THE ALABAMA LAWYER

SEPTEMBER 2017 | VOLUME 78, NUMBER 5

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13 Litigating the Auto Accident Case *Webcast*
20 Exit Solutions for the Small Law Firm *Webcast*
22 Criminal Defense Law *Tuscaloosa*
29 Adult Guardianships & Conservatorships *Tuscaloosa*

OCTOBER

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DECEMBER

1 Employment Law Update *Birmingham*
8 Estate Planning *Birmingham*
15 Tort Law Update *Birmingham*
19 Alabama Update *Birmingham*
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On The Cover

Alabama State Bar President Augusta Dowd of Birmingham enjoying the 2017 Annual Meeting at the Grand Hotel with her family. As pictured from left: daughter Grace, husband David III, President Dowd, daughter Bevan and son David IV.

Photograph by Scout Branding Company, Birmingham, *http://scoutbrand.com*

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

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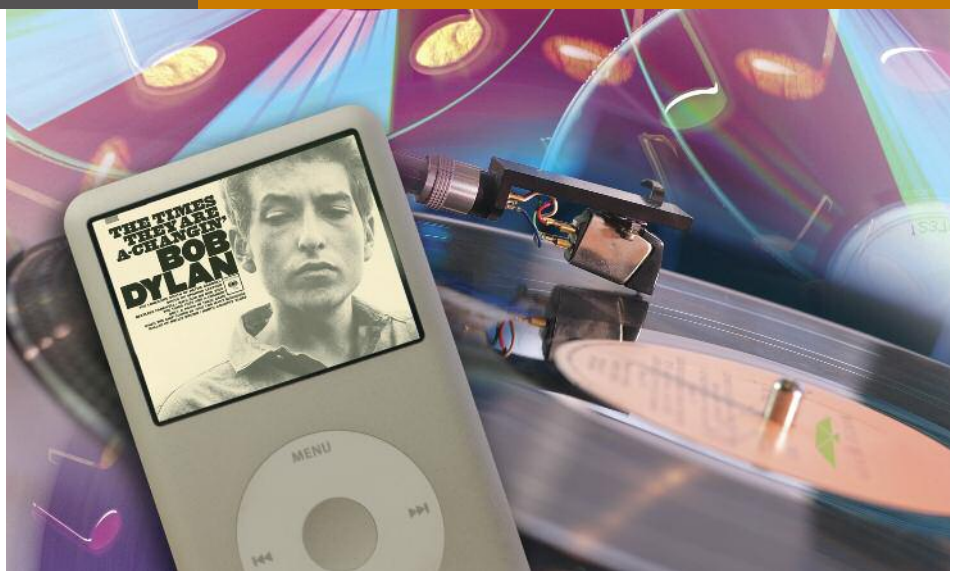

The Times They Are a-Changin'

I have long been a fan of Bob Dylan's famous song, "*The Times They Are a-Changin'*" (reflecting, perhaps, how old I find myself to be these days). Dylan's words certainly resonate with me about the place the Alabama State Bar and our profession find themselves as this issue goes to press in the summer of 2017.

I am deeply honored to have the privilege of leading the state bar this year. We are in transition on many fronts, making this an exciting time to be involved with the bar. The first transition, of course, is our annual change from one president to the next. Immediate Past President Cole Portis did an outstanding job as president. We are all grateful for his passionate and member-focused leadership, and we will miss his consistent presence and guiding hand around the state bar. I suspect his family and his partners at Beasley Allen are delighted to have more of his attention going forward, and we are all grateful for their respective sacrifices in supporting him through his presidential year. Thank you, Cole!

I know many members of our bar, and I look forward to meeting many more of you over the course of the next year. By way of personal background, I was born and raised in Birmingham, leaving only to spend a few years in Tennessee for undergraduate (Sewanee) and law school (Vanderbilt). My husband, David Dowd III, and I met in law school, and we have both built our professional careers in Birmingham. David, who practices at Burr Forman, and I are blessed to have three wonderful children: Bevan (31, San Francisco), Grace (29, New York City) and David IV (27, Washington, D.C.). One

President Augusta Dowd (front row, fourth from right) and her extended family at the Presidential Reception

might observe that our children grew to adulthood and got as far away from us as possible . . . kind of hard to argue with that hypothesis, but cell phones are truly a great invention. The Dowd family history definitely reflects the changing landscape of professionals with families over the past several decades: as a private practitioner, I have worked full-time, part-time, no time, part-time and back to full-time as David and I navigated our professional and family lives and priorities together.

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

As all of you know by now, Keith Norman, our longtime executive director who served our bar in an exemplary fashion, retired May 31 of this year. We certainly wish him well. I have worked extensively with his successor, Past President Phillip McCallum, on plans for this year and beyond. Building on the successes Keith leaves behind, Phillip is going to be a game-changer for our state bar. What an amazing opportunity for our bar to combine into one person the experience and wisdom of a past bar president with the professional leadership position for our organization.

You will see many changes throughout the coming year–that's certainly the goal that Phillip and I share for the direction of our bar. Phillip and I, together if possible but separately if not, intend to hit the ground running (or driving, as the case may be) to travel all over our great state to meet and hear from as many of our members as possible. We want to be present at your local bar events, your annual meetings, your monthly gatherings. We want you to know who we are and, more importantly, we want to know who you are and what you have to say. We want to make sure your state bar is relevant to you and your everyday practice. We need your input and insight. We intend to engage your local bar commissioners and local bar presidents to help us schedule and implement this goal. If you have a particular event or program that you think would present a good opportunity for us to interact with your local lawyers, let one of us know. Putting it simply, our goal is to make your state bar relevant to your lives, and we need your help to do so.

One way we are putting this goal into action is by taking the Board of Bar Commissioners' meetings on the road! The BBC typically meets at the bar in Montgomery, and, occasionally, in the past the BBC has met in other parts of the state. This year, we will meet in Montgomery, but also in Tuscaloosa on October 13 and in Mobile on March 9. If we are coming to your general area, please join us or feel free to come to Montgomery and join us for any of our meetings there. Our meetings are open to all of you and the dates are posted in advance on our website (*www.alabar.org*). Please let Phillip or me (or the one and only Diane Locke at the bar offices) know when you are able to attend so we can be sure to introduce you to the Board of Bar Commissioners.

Come writers and critics / Who prophesize with your pen / And keep your eyes wide / The chance won't come again / And don't speak too soon / For the wheel's still in spin / And there's no tellin' who that it's namin' / For the loser now will be later to win / For the times they are a-changin'

Another major area in transition in our state bar is the general counsel's office. Tony McLain was a very special person, leader, lawyer, friend, ambassador and general counsel. He was dearly loved and respected. Thanks to the outstanding work and dedication of our three associate general counsel and the leadership of Acting General Counsel and Past President Doug McElvy, that office continues to operate very effectively and smoothly. I don't know how Doug accomplishes everything that he has on his plate, but he is doing a great job as acting general counsel. Thank you for your continued service to our bar, Doug. I know everyone is interested to know where we are in finding a full-time general counsel. In conjunction with our regulatory body, the Alabama Supreme Court, bar leadership has taken this opportunity to review the structure and function of the general counsel's office to ensure we are engaging in the best practices possible within

(Continued from page 333)

the particular framework and structure of our organization. The review process has taken some time to accomplish, and it is ongoing as we go to press.

Come senators, congressmen / Please heed the call / Don't stand in the doorway / Don't block up the hall / For he that gets hurt / Will be he who has stalled / There's a battle outside and it is ragin' / It'll soon shake your windows and rattle your walls / For the times they are a-changin'

We are all grappling with the changing times of our profession. The old way of doing business is not working as well as it once did. Our clients are looking to a much broader spectrum of individuals and entities to meet their legal needs, often with a goal of minimizing the level of involvement of lawyers themselves. Our individual professional challenge–like the challenge faced by the state bar itself–is to be relevant in these changing times. And to be relevant, we must, at a minimum, expand our horizons as to how we present ourselves to our potential client base, other members of the bar, the judiciary and the general public.

In meeting its own relevancy goal, the state bar faces the same challenges on the same fronts. One of our main focal points for this bar year will be the refining and promoting of the bar's online presence, including expanding our social media and other electronic outreach. Before the year is out, we hope to bring CLEs to you via webinars to make this integral part of your licensing requirement convenient, accessible and affordable to all. Of course, for that to work, our membership must itself have online capability and technological proficiency, which will be another focal point for this year. Bar employee Laura Calloway's job is to help you with managing your law practice, including computer assistance. She is a great asset, and you should call upon her for help (*laura.calloway@alabar.org*). Last year, Cole and the state bar initiated "Lawyer University," a practical series of CLEs designed to address technology skills development, law firm management and marketing and other "blocking and tackling" fundamentals of the business of practicing law in 2017. I intend to continue this wonderful program, hopefully using webinar capabilities later in the year to spread these key messages to as many of you as possible.

Come mothers and fathers / Throughout the land / And don't criticize / What you can't understand / Your sons and your daughters / Are beyond your command / Your old road is rapidly agin' / Please get out of the new one if you can't lend your hand / For the times they are a-changin'

We will also be working to enhance the relationships between and among all segments of our bar: relationships with one another, with members of our judiciary and with the public at large. I recognize that our state bar, and our individual membership, has image problems at every one of these levels. We will be examining ways to enhance our image, but to do so, we must engage together and speak honestly about what divides and what unites us. I intend to build on Cole's great leadership by continuing the Local Bar Task Force, whose mission is to have bar leaders visit every local bar in the state and share with them the many member benefits available to our membership through their membership in the state bar.

The responsibility for the changes that will be necessary for our profession to survive is not the bar's alone nor should it be borne solely by our bar leadership. To remain relevant as a profession, all of us must engage together in this process. If a rowboat's oars are all on one side of the boat, the boat spins in a continuous circle, making no forward progress. Forward movement comes only with balanced teamwork moving toward a common goal. We need you to be engaged with us so that we don't just spin around at the mercy of the current, without clear direction or destination.

The line it is drawn / The curse it is cast / The slow one now / Will later be fast / As the present now / Will later be past / The order is rapidly fadin' / And the first one now will later be last / For the times they are a-changin'

As we move forward in these changing times, I encourage all of you to reach out to me, Phillip or your local bar commissioner and engage, be heard and work toward bettering our own lives as well as our noble profession. We are fortunate to have great resources in our state bar employees, who are a stellar group of people. These individuals understand and embrace that, in the final analysis, their jobs exist to serve each of you. I appreciate their continued enthusiasm and dedication as we work together to leave our state bar even better at year-end than we found it. It's going to be a great year, folks!

Indeed, the "Times They Are a-Changin'." ▲

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November 2-3	Southeastern Business Law Institute 2017
November 10	Mandatory Professionalism
November 16	Trends in Commercial Real Estate Law
December 8	Law Office Technology Conference: How to Maximize Legal Technology in Your Office
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EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum
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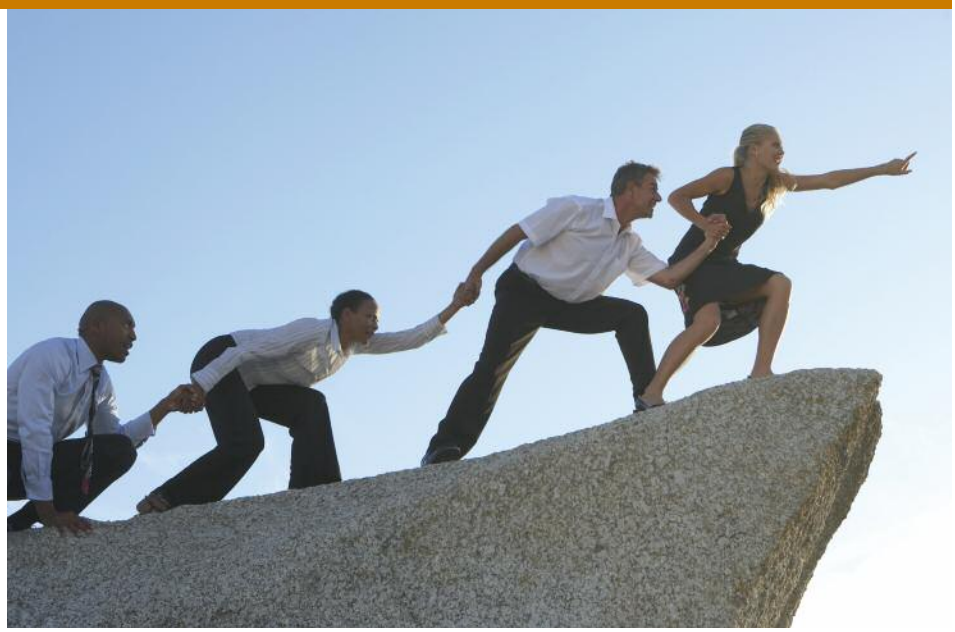

Optimism and Opportunity For a Better Bar

It is a true privilege to represent the lawyers of Alabama as the new executive director of the Alabama State Bar. Now that I have been "official" for a few short months, I am even more excited about the process of managing our bar and promoting our profession. As I see it, the biggest challenge for our bar is also our greatest opportunity. While recognizing the loss of institutional knowledge from Tony McLain and Keith Norman, as well as the indelible impact on our bar from their service, it is now my humble task, with the help of bar leadership, to move forward in a way that makes members proud of the Alabama State Bar.

While we celebrate the contributions of our past leaders, we will forge ahead in a path that creates optimism in our profession and considerable opportunity for the legal community. And, as the traditional practice of law continues, the advent of technology and removal of some boundaries will require progressive ideas and strong leadership. I look forward to undertaking this challenge with your help and support.

It is an honor to work with Immediate Past President Cole Portis, President Augusta Dowd, President-elect Sam Irby and all 75 of our Board of Bar Commissioners, whose leadership will help develop our future path. President Dowd's

Joy and Cole Portis (front row) enjoying the Opening Reception and Family Night Dinner with Phillip and Kelley McCallum

overarching vision is that the bar will function as a vehicle of inclusion for all lawyers as we move forward. We are very excited to implement increased outreach to Alabama lawyers, our judiciary and the public. Our bar will emphasize how we communicate internally *and* externally from both a traditional and digital communication standpoint. It is in this area of communications and outreach that you will see significant changes in how our bar operates.

There was a tremendous sense of positivity and fellowship among the membership during our productive annual meeting at the Grand Hotel in Point Clear. Many thanks to outgoing President Cole Portis and our wonderful bar staff for their great work. The overlap with the Judicial College's annual meeting was a welcomed opportunity for our members to connect with state and appellate judges. The bar's relationship with the judiciary will be a point of great emphasis as we move forward. To that end, I am delighted to report that when our annual meeting returns to Point Clear in 2019, we will again be able to collaborate with our judges.

Words cannot truly express my appreciation for all the kind words and support I have received in the short time since taking this position. As your executive director, I am committed to being accessible to our members and making the Alabama State Bar better for lawyers, our communities and the state. ▲

McCallum, Methvin & Terrell PC congratulates Phillip W. McCallum, who became executive director of the Alabama State Bar on June 1, 2017.

IMPORTANT NOTICES

Open position: Birmingham Bar Association Executive Director

With the upcoming retirement of longtime Executive Director Bo Landrum, the Birmingham Bar Association is seeking a new executive director. Those interested should send a resume and a letter of interest to *EDSearchComm@BirminghamBar.org*.

As you may know, Bo is retiring at the end of the year as our executive director. He has served the bar in a tremendous way. We are all incredibly appreciative of his service, friendship and the value he has brought to our association. Our bar is much stronger because of Bo. He will be missed. We will keep him in our thoughts and prayers as he goes forward with his medical treatment.

The process to find a new executive director has begun. A search committee has been organized and has met. The specific information regarding the executive director position's job description can be found at the Birmingham Bar's website, *http://birminghambar.org/*. Please encourage anyone to apply whom you feel would continue the progress made by Bo. This will be a deliberate and detailed process, and one for which the search committee welcomes everyone's input. It is the search committee's hope that the new executive director can be selected by the end of the year. We will provide more information over the course of the next several weeks. Meanwhile, please keep Bo in your thoughts and prayers.

We invite applications for the position. Resumes and cover letters should be forwarded no later than October 15 to *EDSearchComm@birminghambar.org*.

The Birmingham Bar Association is an Equal Opportunity Employer.

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- 2015-2016 *Alabama Pattern Jury Instructions–Civil* @ $100
- 2016-2017 *Alabama Pattern Jury Instructions–Civil* @ $175

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Annual License Fees and Membership Dues

Renewal notices for payment of annual license fees and membership dues were emailed September 5. The fee for an Occupational License is $325 and the dues for a Special Membership are $162.50. Payments are due by October 1; payments made after October 31 will be subject to the statutory late fee. ***We are paperless this year, so you did not receive a paper invoice in the mail.***

Online payments may be made at *www.alabar.org* or you can create and print a voucher to mail with your check. Log in to the website and select "Consolidated Fee Invoice" from your MyDashboard page to make an online payment or print a voucher. Instructions for the payment process and help with logging in are available online as needed. ▲

Celebrating Those Who Make Access to Justice a Priority

By Jana Russell Garner and G. Allen Howell

When the terms pro bono and access to justice are introduced into a conversation, do you yawn? Do the ideas of pro bono and access to justice translate to duty and obligation? Does the idea of finding time in the margins of your life to intentionally provide legal services for free cause you stress? If you answered "yes" to any or all of these questions, you are not alone.

At the Alabama State Bar, pro bono services and access to justice issues are priorities. As members of the state bar, we agree that those issues should be a priority and want them to continue to be in the future. So, the real question for the bar is how do we invigorate individuals whose actions compose pro bono and access to justice on a daily basis throughout Alabama?

One way is to celebrate! On October 12, the Alabama State Bar is hosting a cocktail reception at the federal courthouse in Tuscaloosa. We are inviting members of our bar, judiciary, executive and legislative members of the state and federal governments, along with corporate and community partners. You are invited to accept the gratitude of the Alabama State Bar and celebrate with others the good works accomplished! If you are able to attend, please email Linda Lund, director of the Alabama State Bar Volunteer Lawyers Program, at *linda.lund@alabar.org* to let us know we will see you there.

If you are not able to attend the statewide celebration, there are many events being held in October, proclaimed Pro Bono Month in Alabama, and we ask you to attend one convenient for you. All of the events will be posted on the Alabama State Bar Events Calendar and there will be at least one in a location near you.

From those who comprise the Pro Bono Celebration Task Force and the Alabama State Bar as a whole, we say "thank you" for taking the opportunity to render service and opening the door to those who would otherwise not have access and we ask you to come celebrate with us in October. ▲

Jana Russell Garner

Jana Garner is of counsel with Reeves & Stewart PC in Selma.

G. Allen Howell

Allen Howell is the Assistant Dean of External Relations and Career Development at Cumberland School of Law in Birmingham.


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TEXTBOOK LAW V. THE LAW OF PRACTICE:

Counterfeit Rules of Evidence

By Dean Charles W. Gamble

Introduction

The primary responsibility of evidence professors is to teach the law as it appears under rules of court, case law, statutory law and constitutional provisions. Often, however, the teacher is confronted by students, usually those returning from their first clerkship experience, who manifest surprise at the inconsistency between the evidence law in the books and the law as sometimes applied in the trial courts. Indeed, because of such inconsistencies, these same students begin to question whether the law professor correctly understands the evidence law. Over time, the professor feels compelled, largely as a means of self-defense, to teach these points of inconsistency between the law of the textbook and the law of practice.

These erroneous variants upon traditional principles of evidence are termed, for purposes of this paper, "counterfeit rules of evidence." The adjective "counterfeit" seems particularly appropriate since each of these rules manifests some characteristics that closely

resemble, except for corruption, the corresponding correct rule. Stated differently, these counterfeit doctrines frequently contain, intermingled with error, a grain of truth. It is this latter characteristic that renders them all the more solidly entrenched, almost immune to correction and widely recognized by lawyers and judges as correct law.

The immediate purpose of this article is to set forth illustrative examples of these counterfeit rules, to explain their application and to identify their basis in error. The ultimate goal, however, is to convince the bench and bar that these corruptions should forthwith be eradicated despite their strength and breadth of application in trial practice.

Counterfeit #1: An Out-of-Court Statement Is Non-Hearsay if the Declarant Takes the Witness Stand and Is Subject to Cross-Examination and Confrontation

The first and perhaps most pervasive counterfeit rule of evidence applied as part of trial court custom is that an out-of-court statement is not hearsay if the declarant is on the witness stand and subject to cross-examination and confrontation. Often, the party arguing non-hearsay under this counterfeit will do so by responding to a hearsay objection in the shorthand: "This, your honor, is not hearsay because it is the witness's own statement." On other occasions, the response will be: "This is not objectionable as hearsay because the evil aimed at by the hearsay rule is the absence of cross-examination while, in this case, the declarant is on the stand and may be crossed and confronted by the objecting party regarding the prior statement."

This argument sounds beautifully logical, but it is fatally flawed. Both of these responses constitute counterfeit principles and generally should not be deemed a correct response to a hearsay objection. Innumerable instances arise where it is hearsay to place a witness on the stand and to ask that witness regarding his or her own out-of-court statement. The reason this remains hearsay, despite a present right to cross-examine and observe the witness's demeanor, is that the original evil giving rise to the hearsay objection was the absence of the right to cross, confront or see the demeanor of the declarant at the time the statement was made. No amount of cross or confrontation at trial will abate this evil sufficiently to satisfy the historic definition of hearsay.[1]

Counterfeit #2: That Failure to Satisfy a Particular Restrictive Requirement Contained In One Alabama Rule Of Evidence *Precludes The Offering Party from Securing the Admission Of the Same Evidence Under another* Alabama Rule of Evidence *Which Does Not Contain this Restrictive Requirement*

Another counterfeit principle arises from the argument that proof which violates one rule of evidence, because it cannot satisfy a specific requirement of that particular rule, cannot then be offered successfully under another rule of evidence which does not contain this requirement. Assume, for example, that a witness is called to testify for labor in a dispute with management. Management asks the witness on cross: "Isn't it true that you were fired by management for embezzlement?" The witness answers in the negative and the management offers a second witness who saw the embezzlement by the first witness. Labor argues that extrinsic evidence in the form of the second witness's testimony is inadmissible because *Ala. R. Evid*. 608(b) provides that a witness may not be asked for impeachment about prior acts of misconduct relevant to untruthfulness for which there has been no conviction nor may such acts be proven by extrinsic evidence. Management responds that the "no cross, no extrinsic provision" of Rule 608(b) is inapplicable because the question is asked to show bias on the part of the witness and the bias method of impeachment, as set forth in *Ala. R. Evid*. 616, fails to contain any such limitation. While the act of misconduct violates the provision of Rule 608(b), precluding cross regarding or extrinsic proof concerning the act of misconduct, nothing forbids its alternate admission for bias under *Ala. R. Evid*. 616. Argument to the

contrary would be counterfeit because generally a failure to satisfy a limit found in one rule does not apply to restrict the successful application of a different rule that does not contain such a limit.[2]

Counterfeit #3: That The Rules of Evidence Do Not Apply in Family Law Cases

Many people have the perception that the rules of evidence, governing civil cases generally, are less applicable in family law cases (particularly those involving divorce and child custody) than in other types of litigation. This mindset is legally erroneous. The advisory committee's notes to *Ala. R. Evid*. 1101(a) observe that the rules of evidence govern nonjury cases.[3] Speaking in *Glaze v. Glaze*, the Alabama Court of Civil Appeals recognized the trial court's error in failing to apply the offer of compromise rule in a divorce action thusly:

> We have not been cited to any Alabama authority that would permit the introduction of such a settlement proposal. A divorce case is a civil action. There is no domestic relations exception to that general rule of evidence, and we will not attempt to here create one because of the undesirable consequences that would result if self-serving offers of settlement were admissible of the offeror in divorce cases merely to indicate that that particular spouse had made an attempt to settle the case or to show what relief that party desired out of the litigation.[4]

As a practical matter, largely due to advocate acquiescence, evidence objections are not pursued as vigorously in family law cases. Additionally, domestic relations judges seem to take a more relaxed view of traditional evidentiary principles in these cases, particularly exclusionary rules.

This state of counterfeit evidence practice in family law courts appears to have arisen from several factors:

1. Nonjury, judge-tried cases– There is an awkwardness in applying the rules of evidence in cases which generally are nonjury and judge-tried. Since the rules of evidence were created historically as a means of addressing the lack of sophistication of lay jurors, a tendency is naturally present to relax their application when offering proof before a judge only. This awkwardness is found in such objections as, "You cannot consider this out-of-court statement, your honor, because it is inadmissible hearsay"[5] or "While this evidence is admissible for the permissible purpose of proving _____, it is not admissible for the impermissible purpose of showing _____; consequently, we request you to instruct yourself not to consider the evidence for this impermissible purpose."[6]

2. *Ore tenus rule*–When family law cases are appealed, the trial judge's evidentiary decisions are clothed in the protective shield of the *ore tenus* rule.[7] A reviewing court, under the *ore tenus* rule, will affirm the trial court which heard the evidence unless the trial court's findings were plainly and palpably erroneous. The practical result of this rule's application is that a family law judge is seldom reversed on appeal for the admission of evidence that violates some exclusionary rule of evidence.[8]

Very few appellate family law cases exist which deal with evidence errors. The lion's share of those reported, however, deal with argued erroneous exclusion of evidence rather than its wrongful admission.[9] *Ore tenus* favors the respondent when the petitioner assigns as appellate error the erroneous admission of evidence. The trial judge's admission of incompetent evidence will not be reversed so long as there is other evidence to support the verdict. The appellate court will reverse only if, after considering all the evidence, it concludes that the trial court's decree is clearly and palpably wrong.[10] This principle is well described in *Thrasher v. Thrasher,*[11] a case where the petitioner argues that the trial court admitted inadmissible hearsay:

> Additionally, this was an ore tenus hearing; no jury was present. Even if the evidence had been inadmissible hearsay, we would presume that the judge disregarded any inadmissible evidence and considered only admissible evidence.[12]

If left to thrive, these corruptions will form an ever-deeper thicket of misunderstanding of the law of evidence.

This seldom-seen reversal for erroneous evidentiary rulings adds to the perception that the rules of evidence are less vigorously applied in family court.

3. Trial court discretion– Whether the family law judge admits or excludes evidence, a decision concerning relevancy is seldom found to be reversible error on appeal. This is because such an evidentiary decision is vested in the trial court's discretion and will not be reversed for mere error; rather, to be reversible, error must rise to the level of constituting abuse of discretion.[13] This abuse-of-discretion principle applies in all civil cases, not just family law litigation. However, it is almost always prominently restated in every appellate family law decision, especially those dealing with divorce and child custody. This generous treatment by the appellate courts is at least partially responsible for the perception that the application of all evidence rules is relaxed in family law cases.

4. *Breadth of materiality and relevancy*–A concluding factor giving rise to an air of evidentiary leniency is the enormous breadth of materiality and relevancy in family law cases.[14] This is particularly true in the area of character. Character evidence (whether offered in the medium of misconduct, reputation or opinion) is excluded as a general exclusionary rule in all civil cases as a basis from which to infer how a party acted upon the occasion being litigated.[15] Such character evidence is

admissible whenever the case being litigated makes character an essential element of a claim or defense.[16] Likewise, it is admissible when offered for some purpose in the case other than to prove conformity.[17] Innumerable issues in divorce cases open the door, based upon one of the two foregoing theories, to evidence of spousal character. Collateral misconduct of a spouse, for example, may be relevant to the issues of property division, alimony and child custody.[18]

Conclusion

Applying the foregoing counterfeit evidentiary rules corrupts the true path of trial practice. If left to thrive, these corruptions will form an ever-deeper thicket of misunderstanding of the law of evidence. Consequently, it is the responsibility of litigating attorneys and trial judges to do all within their power to eliminate them. ▲

Endnotes

1. *Ex parte* Snell 565 So. 2d 271 (Ala. 1990); *see* 2 *McElroy's Alabama Evidence* § 242.01(1)(a) (6th ed. 2009)(hereinafter referred to as "McElroy's"); Gamble's *Alabama Rules of Evidence* § 801 (3d ed. 2014) (hereinafter referred to as "Gamble's"). While the foregoing constitutes the general counterfeit principle, its solidity in the courts is made even stronger by virtue of the fact that several definitional sections of the *Alabama Rules of Evidence* recognize instances when, under limited circumstances, a declarant's' presence on the witness stand, with the accompanying right to cross and confront, will properly render his statement as non-hearsay. If an offered, inconsistent statement, for example, was made under oath subject to perjury at a trial, hearing or other proceeding, or in a deposition then it constitutes non-hearsay by definition and is admissible to prove the truth of the matter asserted when the declarant testifies and is subject to cross-examination. *Ala. R. Evid*. 801(d)(1)(A). This same definitional exemption from hearsay, even when offered to prove the truth of the matter asserted, is given to a testifying witness' consistent statements when offered to rebut an express or implied charge of recent fabrication or improper influence or motive. *Ala. R. Evid*. 801(d)(1)(B). Lastly, a witness's prior identification of a person made after perceiving the person is non-hearsay when the declarant testifies at the trial or hearing and is subject to cross-examination. *Ala. R. Evid*. 801(d)(1)(C).
2. *See Gamble's* § 608(b) (3d ed. 2014). *Ala. R. Evid*. 608(b) advisory committee's notes ("Rule 608 does not preclude cross-examination calling for evidence of conduct, or exclude extrinsic evidence of conduct, when that evidence is sought or offered for purposes sanctioned by other rules. If the conduct goes to show the witness's bias, for example, then it may be inquired about on cross-examination or proven extrinsically after the witness denies that it occurred."). It should be noted that in at least one circumstance the appellate courts have held that a restriction found in one rule applies to other rules whose express language does not include the restriction. In *Ex parte Lawrence*, 776 So. 2d 50, 53 (Ala. 2000), for example, the Alabama Supreme Court was faced with the question of whether the notice provision found in *Ala. R. Evid*. 404(b), which requires that the prosecution furnish notice to the defense of collateral crimes, wrongs or acts whenever the prosecution intends to offer them via Rule 404(b), applies when the prosecution offers such conduct under other rules which do not require such notice. The court held that the Rule 404(b) notice is required without regard to the rule under which such conduct is being offered. If the prosecution is offered a conviction to impeach the accused under *Ala. R. Evid*. 609, prior notice is required even though the language of Rule 609 contains no such requirement. Should the accused take the stand and testify that he has never stolen property, then the prosecution may offer collateral crimes as "open-the-door" or "reply-in-kind" evidence; however, such rebuttal evidence would be admissible only if the state furnishes notice in compliance with *Ala. R. Evid*. 404(b). *Ex parte Lawrence*, 776 So. 2d 50, 53 (Ala. 2000).
3. *See Ala. R. Evid*. 1101(a) advisory committee's notes.
4. 477 So. 2d 435, 436 (Ala. Civ. App. 1985).
5. *Ala. R. Evid*. 801.
6. *Ala. R. Evid*. 105; see 1 McElroy's S 6.05 (6th ed. 2009).
7. *Black's Law Dictionary* 1099 (6th ed. 1990) (cites the Alabama divorce case of *Hamaker v. Hamaker, 328 So. 2d 588, 592 (Ala. Civ. App. 1976)* as illustrating application of the "ore tenus rule").
8. But see *Glaze v. Glaze*, 477 So. 2d 435, 436 (Ala. Civ. App. 1985) (trial court reversed for ignoring the rule excluding offers of compromise).
9. *See, e.g., Ex parte* O'Daniel, 515 So. 2d 1250 (Ala. 1987).
10. *Reid v. Reid*, 298 So. 2d 611, 612 (Ala. Civ. App. 1974).
11. 674 So. 2d 595(Ala. Civ. App. 1995).
12. 674 So. 2d at 598.
13. *Everett v. Everett*, 660 So. 2d 599, 602 (Ala. Civ. App. 1995).
14. *Ala. R. Evid*. 401.
15. *Ala. R. Evid*. 404(a); Gamble's S 404(a)(1)(2d ed. 2002) (discussing application of the general exclusionary rule of character in civil cases).
16. *Ala. R. Evid*. 405(b).
17. *Ala. R. Evid*. 404(b).
18. *Ex parte* Johnson, 567 So. 2d 867 (Ala. 1990) (conduct of parties causing divorce relevant to awarding child custody); 1 *McElroy's* S 32.04 (6th ed. 2009).

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ERISA-Governed Healthcare Liens

By Kristen S. Cross, Lee P. Fernon, Jr. and Thomas O. Sinclair

The acronym ERISA[1] is enough to trigger an instinctive urge to run away in most lawyers, but this complex law[2] often cannot be avoided entirely. According to the Bureau of Labor statistics, 52 percent of civilian workers received employer-sponsored medical coverage in March 2017, and the Kaiser Family Foundation used census information to determine that 46 percent of Alabamians were covered by employer insurance in 2015.[3] Thus, it seems fair to say that lawyers in numerous fields will have to deal with ERISA at some point. One of the most common instances where ERISA may pop up is in the context of a healthcare insurer's use of subrogation and reimbursement provisions to recover medical expenses.[4]

This article will consider, from a plaintiff's and a defendant's perspectives, those issues that may arise in managing ERISA-governed healthcare liens. Specifically, this article will address the implications of the Supreme Court's recent decision in *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016). Before delving into these issues we provide a brief overview of the terminology involved in our analysis.

ERISA "Plans" and Equity

The terms of an "ERISA Health and Welfare Benefits Plan" or "Plan" are most often found in the group healthcare contract between the employer and healthcare provider. Unfortunately, as with most things ERISA, courts and litigants struggle with whether other documents such as "Summary Plan Descriptions" or "SPD's" (think employee handbooks describing the benefits) are also considered to contain "Plan" terms.[5] This becomes important when consulting the plan terms to determine the extent of the obligation to honor the lien. Larger employers often will have engaged their own counsel to help craft the plan terms and will not rely solely on the insurance carrier to define the employer's plan, thus plan terms

may be contained in more than one single document. Smaller employers may only have the healthcare insurance contract to serve as the plan terms. Once the plan terms are defined, you most often find the scope of the lien defined in a "subrogation" or a "reimbursement" (also referred to a "right of recovery") provision within the plan. If an employee meets the requirements to participate in the plan, they then are referred to as a "plan participant."

Once you have defined the plan terms and thus the rights/obligations of the plan and plan participant as set out in those terms, remember that this is ERISA. Nothing is that easy in ERISA. Now, dust off those equity court decisions and prepare for discussions of equitable claims and remedies.

ERISA contains one type of claim under 29 U.S.C. § 1132(a)(1) that is primarily used by plan participants seeking to have their benefit claim paid by the plan or insurance carrier. A second type of ERISA claim under 29 U.S.C. § 1132(a)(3) is often referred to as the equitable remedy claim. It is this second type of claim that plans must use when seeking to recover their lien which now must also seek an "equitable remedy" (if you are wondering why, you are in good company[6]). Now armed with the requisite uncertainty of an experienced ERISA litigator, we turn to the Supreme Court's most recent attempt at "clarification."

The *Montanile* Decision

In *Montanile*, the insured was severely injured by a drunk driver who ran a stop light, and the ERISA-governed health insurance plan paid more than $121,000 in health benefits as a result. Montanile later obtained a settlement of $500,000, and roughly $240,000 remained after paying his attorneys' fees and repaying their case expenses. His attorneys retained the funds in a trust account while they attempted to resolve the lien with the plan, but eventually those negotiations fell apart. The attorneys then sent the plan a letter indicating that the full amount would be disbursed to Montanile unless the plan objected within 14 days. The plan took no action and Montanile's attorneys disbursed the entire remaining settlement funds.

Six months *after* Montanile's attorneys disbursed, the plan sued Montanile in the Southern District of Florida, seeking reimbursement for the money paid by the plan to his medical providers. In circumstances such as this, because ERISA only allows plans to bring "equitable claims," the plan terms forming the basis of the plan's claim must seek equitable (not legal) relief and seek recovery from specifically identified funds. *See, e.g.*, *Sereboff v. Mid A. Med. Services, Inc.*, 547 U.S. 356, 364 (2006); *Popowski v. Parrott*, 461 F.3d 1367, 1374 (11th Cir. 2006) (refusing to enforce provision that failed to identify any specific fund or limit recovery to any portion thereof).[7]

By the time the plan filed suit against Montanile, it appeared he may have spent most or all of the settlement money. The district court rejected Montanile's arguments that there was no specific, identifiable fund separate from his general assets upon which the plan's equitable lien could be enforced.[8] The Eleventh Circuit subsequently affirmed that decision, finding that dissipation of the settlement funds could not destroy an equitable lien once it had attached.[9] The Supreme Court disagreed in an 8-1 decision.

The Court held that "when a participant dissipates the whole settlement on non-traceable items, the fiduciary cannot bring a suit to attach the participant's general assets under [29 U.S.C. § 1132(a)(3)]."[10] In *Montanile*, the Court remanded the case to the district court to determine whether Montanile had separated his settlement fund from his general assets and whether he had dissipated the whole of the settlement on non-traceable items. The holding makes clear that there is no equitable remedy available to the plan when a participant has dissipated settlement funds through the purchase of non-traceable items (such as services or consumable items) because an action to enforce on the general assets of the insured seeks a legal remedy. Those confounded by this result may find company (though little solace) in Justice Ginsburg's prediction in *Knudson*.

Plaintiff Practice Pointers

In the typical scenario, your office will receive a demand letter from your client's medical insurance carrier asserting a lien on any recovery. If the medical insurance was provided to your client as part of a group healthcare plan, it is likely an ERISA-governed plan.[11]

This form letter may attempt to default you into representing the plan's interests if you fail to respond or simply demand that you turn over all or a large portion of any settlement or judgment you obtain (after years of work). The plan may also assert it is not obliged to pay any of your costs or fees. Needless to say, this sort of communication from a party who does nothing to protect its own rights does not help your blood pressure.

The purpose of this section will be to generally[12] run through the steps that need to be taken regarding potential ERISA-governed healthcare liens.

Investigation Step 1

The first step after receiving such a demand should be to determine whether ERISA applies to some or all of the plan's lien. A good starting rule of thumb is to assume that it does if the medical insurance was provided by the client's employer.

Investigation Step 2

The second step would be to determine how the plan is funded. An ERISA plan may be 1) self-insured or self-funded (the plan pays the benefits out of its own pool of funds),[13] 2) fully-insured (an insurance company pays the benefits) or 3) stop-loss[14] (the plan pays benefits up to a certain amount and then an insurer pays the rest–akin to a deductible). This is important because claims from a self-funded ERISA plan are wholly governed by ERISA. On the other hand, fully-insured plans[15] may be subject to insurance-specific state laws, which are often more desirable.[16]

To find out how benefits were funded, often the fastest method is to check the federal filings mandated by ERISA. The form 5500 filings can be found on the Department of Labor's website at *https://www.efast.dol.gov/ portal/app/disseminatePublic?execution=e2s1*. Some practitioners also prefer to use *www.freeerisa.com* (free registration required). Make sure to look at the correct plan and year, and keep in mind that this will not always yield the necessary information.

Investigation Step 3

Regardless of what is found in Step 2, it is best to issue an ERISA document request pursuant to 29 U.S.C.A. § 1021(a)(1) and (2) and 29 U.S.C.A. § 1024(b)(4). These requests can be made (and generally are made) via correspondence before litigation. ERISA Plan Administrators (usually the employer) must respond to the request within 30 days or face statutory penalties.[17] Some courts have held that a litigation discovery request does not trigger the duties under these statutes, so this should be done as early as possible and via written request (in addition to subsequent discovery requests if these efforts fail). This request should be sent to the named plan administrator, the insurer and the employer (some of these may be the same entity), and it is imperative to explain that you are requesting the "Master Plan Document," the insurance policy and the summary plan description ("SPD").[18] It is not uncommon that only an SPD will be sent in response, but this document's terms may not control the subrogation or reimbursement rights of the plan if they differ from the governing plan documents.[19] *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011); *US Airways, Inc. v. McCutchen*, 2:08CV1593, 2016 WL 1156778, at *1 (W.D. Pa. Mar. 16, 2016).[20]

What to Do with the Information

If the plan only references subrogation, then one could argue the plan should be willing to help with expenses or costs or have their attorney appear and help with the claim against the third party because the plan is stepping into the insured's shoes. Since reimbursement is the insurer's right to seek repayment from your client, you could argue that a plan's failure to exercise subrogation rights should impair their reimbursement claim (if there is a reimbursement provision at all).

It is also important to determine whether the plan is silent regarding the made-whole doctrine, common fund doctrine or reimbursement in general. *US Airways, Inc. v. McCutchen*, 133 S. Ct. 1537, 1542-43 (2013), made it clear that the terms of the plan will control subrogation rights and defenses, but any gaps in those provisions might be filled with federal common law equitable defenses such as the common fund doctrine. *Id.* at 1543 ("We hold that neither of those equitable rules can override the clear terms of a plan."). This would obligate the plan to pay a pro rata share of the legal fees out of its recovery via subrogation. *See, e.g.*, *Cagle v. Bruner*, 112 F.3d 1510, 1521 (11th Cir. 1997) (discussing the make-whole doctrine and finding that it is a default rule if it has not been contracted out of).

It is vital to know these things early and possibly before agreeing to take the case. For instance, in a situation where the plan documents state that the right to reimbursement is free of any legal expenses, it may still be in the plan's best interest to agree to allow the deduction of legal fees if the case is in its early stages. In these situations, any attempt to enforce a plan's reimbursement rights would be an attempt to seek enforcement of an "equitable" lien on any judgment or settlement. Because it is unlikely you will be willing to work for free, the plan would be looking at little to no award or settlement from which to be reimbursed. If you were to wait to negotiate this issue *after* settlement is reached, then the plan has no reason to worry about whether you will receive any compensation from that settlement, and it is unlikely you will have any recourse.

The Alabama State Bar has made it clear that no additional fee regarding the negotiation or reduction of a lien can be obtained absent extraordinary circumstances. Formal Opinion 2015-01. The Alabama State Bar views these services as being tied in with the lawyer's services in obtaining the settlement, so there is little prospect of receiving extra compensation from these efforts after settlement has been reached or a judgment has been obtained. While the opinion does not prohibit the outsourcing of lien resolution (in complex matters such as ERISA-governed liens), waiting to resolve the issue until the end of litigation puts the plan (and insurance carriers) in a more advantageous bargaining position.

In sum, practitioners will first want to find out whether state laws apply because those may be more (or less) favorable and allow for a stronger negotiating position regarding ERISA healthcare liens (or negate them entirely). You would then want to examine the terms of the subrogation and/or reimbursement provisions in the plan document and ensure that there is such a right and that it is properly drafted under *Sereboff* and *Popowski*.

Assuming the plan is fully funded, you would then check to see whether the federal common law equitable defenses have been explicitly waived under the contract. If they have not, then any subrogation or reimbursement claim may be reduced under the make-whole doctrine, common fund doctrine or any other available. It is also important to determine what portion of the settlement is for medical expenses and to ensure the plan is only asking for reimbursement of expenses related to the injury at issue in your litigation. It is unlikely the medical plan would be entitled to seek payment out of settlement awards for lost wages or general damages. Finally, it may be necessary to point out that you do not intend to work for free and that any strict enforcement of a plan provision negating all or most of your fee award (and your client's recovery) would force you to decline taking on the case. Neither you nor your client would have any reason to prosecute the case in that situation.

Montanile left open numerous questions regarding what an attorney should do with these claims, and it would be a mistake to simply assume the best course of action is to disburse the funds in question to the client. *Alabama Rule of Professional Conduct* 1.15 should be referenced before making any decision regarding disbursement. A good rule of thumb would appear to be to give the plan a minimum of 14 days' notice before disbursing any disputed funds because the Supreme Court took no issue with this timeframe in *Montanile*. However, careful consideration of the risks and rewards of such a strategy is advisable. Fighting one lawsuit only to start another is rarely good practice.

It is also unclear what the best advice would be regarding what a client should do with those disbursed funds. For instance, it is uncertain what the effect would be if the client combined the disbursed funds with their general assets. This is undoubtedly more convenient for most people, and it could even mean the funds are no longer traceable. The *Montanile* court's discussion of substitute money decrees and deficiency judgments clearly stated these were merely legal remedies available in equity courts, but its discussion of the swollen assets doctrine left open the question of whether commingling funds allowed a lien to be enforced against the entire commingled pot. The Court's dismissive discussion of the swollen assets doctrine and observation that "most equity courts and treatises rejected that theory" gives the impression that it was merely assuming *arguendo* the doctrine could apply before noting that it was irrelevant because there had been no commingling.[21] Thus, failing to keep the disbursement in a separate account could also potentially allow the insurer to enforce its claim against any general assets that were commingled with the disbursement. Some practitioners also advise their clients to document all of their purchases from the disbursement so that dissipation, rather than concealment or commingling, can be demonstrated at a later date if necessary.

The main point of all this is to explain that members of the plaintiff's bar should never simply take an insurer's word that it has a valid ERISA lien, and it is our obligation to flesh out all of the details before responding or agreeing to any request for payment of the lien. It is also important to address these issues as soon as they appear because delay can be just as damaging as any statute of limitations, given the possibility that it could wipe out all of your bargaining power and recovery by the client. This is undoubtedly something you should consider when deciding whether to take a case, and waiting to address the issue may cause substantial delays to settlement.

Defense Practice Pointers

Although the Supreme Court's decision in *Montanile* was surprising to many, it should not have been in light of the Court's earlier ruling in *Sereboff v. Mid-Atlantic*

Medical Services, Inc., 126 S. Ct. 1869 (2006). The Sereboffs recovered $750,000 from a tortfeasor, but refused to reimburse their health plan $75,000 in accident-related medical bills. When the plan fiduciary filed suit, the Sereboffs agreed to set aside the reimbursement amount of $75,000 pending a final court ruling. The federal district court, as well as the 4th Circuit Court of Appeals, ruled in favor of the plan. The Supreme Court affirmed on the basis that the plan sought to enforce its equitable lien against "specifically identifiable" funds which were in the possession and control of the Sereboffs. The *Sereboff* Court emphasized that in such cases, both the claim and the remedy had to be equitable–a proposition which *Montanile* fully supports.

The surprising thing about the *Montanile* decision is that the result seems, well, inequitable. The plan did exactly what it needed to do to create an equitable lien by agreement. The plan specifically provided as follows: "Amounts that have been recovered by a [participant] from another party are assets of the Plan … and are not distributable to any person or entity without the Plan's written release of its subrogation interest." The plan also took the extra step of having Montanile sign a reimbursement agreement guaranteeing that he would repay the plan from any recovery he received from a third party in a lawsuit or settlement. Montanile reneged on that agreement when he spent the settlement money rather than repaying the plan. The plan should have some avenue of redress, right?

Unfortunately, the question is complicated by the laws of equity that require a lien to attach to an "identifiable fund," which an insured's general assets are not. Most, if not all, of today's healthcare plans contain subrogation language which is sufficient to create a lien by agreement that requires reimbursement of medical expenses from any judgment or recovery received from a third-party tortfeasor. Likewise, it is commonplace for health insurers to require a participant to sign a separate agreement to repay the insurer from any proceeds received from a settlement with or judgment against a tortfeasor. What *Montanile* confirms is that the area where things now have the potential to go wrong for a plan is in the monitoring of and involvement in any action by the participant against the tortfeasor.

When a health insurance plan pays significant medical bills on behalf of an insured, it has an obligation to other plan participants to moderate its costs by pursuing reimbursement to the fullest extent permissible under the terms of the plan. One of the most effective ways to accomplish that goal is to have an attorney get involved right away to protect the plan's rights. While a health insurer may be inclined to have its own employees or affiliates monitor the status of an insured's litigation against a third party, the earlier that the insurer gets a lawyer involved, the better it protects its rights. If there was ever any doubt, there can be none after *Montanile*–once an insured has reached a settlement with a third party, it may well be too late to enforce a reimbursement provision. Thus, as soon as a plan becomes aware that an insured has engaged an attorney to pursue litigation against a tortfeasor, the plan should consider the extent to which it should involve itself in that litigation. The plan does not want to be in the position of relying on the insured or the insured's attorney to notify it of the status or result of any legal action. Automatically-generated form letters and similar "notices" of a subrogation right are probably fine if the dollar value of a claim is relatively low, but when the stakes are higher there is no substitute for personal communications between the plan's lawyer and the insured's lawyer. Additionally, the more involved the plan's attorney is in the resolution of the lawsuit against the tortfeasor, the less likely it is that either the insured or the plan will be caught unaware when the proceeds of the lawsuit are disbursed. You can most effectively protect your client's rights by encouraging your client to allow you to have a high level of involvement in the insured's tort claim from the outset.

You cannot begin your pursuit of the plan's claim until you know what tools are in your arsenal to help ensure full cooperation from the insured's attorney. In most instances, you can expect the insured's attorney to take issue with the extent to which the plan is entitled to payment. Before communicating with the insured's attorney, you will want to fully educate yourself on the specifics of the plan's terms. In cases where an insurer has successfully pursued reimbursement, the plan at issue has unequivocally provided that if the insured recovers compensation from a third party, the insured must repay the insurer. How strong is the reimbursement language in the applicable plan? Does the plan speak to the issue of the insured's attorney's fees or is that an issue open for negotiation? Does the plan expressly include or exclude any equitable doctrines such as the "made-whole" doctrine, or is it silent on those issues? Does the plan have full discretion to negotiate regarding the reimbursement amount, or is another party, such as a stop-loss insurer, involved? Each of these issues needs consideration.

Likewise, you will want to know what other agreements or communications exist on the issue of reimbursement exist. If the insured has signed a separate agreement promising to repay the plan from any monies received from a lawsuit against the tortfeasor, that is a fact that needs to be made known to the insured's attorney. If no such agreement exists, even early letters from the insurer to the insured explaining the plan's right to reimbursement will bolster your position.

Whether your preferred method for communications with the insured's lawyer is phone, email or old-school letters, it is important to have something in writing to the lawyer for the insured detailing the plan's rights, your expectations of the lawyer in complying with the insured's obligations and the level of involvement you anticipate having. In today's environment, we should all expect that settlement negotiations between an injured party and a tortfeasor will begin immediately, maybe even before a lawsuit has been filed. Accordingly, even in the very early stages of these cases, it is important not to delay in taking action. In all likelihood, the insured's attorney is going to have two people to negotiate with–you and the tortfeasor's attorney. The sooner you begin a dialogue with the insured's attorney about the plan's expectations, the more potential there is for things to go smoothly when it comes time for the insured and the tortfeasor to come to an agreement. The insured's lawyer is in a better position to negotiate if he or she knows what the plan requires, and it may well fall to you to educate the insured's lawyer regarding the plan's provisions and the case law relating to the enforcement of those provisions.

Occasionally, it may happen that a busy practitioner places cases on the back burner, which are, to some extent, merely being "monitored." Other times, a lawyer may hesitate to pester a fellow lawyer too often for updates. Nevertheless, *Montanile* makes it abundantly clear that lawyers who represent plans in subrogation or reimbursement claims must be extremely vigilant in pursuing those recoveries. Be the squeaky wheel. You should know, at all times, the status of the litigation as well as the status of settlement negotiations. You may even want to ask to be involved directly in any settlement discussions or decisions. The more involved you are in the settlement, the fewer questions there may be later about what portion of the settlement is intended to be for medical expenses.

Once the insured and the third-party tortfeasor have reached an agreement, you will want to confirm again in writing the amount you expect (and demand) will be paid to the plan from the settlement proceeds. Depending on the plan language, you may have to put pencil to paper to calculate the amount to which the plan is entitled. Even if the plan language contemplates that the plan will be reimbursed every dollar it has expended on the insured's behalf, compromise is probably worth considering if it will help the insurer avoid litigating the amount. If you and the insured's attorney have not already come to an understanding about the amount that will be paid to the plan, those negotiations can wait no longer. And if you and the insured's attorney cannot quickly come to an agreement, it is imperative that the insured's attorney agree to place the disputed funds into a separate account (thus creating an "identifiable fund") until an agreement is reached or until the court decides the issue.

Should the insured refuse to voluntarily reimburse the plan at all or in the amount to which the plan is entitled, you will need to advise your client on whether to file a claim under 29 U.S.C. § 1132(a)(3). As in any other matter where litigation is being contemplated, there has to be a cost-benefit analysis: does the potential recovery under the plan terms justify the cost of litigation? And, of course, no cost-benefit analysis is complete without an assessment of the likelihood of success in the litigation. To evaluate these issues, you will need to turn back not only to the plan terms in order to judge the strength of the "equitable claim," but you will also need to evaluate how carefully the plan acted to protect its right to reimbursement from an identifiable fund (or "equitable relief").[22] The *Montanile* Court was not bashful about criticizing the plan, not only for failing to respond to Montanile's attorney's letter stating that funds were going to be released within 14 days in the absence of any objection, but also for waiting six months thereafter to file suit. You will do your clients and yourself a favor if you can fully represent to the court that the plan did not sleep on its rights, but, instead, pursued them with vigor.

Conclusion

ERISA-governed liens arise in a wide spectrum of cases, such as personal injury, product liability and medical malpractice claims. For both plaintiffs and defendants, the early involvement and advice of experienced ERISA counsel is advisable. ▲

Endnotes

1. The Employment Retirement Income Security Act of 1974. 29 U.S.C. § 1001 *et seq*.
2. "ERISA is, we have observed, a 'comprehensive and reticulated statute, ...' *Mertens v. Hewitt Associates*, 508 U.S. 248, 251 (1993).
3. *Employee Benefits in the United States–March 2017*, Bureau of Labor Statistics, *https://www.bls.gov/ news.release/pdf/ebs2.pdf*; *2015 Health Insurance Coverage of the Total Population*, The Henry J. Kaiser Family Foundation, *http://www.kff.org/other/state-indicator/total-population/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D*.
4. Subrogation is the right to step into the insured's shoes to pursue the claim directly against the third party, and reimbursement is the right to seek repayment from the insured if they recover funds from the third party.
5. *See, e.g., Cigna Corp., et. al., v. Amara*, 131 S. Ct. 1866 (2011).
6. *Great-West Life & Annuity Ins. Co. v. Knudson*, 122 S. Ct. 708, 726 (2002) (dissent by Justice Ginsburg) ("Today's decision needlessly obscures the meaning and complicates the application of § [1132](a)(3). The Court's interpretation of that provision embroils federal courts in "recondite controversies better left to legal historians," . . . , and yields results that are demonstrably at odds with Congress's goals in enacting ERISA. Because in my view Congress cannot plausibly be said to have "carefully crafted" such confusion, . . .").
7. *Popowski* involved two subrogation provisions, one of which was upheld, so it is an excellent case for practitioners to use as a measuring stick when evaluating the enforceability of a subrogation provision.
8. *Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan v. Montanile*, 2014 WL 8514011 (S.D. Fla.).
9. *Bd. of Trustees of Nat. Elevator Indus. Health Ben. Plan v. Montanile*, 593 Fed. App'x 903, 909 (11th Cir. 2014) (unpublished), *rev'd and remanded sub nom. Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016), and *vacated and remanded,* 644 Fed. App'x 984 (11th Cir. 2016) (unpublished).
10. *Montanile*, 136 S. Ct. at 655.
11. These comments assume your client is the person who received the medical care forming the basis of the claim and is the plan participant. If that is not the case, such as in a wrongful-death claim, further consultation with an experienced ERISA attorney is recommended.
12. There are a plethora of caveats, so we do mean generally here.
13. These types of plans still typically have an insurance company act as the claims administrator to process claims and handle other administrative tasks, so don't just assume it is fully insured if you see an insurance company being involved or have received a demand from one.
14. Every circuit to address the question has found that stop-loss plans are considered self-insured, so this article will presume that a plan is either self-insured or fully-insured.
15. Keep in mind that some benefits under a plan may be self-insured and others fully-insured, so it is important to know how the particular coverage in question was funded.
16. This is not to say all state claims and defenses are available. That is another complex question that is beyond the scope of this article, but we will point out that *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003), represents the current two-part test regarding preemption here.
17. The Plan Administrator is potentially subject to a daily fine for every day after 30 days if they fail to provide these documents. However, finding the entity charged with fulfilling this important fiduciary function as one learned author noted has become a bit of a "shell game." Hon. William M. Acker, Jr., *Can the Courts Rescue ERISA?*, 29 Cumb. L. Rev. 286, 293 (1999) ("A beneficiary's finding a target under ERISA has become a shell game.").
18. To be clear, you should not limit your request to these materials. You should generally ask for all documents relating to any of your client's healthcare claims, including any payments that were made by the plan and a breakdown of those payments.
19. It is rarely a good idea to take an insurer's word for it, but it is possible that the court may find that the SPD and Plan document are one and the same. *See Bd. of Trustees of Nat. Elevator Indus. Health Ben. Plan v. Montanile*, 593 Fed. App'x 903, 909 (11th Cir. 2014) (unpublished), *rev'd and remanded sub nom. Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651 (2016), and *vacated and remanded,* 644 Fed. App'x 984 (11th Cir. 2016) (unpublished). The Supreme Court's decision did not address the panel's comments regarding the SPD and Plan document often being the same in health plans.
20. The SPD, rather than the Plan document, was cited to by both lower courts, and the Supreme Court was the first to demand a copy of the Plan. The Court assumed *arguendo* that the SPD's terms were identical because that is what had been done throughout the lower courts. On remand, the district court found that the Plan did not contain the SPD's reimbursement provision, so this remedy was not even available. A lot of time and effort could have been avoided if this had been obtained earlier on, and the participant also ran the risk of forfeiting this argument.
21. *Montanile*, 136 S.Ct. at 661.
22. Another part of the analysis might be whether the decision to file an ERISA claim is the plan fiduciary's to make alone. In some cases, the plan fiduciary may have an obligation to some other party, like a stop-loss insurer, which requires it to pursue litigation to enforce subrogation/reinforcement provisions.

Kristen S. Cross

Kris Cross is a shareholder at Sirote & Permutt and has more than 17 years of general litigation experience with a concentration in defending businesses and insurers in ERISA-governed life, health and disability insurance claims and state law bad faith claims.

Lee P. Fernon, Jr.

Lee Fernon is an associate attorney at Sinclair Law Firm LLC in Birmingham and has primarily focused on ERISA and general insurance litigation after spending four years as a federal law clerk in Texas and Arkansas.

Thomas O. Sinclair

Tom Sinclair is the founding partner of Sinclair Law Firm LLC in Birmingham. His firm focuses on insurance benefits, including group and individual life insurance benefits, as well as disability, pension and health insurance benefits, including ERISA.

ALABAMA STATE BAR
ANNUAL MEETING
2017
GRAND HOTEL POINT CLEAR

2017 Award Recipients

JUDICIAL AWARD OF MERIT

This award is presented to a judge who is not retired, whether state or federal court, trial or appellate, and is determined to have contributed significantly to the administration of justice in Alabama.

Ott

Hon. John E. Ott was appointed to the court in 1998 and now serves as the chief magistrate judge of the court. He has presided as a trial judge in more than 60 criminal or civil cases in a variety of subject areas, including employment discrimination, civil rights, contract disputes, antitrust, negligence and federal misdemeanor cases. He has also served as a settlement judge or mediator in more than 700 cases in nearly every type of federal litigation.

Prior to his appointment, Judge Ott served as an assistant United States Attorney in the Northern District of Alabama for 15 years. He began as a prosecutor in the criminal division of the office and held the positions of deputy chief and chief of the criminal division and executive assistant United States Attorney with oversight responsibility for litigation. Prior to his service with the United States Attorney, he was a law clerk for the United States Magistrate for the Northern District of Alabama.

Judge Ott serves on the adjunct faculty at Samford University's Cumberland School of Law teaching trial advocacy. He has also been an adjunct faculty member at the University of Alabama at Birmingham and Miles School of Law teaching trial techniques and advocacy, criminal evidence, e-discovery and social media and negotiation and mediation. He is a frequent writer and presenter at continuing education courses for attorneys on attorney ethics and professionalism, trial advocacy, evidence, mediation and employment law.

In 1977, Judge Ott earned his B.A. degree in criminal justice magna cum laude from the University of Central Florida and his J.D. degree from the Cumberland School of Law in 1981. He is a member of the Alabama, Florida and Birmingham bars. He is also a fellow of the Alabama Law Foundation and the Birmingham Bar Foundation.

AWARD OF MERIT

This award recognizes outstanding constructive service to the legal profession in Alabama.

Pierson

Pamela Bucy Pierson is the research professor of law at the University of Alabama School of Law. She has served on the law school's faculty for 30 years. Prior to entering teaching, Professor Pierson served as an AUSA, ED MO, criminal division, where she specialized in white-collar prosecutions. She has published seven books and more than 50 law review articles and published bar journals. She has testified before Congress three times and is active in the ABA and the Alabama State Bar. One of her former students, Ken Minturn, and the Honorable Philip Reich (retired, Alabama Circuit Court) join her as co-authors in their forthcoming book, *Economics, Emotional Intelligence and Finance: Tools for Every Lawyer in the Twenty-First Century* (West Academic, 2017).

WILLIAM D. "BILL" SCRUGGS, JR. AWARD

This award was created in 2002 in honor of the late Bill Scruggs, former state bar president, to recognize outstanding and dedicated service to the Alabama State Bar.

Alyce Manley Spruell and President Portis

A native of Demopolis, **Alyce Manley Spruell** received her undergraduate degree from Vanderbilt University in 1980 and her law degree from the University of Alabama in 1983. For more than 34 years, she has practiced law primarily in the Tuscaloosa County area in governmental and regulatory matters, employment and business law and general civil litigation.

Alyce has served in a variety of roles within the bar, including as president from 2010-2011, a member of the Board of Bar Commissioners, the founding co-chair of the Leadership Forum, the chair of the National Pro Bono Celebration Committee and the initial leadership member of the Volunteer Lawyers Program. She also served as president of the Tuscaloosa County Bar, a member of the Alabama Law Foundation Board of Directors, a member of the Executive Committee of the National Conference of Bar Presidents and the president of the Southern Association of Bar Presidents when the bar hosted the meeting during her presidency.

She served as the director of the Administrative Office of Courts, as well as its Legal Division director, assistant dean and director of development for the University of Alabama School of Law and as counsel for the Alabama Senate's Committee on Transportation and Energy for the Alabama Law Institute. She teaches courses in trial advocacy and legislative drafting at the University of Alabama School of Law, and provides continuing education and training on topics related to leadership development and civic education.

Alyce received the W. Harold Albritton Award for her service to the VLP in 2013, and was recognized by the West Alabama Chamber of Commerce in 2014 for her community advocacy. She was also recognized by the Alabama Criminal Lawyers Association in 2011 and the Alabama Circuit Clerks Association in 2012 for her service to our court system.

J. ANTHONY "TONY" MCLAIN PROFESSIONALISM AWARD

This award recognizes members for distinguished service in the advancement of professionalism.

President Portis and Sam Crosby

Samuel N. Crosby has practiced law for 39 years with the firm of Stone Crosby PC in Baldwin County. He attended the University of Virginia where he graduated with academic distinction, and went on to graduate from the University of Alabama School of Law. He is retired from the JAG Corps of the United States

Naval Reserve. Sam has authored two books and numerous professional articles and columns. He is recognized by his peers as a premier mediator. From 2007-2008, he served as president of the Alabama State Bar, and became the first Alabama lawyer to receive the Chief Justice's Outstanding Leadership Award for his service to the public. As a member of the Chief Justice's Commission on Professionalism, he helped coordinate the first statewide professionalism consortium.

COMMISSIONERS' AWARD

This award, created by the Board of Bar Commissioners in 1998, recognizes individuals who have had a long-standing commitment to the improvement of the administration of justice in Alabama.

President Portis and Bill Broome

William H. "Bill" Broome received his undergraduate degree from Auburn University and his law degree from the University of Alabama School of Law. He was a sole practitioner in Anniston from 1997 until 2015 when his son, William H. Broome, Jr., joined his practice as a partner. Their practice is devoted exclusively to the defense of individuals accused of criminal offenses ranging from capital murders to misdemeanors in federal, state and municipal courts.

Bill has tried 18 capital murder cases to a jury verdict and has never had a client receive the death penalty. To Bill, being a criminal defense lawyer is not simply a job, a business or even a profession. It is a mission to protect the constitutional rights of all defendants and promote equal justice for all.

Bill is currently serving his sixth term as a member of the Board of Bar Commissioners. He served on the bar's Executive Council (2006-2007) and is currently chair of the bar's Appointed Counsel and Indigent Representation Committee. Bill is a past president of the Alabama Criminal Defense Lawyers Association (2014-2015) and presently serves on the board of directors. He currently serves on the Board of Directors of Legal Services Alabama and served as president of the board from 2007-2009. He is a fellow of the American Bar Foundation and the Alabama Bar Foundation, and served as president of the Opportunity Center Foundation of Northeast Alabama from 2007-2014.

JEANNE MARIE LESLIE SERVICE AWARD

This award recognizes exemplary service to lawyers in need in the areas of substance abuse and mental health and is presented by the Alabama Lawyer Assistance Program Committee.

Mary Margaret Relfe, accepting for her late father, Massey Relfe; President Portis; and Chip Schwartz

J. Massey Relfe, Jr. was a long-time resident of Birmingham where he practiced law as a general practitioner, specializing in criminal defense law. He was a graduate of the University of Alabama where he received his degree in communications and later received his juris doctorate from the Cumberland School of Law. As a member of the Birmingham Bar Association and the Alabama State Bar, he served on numerous committees over the years. He also served as an appointed judge for the 10th Judicial Circuit on numerous occasions.

Massey was a proud member of the U.S. Air Force and U.S. Air Force Reserve. While on active duty with the Air Force, he was stationed at bases in Missouri, Turkey and Germany. During his time with the Alabama Air National Guard, he was the commander of the 117th Communications Flight in Birmingham (1968-1982) and served at Maxwell-Gunter Air Force Base in Montgomery before retiring as lieutenant colonel.

Massey gave his time to many community organizations, including St. Anne's Home and Fellowship House. He was an active member of First United Methodist Church for more than 50 years, teaching church school, ushering and serving on the administrative board. He became a member of All Saints Episcopal Church in 2006 and was active in many activities, including serving as member of the vestry.

Massey considered it an honor and was proud to be a part of the legal community for more than 40 years before passing away in March 2016.

David A. "Chip" Schwartz is a native of Cincinnati, and one of the founding members of Zarzaur & Schwartz PC in Birmingham. He is a graduate of the University of Alabama and attended Samford University's Cumberland School of Law, class of 1977. He served on the boards of the Southern Region of the Commercial Law League of America, Temple Beth-El, the Jewish Community Center of Birmingham, Alcohol and Drug Abuse Council (ADAC) and St. Anne's Home for Women in Recovery. He is an active committee member of the Alabama Lawyer Assistance Program and a board member of the Alabama Lawyer Assistance Foundation.

MAUD MCLURE KELLY AWARD

Maud McLure Kelly was the first female to be admitted to the practice of law in Alabama. In 1907, Kelly's performance on the entrance exam at the University of Alabama Law Department merited her admission as a senior, the second woman ever to have been admitted to the school.

Martha Jane Patton and Anne Mitchell

Martha Jane Patton is a Birmingham lawyer who recently retired from 18 years' tenure as executive director of the Legal Aid Society of Birmingham, a nonprofit organization providing legal services to children and low-income citizens. Prior to her appointment with Legal Aid, she maintained a private practice both as a solo practitioner and with the firm of Vowell & Meelheim over the course of 20 years. Her private practice was a general one, but eventually she concentrated on probate and family law, particularly adoptions and child custody. Along the way, she received an AV rating from Martindale-Hubbell for achieving the highest level of professional excellence.

As a dedicated member of the Birmingham Bar Association and the Alabama State Bar, she and women lawyer friends founded the Women Lawyers Section of the Birmingham Bar Association and the Women's Section of the Alabama State Bar. She has been recognized twice by the Women Lawyers Section of Birmingham with its Distinguished Service Award and by the Birmingham Bar with its Burton Dunn Public

Service Award. Her law school, Samford University's Cumberland School of Law, conferred its Pro Bono Award to her and in 2016 she became the first female to receive the Birmingham Bar Association Lifetime Achievement Award.

Outside of professional achievements, she founded the Friends of Avondale Park organization in 1990 which led the transformation of the Avondale area of Birmingham. Through her activities with St. Andrew's Episcopal Church, she has taken on leadership at the Diocesan level on the Commission on Race Relations. She is a founder of the Alabama Women's Political Caucus, a member of the Leadership Birmingham Class of 1990 and received the Distinguished Alumnus Award from her alma mater, Birmingham-Southern College, in 2006.

SUSAN B. LIVINGSTON AWARD

The recipient of this award must demonstrate a continual commitment to those around her as a mentor, a sustained level of leadership throughout her career and a commitment to her community in which she practices, such as, but not limited to, bar-related activities, community service and/or activities which benefit women in the legal field and/or in her community.

Porter

Maibeth J. Porter is a founding member and shareholder of Maynard Cooper & Gale PC where she has exemplified to an extraordinary degree all of the qualities that the Susan B. Livingston Award seeks to highlight. Maibeth is an accomplished trial lawyer and serves as co-chair of the firm's financial institutions, corporate governance and fiduciary litigation practice group and co-chair of the Women's Mentoring Program. Her litigation and appellate talents are consistently recognized by her peers and clients and include rankings in Chambers USA: America's Leading Lawyers for Business since 2008, Best Lawyers in America since 2007, which also named her Lawyer of the Year in 2012 and 2014, and Super Lawyers since 2008, which most recently tapped her among the Top 50 Female Mid-South Lawyers in 2016, one of Alabama's Top 10 Lawyers in 2015 and Top 25 Women Lawyers from 2008-2015. In April 2011, Maibeth became the first female lawyer in Alabama to be inducted into the International Academy of Trial Lawyers.

She is a past president and past member of the Executive Committee of the Birmingham Bar Association, a decade-long commissioner of the Alabama State Bar, former chair of Panel II of the Alabama State Bar Character and Fitness Committee and chair of the Alabama Supreme Court Standing Committee on the *Alabama Rules of Civil Procedure*. She was recently appointed to the Alabama Judicial Inquiry Commission and is a fellow of the Alabama Law Foundation. Maibeth represents indigent clients in divorce actions through the Birmingham Bar Volunteer Lawyers Program and the YWCA.

Maibeth graduated summa cum laude from the University of the South in 1977, where she was a member of Phi Beta Kappa and Omicron Delta Kappa, among other honorary societies. She received her law degree from the Vanderbilt University School of Law in 1980. At Vanderbilt, Maibeth was a Patrick Wilson Scholar and executive student writing editor of the *Vanderbilt Law Review*. Upon graduation from law school, she served as law clerk to the Honorable Seybourn H. Lynne in the Northern District of Alabama.

LOCAL BAR ACHIEVEMENT AWARD RECIPIENTS

This award recognizes local bars for their outstanding contributions to their communities judged by the quality and extent of programs, level of participation of the bar and overall impact of the programs on its citizens.

Calhoun-Cleburne County Bar Association
President: Eric N. Snyder
Tuscaloosa County Bar Association
President: Anne W. Guthrie
Birmingham Bar Association
President: Leila H. Watson

JUSTICE JANIE L. SHORES SCHOLARSHIP

Jackson

To encourage the next generation of women lawyers, the Women's Section of the Alabama State Bar established the Justice Janie L. Shores Scholarship Fund. Named in honor of the first woman justice to sit on the Supreme Court of Alabama, the scholarship is awarded to an outstanding woman who is an Alabama resident attending law school in Alabama. This year's recipient is **Krystina Jackson** of Stevenson (the University of Alabama School of Law '18).

VOLUNTEER LAWYERS PROGRAM PRO BONO AWARDS

The Albert Vreeland Pro Bono Award is presented to an individual who demonstrates outstanding pro bono efforts through the active donation of time to the civil representation of those who cannot otherwise afford legal counsel and by encouraging greater legal representation in, and acceptance of, pro bono cases.

Richard P. Carmody, Adams & Reese LLP, Birmingham–In 2016, Richard dedicated more than 575 hours to pro bono work with the National Appleseed, Alabama Appleseed and the organizations' justice centers. In his work with Appleseed, he collaborated on a national Appleseed venture to analyze current foreign remittance fees and uncover ways to reduce fees. He worked with regional Appleseed centers to update

President Portis with Alan Rogers (Birmingham Bar Association), Eric Snyder (Calhoun-Cleburne County Bar Association) and Scott Holmes (Tuscaloosa County Bar Association)

judicial process requirements for debt-collection practices and assisted in Appleseed's evaluation of the current SNAP benefit structure, specifically to prevent the expected cut-off of an estimated 500,000 SNAP recipients. Richard also volunteered with the Birmingham Bar Volunteer Lawyers Program at their Project Homeless Connect monthly help desk.

FIRM/GROUP AWARD

NXTSTEP Family Law PC, Huntsville–Since 2010, this small firm has donated more than 530 hours of pro bono work and served more than 40 pro bono clients. NXTSTEP Family Law has provided assistance in a wide array of family law cases from uncontested divorce to child support and custody and visitation issues. The firm's pro bono clients rave about their work, stating that they are very thorough, take time to answer questions and make them feel protected. In addition to providing direct service to clients, the firm's attorneys have served on committees addressing affidavits of substantial hardship in Madison County. As a result of their efforts, a protocol for submission and granting hardship requests has been established in domestic relations matters.

LAW STUDENT AWARD

Jessica Chang, Cumberland School of Law, Birmingham–Jessica began volunteering with the Birmingham Bar Volunteer Lawyers Program as a first-year law student. She's volunteered at the Domestic Relations Help Desk, as well as the Homeless Help Desk, every month. Jessica interviewed clients and entered their information into the case management system, often talking to as many as 40 clients during one session. Jessica also volunteers at the Birmingham VLP office helping staff close cases and follow up with volunteer attorneys. She helps at the program's yearly fundraiser, Pro Hops Vino, handling registration and check-in. Jessica said that she finds working at the Volunteer Lawyers Program "a huge learning experience" and is happy "we have a program that can provide legal services to people that would have no avenue of help."

President Portis with Elizabeth Smithart, Jessica Chang, Cody Boswell and Richard Carmody

MEDIATION AWARD

Bowers

Sally C. Bowers, Proctor & Vaughn LLC, Sylacauga–Sally participates in the Foreclosure Mediation Program and the Family Mediation Program, which provide free mediation to the parties. In 2016, Sally provided more than 100 hours of service to the mediation program. She conducts mediation for parents involved in divorce and custody cases in Jefferson and Shelby counties.

50-YEAR MEMBERS

Neal Hagood Acker
Gilbert Eugene Alberding
Elliott Richard Alhadeff
Melvin C. Alldredge
Angela Stover Anderson
Horace Thomas Armstrong, Jr.
John Martin Baker
Hon. Daniel Basil Banks, Jr.
Jerry Rufus Barksdale
George Melvin Barnett
Jerry Franklin Bartlett
Hon. Joseph Laurie Battle
Robert Lynn Bertram
Michael Thomas Blacker
Harold Hampton Boles
Patrick Hodges Boone
Hon. Archie Ted Bozeman
Donald Mayer Briskman
Robert Russell Bryan
Harvey Melvin Burg
Samuel Curtis Butler, Jr.
Robert Craig Campbell, III
John Wesley Clark, Jr.
John St. Clair Cline, III
Nicholas Hamner Cobbs, Jr.
Richard Jay Cohn
Brittin Turner Coleman
William Deal Coleman
Leon E. Cooper, Jr.
Andrew McCorkle Cromer, Jr.
Norman Charles Cummins
Marcy Bradshaw Darnall, III
Philip Christopher Davis
Joseph Ray Davis
John Forrester DeBuys, Jr.
William Richard Delaney
Joseph Michael Druhan, Jr.
Mac Simmion Dunaway
Charles Herbert Erwin
Rachel Smith Ferguson
Raymond R. Flowers, Jr.
Wilson Howard Foote, Jr.
James D. Forstman
Arnold Charles Freeman
Donald Aaron Friedlander
Henry I. Frohsin
William Jordan Gamble
Thomas Ranshaw Gamble
John Patrick Geary
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Robert Eugene Gibney
Joseph Edward Glenn
John Grant Gourlay, Jr.
Hubert Aubrey Grissom, Jr.
Daniel Howard Gross
Jane Smelley Grubbs
Albert Martin Guemmer
Jerry Franklin Guyton
Donald Robert Hall
William Joseph Hamner
David Earl Hampe, Jr.
Hon. Arthur Jackson Hanes, Jr.
Robin H. Harbin
Clifford William Hardy, Jr.
James Douglas Harris, Jr.
Harold Edward Hartline
Thomas Burns Henley
Herbert Hemingway Henry, III
John Zachariah Higgs, Jr.
Tommy Edward Hill
Larry Henry Hipsh
Charles John Holditch
Robert Burks Huie
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Daniel Gray McDowell
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Hon. Jeffords D. Miller
Claude McCain Moncus
John Thaddeus Moore
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Hon. Drayton Nabers, Jr.
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Joel Morrie Nomberg
Jerry Brantley Oglesby
John Percy Oliver, II
Andrew Michael Onderdonk
John Arthur Owens
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William Andrew Parker, III
Charles Levon Parks
Theodore Bowling Pearson, Jr.
Emory Bush Peebles, III
Abner Riley Powell, III
Allen Clay Rankin, III
Ronald Alan Rappoport
John Michael Rediker
Susan Williams Reeves
Fred Miller Ridolphi, Jr.
Robert Werner Rieder, Jr.
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ALABAMA STATE BAR
ANNUAL MEETING
2017
GRAND HOTEL POINT CLEAR

2017 Annual Meeting
Photo Highlights

Participants in the Poverty Simulation & Economic Justice interactive course

Attendees enjoyed gorgeous weather during the 2017 Annual Meeting.

Balloon artist creating magic

Hays Webb (far right) and Karen and Othni Lathram with their children at the Family Night Dinner

President Portis with the official annual meeting beverage

Plenary speaker Mike Ethridge with President Portis and Emily Baggett, co-chair, Quality of Life, Health & Wellness TF

Making memories at "Playing in the Mud" pottery workshop

Legal Expo exhibitors Tony Hoffman and Neal Buchman with alacourt.com

Judge Eugene Verin, Judge Annetta Verin, Jana Russell Garner and Leigh Davis visit during a break.

Ashby Pate, "Love Your Neighbor" luncheon speaker, performing his cover of Lead Belly's "Midnight Special"

Justice Gorman Houston (ret.), Chief Justice Lyn Stuart and Martha Houston

Piano duet at the 21st Annual VLP Reception

Seeing how high they can build it at the Children's Party and Dinner with the Trolls!

Preparing bananas foster for alumni and friends at the Jones School of Law Dessert Reception

Sharing tall tales at the Past Presidents' Breakfast were, front row left to right, Johnny Owens, Alva Caine, Fred Gray, Broox Holmes and Justice Sonny Hornsby (ret.). In the middle row were, left to right, A.J. Joseph, Rich Raleigh, Doug McElvy, Sam Rumore, Phillip McCallum, Lee Copeland and Sam Crosby. On the back row were Tom Methvin, Boots Gale, Larry Morris and Mark White.

LaVeeda Battle and Sen. Cam Ward

Keeping their attendance record unbroken are Michael Oakley and his sister, Mary Jane Oakley, with Barbara Luckett.

Lots of creative combinations at the Children's Pizza Party!

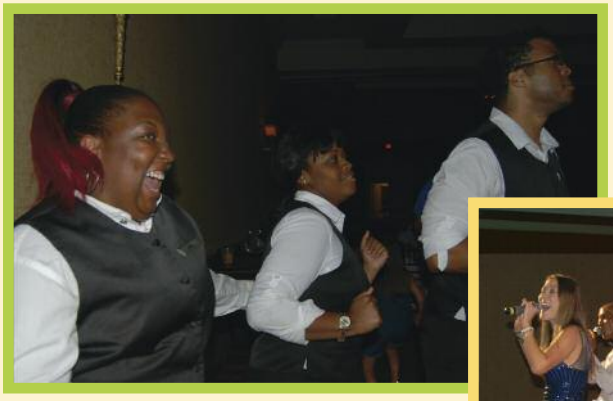
One of the many Legal Expo exhibitors was Jeff Hammock with Comprehensive Investigative Group.

Executive Director Phillip McCallum thanks keynote speaker Judy Perry Martinez, former chair, ABA Commission on the Future of Legal Services.

Bill and Winks Kelley enjoying their very first annual meeting

Brannon Buck and his daughter having fun at the photo booth

George Beck bidding on a two-night stay at the Battle House Hotel & Spa during the Women's Section Silent Auction



Even the hotel staff was having fun listening to…

The Main Attraction Band!

Robert Thornhill entertained later at the Barrels and Planks Bourbon and Cigar Mixer.

Donna and Everette Price and Bryan and Terrie Morgan enjoying the great weather on the patio

Relaxing and listening to the music of Robert Thornhill

Leslie Wright and John Neiman, women's and men's first-place winners, Freedom 5k run

Sloan Downes, legal assistant to President Portis, is thanked by Lee Copeland on behalf of the bar for her help during the past year.

Laura Livaudais, grand prize winner of the weeklong trip to Mazatlán, Mexico from ISI Alabama

Past, present and future: Immediate Past President Cole Portis, President Augusta Dowd and President-elect Sam Irby

Having fun at the Presidential Reception are Stephanie Hunter and Hope Marshall.

The WingNuts, including Donnie Todd and Judge Alan Furr

Brad Green and Mickey Turner

President Dowd and daughter Grace make a new friend on the dance floor.

Leah McLain and Chip McCallum enjoying the music of the WingNuts

See you next year, June 27-20, at the Sandestin Hilton!

Hosp Honored with Servant Leadership Award

Hosp

Edward A. "Ted" Hosp was recently named the 2017 recipient of the Edward M. Patterson Servant Leadership Award. This award is given annually to a member of the Leadership Forum Alumni Section who demonstrates professional excellence, integrity and service to the bar and the community at large.

Ted is known throughout the state as an expert in the areas of government ethics laws, the legislative and regulatory process and campaign finance law. From 1989 to 1991, he served on the staff of the United States Senate Committee on the Judiciary. In 1994, he graduated *cum laude* from Fordham University School of Law. Before joining Maynard, Cooper & Gale, he clerked for the Honorable Harold Albritton, United States District Judge for the Middle District of Alabama from 1994-1995. From 1999 to 2003, he served as legal advisor to the Governor of Alabama.

Ted stays busy. He not only serves as co-leader of Maynard Cooper's governmental and regulatory affairs practice group, but also serves as an administrative law judge for Alabama's State Health Planning and Development Agency, focusing on certificates of need. Ted also believes in educating the next generation of lawyers. He has served as an adjunct professor of law at the University of Alabama School of Law on ethics and election law. He also educates those currently in our government on ethics and campaign finance law through his work with the Association of County Commissioners of Alabama.

Ted consistently shows up to serve as a leader to Alabama lawyers. He is a founder and the current chair of the Alabama State Bar Section on Ethics, Elections & Government Relations Law. He is a member of the Alabama Access to Justice Commission, which was established by the Alabama Supreme Court in 2007, and was the commission's first chair from 2007-2011. Ted has served on the board of the Birmingham Volunteer Lawyers Program. He currently is on the Alabama State Bar Committee on Volunteer Lawyers Programs and on the boards of the Montgomery Bar Volunteer Lawyers Program and the Middle District of Alabama Federal Defenders Program. He has helped the bar establish and develop relationships within state government that has raised awareness of many issues affecting the legal and judicial system in Alabama.

The Leadership Forum Alumni Section is also proud of Ted's recent work as a servant leader in conjunction with Congresswoman Terri Sewell. In 2014, Ted formed the "Seventh Project," a non-profit foundation that assists undergraduate college students who reside in or who are originally from Alabama's 7th Congressional District pursuing internships in Washington, DC, as well as in her district offices in Alabama in Birmingham, Montgomery, Tuscaloosa and Selma.

Previous award winners include Angela Slate Rawls, Huntsville (2013); Richard J.R. Raleigh, Jr., Huntsville (2014); Rebecca G. DePalma, Birmingham (2015); and Othni J. Lathram, Montgomery (2016). ▲

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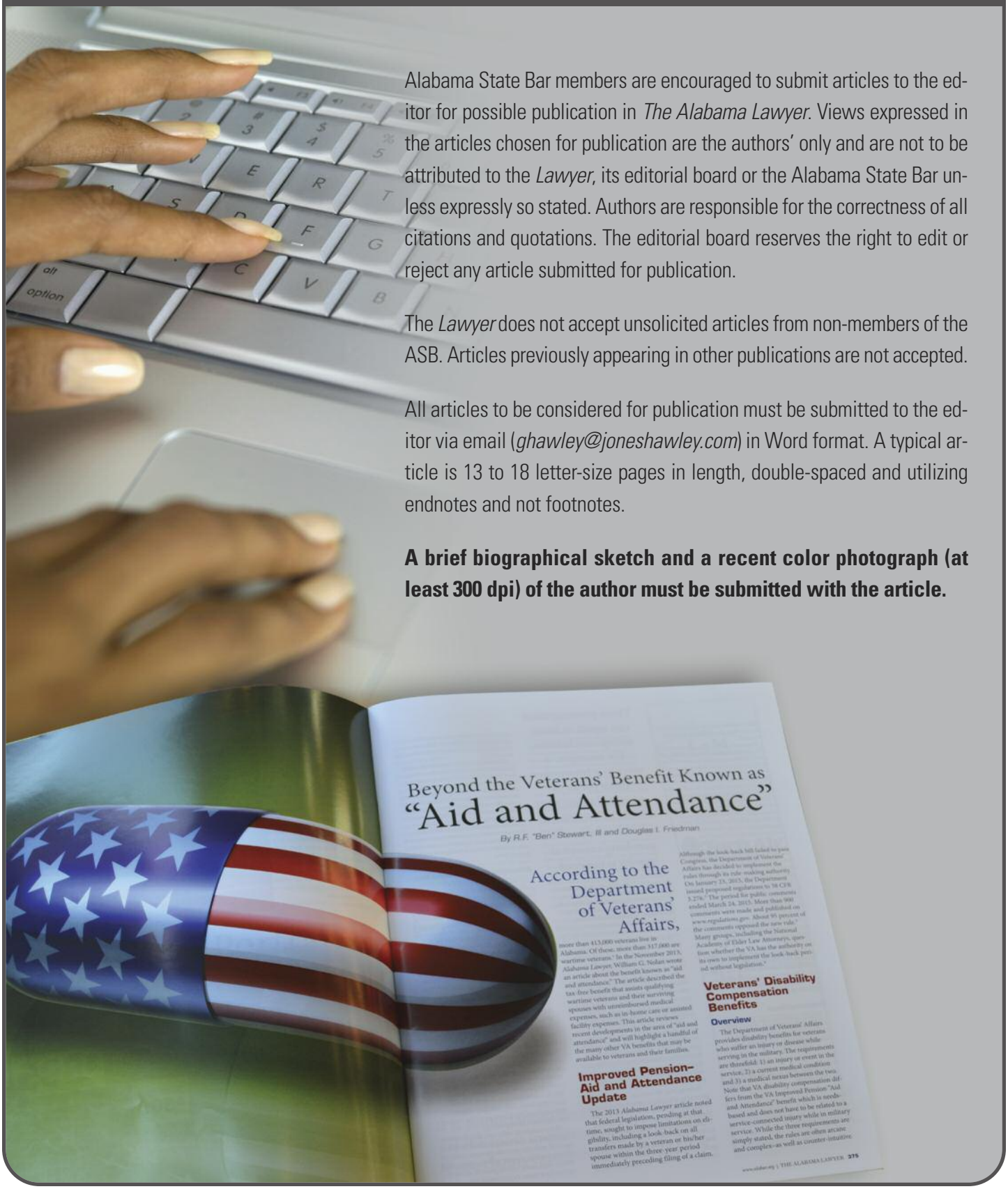

Alabama State Bar members are encouraged to submit articles to the editor for possible publication in *The Alabama Lawyer*. Views expressed in the articles chosen for publication are the authors' only and are not to be attributed to the *Lawyer*, its editorial board or the Alabama State Bar unless expressly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

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

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

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

(Photograph by FOUTS COMMERCIAL PHOTOGRAPHY, Montgomery, photofouts@aol.com)

FEBRUARY 2017 BAR EXAM STATISTICS OF INTEREST

Number sitting for exam	312
Number passing exam (includes MPRE deficient and AL course deficient)	129
Bar exam pass percentage	41.3 percent

Bar Exam Passage by School

University of Alabama School of Law	84.2 percent
Cumberland School of Law	59.1 percent
Faulkner University Jones School of Law	30.8 percent
Birmingham School of Law	25.5 percent
Miles College of Law	16.7 percent

Certification Statistics*

Admission by examination	147
Admission by transfer of UBE Score	12
Admission without examination (reciprocity)	30

**Statistics of those individuals certified to the Supreme Court of Alabama for admission to the Alabama State Bar for the period October 4, 2016 through May 15, 2017. To be certified for admission, a candidate must satisfy all admission requirements as prescribed by the* Rules Governing Admission to the Alabama State Bar.

For detailed bar exam statistics, visit *https://admissions.alabar.org/exam-statistics*.

ALABAMA STATE BAR
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Joseph Clayton Benson
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Alexander Barrett Bowdre
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Lee Price Fernon, Jr.
Lindsey Paige Albertson Fish
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Maurice Joseph FitzGerald, III
Tana Marie Flaten
Gloria LaTasha Floyd
Kristin Ashlee Forbes
Jodie Mae Ford
Jennifer Lynn Foutch
Maya Laurelle Frazier
Parker Clinton Freeman
Darcie Anne Bamberg Freitag
Katherine Furek
Brandy Lee Gentry
Mark Benjamin Hugh Gibson
Joshua Robert Graff
Kalif Rashad Green
Timothy James Greene, Jr.
Gregory Oswald Griffin, Jr.
Brooke Gurganus Grigsby
Richard Ray Grooms, III
Charles Robert Hall
James Franklin Hall, III
Amanda Griggs Hardy
Jason Andrew Hartsough
Christina Lynn Hartzell-Behrndt
Brandt Petar Hill
Thomas Dillon Hobbs
Max Johann Holzbaur
Joshua Brandon Horn
William Rufus Hovater, Jr.
Jamila Marie Hubbard
Emily Catherine Irvin
Jordan Tyler Isringhaus
April Marie Jackson MacLennan
Carlton Murray Johnson, III
Christopher Wayne Johnson
Yolonda Joiner
Jennifer Hallie Jones
Leslie Heard Jones
Matthew Steven Jones
Perrar Aquity Joseph
Bryan Daniel Judah
Tiffany Sepulveda Kahlon
Matthew Tyler Kimbrough
Kimberly King
Donald Eugene Knapp, Jr.
Brittany Joy Lamb
Kyungbum Lee
Lauren Ashley Lewis
Claire Debra Lim
Walter Edwin Lorcheim
Nicholas Donald Lough
Rachael Danielle Lyle
Christina Maxine Malmat
Robert Colby Marks
Kelly Rochelle Hyatt Masters
Kintisha Marsha' Matthews
Michael Patrick McGeown-Walker
Caroline Gray McGlamry
Jasmine Nicole McNamara
Carey Brian Meadors
Jordan Andrew Means
Brett Andrew Millar
Ashley Marie Miller
Amy Milling
David Lawrence Mize
John Joseph Moore
Matthew Eugene Moore
Nicole Lynn Moore
Heather Ann Morcroft
Angela Majors Morrison
Zachary Scott Morro
Daniel Matthew Murdock
Stephanie Quinnell Naylor
Daniel Anthony Necci
Robert Charles NeSmith
Carling Tran Nguyen
Dylan Lucke Nickerson
Parrish Scott Nordan
Orin Clayton Odom, III
John Michael O'Dowd, Jr.
Amy Michelle Osborne
Audra Britton O'Shields
Evan Dennis Pantazis
Anna Nelda Parker
Nygel Orion Parrish
Hitenkumar Hasmukhlal Patel
Priyanka Pranav Patel
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Tremele Deshun Perry
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Jana Smith Rucker
Jackie Russell
Amy Nicole Sanborn
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Caitlin Joy Sandley
Patrick Drake Schach
Ursula Lauren Anna Shakespeare
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Tonya Shy
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Mary Melissa Smith
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Matthew Miles Williams
Katie Elizabeth Willoughby
Benn Charles Wilson
Alexander Garrett Zoghby

LAWYERS IN THE FAMILY

Garrett Zoghby (2017) and
Alex Zoghby (1983)
Admittee and father

Amy Roland Milling (2017) and
Elizabeth Roland (1990)
Admittee and mother

Meaghan Lane Ellis (2017) and
January Blair Ellis (2006)
Admittee and aunt

Carrietta Pritchett-Stallworth
(2017) and Leston C. Stallworth,
Jr. (2002)
Admittee and husband

Bennett T. Richardson (2017)
and James H. Richardson (1978)
Admittee and father

Christina Perry (2017) and
Richard Perry (2010)
Admittee and husband

Rachel Cohen Blume (2017), Gary L. Blume (1978)
and Nettie Cohen Blume (1980)
Admittee, father and mother

Greg Griffin, Jr. (2017), Kaasha Benjamin (2016)
and Judge Greg Griffin (1984)
Admittee, wife and father

LAWYERS IN THE FAMILY

James M. Allen (2017) and
Edward S. Allen (1963)
Admittee and father

William R. Hovater, Jr. (2017)
and William R. Hovater, Sr. (1979)
Admittee and father

Robert NeSmith (2017) and
Dalton NeSmith (1981)
Admittee and father

John J. Moore (2017) and
Clifton S. Price, II (1984)
Admittee and cousin

Evan Dennis Pantazis (2017), Dennis George Pantazis
(1981) and Elizabeth Bourland Pantazis (1982)
Admittee, father and mother

David B. Dobson (2017) and John
J. Dobson (1976)
Admittee and father

Julian M. Davis, III (2017), J. Mason Davis, Jr. (1960),
Marcus W. Reid (1982) and Mary Bulls (1984)
Admittee, father and cousins

ALABAMA LAW FOUNDATION, INC.

Law Foundation Welcomes New President and Board Members

Joseph

The Alabama Law Foundation announces that Anthony A. Joseph is the new board of trustees' president for 2017-2018.

Joseph, known as "AJ," is a shareholder in Maynard, Cooper & Gale's Birmingham office. He has served as president of the Alabama State Bar and as chair of the American Bar Association's Criminal Justice Section. He is a fellow of the American College of Trial Lawyers, the Alabama Law Foundation and the Birmingham Bar Foundation.

In addition to the new president, the Alabama Law Foundation welcomes Vice President Mary Margaret Bailey, of Frazer, Greene, Upchurch & Baker in Mobile; Treasurer Laura Crum, of Hill, Hill & Carter in Montgomery; and Secretary Judge Jimmy Poole. Other new board members are James S. Ward of Ward & Wilson in Birmingham and Sam Irby of Irby & Heard in Fairhope. Returning trustees are Christine D. Crow of Jinks, Crow & Dickson in Union Springs and Patrick C. Davidson of Davidson, Davidson & Umbach in Auburn.

Trustees assume the responsibility of advancing the foundation's mission of making access to justice a reality for all Alabama citizens. President Joseph explains, "There are many needs within our state. This year, the foundation's goal is to expand our reach and touch as many lives as possible. It is gratifying to be part of this mission. The Alabama Law Foundation expresses appreciation to the new officers, the new board members and the returning board members."

2017 Justice Janie L. Shores Scholarship Recipient Announced

The Women's Section of the Alabama State Bar, along with the Alabama Law Foundation, announces that Krystina T. Jackson has been awarded $6,000 as the 2017 winner of the Justice Janie L. Shores Scholarship.

The scholarship, created in 2006, supports a female Alabama resident attending an Alabama law school. As Christina Crow, chair of the scholarship committee, explains, "The Women's Section of the Alabama State Bar is proud to honor the hard work and dedication of female attorneys past and present through the presentation of the

Janie L. Shores Scholarship to Krystina Jackson." The scholarship is named in honor of the first female Alabama Supreme Court Justice, who was elected in 1974. Justice Shores passed away August 9.

Jackson is a law student at the University of Alabama School of Law. Her many extracurricular activities include placing runner-up in the Case Classic Trial Advocacy Competition and membership in the Student Bar Association and the Criminal Law Society. She was recognized by the National Society for Collegiate Scholars, and is a member of Lambda Pi Eta Honors Association.

Jackson

Shores

Jackson has worked as a legal assistant and served a legal internship for the Mobile County District Attorney's Office. She also has volunteer experience with children with special needs. As Jackson explains, those experiences led her to aspire to "be a voice for those who need someone to speak for them." To achieve that, Jackson's career goal is to work in criminal law as a prosecutor. Her focus is not so much on punishing as it is "making sure the victim's voice is heard–standing up for them." In addition, she wants to return to her rural hometown area of Stevenson, Alabama.

Jackson says growing up in a small rural town presented some challenges when she decided to attend college and law school; most of her fellow high school students were not interested in continuing their education. She says she appreciates the Women's Section and the Janie L. Shores Scholarship as much for the sense of professional support as the financial support.

Jackson was recognized at the Maud McLure Kelly Award Luncheon during the Alabama State Bar Annual Meeting. The luncheon is named in honor of Alabama's first female lawyer, who continued blazing pathways by also becoming the first female attorney in the country to plead a case before the U.S. Supreme Court.

A silent auction, held the evening after the luncheon, raised money for the scholarship. Christina Crow states, "Janie Shores paved the way for many young lawyers, male and female, and we are proud to follow her example of hard work and dedication to the profession by raising the funds for this scholarship with our annual silent auction. We also thank our donors who make the silent auction possible." ▲

MEMORIALS

Howard Stuart Leach, Jr.

The Honorable H. Stuart Leach, Jr. died June 1, 2017. He was born December 14, 1930 in Fairfield, Alabama and was raised in Utah, Hawaii and Alabama. He was preceded in death by his father, Howard Leach, and his mother, Fan Marshall Leach. Survivors include his beloved wife of 53 years, Cile Shepherd Leach; a son, Shepherd Alexander Leach; a daughter, Nancy Marshall Dunning (Michael); a granddaughter, Brittnie Lucile Colvard; a sister-in-law, Nancy Shepherd Christie; a niece Catherine Christie Dellinger (Craig); and a nephew J.S. "Chris" Christie, Jr. (Donna).

Stuart attended Central Park Grammar School and graduated from Ensley High School in 1948. He graduated from Alabama Polytechnic Institute (now Auburn University) in 1953. While at Auburn, he was a member of Spades and ODK honor societies and was listed in Who's Who in American Colleges and Universities. He was a member of the Sigma Phi Epsilon social fraternity.

Following graduation from Auburn, Stuart served as an officer in the U.S. Army Signal Corps in Japan during the Korean conflict until 1955. He entered the University of Alabama School of Law in the fall of 1955, graduating in January 1958. He was employed as a legislative assistant to United States Senator John J. Sparkman in Washington, D.C. from 1958-1961. He left there to work as an attorney with the National Labor Relations Board in Memphis. In 1962, he returned to Birmingham and entered the private practice of law. He continued practicing law until elected to the civil division of the Jefferson County Circuit Court in January 1983. He was re-elected for two terms and served 13 years, the last four as presiding judge of the 10th Judicial Circuit. Judge Leach retired from the bench in January 1996, then serving as a mediator with the Sirote Permutt firm for many years.

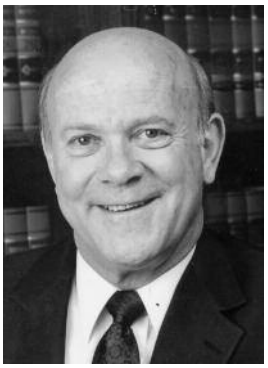
After Stuart returned to Birmingham, he met Cile Shepherd. They married in December 1964, the first wedding held at the former Highway 280 location of Briarwood Presbyterian Church.

For more than 50 years, Stuart was a member of Briarwood, where he served as a deacon and elder and as a member of the Jethro Council. He held many Bible classes at his home. Stuart was good-natured and dearly loved his friends. There was nothing more important to him than looking to his Lord for guidance and helping his family and friends.

In lieu of flowers, please send memorials to The Mercy Ministry at Briarwood Presbyterian Church, 2200 Briarwood Way, Birmingham 35243.

–J.S. Christie, Jr., Birmingham

Stanley Edward Munsey



Stanley Edward Munsey, Sr. passed away on January 22, 2017 at the age of 82. He was born on March 12, 1934, one of six children, to Estelle and Maynard Munsey in Brunswick, Maine. Upon graduation from high school, he enlisted in the Army, in which he served with the 101st Airborne Division at Fort Campbell, Kentucky, followed by serving as an ROTC instructor at

Asman, Harry
Birmingham
Admitted: 1957
Died: May 13, 2017

Buck, Robert Loye
Madison
Admitted: 1982
Died: May 4, 2017

Calhoun, Chrissy Michelle Dooley
Eclectic
Admitted: 2007
Died: May 31, 2017

Faile, William Thomas
Selma
Admitted: 1967
Died: June 17, 2017

Farah, Olivia Suhair
Greensboro, NC
Admitted: 2017
Died: May 18, 2017

Forman, Daniel Lee
Decatur
Admitted: 2003
Died: May 13, 2017

Gold, Victor
Alexandria, VA
Admitted: 1951
Died: June 5, 2017

Hein, Vernon Paul
Dothan
Admitted: 2013
Died: May 9, 2017

Hendrix, Willis Hallman
Pelham
Admitted: 1960
Died: June 23, 2017

McFadden, Stova Franklin
Mobile
Admitted: 1955
Died: May 31, 2017

Rowe, Mark Roy Lynwood
Vestavia
Admitted: 1984
Died: May 14, 2017

Skinner, William Edward
Montgomery
Admitted: 1953
Died: May 2, 2017

Stokes, Ronald Keith
Tuscaloosa
Admitted: 2003
Died: June 4, 2017

Upchurch, Robert Edward
Meridian, MS
Admitted: 1977
Died: May 23, 2017

Watkins, Nathan Graydon, Sr.
Livingston
Admitted: 1956
Died: March 12, 2017

Williams, Genubath Coke
Anniston
Admitted: 1959
Died: December 18, 2014

Williams, Lee Bowling
Grove Hill
Admitted: 1956
Died: June 21, 2017

(Continued from page 373)

Middle Tennessee State College (now MTSU). Following his service in the Army, he attended Millsaps College in Jackson, Mississippi, from which he graduated with honors, earning a full tuition scholarship to Tulane University School of Law in New Orleans, from which he earned his juris doctor.

Upon receiving his juris doctor, he worked with the land department of Shell Oil Corporation in New Orleans, until 1966 when he moved with his wife and two children to Picayune, Mississippi, where he opened his first law practice. He served as a general practitioner for two years before moving to Florence, Alabama, where he served as the executive director of the Council of Local Governments. He served in this capacity for four years before joining as a partner in the practice of Heflin, Rosser & Munsey in Tuscumbia. He was partners with and instrumental in the campaign of Howell T. Heflin, who became chief justice to the Alabama Supreme Court. After Chief Justice Heflin left the law practice, Stan remained in the practice for many years before opening Munsey & Ford, which would ultimately become Munsey & Associates.

During his many years as an attorney, my father vigorously represented his clients as a general practitioner. As part of his practice, he became an expert in the area of school law and served for many years as outside counsel to the Colbert County Board of Education where, upon his retirement from the private practice of law in 2004, he became in-house counsel until his full retirement in 2013 when his health began to decline. My father literally retired while lying in a hospital bed, only then realizing that he could no longer provide the level of service that he demanded of himself. Though physically unable to continue working, he always felt the call to serve and would often say of retirement, "I hate it."

He was bestowed many gifts by his Creator, including his strong and brilliant mind, his keen sense of right and wrong, his love of people and his love of justice, all of which combined resulted in his more than 40 years of service as a practicing attorney. If able, he would have practiced law until the moment of his actual passing from this earth, I am certain.

A strong advocate for his clients, Stan was known for his passion for the law, as well as his intelligence, tireless energy and great care to see that his clients received the full measure of what was rightfully due them under the law. I have heard many an attorney say that they knew that they had better be fully prepared when going up against my father in the courtroom. Clients regularly showed their appreciation of his thorough attention and superior representation by bringing home-grown vegetables and other freshly prepared food to our home, sometimes as payment for services rendered, which my father always graciously accepted with a smile and a handshake. He loved the law and he loved people more. Such passion made him a true advocate for his clients and an admirable opponent. Serving not only his clients, he also mentored and trained many young associates, me included, a number of whom are judges or practicing attorneys today. He expected great diligence and dedication to the art of learning and growing one's skills as an attorney, but he was always willing to offer counsel and guidance to an attorney who was new (or, not so new) to the profession. Some judges may also say that he felt compelled to offer a bit of guidance in their courtrooms, as well! Did I mention that he was passionate about the law?

My father was licensed to practice in Mississippi and Alabama and was a member of the American Bar Association, the Mississippi Bar, the Alabama State Bar, the Mississippi Trial Lawyers Association and the Alabama Association for Justice. He also served as mediator. From 1981-1982 he served as chair of the North Alabama Health Systems Agency and vice chair of the Alabama Statewide Health Coordinating Council. He served on the Alabama State Bar commission regarding advertising and was instrumental in drafting the disclaimer that still appears today. He was a faithful member of First Presbyterian Church in Tuscumbia, where he served as a Sunday school teacher for many years.

Stan Munsey was a wonderful attorney, truly representing the profession with dignity and the highest professional and ethical standards. The work that he did and the services that he rendered truly made a difference and had a tremendously positive and lasting impact on people's lives and in communities.

He is survived by his devoted wife of 62 years, Elena ("Lee") Storer Munsey; his son, Stanley Munsey, Jr. (Donna); his daughter and fellow Alabama State Bar member, Michele Denton (Keith); and his most beloved grandsons, Matthew Denton, Stephen Denton (Caroline) and Philip Denton. He is and will continue to be greatly missed. ▲

–Michele Munsey Denton, Madison

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

Co-authored by

Caleb Hindman

2017 Legislative Recap, Part 2

The July edition of this column covered the general tone of the 2017 Legislative Session and gave detailed information on the Alabama Law Institute legislation that passed. This month serves as installment two and covers other noteworthy legislation. There were 1,031 bills introduced during the 2017 Legislative Session, of which 299 were enacted and became law, and of that total, 152 were general bills. Below are summaries of select general bills that might be of interest to practitioners around the state. Summaries of all of the general acts can be found at *http://lrs.state.al.us/publications/publications.html*.

Constitutional Amendments

Right to Life (Act 2017-188)

Representative Matt Fridy

This proposed constitutional amendment declares that it is the public policy of the state to support the sanctity of unborn life and the rights of unborn children and specifies that the state constitution does not protect the right to abortion or require the funding of abortion. Effective upon ratification and will be voted on at the November 2018 General Election

Court System

Judicial Reallocation (Act 2017-42)

Senator Arthur Orr

This act creates the Judicial Resources Allocation Commission and establishes the criteria for determining the need for increasing or decreasing the number of judgeships in the district and circuit courts. The act also provides that, in the event of a district or circuit court judgeship vacancy, the commission will determine whether to reallocate the judgeship to another district or circuit or to fill the vacancy according to law. Effective: March 6, 2017

Liability of Probate Court Judge (Act 2017-174)

Senator Greg Albritton

This act further revises the circumstances under which a judge of probate may be liable for either not taking a bond or for taking an insufficient bond from a conservator or a personal representative of an estate. The act also provides that a judge of probate may only be liable for wanton, fraudulent or intentional misconduct rather than neglect or omission. Effective: July 1, 2017

Judicial Administration Fund (Act 2017-270)

Senator Rodger Smitherman

This act provides that funds in the Circuit Clerk's Judicial Administration Fund may be used for awarding merit and promotional raises to full-time employees of the clerk's office. Effective: October 1, 2017

Probate Court Fees (Act 2017-293)

Representative Juandalynn Givan

This act provides that probate court fees must be collected either at the time a pleading is filed or at the termination of a suit, as determined by the court. The act also provides that the court may order that security deposits be deposited with the court to cover expected court costs. Effective: August 1, 2017

Probate Judge Contempt Power (Act 2017-388)

Representative Matt Fridy

This act provides that when a judge of probate is a licensed attorney in this state, the judge has the same power to punish for civil contempt as granted to a judge of the circuit court. Effective: May 26, 2017

Registered Therapy Dogs and Certified Facility Dogs (Act 2017-413)

Senator Jimmy Holley

Sections 2 through 4 of the act, known as Koda's Law, authorize a court to allow a registered therapy dog, as defined, to accompany a victim or witness while testifying. Section 6 of the act, known as Willow's Law, authorizes a certified facility dog, as defined, to accompany a victim or witness while testifying. Effective: August 1, 2017

Criminal Law

False Claims for Medicaid Benefits (Act 2017-66)

Senator Lee "Trip" Pittman

This act: (1) requires that a person must act knowingly to be convicted of making a false statement or claim on an application for payment of medical benefits from the Medicaid Agency, (2) provides certain exceptions for activity excepted by federal law and (3) establishes a six-year statute of limitations. Effective: June 1, 2017

Jury Override (Act 2017-131)

Senator Dick Brewbaker

This act: (1) prohibits a court from overriding a jury verdict in a capital case; (2) specifies that when a jury in a capital case returns a verdict of death, the defendant must be sentenced to death; and (3) specifies that when a jury in a capital case returns a verdict of guilty, but not a verdict of death, the defendant must be sentenced to life without parole. Effective: April 11, 2017

Assisted Suicide Ban Act (Act 2017-231)

Representative Mack Butler

This act makes it a crime for any person to deliberately aid another person in dying and provides that if a person aids or assists another in committing suicide or dying, the personal representative or administrator of the estate of the decedent may bring an action for wrongful death. The act also provides that if any physician or healthcare provider violates the act, the appropriate licensing board must suspend or revoke his or her license. Effective: August 1, 2017

Elder Abuse Protection Order and Enforcement Act (Act 2017-284)

Senator Rodger Smitherman

This act provides for the issuance of elder abuse protection orders and *ex parte* elder abuse protection orders, authorizes certain individuals to petition for the orders and provides penalties for violations of the orders. The act also specifies that a law enforcement officer may arrest a person without a warrant when the officer has reasonable cause to believe

(Continued from page 377)

that the person violated an elder abuse protection order or has committed elder abuse. Effective: August 1, 2017

Medicaid Benefits (Act 2017-298)

Representatives Chris England and April Weaver

This act suspends, but does not terminate, the Medicaid benefits of any county inmate or child under the jurisdiction of the juvenile court system who is detained in a public institution until the inmate or child is no longer eligible for benefits or no longer an inmate of a public institution. Effective: May 16, 2017 and becomes operative January 1, 2018

Marshall James Walton Highway Safety Act (Act 2017-336)

Senators Lee "Trip" Pittman and Cam Ward

This act creates the crime of homicide by vehicle, a Class C felony. Effective: August 1, 2017

Alabama Medical Parole Act (Act 2017-355)

Senator Lee "Trip" Pittman

This act provides for the medical parole of certain inmates, including those who are terminally ill or suffer from chronic illnesses. The act also requires the Department of Corrections to identify all inmates who have spent 30 or more days in an infirmary in the prior calendar year and consider them as candidates for medical parole. Effective: November 25, 2017

Deputy Hart Act (Act 2017-358)

Representative Mike Holmes

This act revises the penalties for a violation of the restrictions of the Stage II driver's license. The act also provides penalties for a parent or legal guardian who knowingly allows his or her child with a Stage I or Stage II driver's license to drive a motor vehicle in violation of the applicable restrictions. Effective: August 1, 2017

Expungement of Criminal Records (Act 2017-377)

Representative Alan Baker

This act authorizes a person who has been charged with any felony offense and who has been found not guilty of the offense to file a petition in the criminal division of the circuit court in the county in which the charges were filed to expunge records relating to the charge. The act also provides for the release of certain expunged records in related civil suits under certain conditions. Effective: August 1, 2017

Sex Crimes (Act 2017-414)

Senators Vivian Davis Figures and Cam Ward

This act creates the crimes of distributing a private image, sexual extortion, assault with bodily fluids and directing a child to engage in sexual intercourse or deviate sexual intercourse, and further provides for the crime of electronic solicitation of a child. The act also: (1) adds crimes to the list of enumerated sex offenses for purposes of registration and notification of sex offenders, (2) requires certain sex offenders to notify law enforcement of each place the sex offender resides, (3) provides for the notification requirements associated with establishing a residence or vacating a residence, (4) modifies the procedure by which a court may relieve certain sex offenders from registration and notification requirements and (5) places limits on locations where a sex offender may accept a volunteer position. Effective: August 1, 2017

Fair Justice Act (Act 2017-417)

Senator Cam Ward and Representative Lynn Greer

This act: (1) provides that Rule 32.2(c) of the *Alabama Rules of Criminal Procedure* applies only to non-death penalty cases, (2) provides a specific time frame for an appellant to file petitions for post-conviction remedies in death penalty cases and requires appellants to pursue direct appellate remedies and post-conviction remedies under Rule 32 concurrently, (3) requires the trial court judge in death penalty cases to appoint an appellate counsel for both direct appeal and post-conviction remedies within a specified period of time and (4) specifies that properly filed petitions for post-conviction relief under Rule 32 that are still pending at the time of the conclusion of the direct appeal and affirmation of death sentence may be considered for a specified amount of time. Effective: August 1, 2017

Civil Law

Alabama Child-Placing Agency Inclusion Act (Act 2017-213)

Representative Rich Wingo

This act prohibits the state from refusing to license or discriminating against any child-placing agency that is licensed by the state because the child-placing agency declines to make, provide, facilitate or refer for placement in a manner that conflicts with the sincerely held religious beliefs of the child-placing agency. The act also provides remedies to

child-placing agencies injured by a violation of the act. Effective: May 3, 2017

Insurance (Act 2017-228)

Representative Kerry Rich

This act: (1) provides that the commissioner of insurance may not testify in a private civil action concerning any confidential documents and materials in risk-based capital reports filed with the commissioner, (2) authorizes the commissioner to enter into information-sharing agreements with certain associations and agencies under the condition that the recipient maintains the confidentiality and privileged status of the information, (3) specifies that any sharing of documents or materials does not result in a waiver of any applicable privilege or claim of confidentiality, (4) removes exceptions to the requirement that the ultimate controlling person of every insurer subject to registration under the Alabama Insurance Holding Company Regulatory Act file an annual enterprise risk report and (5) clarifies the legal authority and power of the commissioner to act as a group-wide supervisor for any internationally active insurance groups. Effective: May 4, 2017 with the exception of the amendment to Section 27-29-4, *Code of Alabama* 1975, which becomes effective January 1, 2019

Immunity (Act 2017-241)

Representatives John Rogers and Mary Moore

This act provides civil immunity to any person who, acting in good faith, uses force to rescue a child or incapacitated person from an unattended motor vehicle. Effective: August 1, 2017

Real Property

Court-Ordered Disposition of Property of Protected Persons (Act 2017-245)

Representatives James Buskey and Victor Gaston

This act allows a court, without appointing a conservator, to authorize the sale, mortgage, lease or other transfer of oil, gas and other mineral rights of a protected person with a disability or a minor. Effective: May 9, 2017

Alabama Memorial Preservation Act of 2017 (Act 2017-354)

Senator Gerald Allen

This act prohibits the relocation, removal, alteration or renaming of any architecturally significant building, memorial building, memorial street or monument which is on public property and is 40 years old or more. The act also requires the Committee on Alabama Monument Protection, created by the act, to approve the relocation, removal, alteration or renaming of an architecturally significant building, memorial building, memorial street or monument located on public property which is more than 20 but less than 40 years old. Effective: May 25, 2017

Elections

Felony Voter Disqualification Act (Act 2017-378)

Representative Mike Jones

This act codifies a comprehensive list of felonies that involve moral turpitude which disqualify a person from exercising his or her right to vote. The act also requires each county board of registrars to purge the computerized statewide voter registration list of any person who has been convicted of an offense designated by the act as a felony involving moral turpitude. Effective: August 1, 2017

Taxation

Annual School Sales Tax Holiday (Act 2017-120)

Senator Tim Melson

This act changes the annual sales tax holiday on school items from the first full weekend of August to the third full weekend of July. Effective: March 29, 2017

(Continued from page 379)

Excise Tax (Act 2017-165)

Representative Ken Johnson

This act includes loans and credit card receivables as property in the state of the financial institution for purposes of the excise tax apportionment formula. Effective: April 20, 2017 for all tax years beginning January 1, 2017

Forest Products Privilege and Severance Tax (Act 2017-301)

Representative Elaine Beech

This act provides alternative tax rates for certain types of timber and excludes from the tax wood residue produced in conjunction with certain forest products manufacturing processes. The act also repeals Section 9-13-85, *Code of Alabama* 1975, relating to expenditures for forest protection. Effective: July 1, 2017

Alabama Jobs Act (Act 2017-314)

Representative Ken Johnson

This act continues the eligibility for incentives provided in the Alabama Jobs Act and reduces the maximum balance from an aggregate balance of $850 million to an annualized balance of $300 million. The act also specifies that the job incentives created by the Alabama Jobs Act are not available to any project unless at least 80 percent of the jobs created by the qualifying project are full-time. Effective: May 18, 2017

Alabama Taxpayer Protection and Assistance Act (Act 2017-363)

Representative Rod Scott

This act: (1) prohibits any person from providing tax preparation services for an Alabama income tax return unless the return includes the IRS-issued Preparer Tax Identification Number of the preparer and the preparer's signature and provides civil penalties for violations, (2) ensures that business privilege tax returns are due at the same time as the corresponding federal income tax return and deletes the maximum business privilege tax amount for a Real Estate Investment Trust, (3) changes the name of the Taxpayer Advocate to the Taxpayer Assistance Officer and (4) provides for multiple Taxpayer Assistance Officers. Effective: May 25, 2017, for tax returns due on or after January 1, 2018

Historic Tax Credit (Act 2017-380)

Representative Victor Gaston

This act provides an income tax credit against the tax liability of the taxpayer for expenses associated with the rehabilitation, preservation and development of historic structures. The act also establishes the Historic Tax Credit Evaluating Committee. Effective: May 25, 2017

Individual Income Tax Simplified Short Form Filing Act (Act 2017-405)

Representative Chris Blackshear

This act allows an optional increased standard tax deduction to qualifying individual income tax taxpayers who file as single or married filing joint filing status and who meet certain income criteria. Effective: May 26, 2017 for all tax years beginning after December 31, 2017

Education

High School Graduation Requirements (Act 2017-173)

Senator Arthur Orr

This act requires all students to successfully pass a civics test as a required component for completing the government course required in the high school course of study beginning with the 2018-19 school year. The act specifies that the term civics test means the 100 questions used by officers of the United States Citizenship and Immigration Services as the basis for selecting the questions posed to applicants for naturalization. Effective: July 1, 2017

Sunscreen (Act 2017-278)

Senator Jim McClendon

This act authorizes public and nonpublic school students to possess and use over-the-counter sunscreen that is regulated by the federal Food and Drug Administration when the students are at school and school-based events. Effective: May 16, 2017

Health

Healthcare Rights of Conscience Act (Act 2017-189)

Representative Arnold Mooney

This act provides that, except in limited circumstances, a healthcare provider has the right not to participate in a healthcare service that violates his or her conscience. The act also provides that injunctive relief may be brought for a violation of the act and that, upon a finding of a violation, the

court may order reinstatement of the healthcare provider's job position, back pay and costs of the action. Effective: July 1, 2017

Eyeglasses (Act 2017-319)

Senator Gerald Dial

This act provides a definition for the term over-the-counter spectacles, prohibits the over-the-counter sale of nonprescription, ready-to-wear spectacles that do not conform to the definition and provides for enforcement by the Board of Optometry, a district attorney or the attorney general. Effective: August 1, 2017

Autism Spectrum Disorder (Act 2017-337)

Representative Jim Patterson

This act requires health benefit plans to cover the treatment of Autism Spectrum Disorder under certain conditions. Effective: October 1, 2017

Midwifery (Act 2017-383)

Representative Ken Johnson

This act establishes the State Board of Midwifery to license and regulate the practice of midwifery. The act also repeals certain laws relating to midwifery. Effective: August 1, 2017

Military

Mandatory Child Abuse Reporting Requirements (Act 2017-257)

Senator William Holtzclaw

This act requires the department of human resources to determine the military status of the parent or guardian of a child who is the subject of a child abuse or neglect allegation and requires the department to notify the U.S. Department of Defense of any allegation of child abuse or neglect that involves a child of a military parent or guardian. Effective: May 11, 2017

National Guard (Act 2017-258)

Senator William Holtzclaw

This act extends the application of the federal Servicemembers Civil Relief Act and the federal Uniformed Services Employment and Reemployment Rights Act to any member of the National Guard of another state who is employed in this state. The act also provides military differential pay and restoration of annual or sick leave under certain conditions. Effective: August 1, 2017

(Continued from page 381)

Military Recruiters (Act 2017-259)

Senator William Holtzclaw

This act requires all public schools and public institutions of higher education to allow military recruiters the same access to students and campus facilities that the schools and institutions allow to prospective employers and postsecondary institutions. Effective: August 1, 2017

Alabama Code of Military Justice (Act 2017-260)

Senator William Holtzclaw

This act amends significant portions of the *Alabama Code of Military Justice* to: (1) specify that the code does not apply to a member of the state military who commits an offense while in a duty status with the Armed Forces of the United States under Title 10 of the U.S.C., (2) provide that the trial for an offense subject to prosecution pursuant to the code may be convened in any county of the state, (3) delete the requirement that the presiding military judge of a court-martial proceeding be a member of the same military force as the accused, (4) adopt recent changes in the federal *Uniform Code of Military Justice* regarding preliminary hearings and victims' rights, (5) clarify the procedures for compelling the appearance of witnesses and the production of evidence and (6) specify that the constitutional right to a jury does not apply to a court-martial proceeding. Effective: August 1, 2017

Alabama Job Creation and Military Stability Commission (Act 2017-277)

Senator William Holtzclaw

This act creates the Alabama Job Creation and Military Stability Commission for the purpose of ensuring the stability of Department of Defense resources assigned to Alabama through the study and evaluation of military organizations, personnel, civilian support personnel, equipment and infrastructure currently located in the state. Effective: August 1, 2017

Alabama National Guard (Act 2017-349)

Senator Gerald Dial

This act: (1) increases the minimum disability rating veterans must have to make their dependents eligible to receive educational scholarship benefits under the act, (2) establishes residency requirements for veterans and their dependents, (3) establishes academic requirements for dependents receiving benefits, (4) specifies that state educational benefits will be applied only after exhausting all other available resources and (5) provides tuition reimbursement for any member of the Alabama National Guard who is in good standing and meets certain criteria at an institution of higher learning. Effective: August 1, 2017

Banking

Alabama Monetary Transmissions Act (Act 2017-389)

Representative Ken Johnson

This act repeals the existing Sale of Checks Act and adds a new chapter to: (1) provide for the regulation of money transmissions by the Alabama Securities Commission and require any person engaging in the business of money transmissions to obtain a license from the commission; (2) specify the licensing requirements; (3) require each licensee to maintain a sufficient amount of security to secure faithful performance of the obligations of the licensee; (4) authorize the commission to conduct an annual examination of each licensee; (5) provide the commission with the power to suspend or revoke a license under certain circumstances; (6) provide for civil penalties up to $1,000 per day for violations; and (7) provide criminal penalties for certain violations of the act. Effective: August 1, 2017

Miscellaneous

Hunting and Fishing Licenses (Act 2017-92)

Representative Tommy Hanes

This act allows certain nonresident students to purchase certain noncommercial resident hunting and fishing licenses for the same fee as a resident. Effective: June 1, 2017

Alabama Youth Residential Facility Abuse Prevention Act (Act 2017-374)

Representative Steve McMillan

This act: (1) establishes registration and regulatory requirements for certain religious nonprofit, other nonprofit, and for-profit youth residential facilities, schools, and programs; (2) requires employees, volunteers, and applicants for employment or volunteer positions to undergo a criminal background investigation prior to having unsupervised contact

with children; (3) allows the Department of Human Resources to charge a registration fee and an annual renewal fee; (4) provides that all youth residential facilities and organizations under the act are subject to a quarterly inspection by the department; and (5) requires the facilities and organizations to provide the department with certain information upon request, including the names of all children enrolled, the names of all personnel currently employed and the plan of operation and procedures. Effective: May 25, 2017

Workers' Compensation (Act 2017-390)

Representative Danny Garrett

This act: (1) authorizes an individual limited liability company member to elect to be exempt from workers' compensation (2) removes the requirement that the certification of the election to be exempt from the coverage be filed annually, (3) specifies that once the exemption takes effect, it remains in effect until revoked and (4) provides procedures for revocation. Effective: August 1, 2017

Travel Expenses of State Officers and Employees (Act 2017-409)

Representative Randy Davis

This act allows for the payment of all of the actual and necessary expenses in addition to the actual expenses for transportation for any person traveling in the service of the state for the purpose of attending or assisting in hosting a convention, conference, seminar or other meeting of a state or national organization of which the state or individual is a dues-paying member. The act also specifies that the president of the senate is charged with authorizing the travel for members of the senate. Effective: May 26, 2017 ▲

DISCIPLINARY NOTICES

- Notices
- Reinstatements
- Suspensions

Notices

- **Tessie Patrice Clements**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of the date of this publication, or thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB Nos. 2013-105, 2013-185, 2013-311, 2013-365, 2013-794 and 2014-772 by the Disciplinary Board of the Alabama State Bar.
- Notice is hereby given to **George Bondurant Elliott,** who practiced in Mountain Brook and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated April 17, 2017, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2016. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 17-390]
- Notice is hereby given to **Sidney Moxey Harrell, Jr.,** who practiced in Mobile and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated April 17, 2017, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2016. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 17-393]
- Notice is hereby given to **Anna Genevieve Turner,** who practiced in Birmingham and whose whereabouts are unknown, that, pursuant to the Disciplinary Commission's order to show cause dated April 17, 2017, she has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2016. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 17-405]

Reinstatements

- Cullman attorney **Bryan Hugh Andrews** was reinstated to the practice of law in Alabama, effective April 24, 2017. The Supreme Court of Alabama entered an order April 24, 2017 noting Andrews's reinstatement to the practice of law and inclusion on the official roster of attorneys. The supreme court's order was based upon the decision of Panel II of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Andrews on February 17, 2017. [Rule 27(g), Pet. No. 2017-175]

- Haleyville attorney **Jerry Dean Roberson** was reinstated to the practice of law in Alabama, effective April 18, 2017. The Supreme Court of Alabama entered an order April 18, 2017 noting Roberson's reinstatement to the practice of law and inclusion on the official roster of attorneys. The supreme court's order was based upon the decision of Panel II of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Roberson on January 19, 2016. [Rule 27(a), Pet. No. 2016-169]

Suspensions

- Birmingham attorney **Robert Lee Beeman, II** was suspended from the practice of law in Alabama for 91 days with the suspension to be held in abeyance. Beeman will be placed on probation for two years, effective June 16, 2017. The suspension was based upon the Disciplinary Commission's acceptance of Beeman's conditional guilty plea, wherein he pled guilty to violating Rules 1.7, 4.1 and 8.4(a), (c) and (g), *Ala. R. Prof. C*. Beeman previously worked at a company in various legal and non-legal roles. While at the company, Beeman met an employee who was considering pursuing a racial discrimination claim against the company. Beeman subsequently spoke with the employee about her legal claims, advised her and referred her to another attorney. Beeman assisted the other attorney in his representation of the employee by helping to draft the damages letter to the EEOC, assisting with the drafting of the complaint against the company and assisting the other attorney in drafting a notice of deposition. [ASB No. 2016-1204]
- Prattville attorney **Christopher Michael Howell** was summarily and interimly suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective April 17, 2017. The supreme court entered its order based upon the Disciplinary Commission's order that Howell be summarily and interimly suspended for failing to respond to formal requests concerning disciplinary matters and for conduct likely to cause injury to a client. [Rule 20(a), Pet. No. 2017-415]

(Continued from page 385)

- Birmingham attorney **Reginald Daryl McDaniel** was suspended from the practice of law in Alabama for 60 days with the suspension to be held in abeyance. McDaniel will be placed on probation for two years, effective June 16, 2017. The suspension was based upon the Disciplinary Commission's acceptance of McDaniel's conditional guilty plea, wherein he pled guilty to violating Rules 1.10, 1.16(a) and 8.4(a) and (g), *Ala. R. Prof. C.* A client was referred to McDaniel for a possible discrimination claim against a company. The referring attorney, who worked at the client's company, then assisted McDaniel with the drafting of letters and documents for the client's discrimination claim against the company. [ASB No. 2016-1205]
- Birmingham attorney **Ayn Traylor-Sadberry** was suspended from the practice of law in Alabama for three years, with the suspension to be deferred and held in abeyance conditioned upon her compliance with the conditions of a three-year term of probation, effective April 19, 2017, by order of the Disciplinary Commission of the same date. The Disciplinary Commission accepted Traylor-Sadberry's conditional guilty plea to violations of Rules 1.3, 1.4(a), 1.15(a) and (b) and 8.4(a), *Ala. R. Prof. C.* Traylor-Sadberry was hired to represent a client in an estate matter. During the course of representation she received a check, payable to her, containing funds belonging and due to be paid to the client. However, she did not promptly deposit the funds in trust, notify the client of their receipt or disburse them to her client. The client contacted Traylor-Sadberry and inquired about the funds. Traylor-Sadberry advised the client that a check containing the funds was in the mail. However, the check had not been mailed. Traylor-Sadberry subsequently was not responsive to the client's telephone calls, and she did not disburse the funds to the client until after the client filed a bar complaint. [ASB No. 15-1496] ▲

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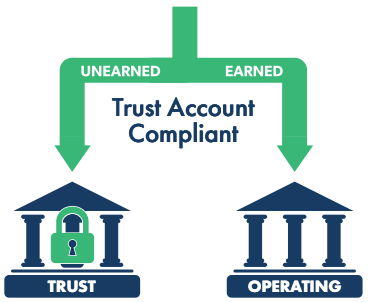

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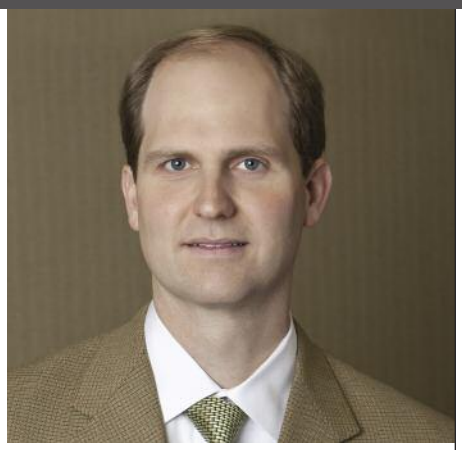

Wilson F. Green

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

Arbitration

***Family Security Credit Union v. Etheredge*, No. 1151000 et al. (Ala. May 19, 2017)**
Trial court's determination that arbitration agreement was unconscionable was erroneous for lack of evidence of procedural unconscionability (inability to negotiate contract terms); alleged substantive unconscionability was not established merely because of lack of complete mutuality in arbitration agreement.

Amendments to Pleadings

***Gerstenecker v. Gerstenecker*, No. 1160144 (Ala. May 19, 2017)**
When a party contends that an issue was tried by express or implied consent, and evidence on that issue is also relevant to an issue expressly litigated, pleadings are not deemed amended to conform to the evidence under Rule 15(b).

Rule 54(b)

***Ragland v. State Farm Mut. Auto. Ins. Co.*, No. 1160140 (Ala. May 19, 2017)**
Rule 54(b) certification of dismissal of bad-faith claim was improper; disposition of pending UIM claim might moot bad-faith claim entirely, thus claims were intertwined.

Arbitration

***SSC Selma Operating Company, LLC v. Fikes*, No. 1160080 (Ala. May 19, 2017)**
Order denying arbitration of retaliatory discharge comp claim reversed; employer's EDR Program contained arbitration, was applicable to all employees and covered the retaliation claim.

Municipalities

***Ex parte City of Guntersville*, No. 1151214 (Ala. May 26, 2017)**
Municipality was entitled to immunity under recreational-use statutes (*Ala. Code* § 35-15-1 et seq.) and under *Ala. Code* § 11-47-190 for claims arising from injuries suffered at or after attendance at fireworks display at municipal park.

Arbitrator Jurisdiction

***Rainbow Cinemas, LLC v. Consolidated Constr. Co.*, No. 1160070 (Ala. June 16, 2017)**

Because the AAA's Construction Industry Arbitration rules empower arbitrators to determine the scope of their own jurisdiction, whether conditions precedent to arbitration have been satisfied, as well as issues of non-signatory enforcement, are for the arbitrator.

Leases; Recording

***Rochester-Mobile, LLC v. C&S Wholesale Grocers, Inc.*, No. 1160185 (Ala. June 16, 2017)**

Sublease is not a "lease" within the meaning of *Ala. Code* § 35-4-6, and thus is not subject to the recording requirement (under which lack of recording renders term beyond 20 years void) separate from the upstream lease.

Pleading Requirements

***Newman v. Howard*, No. 1160226 (Ala. June 16, 2017)**

Circuit court erred in granting summary judgment based on an unpleaded affirmative defense of release, when no motion for leave to amend the answer or amended answer asserting the defense was ever filed.

Outbound Forum Selection

***Ex parte Jewels by Park Lane, Inc.*, No. 1160333 (Ala. June 23, 2017)**

Outbound forum selection clause within multi-level marketing agreement, designating Illinois courts as exclusive venue for suits, was enforceable; plaintiff failed to show that Illinois forum was seriously inconvenient, especially since counterparty was headquartered there and plaintiff had attended defendant's convention there. Claim of fraud in the inducement directed to the entire agreement did not render forum selection clause unenforceable; only if fraud was directed to the clause itself would enforcement be impacted.

Estate Administration

***Engel v. Amonett*, No. 1160113 (Ala. June 23, 2017)**

Under *Ala. Code* § 43-2-22, "[i]mprovidence means a lack of care and foresight, of forehandedness, of thrift, of business capacity." The evidence supported the conclusion that the co-executors' lack of capacity to handle their own affairs suggested the improvidence triggering disqualification under the *Code*.

Post-Arbitral Review

***Honea v. Raymond James Financial Services, Inc.*, No. 1130590 (Ala. June 30, 2017)**

(1) Trial court lost jurisdiction to adjudicate matters after denial (by operation of law) of Rule 59 motions; (2) trial court did not violate mandate from first appeal by allowing post-arbitral award motion to vacate (treated as Rule 59 motion) to be denied by operation of law, because denial was merits adjudication of motion to vacate; (3) denial of hearing under Rule 59(g) was not reversible error as to many claims because movant failed to show "probable merit" to motion to vacate, required to consider reversible the denial of a hearing requested under Rule 59(g); (4) however, movant demonstrated probable merit as to breach of contract claims, thus rendering denial of Rule 59(g) hearing reversible.

Attorneys' Fees; UCC

***Wells Fargo Bank, N.A. v. National Bank of Commerce*, No. 1150992 (Ala. June 30, 2017)**

Under *Ala. Code* § 7- 4-208, drawee bank has right to reimbursement of "expenses" when presenting bank violates presentment warranty. Held: "expenses" do not include attorneys' fees incurred by drawee bank in defending action by party entitled to payment on the instrument.

(Continued from page 389)

Product Liability; Expert Witnesses

***Mazda Motor Corp. v. Hurst*, No. 1140545 (Ala. July 7, 2017)**

Driver was killed and passenger injured in single-vehicle MVA in which speeding vehicle crashed and burst into flames due to rupture in fuel system in crash. Driver's estate and passenger sued manufacturer under AEMLD, claiming defective design of the fuel system (both had survived initial crash with non-life-threatening injuries, but driver was killed and passenger injured from burn injuries). After judgments for plaintiffs on jury verdicts, Mazda appealed. The supreme court held: (1) trial court did not err in admitting plaintiff's design defect and causation expert's testimony; he offered "technical" testimony rather than "scientific" testimony, such that the testimony was not subject to the *Daubert*-like requirements of *Ala. R. Evid.* 702(b), because his conclusions were based upon his own specialized knowledge and experience in and with automotive technology and the automotive industry and not "on a scientific theory, principle, methodology, or procedure"; (2) trial court did not err in refusing to instruct jury on contributory negligence as to AEMLD wrongful death claim brought on behalf of driver, because there was no evidence as to how speed might contribute causally to an accident generally versus speed which might contribute to an accident leading to a fuel system failure; (3) trial court erred in submitting wantonness claim because there was insufficient evidence of wantonness to support such a claim brought on behalf of driver, given Mazda's evidence of extensive testing and lack of other accidents; a defendant's lack of knowledge of any other occurrences of similar accidents weighs against a claim of wantonness; and (4) in an extensive discussion of the good count-bad count rule, the failure of the wantonness claim and the presence of a general verdict did not, in this rare case, require retrial of all claims, because given the verdict for passenger and the amount of damages awarded for punitive damages based on wantonness, the amount of damages awarded under AEMLD for driver's estate based on the non-wantonness theory was apparent.

From the Alabama Court of Civil Appeals

Ejectment

***Davis v. Samara*, No. 2160019 (Ala. Civ. App. June 16, 2017)**

Ala. Code § 6-6-298 changed the common law rule that a judgment in ejectment is never final by making two judgments in favor of a defendant a bar to further action by the plaintiff for the recovery of the possession of the land. The only exception (which would allow the application of *res judicata*) applies where title to property is an essential question as to ejectment and the title question is adjudicated in the first proceeding. In this case, the second action brought by plaintiff, despite an arguably adverse adjudication in a prior federal action not relating to title, was not barred by *res judicata* because of these principles.

Workers' Compensation; Venue

***Ex parte R.E. Garrison Trucking, Inc.*, No. 2160556 (Ala. Civ. App. June 16, 2017)**

Trial court directed to transfer comp action from Washington County to Cullman County. Defendant was not doing business by agent in Washington County simply because employee driver lived there; asking drivers to refer potential new drivers is "incidental to [Garrison's] corporate business functions" and is an insufficient activity to constitute Garrison's "doing business" in Washington County.

Easements; Nuisance

***Commonwealth Savingshares Corporation v. Fayetteville Holdings, LLC*, No. 2150916 (Ala. Civ. App. June 30, 2017)**

At issue was an easement for an industrial conveyor running through Commonwealth's property. After 2004 annexation by the City of Scottsboro, the parties' properties were subjected to the regulations in the Scottsboro Zoning Ordinance. Commonwealth argued that the ordinance prohibited the presence of the conveyor, thereby extinguishing the easement, and that the conveyor was a nuisance. Held: conveyor is permitted as a nonconformity under the ordinance; easement was not extinguished; and conveyor is not a nuisance.

Arbitration and Appeal; Summary Judgment Procedure

***Colony Homes, LLC v. Acme Brick Tile & Stone, Inc.*, No. 2160209 (Ala. Civ. App. July 14, 2017)**

(1) There is no appellate jurisdiction to consider a denial of arbitration where the appeal is taken on the arbitration question more than 42 days after entry of the order denying arbitration and (2) a party objecting to the contents of an affidavit offered at summary judgment must move to strike the objectionable material or testimony before adjudication of the summary judgment motion in order to preserve the objection.

Attorneys' Fees; *Quantum Meruit*

***Pope, McGlamry, Kilpatrick, Morrison & Norwood, P.C. v. DuBois*, No. 2160197 (Ala. Civ. App. July 14, 2017)**

Trial court properly denied *quantum meruit* fee requested by firm via attorneys' lien in connection with client's settlement of personal injury claim, where lawyer representing client left firm well into representation of the client. Evidence offered by firm to support its requested fee was from lawyer lacking personal knowledge of the amount of time spent in connection with the tasks associated with the representation, and the firm's attorneys did not keep any contemporaneous time records to substantiate the time spent on the matter. This is a plurality decision, with three judges concurring in the result, but it would suggest that personal injury and contingent-fee firms may need to start keeping contemporaneous time records to document representation in significant litigation.

Workers' Compensation

***Bailey v. Jacksonville Health and Rehabilitation Center*, No. 2160350 (Ala. Civ. App. July 21, 2017)**

Evidence before the trial court, viewed in the light most favorable to employee, demonstrates that factual issues regarding the employee's alleged contraction of scabies and the causation of her psychological injury exist. Medical records from at least two doctors confirmed a diagnosis of scabies and mite infestation. Furthermore, genuine issue of fact existed regarding existence and causation of psychological injury.

Workers' Compensation

***Wyatt v. Baptist Health System, Inc.*, No. 2160280 (Ala. Civ. App. July 21, 2017)**

Sufficient evidence supported trial court's conclusion that employee failed to prove medical causation; sufficient evidence supported conclusion that the twisting and lifting motions made by the employee on that date could not and did not cause or contribute to her injury.

(Continued from page 391)

From the United States Supreme Court

Arbitration

***Kindred Nursing Centers, LP v. Clark*, No. 16-32 (U.S. May 15, 2017)**

Kentucky law requires that a POA contain a "clear statement" of authority to enter into an arbitration agreement. The Supreme Court held that Kentucky's clear-statement rule placed arbitration agreements on unequal footing with other contract terms, singling out arbitration for disfavored treatment, and thus violated the FAA.

FDCPA; Time-Barred Debt

***Midland Funding LLC v. Johnson*, No. 16-348 (U.S. May 15, 2017)**

Reversing the Eleventh Circuit, the Court held that debt-buyer's filing proof of claim on debt obviously time barred is not a false, deceptive, misleading, unfair or unconscionable debt collection practice under FDCPA.

Veterans

***Howell v. Howell*, No. 15-1031 (U.S. May 15, 2017)**

State court may not order veteran to indemnify divorced spouse for loss in divorced spouse's portion of veteran's retirement pay caused by veteran's waiver of retirement pay to receive service-related disability benefits.

Patent; Venue

***TC Heartland LLC v. Kraft Foods Group Brands, LLC*, No. 16-341 (U.S. May 22, 2017)**

The patent venue statute, 28 U. S. C. §1400(b), provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." A corporation "resides" under this statute only where it is incorporated.

Hague Convention; Service by Mail

***Water Splash, Inc. v. Menon*, No. 16-254 (U.S. May 22, 2017)**

The Hague Convention does not prohibit service by mail.

Legislative Redistricting

***Cooper v. Harris*, No. 15-1262 (U.S. May 22, 2017)**

North Carolina Legislature's use of race as the predominant driver in drawing a district could not withstand strict scrutiny. In this case, the state contended that it had to draw a majority-minority district because of the likelihood of facing and losing a section 2 anti-dilution Voting Rights Act claim. While anti-dilution concerns can cause such districts to satisfy strict scrutiny, in this case, there was no evidence (as there must be for anti-dilution claim to have legitimacy) that a district's white majority votes sufficiently as a bloc to usually defeat the minority's preferred candidate.

Patent

***Impression Productions, Inc. v. Lexmark International, Inc.*, No. 15-1189 (U.S. May 30, 2017)**

Patentee's decision to sell a product exhausts all its patent rights in that item, regardless of any restrictions the patentee purports to impose.

Fourth Amendment; Qualified Immunity

***Los Angeles County v. Mendez*, No. 16-369 (U.S. May 30, 2017)**

Ninth Circuit's provocation rule provides that an officer's otherwise reasonable use of force can be unreasonable if (1) the officer "intentionally or recklessly provokes a violent confrontation" and (2) "the provocation is an independent Fourth Amendment violation." The Supreme Court reversed, holding that when an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim.

FLSA; Personal Jurisdiction

***BNSF Railway, Inc. v. Tyrrell*, No. 16-405 (U.S. May 30, 2017)**

FELA does not establish a personal jurisdiction standard different from generally applicable standards. BNSF was not "at home" in Montana so as to justify exercise of general personal jurisdiction, where it was neither incorporated nor headquartered, and where it maintains less than five percent of its work force and about six percent of its total track mileage.

Standing; Intervention

***Town of Chester v. Laroe Estates, Inc.*, No. 16-605 (U.S. June 5, 2017)**

Litigant seeking to intervene as of right under Rule 24(a)(2) must meet the requirements of Article III standing, if intervenor wishes to pursue relief not requested by plaintiff.

Forfeiture

***Honeycutt v. U.S.*, No. 16-142 (U.S. June 5, 2017)**

Because forfeiture pursuant to 21 U.S.C. §853(a)(1) is limited to property the defendant himself actually acquired as the result of the crime, that provision does not permit forfeiture with regard to the property in issue of Honeycutt, who had no ownership interest in his brother's store and did not personally benefit from the illegal sales.

Class Actions

***Microsoft Corp. v. Baker*, No. 15-457 (U.S. June 12, 2017)**

Federal courts of appeals lack jurisdiction under 28 U.S.C. § 1291 to review an order denying class certification (or, as here, an order striking class allegations) after the named plaintiffs have voluntarily dismissed their claims with prejudice.

FDCPA

***Henson v. Santander Consumer USA*, No. 16-349 (U.S. June 12, 2017)**

FDCPA does not apply to a debt buyer which attempts to collect solely on its own accounts, because for purposes of the statutory definition of "debt collector," that actor is not regularly seeking to collect a debt owed to another. This is Justice Gorsuch's first opinion for the Court.

First Amendment

***Packingham v. North Carolina*, No. 15-1194 (U.S. June 19, 2017)**

North Carolina law makes it a felony for a registered sex offender "to access a commercial social networking Website where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." The Supreme Court held that the statute impermissibly restricted lawful speech, in violation of the First Amendment.

Trademark; First Amendment

***Matel v. Tam*, No. 15-1293 (U.S. June 19, 2017)**

Lanham Act provision prohibiting the registration of trademarks that may "disparage . . . or bring. . . into contemp[t] or disrepute" any "persons, living or dead." 15 U. S. C. §1052(a), is facially unconstitutional under the Free Speech Clause.

Personal Jurisdiction

***Bristol Myers Squibb v. Superior Court*, No. 16-466 (U.S. June 19, 2017)**

In a multi-plaintiff case, contacts relating to resident plaintiffs could not be attributed to the non-resident plaintiffs. The mere fact that other plaintiffs were prescribed, obtained and ingested Plavix in California does not allow the state to assert specific jurisdiction over the nonresidents' claims. Nor is it sufficient (or relevant) that BMS conducted research in California on matters unrelated to Plavix. What is needed is a connection between the forum and the specific claims at issue.

Regulatory Takings

***Murr v. Wisconsin*, No. 15-214 (U.S. June 23, 2017)**

Under flexible approach properly taken by courts analyzing regulatory takings claims, zoning treatment prescribing that two adjacent lots under common ownership are usable only in a combined lot can form the basis for a regulatory taking of one of the lots.

Same-Sex Rights

***Pavan v. Smith*, No. 16-992 (U.S. June 26, 2017)**

When a married woman gives birth in Arkansas, state law generally requires the name of the mother's male spouse to appear on the child's birth certificate, regardless of his biological relationship to the child. The Arkansas Supreme Court held that Arkansas need not extend that rule to similarly situated same-sex couples, so that the state would not issue birth certificates including the female spouses of women who give birth in the state. The Supreme Court reversed, holding that this infringed on the commitment, under *Obergefell v. Hodges*, 576 U. S. ___ (2015), to provide same-sex couples "the constellation of benefits that the States have linked to marriage."

Securities; American Pipe Tolling

***CALPERS v. Anz Securities, Inc.*, No. 16-373 (U.S. June 26, 2017)**

Three-year limitations period in section 77m of the 1933 Securities Act is a statute of repose, not subject to *American Pipe* equitable class-action tolling.

Free Exercise Clause

***Trinity Lutheran Church of Columbia, Inc. v. Comer*, No. 15-577 (U.S. June 26, 2017)**

Missouri department's policy of denying grants to religious organizations for installing playground surfaces made from recycled tires violated the Free-Exercise rights of Trinity Lutheran (the applicant) by denying it an otherwise available public benefit on account of religious status.

From the Eleventh Circuit Court of Appeals

Due Process; Application of Offensive Issue Preclusion

***Graham v. R.J. Reynolds Tobacco Co.*, No. 13-14590 (11th Cir. *en banc* May 18, 2017)**

In *Walker v. R.J. Reynolds Tobacco Co.*, 734 F.3d 1278 (11th Cir. 2013), the Court allowed the plaintiff to apply the offensive

(Continued from page 393)

use of issue preclusion to bar defendants from relitigation of certain negligence and strict liability questions, which had been adversely decided in a class case called *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006) (*Engle III*), which had been later decertified as a class to allow individual actions about the remaining issues of specific causation, damages and comparative fault. (*Engle III* held that jury findings of negligence and strict liability had preclusive effect in later individual actions.) In this 280-plus page *en banc* decision, the Court rejected defendant's due-process challenge to the offensive use of issue preclusion and refused to overrule *Graham*.

TCPA; Claim-Splitting; Amendments to Pleadings

***Vanover v. NCO Financial Services, Inc.*, No. 15-15294 (11th Cir. May 17, 2017)**

Whether a complaint may be dismissed for asserting claims which could and should have been presented in an earlier-filed complaint is an issue of first impression in the Circuit. In this case, the Court affirmed the district court's dismissal of a second complaint as an improper claim-splitting of the claims asserted in the first complaint. The Court also held that even though the sought-after amendment in the second action was timely, the district court did not abuse its discretion in denying plaintiff's motion to join additional parties in an attempt to defeat defendant's motion to dismiss, because it would have the undesirable effect of exposing NCO to potential conflicting liability and inconsistent judgments; since plaintiff could have added these as parties in the first action, the district court determined that permissive joinder was not in the interest of justice and would not advance judicial economy.

Qualified Immunity

***Jones v. Fransen*, No. 16-10715 (11th Cir. May 19, 2017)**

Officers were entitled to qualified immunity on claims brought by apprehended suspect who suffered injuries from police canine. Officers' employment of a police canine under the circumstances did not violate clearly established rights.

Qualified Immunity

***Mikko v. City of Atlanta*, No. 15-15135 (11th Cir. May 26, 2017)**

DA and assistant DA were entitled to qualified immunity on claims brought by police investigator based on complaint lodged by DA to police chief (who fired detective based on the complaint) concerning detective's moonlighting as a defense expert in a Florida case. The law was not clearly established in 2013 that it violates the First Amendment for a government employer to fire an employee on account of testimony the employee gave, under oath and outside the scope of his ordinary job responsibilities.

False Claims Act

***USA ex rel. Phalp v. Lincare Holdings, Inc.*, No. 16-10532 (11th Cir. May 26, 2017)**

District court's conclusion that a finding of scienter under the FCA can be precluded by a defendant's identification of a reasonable interpretation of an ambiguous regulation that would have permitted its conduct is erroneous. Although ambiguity may be relevant to the scienter analysis, it does not foreclose a finding of scienter. Instead, a court must determine whether the defendant actually knew or should have known that its conduct violated a regulation in light of any ambiguity at the time of the alleged violation.

TCPA

***Florence Endocrine Clinic, PLLC v. Arriva Medical, LLC*, No. 16-17483 (11th Cir. June 5, 2017)**

Order form faxed to a doctor by a company that supplies a medical product purchased by that doctor's patient did not constitute an "unsolicited advertisement" within the meaning of the TCPA, 47 U.S.C. § 227(a)(5), because the faxes did not promote the sale of Arriva products.

CAFA

***Hunter v. City of Montgomery*, No. 16-15861 (11th Cir. June 14, 2017)**

Putative class action brought against city and third-party vendor by violators of camera red-light enforcement ordinance was not properly removed under CAFA; because only injunctive relief was sought against vendor while monetary and injunctive relief was sought against the city, only the city was the "primary" defendant under 28 U.S.C. § 1332(d)(4)(A), (B), and the other conditions for mandatory declination of jurisdiction were present.

Bankruptcy

***Pollitzer v. Gebhardt*, No. 16-11506 (11th Cir. June 27, 2017)**

Section 707(b) of the *Bankruptcy Code* allows a bankruptcy court to dismiss a petition filed under Chapter 7 if it determines

that relief would be an "abuse" within the meaning of that section. 11 U.S.C. § 707(b). That section applies to a petition that was initially filed under Chapter 13 but later converted to a petition under Chapter 7.

SSI; Attorneys' Fees

***Wood v. Commissioner*, No. 16-13664 (11th Cir. June 26, 2017)**

Attorney who is awarded fees under both the EAJA and § 406(b) is required to refund the smaller of the two awards to the claimant. And, prior precedent limits the combined § 406(a) and (b) attorney's fee awards to 25 percent of past-due benefits.

Medical Devices

***Mink v. Smith & Nephew, Inc.*, No. 16-11646 (11th Cir. June 26, 2017)**

Though this case arises primarily under Florida law, the Court reviewed extensively the express and implied preemption standards under the Medical Device Amendments, 21 U.S.C. § 360c *et seq*.

Informed Consent

***Looney v. Moore*, No. 15-13979 (11th Cir. July 6, 2017)**

In a case turning on the parameters of informed consent, the Court certified the following question to the Alabama Supreme Court: Must a patient whose particular medical treatment is dictated by the parameters of a clinical study, and who has not received adequate warnings of the risks of that particular protocol, prove that an injury actually resulted from the medical treatment in order to succeed on a claim that his consent to the procedure was not informed?

Arbitration

***Burch v. P.J. Cheese, Inc.*, No. 13-15042 (11th Cir. July 7, 2017)**

Procedures within Section 4 of the Federal Arbitration Act concerning demand for jury trial displace the general procedures for demanding a jury trial under the Rules.

Employment

***Stamper v. Duval County School Bd.*, No. 15-11788 (11th Cir. July 18, 2017)**

Issue: whether EEOC revived employee's claim of discrimination–otherwise barred by the statute of limitations–when it vacated a two-year-old dismissal of employee's administrative charge and DOJ issued employee new notice of the right to sue? Held: Commission lacked authority to issue subsequent notice to sue, and employee was not entitled to equitable tolling because she failed to file case within 90 days of receipt of first right to sue.

First Amendment

***Rodriguez v. City of Doral*, No. 15-11595 (11th Cir. July 19, 2017)**

There was substantial evidence to support First Amendment retaliation claim; specifically, that employee did not voluntarily leave his employment with defendant, but rather was effectively terminated.

RECENT CRIMINAL DECISIONS From the United States Supreme Court

Criminal Law; Psychiatric Testimony

***McWilliams v. Dunn*, No. 16-5294 (U.S. June 19, 2017)**

Under *Ake v. Oklahoma*, 470 U. S. 68, 83, when indigent "defendant demonstrates . . . that his sanity at the time of the offense is to be a significant fact at trial, the State must" provide the defendant with "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Held: State of Alabama deprived McWilliams of right to assistance under *Ake*; Eleventh Circuit should determine on remand whether the Alabama courts' error had the "substantial and injurious effect or influence" required to warrant a grant of habeas relief, *Davis v. Ayala*, 576 U. S. ___, ___, specifically considering whether access to the type of meaningful assistance in evaluating, preparing and presenting the defense that *Ake* requires could have made a difference.

Ineffective Assistance

***Jae Lee v. U.S.*, No. 16-327 (U.S. June 23, 2017)**

Lee demonstrated ineffective assistance in his following his lawyer's advice to accept a plea deal under which he pleaded guilty to a crime subject to deportation, when he specifically asked his counsel whether the plea deal would adversely affect his immigration status and was advised in the negative.

Immigration

***Maslenjak v. U.S.*, No. 16-309 (U.S. June 22, 2017)**

Government charged Maslenjak with knowingly "procur[ing], contrary to law, [her] naturalization," in violation of 18 U.S.C. §1425(a). Held: when the underlying illegality alleged in a §1425(a) prosecution is a false statement to government officials, a jury must decide whether the false

(Continued from page 395)

statement so altered the naturalization process as to have influenced an award of citizenship.

Brady Material

***Turner v. U.S.*, No. 15-1503 (U.S. June 22, 2017)**
Evidence not disclosed by prosecution was not required to be disclosed under *Brady* for lack of materiality. Such "evidence is 'material' . . . when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Cone v. Bell*, 556 U. S. 449, 469-470. "A 'reasonable probability' of a different result" is one in which the suppressed evidence " 'undermines confidence in the outcome of the trial.'"

Ineffective Assistance

***Weaver v. Massachusetts*, No. 16-240 (U.S. June 22, 2017)**
In the context of a public-trial violation during jury selection, where the error is neither preserved nor raised on direct review, but is raised later via an ineffective-assistance-of-counsel claim, the defendant must demonstrate prejudice to secure a new trial.

Ineffective Assistance

***Davila v. Davis*, No. 16-6219 (U.S. June 26, 2017)**
Ineffective assistance of post-conviction counsel does not provide cause to excuse the procedural default of ineffective-assistance-of-appellate-counsel claims.

From the Court of Criminal Appeals

Continuances

***Greene v. State*, CR-15-0952 (Ala. Crim. App. June 9, 2017)**
Denial of defendant's motion to continue trial was abuse of discretion. Defense counsel was unaware that an expert witness for the defense would be unavailable to testify until a week before trial, and immediately informed the trial court upon learning his unavailability.

Evidence

***Sheffield v. State*, CR-15-1467 (Ala. Crim. App. June 9, 2017) (on rehearing)**
Declarant's hearsay statements, made against her spouse's penal interest, were inadmissible as contrary to her own pecuniary or proprietary interest under *Ala. R. Evid.* 804(b)(3), and admission of the statements was not harmless error. ▲

ABOUT MEMBERS, AMONG FIRMS

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

About Members

Mandy Baker announces the opening of the **Law Office of Mandy L. Baker LLC**. The mailing address is P.O. Box 1016, Wadley 36276. Phone (256) 395-6527.

Stephen W. Burrow announces the opening of the **Burrow Law Firm PLLC** at 1126 Jackson Ave., Ste. 102, Pascagoula, MS 39569-2221. Phone (228) 447-4330.

Among Firms

Judge David Kimberley of Gadsden was elected presiding judge of the 16th Judicial Circuit, effective June 1.

Balch & Bingham LLP announces that **Martha Thompson** joined as a partner in its Birmingham office.

Burr & Forman LLP announces that **Eli J. Hare, Michelle L. McClafferty** and **Brook V. Robertson** joined as associates in the Birmingham office.

Carlton Fields announces that **Eric D. Coleman** joined the Miami office as an associate.

Carr Allison announces that **Andrew Turpen** and **Robert Rylee Zalanka** joined as associates in the Birmingham office.

The **Finley Firm PC** of Atlanta announces that partner **George W. Walker, III** opened the firm's Auburn office.

Friedman Dazzio Zulanas & Bowling PC announces that **Matthew Slaughter** joined as an associate and **Rachel Cobble** joined as a staff attorney.

Hill Hill Carter announces that **Jordan Speake Jenkins** joined the firm in the Montgomery office.

Maynard Cooper & Gale announces that **Matthew B. Reeves** rejoined the firm as a shareholder in the Huntsville office and **Maggie Johnson Cornelius**, **Timothy W. Gregg** and **Andrew S. Nix** rejoined as shareholders in the Birmingham office.

Norris Injury Lawyers of Birmingham announces that **Douglas Jackson** joined as an associate.

Ogletree Deakins announces that **Robert Ellerbrock** joined the Birmingham office.

Owens & Millsaps LLP announces that **Melinda Murphy Dionne** joined the firm.

Porterfield, Harper, Mills, Motlow & Ireland PA announces that **C. Jeffrey Ash** and **Kelli R. Degnan** joined the practice.

Smith, Spires & Peddy PC announces that **Jamila M. Hubbard** joined as an associate.

Wilmer & Lee PA announces that **Amy Hill Nation** is a shareholder. ▲

J. Douglas McElvy
douglas.mcelvy@alabar.org

Billing Client for Attorney's Fees, Costs and Other Expenses

The Disciplinary Commission, in RO-94-02, addressed the issues surrounding a lawyer's billing a client for attorney's fees, costs and other expenses incurred during the representation of the client. Basically, the Disciplinary Commission's opinion adopted ABA Formal Opinion 93-379.

The instant opinion reaffirms the Disciplinary Commission's adoption of and adherence to that referenced formal opinion of the ABA.

DISCUSSION:

One of the primary factors considered by a client when retaining a lawyer is the fee to be paid by the client for the lawyer's providing legal representation to the client. Incidental to the lawyer's fee, for which the client will be responsible, are those expenses and costs incurred by the lawyer during the representation of the client.

Rule 1.4(b) requires that a lawyer explain a matter to the extent reasonably necessary to permit a client to make informed decisions regarding the representation. Inherent in this initial consultation with a client would be some discussion of the fee to be charged by the lawyer, and possibly reimbursement to the lawyer for expenses he or she incurs during the representation of the client.

In those situations where there is no pre-existing lawyer-client relationship, Rule 1.5(b), *Alabama Rules of Professional Conduct*, encourages the lawyer to communicate to the client, preferably in writing, the basis or rate of the fee to be charged by the lawyer for representing the client. The rule suggests that this communication occur "before or within a reasonable time after commencing the representation." *A.R.P.C.*, 1.5(b).

The Comment to Rule 1.5 encourages that "… an understanding as to the fee should be promptly established." The lawyer is also given an opportunity at the outset of representation to fully discuss and address any concerns which the client may have concerning the total fee, which would obviously include costs and expenses to be reimbursed to the lawyer by the client.

Additionally, Rule 1.5(c) states:

> "Rule 1.5 Fees
>
> (c)… A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined,including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated."

* * *

Rule 1.5(a), *A.R.P.C.*, also prohibits a lawyer from entering into an agreement for or charging or collecting a clearly excessive fee. In the past, the Disciplinary Commission has reviewed allegations of clearly excessive fees in the disciplinary process. Due consideration is given, in addressing those type of complaints and fee disputes, to the total fee to be charged to the client by the lawyer, which would necessarily include reimbursed costs and expenses.

For that reason, the lawyer should, when assessing the reasonableness of the fee, take into consideration not only the basic attorney fee, but the total amount to be paid by the client, including costs and expenses reimbursed to the lawyer.

The primary focus of the assessment should be to determine whether the total charges to the client are reasonable.

The basic costs or expenses incurred by the lawyer in representing the client can be broken down into two basic categories: (1) Those costs which are incurred by the lawyer within the firm itself, e.g., photocopying, postage, audio and videotape creations, producing of exhibits and the like; and, (2) Costs incurred external of the law firm or outsourced by the law firm in further representation of the client, e.g., depositions, production of records from a third party, travel and lodging and the like.

In ABA Formal Opinion 93-379, charges other than professional fees are broken down into three groups, for discussion: (A-1) General overhead, (B-2) disbursements and (C-3) in-house provision of services. With regard to overhead, said opinion states:

> "In the absence of disclosure to the client in advance of the engagement to the contrary, the client should reasonably expect that the lawyer's cost in maintaining a

(Continued from page 399)

> library, securing malpractice insurance, renting of office space, purchasing utilities and the like would be subsumed within the charges the lawyer is making for professional services."

Therefore, that opinion does not consider overhead as an expense which is to be passed along to the client independent of the basic fee for professional legal services.

With regard to disbursements (B-2) above, the opinion points out that it would be improper "… if the lawyer assessed a surcharge on these disbursements over and above the amount actually incurred unless the lawyer herself incurred additional expenses beyond the actual cost of the disbursement item." This would include, but not be limited to, litigation expenses such as jury consultants, mock trials, focus groups and the like. The opinion also points out that if a lawyer receives any type of discounted rate or benefit points, then those discounted rates or benefit points should be passed along to the client.

With regard to (C-3) above, the opinion states that "… the lawyer is obliged to charge the client no more than the direct cost associated with the service … plus a reasonable allocation of overhead expenses directly associated with the provision of the service … ." The obvious reasoning behind this approach is that the lawyer should not utilize the lawyer-client relationship, beyond the fees for professional services, to "manufacture" a secondary source of income by inflating costs and expenses billed to a client. This approach philosophically agrees with Rule 1.5's prohibition against clearly excessive fees. Since the basic lawyer's fee is governed by a "reasonableness" approach, likewise, all fees and expenses which are charged back to a client during the course of the representation should be reasonable, and not considered as a secondary opportunity for a lawyer to generate additional income from the lawyer-client relationship.

In reviewing this aspect of the lawyer-client relationship, it is also necessary to consider possible abuses by lawyers of a lawyer-client relationship with regard to fees charged for the lawyer's professional services. ABA Formal Opinion 93-379 recognizes two possible scenarios where a lawyer's billing practices would contravene the *Rules of Professional Conduct*. In one situation, the lawyer bills more than one client for the same hours spent. If a lawyer appears on behalf of multiple clients for one docket call, with each client being a separate case file and separate lawyer-client relationship, may the lawyer bill each file for the total number of hours spent at the docket call? The obvious answer to this would be no. Otherwise, the lawyer would be guilty of using a multiplier for his time spent on behalf of a client which would not only be misleading, but, in some instances, rise to the level of fraud.

The classic example would be a lawyer appointed to represent indigent defendants in criminal cases. The lawyer receives notices that he has three separate clients on the same morning docket. The lawyer sits and participates throughout the docket which spans some two hours. Upon returning to his office, the lawyer then bills each of the client files the two hours expended in court, totaling hours in multiple of the number of client files presented during that docket.

The situation would develop whereby a lawyer would actually be billing more hours than actually expended by the lawyer, which would contravene not only public policy, but also the *Rules of Professional Conduct*.

A second situation involves a lawyer who performs work for one client while engaged in an activity for which he bills another client. The classic example is the lawyer who flies from one city to another for a deposition on behalf of Client A. The time spent by the lawyer in traveling to and conducting the deposition would be billed to Client A.

However, during the flight, the lawyer works on files for Client B. May the lawyer also charge Client B for the same time for which he is billing Client A?

Again, the obvious answer would be no. To allow otherwise would constitute double billing by the lawyer for his or her time.

Lastly, there is a possibility that lawyers "recycle" documents and research on behalf of clients. The classic example arises where a lawyer has done a significant amount of research and drafted memoranda, pleadings or other documents on behalf of a client. The client is billed for this research and these documents.

Later, the lawyer is hired by a new client, but in discussing the case with the new client, the lawyer realizes that he or she may be able to utilize the research and documents created for the predecessor client. May the lawyer now charge the same number of hours billed to the initial client, to this subsequent client, even though the actual time will not be necessary to recreate the research and documents in question? Again, the obvious answer would be no.

The commission suggests that lawyers review their office practices with regard to fee contracts and letters of engagement to ensure compliance with the above-discussed fee and expense issues. [RO-2005-02] ▲

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