we have a diverse slate of proposed constitutional amendments this year. I hope that you will seek out all available sources in studying and considering these amendments prior to casting your ballot. | AL

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

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

About Members
This section announces the opening of new solo firms.

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

About Members

Katherine S. Elmore, formerly with The Cochran Firm, announces the opening of **The Law Office of Katherine S. Elmore PC** at 107 Jefferson St., N., Huntsville 35801. Phone (256) 469-8536.

John M. Fraley, formerly with Haskell Slaughter & Young LLC, announces the opening of **The Fraley Law Firm** at 4268 Cahaba Heights Ct., Ste. 150, Birmingham 35243. Phone (205) 969-8891.

Robert J. Hedge announces the opening of the **Hedge Law Firm** at 5 N. Conception St., Mobile 36602 (P.O. Box 1905, 36633). Phone (251) 432-8844.

Among Firms

Bailey & Glasser LLP announces that **David A. Felice** opened the firm's Wilmington, Delaware office. Phone (302) 504-6333.

Belt Law Firm PC of Birmingham announces that **S. Drew Barnett** joined the firm.

Carr Allison announces that **Robert A. Hornbuckle, Caylan Holland** and **Felicia Long** joined the firm's Birmingham office as associates.

Clark, Partington, Hart, Larry, Bond & Stackhouse announces that **Megan F. Fry** is now a shareholder.

Gary V. Conchin, Joseph M. Cloud and **Kenneth B. Cole, Jr.** announce the opening of **Conchin Cloud & Cole LLC** at 2404 Commerce Ct., Huntsville 35801. Phone (256) 384-7777.

Wendy Brooks Crew and **Kathryn Crawford Gentle** of Crawford-Gentle & Associates announce the formation of **Crew Gentle Law PC** at 2001 Park Place N., Ste. 550, Birmingham 35203.

John W. Dodson and **Michael H. Gregory** announce the formation of **Dodson Gregory LLP** at 2700 Highway 280, Ste. 410 E., Birmingham 35223 (P.O. Box 530725, 35253). **Michelle L. Crunk** and **Denise A. Dodson** joined as partners and **Robert A. Arnwine, Jr.** joined as an associate. Phone (205) 834-9170.

Dorroh & Associates PC announces that **O. Scott Hewitt** joined as an associate.

Drew Eckl Farnham in Atlanta announces that **Andy Robinson** joined as an associate.

Robert E. Garner, Christopher P. Couch and **Mark Ezell** announce the formation of **Garner Couch & Ezell LLP** at 17 N. 20th St., Ste. 400–John Hand Bldg., Birmingham 35203. Phone (205) 719-1100. **Peyton D. Bibb, Jr.** is *of counsel.*

Hare Wynn Newell & Newton announces that **S. Hughston Nichols** is now a partner.

Harrison, Gammons & Rawlinson PC of Huntsville announces that **Bethany H. Sneed** is now a partner.

Hollis, Wright, Clay & Vail PC announces that **Christopher McNutt** joined the firm.

Maynard Cooper & Gale PC announces that **Kim Ingram** joined the firm.

Nolan Stewart PC of Birmingham announces that **R. Matthew Talley** is now a shareholder.

Oscar M. Price, IV and **Nicholas W. Armstrong** announce the formation of **Price Armstrong LLC** at 2421 2nd Ave., N., Ste. 1, Birmingham 35203. Phone (205) 208-9588.

Satterwhite & Tyler LLC announces that **J. Michael Druhan, Jr.** and **Thomas O. Gaillard, III** joined the firm as partners and **Tiffany B. Smith** joined as an associate. The firm name is now **Satterwhite, Druhan, Gaillard & Tyler LLC**. Offices are located in Mobile (1325 Dauphin St. 36604) and Fairhope (50 N. Green Rd. 36532). Phone (251) 432-8120.

Starnes Davis Florie LLP announces that **Allen C. King** and **Michael R. Lasserre** joined the firm as associates.

Webster, Henry, Lyons, White, Bradwell & Black PC announces a name change to **Webster, Henry, Lyons, Bradwell, Cohan & Black PC.**

Woodruff & Love announces that **Gregory C. Morgan** joined the firm as a partner and the new firm name is **Woodruff, Love & Morgan**. | AL


free•dom:
noun
the power to determine action without restraint.
free•dom court re•porting:
proper noun
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