



2018-19 ASB PRESIDENT
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On The Cover

Alabama State Bar
President Sam Irby of
Fairhope with his family

Pictured left to right are
Grier Donald, D Hunt,
Lee Irby Hunt, President
Irby, Ginger Irby,
grandchild Enzo, Allison
Grahovec, grandchild
Asher and Tyler
Grahovec.

—Photograph by Jeff Kennedy,
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P R E S I D E N T ' S P A G E

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Listening Is Key

One of the benefits of participating in a contested race for Alabama State Bar president is that I spent a good deal of time travelling around the state, meeting and talking with individual members of the Alabama State Bar. This experience was invaluable. What I learned from countless conversations with state bar members has greatly influenced what I would like to accomplish during my presidency.

Speaking to various legal groups about the state bar and why I decided

to run for president forced me to think about the role and function of the organization. As I see it, the Alabama State Bar has two distinct duties: One is to serve the public, and the other is to serve its members. Both of these duties are equally important. Services which the state bar provides to the public include: (1) communication, (2) lawyer discipline, (3) volunteer lawyer programs, (4) the administration of justice, (5) education, (6) lawyer licensing and (7) charitable outreach. Services that the



Enjoying the President's Closing-Night Family Dinner are none other than 2018-2019 President Augusta Dowd and President-elect Sam Irby...



...and Executive Director Phillip McCallum and President-elect Sam Irby.

Alabama State Bar provides to its members include: (1) communication, (2) local bars, (3) member benefits, (4) education, (5) wellness, (6) operations, (7) the administration of justice, (8) diversity and (9) licensing. It is this second duty, the duty owed by the state bar to its members, which I intend to focus on while serving as president.

Meeting so many lawyers in different parts of the state and different areas of practice highlighted for me the diverse nature of our membership. We are a mandatory bar so all lawyers in Alabama are required to be members. Diversity is a strength, but it also creates challenges. After talking with various kinds of lawyers, I believe that one of the biggest issues facing our profession is the gap between large-firm lawyers and solo/small-firm lawyers, and between city lawyers and rural lawyers. It is important that we all come together as one bar. Doing so is in the best interest of all practicing lawyers, and the Alabama State Bar has an important role to play in making this happen.

What I heard from our membership is that there needs to be better communication between the Board of Bar Commissioners and individual state bar members. To meet its duty of providing service to individual members, the Alabama State Bar must be transparent to its members and should develop a system that allows its members to participate, play a role and have a vote. The state bar needs to reach out and communicate better with all practicing lawyers so that we can work together to improve our profession.

My main goals as president are to:

- Promote full and equal participation in the Alabama State Bar by its members;
- Reach out to improve communications between all members of the Alabama State Bar;

- Increase lawyer understanding of how the Alabama State Bar works;
- Improve communications between the Executive Council of the Board of Bar Commissioners, the Alabama State Bar staff, the Alabama State Bar Board of Bar Commissioners and the members of the Alabama State Bar;
- Increase the effectiveness and efficiency of state bar sections and committees;
- Actively pursue additional benefits for members; and
- Provide a proactive voice to represent the interests and concerns of our members.

I cannot accomplish these goals on my own, of course. Fortunately, I will be aided in this endeavor by a very capable state bar staff, by members of the Executive Council and by the Board of Bar Commissioners. The Executive Council—all volunteers who will spend a great deal of time this year giving service to the state bar—includes Taze Shepard (vice president), Tom Perry (member), Jana Garner (member), Monet Gaines (member), Fred Helmsing (ex officio), Rachel Miller (ex officio), Christy Crow (president-elect) and Augusta Dowd (past president). Phillip McCallum, executive director of the Alabama State Bar, will act as secretary of the Executive Council. We will also work closely with General Counsel Roman Shaul.

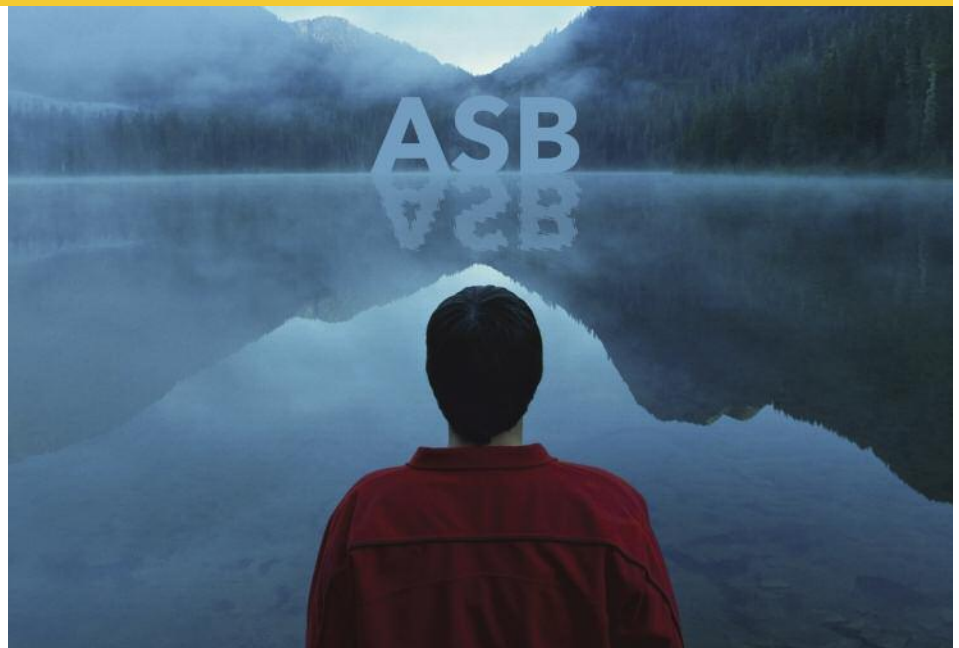
Most importantly, though, I promise to *keep* listening to all of the individual members out there. During my term, I will be travelling along with state bar staff and members of the Executive Council to most of the circuits to listen to what our members have to say. I want to hear from you about your thoughts on how the Alabama State Bar can better serve its members.

I thank Mary Margaret Bailey for her assistance in preparing this article. ▲



EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum
phillip.mccallum@alabar.org



Reflecting on a Year of Change

As the summer winds down, I am able to reflect on my first year as executive director of the Alabama State Bar. It's been a year of change for me as I've wound down my law practice and taken on a role that is outside my comfort zone. The challenges I've faced have allowed me to better understand the makeup of this bar. No two lawyers are alike and harnessing that idea is crucial to the development of this organization. We've made headway during my first year in getting out the message: lawyers matter, the courts matter and this profession adds economic value to every single community in the state.

Last year, President Augusta Dowd, other bar leaders and I rolled out the State of the Bar, which, in broad terms, entirely replaces "Roadshows," but, more

specifically, offers a program in which the bar president and I visit with local bar associations across the state. We've been able to interact with members face to face, hear their concerns and, most importantly, be present in communities where "the bar" carries only regulatory meaning.

With President Dowd's support, we decided to highlight the growing issue of funding the judicial branch. This topic impacts every lawyer and judge in Alabama. We feel that it is absolutely critical that the legal community is aware of the judicial branch's lack of funding, the fees associated with the courts and where they go, the positive economic impact the courts have on their local communities and how lawyers can be heard in the legislature. At this point, we



Executive Director Phillip McCallum presents outgoing President Augusta Dowd with a small token of appreciation for her service.

have visited with 53 local bars and plan to visit them all. For those of you who missed us, we encourage you to visit www.alabar.org/resources/judicial-court-information/ to access various resources containing judicial information. In addition to the county-by-county disbursements supplied to us by the Supreme Court of Alabama, the Public Affairs Council of Alabama (PARCA) released a study in 2014 reviewing our current

court cost structure. This study is still relevant given the updated 2017 numbers we have available. As noted on our website, PARCA's court costs study found the current structure to be archaic, inefficient and without transparency. PARCA further found that the use of court costs as a source of court funding is inadequate. The unfortunate reality is that the current system, though deemed inadequate by reliable sources, is still being pushed as a way to help fund state agencies, city and county governments and many others.

The court system (its history and its current functionality) is incredibly important to the overall health of our state. Since the legislature appropriates funding for the judicial branch and decides where court revenues are spent, it is imperative that the opinions of the legal profession are heard in the halls of the statehouse. There are very few lawyer-legislators currently in office and the voices of constituents are more important than ever. At the Alabama State Bar, it is our duty to inform our members and protect the livelihood of our profession. At more than 18,200 strong, we can make waves in this state and work together for the common goal of a strong profession. ▲

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Renewal notices for payment of annual license and special membership dues were emailed September 4. The fee for an Occupational License is \$325 and the dues for a Special Membership are \$162.50. Payments are due by October 1; payments made after October 31 will be subject to the statutory late fee. ***As a reminder, you will not receive a paper invoice in the mail.***

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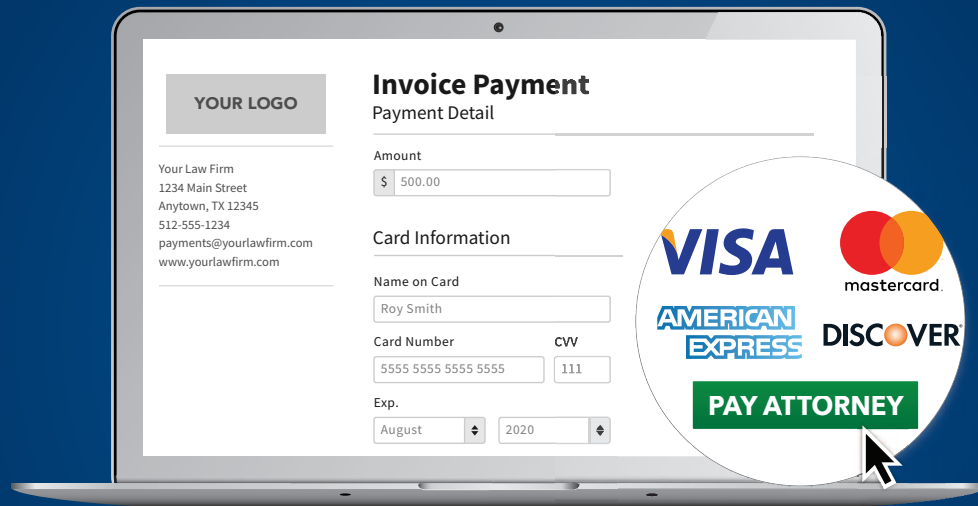
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2018 ANNUAL MEETING AWARD RECIPIENTS AND PHOTO HIGHLIGHTS

■ JUDICIAL AWARD OF MERIT

(Presented at the Bench & Bar Luncheon on Thursday)
 This award is presented to a judge who is not retired, whether state or federal court, trial or appellate, and is determined to have contributed significantly to the administration of justice in Alabama.

Judge Harold V. Hughston, Jr. of Tuscumbia practiced with Harold V. Hughston and James D. Hughston in the firm of Hughston, Hughston & Hughston until being appointed to the circuit bench in 1998. He became presiding judge in 2001 and has served in that position to the present.



He has served on the Board of Directors of the Alabama Circuit Judges Association for many years and has held several offices, including serving as the 2016-17 president. He has also served on numerous committees, most notably the Scholarship Committee.

Judge Hughston has been a significant leader in his community for many years, including serving the Tuscumbia Kiwanis Club as club president and division lieutenant governor. Additionally, Judge Hughston is a lifelong member of the First Presbyterian Church in Tuscumbia, where he has served as an elder, deacon and Sunday school teacher.

Judge Hughston obtained his bachelor's degree and his J.D. from the University of Alabama.

■ AWARD OF MERIT

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

Daniel F. Johnson graduated from the University of the South, magna cum laude, in 1982, with a B.A. in political science. He is a member of Phi Beta Kappa. He graduated from the University of Georgia's School of Law, cum laude, in 1985. While in law school, he was the notes editor of the *Georgia Journal of International and Comparative*



Law. Dan has been licensed to practice law in Tennessee since 1985 and in Alabama since 1996. He has served on the State of Alabama's Board of Bar Examiners since 2004, and he is the board's current chair. He has also served as a member of the Special Committee on the Uniform Bar Examination of the National Conference of Bar Examiners. Dan has been a partner in the Dothan firm of Lewis, Brackin, Flowers, Johnson & Sawyer since 2000. He has been married to Julia Gillespie Johnson for 25 years, and they have two children, Ellen (22) and Collier (19).

■ WILLIAM D. "BILL" SCRUGGS, JR., AWARD

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

Justice Michael F. Bolin is a lifelong resident of Jefferson County. He received his bachelor's degree in business administration from Samford University and his J.D. from Cumberland School of Law, graduating cum laude. While at Cumberland, he served as associate editor of the *Cumberland Law Review*. After graduation, he was inducted into Curia Honoris, Cumberland's leadership and honor society.



Justice Bolin practiced in Birmingham for 16 years, first with retired Circuit

Judge Art Hanes, Jr. at Hanes, Hanes & Bolin, and later with David P. Rogers, Jr. at Frey, Rogers & Bolin. As a practicing attorney, Justice Bolin was active in the Birmingham Bar Association, serving on numerous committees, including the bar association's Executive Committee and as president of its Young Lawyers' Section.

Justice Bolin was elected probate judge of Jefferson County in 1988 and he served for 16 years. He was first elected to the Alabama Supreme Court in 2004 and was reelected to the court in 2010 and 2016. He is currently the senior associate justice on the court. He serves as the supreme court's liaison to the Alabama State Bar, the Alabama Law Institute and the Access to Justice Committee.

As probate judge, Justice Bolin was active in the Alabama Probate Judges Association, with service on many committees, including as chair of the Judges Continuing Education Committee. He was elected by his peers to serve at various times as president, secretary and treasurer of the Alabama Probate Judges Association. As a member of the Alabama Law Institute's Children's Code Committee, the Probate

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Procedures Committee and the Paternity Committee, Justice Bolin assisted the Law Institute in writing new laws. He authored Alabama's Putative Father Registry to protect the rights of all parties in adoption proceedings. In 2000, Justice Bolin was given a national award from the "Angels of Adoption" organization in Washington, D.C. for his work in adoptions.

Justice Bolin continues his commitment to families and children as a member of the Board of Directors of Glenwood, a nonprofit organization that provides treatment and educational services for individuals diagnosed with autism, emotional disturbances and mental illnesses. He has also served on the Board of Directors of Heart Gallery of Alabama, a non-profit organization that finds permanent adoptive homes for DHR foster care children.

Justice Bolin has been married to Rosemary for 33 years. He has one daughter, Leigh Anne, and two stepdaughters, Vivian LeMaster and Andrea Fraser. Justice Bolin and his wife (and three dogs) live in Vestavia Hills and are members of St. Peter the Apostle Church.

■ J. ANTHONY "TONY" MCLAIN PROFESSIONALISM AWARD

This award is given to recognize members for distinguished service in the advancement of professionalism.

Billy C. Bedsole is a graduate of the University of Alabama, where he received his bachelor's degree in business and commerce, and his J.D. from the University of Alabama School of Law.

Immediately following his admittance to the bar, Bedsole began his career in private practice. Bedsole is chair of the Alabama Judicial Inquiry Commission, and has served on the commission since 2011. He was a member of the Alabama State Bar Disciplinary Board from 1995-2014 and served as a hearing officer. Bedsole is a past vice president of the Alabama State Bar (2010), served on the bar's Executive Committee (2007, 2008 and 2010) and was a member of the Alabama State Bar Board of Bar Commissioners (2003-2013). He was awarded the Howell Heflin Award for Honesty and Integrity in 2011 by the Mobile and Baldwin County bar associations, recognized in 2013 by the Alabama State Bar and the Mobile Bar Association for 50 years of service and inducted into the Murphy High School Hall of Fame in 2014.



■ COMMISSIONERS' AWARD

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

LaBella S. Alvis is a Birmingham attorney who has a strong passion for going to court—something she has been doing for more than 30 years.

She has extensive experience with aviation, health care, products liability, professional liability, liquor liability and coverage cases. Alvis's professional liability work includes hundreds of EEOC and employment liability claims, medical malpractice defense, construction/architect liability and Civil Rights litigation alleging violations under 42 U.S.C. § 1983. She brings an extra dimension to liquor liability claims due to her experience as a certified ABC Board vendor trainer. Alvis currently serves on the Alabama State Bar Board of Bar Commissioners (10th Circuit), for which she received the Bar Commissioner Award in 2018, and is the co-chair of the state bar's Relationship Task Force.



■ JEANNE MARIE LESLIE SERVICE AWARD

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

Never hesitating to help a colleague in need, **W. Eason Mitchell** dedicated his life to assisting those with substance misuse issues. A native of Calera and a graduate of the Cumberland School of Law, Mitchell practiced law in Alabama for nearly four decades. He ultimately became a groundbreaking advocate for rural communities involved in environmental litigation, but his true passion was guiding colleagues along the path to recovery. (Eason Mitchell's daughter, Megan Mitchell Johnson, accepts the award in honor of her late father.)



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Always authentic and kind, Mitchell was open about his own struggles since he believed speaking out and speaking up were essential to the prevention and reduction of the stigma associated with substance misuse. Touching the lives of countless families as both a lawyer and a certified substance abuse counselor, he approached the subject of addiction with compassion and without judgment and spoke of the importance of treating those with drug or alcohol issues with dignity.

In addition to being a certified substance abuse counselor, Mitchell was a member of the state Advocacy Advisory Board for Substance Abuse and Mental Health and an active member of the Alabama Lawyer Assistance Program, later serving on the board of the Phoenix House of Tuscaloosa.

A deeply spiritual person, Mitchell spent the weekend before his death at a talk by the Dalai Lama called "Engaging Compassion."

James O. Standridge has been a practicing attorney for more than 40 years and is the managing partner of Crownover & Standridge LLC. Standridge lives in Tuscaloosa with his wife, Shelly Hood Standridge. He enjoys spending time with his children, Camille, Hunter, Carly and Markie, and his six grandchildren. A native of Anniston, Standridge attended the University of Alabama and the University of Alabama School of Law, where he graduated in 1976. Between college and law school he served in the United States Army in Korea as an enlisted man.



Standridge has primarily worked in the area of criminal law although he and his firm practice in other areas of the law as well. He has been involved in death penalty litigation for all of his law practice and has handled many death penalty cases throughout the state.

In addition to his law practice, Standridge has served as a special circuit judge where he was appointed by the Alabama Supreme Court to implement the drug court program in Tuscaloosa. He was appointed by the governor to serve as district attorney for Tuscaloosa County from 1997 to 1999. Standridge serves as one of the judges in the Northport Municipal Court and is the prosecutor and legal counsel for the Town of Vance.

Standridge has been involved in numerous civil and social activities, mostly dealing with alcohol and substance abuse treatment and rehabilitation. He has served on the Board of Directors of the Phoenix House for more than 20 years, in addition to the board of the United Way of Tuscaloosa, Police Athletic League, Public Defender's Commission and Partnership for a Drug-Free Tuscaloosa. He has been a long-standing member of the Alabama State Bar and the Tuscaloosa County Bar Association, and has worked extensively with the Alabama Lawyer Assistance Program.

LOCAL BAR ACHIEVEMENT AWARDS RECIPIENTS

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



Talladega County Bar Association

President: Trina W. Hammonds

Tuscaloosa County Bar Association

President: Scott Bradley Holmes

Mobile Bar Association

President: Jean M. Powers

MAUD MCLURE KELLY AWARD

(Presented at the Women's Section Luncheon on Friday)

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

A native of Demopolis, **Alyce Manley Spruell** received her undergraduate degree from Vanderbilt University and her law degree from the University of Alabama in 1983. For almost 35 years, she has practiced primarily in the Tuscaloosa County



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area in governmental and regulatory matters, employment and business law and general civil litigation.

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

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

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

■ SUSAN B. LIVINGSTON AWARD

(Presented at the Women's Section Luncheon on Friday)

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

Kathy Miller is managing partner of Armbrecht Jackson LLP in Mobile. Among her many leadership roles, she has served as president of the Mobile Bar Association, chair of the Mobile Bar Foundation, first female president of the Rotary Club of Mobile, chair of the St. Paul's Episcopal School



Board of Trustees and vice president of the Community Foundation of South Alabama. She currently serves as chancellor for Alabama for the Episcopal Diocese of the Central Gulf Coast.

Miller has demonstrated each of the attributes mentioned above, as did the award's namesake, Susan Bevill Livingston. As one of her many recommenders noted, presenting this award to Miller "honors Kathy and honors Susan Bevill Livingston's memory and example. It is a perfect fit."

Miller is married to Charles J. Fleming, who practices with Fleming & Chavers LLP in Mobile.

■ SUPREME COURT OF ALABAMA LIFETIME SERVICE AWARD

This award recognizes a lawyer for his or her outstanding service to the legal profession and to the citizenry of Alabama.

Penny Davis has served Alabama since August 1979 through her work with the Alabama Law Institute. In her 36 years with the law institute, she served on numerous drafting committees, including nine of which she served as the committee reporter. She assisted the law institute by helping to edit dozens of publications, including five editions of the *Alabama Probate Judges Handbook*, two editions of the *Alabama Sheriffs Handbook*, six editions of *Tax Assessors' and Tax Collectors' Handbook* and many others. Through the Lawyers Educational Press, she also published *Real Estate Handbook: Land Laws of Alabama* and *Alabama Divorce, Alimony and Child Custody Hornbook*.



In addition, Davis planned and presided over countless conferences to ensure that elected officials in Alabama had the legal training to assist them in performing their duties to the citizens of this state.

Davis also serves as adjunct faculty at the University of Alabama School of Law (since 1984), teaching a variety of family law topics, as well as legal writing.

Davis is a member of several professional organizations, including the American Bar Association, the Alabama State Bar and the Tuscaloosa County Bar Association.

2018 ANNUAL MEETING AWARD RECIPIENTS AND PHOTO HIGHLIGHTS

■ PRESIDENT'S AWARD PRESENTED IN RECOGNITION OF EXEMPLARY SERVICE TO THE PROFESSION

President Dowd has chosen to recognize the following members who best exemplify the ASB motto, "Lawyers Render Service."

Katherine R. "Kitty" Brown
Jeanne Dowdle Rasco
Stephanie A. Hunter
Erin Owen



■ VOLUNTEER LAWYERS PROGRAM PRO BONO AWARDS

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

Jana Russell Garner is a solo practitioner in Selma. She provides direct pro bono assistance to clients, volunteering in the areas of highest demand, contested divorce and custody cases. Garner has served as chair of the Pro Bono Celebration Task Force, and as a member of the Pro Bono Committee, the Alabama State Bar Board of Bar Commissioners and the MCLE Commission.



In 2012, Garner began representing the 4th Circuit as the Alabama State Bar Commissioner. In her first year as a commissioner, she encouraged her circuit to sponsor an event for Pro Bono Month and was appointed to the Pro Bono Celebration Task Force in 2013. As a member and then chair of the Local Bar Involvement subcommittee,

Garner organized the original Pro Bono Celebration Kick-off in the 4th Circuit. That event became a template which the task force used to organize and hold kickoff events around the state. Last year, Garner served as chair of the Pro Bono Celebration Task Force and a record number of legal assistance events were held.

Garner also advocated for the approval of the Pro Bono CLE Regulation which allows participants in approved pro bono programs to receive one hour of MCLE credit for six hours of pro bono work, not to exceed three hours per year.

Garner's access to justice work has increased the profile of the state's Volunteer Lawyers programs, led to a tangible benefit for pro bono volunteers and improved the lives of clients across the state.

■ FIRM/GROUP AWARD

The Birmingham office of **Balch & Bingham LLP** has been a significant partner of the Birmingham Volunteer Lawyers Program for

more than 10 years, dedicated to providing pro bono legal advice and services to those in need in the Birmingham metropolitan area. Collectively, Balch lawyers have contributed



more than 500 volunteer hours assisting pro bono clients statewide in the last 12 months. The firm's commitment to the program is evident in their willingness to serve, their drive and the fervor in which they fight to obtain justice for their clients. Balch attorneys have volunteers at Project Homeless Connect and are regular volunteers at the Birmingham VLP's bankruptcy, civil, domestic relations, veterans and homeless help desks. A small sample of the work of their attorneys last year includes assisting a client who was cheated out of her security deposit, helping a client obtain unpaid wages and removing an IRS garnishment for a victim of identity theft.

■ LAW STUDENT AWARD

Lea Luterstein has taken every opportunity to participate in public service and pro bono activities during her first two years in law school, logging more than 280 hours of service. Every time a pro bono event is organized she is there. She has participated in the university's Habitat for Humanity legal



2018 ANNUAL MEETING AWARD RECIPIENTS AND PHOTO HIGHLIGHTS

clinics, Voting Rights Restoration Clinic, Veterans Legal Assistance Clinic and DACA clinics. She is a regular volunteer at the Alabama State Bar's Volunteer Lawyers Program monthly Legal Assistance Clinic in Tuscaloosa and has served on the bar's Pro Bono Celebration Task Force. Luterstein serves as treasurer of the UA Law Public Interest Student Board and as CFO of the Raise the Bar Mentoring Program. In addition to the many hours she has spent in dedication to public service and pro bono work, she has also competed on a trial advocacy team and works as a part-time law clerk for a federal judge.

■ **MEDIATOR AWARD**

Faith Whidden-Buster's contributions are numerous. She gives selflessly of her time as a pro bono mediator and as the Dallas County Volunteer District Court Mediation Coordinator. She also assists the Alabama Center for Dispute Resolution with the gathering of statistics for district court mediation. As the Dallas County Volunteer District Court Mediation Coordinator, Whidden-Buster helps reduce the court docket and promote mediations. As District Court Judge Robert



Armstrong said, "Our mediation program in the District Court has helped countless people settle their differences . . . Faith has been unbelievably professional and responsible in heading up our mediation program." Last year, she mediated 27 civil and 38 domestic relations cases, providing 182 hours of pro bono service, and through her effort as the Dallas County Volunteer District Court Mediation Coordinator, an additional 150 hours of pro bono services were provided.

■ **JUSTICE JANIE L. SHORES SCHOLARSHIP**

To encourage the next generation of women lawyers, the Women's Section of the Alabama State Bar established the Justice Janie L. Shores Scholarship Fund. Named in honor of the first woman justice to sit on the Supreme Court of Alabama, the scholarship is awarded to an outstanding woman who is an Alabama resident attending law school in Alabama.

Alex Priester is the 2018 recipient of the Justice Janie L. Shores Scholarship. Priester is a graduate of the University of North Alabama with a B.S. in psychology and is a rising second-year student at the University of Alabama School of Law. Upon graduation from law school, Priester plans to return to her hometown of Huntsville and practice elder law with her mother in the Elder Law Firm of Connie Glass.



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2018 ANNUAL MEETING AWARD RECIPIENTS AND PHOTO HIGHLIGHTS



President Dowd and her Executive Council hard at work!



Visiting with old friends and making new ones at the Opening Reception and Family Night Dinner



State bar members stopping by to meet Alabama Court Reporting, one of our many valued vendors—thank you to all!



When you're on vacation, you definitely get to eat dessert first.



Crabbing is fun for all ages!

2018 ANNUAL MEETING AWARD RECIPIENTS AND PHOTO HIGHLIGHTS



President Dowd thanks plenary speakers Joe Borg, Greg Bordenkircher and Amanda Senn, Alabama Securities Commission.



Beautiful weather provided plenty of time for building sandcastles.



Jones School of Law's Dessert Reception is always a big hit!



President-elect Irby tries to keep a straight face while thanking Barry Ragsdale for his Bench & Bar Luncheon address.



Enjoying the great food at the VLP Reception are Judge Pamela Higgins, Eileen Harris and Karen Mastin Laneaux.

2018 ANNUAL MEETING AWARD RECIPIENTS AND PHOTO HIGHLIGHTS



Judge Vanzetta Penn McPherson and George Beck



A house divided: Eloise (AU) and Mark Wilkerson (UA) at the Women's Section Silent Auction



Opening plenary speaker Peter Zeihan "poses" during his presentation.



Looks like the Children's Star Wars™ Party was a hit!



President Dowd and new General Counsel Roman Shaul



Comparing chapeaus are Greg Cusimano and Judge Chuck Price.



Enjoying the Past Presidents' Breakfast are, front row, Cole Portis, Boots Gale, Justice Sonny Hornsby, John Owens and Broox Holmes. On the back row are Sam Crosby, Doug McElvy, Phillip McCallum, Tom Methvin and Rich Raleigh.

2018 ANNUAL MEETING AWARD RECIPIENTS AND PHOTO HIGHLIGHTS



Golf tournament organizer Chip McCallum takes a moment to thank all the sponsors of this special event.



Among the many golfers toasting Tony McLain in the first annual "Friends of Tony Golf Tournament" were Steve Moore, Fred Moore, Fred Moore, III, and Royal Dumas.



President Dowd getting golfing tips from First Husband David Dowd



Participants in the tennis round robin, including winner John Enslin (far right)



Anita Ellison, President Dowd's legal assistant, gets a hug and a thank-you from Cole Portis for keeping things (and people) on track this past year.



Keith Miller, grand prize winner of the Disney getaway from ISI Alabama



Long-time attendees Mary Jane Oakley and her brother, Michael Oakley, at their final annual meeting



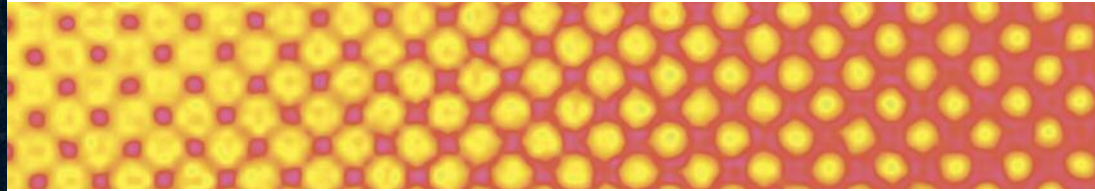
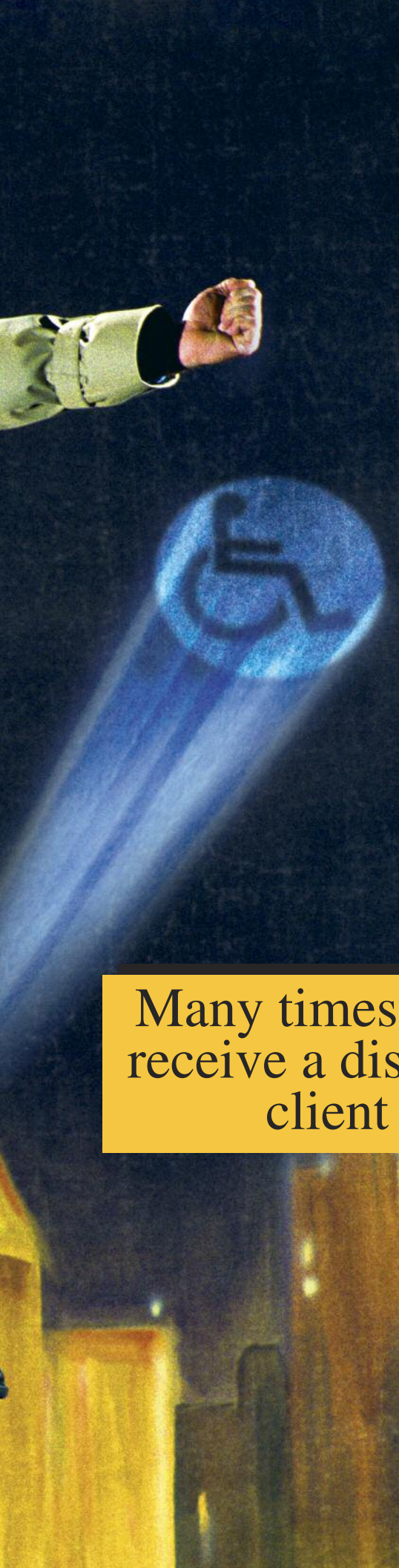
See you next year!

WE LOOK FORWARD TO SEEING YOU AT THE GRAND HOTEL, POINT CLEAR, FOR THE 142ND ANNUAL MEETING, JULY 17-20, 2019.



Past, present and future: Past President Augusta Dowd, President Sam Irby and President-elect Christy Crow





ABLE ACCOUNTS:

A New Means to Preserve Benefits for Disabled Clients

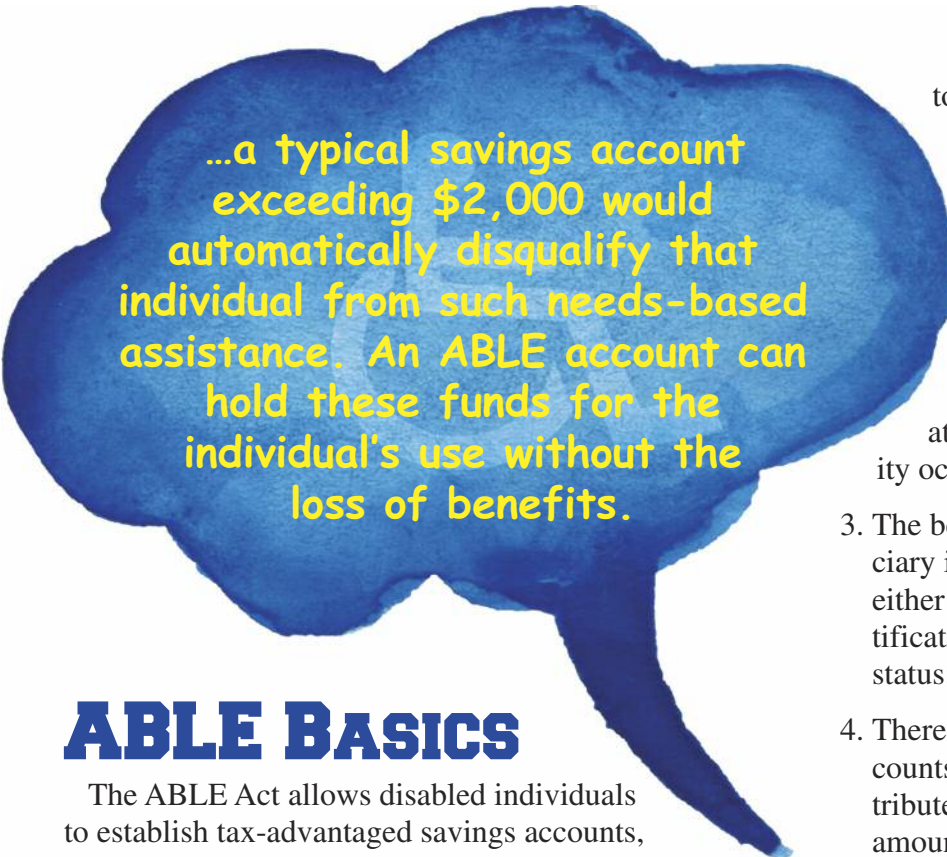
By Jack T. Carney

Many times an attorney will receive a distress call from a client with a disability

because of the threatened loss of essential government benefits. These much-needed benefits (such as SSI or Medicaid) may be at risk due to the receipt of a personal injury award or an unexpected inheritance. Through “special-needs planning,” often an attorney can help the client both protect their new resources and maintain their government-provided care (and feel like a super hero in the

process). The traditional tool used to accomplish this feat is a special needs trust. However, attorneys now have a new gadget in the planning utility belt: Achieving a Better Life Experience (ABLE) accounts.

ABLE accounts are a new development in special-needs planning. Congress passed the ABLE Act in 2014 and most states began offering accounts in 2016. In 2017, there were two amendments to the ABLE Act that made the accounts an even more powerful tool for disabled individuals.¹



...a typical savings account exceeding \$2,000 would automatically disqualify that individual from such needs-based assistance. An ABLÉ account can hold these funds for the individual's use without the loss of benefits.

ABLE BASICS

The ABLE Act allows disabled individuals to establish tax-advantaged savings accounts, which are quite similar to Section 529 education savings accounts. The advantage of an ABLE account is that any income earned in the account is not taxable. More importantly, the account is not a countable resource for government benefit purposes (subject to certain restrictions discussed below). The assets in the account can be spent on qualified disability expenses (very similar to the education account rules where assets must be spent on qualified education expenses).

This Act is significant because it allows a disabled individual to have more leeway in saving money for future expenses. The general rule is that an individual is ineligible for SSI and Medicaid (two of the primary assistance programs) if they have more than \$2,000 in countable resources.² Therefore, a typical savings account exceeding \$2,000 would automatically disqualify that individual from such needs-based assistance. An ABLE account can hold these funds for the individual's use without the loss of benefits.

Anyone can establish and contribute to an ABLE account, but the account must be established for a "designated beneficiary."³ Even the designated beneficiary himself or herself can establish and contribute

to an account. There are several important requirements and restrictions regarding ABLE accounts:

1. A beneficiary may have only one ABLE account;⁴
2. The beneficiary's qualifying disability must have occurred *prior to age 26* (however the account can be established at any age, so long as the qualifying disability occurred prior to age 26);⁵
3. The beneficiary must be "disabled." The beneficiary is deemed disabled if he or she is receiving either SSI or SSDI⁶ A doctor may also sign a certification regarding the beneficiary's disability status;⁷
4. There are certain financial limits for these accounts. First, the total amount that may be contributed on a yearly basis is \$15,000.⁸ This amount is the same as the annual gift tax exclusion and as that exclusion (which is adjusted for inflation) increases, the contribution limit will also increase. A beneficiary may be able to contribute more than \$15,000 in a year if they have earned income (pursuant to the ABLE to Work Act).⁹
Second, the total amount that an individual may have in the account will be the same as a state's limits on Section 529 plans.¹⁰ However, the practical limit may be \$100,000, as that will be the limit for SSI purposes.¹¹ Social Security will consider any funds over \$100,000 to be a countable resource, potentially disqualifying an individual from benefits;
5. Once the account is established it can only be spent on "qualified disability expenses," which the law defines as "expenses related to the eligible individual's blindness or disability."¹² Some examples of qualified disability expenses include: education, housing, transportation, employment training, financial management and administrative services, legal fees and funeral

and burial expenses and other expenses.¹³ The definition of a qualified disability expense is broad enough to give beneficiaries tremendous flexibility in spending the money in their accounts. Further, some ABLE plans will even issue the beneficiary a debit card;¹⁴ and

6. One important limitation in the Act is that any amount remaining in the account upon the death of the beneficiary must be repaid to the state for Medicaid benefits.¹⁵ There is a significant difference in the ABLE payback and the traditional payback clause in a special needs trust established under 42 U.S.C. §1396p(d)(4)(A). The payback for a “(d)(4)(A) trust” is for all Medicaid services during the beneficiary’s life, while the ABLE payback is limited to services occurring after the establishment of the account.¹⁶

USING ABLE ACCOUNTS

In some cases, an ABLE account can be a better alternative to a special needs trust, as the beneficiary would have more control and it would be less expensive to establish and administer. There is no need to ask for a distribution from an ABLE account, as the beneficiary has complete access and control (and sometimes even a debit card). The downside is that, unlike a special needs trust, the total account value will be effectively capped at \$100,000. Further, an individual can contribute no more than \$15,000 a year to the account, which would be insufficient for most personal injury awards or inheritances.

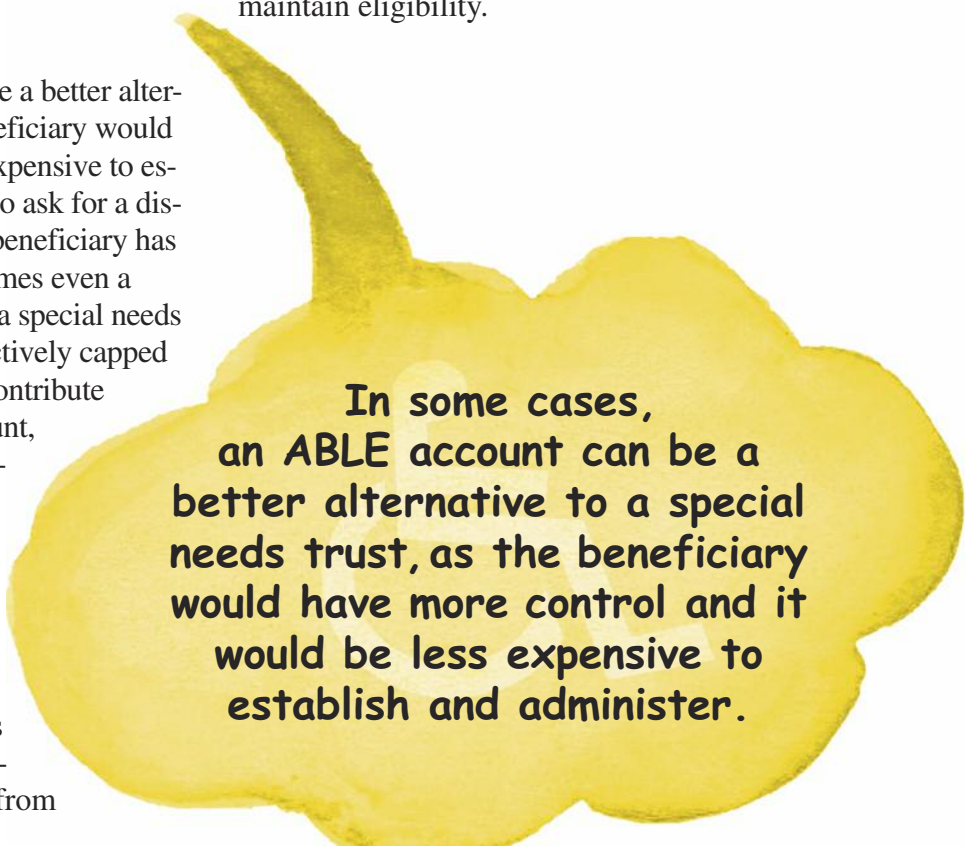
ABLE accounts do present an additional planning opportunity where a beneficiary may have a reduction in his or her SSI because a third party is providing support for food or shelter. Social Security will reduce SSI benefits by one-third when there is “in-kind support and maintenance.”¹⁷ Distributions from

an ABLE account for these expenses would not result in a one-third reduction, as the funds are not deemed to be coming from a third party (because those funds are deemed to belong to the ABLE beneficiary).

There are several examples where an ABLE account can be a viable planning option in a special needs practice, including:

Example 1:

An individual is injured in an automobile accident. The settlement check for their share of the accident is \$10,000. The receipt of these funds would disqualify the beneficiary from most needs-based government assistance programs. However, if the individual places those funds into an ABLE account, he or she would maintain benefit eligibility. If the amount in question was \$100,000, the individual could place \$15,000 into an ABLE account. The remaining \$85,000 would need to pass to a (d)(4)(A) trust or to a pooled income trust (a (d)(4)(C) trust), such as the Alabama Family Trust, in order for the individual to maintain eligibility.



**In some cases,
an ABLE account can be a
better alternative to a special
needs trust, as the beneficiary
would have more control and it
would be less expensive to
establish and administer.**

Example 2:

A beneficiary is receiving an inheritance of \$25,000 from her grandmother's estate. The beneficiary is on needs-based assistance. The beneficiary can fund an ABLE account with \$15,000 of these assets. If he or she "spends down" the remaining \$10,000 on an asset that is exempt for government benefit purposes (such as an automobile), then he or she would be able to retain benefits.

Example 3:

A trust beneficiary has a special needs trust, which pays for her living expenses. However, because the special needs trust pays her monthly rent of \$950, she receives a one-third reduction in her monthly SSI benefit (resulting in a \$500 payment, as opposed to \$750). If allowed by the terms of the special needs trust, the trustee can place \$11,400 each year into an ABLE account. The beneficiary can then use the funds in the ABLE account to pay her rent, and she would not receive a reduction in her SSI benefits. Moving money to an ABLE account preserves an additional \$3,000 in benefits a year for the beneficiary.

HOW TO ESTABLISH AN ABLÉ ACCOUNT

An individual can easily establish his or her own ABLÉ account and usually does not need any legal assistance. An individual may establish an account at www.enableal.com. In the event that an agent or legal guardian is establishing an account for the benefit of the designated beneficiary, then the account must be opened by a paper application.

These accounts are another useful tool available in special-needs planning. Individuals should consult with their legal and financial advisors regarding the appropriateness of these accounts for their own situation. In some cases, an ABLÉ account will provide a tremendous benefit for a disabled individual, but in others that individual may be better served with a special needs

trust. Regardless, planners can celebrate that there is an additional "benefit saving tool" for future use. ▲

Endnotes

1. See ABLÉ to Work Act, H.R. 1896, 115th Cong. (2017-2018); ABLÉ Financial Planning Act, H.R. 1897, 115th Cong. (2017-2018).
2. See POMS SI 01110.003(A)(2) (2010); Ala. Medicaid Manual Rule No. 560-X-25-.06(1).
3. See 26 U.S.C. § 529A(b)(1)(B).
4. See *id.*
5. See 26 U.S.C. § 529A(e)(2).
6. See 26 U.S.C. § 529A(e)(1)(A).
7. See 26 U.S.C. § 529A(e)(1)(B).
8. See 26 U.S.C. § 529A(b)(2)(B)(i) (citing 26 U.S.C. § 2503(b)).
9. See 26 U.S.C. § 529A(b)(2)(B)(ii).
10. See 26 U.S.C. § 529A(b)(6).
11. See POMS SI 01130.740(C)(3).
12. See 26 U.S.C. § 529A(c)(1)(B)(i).
13. See POMS SI 01130.740(B)(8).
14. See POMS SI 01130.740(G).
15. See 26 U.S.C. § 529A(f).
16. See *id.* (stating the reimbursement is for "the total medical assistance paid for the designated beneficiary after the establishment of the account"). Cf. 42 U.S.C. § 1396p(d)(4)(A) (stating the reimbursement is for "the total medical assistance paid on behalf of the individual under a state plan under this subchapter").
17. See POMS SI 00835.000.

Jack T. Carney

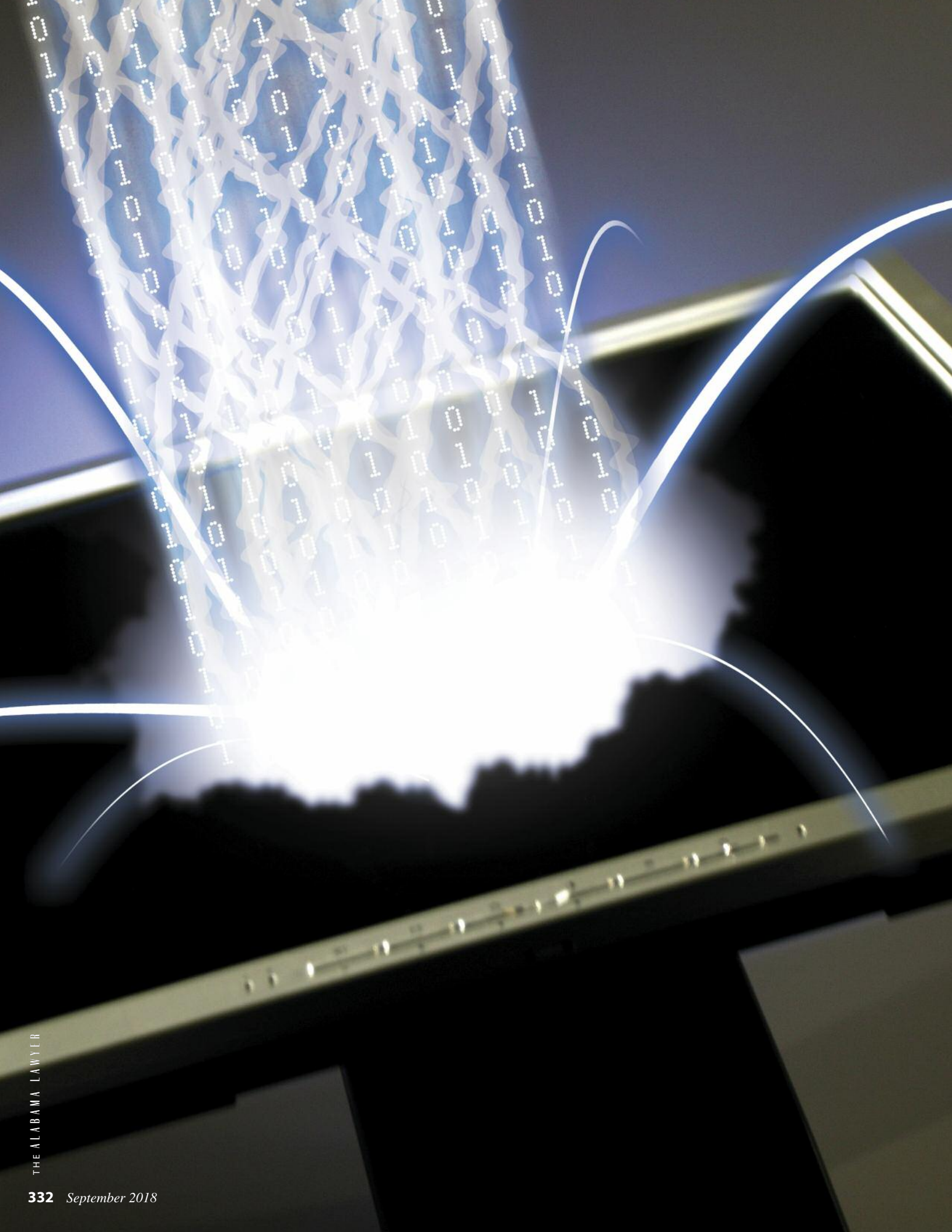


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The Alabama Data Breach Notification Act of 2018

By Edward A. Hosp, Starr T. Drum and Sarah S. Glover

Senate Bill 318, which became the Alabama Data Breach Notification Act

(“the Act”) was introduced in the Alabama Senate by Senator Arthur Orr on Tuesday, February 13, 2018. It was revised significantly at every stage of the legislative process before receiving final passage on March 27. The bill was signed by Governor Kay Ivey on March 28 and became Act 2018-396. The new law went into effect on June 1.

The primary intent—and one could argue the only effect—of the legislation is to require timely notice to affected individuals when their personal information has been compromised, and to provide an enforcement mechanism for the

Alabama Attorney General when a covered entity fails to provide that notice. Thus, *only* the failure to notify affected individuals and, when the breach affects more than 1,000 individuals, the attorney general, of a breach subjects an entity to penalties under the Act.¹ That said, there are actions that businesses are “required” to take, and, therefore, should be aware of, under various additional provisions of the new law.

I. What Entities Are Covered?

It is difficult to imagine any business operating in today’s world that would not be covered by the new Alabama law. According to the definitions, a “covered

The Alabama State Bar, in conjunction with the Alabama Supreme Court and the Administrative Office of Courts, created the Alacourt.com and Personal Identifying Information Task Force that is reviewing how lawyers and Alacourt address personal identification information, which also includes review of the new data breach law and its effect on the profession. Mike Ermert (mike@hwinn.com) and Tom Heflin (tom@tomheflinlaw.com) are the Alabama State Bar points of contact. The task force will make recommendations in the near future that will be applicable to our members.

entity” is a person or a business of any kind that acquires what the law calls “Sensitively Personally Identifying Information” (“SPII”). The Act covers SPII of any individual—customer, employee, contractor or any other person.

II. What Is a “Breach Of Security”?

A “breach of security” or “breach” is defined as the “unauthorized acquisition of data in electronic form containing [SPII].” Multiple instances of unauthorized acquisition by the same source constitute a single breach.

III. What Data Is Considered “Sensitive”?

The new law requires notice when SPII in electronic form is acquired by an unauthorized entity. SPII is defined to include non-truncated data points that could facilitate identity theft, financial fraud or other harm when combined with the person’s first name or initial and their last name. These include:

- Social Security number or tax ID number;
- Driver’s license number, state-issued identification card number, passport number or military identification number;
- Bank account number, credit card number or debit card number (in combination with any security code, access code, password, expiration date or PIN);
- Information regarding an individual’s medical history, mental or physical condition, or medical treatment or diagnosis;
- An individual’s health insurance policy number or subscriber



Thus, while a business should evaluate its security program, take steps to prevent data breaches in order to comply with other applicable laws and prevent financial and reputational damage, failure to do so would not result in the imposition of a penalty under the new Alabama law.

identification number *and* any unique identifier used by a health insurer to identify the individual;

- A user name or email address (in combination with a password or security question and answer that would permit access to an online account).

IV. What Is Required Before a Breach?

Act 2018-396 includes a few “requirements” for businesses that are preventative in nature. Specifically, the Act requires a covered entity to conduct an assessment of its data security, and then establish reasonable security measures to protect SPII from being breached. The Act also requires businesses to take reasonable steps when disposing of

SPII to mitigate the risk of it falling into the wrong hands.

With respect to the evaluation and implementation of reasonable security measures, the Act provides guidance on how this should be done, but, as noted above, the only provisions of the Act that include an enforcement mechanism relate to the failure of an entity to provide notice to individuals or the Attorney General after a breach. Thus, while a business should evaluate its security program, take steps to prevent data breaches in order to comply with other applicable laws and prevent financial and reputational damage, failure to do so would not result in the imposition of a penalty under the new Alabama law.

Under the Act, what is required of a business for both the evaluation of its security needs and the implementation of reasonable security measures is expressly tied to the relative size of the entity, as well as the amount and type of SPII the business has in its possession. Also relevant to what is reasonable for a business to implement is the cost that would be incurred to put in place and to maintain certain security measures. In implementing a system of security, the Act instructs an entity to consider all of the following:

- Designation of an employee or employees to coordinate the covered entity’s security measures to protect against a breach of security. An owner or manager may designate himself or herself;
- Identification of internal and external risks of a breach of security;
- Adoption of appropriate information safeguards to address identified risks of a breach of security and assess the effectiveness of such safeguards;

- Retention of service providers, if any, who are contractually required to maintain appropriate safeguards for SPII;
- Evaluation and adjustment of security measures to account for changes in circumstances affecting the security of SPII; and
- Keeping the management of the covered entity, including its board of directors, if any, appropriately informed of the overall status of its security measures.

V. What Is Required After a Breach?

A. Good Faith Investigation And Evaluation

Section 4(a) requires an entity that has suffered a breach to conduct a “good faith and prompt investigation” to determine:

- The scope of the breach;
- Whose information was compromised, and the nature of that information;
- Whether the breached information is “reasonably likely to cause substantial harm” to the person(s) whose information was lost; and
- Measures to be taken to restore security of the information and system breached.

Section 4(b) provides factors to consider in determining whether the breach is “reasonably likely to cause substantial harm.” These factors include that the information is in the physical possession of an unauthorized person; that the information has been copied or downloaded; that the information has been used by an unauthorized person; and/or if the breached information has been made public.

It is imperative that a business maintain careful records of its activities following a breach, particularly relating to a determination of whether the breach was one that was “reasonably likely to cause substantial harm.” Section 5 of the Act, which relates to the provision of notice, explicitly requires that records relating to this determination be maintained by the affected entity for five years.

B. Notice to Affected Individuals

Section 5 of the Act requires an entity that has determined it has suffered a breach of information that is “reasonably likely to cause substantial harm” to give notice of the breach to the affected Alabama residents. Notice must be given “*as expeditiously as possible* and without unreasonable delay,” but in no event more than 45 days from the determination of the breach. Notice can (and should) be delayed when requested by federal or state law enforcement based on a criminal investigation or national security issues.

The time to inform individuals (and the attorney general under Section 6) begins to run from the date of the determination that the breach is “reasonably likely to cause substantial harm” and not from the date of the determination of the occurrence of the breach.

Section 5(d) sets forth the requirements for notice to affected Alabama residents. Notice must be in writing (mail or email) and must include the following:

- The date of the breach;
- The SPII that was breached;
- The actions taken to restore the confidentiality of the data;
- The actions that the impacted individual can take to protect

himself/herself from the breach; and

- Information about how to contact the covered entity with questions.

Under certain circumstances, a business may be entitled to use substitute notice. The substitute notice provision is available under four circumstances:

- Insufficient contact information regarding the affected individuals;
- Excessive cost relative to the size and resources of the business;
- Where the breach affected more than 100,000 people; or
- Where the cost of notice would exceed \$500,000.

In general, under the substitute notice provision, the entity must (1) post a conspicuous notice of the breach on its website for at least 30 days, and (2) place notice of the breach in print and broadcast in the area where affected individuals reside. However, the attorney general has the authority to approve an alternative method of substitute notice that can be proposed by the entity.

C. Notice to the Attorney General

The Act also requires written notice to the attorney general in the event the breach affects more than 1,000 Alabama residents. It is important that businesses not confuse the individual notice requirements with the requirement to notify the attorney general. Notice of a breach is *always* required to the affected individual—even if only one person is affected. Notice to the attorney general is only required if the number of affected Alabama residents exceeds 1,000 people.

As with the requirement for notice to individuals, notice to the attorney general must be made “as expeditiously as possible,” but in no event more than 45 days after the determination that the breach is “reasonably likely to cause substantial harm.”

The notice provided to the attorney general must include:

- A description of the “events surrounding the breach;”
- The number of Alabama residents affected;
- Services being offered to those affected by the breach; and
- Contact information for a point person² regarding the breach.

The Act provides that information provided to the attorney general marked as “confidential” will not be subject to any open records or freedom of information request. There is no provision that sets forth any mechanism for a business to make a determination of what should be confidential, but given the sensitive nature of a data breach and the potential harm to both the individuals and the business, it is reasonable to lean heavily toward designating the notice to the attorney general as “confidential.”

D. Notice to Credit Reporting Agencies

Section 7 requires an entity suffering a breach that impacts an excess of 1,000 Alabama residents to also notify all nationwide consumer reporting agencies of the breach.

VI. What if a Third-Party Vendor I Use Suffers a Breach? (Or, What if I Am a Third-Party Vendor?)

Section 8 requires a third-party vendor (termed “third-party agent” under the Act) that suffers a breach to notify the covered entity of the breach within 10 days.

Once receiving that notice, the covered entity must provide the notices to affected individuals, the attorney general and consumer credit reporting agencies as set forth in Sections 5, 6 and 7 of the Act.

Where there is a breach of a third-party agent, the time for a covered entity to provide notice begins to run when the covered entity receives notice of the breach from that third-party entity.

The third-party agent is required to cooperate with the covered entity and provide the covered entity with “information in the possession of the third-party agent so that the covered entity can comply with its notice obligations.”

In general, this section places the requirement for providing notice to affected individuals and to the attorney general on the covered entity and not the third-party agent. However, a change was made in the senate to clarify that the parties may enter into a contractual arrangement that would allow that burden to be shifted to (and satisfied by) the third-party agent. It is important for this (and other) reason(s) to carefully review and negotiate contracts where SPII will change hands.

VII. Penalties and Enforcement

There are two provisions in SB318 under which an entity could face penalties. First, Section 9(a) provides that a violation of “this Act” is a violation of the Alabama Deceptive Trade Practices Act (“DTPA”), but is not a criminal offense under the DTPA. As noted

above, the bill was clarified in the senate to make it clear that only violations “of Sections 5, 6, or 7 of this Act” (the notice provisions only) are considered violations of the DTPA. Further, section 9(a)(1) states that a violation of the Act does not establish a private cause of action.³

Section 9(a)(2) provides that the penalty provisions of the DTPA apply if a party has “knowingly engaged in a violation of this act.” This section clarifies that for the purposes of this act, “knowingly” shall mean “willfully or with reckless disregard.” As such, in order to apply the DTPA to a violation, there must be a heightened level of culpability on the part of the covered entity. Although the penalty provisions of the DTPA provide that a violation is subject to a civil penalty of up to \$2,000 per violation, this section of the Act caps possible penalties under the DTPA at \$500,000 per breach.

Section 9(b)(1) provides a per breach civil penalty of \$5,000 per day (theoretically commencing no sooner than the 46th day after a breach) against an entity that fails to take reasonable steps to comply with the Act.

Section 9(b)(2) allows the attorney general—and only the attorney general—to bring an action on behalf of individuals. This provision may allow the attorney general to pursue an action against an entity for the breach itself—rather than for a failure to notify. However, damages are limited in such an action to “actual damages.”

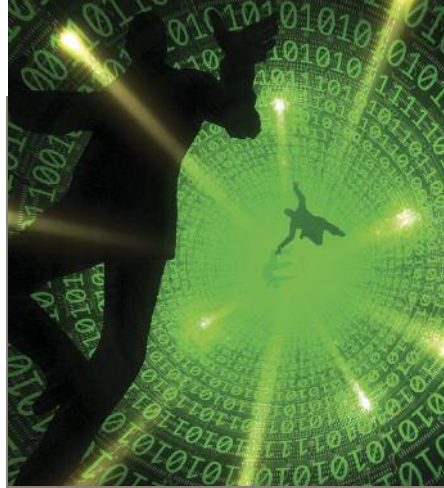
VIII. Entities Subject To Existing Federal or Other Alabama Data Breach Standards

An exemption section, Section 11, was included in the bill for entities that are subject to data breach standards under federal laws or regulations. Under Section 11, an entity subject to such standards that complies with those standards and that provides notice of a breach to affected individuals pursuant to those standards is exempt from the act—as long as it also provides a copy of the individual notice to the attorney general if more than 1,000 Alabama residents are affected.

The goal of this section is to ensure that an entity subject to federal data breach standards, such as the Gramm-Leach-Bliley Act (“GLBA”) or the Health Insurance Portability and Accountability Act (“HIPAA”) is not required to alter its existing procedures and systems as a result of this Act.

A. GLBA

The potential breach notification obligations under the GLBA vary by industry and regulator. Title V, Subtitle A of the GLBA governs the treatment of nonpublic personal information about consumers by financial institutions. The definition of “financial institution” is exceedingly broad—often broader than many businesses realize.⁴ A full list of activities that would bring a business within scope is listed in Section k(4) of the Bank Holding Act.⁵ The GLBA requires financial institutions to design, implement and maintain standards to protect nonpublic consumer information,⁶ which become promulgated as the Safeguards Rule. The Safeguards Rule is implemented and enforced by eight different federal and state agencies, depending on the type of financial institution at issue.⁷ Banks are regulated in this regard



Where there is a breach of a third-party agent, the time for a covered entity to provide notice begins to run when the covered entity receives notice of the breach from that third-party entity.

by the federal banking agencies (e.g., Federal Reserve, FDIC, OCC). State departments of insurance enforce the Safeguards Rule against insurance companies. The SEC regulates brokers, dealers, investment companies and investment advisors. The Federal Trade Commission (FTC) has become a sort of “catch-all” regulator of the GLBA for financial institutions who do not fall within one of these or other enumerated categories, such as nonbank mortgage lenders, loan brokers, tax preparers, providers of real estate settlement services and debt collectors.

Certain regulators, pursuant to the Safeguards Rule as implemented by each regulator, require or at least recommend notice to affected individuals following a data breach of nonpublic personal information. For example, the “Interagency Guidance on Response Programs for Unauthorized Access to Customer Information and Customer Notice,” promulgated by the federal banking

agencies, requires notice to affected individuals upon unauthorized access to “sensitive customer information” when there has been misuse of that information or misuse is reasonable possible.⁸ The FTC Safeguards Rule itself does not mention individual notice,⁹ but subsequent guidance published by the FTC recommends that non-bank financial institutions notify impacted individuals in the event of a security breach.¹⁰ The information that typically qualifies under the Safeguards Rule as implemented is much broader than under Alabama’s data breach notification statute.

B. HIPAA

The HIPAA Breach Notification Rule¹¹ requires covered entities to notify affected individuals, the U.S. Department of Health and Human Services (HHS), and in some cases, the media, of a breach of unsecured Protected Health Information (“PHI”). While there is substantial overlap between the definition of PHI and that of SPII in the Alabama Act, the definition of “covered entity” under HIPAA is much narrower than under Alabama’s new Act—only health care providers, health plans and health care clearinghouses are within scope.¹² If a HIPAA-covered entity experiences a potential security breach that impacts SPII of Alabama residents, it should comply with its notice obligations under HIPAA, which involves performing a four-part risk assessment to determine the risk of harm to impacted individuals, and then, if warranted, supplying notice to such persons within 60 days.

C. Alabama State Law-Based Exemption

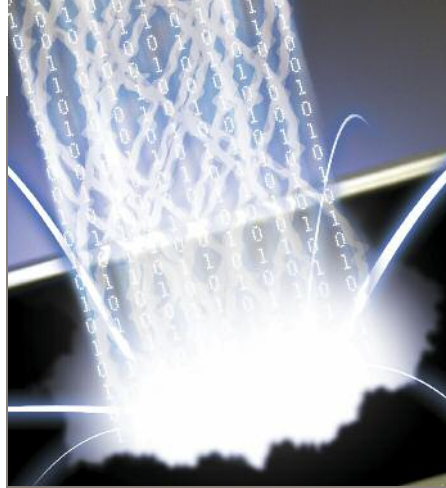
The senate floor substitute added a new Section 12 that provides an

exemption similar to Section 11 for entities that are subject to Alabama state law data breach requirements that are at least as strict as the provisions of this legislation. This change was made to accommodate an anticipated change in Alabama law based on recommendations of the National Association of Insurance Commissioners (“NAIC”). Section 12 of the Alabama Act states that when an entity is subject to a data breach and notification provision of state law that is at least as stringent as the Act, the company need only comply with that law, without regard to the requirements of SB318.

IX. Entities Subject to International Data Security and Privacy Regulations

Although the Act provides for state and federal exemptions, there is no exemption for entities covered by international laws such as the GDPR. The GDPR is European regulation, but its requirements extend beyond the boundaries of the European Union and apply where an entity:

1. Has an establishment as a controller or processor in the European Union, even if the processing of personal data takes place outside of the European Union;
2. Offers goods and services to individuals in the European Union;
3. Monitors the behavior of individuals in the European Union (e.g. through an application that tracks location or activity); or



Section 12 of the Alabama Act states that when an entity is subject to a data breach and notification provision of state law that is at least as stringent as the Act, the company need only comply with that law, without regard to the requirements of SB318.

4. Provides processing services for a controller established in the European Union.

The GDPR applies both to controllers (entities that determine why and how personal data is processed), and to processors (entities who process personal data at the direction of controllers). The GDPR also regulates all “personal data,” which is much more broadly defined than SPII as “any information relating to an identified or identifiable natural person.”¹³

In terms of data protection, the GDPR requires an organization to “implement appropriate technical or organizational measures to ensure a level of security appropriate to the risk.”¹⁴ Though the GDPR does not impose specific data security requirements, it offers some examples of “appropriate” security measures as:

- Pseudonymization;
- Encryption;
- The ability to ensure the continuous confidentiality, integrity, availability and resiliency of processing systems and services;
- The ability to restore access and availability to personal data in the event of a physical or technical incident; and
- Processes for regular testing, assessment and evaluation of the security measures in place.

A “data breach” is also defined more broadly under the GDPR than under the Act and includes any “breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorized disclosure of or access to personal data transmitted, stored or otherwise processed.”¹⁵ The breach notification provisions under the GDPR require an affected processor entity to notify the controller of a breach “without undue delay.”¹⁶ A controller who is notified of a breach by a processor or who is independently subject to a data breach must notify a European supervisory authority of the breach within 72 hours after becoming aware of it.¹⁷ Communications to affected individuals must be made by the controller “without undue delay” where the breach is “likely to result in a high risk to the rights and freedoms of natural persons.”¹⁸

An organization that fails to comply with the data security and data breach notification requirements of the GDPR can be exposed to penalties of up to €10,000,000 or 2 percent of their worldwide annual revenue—whichever is greater.¹⁹ While the penalties for GDPR violations are serious and have been receiving a

lot of attention recently, it is important for a company with an international presence or reach to keep in mind that the GDPR is just one of many international data protection laws that the Act does not exempt. And unlike the Act, a number of international laws, including the GDPR, explicitly allow for civil remedies in addition to regulatory fines, even where the affected individual cannot demonstrate material damages.²⁰

X. Potential Civil Liability under the Act

It is important to note that although Section 9(a)(1) of the Act explicitly forecloses a private right of action under Section 8-19-10 (Alabama Unfair and Deceptive Trade Practices Act), that does not necessarily mean that a business who sustained a data breach affecting Alabama residents would be immune from a civil lawsuit. That same section also states that “[n]othing in this act may otherwise be construed to affect any right a person may have at common law, by statute, or otherwise.” Thus, the Act may not prevent litigants from bringing a lawsuit arising out of a covered entity’s failure to timely notify, or out of a covered entity’s data breach generally, if the suit is based on a common law cause of action. Plaintiffs lawyers have presented various theories in data breach cases around the country in recent years—some of the more common causes of action include negligence, negligence per se, breach of contract and unjust enrichment.²¹

The impact that the standards in the Alabama Act—both the notifica-

tion requirements and the proactive data security requirements—will have on civil litigation remains to be seen. It is at least plausible that litigants on both sides will look to the standards to either prosecute or defend a company’s actions both before and after a data breach. For example, will the 45-day deadline serve as a benchmark in private lawsuits to measure “timely” notice? Will a company be more likely to be deemed negligent if it did not contractually require its third-party vendor to safeguard personal information, as is required under the Act? Or, will the prohibition on a private right of action limit or even prohibit private litigants from relying on the statute in support of their common law claims? Questions like these would be matters of first impression for Alabama courts.

The doctrine of negligence per se poses an especially interesting question here in terms of the possibility of the Act’s requirements serving to establish a duty or standard of care. Alabama allows a plaintiff to proceed with a negligence claim under a statute that does not otherwise provide a cause of action under the doctrine of *negligence per se*.²² The doctrine of negligence per se “arises from the premise that the legislature may enact a statute that replaces the common-law standard of the reasonably prudent person with an absolute, required standard of care.” *Parker Bldg. Servs. Co. v. Lightsey ex rel. Lightsey*, 925 So. 2d 927, 930-31 (Ala. 2005) (citing *Thomas Learning Ctr., Inc. v. McGuirk*, 766 So.2d 161, 171 (Ala. Civ. App. 1998)). To state a claim under a negligence per se theory, the plaintiff must establish “(1) The statute must



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have been enacted to protect a class of persons, of which the plaintiff is a member; (2) the injury must be of the type contemplated by the statute; (3) the defendant must have violated the statute; and (4) the defendant's statutory violation must have proximately caused the injury." *Anderson v. United States*, 2016 WL 270965, at *1 (N.D. Ala. Jan. 22, 2016) (citing *Parker Bldg. Servs. Co. v. Lightsey ex rel. Lightsey*, 925 So. 2d 927, 931 (Ala. 2005)). In the abstract, the Alabama Act should serve as an effective vehicle for a negligence *per se* claim following a data breach. However, some courts outside Alabama have refused to allow negligence claims to go forward where the respective state data breach notification statutes have not provided for a private right of action.²³ Alabama businesses—and Alabama lawyers—will have to wait and see how Alabama courts will treat such claims now that Alabama's own data breach law is on the books.

Conclusion

The handling and potential breach of sensitive personal data are among the greatest risks faced by businesses today. A prudent organization, therefore, must be proactive in addressing these risks and putting safeguards into place to prevent a breach, as well as incident response plans to implement in the event that a breach occurs. One step in formulating such a plan is making a determination about which standards may apply—state, federal or even international—and understanding exactly what is required under each standard. Although Alabama is late to the game with respect to a state-based data breach law, its adoption serves as a reminder to all businesses to make sure they know what their data security and

privacy vulnerabilities are and how to deal with them. ▲

Endnotes

1. Contrast this with the recently enacted European General Data Protection Regulation ("GDPR"), enacted on May 25, 2018, which requires entities within the regulation's scope to undertake a number of proactive privacy and security measures and provides for enforcement through both regulators and private causes of action, even where the damage is "non-material." See Part IX, *infra*.
2. The Act simply requires that this person be an "employee or agent" of the covered entity, which means that the point person may come from within or outside the covered entity. Presumably, outside counsel would meet the requirement.
3. Despite this language, see Section X, *infra*, for a brief discussion of potential civil liability under various common law private causes of action.
4. 15 U.S.C. § 6809(3).
5. 12 U.S.C. § 1843(k).
6. 15 U.S.C. § 6801(b).
7. 15 U.S.C. § 6805(a).
8. 70 Fed. Reg. 15,736 (Mar. 29, 2005) (codified at multiple locations).
9. See 16 CFR 314.
10. Federal Trade Commission, Financial Institutions and Customer Information: Complying with the Safeguards Rule, <https://www.ftc.gov/tips-advice/business-center/guidance/financial-institutions-customer-information-complying> (last accessed July 7, 2018).
11. 45 CFR 164.400-414.
12. 45 CFR 160.103.
13. GDPR Art 4(1).
14. GDPR Art. 32(1).
15. GDPR Art. 4(12).
16. GDPR Art. 33(2).
17. GDPR Art. 33(1).
18. GDPR Art. 34.
19. GDPR Art. 83. Other GDPR violations not addressed in this article can subject a company to regulatory penalties of up to €20,000,000 or 4 percent of worldwide annual revenue, whichever is greater. *Id*.
20. See e.g. GDPR Art. 82.
21. See, e.g., *Resnick v. AvMed, Inc.*, 693 F.3d 1317 (11th Cir. 2012); *In re Anthem, Inc. Data Breach Litigation*, 162 F.Supp.3d 953 (N.D. Cal. Feb. 14, 2016); *Smith v. Triad of Alabama, LLC*, No. 1:14-CV-324-WKW, 2017 WL 1044692 (M.D. Ala. Mar. 17, 2017).
22. See *Smith v. Triad of Alabama, LLC*, 2015 WL 5793318, *11 (M.D. Ala. Sept. 29, 2015) (citing *Allen v. Delchamps, Inc.*, 624 So. 2d 1065, 1067-68 (Ala. 1993)). See also *Bocage v.*

Acton Corp., No. 2:17-CV-01201-RDP, 2018 WL 905351, at *8 (N.D. Ala. Feb. 15, 2018) ("Alabama case law allows negligence *per se* claims to be based on both federal and state statutes even when a private right of action is not contemplated by the statute in question").

23. *In re Anthem, Inc. Data Breach Litigation*, 162 F.Supp.3d at 976-97* (dismissing plaintiffs' negligence claims arising out of defendants' data breach, holding that data breach actions must be brought by the Indiana Attorney General, and discussing cases where other courts did not allow data breach plaintiffs' negligence claims to proceed).

Edward A. Hosp



Ted Hosp is the chair of Maynard Cooper's governmental and regulatory affairs practice group, and is a founder and the immediate past chair of the Alabama State Bar Section on Ethics, Elections & Government Relations Law. He also serves as chair of the Alabama Access to Justice Commission, and is a member and past chair of the ASB Pro Bono Committee.

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NOTE FROM THE EDITOR

Gregory H. Hawley
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Mike and Mickey Turner

A Nice Reflection

Occasionally, something happens that is a clear sign that I am getting older, and I wince at the notion—perhaps even try to reject the idea.

Fortunately, some signs of getting older are worth embracing, because the realization also conjures up warm memories. One aspect of creating this issue of *The Alabama Lawyer* fits into the latter category.

I have a clear recollection of my first deposition. It was an FELA case. I represented the railroad. And the court reporter was Mickey Turner, and she was soon to deliver her daughter, Starr. Mickey and Mike (we still miss him, don't we?) have been great friends since that day. And, it has been a joy to watch Starr grow up—Advent Day School, Indian Springs School, Emory, Alabama Law School, Maynard Cooper.

When Starr submitted an article to *The Alabama Lawyer*, I sat back and enjoyed the moment. Very cool. Mickey is proud. Mike would be, too. ▲

—Gregory H. Hawley

UNITED STATES MAGISTRATE JUDGES— Middle District of Alabama

By Rudy Hill

EDITOR'S NOTE: U.S. Magistrate Judges have become increasingly important in recent years, handling many cases from start to finish. We are profiling the Magistrate Judges, district by district, starting with this issue of *The Alabama Lawyer*. We thank **Rudy Hill** for interviewing the Magistrate Judges from the Middle District and preparing biographical sketches of each of them.

The general feeling among litigators on the Editorial Board is that lawyers who practice in federal court are quite familiar with the Article III judges across the state, but that most of those lawyers only know their local U.S. Magistrate Judges. We hope that these profiles are both helpful and interesting. Thank you, judges!

Chief Magistrate Judge Wallace Capel, Jr.

Chief Magistrate Judge Wallace Capel, Jr. has served on the federal bench for almost 20 years. He has served as a magistrate judge in the Middle District of Alabama for more than half of that time. His career has been devoted to public service in a variety of interesting capacities and places.

Judge Capel was born into a military family at Fort Bragg in North Carolina, although he thinks of Alabama—specifically, Tuskegee—as home. His father was from Andalusia, while his mother was from New Orleans. He has three siblings—two older sisters and a younger one.

Judge Capel's father was a quiet, disciplined and determined man. He served as a flight surgeon throughout a lengthy and distinguished military career, which he retired from as an Army Colonel when Judge Capel was 18. Judge Capel learned much from his father, including the importance of serving one's country and doing the right thing.



Judge Capel's family moved several times during his childhood. During his high school years, his father was stationed at a U.S. Army testing facility, Dugway Proving Ground or "Area 52," which is located in Utah about 85 miles southwest of Salt Lake City. So, Judge Capel attended and graduated from high school in Utah. Thereafter, he enrolled in college at the University of Utah, where he graduated from in 1977 with a B.S. degree in political science.

In the meantime, Judge Capel's father had retired from the military and begun serving as chief of staff at the VA Medical Center in Tuskegee. After college, Judge Capel rejoined his family in Tuskegee and obtained a master's in public administration from Auburn University at Montgomery. He then attended law school at Wayne State University in Detroit and graduated in 1982.

After law school, Judge Capel went to work as a public defender in Detroit. He tried a number of jury trials over the course of the next five years, most of which involved murder charges, thereby gaining invaluable experience in state courts. He then went into private practice for a period of time before moving to St. Croix in the U.S. Virgin Islands.

Judge Capel's change in practice at that time was almost as radical as his change in geography—he went

from a practice devoted primarily to representation of criminal defendants to the practice of a prosecutor, serving as an assistant attorney general in Christiansted, St. Croix. This change furthered the diversity and complexity of his experience, as he began prosecuting a wide variety of cases ranging from murder charges to paternity and child support matters as well as handling government civil suits. He enjoyed the change in scenery as well, learning advanced diving techniques and often taking swims in the ocean before work. Judge Capel was working in St. Croix when Hurricane Marilyn hit the island in 1995. The island sustained significant damage and was governed by martial law for a period of time. Not long afterward, Judge Capel returned to Michigan.

Upon his return, Judge Capel helped open a new branch of the Federal Defender Office for the Eastern District of Michigan in Flint. Not long thereafter, he was appointed to fill an open magistrate judge position in that district in 1999. He served in that position for seven years and then applied for a magistrate judge position in the Middle District of Alabama in 2006 to get back closer to home. He was offered the position and has been serving in that role ever since.

Judge Capel has a unique perspective, having served as a magistrate judge in multiple districts and states. He appreciates the diverse caseload enjoyed by the magistrate judges serving in the Middle District of Alabama and also the efficiency with which those cases are handled. He also appreciates the collegial relationship among the judges.

In his courtroom, Judge Capel values punctuality, preparedness and decorum. He also appreciates when attorneys before him are familiar with courtroom procedures. He has a lot of respect for and greatly enjoys good lawyers. For younger lawyers he has this advice: “He who knows that he knows not is a wise man.” In other words, it is perfectly acceptable to answer a question honestly by saying, “I don’t know, but I’ll find out.” It is not acceptable to pretend to know an answer and, in so doing, to misrepresent the facts or the law to the Court.

When he is not serving as a judge, Judge Capel enjoys a variety of activities, including sport shooting, flying drones, building computers, reading and traveling, and he engages in many of these activities with his family. He has two children.

Judge Capel is currently serving as Chief Magistrate Judge for the Middle District. He appreciates the tremendous workload and significant responsibilities that his office holds. The Middle District is fortunate to have someone with his experience and dedication to hard work on the bench.

Magistrate Judge David A. Baker

Judge David A. Baker has served as a federal magistrate judge for 27 years. He was first appointed to the bench in the Middle District of Florida in 1991. He retired in 2016, but was immediately recalled to continue his service. And he did not just return to his home district; after talking to then-Chief Magistrate Judge Susan Russ Walker about openings in the Middle District of Alabama, he volunteered to assist in our state as well.



Judge Baker grew up in northern Virginia, just outside of Washington, D.C. He attended college at the University of North Carolina—Chapel Hill where he was awarded degrees in mathematics and English. After completing his undergraduate studies, he attended the University of Virginia School of Law. He describes law school as an “interesting experience” for several reasons. First, the University of Virginia was, and still is, home to the U.S. Army Judge Advocate General’s Legal Center and School, which placed Army officers in many of Judge Baker’s classes. Second, the university had just begun to admit women into its undergraduate programs during Judge Baker’s time there. Third, his class was the first one to move into new facilities. Finally, the Watergate scandal occurred during that time. It was simply a fascinating time to be a law student at the University of Virginia.

Following law school, Judge Baker clerked with Judge Calvitt Clarke, Jr. on the U.S. District Court for the Eastern District of Virginia in Norfolk. He then joined the Foley & Lardner firm in its Milwaukee office. He became a partner in the firm and handled litigation and administrative law matters concerning environmental issues, intellectual property, commercial disputes, employment and a number of other matters.

When the firm merged with an Orlando firm, Judge Baker agreed to join the Orlando office after the merger, and he has been there ever since.

In private practice, Judge Baker thought from time to time about serving on the bench, and when a magistrate judge position opened in the Middle District of Florida, he applied for it. The broad scope of matters handled by magistrate judges appealed to him, and he had always enjoyed procedural and jurisdictional matters in private practice. He was awarded the position and appointed to serve in 1991.

Judge Baker explained that, having come from a civil practice, he had to become an expert on a lot of new topics very quickly upon taking the bench. This was particularly so in criminal matters, and he could tell that prosecutors and defense attorneys were testing him in his first few criminal cases, not to mention that the Middle District of Florida is much like the Middle District of Alabama in that the magistrate judges are fully utilized and preside over all types of matters.

Since his appointment to assist in Alabama, Judge Baker has primarily presided over contested civil cases and civil rights cases. While he has had to learn some Alabama law here and there as well as some local procedural requirements and nuances, the incorporation of Alabama cases into his docket has gone smoothly.

Judge Baker has also made numerous contributions to the federal court system during his time as a magistrate judge. Technology has changed drastically and entered the courtroom in many new ways since his appointment in 1991. Judge Baker has worked tirelessly on many issues related to courtroom technology, electronic dockets and the electronic case files used by judges. Indeed, he served two terms as a member of the Information Technology Committee of the Judicial Conference of the United States. One needs to look no further than a case docket on PACER to see his work—Judge Baker is responsible for the coloring and bolding on the docket sheets.

Judge Baker has also been active in continuing legal education. He has been a speaker and panelist at numerous bar and judicial seminars and workshops on various topics, including professionalism, intellectual property, federal practice and procedure, multidistrict litigation, electronic discovery and technology and the law. He also taught a course in legal ethics as an

adjunct instructor for the Legal Studies Department at the University of Central Florida. And just to be sure, if anyone had occasion to question Judge Baker's commitment to serving the legal profession (which no one ever would), the fact that he taught his college class on Saturday mornings should end the discussion.

Judge Baker often challenges young lawyers to develop the habit of viewing their cases and arguments from the perspectives of their opponent and the presiding judge. Doing so may highlight the futility of a position or the need to remove an argument from a brief. He also encourages lawyers of all ages to keep their submissions uncluttered and limited to the materials that are needed; shorter briefs are almost always better.

When he is not at work, Judge Baker can likely be found spending time with his children and grandchildren. He also enjoys hiking—especially in national parks—cooking and reading. His favorite subjects include history, historical fiction and thrillers.

Judge Baker has found it both challenging and rewarding to serve in the Middle District of Alabama and to spend time in Montgomery. His time here likely will wind down in 2018, but the citizens of this state and members of the bar will be indebted and grateful to him long afterward for the service he has provided to our state.

Magistrate Judge Gray M. Borden

Judge Gray M. Borden has served as a magistrate judge in the Middle District since October 2015. He was well-prepared to assume the significant responsibilities and diverse assignments that the position entails, having a wealth of experience in both criminal and civil matters prior to taking the bench.



Judge Borden was born and raised in Montgomery. After graduating from high school, he attended Washington and Lee University, where he obtained a B.S. degree in business administration. Of his undergraduate studies, Judge Borden recalls that the Honor System at Washington and Lee had a profound impact on

his personal and professional development. The Honor System is an all-encompassing system of trust based on principles of honor, civility and integrity that is self-regulated by, and governs, the student body at the university. Even today, it impacts Judge Borden's service on the bench, including his expectations of the lawyers who appear in his courtroom.

For a year between college and law school, Judge Borden worked at his father's accounting firm and also pursued two of his most salient interests—hiking and camping. During this time, he hiked a significant portion of the Appalachian Trail, including sections in Georgia, Tennessee and North Carolina, as well as Vermont's Long Trail.

Judge Borden then attended the University of Alabama School of Law, where he studied a variety of subjects, but particularly enjoyed criminal procedure. He also served as editor-in-chief of the *Alabama Law Review* and received several awards and honors, including the Jerome A. Hoffman Student Leadership Award. He was named to the Order of the Coif and recognized as a Hugo L. Black Scholar.

Following law school, Judge Borden clerked with Senior U.S. District Judge William M. Acker, Jr. in the Northern District of Alabama. Judge Borden still displays in his office the rather amusing letter he received from Judge Acker confirming his clerkship, and he has many fond memories from his time studying under the respected jurist. Judge Borden particularly remembers that Judge Acker was truly a legal encyclopedia and held a love of the law unmatched by others; perhaps most importantly, the clerkship allowed Judge Borden to observe in Judge Acker what it takes to serve as a respected and effective judge.

Following his clerkship, Judge Borden practiced in Birmingham at Lightfoot, Franklin & White. He primarily handled commercial litigation and products liability matters during his time there. He enjoyed private practice and particularly appreciated the balance that it provided between the complexity of the subject matter involved and the opportunities to perform substantive pre-trial and trial work.

Judge Borden's interest in criminal law and procedure eventually pulled him away from private practice and into public service. From 2010 until he assumed the bench in 2015, he served as an Assistant U.S. Attorney for the Middle District. In this role, he prosecuted a number of criminal offenders for white collar

and drug-trafficking offenses and eventually specialized in complex wiretapping operations. He also served on the Organized Crime Drug Enforcement Task Force (OCDETF), using his wiretapping expertise to build cases against high-level drug traffickers. The OCDETF program is the centerpiece of the U.S. Attorney General's drug strategy to reduce the availability of drugs by disrupting and dismantling major drug trafficking and money laundering organizations and related criminal enterprises. Judge Borden was integrally involved in these efforts as a federal prosecutor, as evidenced by his receipt of the Drug Enforcement Administration's 2013 Spartan Award for dedication and extraordinary effort in prosecuting organization-level drug trafficking crimes.

Judge Borden had thought of serving as a judge for most of his life, and those thoughts became a reality in 2015 when he applied for and was appointed to a position as a magistrate judge in the Middle District. The experience he gained in both civil and criminal matters before assuming the bench has proven to be invaluable, as well as the vast amount of institutional knowledge and experience that his fellow magistrate judges possess and are glad to share.

Judge Borden values preparedness, punctuality and efficiency from the lawyers appearing in his courtroom. Above all else, though, he appreciates and expects civility. Judge Borden has little tolerance for disrespect of the lawyers and litigants appearing before him, and he believes the best lawyers are strategic thinkers who can avoid most conflicts that might arise in litigation.

Judge Borden's service to the community extends well beyond the bench. He has served on the Board of Directors of the Alabama Appleseed Center for Law & Justice and the Family Guidance Center of Alabama in Montgomery, and the Freshwater Land Trust in Birmingham. He frequently returns to the University of Alabama School of Law to serve as a guest lecturer on criminal law and other topics.

In his free time, Judge Borden enjoys spending time with his wife and two boys. He has begun to share his love of the outdoors with his sons, and he particularly enjoys coaching them in baseball. His other interests include traveling, hunting, fishing and cooking. Judge Borden is truly a man of many interests and talents, and we are fortunate to have him serving in the Middle District.

Magistrate Judge Charles S. Coody

Judge Charles S. Coody has served as a United States Magistrate Judge for the Middle District of Alabama for more than 30 years, presiding continuously since the date of his initial appointment on May 1, 1987. His career is as diverse as it is remarkable and revolves around a common theme: Service.



Judge Coody was born and raised in Mobile, where he attended UMS-Wright Preparatory School. After graduating from high school, he attended Spring Hill College, where he served in the Army ROTC program and was a varsity debater. He received his B.S. degree in English in 1968 and was married that same year.

Judge Coody's service to our country is not limited to his 30 years on the bench. Instead, it began upon his graduation from college, when he was commissioned as a Second Lieutenant in the United States Army. He was first stationed at Fort Knox for Armored Officer Basic School and then at Fort Hood as an armored cavalry officer in the Second Armored Division. He later served on Advisory Team 80 in the Republic of Vietnam during the Vietnam War. In this role, he worked directly with the Vietnamese military to modernize their army and to provide assistance with combat planning, operations, training, intelligence, psychological warfare, communications, civil affairs, logistics and medicine. For his distinguished service, Judge Coody was promoted to captain and awarded two air medals and the Army Commendation Medal, the latter presented to those who distinguish themselves by heroism, meritorious achievement or meritorious service. After returning from Vietnam, Judge Coody continued to serve in the Alabama Army National Guard for many years.

While overseas, Judge Coody befriended a fellow army officer who inspired him to enroll in law school upon his return to the United States. He did just that, attending the University of Alabama School of Law from 1972 to 1975. During law school, Judge Coody was a founding editor of the *Law and Psychology Review* and a member of the Bench and Bar Legal Honor Society.

After graduating from law school, Judge Coody served as a law clerk to the Honorable T. Eric Embry,

associate justice of the Alabama Supreme Court. He then went to work for Smith, Bowman, Thagard, Crook & Culpepper in Montgomery, but not for long; in 1978, he was appointed general counsel for the Alabama State Board and State Department of Education, a position he held until he was appointed to the bench in 1987. During private practice, the board had been a client of Judge Coody's, and it was a natural transition for him to then serve as its first general counsel. During this time, he worked on a number of Title VII cases and desegregation issues and, in the process, gained a lot of experience practicing law in federal courts.

Judge Coody's experience made him a strong candidate and natural fit for a position on the bench, which he assumed in 1987. In his earlier years as a magistrate judge, he presided over a number of desegregation cases and prisoner cases. Since that time, he has presided over a variety of additional cases and proceedings, including civil jury trials and pre-trial proceedings; criminal proceedings including arraignments, motion to suppress hearings and guilty pleas; Social Security cases; military and veterans' affairs matters; and cases tied to the national park system.

Judge Coody has also been involved in many activities in addition to presiding over cases. He served as Chief Magistrate Judge for the Middle District from 2001 to 2008. He has also served on the Judicial Conference of the United States Committee on Court Administration, the Case Management and the Project Steering Group for development of the Next Generation CM/ECF and the Middle District's Information Technology Committee. He helped form the Middle District's Federal Defender Program, which provides representation to indigent defendants, and has devoted time to the Hugh Maddox Inn of Court, where he served as president, and as a member and chair of the Federal Bar Association's Bench & Bar Committee. He is also a firm proponent of civic engagement.

Judge Coody's advice to lawyers, young and old, is to be prepared when entering his courtroom, both with respect to the facts and the law. He enjoys and appreciates a well-prepared advocate. His greatest frustrations come from lawyers who do not devote the attention to detail required by the matter at hand. In reflecting on his time on the bench and how the practice of law has changed, Judge Coody is dispirited by the declining number of jury trials today, which he believes to be a loss both to lawyers and judges.

Outside of the courtroom, Judge Coody enjoys spending time with his family, which now includes five grandchildren. He first wife passed away in 2007, and he has since remarried. He also enjoys traveling and spending time in the mountains, as well as reading. His favorite subjects include political history and spy novels.

Perhaps the best example of Judge Coody's commitment to service is evidenced by how he described the celebration of his remarkable milestone of 30 years on the bench –“by having a bite of cake and returning to work.” While he may begin to wind down his caseload a bit in 2018, Judge Coody plans to continue serving on the bench. The Middle District has truly been fortunate to have such a remarkable and distinguished jurist and servant leader in its ranks for the past 30 years.

Magistrate Judge Susan Russ Walker

Judge Susan Russ Walker has served as a United States Magistrate Judge for the Middle District of Alabama for more than 20 years, presiding continuously since the date of her initial appointment on April 22, 1996. Both service and scholarship have defined her fascinating life and career.



Judge Walker was born and raised in Kingsport, Tennessee. She calls her hometown a bit of a compromise between her mother, who was from Alabama, and her father, who was from New Jersey. The hills of eastern Tennessee had an indelible impact on her as she grew up and contributed much to her lifelong interests in art and natural history.

After graduating from high school, she attended Eckerd College in St. Petersburg, Florida. Eckerd is a small liberal arts college that was founded as Florida Presbyterian College in 1958, and it holds a special place in the hearts of Judge Walker and her family. It is one of only 40 liberal arts colleges selected for Loren Pope's *Colleges That Change Lives*. Judge Walker was the fourth person in her family to study there, and she has served on Eckerd's Board of Trustees for the last 15 years.

Judge Walker graduated with highest honors from Eckerd in 1977 with a degree in English literature and

a minor in philosophy. After a year of graduate work at the University of Virginia, she attended Oxford University on a Rhodes Scholarship. She became a Rhodes Scholar in only the second year that women could apply for the prestigious honor. She studied at Oxford for two years and completed a B.A. degree with first class honors in English language and literature in 1980. She was later awarded an M.A. degree from Oxford as well.

The confluence of Judge Walker's interest in writing and political theory and her time at Oxford eventually pushed her toward the study of law. After her studies at Oxford, she worked as a professional writer for a year and a half, and then attended Yale Law School. Of those studies she recalls “incredibly interesting professors” and the time she spent with the Yale Barrister's Union and the Green Haven Prison Project. She was recognized both for her writing and advocacy talents, winning Yale's Felix S. Cohen and Colby Townsend Memorial Prizes for legal writing

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and the John Currier Gallagher Prize for trial practice. She focused her studies on constitutional law and legal history, did summer work in public interest law and gained invaluable experience in prison and poverty law.

Upon the recommendation of her law professor Burke Marshall—who had previously served as Assistant Attorney General in charge of the Civil Rights Division under President Kennedy—Judge Walker clerked on the Eleventh Circuit Court of Appeals for Judge Frank M. Johnson, Jr. after law school. She describes her time with the famed jurist as “remarkable.” After the clerkship, she served as an assistant attorney general for the State of Alabama. She then went into private practice in Montgomery with the firm of Miller, Hamilton, Snider & Odom until her judicial appointment. At the firm she maintained a diverse litigation practice, representing both plaintiffs and defendants in a broad range of fields including education, disability and voting rights.

Judge Walker’s time as an advocate in federal courthouses eventually brought her to the federal bench. She was appointed as a Magistrate Judge in 1996 and has maintained a diverse caseload since that time. The role of Magistrate Judges in the Middle District has expanded during her time on the bench and now includes all manner of pretrial proceedings in both civil and criminal actions—as well as many civil cases that are tried to verdict by consent. Judge Walker and her colleagues also handle certain specialized cases, such as those involving Social Security or arising from military bases or federal lands, as well as a number of ancillary matters, including mediation. Judge Walker served as Chief Magistrate Judge for the Middle District from May 2008 to February 2017.

Judge Walker truly enjoys her role as a judge and, perhaps drawing upon her background in literature,

she finds the most interesting part of her job to be the way people talk about themselves and construct narrative in the cases before her. In her courtroom, she values high-quality research and writing and advocates who are well prepared. She also appreciates lawyers who are collegial with their adversaries. Her ire may be drawn by the ill-prepared or the disrespectful.

Judge Walker has also tirelessly served the profession and the community in many additional capacities. For example, she has served as president of the Board of Directors of the Middle District’s Federal Defender program; as an Alabama State Bar examiner in civil procedure; as a member of the Alabama Inns of Court; as a member of *The Alabama Lawyer* Editorial Board; and as the Alabama secretary for the American Rhodes Trust. She has also devoted tremendous amounts of time and energy to pro bono assistance programs and efforts to provide criminal defendants with appropriate mental health and drug treatment, as well as projects relating to the history of the court and art in the courthouse. In addition, she teaches other federal judges subjects such as law and literature and mediation at national seminars.

Judge Walker is a proponent of a strong work-life balance, advising lawyers to “learn to play the cello”—to enjoy other aspects of life outside of the practice of law. She certainly follows this advice, as her personal pursuits are diverse and many. She enjoys art of many kinds, including painting, working with fine metals, gilding and woodcarving, as well as literature and natural history. She enjoys spending time with her family, including her husband, her daughter and “lots of nieces and nephews.”

Perhaps the most amazing part of Judge Walker’s career and life story is the humility with which she tells it. The Alabama bar is truly fortunate to have called her Judge Walker for more than 20 years and for her continued service on the bench. ▲

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Rudy Hill is a senior associate in Bradley Arant Boult Cummings LLP’s Birmingham and Montgomery offices, where he handles litigation and intellectual property matters. He graduated from the University of Alabama School of Law in 2010 and clerked with Hon. William H. Pryor, Jr. on the Eleventh Circuit Court of Appeals before beginning his practice. He serves as vice chair and associate editor for *The Alabama Lawyer*.

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FEBRUARY 2018 BAR EXAM
STATISTICS
 OF INTEREST

Number sitting for exam.....	311
Number passing exam (includes MPRE deficient and AL course deficient)	101
Bar exam pass percentage.....	32.5 percent

Bar Exam Passage by School

University of Alabama School of Law	66.7 percent
Cumberland School of Law	41.7 percent
Faulkner University Jones School of Law.....	22.6 percent
Birmingham School of Law	18.8 percent
Miles College of Law	11.8 percent

Certification Statistics*

Admission by examination	97
Admission by transfer of UBE score	29
Admission without examination (reciprocity).....	24

*Statistics of those individuals certified to the Supreme Court of Alabama for admission to the Alabama State Bar for the period October 4, 2017 through May 15, 2018. To be certified for admission, a candidate must satisfy all admission requirements as prescribed by the Rules Governing Admission to the Alabama State Bar.

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

LAWYERS IN THE FAMILY



**Brittany Ford (2018) and
Shaun Quinlan (1997)**
Admittee and stepfather



**Jameson Brent Butler (2018), James D. Butler (1995) and
Cynthia Vines Butler (2002)**
Admittee, father and mother



**Holly Harkins Worley (2018)
and Drew Alan Worley (2017)**
Admittee and husband



**Katherine Barnes (2017) and
William G. Barnes (1999)**
Admittee and father



**Halley Gillis (2018) and James
Gillis (1990)**
Admittee and father

LAWYERS IN THE FAMILY



**Christin R. French (2018), G. Courtney French (1998),
Hon. Elisabeth French (1997) and Lana Bell (2016)**
Admittee, brother, sister-in-law and cousin



**Clarence Dortch, IV (2017) and
Clarence Dortch, III (1987)**
Admittee and father



**John Philip Shealy Walter (2018) and
James N. Walter, Jr. (1981)**
Admittee and father



**Samuel Carr (2018), LeAnna Huddleston (1997)
and David Huddleston (1997)**
Admittee, aunt and uncle



OPINIONS OF THE GENERAL COUNSEL

Roman A. Shaul
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Third-Party Auditing of Lawyer's Billings—Confidentiality Problems and Interference with Representation

QUESTION:

The Office of General Counsel has received numerous opinion requests from attorneys who represent insureds pursuant to an employment agreement whereby the attorney is paid by the insured's insurance carrier. Some insurance companies have begun to submit to the attorney billing guidelines and litigation management guidebooks which place certain restrictions on discovery, the use of experts and other third-party vendors. The billing guidelines also restrict the lawyers who will be allowed to work on the files and require pre-approval of time spent on research, travel and the taking and summarization of depositions. Some insurance companies also require the attorneys they employ to submit their bills to a third-party billing review company for their review and approval. The bills obviously contain descriptions of work done on behalf of the insureds. In most instances, the insureds have not been consulted and have not approved the use of the billing guidelines and litigation management guidebook or the billing review process. The inquiry presented is whether there is any ethical impropriety in following these procedures which some insurance companies are attempting to impose.

ANSWER:

It is the opinion of the Disciplinary Commission of the Alabama State Bar that a lawyer should not permit an insurance company, which pays the lawyer to render legal services to its insured, to interfere with the lawyer's independence of professional judgment in rendering such legal services, through the acceptance of litigation management guidelines which have that effect. It is further the opinion of the commission that a lawyer should not permit the disclosure of information relating to the representation to a third party, such as a billing auditor, if there is a possibility that waiver of confidentiality, the attorney-client privilege or the work product privilege would occur. The Disciplinary Commission expresses no opinion as to whether an attorney may ethically seek the consent of the insured to disclosure since this turns on the legal question of whether such disclosure results in waiver of client confidentiality. However, the commission cautions attorneys to err on the side of non-disclosure if, in the exercise of the attorney's best professional judgment, there is a reasonable possibility that waiver would result. In other words, if an attorney has any reasonable basis to believe that disclosure could result in

waiver of client confidentiality, then the attorney should decline to make such disclosure.

DISCUSSION:

The Disciplinary Commission has addressed the conflict of interest issues raised by dual representation of the insurer and the insured in several earlier opinions. In one of those, RO-87-146, the commission concluded:

“Although you were retained to represent the insured by the insurance company and are paid by the company, your fiduciary duty of loyalty to the insured is the same as if he had directly engaged your services himself. See, RO-84-122; *Nationwide Mutual Insurance Company v. Smith*, 280 Ala. 343, 194 So.2d 505 (1966) and *Outboard Marine Corporation v. Liberty Mutual Insurance Company*, 536 F. 2d 730, 7th Cir. (1976). Since the interests of the two clients, the insurance company and the insured, do not fully coincide, the attorney’s duty is first and primarily to the insured.” Similar conclusions were reached in RO-90-99 and RO-81-533. Additionally, the Alabama Supreme Court discussed the insurer-insured relationship in *Mitchum v. Hudgens*, 533 So.2d 194 (Ala. 1988) and confirmed the Disciplinary Commission’s analysis of that relationship, viz: “It must be emphasized that the relationship between the insured and attorney is that of attorney and client. That relationship is the same as if the attorney were hired and paid directly by the insured and therefore it imposes upon the attorney the same professional responsibilities that would exist had the attorney been personally retained by the insured. These responsibilities include ethical and fiduciary obligations as well as maintaining the appropriate standard of care in defending the action against the insured.” 533 So.2d at 199.

See also, Hazard and Hodes, *The Law of Lawyering*, 2nd Ed. §§ 1.7: 303-304. These authorities conclusively establish the proposition that the insured is the attorney’s primary client and it is to the insured that the attorney owes his first duty of loyalty and confidentiality. Effective January 1, 1991, the Alabama Supreme Court promulgated the *Rules of Professional Conduct* of the Alabama State Bar. Rule 1.8(f) of the *Rules of Professional Conduct* provides as follows:

“Rule 1.8 Conflict of Interest: Prohibited Transactions

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
- (1) the client consents after consultation or the lawyer is appointed pursuant to an insurance contract;
 - (2) there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship; and
 - (3) information relating to representation of a client is protected as required by Rule 1.6.”

A similar and related prohibition is found in Rule 5.4(c) of the *Rules of Professional Conduct* which provides:

“Rule 5.4 Professional Independence of a Lawyer

- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer’s professional judgment in rendering such legal services.” The Disciplinary Commission has examined a *Litigation Management Guidebook* which the commission understands to be one example among many of the procedures which some insurance companies have requested attorneys to follow in representing insureds. This guidebook contains various provisions and requirements which are of concern to the commission. The guidebook requires a “claims professional,” who, in most instances, is a non-lawyer insurance adjuster, to “manage” all litigation. An excerpt from the guidebook provides:

“Accountability for the lawsuit rests with the defense team. This team is composed of the claims professional and the defense attorney. The claims professional is charged with fulfilling all the responsibilities enumerated below and is the manager of the litigation.”

Other responsibilities of the claims professional include “evaluation of liability, evaluation of damages, recommendation of discovery and settlement/disposition.” The guidebook requires the claims professional and the defense attorney to jointly develop an “Initial Case Analysis” and “Integrated Defense Plan” which are “designed for the claims professional and defense attorney to reach agreement on the case strategy, investigation and disposition plan.” Furthermore, the attorney “must secure the consent of the claims professional before more than one attorney may be used at depositions, trials, conferences, or motions.” The claims professional must approve “[e]ngaging experts (medical and otherwise), preparation of charts and diagrams, use of detectives, motion pictures and other extraordinary preparation” The *Litigation Management Guidebook* also requires that all research, including computer time, over three hours be pre-approved by the insurance company and restricts deposition preparation by providing that the “person attending the deposition should not spend more time preparing for the deposition than the deposition lasts.” It is the opinion of the Disciplinary Commission of the Alabama State Bar that many of the requirements of the *Litigation Management Guidebook*, such as described above, could cause an “interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship” in violation of Rule 1.8(f)(2) and also possibly constitute an attempt “to direct or regulate the lawyer’s professional judgment” in violation of Rule 5.4 (c). The commission is of the opinion that foremost among an attorney’s ethical obligations is the duty to exercise his or her independent professional judgment on behalf of a

(Continued from page 355)

client and nothing should be permitted to interfere with or restrict the attorney in fulfilling this obligation. An attorney should not allow litigation guidelines, or any other requirement or restriction imposed by the insurer, to in any way impair or influence the independent and unfettered exercise of the attorney's best professional judgment in his or her representation of the insured.

The commission has also examined the insurance company's "Billing Program" pursuant to which attorneys are required by the insurance company to submit their bills for representation of the insureds to a third-party auditor for review and approval. Not only are the bills themselves to be submitted to the auditor, but all invoices must be accompanied by the most recent Initial Case Analysis and Integrated Defense Plan which contains the defense attorney's strategy, investigation and disposition plans. Each activity for which the attorney bills "must be described adequately so that a person unfamiliar with the case may determine what activity is being performed."

It is the opinion of the Disciplinary Commission that disclosure of billing information to a third-party billing review company as required by the billing program of the insurance company may constitute a breach of client confidentiality in violation of Rules 1.6 and 1.8(f)(3) and, if such circumstances exist, such information should not be disclosed without the express consent of the insured. However, the commission also has concerns that submission of an attorney's bill for representation of the insured to a third party for review and approval may not only constitute a breach of client confidentiality, but may also result in a waiver of the insured's right to confidentiality, as well as a waiver of the attorney-client or work product privileges. While it is not within the purview of an ethics opinion to address the legal issues of whether and under what circumstances waiver may result, the fact that waiver is a possibility is a matter of significant ethical concern. A recent opinion of the United States First Circuit Court of Appeals, *U.S. v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997), held that the IRS could obtain billing information from MIT's attorneys, which would otherwise be protected under the attorney-client privilege and as work product, because MIT had previously provided this same information to Defense Department auditors monitoring MIT's defense contracts. The Court held that the disclosure of these documents to the audit agency forfeited any work product protection and waived the attorney-client privilege. MIT argued that disclosure to the audit agency should be regarded as akin to disclosure to those with a common interest or those who, though separate parties, are similarly aligned in a case or consultation, e.g., investigators, experts, codefendants, insurer and insured, patentee and licensee. The Court rejected this argument, holding that an outside auditor was not

within the "magic circle" of "others" with whom information may be shared without loss of the privilege.

"Decisions do tend to mark out, although not with perfect consistency, a small circle of 'others' with whom information may be shared without loss of the privilege (e.g., secretaries, interpreters, counsel for a cooperating codefendant, a parent present when a child consults a lawyer). Although the decisions often describe such situations as one in which the client 'intended' the disclosure to remain confidential, the underlying concern is functional: that the lawyer be able to consult with others needed in the representation and that the client be allowed to bring closely-related persons who are appropriate, even if not vital, to a consultation. An intent to maintain confidentiality is ordinarily necessary to continue protection, but it is not sufficient. On the contrary, where the client chooses to share communications outside this magic circle, the courts have usually refused to extend the privilege." 129 F.3d at 684.

As indicated above, the question of whether disclosure of billing information to a third-party auditor constitutes a waiver of confidentiality or work product is essentially a legal, as opposed to ethical, issue which the commission has no jurisdiction to decide. The commission is also aware that this may be a developing area of the law which could be affected, or even materially altered, by future decisions. However, while the commission recognizes that the MIT opinion may not be the definitive judicial determination on this issue, the possibility that other courts could follow the 1st Circuit makes it incumbent on every conscientious attorney to err on the side of caution with regard to such disclosures. If disclosure to a third-party auditor waives confidentiality, the attorney-client privilege or work product protection, then such disclosure is clearly to the detriment of the insured to whom the defense attorney owes his first and foremost duty of loyalty. Attorneys who represent the insured pursuant to an employment contract with the insurer should err on the side of non-disclosure when there is any question as to whether disclosure of confidential information to a third party could result in waiver of the client's right to confidentiality or privilege.

Furthermore, while a client may ordinarily consent to the disclosure of confidential information, the commission questions whether an attorney may ethically seek the client's consent if disclosure may result in a waiver of the client's right to confidentiality, the attorney-client privilege or the work product privilege. This concern was specifically addressed by the State Bar of North Carolina in Proposed Ethics Opinion 10. The opinion points out that "the insured will not generally benefit from the release of any confidential information." To the contrary, release of such information could work to the detriment of the insured. "The release of such information to a third party may constitute a waiver of the insured's attorney-client or work product privileges. Therefore, in general, by consenting,

the insured agrees to release confidential information that could possibly (even if remotely) be prejudicial to her or invade her privacy without any returned benefit.”


The North Carolina opinion discusses the comment to Rule 1.7(b) which states that the test of whether an attorney should ask the client to consent is “whether a disinterested lawyer would conclude that the client should not agree.” The opinion concludes as follows:

“When the insured could be prejudiced by agreeing and gains nothing, a disinterested lawyer would not conclude that the insured should agree in the absence of some special circumstance. Therefore, the lawyer must reasonably conclude that there is some benefit to the insured to outweigh any reasonable expectation of prejudice, or that the insured cannot be prejudiced by a release of the confidential information, before the lawyer may seek the informed consent of the insured after adequate consultation.”

In reaching the above-stated conclusions, the Disciplinary Commission has examined and considered, in addition to opinion of the North Carolina Bar referenced above, opinions issued by, or on behalf of, the bar associations of Florida, Indiana, Kentucky, Louisiana, Missouri, Montana, North Carolina, Pennsylvania, South Carolina, Utah, Washington and the District of Columbia. All of these opinions appear to be consistent with the conclusions and concerns expressed herein. Only Massachusetts and Nebraska have

released opinions which may, in part, be inconsistent with this opinion, and it appears that the opinions from these two states are not official or formal opinions of those states’ bar associations.

In summary, and based upon the foregoing, it is the opinion of the Disciplinary Commission of the Alabama State Bar that a lawyer should not permit an insurance company, which pays the lawyer to render legal services to its insured, to interfere with the lawyer’s independence of professional judgment in rendering such legal services, through the acceptance of litigation management guidelines which have that effect. It is further the opinion of the commission that a lawyer should not permit the disclosure of information relating to the representation to a third party, such as a billing auditor, if there is a possibility that waiver of confidentiality, the attorney-client privilege or the work-product privilege would occur. The Disciplinary Commission expresses no opinion as to whether an attorney may ethically seek the consent of the insured to disclosure since this turns on the legal question of whether such disclosure results in waiver of client confidentiality. However, the commission cautions attorneys to err on the side of non-disclosure if, in the exercise of the attorney’s best professional judgment, there is a reasonable possibility that waiver would result. In other words, if an attorney has any reasonable basis to believe that disclosure could result in waiver of client confidentiality, then the attorney should decline to make such disclosure. [RO-98-02] ▲



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NOTICE

DISCIPLINARY NOTICES

- ▲ Notice
- ▲ Surrender of License
- ▲ Suspensions

Notice

- **Richard Larry McClendon**, who practiced in Bessemer and whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 30, 2018 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 2016-1021, 1025, 1089, 1351 and 1406, before the Disciplinary Board of the Alabama State Bar. [ASB Nos. 2016-1021, 1025, 1089, 1351 and 1406]

Surrender of License

- On May 9, 2018, the Supreme Court of Alabama adopted the order of the Alabama State Bar Disciplinary Commission, accepting the surrender of license of Mobile attorney **James W. Zeigler** from the practice of law in Alabama, effective April 18, 2018. On February 19, 2018, Zeigler voluntarily submitted his surrender of license to practice law in Alabama. [ASB No. 2015-864]

Suspensions

- Anniston attorney **Raymond Charles Bryan** was suspended from the practice of law for one year in Alabama by the Supreme Court of Alabama, effective May 8, 2018. The supreme court entered its order based upon the Disciplinary Board's report and order, wherein Bryan was found guilty of violating Rule 8.4(g), *Ala. R. Prof. C.* Bryan failed to pay the 941 taxes he withheld from his employee's pay, failed to notify his former employees of his misconduct and used those 941 tax funds due to be remitted to the federal government to pay other personal and business expenses. [ASB No. 2014-509]
- Covington, Louisiana attorney **Christa Hayes Forrester**, who is also licensed in Alabama, was ordered by the Disciplinary Board of the Alabama State Bar to receive reciprocal discipline of a six-month suspension from the practice of law in Alabama, effective May 17, 2018, with the six-month suspension to be held in abeyance pending the successful completion of a one-year probationary period. Forrester was found guilty of violating Rules 1.3 [diligence], 1.4 [communication] and 8.4 (a) and (d) [misconduct], *Louisiana Rules of Professional Conduct*. ▲



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M E M O R I A L S

▲ Alex F. Lankford, III

Alex F. Lankford, III

Hand Arendall Harrison Sale LLC honors the life of its dear friend and member, Alexander Fillmore Lankford, III. Alex passed away peacefully on July 28, 2018 at his home in Mobile, Alabama. He is remembered as a devoted, loving and loyal husband, father and grandfather. He is also remembered as an outstanding lawyer and devoted law partner. Alex was 91 years old and was an active member of the firm's admiralty practice for over sixty years. He loved the practice of law and, remarkably, kept regular office hours and assisted clients beyond his 90th birthday.



Born in 1927 in Wilmington, North Carolina to Alex F. Lankford, Jr. and Pauline Guest Lankford, Alex was raised in Gadsden, Alabama. He graduated from the McCallie School in Chattanooga, TN, then served in the U. S. Navy. Having earned a four-year track scholarship, he graduated from Vanderbilt University in 1950, where he met his future bride, Molly. Alex and Molly were married in 1951.

Alex received his LLB from the University of Alabama School of Law in 1952 and served on the Board of Editors of the Alabama Law Review. Before joining Hand Arendall in 1956, he served as law clerk for the Honorable Daniel H. Thomas, United States District Court, Southern District of Alabama. Alex was a tenacious advocate and thoughtful counselor. Known for his intellect, energy, and loyalty, his clients found him to be a trusted advisor and faithful friend. During his career, he handled hundreds upon hundreds of maritime cases. In 1974, he argued (and won) a case before the United States Supreme Court. A member of the Consular Corps (Chairman 1985-86), he served as Honorary Consul for Bolivia, S.A. from 1966-2017. He served as president of the Mobile County Bar Association in 2000. In 2012, he was honored by Best Lawyers® as Lawyer of the Year in Admiralty and Maritime law in Mobile. In 2017, Alex was named Maritime Person of the Year by the Mobile chapter of the Propeller Club of the United States.

Alex was an avid outdoorsman. In 1958, he served as president of the Alabama Deep Sea Fishing Rodeo. He loved nature, often taking fishing and hunting trips with friends and grandchildren. Alex also enjoyed traveling with Molly and especially loved spending time on Dauphin Island with his family. An ardent gardener his entire life, it gave him great pleasure to share his flowers, fruits and vegetables with friends. Always a competitor, Alex was a tennis player and a dedicated runner; he participated in road races into his late 80's. He was involved in the YMCA Big Brothers and Big

Sisters organization and was, for over 50 years, an active member of Spring Hill Presbyterian Church. Alex served many years as an elder in his church and especially enjoyed teaching adult Sunday school. Predeceased by his parents, Alex is survived by Molly, his wife of 66 years; his children, Jean Lankford (Marilyn) of Mobile; Louisa Harrington (Bill) of Dallas, Texas; Alex Lankford, IV (Laura) of Fairhope; his grandchildren, Will Harrington (Morgan), Tanner, Preston, Anna and Lillie Harrington; Coleman Torrans, Ben, Sam and James Lankford. ▲

Acker, Hon. William Marsh, Jr.

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Admitted: 1952
Died: June 21, 2018

Alexander, Michele Marybeth

West Blocton
Admitted: 2001
Died: December 4, 2017

Bounds, Donald Richard

Mobile
Admitted: 1956
Died: June 22, 2018

Brooks, Robert Thomas

Pinson
Admitted: 1974
Died: June 24, 2018

Brower, William Jordan

Birmingham
Admitted: 1985
Died: May 25, 2018

Calton, Jimmy Spurlock, Jr.

Eufaula
Admitted: 1997
Died: May 17, 2018

Cassady, Joe Calvin, Jr.

Enterprise
Admitted: 1982
Died: May 19, 2018

Caylor, John Will

Huntsville
Admitted: 1976
Died: April 13, 2018

Culpepper, Sterling Gardner, Jr.

Montgomery
Admitted: 1961
Died: May 4, 2018

Foster, Arthur Key, Jr.

Birmingham
Admitted: 1960
Died: May 24, 2018

Franklin-Sisson, Victoria Jeanne

Birmingham
Admitted: 1990
Died: June 12, 2018

Geary, John Patrick

Boone, NC
Admitted: 1967
Died: March 18, 2018

Holloway, John Malcolm, Jr.

Montgomery
Admitted: 1978
Died: June 15, 2018

Johnson, James Ronald

Carbon Hill
Admitted: 1997
Died: June 1, 2018

Keel, James Michael

Birmingham
Admitted: 1998
Died: June 28, 2018

Kyle, James Timothy

Decatur
Admitted: 1980
Died: April 20, 2018

Parker, William Andrew, III

Birmingham
Admitted: 1967
Died: May 15, 2018

Rosenthal, Richard Rockwell

Birmingham
Admitted: 1992
Died: May 25, 2018

Sees, Elizabeth Anne

Springfield, IL
Admitted: 2007
Died: June 2, 2018

Storm, Hon. Sandra Hendrickson

Birmingham
Admitted: 1978
Died: June 4, 2018

Torbert, Hon. Clement Clay, Jr.

Opelika
Admitted: 1954
Died: June 2, 2018

Wynn, Carlton Terrell, Jr.

Birmingham
Admitted: 1967
Died: June 9, 2018



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

Election Law

Veitch v. Vowell, No. 1170723 (Ala. June 1, 2018)

Jurisdiction stripping statute, *Ala. Code* §17-16-44, under which “[n]o jurisdiction exists in or shall be exercised by any judge or court to entertain any proceeding for ascertaining the legality, conduct, or results of any election, except so far as authority to do so shall be specially and specifically enumerated and set down by statute,” did not apply to candidate’s claim he was wrongfully denied right to have his name included on a ballot, pursuant to an act he alleges is void.

Reformation; Mutual Mistake

G.R.L.C. Trust v. Garrison Decatur Crossings, LLC, No. 1170315 (Ala. June 15, 2018)

Trial court properly granted petition for reformation of recorded memorandum of lease based on mutual mistake, in the failure to record an “Exhibit A” containing a legal description of the leasehold. Clear and convincing evidence demonstrated that both parties knew the premises subject to the leasehold, and that their intent was to record the memorandum of lease with the legal description attached, but that through clerical error it was never recorded.

Rule 54(B) Certification Improper

Richardson v. Chambless, No. 1170263 (Ala. June 15, 2018)

The court dismissed an appeal as being from an improper Rule 54(b) certification; resolution of pending claims regarding an allegedly faulty inspection could potentially moot the claims adjudicated by the trial court’s partial summary judgment, and, thus, the remaining claims were intertwined with claims disposed of.

Wantonness (Statute of Limitations)

Beddingfield v. Mullins Insurance Co., No. 1170143 (Ala. June 15, 2018)

Because plaintiff’s claims accrued before June 3, 2011, their wantonness claims were subject to a six-year statute of limitations under *Ex parte Capstone*, while negligence claims were properly dismissed based on the applicable two-year statute of limitations.

Will Contests

Colley v. Dees, No. 1170042 (Ala. June 15, 2018)

Plaintiff could establish prima facie case of lack of testamentary capacity based on lay testimony. Under *Sanders v. Brooks*, 611 So. 2d 336 (Ala. 1992), lay testimony can outweigh even medical testimony on the issue.

Stay of Civil Proceedings Pending Criminal Proceedings

Ex parte Decatur City Bd. of Educ., No. 1170017 (Ala. June 22, 2018)

Under *Ala. Code* § 16-24C-6(j), in a teacher termination proceeding, no testimony of the teacher may be admitted in a criminal proceeding. Nevertheless, teacher brought action against board to enjoin teacher termination proceeding, due to pendency of criminal charges against teacher. Trial court granted the injunction. Afterward, teacher (in her criminal case) then successfully challenged the constitutionality of the underlying criminal statute (statute concerned teacher engaged in sex act with student under 19), and trial court in the criminal case dismissed the charges. State appealed that decision (appeal is pending). Board moved to dissolve the injunction based on the *Code* section prohibiting admission of any teacher testimony in the parallel criminal case, and based on the change of circumstances, which the trial court denied. The supreme court reversed, holding that the change of circumstances, coupled with the statute's rendering all teacher testimony inadmissible in a criminal case, gave teacher adequate protection of her Fifth Amendment rights.

Relation Back of Amendments

Ex parte Brookwood Health Services, Inc., No. 1170054 (Ala. June 22, 2018)

Even assuming there was an identity of interests between Brookwood Health Services, Inc. and Brookwood Baptist Health, LLC (the originally-named defendant), the claim against the Inc. did not relate back to original filing against the LLC, thus rendering the medical-liability claims time-barred. Under Rule 15(c), "within the applicable period of limitations or one hundred twenty (120) days of the commencement of the action, whichever comes later, the party to be brought in by amendment" must have received notice of the action. Plaintiff did not serve the LLC (the original defendant) until 128 days after commencement, and the Inc. was not served until five months later.

Venue; Forum-Selection Clauses

Ex parte Consolidated Pipe & Supply Co., Inc., No. 1170050 (Ala. June 22, 2018)

Consolidated (pipe supplier) sued Bolt (its contractor) and Ohio Casualty (Bolt's bonding company) in Morgan County, seeking compensation for pipe supplied to a public works project in Morgan County subject to the Alabama Little Miller Act. Bond contained provision mandating venue for any action where the project occurred. Defendants moved to transfer venue to Jackson County, contending that Bolt is situated in Jackson County and that it was the only proper venue in Alabama for the action, and also asserted *forum non conveniens* as an alternative. Trial court granted the motion to transfer, and Consolidated petitioned for mandamus. The supreme court granted the writ, rejecting defendants' argument that Consolidated was not a proper "claimant"

under the bond, and that the forum selection clause in the bond mandated venue in Morgan County. The court further noted that *forum non conveniens* arguments are not sound where a contractual forum selection is mandatory.

Products Liability

DISA Industries, Inc. v. Bell, No. 1160339 (Ala. June 29, 2018)

While employed by Anniston Foundry, Bell was injured while misstepping over a trough not protected by guardrails and holding molten iron, which led to the medically-necessitated amputation of toes on his foot. He sued DISA, the manufacturer and designer of the molding system containing the trough, under AEMLD and on negligence theories. The jury returned a verdict of \$500,000. The supreme court reversed, holding that as to the AEMLD claim, the undisputed evidence was that DISA was not the "manufacturer" of the modified trough not protected by guardrails—instead, that was Union Foundry, Bell's employer. As to the negligence claim, the undisputed evidence showed that the molding system (DISA) was separate and distinct from the furnace system (of which the trough was a part), and, thus, DISA's duty did not extend into a system which it did not design and which it had no contractual duty to inspect or modify.

Wrongful Death; Standing

Ex parte Continental Motors, Inc., No. 1170165 (Ala. June 29, 2018)

The court adopted Justice Bolin's special concurrence from *Golden Gate National Senior Care, LLC v. Roser*, 94 So. 3d 365 (Ala. 2012), under which an administrator *ad litem* appointed under § 43-2-250 "lacks the capacity of a 'personal representative'" under § 6-5-410, and, thus, an AAL appointed by the Mobile Probate Court lacked standing to bring the death claim.

Competitive Bid Law; Mootness

Ex parte Carter, No. 1160887 (Ala. July 27, 2018)

Trial court directed to dismiss action brought by state auditor against state finance officials, seeking to void a contract for purported violations of competitive bid law. Auditor's only potential remedy was injunctive, and completion of contract mooted the action. *Ala. Code* § 41-16-31 authorizes a taxpayer action exclusively for injunctive relief for violations of the Competitive Bid Law.

Arbitration

Aurora Healthcare, Inc. v. Ramsey, No. 1160659 (Ala. July 27, 2018)

In arbitration enforcement proceedings, trial court determined that a jury trial was needed on whether plaintiff's signature was valid or had been procured through fraud. On appeal, defendant did not challenge that finding, but instead argued that the arbitration agreement covered disputes preceding the date of the agreement itself. The

(Continued from page 363)

supreme court held that the appeal was premature, because there had been no determination as to whether the agreement itself was enforceable. The court also dismissed plaintiff's cross appeal, which challenged the circuit court's determination that a disputed fact issue existed, because there had been no grant of a motion to compel arbitration.

Omitted Spouse; Common-Law Marriage

Harbin v. Estess, No. 1170209 (Ala. July 27, 2018)

(1) *Ala. Code* § 43-2-350(b)'s six-month limitation does not apply to a claim for an omitted spouse's share pursuant to § 43-8-90, because it is not a claim against the estate; and (2) there is a conflict in the evidence as to whether a common-law marriage existed, precluding summary judgment on the substantive question. (The common-law marriage purportedly arose before January 1, 2017; Alabama does not recognize common-law marriages commencing after that date).

From the Court of Civil Appeals

Lien Priority; Interpleader

Alabama Medicaid Agency v. Southcrest Bank, No. 2170186 (Ala. Civ. App. June 1, 2018)

Under *Bailey Mortgage Co. v. Gobble-Fite Lumber Co.*, 565 So. 2d 138 (Ala. 1990), liens falling behind a mortgage interest are prioritized in order of time the liens were created. In this case, Medicaid lien took priority over conservator for former ward (now deceased) as well as funeral home for its expenses. Trial court did not err in awarding attorneys' fees to interpleading party, because that is within trial court's discretion under *Youngblood v. Bailey*, 459 So. 2d 855, 861 (Ala. 1984).

Civil Forfeiture

Blackwell v. State ex rel. Snyder, No. 2160941 (Ala. Civ. App. June 1, 2018)

In connection with second-degree marijuana possession charge, officer seized \$13,320 in cash and sought forfeiture based on use in connection with crime. Trial court, after hearing testimony *ore tenus*, found largely for state. The CCA reversed, holding that "although some or all of the currency seized from the claimant might not be traceable to legitimate business enterprises engaged in by the claimant, there remains no evidence linking that money to a specific drug transaction, past or future..."

Rule 60; Taxation

Norfolk Southern Railway Company v. Williams, No. 2160823 (Ala. Civ. App. June 15, 2018)

In a FELA case, because there was some amount in the \$360,000 general verdict for recovery of lost wages, the entire amount was subject to taxation under the Railroad Retirement Tax Act ("the RRTA"), 26 U.S.C. § 3201 *et seq.*

Workers' Compensation

Lawler and Cole CPAs, LLC v. Cole, No. 2170162 (Ala. Civ. App. July 13, 2018)

Employee (accountant in accounting firm) was killed while at work by office intruder who was a former long-time client, though many years had passed since the last engagement. Surviving spouse brought comp action, which employer and insurer contested. The trial court awarded benefits. The CCA affirmed, reasoning that Alabama law has long recognized that an unexpected willful assault upon an employee by another person constitutes an accident for purposes of the Act. The evidence showed that the dispute was not purely personal in nature, but arose out of the employment relationship.

Education Law

Ex parte Guin, No. 2170850 (Ala. Civ. App. July 13, 2018)

Board of Education canceled Guin's contract principal contract; Guin sought review in circuit court under Alabama's Teacher Accountability Act ("the TAA"), *Ala. Code* § 16-24B-1 *et seq.* The circuit court eventually determined, under § 16-24B-3(e)(3), that it would not be able to hear the matter within 45 days, and under that statute appointed a "mediator" (the statutory term) for a binding resolution under that section. Thereafter, the circuit court entered certain discovery orders quashing discovery requests, from which mandamus relief was sought. The CCA dismissed the petition, holding that the circuit court lacked jurisdiction to enter any orders after referral to the statutory mediator.

Tax Redemption

Equity Ventures, LLC v. Cheaha Bank, No. 2170365 (Ala. Civ. App. July 20, 2018)

Circuit court erred by dismissing petition for writ of mandamus filed by EV, which had acquired property via tax deed, from ruling of probate court on lender's redemption action. Proper procedure for obtaining review of probate court's rulings regarding a redemption action is through petition for mandamus, because circuit courts lack appellate jurisdiction specifically over such actions, but have supervisory authority over the probate courts.

Sales Tax

***ADOR v. Downing*, No. 2170129 (Ala. Civ. App. July 20, 2018)**

Sales of prepaid authorization numbers for wireless services on cellular telephones were subject to sales tax.

Section 14 Immunity

***ADPH v. Noland Health Services, Inc.*, No. 2170404 (Ala. Civ. App. July 27, 2018)**

State agency is absolutely immune from suit, including on claims seeking declaratory and injunctive relief; those claims must be brought against officials in their official capacity, not against the agency itself.

Evidence (MVA)

***Carter v. Haynes*, No. 2170367 (Ala. Civ. App. July 27, 2018)**

In MVA case, trial court did not abuse its discretion in excluding (under Rule 403) evidence that defendant consumed methadone and marijuana six to seven hours before accident, where defendant testified he was completely sober at time of accident and where no other witness claimed defendant was exhibiting any sign of impairment.

From the United States Supreme Court

Statutory Construction

***Lagos v. U.S.*, No. 16-1519 (U.S. May 29, 2018)**

Expenses incurred by victim (defendant's lender) in ascertaining scope and breadth of defendant's fraudulent conduct are not reimbursable or subject to payment as "expenses" incurred in an "investigation" under the Mandatory Victim's Restitution Act of 1996; reimbursable expenses under the Act are those investigatory expenses incurred by the government.

Free Exercise Clause

***Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n.*, No. 16-111 (U.S. June 4, 2018)**

Commission violated Phillips's free-exercise rights by citing him with violations of Colorado's anti-discrimination laws in Phillips's refusal to prepare a wedding cake for a

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same-sex couple. Commission's treatment of Phillips's case showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection in multiple ways, including (1) certain commissioners' public-hearing comments that religious beliefs cannot legitimately be carried into commerce; (2) comments disparaging Phillips's faith as despicable and comparing it to the use of religious beliefs associated with slavery and the Holocaust, which comments cast doubt on the fairness and impartiality of the commission; and (3) different treatment of Phillips's case and the cases of other bakers with objections to anti-gay messages who prevailed before the commission.

Bankruptcy; Non-Dischargeability

Lamar, Archer & Cofrin v. Appling, No. 16-1215 (U.S. June 4, 2018)

Statement about a single asset can be a "statement respecting the debtor's financial condition" which, if false, subjects debtor to a non-dischargeability determination under 11 U.S.C. § 523(a)(2).

Class Actions; American Pipe Tolling

China Agritech, Inc. v. Resh, No. 17-432 (U.S. June 11, 2018)

Upon denial of class certification, a putative class member may not, in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations. Class-action tolling created by the *American Pipe* standard cannot be "tacked" or "piggy-backed" from one putative class action to another.

Voting Rights

Husted v. A. Philip Randolph Institute, No. 16-980 (U.S. June 11, 2018)

Ohio's process for purging enrolled voters from voter lists based on failure to vote for two years (requesting address verification and requiring a response to maintain eligibility) does not violate the National Voter Registration Act (NVRA), 52 U.S.C. §20501(b) and §20507(a)(4).

Contracts Clause

Sveen v. Melin, No. 16-1432 (U.S. June 11, 2018)

Under a 2002 Minnesota statute, "the dissolution or annulment of a marriage revokes any revocable . . . beneficiary designation . . . made by an individual to the individual's former spouse." Former spouse contended that retroactive application of the statute to a policy issued before 2002

violated the Contracts Clause. The Supreme Court disagreed, finding no Contracts Clause violation.

Free Speech

Minnesota Voters Alliance v. Mansky, No. 16-1435 (U.S. June 14, 2018)

The Court invalidated, on free-speech grounds, a Minnesota law which prohibits individuals (including voters) from wearing a "political badge, political button, or other political insignia" inside a polling place on election day. The restriction was forum-based; the forum was non-public, meaning that content-based restrictions are enforceable if reasonable; but that the state's line-drawing was not "reasonable" because the term "political" was completely unmoored, especially in light of concessions at oral argument about expressions such as rainbows on shirts, etc.

Choice of Law (Foreign Law)

Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical, Ltd., No. 16-1220 (U.S. June 14, 2018)

Federal court determining foreign law under FRCP 44.1 should give "respectful consideration" to a foreign government's submission, but the court is not bound to accord conclusive effect to the foreign government's statements.

Redistricting; Standing

Gill v. Whitford, No. 16-1161 (U.S. June 18, 2018)

Plaintiffs challenging legislative redistricting based on political gerrymandering lacked standing to seek statewide redrawing of districts. In other malapportionment cases, the only way to vindicate an individual voter's right to an equally-weighted vote was through wholesale redrawing. Here, though plaintiffs claimed that their individual votes had been diluted through partisan gerrymandering, the harm resulted from the composition of the voter's own district, not necessarily of all districts in the state. Though a lack of standing usually necessitates dismissal of a case, in this case, where the kind of claim involved and its contours of justiciability are unsettled, the Court remanded the case to the district court to afford plaintiffs an opportunity to prove concrete and particularized injuries proving the burden on individual voting and (presumably) necessitating a remedy of statewide redrawing.

First Amendment Retaliation

Lozman v. City of Riviera Beach, No. 17-21 (U.S. June 18, 2018)

Plaintiff lawfully arrested during a city council meeting, allegedly in retaliation for plaintiff's past disputes with city officials concerning use of eminent domain power, could prevail on a First-Amendment retaliation claim despite the existence of probable cause. The *Mt. Healthy* but-for causation standard (under which the retaliation against plaintiff for his lawful open-meetings lawsuit and public comments was the but-for cause of plaintiff's arrest) governs.

Dormant Commerce Clause

***South Dakota v. Wayfair, Inc.*, No. 17-494 (U.S. June 21, 2018)**

Overruling *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the Court upheld a South Dakota statute requiring a merchant lacking a physical presence in the state to remit sales tax on a transaction of sale to a state's resident. The statute covered only sellers that delivered annually either more than \$100,000 of goods into the state or engaged in 200 or more separate transactions for goods delivered into the state, surpassing a *de minimis* threshold.

Appointments Clause; ALJs

***Lucia v. SEC*, No. 17-130 (U.S. June 21, 2018)**

The Appointments Clause of the Constitution lays out the permissible methods of appointing "Officers of the United States," a class of government officials distinct from mere employees. Art. II, §2, cl. 2. Held: administrative law judges (ALJs) appointed directly by officials with the Securities and Exchange Commission, rather than by the commission itself, qualify as such "Officers" whose appointment directly by commission officials violates the Appointments Clause.

Patent

***WesternGeco LLC v. Ion Geophysical Corp.*, No. 16-1011 (U.S. June 22, 2018)**

Patent plaintiff could recover lost profits from extraterritorial sales of infringing goods manufactured with U.S. parts. Patent infringement actions under 35 U.S.C. §§271(f)(1) and (f)(2) therefore allow for recovery of extraterritorial lost profits under section 284 of the Patent Act, because the focus of section 284 in a section 271(f)(2) case is on the act of exporting components from the U.S. The conduct in this case, therefore, which is relevant to the statutory focus, occurred in the U.S., making the extraterritorial lost profits properly recoverable.

Unions; First Amendment

***Janus v. State, County, and Municipal Employees*, No. 16-1466 (U.S. June 27, 2018)**

State's extraction of mandatory collective-bargaining agency fees from non-consenting public-sector employees for remittance to a public-sector employee union violates the First Amendment; *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209, which concluded otherwise, is overruled.

Abortion; First Amendment

***Nat. Inst. of Family and Life Advocates v. Becerra*, No. 16-1140 (U.S. June 26, 2018)**

In the posture of a preliminary injunction, petitioners, who challenged a California law requiring abortion-avoidance counseling centers to notify patients of abortion rights and options, are likely to succeed on their claim that the statute violates the First Amendment. It is a content-based speech law as to which strict scrutiny applies.

Immigration

***Trump v. Hawaii*, No. 17-965 (U.S. June 26, 2018)**

The President lawfully exercised the broad discretion granted to him under 8 U.S.C. §1182(f) to suspend the entry of aliens into the United States. In the posture of a preliminary injunction, respondent aliens have not demonstrated a likelihood of success on the merits of their claim that Presidential Proclamation No. 9645 violated the Establishment Clause, because its language was facially grounded in security concerns about the vetting of traveling aliens, notwithstanding certain statements by the President suggesting general religious animus.

Redistricting

***Abbott v. Perez*, No. 17-586 (U.S. June 25, 2018)**

District court disregarded the presumption of legislative good faith and improperly reversed the burden of proof when it required the state to show a lack of discriminatory intent in adopting new districting plans; only one of the challenged state house districts was held to be an impermissible racial gerrymander.

Antitrust

***Ohio v. American Express Co.*, No. 16-1454 (U.S. June 25, 2018)**

American Express's anti-steering provisions in its merchant contracts, which prohibit merchants from avoiding fees by discouraging customers' American Express card use at the point of sale, do not violate federal antitrust law.

From the Eleventh Circuit Court of Appeals

Employment

***Jefferson v. Sewon America, Inc.*, No. 17-11802 (11th Cir. June 1, 2018)**

While still in her probationary period of employment, Jefferson approached an IT manager and expressed interest in

(Continued from page 367)

transferring to his department. Manager initially indicated that she could transfer, but later informed her she was ineligible because she lacked experience and because a higher-ranked manager “wanted a Korean in that position.” Jefferson immediately reported this statement to HR, and a week later, Sewon fired Jefferson. Jefferson then sued, and the district court granted summary judgment in favor of Sewon on all claims. The Eleventh Circuit reversed in part, holding there was direct evidence that Sewon failed to transfer her on the basis of her nationality, and circumstantial evidence that Sewon fired her in retaliation for her complaint.

Rule 41

Perry v. The Schumaker Group, No. 16-15400 (11th Cir. June 4, 2018)

Joint stipulation of parties, dismissing a single remaining claim without prejudice after dismissal of other claims with prejudice, was invalid. Rule 41(a)(1) permits voluntary dismissals only of entire “actions,” not claims.

Qualified Immunity

Manners v. Cannella, No. 17-10088 (11th Cir. June 4, 2018)

Officers were entitled to qualified immunity in section 1983 excessive force claim arising from altercation incident to plaintiff’s arrest. Reasonable officer could believe Manners failed to stop when directed to do so, which established arguable probable cause, the standard for qualified immunity.

Securities

Brink v. Raymond James & Assocs. Inc., No. 16-14144 (11th Cir. June 8, 2018)

Alleged misrepresentation in issue—that RJA had built a profit into a processing fee associated with passport accounts, which purportedly covered only transaction execution and clearing costs—was not “material” for purposes of federal securities laws, and thus, the complaint did not fall within the preclusive effect of SLUSA (which prohibits state-law-based class actions based upon an alleged misrepresentation of material fact in connection with a purchase or sale of a “covered security”).

Garnishments; Eleventh Amendment

Cassady v. Hall, No. 18-10667 (11th Cir. June 15, 2018)

Garnishment actions are “suits” under the 11th Amendment, and the State of Georgia had not waived its immunity to such a garnishment, and Congress has not clearly abrogated the states’ immunity to garnishments.

Mootness; ADA

Haynes v. Hooter’s of America LLC, No. 17-13170 (11th Cir. June 19, 2018)

Plaintiff’s claims for declaratory and injunctive relief pursuant to ADA’s Title III were not moot based on defendant’s remediation plan based on agreement with different plaintiff in an almost identical earlier-filed suit. Plaintiff was not a party to the agreement and, thus, has no standing to enforce it, and in any event, defendant had not complied with the requirements of that agreement.

Qualified Immunity

Cozzi v. City of Birmingham, No. 17-11011 (11th Cir. June 19, 2018)

Officers were not entitled to qualified immunity on unlawful arrest claim; viewing the evidence most favorably to plaintiff, officer disregarded readily verifiable exculpatory evidence concerning Cozzi (absence of a tattoo, among other items) before arresting him.

Labor

Cowabunga, Inc. v. NLRB, No. 16-10932 (11th Cir. June 26, 2018) and Everglades College v. NLRB, No. 16-10341 (11th Cir. June 26, 2018)

The requiring of employees to agree to arbitration is not an unfair labor practice.

FLSA

Llorca v. Collier County, FL Sheriff, No. 17-10616 (11th Cir. June 27, 2018)

Former sheriff were not entitled to compensation under the FLSA for the time that they spent donning and doffing police gear or the time that they spent driving to and from work in marked patrol vehicles.

Judicial Estoppel

Weakley v. Eagle Logistics, No. 17-14022 (11th Cir. June 29, 2018)

Using the new two-part standard set forth in *Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1180 n.4 (11th Cir. 2017) (*en banc*), the Court affirmed the district court’s dismissal of two lawsuits for failure to disclose them in the plaintiff’s bankruptcy schedules, based on judicial estoppel. Of particular note in this case, the debtor/plaintiff had disclosed two lower-dollar lawsuit claims in his schedules, but failed to disclose these potentially higher-dollar claims.

FLSA

***Asalde v. First Class Parking Systems, LLC, No. 16-16814* (11th Cir. June 29, 2018)**

Parking valets could be entitled to overtime under FLSA based on employer's being subject to "enterprise coverage" under FLSA; uniforms being used by the valets could be "materials" under that FLSA provision (which was an issue of fact for the jury), because an item may qualify as a "material" as long as "a business provides a service using [the] item as part of its commercial operations."

Prudential Standing

***Newton v. Duke Energy Florida, LLC, No. 17-10080* (11th Cir. July 11, 2018)**

Utility consumers sued utilities, challenging under the Dormant Commerce Clause (DCC), a Florida statute designed to incentivize utilities to invest in nuclear power plant construction. The district court dismissed the case for lack of prudential standing, holding that plaintiffs were not in the zone of interests which the DCC was designed to protect. The Eleventh Circuit affirmed.

FOIA

***Sikes v. U.S. Dept. of the Navy, No. 17-12421* (11th Cir. July 19, 2018)**

Writer brought FOIA action against Navy, seeking copy of suicide note written by former Navy admiral to his wife, as well as certain notes of decedent found in the backseat of his official Navy vehicle. The district court denied the request. The Eleventh Circuit reversed as to the backseat notes; even though the requester obtained responsive documents in a prior FOIA request, nothing in FOIA allows an agency to withhold documents based on the prior request. The Court affirmed with respect to the suicide note based on FOIA's privacy exemptions; under the applicable balancing test, the privacy interest was strong and that the district court was not required to conduct an *in camera* inspection of the document before making that determination.

Offers of Judgment

***Collar v. Apalux, Inc., No. 18-10676* (11th Cir. July 17, 2018)**

Once a final judgment is entered, a party is no longer "defending against a claim" under Rule 68(a), and, therefore, the offer expires.

Quiet Title Act; Statute of Limitations

***NE 32nd St. LLC v. USA, No. 17-11908* (11th Cir. July 23, 2018)**

Twelve-year statute of limitations under the Quiet Title Act, 28 U.S.C. § 2409a, barred a challenge to an 80-year-old easement; 2013 permit did not change the terms of that easement to the detriment of the trust so as to revive the statute.

Bankruptcy

***In re: Daughtrey, No. 15-14544* (11th Cir. July 24, 2018)**

Bankruptcy Court properly denied debtors' effort to convert their case from a Chapter 7 to Chapter 11, where the 7 was filed to prevent the sale of their property in a public auction pursuant to a state court judgment that foreclosed the mortgage on the property.

Equal Protection

***Lewis v. Governor of Alabama, No. 17-11009* (11th Cir. July 25, 2018)**

The day after the City of Birmingham imposed a minimum wage of \$10.10 per hour, the Governor of Alabama signed a "Minimum Wage Act" ("MWA") into law, which mandated a uniform minimum wage in Alabama, that being the federal minimum. Citizens sued state officials, contending that the MWA violated their equal protection rights because the Act's purpose and effect was to discriminate against Birmingham's black citizens. The district court dismissed the complaint. The Eleventh Circuit affirmed as to other claims, but reversed the dismissal as to the equal protection claim, holding that the complaint stated a plausible cause of action.

RECENT CRIMINAL DECISIONS

From the United States Supreme Court

Search and Seizure

***Collins v. Virginia, No. 16-1027* (U.S. May 29, 2018)**

Acting without a warrant, officer approached the curtilage of a home, removed a tarp over a motorcycle and confirmed cycle's theft by running a search on the license plate. The Supreme Court held that the "automobile exception" does not extend to an officer's warrantless intrusion into the curtilage of a home; the search was illegal.

Criminal Law (Federal); Sentencing

***Hughes v. U.S., No. 17-155* (U.S. June 4, 2018)**

Defendant may seek relief under 18 U.S.C. §3582(c)(2) for sentence reduction, based on retroactively applying change to applicable sentencing guideline range, if he entered a plea agreement under *Federal Rules of Criminal Procedure* 11(c)(1)(C) (Type-C agreement), which permits the defendant and the Government to "agree that a specific sentence or sentencing range is the appropriate disposition of the case," and "binds the court [to the agreed-upon sentence] once [it] accepts the plea agreement." The sentence imposed pursuant to a Type-C agreement is "based on" the guidelines.

(Continued from page 369)

Criminal Law (Federal); Sentencing

Koons v. U.S., No. 17-5716 (U.S. June 4, 2018)

Defendants pleaded guilty to charges carrying mandatory minimum sentences. Because the guideline range maximum was below the mandatory minimum, the district court at sentencing started with the mandatory minimum and then employed a downward departure based on substantial assistance to the government. When the guideline range changed, defendants sought reductions under 18 U.S.C. § 3582(c)(2). Held: courts below properly denied sentence reduction, because the sentences were not “based on” the guidelines

Sentencing

Rosales-Mireles v. U.S., No. 16-9493 (U.S. June 18, 2018)

Under *Fed.R. Crim. P.* 52(b), guidelines-calculation errors not raised in the district court may be remedied in the court of appeals if, as established in *United States v. Olano*, 507 U.S. 725: (1) the error was not “intentionally relinquished or abandoned,” (2) the error is plain and (3) the error “affected the defendant’s substantial rights.” If those conditions are met, “the court of appeals should exercise its discretion to correct the forfeited error if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” Issue: when a guidelines error satisfies *Olano*’s first three conditions, does that warrant relief under the fourth prong? Held: yes, in the ordinary case

Fourth Amendment; Cell Phone Location Data

Carpenter v. U.S., No. 16-402 (U.S. June 22, 2018)

Government’s warrantless acquisition of cell-phone location records constitutes a Fourth Amendment “search,” because the cell phone owner has a “reasonable expectation of privacy” in one’s location. Thus, such records are obtainable only generally by securing a warrant. The Court’s opinion cautioned, however, that existing exceptions to obtaining a warrant (exigent circumstances, for example) still would apply and might be available in appropriate cases to obtain such data without a warrant.

Double Jeopardy

Currier v. Virginia, No. 16-1348 (U.S. June 22, 2018)

Defendant who consented to severance of criminal charges into two proceedings was not placed in double jeopardy by prosecution of second offense, where the jury acquitted him in the first proceeding.

From the Court of Criminal Appeals

Probation Revocation

Taylor v. State, CR-17-0103 (Ala. Crim. App. June 1, 2018)

Trial court’s proceedings did not constitute an adequate probation revocation hearing. The probationer’s counsel, rather than the probationer, admitted to the probation violation, and probationer was not given an opportunity to speak on his own behalf when he attempted to do so.

Sex Offender Sentencing

R.V.D. v. State, CR-16-1317 (Ala. Crim. App. June 1, 2018)

Trial court erred in sentencing defendant to life without parole under *Ala. Code* § 13A-5-6, because the statute was not in effect at the time of one of his sodomy offenses, and the evidence did not show that the victim of the other sodomy offense was less than six years of age when it occurred. Remand was necessary both for the trial court to re-sentence the defendant on those charges and to provide him an opportunity to speak on his own behalf as required by *Ala. R. Crim. P.* 26.9.

Rule 32

Bedell v. State, CR-17-0238 (Ala. Crim. App. June 1, 2018)

The court reversed the summary dismissal of the defendant’s Rule 32 petition, finding that he had sufficiently pleaded his claim that his prior Georgia conviction, was erroneously used for his sentencing as under the Alabama Habitual Felony Offender Act, *Ala. Code* § 13A-5-9, because he had fully discharged under a Georgia first offender statute.

Rule 32; Ineffective Assistance

McBurnett v. State, CR-16-1324 (Ala. Crim. App. June 1, 2018)

Because defendant had not been advised by counsel that he would not be eligible for parole if he pleaded guilty, the court reversed the denial of Rule 32 relief to provide him an opportunity to withdraw his guilty pleas to several sexual offenses involving children. ▲

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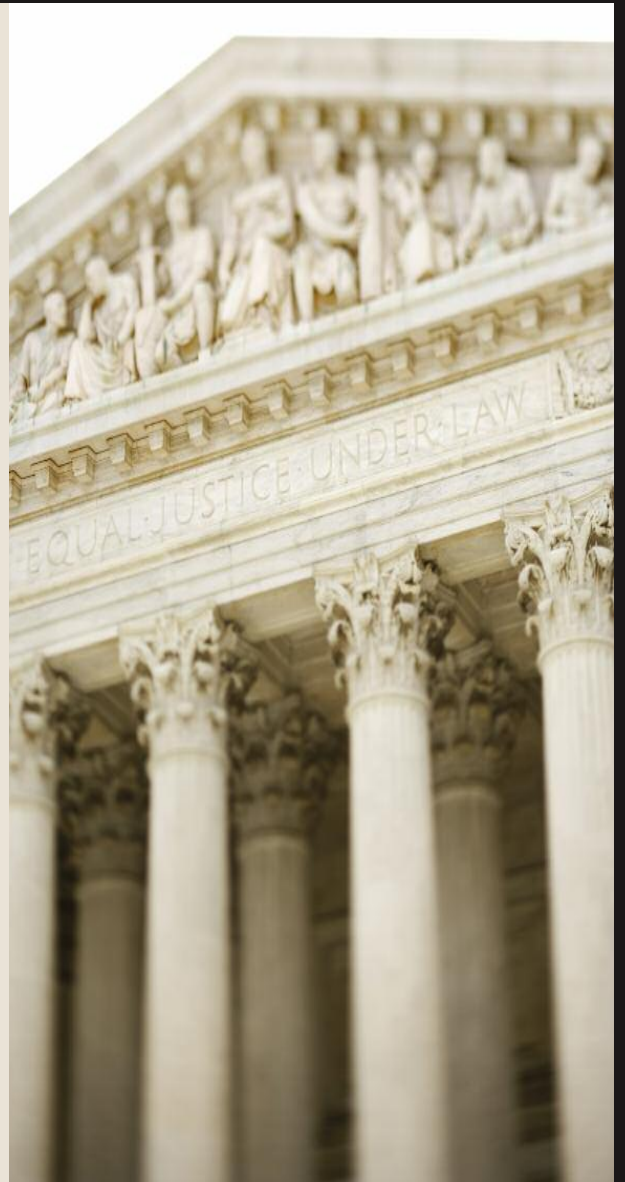
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ABOUT MEMBERS, AMONG FIRMS

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Among Firms

Adams & Reese LLP announces that **Bradley Sanders** joined as special counsel and **Garrett Zoghby** joined as an associate, both in the Mobile office.

Auburn University announces that **Morgan M. Sport** is now senior staff counsel.

Balch & Bingham announces that **Josh Bell** joined as a partner in the Birmingham office.

Brackin, McGriff & Johnson PC of Foley announces a name change to **Brackin & Johnson PC** and the opening of its Fairhope office.

Cody Allison & Associates PLLC of Nashville announces that **Samuel D. Payne** is now a senior attorney.

Constangy, Brooks, Smith & Prophete LLP announces that **Tom Scroggins** and **Brooke Nixon** joined as partners in the Birmingham office.

Davidson, Davidson, Umbach & Forbus of Auburn announces that **Jason Forbus** joined as a partner.

Kenneth D. Davis PC announces that **Florrye M. Cleveland** joined as an associate.

Dominick Feld Hyde PC announces that **Richard G. Burton** joined as a shareholder and **Emily V. Frost** joined as a staff attorney.

Green Mountain Legal Services announces that **Nikki L. Smith** joined as an associate.

Hall Booth Smith PC announces that **Sean T. Mims** is now a partner in the Columbus, Georgia office.

Hamer Law Group LLC announces that **Rebecca M. Wright** joined as an associate.

Hyundai Motor Manufacturing Alabama LLC of Montgomery announces that **Jason Trippe** joined as corporate counsel.

Lloyd & Hogan PC announces that **Emily Peake Mauck** joined as an associate in the Birmingham office.

Lyons HR announces that **Catherine Glaze** is now vice president of corporate human resources.

Maynard Cooper & Gale announces that **Kyle Heslop** joined as an associate in the Birmingham office, and **Dale Gipson**, **Katherine McGuire** and **Jordan Hennig** joined the Huntsville office, as a shareholder and as associates, respectively.

Morris, King & Hodge PC of Huntsville announces that **Jasmine N. McNamara** joined as an associate.

Red Oak Legal PC announces that **Davis B. Hartley, Sr.** joined the Montgomery office as an associate.

Sirote & Permutt PC announces that **Daniel R. Hugunine** joined the Birmingham office.

Smith, Spires, Peddy, Hamilton & Coleman PC announces that **Angela C. Shields** is now a partner/shareholder and that **Andrew N. King** joined as an associate.

Taylor Martino PC announces that **Ruth Lichtenfeld** joined the firm.

The **Social Security Administration** announces that **Bettye L. Rutledge** accepted an appointment last fall as administrative law judge in Philadelphia.

Stockham, Cooper & Potts announces that **Hannah Thrasher** joined as counsel and **JT Salmon** joined as an associate.

Watkins & Eager LLC announces that **Aaron B. Thomas** joined as a member in the Birmingham office.

Wallace, Jordan, Ratliff & Brandt LLC announces that **Robert L. Loftin, III** joined as a member and **Jonathan A. Griffith** joined as an associate.

West Alabama Disability Law LLC announces the opening of an office in Tuscaloosa and that **E. Drew Emerson** joined as an associate. ▲



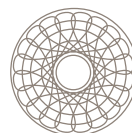
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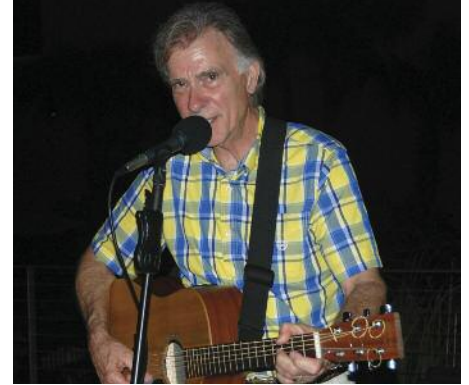


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Rachel Miller
alabamayls@gmail.com



Jamie and Jack Durham enjoy one last “Barrels and Planks” before leaving Alabama for the Big Apple!



Always a big hit at this YLS get-together is Robert Thornhill, director of the Alabama Lawyer Assistance Program.

What's in Store for Your YLS

As I look forward to serving this year as president of the Alabama State Bar Young Lawyers' Section, I am excited about what is in store for our section. The YLS is a group of highly-motivated, community-minded attorneys who are under the age of 37 or who have been practicing law for three years or less. Of the members who opt in to the section through the Alabama State Bar, approximately 40 are selected to serve on the Executive Committee. Executive Committee members are assigned to individual projects that the section promotes throughout the year, and they work tirelessly to ensure that those projects are successful. It is important to note, however, that you do not have to be chosen for the Executive Committee to be actively involved in the section. General members of the section are encouraged to volunteer with our programs and to take advantage of the opportunities their membership provides throughout the year. Below I will share with you a few of the ways in which you can become involved and benefit from your membership.

Networking

Membership in the ASB YLS provides multiple opportunities for young lawyers to network with like-minded attorneys throughout the state. At the Alabama State Bar Annual Meeting held in June, our section co-sponsored a cigar and bourbon mixer appropriately named Barrels and Planks. Attorneys and judges of all ages enjoyed live music and fellowship, along with a few top-shelf bourbons and cigars. The event was a great success, and we look forward to partnering with the state bar for events at next year's annual meeting.

In May, our section will travel to Orange Beach for our annual Orange Beach CLE. This three-day event will offer highly relevant CLE courses targeted to the early stages of

law practice, as well as provide attendees invaluable time to socialize and connect on a personal level with practitioners and judges whom they may not otherwise have the chance to meet. It is through these contacts that many young lawyers have made a friend, referred a case and even secured a new job. And, while it might go without saying, a CLE at the beach is *just fun*. We hope you will make plans to attend.

Community Involvement and Service

In addition to networking opportunities, membership with the YLS offers multiple platforms for community involvement and service. As part of a larger task force with the American Bar Association, the ASB Young Lawyers' Section recently assisted with disaster relief efforts in three north Alabama counties affected by the March 2018 tornadoes. Individuals in those communities needing assistance with FEMA, landlord/tenant issues and other storm-related legal matters were able to have their questions answered by our volunteers through a hotline set up by the state bar. While our section certainly hopes this type of service is not needed throughout the upcoming year, we are prepared to dedicate our resources to aid those impacted by natural disasters and other emergencies.

Looking forward to the beginning of 2019, our section will host Minority Pre-Law conferences in Mobile, Montgomery, Birmingham and Huntsville. These events provide high school students interested in the law with a forum to learn

the ins-and-outs of pursuing a law degree and what law practice is all about. Each year, we strive to grow and improve our Minority Pre-Law conferences, and our section is confident that this year will once again bring valuable information to young minds who may very well be the future of our profession. Our programs always need volunteers, so please consider helping in your geographical area.

Partnership with the Alabama State Bar

Finally, as a member of the YLS, opportunities abound for partnership with the Alabama State Bar. Multiple members of our section have served on state bar task forces in both leadership and supporting roles. Involvement in the task forces has afforded YLS members the opportunity to address issues important to the state bar while providing the task forces with the unique perspective of a young lawyer. These task forces have also allowed our members to pursue initiatives that are of particular interest to them or to their practice, and to impact those areas through their contributions. Our section is grateful for the opportunity to serve on these task forces, and our members look forward to contributing meaningfully to these committees and to advancing the goals of the state bar as a whole.

For more information on how you can become involved, please contact the Young Lawyers' Section at alabamayls@gmail.com. We look forward to hearing from you! ▲

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Rachel Laurie Riddle
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LEGISLATIVE WRAP - UP

The Department of Examiners of Public Accounts

The Department of Examiners of Public Accounts is one of the least appreciated, yet most critical, agencies in state government. It performs numerous functions that are essential to the honest and effective operation of the state. From ensuring that money is spent in a manner consistent with how the legislature appropriated it, to ensuring legal compliance of boards and agencies, to supporting the ferreting out of fraud, there is little daily government activity at any level in which the department does not have some oversight role or function.

The department was established in 1947 as part of the legislative branch. See *Ala. Code* §§ 41-5A-1 thru 41-5A-22. Prior to 1947, it existed as a division of the department of finance. In Alabama, the Department of Examiners of Public Accounts serves as the primary auditing agency and is the sister agency to other states' state auditor's offices. The department is overseen by a chief examiner, who is appointed to a five-year term by the Legislative Committee on Public Accounts and subject to confirmation by the senate.

From 1982 until June of this year, the chief examiner was Ron Jones. Ron was a true public servant who dedicated his professional life to serving the citizens of Alabama. On June 1, Rachel Laurie Riddle assumed that role. Rachel is a member of our state bar and is also the example of what a true public servant should be. Previously, Rachel served as deputy director and senate fiscal officer for the Legislative Fiscal Office, where she specialized in providing legal and financial advice to the Alabama Legislature in matters concentrated on government budgeting, financing structure and opportunities and other similar matters. Rachel deserves credit for most of the rest of this article, which serves as an overview of the operation and function of the department.

Jurisdiction

The Department of Examiners of Public Accounts touches all aspects of government and others' use of public funds. The department has the authority to examine and audit the books, accounts and records of all state and county offices, officers, bureaus, boards, commissioners, corporations, departments and other agencies, including the state's two-year and four-year colleges and universities.

The department may perform investigations or assist federal, state and local law enforcement agencies by performing audits and examinations or providing technical assistance. As can be seen from the vast statutory authority given to the department, many in the legal community are either directly or indirectly familiar or should be familiar with its process and inner-working. A brief glance of those processes are set out below.

Accountability

The main function of the chief examiner and the department is to promote accountability and balance in government by instituting the legislative “check” on the executive and judicial branches, as well as local government entities. This role is extremely imperative to the State of Alabama and the function of government in general. The department examines all state and county books, accounts and records and prepares such accounting and reporting systems, procedures, records and forms as are necessary for uniform accounting in state and county offices.

The majority of audit work performed by the department consists of traditional financial and legal compliance audits/examinations, including federal compliance. These audits focus on two areas: reliability and accuracy of financial statements and compliance with laws, ordinances, regulations and other requirements. The department conducts financial audits of universities and colleges, county governments (including local school boards) and state agencies. Most of these audits are performed to ensure federal compliance concerning the proper use of federal funds. This type of audit is essential to the entities receiving federal funds and ensuring the continued flow of federal funds to the entity. Legal compliance examinations are a great bulk of the department’s work product. During legal compliance examinations, examiners look at entities’ legal authority concerning funding distributions and allocations, contracts and other statutory provisions regarding officials and personnel.

In addition, the department performs “operational audits” and sunset reviews that go beyond the traditional audits and address economy, efficiency and effectiveness of operations. Such audits have been developed because the performance of governmental entities is not generally measured by profit and cannot therefore be determined alone through analysis of financial transactions. Operational audits and sunset reviews are not normally comprehensive, but focus on particular aspects of operations. Each of these reports serves a different and vital purpose in state and local government. Sunset reviews are performed for the Legislative Sunset Committee and are presented cyclically to the committee at a hearing conducted for each state board, commission or agency being reviewed. At these hearings, the committee has the opportunity to continue or “sunset” each of the entities before them. In most cases, the entity is continued. However, in certain instances, the board, commission or agency may be required to go through a sunset review process more regularly to facilitate fixing problems that were highlighted in the department’s sunset review to the committee.

Enforcement

During the process of conducting all audits and examinations, department personnel consistently and vigilantly look for evidence of fraudulent practices taking place concerning the use of public funds. To facilitate this process and any investigations taking place, the chief examiner may issue subpoenas for any relevant information and question individuals

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(Continued from page 377)

under other related to any such investigations, audits or examinations. Section §41-5A-12, *Code of Alabama*, 1975, states that a person who knowingly makes any materially false, fictitious or fraudulent statement or representation in any audit or in providing any information under this chapter shall be guilty of a Class C felony.

In the process of settling charges with individuals found to have been unjustly enriched, whether fraudulently or not, the chief examiner is required to attempt to settle amounts found due. If amounts that are the result of transactions made in error or not in compliance with state and local laws come to the attention of the examiner during the examination, the examiner will notify appropriate officials of the entity under examination of the amounts to be repaid and will allow the amounts to be voluntarily repaid to the proper accounts, funds or agencies. However, the report will present the facts surrounding the discrepancy along with a statement that amounts due were repaid during the examination. It is noted that voluntary repayment will not absolve or relinquish any liability that may result from fraudulent or criminal acts.

If amounts due remain unpaid at the end of the examination, a formal demand letter for repayment will be delivered to the responsible person. The demand letter will contain an explanation of why the department has decided the amount is due; a citation, if appropriate, of the legal authority or criteria used by the department in their decision; and copies, or references to, public documents used to determine amounts due.

In addition to demanding repayment of amounts due, the letter will schedule a hearing date with the chief examiner to show cause why the amount should not be repaid. If after such hearing is conducted, the chief examiner rules that these charges still stand, such unpaid charges are certified to the attorney general or district attorney for suit. Reports setting out such charges by the department are *prima facie* evidence in court proceedings.

Reports are released to the public on Friday of every week and can be found on the Alabama Department of Examiners of Public Accounts website, www.examiners.alabama.gov. ▲

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