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On The Cover

Pictured on the cover is the courtroom in the Monroe County Courthouse, where real lawyers tried real cases, one or more of which inspired Harper Lee to create Atticus Finch and the novel, *To Kill a Mockingbird*.

Photo by Alabama State Bar member Steven L. Atha, Birmingham, satha@mindspring.com

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Using Our Talents to Love Our Neighbors

Love your neighbor. We must do more than agree with this truth. We must open our eyes and our hearts to see the needs around us and respond.

All of us can agree that many people have displayed unselfish love to us throughout our lives. Maybe it was your parents who sacrificed their time and resources to help you be successful. Maybe it was a coach or a teacher who pushed you to be your best you. Or, maybe it was a seasoned attorney or judge who mentored you in the practice of law. Regardless, we can all admit that other people have affected our lives in ways that shaped who we are. It is quite sobering to consider the kindness that has been shown to each of us by others. We recognize that such kindness, or sacrificial love,

must not be wasted, but shared and passed down to others.

I suspect that most, if not all of you, have had a profound and positive impact in the lives of others. You were blessed with mental and physical skills that allowed you to meet the needs of others. You learned life lessons along the way through suffering or experience that allowed you to empathize with others and counsel them.

Based on my life, I find it is easier to make an impact on those who are near to me—my spouse, my children, my friends—but what about the neighbors we don't really know? What about the neighbors who don't look like us, talk like us, live in our neighborhoods or attend the same places of worship that we do?



Wouldn't we agree that their lives are valuable and worth expending time and resources to make our communities, our state and our nation a better place?

In October, lawyers celebrated Pro Bono (for the public good) Month. This is the month that we focus on providing free civil legal services to the poor. We want to draw the attention of lawyers and the public to the necessity of this program. While our purpose is excellent, I also hope that lawyers in our state will consider the fact that providing free civil legal advice is a selfless opportunity to love your neighbor—probably a neighbor who has a completely different life experience than you. This is not only an opportunity to use your unique skill set to help another human in a stressful situation, but an opportunity to make a new friend and receive numerous blessings.

Due to their selfless work, lawyers in Alabama are receiving many blessings by representing the poor in civil cases. I recently heard about some cases involving Alabama lawyers who assisted pro bono clients. One lawyer helped ease overbearing debt that weighed down his client by ensuring that his client received benefits that the client was due. Another aided someone by obtaining various probate documents to bring closure to a loved one who passed away. Still another lawyer eased the concerns of an elderly client who needed assistance with bankruptcy matters caused by significant medical bills. The time expended by these lawyers was not significant, but the positive impact they made was enormous.

In the parable of the talents found in the book of Matthew 25:14-30, the master goes on a long journey. He entrusts talents to three servants, according to their abilities. Two of the servants put the money to good use and doubled what their master had given them. The other was afraid. He hid his talent. Even though he was able to return that one talent to his master when he returned, he was chastised for not putting it to good use.

We can personalize this parable with our modern understanding of the word talent as being our unique abilities as lawyers. If we don't put our abilities to use in the world, they are useless. On the other hand, faithful investment of what we are given produces fruitfulness. Therefore, we, as a profession, must multiply our talents by putting them to use in the service of others.

I am grateful to be a part of a profession that has both the ability and the opportunities to encourage, counsel and love our neighbors. May we never lose sight of the talents given to us and may we go forth and do good works. Let us stand in the gap to help those who need it most. ▲

Poverty Simulation PROGRAM

Provides Insight into Challenges of Alabama's Poorest Citizens

We've spent the past month talking about pro bono work, and providing access to justice for the poor, but just how much do we really understand about what it really means to be poor? To *live* in poverty?

I'm sure there have been occasions where a lot of us have worried about money, about paying bills, about paying back our student loans, about how to afford the car we want or the house we would like. How many of us, though, have really had to worry about how to pay our rent or utility bill, every month? And, if I should face such a challenge, I have a network I can reach out to for help if I need it, but so many people don't have that support system. What is that like?

There's a program that some of you may have participated in during the Pro Bono Celebration, called the **"Poverty Simulator."** As its name suggests, this interactive educational experience provides an opportunity to experience just a small glimpse of the daily struggles, challenges and choices faced by those living at or below the poverty line.

Eighty people can participate in a full simulation, which lasts about two and a half hours. Each member of the simulation is put into the life of a low-income family, assigned a role and a story—for example, an 85-year-old dependent on a fixed income; a 25-year-old whose parents are absent who has been left to care for younger siblings; grandparents trying to raise their grandchildren; someone with a disability or a past conviction.



About 16 members of the simulation class will act in the roles of service providers—employer, public school employee, payday lender, health care provider, social service agency, pawn shop, police officer, grocer and so on. The individuals in each low-income scenario must make choices about how to spend what little time, money and other resources they have to meet all their needs.

“Stress is the most prominent result of the simulation,” says Kristina Scott, executive director of **Alabama Possible** (“AP”), which operates the Poverty Simulation Program for Alabama. “You realize how much you don’t know. Living my life takes a different set of life skills than these people need just to navigate day to day.”

Scott earned her bachelor’s degree in history from the University of Florida and her juris doctor with distinction from Emory University. Before joining Alabama Possible in August 2008, she served as the managing attorney for external affairs at the Los Angeles City Attorney’s Office. Before becoming involved with the Poverty Simulation program professionally, she went through the program as part of a Leadership Alabama Class.

In the simulation, she says, almost nobody buys enough food for their family. Children end up low on the priority list, especially in terms of emotional needs. Their caregivers may be able to put a roof over their head and food on the table, but they don’t ask how their day is going, or the children get sent to school



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without money for a field trip or school supplies. They feel alone and afraid. Some participants turn to crime to try to make ends meet, or take advantage of their neighbors out of desperation, or get caught in a cycle of payday loans and pawn shops.

She believes one of the most important results of the experience is a powerful sense of empathy with the plight of poverty.

"I think one of the most important takeaways for us, as lawyers, is to learn to take a breath if your client is late, or you can't get in touch with them because they ran out of minutes on their cell. We run our life by a schedule and always have to be in touch, so it's frustrating when people we are trying the help, trying to *serve*, are not easy to get

in touch with," she explains. "This program helps you to really have empathy for the client and put yourself into their shoes. Remember, you are not asking them to stand in your shoes, but for us to stand in other's shoes and think about how much our lives could be different."

The Poverty Simulation program started in 2013, originating in Iowa, and is now owned by the Missouri Community Action Association. In Alabama, the program is operated by Alabama Possible, which was begun in 1993 as the Alabama Poverty Project by a group of concerned citizens, including Auburn University President Wilford Bailey, Auburn History Professor Emeritus Wayne Flynt, social work pioneer Eulene Hawkins and Alabama Baptist Convention President Earl

Potts. They joined with others across the south to study poverty, publicize their findings, teach undergraduates what they had learned and mobilize public policy to bring about systems change. AP is a 501(c)3 nonprofit corporation.

Poverty Simulation classes may be scheduled as a professional development experience. It is also presented to teachers, college students, faculty and staff who will be in service with low income communities and church groups. If you are interested in scheduling or participating in a class, visit www.alabamapossible/program/povertysimulation or contact Kristina Scott at (205) 939-1408 or kscott@alabamapossible.org. ▲

—J. Cole Portis

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EXECUTIVE DIRECTOR'S REPORT

Keith B. Norman
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Alabama's Civil Rights Trifecta

This past August, **Bryan Stevenson** became the latest member of the Alabama State Bar to receive the Thurgood Marshall Award. The award has been given annually since its inception in 1992 by the American Bar Association (ABA) Section of Civil Rights and Social Justice. The award honors United States Supreme Court Justice Thurgood Marshall who is the award's first recipient. The other state bar members who have received this award are **Judge Frank M. Johnson, Jr.**, the award's second recipient, and **Fred D. Gray**.

While paying tribute to Justice Marshall's long civil rights record, the award epitomizes individual commitment to the cause of civil rights by members of the legal profession. In particular, the award recognizes long-term contributions to the advancement of civil rights, civil liberties and human rights in the United States. Other notable recipients



Stevenson

to receive the award include Hon. Janet R. Reno, Jack Greenberg, Elaine Jones and Hon. Ruth Bader Ginsburg. Bryan received this year's award during the ABA's annual meeting in San Francisco.

As many of you may know, Bryan is the founder and executive director of the

Equal Justice Initiative (EJI) in Montgomery. He has dedicated his legal career to helping the poor, the incarcerated and, in particular, those sentenced to death. Under Bryan's leadership, the EJI has won major legal challenges which have eliminated excessive and unfair sentencing, exonerated innocent death row prisoners and confronted abuse of the incarcerated and the mentally ill as well as assist children prosecuted as adults. Bryan has successfully argued several significant cases before the U.S. Supreme Court, including a recent victory having mandatory life-without-parole sentences for children 17 or younger declared unconstitutional. The EJI has also embarked on new anti-poverty and anti-discrimination efforts to challenge the legacy of racial inequality in America.

Bryan's career is truly a remarkable one and the Thurgood Marshall Award is a fitting recognition for his many years of selfless dedication to the cause of justice and using the legal system to come to the aid of so many. He joins the company of a very select pair of Alabama lawyers—Judge Johnson and Fred Gray—in receiving this distinguished honor. Congratulations, Bryan! ▲



Correction: In the "Education Debt Update" in the September 2016 issue, it was incorrectly reported that 68 percent of those taking the February 2016 bar exam for the first time had education loans and that the average of those loans was \$119,695. It should have stated that those figures were for the **July 2016** exam.

2017 ASB Annual Meeting

The Grand Hotel Marriott Resort Golf Club & Spa • Point Clear, Alabama
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Thank you very much for planning so many family activities and making the meeting so kid friendly. My whole family had a blast.

All the meetings I attended were great. I enjoyed the subjects offered this year, and enjoyed networking as well.

Overall, the conference was excellent, well organized, quality speakers and panels and plenty of networking opportunities.

It's nice to have so many options!

This was my first time to attend and I brought my whole family. We have a 3-year old and a 1-year old. We found the whole event very family friendly! Big relief!

• EVENT SPECIAL •

ABA Foundation Fellows Dinner

July 13, 2017

Speaker: Dr. Wayne Flynt, Alabama historian



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- ▲ **Position Available: Executive Director—Alabama Center for Dispute Resolution**

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 the year 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 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, 55 lawyers have become members of the hall of fame. The five newest members were inducted May 6, 2016.

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 to 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 at www.alabar.org.

Download an application form at <https://www.alabar.org/assets/uploads/2016/09/Lawyers-Hall-of-Fame-Nomination-Form-2017-fillable.pdf> and mail the completed form to:

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

The deadline for submission is **March 1, 2017**.

Judicial Award of Merit

The Alabama State Bar Board of Bar Commissioners will receive nominations for the state bar's Judicial Award of Merit through **March 15, 2017**. Nominations should be mailed to:

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

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

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

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

Local Bar Award of Achievement

Cole Portis, Alabama State Bar president, and the ASB Local Bar Task Force want you to apply this year! This award recognizes local bars for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's 2017 Annual Meeting at the Grand Hotel Marriott Resort 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 applications:

- 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 application by Friday, June 2, 2017. Applications may be downloaded from www.alabar.org or obtained by contacting Mary Frances Garner at (334) 269-1515 or maryfrances.garner@alabar.org.

Amendment of Alabama Rules of Judicial Administration

The Alabama Supreme Court has amended Rule 4.I(C), *Alabama Rules of Judicial Administration*, dealing with duties of clerks and registers. The amendment of this rule was effective October 1, 2016. The order amending Rule 4.I(C) appears in an advance sheet of *Southern Reporter* dated on or about September 29, 2016. The amendment provides that any attorney or party to a court proceeding who is entitled to receive notice required by law or issued by the court by first-class mail may receive that notice by electronic means approved by the Administrative Director of Courts. The rule provides the procedure by which a party may elect to receive notice electronically as well as a provision for rescinding such election. The text of this rule can be found at <http://www.judicial.alabama.gov>, "Quick links—Rule changes."

—Bilee Cauley, reporter of decisions, Alabama Appellate Court

Position Available: Executive Director—Alabama Center for Dispute Resolution

The Alabama Center for Dispute Resolution, Inc., a non-profit ADR-focused corporation located in Montgomery, is seeking applications for the position of executive director. The center coordinates the work of the Alabama Supreme Court Commission on Alternative Dispute Resolution. The position requires a current law license from any state, but with a preference for an Alabama law license; recent or current experience in mediation, arbitration or other ADR procedures; experience in training, public speaking, research and writing, business and supervisory skills, and fundraising. The forecasted start date is spring 2017. Salary is commensurate with experience. The position will remain open until filled with a preference for receipt of resumes/vitae before **November 30, 2016**. For more information and to submit a resume with letter of interest see www.alabamaadr.org. ▲

Collage photos on this page by Henry L. "Max" Cassidy, Jr.

No. 1665

In the Matter of the Estate

John Benjamin Watts,
= Deceased =

IN PROBATE COURT
MONROE COUNTY
STATE OF ALABAMA

L. L. Dees,
= Adm'r =

In the Probate Court of
MONROE COUNTY, ALABAMA

Know all men by these presents, that I, *J. B. Watts*, deceased,

do hereby certify that the will of the said *J. B. Watts*, deceased, was admitted to probate in the Probate Court of Monroe County, Alabama, on the 29th day of October, 1942, and that the said will was duly executed in accordance with the laws of the State of Alabama.

Witness my hand and seal at the City of Monroe, Alabama, this 29th day of October, 1942.

L. L. Dees
Clerk of Court

L. L. Dees
atly

I, *John Benjamin Watts*, being over the age of twenty-one years of life and disposing mind and memory, mindful of the duties of life and desiring to direct the disposition of this my last will and Testament, in words and form as follows:

First
I direct my executor hereinafter named, to pay all of my just debts including funeral expenses as soon after my death as convenient.

Second
I give, devise and bequest to *Mazarene Parker* all of my estate or every kind and character, real, personal and mixed, including any money on hand or in banks, in fee simple, without any reservation or restriction of any kind.

Third
I hereby nominate, constitute and appoint, *Loxley L. Dees*, of *Monroeville, Alabama*, sole executor of this my last will and Testament, and specifically exempt him from giving any bond or further except the proper discharge of his duties as such, and executor to my court.

Fourth
I hereby revoke any and all former wills or testamentary dispositions by me at any time heretofore made.

IN WITNESS WHEREOF I have hereunto set my hand and seal, and declare this to be my last will and Testament, in the presence of *Leslie Johnson* and *Leon Figgins*, whom I have requested to become acting witnesses hereto, on this the 29th day of *March*, 1936.

John Benjamin Watts (Seal)

Leslie Johnson
Leon Figgins

THURSDAY, OCTOBER 29, 1942

THE MONROE JOURNAL

Published by
THE MONROE JOURNAL COMPANY
A. C. LEE
E. M. SALTER
Business Manager
Entered at *Monroeville* Postoffice as Second Class Matter, Under Act of Congress of March 3, 1879.

OUR INITIAL TEST BLACKOUT

On Monday night of this week the town of *Monroeville* put on its first test blackout. The siren sounded promptly at eight thirty, and in two minutes thereafter the town was in darkness; in fact, it was virtually complete within one minute. On this occasion the people had advanced notice of the time it was to occur and they were ready. Hereafter, the alarms will be sounded and then it is that the real test will be made.

In the Probate Court of
MONROE COUNTY, ALABAMA

Know all men by these presents, that I, *J. B. Watts*, deceased,

do hereby certify that the will of the said *J. B. Watts*, deceased, was admitted to probate in the Probate Court of Monroe County, Alabama, on the 29th day of October, 1942, and that the said will was duly executed in accordance with the laws of the State of Alabama.

Witness my hand and seal at the City of Monroe, Alabama, this 29th day of October, 1942.

L. L. Dees
Clerk of Court



Photo by Steven L. Atha

Harper Lee's Dolphus Raymond Inspired by Father's Client

By Henry L. "Max" Cassady, Jr.

In October 1938, when Harper Lee was 12 years old, something extraordinary occurred in her small town.

According to a published Alabama Supreme Court case and records at the Alabama Department of Archives, a respected white businessman named Ben Watts walked into the Monroe County Bank in a hurry. He needed a "last will and testament" leaving his land and five-bedroom home to a black woman he was in love with. Her name was Nazarine Parker.

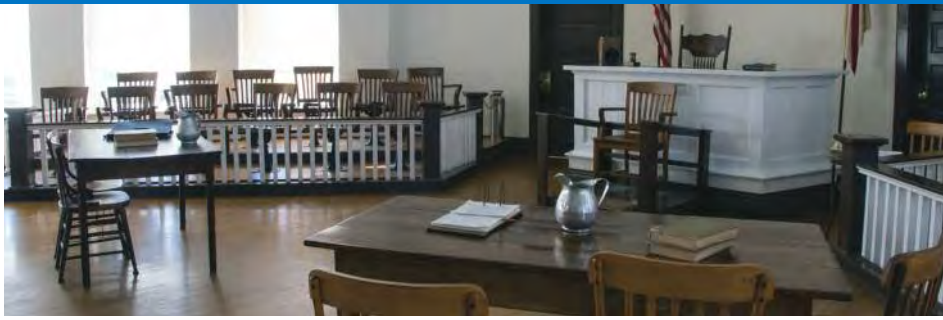
"I want you to draw up a will and I want to fix it up this morning," Watts told his banker. "I want to leave what I have for this Negro woman that has been taking care of me all the time. You know how white people are about Negroes, and I want to be sure this thing is handled right because I want her to have what I've got. All my own people have ever done for me was to borrow money and never pay it back. I want to see that she gets it, and I want to see that some white man sees that she does get it."

"Mr. Ben," the banker said, "you have been doing business with us a long time here and if there is any way I can help you, I want to do it."

The will was signed in the bank boardroom. Two bank employees signed as witnesses.

Watts was the town drayman, the equivalent of the UPS package and heavy-freight delivery service, but using horse wagons. He and his helpers also delivered the mail. He was all over town, all day, all the time. He even delivered bulk cash bags to and from the bank.

In the next year, 1939, Watts worried. He knew about will contests from working the courthouse square every day.



Photos by Steven L. Atha

Then as now, under Alabama law, if a person dies without a will, the spouse and the bloodline inherit. Who gets what depends on who is alive when the person dies, but the money stays in the family if a person dies without a will.

So when a will leaves land or money to a non-family member, watch out for a lawsuit. The relatives who feel cheated wish there had never been a will. Beat the will, and they keep the money in the family.

Watts's premonition haunted him. An all-white jury of men would strike down his will naming Parker as his heir. One day a deputy sheriff would knock on her door with a court order to evict her.

Watts went to see his lawyer, A.C. Lee, Harper Lee's father.

Lee later testified: "He consulted with me professionally about his will. It was in my office. He came in one day and told me that he had made a will and that he wanted me to look at it and tell him whether or not it would accomplish what he wanted it to accomplish."

Lee first told Watts to "tell me what he wanted to do with his property." Watts told him he wanted to leave everything he owned to Parker.

"I read it over," Lee testified, and advised him the will "would accomplish what he wanted." Lee recalled Watts "stated if there was any doubt in my mind about it, he wanted me to make another one, but I advised him that [the will] was quite sufficient to carry out his wishes."

Watts's mind was put at ease, and he left Lee's office. Why second-guess the advice of his own counsel? Lee was an experienced lawyer, editor of the town newspaper and elected to the state legislature again and again by the people.

But worry returned, and would not let go. Watts met with Lee again on March 21, 1940. He wanted a deed in Nazarine Parker's name. He would sign it that day,

but with a condition. Could he hold back a "life estate" in the land to Watts? He wanted to control the land until the moment of his death. Parker would own the land the first second after he died.

Lee would later testify, "I think it was a few months before he died" that "he came in again and asked me if he could legally convey his lands to this Negro woman and reserve the use of the lands during his

lifetime, and in that conversation he referred again to his will and stated that he anticipated that his people might try to break his will and that he wanted to do everything possible to make sure that his will would be carried out.

"And I explained to him that he could make a conveyance of his land and reserve for himself the right to use during his lifetime, and he asked me to prepare a deed of that character for him, and I did so," Lee testified.

Lee signed the deed as a witness and the document was filed in the county courthouse the same day.

Watts did all he could do to prevent, or win, a war he would not live

to see fought. His relatives would have to defeat not one, but two legal transfers of his land to Nazarine Parker.

It would be very difficult. First, the deed had already transferred the land to Parker. Watts just had to die and his "life estate" was over. The property was already in her name.

Lee's sworn testimony in court would be powerful in any contest to set aside the deed. Lee personally signed as a witness. If a lawyer's sworn word in court doesn't protect his client's land deed, the land ownership system destabilizes. Banks lend money to purchase land and take mortgages on that land. Land cannot run away. Land beats the gold standard, because no more will ever be discovered on earth. Courts presume land deeds are valid and uphold them if at all possible.

"He came in one day and told me that he had made a will and that he wanted me to look at it and tell him whether or not it would accomplish what he wanted it to accomplish."



Photos by Steven L. Atha

Second, the “last will and testament” would win the day if the relatives defeated Lee’s land deed. Parker would still inherit by the will.

Watts’s legal mind was sublime. His relatives would need to win two cases, not just one.

Four months and 30 days after Lee prepared the deed, Ben Watts died. It was August 20, 1940, and Nazarine Parker and a doctor were with him.

Watts had been right about the lawsuit to come. His relatives hired C.L. Hybart, a prominent trial lawyer in Monroeville. The man was a known force in south Alabama courtrooms.

On October 15, 1941, the jury trial began. It ended in a mistrial after Judge Hare determined he “personally knew too much about the facts firsthand” and had a “fixed opinion on the merits.” He probably knew Watts very well.

A year passed. On October 13, 1942, the second jury trial began with an out-of-town judge and 12 white men on the jury.

A will-and-deed contest is a free-for-all. Falsely swearing for filthy lucre is older than the stone tablet that warns us: “Thou shalt not bear false witness.”

Watts was about to roll over in his grave. You can put any words you want in a dead man’s mouth and there’s not a thing he can do about it.

The relatives could win in two ways: prove Watts lacked the mental capacity to understand what was happening when the deed or will was signed—insane people can’t legally sign deeds—or prove that Parker used “undue influence” to puppet Watts into signing the will in 1938 and the deed in 1940. In other words, prove that Parker, in the shadows of interracial sin, was forcing him, tricking him or owning him.

The first witness itched to prove both cases. Leonard Wiggins was the husband of a niece who

stood to inherit. His hand was barely off the Bible when he told the jury Watts had syphilis by 1922, just two years after moving in with Parker in 1920.

Syphilis was the AIDS of the time. Neurosyphilis is the end stage of the disease, and it was known by the public to cause mental disorders. Eighteen years of the disease meant end-stage mental disorders. Parker had given Watts a sexual disease which drove him insane.

According to the Watts family witnesses, mental illness also ran in Watts’s family. His sister had “been crazy a long time.” A family member testified that one day she was walking down the railroad track saying, “I am going to the lake and drown myself” because her parents were dead, and because “Ben [Watts] don’t care nothing about me.” She was dead in the lake the next morning. This witness said Ben Watts reacted to his sister’s death with heartlessness: “By God, that’s the best thing she could have done,” Ben said. Worse, this witness testified that Ben wouldn’t even help drag his sister’s body out of the lake.



THE ALABAMA LAWYER



Photos by Steven L. Atha

Another family witness said that Ben's brother, Charlie, had been dying of pneumonia one cold night. Ben would not go fetch Dr. Harper. It was too cold, and he wanted to be with Nazarine. "Let the son of a bitch die."

Ben kicked his sister's dogs off the porch, swore one family member.

Ben usually ate lunch with his blood relatives. He broke the dishes and kicked the stove when the food did not please him.

His mother had been a poor Confederate widow on a small pension, and he treated her cruelly.

The plaintiffs further claimed Nazarine Parker had owned Ben Watts.

"One time I had a conversation with Nazarine Parker in which the will and deed were mentioned," a witness testified. "I was talking to her one Sunday, and she said

she had every damn thing fixed. She said that Ben Watts fixed her a will and she was afraid that damn thing wouldn't hold, and she said she told him to go and fix her a deed: 'Honey, they might break the will.'"

Witness after witness painted a portrait of a man insanely angry and uncontrolled by his white family, but controlled like a puppet by Nazarine Parker.

Then, Nazarine Parker's witnesses took the stand.

J.B. Barnett had managed the bank 39 years and had known Watts long enough that he couldn't remember exactly. Watts had "unusually keen intellect," he said, and the bank trusted him with bags of cash.

"When money was shipped into the bank he received it for us at the express office," Barnett said. "When we had any money to ship away from here, we turned it over to him."

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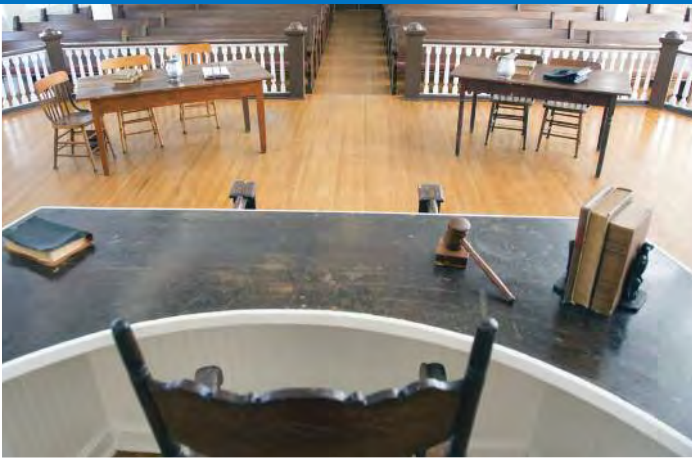
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Photos by Steven L. Atha

It was true, however, that Watts was a bad drinker, but he quit 12 years before he died. His mother made him promise to quit while she was on her own deathbed.

Interestingly, his mother had not made him promise to stop living with Nazarine Parker—just to quit alcohol. And Barnett testified that he was aware of Watts’s interracial relationship with Parker.

Asked about the “insane” behavior Watts’ relatives had sworn to, Barnett said if it were true, he had an opinion.

“Yes, men are crazy on some subjects ... I have known men whose morals weren’t above reproach but whose integrity was unquestionable.” He concluded, “We entrusted many hundreds of thousands of dollars to him to carry for us,” and “He was, in my opinion, mentally capable of making his last will.”

The owner of the hardware store, G.B. Barnett, saw Watts every day except Sunday. The owner of the funeral home, J.T. Moore, knew him 35 years and “talked to him nearly every day in town.” Watts delivered his caskets for the business.

“Strictly business” and “a man of strong determination,” the funeral home owner testified. Watts had bought vaults for his family members when they died. The interracial lifestyle of Watts had never mattered.

“Yes, I knew how he was living out there,” Moore said.

The town physician since 1912, Dr. R.A. Smith, made it clear to the jury. Smith, who was with Watts “the hour he died,” testified to his “absolutely sound mind,” adding that until the very end, he remained “perfectly sane.”

The postmaster, J.C. Hybart, released mail “every day” to Watts to deliver for the U.S. Postal Service.

Witness after witness painted a portrait of a man insanely angry and uncontrolled by his white family, but controlled like a puppet by Nazarine Parker.

The railroad agent in town, J.R. Carter, saw Watts “twice a day” for 10 years; his mind was sound.

Sheriff J.L. Bowden knew Watts “40 years” and talked with him “every day.”

“His mind was all right,” the sheriff said on the witness stand. Yes, Bowden admitted, “I have heard of him living in a state of adultery with one Nazarine Parker. As sheriff of this county I never investigated that. I never tried to break it up.”

Prominent leaders, one by one, praised Ben Watts.

Then Lee took the oath.

“I knew him something over 25 years” and “would see him rather frequently during most of that time.”

After explaining his meetings with Ben Watts (quoted earlier in this article), Lee said what everyone already knew: “On both occasions, [Watts] was absolutely of sound mind, and there was no question

about him understanding the nature of the business he was transacting.”

Lee admitted knowing about the interracial adultery. “I have heard it,” but he left no doubt. Ben Watts “was determined and wanted to see that none of his people got any of his money.” Nazarine Parker had “taken care of him and he wanted her to have the property.”

Yet the all-white, male jury was not having it. Their verdict struck down both the will and the deed.

An appeal was filed. Parker could not write her own name. She scrawled the illiterate mark of “X” as required by law.

The Supreme Court of Alabama studied the same trial record quoted in this article. A bare majority of five of the nine justices voted to uphold the jury verdict. Parker lost.

When the state's highest court ruled, its opinion stressed the 1901 Alabama Constitution had forbidden for all time "any marriage between any white person and a Negro." It was a miscegenation felony to "intermarry, or live in adultery or fornication with each other," and the prison sentence was "not less than two nor more than seven years."

Watts and Parker had lived a "continuous felony," the majority opinion read. A white man living as Watts did "sacrifices his own self-respect" and "humiliates his family, his blood relatives."

The conclusion was inescapable that Parker had undue influence on Watts's mind: "Keeping up such criminal relations" meant that the white man "has become so infatuated with his Negro mistress as to render her the dominant party."

As for the mental disorders resulting from syphilis, the "symptoms of the disease" were known to the public.

It was over. Nazarine Parker would lose her home. Her lawyers, John Coxwell and J.D. Ratcliffe, would have a duty to tell her the bad news.

Then something troubled one of the judges who had ruled against Nazarine Parker. And a rare blue moon rose over the Monroe County Courthouse. One judge in Montgomery reconsidered and switched his vote. Instead of a 5-4 majority against Parker, the court was now a 5-4 majority in her favor. The all-white jury verdict was now reversed.

While the new opinion showed no more warmth for Ben Watts than the first one, it noted that the "organized society" in Monroeville had decided to live and let live: "However boldly he may have defied the laws of our State and its public policy, and the recognized traditional racial distinctions, organized society took no steps to interfere."

The court quoted Lee's trial testimony extensively, and ultimately it carried the day. In fact, the court's emphasis on Lee's testimony may be the origin in *To Kill a Mockingbird* of Miss Maudie telling the children "he can make somebody's will so airtight can't anybody meddle with it." In the real life of Ben Watts, however, it was a deed, not a will.

The court concluded, "It is clearly shown from this record, beyond the peradventure of a doubt, that he wanted this estate to go to Nazarine Parker."

The court assumed Watts had no religion "at all," but that was his legal right: "Freedom of religion, so sacredly guaranteed to us, and which we cherish so highly, is freedom not only to worship according to the dictates of one's own conscience and to follow whatever religion one desires, but it is also a freedom, if one chooses, to have no religion at all."

Watts was "evil," the court concluded. "There is a freedom also in the moral world for one to choose his own way of life. Ben Watts chose the evil way."

But the "evil way" he chose did not take away from Watts his legal right to own and transfer property. "In condemnation of his manner of life, and however disgraceful and reprehensible it may have been, the courts must not lose sight of the fact that his accumulated estate ... was his own."

The court concluded, "It is clearly shown from this record, beyond the peradventure of a doubt, that he wanted this estate to go to Nazarine Parker."

In *To Kill a Mockingbird*, the character Dolphus Raymond is described in Scout's mind as an "evil

man." He is a white drunk who breeds mixed-race children with a black woman.

Dill first spots Dolphus sitting with the blacks on the town square, "drinking' out of a sack." Jem explains the sack is a "Co-Cola bottle full of whiskey." Jim says Dolphus sits with blacks because he "likes 'em better'n he likes us," and "he's got a colored woman and all sorts of mixed chillun."

The children discuss that a single drop of non-white blood means you are not white.

Scout's view of Dolphus as "evil" is transformed during the trial of Tom Robinson. The transformation begins when Dolphus offers his brown bag to Dill, who drinks it. It is only Coca-Cola, not alcohol. Dolphus explains his fake alcoholism is to allow white people to blame his interracial relationships on alcohol.

Dolphus knows "folks don't like the way I live," but he cannot reject whites who reject him. "I don't say the hell with 'em." But he despairs at "the hell white people give colored folks" and says the trial of Tom Robinson at that very moment is a good example.



Photos by Steven L. Atha

Dolphus tells Scout, “You don’t know your pa’s not a run-of-the-mill man, it’ll take a few years for that to sink in.”

Indeed, in the world of Ben Watts, Lee was not a run-of-the-mill man. Like other stand-up citizens, he would not betray a dead friend on the witness stand.

In the *Mockingbird* world, Watts appears to be the DNA building block for Dolphus Raymond. Aside from the obvious, Scout describes the smell of a drayman. “I liked his smell: it was of leather, horses, cottonseed. He wore the only English riding boots I had ever seen.”

The novel also describes Raymond as “living alone,” yet also living and having children with a black woman. In the Watts trial, witnesses repeatedly described his land as having a large home where he lived with Parker and other blacks.

But the trial testimony was also clear that Watts had constructed a small home on the same land, and that he sometimes lived in that home. Given the criminal law against miscegenation, the smaller home maintained the appearance of segregation of races on his land.

Did Ben Watts have children with Nazarine Parker?

Monroeville lawyer Milton Coxwell says yes. He is the son of attorney John Coxwell, who represented Parker. He practices law to this day in Monroeville. In a letter, Coxwell recalls, “They had several children together, one of whom was the maid for the family next door when I was a child.”

Watts probably never named his children in a legal document for good reason. Any signature by him claiming children with Parker would prove he had committed the felony miscegenation, or interracial sexual relation. The same criminal law may also explain why Parker was never called as a witness at the trial.

Regardless of the theory that Ben Watts is Dolphus Raymond, the archive record of the Watts estate trial is the only known sworn testimony of Harper Lee’s father.

It is also an important, non-fictional Southern Gothic story, in which the leading citizens on the town square in Monroeville in the 1920s-1940s were obviously tolerant of Ben Watts and Nazarine Parker as an interracial couple.

Race, family, politics, religion? As they say, “It’s complicated.”

Then again, maybe it’s not. Ben loved Nazarine, and she loved him. And whoever didn’t like it would eventually be worn down and, in time, irrelevant to the progress of human liberty and rights. *Loving v. Virginia*, 388 U.S. 1 invalidated laws prohibiting interracial marriage. ▲

Post-Note: *Harper Lee was born in 1926. She was a high school sophomore when the case went to trial in the fall of 1942. The next year, 1943, Harper Lee’s older sister, Alice Lee, broke gender lines herself by becoming a lawyer and moving back to Monroeville to work with A.C. Lee. Television did not exist at the time, and trials were a form of non-fiction theater. A.C. Lee obviously reared his two daughters to be interested in law in a time when it was extremely rare for a woman to become a lawyer. Thus, it seems probable that Mr. Lee would have discussed this case with Harper Lee in 1942 when it was being tried in Monroeville. By the time the supreme court ruled in Nazarine Parker’s favor in February 1944, Harper Lee was a senior in high school and Alice Lee was back in town as a lawyer. The lawyers in a small town usually know when a case from local their court is reversed by the Supreme Court of Alabama. The lawyers discuss it with the local judge. Therefore, it also seems likely that this case would have been a subject of discussion at the Lee dinner table in 1944, among Mr. Lee, lawyer Alice Lee and Harper Lee, then a 12th-grade senior at Monroe County High School.*

Henry L. “Max” Cassady, Jr.



Max Cassady is a civil trial lawyer in Fairhope and Evergreen. Cassady is married to Utopia Conger Cassady, also a member of the Alabama State Bar.



Controversial Overtime Rule

Goes into Effect December 1

By Jenna M. Bedsole and Dena H. Sokolow

On May 18, 2016, the Department of Labor (DOL) announced new overtime regulations

which were published in the *Federal Register* on May 23, 2016. It estimated 4.2 million workers will be affected by the new rules that go into effect as of December 1, 2016 – 60,000 in Alabama.¹

A Little History

The Fair Labor Standards Act (FLSA), the federal wage law, was passed in 1938 and it requires employees to be paid at least the federal minimum wage (currently \$7.25 per hour) and overtime for any time worked in excess of 40 hours in a workweek.² Overtime is calculated at one and a half times the employee's regular rate of pay.³ In general, those businesses that have employees who are “engaged in commerce or in the production

of goods for commerce” or whose employees handle, sell or otherwise work on goods that move in commerce” are subject to the FLSA if they also have \$500,000 in annual gross volume in sales or business.⁴

The statute carves out a number of exemptions from the FLSA's minimum wage and overtime requirements. For example, Section 13(a)(1) of the FLSA exempts from minimum wage and overtime protection “any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of the Department of Labor], subject to the provisions of [the Administrative Procedure Act] . . .).”⁵ These exemptions are sometimes referred to as the “white collar” exemptions. However, the act itself does not define what constitutes an executive,

an administrator or a professional (“EAP”). The DOL through its regulations and the courts have been left to flesh out their meanings.

“Exemption” From Overtime

The DOL published its first regulations relating to the FLSA in October 1938. The regulations have been revised throughout the years but for the most part the “white collar” exemptions have been subject to a three-part test, namely:

- a) **How an Employee Is Paid—Salary Basis;**
- b) **How Much an Employee Is Paid—Salary Level/Threshold; and**
- c) **What Kind of Work Does the Employee Do—Job Duties Test**

All three parts must be satisfied in order for the employee to be exempt from the FLSA. If an employee is exempt, the employee can work any number of hours per week without minimum wage or payment of overtime.

How an Employee is Paid—the Salary Basis Test

First, the employee must be paid a pre-determined amount, a fixed salary that cannot be reduced regardless of the numbers of hours worked or not worked. It is not dependent on the quality or amount of work.⁶ As early as 1940, the DOL published revised regulations which added the salary basis test.⁷

How Much an Employee Is Paid—Salary Level/Threshold

Second, the salary must meet a specific minimum threshold—in the year the FLSA was passed, the minimum was \$30 per workweek for the administrative and executive exemptions.⁸ The salary threshold has changed over the years.

As noted below, in 1975, the salary threshold was set at \$155 per week.⁹ On August 23, 2004, the DOL increased the salary threshold for the executive, administrative and professional (EAP) exemptions to \$455 per week or \$23,660 per year.

Many employers mistakenly believe that paying salary alone renders an employee exempt from the statute—that is simply not the case. The DOL has “long recognized the salary level test is the best single test of exempt status for white collar employees” as it is objective and forms a bright line between exempt versus non-exempt employees.¹⁰

What Kind of Work Does the Employee Do—Job Duties Test

In 1966, the “long” and “short” duties tests were established.¹¹ Under the “short” test, the employee had to have been paid at least \$250—not including lodging, board or other facilities.¹² The

LONG TEST

Date Enacted	Executive	Administrative	Professional	Short Test (all)
1938	\$30.00	\$30.00		
1940	\$30.00	\$50.00	\$50.00	
1949	\$55.00	\$75.00	\$75.00	\$100.00
1958	\$80.00	\$95.00	\$95.00	\$125.00
1963	\$100.00	\$100.00	\$115.00	\$150.00
1970	\$125.00	\$125.00	\$140.00	\$200.00
1975	\$155.00	\$155.00	\$170.00	\$250.00

STANDARD TEST

2004

\$455

“long” test applied when the employee was paid less than \$250 but more than \$115 per week.¹³ Under both the “long” and “short” tests, the duties of the employee were evaluated; however, under the “long” test, because the employee was paid less, the duties received greater scrutiny. To pass muster under the “long” test, an exempt employee had to spend no more than 20 percent of his or her time (or 40 percent of his or her time in retail or service establishments) performing non-exempt work.¹⁴

The 2004 revisions replaced the “long” and “short” tests with the “duties test.” The duties test remains in place today. Under the “duties test,” the focus of the inquiry is on what the employee actually does to determine whether the employee is exempt from the overtime regulations. While job titles or descriptions are persuasive, they are not determinative.¹⁵ Further, to be exempt, the employee’s primary duty (generally 50 percent or more of the work time) must be spent on exempt work.¹⁶

For example, to satisfy the executive duties test, an employee’s primary duty must be the “management of the enterprise in which the employee is employed or of a customarily recognized department” and she must “customarily and regularly direct the work of two or more other employees.”¹⁷ In addition, the executive must have “the actual authority to hire, fire or make decisions regarding any other change of employees’ status, or her recommendations must be given ‘particular weight.’”¹⁸

Likewise, for the administrative exemption, not only must the employer pay the individual a pre-determined amount equal to or greater than the salary threshold but the duties test requires the administrative


employee to perform office or non-manual work “directly related to the management or general business operations of the employer or the employer’s customers” and his primary duty must include “the exercise of discretion and independent judgment with respect to matters of significance.”¹⁹

Again, the professional employee must be compensated on a salary at an amount not less than the salary threshold and the employee’s primary duty must require “knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction” or requires “invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.”²⁰ The 2004 regulations specifically included those who serve as “computer systems analysts, computer programmers, software engineers” or other similarly skilled workers as professionals and therefore eligible for an exemption—again if the salary basis and threshold tests have been satisfied.²¹ Unlike the EAP exemptions, computer employees have their own salary threshold—they must be paid at least \$27.63 per hour.²²

In 2004, the DOL streamlined the exemption for highly-compensated employees (“HCE”) who earn at least \$100,000 gross per year (including base salary, commissions and non-discretionary bonuses). The employees automatically became exempt if they also performed office or non-manual work and “customarily and regularly” performed one or more of the exempt duties contained as an executive, administrator or as a professional.²³

The 2004 regulations also revised the exemption for outside salespersons. The outside salesperson must be one whose primary duty is to

“obtain[] orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer” and who is customarily and regularly engaged in away from the employer’s place of business.²⁴ Importantly, unlike the EAP exemptions, outside sales employees do not have to be paid a salary nor are they subject to the salary threshold.²⁵ The regulations also include “incidental deliveries and collections” as exempt outside sales work. Likewise, work such as “writing sales reports, updating or revising the employee’s sales or display catalogue, planning itineraries and attending sales conferences that furthers the employee’s sales efforts” is regarded as exempt work.²⁶ After 2004, the FLSA regulations remained unchanged until this year.



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The Process— How Did We Get Here?

On March 13, 2014, President Barack Obama issued an executive memorandum directing Secretary of Labor Thomas Perez to “modernize and streamline” the overtime exemption regulations.²⁷ In particular, President Obama stated “regulations regarding exemptions from the Act’s overtime requirement, particularly for executive, administrative, and professional employees (often referred to as “white collar” exemptions) have not kept up with our modern economy. Because these regulations are outdated, millions of Americans lack the protections of overtime and even the right to the minimum wage.”²⁸ To that end, President Obama directed the Secretary of Labor to “consider how the regulations could be revised to update existing protections consistent with the intent of the Act, address the changing nature of the workplace and simplify the regulations to make them easier for both workers and businesses to understand and apply.”²⁹

On July 6, 2015, the DOL published its proposed changes to the overtime regulations—more than doubling the \$23,660 salary level to \$50,440 (or \$970 per week) and increasing the salary level for the highly-compensated exemption from \$100,000 to \$122,148.³⁰ Additionally, the DOL proposed a mechanism to automatically update the salary level annually using a fixed percentile of wages or the Consumer Price Index.³¹ The DOL’s final regulation was sent to the Office of Management and Budget (OMB) for review, which was completed on May 18, 2016. The Final Rule was published in

the *Federal Register* shortly thereafter on May 23, 2016.³²

The OMB listened to employers’ concerns about the complexity of compliance and provided an extended period, until December 1, 2016, before the Final Rule becomes effective and employers are required to be in compliance.³³

What Is the 2016 Final Rule?

The salary threshold doubled, but the Final Rule looks different than the DOL’s proposed rule and contains some concessions:

- The **2016 salary threshold is \$913/week or \$47,476/year**. The final rule is \$2,964 less than the originally proposed \$50,440 salary threshold. The salary threshold will be based upon the 40th percentile of the lowest-wage region as published by the Bureau of Labor Statistics, currently the South, rather than the entire country as initially proposed.³⁴ This change is likely the result of criticism the DOL received for basing their proposed rule on national statistics, which did not take into account regional salary fluctuations.³⁵ The DOL calculated due to the increased salary threshold 4.2 million employees who previously met the standard duties test will no longer fall within the exemption and thus must be paid overtime for any time over 40 hours.³⁶

For the highly-compensated employee exemption (HCE), however, the DOL based the new salary threshold on the weekly earnings of the 90th percentile of full-time salaried workers nationally, which will mean an increase in the HCE annual salary threshold from \$100,000 to \$134,004.³⁷

- One of the biggest concessions to employers is that **bonuses and incentives (including commissions) can be included to satisfy up to 10 percent of the standard salary level (i.e., up to \$4,747 of the annual salary)**. For the first time, non-discretionary bonuses and incentives (including commissions—which is surprising as the DOL said no commissions in the proposed rule) can be included *and* the rule (also for the first time) allows employers to make a “catch up” payment. For employers to credit non-discretionary bonuses and incentive payments toward a portion of the salary threshold, the Final Rule requires such payments to be paid on a quarterly or more frequent basis. If an employee does not earn enough in nondiscretionary bonuses and incentive payments (including commissions) in a given quarter to retain their exempt status, employers may make a lump-sum “catch-up” payment at the end of the quarter. The employer has one pay period to make up for the shortfall.³⁸
- The **automatic updates** to the salary threshold will be every three years beginning January 1, 2020. Rather than the initially proposed annual updates, the Final Rule provides for salary threshold updates every three years. This will be based on the 40th percentile of weekly earnings of full-time salaried workers in the lowest-wage region as determined by the Bureau of Labor Statistics, which is currently and will likely remain the South. The HCE will also be updated every three years based upon the 90th percentile, using the nationwide statistics.³⁹ Based upon current trends, it is estimated the standard

threshold will be approximately \$51,168 and the HCE \$147,524 in 2020.

• **No changes to the duties test.**

There was some speculation that the DOL would revise the duties test in the Final Rule, but they did not touch them.

When Will the Final Rule Be Effective?

The final rule was published in the *Federal Register* on May 23, 2016. Although by law employers were only required to be given 60 days to comply, the OMB extended the compliance date until December 1, 2016.⁴⁰ Employers have between now and the end of this month (November 2016) to get their affairs in order.

Why?

One of the purposes of the FLSA was to establish minimum labor standards to eliminate “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers.”⁴¹ The Supreme Court opined the FLSA was “to aid the unprotected, unorganized, and lowest paid of the nation’s working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage.”⁴²

In announcing the 2016 revisions, the DOL has set forth several policy objectives. First, the DOL postulates that an increase to the salary threshold will increase employment. According to the DOL, employers will be incentivized to hire more employees

rather than pay their current employees the higher salary threshold to keep the employees exempt. To avoid paying overtime, employers will hire more employees to do the job formerly done by an exempt employee.⁴³

The increased salary threshold, according to the DOL, also provides clarity to employers because fewer employees will be subject to the duties tests with the increased salary threshold.⁴⁴ Those employees currently paid less than \$47,476 fail the second test (the salary threshold test) and therefore employers do not have to undergo the duties test. The employees do not qualify for the exemption before an examination of their duties and simply must be paid overtime. The DOL also maintains the 2016 revisions reduce an employee’s workload and its detrimental effect on the health and well-being of the worker.⁴⁵

What Should Employers Do Now?

Wage and hour claims are old news for most industries. According to the federal judiciary, in 2002, 2,035 FLSA lawsuits were filed. The very next year, the number almost doubled to 4,055. The number has continued to increase, and in 2015, the number climbed to 8,070 federal FLSA lawsuits.⁴⁶ Wage-and-hour litigation will only increase under the 2016 Final Rule as employers grapple with the many positions barely meeting the current threshold requirements, including assistant managers, supervisors, back office administrators and sales employees.

So what should employers do now? Here are some initial steps:

1. Identify employees who must be reclassified, i.e. current employees who are currently exempt, but paid less than \$47,476 annually.
2. Determine the number of hours the employee works. This seems simple but exempt employees are not required to track their hours, and, therefore, employers may not be fully aware of the hours an exempt employee is working.
3. Analyze the financial impact. Should the employer raise pay to the new threshold level, reclassify employees as nonexempt and pay overtime or lower pay to offset the overtime requirement?
4. Review job descriptions and tasks of affected positions to determine if certain exempt

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tasks may be reassigned or maintained with the current position.

5. Consider how pay changes or other changes in job assignments may affect the organization. Will the employer need to make process or structural changes?
6. Develop communication and administrative plans to ensure compliance when the regulations become official. This means employers should prepare and train managers.
7. Remember the FLSA provides strict record-keeping requirements for employers to track working hours. Review record-keeping procedures.

These rules are complex, and there are serious financial consequences if an employer has been

found to be in violation of them. The DOL's budget for FY2017 includes \$277 million for wage-and-hour division enforcement, an increase of \$50 million from FY2016. Now that the rule has been finalized, the DOL will be eager to ensure employers are in compliance. ▲

Endnotes

1. <https://www.dol.gov/featured/overtime>.
2. 3 Fed. Reg. 2518 (October 20, 1938).
3. 29 U.S.C. § 207(a)(1).
4. 29 U.S.C. §203(s).
5. 29 U.S.C. § 213(a)(1).
6. 29 C.F.R. § 541.602
7. 5 Fed. Reg. 4077 (Oct. 15, 1940).
8. 3 Fed. Reg. 2518 (Oct. 20, 1938).
9. 69 Fed. Reg. 22122 (Apr. 23, 2004).
10. 81 Fed.Reg. 32391* 32392; 32400-01 (May 23, 2016).
11. Sec. 214, Public Law 89-601, 80 Stat. 830 (Sept. 23, 1966).
12. 29 C.F.R. § 541.2(e)(2).
13. See generally *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 626 (11th Cir. 2004).
14. *Hogan v. Allstate Ins. Co.*, 361 F.3d 621, 626 n.3(11th Cir. 2004).
15. 29 C.F.R. §541.2.
16. 29 C.F.R. §541.100.
17. 29 C.F.R. §541.100 (a)(2) and (3).
18. 29 C.F.R. §541.100(a)(4).
19. 29 C.F.R. §541.200(a)(2) and (3).
20. 29 C.F.R. §§ 541.303(d); 541.304(d). 9 C.F.R. §541.300.
21. 29 C.F.R. § 541.400.
22. 29 C.F.R. § 541.400(b).
23. 29 C.F.R. § 541.601.
24. 29 C.F.R. § 541.500(a).
25. 29 C.F.R. § 541.500(c).
26. 29 C.F.R. § 541.500(b).
27. 79 Fed. Reg. 18737 (Apr. 3, 2014).
28. See *id.*
29. See *id.*
30. 80 Fed. Reg. 38516 (July 6, 2015).
31. Fed. Reg. 38516, 38537 (July 6, 2015).
32. Fed. Reg. 32391 (May 23, 2016).
33. See *id.* at *32499.
34. See *id.* at *32404.
35. See *id.* at *32393
36. See *id.* at * 32405.
37. See *id.* at *32429.
38. See *id.* at *32426-27.
39. See *id.* at *32430.
40. See *id.* at *32499.
41. 29 U.S.C. § 202(a).
42. *Brooklyn Sav. Bank v. O'Neil*, 63 S. Ct. 895, 902 n.18 (1945).
43. See e.g., *Davis v. J.P. Morgan Chase*, 587 F.3d 529, 535 (2d Cir. 2009).
44. 81 Fed. Reg. 32391 *32393(May 23, 2016).
45. See e.g., *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 739 (1981).
46. <http://www.uscourts.gov/statistics-reports/analysis-reports/federal-judicial-caseload-statistics>.

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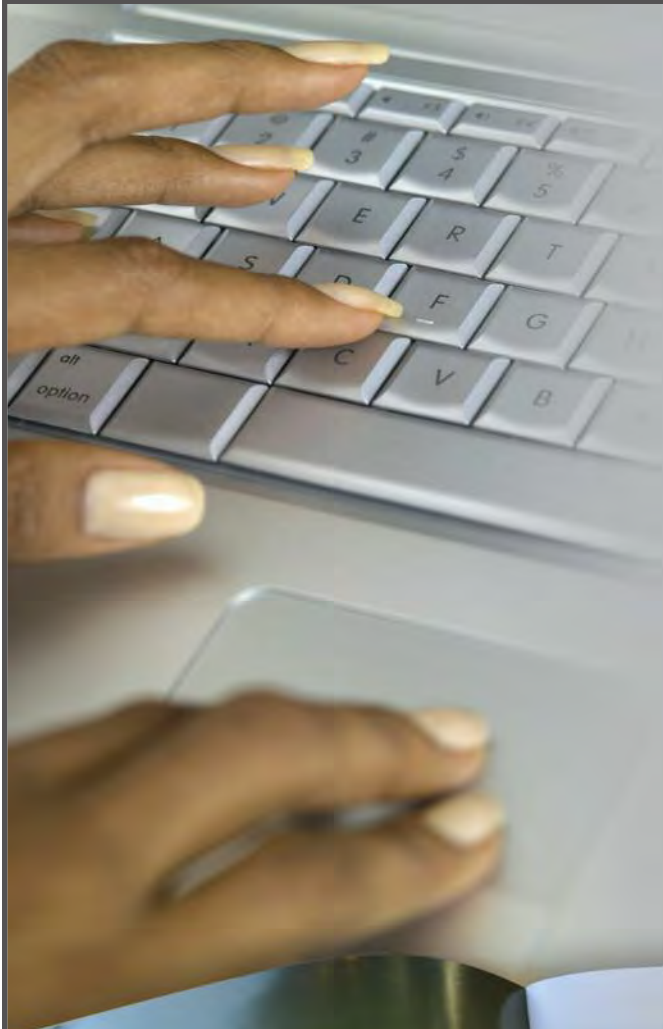
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Transitioning to the Transgender Workplace

*What Lawyers and Their
Clients Need to Know*



By Sandra B. Reiss

Recent headlines have focused greater attention on the transgender community. Though we live and practice law in the “Deep South,” this issue and the individuals who are considering transitioning or who have already done so will soon become more visible and a part of your workplace, client list, circle of friends or a member of your family. This article should provide you with an introduction to terms and a short history of transgender people, as well as recent employment laws changes protecting these individuals, state and local legislation as it relates to the transgender population and some practical pointers for assisting transgender employees.

History, Facts and Figures

The term “transgender” refers to people whose gender identity, not sexual attraction, differs from the sex they were identified with at birth. A transgender person may identify as male-to-female (transitioning from male to female) or as female-to-male, and most transgender persons describe their condition as one of feeling, with unbearable intensity, they were born in the wrong body.¹ Well-known figures such as Caitlyn Jenner and Laverne Cox, of the Netflix show “Orange Is the New Black,” are identified as transgender women because they were born as biological males or identified as such at birth, and have transitioned to become the female they long believed and felt they were since childhood.² Children as young as three years of age have experienced and voiced this sense of gender dysphoria.³

The gender transition process is usually long and involved and frequently includes intensive counseling, legal changes and medical procedures in

order to complete the transition and live in society as the gender one believes he or she was born to be. One of the first recorded transgender men was Lawrence Michael Dillion, born May 1, 1915 in London as Laura Maud Dillon. In 1942, she began the process of taking male hormones and had necessary surgeries. In 1944, she amended her birth certificate, changing “daughter” to “son” and “Laura Mead” to “Laurence Michael.” Laurence Michael later enrolled in medical school and during his holidays underwent additional surgeries to complete the transition to becoming a male.⁴ He served as a ship’s doctor on voyages to Asia, Australia and America; however, after his “secret” was disclosed without his consent, he fled to Calcutta and lived in a Buddhist monastery later becoming ordained as a monk in the Tibetan Order.

The first well-known transgender woman in the United States was Christine Jorgensen. She was born George William Jorgensen, Jr. in May 1926, and grew up in the Bronx as a male. She was drafted into the U.S. Army in 1945, and attended college and worked as a dental assistant. Ms. Jorgensen began taking hormones and had two major surgeries abroad in 1951 and 1952 as such medical procedures were not readily available in the United States. She later located to California and died in 1989.⁵

It is estimated that 0.3 percent or 700,000 Americans identify as transgender.⁶ The average transgender American earn less than \$10,000 a year and the rate of poverty among this group is four times higher than the national average, an irony given that these individuals as a whole, have a higher education level than the general population.⁷

Federal Law Now Protects Transgender Employees and the Eleventh Circuit Court Of Appeals Opened the Door to This Protected Class

If you are an employer with 15 or more employees in this or the previous year, you may not discriminate

against a transgender employee or applicant as to any recognized term or condition of employment, including, but not limited to, hiring, promotion, termination, discipline and pay. In 2012, the Equal Employment Opportunity Commission (“EEOC”) held that discrimination against a person because he or she is transgender is discrimination “because of sex and therefore is prohibited under Title VII of the Civil Rights Act of 1964.”⁸ In sum, **making employment decisions because an employee or applicant does not fit a gender stereotype is a form of sex or gender discrimination.** The EEOC has made coverage of “lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions. . .” an enforcement priority for FY 2013-2016.⁹ In the final three quarters of 2013, the EEOC received 147 charges of discrimination and/or harassment based on gender identity/transgender status. In 2014, that number grew to 202 charges, and as of the first two quarters of 2015, 112 charges had already been filed based on transgender status.¹⁰ In 2014, of the 9.2 percent transgender cases settled by the EEOC, the claimants were awarded \$530,995, which did not include the other 90.8 percent of cases that went to court or were settled privately between the parties.¹¹ Discrimination based on transgender status applies to both public and private sector employees.¹²

Even before the EEOC recognized transgender status as a protected category, the Eleventh Circuit Court of Appeals played an important role in recognizing the rights of transgender employees before they were officially protected by the EEOC and Title VII of the Civil Rights Act of 1964. In *Glenn v. Brumby*, a claim including direct evidence arising under Section 1983, the **defendant appealed from an adverse summary judgment in favor of the plaintiff** finding that Brumby had violated the Equal Protection clause based on sex discrimination 663 F.3d 1312 (11th Cir. 2011). At the time, plaintiff Glenn was working as an editor for the Georgia General Assembly Office of Legislative Counsel (“OLC”). Defendant Brumby was the head of the OLC and was responsible for personnel decisions. Glenn, a male-to-female transgender individual was diagnosed with Gender Identity Disorder (“GID”) in 2005, and began transitioning from male to female under the supervision of health care providers. Part of the treatment required Glenn to live as a woman outside of the workplace as a prerequisite to surgery. 663 F.3d at 1313. “In . . . 2007, Glenn informed . . . [her

immediate supervisor] that she was ready to proceed with gender transition and would begin coming to work as a woman and was also changing her legal name.” *Id.* Glenn’s supervisor “Yinger informed Brumby, who . . . [in turn] terminated Glenn because ‘Glenn’s intended gender transition was inappropriate, . . . would be disruptive, . . . some people would view it as a moral issue and that it would make Glenn’s coworkers uncomfortable.’” *Id.* (emphasis added.)

In affirming summary judgment for the plaintiff, the appellate court composed of Judges Barkett, Pryor and Kravitch, stated, “[T]he questions here is whether discriminating against someone on the basis of his or her gender non-conformity constitutes sex-based discrimination under the Equal Protection Clause. For the reasons discussed below, we hold that it does.” *Id.* at 1316.

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. “The very acts that define transgender people as transgender are those that contradict stereotypes of gender appropriate appearance and behavior.” Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employer and Title II*, 95 Cal. L. Rev. 51, 563 (2007) . . . There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms. *Id.* (emphasis added).

In examining Glenn’s termination, the Court further stated, in this case, Brumby testified at his deposition that he fired Glenn because he considered it “inappropriate” for her to appear at work dressed as a woman and that he found it “unsettling” and “unnatural” that Glenn would appear wearing women’s clothing. Brumby testified that his decision to dismiss Glenn was based on his perception of Glenn as a “man

...making employment decisions because an employee or applicant does not fit a gender stereotype is a form of sex or gender discrimination.

dressed as a woman and made up as a woman” and Brumby admitted that his decision to fire Glenn was based on “the sheer fact of the transition.” 663 F.3d at 1320-1321.

The Court held that “Brumby’s testimony provides ample *direct evidence* to support the district court’s conclusion that Brumby acted on the basis of Glenn’s gender non-conformity. **If this were a Title VII case, the analysis would end here.**” 663 at 1321. (emphasis added)

In *Macy v. Eric Holder, Department of Justice, (Bureau of Alcohol, Tobacco, Firearms and Explosives), Agency*, the EEOC recognized, for the first time, that discrimination against transgender employees was a

form of sex discrimination under the Civil Rights Act of 1964 Agency No. ATF-2011-00751, Appeal No. 0120120821 (April 20, 2012). In short, Mia Macy, a police detective in Phoenix, was promised a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”) upon completion of a background check. During this time, Macy was transitioning to a female and once the ATF found out about her transition, Macy was told that “due to a federal budget reduction, the position . . . was no longer available.” Macy later found out the job had been filled by another candidate. Macy filed an EEO claim with the ATF and checked off the boxes “sex” and “female” and then typed “gender identity” and “sex stereotyping” as the basis of her complaint. The EEO, in responding her to complaint, alleged that while her sex discrimination charge could proceed, it did not recognize claims based on gender-identity stereotyping.

Relying heavily on the language in *Glenn, supra*, the EEOC, on appeal, reversed its characterization of Macy’s claims stating:

That the Agency mistakenly separated Complainants’ complaint into separate claims: one described as discrimination based on “sex” (which the Agency accepted for processing

under Title VII) and others that were alternatively described by Complainant as “sex stereotyping,” “gender transition/change of sex” and “gender identity” . . .

That Title VII’s prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when the employer prefers a man over a woman, or vice versa. But the statute’s protections sweep far broader than that, in part because the term “gender” encompasses not only a persons’ biological sex, but also the cultural and social aspects associated with masculinity and femininity.

The agency appeals decision concluded “that intentional discrimination against a transgender individual because that person is transgender is by definition discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.”

It is important to note that a person can present as transgender without having undergone any surgery or genital reassignment. As such, if a man or woman chooses to transition in appearance by clothing, hairstyle, hormone treatment, etc., that is sufficient to signify a change from their sexual identity at birth and to trigger legal protection.

One of the first transgender cases prosecuted by the EEOC in the private sector also occurred within the Eleventh Circuit. In 2014, the EEOC sued on behalf of the United States in *EEOC v. Lakeland Eye Clinic, P.A.*, alleging that the defendant discriminated against an employee after firing her when she began to present herself as a woman (M.D. Fla. Civ. No. 8:14-cv-2421-T35 AEP filed Sept. 25, 2014, settled April 9, 2015). In this case, the organization of healthcare professionals,

...if a man or woman chooses to transition in appearance by clothing, hairstyle, hormone treatment, etc., that is sufficient to signify a change from their sexual identity at birth and to trigger legal protection.

who had provided the male employee with satisfactory performance reviews, fired the same employee when she began presenting as a female. The case settled on April 9, 2015 for \$150,000, along with injunctive relief.¹³

Transgender discrimination is not only actionable in a scenario when an employee is fired, like other protected categories, but is also subject to litigation where an employee alleges harassment. Further, the settlements in these cases can be markedly different than in other hostile environment cases and can even result in a change to a defendant’s healthcare benefits. In *EEOC v. Deluxe Financial Services Corp.*, the EEOC sued the defendant after it refused to allow Britney Austin, a long-term employee who began to present as a woman, to use the women’s restroom in violation of Title VII (D. Minn. Civ. No. 0:15-cv-02646-ADM-SER, June 4, 2015). The EEOC also

alleged that Ms. Austin was subject to a “hostile work environment including hurtful slurs and intentionally using the wrong gender pronouns when speaking to or referencing her. The EEOC alleged that such “conduct violates Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination, including that based on transgender status and gender stereotyping.”¹⁴ In January 2016, defendant Deluxe Financial settled the lawsuit for \$115,000 dollars in addition to a three-year consent decree which requires that Deluxe issue a letter of apology to Ms. Austin and a letter of reference to future employers.¹⁵ The settlement also “provides that, as of January 1, 2016, Deluxe’s national health benefits plan will not include any partial or categorical exclusion for other medically necessary care based on transgender status.”¹⁶

Importantly, as with all cases arising under Title VII, the same burdens of proof and standards of evidence are required by parties trying transgender discrimination or harassment cases. This includes the

issue of arbitration. *Broussard v. First Loan Tower*, involves the interesting case of the hire and the quick fire of a transgender man, 2015 U.S. Dist. LEXIS 165636, (E. D. La.). As the court explained, Broussard “is a transgender man, meaning he outwardly appears to be male and his gender identity is male. However, his birth sex is female.” *Id.* Broussard applied for a job as a manager trainee at Tower’s Lake Charles office. Sparks, a manager, interviewed Broussard and called him later that day offering him a job. The following week, when Broussard appeared for employment, he was required to sign an arbitration agreement related to his employment and fill out various human resource documents, including providing his driver’s license. When Sparks noticed that Broussard’s driver’s license listed his sex as female, he asked him about it and Broussard explained he was a transgender male.

A month after his hire, Tower Loan vice president Morgan visited the Lake Charles office.

Morgan gave Broussard a copy of the company’s dress code for female employees and informed Broussard that the company would require him to dress as female. Morgan also presented Broussard with a written statement and told him that he must sign the statement in order to continue working at Tower. The statement expressed that Broussard’s “preference to act and dress as male” was not “in compliance with Tower Loan’s personnel policies.” Further, the statement indicated that when an overnight room is required for out-of-town meetings, Broussard would be assigned to a room with a female. Broussard refused to sign the statement and his employment was terminated. *Broussard*, at * 8.

Broussard filed an EEOC charge alleging sex discrimination and subsequently filed a lawsuit in federal court. Tower filed suit against Broussard in the chancery court seeking to compel arbitration. Broussard removed the case to federal court and both cases were joined. The EEOC intervened. The parties argued the merits of arbitration and currently the case is stayed pending arbitration.

As of this writing, there have been, or are pending cases alleging transgender discrimination in federal courts in the following circuits: Second (New York), Third (Pennsylvania), Fourth (Maryland, North Carolina), Fifth (Louisiana, Texas), Sixth (Michigan, Ohio), Eighth (Minnesota), Ninth (California), Tenth

(Kansas), Eleventh (Alabama, Florida and Georgia) and the District of Columbia.¹⁷

Numerous States, Counties and Municipalities Are Passing Transgender Anti-Discrimination Laws

States, counties and municipalities are also drafting and instituting laws to protect transgender employees and citizens. In 1993, Minnesota became the first state to pass a law protecting the employment rights of transgender workers.¹⁸ As of February 2016, 20 states (California, Colorado, Connecticut, Delaware, Hawaii, Iowa, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Nevada, Oregon, Rhode Island, Utah, Vermont and Washington), as well as the District of Columbia and Puerto Rico, have laws protecting gender identity in the workplace.¹⁹ As such, 47 percent of LGBT persons live in states with statutes protecting employment discrimination based on their status.²⁰

As of January 2015, at least 225 counties and municipalities have also passed laws protecting transgender employees and this number does not include those counties and cities that have passed ordinances protecting only public employees.²¹ Some of these counties and cities are in states where there is no statewide legislation protecting such classifications, such as Fayetteville, Arkansas; Broward County, Florida; Atlanta and Boise. Many of the existing discrimination statutes are short, plainly written and may simply be amended by adding the category of transgender to the list of protected categories such as sex, race and religion.

An example of such policy may be instructive. In August 2013, the City of Frankfort, Kentucky passed sweeping transgender non-discrimination policies in a number of areas including housing, employment and public accommodations.²² The general policy states:

§ 96.01 POLICY.

“It is the policy of the City of Frankfort for all individuals within the City of Frankfort to be free from discrimination in housing, employment, and

public accommodation because of race, color, religion, national origin, familial status, age forty (40) and over, disability, sex, gender identity, or sexual orientation.”²³

Chapter 96 of the ordinance also defines the terms “discrimination” and “gender identity” and sets forth unlawful practices in housing including the categories of sales or rentals, financing and brokerage services and also explains unlawful practices in public accommodations and employment. Chapter 96 also provides exemptions for religious entities such as the following:

§ 96. 11 GENERAL EXEMPTION.

(B) The provision of this Chapter regarding sexual orientation or gender identity shall not apply to a religious institution, association, society or entity or to an organization operated for charitable or educational purpose, which is owned, operated or controlled by a religious institution, association, society or entity, except that when such an institute or organization received a majority of its annual funding from any federal, state, local or other governmental body or agency, or any combination thereof, it shall not be entitled to this exemption. (Ord. 7, 23013, passed, 8-29-13).

At this time, Alabama has no state, county or local laws protecting transgender employees, but federal and constitutional mandates apply to Alabama employers including public and private entities. As such, at this time a person applying for, or working with, an employer with more than 15 employees can sue for transgender discrimination in Alabama.

OSHA Issues Workplace Guidelines for Employers with Transgender Employees

Restroom preferences may be the most controversial and public of issues for transgender individuals. The majority of the 20 largest cities now enforce state or local laws allowing people to use the “bathroom of the gender they identify with,” but elected officials are experiencing strong pushback in this area. On February 23, 2016, the City Council of Charlotte, North Carolina voted 3-2

passing an ordinance protecting the “restroom choices of transgender people” which the governor threatened to effectively ban by statewide legislation.²⁴ Exactly a month later on March 23, 2016, the North Carolina Legislature met for a special session wherein the Charlotte ordinance on use of bathrooms was overturned by a state bill which was signed by the governor.²⁵ “The law not only overturns Charlotte’s ban; It also prevents any local governments from passing their own non-discrimination ordinances, [and] mandates that students in state’s schools use bathrooms corresponding to the gender *on their birth certificate . . .*”^{26,27} As such, even if a person has had gender reassignment surgery, he or she must still use the bathroom of the gender on their birth certificate. On March 27, 2016, a complaint was filed in federal court in Raleigh, North Carolina by, *inter alia*, two transgender males, a law professor and various civil rights groups challenging the legislation.²⁸

The same concerns and controversies hold true in the workplace. In *Glenn, supra*, the appellant tried, unsuccessfully, to raise this issue on appeal. *Glenn*, 663 F.3d at 1321. In June 2015, the Occupational Safety and Health Administration (“OSHA”) published *A Guide to Restroom Access for Transgender Workers*.²⁹ OSHA was the natural choice to publish this guide as this agency is responsible for ensuring that employers provide employees with sanitary and available toilet facilities.

When the guide was released, Dr. David Michaels, assistant Secretary of Labor for OSHA, stated that the “core principle is that all employees, including transgender employees, should have access to restrooms that correspond to their gender identity.” In practicality, this means that an employee who identifies as a male should be permitted to use the men’s restroom.

Specifically, the guide reads:

Gender identity is an intrinsic part of each person’s identity and everyday life. Accordingly, authorities on gender issues counsel that it is essential for employees to be able to work in a manner consistent with how they live the rest of their daily lives, based on their gender identity. Restricting employees to using only restrooms that are not consistent with their gender identity, or segregating them from other workers by requiring them to use gender-neutral or other specific restrooms, singles those employees out and may make them fear for their physical safety. Bathroom restrictions can result in employees

avoiding using restrooms entirely while at work, which can lead to potentially serious physical injury or illness.³⁰

The guide also includes the following:

[I]n April 2015, the EEOC ruled that a transgender employee cannot be denied access to the common restrooms used by other employees of the same gender identity, **regardless of whether that employee has had any medical procedure or whether other employees may have negative reactions to allowing the employee to do so. The EEOC held that such a denial of access constituted direct evidence of sex discrimination under Title VII.**³¹ (emphasis added.)

While this is merely a guide, employers would be wise to follow its directions as it is already being used by the EEOC to find evidence of discrimination and will surely be referenced in lawsuits and judicial opinions. *See supra, EEOC v. Deluxe Financial Services Corp.*

Suggested Practices

Many employers may already have transgender employees working for them without their knowledge, but in all cases it is very wise not to make decisions based on stereotypes—this practice serves the employer well for any protected category. While case law is developing monthly on this issue, following these suggested practices should provide both the employer and employee with a fair workplace.

...a transgender employee cannot be denied access to the common restrooms used by other employees of the same gender identity, regardless of whether that employee has had any medical procedure or whether other employees may have negative reactions to allowing the employee to do so.

because he or she is transitioning. As noted above, trying to hide the employee or lessen or change responsibilities can be considered discrimination and lead to lawsuits. Any change in the terms and conditions of employment in close proximity to or “because of” the employee’s transgender status will be considered suspect.

- An employer who is approached by an employee who is transitioning, or who notices such changes, should sit down with the employee and have a sensitive conversation about what the employee would like to be called, what pronoun to use and other changes or adaptations that need to be made at the workplace. The employer may want to ask how long the transition will take and how the employee will want the transition to be communicated to other employees, if at all.
- An employer should allow a transgender employee to dress as the gender that he or she identifies as, while still complying with dress codes or workplace standards.
- An employee requiring medical procedures for a transition is most likely to have a “serious health condition” consistent with the Family and Medical Leave Act (“FMLA”) and may even be considered disabled by the Americans with Disabilities Amendment Act (“ADAAA”) if the applicant or employee has been diagnosed with “gender identity dysphoria.”
- A medical procedure or modification is not necessary for someone to begin presenting as transgender or to be recognized as transgender.
- The employee’s job duties, responsibilities and visibility should not change simply be-

- While an employer may consider offering single-occupancy restrooms to transgender employees, the employee is not required to use this facility and must be allowed access to the restroom that fits his or her gender identity. If the employer receives complaints from non-transgender employees, the employer may offer the non-transgender employee a single-occupancy restroom.
- Employers should update their personnel policies and handbooks, as well as postings to include “transgender” as a protected classification in their non-discrimination and non-harassment policies, and provide training to all managers in preventing such discrimination and/or harassment. ▲

Because of the lead time involved with publication deadlines, some issues addressed in this article—for example, legislative debates—may have resolved themselves. The Editorial Board regrets any changes in circumstances that have occurred since this article went to press.

Endnotes

1. A 2014 study revealed that 41 percent of transgender people attempt suicide, nine times the national rate. Reyes, Emily Alpert, “Transgender Study Looks at ‘Exceptionally High’ Suicide-Attempt Rate” L.A. TIMES January 28, 2014.
2. Shawn M. Burn, Ph.D., “Understanding the Changing Landscape of Gender Identity” PSYCHOLOGY TODAY, March 2014, www.psychologytoday.com/blog/presence-mind/201403/understanding-the-changing-landscape-gender-identity.
3. *Id.*
4. “The World’s First Transsexual Man,” 71 POLARI, <http://www.gendercenter.org/au/resources/polare-archive>, last visited October 2013.
5. Christine Jorgensen. BIOGRAPHY.COM., Jun 22, 2015, 01:05 from <http://www.biography.com/people/christine-jorgensen-262758>.
6. Tanya Lewis, “Bruce Jenner’s Transition: HOW MANY AMERICANS ARE TRANSGENDER?” <http://www.livescience.com/50635-bruce-jenner-transgender-prevalence.html>, (April 27, 2015). (Interestingly, “that two-third of millennials (people ages 14 to 34) report that the traditional labels of male and female “do not adequately describe their gender roles and behavior.”)
7. The Editorial Board, “The Struggle for Fairness for Transgender Workers” *The New York Times* July 9, 2015.
8. *See, Macy v. Department of Justice, EEOC Appeal No. 0120120821 (April 2012).* “What You Should Know about EEOC and the Enforcement Provisions for LGBT Workers” U.S. Equal Employment Opportunity Commission.
9. “What You Should Know about EEOC and Enforcement Protections for LGBT Workers” http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.
10. http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.
11. *Id.*
12. In June 2015, the EEOC revised and published an eight-page guideline on LGBT rights in the federal workplace entitled, “Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment; A Guide to Employment Rights, Protections and Responsibilities” which can be found at [EEOC.gov](http://www.eeoc.gov).
13. <http://www.eeoc.gov/eeoc/newsroom/release/4-13-15.cfm>.
14. “Deluxe Financial to Settle Sex Discrimination Suit on Behalf of Transgender Employee” January 21, 2016, Press Release, U.S. Equal Employment Opportunity Commission, <http://www1.eeoc.gov/eeoc/newsroom/release/1-21-16.cfm>.
15. *Id.*
16. *Id.*
17. These articles do not address the numerous education cases, medical cases or changes in immigration and incarceration laws.
18. The Editorial Board, “The Struggle for Fairness for Transgender Workers” *The New York Times* July 9, 2015.
19. “Non-Discrimination Laws—Employment” TRANSGENDER LAW CENTER <http://transgenderlawcenter.org/equalitymap>.
20. *Id.*
21. “Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity” HUMAN RIGHTS CAMPAIGN <http://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender>.
22. CITY OF FRANKFORT CODE OF ORDINANCE, TITLE IX GENERAL REGULATIONS, Chapter 96, Fair Housing, Public Accommodations and Employment, Am. Ord. 7, 2013, passed 8-29-13.
23. *Id.*
24. Jonathon Drew and Gary Robertson, “Bathrooms Become Battlegrounds in Anti-Discrimination Debate”, Associated Press/ABC News February 23, 2016 <http://abcnews.go.com/Health/wirestory/nc-lawmakers-vow-overtturn-charlotte-transgender>.
25. David A. Graham, “North Carolina Overturns LGBT-Discrimination Bans” THE ATLANTIC Mar. 24, 2016, www.theatlantic.com/politics/archive/2016/03/north-carolina-lgbt-discrimination-transgender.
26. *Id.*
27. Jonathon Drew and Gary Robertson, “Bathrooms Become Battlegrounds in Anti-Discrimination Debate”, Associated Press/ABC News February 23, 2016 <http://abcnews.go.com/Health/wirestory/nc-lawmakers-vow-overtturn-charlotte-transgender>.
28. “North Carolina Sued over Transgender Bathroom Law” CBS/AP Mar. 28, 2016 www.cbsnews.com/news/north-carolina-sued-over-transgender-bathroom-law.
29. “Best Practices, A Guide to Restroom Access for Transgender Workers” Occupational Health and Safety Ass., www.osha.gov/Publications/OSHA3795.pdf.
30. *Id.*
31. *Id.* (referencing *Lusardi v. McHugh, EEOC Appeal No. 0120133395*, dated April 1, 2015.).

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*Council for Disability Awareness, Long Term Disability Claims Review, 2012.

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Alabama Medical Records

PART 1

By David G. Wirtes, Jr. and George M. Dent, III

Introduction

This article addresses five topics: 1. The sources of duties to create and maintain accurate medical records, 2. Accessibility to such records, 3. Discoverability of such records, 4. Admissibility into evidence of such records and 5. Exceptions to discoverability and admissibility.

Section I outlines the state, federal and voluntary bases of duties to create and maintain accurate medical records. Section II discusses accessibility to medical records; Section III discusses discoverability; Section IV discusses admissibility and Section V surveys the exceptions to discoverability and admissibility—such as when records contain quality assurance or peer review matters—and catalogues many of the controlling state and federal reported decisions.

Why be concerned with these varying requirements? Because we presently are in the midst of great changes in the way judges, lawyers and litigants must understand

and use medical records in litigation. Changes from traditional paper medical records to electronic medical records systems are occurring across the spectrum of healthcare providers, as intended by the Health Information Technology for Economic and Clinical Health (“HITECH” Act), which was enacted as part of the American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115 (commonly known as “The Stimulus” or “The Recovery Act”). Congress, through HITECH, provided more than \$50 billion for healthcare providers to transition from paper to electronic medical records systems.¹ As these changes unfold, problems concerning obtaining *complete* and *accurate* patient records for use in litigation have become commonplace.² Our goal is to marshal the hodgepodge of state and federal statutes, regulations, Joint Commission standards and common law decisions into one relatively comprehensive guide. We scrupulously avoid editorializing with the express hope our article becomes a useful tool for all judges and lawyers in this state.



Part 1

Duty to Create and Maintain Accurate Medical Records

There are three fundamental sources of duty for creation, maintenance and access to accurate medical records. They are found in: (A) Alabama's statutes and administrative regulations governing: (1) physicians, (2) nurses, (3) hospitals, (4) nursing facilities and (5) assisted living facilities; (B) federal Medicare and Medicaid regulations applying to: (1) participating hospitals, (2) nursing facilities, (3) assisted living facilities and (4) other specialties; and (C) voluntary standards such as accreditation guidelines issued by the Joint Commission ("JC"³), and universal standards established by the American Society for Testing and Materials ("ASTM").⁴

A. Alabama Statutes and Administrative Regulations

1. Physicians

Pursuant to the regulatory authority granted in § 34-24-311, *Ala. Code* 1975, the Alabama Medical Licensure Commission ("AMLC"), together with the Alabama Board of Medical Examiners ("ABME"), jointly promulgate regulations concerning physicians' duties to create, maintain and provide access to medical records. The duties are mandatory, as shown by §

34-24-360 (22), which gives the AMLC "the power and duty to suspend, revoke, or restrict" a physician's license to practice for failing to maintain a patient's medical record to the commission's "minimum standards."⁵ The AMLC, (specifically relying on § 34-24-360(22)'s "minimum standard" provision), promulgated baseline standards concerning the creation, maintenance and accessibility of medical records that "every physician licensed ... in Alabama shall maintain for each of his or her patients."⁶ Rule 545-X-4-.08(1), *Ala. Admin. Code*, requires physicians to "maintain legible well documented records reflecting the history, findings, diagnosis and course of treatment in the care of a patient ... for such period as may be necessary to treat the patient and for such additional time as may be required for medical legal purposes." Further, records must: (a) "reflect examinations, vital signs, and tests obtained, performed, or ordered and the findings or results of each"⁷; (b) "indicate the medications prescribed, dispensed, or administered and the quantity and strength of each"⁸; (c) "reflect the treatment performed or recommended"⁹; and (d) "document the patient's progress during the course of treatment."¹⁰

Section 34-24-504, regarding "Patient Medical Records," requires all physicians licensed by the state to protect patients' medical information and, specifically to "comply with all laws, rules, and regulations governing the maintenance of patient medical records,

including patient confidentiality requirements, regardless of the state where the medical records of any patient within this state are maintained.” Rule 545-X-4.06(11) explains that the AMLC has “the power and duty to suspend, revoke, or restrict” a physician’s license for “[u]nprofessional conduct,” such as “[i]ntentionally, knowingly or willfully causing or permitting a false or misleading representation of a material fact to be entered on any medical record of a patient,”¹¹ and “[f]ailing or refusing to maintain adequate records on a patient or patients.”¹²

2. Nurses

The Board of Nursing (“BoN”) has statutory authority to adopt regulations and standards governing the licensure and conduct of nurses,¹³ and to “deny, revoke, or suspend any license” for various infractions, e.g., if a nurse is found “guilty of unprofessional conduct of a character likely to deceive, defraud, or injure the public in matters pertaining to health.”¹⁴

Alabama Administrative Code Chapter 610-X-6 establishes the duties owed by registered nurses (“RNs”) and licensed professional nurses (“LPNs”) relative to medical records. These regulations define both comprehensive assessments (performed by RNs)¹⁵ and Focused Assessments (performed by RNs and LPNs alike).¹⁶

The BoN’s standards require nurses to “[r]espect the dignity and rights of patients,” including their right to the “[p]rotection of confidential information, unless disclosure is required by law.”¹⁷ The BoN pertinently requires nurses to “[a]ccept individual responsibility and accountability for accurate, complete, and legible documentation related to ... [p]atient care records.”¹⁸ Like physicians, RNs and LPNs risk severe sanctions for non-compliance with the regulatory requirements.¹⁹

3. Hospitals

Article 2 of Chapter 21 of Title 22 of the *Alabama Code of 1975* governs the “[l]icensing of hospitals, nursing homes, and other health care institutions.”²⁰ An entity must apply for and obtain a license from the state Board of Health (“BoH”) to “establish, conduct or maintain any hospital as defined in Section 22-21-20.”²¹

Section 22-21-28 empowers the BoH “to make and enforce, ... modify, amend, and rescind, reasonable rules and regulations governing the operation and conduct of hospitals as defined in Section 22-21-20. All such regu-

lations shall set uniform minimum standards applicable alike to all hospitals of like kind and purpose”²² The BoH may suspend or revoke a license for “[v]iolation of any of the provisions of this article or the rules and regulations issued pursuant thereto.”²³ *Alabama Administrative Code* Chapter 420-5-7 establishes the pertinent BoH regulations concerning hospitals’ duties to create and maintain medical records. Hospitals’ duties concerning medical records services are catalogued at Rule 420-5-7-.13(1)-(5).²⁴ For example, “[t]he hospital shall use a system of author identification and record maintenance that ensures the integrity of the authentication and protects the security of all record entries.”²⁵ “Medical records shall be accurately written, promptly completed, properly filed and retained, and accessible.”²⁶ “All patient medical record entries shall be legible, complete, dated, timed and authenticated in written or electronic form by the person responsible for providing or evaluating the service provided, consistent with hospital policies and procedures.”²⁷

4. Nursing Facilities

The definition of “hospitals” in § 22-21-20 includes “skilled nursing facilities, intermediate care facilities, assisted living facilities, and specialty care assisted living facilities rising to the level of intermediate care.” The Alabama Supreme Court held that a nursing home is a hospital for purposes of the Alabama Medical Liability Act (“AMLA”).²⁸ Thus, the statutes quoted above regarding the BoH’s licensure and governance of hospitals also apply to nursing facilities.

Alabama Administrative Code Chapter 420-5-10 outlines the duties imposed on nursing facilities by the BoH for creation and maintenance of medical records, which are detailed in Rule 420-5-10-.03(32)-(36).²⁹ Among other requirements, the records must be “in accordance with accepted professional standards and practices” and must be complete, accurately documented, readily accessible and systematically organized.³⁰ The “facility must safeguard clinical record information against loss, destruction, or unauthorized use” and also must clinical record must be retained for five years.³¹

5. Assisted Living Facilities

Assisted living facilities are also within the statutory definition of hospitals³² and thus subject to the

licensing and other provisions of Article 2 of the Hospitals and Other Health Care Facilities Chapter of the *Alabama Code*. The duties imposed upon assisted living facilities to create and maintain medical records are found in Rule 420-5-4-.05(1)-(3).³³ Records necessary for care, including care plans and admissions and examination records, “shall be accessible to the direct care staff at all times,” “shall be current” and “shall be retained in the facility for at least three years after a resident’s death or discharge.”³⁴ Such facilities are required to create and maintain incident reports for specified incidents with specified contents.³⁵ The records shall be confidential, but “[a] resident or his or her legal guardian may grant permission to any other individual to review the resident’s confidential records by signing a standard release.”³⁶

B. Alabama Common Law

The duties owed by healthcare providers to create, maintain and provide accurate medical records also spring from Alabama common law. When a healthcare provider destroys, hides, conceals, alters or tampers with medical records, they risk suffering adverse evidentiary inferences at trial, and they may be liable in tort for spoliation. An overview of the common law of spoliation of evidence appears in the Alabama Pattern Jury Charge on Spoliation of Evidence by a Defendant.³⁷ This instruction allows a jury to consider whether a defendant intentionally destroyed, hid, concealed, altered or tampered with evidence and, if the jury so finds, to draw “such inferences that you believe are reasonable from the wrongful conduct.”³⁸

Another Alabama Pattern Jury charge³⁹ outlines the common law tort claim of spoliation recognized in *Smith v. Atkinson*, 771 So. 2d 429 (Ala. 2000) (recognizing a cause of action against a third-party that spoliates evidence vital to a plaintiff’s claim against another).

When a healthcare provider destroys, hides, conceals, alters or tampers with medical records, they risk suffering adverse evidentiary inferences at trial, and they may be liable in tort for spoliation.

Our supreme court has applied these common law spoliation principles to the attempted or successful alteration or destruction of medical records, as reflected in *May v. Moore*, 424 So. 2d 596 (Ala. 1982), and *Campbell v. Williams*, 638 So. 2d 804 (Ala. 1994).⁴⁰

C. Federal Medicare/Medicaid Regulations

The United States conditions the payment of Medicare and Medicaid funds to various healthcare providers on the providers’ compliance with stringent requirements to create and maintain accurate medical records. The regulations setting forth these conditions are in the “Public Health” regulations, Title 42 of the *Code of Federal Regula-*

tions. Chapter IV (Parts 400-699) of Title 42 gives the regulations pertinent to the Centers for Medicare and Medicaid Services (“CMMS”), a division of the Department of Health and Human Services (“HHS”).

CMMS imposes particularized medical records requirements upon hospitals,⁴¹ Ambulatory Care Centers (“ACC”),⁴² hospices,⁴³ elder care facilities,⁴⁴ home health services,⁴⁵ rural health clinics,⁴⁶ laboratories⁴⁷ and “End-Stage Renal Disease Facilities,”⁴⁸ as well as “Specialized Providers,” which encompasses Comprehensive Outpatient Rehabilitation Facilities (“CORFs”),⁴⁹ Critical Access Hospitals,⁵⁰ “Clinics, Rehabilitation Agencies and Public Health Agencies as Providers of Outpatient Physical Therapy and Speech-Language Pathology Services,”⁵¹ Community Mental Health Centers⁵² and psychiatric hospitals.⁵³

D. Joint Commission Standards

1. Medical Records Standards, Generally

The Joint Commission accredits more than 21,000 healthcare organizations and programs including general, psychiatric, children’s and rehabilitation hospitals; critical care hospitals; home healthcare organizations; nursing homes and other long-term care facilities; ambulatory care providers, clinical laboratories and other specialty healthcare providers.⁵⁴

Accreditation by the Joint Commission requires adherence to standards as are set forth in organization-specific accreditation manuals. The Joint Commission performs periodic accreditation reviews of healthcare providers' compliance with its standards. Among criteria surveyed for accreditation are medical records services.

The Comprehensive Accreditation Manual for Hospitals ("CAMH"), effective January 2016, states that it is "a one-stop resource to help your hospital achieve or maintain continuous compliance with the joint commissions standards." CAMH p. HM - 1. Pertinent here are the chapters on Information Management ("IM") and, especially, Record of Care, Treatment and Services ("RC").

Standard IM.01.01.01 covers "hospital plans for managing information," including Elements of Performance standards.⁵⁵ STANDARD IM.02.01.03 provides: "The hospital maintains the security and integrity of health information." CAMH, p. IM-6. The introduction to this standard says that "[e]ven simple mistakes, such as writing the incorrect date of service or diagnosis, can undermine data integrity just as easily as intentional breaches. For these reasons, an examination of the use of paper and electronic information systems is considered in the hospital's approach to maintaining the security and integrity of health information." *Id.* Under the Elements of Performance for this standard, numbers 6 and 7 are especially pertinent to the integrity of health care records. They provide: "6. The hospital protects health information against loss, damage, unauthorized alteration, unintentional change, and accidental destruction," and "7. The hospital controls the intentional destruction of health information." CAMH, p. IM - 7.

Standard IM.02.02.01 provides: "The hospital effectively manages the collection of health information." Elements of Performance 1 requires "uniform data sets to standardize data collection throughout the hospital."

A highly detailed document when seen in its entirety, the record of care comprises all data and information gathered about a patient from the moment he or she enters the hospital to the moment of discharge or transfer.

Elements of Performance 2 requires "standardized terminology, definitions, abbreviations, acronyms, symbols, and dose designations." CAMH, IM - 7.

Standard IM.02.02.03 provides: "The hospital retrieves, disseminates, and transmits health information in useful formats." *Id.*, IM - 8. Standard IM.03.01.01 provides: "Knowledge-based information resources are available, current, and authoritative." Standard CAMH, p. IM-9 provides: "The hospital maintains accurate health information." This requires both that the hospital's health information be accurate and that the hospital maintain it.

2. Record of Care, Treatment and Services

The overview of this chapter tells how important it is:

The "Record of Care, Treatment, and Services" (RC) chapter contains a wealth of information about the components of a complete medical record. A highly detailed document when seen in its entirety, the record of care comprises all data and information gathered about a patient from the moment he or she enters the hospital to the moment of discharge or transfer. As such, the record of care functions not only as a historical record of a patient's episode(s) of care, but also as a method of communication between practitioners and staff that can facilitate the continuity of care and aid in clinical decision-making.

CAMH, p. RC - 1.⁵⁶

3. Sentinel Events Records

An important part of the accreditation process is the Joint Commission's review of responses to "sentinel events." The Commission defines a sentinel event as "an unexpected occurrence involving death or serious physical or psychological injury, or the risk thereof ... [including] any process variation for which a recurrence would carry a significant chance of a serious

adverse outcome.” The purpose of its sentinel event policy is explained this way:

The Joint Commission adopted a formal Sentinel Event Policy in 1996 to help hospitals that experience serious adverse events, improve safety, and learn from those sentinel events. Careful investigation and analysis of patient safety events, as well as strong corrective actions that provide effective and sustained system improvement, is essential to reduce risk and prevent patient harm. The Sentinel Event Policy explains how the Joint Commission partners with hospitals that have experienced a serious patient safety event to protect the patient, improve systems and prevent further harm.

CAMH SE - 1. The chapter defines sentinel event as follows:

A sentinel event is a patient safety event (not primarily related to the natural course of the patient’s illness or underlying condition) that reaches a patient and results in any of the following:

- Death
- Permanent harm
- Severe temporary harm, which is defined as “critical, potentially life-threatening harm lasting for a limited time with no permanent residual, but requires a transfer to a higher level of care/monitoring for a prolonged period of time, transfer to a higher level of care for a life-threatening condition, or additional major surgery, procedure, or treatment to resolve the condition.”⁵⁷

The Joint Commission prescribes the following responses to sentinel events:

Such events are considered “sentinel” because they signal a need for immediate investigation and response. All sentinel events must be reviewed by the hospital and are subject to review by the Joint Commission. Accredited hospitals are expected to identify and respond appropriately to all sentinel events (as defined by the Joint Commission) occurring in the hospital or associated with services that the hospital provides. An appropriate response includes all of the following:

- A formalized team response that stabilizes the patient, discloses the event to the patient and family and provides support for the family as well as staff involved in the event
- Notification of hospital leadership
- Immediate investigation
- Completion of a comprehensive systematic analysis for identifying the causal and contributory factors
- Identification of corrective actions to eliminate or control system hazards or vulnerabilities directly related to causal and contributory factors
- Timeline for implementation of corrective actions
- Systemic improvement

This chapter has further sections on the Goals of the Sentinel Event Policy, Responding to Sentinel Events, the Sentinel Event Database, Determination That a Sentinel Event Is Subject to Review, Optional On-Site Review of a Sentinel Event, Disclosable Information, the Joint Commission’s Response, Sentinel Event Measure of Success (SE MOS), Handling Sentinel Event-Related Documents, Oversight of the Sentinel Event Policy, Survey Process and an Appendix on Accreditation Requirements Related to Sentinel Events. CAMH SE - 4-17.

E. ASTM Standards

“[E]vidence of a defendant’s compliance with applicable industry standards may be relevant and admissible for purposes of determining whether a defendant breached a duty of care it owed an injured plaintiff.”⁵⁸

The American Society for Testing and Materials (“ASTM”) is a globally recognized leader in the development and delivery of voluntary consensus standards. ASTM employs more than 140 Technical Standards writing committees which have promulgated more than 12,000 ASTM standards used around the world to, among other things, enhance health and safety.⁵⁹ Pertinent here, ASTM has standards concerning electronic medical records:

- Standard Practice for Content and Structure of the Electronic Health Record⁶⁰
- Standard Specification for Audit and Disclosure Logs for Use in Health Information Systems⁶¹

- Standard Guide for Confidentiality, Privacy, Access and Data Security Principles for Health Information Including Electronic Health Records⁶²
- Standard Specification for Coded Values Used in the Electronic Health Record⁶³
- Standard Practice for View of Emergency Medical Care in the Electronic Health Record⁶⁴
- Standard Practice for Defining and Implementing Pharmacotherapy Information Services within the Electronic Health Record (EHR) Environment and Networked Architectures⁶⁵

PART 2

Access to Medical Records

Patient access to medical records was traditionally governed by state law; however, federal law now plays an increasingly important role, especially with the advent of the Health Insurance Portability and Accountability Act of 1996, (“HIPAA”) now codified at 42 U.S.C. §§ 1320d-1, *et seq.*, with implementing regulations at 45 C.F.R. Part 160, 164, as augmented by the Health Information Technology for Economic and Clinical Health Act (“HITECH”), now codified at 42 U.S.C., §§ 17935, *et seq.*, with implementing regulations at 45 C.F.R. 164.524, *et seq.*

A. Alabama Code

In Alabama, access to medical records is governed in the first instance by state statutes and state regulations. Section 12-21-6.1, *Ala. Code* 1975, defines the meaning of various terms related to the “Reproduction and delivery of medical records.”⁶⁶

Section 34-26-2, *Ala. Code* 1975 and Rule 503, Ala. R. Evid. protect from disclosure (and admission into evidence) records of confidential relations and communications between patients and psychologists, psychiatrists and other psychotherapists.⁶⁷ Section 22-11A-22, *Ala. Code* 1975, likewise cloaks medical records of persons with sexually transmitted diseases protection from public disclosure and admission into evidence.⁶⁸ Section 22-50-62, *Ala. Code* 1975, cloaks mental health records compiled by Alabama Department of

Mental Health and Mental Retardation with additional special protections.⁶⁹

B. Alabama Administrative Regulations

Regulations promulgated by the State Board of Medical Examiners and the Medical Licensure Commission also specify the duties of Alabama’s physicians to make medical records accessible to their patients:

1. Alabama Administrative Code § 545-X-4-.08

Joint Guidelines of the State Board of Medical Examiners and Medical Licensure Commission for Medical Records Management.

(2) Access. On the request of a patient, and with the authorization of the patient, a physician should provide a copy or a summary of the medical record to the patient or to another physician, attorney or other person designated by the patient. By state law, a physician is allowed to condition the release of copies of medical records on the payment by the requesting party of the reasonable costs of reproducing the record. Reasonable cost as defined by law may not exceed one dollar (\$1.00) per page for the first twenty-five (25) pages, fifty cents (\$.50) per page for each page in excess of twenty-five (25) pages, a search fee of five dollars (\$5.00) plus the actual cost of mailing the record. In addition, the actual costs of reproducing x-rays or other special records may be included. For medical records provided in an electronic file, a flat fee that would not exceed the cost of providing the records in paper form may be charged. Records subpoenaed by the State Board of Medical Examiners are exempt from this law. Physicians charging for the cost of reproduction of medical records should give primary consideration to the ethical and professional duties owed to other physicians and to their patients, and waive copying charges when appropriate.

C. Alabama Common Law

In *Horne v. Patton*, 291 Ala. 701, 287 So. 2d 824 (1974), the supreme court held that a complaint

alleging that a doctor improperly disclosed the plaintiff's medical information to the plaintiff's employer, resulting in his being fired, stated causes of action for breach of fiduciary duty, invasion of privacy and breach of implied contract. The court wrote "[I]t must be concluded that a medical doctor is under a general duty not to make extra-judicial disclosures of information acquired in the course of the doctor-patient relationship and that a breach of that duty will give rise to a cause of action." *Horne* was followed in *Mull v. String*, 448 So. 2d 952 (Ala. 1989), and *Crippen v. Charter Southland Hospital, Inc.*, 534 So. 2d 286 (Ala. 1988).⁷⁰

D. HIPAA

In 1996, Congress enacted, and President Clinton signed into law, the Health Insurance Portability And Accountability Act ("HIPAA"), Pub. L. 104-191. Section 244 of that Act added to the U.S. Code a section on "False Statements Relating to Health Care Matters."⁷¹ That section made it a federal crime to, "in any matter involving a health care benefit program, knowingly and willfully ... make[] any materially false, fictitious or fraudulent statements or representations ... in connection with the delivery of ... health care ... services"⁷² The Department of Health and Human Services ("HHS") adopted regulations regarding the privacy of individually identifiable health information.⁷³ "Individually identifiable health information is information that ... [i]s created or received by a health care provider ... and [r]elates to the past, present, or future physical or mental health or condition of an individual; [or] the provision of health care to an individual; ... and [T]hat identifies the individual"⁷⁴ Further, "protected health information" is individually identifiable health information that is transmitted or maintained in electronic media or in any other form or medium.⁷⁵

HIPAA mandates that a health care provider "may not use or disclose protected health information" except as allowed by other provisions such as disclosing

The regulations allow a health care provider to "obtain consent of the individual to use or disclose protected health information to carry out treatment, payment, or health care operations."

the information to the individual patient or for further treatment of the individual or for payment for the health care provider's services.⁷⁶ The regulations allow a health care provider to "obtain consent of the individual to use or disclose protected health information to carry out treatment, payment, or health care operations."⁷⁷

Pursuant to these regulations, every health care provider now provides patients with a HIPAA Privacy Notice to sign. These notices derive from the regulation giving "an individual ... a right to adequate notice of the uses and disclosures of protected health information that may be made by the covered entity, and of the individual's rights and

the covered entity's legal duties with respect to protected health information."⁷⁸ The notice must have a header or other prominent display of the following: "THIS NOTICE DESCRIBES HOW MEDICAL INFORMATION ABOUT YOU MAY BE USED AND DISCLOSED AND HOW YOU CAN GET ACCESS TO THIS INFORMATION. PLEASE REVIEW IT CAREFULLY."⁷⁹

"[A]n individual has a right of access to inspect and obtain a copy of protected health information about the individual in a designated record set, for as long as the protected health information is maintained in the designated record set."⁸⁰ There are exceptions for psychotherapy notes and information for use in a civil, criminal or administrative action or proceeding.⁸¹ The HIPAA regulations also include Security Standards for the protection of electronic protected health information.⁸²

In short, HIPAA provides a *federal* baseline of health information privacy protections, which states are free to rise above in order to best protect their citizens. HIPAA and the standards promulgated by HHS expressly supersede any contrary provision of state law except as provided in 42 U.S.C. § 1320(d)-(7)(a)(2). Under that exception, HIPAA and its standards expressly do not preempt contrary state law if the state law "relates to the privacy of individually

identifiable health information,” and is “more stringent” than HIPAA’s requirements.⁸³ Many reported decisions address the scope and effect of HIPAA’s preemption provision.⁸⁴

HIPAA’s implementing regulations at 42 CFR § 482.13 give patients a right of access to their medical records. Entitled “Condition of participation: Patient’s rights,” this section begins: “A hospital must protect and promote each patient’s rights.” Paragraph (a) gives a standard for giving patients notice of their rights. Paragraph (b) gives a standard for exercise of rights. Paragraph (c) gives a standard for privacy safety. Paragraph (d), the standard for confidentiality of patient records, grants a patient “the right to access information contained in his or her clinical records within a reasonable time frame.”⁸⁵ Most importantly, “[T]he hospital must not frustrate the legitimate efforts of individuals to gain access to their own medical records and must actively seek to meet these requests as quickly as its record-keeping system permits.”⁸⁶

The HIPAA regulation applicable to judicial proceedings is 45 C.F.R. § 164.512(e)(1) which defines the circumstances when a covered healthcare provider may reveal protected health information in the course of judicial proceedings.⁸⁷ Specifically, disclosure of protected health information is permissible only under the following conditions:

- (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or
- (ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:
 - (A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by

Most importantly, “[T]he hospital must not frustrate the legitimate efforts of individuals to gain access to their own medical records and must actively seek to meet these requests as quickly as its record keeping system permits.”

such party to ensure that the individual who is the subject of the protected health information that has been requested has been given notice of the request; or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.⁸⁸

45 C.F.R. § 164.512(e)(i),(ii). When producing such information, healthcare providers must produce only the minimum information necessary.⁸⁹

E. HITECH

Congress promulgated HITECH with the intention that new electronic medical records be afforded the same protections provided by HIPAA.⁹⁰ Under HITECH, a patient has the “right to obtain from [their healthcare providers] a copy of [their medical records] in an electronic format,” 42 U.S.C. § 17935(e)(1), and the healthcare provider is permitted to bill “only the cost of ... [c]opying, including the cost of supplies for and labor of copying,” 45 C.F.R. 164.524(c)(4)(i). This is all part of the comprehensive push by Congress to move our country’s healthcare providers to easily accessible electronic health records under HITECH.

Lawyers representing patients are equally entitled to obtain clients’ electronic health information. “The final rule adopts the proposed amendment Section 164.524(c)(3) to expressly provide that, if requested by an individual, a covered entity must transmit the copy of protected health information directly to another person designated by the individual.” Federal Register Jan. 25, 2013, vol. 78, no. 17, page 5634.⁹¹ ▲

Endnotes

1. American Recovery and Reinvestment Act of 2009: implementation plans available at http://www.hhs.gov/recovery/reports/plans/hhs_implementation_plans.pdf.

2. See, e.g., Chad P. Brouillard, *THE FIRST WAVE*. Emerging Trends in Electronic Health Record Liability, 52 No. 7 DRI For Defense, 39 (July 2010) (article surveys areas of medical liability involving electronic health records and catalogs new risks impacting medical providers' practices and standard of care issues); Note, *Electronic Medical Records and E-Discovery: With New Technology Come New Challenges*, 5 Hastings Sci. & Tech. L.J. 245, 249 (Summer 2013) ("... new and different challenges have arisen during the transition from paper medical records to electronic medical records. A major question that medical care providers face is how to produce a single patient's electronic medical record to the lawyer.").
3. The American Hospital Association, the American College of Physicians, the American College of Surgeons, the Canadian Medical Association, and the American Medical Association formed the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) in 1951 as a not-for-profit corporation. Joint Commission on Accreditation of Healthcare Organizations Corporate Overview Brochure (<http://www.jcaho.org/about+us/corporate+brochure.htm>). The Joint Commission on Accreditation of Healthcare Organizations in 2007 shortened its name to The Joint Commission. *The Joint Commission: Over a century of quality and safety*, .pdf (http://www.jointcommission.org/about_us/history.aspx). Facts about the Joint Commission on Accreditation of Healthcare Organizations (<http://www.jcaho.org/about+us/index.htm>).
4. https://www.astm.org/ABOUT/full_overview.html.
5. Section 34-24-360(22), Ala. Code 1975.
6. Ala. Admin. Code r. 545-X-4-.09, which governs "Minimum Standards For Medical Records," provides:
The maintenance of adequate medical records is an integral part of good medical care. Adequate records are necessary to ensure continuity of care, not only by the physician who maintains a particular record, but by other medical professionals. Therefore, every physician licensed to practice medicine in Alabama shall maintain for each of his or her patients, a record which, in order to meet the minimum standard for medical records, shall: (1) be legible, and written in the English language; (2) contain only those terms and abbreviations that are or should be comprehensive [sic] to other medical professionals; (3) contain adequate identification of the patient; (4) indicate the date any professional service was provided; (5) contain pertinent information concerning the patient's condition; (6) reflect examinations, vital signs, and tests obtained, performed, or ordered and the findings or results of each; (7) indicate the initial diagnosis and the patient's initial reason for seeking the physician's services; (8) indicate the medications prescribed, dispensed, or administered and the quantity and strength of each; (9) reflect the treatment performed or recommended; (10) document the patient's progress during the course of treatment; and (11) include all patient records received from other health care providers, if those records formed the basis for a treatment decision by the physician.
7. Ala. Admin. Code r. 545-X-4-.09(6).
8. Ala. Admin. Code r. 545-X-4.09(8).
9. Ala. Admin. Code r. 545-X-4.09(9).
10. Ala. Admin. Code r. 545-X-4-.09(10).
11. Ala. Admin. Code r. 545-X-4.06(2).
12. Ala. Admin. Code r. 545-X-4-.06(11).
13. Ala. Code § 34-21-2 (1975), which governs the Board of Nursing generally, provides that: "(j) The board may: (1) Adopt and, from time to time, revise such rules and regulations, not inconsistent with law, as may be necessary to carry out this chapter and (21) Adopt standards for registered and practical nursing practice"
14. Ala. Code § 34-21-25(b)(1)g. (1975).
15. Ala. Admin. Code r. 610-X-6-.01(02) defines "Assessment, Comprehensive [as] the systematic collection and analysis of data including the physical, psychological, social, cultural and spiritual aspects of the patient by the registered nurse for the purpose of judging a patient's health and illness status and actual or potential health needs. Comprehensive assessment includes patient history, physical examination, analysis of the data collected, development of the patient plan of care, implementation and evaluation of the plan of care."
16. Ala. Admin. Code r. 610-X-6-.01(03), defines, "Assessment, Focused [as] [a]n appraisal of a patient's status and specific complaint through observation and collection of objective and subjective data by the registered nurse or licensed practical nurse. Focused assessment involves identification of normal and abnormal findings, anticipation and recognition of changes or potential changes in patient's health status, and may contribute to a comprehensive assessment performed by the registered nurse."
17. Ala. Admin. Code r. 610-X-6-.03(11).
18. Ala. Admin. Code r. 610-X-6-.03(15).
19. Ala. Admin. Code r. 610-X-8 authorizes the BoN to "reprimand, fine, probate, suspend, revoke and/or otherwise discipline" any RN or LPN found "guilty of unprofessional conduct of a character likely to deceive, defraud, or injure the public in matters pertaining to health, as demonstrated by one or more of the following: ... (a) Failure to practice nursing in accordance with the standards adopted by the Board ..., (f) Falsifying, altering, destroying, or attempting to destroy patient, employer, or employee records [,or] ... (h) Failure to respect or safeguard the patient's dignity, right to privacy, and confidential health information unless disclosure is required by law."
20. Ala. Code § 22-21-21(1975). The article's purpose is "to promote the public health, safety, and welfare by providing for the development, establishment, and enforcement of standards for the treatment and care of individuals in institutions within the purview of this article and the establishment, construction, maintenance, and operation of such institutions which will promote safe and adequate treatment and care of individuals in such institutions."
21. Ala. Code § 22-21-22 and § 22-21-23(1975). The BoH "may grant licenses for the operation of hospitals which are found to comply with the provisions of this article and any regulations lawfully promulgated by the State Board of Health." Ala. Code § 22-21-25(a) (1975).
22. Ala. Code § 22-21-28(a) (1975).
23. Ala. Code § 22-21-25(b)(1) (1975).
24. Ala. Admin. Code § 420-5-7-.13, "Medical Record Services."
25. Ala. Admin. Code r. 420-5-7-.13(3).
26. Ala. Admin. Code r. 420-5-7-.13(3).
27. Ala. Admin. Code r. 420-5-7-.13(4)(a).
28. *Husby v. South Alabama Nursing Home, Inc.*, 712 So. 2d 750, 753 (Ala. 1998); *Ex parte Northport Health Service, Inc.*, 682 So. 2d 52, 55 (Ala. 1996).
29. Ala. Code § 420-5-10-.03(32)-(36) "Administrative Management."
30. Ala. Admin. Code r. 420-5-10-.03(32).
31. Ala. Admin. Code r. 420-5-10-.03(33),(34).
32. Ala. Code § 22-21-20 (1975).
33. Ala. Admin. Code r. 420-5-4-.05, "Records And Reports."
34. Ala. Admin. Code r. 420-5-4-.05(1)(c).

35. Ala. Admin. Code r. 420-5-4-.05(3)(f).
36. Ala. Admin. Code r. 420-5-4-.05(e).
37. *Alabama Pattern Jury Instructions Civil* (3d ed. 2015), No. 15.12, "Spoliation of Evidence by Defendant [PL]."
38. *Id.*
39. *Alabama Pattern Jury Instructions Civil* (3d ed. 2015) No. 15-13, "Spoliation - Tort Claim [PL]."
40. Reference should also be made to the potential application of § 13A-10-129(a), Ala. Code 1975, "Tampering With Physical Evidence" and § 13A-10-130(a)(3), Ala. Code 1975 "Interfering With Judicial Proceedings."
41. See 42 CFR § 482.24, *et seq.*
42. See 42 CFR § 416.47, *et seq.*
43. See 42 CFR § 418.104, *et seq.*
44. See 42 CFR § 460.210, *et seq.*
45. See 42 CFR § 484.48, *et seq.*
46. See 42 CFR § 491.10, *et seq.*
47. See 42 CFR § 493.1105, *et seq.*
48. See 42 CFR § 494.170, *et seq.*
49. See 42 CFR §§ 485.50 - 485.74.
50. See 42 CFR §§ 485.601 - 485.647.
51. See 42 CFR §§ 485.701 - 485.729.
52. See 42 CFR §§ 485.900 - 485.918.
53. See 42 CFR §§ 482.1 through 482.23, 482.25 through 482.57 and 482.60 through 482.61.
54. Facts about the Joint Commission on Accreditation of Healthcare Organizations (<http://www.jcaho.org/about+us/index.htm>).
55. Those "elements" provide: "1. The hospital identifies the internal and external information needed to provide safe, quality care; 2. The hospital identifies how data and information enter, flow within, and leave the organization; 3. The hospital uses the identified information to guide development of processes to manage information; 4. Staff and licensed independent practitioners, selected by the hospital, participate in the assessment, selection, integration, and use of information management systems for the delivery of care, treatment, and services." CAMH, pp. IM - 3-4.
56. Standard RC.01.01.01 provides: "The hospital maintains complete and accurate medical records for each individual patient." Standard RC.01.02.01 provides: "Entries in the medical record are authenticated." Standard RC.01.03.01 provides: "Documentation in the medical record is entered in a timely manner." Standard RC.01.04.01 provides: "The hospital audits its medical records." Standard RC.01.05.01 provides: "The hospital retains its medical records." Standard RC.02.01.01 provides: "The medical record contains information that reflects the patient's care, treatment, and services." Element of Performance No. 2 for RC.02.01.01 is critical: 2. The medical record contains the following clinical information: • The reason(s) for admission for care, treatment, and services; • The patient's initial diagnosis, diagnostic impression(s), or condition(s); • Any findings of assessments and reassessments (See also PC.01.02.01, EPs 1 and 4; PC.03.01.03, EPs 1 and 8 ["PC" is Provision of Care, Treatment and Services, a chapter of its own]); • Any allergies to food; • Any allergies to medication; • Any conclusions or impressions drawn from the patient's medical history and physical examination; • Any diagnoses or conditions established during the patient's course of care, treatment, and services (including complications and hospital-acquired infections).
- Standard RC.02.01.03 provides: "The patient's medical record documents operative or other high-risk procedures and the use of moderate or deep sedation or anesthesia." Standard RC.02.01.07 provides: "The medical record contains a summary list for each patient who receives continuing ambulatory care services." Standard RC.02.03.07 provides: "Qualified staff receive and record verbal orders." The Elements of Performance for this standard are important. They include: 1. The hospital identifies, in writing, the staff who are authorized to receive and record verbal orders, in accordance with law and regulation; 2. Only authorized staff receive and record verbal orders; 3. Documentation of verbal orders includes the date and the names of individuals who gave, received, recorded, and implemented the orders; 4. Verbal orders are authenticated within the time frame specified by law and regulation. ...
- Standard RC.02.04.01 provides: "The hospital documents the patient's discharge information."
57. An event is also considered sentinel if it is one of the following:
- Suicide of any patient receiving care, treatment, and services in a staffed around-the-clock care setting or within 72 hours of discharge, including from the hospital's emergency department (ED)
 - Unanticipated death of a full-term infant
 - Discharge of an infant to the wrong family
 - Abduction of any patient receiving care, treatment, and services
 - Any elopement (that is, unauthorized departure) of a patient from a staffed around-the-clock care setting (including the ED), leading to death, permanent harm, or severe temporary harm to the patient
 - Hemolytic transfusion reaction involving administration of blood or blood products having major blood group incompatibilities (ABO, Rh, other blood groups)
 - Rape, assault (leading to death, permanent harm, or severe temporary harm), or homicide of any patient receiving care, treatment, and services while on site at the hospital
 - Rape, assault (leading to death, permanent harm, or severe temporary harm), or homicide of a staff member, licensed independent practitioner, visitor, or vendor while on site at the hospital
 - Invasive procedure, including surgery, on the wrong patient, at the wrong site, or that is the wrong (unintended) procedure
 - Unintended retention of a foreign object in a patient after an invasive procedure, including surgery
 - Severe neonatal hyperbilirubinemia (bilirubin >30 milligrams/deciliter)
 - Prolonged fluoroscopy with cumulative dose >1,500 rads to a single field or any delivery of radiotherapy to the wrong body region or >25% above the planned radiotherapy dose
 - Fire, flame, or unanticipated smoke, or flashes occurring during an episode of patient care
 - Any intrapartum (related to the birth process) maternal death
 - Severe maternal morbidity (not primarily related to the natural course of the patient's illness or underlying condition) when it reaches a patient and results in any of the following: Permanent harm or severe temporary harm
- CAMH SE - 1-3 (footnotes omitted).
58. *Galaxy Cable, Inc. v. Davis*, 58 So. 3d 93, 99 (Ala. 2010) citing *Standard Plan, Inc. v. Tucker*, 582 So. 2d 1024 (Ala. 1991); *King v. National Spa & Pool Inst., Inc.*, 570 So. 2d 612 (Ala. 1990).
59. *Id.*
60. ASTM E1384-07 (2013)
61. ASTM E2147-01 (2013)

62. ASTM-E1869-04 (2014)
63. ASTM E1633-08A (2013)
64. ASTM E1744-04 (2010)
65. ASTM E2538-06 (2011)
66. See Ala. Code § 12-21-6.1 (1975).
67. Ala. Code § 34-26-2 (1975) Confidential relations between licensed psychologists, licensed psychiatrists, or licensed
68. Ala. Code § 22-11A-22 (1975). Medical records of persons infected with sexually transmitted diseases confidential; penalty for release.
69. Ala. Code § 22-50-62 (1975). Disclosure of information.
70. See also, Lonette, E. Lamb, *To Tell or Not To Tell: Physicians Liability for Disclosure of Confidential Information About a Patient*, 13 CUMB. L. Rev. 617 (1983); Judy E. Zelin, *Annotation, Tort Liability for Unauthorized Disclosure of Confidential Information About Patient*, 48 ALR 4th 668 (1986 & Supp.)(collecting state and federal cases in which courts have considered whether tort liability exists when a physician or other medical practitioner makes an unauthorized disclosure of health information).
71. Pub. L 104-191, § 244, adopting 18 U.S.C. § 1035.
72. 18 U.S.C. § 1035(a)(2).
73. The privacy rule is found in parts 160 and 164 of 45 CFR.
74. 45 CFR § 160.103, Definition of “individually identifiable health information.”
75. *Id.*, definition of “protected health information.”
76. 45 CFR § 164.502.
77. 45 CFR § 153.506(b)(1). “Health care operations” is defined in 42 CFR § 164.501 to include matters such as “[c]onducting quality assessment and improvement activities,” “[r]eviewing the competence or qualifications of health care professionals,” and other similar activities.
78. 45 CFR § 164.520(a)(1).
79. 45 CFR § 164.520(b)(1)(i).
80. 45 CFR § 164.524(a)(1).
81. 45 CFR § 164.524(a)(1)(i) and (ii).
82. Part 164, Subpart C, 45 CFR §§ 164.302 through 164.318 and Appendix A to Subpart C.
83. “More stringent” is defined in 45 C.F.R. § 160.202.
84. See, e.g., *Moreland v. Austin*, 670 SE 2d 68, 71-72 (Ga. 2008) (“we find that HIPAA preempts Georgia law with regard to ex parte communications between defense counsel and plaintiff’s prior treating physicians because HIPAA affords patients more control over their medical records when it comes to informal contacts between litigants and physicians. HIPAA ... prevents a medical provider from disseminating a patient’s medical information in litigation, whether orally or in writing, without obtaining a court order or the patient’s express consent, or fulfilling certain other procedural requirements designed to safeguard against improper use of the information.”). See also, David G. Wirtes, Jr., R. Edwin Lamberth, Joanna Gomez, *An Important Consequence of HIPAA: No More Ex Parte Communications Between Defense Attorneys And Plaintiffs’ Treating Physicians*, 27 Am. Jnl. Trial Adv. 1 (Summer 2003).
85. 42 CFR § 482.13(a)-(d).
86. 42 CFR § 482.13(d)(2).
87. 45 C.F.R. § 164.512(e).
88. 45 C.F.R. § 164.512(e)(I), (II).
89. 45 C.F.R. § 164.512(b)(1).
90. See HITECH Act, Subtitle D, Part 2, § 13421:
Sec. 13421. Relationship to Other Laws.
- (a) Application of HIPAA State Preemption.—Section 1178 of the Social Security Act (42 U.S.C. 1320d–7) shall apply to a provision or requirement under this subtitle in the same manner that such section applies to a provision or requirement under part C of title XI of such Act or a standard or implementation specification adopted or established under sections 1172 through 1174 of such Act.
- (b) Health Insurance Portability and Accountability Act.—The standards governing the privacy and security of individually identifiable health information promulgated by the Secretary under sections 262(a) and 264 of the Health Insurance Portability and Accountability Act of 1996 shall remain in effect to the extent that they are consistent with this subtitle. The Secretary shall by rule amend such Federal regulations as required to make such regulations consistent with this subtitle.
- (c) Construction.—Nothing in this subtitle shall constitute a waiver of any privilege otherwise applicable to an individual with respect to the protected health information of such individual.
91. Note that “fees charged to incur a profit from the disclosure of protected health information are not allowed. We believe allowing a profit margin would not be consistent with the language contained in Section 13405 of the HITECH Act.” 78 F.R. 5566, 5607 (Jan. 25, 2013).

David G. Wirtes, Jr.



David Wirtes is a member of Cunningham Bounds LLC of Mobile, where he focuses on strategic planning, motion practice and appeals.

Wirtes is licensed in all state and federal courts in Alabama and Mississippi, the Fifth and Eleventh Circuit Courts of Appeals and the United States Supreme Court. He is a long-time member of the Alabama Supreme Court’s Standing Committee on the Rules of Appellate Procedure and has served on that court’s Standing Committee on the Rules of Civil Procedure.

George M. Dent, III



George Dent practices at Cunningham Bounds LLC in Mobile. He received his undergraduate degree from Yale in 1978 and his J.D. from the University of Alabama in 1981. He has been practicing at Cunningham Bounds since January 1999. He is a member of the Alabama State Bar, and is admitted to practice in the Southern District of Alabama, the Eleventh Circuit and the United States Supreme Court. He was appointed to the Supreme Court of Alabama Standing Committee on the Rules of Civil Procedure in 1999 and, in 2007, was appointed chair of the committee.

ALABAMA STATE BAR

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ENDNOTES

1. Expense ratios depicted on the graph are associated with information disclosed in program prospectus and/or annual disclosure documents. Expense ratios shown are unweighted and reflect an approximate cost for a participant invested equally in all core funds available through the program

as of a specific date. All ABA Retirement Fund Program fees are allocated to each investment option (excluding brokerage accounts) and are reflected in each fund's expense ratio. These fees are the only costs charged to participants (or employers) for participating in the program. There are no additional costs to the employer or out-of-pocket expenses for participants. Clients may incur additional expenses through the use of outside service providers, such as a TPA or CPA to support their plan design or responsibilities as a plan sponsor. Participants may incur costs by opting for certain advisory services or by utilizing the self-directed brokerage account option.

2. As of December 31, 2015.

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ABA TECHSHOW 2017

ABA TECHSHOW is the world's greatest legal technology CLE and Expo, and Alabama State Bar members will once again receive discounted registration prices. For now, mark your calendar for March 15-19, 2017, and watch this space and *The Alabama Lawyer* for more information on how to receive the discount when you register.

**Judicial Arbiter Group congratulates
Judge Kenneth O. Simon of our
Birmingham office upon his election
as Chair Pro Tempore of the University
of South Alabama Board of Trustees.**



Ken Simon is a 1976 graduate of the University of South Alabama, where he served as Student Government Association president, vice president and senator, and was a member of the varsity debate team. In 1983, he was one of 13 persons selected as a White House Fellow and served his Fellows' appointment as a special assistant to U.S. Attorney General William French Smith. He is a 2007 recipient of a USA Distinguished Alumni Award.

Ken Simon has more than 30 years' experience as a judge, litigator and mediator. He has served as a circuit judge in Jefferson County, the state's largest judicial district, and has developed a reputation as a skilled litigator, mediator/arbitrator, advisor to public agencies and expert in securities law. He is presently a mediator/arbitrator with the Denver based Judicial Arbiter Group, Inc. (JAG), for which he recently established a Southeastern office in Birmingham.



BAR BRIEFS

- Baker Donelson recognized **Timothy M. Lupinacci** with two firm-wide awards honoring his commitment to diversity and women in the legal profession. Lupinacci was named the recipient of the 2016 Susan E. Rich Award for excellence in the promotion of and commitment to women in the legal profession.



Lupinacci

- Three Beasley, Allen, Crow, Methvin, Portis & Miles PC attorneys were honored at the recent American Association for Justice (AAJ) meeting for their outstanding performance in the profession of law. Prin-



Beasley



Mason



Vance

cipal and founder **Jere L. Beasley** was selected as a 2016 recipient of the AAJ Tonahill Award. The award is presented in recognition of outstanding and dedicated service to and support of consumers and the trial bar. Principal **Danielle Mason** was selected as a 2016 recipient of the AAJ F. Scott Baldwin Award. Principal **C. Gibson Vance** was selected as a 2016 recipient of the American Association for Justice (AAJ) Wiedemann & Wysocki Award. The award is presented annually to lawyers who demonstrate a deep commitment to the highest standards and who are passionately committed to the principles of the civil justice system and the mission of AAJ.

- Bradley Arant
Boult Cummings
LLP announces
that Birmingham
partner **Arlan D.
Lewis** was elected
a fellow of the
American Bar
Foundation;
Huntsville partner
Scott E. Ludwig
was selected the
2016 recipient of
the American Bar
Association LLCs,
Partnerships and
Unincorporated
Entities Commit-
tee's Martin I.
Lubaroff Award; **Harold D. Mooty, III** was elected the
2016-2017 president of the Alabama Defense Lawyers As-
sociation's Young Lawyers' Section; and **Scott Burnett
Smith** was elected a fellow in the American Academy of



Lewis



Ludwig



Mooty



Smith

Appellate Lawyers, a distinction reserved for experienced appellate advocates who demonstrate prominent capabilities and integrity.

- Christian & Small
LLP announces
that partner
Sharon D. Stuart
was named presi-
dent-elect of the
Alabama Defense
Lawyers Associa-
tion and that
Richard E. Smith, also a partner, was appointed to a four-
year term on Samford University's Board of Overseers.
- The College of Labor and Employment Lawyers an-
nounces the election of the new fellows of the Class of
2016. The one new fellow from Alabama is **Jeffrey Allen
Lee** of Regions Bank. ▲



Stuart



Smith

Alabama Law Foundation Receives Funds Targeted for Foreclosure Prevention and Community Re-Development Legal Assistance

The Alabama Law Foundation has received \$3.3 million in funds from the Bank of America's August 20, 2014 mortgage settlement with the U.S. Department of Justice. The settlement requires funds to be allotted to IOLTA (Interest On Lawyers Trust Accounts) foundations based on federal poverty censuses data. The settlement reads as follows: "For the sole purpose of providing funds to legal aid organizations in the state of Alabama for foreclosure prevention legal assistance and/or community redevelopment legal assistance." Professor Eric Green is the independent monitor to oversee the

Bank of America's compliance with its ongoing consumer-relief obligations under the settlement.

In March 2016, the Alabama Law Foundation awarded \$266,000 in grants from funds received in a 2015 disbursement by the monitor. The organizations listed below received grants to provide foreclosure prevention legal assistance. Homeowners with incomes of up to 250 percent of the federal poverty level are eligible for free assistance. The additional funding will allow continuation of the project.

Alabama Center for Dispute Resolution	\$60,000
Alabama State Bar Volunteer Lawyers Program.....	\$32,500
Birmingham Bar Association Volunteer Lawyers Program	\$42,500
Legal Services Alabama	\$65,000
Madison County Volunteer Lawyers Program	\$20,000
Montgomery County Bar Foundation Volunteer Lawyers Program	\$25,500
South Alabama Volunteer Lawyers Program	\$20,500



YLS UPDATE

Parker Miller
parker.miller@beasleyallen.com



Making a Difference in People's Lives

As the incoming president of the Alabama State Bar's Young Lawyers' Section ("YLS"), it is my honor to walk in the footsteps of some great lawyers. **Hughston Nichols**, who is our immediate past president, did a fantastic job on behalf of the section, and he deserves a lot of credit for his leadership this past year.

As we look to the coming year, we dedicate our work to making a difference in people's lives. We will accomplish this by attacking three important angles: mentoring, outreach to our communities and networking.

Since my early days in the YLS and having experienced the challenges of practicing law myself, I have long wanted to build a strong mentoring program for younger lawyers. Simply put, taking the time to help lawyers grow and learn makes a real difference in their lives, and I have seen this difference play out firsthand. Younger lawyers face a number of unique hurdles that they are all too often untrained to handle, including managing student debt, employment challenges (including the rise of temporary legal jobs), marketing, conversing with other lawyers and work-life balance challenges. This year, the YLS will establish a pilot mentorship program geared to address many of these issues. This pilot program will hopefully serve as the foundation for a support system that many younger lawyers tell me they desperately want.

Secondly, the YLS will continue to perform outreach to communities in need. Our section has been working hand-in-hand with President Cole Portis and the state bar to orchestrate a disaster relief drive for those devastated by flooding in Louisiana. This spring, we will again hold our **Minority Pre-Law Conferences** in Birmingham, Montgomery, Huntsville and Mobile. These conferences are part of an award-winning program

designed to introduce 11th- and 12th-grade students to the American civil and criminal justice system. The program provides students with direct access to minority lawyers, where they can view a simulated trial (performed by practicing lawyers) and gain important perspective on the procedures of the court system. Danielle Starks will head the program for us this year. Contact her at dstarks@sirote.com for more information. In addition, the YLS will continue to grow our outreach to law students throughout Alabama. Heading up this effort is Rachel Cash, and you can contact her at rcash@burr.com.

Finally, we want to provide our lawyers with networking opportunities. There is no better networking opportunity for a young lawyer than to attend the largest program for young lawyers in Alabama, the **Orange Beach CLE** at the Caribe Resort in May. Last year, attendance was higher than it has been in years. Lawyers attending came from a diverse set of practice areas and from locations throughout Alabama. We are constantly improving the program to tailor it to our audience. Not only is the program a great opportunity for development, but it is also a tremendous opportunity to meet a number of state and federal judges that attend the events. Evan Allen is leading the Orange Beach CLE this year. If you have any questions about the program, contact him at evan.allen@beasleyallen.com.

In addition to the Orange Beach CLE, we will once again be hosting an **Iron Bowl CLE** in multiple locations in

Alabama. If you have any questions about the Iron Bowl CLE, contact our committee head, Jesse Anderson, at janderson@hillhillcarter.com.

Understanding that a number of our YLS members want to be involved in the state bar, we are working to develop a more stream-lined program for our members to participate in bar events and programs. It is our hope that YLS members will see the Young Lawyers' Section as a launching pad for greater involvement in the Alabama State Bar and the many opportunities the bar offers for personal and professional growth.

In closing, I see great promise with the YLS. If you are a young lawyer, I would strongly encourage you to opt in to our section, get involved and take advantage of the opportunities our section provides. For additional information, follow us on <https://facebook.com/ABSyounglawyers>, <https://twitter.com/asbyounglawyers> and <https://instagram.com/asbyounglawyers>. If you would like to help sponsor one of our programs, contact Megan Comer or Morgan Hofferber at megan.brooks3@gmail.com and mhofferber@mcdowellknight.com, respectively. Finally, if you would like to get involved in the YLS or assist with any one of our upcoming events, contact me or any of our executive committee members, Vice President Lee Johnsey (ljohnsey@balch.com), Secretary Rachel Miller (rachel_miller@almd.uscourts.gov), and Treasurer Robert Shreve (rshreve@lchclaw.com). ▲

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DISCIPLINARY NOTICES

- ▲ Notices
- ▲ Transfer to Disability Inactive Status
- ▲ Disbarment
- ▲ Suspensions

Notices

- Notice is hereby given to **Jeffrey Preston Burks** who practiced law in Franklin, Tennessee and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated May 12, 2016, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2015. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 16-694]
- **Jesse Derrell McBrayer**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of November 25, 2016 or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB nos. 2011-437 and 2011-613 by the Disciplinary Board of the Alabama State Bar.
- Notice is hereby given to **Mary Margaret McNeil**, who practiced law in Birmingham and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated May 13, 2016, she has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2015. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 16-713]
- Notice is hereby given to **Lee Aubra Rudolph** who practiced in Birmingham and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated May 17, 2016, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2015. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 16-722]

Transfer to Disability Inactive Status

- Saraland attorney **Johnny Mack Lane** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective August 23, 2016. Mobile attorney Hendrik Snow was appointed trustee for Lane's practice. [Rule 27(c), Pet. No. 16-1150].

Disbarment

- Hoover attorney **Joseph Whitlow Blackburn** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective June 27, 2016. The supreme court entered its order based on the Disciplinary Board's order accepting Blackburn's consent to disbarment, after Blackburn was convicted in the United States District Court for the Northern District of Alabama for possession of child pornography. [Rule 23(a), Pet. No. 2016-915]

Suspensions

- Florence attorney **Edward Ray Dillard** was interimly suspended from the practice of law in Alabama by order of the Disciplinary Commission of the Alabama State Bar, effective June 8, 2016, after Dillard was arrested and indicted on multiple counts of sex trafficking. The Disciplinary Commission's order was based on a petition for interim suspension filed by the Office of General Counsel of the Alabama State Bar. Dillard executed an affidavit consenting to the interim suspension. [Rule 20(a), Pet. No. 2016-837]
- Montgomery attorney **Joseph Lee Fitzpatrick, Jr.** was summarily suspended from the practice of law in Alabama by the Disciplinary Commission of the Alabama State Bar, effective August 17, 2016, for failing to respond to formal requests for a written response concerning a disciplinary matter. The Disciplinary Commission's order was based on a petition for summary suspension filed by the Office of General Counsel of the Alabama State Bar. [Rule 20(a), Pet. No. 2016-1127]



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(Continued from page 457)

- Bloomington, Illinois attorney **Mark Douglas Johnson**, who is also licensed in Alabama (although inactive), was suspended from the practice of law by order of the Supreme Court of Alabama on August 11, 2016, retroactive to June 8, 2016. The supreme court entered its order based on the order entered by Panel III of the Disciplinary Board imposing reciprocal discipline of a one-year suspension. This suspension was imposed as reciprocal discipline for the order of suspension entered on May 18, 2016 by the Supreme Court of Illinois, for violations of Rules 1.2(d), 4.1(b) and 8.4(a)(4), *Ill. R. Prof. C.* (1990). Johnson accompanied his client onto property without authorization and misled a law enforcement officer and others into believing he had a court order allowing him to enter the property and remove certain items. Johnson was also suspended for 45 days by the Supreme Court of Illinois, effective June 10, 2005, and ordered to reimburse \$500 to the Circuit Clerk of McLean County, for violations of Rules 3.5(h) and 8.4(a)(3), *Ill. R. Prof. C.* Johnson paid an assistant clerk in the clerk's office to provide him copies of bond forms or other information relating to persons charged with driving under the influence. The assistant clerk produced approximately 500 bond forms by utilizing the circuit clerk's copy machine. [Rule 25(a), Pet. No. 2016-834] ▲

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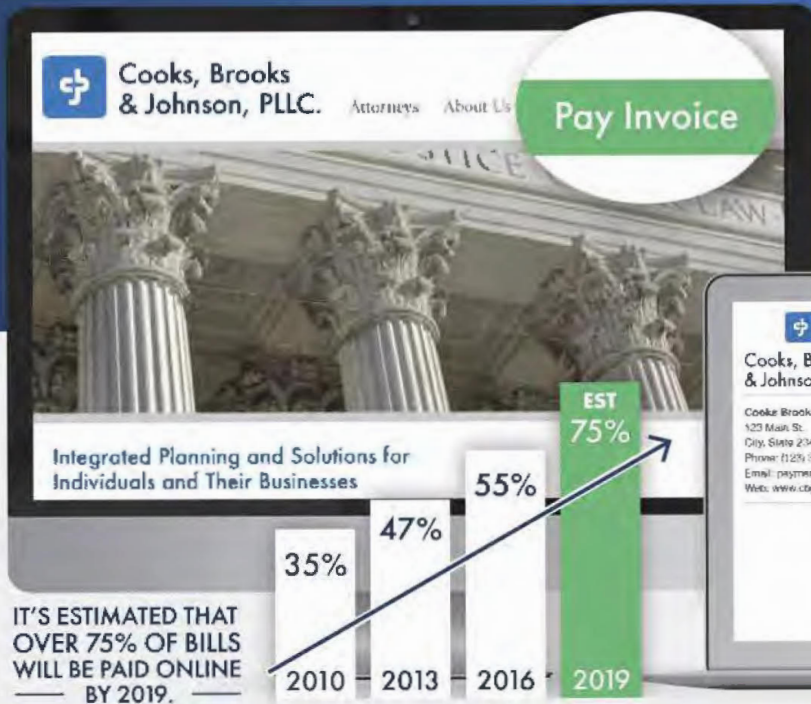
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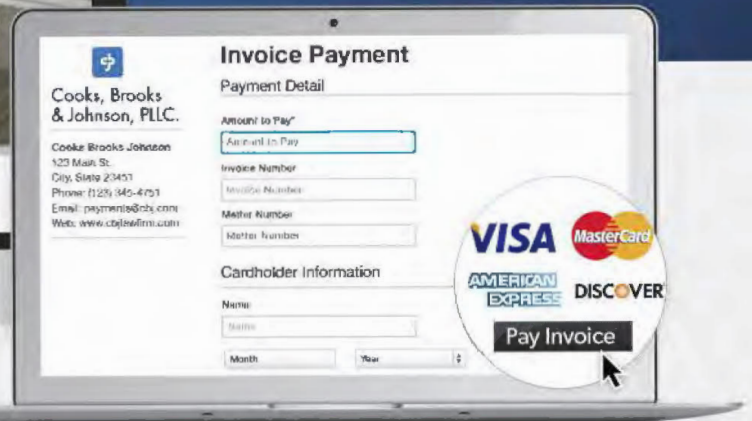
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Wilson F. Green

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



Marc A. Starrett

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

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

AEMLD; Design Defect Claims

Hosford v. BRK Brands, Inc., No. 1140899 (Ala. Aug. 19, 2016)

Although the existence of a safer alternative design is generally a question of fact for the jury, there are circumstances where a court can appropriately hold, as a matter of law, that a proposed alternative design is sufficiently different from the allegedly defective product that it is more properly viewed as a design for a different product than as an alternative design of the allegedly defective product. The case involved smoke detectors which use "single" technology (ionization only) vs. "dual" technology (ionization plus photoelectric). The court held that "dual" technology alarms are a different product from "single" technology alarms, so evidence of "dual" technology alarms could not support the existence of a safer alternative design to a "single" technology alarm.

Workers' Compensation; Exclusivity; Jury Waiver

Ex parte Lincare, Inc., No. 1141373 (Ala. Aug. 19, 2016)

Assault, battery and outrage claims by former employee that, on the occasion of her termination of employment (but after actual termination), her supervisor assaulted and battered her by choking her, were subsumed by Worker's Compensation Act, to the extent they were asserted against the employer (as opposed to the supervisor). The fact that resignation occurred immediately before the attack did not exempt claims from exclusivity. Claims against supervisor were not subject to jury waiver signed in employer's favor, because there was no intent to benefit supervisor.

Arbitration

African Methodist Episcopal Church, Inc. v. Smith, No. 1141100 (Ala. Aug. 19, 2016)

Form amendment to group life policies adding arbitration provision, which was submitted to Alabama Department of Insurance by insurer's predecessor in interest, was not void for enforcing insurer's having not submitted the form to the ADOI (generally, failure to submit a policy form renders it void under *Ala. Code* § 27-14-8 and *Aetna Insurance Co. v. Word*, 611 So. 2d 266, 267-69 (Ala. 1992)). Confidentiality clause in arbitration provision, even though more favorable to insurer than to insureds or beneficiaries, was not so one-sided as to make arbitration provision substantively unconscionable. One-sidedness of arbitration obligation did not render arbitration agreement unconscionable. The court rejected a host of other arbitration challenges, including a waiver argument where defendants had filed and prosecuted a merits-based motion to dismiss and had instigated merits discovery.

FELA; Summary Judgment

Cottles v. Norfolk Southern Railway Co., No. 1140632 (Ala. Aug. 26, 2016)

(1) Trial court erred in striking expert affidavit, which attested that rail track on premises of Daikin was not maintained in accordance with FRA regulations, because if NS had a non-delegable duty to maintain the track, then failure to maintain would constitute substantial evidence against NS, but if track were properly maintained, that would redound to NS's benefit; (2) the fact that Daikin owns the track and switches inside its plant does not relieve NS of its duty under FELA to provide a safe work environment to its employees; (3) expert testimony established that the fact that the switch was hard to throw was a symptom of its defective condition, a condition that reached a state of complete malfunction; (4) expert testimony that if a qualified inspector had thrown the track 4 switch, the defect would have been noticed, together with (3), created genuine issue of fact regarding negligence of NS and the requisite causal link to his injuries; and (5) "the fact that FRA regulations did not require [NS] to throw the switches inside the Daikin plant when it inspected them constitutes non-dispositive evidence of due care on [NS's] part."

Statute of Limitations; No Bona Fide Intent to Serve Process

ENT Associates of Alabama, P.A. v. Hoke, No. 1141396 (Ala. Sept. 2, 2016)

Plaintiff filed medical liability action the day before the statute expired; listed on the complaint was an out-of-state lawyer with a notation that a PHV motion would be filed. On PHV motion, attorney listed the addresses of the defendants.

No action was taken on service immediately; eventually defendants were served through re-issued process 69 days after complaint was filed. Defendants moved to dismiss based on the statute of limitations, arguing that there was no bona fide intent to serve at the time the complaint was filed. The trial court denied the motion but certified the issue under Rule 5. The supreme court reversed, holding that the evidence demonstrated a lack of bona fide intent to serve at the time the complaint was filed, because plaintiff offered no explanation as to the delay in effecting service of 69 days, other than that she intended to wait until the PHV motion had been granted before effecting service.

Immunity; Taxpayer Standing

Ex parte Wilcox County Board of Education, No. 1150812 (Ala. Sept. 2, 2016)

(1) County boards of education are entitled to Section 14 immunity; (2) state officials are entitled to section 14 immunity unless complaint seeks injunctive or declaratory relief based on conduct which is fraudulent, in bad faith, beyond a state official's authority or done in a mistaken interpretation of law; and (3) although taxpayer may have standing to enjoin proposed illegal expenditure of public funds by a state official, taxpayer lacks standing to bring an action to recover funds already wrongfully expended.

Immunity

Ex parte State of Alabama Bd. of Educ., No. 1150366 (Ala. Sept. 9, 2016)

In tangled litigation concerning state board's 2012 takeover of Birmingham Board of Education, the court held (plurality opinion): (1) State Board of Education is entitled to 11th Amendment immunity from any section 1983 claim for any relief; (2) 11th Amendment bars section 1983 claims for monetary relief against state officials in their official capacities; (3) 11th Amendment does not bar section 1983 claims for injunctive relief (in the form of reinstatement); (4) 11th Amendment immunity does not shield school officials sued in their individual capacities from suit; and (5) school officials were entitled to qualified immunity on section 1983 claims asserted against them in their individual capacities, because the officials were undisputedly exercising discretionary authority, not in violation of clearly established law.

Judgment Execution; Priority of Interest

Ex parte Arvest Bank, No. 1141421 (Ala. Sept. 16, 2016)

Raymond and Evelyn Niland held real property as JTROS. In August 2007, the Nilands quitclaimed the property to Evelyn. In October 2008, Raymond stopped paying an existing indebtedness to Iberia Bank. On March 26, 2009, Iberia obtained a judgment against Raymond for roughly \$125,000. On April

(Continued from page 461)

9, 2009, Iberia filed its judgment for record in the probate of fice. On September 11, 2012, Evelyn transferred the property back to herself and Raymond, “jointly” with right of survivorship. The Nilands executed a mortgage to Arvest Bank the same day. Raymond died December 5, 2012. In January 2015, Iberia secured a writ of execution against the property. On August 10, 2015, Arvest moved to intervene and to quash the scheduled sheriff’s sale of the property, contending that Iberia had no interest in the property because Raymond’s interest ceased upon death. Issues and holdings: (1) whether September 11, 2012 deed created a “joint tenancy” with right of survivorship—held yes, because the deed indicated a clear intent to convey the property with joint undivided interests with survivorship, and (2) whether Iberia’s recording of judgment against Raymond, without execution on the judgment during Raymond’s lifetime, established priority of interest for Iberia over Arvest’s mortgage as to the property in which Raymond was a joint tenant—held no, because the joint tenant’s interest in the property ceased at death.

Civil Forfeiture

***Ex parte State of Alabama*, No. 1150559 (Ala. Sept. 16, 2016)**

Victim of currency seizure (allegedly without *Miranda* rights) which took place in friend’s house lacked standing to challenge the search of friend’s house and the seizure of the currency for lack of expectation of privacy or a proprietary interest in the property searched to challenge a search.

Standing v. Real Party in Interest; Contractual Ambiguity

***The Gardens at Glenlakes Property Owners Association, Inc. v. Baldwin County Sewer Service, LLC*, No. 1150563 (Ala. Sept. 23, 2016)**

Circuit court improperly dismissed for lack of “standing” an action by HOAs and golf club to enforce agreement between developer and sewer provider concerning sanitary service provisions to properties. Whether HOAs and golf club could bring action was question of real party in interest, curable under Rule 17(a), not a question of “standing.” Scope of properties to be covered by agreement, and contract provision requiring that the sewer rates charged be “competitive with charges made by others for similar services,” were not so hopelessly ambiguous to render the contract indefinite, especially since the law disfavors voiding contract for indefiniteness.

Evidence (Rule 404(b))

***Ex parte Boone*, No. 1150387 (Ala. Sept. 23, 2016)**

Trial court committed reversible error in admitting, under Rule 404(b), that defendant was affiliated with a “gang,” where there was no evidence that subject crime was gang-related or was otherwise relevant to motive.

From the Alabama Court of Civil Appeals

Workers’ Compensation

***Smith v. Brett/Robinson Construction Company, Inc.*, No. 2140245 (Ala. Civ. App. July 22, 2016)**

Substantial evidence supported trial court’s refusal to require employer to pay for a proposed knee surgery, concluding that the medical evidence suggested that any further surgery would not be medically necessary.

Municipal Law

***East Central Baldwin County Water, Sewer and Fire Protection Authority v. Town of Summerdale*, No. 2130708 (Ala. Civ. App. July 22, 2016)**

(1) Although county commission’s action is subject to “arbitrary and capricious” review when commission exercises discretion, in this case, *Ala. Code* § 11-88-5(d) imposes duty on commission to deny an application for sewer service expansion if commission finds that statements in application are not true, and thus deferential review is not appropriate; (2) “adequate” in section 11-88-5 means “capable of providing service,” and thus the challenging towns’ undisputed ability to provide service in the proposed expanded territory (despite the towns’ apparent decision to choose not to provide such service) rendered ECB’s application factually wrong.

Landlord-Tenant

***Evans v. Waldrop*, No. 2150342 (Ala. Civ. App. Aug. 12, 2016)**

Landlord’s refusal to consent to assignment of lease to prospective sub-lessee was not commercially unreasonable, given evidence that prospect had never run the type of business being proposed (a bingo parlor).

Zoning

BZA of City of Huntsville v. Watson, No. 2150314 (Ala. Civ. App. Aug. 12, 2016)

BZA acted within its discretion in denying variance for relief from self-created or self-inflicted conditions.

Attorneys; Sanctions

Ex parte Sikes, No. 2150469 (Ala. Civ. App. August 26, 2016)

Trial court was not required to find that the attorney had failed to comply with a prior order before entering a sanctions order for “vexatious” discovery conduct.

Res Judicata

Sims v. JPMC Specialty Mortgage, LLC, No. 2150437 (Ala. Civ. App. August 26, 2016)

Sims sued JPMC in 2013, claiming post-foreclosure misconduct and that JPMC trespassed because it had lacked authority to foreclose on Sims’s residence in 2009, and that JPMC’s entry upon the property and disposal of certain personal property after the 2009 foreclosure was tortious. Trial court granted summary judgment to JPMC based on res judicata effect of 2009 case. The CCA reversed in part, holding that res

judicata was a jury question because (1) JPMC repeatedly asserted in 2009 that the validity of the foreclosure was not being adjudicated and (2) some of the conduct upon which the claims were based occurred after the 2009 action.

Garnishment


Crews v. Jackson, No. 2150422 (Ala. Civ. App. August 26, 2016)

Under *Ala. R. Civ. P.* 64B, failure of judgment creditor to file timely contest of exemption claims required dismissal of garnishment.

Damages

Magrinat v. Maddox, No. 2150357 (Ala. Civ. App. August 26, 2016)

“[W]hen a third party purchases a medical provider’s debt but the injured party who was treated remains responsible and liable for that debt in full, the injured party is entitled to recover as damages the amount the injured party owes, to the extent it is reasonable and necessary; the injured party is not limited to recovering the amount the medical provider agreed to accept from the third-party purchaser of that debt.”



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(Continued from page 463)

Validity of Deeds

Turner v. Williams, No. 2150511 (Ala. Civ. App. Sept. 2, 2016)

Our supreme court has never decided whether, as a matter of law, a deed that is executed by some but not all of the grantors is totally inoperative. The CCA expressed no opinion on the issue, other than to hold a Rule 12(b)(6) dismissal improper.

Unlawful Detainer; Jurisdiction

The Rimpsey Agency, Inc. v. Johnston, No. 2150461 (Ala. Civ. App. Sept. 2, 2016)

Circuit court lacked jurisdiction to enter judgment in action in which only claim asserted was unlawful detainer; district court improperly transferred action to circuit court.

Attorneys' Fees; Evidence

Massey v. Carriage Towne, LLC, No. 2150432 (Ala. Civ. App. Sept. 2, 2016)

The court reversed the circuit court's award of attorneys' fees in which the court assessed the reasonableness of claimed fees based solely on the contingency contract between the plaintiff and his counsel; multi-factor analysis was required.

Contracts; Mental Anguish Damages; Veil-Piercing

TLIG Maintenance Services, Inc. v. Fialkowski, No. 2150255 (Ala. Civ. App. Sept. 2, 2016)

Mental anguish damages were not recoverable in contract action for negligent home repairs because there was no evidence house was rendered uninhabitable. The court disallowed veil-piercing to reach a non-shareholder or officer of the corporate entity which had presented himself as an agent of the entity, but evidence of co-mingling of corporate and shareholder funds was sufficient to support a veil-piercing as to the actual sole shareholder of the entity.

Psychotherapist Privilege

Ex parte Johnson, No. 2150835 (Ala. Civ. App. Sept. 9, 2016)

Ala. R. Evid. 503(d)(5) recognizes exception to psychotherapist-patient privilege in child-custody cases, where mental state of a party is at issue. In this custody modification proceeding, therapist of minor child sought mandamus after being compelled to testify—she claimed (correctly) that minor child held the privilege, not one or the other parent, and that minor child is not a party to the custody proceeding.

Workers' Compensation

Kennamer Brothers, Inc. v. Stewart, No. 2150359 (Ala. Civ. App. Sept. 9, 2016)

CCA affirmed trial court's compensability finding, even though medical records indicated that employee's earliest onset of injury occurred five months after the truck crash, because there was no evidence of any intervening cause. However, trial court erred in calculation of TTD benefits under *Ala. Code* § 25-5-68, because the trial court increased the calculated average weekly wage during the total temporary period due to an increase by the state.

Restrictive Covenants; Statutes of Limitation

Bekken v. Greystone Residential Association, Inc., No. 2150365 (Ala. Civ. App. Sept. 18, 2016)

Six-year limitations period provided in § 6-2-34(6), *Ala. Code* 1975, concerning "[a]ctions for the use and occupation of land," apply to any action to enforce restrictive covenants.

Judicial Redemption; Laches

The Dombrowski Living Trust v. Morgantown Property Owners Association, Inc., No. 2150391 (Ala. Civ. App. Sept. 18, 2016)

Former landowner and possessor was entitled to bring action for judicial redemption without limitation of time, based on evidence that plaintiff was in possession of disputed land; redemption by one in possession under *Ala. Code* § 40-10-83 does not require exclusive possession. However, laches barred the claim for judicial redemption; judicial redemption is equitable in nature, and in this case, the purchaser (a homeowner's association) would be prejudiced by the 10-year delay between the tax sale and the action for judicial redemption, due to the substantial increase in market prices for property to obtain walking access for homeowners in the subdivision.

Workers' Compensation; Mileage Reimbursement

Page v. Southern Care, Inc., No. 2150451 (Ala. Civ. App. Sept. 16, 2016)

Ala. Code § 25-5-77(f) provides: "The employer shall pay mileage costs to and from medical and rehabilitation providers at the same rate as provided by law for official state travel." Former employee with comp claim sought reimbursement for

mileage expenses to and from her new place of employment (as a traveling nurse in West Palm Beach and Valdosta) to Alabama. The trial court rejected that claim, but allowed mileage reimbursement between medical providers and pharmacies and plaintiff's customary residence in Gadsden.

Teacher Termination

Escambia County Board of Education v. Lambert, No. 2150548 (Ala. Civ. App. Sept. 23, 2016)

The court reversed the hearing officer's determination that the board's termination of a teacher (assistant band director) under the Students First Act was arbitrary and capricious. Teacher was terminated for bringing loaded weapon (with additional ammo clips) on campus, in a bag on a desk, in violation of board's no-weapons and zero tolerance policy. Hearing officer failed to apply the arbitrary and capricious standard of review.

Prescriptive Easements

Barker v. Bennett, No. 2150501 (Ala. Civ. App. Sept. 23, 2016)

Evidence supported finding a prescriptive easement. Predecessor in title had used the roadway for more than 20 years without express permission until defendant erected a gate across the roadway. Other persons' use of roadway did not undermine the essential element of exclusivity, which merely requires a claim of right independent of others.

Workers' Compensation; Contempt

Augmentation, Inc. v. Harris, No. 2150307 (Ala. Civ. App. Sept. 23, 2016)

Trial court did not abuse discretion by determining employer failed to conduct reasonable investigation into compensability before denying payment; employer failed to resort to a utilization-review process and did seek judicial review of the dispute before refusing to pay.

From the Eleventh Circuit Court of Appeals

Admiralty

Tundidor v. Miami-Dade County, No. 15-12597 (11th Cir. Aug. 3, 2016)

Canal is not navigable in admiralty if an artificial obstruction prevents vessels from using the canal to conduct interstate commerce.

First Amendment

Flanigan's Enterprises, Inc. v. City of Sandy Springs, No. 14-15499 (11th Cir. Aug. 3, 2016)

Under *Williams v. Attorney General*, 378 F.3d 1232 (11th Cir. 2004), the Due Process Clause does not contain a right to buy, sell and use sexual devices.

Securities; American Pipe Tolling; RICO

Dusek v. J.P.Morgan Chase & Co., No. 15-14463 (11th Cir. Aug. 10, 2016)

Because the *American Pipe* rule for class-action tolling of the statute of limitations is a principle of equitable and not legal tolling, it does not apply to save an otherwise untimely claim brought in violation of a statute of repose (in this case, a claim under Section 20(a) of the Securities Act). Section 1964(c) of RICO prohibits the bringing of a RICO claims based on predicate acts of mail and/or wire fraud which would be actionable securities fraud claims.

Bankruptcy; Domestic Support Obligations

In re Gonzalez, No. 15-14804 (11th Cir. Aug. 11, 2016)

Exception to the automatic stay for domestic support obligations does not apply after the confirmation of a debtor's Chapter 13 plan.

Environmental Law

Black Warrior Riverkeeper v. U.S. Army Corps of Engineers, No. 15-14745 (11th Cir. Aug. 12, 2016)

Corps' 2012 decision to reissue Nationwide Permit 21 ("NWP 21"), a general permit regulating discharge of dredged or fill materials into navigable waters by surface coal mining operations, was neither arbitrary nor capricious.

First Amendment

Wright v. City of St. Petersburg, No. 15-10315 (11th Cir. Aug. 15, 2016)

City's exclusion of Wright from a park for one year for misconduct was lawful even though it had an incidental effect on his First Amendment rights during that year.

ERISA; Benefits Claims

Alexandra v. Oxford Health Insurance, Inc. Freedom Access Plan, No. 15-11513 (11th Cir. Aug. 16, 2016)

Held: (1) district court correctly decided that the record of the external review was properly before the district court, but erred in holding that the adverse external review decision barred Alexandra from presenting her challenge to the adverse medical necessity determination; and (2) because the external review process does not conflict with ERISA, it is not preempted.

(Continued from page 465)

First Amendment; Employment

***Carollo v. Boria*, No. 15-11512 (11th Cir. Aug. 17, 2016)**

Qualified immunity did not bar First Amendment termination claim at motion to dismiss stage; reasonable public officials would have known at the time of termination that it violated the First Amendment to terminate a colleague for speaking about matters of public concern outside the scope of his ordinary job responsibilities.

Section 1981

***Moore v. Grady Mem. Hosp.*, No. 14-14719 (11th Cir. August 22, 2016)**

Section 1981 complaint sufficiently alleged specific instances of actions motivated by race, which included summarily suspending African-American doctor's privileges, diverting cases to white physicians outside of hospital, and failing to provide operating rooms for surgery to the African-American doctors of Morehouse College.

Title VII; Joint Employer

***Peppers v. Cobb County*, No. 15-10866 (11th Cir. August 25, 2016)**

Retired investigator with Cobb County DA's office sued county under Title VII and Equal Pay Act. The district court granted summary judgment to county, rejecting plaintiff's theory that county and DA were joint employers because county was responsible for approving the district attorney's budget and paying Peppers's salary and benefits. The Eleventh Circuit affirmed, reasoning that the county is a legally separate and distinct entity that did not control the fundamental aspects of the employment relationship.

Bankruptcy; Contempt

***In re: Ocean Warrior, Inc.*, No. 15-11891 (11th Cir. August 26, 2016)**

Civil contempt proceeding conducted through pursuant to a show-cause order complied with due process. President of entity was not entitled to appointed counsel because incarceration was not involved in civil contempt. Bankruptcy court had jurisdiction to conduct a contempt proceeding ancillary to a core matter.

RICO

***Ray v. Spirit Airlines, Inc.*, No. 15-13792 (11th Cir. Sept. 2, 2016)**

RICO claim was properly dismissed: plaintiffs failed to adequately allege proximate cause and failed to properly plead existence of RICO enterprise.

Constitutional Torts

***Jacoby v. Baldwin County*, No. 14-12932 (11th Cir. Aug. 29, 2016)**

Pretrial detainee's conditions of confinement alleged were not so unsanitary or outrageous to trigger substantive due process violation, and, under the test for procedural due process applicable to an already-confined inmate, his procedural due process rights were not violated.

Arbitration; Unavailable Arbitrator and Severability

***Parm v. National Bank of California, NA*, No. 15-12509 (11th Cir. Aug. 29, 2016)**

Arbitration agreement providing for arbitration before Cheyenne River Soix Tribe was unenforceable because the arbitral forum was unavailable. The arbitrator selection was so integral to the clause, moreover, that it could not be severed from the remainder of the agreement, and thus arbitration was properly denied.

Arbitration; Post-Arbitral Review

***Wiregrass Metal Trades Council AFL-CIO v. Shaw Environmental & Infrastructure, Inc.*, No. 15-11662 (11th Cir. Sept. 8, 2016)**

Arbitrator acts within her authority when she even arguably interprets a contract, but she exceeds her authority when she modifies the contract's clear and unambiguous terms.

Employment

***EEOC v. Catastrophe Management Solutions, Inc.*, No. 14-13482 (11th Cir. Sept. 15, 2016)**

Held: (1) EEOC improperly conflated the distinct Title VII theories of disparate treatment and disparate impact, (2) Title VII prohibits discrimination based on immutable traits, and the proposed amended complaint does not assert that dreadlocks—though culturally associated with race—are an immutable characteristic of black persons and (3) the EEOC's Compliance Manual was not entitled to deference or persuasiveness because it conflicted with the position taken by the EEOC in an earlier administrative appeal; the EEOC has not offered any explanation for its change in course.

RECENT CRIMINAL DECISIONS

Juveniles; Double Jeopardy

***D.I.J. v. State*, No. CR-15-0221 (Ala. Crim. App. Aug. 12, 2016)**

Trial court erred in denying juvenile's motion for acquittal on first degree theft; state's evidence listed various stolen items but did not establish value for items. There was no double jeopardy violation in delinquency adjudication of burglary and remaining theft charge arising from the same conduct; each offense required proof of element not present in the other.

Rule 32; Double Jeopardy

***McMeans v. State*, No. CR-15-0295 (Ala. Crim. App. Aug. 12, 2016)**

Trial court erred in summarily dismissing defendant's Rule 32 petition, because he sufficiently pleaded facts to require further proceedings on claim that convictions for first-degree rape and second-degree rape, stemming from the same act, constituted double jeopardy.

"Stand Your Ground" Instruction

***Thomas v. State*, No. CR-14-0723 (Ala. Crim. App. Aug. 12, 2016)**

Because evidence indicated that defendant, charged with murder, was not prohibited from visiting home where fatal shooting occurred and was not acting unlawfully there, trial court erred in denying defendant's request for a "stand your ground" instruction.

Rule 32; Juvenile Life without Parole

***Wynn v. State*, CR-14-1261 (Ala. Crim. App. Sept. 9, 2016)**

Trial court properly denied defendant's motion to amend Rule 32 petition; petition was filed 11 years earlier, and amendment would cause actual prejudice and undue delay. The court remanded for review of defendant's mandatory life without parole sentence in light of *Montgomery v. Louisiana*, ___ U.S. ___, 136 S. Ct. 718 (2016).

"Stand Your Ground"

***State v. Watson*, CR-15-0211 (Ala. Crim. App. Sept. 9, 2016)**

Trial court did not err in conducting a pretrial evidentiary hearing and concluding that defendant, charged with murder, was entitled to immunity from prosecution under *Ala. Code* § 13A-3-23(d); evidence showed he was justified in using deadly physical force.

Probation Revocation; Confrontation

***Taylor v. State*, CR-15-0354 (Ala. Crim. App. Sept. 9, 2016)**

Defendant's right to confrontation was not violated at his probation revocation hearing by absence of technician who placed his urine sample into machine for drug analysis. Laboratory's director who had reviewed the drug test result was present and was subject to examination.

Guilty Plea; Involuntariness

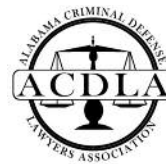
***Case v. State*, CR-12-0252 (Ala. Crim. App. Sept. 9, 2016)**

Defendant's guilty plea to felony murder was involuntary because he was informed that the minimum sentence for his crime was 10 years' imprisonment, but, because of the use of a firearm in the offense, his sentence was enhanced to a minimum of 20 years' imprisonment.

Sentencing Guidelines

***Hinkle v. State*, CR-15-0615 (Ala. Crim. App. Sept. 9, 2016)**

Trial court did not err in departing from sentencing guidelines in sentencing the defendant to a total of 137 years' imprisonment on her numerous theft convictions because its decision was not based on an erroneous conclusion of law, nor did not "violate the general admonition" that such departures be rare. ▲



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MEMORIALS

▲ Gene Harrison Lentz

▲ Judge Charles E. Robinson, Sr.

Gene Harrison Lentz

Gene Harrison Lentz of Decatur passed away on February 1, 2016 at the age of 86. Gene was born August 2, 1929 and was a lifelong resident of Decatur. He attended Riverside High School where he excelled in academia and athletics. Gene developed leadership skills early in life. He was president of his senior class in high school and played football under Coach H.L. "Shorty" Ogle while working part-time jobs to help support his family.

After graduating from high school, Gene attended Cumberland University and Florence State Teachers College on football scholarships and graduated in 1951 with a double major in English and education. After a brief career teaching and coaching football at Cullman High School, Gene was drafted into the army and was selected to join the Army Counter Intelligence Corps. After completing his military service, he was influenced by his friend Albert P. Brewer (who later held several state positions including governor of Alabama) and attended law school at the University of Alabama. He ultimately joined Governor Brewer in establishing a legal practice in 1957 in Decatur, which practice survives today as Lentz, Whitmire, House & Propst LLP. Gene's practice areas focused on commercial transactions, wills and estates and banking.

Gene was a true "counselor" and advised many individuals in both legal and personal matters. He also counseled and mentored young lawyers in his firm and the community, many of whom have expressed appreciation for his leadership and guidance. Early in his career he also advised the City of Decatur and surrounding communities on commercial development and finance matters. Gene was proud of his legal service and prominently displayed his certificate from the Alabama State Bar recognizing his 50 years of service.

Throughout his life, Gene had a deep passion for learning and kept current on a wide range of subjects from biblical history to international current events. For more than 50 years, he shared his knowledge of the gospels and biblical history with his Sunday school class at Central Park Baptist Church in Decatur. Gene loved to travel, both within the United States and internationally. He had an opportunity to travel to Europe and Asia with his family in his later years. Gene also maintained a strong interest in physical fitness and health throughout his entire life and inspired his family and friends to do the same.

Gene is survived by his daughters Kimberly R. Lentz (married to William J. Little, Jr.) and Gena R. Lentz (married to Tony Kuan), both of whom were inspired by Gene's dedication to the practice of law. Kim earned a J.D. degree from Cumberland School of Law and an LLM in taxation from New York University School of Law and currently works as



Lentz

a Chapter 7 bankruptcy trustee and attorney in Gulfport. Gena earned a J.D. degree from University of Alabama School of Law and currently works at Mississippi Power Company as economic development services manager in Hattiesburg.

Judge Charles E. Robinson, Sr.

Judge Charles E. Robinson, Sr. was born July 10, 1939 and died May 24, 2016, after almost 51 years of service to his community in St. Clair County as a practicing attorney, district attorney and circuit court judge.

Judge Robinson was married to Mary Anne Lowery Robinson on August 20, 1964. They had two sons, Charles E. Robinson, Jr. and Thomas Dozier Robinson, and four grandchildren.

Judge Robinson was a lifelong resident of St. Clair County. He attended Ashville High School for two years and was a graduate of Pell City High School. Judge Robinson played baseball, basketball and was the quarterback on the football team. In 2015, Judge Robinson was inducted into the St. Clair County Sports Hall of Fame.

Following his graduation in 1962 from the University of Alabama and the Cumberland School of Law in 1965, Judge Robinson began practicing law with former Judge Frank Embry. In addition to his legal career, Judge Robinson was active in St. Clair County politics, having served several terms as chair of the St. Clair County Democratic Party. He was also active in numerous professional and civic organizations, including serving as a former president of the St. Clair County Bar



Robinson

Association and as a former member of the Alabama State Bar Board of Commissioners. He first entered public office in 1971 when he was elected to serve as district attorney for the 30th Judicial Circuit (which included both St. Clair County and Blount County at the time). In 1975, Judge Robinson re-entered the private practice of law with Church, Trussell & Robinson PC. In 1990, Judge Robinson decided to open his own law office as a solo practitioner in Ashville, Alabama. Judge Robinson's son, Charles E. Robinson, Jr., joined his dad in the practice in 1996. Judge Robinson was extremely proud of having the opportunity to practice law with his son.

In 2001, Judge Robinson was appointed to serve as circuit judge for the 30th Judicial Circuit (St. Clair County). He later became the presiding circuit judge for that circuit before retiring in 2011. A testament to his character, his integrity and his principles was the fact that, although he served as a Democrat in an overwhelmingly Republican county, Judge Robinson ran unopposed in the two election cycles following his initial appointment as circuit judge. As he stated in 2008, during the last of those election cycles, "A lot of people encouraged me to switch over, and I would be less than honest to say I didn't consider it, but I would have a hard time turning my back on people who have helped me since 1965. That's what I felt like I would be doing."

Judge Robinson possessed a disposition and demeanor that made him an excellent judge. He was known as a "lawyer's judge." As a judge, he was firm but always fair. As a person, Judge Robinson had compassion for people and a natural inclination to help others. He often stated that he tried to treat people the way he wanted to be treated.

Those who knew him best will remember Judge Robinson as a man who was devoted to his family. He was actively involved in the lives of his children and grandchildren.

Following his retirement from the bench, he became of counsel with the Robinson Law Firm and resumed the practice of law with his son in Ashville. Judge Robinson will long be remembered as a legend in the legal community in St. Clair County and in the region. He is and will be sorely missed. ▲

Chambless, Mark Norman

Montgomery
Admitted: 1983
Died: July 3, 2016

Howard, Ralph O'Sullivan

Alpharetta
Admitted: 1961
Died: June 22, 2016

Howell, William Lee

Mobile
Admitted: 1968
Died: July 21, 2016

Patterson, Tommy Wayne

Mobile
Admitted: 2000
Died: July 7, 2016

Powell, Joseph Benjamin

Huntsville
Admitted: 1973
Died: June 28, 2016

Russell, William Morgan, Jr.

Tuskegee
Admitted: 1951
Died: July 10, 2016

Scott, Romaine Samples, Jr.

Birmingham
Admitted: 1948
Died: July 11, 2016

Vann, Michael Owen

Birmingham
Admitted: 1983
Died: July 13, 2016



LEGISLATIVE WRAP-UP

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Judicial Retirement Reforms

In March 2016, during the primary election, the voters of Alabama ratified Amendment 1. This amendment cleared the way to reform the retirement system for judges and created a retirement system for district attorneys and circuit clerks who have historically been under the supernumerary system. Considering the significance of these offices to our profession, it is important to have an understanding of how these changes came about, why they were necessary and what the end effect will be.

The legislation leading to these changes was sponsored by Senator Arthur Orr and was carried in the House by Representative Jim Hill, a retired circuit judge. These legislators did a tremendous job of recognizing the uniqueness of these public servants and the need to have their retirement system reflect a different set of incentives than are standard. Their focus and hard work allowed for these changes to pass with support of not only the legislature, but also the affected groups and the Retirement Systems of Alabama.

First, it is important to understand that these changes will not affect anyone already in the system. The changes will only apply to persons elected or appointed to office on or after November 8, 2016. All persons holding office before that time or already retired will see no change.

Second, it is important to understand the key motivations for why changes needed to be made. All judges in Alabama were already covered by the Judicial Retirement Fund that is administered by the Retirement Systems of Alabama. This mandatory retirement system covered all appellate and circuit judges appointed or elected after September 18, 1973, all district judges elected or appointed after October 1, 1975 and all probate judges elected or appointed after October 1, 1976. Under this system, judges contribute 8.5 percent of their salary in return for a regiment benefit of 75 percent after 10 years of service at age 70, 12 years of service at age 65, 15 years of service at age 62, 16 years of service at age 61, 17 years of service at age 60 or 18 years of service at any age.

Prior to the ratification of the amendment allowing for these changes, district attorneys and circuit clerks were not eligible to participate in any retirement plan as such. Instead, they were eligible for supernumerary benefits. Under this system, upon retirement, they continued to be paid a supernumerary salary and, under certain circumstances, could be called back into service. Therefore, there was a need to shore up the financial footing of these systems.

There were multiple problems with these prior systems. The first is they were not fiscally sound. The Judicial Retirement Fund was only funded at approximately 62 percent of its projected needs at the end of its last fiscal year. This was largely due to the disconnect between its employee contribution levels in comparison to benefits. Similarly, the bulk of supernumerary payments come from the general fund of the state and counties. This means money was being routed from current needs and obligations to pay retirement benefits.

Additionally, change was warranted to provide better flexibility for these public servants at the time of their retirement. Unlike the retirement systems in which other state employees and teachers participate, these systems had very limited options to provide for surviving spouses and beneficiaries. Under the new system judges, district attorneys and circuit clerks will have the same range of options at retirement as other state employees.

Third, it was important to recognize why the retirement benefits for these public servants were historically higher than those of other employees. This was not done by accident, but rather in recognition of the need to attract the best persons to these jobs. Ideally a person who becomes a judge or district attorney does so as a "second career" after spending a significant amount of time in the practice of law. Both the historical and future retirement systems recognize this and therefore have an incentive that is greater than the normal employee. Because of this, the multiplier used in the new system is significantly higher than the multiplier used for other state employees and teachers.



Now let's turn to the structure of the new system:

- This plan will be structured as a newly-created plan within the Judicial Retirement Fund.
- All participants will be required to participate upon their election or appointment to office and will contribute 8.5 percent of his or her salary to the fund.
- Retirement benefits will be calculated based on the participant's five highest years of compensation of their last 10 years of service and the benefit amount will be based upon years of service times a 4 percent multiplier for judges and a 3 percent multiplier for district attorneys and circuit clerks.
- Participants will be eligible to receive retirement benefits upon attaining the age of 62 with at least 10 years of service.
- Total benefits may not exceed 80 percent of the average final contribution.
- Judges will continue to get 75 percent of their average final salary upon attaining 18 years of service.
- If a member ceases to participate prior to retirement, he or she gets all contributions back, plus interest.
- At retirement, the member can choose, in lieu of his or her retirement allowance, a reduced amount in four different options to better provide for his or her surviving spouse or beneficiary.

This system should be both more sound fiscally and provide better flexibility for its participants.

ALI News

I am very glad to announce that **Clay Hornsby** has joined the Law Institute as our deputy director. Clay brings with him a tremendous background in the practice of law and is well known for his attention to detail and skill as a consensus builder. He is going to be a tremendous asset to all of our endeavors. Clay will be based in our Tuscaloosa office and overseeing our day-to-day committee and education functions. ▲



ABOUT MEMBERS, AMONG FIRMS

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

About Members

Martha R. Cook announces the opening of **Martha Reeves Cook LLC** at The Kress Building, 301 19th St. N, Ste. 520, Birmingham 35203. Phone (205) 458-1250.

Samarria M. Dunson announces the opening of **The Dunson Group LLC** in Montgomery. Phone (888) 959-9501.

Thomas Jarvinen announces the formation of **Jarvinen Law Firm LLC** at 201 Eastside Sq., Ste. 5, Huntsville 35801. Phone (256) 970-7195.

Shannon L. Millican announces the opening of her office at 255 S. 8th St., Gadsden 35901. Phone (256) 543-7610.

Leigh M. Snodsmith announces the opening of **Leigh M. Snodsmith LLC** at 1490 Northbank Parkway, Ste. 224, Tuscaloosa 35406. Phone (205) 469-7913.

Baker Donelson announces that **Marcus Maples** joined as a shareholder in the Birmingham office.

Bradley Arant Boulton Cummings LLP announces that **Stephen Hinton** joined as counsel; **Timothy W. Gregg**, **Andrew S. Nix** and **Julia Gruenewald Bernstein** joined as partners; and **Maggie Johnson Cornelius**, **Benn C. Wilson** and **Megan R. Wilson** joined as associates, all in the Birmingham office. The firm also announces that **Kevin C. Gray** joined as a partner and **David Vance Lucas** rejoined as a partner, both in the Huntsville office.

John B. Brunson, **J. Scott Barnett** and **W. Jefferson Sherrer** announce the opening of **Brunson, Barnett & Sherrer PC** with offices in Leeds and Oneonta.

Burr & Forman LLP announces that **Lindsey Cochran**, **Samuel S. Grimes, Jr.**, **Fob James**, **Bret L. Thompson** and **Ryan Rummage** joined as associates in the Birmingham office.

Butler Snow announces that **Lance J. Wilkerson** joined the firm in the Birmingham office.

Carr Allison announces that **Brett Adair** joined as a shareholder and **Joe Davis**, **Madison Davis** and **Woods Parker** joined as associates, all in the Birmingham office.

Among Firms

Governor Robert Bentley announces that **Christy O. Edwards** was appointed an associate judge of the **Alabama Tax Tribunal**.

Annesley H. DeGaris and **Wayne Rogers** announce the opening of **DeGaris & Rogers LLC** at Two N. 20th St., Ste. 1030, Birmingham 35203.

Farris, Riley & Pitt LLP announces that former Alabama Senator **Zeb Little** joined as of counsel and **Brett Hollett** and **Meredith Maitrejean** joined as associates.

Hall Booth Smith PC announces that **David W. Proctor** and **R. Rhett Owens** joined the new Birmingham office as a partner and as an associate, respectively.

Marsh Rickard & Bryan PC announces that **J.D. Marsh** joined as an associate.

Maynard Cooper & Gale announces that **Lindsay Whitworth** joined as of counsel.

The **Mobile County License Commission** announces that **Adam Bourne** is now deputy license commissioner. Phone (251) 574-8790.

Kristina Jill Sexton and **Coby McEachern Boswell** announce the opening of **NXTSTEP Family Law PC** at 401 Pratt Ave. NW, Huntsville 35801. Phone (256) 534-8799.

Red Mountain Law Group of Birmingham announces that **Rory McKean, Wells Robinson, Joyce Baker** and **Susan Han** joined the firm.

Samford & Denson LLP of Opelika announces that **Adam Leavitt Sanders** joined as an associate.

James D. Sears and **Shane Sears** announce the opening of **Sears & Sears PC** at 5809 Feldspar Way, Hoover 35244. Phone (205) 588-0755.

Sewell Sewell McMillan LLC announces that **Alana S. Beard** joined as a partner in the Jasper office and that the firm opened a second office in Birmingham.

St. John & St. John LLC of Cullman announces that **Shay Persall** joined as an associate.

Wayne L. Williams & Associates LLC announces that **Erin S. Hardin** joined as an associate.

Webster, Henry, Lyons, Bradwell, Cohan & Speagle PC announces that **Martin D. Smith** joined as an associate in the Montgomery office. ▲

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OPINIONS OF THE GENERAL COUNSEL

J. Anthony McLain



Retention, Storage, Ownership, Production and Destruction of Client Files

Introduction

Formal opinions 1986-02, 1993-10 and 1994-01 are the most recent pronouncements of a lawyer's ethical obligations regarding client files. Since those opinions were issued, advances in technology, electronic filing and Internet-based electronic file storage and retrieval services have created issues that were not contemplated by those opinions. Realizing the need to provide guidance to lawyers that is relevant to the practice of law in today's technological world, the Disciplinary Commission offers the following opinion concerning a lawyer's ethical responsibilities relating to the retention, storage, ownership, production and destruction of client files.

Applicable Rules

The following rules must be considered when determining a lawyer's professional responsibilities relating to client file retention policies. Although most often considered a rule relating solely to lawyer trust accounting, Rule 1.15, *Alabama Rules of Professional Conduct*, sets out a lawyer's responsibilities relating to types of property of clients or third persons, other than money, and provides, in pertinent part:

“(a) A lawyer shall hold the property of clients or third persons that is in the lawyer’s possession in connection with a representation separate from the lawyer’s own property. [...] Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for six (6) years after termination of the representation....”

“(b) Upon receiving funds or other property in which a client or third person has an interest from a source other than the client or the third person, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding that property.

“(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and a

severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.”

* * *

Comment

“A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property which is the property of clients or third persons should be kept separate from the lawyer’s business and personal property and, if monies, in one or more trust accounts....”

* * *

“Third parties, such as a client’s creditors, may have just claims against funds or other property in a lawyer’s custody. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client, and accordingly may refuse to surrender the property to the client. However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party.”



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The issue relating to whom the file belongs was decided in Formal Opinion 1986-02, wherein we held that the materials in the file furnished by or for the client are the property of the client. Therefore, Rule 1.15, *Ala. R. Prof. C.*, imposes an ethical and fiduciary duty on the lawyer to properly identify a client's file as such, segregate the file from the lawyer's business and personal property, as well as from the property of other clients and third persons, safeguard and account for its contents and promptly produce it upon request by the client.

Although specifically addressing the issues relating to declining or terminating representation, Rule 1.16(d), *Ala. R. Prof. C.*, also refers to client property and provides, in pertinent part:

"(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law."

As we explained in Formal Opinion 1986-02, the file belongs to the client. However, the client's possessory rights to the file are subject to an attorney's lien created by *Ala. Code* §34-3-61 (1975, as amended), for unpaid fees and expenses. We take this opportunity to reiterate that where a lawyer is asserting a valid attorney's lien pursuant to the Attorney's Lien Statute to secure payment for reasonable fees and expenses that the client has not paid, the lawyer has a statutory right to withhold a client's papers and property in his possession until such time as the client satisfies the lien by tendering payment or makes reasonable and satisfactory arrangements to protect or otherwise secure the lawyer's interest in the unpaid fees and expenses.

Rule 1.6, *Ala. R. Prof. C.*, embodies one of the most fundamental principles of our profession and requires that, with few exceptions, a "lawyer shall not reveal information relating to representation of a client." The duty to maintain confidentiality includes the duty to segregate, protect and safeguard a client's file and the information it contains. The obligation to maintain a client's file contemporaneously organized and orderly filing and indexing system is inherent in the duty of confidentiality and explicit in Rule 1.15. The failure to do so is

a breach of Rule 1.15 and may also rise to the level of a breach of Rule 1.6. The principles of confidentiality, loyalty and fidelity are so fundamental to the practice of law that these rules must be enforced to eliminate even the risk of a breach of these principles.

However, a lawyer's obligation to identify and segregate a client's file, safeguard its contents, maintain its confidentiality and promptly account for and produce it upon request from the client does not create an obligation to preserve permanently all files of the lawyer's clients or former clients. See, D.C. Bar Opinion 206; ABA Informal Op. 1384 (1989). Lawyers do not have unlimited space to store files and what limited space is available is often expensive. Lawyers do have an ethical obligation to prevent the premature or inappropriate destruction of client files. See, D.C. Bar Opinion 205 (1989). Clients may reasonably expect lawyers to maintain valuable and useful information, not otherwise readily available to the client, in their files for a reasonable period of time. ABA Committee on Ethics and Professional Responsibility, Formal Opinion 13384 (March 14, 1977).

Adopt File-Retention Policies

The best practice is for a lawyer to adopt and follow a file-retention policy that best fits the needs of the lawyer's practice and the lawyer's clients. File retention policies may vary from lawyer to lawyer and even from client to client, but they must be consistent with the guidelines expressed in this opinion. Additionally, the policy must be communicated to the client in writing at the outset of the representation. Upon conclusion of the representation, the lawyer should reiterate the policy and engage in appropriate follow-up with the client regarding retention and destruction of the client's file. The lawyer's file-retention policy may be included in the retainer or engagement agreement. In certain situations, it may be necessary and appropriate for a lawyer to create a separate file-retention and destruction policy, tailored to meet the specific needs of a client or a client matter, or the lawyer's practice. In developing a file-retention and destruction policy, the lawyer must abide by the guidelines expressed in this opinion and should also consider the individual client's level of education, sophistication, resources and other relevant circumstances.

Although as a general rule the file belongs to the client and must be produced promptly upon request, circumstances may exist that would make production of a copy of the entire client's

file inappropriate. Absent a court order, a lawyer should not tender the entire file to a client, who has diminished capacity or serious mental health disorders, or to juvenile clients or to clients who have a propensity for violence. A lawyer may also refuse to tender the entire client file to clients who are violent criminal defendants, sex-offenders or other clients where the information contained in the file would endanger the safety and welfare of the client or others. In these circumstances, it is reasonable and appropriate for the lawyer to redact or remove documents containing sensitive mental health or medical records, descriptions of crimes, photographs of crime scenes or victims, sensitive or salacious information and personal or other identifying information relating to jurors, victims, witnesses or others. A lawyer's retention and destruction policy should allow for these exceptional situations.

How long must a file be retained?

Generally, a lawyer should maintain a copy of the client's file for a minimum of six years from termination of the representation or conclusion of the matter. A lawyer's failure to maintain a file for this minimum period of time is presumptively unreasonable based upon consideration of the statute of limitations under the Alabama Legal Services Liability Act (*Ala. Code* §6-6-574) and the six-year period of limitations for the filing of formal charges in lawyer disciplinary matters

(Rule 31, *Alabama Rules of Disciplinary Procedure*). Six years is the absolute minimum period, but special circumstances may exist that require a longer, even indefinite, period of retention. Files relating to minors, probate matters, estate planning, tax, criminal law, business entities and transactional matters should be retained indefinitely and until their contents are substantively and practically obsolete and their retention would serve no useful purpose to the client, the lawyer or the administration of justice.

What is considered part of the client's file?

In general, there are two approaches to determine what constitutes the client's file. The "entire file" approach provides that the client owns and is, therefore, entitled to all of the documents within the client's file, unless the lawyer establishes that withholding items would not result in foreseeable prejudice to the client or would, as previously discussed, endanger the health, safety or welfare of the client or others. *In the Matter of Sage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn LLP*, 91 N.Y. 2d 30, 666 N.Y.S. 2d 985, 689 N.E. 2d 879, 883 (1997); *Clark v. Milam*, 847 F. Supp. 424, 426 (D. W.Va. 1994); *Gottlieb v. Wiles*, 143 F.R.D. 241, 247 (D. Colo. 1992); *Martin v. Valley Nat. Bank of Arizona*, 140 F.R.D. 291 (S.D.N.Y. 1991); *Resolution Trust Corp. v. H—, P.C.*, 128 F.R.D. 647 (N.D. Tex. 1989). The "end product" approach divides ownership of documents in the file between



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the client and the lawyer and permits a lawyer to retain certain documents, such as notes by the lawyer to himself made in preparation for deposition, trials or interviews or blemished drafts of other documents, which may contain the lawyer's mental impressions, opinions and legal theories, some of which may not be flattering or palatable to the client or the lawyer. *Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, et al.*, 824 S.W.2d 92 (Mo. App. E.D. 1992); Minnesota Lawyers Professional Responsibility Board Opinion 13 (June 15, 1989); ABA Informal Ethics Op. 1376 (Feb. 18, 1977). Either approach requires weighing the protections of both a lawyer's right to think and practice freely during the representation and the client's right to demand an accounting of the actions of his lawyer. The rationale supporting the "end product" approach is that unless the lawyer's recorded thoughts are protected, he will not provide effective representation. The "entire file" approach, which is the majority view, fosters open and forthright lawyer-client relations. The rationale supporting this approach is that a lawyer's fiduciary relationship with a client requires full, candid disclosure. The relationship would be impaired if lawyers withheld any and all documents from their clients without good cause. *Henry v. Swift, Currie, McGhee & Hiers, LLP, et al.*, 581 S.E.2d 37 (Ga. 2003) (adopting the majority view.) The Disciplinary Commission agrees with the majority of jurisdictions that the "entire file" approach is the best approach. The lawyer is in possession of the file, knows its contents and is best able to determine the appropriateness of redaction or removal of some of its contents. In those situations where the lawyer determines that production of the entire file is unreasonable or inappropriate, the lawyer must provide reasonable notice to the client that portions of the file have been redacted or items removed for good cause.

What contents of a client's file may be destroyed?

We have consistently opined that six years is the minimum period of time a lawyer must retain a client's file after the file is closed or after final disposition of the matter. See, Formal Opinions 1994-91 and 1993-10. Although we have opined that six years was generally a reasonable minimum period of time, we are aware that most have assumed that the six-year minimum period of time applied to all client files. Today, we emphasize that six years is the minimum period of time that a client's file must be retained, but circumstances may indefinitely extend

that minimum period of time. Even when the passage of time and other circumstances render destruction of a client's file appropriate, there are some contents that should never be destroyed.

In Formal Opinion 1993-10, we described the nature of documents that might be contained in a client's file and opined that it was the nature of those documents that determined whether they could be destroyed. We stated that those documents fall into four basic categories. Today, we modify that categorization to simplify the analysis; the results are unchanged.

Category 1 property is "intrinsically valuable property." Its "value" is inherent in its nature. Value is not dependent upon certainty of ownership or its source. The fact that the property may be a copy or duplicate, rather than an original, may minimize its value, but this factor, without more, does not change its character as a Category 1 documents. Copies of Category 1 documents must be retained indefinitely, unless the lawyer determines that the copy can be lawfully destroyed because it has been rendered useless and of no value by the client's possession of the original, or by the proper recording of the original or at the specific written instruction of the client, under circumstances where destruction of the property would not otherwise be illegal or improper. However, the best practice is that the lawyer should never destroy originals of Category 1 property. Where destruction is necessary and appropriate, the lawyer should deliver the original to the client or deposit it with the court. Examples of such property include, but are not limited to: wills, powers of attorney, advance healthcare directives, other executed estate planning documents, stock certificates, bonds, cash, negotiable instruments, certificates of title, abstracts of title, deeds, official corporate or other business and financial records and settlement agreements.

Category 2 property is "valuable property." Its value is dependent upon the present circumstances or upon the reasonably foreseeable probability of a change in future circumstances. Factors that the lawyer may consider are certainty and identity of ownership, source of the property, its intended purpose, its planned or possible use, its character as an original or copy, its form and size, the practicality of preserving or storing it and the reasonable expectations of the client or owner regarding its ultimate disposition. Category 2 property may be destroyed with the actual consent of the client or upon the client's implied consent, which may be obtained by the client's failure to take possession of the property on or within 60

days of a date established by the lawyer's written file retention policy or as provided in a separate written notice, sent to the client's last known address, advising of the date of the lawyer's planned destruction or disposal of the property. Notice provided as part of the lawyer's written file retention policy, which is affirmatively acknowledged in writing at the outset of the representation or upon termination of the representation, is presumed sufficient and no further notice or attempted notice is required prior to destruction or final disposition of the property. Examples of Category 2 property include, but are not limited to: tangible personal property, photographs, audio- and video-recordings, pleadings, correspondence, discovery, demonstrative aids, written statements, notes, memoranda, voluminous financial, accounting or business records and any other property, the premature or unauthorized destruction of which would be detrimental to the client's present or reasonably foreseeable future interests.

Category 3 property is property that has no value or reasonably foreseeable future value. It does not fall into either Category 1 or Category 2. It may be destroyed after the minimum required period of time without notice to or authorization by the client. However, the best practice is for the lawyer to use the same notice procedure for Category 3 property as prescribed for Category 2 property.

Documents which fall into category 1 should be retained for an indefinite period of time or preferably should be recorded or deposited with a court. Documents falling into categories 2 and 3 should be retained for a reasonable period of time at the end of which reasonable attempts should be made to contact the client and deliver the documents to him. After the minimum retention period of six years, those documents may be appropriately destroyed. There is no longer a category 4 for purposes of the analysis.

Before destroying or disposing of any client file, it is the lawyer's responsibility to review and screen the file to ensure that Category 1 property is not being destroyed. The lawyer must maintain an index of all destroyed files, which index must contain information sufficient to identify the client, the nature or subject matter of the representation, the date the file was opened and closed, the court case number associated with the file, a general description of the type of property destroyed, e.g., "Pleadings, Correspondence, Notes, Legal Research, Video-tapes, Photographs," a notation that the file was reviewed for Category 1 property, by whom, whether or not such property was contained in the file, and if so, its location or disposition, and the date and method of destruction of the file.

What are the ethical considerations relating to electronic files?

The practice of law today often requires legal documents and many other components of a client's file to be converted to, created, transmitted, stored and reproduced electronically.

Moving from "the paper chase" to "the paperless office" presents practical concerns. Converting existing paper files to electronic format is usually accomplished by "scanning" the paper file, which converts it to a format that can be stored, transmitted and reproduced electronically.

When paper files are converted to electronic format, destruction of the paper file is not without limits or conditions. Even after Category 1 documents are scanned and converted to electronic format, the lawyer cannot destroy the paper Category 1 document. After scanning and conversion, Category 2 and 3 documents may be destroyed, but the best practice is to follow the procedure used for ordinary paper documents.

Like documents that are converted, documents that are originally created and maintained electronically must be secured and reasonable measures must be in place to protect the confidentiality, security and integrity of the document. The lawyer must ensure that the process is at least as secure as that required for traditional paper files. The lawyer must have reasonable measures in place to protect the integrity and security of the electronic file. This requires the lawyer to ensure that only authorized individuals have access to the electronic files. The lawyer should also take reasonable steps to ensure that the files are secure from outside intrusion. Such steps may include the installation of firewalls and intrusion detection software. Although not required for traditional paper files, a lawyer must "back up" all electronically-stored files onto another computer or media that can be accessed to restore data in case the lawyer's computer crashes, the file is corrupted or his office is damaged or destroyed.

A lawyer may also choose to store or "back up" client files via a third-party provider or Internet-based server, provided that the lawyer exercises reasonable care in doing so. These third-party or Internet-based servers may include what is commonly referred to as "cloud computing." According to a recent *ABA Journal* article on the subject, "cloud computing is a sophisticated form of remote electronic data storage on the Internet. Unlike traditional methods that maintain data on a computer or server at a law office or other place of business, data stored 'in the cloud' is kept on large servers located elsewhere and maintained by a vendor." Richard Acello, "Get Your Head in the Cloud," *ABA Journal*, April 2010, at 28-29.

The obvious advantage to "cloud computing" is the lawyer's increased access to client data. As long as there is an Internet connection available, the lawyer would have the capability of accessing client data whether he was out of the office, out of the state or even out of the country. In addition, "cloud computing" may also allow clients greater access to their own files over the Internet. However, there are also confidentiality issues that arise with the use of "cloud computing." Client confidences and secrets are no longer under the direct control of the lawyer or his law firm; rather, client data is now in the hands of a third party that is free to access the

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data and move it from location to location. Additionally, there is always the possibility that a third party could illegally gain access to the server and confidential client data through the Internet.

However, such confidentiality concerns have not deterred other states from approving the use of third-party vendors for the storage of client information. In formal opinion no. 33, the Nevada State Bar stated that:

“[A]n attorney may use an outside agency to store confidential client information in electronic forms, and on hardware located outside the attorney’s direct supervision and control, so long as the attorney observes the usual obligations applicable to such arrangements for third-party storage services. If, for example, the attorney does not reasonably believe that the confidentiality will be preserved, or if the third party declines to agree to keep the information confidential, then the attorney violates SCR 156 by transmitting the data to the third party. But if the third party can be reasonably relied upon to maintain the confidentiality and agrees to do so, then the transmission is permitted by the rules even without client consent.”

In approving online file storage, the Arizona State Bar noted in formal opinion 09-04 that:

“[T]echnology advances may make certain protective measures obsolete over time. Therefore, the Committee does not suggest that the protective measures at issue in Ethics Op. 05-04 or in this opinion necessarily satisfy ER 1.6’s requirements indefinitely. Instead, whether a particular system provides reasonable protective measures must be ‘informed by the technology reasonably available at the time to secure data against unintentional disclosure.’ N.J. Ethics Op. 701. As technology advances occur, lawyers should periodically review security measures in place to ensure that they still reasonably protect the security and confidentiality of the clients’ documents and information.”

In their opinions, the bars of Arizona and Nevada recognize that just as with traditional storage and retention of client files, a lawyer cannot guarantee that client confidentiality will never be breached, whether by an employee or some other third party. Rather, both Arizona and Nevada adopt the approach

that a lawyer only has a duty of reasonable care in selecting and entrusting the storage of confidential client data to a third-party vendor. The Disciplinary Commission agrees and has determined that a lawyer may use “cloud computing” or third-party providers to store client data provided that the attorney exercises reasonable care in doing so.

The duty of reasonable care requires the lawyer to become knowledgeable about how the provider will handle the storage and security of the data being stored and to reasonably ensure that the provider will abide by a confidentiality agreement in handling the data. Additionally, because technology is constantly evolving, the lawyer will have a continuing duty to stay abreast of appropriate security safeguards that should be employed by the lawyer and the third-party provider. If there is a breach of confidentiality, the focus of any inquiry will be whether the lawyer acted reasonably in selecting the method of storage and/or the third-party provider.

In whatever format the lawyer chooses to store client documents, it must allow the lawyer to reproduce the documents in their original paper format. If a lawyer electronically stores a client’s file and the client later requests a copy of the file, the lawyer must abide by the client’s decision in whether to produce the file in its electronic format, such as on a compact disc, or in its original paper format.

When a lawyer discards laptops, computers or other electronic devices, he must take adequate reasonable measures to ensure that client files and/or confidential information have been erased from those items. Failure to do so could result in the disclosure of confidential information to a subsequent user. If such disclosure occurs, the lawyer could be subject to disciplinary action for a violation of Rule 1.6 of the *Alabama Rules of Professional Conduct*.

In what format must the client’s file be delivered?

There are various possible combinations of client file formats, including original paper files scanned and converted to electronic document format, original e-documents and emails. Often, client files are maintained in part in paper format and electronic format. Rarely is it possible to originate and maintain a client file in electronic format. Therefore, the best practice is to develop a procedure that integrates the various file formats into an organized, indexed and searchable, unified system, so that prompt access to and production

of the complete file, regardless of its various formats, can be reasonably assured.

Where a client has requested a copy of his file, the file may be produced in the format in which it is maintained by the lawyer, unless otherwise agreed upon or requested by the client. If the client requests that the electronic documents be produced in paper format, then the lawyer must accommodate the client, unless the lawyer's written file-retention policy agreed to by the client provides otherwise. Even in cases where the lawyer's file-retention policy provides that the file will be produced in only electronic format, where the client's level of education, sophistication or technological ability, or lack of financial resources or the unavailability of computer hardware or software necessary to access the documents would create an burden on the client to access the file in electronic format, the lawyer must produce a copy of the file in traditional paper format. Likewise, if the client requests the lawyer to produce the file in electronic format, but the lawyer maintains portions of the file in traditional paper format, the lawyer is not required to produce the file in electronic format, but may simply produce the file in the format in which it is maintained.

Can the lawyer charge the client for the cost of copying the file?

A lawyer may not charge the client for the cost of providing an initial copy of the file to the client. We note that many lawyers furnish courtesy copies of documents to their clients during the representation. Again, unless the lawyer includes a provision providing otherwise in his written file-retention policy, acknowledged by the client at the outset of the representation, providing contemporaneous courtesy copies does not change the lawyer's obligation to tender the *entire* file to the client at the termination of the representation. And, the lawyer may not charge the client for copying the *entire* file, even though courtesy copies of some documents have been previously provided to the client. Although some of the documents being provided to the client may be duplicates, tendering the entire file protects the interests of the client and the lawyer with the assurance that nothing has been overlooked. If the lawyer includes a contrary provision in the client contract or engagement letter which provides that contemporaneous courtesy copies of documents during the representation satisfies his obligation to produce the

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client's file, such provision must describe with specificity what documents will be contemporaneously produced, what documents will not be contemporaneously produced and what procedure and safeguards will be in place to ensure that the contemporaneous courtesy copy policy will be consistently followed. In any case, the client has a right to inspect the lawyer's file to ensure that the client's contemporaneous courtesy copy corresponds to the lawyer's copy of the file. Lawyers may not charge the client for any costs incurred in producing and tendering the file to the client. However, the lawyer may charge reasonable copying costs if a client requests additional copies of his file.

As a general rule, the client is responsible for making arrangements to pick up a copy of his file at the lawyer's place of business. The lawyer may insist on a written acknowledgement of receipt from the client as a condition of surrender of the file. In the event the client refuses to

acknowledge receipt of the file, the lawyer may refuse to tender the file. If the client requests that the file be produced to his authorized agent, then the lawyer should insist on written authorization to do so and should expressly warn the client that production of the file to a third party may defeat confidentiality and attorney-client privilege. Finally, if the client requests that the file be produced by mail, common carrier or at a location other than the lawyer's office, the client is responsible for the costs associated with such production and the lawyer may withhold production until the client pre-pays the estimated costs or makes arrangements agreeable to the lawyer. [RO-2010-02] ▲

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

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		Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)		18,213	18,485
b. Paid Circulation (By Mail and Outside the Mail)	(1) Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	17,997	18,038
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e. Total Free or Nominal Rate Distribution (Sum of 15d (1), (2), (3), and (4))		143	207
f. Total Distribution (Sum of 15c and 15e)		18,140	18,245
g. Copies not Distributed (See Instructions to Publishers #4 (page #3))		73	180
h. Total (Sum of 15f and g)		18,213	18,425
i. Percent Paid (15c divided by 15h times 100)		99%	99%

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a. Paid Electronic Copies		NA	NA
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c. Total Print Distribution (Line 15f) + Paid Electronic Copies (Line 16a)		NA	NA
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