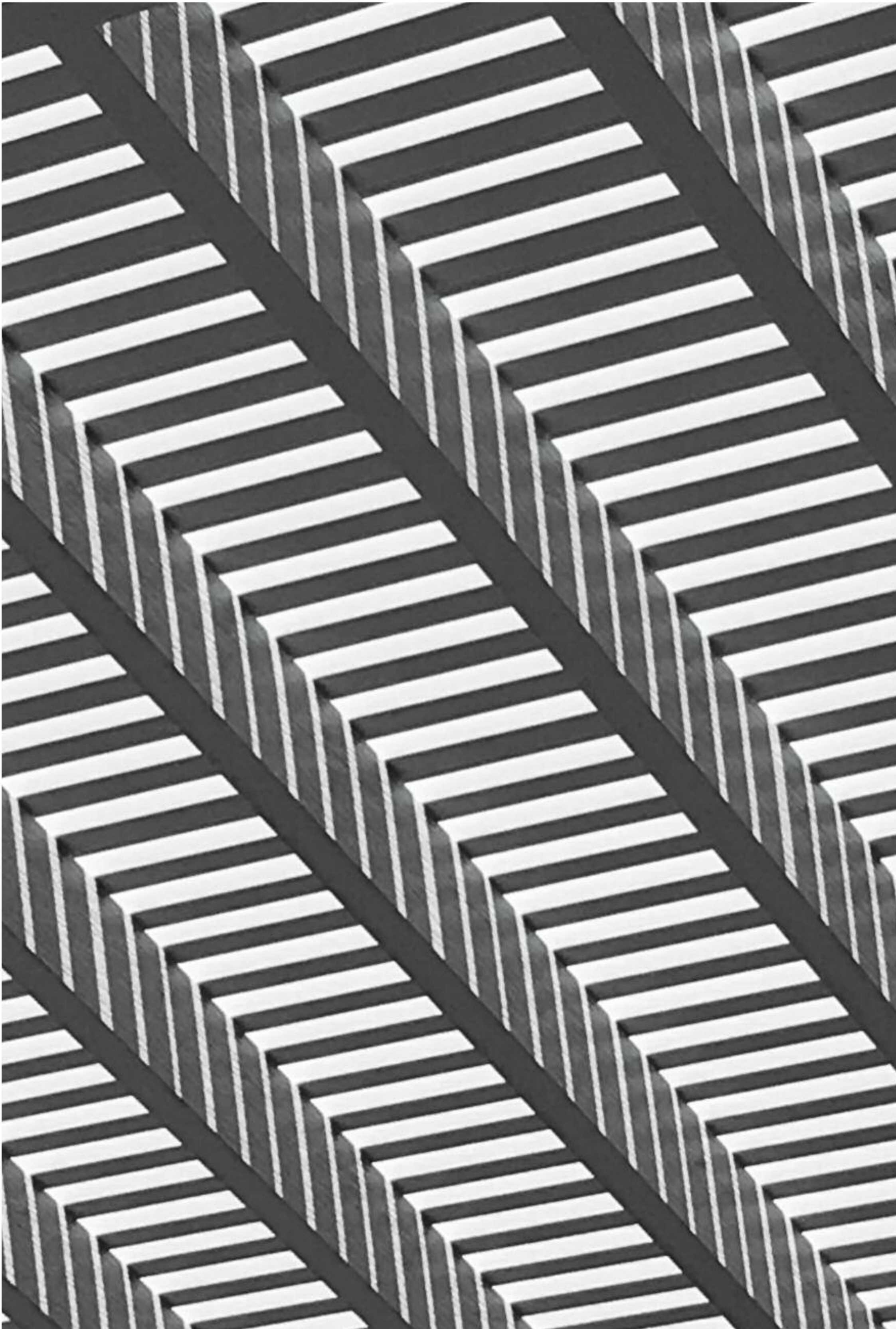
THE ALABAMA LAWYER

NOVEMBER 2017 | VOLUME 78, NUMBER 6



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On The Cover

Abstract art? Pop art? No, it is a beautiful fall sky framed by a pergola at a restaurant on the Alabama Gulf Coast. The adjacent photograph, from a different angle, makes the setting clear.

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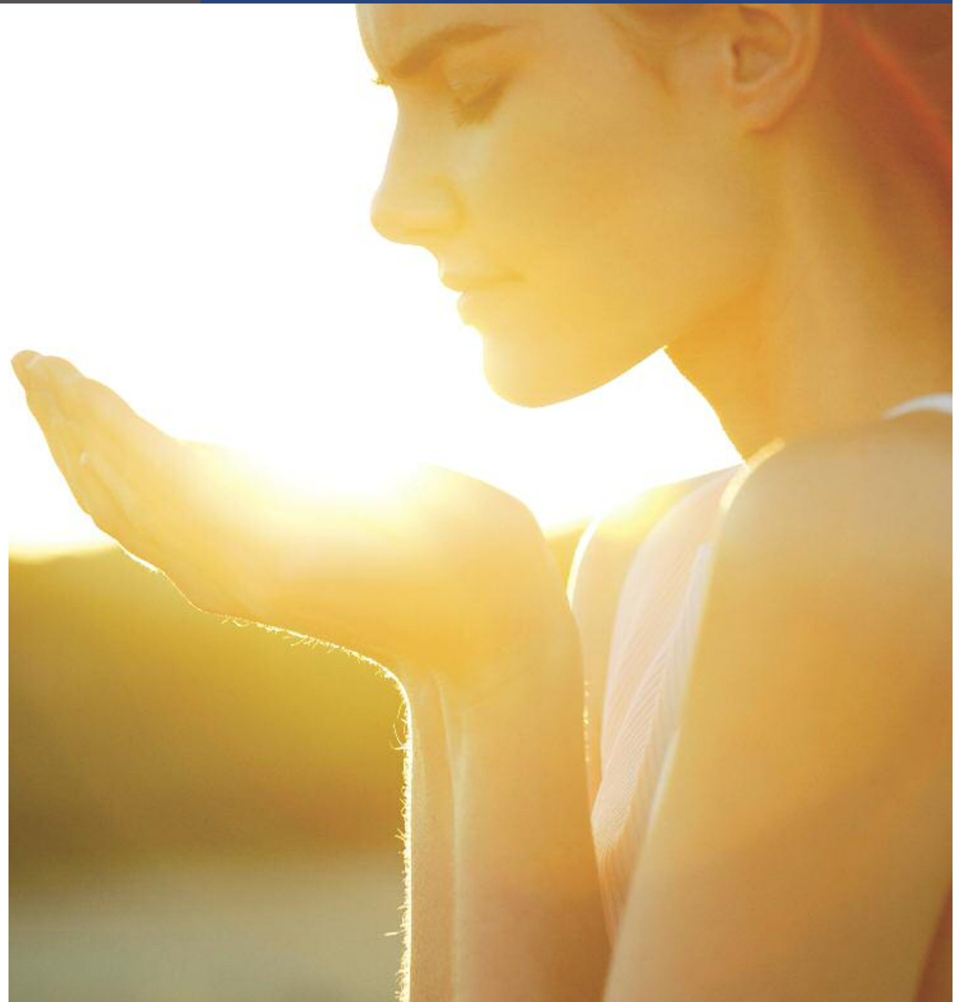

The Present Is Your Gift

During Saturday morning's Grand Convocation at the Annual Meeting in July, I shared with those of you in attendance that my brother-in-law, Douglas, had been involved in a boating incident the previous afternoon. Douglas, a regular swimmer, had been exercising in the waters in front of the Grand Hotel when a boat came toward him at a rapid pace. He had the presence of mind to dive down to avoid a direct hit, but unfortunately, the boat's propeller caught the back lower part of his foot, causing significant injury. To put it mildly, my priorities were instantly realigned that Friday afternoon. In a split second, my focus moved away from fine-tuning my incoming president's address, turning instead

to making sure Douglas got the care and support he needed. One moment in time can change everything.

This unfortunate incident has remained at the forefront of my thoughts in the time that has passed since I became president. As the demands of a busy law practice and the bar presidency seemingly conspire to dominate my life, I am constantly working to embrace Coach Saban's leadership mantra: "Be where your feet are." Life is precious, and time well spent with those we love is a blessing we often fail to appreciate. In a fleeting second, a boat propeller, a heart attack, a car accident or any one of a thousand other calamities can rip that blessing from us. Of course, the seemingly more innocent–yet equally persistent–pulls on our time and attention of work and other commitments can, over time, erode our closest relationships with equally damaging results.

Life is precious, and time well spent with those we love is a blessing we often fail to appreciate.

All of us have experienced a near catastrophe or worse. It's part of the fragile fabric of our lives. Afterwards, we talk about how things will be different for us going forward. We make big plans to realign our schedules and focus on spending our time with those cherished individuals and on those projects that are the most fulfilling to us. That usually works for a while, and then–despite our good intentions–the competing priorities of daily life get in the way. Instead of things being different, we eventually go back to how they were before "The Event." The timing of Douglas's injury, colliding as it did with my installation as the state bar president with its accompanying celebrations, parties and visionary talk of great things to come, was an unfortunate but sharp reminder to me to "be where my feet are."

Being president of your bar is the pinnacle of my professional career, and in no way do I seek to diminish the importance of these events or this great honor. Instead, the events leading up to last July's Grand Convocation stand as an Ebenezer stone for me, helping me to remember we must all live and love in the present, with full knowledge that the present will not last forever and may not last another hour or even minute. We must recognize and treasure the blessing of the present for the gift that it is, each and every day. We should all hope that the best of our present shapes our future.

I believe in the restorative power of positive human relationships, communication and interaction. I think about this every time I speak by phone to my children (who are scattered across the country, as far away from me as they can get), my husband, my mother and other loved ones. No matter the topic or duration of the call, we never hang up without expressing "I love you!" to the dear one on the other end of the line. Although we go through our days geographically separated, we never doubt the love that we share. Embracing the gift that is the present has greatly enriched my life. I remind each of you not to assume that those you love know how valuable they are to you and the great things you see in store for their lives. I challenge you to tell them so emphatically and often. Tell them how special they are to you and how much you cherish having them in your life.

We are a wildly talented and passionate state bar, made up of individuals who are deeply dedicated to the profession and the communities in which we live and work. I am grateful for the gifts that each of you share with us. You are advocates, leaders, negotiators, protectors of the rule of law and so much more. Thank you for what you do each and every day to meet the challenges that our great state and the people who live and work here face. You are the heart and soul of our bar. As always, I encourage all of you to reach out to me (*barpresident@alabar.org*), our Executive Director Phillip McCallum (*phillip.mccallum@alabar.org*) or your local bar commissioner with any feedback or input on how your state bar can better serve you. Blessings in the approaching holiday season and the New Year to come–may you truly enjoy your greatest gift, the present!

EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum
phillip.mccallum@alabar.org

Photo by Robert Fouts, Fouts Commercial Photography, Montgomery, *www.photofouts.com*

The State of the Bar

This is the first in a series of articles to better educate members about the workings of the Alabama State Bar and pressing issues facing the legal profession.

Where Has the Money Gone? Court Funding and the Legislative Process

The Alabama court system is a large, unified entity that generates nearly half a billion dollars of revenue each year. Quick question for attorneys–do you know how much of that money is directed back into the system? Roughly half of all revenue generated by rising court costs and filing fees is allocated to the courts. The perception is that court costs, fines and fees are for the administration of the system as a whole; however, the numbers tell us a different story.

The Alabama State Bar, in partnership with Alabama Supreme Court Chief Justice Lyn Stuart, recently gathered data related to court funding and made it available online at *https://www.alabar.org/resources/judicial-court-information/disbursements-by-county/*. You are able to search by county and get a breakdown of where your money goes each year. We encourage you to do some research on the numbers in your area and see where the funds are being disbursed. To us, the numbers paint a clear picture of the courts acting as an economic engine for the state with tremendous impact on local communities.

Without the monetary support from the court system, the general fund and many state agencies would not be properly funded. Although these executive branch agencies are very important to the overall function of the state, the increased court costs and fees are affecting lawyers and their clients in a negative way.

It is no secret that the State of Alabama is in a budget crisis each year; take a hard look at how much money is being taken away from the judicial branch, though. There are very few lawyer legislators and, thus, fewer people protecting your interests in the state house.

It is time that lawyers become educated about the system from which they make their living. President Augusta S. Dowd, other bar leaders and I are traveling around the state on our "State of the Bar" tour. We will be addressing the issue of court funding and related topics in detail. This new initiative is part of a systematic outreach effort to keep our members informed, not only about the benefits and programs available through the bar, but also about issues facing the legal profession. I look forward to visiting your area very soon! ▲

Pictured above are Birmingham attorney and Bar Commissioner Leslie Barineau (center), ASB President Augusta Dowd and Executive Director Phillip McCallum. Barineau is currently serving as the 2017 president of the National Conference of Bar Foundations Board of Trustees. Because of her selfless contributions to the legal profession, both in-state and on the national level, she was chosen as the first recipient of the "Executive Director's MVP Award," presented at the September BBC meeting.

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- Alabama Lawyers' Hall of Fame
- Judicial Award of Merit
- Local Bar Award of Achievement

Alabama Lawyers' Hall Of Fame

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

The implementation of the idea of an Alabama Lawyers' Hall of Fame originated during the term of state bar President Fred Gray. He appointed a task force to study the concept, set up guidelines and provide a recommendation to the Board of Bar Commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004. Since then, 60 lawyers have become members of the hall of fame. The five newest members were inducted in May of this year.

A 12-member selection committee consisting of the immediate past-president of the Alabama State Bar, a member appointed by the chief justice, one member appointed by each of the three presiding federal district court judges of Alabama, four members appointed by the Board of Bar Commissioners, the director of the Alabama Department of Archives and History, the chair of the Alabama Bench and Bar Historical Society and the executive secretary of the Alabama State Bar meets annually to consider the nominees and to make selections for induction.

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

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

Download an application form at *https://www.alabar.org/assets/uploads/2014/08/Lawyers-Hall-of-Fame-Nomination-Form-2017-Fillable.pdf* and mail the completed form to:

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

The deadline for submission is March 1.

Judicial Award of Merit

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

Phillip W. McCallum
Board of Bar Commissioners
P.O. Box 671
Montgomery, AL 36101-0671

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

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

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

Local Bar Award of Achievement

The Local Bar Award of Achievement recognizes local bars for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's Annual Meeting.

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

The following criteria are used to judge the applications:

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

To be considered for this award, local bar associations must complete and submit an application by June 1. Applications may be downloaded from *www.alabar.org* or obtained by contacting Mary Frances Garner at (334) 269-1515 or *maryfrances.garner@alabar.org*.

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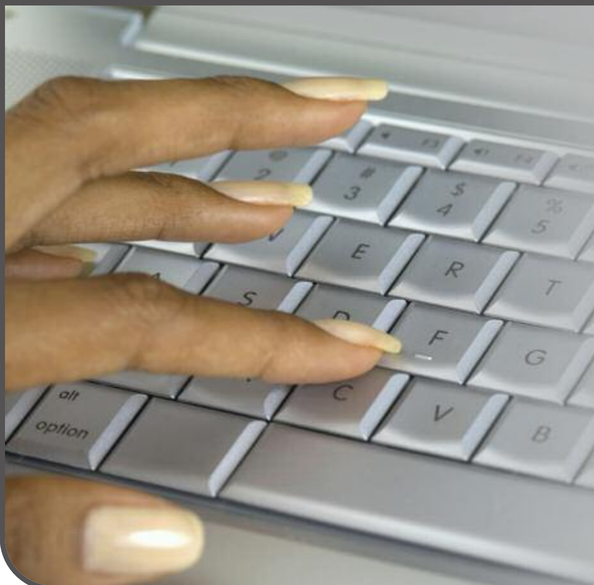

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Santa Claus May Be Coming to Town, but You May Want to Check YOUR List Twice:

Explaining the Rules that Govern whether Lawyers May Give Holiday Gifts to Judges

By Gregory P. Butrus and Othni J. Lathram

The holiday season is here and this inevitably leads to questions about the ethical and legal implications of holiday hospitality, gifts and gatherings. After all, it's fun to be Santa and no one wants to force others to be the Grinch. For lawyers, questions often arise about the rules that apply to their holiday interactions with judges–many of whom they have known for years.

There are two key state agencies with authority in this area. One is the *Alabama Ethics Commission* (AEC) and the other is the *Alabama Judicial Inquiry Commission* (JIC).[1] The AEC has authority over all public officials and employees (and their family members in some cases) under the Ethics Act (36-25-1 *et seq.)* which includes judges and their staff. The JIC is established pursuant to Section 156 of the Alabama Constitution as the body with the authority to both

provide guidance to, and enforce rules of conduct and ethics for, the judicial branch.

Any lawyer or judge trying to become familiar with what is generally permitted and prohibited in this area needs to be familiar with the applicable requirements set forth by both the AEC and JIC. The goal of this article is to provide background on the rules that apply to common holiday questions for lawyers and judges. Following an overview, it is organized in a scenario-based Q&A format. Please note that all of the Advisory Opinions (AOs) referenced below are available on the bar's website, and the AEC AOs are available on its website.

Historical Ethics Standard

Prior to December 2016, the overarching concern in this area was whether any Christmas "gift" (*e.g.*, food, beverage, tangible item or social hospitality) was permitted by the more restrictive AEC requirements. This is because *since the late 1990s, the AEC had held that no public official or employee could accept any "thing of value" from any provider–regardless of the provider's status*.[2] The basis of the opinion was a concern that allowing anything more than a *de minimis* gift would be tantamount to the public employee using their position for impermissible "personal gain." That AEC interpretation was limiting enough that there was little room for any JIC guidance to operate.

December 2016 Change

Things changed in December 2016 when the AEC approved AO 2016-34. *This 2016 Opinion overruled prior AEC guidance (including a directly on point 2011 AEC AO) and removed the "thing of value/personal gain" standard in favor of a more flexible circumstances-based test approach to Christmas gifts* for public officials and employees.[3] In that AO, the AEC stated:

> "In [our 2011 AO], the Commission relied on its longstanding 'personal gain/thing of value' approach in applying the Section 36-25-5(a) 'use of office for personal gain' restrictions. That approach had been followed for many years prior to 2010. Following the 2010 revisions to the Act and the addition of Section 36-25-5.1, however, *that well-intended approach to interpreting the Section 36-25-5(a) 'use of office for personal gain' restrictions is no longer warranted and has only led to confusion* as to the relationship between Sections 5(a) and 5.1(a)." (Emphasis added).

Instead, the AEC's 2016 AO included "guidelines" that are intended as "practical guidance" for approaching these issues. It explained that the purpose of the Ethics Act is the prevention of "official corruption" and then looked at the following as factors on whether a gift is permitted:

(1) The "*relative positions* of the giver and the recipient … including whether their relationship presents an opportunity for corruption."

(2) "The *value/amount/nature of the gift* and *the facts surrounding* the giving and receipt of the gift are relevant."

(3) "When the facts make it clear that *the gift is not in exchange for any action*, inaction, or decision…" (Emphasis added).

In considering the challenges of applying the 2016 factors, the AEC also stated, importantly, that it "will continue to recognize the exceptions found in [the thing of value definition] to be a *'safe harbor'* for public employees and officials…"[4]

Once a lawyer who would like to provide a Christmas gift to a judge feels comfortable that it is permitted under the AEC standards, *that individual must ensure that it is permitted under long-established JIC guidance as well*. By taking steps to obtain these assurances on the front end, the lawyer will not ruin the holiday spirit in which a gift is intended or put the judge in the uncomfortable position of having to refuse an innocent gift. Common scenarios are below.

May I send a turkey/ham to a judge as a Christmas gift?

The gift of a food item such as a turkey or ham (or, in some counties, a bottle of wine) is relatively common during the holidays. They have also been considered by several AEC and JIC AOs.

Alabama Ethics Commission–The AEC's general approach to holiday items is outlined above. Prior to the issuance of its new approach in 2016, in two 2011 AOs, the AEC concluded that a holiday turkey or ham was a restricted (and generally impermissible) "thing

of value" under the then-applicable standard.[5] However, in light of the 2016 ruling, a more fact-based analytical approach would apply as would the traditional approach of keeping gifts under $25, which falls within the "safe harbor" for *de minimis* items recognized in AO 2016-34.

Judicial Inquiry Commission–The JIC has also evaluated these issues and looked at the circumstances to determine what was permissible. Two of the Canons of Judicial Ethics–Canon 5C(4)[6] on gifts to judges and Canon 2 on the appearance of impropriety–formed the basis for JIC's 1994 AO regarding holiday gifts which provided that:

> "Under the Alabama Canon of Judicial Ethics *a judge may accept a gift from an attorney* who practices before the judge *where the gift does not reflect expectation of judicial favor and where the gift does not create the appearances of impropriety*. In deciding whether or not to accept a gift, the judge should ***consider the nature of the gift*** as well as ***the circumstances under which and the time when the gift was given***. For example, the gift of a smoked turkey at Christmas may not violate any [Canon]. However, the gift of that same turkey on another date by an *attorney who has a case pending before the judge* may very well have all the appearances of an attempted bribe or an attempt to curry the judge's favor. *The decision* whether or not to accept the gift is one which *must be made by the judge on a case-by-case basis* after a consideration of all the surrounding circumstances." (Emphasis added).

Thus, the JIC would look to the nature, circumstances and timing of the gift. This guidance suggests that the gift of a turkey might be viewed differently around Christmas time than at another time of year. Based on this AO–and later JIC AOs[7]–another factor is *whether the attorney has a case pending before the judge*. The judge's authority over a lawyer with a pending case is a factor that militates against a gift to a judge being appropriate. This consideration is consistent with AEC's focus on the "relative positions" of the parties in its 2016 AO. Other possible considerations that may be relevant are the past relationship between the judge and the lawyer, the traditions in the community and the nature and timing of any pending issues before the judge.

May I invite a judge to my Christmas party?

To many attorneys, inviting a judge to a holiday party may not seem like a major issue. However, the food and beverages provided at such a reception could implicate the Ethics Act and Judicial Canons, and the AEC and JIC guidance discussed above would apply in that context as well.

Judicial Inquiry Commission–The JIC has considered social hospitality scenarios in its AOs. In a 2000 AO, the JIC ruled that a judge could, under the Canons, accept a bank's invitation to join dozens of people from the community for an annual dinner at a restaurant and a bus trip to an Alabama basketball game hosted by the bank. The bank did not have any cases pending before the judge and was not a "frequent litigator," but had been a party to cases in the judge's court in the past. JIC AO 2000-748. In a subsequent opinion, AO 02-803, the JIC concluded that a judge could *not* accept complimentary tickets to a football game "or other events" from an attorney who has a case pending before the judge. However, if the attorney does not have any cases pending before the judge, then the "totality of the circumstances" would need to be examined to determine if accepting the tickets would be appropriate. One example of a permissible circumstance is provided by JIC in the AO and that is where the attorney began providing the tickets to the judge several years before the judge took office, and the attorney has no pending cases in the judge's court and does not foresee having any such cases.

Alabama Ethics Commission–In light of the above-referenced 2016 AEC AO, an attorney extending holiday hospitality to a judge is *not* limited to the "thing of value" exceptions, but they may help you navigate the issue. For example, in many cases, the value of what is given may be less than $25, which remains a safe harbor for gift-giving. In other cases, attorneys may wish to ensure that any holiday gathering they are inviting a judge to meets the criteria for a "widely-attended event" which is an Ethics Act exception where food and beverages can be provided to a judge/public official. Such attorneys should remember that the AEC has ruled that one requirement for a gathering to be deemed a "widely-attended event" is that it must have an educational or informational component. AEC AOs 2011-09 and 2011-11. This is not an issue for most receptions, but it may be a little trickier to incorporate into a traditional Christmas party. If in doubt, the AEC director is authorized to certify an event in advance as not being a "thing of value." In some cases, the facts may so clearly show that the invitation is unrelated to any official decision that it poses little risk of being perceived as corrupt.

May I send a can of pecans to a judge's chambers for everyone to share?

Judicial Inquiry Commission–From the JIC perspective, the answers above are probably relevant to providing a gift of a shared, perishable item to a judge's office. The JIC AOs do not address this directly, so it seems reasonable to expect that JIC would suggest the same analysis of all of the surrounding circumstances to this scenario that it applies to judges individually regarding whether the attorney has a case pending before the judge or if the attorney is frequently in their courtroom even though no case is currently pending. It seems that there will be fewer concerns with the appearance of impropriety when a can of pecans or plate of holiday cookies is provided to a judge's entire office, as opposed to providing a turkey to a judge individually. In fact, JIC AOs have noted that the monetary value of the item provided is a relevant factor in the evaluation of the circumstances associated with something provided to a judge. JIC AO 02-803.

Alabama Ethics Commission–With respect to the AEC, it has seemed more comfortable with the provision of shared office gifts than other gifts. In its 2011 AO (that has now been superseded on other grounds), the AEC specifically addressed this situation and found that these sort of holiday refreshments are permissible under the Ethics Act. In that 2011 AO, it said:

> "There is *nothing improper or in violation of the Ethics Law* for vendors, lobbyists, etc. to provide consumable items such as pecans, fruit baskets, cookies, cheese plates, etc. to public offices for enjoyment by the staff or other people having business with that office. For example, *a law firm may provide a box of cookies to a judge's office*. The box is set out in the reception area for the staff and other individuals to enjoy."

The AEC's clarity on this point, even in the midst of its more restrictive 2011 AO, is helpful to the attorney trying to determine the rules that apply. Notably, the AEC did not modify this element of its 2011 opinion when it issued its 2016 AO.

As attorneys, we learn to look before we leap. While the holidays are filled with good cheer, we hope that an evaluation of the considerations and standards described above will help avoid a situation where a judge is forced to be a Grinch in declining a holiday gift or invitation that is provided by an attorney who was thinking like Santa without knowing the rules.[8] ▲

Endnotes

1. The focus of this article is the relationship between lawyers and state and municipal judges. The guidance given under the Ethics Act is also relevant to district attorneys, court staff and other state and local officials. This article does not in any way address federal judges and employees who would be subject to other legal authorities.
2. *See* Ethics AO 2011-12 (holding that students and their parents were restricted by the Ethics Act in what they could give to public school teachers at Christmas).
3. To be sure, the 2016 AEC opinion did retain the no "things of value" standard on holiday gifts from principals, lobbyists and subordinates of lobbyists to judges. This article assumes that the attorney is *not* a principal, lobbyist or subordinate of a lobbyist. This article also assumes that (i) the attorney would *not* view themselves as having a personal "friendship" with the judge under 36-25-1(34)b(3) because the AEC in practice seems to view that "thing of value" exception and the statutory factors narrowly; and (ii) the judge has *not* solicited the attorney for any of the holiday items discussed herein which AO 2016-34 expressly prohibits pursuant to 36-25-5(a) and -5(e).
4. The "safe harbor" recognized in AO 2016-34 does not apply, however, when the purpose of the gift is to corruptly influence official action.
5. AEC AO 2011-12 and AEC AO 2011-09 ("...gifts such as turkeys and hams given as seasonal gifts, do have a monetary value. Due to the fact that the exception for seasonal gifts was removed [in 2010 from being an exception to a "thing of value"], it is the Commission's opinion that the practice of giving turkeys, hams, etc. to public officials during the holiday season is no longer permissible.").
6. Canon 5C(4): "Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone if it reflects expectation of judicial favor."
7. JIC AO 00-748 and JIC AO 02-803.
8. As attorneys, it is also important to be aware that state bar rules can be implicated if an attorney is involved in questionable judicial conduct. *See e.g.,* Alabama State Bar *Rules of Professional Conduct* §§ 3.5 and 8.4.

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Othni J. Lathram

Othni Lathram serves as director of the Legislative Services Agency. In 2017, the Alabama Legislature established the Legislative Services Agency to provide and coordinate the services and functions previously performed by the Alabama Law Institute, the Legislative Fiscal Office and the Legislative Reference Service. It provides non-partisan legal advice, fiscal advice and bill-drafting services to the Alabama Legislature.

The New Partnership Audit Rules:

Are You and Your Clients Ready?

By Bruce P. Ely and William T. Thistle, II

In late 2015, Congress passed the Bipartisan Budget Act of 2015 (the "BBA")[1] as amended by the PATH Act of 2015. The BBA established a new partnership audit and assessment regime and repealed prospectively the current TEFRA partnership audit rules.[2] As discussed below, the BBA greatly enhanced the Internal Revenue Service's ability to audit partnerships (including multi-member LLCs). As a result, the new federal partnership income tax audit rules, which are scheduled to take effect on January 1, 2018, will have significant implications for the taxation of partnerships and their partners.

Currently, very few partnerships are audited, generally because the IRS cannot directly assess partnerships, but instead must pursue each partner for its share of the assessment, often through multiple tiers. The BBA repealed the existing rules regarding partnership audits and replaced them with fairly radical new procedures, which are codified under Sections 6221 to 6231 of the Internal Revenue Code. The new regime is designed to alter the burden of sifting through myriad assortments of partnership structures, saving time and expense for IRS revenue agents who the GAO notes are often not conversant with the intricacies of Subchapter K.

Under the new rules, the IRS will audit a partnership's tax items and the partners' distributive shares for a particular year (the

"reviewed year"), and any audit adjustments will be made at the partnership level and taken into account by the partnership in the year the audit or judicial review is completed (the "adjustment year"). If an audit results in a tax deficiency, the "imputed underpayment" presumptively will be assessed against and collected from the partnership rather than the individual partners. Unless the partnership timely elects out of the new regime, or unless certain elections are made as described below, the adjustment year partners will therefore bear the audit assessment, including interest and possibly penalties, even if some or all are different than the partners in the reviewed year. Thus, under the new rules, partners can be on the hook for someone else's income tax liability.

The January 1, 2018 effective date of the new federal partnership audit rules is fast approaching, and it is clear that most of our (and likely your) Subchapter K clients (*i.e.*, partnerships of all stripes and multi-member LLCs) have taken a wait-and-see approach. That's either because (a) they are not convinced the new rules apply to them or (b) because they have heard that the rules might be delayed or, at the very least, altered by a technical corrections bill or by IRS "interpretation" principally through their 277 pages of proposed regulations. Tax practitioners are beginning to panic, as evidenced by the titles of several recent law firm newsletters, our favorite being "Holding the Bag: Update Your Operating Agreement or Face the (Tax) Consequences."

From our involvement in the ABA Tax Section's Task Force on the State Implications of the New Federal Partnership Audit Rules and from speaking to various CPA and attorney groups over the past year or so, we have developed some frequently-asked questions that we hope will be quick reading for non-tax lawyers. We will use the terms "partnership" and "partners" throughout, but that includes multi-member LLCs classified as partnerships and their members where appropriate.

Worse yet, at least from the perspective of us lawyers, the partners will have no statutory right to participate in the audit or any resulting appeal.

Why should my partnership clients be concerned about the new rules?

You may have heard that the Bipartisan Budget Act of 2015 created a comprehensive and radically new partnership audit regime. This is what "repeal and replace" actually looks like. The current tripartite regime, meaning the TEFRA audit rules, the elective large partnership audit procedures and the default rules, will be repealed effective for tax years beginning after *December 31, 2017*. Going forward, there will be no such thing as a "tax matters partner" or the fundamental principle that partnerships are not taxpayers for income tax purposes. The partnership audit will be performed by the IRS (and perhaps by the states) at the partnership level, and by default, the partnership will be liable for any income tax deficiency, interest and penalties. Worse yet, at least from the perspective of us lawyers, the partners will have no statutory right to participate in the audit or any resulting appeal. A new creature, called the "partnership representative," will have sole authority to speak for the partnership *and its partners*.

Congress has been told that the new rules will raise approximately $9.3 billion over the next 10 years and a substantial amount of revenue will also likely be generated for the often cash-starved states, like Alabama. For those states with an income tax, this will be like found money.

To which entities do these new rules apply?

Obviously, traditional partnerships and multi-member LLCs are covered, but here is the first surprise: so are joint ventures and other arrangements that the IRS

will try very hard to classify as partnerships for federal income tax purposes. For example, many co-investment funds and special purpose vehicles set up to hold particular assets could be covered. On several recent occasions, Treasury officials have told bar and CPA groups they want these new rules to apply to as many arrangements as possible. Notably, the rules do *not* apply to disregarded entities such as single-member LLCs or to S corporations or to trusts or IRAs. However, as discussed below, single-member LLCs and trusts can be problematic.

What do you mean my partnership is covered by the new rules? We only have five partners!

As mentioned above, we expect that many clients will be surprised that their partnership is even *covered* by the new rules. That could result from either having one or more ineligible partners, or they or their CPA having failed to make the annual opt-out election by filing the Form 1065 (with the new opt-out box) one day late.

Most tax advisers will suggest that if your client can opt out, they should. Your client's lenders may begin to require that, too. The new rules provide relief from the entity-level tax for partnerships that (a) issue 100 or fewer Schedules K-1 annually; (b) are owned by some combination of individuals, estates of deceased partners, C corporations and S corporations; and (c) as mentioned above, timely file their Form 1065 and check the correct box to opt out. In the case of S corporation partners, each shareholder is considered a partner for purposes of headcount. As mentioned above, so far the Treasury Department has indicated there will be no grace in terms of expanding the pool of eligible partners. For example, if even one member of the LLC is itself another LLC or a trust–even a disregarded single-member LLC or a grantor trust–the opt-out election is not available. And any complex or tiered LLC structure won't be permitted to opt out. Note it appears that the partnership representative must make the annual election, not the president, CFO, managing member or TMP.

Who controls the audit? Which partners will have a say-so?

Under the new rules, the partnership must designate a "partnership representative" ("PR") for each tax year, and that individual or entity will control the audit and any appeal. By statute, the PR is the only person empowered to work with the IRS, and based on the proposed regulations, it is going to be difficult to fire the PR, at least externally. If the PR is an entity, the proposed regulations require the *partnership* (not the PR, oddly) to designate a live human being, otherwise known as a "designated individual," who'll be the only person authorized to deal with the IRS. The PR, or the designated individual of an entity PR, need not be a partner in the partnership, and we can foresee a new cottage industry of "professional" PRs springing up to represent multiple partnerships, akin to registered agents for corporations, but who possess some tax expertise.

Under the new rules, the PR (or the designated individual, if the PR is an entity) controls all partnership audit proceedings with the IRS, and according to the proposed regulations, the partners *may not* participate in the audit, and there is absolutely no requirement that the IRS inform the partners of the audit proceeding in any circumstances. Here is where the partnership agreement comes in, though: the *agreement* may require the PR to provide notice of and updates on

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audit proceedings, to obtain partner votes on various issues and otherwise restrict the activities of the PR. A breach of an obligation under the partnership agreement by the PR may be pursued under contract law, or in some states, possibly as a breach of fiduciary duty. Obviously, it is extremely important to appoint a qualified PR (and a designated individual if the PR is an entity). Failing to do so will allow the IRS to appoint one–sort of like a court-appointed attorney. Fortunately, the proposed regulations impose some restrictions on that selection process.

Who pays the audit adjustment?

Generally, the partnership itself will be responsible for paying any income tax, interest and penalties that arise from an IRS audit, post-2017 tax year. Thankfully, there are two mechanisms (three if the 2016 Tax Technical Corrections Bill is reintroduced and enacted) that can mitigate the damage, but can put the PR in a quandary, as discussed below. The BBA and proposed regulations provide a mechanism to reduce the impact of an audit adjustment by, for example, allowing the PR to prove that certain partners filing amended returns are in a tax bracket lower than 39.6 percent (e.g., C corporations) or are tax-exempt organizations. And even after the proposed adjustment is reduced in that manner and issued in final form, the PR has the election to "push out" the final audit adjustment to the persons or entities who were the partners during the so-called "reviewed year." The proposed regulations clarify that if the PR makes that election, the partnership is off the hook for the audit adjustment, and the liability shifts to the reviewed-year partners, or perhaps by that time, their estates. With the PR possessing that power, *somebody* will not be happy, whether that will be the reviewed-year partners or the current ("adjustment year") partners who will indirectly, or perhaps directly, bear the brunt of the tax liability absent a push-out election.

So what do we do now?

First and foremost, attorneys should promptly contact their partnership clients (and document those efforts) to be sure that each is aware of the impending rules and is examining their ownership structures. If, for example, a family LLC or limited partnership has a grantor trust or a single-member LLC as a partner, the client should consider transferring those membership interests away from ineligible members. This must be done *by December 31, 2017* since eligibility will be determined as of January 1, 2018 and throughout the years thereafter.

This suggestion leads to the next one: Every partnership agreement must be reviewed–soon–and you should be sure that the client's CPA is in the loop. Because every Subchapter K entity (big or small) should have a PR according to the proposed regulations, who must be officially appointed and in place before the 2018 tax return must be filed, the client needs to consider who would be the best PR.

Depending on who you represent in this matter (the partnership? the managing partner? the minority partner[s]? the proposed PR?), you may suggest that the client build a high wall of protection around the PR and any actions he or she may take in that capacity. On the other hand, your client(s) may wish to impose strict reporting obligations on the PR and require him or her to seek partner input on major decisions, *e.g.*, whether to extend the statute of limitations, or to appeal or settle, and whether to make the push-out election described above. There is a tradeoff with imposing strict duties, however–the more burdens placed on the PR, the more difficult it will be for your client to convince a trustworthy and competent individual to serve in that capacity.

There are a number of items related to the new partnership audit rules that need to be addressed in any new or amended partnership agreement. For example, any partnership agreement (new or existing) should consider the following:

- the designation and removal of the partnership representative;
- the designation and removal of the individual who must be appointed under the proposed regulations if the partnership representative is an entity;
- the requirements for the partnership representative and partners to obtain and provide information that may reduce the partnership's liability for the imputed underpayment;
- partner consent required, if any, for making elections or settlements by the partnership representative, including the

election out and the push-out election;

- the potential for filing amended returns by those who were partners in the reviewed year(s);
- terms and conditions for amending the partnership agreement to deal with changes or updates to the new rules;
- restrictions on transfers of partnership interests to entities that are ineligible partners;
- partners' notice and participation rights in connection with IRS or state audits;
- appropriate indemnifications for and duties of the partnership representative; and
- how to ensure that the appropriate partners and former partners bear the actual costs of imputed underpayments, including cooperation requirements for former partners.

When should these amendments be made? Now. And obviously, any *new* partnership or LLC agreement should address these issues. Although the proposed regulations have yet to be finalized, and we expect more guidance in the next few months, there is little chance the rules will be delayed or materially changed in the near future.

Explaining all of this to your partnership clients will take time and patience. It might take multiple meetings and telephone conferences, the input of their CPA and an experienced tax attorney and perhaps some courting of the individual your client hopes will agree to serve as the PR. Remember, most partnership agreements require unanimous consent to be amended for fundamental changes like we're suggesting here, and yes, they need to be reviewed by experienced tax and partnership counsel.

That's just the federal rules?! What about the states?

As mentioned above, the American Bar Association Tax Section's SALT Committee has created a task force on the state implications of these new rules. As co-chairs of the task force, we have been involved in drafting a model act that we *hope* will be adopted by every state with an income tax.[3] ▲

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Endnotes

1. Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (to be codified as amended at IRC §§ 6221–6241) (2015).
2. The current audit rules were enacted as part of the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324, and are typically referenced, using the legislation's acronym, as the "TEFRA" rules.
3. For more information on the proposed model act and related state-level issues, see the following articles: "MTC, Business Groups Respond to Federal Partnership Audit Rules," *State Tax Notes* (Jan. 9, 2017); "Tax Pros Float State Law Model for Partnerships," *Law 360* (Jun. 8, 2017); and "Parties Unveil Model State Statute for Partnership Audit Law," *Bloomberg BNA* (Jun. 9, 2017). Links to all the articles cited in this article are available on our website (*https://www.bradley.com/practices-and-industries/practices/tax/state-and-local-tax?tab=insights-events*).

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Bruce Ely's practice focuses on representing taxpayers in federal, state and local administrative and judicial forums; advising companies on choosing the proper form of entity through which to conduct business in the southeast and potential tax incentives; and advising companies and various trade and professional organizations regarding state and local tax legislative matters. Ely serves as counsel to multistate taxpayers in cases before the U.S. Supreme Court, Alabama appellate courts, circuit courts and the Alabama Tax Tribunal. He also co-chairs the New York University Institute on State & Local Taxation, and was selected by *State Tax Notes/Tax Analysts* as one of its "Top Ten Tax Lawyers in the U.S." As a long-standing Fellow of the American College of Tax Counsel, Ely is the only Alabama member included in the *International Who's Who of Corporate Tax Lawyers*.

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You Can Appeal that Order… Right?! Or Finality: THE GREAT CONUNDRUM

By J. Bradley Medaris

Finality. What a dumb topic for an article, right?

You try your case, you get a verdict and then, if you lose, you appeal. What is there to think about?

Well, finality can be a bit of a minefield if you do not pay attention. Take the wrong steps and your appeal blows up. All of those great arguments you have for the justices of the Supreme Court of Alabama[1] disappear before you even put fingers to keyboard (and usually after you have already paid for the record and transcript). This is never a fun conversation to have with a client or a senior partner.[2]

So here is a bit of help from a friendly insider at the court. This article highlights some of the stickier problems that can snatch an appeal out from underneath you. There are thousands of attorneys in Alabama, and some unlucky lawyer is always finding a new, clever way to ruin his or her appeal from the start, so this article will not cover every sinkhole that could possibly exist; it merely touches on those large enough to swallow a bus.

Before we begin, though, here's a quick disclaimer: Don't rely on this article as the ultimate source on this issue. While it will no doubt strike you as a work of staggering genius and surely will become required reading in law schools throughout the state, you will always want to do your own research. And citing this article in an appellate brief will not get you any bonus points with any of the courts located at 300 Dexter Avenue, so don't count on that trick to work.

Finality Unsimplified

Whether an order is final and appealable is a jurisdictional question, the burden of which falls on the party bringing the appeal.[3] That means if you are seeking appellate review, you need to be able to explain why you are entitled to appellate review. Conversely, if you are defending a trial court's decision, you can save everyone a significant amount of time (and money) if you discover a problem with jurisdiction before the briefing begins. As we will see, what is truly a final order is not always as

simple as it seems, so spending a few minutes confirming that you have a decision you can appeal is a worthy use of your time, regardless of your position in the appeal.

Generally, a final order is one which disposes of all claims against all parties.[4] It is just that simple. There's nothing left to argue about because the trial court has resolved everything. This includes counterclaims and cross-claims and claims involving intervenors and third-party claims and all sorts of claims and parties. The battles have been fought, the war is over and everyone knows where they stand, but make sure all decisions have been entered on the record. Finality can only be established by a formal adjudication by the trial court.[5] Nothing is more frustrating than finding out your appeal must be dismissed because the trial court forgot to enter a written order disposing of that one party everyone agreed should not be in the case. If you are going to claim a victory, make sure history (i.e., the trial court) records it.

If you are going to claim a victory, make sure history (i.e., the trial court) records it.

One great thing trial courts can do to help parties avoid this problem is to end all final judgments with a phrase that makes it clear that all claims (including counterclaims and third-party claims and cross-claims) and all parties not addressed by the final order are denied or dismissed or otherwise disposed. This language makes it clear that order is intended to be a final judgment of the court, and to the extent any loose threads may be hanging out which could be snagged and unravel this case, they are snipped off. Attorneys should include this language in their proposed orders for the same reason. It simply puts a nice little bow on top of the case.

A final order must also address damages. The record needs to reflect not only who won, but what they won. An order that leaves the question of damages open won't cut it as an appealable decision.[6] However, this does not apply to collateral issues, such as an unadjudicated claim for attorney's fees.[7] I'll leave to you the joy of determining what types of issues are collateral to your appeal.

Naturally, every attorney is looking for ways to do less work, not more. Yet one bit of extra work early on could save you dozens of hours of unnecessary work if a question arises of finality. Take the time to go through the history of the case and make a list of every party to see if the trial court's order disposed of each in some fashion, along with any damages or other relief they were awarded. Once you do this, put this list in your file (and stick this information in your brief, as we will discuss below). If an appellate court ever questions whether you have a final order, you've got the notes you need. If you finish this little task and discover a party fell through the cracks, though, you can go to the trial court and ask for an order addressing the missing party before you get your appeal going. And you'll look like a super-genius to your client, opposing counsel and the trial court. Which is all any of us truly want in this profession, right?

So why the fuss over finality? Why won't appellate courts just address the issues the parties want addressed and quit raining on everyone's parade? Well, think about our rules of procedure. Rule 1, *Ala. R. App. P.*; Rule 1(c), *Ala. R. Civ. P.;* and Rule 1.2, *Ala. R. Crim. P.* all direct courts to resolve litigation in an economical and speedy manner. This has been the goal of the Alabama courts since the 1800s.[8] Would you want a system that allows for appellate review of every single decision the trial court makes? It would take ages to resolve a simple case. This is why appellate review in a piecemeal fashion is strongly disfavored.[9]

What if your corporate client insists on appealing an interlocutory order, though, and Alabama case law be damned? Well, remind your client that a party obtains a right to appeal, if at all, "by grace of a statute" and not through some divinely-crafted right.[10] Then when your client starts muttering about finding counsel who can get the job done, read the next section of this article.

Strong-Arming Finality–Rule 54(B) Certifications

Rule 54(b), *Ala. R. Civ. P.*, allows a trial court to certify an order for immediate appellate review. Once the trial court issues that certification, an appeal will generally lie from that judgment.[11] Fantastic! An out! The

trial court can just certify everything as a final order and then we can skip all of the issues discussed above!

As with all issues under the law, it's not that simple. That's why we need three years of law school and to enter into tens of thousands of dollars of debt to join this profession. Because our courts disfavor piecemeal litigation, Rule 54(b) certifications are also viewed with some disfavor.[12] Actually, it's not just our state courts; even federal courts dislike interlocutory appeals. As stated by the legendary treatise *Federal Practice and Procedure*: "It is uneconomical for an appellate court to review facts on an appeal following a Rule 54(b) certification that it is likely to be required to consider again when another appeal is brought after the [trial] court renders its decision on the remaining claims or as to the remaining parties."[13] Trial courts are therefore expected to enter Rule 54(b) certifications only in exceptional situations.[14]

I know. I can hear your sigh. Why even give trial courts this opportunity if it's just another legal jungle that force attorneys to risk stumbling into some procedural punji trap? In reality, this rule provides a pretty great opportunity to fix a problem for your client in certain situations without waiting for the entire litigation to play out if you can correctly manage the situation.

As per the plain text of the rule, an order can be certified as a final judgment if it disposes of one or more claims (but not all, obviously) or disposes of all claims against one or more parties (again, but not all). To stress this point, the certification will only be appropriate if a claim in full or all claims against a party in full are disposed.[15] So the rules of finality discussed above must be satisfied with respect to the issues/parties certified. If, however, a plaintiff wins summary judgment on a claim, but the trial court has yet to assess damages, a Rule 54(b) certification may be premature.

Additionally, the issues certified for appeal cannot be so entangled with the issues remaining with the trial court so as to pose a risk of inconsistent results between the courts.[16] Examples of these types of situations include a summary judgment ruling on a claim for failure to pay on a promissory note when the opposing party had an unaddressed counterclaim for fraud in the inducement still pending;[17] where summary judgment is granted against one plaintiff in a premises liability action brought by multiple plaintiffs arising out of the same incident, with the question of causation being common among all plaintiffs;[18] and when a party loses on summary judgment, but an alternative theory of how it can obtain relief remains pending.[19] This is an issue the appellate court can raise and review *ex mero muto*, so don't get excited if your opposing party fails to raise the issue.[20]

The trial court order certifying the interlocutory appeal also requires some magic language. Rule 54(b) requires the trial court to make an "express determination that there is no just reason for delay." A wise trial court will use that very language. A wiser attorney will help the trial court out by preparing a proposed order that uses that exact language. That being said, our supreme court generally will not play a game of "Simon Says" and typically only requires the order clearly express its intention to be a final order under the terms of Rule 54(b).[21] So Rule 54 isn't completely full of trip wires and landmines; just mostly full. They can all be avoided, however, by an attentive counsel who is willing to study the rules.

What if this isn't enough? What do you do if you have an issue that your well-paying client insists needs immediate appellate attention, but you can't find a way to justify it as a final order and the trial court can't or won't certify it under Rule 54(b)? That's when you need something . . . extraordinary!

The Part of the Article That Doesn't Address Finality

Naturally, in an article about finality, we are going to discuss appellate actions that avoid the issue of finality altogether.[22] Remember that scene in RAIDERS OF THE LOST ARK (Paramount Pictures 1981)[23] where Indiana Jones has his path blocked by the giant guy with the two swords? Instead of a fantastic action scene where Indy outduels the swordsman, he simply draws a pistol and shoots the guy dead. That's what we are doing here–shooting finality in the back so we can move on to get some type of appellate review. So, in a way, we're being as cool as Indiana Jones right now!

Two primary ways to have your case reviewed without any scent of finality are through petitions for permission to appeal and petitions for writ of mandamus. Both are useful tools for a savvy litigator to keep in mind as they can drastically affect the course of litigation when properly utilized. I can't promise you will become an expert by reading the next few paragraphs, but I feel reasonably certain you can learn the basics well enough to avoid shooting yourself with your own gun in these situations.

Petitions for permission to appeal can be the trickier of the two, so let's start there. Petitions for permission

to appeal (or PPAs as the cool kids call them) are generally governed by Rule 5, *Ala. R. App. P*. There are several hoops one must jump through to successfully file a PPA. First, the trial court must be willing to certify in an order that (a) an interlocutory order involves a question of controlling law, (b) there is substantial ground for difference of opinion on that question, (c) an immediate appeal from the order would materially advance the ultimate termination of the litigation and (d) the appeal would help the parties avoid protracted and expensive litigation. Within this highly specific certification, the trial court must also identify the question of law the supreme court is to consider. This is incredibly important because that question defines the scope of the court's review.[24] In other words, whatever the certified question doesn't address, the court won't touch.

For this reason, the party seeking permission to appeal should strongly consider drafting this order for the trial court so it can define precisely what issue is put to the supreme court on appeal. It's always a smart move to keep control in the appellate process where you can. When drafting your petition to the supreme court, make sure you address each of these points as well. If you are presenting what appears to be an issue of first impression, don't be bashful about including decisions from other jurisdictions to demonstrate that there truly is a substantial ground for a difference of opinion on this legal issue. You'll need something more than "I disagree with the ruling, so clearly there is a ground for dispute"; your opinion doesn't matter. You will need to demonstrate a true ground for legal minds to differ, such as there is conflicting Alabama case law or Alabama courts have never addressed the question.[25] It is also helpful if some detail is provided to the supreme court as to how much protracted and expensive litigation remains. A case that has 15 depositions in four different states that still must be taken is in a better position on this point than one where all of the discovery is done and this PPA is a last effort to avoid going to trial. Naturally, you'll also want to explain why the court should answer the question in your client's favor.

If you are presenting what appears to be an issue of first impression, don't be bashful about including decisions from other jurisdictions to demonstrate that there truly is a substantial ground for a difference of opinion on this legal issue.

Notice how I keep referencing the supreme court? That's because Rule 5 allows PPAs to only go to the supreme court. The other appellate courts have no authority to consider PPAs.[26] This also implicitly means only cases which are within the supreme court's jurisdiction for a direct appeal are eligible for review by PPA. So no criminal questions, no workers' compensation issues and no divorce disputes can give rise to a PPA.

Because PPAs are designed to address only questions of law, the supreme court reviews such filings on a *de novo* standard. The court will not attempt to settle factual disputes. If the facts are up for debate, your PPA may be doomed from the outset.[27] And that is what we are trying to avoid by way of this article: doom! Well, doom and bar complaints.

If the supreme court agrees that your PPA raises an important question of law, you get to enjoy a full appeal on the question raised in your petition. A record must be ordered and briefing completed and the whole enchilada. Make sure your client is ready for those costs. And remember: the mere granting of a PPA won't affect the issues remaining before the trial court, so be prepared to fight the litigation on two fronts (or try to secure a stay of the trial court proceedings).[28]

Your second option, petitions for writ of mandamus, is a little less hairy. These extraordinary writs are governed by Rule 21, *Ala. R. App. P*., which lays out all

of the form and other requirements for filing your petition (don't forget the index of attachments and to tab your attachments and to include all of your attachments). Mandamus relief is considered an extraordinary remedy and "'is appropriate when the petitioner can show (1) a clear legal right to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) the properly invoked jurisdiction of the court.'"[29] Notice the big thing not required here? You don't need the trial court to do anything before you bring a mandamus petition. You get to enjoy all of the sweet, tasty freedom you need to screw up your case on your own terms!

You can't expect to receive mandamus relief on any ruling you don't like, however. Mandamus is generally only appropriate to ensure matters are brought in the correct court (e.g., subject-matter jurisdiction or venue); involve the correct parties (e.g., immunity or personal jurisdiction); to review certain discovery rulings (e.g., privileged matters or discovery sanctions so severe that a party's action or defense is eviscerated); or in certain other situations where there is a compelling reason not to wait for an appeal (e.g., abatement or indefinite stay of an action).[30] So you can't bring a mandamus petition merely because you got your feelings hurt. It is designed to be limited in scope because, again, piecemeal appeals aren't favored under the law, despite there being so many ways to bring them.

We've covered rules for cases in general, but there are specific situations that allow for an immediate appeal. So let's continue to avoid discussing finality in this article allegedly about finality.

Appeals without Finality and Other Nonsense

Understand that case law and the *Alabama Code* is littered with specific authorizations to appeal certain orders in situations without "finality." This article won't come close to touching them all; thus, don't rely on this as a complete guide to such issues.[31] We are only going to touch on five common situations where an appealable order can be found that doesn't necessarily resolve all claims against all parties.

Arbitration orders get special treatment under the law. An order granting or denying a motion to compel arbitration is appealable within 42 days of the entry of said order under Rule 4(d), *Ala. R. App. P*. A party can also appeal the denial of a motion to stay proceedings while the arbitration is ongoing.[32] However, this right does not extend to a denial of a motion to stay claims not subject to arbitration until the conclusion of the arbitration proceeding.[33]

Rule 4, under subsection (a)(1)(A), also allows for the immediate appeal of any order granting, continuing, modifying or dissolving an injunction. Before you go crazy with this avenue of relief, understand that an injunction is not an order compelling discovery or an order requiring a responsive pleading by a specific date. Yes, an injunction is an order commanding or preventing an action,[34] but it truly is a command to a party to engage or disengage in behavior that is related to the controversy before the trial court and affects a substantive rather than procedural right or obligation.[35] Some goofy claims as to what an injunction is or ought to be have passed through the supreme court in an effort to obtain appellate review prematurely. Please don't be one of those attorneys. An interlocutory appeal from any of the orders listed in Rule 4(a)(1)(A), *Ala. R. App. P*. must be taken within 14 days.[36]

An order granting or denying a motion for a new trial is an appealable order under *Ala. Code* 1975, § 12-22-10.[37] However, this is only allowed after the trial court enters a final judgment, so don't jump the gun and seek an appeal before the trial court enters its judgment.[38] An order setting aside a dismissal is considered an interlocutory order and does not provide a right to an immediate appeal.[39] Likewise, any order setting aside a default judgment is not immediately appealable as it too is considered interlocutory.[40]

A variety of orders issued by a probate court are also immediately appealable to either the supreme court or the circuit court pursuant to *Ala. Code* 1975, § 12-22-21. This includes orders resulting from challenges to the validity of a will and orders removing an executor. Each issue presents a different time to appeal, so, as with all probate issues, nothing is simple, and those practitioners who dare to walk the halls of a probate court do so at their own peril.[41]

Finally, an order denying a motion to intervene is immediately appealable. Our supreme court, following the lead of the United States Supreme Court, determined the spirit of intervention is to reduce the number of cases filed and the denial of a request to intervene is a final order as to the potential intervenor; thus, allowing an immediate appeal from such a denial is a good policy.[42] To appeal, an intervenor has 42 days from the date of the order denying the motion to intervene.[43]

Final Finality Tips (Finally)

Hasn't this journey been fun? At this point, you've basically earned an LLM in finality. Feel free to put that on your resume. No one checks those sorts of things anyway.

Before we part, however, allow me to share a few last morsels of wisdom you can use to mesmerize your colleagues. You'll be an appellate savant with this information. It's that good. I'm willing to share this information for free, though, because I like the cut of your jib. And because it makes the court's job easier.

First, please pull out your rule book and read Rule 28(a)(3), *Ala. R. App. P*. (Go ahead, I can wait.) Okay, so what does the rule require for a statement of jurisdiction? A statement of jurisdiction must explain the basis for the appellate court's jurisdiction with *citations to the appropriate facts in the record* establishing appellate jurisdiction plus *filing dates establishing the timeliness of the appeal*. Does a statement that reads, "The supreme court has jurisdiction over this appeal pursuant to *Ala. Code* 1975, § 12-2-7" satisfy the requirements of Rule 28(a)(3)? Nope, but guess what most statements of jurisdiction look like? Please be a better advocate than this. Give the court a clear understanding of your appeal's jurisdiction.

If there are any questions regarding jurisdiction, this section is where the appellate courts first look for answers. If you follow the rule, the question becomes an easy one to answer. If you don't, you risk your appeal being kicked because no appellate court has a duty to seek out the answer to this question.[44] Also, this rule forces you to review your case and make sure you actually do have a final order that will support appellate review without having to waste a whole bunch of money and time on a brief the court won't read. Remember that list we discussed at the beginning of this article? Here's where you'll want to use it.

Let's pretend you actually follow the requirements of Rule 28(a)(3) when drafting your brief and learn that maybe your appeal doesn't arise from a final order. Perhaps you stumbled upon a claim or party that the trial court never disposed of. This late in the game, one neat trick you can pull to save your appeal is move the appellate court to remand the case to allow the trial court to consider either issuing an order disposing of the outstanding claims or otherwise entered an order pursuant to Rule 54(b), *Ala. R. Civ. P.* The supreme court took the step of officially approving this policy and at times will do so on its own if it discovers a finality issue.[45] Just because the supreme court will do it *sua sponte* does not mean you should rely on an appellate court to save your case. You always want to remain in the driver's seat on your appeal.

We all know a post-judgment motion will toll the time one has for taking an appeal, but did you know this rule does not apply to all post-judgment motions? I think I just heard a few hearts skip a beat. Only post-judgments filed pursuant to Rules 50, 52, 55 and 59 of the *Alabama Rules of Civil Procedure* suspend the time for bringing an appeal.[46] A post-judgment motion brought pursuant to Rule 60, *Ala. R. Civ. P.*, for example, won't provide the same benefit.[47]

Likewise, a motion to reconsider a post-judgment motion won't do anything to give you more time to bring an appeal. Exception (because there is always an exception in the law): if the order on the original post-judgment motion effectively rendered a new judgment, a second motion to reconsider can toll your appeal time.[48] That being said, you are a bigger gambler than I am if you are willing to wait to file your notice of appeal in that situation, especially since there is effectively no penalty to filing a premature notice of appeal while awaiting a ruling on a post-judgment motion.[49] Always play it safe because there is *nothing* that can be done to save an untimely appeal.[50]

One Final Tip

Before we part ways, here's one last word of advice: If you ever have a question regarding any appellate procedural rule, never hesitate to contact the clerk's office of the Supreme Court of Alabama at (334) 229-0700. There are lots of amazing folks there (and a few mediocre ones, like me) who can help guide you through any appellate procedural issue. We certainly cannot give legal advice, but we help in whatever way we can. All of the central staff attorneys who work out of the clerk's office spent many years in practice before joining the court, so we do our best to steer folks away from procedural pitfalls because we know all too well how expensive a mistake can be. If you have a case pending in the court of civil appeals or the court of criminal appeals, their clerk's offices are full of fantastic folks, too. Don't be bashful: we are happy to help![51] ▲

Endnotes

1. This article is primarily directed toward filings brought in the Supreme Court of Alabama, though many of the principles discussed herein apply to the intermediate appellate courts as well.

2. Not that I have ever had this conversation during my time in practice, Mr. and Mrs. Disciplinary Board members!
3. *Crutcher v. Williams*, 12 So. 3d 631, 635-36 (Ala. 2008).
4. *Jakeman v. Lawrence Group Management Co, LLC*, 82 So. 2d 655, 659 (Ala. 2011); Rule 58, *Ala. R. Civ. P*.
5. *Dawson v. Campbell*, 270 Ala. 586 (1960).
6. *Grantham v. Vanderzyl*, 802 So. 2d 1077, 1079-80 (Ala. 2001).
7. *State Bd. of Educ. v. Waldrop*, 840 So. 2d 893, 899 (Ala. 2002).
8. *Ex parte Elyton Land Co.*, 104 Ala. 88, 92 (1894) (noting that the purpose of requiring a final order before appellate jurisdiction could be triggered was to reduce the costs and delays incurred in resolving a controversy).
9. *Lund v. Owners*, 170 So. 3d 691, 695-96 (Ala. Civ. App. 2014).
10. *Crane-Houdaille, Inc. v. Lucas*, 534 So. 2d 1070, 1073 (Ala. 1988).
11. *Baugus v. City of Florence*, 968 So. 2d 529, 531 (Ala. 2007).
12. *Equity Trust Co. v. Breland*, [Mss. 1150302 and 1150876 February 17, 2017] ____ So. 3d ____ (Ala. 2017).
13. Charles Alan Wright et al., *Federal Practice and Procedure* § 2659 (3d ed. 1998).
14. *State v. Lawhorn*, 830 So. 2d 720, 725 (Ala. 2002) *quoting Baker v. Bennett*, 644 So. 2d 901, 903 (Ala. 1994).
15. *Hayes v. Alfa Financial Corp.*, 730 So. 2d 173, 181 (Ala. 1999).
16. *Loachapoka Water Authority, Inc. v. Water Works Bd. of City of Auburn*, 74 So. 3d 419, 422-23 (Ala. 2011) *quoting Schlarb v. Lee*, 955 So. 2d 418, 419-20 (Ala. 2006) *quoting in turn Clarke-Mobile Counties Gas Dist. v. Prior Energy Corp.*, 834 So. 2d 88, 5 (Ala. 2002).
17. *Sanspree v. Sterling Bank*, 130 So. 3d 1200 (Ala. 2013).
18. *Patterson v. Jai Maatadee, Inc.*, 131 So. 3d 607 (Ala. 2013).
19. *North Alabama Elec. Co-op v. New Hope Telephone Co-op*, 7 So. 3d 342 (Ala. 2008).
20. *Firestone v. Weaver*, [Ms. 1151211 May 12, 2017] ____ So. 3d ____ (Ala. 2017).
21. *Schneider Nat. Carriers, Inc. v. Tinney*, 776 So. 2d 753, 755-56 (Ala. 2006).
22. Yeah, this is one of those articles that meanders through the woods rather than staying focused on the topic at hand.
23. Did you know the Bluebook has citation rules for films? Rule 18.5. Kind of blew my mind, but I also get easily distracted by videos of funny animals on YouTube, so I may not be the proper litmus test to decide what is mind-blowing.
24. *BE&K, Inc. v. Baker*, 875 So. 2d 1185, 1189-90 (Ala. 2003).
25. A thorough discussion about this issue can be found in *Once Upon a Time, LLC v. Chappelle Properties, LLC*, 209 So. 3d 1094.1106-08 (Ala. 2016) (Murdock, J., dissenting).
26. *Mancil v. Jeffreys Steel Co., Inc.*, 532 So. 2d 1262, 1263 (Ala. Civ. App. 1988).
27. *Compare Precision Gear Co. v. Continental Motors, Inc.*, 135 So. 3d 953, 956 (Ala. 2013) (questions of law certified for permissive appeal are reviewed *de novo*) *with Scott Bridge Co. v. Wright*, 883 So. 2d 1221, 1223 (Ala. 2003) (*de novo* review is the appropriate standard when only questions of law, and no questions of fact, are presented).
28. *See* Rule 5(d), Ala. R. App. P.
29. *Ex parte Fairfield Nursing and Rehabilitation Center, LLC*, 183 So. 3d 923, 927 (Ala. 2015) *quoting Ex parte BOC Grp., Inc.,* 823 So. 2d 1270, 1272 (Ala. 2001).
30. *Ex parte U.S. Bank Nat. Ass'n*, 148 So. 3d 1060-1064-65 (Ala. 2014).
31. This limitation does not diminish the previous comments you read and tacitly agreed with about this article being a work of genius, of course.
32. *Lee v. YES of Russellville, Inc.*, 784 So. 2d 1022, 1025 (Ala. 2000).
33. *Bear Bros., Inc. v. ETC Lake Development, LLC*, 121 So. 3d 334, 335 (Ala. 2013)
34. *Black's Law Dictionary* (8th ed. 2004).
35. *See generally Ex parte Alabama Dept. of Mental Health and Retardation*, 837 So. 2d 808, 811 (Ala. 2002) (an injunction is an extraordinary remedy designed to prevent a party from experiencing irreparable harm).
36. *See City of Gadsden v. Boman*, 143 So. 3d 695, 702 (Ala. 2013).
37. *John Crane-Houdaille, Inc. v. Lucas*, 534 So. 2d 1070, 1074-75 (Ala. 1988).
38. *New Action Coal Mining Co., Inc. v. Woods*, 49 So. 3d 181, 184 (Ala. 2010).
39. *Wessex House of Jacksonville, Inc. v. Kelley*, 908 So. 2d 226, 229-30 (Ala. 2005).
40. *Fisher v. Bush*, 377 So. 2d 968 (Ala. 1979); *Moore v. Strickland*, 54 So. 3d 906, 908 (Ala. Civ. App. 2010).
41. I say this merely because nothing is more challenging for me to understand than the complexities and details of probate law, and I willingly bow to those attorneys and judges who have mastered such an arcane art.
42. *Thrasher v. Bartlett*, 424 So. 2d 605 (Ala. 1982); *see also State v. Estate of Yarbrough*, 156 So. 3d 947, 951 (Ala. 2014).
43. *Thrasher*, 424 So. 2d at 607-08.
44. *Crutcher*, 12 So. 3d at 635-36.
45. *See Foster v. Greer and Sons, Inc.*, 446 So. 2d 605, 609-10 (Ala. 1984) *overruled on other grounds in Ex parte Andrews*, 520 So. 2d 507 (Ala. 1987).
46. Rule 4(a)(3), *Ala. R. App. P*.
47. *Graves v. Golthy*, 21 So. 3d 720, 722 (Ala. 2009).
48. *Southeast Environmental Infrastructure, LLC v. Rivers*, 12 So. 3d 32, 49-50 (Ala. 2008) *quoting extensively from Ex parte Allstate Life Ins. Co.*, 741 So. 2d 1066, 1070 (Ala. 1999).
49. *See* Rule 4(a)(5), *Ala. R. App. P*.
50. And on this point, why wait until the 42nd day to file your appeal? So many things can go wrong by waiting until the last minute. File your appeal within 30 days or whatever number gives you the warm fuzzies. The last thing you want to have happen is you being stuck in the hospital on the same day you must file a notice of appeal in a case.
51. It's not necessarily because we are good people. We would rather prevent you from spilling the milk than trying to help you clean it up. Totally selfish motive here, but we can all enjoy this mutually beneficial relationship.

J. Bradley Medaris

Brad Medaris, a graduate of Jacksonville State University and the University of Alabama School of Law, serves the Supreme Court of Alabama as a central staff attorney within the clerk's office. His hobbies include finding ways to eat cookies without his kids noticing and unconsciously creating new ways to act awkward at social events.

History of Wage Protection Law In Alabama

By Farah Majid

For more than 148 years, the constitutions of the state of Alabama have contained a provision that allowed a citizen to protect up to $1,000 of personal property from collections.[1] The first constitution to include this protection was adopted in 1868. That is the same year that Ulysses S. Grant was elected president, the first year that floats appeared in the Mardi Gras celebration in Mobile and the year that Cornell University first opened its doors. As early as 1884, the Supreme Court of Alabama held that the phrase "personal property" in the constitution applied to wages and protected Alabama's working population from collection activity that might impoverish them.[2]

The most recent protection, found in the Alabama Constitution of 1901, provides that, "The personal property of any resident of

this state to the value of one thousand dollars, to be selected by such resident, shall be exempt from sale or execution, or other process of any court, issued for the collection of any debt..."

The purpose of exemption laws has always been to afford debtors a minimum amount of personal property so that they do not become destitute and thus become public charges.[3] In 1868, when the $1,000 personal property exemption was enacted, that amount had roughly the same buying power as $24,243.13 in 2016, according to the Consumer Price Index.[4] The framers of the constitution thus intended that judgment debtors be able to protect that much personal property from collection by judgment creditors. In light of that fact, the fact that the personal property exemption found in the constitution today is only $1,000 is telling.

A judgment debtor claiming an exemption under the constitutional provision might make $500 per biweekly paycheck. The debtor would then presumably spend that amount on rent, food, transportation and medical expenses. By the time they received their next paycheck of $500 in two weeks, he or she would have already expended their entire previous paycheck. A debtor in this situation never reaches the $1,000 minimum threshold that the constitution sets out that he or she is able to claim as exempt.

In the past two years, there have been two attempts to modify a debtor's right to claim up to $1,000 per paycheck as exempt, as debtors have been able to do for more than 100 years. This includes confusion caused by a court of appeals case that some creditors interpreted as allowing only a one-time exemption, as opposed to a recurring exemption when wages were expended, and a legislative amendment that appears to remove wages from constitutional protection at all.

Ability to Protect Wages of Debtors Living Paycheck to Paycheck

As early as 1970, in *Walker v. Williams and Bouler Construction*, the court of appeals ruled that not only did Alabama's exemption laws protect a single amount, but also allowed for citizens to protect their income on an ongoing basis where income was expended for the upkeep of their family. 241 So. 2d 896, 900 (Ala. Civ. App. 1970). In that case, the court stated, "When the property which he had selected has been lost to him, or has deteriorated in value, without fault on his part, or has been consumed in the maintenance of himself or his family, or applied by him to the payment of debts, the right secured to him would be impaired, if he could not select and retain property, notwithstanding the former claim of exemption. The rights of creditors are not impaired, so long as the debtor is not permitted to hold property exceeding in value one thousand dollars."[5]

In *Ex Parte Avery*, 514 So. 2d 1380 (Ala. 1987), the Alabama Supreme Court confirmed that future wages could be claimed as exempt. In *Avery*, the supreme court overruled a court of appeals decision that would have prevented a garnishment from being quashed for lack of property based on the existence of future wages, but would have prevented a debtor from claiming those same wages.[6] The *Avery* court reasoned that it would be "untenable" to recognize the existence of future wages for the benefit of the creditor without allowing the debtor to exercise his or her rights as to those future wages.

In *Avery* the court states, "The purpose of the exemption laws is to protect the debtor and his family from being deprived of the items necessary for subsistence, and possibly to prevent them from becoming a burden upon the public. The decision of the Court of Civil Appeals in the case at bar thwarts this purpose. The holding of the Court of Civil Appeals gives an undue advantage to the creditor, albeit the statutes were designed to protect the debtor. This Court has held on numerous occasions that exemption laws must be liberally construed. In the context of the garnishment and exemption laws, courts of this state should be concerned with the rights of the debtor, as the creditor is almost always in a better position to protect its interests." *Id.* at 1382.

As recently as 2013, the court of appeals agreed, based partially on *Avery*, that the constitutional exemption includes wages and allows a judgment debtor to choose to exempt wages as long as the amount being claimed as exempt does not exceed $1,000.[7]

The filing of a claim of exemption should be relatively straightforward under the constitution and this

precedent. Pursuant to *Alabama Rules of Civil Procedure* 64A and 64B, a debtor must simply file a sworn claim of exemption in the trial court where the garnishment has been filed. This can be done through an attorney or through use of pro se form PS-20 found at *www.alabar.org/for-the-public/need-legal-help/*. The creditor is then allowed 15 days to notify the court of any contest through a sworn objection stating any reasons they believe the claim is incorrect. The court can thereafter hold a hearing on the matter. In the absence of any objection, the rules require the garnishment to be automatically dismissed. At such hearings, the garnishment is usually quashed, so long as the claimant is able to demonstrate that his/her wages are below $1,000 and that he/she spends those wages prior to the next paycheck (living paycheck-to-paycheck without accumulating money).

The functional result of this interpretation of the constitution was that Alabama's working families were allowed to retain the minimum level of income they needed to provide food, shelter and transportation while allowing creditors to seize excessive assets for the payment of debts. It both protected the integrity and stability of Alabama families and ensured that no one became rich by ignoring his obligations.

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Recent Legislation To Interpret Constitutional Provision

On June 11, 2015, things became somewhat confused when the governor signed into law a bill that raised both the statutory homestead and the statutory personal property exemptions. The main purpose of the bill was to increase the statutory exemptions for both real and personal property used mainly in bankruptcy courts. The new law increased the protection for homeowners from $7,500 to $15,000 (or $30,000 for a married couple) and the personal property exemption from $3,000 to $7,500. It also provided for future increases based on a mathematical formula to adjust for inflation.

The new law also contained a subsection that stated that the statutory personal property exemption did not apply to wages. This subsection, now codified at *Ala. Code* § 6-10-6.1, went on to state that the 1901 constitutional provision no longer protects wages. The text reads: "(a) Wages, salaries, or other compensation of a resident are not personal property for the purposes of exemption from garnishment, levy, sale under execution, or other process for the collection of debt. (b) It is the intent of this section to exclude from the meaning of personal property the wages, salaries, or other compensation of a resident for the purposes of the personal property exemption under Section 6-10-6 and Section 204 of the Constitution of Alabama of 1901." *Ala. Code* 6-10-6.1 (as amended June 11, 2015).

The enactment of this statute raises numerous questions about the continued existence of the constitutional wage protection. As any first-year law student knows, the Constitution of Alabama, like that of the nation and of the other states, is the supreme law within the realm and sphere of its authority. Subject only to the restraints resulting from the Constitution of the United States, the Constitution of Alabama is the highest form and expression of law that exists in this state. Pursuant to Alabama Constitution Article III § 42, the powers of government are divided into three separate departments: legislative, executive and judicial. The powers of one department shall never be exercised by another and the powers confided to one cannot be exercised by the other.

It is the function of the judicial branch to interpret the constitution.[8] It is the responsibility of the judiciary is to interpret the constitution and to define the law. Such judicial interpretation is binding upon the legislature. Quoting *Marbury v. Madison,* the Supreme Court of Alabama has stated that, "It is emphatically the province and duty of the judicial department to say what the law is."[9]

In effect, §6-10-6.1 has attempted to amend the constitution without complying with the necessary process. Because of the importance of constitutional rights, constitutional amendments normally require additional steps before they become law. To amend the Alabama Constitution, the Alabama Legislature must first draft a bill to propose an amendment to the constitution. This bill must then pass by a three-fifths vote. It must then be submitted for a vote by the general population. To become part of the constitution the amendment must win a majority vote of the general population of the state.[10] None of these occurred in the case of §6-10-6.1.

Following the passage of the new law, collections attorneys around the state began appearing in Alabama courtrooms and arguing that debtors had no right to protect their paychecks from garnishment. The main dilemma raised, for debtors and judges attempting to conscientiously apply the law regarding the debtor's rights, is whether or not the statute had any effect. This is not the first time creditors have argued that legislative enactments have amended the constitution, but Alabama courts have consistently rebuffed these previous efforts. The court of civil appeals held in 1991 that amendments to the personal property statute (§ 6-10-6) in 1988 that exempted wages could not change the meaning of the constitutional exemption right.[11] The courts have also stated on three separate occasions that "the constitutional exemption is "*a minimum exemption below which the legislature may not go*."[12] Because § 6-10-6.1 appears to be a fairly clear attempt by the legislature to exercise powers which are not provided to it through the constitution, judges were left to determine whether or not hundreds or thousands of citizens would go without having the money to deal with the costs of daily living until some further guidance was issued on the matter.

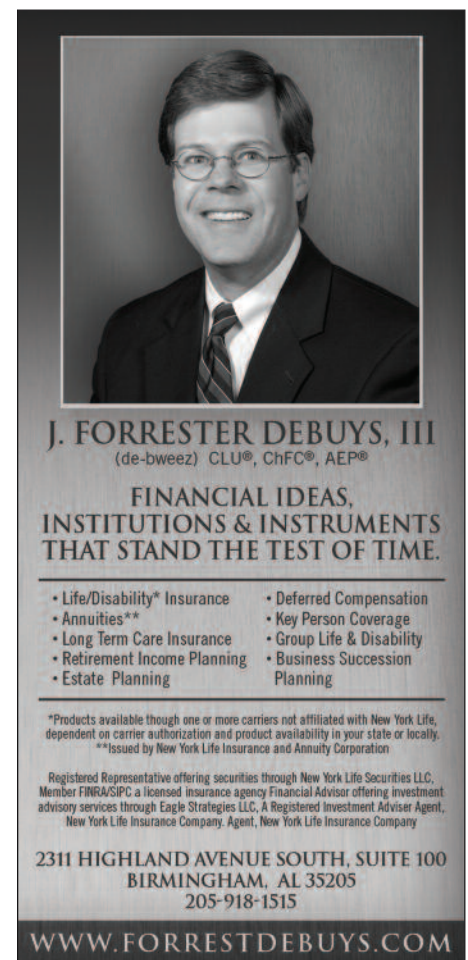
Following the passage of 6-10-6.1, the vast majority of Alabama trial judges presented with the question refused to recognize the law. For the most part, the trial courts continued to protect the wages of the low income as they had done for more than 100 years. Although some judges began to deny all claims of exemption regarding wages, many determined that *Avery* and the previously decided cases were dispositive on the issue regardless of the new statutory provision.

This state of affairs continued for several months until the first ruling regarding §6-10-6.1 (albeit in dictum) in *Alabama Telco Credit Union v. Gibbons*, 195 So. 3d 1012 (Ala. Civ. App. 2015).

Gibbons recognized §6-10-6.1, and noted that it could not apply in this case, where the debt was incurred prior to enactment of the law. *Gibbons* noted that the statute changed the meaning of personal property under the constitutional exemption, but did not address the question of the constitutionality of §6-10-6.1. And it raised a whole new set of issues about the ability of debtors to claim exemptions from each paycheck which plagued trial courts until the court clarified its ruling in 2017.

The *Gibbons* Case

The *Gibbons* case originated in the Circuit Court of Jefferson County after Alabama Telco Credit Union (ATCU) received a judgment against Gerry Gibbons, awarding it $13,551.90 in damages plus court costs and post-judgment interest. The ATCU filed a process of garnishment against Gibbons's wages and Gibbons thereafter filed a pro se claim of exemption. In the claim, Gibbons stated that he had a weekly income of $1,000 and personal property worth a total of $11,500 (which he did not claim as exempt). The personal property listed by Gibbons included a bank account with a $1,500 balance, a motor vehicle worth $6,000, a television, furniture and some tools. The ATCU filed an objection to the claim of exemption and the trial court held a hearing (where Gibbons again appeared pro se) and the trial court entered an order on April 9, 2015 denying the ATCU's contest and allowing Gibbons to protect his income. Based on court



records, the next day Gibbons terminated his employment (on April 10, 2015).

On April 22, 2015, the ATCU appealed the case to the court of appeals. On appeal, the ATCU argued that the exemption granted by the trial court erroneously applied the constitutional exemptions to all of Gibbons's future wages and that the inventory submitted with the claim of exemption contains an insufficient description of Gibbons's personal property. Gibbons did not file a brief with this court. The court issued its decision on October 30, 2016.

In the *Gibbons* decision, the court of appeals upheld the trial court's original $1,000 protection, but struck down the portion of the trial court's ruling protecting his future wages. While recognizing the existence of *Avery* and *Walker* the court states that, "We take this opportunity to clarify that the holding in *Pruett* does not allow for the application of a reoccurring $1,000 exemption for a claimant's wages earned during each pay period *in perpetuity.*" *Gibbons,* 195 So. 3d at 1017 (emphasis added). While this appears to be a repudiation of more than 100 years of Alabama law, this one sentence appears to clearly resolve the court's position on the issue of claims of exemption.

In the next paragraph, however, the court of appeals states that, "In this case, Gibbons claimed only his wages as exempt under Ala. Const. 1901, Art. X, § 204, and he did not attempt to claim as exempt any of his items of personal property. Because the amount of his wages does not exceed $1,000, he is entitled to a constitutional exemption of $1,000 for his wages. *Any accumulation of wages exceeding $1,000 is not exempt under Ala. Const. 1901, Art. X, § 204, from the process of garnishment to collect the ATCU debt.*" *Gibbons,* 195 So. 3d at 1017-18 (emphasis added).

In essence this reference to an "accumulation of wages" appeared to represent a continuation of the previous Alabama case law. As the *Walker* case has stated, a citizen may continue to protect his wages so long as his previous wages were "consumed in the maintenance of himself or his family." *Walker v. Williams & Bouler Constr. Co*., 46 Ala. App. 337, 341 (Civ. App. 1970). As such, a debtor has never been allowed to use his exemption for any accumulation and any money in excess of the $1,000 has always been clearly garnishable.

The court also pointed out that Gibbons failed to state the location of the property and that his general description of items as "furniture" and "tools" was legally not specific enough.

Because Gibbons was not represented by counsel and did not file anything with the court of appeals (and also likely as a consequence of the fact that the garnishment in question had become moot six months earlier when he left his employer), no application was made to supreme court for review.

Following the court of appeals' decision in *Gibbons,* the state of exemption in Alabama became unpredictable and irregular. Many judges who had for years regularly granted claims of exemptions to low-income Alabamians tried to incorporate the *Gibbons* holding. Many latched onto the statement regarding "accumulation of wages" and continued to address claims as they had for years. Some began to require claimants to file repeated claims of exemptions to continually re-assert their rights. A minority began to hold that a claimant could file only a single claim and thereafter is subject to garnishment in perpetuity based on the language in the opinion that the law "does not allow for the application of a reoccurring $1,000 exemption."

The *Nettles* and *Merrida* Cases

Eventually, because of this uncertainty and confusion among the trial courts, it became clear that the court of appeals would need to revisit the issue of recurring wage exemptions. The court of appeals did so in the joint decision of *Lenita Merrida v. Credit Acceptance Corporation* and *Samantha Nettles v. Credit Acceptance Corporation*, case numbers 2160188

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and 2160189, released May 12, 2017.

In the joint opinion issued in both cases (appealed simultaneously and both presenting the same legal issues), the court determined that, under the prior binding law of Alabama, a debtor was entitled to claim $1,000 per paycheck as exempt as long as the debtor was expending that paycheck before earning another one. *Merrida v. Credit Acceptance Corp.*, No. 2160188, 2017 WL 1967738, at *1 (Ala. Civ. App. May 12, 2017). In that case, both debtors were able to prove that they never had an accumulation of more than $1,000 in wages in their possession at any given time, because they expended each paycheck earned on necessary household expenses. *Id.* For this reason, their paychecks continued to be exempt under the Alabama Constitution.

The court of appeals relied on *Walker v. Williams & Bouler Construction Co.*, 46 Ala. App. 337, 341 (Civ. 1970), for the proposition that a judgment debtor is entitled to hold the sum of $1,000 in his/her possession at any given time. The court also relied on *Ex parte Avery,* 514 So. 2d 1380 (Ala. 1987) for the proposition that exemption laws ought to be liberally construed in favor of the debtor, and that future wages could be claimed as exempt; and on *Pruett v. Worldwide Asset Purchasing, LLC*, 140 So. 2d 481, 484 (Ala. Civ. App. 2013), which allowed a debtor to claim wages of less than $1,000 per paycheck as exempt.

The court of appeals' decision in *Nettles* and *Merrida v. Credit Acceptance Corporation* appears to reconcile the prior decision in *Gibbons* with the prior case law to say that as long as a debtor expends his/her paycheck on necessary household expenses, *and* as long as the debtor is making *less than $1,000 per paycheck*, he or she can file a claim of exemption under the constitution to protect his or her wages.

> An individual earning more than that could not simply claim that he spends their entire paycheck and claim it as exempt; *each individual paycheck* must be less than $1,000 to claim it in its entirety.

It is worth noting that a debtor must make less than $1,000 per paycheck. An individual earning more than that could not simply claim that he spends their entire paycheck and claim it as exempt; *each individual paycheck* must be less than $1,000 to claim it in its entirety. The court's decision in *Nettles* and *Merrida* makes this clear.

Moreover, under *Nettles* and *Merrida,* which relies upon prior Alabama law, each paycheck must be expended only on necessary household expenses. A judgment debtor could not simply expend their paycheck on frivolous expenses and claim it as exempt. The debtors in the *Nettles* and *Merrida* cases were able to demonstrate that they did expend their paychecks only on necessary household expenses such as rent, food, transportation and clothing.

The *Nettles* and *Merrida* decision appears to clarify the state of the law post-*Gibbons*. Trial courts that were previously interpreting *Gibbons* to confine a debtor to a one-time wage exemption have received further guidance from the court of appeals as to how the *Gibbons* decision should be interpreted alongside existing Alabama law.

However, the issue that remains unclear in the area of Alabama's exemption law is the effect of the amendment to *Ala. Code* 6-10-6.1 on Alabama Constitution Article X Sec. 204. The court in *Nettles* and *Merrida* took largely the same approach as it did in *Gibbons* regarding the statutory amendment: because the debts at issue in those cases were both incurred prior to the passage of the amendment, the court explained that the amendment did not apply to them. Thus, no appellate court has yet reached the issue of the constitutionality of the recent legislative amendment.

Effect on the State

It is true that in addition to the $1,000 protection offered by the constitution that the federal government has provided two protections regarding the garnishment of paychecks. The first prohibits the garnishment of any paycheck which is the equivalent of less than 30 times the national minimum wage. This means that an individual's paycheck is protected up to the amount of $217.50 in gross wages per week. The second protection limits the amount that any paycheck can be garnished to 25 percent of the amount of that paycheck. This means that an individual earning $350 per week

could be garnished by $75 down to the amount of $225 per week. Furthermore, $217.50 per week, for a family of four, is less than half of the federal poverty guideline.[13]

Attempting to eradicate the constitutional exemption is not only contrary to precedent and to the plain language of the laws and the Alabama Constitution, but it would also devastate low-income debtors and their families. The purpose of exemption laws is to provide a minimum amount of property for debtors of up to $1,000 in the case of personal property at any one time, not just once but on a continuing basis, in order to allow a debtor to remain a functioning member of society.

Without the constitutional protection for wages, debtors are subject to falling behind on other bills, such as rent, utilities and car payments. This will also effectively prioritize old debts over new, current debts.

Approximately 90 years ago, the Alabama Supreme Court held that exemption laws were necessary to maintain the rule of law stating,

"[A] due exercise of the police power of government to the end that its citizens be not reduced to beggardom and its needy and ignorant citizens and their families be duly protected in the necessary household articles, food, raiment, etc., warranted, within constitutional limits, the denial of seizure for debt of such necessary personal properties [under the exemption statute] (citations deleted)."[14]

The supreme court in 1977 restated this basic principle in *Broadway v. Household Finance Corporation of Huntsville* when the court stated, "[Alabama exemption laws] have been in the Constitution and Statutes of this state for more than one hundred years. Their clear purpose is to protect a debtor and his family from deprivation through judgment execution of certain household items necessary to the maintenance of the family unit and possibly prevent them from becoming a burden upon the public's welfare." 351 So. 2d 1373 (Ala. 1977) (citations deleted).

The court has stated that the purpose of exemption rights is to reduce the possibility that individuals will become destitute and therefore public charges. As the supreme court has noted, the "obvious purpose" of exemption laws "is to secure to each family a home and means of livelihood, irrespective of financial misfortune, and beyond the reach of creditors; security of the State from the burden of pauperism, and of the individual citizen from destitution."[15] Moreover, the supreme court has instructed courts to "be concerned with the rights of the debtor, as the creditor is almost always in a better position to protect its interests." *Ex Parte Avery*, 514 So. 2d at 1382.[16]

The applicable constitutional exemption of $1,000 was enacted more than 100 years ago and continues in effect today, despite the fact that the Consumer Price Index shows that $1,000 in 1913[17] has the same buying power as $24,386.67 in 2016. Although the effect of the constitutional protection may have been diminished by inflation since its inception, its purpose remains as necessary today as it was more than a century ago. ▲

Endnotes

1. *See* Constitution of the State of Alabama 1875, Art. X, § 1; Constitution of the State of Alabama 1868, Art. XIV, § 1.
2. *Enzor & McNeill v. Hurt*, 76 Ala. 595 (1884).
3. *Enzor & McNeill v. Hurt*, 76 Ala. 595 (1884)
4. See Bureau of Labor Statistics, CPI Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm. The first year that the Consumer Price Index was calculated was 1913.
5. 241 So. 2d 896, 900 (Ala. Civ. App. 1970).
6. Where no garnishable property exists to support a writ of garnishment, it should be quashed. *Harris v. National Bank and Trust Co.*, 406 So. 2d 968 (Ala. Civ. App. 1981).
7. *Pruett v. Worldwide Asset Purchasing, LLC*, 140 So. 3d 481, 483-484 (Ala. Civ. App. 2013).
8. Opinion of the Justices, 624 So. 2d 107, 110 (Ala. 1993).
9. *Jefferson County v. Weissman*, 69 So. 3d 827 (Ala. 2011).
10. *Const. of Ala. (1901) Article XVIII, Section 284.*
11. *Roberts v. Carraway Medical Center*, 591 So. 2d 870, 871-72 (Ala. Civ. App. 1991).
12. *Trimble v. Greater Gadsden Housing Authority*, 603 So. 2d 1102, 1103-1104 (Ala. Civ. App. 1992); *Sink v. Advanced Collection Services, Inc.*, 607 So. 2d 246, 246 (Ala. Civ. App. 1992); *Roberts v. Carraway Methodist Medical Center*, 591 So. 2d 870, 872 (Ala. Civ. App. 1991).
13. 81 Fed. Reg. 4036.
14. *Coffman v. Folds*, 112 So. 911, 914 (Ala. 1927).
15. *Hines v. Duncan*, 79 Ala. 112, 114-15 (1885).
16. In *Ex parte Avery*, the supreme court reversed a holding giving an undue advantage to the creditor, because the statutes were designed to protect the debtor. 514 So. 2d 1380, 1382 (Ala. 1987) (emphasis added).
17. The first year that the Consumer Price Index was calculated was 1913. *See* Bureau of Labor Statistics, CPI Inflation Calculator, *http://www.bls.gov/data/inflation_calculator.htm*.

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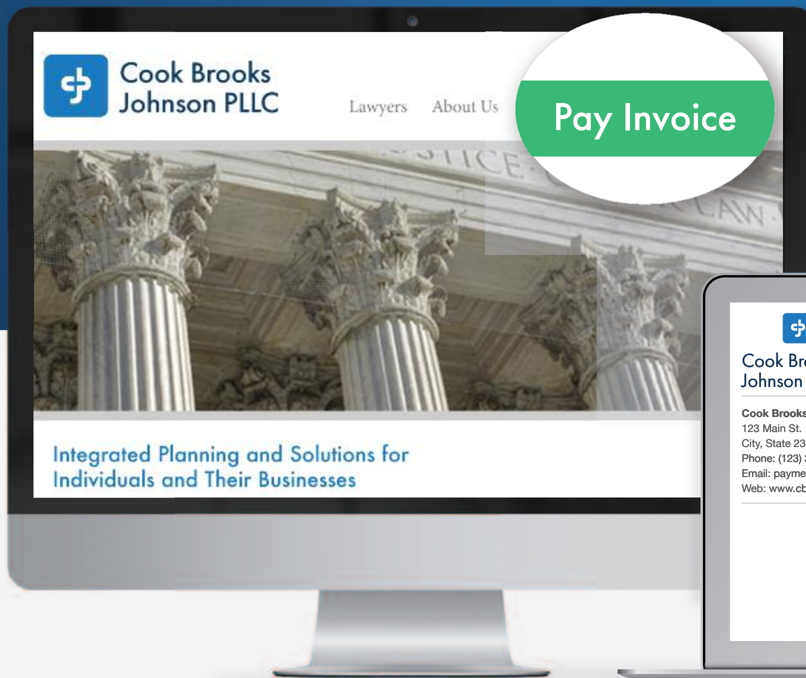

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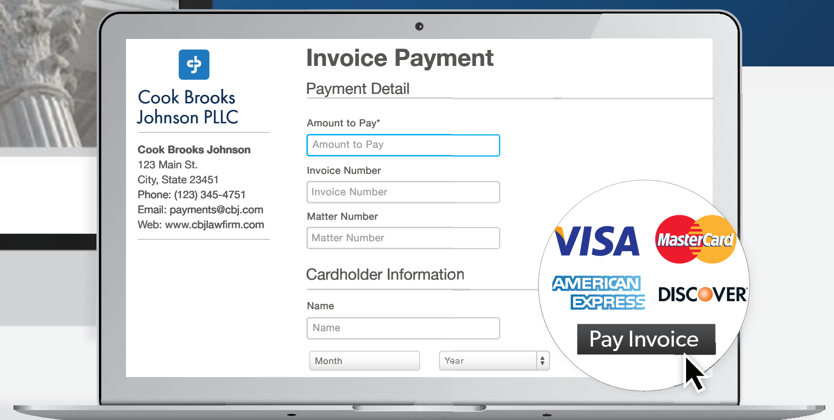

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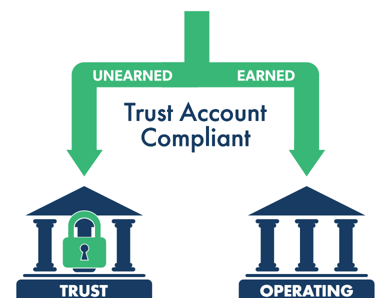

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Specialty Certification

By Angela Parks

A quick glance through the "Attorneys" section of any yellow page directory will make it clear that many lawyers specialize in one or more kinds of legal matters. In fact, most specialize to some degree by limiting the range of matters they handle. An increasing number of lawyers are choosing to be recognized as having special knowledge and experience by becoming certified specialists in certain fields of law. Specialty certification could be part of your professional goals.

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certifying organization must show, among other things, that:

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Angela Parks

Angela Parks is the director of regulatory programs for the Alabama State Bar.

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Fidelity Fiduciary Company LLC announces that **Bennett L. Pugh** has been named chief executive officer.

Holtsford Gilliland Higgins Hitson & Howard PC announces that **Kaasha D.B. Griffin** joined as an associate in the central Alabama office.

Jones Walker LLP announces that **Robert C. Walthall** joined the Birmingham office as partner.

Maynard Cooper & Gale announces that **Matthew A. Aiken, Michel M. Marcoux** and **Kimberly L. Hager** joined as shareholders and **Hansen Babington** and **Michael Evans** joined as associates, all in the Birmingham office.

Smith & McGhee PC of Dothan announces that **Thomas S. Smith, III** joined the firm.

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Supreme Court Committee on Criminal Pattern Jury Instructions

Making Progress

By Timothy A. Lewis and John Hightower

The Alabama Supreme Court's Committee on Criminal Pattern Jury Instructions is publishing updated instructions on the website of the Alabama Supreme Court and State Law Library at *http://judicial.alabama.gov/library/jury_instructions_cr.cfm.*

Pattern jury instructions, whether for criminal or civil cases, are important for the fair, proper and efficient administration of justice. For many years, Alabama has had model instructions for both civil and criminal trials. The last print edition of the criminal pattern jury instructions was released in 1994, but about four years ago, the supreme court's committee began to update criminal instructions work in earnest.

As it completes revised instructions, the committee provides the instructions to the library for publication on its website. So far, there has been no interest in publishing the instructions in book form, but web publication of the instructions makes the updated instructions quickly available to courts and attorneys at a minimum cost.

Circuit Judge Virginia Vinson of Birmingham served as chair of the committee. She indicates that if the Alabama Legislature did not pass any new criminal statutes, the committee could probably finish its work in about six to eight months. Since cessation of legislative activity is not a realistic expectation, though, the committee's work remains an ongoing project. In addition, because the committee has not completed all of its work, Judge Vinson suggests that attorneys may still need to consult the 1994 edition of the criminal pattern jury instructions for crimes not addressed by the instructions on the library's website.

Judge Vinson also indicated that the next big set of instructions to be released will concern theft. She expressed appreciation to former Montgomery County District Attorney Ellen Brooks for her assistance to the committee serving as its reporter. Judge Vinson stepped down as chair of the committee in September when she retired.

Important Pointers about Jury Instructions from Alabama Supreme Court

"It is the preferred practice to use the pattern jury instructions in a capital case." *Ex parte Hagood,* 777 So.2d 214, 219 (Ala.1999), cited in *Johnson v. State,* 120 So. 3d 1130, 1182 (Ala. Crim. App. 2009).

"While most pattern jury instructions may be properly used in the majority of criminal and civil cases, there may be some instances when using those pattern charges would be misleading or erroneous. In those situations, trial courts should deviate from the pattern instructions and give a jury charge that correctly reflects the law to be applied to the circumstances of the case." *Ex parte Wood,* 715 So. 2d 819, 824 (Ala. 1998). ▲

Timothy A. Lewis

Tim Lewis received his JD from the University of Alabama School of Law and is the State Law Librarian, Alabama Supreme Court and State Law Library.

John Hightower

John Hightower received his JD from the University of Mississippi School of Law and is the librarian for Lanier Ford, Shaver & Payne PC.

YLS UPDATE

Parker Miller
parker.miller@beasleyallen.com

Moving Forward

The 2016-2017 year was another one of success and growth in the ASB Young Lawyers' Section ("YLS"). Our membership, which previously held around 600, has now grown to more than 800 members. Going forward, it will be important to ensure that number not only grows, but that the YLS searches for ways to utilize our great state's young legal talent.

Our year began under similar tragic circumstances that we now find ourselves. Last year, floods devastated Louisiana. We worked closely with then bar President Cole Portis to raise $10,000 for flooding victims, as well as to collect and deliver needed goods to the affected region. As I am typing this, a new drive is underway to help those impacted by Hurricanes Harvey and Irma. As we did last year, the YLS will answer the call to help those in need.

The success of our programs has played a major role in the YLS's growth over the years, and that success continued this past year. Our renowned Minority Pre-Law Conference ("MPLC"), which is a set of programs designed to educate Alabama's youth about the legal profession, took place in Birmingham, Mobile and Huntsville. Participation was high, as lawyers, judges and teachers worked with 225 students in Birmingham, 120 in Mobile and 85 in Huntsville. Danielle Starks, our coordinator for the MPLC program for the 2016-2017 year, did an outstanding job orchestrating these events.

The Orange Beach CLE saw another year of continued growth. The event took place in May and was well attended. Presentations focused on the practical aspects of practicing law and were targeted to lawyers younger than 40. The speaker lineup was once again impressive, as we were pleased to have numerous judges and then President-elect Augusta Dowd and Jere Beasley speaking. The Orange Beach CLE also included a golf tournament and two cocktail social events. Close to 100 attendees

enjoyed the beach party and the Kentucky Derby. Evan Allen was the coordinator for this program, and he did a great job making sure it was successful.

The YLS also orchestrates the state bar's admission ceremonies, where new admittees are sworn into practice. The ceremonies take place twice a year at the Montgomery Performing Arts Center. This year, Beau Darley served as chair of the Admission Ceremony Committee, and he did a great job overseeing the event.

Our Iron Bowl CLEs continued this year in Birmingham, Huntsville and Mobile, and Jesse Anderson and his committee did a good job organizing these.

I also thank our Communications Committee, headed up by Julia Shreve and Emily Crow, as well as our Law School Division and Relations Committee. Rachel Cash served as chair of that committee, and she did a great job setting up outreach programs between the state bar and our law schools. Aaron Chastain was the YLS ABA Affiliate representative, and I thank him for his work. Finally, Morgan Hofferber worked extremely hard to create awareness for all of our programs.

I congratulate the newest member of the YLS's officer team–Evan Allen. As noted above, he did an outstanding job organizing the Orange Beach CLE, and is very deserving of this new position. He will begin as treasurer of the section, and will ultimately rotate up to president.

This will be my last column in *The Alabama Lawyer* as YLS president. I am very thankful to the YLS officers who helped me along the way, including Lee Johnsey (incoming president), Rachel Miller (incoming vice president) and Robert Shreve (incoming secretary). Each went above and beyond to assist me. I am grateful to my family and to the lawyers at Beasley Allen for giving me the opportunity to do something about which I am passionate. It goes without saying that I am a beneficiary of incredible mentors who truly care.

Lee Johnsey of Balch & Bingham will be our new president. He is a respected, bright and talented lawyer, and I am convinced he will make his firm and the state bar proud. I look forward to seeing him succeed and helping where I can along the way.

Finally, I encourage you to get involved in the YLS. Our profession, like so many things in life, is all about relationships. From my experience as a lawyer younger than 40, there are few better places to grow and forge relationships than the Alabama State Bar YLS. ▲

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▲ Billy Carson Bond

▲ Stephen Kenneth Griffith

Billy Carson Bond

Billy Carson Bond died on Saturday, August 5, 2017 at age 84. He was a native of Columbia, Mississippi and a resident of Monroeville. He was a Veteran of the United States Air Force and Mississippi National Guard and served during the Korean conflict. He was a graduate of Louisiana State University in forestry and a registered forester in Alabama. He graduated from Jones Law School in Montgomery with a Juris Doctor degree and was a member of the Alabama State Bar.

He spent his career in the forest products industry. During his distinguished career, he held the notable positions of corporate vice president of Hammermill Paper Co. Inc., president of Allegheny Railroad, Inc. and president of Harrigan Lumber Co. Inc. He retired as president of Alabama River Woodlands, Inc. in 2000.

Mr. Bond served in numerous capacities in professional, civic and in governmental organizations. He was inducted into the Society of Foresters Hall of Fame at Auburn University.

He was preceded in death by his father, William A. Bond; his mother, Jewell Garrett Bond Johnson; and his sister, Linda G. James. He is survived by his wife, Evelyn Stringer Bond; his son, Mark (and Dianne) Bond; his daughter, Jennifer (and Mark) Amundsen; grandchildren Mary Carson and William Bond; and step-grandchildren Taylor, Avery and Johnny Amundsen.

He was a member of the First Baptist Church of Monroeville. He was a Free Mason. Donations may be made to Camp Smile-A-Mile, Pilots for Christ or Monroeville First Baptist Church.

Stephen Kenneth Griffith

After a long career as a trial lawyer, Cullman attorney Steve Griffith was tragically killed by an intruder in his home on July 17, 2017. Steve was a fierce advocate for his clients and an effective and skilled courtroom attorney. He was born September 25, 1943 in Cullman to Judge K.J. and Frances Griffith. Both Steve's father and grandfather were judges and attorneys in Cullman and Steve was always mindful of his role in carrying on their legacy. His father, K.J., was probate judge, circuit judge and legal advisor to Governor "Big Jim" Folsom.

Steve graduated from Mississippi State University and the University of Alabama School of Law. After law school, he clerked for Alabama Appeals Court Judge Annie Lola Price, the first female judge on the state court of appeals. Judge Price, a Cullman native, passed the bar exam after reading law with Steve's grandfather, Aquilla Griffith.

In 1968, Steve returned home to Cullman to practice law as a solo practitioner. Later, he practiced with James R. Knight for 40 years, until they and their other partners dissolved the firm of Knight Griffith LLP in 2012. At the time of his death, he was the senior partner in Griffith, Lowry & Meherg LLP.

Steve was an accomplished trial lawyer in personal injury, criminal defense and other forms of trial work during his entire career. Steve could take over a courtroom and his skills in conducting withering cross-examinations were unmatched. The Organization for Competitive Markets awarded the John Helmuth Award to Steve for his outstanding work in *Henry Lee Pickett, et al. v. Tyson Fresh Meats, Inc.* Other notable cases in which Steve has been involved include *Steve Donaldson, et al. v. Degussa-Huls Corporation, et al.* and *Horace Robertson, et al. v. H. Hoffman-LaRoche LTD, et al.* Steve was particularly proud of his role as co-counsel for the citizens of Cullman County in the recovery of 30 million dollars' worth of public water assets that were illegally transferred from the county's control.

Steve was a former Alabama State Bar Commissioner (1990-1994, 2000-20014) and a member of the Alabama State Bar Executive Council (2001-2001). He was a member of the Alabama Criminal Defense Lawyers Association and the Criminal Justice Section of the American Bar Association. Steve was an active member and past president of the Cullman Bar Association.

Steve is survived by his wife of 51 years, Jackie Mann Griffith; two children, Wyles Griffith (Brandy) and Sarah Frances Lovell (Donovon) of Cullman: seven grandchildren, Owen Lovell, Kacie Griffith, Jackson Griffith, Jacob Griffith, Ansley Tapscott, Tyde Tapscott and Rowe Tapscott. Steve was also survived by his brother, Robert Quill Griffith; his sister, Janice Griffith DeJong (Clark); and his mother-in-law, Sarah Mann. Steve will be missed. It is a true tribute to his ability as a lawyer that when other members of the local bar needed a lawyer, Steve was often the one that they called. He was a lawyer's lawyer.

—Tim Culpepper, Cullman Bar Association

Andres, David McCall
Tuscaloosa
Admitted: 1973
Died: August 2, 2017

Bertram, Robert Lynn
Jamestown, KY
Admitted: 1967
Died: August 7, 2017

Butler, Albert Sim
Montgomery
Admitted: 1984
Died: July 20, 2017

Guin, Junius Foy, III
Tuscaloosa
Admitted: 1978
Died: June 12, 2017

Harrison, Donald Richard
Dadeville
Admitted: 1973
Died: June 30, 2017

Higginbotham, George Milton
Bessemer
Admitted: 1961
Died: July 4, 2017

Hollingsworth, Carey Ferguson, Jr.
Birmingham
Admitted: 1956
Died: July 28, 2017

Jones, Thomas Logan
Tuscaloosa
Admitted: 1968
Died: August 27, 2017

Keith, Julian Parke
Selma
Admitted: 1972
Died: July 17, 2017

Mullican, Robert James
Fairhope
Admitted: 1984
Died: June 2, 2017

Myers, Letitia Lynn
Enterprise
Admitted: 1998
Died: July 16, 2017

Perdue, Jacob Calvin, Jr.
Phenix City
Admitted: 1956
Died: August 24, 2017

Perdue, Wayne
Prattville
Admitted: 1976
Died: July 6, 2017

Shores, Hon. Janie Ledlow
Montrose
Admitted: 1959
Died: August 9, 2017

Steuer, Mitzi Laurel Sears
Auburn
Admitted: 1993
Died: July 12, 2017

Suber, Ronald Frank
Fairhope
Admitted: 1981
Died: July 22, 2017

Ufford, John Hawthorne, II
Crossville
Admitted: 1990
Died: June 24, 2017

Weiner, Maury Steven
Birmingham
Admitted: 1993
Died: April 7, 2016

Young, Hon. George
Birmingham
Admitted: 1956
Died: July 26, 2017

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

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

Elections, Elections and More Elections

This month marks one year until our state general election cycle. Preparation for many of these elections has been underway for some time, in certain instances for years. The ability to raise funds for all 2018 elections opened this past June. Qualifying with the parties will take place shortly after the first of the year. Election officials are already getting ready.

In Alabama, the state general election is a big deal. All Alabama Executive Branch constitutional officers and the entire Alabama Legislature is elected on the same cycle. Likewise, all probate judges, sheriffs and a good collection of other state officeholders will be elected. Additionally, several federal and county offices will appear on the ballot. The following is a list of what voters should expect to see on the November 2018 ballot:

- U.S. House of Representatives, all seven seats
- Governor
- Lieutenant Governor
- Attorney General
- State Auditor
- Secretary of State
- State Treasurer
- State Commissioner of Agriculture and Industries
- Alabama State Senate, all 35 seats
- Alabama House of Representatives, all 105 seats
- Chief Justice, Alabama Supreme Court
- Associate Justice, Alabama Supreme Court, three of eight seats
- Justice, Alabama Court of Criminal Appeals, three of five seats
- Justice, Alabama Court of Civil Appeals, three of five seats
- Public Service Commission, one of three seats
- State Board of Education, four of eight seats
- Circuit Judge, various seats
- District Judge, various seats
- Probate Judge, all 68 seats (yes, Jefferson County elects two)
- Sheriff, all 67 seats

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The primary for all of these elections will take place on June 5, 2018, any necessary runoffs on July 17 and the general election will take place on November 6.

As you can imagine, the workload is tremendous on election officials throughout the state to ensure that the process runs smoothly. The Alabama Law Institute has long attempted to help provide these officials with the resources and information they need.

In furtherance of this effort, the institute hosted the Alabama Election Conference October 25 through 27 at the University of Alabama. All probate judges, sheriffs, circuit clerks and registrars were invited. More than 300 of these local officials attended. One day of the conference was dedicated to a joint meeting of all of these local election officials and serves as the only opportunity each election cycle for all of these officials to have joint training.

In conjunction with the election conference, the institute published the 18th Edition of the *Alabama Election Handbook*. This handbook has long been the go-to resource for all those interested in the Alabama election process. The *Alabama Election Handbook*, first published by the institute in 1977, was the successor to the 1952 *Election Officer's Handbook* by University of Alabama Professor Donald Strong. Beginning with the Sixth Edition, the *Alabama Election Handbook* also incorporated the Secretary of State's *Election Official's Handbook* produced first by Dr. Robert Montjoy of Auburn University in 1982. From 1977 until 2011, each edition was edited by Robert L. McCurley, Jr. who served as director of the institute during that time period and had a tremendous passion for the electoral process.

The two most recent editions of the handbook are a substantial revision in form and substance. A committee working under the leadership of Greg Butrus and including experts from all areas of the election process have worked to re-draft the handbook to organize the material with an easier to use scientific numbering system, increased cross-referencing and indexing within the handbook, and to reflect the expansion of campaign finance legal issues in recent years. As is always the case, the handbook is done as a proud partnership with the Secretary of State.

The handbook contains all of the information voters, candidates and election officials might need to understand the process and their individual roles in it. The handbook also has an extensive appendix of forms, administrative rules and other resource materials.

Copies of the handbook can be ordered through the institute's office. ▲

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DISCIPLINARY NOTICES

- Notices
- Transfers to Disability Inactive Status
- Suspensions

Notices

- **Minerva Camarillo Dowben**, who practiced in Hoover and whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of November 30, 2017 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in Rule 20(a), Pet. No. 2014-579 and ASB No. 2014-323, before the Disciplinary Board of the Alabama State Bar. [Rule 20(a), Pet. No. 2014-579 and ASB No. 2016-1558]
- **Richard Leslie Jones**, 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 him in ASB Nos. 2009-1569(a) and 2011-1140 by the Disciplinary Board of the Alabama State Bar.

Transfers to Disability Inactive Status

- Tuscaloosa attorney **Mattie Neal Newell** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective July 24, 2017, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the July 24, 2017 order of Panel III of the Disciplinary Board of the Alabama State Bar in response to Newell's request submitted to the Office of General Counsel requesting she be transferred to disability inactive status. [Rule 27(c), Pet. No. 2017-811]
- Tuskegee attorney **Glenn Doyle Zimmerman** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective February 21, 2017. [Rule 27(c), Pet. No. 2017-164].

Suspensions

- Scottsboro attorney **Brooke Towery Bush** was suspended from the practice of law in Alabama, effective August 4, 2017, for noncompliance with the 2016 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 17-381]

- Mobile attorney **Jacqueline Rachel Macon** was suspended from the practice of law in Alabama for four years by order of the Supreme Court of Alabama, effective June 16, 2017. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Macon's conditional guilty plea, wherein Macon pled guilty to violating Rules 8.4(c) and (g), *Ala. R. Prof. C*. Macon failed to remit employee payroll taxes that she withheld from her employees to the appropriate federal and state government agencies, as required by law. [ASB Nos. 2016-317 and 2016-1126 and CSP No. 2017-276]
- Guntersville attorney **James Russell McMurry** was suspended from the practice of law in Alabama, effective August 4, 2017, for noncompliance with the 2016 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 17-397]
- Houston, Texas attorney **Troy Ted Tindal** was suspended from the practice of law in Alabama, effective August 4, 2017, for noncompliance with the 2016 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 17-404]
- Florence attorney **Donald Glenn Tipper** was suspended from the practice of law in Alabama, by order of the Supreme Court of Alabama, for five years, effective June 15, 2017. Tipper pled guilty to violations of Rules 1.8(l) and 8.4(a), (b) and (g), *Ala. R. Prof. C*. In his conditional guilty plea, Tipper admitted he met with a client in his office to discuss the client's legal matter. During the meeting he propositioned the client for sex. Tipper engaged in sexual intercourse with the client in his office. The client alleged to law enforcement authorities that the sexual conduct was non-consensual. Tipper was charged with first degree rape and sodomy in the Circuit Court of Lauderdale County, Alabama. Tipper admitted engaging in sexual conduct with his client in his office, but claimed the sexual conduct was consensual. Tipper pled guilty to a lesser offense of sexual misconduct, a misdemeanor. [ASB No. 11-1467]

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Mental Health and The Holidays

By Robert Thornhill

The holiday season is upon us!

For many this is a time of joy and fellowship, of giving and receiving, and a time for families to reunite and share their faith and love for one another. For others, the holidays have come to be associated with prior tragedies, such as the death of a loved one or the untimely ending of a cherished relationship. For these people, the holidays have become a time of struggle and depressed mood, and a season that must be "endured" rather than celebrated. And then there are those who have a loved one in the throes of active addiction or are experiencing the symptoms of undiagnosed or untreated mental health issues such as depression or anxiety disorder. For these unfortunate people, the holiday season has become a time of fear, uncertainty, frustration and despair.

The rate of addiction, depression and anxiety among attorneys is far greater than that of the general population. We know that there are many legal professionals who are struggling with these issues on their own, without the benefit of evaluation or treatment. The sad

truth is that, without treatment, these conditions will only get worse over time, and will eventually and inevitably lead to consequences such as loss of law license, legal charges such as DUI or domestic violence, loss of standing within the legal profession and the community, destruction of relationships and families and even death.

The Alabama Lawyer Assistance Program is available to provide assistance to lawyers, judges, law students and their colleagues and families. We can provide consultation, referrals for evaluation and/or treatment, support and mentoring and a monitoring program for accountability. We have a dedicated committee of volunteer attorneys who are ready and willing to provide support and guidance as well. Many of our members have been down this road and found a path to healing and wholeness. We have seen relationships healed, jobs and careers restored, mental and physical health improved and peace and joy experienced. We are here to provide assistance to those who have lost hope or do not know where to turn for guidance.

Please contact me directly at (334) 517-2238 or *robert.thornhill@alabar.org,* or the 24-hour number, (334) 224-6920. We are here to help. ▲

Robert Thornhill

Robert Thornhill is the director of the Alabama Lawyer Assistance Program of the Alabama State Bar.

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

Alabama Lawyer Assistance Program

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; Non-Signatory

***Nissan North America, Inc. v. Scott*, No. 1160656 (Ala. August 11, 2017) and *Daphne Automotive, LLC v. Eastern Shore Neurology Clinic, Inc.*, No. 1151296 (Ala. August 11, 2017)**

In both cases, the language employed in the arbitration agreements confined covered disputes to those between signatory parties, and thus was not broad enough to encompass claims by or against non-signatories.

Arbitrability

***Managed Health Care Administration, Inc. v. Blue Cross and Blue Shield of Alabama*, No. 1151099 (Ala. Sept. 1, 2017)**

Parties' invocation of AAA Commercial Rules in arbitration agreement, standing alone, evinced the necessary "clear and unmistakable evidence" that parties reserved all issues of arbitrability for the arbitrator, including waiver, scope and survival of arbitration after contract termination.

Forum Non Conveniens

***Ex parte Alfa Mutual Insurance Company*, No. 1160536 (Ala. Sept. 1, 2017)**

Although insurance policy was issued and delivered in Pickens County and insured resided there, nexus of action by insured against insurer for UM benefits was Tuscaloosa County, where the accident occurred, and thus interests of justice demanded transfer.

Mortgages

***Ex parte Turner*, No. 1160212 (Ala. Sept. 1, 2017)**

Mortgagee seeking to exercise its power of sale must do so in strict compliance with the requirements of the mortgage; mere substantial compliance is insufficient. Failure to provide notice of intent to accelerate the debt, as required by the mortgage, invalidated foreclosure sale.

Peace Officer Immunity; Municipalities

***Ex parte City of Selma*, No. 1160469 (Ala. Sept. 1, 2017)**

City, like its police officers, were entitled to *Cranman* immunity and peace-officer immunity (per *Ala. Code* § 6-5-338) from claims arising from officers' alleged misconduct in connection with lender's agent's repossession of vehicle.

Workers' Compensation; Removal of Safety Device

***Saarinen v. Hall*, No. 1160066 (Ala. Sept. 1, 2017)**
Presence of another saw on the worksite premises that had not been installed and which was not manufactured by the manufacturer of the saw involved in injury was not the equivalent of the removal of a safety guard under *Ala. Code* § 25-5-11(c)(2).

Restrictive Covenants

***Ex parte Odom*, No. 1160620 (Ala. Sept. 1, 2017)**
Restrictive covenant's ambiguity is not necessarily resolved in favor of the party seeking to avoid enforcement. Rather, they must be construed according to the intent of the parties in light of the terms of the restriction and surrounding circumstances known to the parties.

Federal-State Court Relations

***Ex parte Przybysz*, No. 1160381 (Ala. Sept. 1, 2017)**
Under *Donovan v. City of Dallas*, 377 U.S. 408 (1964), trial court lacked authority to direct party before it to dismiss federal action and forfeit its right to seek relief in a federal forum. (This is not to say that the federal court could not determine that the action before it was not subject to abstention.)

Physicians; Discovery

***Ex parte Hunte*, No. 1160164 (Ala. Sept. 1, 2017)**
In civil action brought by former patient against doctor for alleged sexual assault, complaint made to State Board of Medical Examiners concerning another patient was not discoverable under *Ala. Code* § 34-24-60, which makes such complaints confidential.

Discovery

***Ex parte Action Auto Sales, Inc.*, No. 1160598 (Ala. Sept. 1, 2017)**
Discovery compelled by trial court of financial transactions unrelated to case was clearly excessive; personal financial privacy interests of the sole shareholder (though the shareholder was not a party and had not personally objected to the subpoena) required curtailing the subpoena to the transactions between the parties.

Forum Non Conveniens

***Ex parte Dow Corning Alabama, Inc.*, No. 1160028 (Ala. Sept. 1, 2017)**
Though the underlying injury occurred in Montgomery County, there was sufficient connection between a contractual indemnity dispute and Houston County so as not to warrant a transfer, because contract was entered into and negotiated there.

Forum Non Conveniens

***Ex parte MidSouth Paving, Inc.*, No. 1160504 (Ala. Sept. 1, 2017)**
In MVA case, plaintiffs' residency in Hale County and defendants' conducting of unrelated business there did not establish nexus in Hale County; nexus was in Tuscaloosa County, where accident and injuries occurred, and thus transfer was required for interests of justice.

Class Actions; Dismissal

***Hall v. Environmental Litigation Group, P.C.*, No. 1151077 (Ala. Sept. 1, 2017)**
In a putative class action alleging breach of an attorney-client employment agreement as to an agreed-upon percentage fee for representing asbestos clients, the court reversed the trial court's "striking" of class allegations and "denial" of class claims, holding that those rulings were grants of a Rule 12(b)(6) motion as to all claims. The court held that, viewing the allegations most favorable to plaintiffs, the fee agreements did not allow the proposed additional charges for additional work and

(Continued from page 459)

services relating to probate and bankruptcy proceedings to be assessed as expenses.

Wills and Estates; Omitted-Spouse Shares

***Ivey v. Ivey*, No. (Ala. Sept. 8, 2017)**
Under *Ala. Code* § 43-8-90, if a testator's will does not provide for the testator's surviving spouse who married the testator after the execution of the will, the omitted spouse is entitled to an intestate share of the testator's estate unless one of two exceptions applies: (1) if it appears from the will that the omission of the surviving spouse was intentional or (2) if the testator provided for the surviving spouse with transfers outside the will with the intent that those transfers were in lieu of a provision in the will. Evidence was held insufficient to demonstrate that the inter vivos transfers were actually intended to be provided in lieu of a provision in the will.

Scope of Discovery

***Ex parte Altapointe Health Systems, Inc.*, No. 1160544 (Ala. Sept. 8, 2017)**
Plurality concluded that some discovery requests were privileged under the "quality assurance" privilege of *Ala. Code* § 22-21-8, because they concerned Altapointe's internal investigation of an incident. However, interrogatory as to whether Altapointe had knowledge of prior "aggressive acts" by attacker was relevant and could be answered without violating the psychotherapist-patient privilege. *Ala. Code* § 34-26-2, *Ala. R. Evid*. 503.

Real Property

***Hinote v. Owens*, No. 1160268 (Ala. Sept. 8, 2017)**
Rule of repose is not a device to displace title and cannot be used against one with valid record title by one who clearly does not have title. The method of divesting title from other cotenants would be to establish adverse possession. Thus, suit for sale for division and for determination of cotenancy was not barred by the rule of repose, simply because the parties' claims to title arose more than 20 years before.

AMLA

***McNamara v. Benchmark Insurance Company*, No. 1151314 (Ala. Sept. 8, 2017)**
AMLA's statute of limitations, *Ala. Code* § 6-5-482(b), applied to indemnity action brought against medical providers responsible for medical injuries.

UM/UIM

***Easterling v. Progressive Specialty Ins. Co.*, No. 1150833 (Ala. Sept. 15, 2017)**
Bankruptcy discharge of tortfeasor did not bar injured plaintiff from recovering UIM benefits under the plaintiff's own insurance policy.

Rule 41

***Walker Brothers Investment, Inc. v. City of Mobile*, No. 1160203 (Ala. Sept. 15, 2017)**
"Motion to dismiss" was actually a notice of dismissal under Rule 41(a)(1)(i), which upon filing divested the circuit court with jurisdiction to do anything else.

Arbitration

***Nation v. Lydmar Revocable Trust*, No. 1160660 (Ala. Sept. 23, 2017)**
Defendants who successfully compelled arbitration were not obligated to commence arbitral process under AAA Commercial Rules; therefore the circuit court erred in reversing its prior order compelling arbitration and returning case to trial docket based on defendants' failure to commence arbitration.

State Agent Immunity

***Ex parte Venter*, No. 1160539 (Ala. Sept. 23, 2017)**
Fire department employee driving on non-emergency business after an afternoon of patrolling, in conjunction with stopping at grocery store, was not entitled to state-agent immunity in action arising from MVA.

Injunctions

***Slamen v. Slamen*, No. 1160578 (Ala. Sept. 23, 2017)**
Preliminary injunction was improper; underlying causes of action were solely actions at law that allege only a monetary damage.

Wills; Witness Requirements

***Pickens v. Estate of Finn*, No. 1160202 (Ala. Sept. 29, 2017)**
Notary who signs a will in capacity as a notary can be considered valid witness to will to satisfy the two-witness requirement under *Ala. Code* § 43-8-131, as long as the notary observed the testator acknowledging the will as his or witnessed the signature.

Tribal Immunity

***Rape v. Poarch Band of Creek Indians*, No. 1111250 (Ala. Sept. 29, 2017), *Harrison v. PCI Gaming Authority*, No. 1130168, (Ala. Sept. 29, 2017), *Wilkes v. PCI Gaming Authority*, No. 1151312 (Ala. Sept. 29, 2017)**

These three appeals address questions of Indian Tribal immunity and subject-matter jurisdiction in tort cases and involving other claims brought against Indian gaming enterprises. In *Wilkes* and *Harrison*, the court refused extended tribal immunity to ordinary tort claims arising from a tribe's interaction with non-tribal members: "the Court declines to extend the doctrine of tribal immunity to actions in tort, in which the plaintiff has no opportunity to bargain for a waiver and no other avenue for relief." (In *Harrison*, the parties disputed whether the accident occurred on Indian land or in state territory.) In *Rape*, the claim concerned an allegedly unpaid jackpot on a video gaming machine; the court found it unnecessary to address the immunity and jurisdictional questions, however, because under federal law the Tribe had exclusive jurisdiction, but if Alabama law governed, Alabama courts could not grant relief due to illegality of gambling.

Arbitration; Discovery

***Ex parte Locklear Chrysler Jeep Dodge, LLC*, No. 1160372 (Ala. Sept. 29, 2017)**

Trial court exceeded its discretion by allowing merits discovery before the resolution of arbitration questions.

Arbitration; Nonsignatory

***Locklear Automotive Group, Inc. v. Hubbard*, No. 1160335 (Ala. Sept. 29, 2017)**

Plaintiffs alleged that they were victims of identity theft resulting from personal information they had provided Locklear CJD (another Locklear entity, not the appellant) in order to explore the possibility of financing the purchase of a vehicle from Locklear CJD. Locklear Group (the appellant) moved to compel arbitration; all but one trial court granted arbitration. The supreme court held that (1) Locklear Group's argument that the arbitrator must decide questions of arbitral scope was not adequately raised in the trial court, and thus could not be a basis for reversal in the cases wherein reversal was sought; (2) the arbitration agreement was confined to "dealer" and the customer, and thus was not broad enough

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to cover Locklear Group, which was not the dealer, for third-party enforcement of the arbitration agreement; (3) however, claims brought against Locklear Group were intertwined with claims against the signatory to arbitration, Locklear CJD, and thus those intertwined claims against Locklear Group were subject to arbitration where Locklear CJD was also sued; (4) in one of the consolidated appeals, the arbitration agreement entered into 2013, which covered all claims "relating to" a 2013 sale transaction, was not broad enough to cover claims arising from wrongful dissemination of personal information, where the personal information was provided to Locklear CJD in connection with a different potential transaction in 2015; and (5) in one of the appeals, in the transcribed hearing on arbitration in the circuit court, Locklear clearly raised the issue of "arbitrator should decide arbitrability issues," and the arbitration agreement was broad enough to relegate issues of arbitrability to the arbitrator.

Fraud; Evidence; Punitive Damages

***Alabama River Group, Inc. v. Conecuh Timber, Inc.*, No. 1150040 (Ala. Sept. 29, 2017)**

In a sprawling 122-page decision, the court affirmed in relevant part the trial court's judgment on jury verdict for plaintiff wood dealers asserting fraud claims against ARG concerning alleged misrepresentations concerning federal subsidies available for certain wood products. Among the court's holdings: (1) the record contained substantial evidence that ARG misrepresented how much of the wood dealers' wood material was eligible for BCAP subsidies, and therefore misrepresented the total price the wood dealers would receive; (2) under Alabama law promissory fraud and misrepresentation are not mutually exclusive; (3) jury instructions on alternative theories of express and implied contract were proper; (4) trial court did not exceed its discretion in excluding state committee report regarding the federal subsidy program, because although report was a public record under Rule 803(8), *Ala. R. Evid.*, multiple circumstances indicated lack of trustworthiness; (5) pre-suit letter was inadmissible under Rule 408; (6) in considering an attack on punitive damages based on lack of "clear and convincing evidence," any weighing of evidence to meet "clear and convincing" is to be done by the trier of fact, not the reviewing court; (7) awards of punitive damages were supported by the *Gore* and *Campbell* guideposts, but several punitive damage awards for plaintiffs would need to be remitted to fall within a 3:1 ratio.

From the Alabama Court of Civil Appeals

Arbitration; Summary Judgment

***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)**

The plurality affirmed the trial court's denial of quantum meruit fee requested by firm via attorneys' lien; evidence offered by firm 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.

Workers' Compensation

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

Factual issues regarding the employee's alleged contraction of scabies and the causation of her psychological injury precluded summary judgment to employer. Trial court is not confined to the consideration of solely the testimony of medical experts in determining causation.

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.

Insurance

***Thomas v. Safeway Insurance Company of Alabama, Inc.*, No. 2160613 (Ala. Civ. App. August 4, 2017)**

Summary judgment for insurer in first-party bad faith case affirmed; insured undisputedly failed to provide medical records and failed to sign medical authorization form required by insured, contravening policy terms.

Return-to-Work Statute

***Grieser v. Advanced Disposal Services Alabama, LLC*, No. 2160290 (Ala. Civ. App. August 11, 2017)**

Trial court erred in declining to consider evidence of the employee's vocational impairment based on that defense, based in part on the return-to-work statute, *Ala. Code* § 25-5-57(a)(3)i.

Abortion Rights

***In re Anonymous*, No. 2160920 (Ala. Civ. App. Sept. 7, 2017)**

Under *Ala. Code* § 26-21-1, unemancipated minor must have parental consent for abortion unless juvenile court determines that minor is of sufficient age and maturity. Juvenile court found minor was sufficiently mature and well informed to make abortion decision, but then denied the petition for waiver. The CCA reversed, holding that the juvenile court's finding alone was sufficient to require that the petition be granted.

Taxation; International Sales

***P.J. Lumber Company, Inc. v. City of Prichard*, No. 2160627 (Ala. Civ. App. Sept. 23, 2017)**

City's business-license tax, which was based in part on P.J. Lumber's gross receipts for exported goods, was not an impost or duty of the type contemplated by the Import-Export Clause of the U.S. Constitution.

The United States Supreme Court has been in recess over the summer.

From the Eleventh Circuit Court of Appeals

Employment Law

***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

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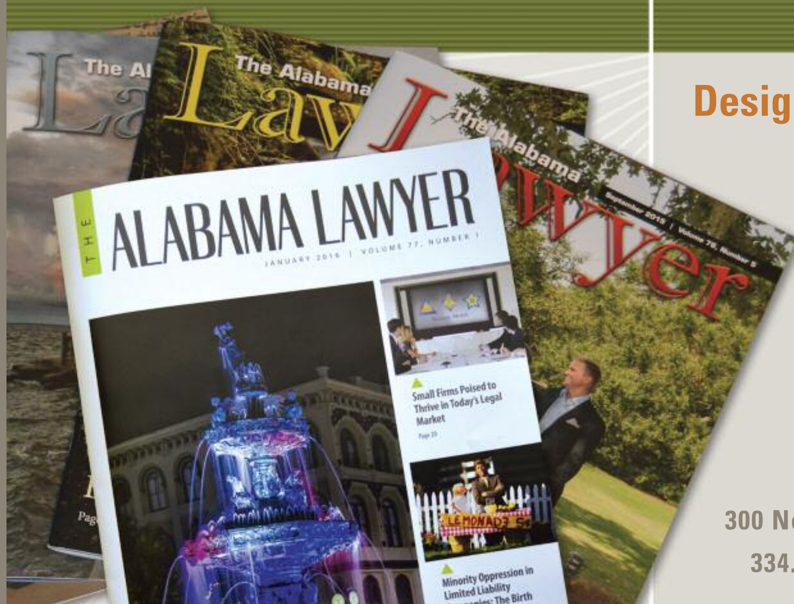

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vacated two-year-old dismissal of the employee's administrative charge and DOJ issued new notice of right to sue. Held: Commission lacked authority to issue subsequent notice to sue, and employee was not entitled to equitable tolling because she failed 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)**

Though the district court concluded that Rodriguez had engaged in protected activity, it nonetheless granted summary judgment because he voluntarily left position. The Eleventh Circuit reversed, holding that Rodriguez did not voluntarily leave his employment with Doral, but rather was effectively terminated.

Class Actions

***Love v. Wal-Mart Stores, Inc.*, No. 15-15260 (11th Cir. August 3, 2017)**

In *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), the Supreme Court reversed the certification of a nationwide class of female Wal-Mart employees claiming gender discrimination. Thereafter, the unnamed plaintiffs in *Dukes* filed new actions seeking certifications of regional classes. The appellants, a group of would-be class members of one of these regional class actions, appealed the district court's dismissal of the class claims and the denial of the appellants' motion to intervene. The Court held that the appeal from the order dismissing the class claims was untimely filed, because it was filed more than 30 days following the stipulated dismissal which triggered the right of appeal. The Court also held that the appeal from the order denying the appellants' motion to intervene was moot because the only basis on which intervention was sought was to appeal the dismissal of the class claims.

Arbitration; Class Actions

***Jones v. Waffle House, Inc.*, No. 16-15574 (11th Cir. August 7, 2017)**

Arbitration agreement contains a broad, valid and enforceable delegation provision that expresses the parties' clear and unmistakable intent to arbitrate gateway questions of arbitrability, including questions concerning the interpretation, applicability, enforceability and formation of the agreement. Defendant did not engage in "class tampering" by entering into post-lawsuit arbitration agreement covering claims joined in lawsuit; arbitration agreement was not an improper ex parte communication with a represented party.

FLSA; Rehabilitation Act

***Boyle v. City of Pell City*, No. 16-16362 (11th Cir. August 10, 2017)**

District court properly dismissed claims brought under the FLSA and granted summary judgment on Rehabilitation Act claims, as well as properly dismissed state-law contract-based claims. As to FLSA claims, there was no allegation that plaintiff was not compensated at his "regular rate." As to state law claims, plaintiff failed to satisfy the two-year limit in the municipal non-claims statute under Alabama law, *Ala. Code* § 11-47-23. As to Rehabilitation Act failure-to-accommodate claim, Boyle did not meet his burden of identifying a reasonable accommodation; although the city allowed him to perform foreman duties for several years, there is no evidence that the position, which was officially held by Crowe, was ever vacant during this time. The city was not required to reassign Boyle to a non-vacant position, nor was it obligated to create a second foreman position or remove Crowe from the foreman position in order to create a vacancy. There was also no substantial evidence of constructive discharge.

TCPA

***Schweitzer v. Comenity Bank*, No. 16-10498 (11th Cir. August 10, 2017)**

Under *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014), TCPA consent can be orally revoked. The Court extended *Osorio* to hold that the Act permits a consumer to partially revoke her consent to be called by means of an automatic telephone-dialing system.

First Amendment

***FF Cosmetics FL, Inc. v. City of Miami Beach*, Nos. 15-14394 and 15-15256 (11th Cir. August 10, 2017)**

The Court affirmed the district court's grant of a preliminary injunction to stop enforcement of two municipal ordinances restricting hand-billing and commercial solicitation. Ordinance appeared not narrowly tailored because city failed to consider numerous and obvious less-burdensome alternatives. Ordinance regulated both commercial and non-commercial speech and thus could be challenged on overbreadth grounds.

FCRA

***Pedro v. Transunion LLC*, No. 16-13404 (11th Cir. August 24, 2017)**

Consumer reporting agency did not adopt an objectively unreasonable interpretation of FCRA, and therefore had no FCRA liability, by adversely reporting on the credit report of a credit card account "authorized user" a default by the responsible party on the account, even though the authorized user had no financial responsibility for the account.

TVA

***Thacker v. TVA*, No. 16-15105 (11th Cir. August 22, 2017)**

While Thacker and his friend were participating in a local fishing tournament on the Tennessee River, TVA was attempting to raise a downed power line that was partially submerged in the river. The power line, which crossed the river, had become lax earlier in the day when a pulling cable failed during a conductor-replacement project. At the same moment that TVA began lifting the conductor out of the water, the fishing partners' boat passed through the area at a high rate of speed, and the conductor struck both Thacker and the friend, seriously injuring Thacker. The district court dismissed the case based on discretionary-function immunity. The Eleventh Circuit affirmed, holding that the discretionary-function exception to the government's sovereign-immunity waiver in the TVA Act applied to TVA's activities.

Statutory Construction

***Ela v. Destefano*, No. 16-11548 (11th Cir. August 30, 2017)**

Use of "may" in 18 U.S.C. § 2724, the damage provision of the DPPA, supports the district court's discretion to set damages,

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rather than a more wooden absolute amount per-violation interpretation.

Pregnancy Discrimination; Title VII

Hicks v. City of Tuscaloosa, No. 16-13003 (11th Cir. Sept. 7, 2017)

The Court affirmed the district court's judgment on jury verdict for officer (Hicks) and against municipality on claims under the Pregnancy Discrimination Act and for retaliation under FMLA, arising from officer's reassignment and demotion from narcotics unit to patrol division after childbirth and taking FMLA leave and her alleged constructive discharge for not submitting to wearing a fitted ballistic vest due to interference with lactation. At the post-judgment stage, compliance with the McDonnell Douglas framework is of limited significance, and thus comparator evidence may not be as closely reviewed. As to the constructive discharge claim, lactation and breastfeeding are "related medical conditions" to pregnancy or childbirth, and thus covered by the PDA.

Antitrust

Quality Auto Painting of Roselle, Inc. v. State Farm Indemnity Co., No. 15-14160 (11th Cir. Sept. 7, 2017)

The Court reversed the district court's Rule 12(b)(6) dismissal of an antitrust action brought by collision centers against insurers, alleging that the insurance companies engaged in two lines of antitrust-prohibited tactics in pursuit of a single goal: to depress the shops' rates for automobile repair. Complaint alleged multiple specific market-manipulation tactics designed to set a depressed market rate to benefit only the insurance companies.

Bankruptcy; Equitable Estoppel

Slater v. U.S. Steel Corp., No. 12-15548 (11th Cir. Sept. 18, 2017) (_en banc_)

Prior circuit precedent and the panel's opinion following the same held that the mere fact of the plaintiff's nondisclosure of a claim or suit in bankruptcy schedules was sufficient to establish the requisite "mockery of the system" or "undermining of the system" element in applying equitable estoppel to bar the claims, even if the plaintiff corrected his bankruptcy disclosures after the omission was called to his attention and the bankruptcy court allowed the correction without penalty. The *en banc* court reversed that prior precedent, articulating a multi-factor test for use.

FDCPA

Hart v. Credit Control LLC, No. 16-17126 (11th Cir. Sept. 22, 2017)

Voicemail message from debt collector requesting a return call was a "communication" under the FDCPA, if the voicemail reveals that the call was from a debt collection company and provides instructions and information to return the call. However, the Court stopped short of requiring individual callers to identify themselves by name to avoid violating FDCPA; "meaningful disclosure" under the FDCPA is provided as long as caller reveals the nature of debt collection company's business, which can be satisfied by disclosing that call is for debt collection company and its name.

First Amendment Employment; Qualified Immunity

Gaines v. Wardynski, No. 16-15583 (11th Cir. Sept. 21, 2017)

Clearly established law for qualified immunity purposes is not defined at a high level of generality, but instead is "particularized" to the facts of the case. In this case, failing to promote an employee after her father had criticized her employer was not so egregious as to violate the First Amendment on its face, and plaintiff failed to point to materially similar factual cases; therefore school administrator was entitled to qualified immunity.

Arbitration

Johnson v. Keybank NA, No. 15-10779 (11th Cir. Sept. 26, 2017)

The Court reversed the district court's denial of a motion to compel arbitration based on a finding of unconscionability, holding (1) under the summary judgment-like standard under section 4 of the FAA, plaintiff's alleged lack of memory on receiving a document did not create fact question on contract formation; and (2) arbitration agreement was neither procedurally nor substantively unconscionable.

RECENT CRIMINAL DECISIONS

From the Court of Criminal Appeals

Hearsay

***Weatherford v. State*, CR-16-0582 (Ala. Crim. App. Sept. 8, 2017)**

Probation revocation was improper because it was based solely on hearsay evidence. Two judges dissented, noting that the state's evidence included testimony both that an investigator had observed the victim's injuries and that the defendant admitted having struck the victim.

Rule 404(B); Capital Cases

***Russell v. State*, CR-13-0513 (Ala. Crim. App. Sept. 8, 2017)**

The court affirmed the defendant's capital murder conviction, concluding, among other holdings, that the state's evidence that he told an acquaintance that he "wasn't going back to jail" and had stolen his gun was admissible under *Ala. R. Evid.* 404(b). However, it reversed the defendant's death sentence due to the trial court's reliance on a certain aggravating factor–that he was under a sentence of imprisonment at the time he committed the murder–in overriding the jury's recommendation and imposing the death penalty. The record was silent regarding whether the defendant was either represented by counsel or had waived his right to counsel during the municipal court proceedings resulting in the sentence of imprisonment. Remand was required for trial court to conduct new penalty-phase proceeding without evidence of the municipal court conviction.

Search and Seizure

***State v. Williams*, CR-15-1066 (Ala. Crim. App. Sept. 8, 2017)**

Trial court erred in suppressing evidence of cocaine found in defendant's pocket following a traffic stop. Traffic stop was proper after defendant failed to signal his turn, and, upon approach by officer, his nervousness, refusal to exit his vehicle and repeated gestures of reaching into his pants pocket provided reasonable suspicion to believe that he was involved in criminal activity and was armed. During the subsequent pat-down search, the defendant's admission that his pocket contained cocaine provided probable cause for the officer to seize the drugs.

DNA Evidence

***Davis v. State*, CR-15-1485 (Ala. Crim. App. Sept. 8, 2017)**

Among other holdings, the court found no error in the admission of DNA evidence from both the defendant and the victim. The defendant was not entitled the presence of counsel at the taking of his saliva sample for DNA testing, because *Ala. R. Crim. P.* 16.2 permits, but does not require, the presence of counsel at the taking of the sample. Further, the sample was taken before the initiation of formal adversarial proceedings and was therefore not a "critical stage" of his proceedings. The defendant had no standing to challenge the taking of the victim's DNA sample. However, because the defendant's convictions for felony murder and intentional murder arising from the same killing constituted double jeopardy, the court remanded for the trial court to vacate one of the convictions.

Sentencing Standards

***Showers v. State*, CR-15-1387 (Ala. Crim. App. Aug. 11, 2017)**

The court reversed the defendant's consecutive base sentences (97 months) and consecutive split sentences (18 months) on his guilty plea convictions of unlawful distribution of a controlled substance. Length of these consecutive sentences was greater than that authorized by the presumptive sentencing standards for a single "sentencing event" regarding these offenses.

From the Eleventh Circuit Court of Appeals

Capital Punishment (Alabama)

***Grayson v. Warden, Commissioner ALDOC*, No. 16-16876 (11th Cir. Sept. 1, 2017)**

In 2014, the state substituted midazolam, a benzodiazepine sedative, for pentobarbital, the first of the three drugs used in executions. It also substituted rocuronium bromide for pancuronium bromide as the second drug. Potassium chloride remained the third drug. A number of Alabama death-row inmates then challenged Alabama's revised execution procedure on Eighth Amendment grounds. The district court granted summary judgment to the state. The Eleventh Circuit reversed. The upshot of the opinion is that the Court has found substantial evidence to support the claim that the state's method of execution, as revised, works an Eighth Amendment violation.

BAR BRIEFS

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- **Michael W. Jackson**, district attorney for the Fourth Judicial Circuit, has been named to the Centre College Alumni Association Board of Directors.

- **Kasdin Miller Mitchell** of Washington, D.C. has been selected a 2017 John Marshall Fellow.

- The Federal Magistrate Judges Association (FMJA), during its annual convention in August, presented United States **Magistrate Judge William E. Cassady** with its Founders Award. This award is the most prestigious honor bestowed by the FMJA and is presented to those who have made valuable and lasting contributions to the Magistrate Judges system of the United States courts.

- **Marcus M. Maples**, a shareholder in the Birmingham office of Baker Donelson, was recently elected to a one-year term as president-elect of the Alabama Lawyers Association.

- **Frank Woodson**, who practices in Beasley Allen's mass torts section, was inducted as president of the Alabama Association for Justice at the organization's annual meeting in June.

- Bradley recently announced that **Marc James Ayers**, a partner in the firm's Birmingham office, has been reappointed to the Alabama Advisory Committee to the U.S. Commission on Civil Rights. He previously served a two-year term (2014–2016).

  Tripp Haston, a partner in Bradley's Birmingham office, has been appointed the 2018 dean of the Corporate Counsel College.

  Bradley also announced that **Jimmy Long**, a partner in the Birmingham office, has been appointed to the Board of Trustees of the American Institute on Federal Taxation.

- **Steven P. Gregory,** of the Gregory Law Firm PC, was recently named to the Commercial Panel of Arbitrators for the American Arbitration Association.

- Hand Arendall LLC announced that member **J. Burruss "Buzzy" Riis** was elected to a three-year term on the Executive Council for the Association of Defense Trial Attorneys.

- The American College of Trial Lawyers installed **Samuel H. Franklin**, of Lightfoot, Franklin & White LLC in Birmingham, as its 68th president to lead the college during the coming year. "It is my great privilege and honor to serve as the president of the college," said Franklin.

- Littler shareholder **Charles A. Powell IV** has been elected a fellow to the College of Labor and Employment Lawyers in the class of 2017.

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OPINIONS OF THE GENERAL COUNSEL

J. Douglas McElvy
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Lawyer's Indemnification of Defendants for Unpaid Liens

QUESTION:

May a plaintiff's or claimant's lawyer, on behalf of his client, personally indemnify an opposing party, their insurer or their lawyer for any unpaid liens or medical expenses? May a lawyer request or require another lawyer to personally indemnify the lawyer's client against any unpaid liens or medical expenses as a condition of settlement?

ANSWER:

Pursuant to Rules 1.7 and 1.8(e), *Alabama Rules of Professional Conduct*, a plaintiff's or claimant's lawyer, on behalf of his client, may not agree to personally indemnify the opposing party for any unpaid liens or medical expenses due to be paid from the settlement proceeds or underlying cause of action unless the liens or expenses are known and certain in amount at the time of the proposed settlement. Likewise, a lawyer representing the defendant or the defendant's insurer may not request or require the opposing lawyer to personally indemnify defendant(s) for unpaid liens or medical expenses as a condition of settlement unless such liens and expenses are known and certain in amount at the time of the proposed settlement.

If the amount of the lien or expense is known at the time of settlement, the plaintiff's attorney may agree on behalf of the client to use the settlement funds to satisfy such liens or expenses, and, thereby, relieve the defendant or his insurer of any further liability. However, a settlement agreement may not contain language requiring an attorney to indemnify an opposing party, their insurer or their lawyer for unknown liens or expenses or where the amount of such liens or expenses is unknown at the

time of settlement. Such a request would violate Rule 8.4(a), *Ala. R. Prof. C.,* which prohibits an attorney from "induc(ing) another" to violate the *Rules of Professional Conduct.*

DISCUSSION:

The Disciplinary Commission has been asked to issue a formal opinion regarding the growing trend of defense counsel requiring, as a condition to settlement, that plaintiff's counsel personally indemnify the defendant, his insurer and counsel against any unpaid liens, medical bills or third-party claims against the plaintiff arising from the litigation. In examining the issue, the Disciplinary Commission notes that 13 bars have issued formal opinions expressly prohibiting plaintiff's counsel from entering into such indemnification agreements.[1] In finding that such indemnification agreements are prohibited, these bars found that such agreements may create an impermissible conflict of interest and/or constitute improper financial assistance to the client.

For instance, the New York City Bar Association determined that such indemnity agreements by a client's lawyer to "guarantee a client's obligations to third party insurers . . . amounts to 'guaranteeing financial assistance to the client.'" Rule 1.8(e), *Ala. R. Prof. C.,* provides as follows:

RULE 1.8 CONFLICT OF INTEREST:
PROHIBITED TRANSACTIONS

* * *

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client;

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of financial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer; and

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(4) in an action in which an attorney's fee is expressed and payable, in whole or in part, as a percentage of the recovery in the action, a lawyer may pay, for his own account, court costs and expenses of litigation. The fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

Under Rule 1.8(e), a lawyer may not provide any financial assistance to a client except in limited circumstances as set out in the rule. An indemnification agreement in which the lawyer agrees to be personally liable for any outstanding liens or medical expenses incurred by the client would not fall under any of the exceptions to the rule and would, therefore, constitute impermissible financial assistance to the client.

Other bars have focused on the fact that indemnification agreements create an impermissible conflict between the financial interests of the lawyer and those of the client. Rule 1.7(b), *Ala. R. Prof. C.,* provides as follows:

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

* * *

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

As noted by the Arizona Bar in Ethics Op. 03-05 "[t]he mere request that an attorney agree to indemnify Releasees against lien claims creates a potential conflict of interest between the claimant and the claimant's attorney." Such a conflict involves the lawyer's own financial interests in seeking to avoid such exposure and liability for the client's debts and the client's own desire to settle the matter on favorable financial terms.

While the Disciplinary Commission agrees that a plaintiff's or claimant's lawyer may not generally indemnify an opposing party, their insurer or their lawyer for any unpaid liens or medical expenses, a lawyer may agree, on behalf of the client, to use settlement funds to satisfy liens and expenses that are known and certain at the time of settlement. In order to do so, the amount of the lien or expense must be known at the time of the settlement. The liens or expenses to be satisfied under the terms of the settlement must be included in the settlement agreement. Further, the client must agree, in writing, that the settlement funds will be used to satisfy those liens or expenses. Such would be akin to the lawyer's issuing a letter of protection to the opposing party, their insurer or their lawyer that the settlement funds will be used to satisfy a particular lien or expense. Once an agreement has been entered into amongst the parties, the plaintiff's or claimant's lawyer would have an ethical obligation to ensure the payments are made.

Just as a plaintiff's or claimant's lawyer may not agree to sign a general indemnification agreement on behalf of a client, a lawyer representing a defendant may not require the plaintiff's lawyer to personally and generally indemnify the defendant against any unpaid liens or medical expenses as a condition of settlement. Requiring general indemnification as a condition of settlement is analogous to when a lawyer is required to agree to refrain from representing other persons against the defendant in exchange for settling a claim on behalf of a client. Rule 5.6(b), *Ala. R. Prof. C.*, expressly prohibits any lawyer from offering or making any agreement that would place a restriction on a lawyer's right to practice as part of a settlement between private parties. Just as a lawyer cannot participate in making or requiring any agreement that would limit a lawyer's right to practice, a lawyer cannot agree to or require another lawyer to personally enter into a general indemnification agreement on behalf of a client.

Further, Rule 8.4(a), *Ala. R. Prof. C.,* provides, in part, as follows:

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the *Rules of Professional Conduct*, knowingly assist or induce another to do so, or do so through the acts of another . . .

As discussed previously, a plaintiff's or claimant's lawyer, on behalf of the client, may not agree to personally and generally indemnify the opposing party and his lawyer against all unpaid liens and medical expenses without violating Rules 1.7(b) and 1.8(e), *Ala. R. Prof. C.* Rule 8.4(a) provides that is an ethical violation for any lawyer to "induce another" to "violate the *Rules of*

Professional Conduct." As such, a lawyer cannot require or ask opposing counsel to agree to generally indemnify as a condition of settlement since that would constitute inducing and assisting another to violate the *Rules of Professional Conduct*.

[Note: Formal Opinion RO-2011-01 was revised on July 12, 2017 by the Disciplinary Commission of the Alabama State Bar. The revision is in reference to a point requiring clarification in the last paragraph on the first page. In the second sentence of the paragraph, the original opinion read, "However a settlement agreement may not contain language indemnifying an opposing party, their insurer or their lawyer… " This revised opinion will now read, "However a settlement agreement may not contain language *requiring an attorney to indemnify* an opposing party, their insurer or their lawyer…".] [RO 2011-01] ▲

Endnote

1. See Arizona Opinion 03-05, Indiana Opinion No. 1. of 2005, Illinois Adv. Op. 06-10, Kansas Op. 01-05, Missouri Formal Op. 125, New York City Bar Op. 2010-03, North Carolina Ethics Op. RPC 228, South Carolina Ethics Adv. Op. 08-07, Tennessee Formal Op. 2010-F-154, Vermont Ethics Op. 96-05, Wisconsin Formal Op. E-87-11 and Washington State Bar Op. 1736.

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IN THE SUPREME COURT OF ALABAMA

October 12, 2017

ORDER

IT IS ORDERED that this Court's order of August 16, 2017, amending Rule 33(a) and Rule 33(d), *Alabama Rules of Disciplinary Procedure*, effective January 1, 2018, is hereby rescinded;

IT IS FURTHER ORDERED that Rule 33(a) and Rule 33(d), *Alabama Rules of Disciplinary Procedure*, be amended to read in accordance with Appendices A and B, respectively, to this order;

IT IS FURTHER ORDERED that these amendments are effective January 1, 2018;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rule 33:

> "Note from the reporter of decisions: The order amending Rule 33(a) and Rule 33(d), Ala. R. Disc. P., effective January 1, 2018, is published in that volume of *Alabama Reporter* that contains Alabama cases from ___ So. 3d."

Stuart, C.J., and Bolin, Parker, Murdock, Shaw, Main, Wise, Bryan, and Sellers, JJ., concur.

APPENDIX A

Rule 33(a), *Alabama Rules of Disciplinary Procedure*

(a) Lawyer to Bear Costs of Publication. In a case involving the imposition of discipline consisting of disbarment, suspension, public probation, or public reprimand with general publication, or the transfer of a lawyer to disability inactive status, notice shall be published in the official Bar publication, on the official Alabama State Bar Web site, and in a newspaper of general circulation in each judicial circuit of the State of Alabama in which the disciplined or disabled lawyer maintained an office for the practice of law. The costs of publishing the newspaper notice shall be assessed against the disciplined or disabled lawyer. In a case involving the imposition of a reprimand, without general publication, notice of such reprimand will be published only in the official Bar publication.

APPENDIX B

Rule 33(d), *Alabama Rules of Disciplinary Procedure*

(d) Taxable Costs. Taxable costs of the proceeding shall include:

(1) Investigative costs, including travel and out-of- pocket expenses;

(2) Court reporter's fees;

(3) Copy costs;

(4) Telephone charges;

(5) Fees for translation services;

(6) Witness expenses, including mileage, per diem, and actual and necessary expenses; provided, however, that witnesses may be compensated for travel to and attendance at hearings only, and shall be compensated in the same manner and at the then prevailing rate of compensation as provided for in-state travel for state employees and for mileage for state employees or as otherwise directed by the Board of Bar Commissioners of the Alabama State Bar;

(7) Expenses of a Disciplinary Hearing Officer, members of the Disciplinary Board, and members of the Disciplinary Commission;

(8) Expenses incurred by the Office of General Counsel in the proceedings; and

(9) An administrative fee in the amount of $1,000.00 when costs are assessed in favor of the Bar.

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