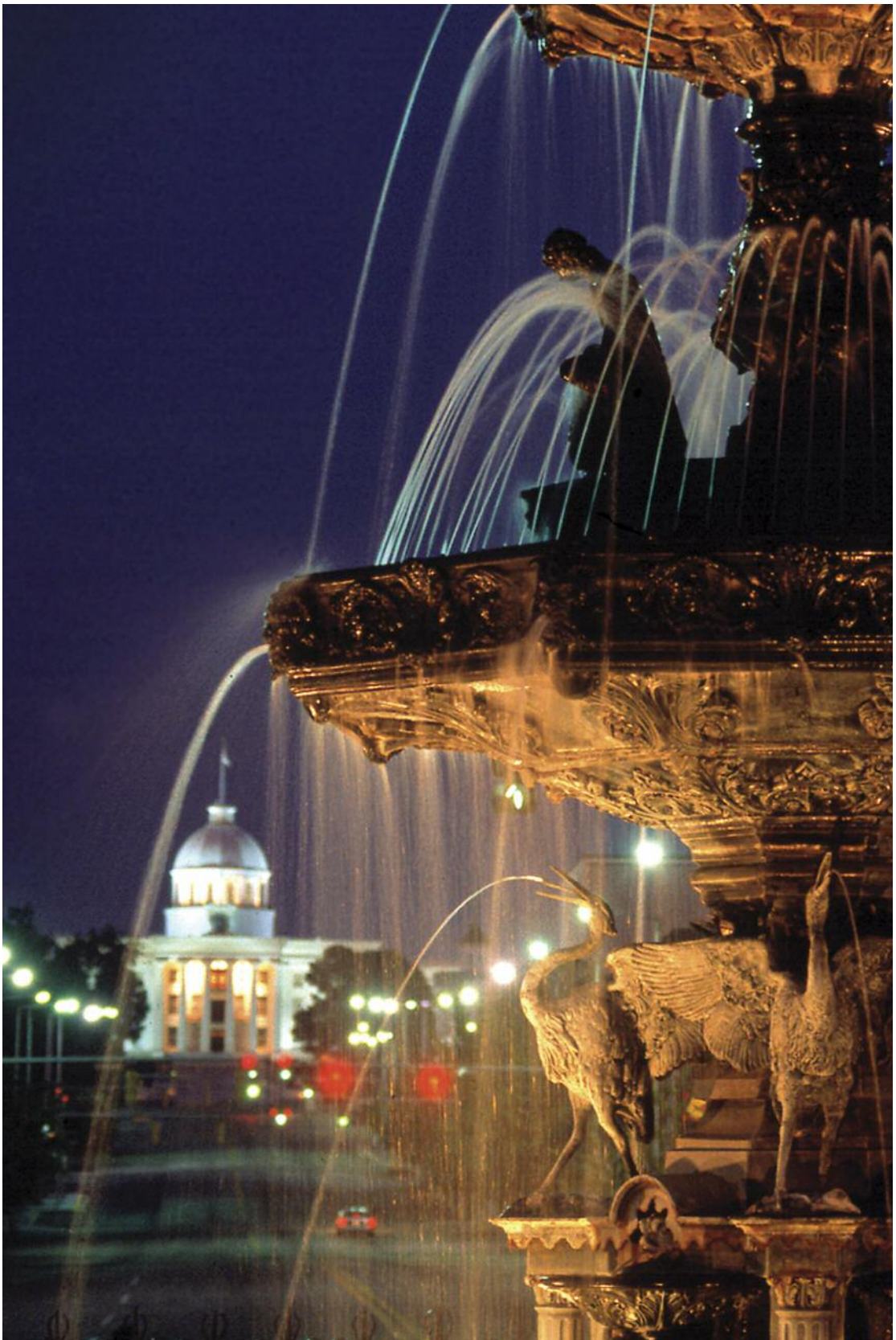
THE ALABAMA LAWYER

JANUARY 2019 | VOLUME 80, NUMBER 1



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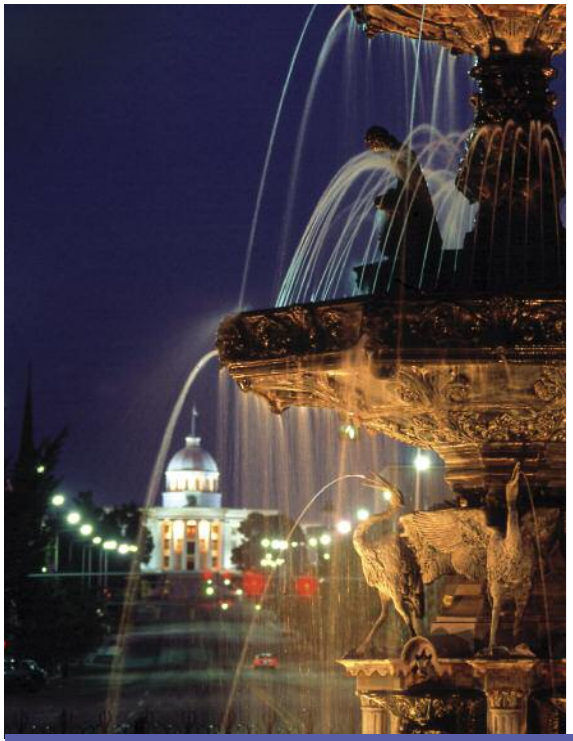

On The Cover

Pictured on the cover is the Alabama state capitol, the setting for the January inauguration of newly-elected state officials. In the foreground is the Court Square Fountain.

–Photo by Robert Fouts, FOUTS COMMERCIAL PHOTOGRAPHY, Montgomery, *photofouts@aol.com*

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Focused on Our Members

It is important to your Executive Council that the Alabama State Bar does a better job of reaching out to its members and listening to them. The Alabama State Bar is committed to making your bar better, stronger and more relevant. The best way to do this is to listen to our members and to determine their needs, issues and problems. Toward this end, we have provided bar members with contact information for each member of the Executive Council and encouraged communication with us about how we might improve the bar's membership services (*https://www.alabar.org/membership/betterbar/*). We have also implemented a series of focus sessions in various parts of the state–Mobile/Baldwin County, Decatur, Montgomery, Gadsden/Fort Payne, Dothan and others to be scheduled.

Taze Shepard, who practices in Huntsville and serves as vice president of the Executive Council, acts as the moderator of these focus sessions. The sessions are designed to solicit input from local bar members. Our aim is to create an atmosphere in which participants feel comfortable sharing their views about the Alabama State Bar, whether those views are positive or negative. Taze agreed to serve as moderator for all of the sessions and is doing a phenomenal job, as well as Laura Calloway, who assisted in scheduling the sessions before

she retired. To better facilitate the exchange of information, Taze limited the number of active participants to 20 individuals selected from a list of bar members who either volunteered or were invited. Those not selected to participate may attend as observers and are also given a chance to share their thoughts. Participants fill out worksheets and the sessions are recorded so that data can be collected, analyzed and eventually compiled into a report. It is important to me to attend the sessions so I can hear what our members are saying.

We have been pleased with each of the sessions. We have received many informative and candid comments from those in attendance. Differing and opposing viewpoints have been respectfully presented. You may be surprised to learn that participants are not just complaining; they are earnestly expressing interest in helping improve the Alabama State Bar. This valuable input will enable us to determine what we are doing right and what needs to be changed. We will take the information received at each of the focus sessions and use that information to determine how the bar can better serve its members.

This is just one of the new initiatives we started this year. We also created a Pro Bono Innovation Task Force which brings together representatives of major stakeholders in the pro bono field, both grant-givers, such as the Alabama Law Foundation, and service-providers, such as the Volunteer Lawyers Program and Legal Services Corporation. This task force will enable these entities to work together along with the bar to develop and coordinate new pro bono programs, collaborations and innovative solutions for improving the delivery of pro bono legal services to low-income Alabamians.

Please let me or any member of the Executive Council know if you have an interest in serving the bar through committee work or task force participation. There are 19 committees covering a wide range of interests–everything from *The Alabama Lawyer* to the Unauthorized Practice of Law–and also 27 active task forces. They are listed on the bar's website (*https://www.alabar.org/membership/committees/*). These committees and task forces have been a topic of discussion at the focus sessions. You and other bar members are encouraged to weigh in on which issues the state bar should be addressing. ▲

Thanks to Mobile lawyer Mary Margaret Bailey for her assistance in preparing this article.

A Fond Farewell to Ed Patterson

The Alabama State Bar will soon lose a tremendous servant-leader when Assistant Executive Director Ed Patterson retires. Ed started out serving the bar as disciplinary counsel in the Office of General Counsel from 1976 to 1980. He was awarded the Alabama State Bar Award of Merit in 1980. After leaving to work in private practice the next 14 years, Ed returned in 1994 to work at the bar.

Although much of his work has been behind the scenes and not readily visible to the general membership, he has left an indelible mark on the next generation of lawyers through his work with the Alabama State Bar Leadership Forum, of which he has served as director since its establishment in 2005. When an award was created in 2012 to honor outstanding forum alumni, it was named the Edward M. Patterson Servant Leadership Award.

"Those of us blessed to work with Ed quickly realize his genuine joy and excitement about the legal profession, and especially our young Leadership Forum graduates," says Mary Frances Garner, who has served as an administrative assistant in Ed's office for the past seven years. "He is passionate about his work and cares for each of the 400-plus forum alumni." According to longtime Bar Commissioner Billy Bedsole of Mobile, "Ed has always mixed an excellent sense of humor with a commitment to service to the bar and its membership; he will be missed." ▲

–President Sam Irby

Ed and Beverly Patterson enjoying some down time with family at one of the numerous state bar annual meetings that Ed coordinated

Ed, we will miss you. You and your leadership have made our bar a better bar.

EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum
phillip.mccallum@alabar.org

Say "Yes" to the Unexpected!

Life is about learning. This is what we are told from the moment we can comprehend the word "learn." *Merriam-Webster Dictionary* defines "learn" this way: to gain knowledge or understanding of skill by study, instruction or experience. Over the last 18 months, I have spent my time learning about you, our members, and have come to further appreciate the uniqueness of our membership.

Though I am still in the legal profession, I changed careers last year. I went from being a full-time lawyer to being an administrator. Both come with their own set of unique challenges and require different facets of my skill-set and personality. I value my time practicing law because it taught me to work hard, persevere through times of trouble, accept help when needed and always remember that professionalism is paramount. I wouldn't be the same without those lessons.

I decided to throw my name in the hat for this job because I care about lawyers. This is a way for me to continue serving the profession I love. After my term as bar president ended I felt a void–I ran for president because I loved the bar and wanted to be engaged at a new level. Once my term ended, I had a couple of years where I was not as involved and, after some time, I missed it greatly. Becoming executive director was just the challenge I needed at this point in my career.

Though I have had a stake in the bar for years, being executive director, to me, means continued, consistent investment in the people who make this organization run. That's everyone from bar leadership to all 18,200+ members to staff here in Montgomery.

During this time, I have made it a personal mission to get out in the field and visit with members who may not have heard from the bar in a while. The response has been tremendous. The State of the Bar tour, beginning with President Augusta Dowd and continuing with President Sam Irby, has operated as a source of information and outreach for the thousands of members who have heard us speak. By the time you read this, I will have visited nearly every county bar in our state. With that said, I have learned a lot so far and look forward to interacting with more lawyers each year.

Not all Alabama lawyers live in Birmingham, Montgomery, Mobile or Huntsville. They live in Florence, Demopolis, Union Springs and Fort Payne, too. I've met solo practitioners, big-firm partners and everyone in between. Though lawyers across the spectrum of practice areas, firm sizes and geography are different, we all share a common thread: the desire to live a life of learning. Whatever your calling in this profession, remember to never stop learning or taking on new challenges. You'll rarely be sorry for saying "yes" to the unexpected. ▲

Ed Patterson: Retiring but Never Slowing Down

When Ed Patterson retires on January 31 as the assistant executive director of the Alabama State Bar, he will have devoted almost 29 years of service to the bar in a career that included two terms of employment.

He first came to the state bar in 1976 as an assistant general counsel, a position he held for five years. During the next 14 years, he worked in private practice in Montgomery, before returning to the ASB in 1994.

Ed graduated from the University of Alabama and the University of Alabama School of Law. He then served as a law clerk to Assistant Justice Hugh Maddox (ret.) on the Alabama Supreme Court.

Under Ed's leadership, a number of innovative programs and ideas have been implemented at the state bar, including the Leadership Forum, begun in 2005. Through the forum, hundreds of outstanding and accomplished mid-career-level lawyers have received extensive training to serve as leaders in the legal profession and in their communities. The Leadership Forum received the 2013 E. Smythe Gambrell Professionalism Award from the American Bar Association Committee on Professionalism, which is the highest professionalism award given to bar or law school leadership/professionalism programs.

In addition, the Edward M. Patterson Servant Leadership Award was established in 2012 by the LF Section to recognize a member of the section and alumnus of the forum who demonstrates professional excellence, integrity and service to the legal profession, the state bar and the community at large.

Always willing to provide musical entertainment at ASB staff cookouts and Christmas parties are Robert Thornhill, Dolan Trout and Ed Patterson.

Ed may be retiring from the state bar, but it is doubtful he will slow down much at all, with his love of family, music and volunteer work to keep him busier than ever.

Thank you, Ed, for your leadership, creativity and sense of humor! ▲

–Phillip McCallum

IMPORTANT NOTICES

Notice, Supreme Court of Alabama

All members of the Alabama State Bar are hereby notified that the Supreme Court of Alabama has abolished its **Standing Committee on Alabama Pattern Jury Instructions–Civil** and its **Standing Committee on Rules for Collaborative Law Practice.**

Additionally, all members of the Alabama State Bar–judges and attorneys–are hereby notified that the Alabama Pattern Jury Instructions Committee–Civil is an Alabama nonprofit corporation independent of the Supreme Court of Alabama and that committee is solely responsible for the form and content of its publication. The Supreme Court of Alabama does not review or approve the Alabama Pattern Jury Instructions (Civil) before their publication.

Alabama Lawyers Hall of Fame

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

The implementation of the idea of an Alabama Lawyers Hall of Fame originated during the term of state bar President Fred Gray. He appointed a task force to study the concept, set up guidelines and then provide a recommendation to the Board of Bar Commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004.

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

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

give due recognition to historic figures as well as the more recent lawyers of the state.

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

Download an application form at *https://www.alabar.org/assets/uploads/2019/01/Lawyers-Hall-of-Fame-Nomination-Form-Fillable.pdf* and mail the completed form to:

Sam Rumore
Alabama Lawyers Hall of Fame
P.O. Box 671
Montgomery, AL 36101-0671

The deadline for submission is March 1.

Judicial Award of Merit

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

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

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

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

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

(Continued from page 13)

Local Bar Award of Achievement

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

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

The following criteria are used to judge the applications:

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

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

J. Anthony "Tony" McLain Professionalism Award

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the J. Anthony "Tony" McLain Professionalism Award through April 15. Nominations should be prepared on the appropriate nomination form available at *www.alabar.org* and mailed to:

Phillip W. McCallum
Executive Director
Alabama State Bar
P.O. Box 671
Montgomery, AL 36101-0671

The purpose of the J. Anthony "Tony" McLain Professionalism Award is to honor the leadership of Tony McLain and to encourage the emulation of his deep devotion to professionalism and service to the Alabama State Bar by recognizing outstanding, long-term and distinguished service in the advancement of professionalism by living members of the Alabama State Bar.

Nominations are considered by a five-member committee which makes a recommendation to the Board of Bar Commissioners with respect to a nominee or whether the award should be presented in any given year.

William D. "Bill" Scruggs, Jr. Service to The Bar Award

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the William D. "Bill" Scruggs, Jr. Service to the Bar Award through April 15. Nominations should be prepared on the appropriate nomination form available at *www.alabar.org* and mailed to:

Phillip W. McCallum
Executive Director
Alabama State Bar
P.O. Box 671
Montgomery, AL 36101-0671

The Bill Scruggs Service to the Bar Award was established in 2002 to honor the memory of and accomplishments on behalf of the bar of former state bar President Bill Scruggs. The award is not necessarily an annual award. It must be presented in recognition of outstanding and long-term service by living members of the bar of this state to the Alabama State Bar as an organization.

Nominations are considered by a five-member committee which makes a recommendation to the Board of Bar Commissioners with respect to a nominee or whether the award should be presented in any given year.

ASB Women's Section–Request For Nominations

The Women's Section of the Alabama State Bar is accepting nominations for the following awards:

Maud McLure Kelly Award

This award is named for the first woman admitted to practice law in Alabama and is presented each year to a female attorney who has made a lasting impact on the legal profession and who has been a great pioneer and leader in Alabama. The Women's Section is honored to present an award named after a woman whose commitment to women's rights was and continues to be an inspiration for all women in the state.

Previous recipients include Justice Janie Shores (ret.), Miss Alice Lee, Miss Nina Miglionico, Judge Phyllis Nesbitt, Mahala Ashley Dickerson, Dean Camille Cook, Jane Dishuck, Louise Turner, Frankie Fields Smith, Sara Dominick Clark, Carol Jean Smith, Marjorie Fine Knowles, Mary Lee Stapp, Ernestine Sapp, Judge Caryl Privett (ret.), Judge Sharon G. Yates (ret.), Martha Jane Patton and Alyce Manley Spruell. The award will be presented at the Maud McLure Kelly Luncheon at the 2019 Alabama State Bar Annual Meeting.

Susan Bevill Livingston Leadership Award

This is the fourth year to solicit nominations for this award for the Women's Section in memory of Susan Bevill Livingston, who practiced at Balch & Bingham. 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. The candidate must be or have been in good standing with the Alabama State Bar and has at least 10 years of cumulative practice in the field of law. This award may be given posthumously. This award will be presented at a special reception. Judge Tammy Montgomery, Maibeth Porter and Kathy Miller were prior recipients.

Submission deadline is February 15.

Please submit your nominations to Elizabeth Smithart, chair of the Women's Section, at *esmithart@yahoo.com*. Your submission should include the candidate's name and contact information, the candidate's current CV and any letters of recommendations. If a nomination intends to use letters of recommendation previously submitted in 2018, please note your intentions.

Notice of Election and Electronic Balloting

Notice is given here pursuant to the *Alabama State Bar Rules Governing Election and Selection of President-elect and*

(Continued from page 15)

Board of Bar Commissioners that the election of these officers will be held beginning Monday, May 20, 2019, and ending Friday, May 24, 2019.

On the third Monday in May (May 20, 2019), members will be notified by email with instructions for accessing an electronic ballot. Members who wish to vote by paper ballot should notify the secretary in writing on or before the first Friday in May (May 3, 2019) requesting a paper ballot. A single written request will be sufficient for all elections, including run-offs and contested president-elect races during this election cycle. All ballots (paper and electronic) must be voted and received by the Alabama State Bar by 5:00 p.m. on the Friday (May 24, 2019) immediately following the opening of the election.

Nomination and Election of President-Elect

Candidates for the office of president-elect shall be members in good standing of the Alabama State Bar as of February 1, 2019, and shall possess a current privilege license or special membership. Candidates must be nominated by petition of at least 25 Alabama State Bar members in good standing. Such petitions must be filed with the secretary of the Alabama State Bar no later than 5:00 p.m. on February 1, 2019.

Nomination and Election of Board of Bar Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits:

- 1st Judicial Circuit
- 3rd Judicial Circuit
- 5th Judicial Circuit
- 6th Judicial Circuit, Place 1
- 7th Judicial Circuit
- 10th Judicial Circuit, Place 3
- 10th Judicial Circuit, Place 6
- 13th Judicial Circuit, Place 3
- 13th Judicial Circuit, Place 4
- 14th Judicial Circuit
- 15th Judicial Circuit, Place 1
- 15th Judicial Circuit, Place 3
- 15th Judicial Circuit, Place 4
- 23rd Judicial Circuit, Place 3
- 25th Judicial Circuit
- 26th Judicial Circuit
- 28th Judicial Circuit, Place 1
- 32nd Judicial Circuit
- 37th Judicial Circuit

Additional commissioners will be elected for each 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits will be determined by a census on March 1, 2019 and vacancies certified by the secretary no later than March 15, 2019. All terms will be for three years.

A candidate for commissioner may be nominated by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Nomination forms and/or declarations of candidacy must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 26, 2019).

Election of At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 2, 5 and 8. Petitions for these positions, which are elected by the Board of Bar Commissioners, are due by April 1, 2019.

Submission of Nominations

Nomination forms, declaration of candidacy forms and applications for at-large commissioner positions must be submitted by the appropriate deadline and addressed to:

Phillip W. McCallum
Secretary
Alabama State Bar
P.O. Box 671
Montgomery, AL 36101-0671

These forms may also be sent by email to *elections@alabar.org* or by fax to (334) 261-6310.

It is the candidate's responsibility to ensure the secretary receives the nomination form by the deadline.

Election rules and petitions for all positions are available at *www.alabar.org.* ▲

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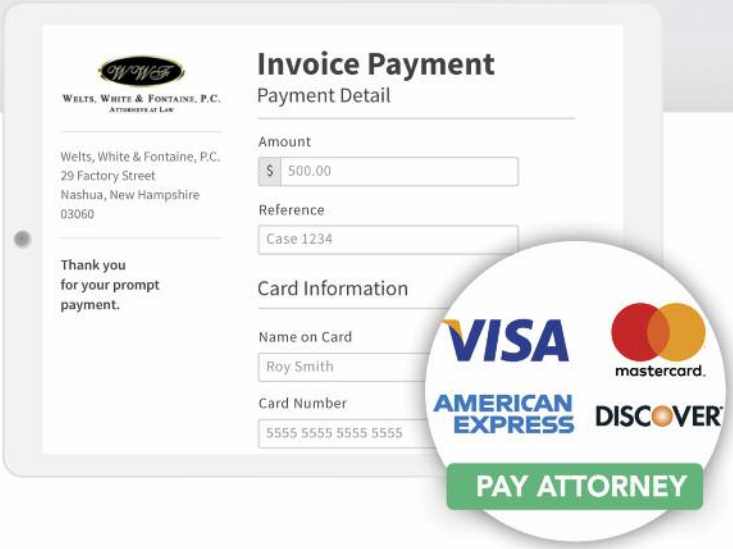

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FEDERAL MAGISTRATE JUDGES: Origin, Evolution And Practice

By Michael E. Upchurch

Magistrate judges are integral and indispensable members of the federal judiciary, yet their origins, specific duties, scope of authority and even correct title are not well understood by many lawyers and litigants. This article is, in effect, an "Introduction to Magistrate Judges 101" for those who need and want the education.

In the Beginning . . .

Congress created the federal courts in 1789. In 1793, Congress authorized the federal circuit courts to appoint "discreet persons learned in the law," who later were given the title "commissioners," to take bail in federal criminal cases. These commissioners could be, but did not have to be, lawyers. The commissioners gradually gained additional responsibility, including the power to issue arrest and search warrants and to hold over the accused for trial. They were paid according to the fees they collected. Our federal magistrate judges today trace their lineage back to these 18th century commissioners.

Commissioners

Congress refined the commissioner position in 1896. The newly designated "United States Commissioners" were given four-year terms of office and now were appointed by district courts. There was no maximum number of commissioners nor were there any prescribed qualifications. A national fee system to compensate the commissioners was put

in place, and litigants were charged a set amount for administering oaths, issuing warrants and extending bail. Over the decades, the number of part- and full-time commissioners grew. By 1965, there were 713 United States Commissioners.

Concerns about Commissioners

By the mid-20th century, the nation's judicial system had matured, and the commissioner system came to be viewed with a more critical eye. Allowing non-lawyers to make legal decisions troubled many. The absence of any uniform criteria for selecting commissioners also raised concerns. Paying commissioners with fees they assessed and collected was an inherent conflict of interest and was criticized as such. Moreover, there were too many part-time commissioners. By the 1960s, a consensus had formed that the federal court caseload had risen to the point that district court judges needed more and better support than they were receiving and that fundamental structural reforms were needed to the commissioner system. The Judicial Conference, the federal judiciary's policy-making body, was among the loudest voices calling for change in the commissioner system.

Sea Change: From Commissioners to "Magistrates"

In 1968, Congress enacted new watershed legislation that replaced the outdated commissioners with lawyers serving as new federal judicial officers called "magistrates" who would assist the district judges in handling their caseloads. The Federal Magistrates Act of 1968 authorized the Judicial Conference, instead of the courts or Congress, to determine the number of magistrates and to set their salaries. It established an eight-year renewable term of office for full-time magistrates and a corresponding four-year term for part-time magistrates.

In addition to inheriting all the powers and duties that had been conferred on the commissioners, the new magistrates were authorized to dispose of minor criminal offenses, whether committed on federal land

Importantly, the 1968 Act also allowed district courts to assign magistrates unspecified additional duties not inconsistent with the Constitution and laws of the United States.

or not, and Congress authorized the district courts to assign magistrates additional duties in civil and criminal cases. Only three of these additional duties were described specifically: serving as a special master, assisting district judges in pre-trial or discovery matters in civil and criminal actions and performing a preliminary review of post-trial applications by convicted criminal defendants to determine whether there should be a hearing. Importantly, the 1968 Act also allowed district courts to assign magistrates unspecified additional duties not inconsistent with the Constitution and laws of the United States. This flexibility, which in hindsight was a rare stroke of legislative brilliance, enabled the district courts to experiment with magistrates to find how they could best be utilized.

Compensation Deficit

One thing the 1968 Act did not do was establish satisfactory compensation for magistrates. Pay for all judges was poor, cost-of-living raises often were not provided and, until 1988, a magistrate's salary was capped at 75 percent of what district judges earned. That was raised to 92 percent in 1988, and in 1989, the Ethics Reform Act increased all judicial compensation and established what were supposed to be automatic cost-of-living adjustments. Compensation for all federal judicial officers nonetheless remained an issue because Congress did not consistently deliver the automatic raises. The litigation that finally resolved this dysfunction ended less than 10 years ago.

The 1968 Act also added magistrates to the government's civil service retirement system. As the years went by, this retirement benefit proved to be inadequate as magistrates typically were many years into their legal careers when they first took the bench and were not able to accumulate enough federal service to produce sufficient retirement income. In 1988, new legislation remedied this by creating a special judicial retirement system for magistrate judges and bankruptcy judges that had more reasonable time in service requirements and other improvements.

Pumping the Brakes

Although the magistrates were a definite upgrade over the commissioners, the extent to which magistrates should assume duties and authority traditionally exercised by Article III judges was unsettled and controversial. In *Wedding v. Wingo*, 418 U.S. 461 (1974), the United States Supreme Court held that the 1968 Act and Habeas Corpus Act did not specifically confer on a magistrate the authority to conduct a habeas corpus hearing. Chief Justice Warren Burger disagreed and wrote a pointed dissent in which he invited Congress to amend the Act to clarify that magistrates could in fact preside over habeas corpus hearings. *Id*. at 487.

More Responsibility

Despite the occasional headwinds, the modern magistrate position continued to develop and evolve. It became evident that the magistrates had a great deal to offer the district courts and could contribute in many more areas than originally anticipated. In 1976, Congress took Chief Justice Burger up on his suggestion and amended the 1968 Act to clarify that magistrates could hear habeas corpus and prisoner civil rights actions, renew administrative determinations of Social Security benefits and issue reports and recommendations on motions to dismiss and motions for summary judgment.

Inconsistent Practices, Competing Solutions

In the 1970s, although magistrates in some courts had acquired meaningful responsibilities, the use of magistrates across the federal courts in the country was uneven. For example, some district courts were using magistrates to try civil cases when the parties consented, but many were not. Some district judges were still unsure of the magistrate's legal authority outside of the specifically delineated activities in the statute and were reluctant to assign any other duties. There were even old-fashioned Article III judges who largely ignored the magistrates. These erratic practices prompted the Judicial Conference to promote legislation that would remove any doubt about the authority of magistrates to try civil cases with consent, and also to establish clear authorization for magistrate judges to try all federal criminal misdemeanors, as opposed to only "minor offenses."

At the same time, the Department of Justice was pushing alternative legislation that would allow magistrates to try certain civil cases, generally smaller federal benefit suits and all criminal misdemeanors. The Justice Department's proposal was criticized for potentially creating what would amount to a federal small claims court and, therefore, two levels of federal civil justice. The Judicial Conference's concept, in contrast, was that magistrates and Article III judges would work together, in concert, to handle federal caseloads rather than operate in separate spheres.

Even More Responsibility

In the Federal Magistrates Act of 1979, Congress incorporated most of the elements the Judicial Conference had proposed. Henceforth, magistrates could conduct civil bench and jury trials with the parties' consent (28 U.S.C. § 636(c)) and preside over jury trials in misdemeanor cases with consent (18 U.S.C. § 3401), and were allocated law clerks and other support. The Federal Magistrates Act did not limit the duties magistrate judges could perform. Rather, each district court had the flexibility to assign to magistrate judges whatever tasks and responsibilities best advanced the efficiency of that court.

Interestingly, under the 1979 Act, appeals from a final judgment in a civil case decided by a magistrate judge could be appealed both to the district judge and the Court of Appeals.

Merit Selection

The 1979 Act also made the process for choosing magistrates more transparent and rigorous. The Act required that magistrates be appointed and reappointed under Judicial Conference regulations that included public notice of vacancies, selection of magistrates by the district court from a list of candidates selected by a merit selection panel of lawyers and lay residents of the district, and retention reviews. With one stroke, the bar for becoming and remaining a magistrate was raised dramatically.

"United States Magistrate Judge"

As time passed and magistrates exercised more and more authority that had previously belonged to Article III judges, magistrates came to be viewed as a type of judge rather than a lesser species of judicial officer. Eventually this was formalized in official circles as well as local practice. In 1988, the Magistrate Committee of the Judicial Conference approved referring to magistrates as "Judge" and addressing magistrates as "Your Honor." In the Judicial Improvements Act of 1990, all ambiguity about the nature of the magistrate's authority was removed and the United States Magistrate designation was replaced with "United States Magistrate Judge." (Other suggestions had included "Assistant United States Judge" and "Associate Judge.")

The Judicial Improvements Act of 1990 also precipitated a significant expansion of the magistrate judge's role in civil cases. Title I of the Act, called the Civil Justice Reform Act, challenged district courts to find ways to reduce the delays and costs bogging down federal court litigation. The Civil Justice Reform Act came close to mandating that when a new civil case was filed, a judicial officer plans discovery in each case and oversees its efficient disposition. Almost immediately, Article III judges tasked their magistrate judges with this new, time-consuming responsibility.

Magistrate Judges at The Millennium

In 1996, legislation eliminated the appeal of a final judgment in a magistrate judge consent case to the district judge. Thereafter, all such appeals were sent to the court of appeals. In addition, the circumstances where consent was necessary for a magistrate judge to decide petty criminal cases were significantly limited. The consent requirement in petty criminal cases was eliminated altogether in 2000.

Also in 2000, the Federal Courts Improvement Act gave magistrate judges limited criminal contempt authority for the first time. Magistrate judges now could impose discipline for conduct in their presence that obstructed the administration of justice. In addition, in those civil consent cases and misdemeanor cases where the magistrate judge had final authority, the magistrate judge was empowered with general criminal and civil contempt authority and could address disobedience or resistance to lawful orders upon notice and hearing.

R-E-S-P-E-C-T

So the last 50 years have seen a steady expansion of magistrate judge utility and authority. The stature of and respect for magistrate judges have grown as the duties and authority of the magistrate judges have evolved and stabilized. In 1976, President Gerald Ford appointed two magistrate judges as United States district judges. This started a trend of promoting magistrate judges to fill Article III vacancies that continues. Moreover, as the salary, retirement benefits and professional standing of the magistrate judge position have improved, the résumés of applicants for the position have become more impressive as well. The average age of new full-time magistrate judges is roughly 49 to 50 years old, which means that most new magistrate judges have decades of experience and corresponding professional standing and achievement when they put on their robes. (Although part-time magistrate judges are still permitted under the Federal Magistrates Act, today there are relatively few part-time positions nationally.)

Magistrate judges also have broadened their involvement and influence in court governance. As the years went by and the contributions of magistrate judges became more appreciated by the Supreme Court, the Judicial Conference started inviting district courts to include magistrate judges in court governance to take advantage of their versatile skill set and diverse experience. Chief Justice Warren Burger appointed the first magistrate judge to a Judicial Conference committee in 1980. Today, magistrate judge service on Judicial Conference committees is commonplace. In 1996, a magistrate judge was added as a statutory member of the Board of Directors of the Federal Judicial Center, which is the judiciary's primary deliverer of education and research. In 2004, the Judicial Conference approved having the Chief Justice invite a magistrate judge to attend sessions of the Judicial Conference in a non-voting capacity, and magistrate judges participate in business meetings at each conference session.

The federal circuit judges also took notice. In the last decade, magistrate judges have been added to the statutory roster of judges invited to annual circuit court conferences. Magistrate judges also now frequently serve as members of circuit court security committees, technology committees and in other capacities.

Today: Criminal

In criminal cases today, magistrate judges decide whether an indicted defendant will be released before trial or held in custody. When a defendant is not indicted by a grand jury, the complaint is presented under oath to a magistrate judge. The magistrate judge determines whether the complaint establishes probable cause and, if so, the magistrate judge issues an arrest warrant or summons to bring the defendant before the court.

After indictment, different districts use magistrate judges in criminal matters in different ways. Some magistrate judges accept grand jury returns, handle arraignments and, when the defendant consents, take felony pleas. Magistrate judges also can conduct pre-trial conferences and hear motions.

Magistrate judges can try any misdemeanor case, which includes Class A, B and C misdemeanors. Magistrate judges hold detention hearings and can detain material witnesses. Magistrate judges also preside over mental competency proceedings, extradition proceedings and transfers of international prisoners, and can empanel a grand jury. Magistrate judges also are called on to master and apply the complex law on search warrants. Magistrate judges issue warrants to search and seize evidence of a crime, contraband, property used or to be used in a crime or a person to be arrested. Magistrate judges issue warrants for telephone and toll records and rule on applications for line-ups, blood samples and fingerprints. So far, however, magistrate judges have not been authorized to issue wire taps. Magistrate judges also seal or unseal court documents.

Today: Civil

In civil cases, how much a district court delegates to a magistrate judge depends on the Article III judge. Some district judges tightly control their cases from the beginning. Others rely heavily on magistrate judges to handle the pre-trial phase of the case. Some district court judges preside over the pre-trial conference and others delegate that responsibility to the magistrate judge.

Magistrate judges have developed such experience in civil discovery and mediation that most have more expertise in these areas than the Article III judges. Magistrate judges typically set discovery and motion cut-off dates, set pre-trial conference and trial dates, resolve all discovery and procedural disputes and handle settlement either themselves or by ordering outside mediation, all subject to whatever involvement in these matters the respective district judges prefer to reserve for themselves.

Magistrate Judge "Recommendations"

Magistrate judges make final decisions on civil and criminal non-dispositive motions. In dispositive motions in civil and criminal cases, however, the magistrate judges do not make the determinative ruling, but, instead, recommend findings and conclusions to the district judge, who then decides the matter.

By definition, in a criminal case a dispositive motion is one that may dispose of the charge or defense. *Fed. R. Crim. P.* 59(b)(1). Motions to suppress evidence and motions to dismiss the indictment or information are considered dispositive.

Civil dispositive motions include certification of a class action, judgement on the pleadings, involuntary dismissal for failure to comply with a court order, injunctive relief, dismissal for failure to state a claim upon which relief may be granted and summary judgment. While magistrate judges can rule on civil case dispositive motions such as summary judgment and dismissal, the Magistrate Judges Committee of the Judicial Conference has recommended that this be an occasional rather than frequent practice to avoid duplication of judicial energy.

When a magistrate judge decides a non-dispositive motion, a party may object to the magistrate judge's decision within 14 days. When there is an objection, the district judge sets aside or modifies the magistrate judge's order only if it was clearly erroneous or contrary to law.

When a magistrate judge handles a dispositive motion, the magistrate judge makes a written recommendation, including proposed findings of fact, and the recommendation is served on the parties. A party has 14 days after being served to file written objections to the magistrate judge's proposed findings and recommendations. (In a civil case, the opposing party may respond to the other party's objections within 14 days.) The district judge then makes a "de novo determination" of the motion. A de novo determination does not, however, require a new hearing. The district judge reviews the record developed by the magistrate judge and then decides, based on that record (assuming he or she deems that record adequate), what the decision should be without being bound by the recommendation of the magistrate judge. The district judge has the option of accepting, rejecting or modifying the findings and recommendation, receiving more evidence or he or she can send the matter back to the magistrate judge for further development and reconsideration.

If there is not unanimous consent of the parties, the case is transferred from the docket of the magistrate judge to a district judge, and the magistrate judge's involvement going forward is the same as it would be in a non-assigned case.

Case Assignments

How cases are assigned to magistrate judges depends on the particular district. In many districts, each new case is randomly assigned by the Clerk to one district judge and one supporting magistrate judge when it is filed, which produces different combinations of Article III judges and magistrate judges in different cases. In some courts, however, magistrate judges and Article III judges are paired more or less permanently and the same magistrate judge works with the same district judge in whatever cases the district judge is assigned.

It is no longer the case, however, that a new case can be assigned only to one of the district judges. In more and more districts, magistrate judges are included on the same case assignment "wheel" as the Article III judges. In other words, the random selection process may designate a magistrate judge rather than an Article III judge to handle and try the case. If all parties consent to that magistrate judge under 28 USC § 636(c), the magistrate judge owns the case from beginning to end, including trial if necessary. If there is not unanimous consent of the parties, the case is transferred from the docket of the magistrate judge to a district judge, and the magistrate judge's involvement going forward is the same as it would be in a non-assigned case.

Social Security Appeals

Magistrate judges are frequently called on to handle an individual's appeal after being denied Social Security benefits, including disability benefits, by the Secretary of Health and Human Services. The same dispositive/non-dispositive procedural structure is in play with Social Security cases as in other cases.

Many districts have a large inventory of Social Security cases. As it has become more routine for magistrate judges to handle these matters, they have developed extensive expertise on Social Security issues. This frequently makes the

magistrate judge the more knowledgeable and more predictable judicial option for the parties. Because many lawyers have developed a high level of confidence in the ability of magistrate judges to handle their Social Security cases, most lawyers recommend that their clients consent to the magistrate judge's complete authority in such cases. Therefore, it has become increasingly uncommon for district judges to decide Social Security cases.

Prisoner Cases

Likewise, prisoner petitions are often handled by magistrate judges. There are three types of prisoner cases: state habeas corpus, federal habeas corpus and petitions challenging conditions of confinement. For the most part, magistrate judges handle these by report and recommendation.

Jury Selection

Magistrate judges also are frequently used by Article III judges to handle jury selection in civil and criminal cases, including voir dire. In criminal cases, the defendant must consent for the magistrate judge to handle jury selection. Whether a magistrate judge needs the parties' consent to conduct voir dire and jury selection in a civil case is not resolved. In any event, magistrate judges strike juries in civil cases with regularity. In fact, some Article III judges always designate a magistrate judge to handle voir dire in that judge's civil trials.

Settlement

In criminal cases, magistrate judges–or Article III judges for that matter–do not get involved in settlement discussions, meaning plea bargains. Under *Federal Rule of Criminal Procedure* 11(c)(1), judges are not allowed to participate in plea negotiations between the government and defense. A recent Supreme Court case went so far as to hold that it was improper (although in that particular set of circumstances harmless error) for a magistrate judge to recommend that a defendant plead guilty in a private ex parte/in camera discussion with the accused outside the presence of the government. *United States v. Davila*, 133 S. Ct. 2139, 2147-48 (2013).

In contrast, in civil cases assigned to Article III judges, magistrate judges are often actively involved in settlement and have become highly skilled at assisting the parties reach a compromise. The Magistrate Judges Committee has endorsed using magistrate judges to facilitate settlements because of the special authority and respect that parties typically afford a judge as compared to a civilian mediator. In recent years, many a federal case has been resolved in a settlement conference with the magistrate judge. Magistrate judges do not normally engage the parties in settlement negotiations in consent cases for the same reasons that Article III judges do not act as mediators. A judge who is involved in settlement discussions receives the parties' confidences and probes their vulnerabilities in the litigation. If no settlement is reached, the same judge could not appropriately transition to the role of decider of the legal issues that will help determine the fate of the same parties who had just looked to him or her as a trusted confidential peacemaker.

Post-Trial Authority

The extent to which magistrate judges are authorized to handle post-trial matters is not completely clear, since 28 USC § 636(b)(1)(A) provides only that magistrate judges may hear any "pre-trial" matter. Nonetheless, some districts allow magistrate judges to decide post-trial matters on the grounds that those post-trial issues are collateral to pre-trial matters or fall under the "additional duties" language of 28 USC 636(b)(1)(B). Post-verdict claims for attorney's fees also can be handled by a magistrate judge, subject to a de novo review by a district judge.

Lagniappe

Magistrate judges are also involved in a variety of other matters, including revocation hearings, drug re-entry court programs, naturalization proceedings, etc.

Exactly where the line of demarcation lies between authority reserved exclusively for Article III judges and matters which a magistrate judge can handle and/or decide with finality is sometimes difficult to identify. If the past is any guide, in coming years, the role of the magistrate judge will continue to grow as the district courts adapt to the ever-changing complexities and pressures of federal litigation.

Essentiality

Magistrate judges have become an essential part of the delivery of justice in the United States district courts. Because of the flexibility afforded to district courts in the Federal Magistrates Act of 1968, Article III judges have been free to experiment with utilizing magistrate judges to find the approach that best serves the needs of that particular district court. The merit selection process and improvement in salary and benefits for magistrate judges have resulted in a stable cadre of qualified, experienced and respected magistrate judges.

The Bottom Line

In 2015, the United States Supreme Court paid tribute to the immense contributions of magistrate judges in an emphatic observation by Justice Sotomayor that no doubt would be seconded by every other court in the judiciary: *[I]t is no exaggeration to say that without the distinguished services of these judicial colleagues, the work of the federal court system would grind nearly to a halt. Wellness Int'l Network, Ltd. v. Shariff*, 135 S.Ct. 1932, 1938-39 (2015). ▲

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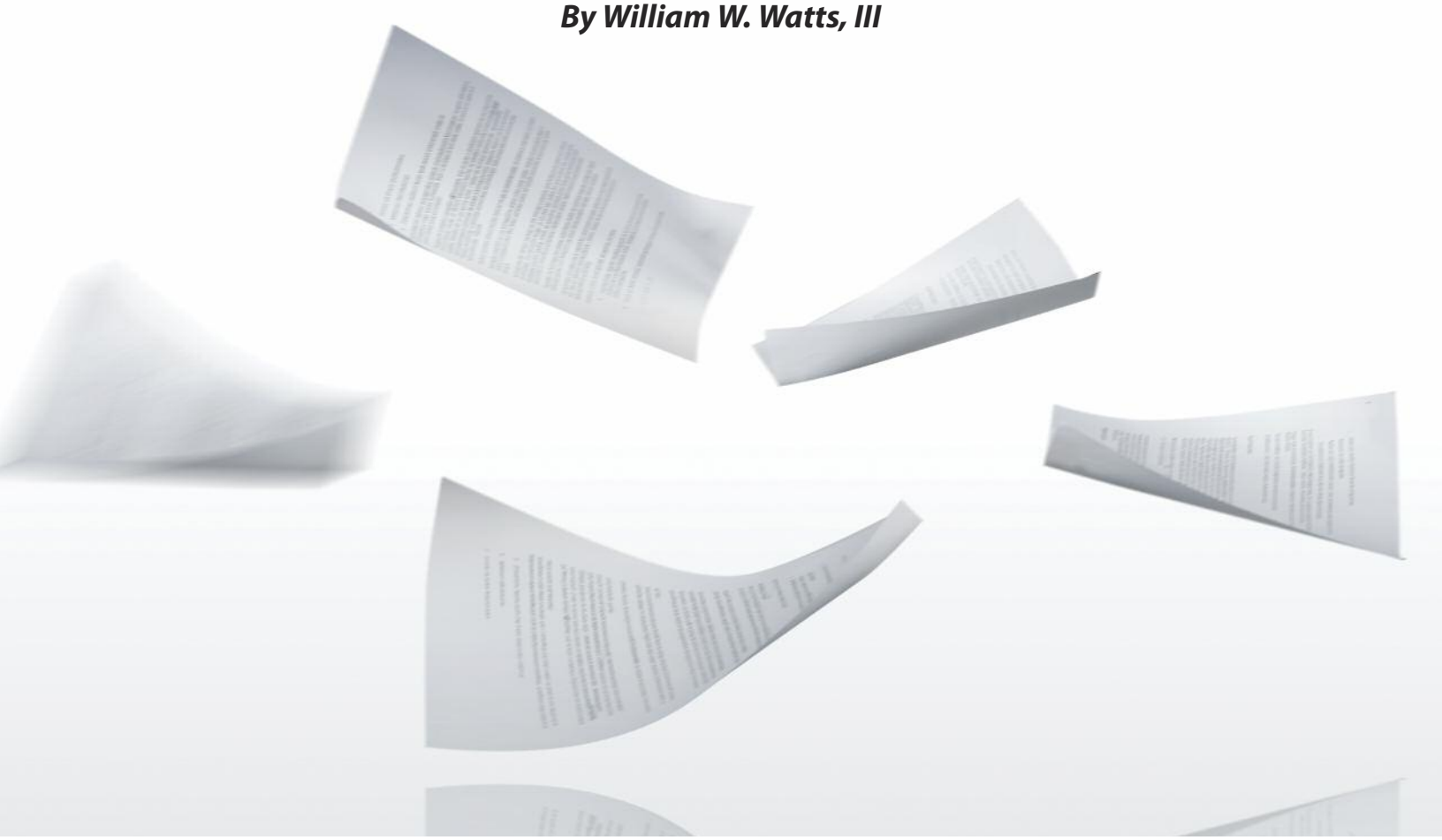
The Timeliness of Mandamus Petitions for Review of Discovery Orders: A Trap for the Unwary

By William W. Watts, III



Introduction

Since 2000, Rule 21, *Ala. R. App. P.,* has provided that 42 days is the "presumptively reasonable" time period for filing a petition for writ of mandamus. The need for such a publicly accessible, bright-line rule governing the time within which mandamus review must be commenced would seem axiomatic. A recent, unpublished decision of the Alabama Supreme Court, however, has revealed that the court will, on occasion, employ a different rule, requiring a shorter time period for the filing of petitions for mandamus review of discovery orders, a rule contradicted by the court's own repeated statement of the rule in its published opinions. The bar needs to be aware that such petitions have been, and may again be, denied as untimely, even though they are being filed within Rule 21's presumptively reasonable time period of 42 days.

Published Rule for Timeliness of Mandamus Petitions for Review of Discovery Orders

Since September 1, 2000, Rule 21(a)(3), *Ala. R. App. P.,* has required that a petition for writ of mandamus be filed within a "reasonable time" and that the "presumptively reasonable time" for filing such a petition seeking review of a trial court order "shall be the same as the time for taking an appeal." Under Rule 4(a)(1), *Ala. R. App. P.,* with limited exceptions, this time period is 42 days after entry of the order or judgment appealed from. Mandamus review of discovery orders is further restricted by the requirement that a motion for protective order first be filed, following the entry of the order compelling discovery, within the time set for compliance with that order. *See Ex parte Orkin, Inc.*¸ 960 So.2d 635, 640 and n.5 (Ala. 2006). This rule is designed to promote the policy of "afford[ing] the trial court the opportunity to address its alleged error before a party seeks mandamus relief from an appellate court to correct the alleged error." *Id.* at 640 (quoting *Ex parte Reynolds Metals Co.*¸710 So.2d 897, 900 (Ala. 1998)). Furthermore, the filing (and denial) of such a motion for protective order is necessary for the petitioner to be able to demonstrate the "lack of another adequate remedy," a prerequisite for the extraordinary relief of a writ of mandamus. *Id.*

Combining the requirements of Rule 21(a)(3) and the case law requiring a timely filed motion for protective order, the Alabama Supreme Court has repeatedly, and as recently as May of this year, described the rule for the timeliness of mandamus petitions seeking review of discovery orders in the following terms:

> "[A] petition [for a writ of mandamus] challenging an order compelling discovery is timely only if (1) a protective order is sought, pursuant to *A.R.C.P.* 26(c), within the time set for compliance with the order, *Ex parte Orkin, Inc.,* 960 So.2d 635, 640 n.5 (Ala. 2006)(citing with approval *Wang v. Hsu,* 919 F.2d 130, 131 (10th Cir. 1990)), and (2) the mandamus petition is filed no more than 42 days after the denial of the protective order. 960 So.2d at 640."

Ex parte Mobile Infirmary Association, 2018 WL 2381977, at *6 n.9 (Ala. S. Ct. May 25, 2018)(quoting *Ex parte Terminix Intl. Co.,* 14 So.3d 849, 852, 53 (Ala. 2009), quoting in turn *Ex parte Meadowbrook Ins. Group, Inc.,* 987 So.2d 540, 546 (Ala. 2007)); *Ex parte Ferrari,* 171 So.3d 631, 638 (Ala. 2015))(quoting *Ex parte Meadowbrook Ins. Group, Inc.,* 987 So.2d at 546).

In determining the timeliness of mandamus petitions challenging discovery orders, the Alabama Supreme Court has consistently applied the time limit of 42 days, following denial of a timely filed motion for protective order, without regard to any shorter period of time for compliance with the challenged discovery order. For instance, in *Ex parte Orkin, Inc., supra*, the discovery order, entered on January 25, 2006, required production within 30 days. 960 So.2d at 637. Orkin filed a timely motion for protective order on February 24, 2006, within the time for compliance with the discovery order. *Id.* On March 8, 2006, following a hearing, the trial court ruled that it would deny Orkin's motion for protective order and signed a written order summarily denying the motion. *Id.* at n.2. On April 19, 2006, 42 days after the March 8 ruling, Orkin filed its mandamus petition. The court held that the petition was timely:

> "Because Orkin filed a motion for protective order with the trial court and filed its mandamus petition within 42 days from March 8, the date the trial court entered a ruling on the motion, Orkin's filing was made within a 'presumptively reasonable time' within the meaning of Rule 21 (a)(3), ARAP."

Id. at 640. Significantly, the court did not find the petition untimely for failure to file it within the 30 days required for compliance with the discovery order, whether measured from the date of the discovery order or from the date of the order denying the motion for protective order.

The court has found petitions to be timely, if filed within 42 days of denial of a timely filed motion for protective order, notwithstanding a shorter period for compliance under the original discovery order, as in *Orkin,* or a shorter period for compliance under the order denying the motion for protective order. *See Ex parte Hunte,* 249 So.3d 1101 (Ala. 2017)(granting writ where petition was filed within 42 days of the order denying the motion for protective order even though beyond the 21 days given for compliance with the order);[1] *Ex parte Int'l Ref. & Mfg. Co.,* 959 So.2d 1084, 1087-1089 (Ala. 2006) (mandamus petition filed 30 days after entry of order compelling discovery, following reconsideration of an earlier order, and requiring compliance within 21 days, was timely because "filed within 42 days" of the order as required under Rule 21(a)(3)); *see also Ex parte Nationwide Mutual Ins. Co.,* 990 So.2d 335, 361 (Ala. 2008) (petition for mandamus review of trial court's order denying motion for protective order, and requiring compliance within 30 days, was timely where petition was filed "within 42 days of entry of order denying the protective order . . ."; citing *Orkin*); *Savage v. Gentiva Health Services,* 8 So.3d 943, 948 (Ala. 2008) (Court finds petition timely filed because "within 42 days of the date the trial court denied [petitioner's] motion to reconsider the trial court's order requiring production," based on Rule 21 (a)(3), and without reference to date required for compliance with order).

Recent Application of Different Rule of Timeliness In Unpublished Decision

Notwithstanding the rule as repeatedly described and applied in these published opinions, a recent, unpublished decision of the court reveals that the court will, on occasion, apply a different rule, requiring a shorter time frame for the filing of mandamus petitions related to discovery orders. In *Ex parte Mobile Infirmary Ass'n,* Case No. 1160769 (Sept. 12, 2017), the trial court ordered production of documents that Mobile Infirmary claimed were privileged as quality assurance materials, requiring responses within 21 days of the order. Mobile Infirmary filed a timely motion for protective order within the 21-day period. The trial court denied the motion for protective order without providing any new date for compliance. Mobile Infirmary filed a petition for writ of

mandamus 42 days after the date of the order denying its motion for protective order. The fact pattern was thus precisely like that in *Ex parte Orkin*.

The respondent filed a motion to dismiss the petition as untimely, relying upon certain dicta from *Ex parte Horton Homes, Inc.,* 774 So.2d 536 (Ala. 2000). In that case, the petitioner, Horton Homes, was ordered to respond to the plaintiff's request for production within 21 days and moved for a protective order only after the 21 days had expired. The court held that Horton Homes had "waived its right to seek mandamus review by failing to move for a protective order pursuant to Rule 26(c) within the time allowed for compliance with the trial court's order compelling production." *Id.* at 539.[2] Although the timeliness of the petition itself was not at issue, the court stated that "the motion for a protective order pursuant to Rule 26(c) **and any subsequent mandamus petition** must be filed within the time period set for production by the trial court in its order compelling discovery." *Id.* at 540 (emphasis added).

Respondent relied upon the highlighted dicta to argue that Mobile Infirmary's petition was untimely because it was not filed within 21 days after denial of the motion for protective order the time period for compliance with the original discovery order. Respondent also relied upon a discussion of this dicta in *Ex parte Community Health Systems Professional Serv. Corp.,* 72 So.3d 595, 599-600 (Ala. 2011)(hereinafter "*Ex parte CHSPSC*"). In that case the trial court had entered an order directing that a deposition be taken within 30 days. The defendant hospital moved for a protective order within the 30-day period for compliance. Thereafter, the trial court denied the hospital's motion and ordered that the plaintiff take into account the deponent's schedule so as to arrange his deposition in such a manner that it would not be "unduly burdensome or amount to oppression." *Id*. at 599. The petition was filed on the 42nd day after the denial of the motion for protective order. *Id.* at 598. The plaintiff argued that the petition was untimely because it should have been filed within the 30-day time period given for compliance with the order compelling the deposition, citing *Ex parte Horton Homes. Id.* at 599. In particular, plaintiff argued that the hospital had to file its petition "within 30 days from the date of the trial court's order denying the protective order." *Id.* [3] The court rejected this argument, finding the "rule" of *Ex parte Horton Homes* inapplicable because, in that case, the order denying the motion for protective order did not modify the time for complying with the discovery order; in the case presently before the court, the order denying a protective order modified the time period for taking the deposition from 30 days to a time period that "will not be unduly burdensome or amount to oppression." *Id.* at 599-600.[4] Therefore, the mandamus petition was timely because it was filed within 42 days of the order denying the motion for protective order. *Id.*

> Notwithstanding the rule as repeatedly described and applied in these published opinions, a recent, unpublished decision of the court reveals that the court will, on occasion, apply a different rule, requiring a shorter time frame for the filing of mandamus petitions related to discovery orders.

As Mobile Infirmary argued in opposition to respondent's motion to dismiss, the dicta of *Horton Homes,* requiring the filing of the petition itself within the time period set for compliance with the discovery order, has never been applied in any published decision as the basis for the dismissal or denial of such a petition. Moreover, at the time the petition in *Horton Homes* was filed, and indeed at the time the decision was later released, on May 26, 2000, Rule 21 contained no time limit for the filing of petitions for writ of mandamus, although, under the case law, unreasonable delay was grounds for dismissing such a petition. *See Ex parte Butts*, 775 So.2d 173, 176 (Ala. 2000).

Effective September 1, 2000, however, amended Rule 21 required that a petition be filed within a "reasonable time" and that "[t]he presumptively reasonable time for filing a petition seeking review of an order of a trial court shall be same as the time for taking an appeal." *See* Rule 21(a)(3)(effective September 1, 2000). Whatever force the dicta from *Horton Homes* may have had at the time, in governing the time within which to file a petition for mandamus review, the subsequent amendments to Rule 21, which explicitly state the time limits for such petitions, would seem to preempt that dicta. In its later decision in *Ex parte CHSPSC,* because the court rejected the respondent's

argument that the *Horton Homes* "rule" even applied, it had no occasion to determine what impact the subsequent amendments to Rule 21 may have had on this "rule." And, as discussed above, the court's decisions both before and after *Ex parte CHSPSC* have ignored the dates for discovery compliance and have applied a bright-line rule of 42 days in measuring the timeliness of mandamus petitions challenging discovery orders.

Following the filing of respondent's motion to dismiss, based on these two decisions, the court in *Ex parte Mobile Infirmary Assn.,* Case No. 1160769, denied the petition with a single citation to *Ex parte Horton Homes*. Because Mobile Infirmary had complied with the requirements of a timely filed motion for protective order, as *Horton Homes* required, the only basis upon which *Horton Homes* might serve as grounds for a denial of Mobile Infirmary's petition was application of the dicta requiring that the petition be filed "within the time period set for production by the trial court in its order compelling discovery."

Whether the court treated Mobile Infirmary's petition as untimely because it was not filed within the 21-day period for compliance with the discovery order, as the *Horton Homes* dicta literally requires, or because it was not filed within 21 days following denial of the protective order, as that dicta was interpreted in *Ex parte CHSPSC,* is unknown. What can be said is that a mandamus petition filed within the presumptively reasonable time of 42 days following denial of a timely filed motion for protective order was denied as untimely due to an earlier date for compliance with the discovery order having passed.[5]

Needless to say, if the court is applying a rule that requires mandamus petitions relating to discovery orders to be filed within the period of time for compliance with those orders, this is a very different rule– and one that actually contradicts the court's repeated reiteration of the rule in its published decisions.

Those decisions include express holdings that petitions filed within 42 days of the order denying the motion for protective order are timely, notwithstanding shorter periods of time for compliance in the original discovery order, as in *Ex parte Orkin,* or shorter time periods for compliance in the subsequent order denying a protective order, as in *Ex parte Int'l Refining & Manuf. Co.* Indeed, if the *Horton Homes* dicta is the rule, petitions for mandamus review of discovery orders must almost always be filed within a shorter period of time than 42 days, except in the rare event that neither the discovery order nor the order denying a protective order contains a compliance date or, even more unlikely, where the orders allow for more than 42 days for compliance. And if the court means to apply the dicta of *Horton Homes* literally (as might be inferred from the court's failure to cite *Ex parte CHSPSC,* in denying Mobile Infirmary's petition), a mandamus petition seeking review of a discovery order must be filed before the date for compliance with that order has passed, even if the trial court has not yet ruled on the motion for protective order, which is a precondition to mandamus review.[6]

Whether the court has ever denied a mandamus petition on timeliness grounds, based on the *Horton Homes* dicta, before its unpublished decision in *Ex parte Mobile Infirmary Assn,* Case No. 1160769, is unknown. If it continues to do so in the future, however, this will undoubtedly come as a shock to counsel representing petitioners, even to experienced appellate practitioners. In the wake of this decision, the leading handbook on Alabama appellate practice has been amended, in its discussion of the general time to file a petition for mandamus, counselling to be "be aware of the trap" of *Ex parte Horton Homes* and the discussion of its "special rule" in *Ex parte CHSPSC*. *See* Ed Haden, *LexisNexis Practice Guide Alabama Appellate Practice* §9.03[3] (2018 Ed. LexisNexis Matthew Bender).

> The safest course would be to file a motion to extend the date for compliance, at the same time you file your motion for protective order, asking for enough time beyond the date of any denial of the motion for protective order to enable you to prepare and file your mandamus petition before that extended date for compliance passes.

Practical Steps to Take to Avoid Timeliness Problems

One additional consideration: what steps to take if you are faced with a discovery order containing a date for compliance that you want to challenge by a mandamus peti-

tion. The safest course would be to file a motion to extend the date for compliance, at the same time you file your motion for protective order, asking for enough time beyond the date of any denial of the motion for protective order to enable you to prepare and file your mandamus petition before that extended date for compliance passes. If you can get the trial court to grant such a motion, before the initial date for compliance passes, you will have protected yourself against dismissal for untimeliness. If you cannot obtain such a ruling before the deadline for compliance, the safest approach would be to file your mandamus petition before that deadline, even if the trial court has not yet ruled on the motion for protective order, explaining your reasons for doing so and indicating that the petition will be amended if and when the motion for protective order is denied, or dismissed if the protective order is granted. This will prevent any argument of untimeliness based upon the literal language of *Horton Homes*. Such a petition might be challenged as premature, given the absence of any ruling on the motion for protective order, but the uncertainty over what timeliness rule the court will apply leaves no alternative if one wants to proceed with all necessary precaution.

Conclusion

The hidden trap created by the court's apparent application of a special timeliness rule for the filing of mandamus petitions challenging discovery orders, a rule that is inconsistent with its published holdings and reiterations of the rule, should be either eliminated or its parameters disclosed. The bar needs a published opinion (or an amendment to Rule 21) that clearly establishes the time frame for the filing of such petitions. The 42-day rule, as codified in Rule 21(a)(3), seems a perfectly workable, simple and appropriate bright-line rule for such petitions, rather than a rule requiring various different deadlines based on various differing time periods for discovery compliance or extensions or modifications of those time periods. The careful preparation of an adequate petition often takes a considerable amount of time, certainly more than the week or two that many discovery orders require for compliance.

No practical purpose appears to be served in requiring that such petitions be filed within the time period for compliance with discovery orders. The mere filing of the petition, no matter how quickly or how far in advance of the compliance date, will not serve to stay the trial court's discovery order or resolve the discovery dispute before the date set for compliance. That date will come and go no matter how quickly the petition is filed. As a practical matter, upon the petition being filed, the party seeking the discovery often will not press for compliance with the order, pending a ruling on the petition. If compliance is demanded, a stay will need to be sought from the trial court or, if unsuccessful, from the supreme court, no matter how quickly the petition has been filed. Requiring that petitions be filed within the period for compliance simply sets an unnecessarily earlier date than that required under Rule 21, to the prejudice of the ability to prepare such petitions in a careful and competent manner. ▲

Endnotes

1. The opinion in *Ex parte Hunte* does not reflect the date the petition was filed, but the online records of the court filings at the Appellate Courts' Online Information Service (*acis.alabma.gov*) show it was filed 39 days after the order denying the protective order.
2. Subsequent decisions have repeatedly cited *Horton Homes* for this procedural requirement. *See Ex parte Michelin N. Amer., Inc.* 161 So.3d 164, 177-178 (Ala. 2014); *Ex parte Terminix Int'l Co. LP*, 14 So.3d 849, 853 (Ala. 2009); *Ex parte CIT Commnunity Fin. Corp*, 897 So.2d 296, 299 (Ala. 2004); *Ex parte Anderson*, 789 So.2d 190, 197-198 (Ala. 2000).
3. This argument seems to distort the meaning of the dicta of *Horton Homes,* which literally requires a filing not only of the motion for protective order, but also of the mandamus petition itself "within the time period set for production with the trial court's order compelling production." This language is not consistent with a more liberal rule allowing a certain period of time for the filing of the motion for protective order and then a subsequent, identical period of time, following denial of that motion, for the filing of the petition.
4. This is a rather bizarre basis for distinguishing *Horton Homes*. The issue in that case did not involve the timeliness of the petition at all. The opinion does not even disclose how many days elapsed from the denial of the motion for protective order until the petition was filed. The court simply ruled that the petitioner was unable to show a "clear legal right to relief" because it "waived" its right to a protective order, not filing its motion for such an order within the period for compliance with the discovery order. 774 So. 2d at 540.
5. Ironically, in a subsequent decision involving mandamus review of a discovery order in another lawsuit against Mobile Infirmary, ordering the production of the same quality assurance materials, over the hospital's identical claim of privilege as to these same materials, and supported by the same evidentiary foundation, the court upheld the claim of privilege and granted the petition, directing the trial court to vacate its order compelling production of these materials. *See Ex parte Mobile Infirmary Assn.,* 2018 WL 2381977 (Ala. S. Ct. May 25, 2018). Thus, had the court ruled on the merits of the petition in Case No. 1160769, it presumably would have reached the same conclusion.
6. This is precisely how the *Horton Homes* dicta was interpreted by an article in this journal in 2007, counseling practitioners to file their petitions within the initial period for compliance with the discovery order, even if the trial court has not yet ruled on the motion for protective order. *See* Mark James Ayers, "The Use and Review of the Extraordinary Writs of Mandamus and Prohibition in Alabama's Appellate Courts," 68 Ala. Law. 396, 397-98 (2007).

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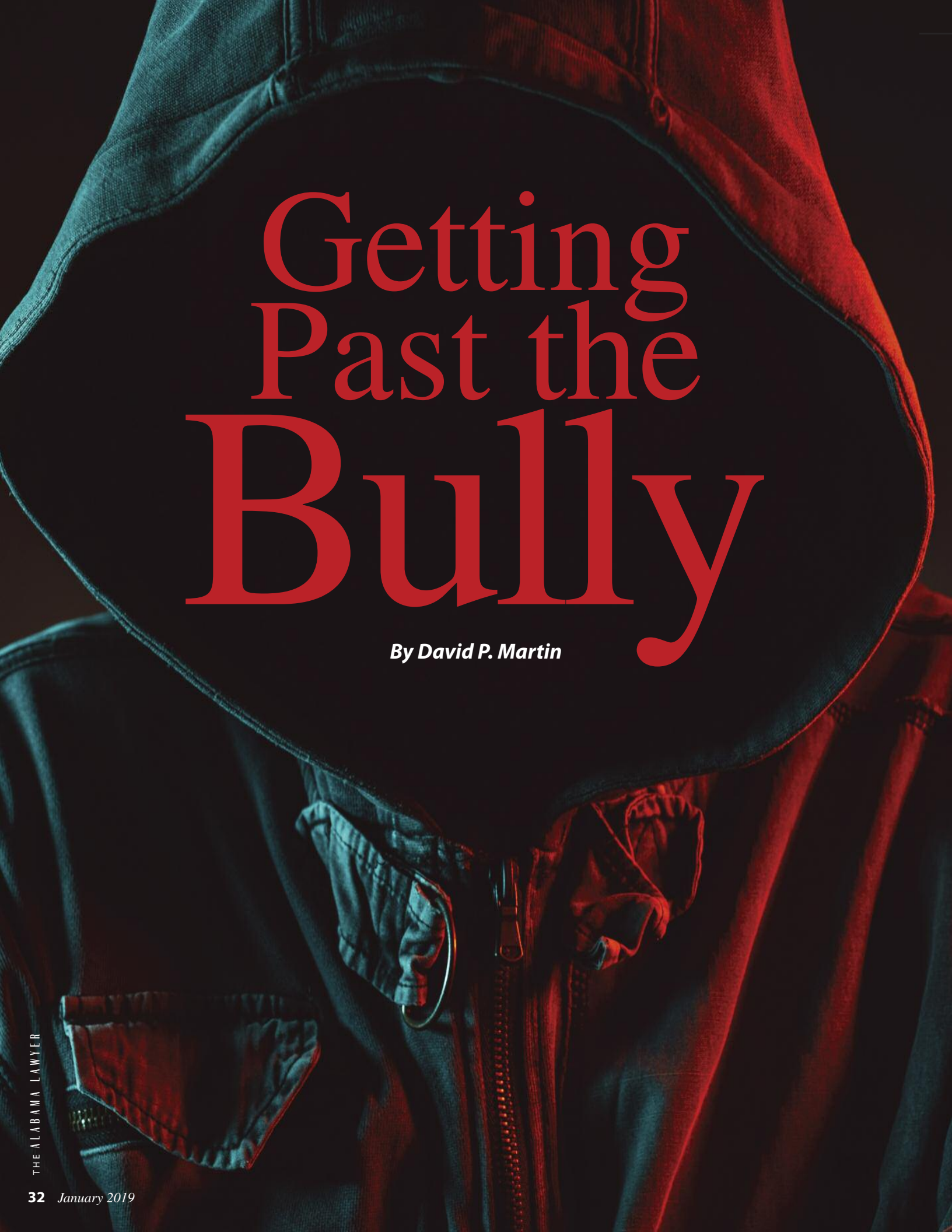

Getting Past the Bully

By David P. Martin

There is one area of law that pushes its way into many civil cases.

Some lawyers have never have encountered it, but many who have faced it now disdain the mention of it. It is the bully known as the Employee Retirement Income Security Act of 1975 (ERISA).[1] This statute is "a federal law that sets minimum standards for most voluntarily-established retirement and welfare[2] plans in private industry to provide protection for individuals in these plans," as so naively described by the U.S. Department of Labor. Judge Acker once remarked that "ERISA is beyond redemption."[3] There is no doubt that ERISA regularly beats up the cases of many experienced litigators.

Consider the following examples.

Scenario One

Counsel's friend who has been disabled for 10 years has his long-term disability claim denied. Counsel, trying to merely help a friend *pro bono*, files a breach of contract claim in state court. This seemingly simple disability insurance claim quickly takes an unexpected turn. Opposing counsel promptly files a motion, and the case is removed to federal court, followed by a dismissal based on a failure to exhaust "administrative remedies."[4] The friend is now left without any remedy at all. The time to appeal has passed, so the insurance company won't review its decision. And, he can't return to court again, because he didn't exhaust the administrative appeal process.

Scenario Two

In a second example, an auto accident case with policy limits of $40,000 is the subject of a lawsuit. Lost wages and pain and suffering exceed that, but the case quickly becomes unprofitable when the "bully" appears. The ERISA health insurer paid more than $40,000 in medical claims, and now claims entitlement to the full sum of $40,000. Never mind that the injured plaintiff has been out of work, experienced years of pain and paid for the health insurance. And, to add insult to injury, the ERISA insurer won't pay the plaintiff's attorney's fees, even though it directly benefitted from the plaintiff's lawsuit.

Scenario Three

In a third scenario, a worker is seriously injured on the job. Workers' compensation benefits commence, but then cease when the impairment is disputed. The employer provides a long-term disability benefit, and the worker also pursues benefits under that policy. That long-term disability claim is denied, and an appeal to the insurer is required within 180 days. A decision on the appeal may not come until 45 to 90 days after it is submitted. This leaves the worker without income for an extended period of time. Settlement discussions on the workers' compensation case result in an apparent victory, until the company's standard release is tendered which releases all ERISA claims. Destitute, in need of funds and perhaps not even realizing the long-term disability claim is an ERISA claim, the worker accepts the settlement. Now the long-term disability benefit is denied which was in place to help replace income.

Scenario Four

Finally, a worker in his late 60s retires after learning the amount of his pension. While he has a fixed income far less than when working, he nevertheless can pay his bills. Ten years later, he learns that he has somehow been overpaid due to a clerical error. Now, the pension fund wants back $200,000. He does not have it and cannot afford to pay a lawyer an hourly fee to defend the claim. The pension threatens to further "offset" his ongoing, already-reduced pension.

These are just a few of the countless examples of unfairness and inequities that arise under ERISA. This obscure area of the law touches many other areas and is the bully often used to avoid what would otherwise reasonably be assumed a clear responsibility. I am a stalwart advocate of personal responsibility. However, when people rely on a benefit to help them in the event of trouble, and the bully snatches it from them, I have a problem with the plan's responsibility. Unfortunately, this happens all too often, and you or a friend or a client will one day encounter ERISA. However, attorneys can and should leverage this bully's weaknesses to add a little fairness to what is set up as an unfair fight.

Some General Guidance

First, assume that ERISA governs the claim. It is far better to assume that it does, even if it turns out that it doesn't, than to assume that it doesn't. If a claim involves an employee benefit, and the plan sponsor is not the government or a church, it is probably governed by ERISA. As to church plans, a church may opt into ERISA, so it is still better to assume that ERISA applies until you determine otherwise. An association (e.g. the Alabama Education Association) may provide a benefit to government employees (e.g. teachers), and again, ERISA will control even though one wouldn't think that such public employees would be covered.

Second, recognize the most commonly-encountered ERISA benefits are health insurance, short-term disability,[5] long-term disability, life insurance, severance pay, retirement benefits (such as a 401(k)) and pension benefits. These benefits commonly entangle other cases such as personal injury, workers' compensation, Social Security, employment, domestic relations, tax and estate planning, to name a few.

Next, understand that, for the most part, ERISA preempts or nullifies state law. Because of this preemption, only ERISA damages are recoverable. There is generally no recovery for mental anguish, pain and suffering, punitive damages or any other extra contractual damages, other than interest and equitable relief[6] There is no right to a jury trial.[7] ERISA typically allows a recovery of the benefits that should have been received (past due benefits), and perhaps interest. If a lawsuit is filed, then a judge may also award attorney's fees to either party.[8]

Certain violations, such as failure to provide a summary plan description or plan document in a timely manner, or failure to provide a notice of COBRA rights for continued health insurance or medical benefit coverage, can give rise to penalties under ERISA. The penalties are capped at $110 per day.[9] However, these penalties are only awarded under certain circumstances.[10]

How to Deal With the Bully

Because the benefits are limited and ERISA law is complicated, an attorney who does not regularly practice in the ERISA arena will likely find that it is not a desirable area of law in which to dabble. The law is rife with unfairness and often runs counter to what a trained lawyer would expect to be the law. Given there will likely not be a public outcry demanding changes to the statute any time soon, it is more practical to learn the leverage points to better deal with the bully.

I. Obtain the Plan Document

The first matter to undertake in any ERISA situation is to obtain the plan document. You have no leverage without it. The ERISA decision-maker, called the ***plan administrator*** or ***claim administrator*****,** is required to utilize a plan document that typically gives the decision-maker discretion. When discretion is given, the decision must be given deference by a court reviewing the decision under the arbitrary and capricious standard of review. It is critically important to obtain this document as soon as possible.

One positive aspect of ERISA is that all plan documents must be produced by the plan administrator. It is often difficult to know the entity which is serving as the plan administrator. Therefore, it is prudent to make such a request of *all* potential plan administrators: the employer, the owner of the employer (if it is a wholly-owned subsidiary), the insurance company and the claim administrator. The request must be made in writing to the plan administrator to trigger ERISA's compliance provisions. A refusal to provide a plan document within 30 days of a written request permits a federal court to impose penalties of up to $110 per day after the first 30 days.[11]

By obtaining these documents, you will better understand your client's rights. For example, there may be a limitation of action provision[12] in the documents which provides a very short time limit for filing a lawsuit after all claims have been exhausted. You will also better understand some of the contractual promises made.

II. Obtain the Claim Record

Another leverage point with ERISA is that it requires production of the claim record, or administrative record, after adverse action.[13] A claim denial or termination of benefits is adverse action. Therefore, before preparing a lawsuit or proceeding, it is prudent to obtain the entire claim record.

The claim record will contain notes made by claims staff, as well as correspondence to the claimant and medical providers, medical records and any medical and vocational reviews the insurance company conducted in deciding the claim. The information can be cross-checked to reveal if all of the record has indeed been produced. Often, it has not. The last claim record should be the same record later produced in litigation.

You should review the claim record to determine whether decisions were timely made, according to the time frames established by ERISA. This will better help you assess the posture of the case and determine your next course of action. It may be possible to proceed to litigation if the claim has been deemed exhausted (either because the insurance company failed to decide a claim in a timely manner or because the claimant already submitted an appeal before seeking counsel). Alternatively, you may have to exhaust all administrative remedies first by submitting an appeal or request for review.

The contents of the claim record will vary, depending on what type of ERISA benefit is at issue. There is a great disparity among plan or claim administrators regarding the care and completeness of the claim record. It is not uncommon to find a decision was based in part upon another claimant's records. You should review the claim record very closely, looking for anything that strikes you as illogical. You will sometimes find, as in the case of a long-term disability claim, that the claimant's medical records have never been reviewed by a qualified medical professional or that an investigation into a claimant's own occupation was not conducted before the insurer determined the claimant could perform the essential duties of his own job. Frequently, shortcuts are taken which are never revealed except by a thorough review of the record. The average claimant is often unaware of his rights, losing a vital leverage point against this bully.

III. Understand the ERISA Trustee Concept

The Law of Trusts

Perhaps you have not studied trust law since law school. Recalling some basics, however, will help you gain more leverage with ERISA. The Supreme Court held that Congress intended that trust law principles be applied in ERISA. This finding provides leverage points.[14] As you may recall, under trust law the duty of loyalty is a key concept. "The first and all-inclusive requirement of the law is that a trustee shall act with **complete and undivided loyalty to his trust.**"[15] (Emphasis added.) This duty of loyalty requires a

claim fiduciary to deal with the plan assets used to pay benefit claims in the sole interest of trust beneficiaries (plan participants), and not for the trustee's gain.[16] The Restatement (Third) of Trusts provides:

> **§ 78. Duty of Loyalty**
>
> (1) Except as otherwise provided in the terms of the trust, a trustee has a **duty to administer the trust solely in the interest of the beneficiaries, or solely in furtherance of its charitable purpose.**
>
> (2) Except in discrete circumstances, the trustee is **strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests.**
>
> (3) Whether acting in a fiduciary or personal capacity, a trustee has a duty in dealing with a beneficiary to **deal fairly and to communicate to the beneficiary all material facts the trustee knows or should know in connection with the matter.** (Emphasis added.)
>
> Part of that duty of loyalty and fair dealing includes the duty to investigate. A claim fiduciary's duty to investigate is a key facet of prudence and is often at the heart of fiduciary litigation.[17] Many claim decisions are made merely based on the interests of the plan. Recalling these trust law principles may provide a strategy that yields multiple leverage points in a variety of circumstances.

The Standard of Review

Buried in the plan document, you will usually find language reserving discretion to the ERISA decision-maker.[18] After the Supreme Court decision in *Firestone v. Bruch*,[19] most plans saw fit to include such language in their plan documents. Statistics show that the standard of review matters. If the arbitrary and capricious standard of review controlled, research from 2012 reflects that claimants lost 79.17 percent of the time. Claimants lost 68 percent of the time if a *de novo* review was required.[20] If the *de novo* standard of review is applicable, then discovery in the 11th Circuit will be conducted the same as in any other insurance case.[21] However, there may be more stringent limitations if the arbitrary and capricious standard of review controls according to some courts.[22] Obviously, under the arbitrary and capricious standard of review, it is critical to provide more than ample evidence during the administrative claim process to gain leverage over the ERISA decision-maker. The claim process under this standard is perhaps the most critical phase of an ERISA case, but it is frequently overlooked, thus losing valuable leverage.

IV. Exhaustion: A Key Weapon for the Bully

Appreciating the ERISA requirement of exhaustion is critical to avoid losing leverage. Too many lawyers file an ERISA lawsuit without first exhausting all claim remedies. This routinely results in the dismissal of many lawsuits. While ERISA does not make any mention of exhausting administrative or claim remedies, courts have imposed exhaustion requirements, believing this reflects the ". . . intent of Congress that pension plans provide intrafund review procedures."[23]

Accordingly, you should always carefully examine the plan document and letters denying the claim to evaluate whether further exhaustion is required. There are time limits that the plan may impose to exhaust. If those time frames have passed, and the plan administrator is not willing to accept any further appeals or exhaustion effort, then the case may be in deep trouble.[24]

Frankly, you want there to be a further exhaustion opportunity, so that you can make the claim record stronger for your client. Under the arbitrary and capricious standard of review, the claim record is often considered closed the moment a lawsuit is filed.[25] Lawyers are well-suited to strengthen the claims of clients who are not savvy in presenting the evidence themselves. Because a trial judge is typically reviewing the claim decision under a deferential standard of review, it is best to think of the plan or claim administrator process as your initial "paper trail." Failure to establish a strong claim record during the claim process is usually not going to be grounds for open discovery, so you want to strengthen it while you can.

V. Know the Definitions

Any good criminal defense attorney knows to be careful not to take on proving more than you have to prove to avoid a conviction. This is true with many ERISA claims. The best leverage is precisely targeting the definitions in the policy and providing overwhelming proof to meet those terms. For example, in a long-term disability claim, there will be a definition of disability in the policy or plan. That is the target. Broad assertions that your client is disabled per the Social Security Administration may not meet the definition in question.[26]

Additionally, there may be a definition pertaining to "any occupation" your client is capable of performing, which removes it from that particular employer's job duties and instead utilizes general job duties for the occupation as it is performed nationally. That, too, is a critical issue, especially if the basis for those job duties is the 1991 *Dictionary of Occupational Titles* (the most frequently-cited resource used by insurance companies in their vocational reviews). It is generally outdated. Focus on the definitions in the plan and let that be your guide as to what is required.

VI. Exclusions or Limitations

Many accidental death and long-term disability policies may exclude coverage for a pre-existing condition that contributes to disability. That exclusion can be abused, because no one is a perfect human specimen. Theoretically, there is always something that can contribute to an illness or injury. Therefore, to gain the most leverage, it is important to understand such exclusions or limitations. Make sure there is proof that the accident would have occurred, regardless of any pre-existing condition, or that the individual is disabled apart from that pre-existing condition.

Then, there are policies that exclude coverage for any physical limitation that is not "objectively verifiable." "Objectively verifiable" may be defined as proof of disability from an X-ray or some other diagnostic test. Unfortunately, many conditions, such as pain or psychiatric issues, cannot be measured by diagnostic equipment. However, we all know that if you are in too much pain, or suffer from severe psychiatric issues, you cannot work. Therefore, to maximize leverage in these circumstances, and regardless of whether the plan has a definition of the required proof, evidence should be presented to corroborate the diagnosis and the known restrictions and limitations flowing from that diagnosis, and to verify as objectively as possible the actual restrictions and limitations. Many areas of

medicine have implemented standards for doctors to utilize to provide reliability in connection with a diagnosis.

VII. Offsets

Offsets are a troublesome area for ERISA claimants. They reduce the amount of a benefit, often in an unanticipated manner. This is a common tactic used to disillusion claimants and practitioners of the value of the claim, showing that it is worth very little and thus not worth the fight. However, understanding the rights involved is critical for leverage.

First, recognize ERISA only allows monetary claims to be asserted by a *participant or beneficiary.*[27] Under ERISA, a *fiduciary* is only permitted to bring an equitable remedy type of claim.[28] The Supreme Court has recognized this and has made clear that a court may not order restitution from a plaintiff by ordering a monetary payment from the plaintiff's general assets. That amounts to awarding legal relief that is not available.[29] This same Court found that restitution sought by an insurer must involve the imposition of a constructive trust or equitable lien on particular funds or property in the insured's possession from which the insurer's claim for relief can be satisfied.[30] Later, the Supreme Court further explained that a lower court "erroneously held that the plan could recover out of Montanile's general assets" without regard to whether the settlement funds were kept separate from general assets.[31] Therefore, the threat of a monetary claim is often an empty one.

Second, if the relief is only equitable, is equity being done? Alabama state and federal courts recognize that one "who seek[s] equity must do equity" and "one that comes into equity must come with clean hands."[32] Utilization of the clean hands doctrine is within the *sound discretion* of the trial court.[33] "It is an elementary proposition of equity jurisprudence that one who seeks equity must do equity; that one who comes into equity must come in with clean hands. Equity courts have historically declined to grant equitable relief to one who seeks to enforce rights under a contract which he, himself, has breached."[34] This ***clean hands doctrine*** precludes contractual and other forms of relief when the assertion of rights is "contrary to equity and good conscience."[35] Equity provides often-overlooked leverage.

VIII. Time Limits

A final point of leverage is to focus on the ERISA time limits as to proof of loss, claim decisions and filing a lawsuit. ERISA is a deadline-intensive bully. Some plans contain time limits on how quickly claimants must provide notice and proof of loss. The time frames may be very short, such as 30 days or 90 days. If a claimant is too late, his claim may not be honored or the decision may be delayed. There also may be time limits as to how quickly claimants must challenge or appeal a refusal to pay a claim. If the claimant does not follow all of the rules regarding the claim process, his claim may be denied or completely barred.

ERISA's deadlines can also work in a claimant's favor. If the time for a claim decision has passed and there are no justifiable circumstances to excuse delay, the claim may be deemed exhausted at that point. Suit may be filed, and this may be an advantage for the client.[36] However, it is critical not to jump the gun and file suit before a careful review of the facts and the plan are conducted. This is a strong leverage point for claimants.

Additionally, if a claim and appeal are denied, there may be time limits as to how quickly a claimant must file a lawsuit on his claim. ERISA does not provide a statute of limitations for benefit claims.[37] The limitations period provided by the most nearly analogous state statute applies.[38] However, the ERISA plan can create its own limitation of action period, replacing the state statute of limitation.[39] This will be enforceable generally, as plan terms are meant to be enforced.[40] "ERISA actions are enforceable, regardless of state law, provided they are reasonable."[41] The 11th Circuit has upheld a limitation period as short as 90 days in which to file suit. While that certainly can benefit an ERISA plan, would it be equitable if time limitations were only enforceable against a participant, and not the plan–for example, when it seeks an overpayment going back 10 years?

There is also the equitable defense of laches,[42] where the fiduciary waited too long to assert its rights. This seems to be especially applicable when the fiduciary made the mistake years ago to the disadvantage of the claimant.[43]

IX. Conclusion

ERISA has been referred to as "every rotten/ridiculous idea since Adam." A few federal judges, as well as noteworthy authors, have agreed with this. Bad idea or not, it isn't going anywhere soon. It seems then that the best approach is to remember how to deal with this bully. ▲

Endnotes

1. 29 U.S.C. § 1003(a); 29 U.S.C. § 1144(a); 29 U.S.C. § 1002 (7) and (8); *Butero v. Royal Maccabees Life Insurance Company*, 174 F.3d 1207, 1213 (11th Cir. 1999).
2. This typically includes health, dental, vision, long-term disability and life benefits.
3. Judge William M. Acker, "Can the Courts Rescue ERISA," 29 Cumb.L.Rev. 285 (1998/99): • "Since writing *Florence Nightingale*, I have changed my mind. ERISA is beyond redemption. No matter how hard the courts have tried, and they have not tried hard enough, they have not been able to elucidate ERISA in ways that will accomplish the purposes Congress claimed to have in mind." Judge Acker passed away on June 21, 2018 never changing his opinion on ERISA. He will long be remembered as a brilliant and compassionate jurist.
4. "Administrative remedies" is a fictional term created by courts which actually refers to completing the claim process. There is really nothing "administrative"' about the process. It is not similar to Social Security or other familiar administrative type claim processes which have open and accessible claim procedures and manuals applicable to all claims. *See, Brown v. Blue Cross & Blue Shield of Ala.*, 898 F.2d 1556, 1567 at n. 7 (11th Cir. 1990) "We express caution, however, at wholesale importation of administrative agency concepts into the review of ERISA fiduciary decisions."
5. Short-term disability that is self-insured by the employer may be a "payroll practice," and not governed by ERISA. In that case, you have a state law claim. 29 C.F.R. § 2510.3-1(b).
6. *Amos v. Blue Cross-Blue Shield of Alabama*, 868 F.2d 430, 433 (11th Cir. 1989) "…eliminating the possibility that insurance companies may be liable for punitive or extra-contractual damages, the courts are removing an historical disincentive to insurance company misbehavior. Consequently, our decision may produce unintended results." *McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 820 (11th Cir. 1991). Extra-contractual damages are not available as a form of relief under ERISA § 502(a)(3).
7. "… the law of this circuit is settled: Chilton was not entitled to a jury trial." *Chilton v. Savannah Foods & Indus., Inc.*, 814 F.2d 620, 623 (11th Cir. 1987).
8. (1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party. 29 U.S.C.A. § 1132(g).
9. The penalty was adjusted from $100 to $110 per day for violations occurring on or after July 30, 1997. 62 Fed Reg 40,696 (July 29, 1997). 29 C.F.R. § 5260.502-5.
10. You can sue for ERISA benefits in state court and obtain a recovery, but a state court judge cannot award equitable

relief. *See*, 29 U.S.C. § 1132(e). "Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section."

11. 29 U.S.C. § 1132(c); 29 U.S.C. § 1024(b)(4).

12. *See e.g., Northlake Regional Medical Center v. Waffle House System Employee Benefit Plan*, 160 F.3d 1301 (11th Cir. 1998).

13. The applicable regulation, at 29 C.F.R. § 2520.102-3, requires a summary plan description to provide that, when a claim is denied, the claimant has the right to the claim file, and the defendant must produce the documents within 30 days.

14. *Varity Corp. v. Howe*, 516 U.S. 489, 496, 116 S. Ct. 1065, 1070, 134 L. Ed. 2d 130 (1996): ". . . we recognize that these fiduciary duties draw much of their content from the common law of trusts, the law that governed most benefit plans before ERISA's enactment. *See, Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570, 105 S.Ct. 2833, 2840, 86 L.Ed.2d 447 (1985) ("[R]ather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility"); H.R.Rep. No. 93-533, pp. 3-5, 11-13 (1973), 2 Legislative History of the Employee Retirement Income Security Act of 1974 (Committee Print compiled for the Senate Subcommittee on Labor of the Committee on Labor and Public Welfare by the Library of Congress), Ser. No. 93-406, pp. 2350-2352, 2358-2360 (1976) (hereinafter Leg. Hist.); G. Bogert & G. Bogert, *Law of Trusts and Trustees* § 255, p. 343 (rev.2d ed.1992)."

15. *Birmingham Tr. Nat. Bank v. Henley*, 371 So. 2d 883, 895–96 (Ala. 1979) *quoting* Headley, Trust Investments, 110 Trusts & Estates 739 (1952).

16. *See*, Restatement of Trusts (2d) § 170.

17. *See, Brock v. Walton*, 794 F.2d 586 (11th Cir. 1986) *and see, Brown v. Blue Cross & Blue Shield of Ala, Inc.*, 898 F.2d 1556, 1566 (11th Cir.1990), cert. denied, 498 U.S. 1040 (1991).

18. Insurance-based plans that incorporate the law of another state may not permit discretion. At this time, 25 states have bans on such clauses in insurance contracts. Alabama is not one of them.

19. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989).

20. See figure 7, p. 12 of "ERISA Benefits Litigation: An Empirical Picture," Sean M. Anderson, *ABA Journal of Labor & Employment Law* Vol. 28, No. 1, Symposium: Employee Benefits in an Era of Retrenchment (fall 2012).

21. *Moon v. Am. Home Assur. Co.*, 888 F.2d 86, 89 (11th Cir. 1989) ". . . contention that a court conducting a *de novo* review must examine only such facts as were available to the plan administrator at the time of the benefits denial is contrary to the concept of a *de novo* review."

22. Compare *Harvey v. Standard Ins. Co.*, 787 F. Supp. 2d 1287, 1292 (N.D. Ala. 2011); *Blair v. Metro. Life Ins. Co.*, 955 F. Supp. 2d 1229, 1232 (N.D. Ala. 2013), *aff'd*, 569 F. App'x 827 (11th Cir. 2014); *Melech v. Life Ins. Co. of N. Am.*, 857 F. Supp. 2d 1281, 1283–84 (S.D. Ala. 2012); and *Till v. Lincoln Nat. Life Ins. Co.*, 107 F. Supp. 3d 1240, 1243 (M.D. Ala. 2015).

23. 29 U.S.C.A. § 1133; *see also*, H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 5038, 5108. *Amato v. Bernard*, 618 F.2d 559, 567-68 (9th Cir. 1980). *Mason v. Continental Group, Inc.*, 763 F.2d 1219 (11th Cir. 1985).

24. There are exceptions to exhaustion, such as carefully pled futility, or "deemed exhaustion," which is a failure to follow the minimum standards of the claim procedure at 29 C.F.R. § 2560.503-1. These are beyond the scope of this presentation.

25. Facts known to the plan or claims administrator, but excluded from the claim record, may be a good basis to add more to the record.

26. However, the basis of that determination may be relevant and of great assistance.

27. 29 U.S.C. § 1132(a)(1), (2), (3), and (c).

28. 29 U.S.C. § 1132(a)(3),

29. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210-211 (2002).

30. Id. at 213.

31. *Montanile v. Bd. of Trustees of Nat. Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 662, 193 L. Ed. 2d 556 (2016).

32. *Levine v. Levine*, 262 Ala. 491, 494, 80 So.2d 235, 237 (1955); *and see, Buchannon v. Upshaw*, 42 U.S. 56, 75, 11 L. Ed. 46 (1843).

33. *Lowe v. Lowe*, 466 So.2d 969 (Ala.Civ.App.1985); *J & M Bail Bonding Co. v. Hayes*, 748 So. 2d 198, 199 (Ala. 1999).

34. *Local Union No. 1055, Int'l Bhd. of Elec. Workers, AFL-CIO v. Gulf Power Co.*, 182 F. Supp. 950, 953–54 (N.D. Fla. 1960).

35. *Draughon v. General Fin. Credit Corp.*, 362 So.2d 880, 884 (Ala.1978).

36. 29 CFR § 2560.503-1.

37. Under 29 U.S.C. § 1132(a)(1)(B).

38. *See, North Star Steel Co. v. Thomas*, 515 U.S. 29, 33–34, 115 S. Ct. 1927, 132 L.Ed.2d 27 (1995).

39. *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S. Ct. 604, 609, 187 L. Ed. 2d 529 (2013).

40. *CIGNA Corp. v. Amara*, 563 U.S. ———, ———, 131 S.Ct. 1866, 1877, 179 L.Ed.2d 843 (2011).

41. *Northlake Reg'l Med. Ctr. v. Waffle House Sys. Employee Benefit Plan*, 160 F.3d 1301, 1303 (11th Cir. 1998).

42. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1973, 188 L. Ed. 2d 979 (2014) ". . . laches is a defense developed by courts of equity; its principal application was, and remains, to claims of an equitable cast for which the Legislature has provided no fixed time limitation. See 1 D. Dobbs, Law of Remedies § 2.4(4), p. 104 (2d ed. 1993) (hereinafter Dobbs) ("laches ... may have originated in equity because no statute of limitations applied, ... suggest[ing] that laches should be limited to cases in which no statute of limitations applies"). Both before and after the merger of law and equity in 1938,14 this Court has cautioned against invoking laches to bar legal relief. See *Holmberg v. Armbrecht*, 327 U.S. 392, 395, 396, 66 S.Ct. 582, 90 L.Ed. 743 (1946) (in actions at law, "[i]f Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter," but "[t]raditionally ..., statutes of limitation are not controlling measures of equitable relief").

43. *Mills v. Dailey*, 38 So. 3d 731, 735 (Ala. Civ. App. 2008) "Laches, in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, and other causes; but, when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief." Stiness, J., in *Chase v. Chase*, 20 R.I. 202, [203-04,] 37 A. 804, [805 (1897)]. 5 Pom. Eq. Jur., § 21.

David P. Martin

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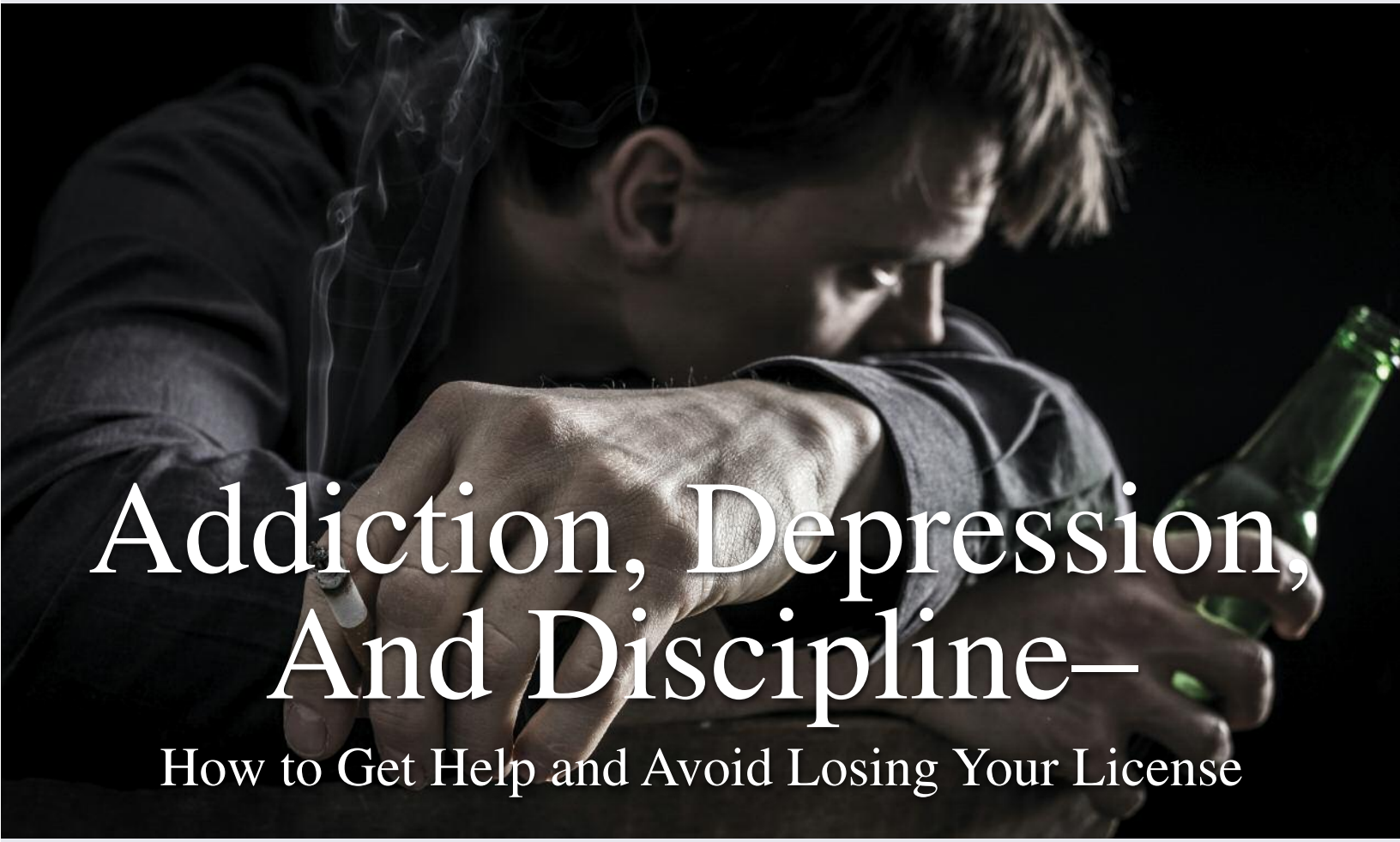

Addiction, Depression, And Discipline–

How to Get Help and Avoid Losing Your License

By Robert B. Thornhill

In my many years of work in the field of mental health, I have become convinced that addiction is, without question, our country's number one problem. It is devastating to our health care system, to law enforcement and corrections, to employers, to families and to our culture and identity. The recent and highly publicized heroin and opiate epidemic is the latest tragic example of the pervasive destruction of addiction in our nation, but this problem truly began and has persisted since the 1960s.

A comprehensive survey released in April 2013 by Faces and Voices of Recovery, "Life In Recovery," showed that the costs of addiction to individuals and to our country are extremely high. The study found that during their active addiction, 50 percent of respondents had been fired or suspended from their jobs one or more times, 50 percent had been arrested at least once and a third incarcerated at least once, contributing to a total societal cost of $343 billion annually.[1]

Numerous studies have shown that the rate of addiction among those in the legal profession is significantly higher than that of the general population. The same is true for depression and anxiety disorder. In a 2016 study published in the *Journal of Addiction Medicine*, "The Prevalence of Substance Use and Other Mental Health Concerns among American Attorneys," it was found that 21 percent to 36 percent of respondents who completed an instrument known as the Alcohol Use Disorders Identification Test (AuDiT–10) revealed a score consistent with an alcohol use disorder. The study also showed that 28 percent reported concerns with mild or high levels of depression, and 19 percent reported mild or high levels of anxiety. Overall, 23 percent reported mild or high levels of stress.[2]

Addiction is a chronic, progressive and fatal illness. The disease begins at an early stage in which the compulsive use of substances appears to be helpful, and will continue without treatment and recovery to the final stages, at which time the addict will be forced to use around the clock to avoid the ravaging effects of physical and emotional withdrawal. Most addicts do not survive to the final stages of addiction; they die in a number of different ways, including automobile and other vehicle accidents, organ failure due to chronic ingestion of alcohol or drugs, homicide or suicide, accidental drowning or burning, overdose and on and on. The disease of addiction is characterized by inevitably worsening negative consequences in every area of the addict's life physical, emotional, mental and spiritual.

Addicts and alcoholics experience a variety of physical pathologies due to a significantly increased risk for cancer, heart disease, liver disease (cirrhosis), pancreatitis, fractures and injuries, HIV/AIDS, STDs and a host of other maladies. Without exception, over time, the addict will experience health problems directly attributable to their compulsive use of alcohol or drugs. The healthcare costs to individuals, families, businesses and our country are incalculable.

Additionally, as the disease of addiction progresses, the addict stops maturing emotionally and often regresses in their ability to respond to life's problems and challenges in a healthy and productive way. I have often asked the following question in family sessions, "Have you ever known an addict who handles his/her anger well?" In all my years in the mental health field I have never received a "yes" response. A primary cause of the addict's emotional immaturity and difficulty with anger arises from the fact that all addicts are compelled to engage in activities and behaviors that they know in their own hearts to be wrong. It is self-evident that no human being can continually engage in behaviors over time that violate their own moral code and simultaneously feel good about who they are! The fact is that most addicts, largely unconsciously, come to hate themselves. In this condition, addicts remain restless, irritable, discontent and quick to anger. Most also become consumed with self-centered fear, self-pity and self-loathing.

Mental health is also negatively impacted by the disease of addiction. Most alcoholics and addicts possess traits for depression, anxiety disorder, bipolar disorder and even personality disorder. Many easily meet the diagnostic criteria for one or more of these mental illnesses. Because addiction is so often accompanied by one or more mental health disorders, there have been increasing efforts to effectively treat these "co-occurring disorders" in treatment settings. For many addicts, symptoms of depression or anxiety lessen over time and become manageable simply by working the 12-Step Program offered by Alcoholics Anonymous and utilizing coping skills acquired while in treatment. For others, these co-occurring disorders will persist and will require ongoing psychiatric treatment, medication management and therapy.

Because addiction is so often accompanied by one or more mental health disorders, there have been increasing efforts to effectively treat these "co-occurring disorders" in treatment settings.

Those of us who have worked in the field of addiction agree that the area of human life that is most significantly affected by the disease of addiction is the spiritual dimension, and that in order to truly recover one must focus first on matters of the spirit. The founders of the fellowship of Alcoholics Anonymous discovered that alcoholics are, most importantly, spiritually sick. Through trial and error, and, I believe, divine intervention, they came upon a spiritual solution to the disease of alcoholism that has since become the blueprint for countless other 12-Step programs that have proven to be life-changing and effective. Many experts agree that AA is a valuable and effective part of recovery. For example, Gorski and Miller stated, "Alcoholics Anonymous is the single most effective treatment for alcoholism. More people have recovered from alcoholism using the program of AA than any other treatment. It is for this reason that AA needs to be a vital part of any alcoholic's sobriety plan."[3]

Lawyers are hard-working and ambitious. They routinely provide counsel and guidance to clients, many of whom are struggling with addiction or mental illness. Sadly, they often fail to recognize or assist when they or a colleague are exhibiting symptoms of impairment. Driven by the shared traits of self-reliance, ambition, perfectionism and a learned adversarial approach, these otherwise intelligent and insightful professionals are unable or unwilling to recognize or acknowledge that there may be a problem. Many are driven by the fear of being judged or ostracized by their peers, or feeling humiliated. The 2016 study showed that the primary reasons attorneys do not reach out for help are 1) fear of others finding out, and 2) concern about privacy and confidentiality.

Undiagnosed and untreated addiction is a primary cause of complaints to the bar. A top priority of the Alabama Lawyer Assistance Program is to increase the number of lawyers who need our help to become involved with our program ***before*** formal complaints are sent to the bar, and ***before*** significant involve-

ment with law enforcement is experienced. These legal professionals can participate in our program with *complete confidentiality*. The leadership at the Alabama State Bar and the Board of Bar Commissioners strongly support the Alabama Lawyer Assistance Program and understand that confidentiality is essential for this program to be effective. Attorneys who are struggling with addiction or mental health issues such as depression or anxiety can rest assured that their involvement with our program will remain confidential.

Sadly, many attorneys will simply be unwilling or unable to accept help until they have experienced significant negative consequences of untreated addiction or depression/ anxiety. For these legal professionals, it is the formal complaints and/or legal consequences such as DUI, domestic violence and so on that will provide the motivation to finally get help.

The most commonly violated *Rules of Professional Conduct* are Rule 1.1: Competence; Rule 1.3: Diligence; Rule 1.4: Communication; and Rule 1.15: Safekeeping Property. Addicted lawyers who do not seek help will inevitably run afoul of one or more of these rules. Depending on the severity of the violation, many of these lawyers will have their license suspended, and some will even be disbarred. It is important to state that we have worked with many attorneys who have lost their license. We have guided them through the evaluation and treatment process, and we have provided support and monitoring. It is one of the highlights of my work as director of this program to testify in a reinstatement hearing on behalf of a suspended or disbarred lawyer who has successfully participated in our program. We have seen careers restored, families reunited and lives saved due to the miraculous and restorative power of recovery.

Lawyers who are struggling with addiction are not "bad people who need to get good;" they are "sick people who need to get well." The answer is to reach out to these people and recognize that they desperately need our help, and that they can recover! Intervening in someone's life is rarely smooth and easy. It is frequently difficult, challenging and unpleasant for all involved. However, there is no doubt that when we have the genuine courage to speak up and let them know what our concerns are, and "risk their wrath" to tell them what they need to hear and not what they want to hear, the path toward recovery has begun.

The Alabama Lawyer Assistance Program can help with this process. If you know of a colleague who is struggling with addiction or another mental health issue, we urge you to contact us. We will do our best to reach out directly to the attorney in question and provide referrals, support and an effective means of accountability. ▲

If you know of a colleague who is struggling with addiction or another mental health issue, we urge you to contact us. We will do our best to reach out directly to the attorney in question and provide referrals, support and an effective means of accountability.

Endnotes

1. Alexandre Landet, Ph.D., Report on Survey Findings "Life In Recovery," Faces and Voices of Recovery (*facesandvoicesofrecovery.org*), April 2013.
2. "The Prevalence of Substance Use and Other Mental Health Concerns among American Attorneys," Krill, Patrick R. JD, LLM; Johnson, Ryan MA; Albert, Linda MSSW; *Journal at Addiction Medicine*; February 2016; Volume 10–Issue 1–pp 46-52.
3. T. Gorski and M. Miller (1986), Staying Sober: A Guide for Relapse Prevention, Independence, MO: Herald House.

Robert B. Thornhill

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DISCIPLINARY NOTICES

- Notices
- Reinstatement
- Transfers to Inactive Status
- Disbarment
- Suspensions
- Public Reprimands

Notices

- **Robert Maurice Lichenstein, Jr.,** who practiced in Fairhope and whose whereabouts are unknown, must answer the Alabama State Bar's order to show cause within 60 days of December 30, 2018 for non-compliance with the 2017 Mandatory Continuing Legal Education requirements of the Alabama State Bar. The attorney's failure to respond to this notice could result in a summary suspension of his law license. [CLE No. 2018-502]
- **John Price McClusky,** whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of the date of this publication, or thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 2015-982, 2015-1636 and 2017-866 by the Disciplinary Board of the Alabama State Bar.
- **Eric Rodney Peak,** who practiced in Madison and whose whereabouts are unknown, must answer the Alabama State Bar's order to show cause within 60 days of December 30, 2018 for non-compliance with the 2017 Mandatory Continuing Legal Education requirements of the Alabama State Bar. The attorney's failure to respond to this notice could result in a summary suspension of his law license. [CLE No. 2018-507]
- **John Walter Sharbrough, III,** who practiced in Mobile and whose whereabouts are unknown, must answer the Alabama State Bar's order to show cause within 60 days of December 30, 2018 for non-compliance with the 2017 Mandatory Continuing Legal Education requirements of the Alabama State Bar. The attorney's failure to respond to this notice could result in a summary suspension of his law license. [CLE No. 2018-510]
- **Robbie Elizabeth Willis,** who practiced in Grenada, Mississippi and who is also licensed to practice law in Alabama, and whose whereabouts are unknown, must answer the Alabama State Bar's order to show cause within 60 days of December 30, 2018 for non-compliance with the 2017 Mandatory Continuing Legal Education requirements of the Alabama State Bar. The attorney's failure to respond to this notice could result in a summary suspension of her law license. [CLE No. 2018-518]

Reinstatement

- Birmingham attorney **Gregory Lee Case** was reinstated to the active practice of law in Alabama on August 29, 2018, per the Supreme Court of Alabama. Case petitioned to be transferred to inactive status and the petition was granted, effective April 26, 2016. On July 25, 2018, Case petitioned for reinstatement to the active practice of law in Alabama and was subsequently reinstated by order of the Supreme Court of Alabama, effective August 29, 2018. [Rule 28, Pet. No. 2018-863]

Transfers to Inactive Status

- Brewton attorney **Jonathan Neal Cook** was transferred to inactive status, effective August 1, 2018, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the August 1, 2018 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to Cook's petition submitted to the Office of General Counsel requesting he be transferred to inactive status.
- Grant attorney **Brent Lorne Parker** was transferred to inactive status, effective September 13, 2018, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the September 13, 2018 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to Parker's petition submitted to the Office of General Counsel requesting he be transferred to inactive status.
- Childersburg attorney **William Kenneth Rogers, Jr.** was transferred to inactive status, effective August 14, 2018, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the August 14, 2018 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to Rogers's petition submitted to the Office of General Counsel requesting he be transferred to inactive status.

Disbarment

- Mobile attorney **Malcolm Bailey Conway** was disbarred from the practice of law in Alabama, effective August 8, 2018. The supreme court entered its order based on the report and order of the Disciplinary Board of the Alabama State Bar, disbarring Conway after he was found guilty of violating Rules 1.3 [Diligence], 1.4(a) [Communication], 1.15(a) [Safekeeping Property], 1.16(d) [Declining or Terminating

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Representation], 8.1(b) [Bar Admission and Disciplinary Matters] and 8.4 (g) [Misconduct], *Ala. R. Prof. C*. In May 2016, Conway was hired by a client to file a petition to modify child support. The client paid Conway $300 for the filing fee and $750 of a $1,200 retainer to handle the matter. Thereafter, Conway failed to file the petition or take any other action on the client's behalf. The client was unable to contact Conway or obtain a refund of the fees paid. Additionally, Conway failed to respond to multiple requests from the Office of General Counsel of the Alabama State Bar for a written response to the client's complaint. [ASB No. 2017-766]

Suspensions

- Greenville attorney **Heather Leigh Friday Boone** was suspended from the practice of law for two years in Alabama by the Supreme Court of Alabama, effective August 8, 2018. The supreme court entered its order based upon the Disciplinary Board's order, wherein Boone was found guilty of violating Rules 1.3 [Diligence], 1.4(a) [Communication], 8.1(b) [Bar Admission and Disciplinary Matters] and 8.4(g) [Misconduct], *Ala. R. Prof. C*. Boone was retained in May 2017 for a fee of $650 to represent a client in an uncontested divorce. The client and her ex-husband signed the divorce documents in August 2017. Thereafter, Boone failed to file the divorce on behalf of the client. The client subsequently filed a bar complaint. Boone failed to respond to formal requests for information concerning a disciplinary matter and was summarily suspended. In a separate matter, Boone had previously filed a Chapter 13 Bankruptcy Petition on behalf of a client in 2014. The client was on a five-year repayment plan. In July 2017, the client began trying to contact Boone regarding the possibility of converting her Chapter 13 plan to a Chapter 7 plan. Thereafter, Boone failed to return the client's calls and failed to take any action on behalf of the client. [Rule 20(a), Pet. No. 2017-1427; ASB Nos. 2017-1156 and 2017-1291]

- Birmingham attorney **Joel Iverson Gilbert** was interimly suspended from the practice of law in Alabama, effective July 26, 2018. The supreme court entered its order based upon Gilbert's recent conviction on six felony counts in the United States District Court for the Northern District of Alabama, Southern Division. [Rule 20(a), Pet. No. 2018-851]

- Homewood attorney **Chevene Neel Hill** was suspended from the practice of law in Alabama for 91 days with the suspension to be held in abeyance. Hill was placed on probation for two years, effective August 21, 2018. The suspension was based upon the Disciplinary Commission's acceptance of Hill's conditional guilty plea, wherein he pled guilty to violating Rules 1.15(a), (e) and (f) [Safekeeping Property], *Ala. R. Prof. C*. [ASB No. 2017-636]

- Birmingham attorney **Anthony Chuma Ifediba** was suspended from the practice of law in Alabama for one year, split to serve 60 days, with the remaining to be held in abeyance. Ifediba will be placed on probation for two years, effective October 28, 2018. The suspension was based upon the Disciplinary Commission's acceptance of Ifediba's conditional guilty plea, wherein he pled guilty to violating Rules 1.5 [Fees] and 1.15(a) and (e) [Safekeeping Property], *Ala. R. Prof. C*. [ASB No. 2014-1632]

- Millbrook attorney **John David Norris** was suspended from the practice of law in Alabama for 91 days in Alabama by the Supreme Court of Alabama, effective June 25, 2018, of which Norris will serve the first 45 days. The remaining 46 days will be held in abeyance pending Norris's successful completion of a two-year probationary period. The supreme court entered its order based upon the Disciplinary Commission of the Alabama State Bar's order reflecting Norris's guilty plea to violations of Rules 1.1 [Competence], 1.2(e) [Scope of Representation], 3.3(a)(1)–(3) [Candor Toward Tribunal], 8.1(a) [Bar Admissions and Disciplinary Matters] and 8.4(a), 8.4(c), 8.4(d) and 8.4(g) [Misconduct], *Ala. R. Prof. C*. Norris admitted he filed various documents with the Probate Court of Butler County containing erroneous information during his representation of his mother's estate. Norris also prepared and filed a deed contrary to an order issued by the court. [ASB No. 2017-447]

- Grant attorney **Brent Lorne Parker** was interimly suspended from the practice of law in Alabama, effective September 5, 2018. The supreme court entered its order based upon the Disciplinary Commission's order finding Parker's conduct is continuing in nature and is causing, or likely to cause, immediate and serious injury to a client and/or to the public. Parker was found to have mishandled client funds, including personal injury settlement funds, resulting in multiple violations of the *Alabama Rules of Professional Conduct*. [Rule 20(a), Pet. No. 2018-973]

- Daphne attorney **John William Parker** was suspended from the practice of law in Alabama for one year by the Supreme Court of Alabama, effective September 4, 2018. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Parker's conditional guilty plea, wherein he pled guilty to violating Rule 5.5(a)(1) [Unauthorized Practice of Law], *Ala. R. Prof. C*. Parker was disbarred from the practice of law on January

1, 2013. In 2016, Parker attempted to represent the mortgagee of a piece of property in extended negotiations to prevent the foreclosure to allow the individual to remain in possession of the property. [ASB No. 2016-674]

- Jasper attorney **Brian Speegle Royster** was suspended from the practice of law for two years in Alabama by the Supreme Court of Alabama, effective October 24, 2018. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Royster's conditional guilty plea, wherein he pled guilty to violating Rules 1.3 [Diligence], 1.4 [Communication], 1.16(d) [Declining and Terminating Representation], 8.1(b) [Bar Admission and Disciplinary Matters] and 8.4(d) and (g) [Misconduct], *Ala. R. Prof. C*. Royster has been summarily suspended from the practice of law, effective November 3, 2014. In a series of matters, Royster failed to take any substantive action on behalf of the client, failed to adequately communicate with the client and failed to refund any portion of the unearned fee. [ASB Nos. 2014-1285, 15-112, 16-990 and 16-1425]
- Morris attorney **Keith William Veigas, Jr.** was summarily suspended pursuant to Rule 20a, *Ala. R. Disc. P.,* from the practice of law in Alabama by the Supreme Court of Alabama, effective September 21, 2018. The supreme court entered its order based upon the Disciplinary Commission's order that Veigas be summarily suspended for failing to respond to formal requests for information concerning a disciplinary matter. [Rule 20(a), Pet. No. 2018-1042]
- Blaine, Minnesota attorney **Joshua Troy Williams,** who is also licensed in Alabama, was summarily suspended pursuant to Rule 20a, *Ala. R. Disc. P.*, from the practice of law in Alabama by the Supreme Court of Alabama, effective August 21, 2018. The supreme court entered its order based upon the Disciplinary Commission's order that Williams be summarily suspended for failure to comply with the 2017 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2018-517]

Public Reprimands

- Montgomery attorney **Elizabeth Clair Addison** received a public reprimand with general publication on September 14, 2018 for violating Rules 1.1, 1.3, 1.4, 5.5(a)(2), 8.4(a), 8.4(c), 8.4(d) and 8.4(g), *Ala. R. Prof. C*. Addison was hired to represent a client to appeal his felony conviction in federal court and was paid $10,000. Two paralegals were hired to assist in drafting the appeal brief, but were difficult to contact. Addison requested, and the client paid, an additional $1,825 to pay yet another paralegal to assist in drafting the brief, as well as $750 in travel expenses to visit the client which Addison failed to do. The client filed the brief, pro se, which was

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rejected by the Court because Addison was counsel of record. As a result, the Court encouraged Addison to withdraw from the matter, but she failed or refused to do so. Addison eventually filed the brief prepared by the paralegals. Addison is also required to pay any costs taxed against her pursuant to Rule 33, *Ala. R. Disc. P*, including, but not limited to, a $1,000 administrative fee. [ASB No. 2016-1532]

- Millbrook attorney **Darren William Kies** received a public reprimand with general publication on September 14, 2018 for violating Rules 5.2(a) [Responsibilities of a Subordinate Lawyer], 5.4(a) [Professional Independence of a Lawyer], 7.2(c) [Advertising], 7.3(a) [Direct Contact with Prospective Client] and 8.4(a) and (g) [Misconduct], *Ala. R. Prof. C*. Kies impermissibly solicited clients, involved in a car accident. The persons involved in the automobile accident advised an investigator of another firm that a representative of Kies's firm urged them to cancel an appointment and retain Kies and his firm. Kies arrived at the home of one of the potential clients, the driver of the automobile, while they were involved in another meeting and exchanged words with the investigator employed by another firm. Kies also impermissibly initiated contact with the passenger in this accident and coerced him to sign a contract with Kies's firm. Later, the client terminated Kies and his firm. With this conduct Kies violated Rules 5.2(a), 5.4(a), 7.2(c), 7.3(a) and 8.4(a) and (g) by failing to abide by the *Rules of Professional Conduct* despite actions taken at the direction of another person, sharing legal fees with a non-lawyer, compensating a person for recommending Kies's services, soliciting professional employment for a prospective client with whom he had no familial or current professional relationship for pecuniary gain and engaging in conduct adversely reflecting on his fitness to practice law. Kies was also required to pay any costs taxed against him pursuant to Rule 33, *Ala. R. Disc. P*., including but not limited to a $750 administrative fee. [ASB No. 2016-847]

- Birmingham attorney **Brandy Murphy Lee** received reciprocal discipline in the form of a public reprimand with general publication on September 14, 2018. On October 12, 2017, the State Bar of Tennessee ordered the sanction of a public censure be imposed against Lee because she committed several *pro hac vice* rule violations, including practicing before certain tribunals without permission or approval, filing pleadings without the signature of local counsel and practicing for a period in excess of two years after her *pro hac vice* status expired, thus violating Rules 3.4(c) and Rule 5.5, *Tennessee Rules of Professional Conduct*. Lee is also required to pay any costs taxed against her pursuant to Rule 33, *Ala. R. Disc. P.*, including but not limited to a $750 administrative fee. [Rule 25A, Pet. No. 2017-1207]

- Decatur attorney **James McCauley Smith** received a public reprimand with general publication on September 14, 2018 for violating Rules 1.5(a) [Fees] and 8.4 (g) [Misconduct], *Alabama Rules of Professional Conduct*. Smith represented a client who passed away in 2008. Per the terms of the client's will, an irrevocable family trust was to be created with his widow as the beneficiary. After the widow's death, the corpus of the trust was to be distributed to the widow's heirs. There was an agreement that Smith would serve as trustee and be paid 2.5 percent of monies taken in and 2.5 percent of monies paid out on rental properties owned by the heirs. By the time one of the daughters passed away in January 2013, the trust still had not been established. The trust was not established until late February 2013, three weeks prior to the death of the widow. Despite the fact that the widow had passed away and the trust was no longer necessary, Smith continued to collect rent, pay bills and pay himself without any oversight for over a year until he signed over control of the trust in July 2014. Smith charged the trust an hourly rate, rather than the 2.5 percent in and the 2.5 percent out fee as outlined in the settlement agreement, and in doing so, he overbilled and improperly charged the trust while serving as trustee. [ASB No. 2014-1317]

- Tuscaloosa attorney **Michael Jay Upton** received a public reprimand with general publication on September 14, 2018 for violating Rules 1.5(a) and 1.5(b) [Fees], 1.15(a) [Safekeeping Property], 7.2(f) [Advertising] and 8.4(a), 8.4(c) and 8.4(g) [Misconduct], *Ala. R. Prof. C.* Upton was hired by the parents of a college student to represent him in a criminal matter. They paid a fee of $4,000. Less than a week after the arrest, the client decided to employ a different attorney. The client's parents requested a refund and, after Upton refused to provide a refund, the parents retained an attorney who sued Upton in small claims court in order to obtain the refund. Upton agreed to a consent judgment in this matter. With this conduct, Upton violated Rules 1.5(a) and 1.5(b), 1.15(a), 7.2(f) and 8.4(a), 8.4(c) and 8.4(g) by failing to abide by the *Rules of Professional Conduct* for charging an excessive fee; failing to communicate the basis or rate of the fee in writing; failing to properly safeguard client money; failing to perform advertised services at the advertised fee; engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and engaging in conduct that adversely reflects on his fitness to practice law. Upton was also required to pay any costs taxed against him pursuant to Rule 33, *Ala. R. Disc. P*., including but not limited to a $750 administrative fee. [ASB No. 2016-972] ▲

BAR BRIEFS

- Capell & Howard PC announces that **Brigadier General Richard F. Allen**, USA, retired, was recently selected by the Board of Trustees of the Army War College Foundation as an outstanding alumnus of the United States Army War College. This honor is bestowed upon General Allen for his "incredible contributions to our nation following [his] military retirement."

Allen

- On November 1, the NAACP Legal Defense and Educational Fund, Inc. held the 32nd Annual National Equal Justice Awards Dinner. Included in those honored at the awards dinner were two Alabama lawyers:

  Judge U.W. Clemon, retired federal district judge and civil rights lawyer, was named a recipient of the Thurgood Marshall Lifetime Achievement Award. Judge Clemon was honored for his iconic career as an exemplary civil rights lawyer and public servant.

Clemon

Stevenson

  Bryan Stevenson, founder and executive director of the Equal Justice Initiative, was named a recipient of the National Equal Justice Award. Stevenson was honored for his leadership in transforming justice for marginalized communities.

Dowd

- White Arnold & Dowd P.C. announces that **Augusta S. Dowd** was recently honored as one of the 2018 Women Who Shape the State by the Alabama Media Group.

- Bradley Arant Boult Cummings LLP announces that **Joseph B. Mays Jr.**, a partner in the Birmingham office, was elected a Fellow of the American Bar Foundation.

Mays

- Lightfoot, Franklin & White LLC announces that partner **Lana A. Olson** was elected secretary-treasurer of DRI, the leading organization of defense attorneys and in-house counsel.

- **Circuit Court Judge Julian M. King** was named the Trial Judge of the Year by the Alabama Chapter of the American Board of Trial Advocates. Judge King took the bench in 1995 for the 29th Judicial Circuit in Talladega, where he serves as the presiding judge. ▲

Olson

The Legal Job Market in Alabama

By G. Allen Howell

Accredited law schools are required to place their American Bar Association (ABA) employment report online, but those reports in isolation don't always make the employment picture easy to understand, even for lawyers. The National Association for Legal Placement (NALP) and the ABA have finalized employment data for the class of 2017. I am sharing aggregated parts of the University of Alabama School of Law, Samford University's Cumberland School of Law and Faulkner University's Thomas Goode Jones School of Law employment data to help you understand the state of the legal job market in Alabama and how it compares to the rest of the country.

NALP reported the employment outcomes for the class of 2017 as "surprisingly strong."[1] Several employment metrics indicate growth and a positive direction for the legal job market. The class of 2017 had a higher median salary, more lawyers being employed in the largest law firms and an increase in jobs for which bar passage is required than the class of 2016.[2] Importantly, the overall employment rate for law school graduates in the class of 2017 increased one percentage point to 88.6 percent of graduates for whom employment status was known as of March 15, 2018.[3] The improvement is only the fourth increase since 2007. The class of 2017's overall employment rate improved by 4.1 percent from when the rate bottomed out with the class of 2013.[4]

The overall employment rate among all ABA-accredited law schools in Alabama also improved from 86.29 percent to

89.59 percent, which is higher than the national average.[5] Cumberland and Alabama improved their overall employment rate from 2016, and Faulkner dropped less than one percentage point. Cumberland improved its JD required/long-term/full-time positions by 5.45 percent, and Alabama increased its rate by 7.34 percent. Faulkner's JD required/long-term/full-time rate dropped by 8.8 percent. Despite some drops, most of this report is great employment news for lawyers and law students. So, is the legal job market strong like NALP reports? As your favorite law professor might have answered, "It depends."

The positive trends don't necessarily mean the legal job market is back to its peak health because most of the growth seems to be the result of shrinking law school classes. There were 34,922 graduates nationwide from ABA accredited law schools in the class of 2017.[6] That total is a 25 percent contraction in size since the historically large class of 2013's 46,776 graduates.[7] According to the ABA, the number of law school graduates in the class of 2017 was down by 2,200, the fourth decline in a row.[8]

Overall jobs for the class of 2017 actually fell by more than 1,200, but the small class size allowed the employment rate to increase despite the decrease in the number of jobs.[9] In Alabama, all three accredited law schools graduated a smaller class than in 2016. The total size of the class of 2017 in the state of Alabama was 346, a 7.5 percent decrease from the size of the class of 2016. Out of the 346 graduating law students from Alabama, Cumberland and Faulkner, more than half of them (192/55.49 percent) found employment in Alabama.

Georgia was the highest employment location outside of Alabama among the three law schools with a total of 24 (6.9 percent) graduates employed in Georgia. The University of Alabama's other highest employment location was Washington D.C. (11),[10] Faulkner's was Texas (3)[11] and Cumberland's was Tennessee (8).[12] Most graduates for all three law schools landed in private practice law firms with two-10 lawyers. The largest employer type outside of private practice was government jobs for Alabama and Faulkner students and business and industry for Cumberland.

Chances are you will see both positive and negative headlines about the legal job market and that's because there is a mix of good and bad news about legal employment. Law schools have been adjusting class size based on shrinking applications and changes in the legal market for the last few years. The changes seem to have adjusted the legal market back to a place where overall employment and quality employment have the opportunity for growth. ▲

Endnotes

1. Allison Beard, Class of 2017 Notched Best Employment Outcomes Since Recession, NALP (Aug. 2, 2018), *https://www.nalp.org/uploads/SelectedFindingsPressReleaseClassof2017.pdf.*
2. Judith Collins, Employment for the Class of Jobs & JDs 2017–Selected Findings, NALP (2018), *https://www.nalp.org/uploads/SelectedFindingsClassof2017.pdf.*
3. *See* id.
4. *See* id.
5. Employment Summary for 2017 Graduates, University of Alabama (Apr. 6, 2018), *https://www.law.ua.edu/wp-content/uploads/ABA-2017-Employment-Final.pdf.*
6. Class of 2017 National Summary Report, NALP (2018), *https://www.nalp.org/uploads/Classof2017_NationalSummaryReport.pdf.*
7. Judith Collins, Employment for the Class of Jobs & JDs 2017–Selected Findings, NALP (2018), *https://www.nalp.org/uploads/SelectedFindingsClassof2017.pdf.*
8. *See* id.
9. *See* id.
10. Employment Summary for 2017 Graduates, University of Alabama (Apr. 6, 2018), *https://www.law.ua.edu/wp-content/uploads/ABA-2017-Employment-Final.pdf.*
11. Employment Summary for 2017 Graduates, Faulkner University (2018), *https://www.faulkner.edu/wp-content/uploads/Employment-Report-Summary-Class-of-2017.pdf.*
12. Employment Summary for 2017 Graduates, Samford University (Apr. 6, 2018), *https://www.samford.edu/cumberlandlaw/files/ABA-EmploymentData-2017.pdf.*

G. Allen Howell

Allen Howell is the assistant dean of external relations and career development at Samford University's Cumberland School of Law. He is the chair of the Alabama State Bar's Pro Bono and Public Interest Committee.

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

JULY 2018 BAR EXAM STATISTICS OF INTEREST

Number sitting for exam	530
Number passing exam (includes MPRE deficient and AL course deficient)	290
Bar exam pass percentage	54.7 percent

Bar Exam Passage by School

Hugh F. Culverhouse Jr. School of Law at the University of Alabama	93.3 percent
Cumberland School of Law	70.4 percent
Faulkner University Jones School of Law	49.3 percent
Birmingham School of Law	20.1 percent
Miles College of Law	0.0 percent

Certification Statistics*

Admission by examination	282
Admission by transfer of UBE score	17
Admission without examination (reciprocity)	16

**Statistics of those individuals certified to the Supreme Court of Alabama for admission to the Alabama State Bar for the period May 16, 2018 through October 16, 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*.

ALABAMA STATE BAR
FALL 2018 ADMITTEES

John Livingston Adams
Chip Devin Adkins
Brandie Joann Alldredge
Cody McLarin Allen
Zachary William Anderson
MaryLou Elizabeth Andrews
Dylan Paul Angeline
Harris Hodges Anthony
Kevyn Armstrong-Wright
Shirley Brooke Arreola-Kern
Griffin Elias Austin
David Jacob Bailey
Thomas Allan Bailey
Joseph Kiley Bamburg
Andrew Francis Banks
Melody Ruth Wynn Banks
Jeannéa Lauren Baptiste
Brittany Elizabeth Barbee
LaVerne Andrea Barnett
Theresa Elizabeth Basile
Kaylee Marie Beauchamp
Kristen Michelle Beavers
Laura Clare Bell
Michael Terrell Bell
Sloane Marie Bell
Ross Hewitt Benson
Jennifer Jeffery Blazer
Louis Steven Bode, V
Allison Elizabeth Booth
Gregory Allen Bordenkircher
Steven Kerby Boydstun
Clayton Patrick Boylen
Jenna Teresa Brady
Patrick Barnes Brannan
John Charles Brinkerhoff, Jr.
Daniel Warren Brooks
Blake Edward Brookshire
Gregory Chad Brown
Jason Daniel Bruner
William Donald Buckley, III
Adam Scott Buddenbohn
Mallory Clair Bullard
Emily Carson Burke
Barry Ta'Quan Burkett
James Joseph Bushnell, III
Christopher Thomas Butler
David Perrine Butler
Jennings Haas Byrd
Kellianne Campbell
Ashley Paige Caraway
Nicholas Paul Carr
Cynthia Eaton Carter
Jerry Lynn Carter
Lewis Wellington Carter, III
Thomas Francis Cassick
Lindsey Robin Catlett
James Mark Chappell, Jr.
James Brandon Cherry
Rachel Elise Childers
Amy Lane Chiou
Chad Ryan Christian
Kimberly Ann Chwalek
Kyle Douglas Clark
Caitlin McCall Cleckler
Richard Steven Cole
Dallas John Coleman
Stephen Luis Conteaguero
Catherine Hall Cooper
Albert Whiting Copeland, II
Anna Griffin Critz
Jeremy Michael Crowley
Gary Culp
Mary Patricia Damrich
Hannah Rebekah Darby
Gabriel Octavius De Moske
Hannah Elizabeth Fuller Deardorff
Ellen Lee Degnan
Anthony Nicholas Dellasala
Danielle Elysees Douglas
Russell MacDonald Dunlap
Robert Frederick Dyar
Payton Lee Edmiston
Britany Carol Smith Edwards
Justin David Edwards
Paul Tyson Ehlinger
Sarah Ann Emerson
Morgan Pike Epperson
Alexis Nicole Esneault
Sydney Paige Everett
Kendall Lauren Fann
James Lewis Farmer
Mary Caroline Farris
Christian Collier Feldman
Ashley Wallace Feltman
Christine Elizabeth Field
Hillary Kathryn Fisher
Justin Waide Fisher
Todd Alexander Fisher
Harris Robert Frank
Alison Marjorie Ganem
Payton Brooke Garner
Austin Steele Gibson
Kriston Laney Gifford
Chakeira Micheale Gilbert
Jonathan David Gilbert
Zachary Ellinger Goozee
Ian Scott Green
Jaryd Patrick Green
Paula Meske Greene
Thomas Weaver Griffin, III
Allison Renee Griffith
Logan Thomas Griffith
Richmond Baker Austin Gunter, II
Christine Elizabeth Gwinn-Ross
David James Haggard
Amber Nicole Hall
Matthew Hilton Hambrick
Robert David Hannah
Christian William Harben
Ransome Reese Hare
Brian Jordan Harrah
Jenekwa Shantell Harrison
Scott Jackson Harrison
Ryan McPherson Hawks
Charles Michael Hearn
David Robert Helmick
John Hunter Henderson
Sean Thomas Herald
Laura Diane Heusel
William Barnwell Heyward, III
Lillie Katherine Hilyer
William Holcomb Hodge
William Christopher Hoffman, Jr.
Jeffrey Nathaniel Holmes
Erin Cornelius Howell
Lynn-Hollyn Tipper Howell
Courtney Addison Huggins
Preston Chandler Huggins
Madeline Elizabeth Hughes
Rebecca Kathryn Hyche
Kenneth Michael Hynes
Xan Peyton Ingram
Joshua Stephen Inman
Krystina Taylor Jackson
Michael Harris Jackson
Sidney Warren Jackson, IV
Fabiola Jimenez
Travis Bryant Johns
Claire Boehmer Johnson
Harrison Royster Jones
Brenda Lynn Jordahl
Jeral Hamilton Jordan
Brent David Kapper

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Megan Moore Kelly
Alexis Caitlyn Killough
Jae Hyung Kim
Kate Reynolds Kirbo
Laura Jean Kirby
Jonathan Luke Kiszla
William Kline
Smriti Bharadwaj Krishnan
Gina Marie Lakatos
Laura Michelle Lantrip
Allison De'kole Lawrence
Angelia Burns Lee
Cole James Leonberg
Sara Elizabeth Leopold
Lisa Ann Lifton
Daniel Briggs Loehr
Eric David Logan
Charles C Lorant
Lydia Townsend Lucius
Shasta Lynn Lunsford
Julia Elizabeth Malueg
Russell Scott Manning
Andrew Barry Mason
Brianna Sullivan Maxwell
Robert Allyn McBride
Sara Elizabeth McCabe
Victoria Lynn McCarthy
Emily Anne McClendon
Ashley Nicole McCord
Jennifer Jo McCoy
Riley Alexander McDaniel
Malcolm Witt McLeod
Joshua Salvador Medina
Sarah Ann Meigs
William Anthony Menas, II
Brittany Stiefel Mercer
Jared Lawrence Miller
Michael Lowell Milton, II
David Scott Mitchell
Mallory Elizabeth Mock
Shandra Nicole Monterastelli
Bret Stuart Moore
Coy Christopher Morgan
Jonathan Patrick Morgan
Jonathan David Morris
Haley Jean Mull
Jonathan Andrew Murphy
Gurkan Mus
Constance Morgan Myles
Spencer Heyward Newman
Elizabeth Lynne Nicholson
Enesha Exzaviera Nnaife
Maria Louise O'Keefe
Natalie Carroll Rezek Olmstead
Garrett Alan Owens
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Stephen Daniel Palmer
Matthew Ryan Parten
Chantal Yvette Peacock
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Destiny Nicole Pettway
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Jillianne Catherine Pierce
Constantin Lucas Post
Kathryn Oline Powell
Elizabeth Larsen Pratt
Morgan Brooke Price
Taylor Akers Pruett
Kevin Michael Puntney
Kelsey Rheanna Reckart
Amanda Leigh Reid
Patrick Daniel Reid
Margaret Hardin Eloise Reiney
Gary Ray Richardson, Jr.
Zachary Braden Roberson
Katie Lynn Robinson
Stephanie Latrice Robinson
Matthew D Roche
Mason Cole Rollins
Joseph Vincent Ronderos, Jr.
Jonathan Andrew Roper
Gaines Elgin Rowe
Janna Akim Royer
Cinthya Pinheiro Pereira Rudder
Michael Aaron Ryan
Beth Hardeman Saint
John Joseph Sawyer
Emily Elizabeth Schreiber
Nicholas William Sciple
Shelby Leigh Scott
Patrick Edward Sebesta, II
Jordan Kyle Self
Gloria Renea Sellers
Matthew Ryan Sellers
Benjamin Tyler Shell
Kara Nikol Sheridan
Benjamin Jordan Shiver
Steven Michael Shunnarah
Tiffany Renee Simms
Austin Blake Smith
Evan Everett Smith, IV
Grant Lyford Smith
Gage Cooper Smythe
James Winfred Smythe
Alexandra Claire SoloRio
Richard Olayemi Somade
Clinton Ray South
Harrison Zachary Spector
John Madison Spencer
Keith Cameron Stephens
Nedra Greer Stephens
Jason Daniel Stone
Charles Darreck Sullivan
Dylan Ellis Sutherland
Rachel Danielle Syx
Nicholas Ryan Taggart
Victoria Elizabeth Kennedy Taravella
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Edilaine Oliveira Telles
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Martin Gary Toole, Jr.
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Davis Hanson Underwood
Cynthia Hill Upton
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Dennis Oscar Vann, Jr.
Zebulon Harris Vaughn
Eric Christopher Vinsant
Christopher Blake Vrieze
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Peter Joseph Wertz
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Douglas Mulry Wilson, III
Florence Wilson
Amanda Lynne Butterworth Wineman
David Brian Wisdom, Jr.
Jamie Nicolas Witter
Mary Caroline Wynn
Laura Elisabeth Yetter
Robert Duane Zarr, III

LAWYERS IN THE FAMILY

Xan Ingram (2018) and
Jeff Ingram (1994)
Admittee and father

Zachary Goozee (2018) and
Stevan Goozee (1987)
Admittee and father

Payton Edmiston (2018) and
Parker Edmiston (2002)
Admittee and father

Malcolm Witt McLeod (2018),
Malcolm S. McLeod (2002) and Jul McLeod (2011)
Admittee, father and mother

Matthew Ryan Sellers (2018),
Sebie G. Sellers (1987) and John M. Gibbs (1997)
Admittee, mother and uncle

Madeline Hughes (2018) and
Judge Donna Pate (1982)
Admittee and aunt

Jennings Haas Byrd (2018) and
James M. Byrd (1979)
Admittee and father

Christian Feldman (2018) and
Danny Feldman (1987)
Admittee and father

LAWYERS IN THE FAMILY

Katie Hilyer (2018), Elizabeth Hilyer (1988) and Jesse Unkenholz (2008)
Admittee, mother and cousin

Mallory Clair Bullard (2018), John Kelley Johnson (1980) and Circuit Judge-elect David F. Law (2000)
Admittee, grandfather and great-uncle

Coy Morgan (2018) and C.S. Chiepalich (1984)
Admittee and stepfather

James J. Bushnell, III (2018) and James J. Bushnell, Jr. (1981)
Admittee and father

Nathan Holmes (2018) and Jeffrey E. Holmes (1984)
Admittee and father

Victoria McCarthy (2018) and Milton McCarthy (1980)
Admittee and father

LAWYERS IN THE FAMILY

Albert Whiting Copeland, II (2018), Lee Hall Copeland (1982), Paul Whiting Copeland (1988) and Susan Glasscock Copeland (1983)
Admittee, father, uncle and aunt

Kevyn Armstrong-Wright (2018) and Debra Armstrong-Wright (1992)
Admittee and mother

Hunter Wade Pearce (2018) and Dawn M. Wade (1999)
Admittee and aunt

Brian Traywick (2018) and Robert Epperson (1996)
Admittee and father

Caroline Farris (2018) and Judge Doug Farris (1998)
Admittee and father

Steven M. Shunnarah (2018), Michael S. Shunnarah (2016) and Anthony S. Shunnarah (2015)
Admittee, father and brother

ABOUT MEMBERS, AMONG FIRMS

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

About Members

Mickey J. Gentle announces the opening of **The Gentle Law Firm LLC** in Huntsville.

Henry Henzel, formerly president of Attorneys Insurance Mutual of the South, announces his return to solo practice in Birmingham.

John H. McElheny announces the opening of **McElheny Law LLC** at 820 Cobb St., Homewood 35209.

Ashley Rhea announces the opening of **Rhea Law Firm LLC.**

Among Firms

William K. Abell and **Brittney S. Bragg** announce the formation of **Abell & Bragg LLC** at 420 S. Perry St., Montgomery 36104. Phone (334) 271-8008.

The **Hugh F. Culverhouse Jr. School of Law at the University of Alabama** announces that **Martha Griffith** is the associate director of development and **Caroline J. Strawbridge** is the director of development.

The **University of Alabama's Capstone College of Nursing** announces that **Anita Hamlett** is the director of development.

Balch & Bingham announces that **Aria B. Allan** joined the Montgomery office as an associate and **Robert V. Baxley, Sloane Bell** and **Lindsey Catlett** joined as associates in the Birmingham office.

Beckum Law LLC announces that **Brooke Davis** joined as an associate.

Bradley Arant Boult Cummings LLP announces that **Kaylee M. Beauchamp, Rachel A. Conry, K. Laney Gifford, Claire B. Johnson, Riley McDaniel, Brian T. Robbins, Alexander G. Thrasher** and **Davis S. Vaughn** joined the Birmingham office and **Ryan J. Letson** joined the Huntsville office, all as associates.

Burr & Forman LLP announces that **Schuyler Espy** joined the firm.

Cabaniss Johnston announces that **Courtney S. Adams** and **A. Reid Harris** joined as associates.

Daniell, Upton & Perry PC announces that **William A. Menas, II** joined as an associate.

Niki Blumentritt Pierce and **Raynor W. Clifton** announce the opening of **Dothan Law Group LLC** in the Maxwelle Building, 344 N. Oates St., Dothan 36303.

Regina B. Edwards PC announces that **Robert B. Reneau** joined the firm of counsel and **Justin D. Edwards** joined as an associate.

Fuller Hampton LLC announces that **Tucker R. North** joined as an associate in the Roanoke office.

Hollis, Wright, Clay & Vail PC announces that **A. Paige Caraway** joined as an associate.

Huie announces that **Hillary Fisher, Kellianne Campbell** and **Barry Burkett** joined as associates.

Lanier Ford Shaver & Payne PC of Huntsville announces that **Lauren A. Smith** is now the firm's president.

Lightfoot, Franklin & White LLC announces that **Christine Gwinn-Ross, Amber N. Hall** and **Clint R. South** joined as associates in the Birmingham office.

Mann & Potter PC of Birmingham announces that **Steven Cole** joined as an associate.

Maynard Cooper announces that **Harris Anthony, Allison Booth, Wes Bulgarella, Zachary Goozee, Spencer Newman, Brock Phillips** and **Mary Caroline Wynn** joined as associates. The firm also announces that **Erica Williamson Barnes, Noah Hicks** and **Robert Jones** joined as shareholders.

Montgomery Ponder LLC announces the opening of its Washington, DC office and that **Witt McLeod** joined as an associate in the Birmingham office.

Shine Law Firm LLC announces that **Kevin Puntney** joined as an associate.

Smith, Spires, Peddy, Hamilton & Coleman PC of Birmingham announces that **Jarrod B. Bazemore** joined as a partner and **Amanda T. Roy** joined as an associate.

Starnes Davis Florie LLP announces that **Mary Pat Damrich** and **Keith Stephens** joined as associates in the Birmingham office.

White Arnold & Dowd PC announces that **H. Eli Lightner, II** is now a shareholder. ▲

Roman A. Shaul
roman.shaul@alabar.org

The Lawyer's Duty in Dealing with Data Breaches

My office has routinely received telephone calls concerning data breaches of law office computer systems. When I ask if the breach was limited just to their computer system, I often get silence on the other end, or the question, "What do you mean?" Many lawyers are surprised to learn that not only are computer systems susceptible to hacking, but also mobile devices and telephone systems. In the modern law office, there are many portals and entryways into digital information that is being stored on behalf of clients. Law firms are tasked not only with worrying about their own systems, but, increasingly, their clients' and third-party systems with which they interact.

Lawyers are required under the *Alabama Rules of Professional Conduct* to safeguard client information and data. Most lawyers understand that if a data breach occurs, they have an obligation to notify clients and to explain the extent of the breach. The ABA Standing Committee on Ethics and Professional Responsibility has recently issued a formal opinion that outlines and reaffirms the lawyer's duty in dealing with data breaches.

Formal Opinion 483 expands older opinions issued by the standing committee and provides new guidance to help attorneys take reasonable steps in meeting their obligations. Previously,

Formal Opinion 477R defined a lawyer's ethical obligations to secure protected client information when transmitting digitally. Formal Opinion 483 states that, "[w]hen a breach of protected client information is either suspected or detected, Rule 1.1 requires that the lawyer act reasonably and promptly to stop the breach and mitigate damage resulting from the breach." The operative language in Rule 1.1 of the *Model Rules of Professional Conduct* is essentially the same as Rule 1.1 of the *Alabama Rules of Professional Conduct*.

The ethics opinion also implicates Alabama Rule 1.4 (communication), Alabama Rule 1.6 (confidentiality of information), Alabama Rule 1.15 (safekeeping property), Alabama Rule 5.1 (responsibilities of a partner or supervisory lawyer) and Alabama Rule 5.3 (responsibilities regarding non-lawyer assistance).

Formal Opinion 483 is limited in its discussion to only breaches involving client data. There may be other types of data breaches that may also require action on the part of an attorney or firm. Although the opinion does not make recommendations on an exact protocol or offer possible software or hardware configurations, it does establish the need to become educated on such concepts. Formal Opinion 483 further advises that, "[a]s a matter of preparation and best practices, …lawyers should consider proactively developing an incident response plan with specific plans and procedures for responding to a data breach . . . The decision whether to adopt a plan, the content of any plan and actions taken to train and prepare for implementation of the plan should be made before a lawyer is swept up in an actual breach."

The opinion points out that due consideration should be given to both technological solutions and practical answers. In this particular arena, more technology instead of less may lead to future breaches or increased vulnerabilities. Implicit in the opinion is also the need to enact data retention policies that limit possession of personally identifiable information and/or obviates the need to collect and store certain types of information.

Like most guidelines, the opinion sets out what essentially amounts to "best practices." Unfortunately, compliance with the opinion will not prevent unauthorized access or unintended disclosure of client information. The new guidance only provides attorneys with a cleaner understanding of what they should be doing on these issues. In a nutshell, when lawyers suspect client information has been compromised, "they have a duty to notify clients of the data breach under [Alabama] Rule 1.4 in sufficient detail to keep clients 'reasonably informed' and with an explanation 'to the extent necessary to permit the client to make informed decisions regarding the representation…" ▲

Joe C. Cassady, Sr.

My friend and former law partner, Joe C. Cassady, died October 4 at 91 years of age. He was born in Glenwood, Crenshaw County, Alabama on November 29, 1926. His career in the law covered 68 years and parts of seven decades. It is a record that he was one of the longest-practicing lawyers in Alabama.

Joe was a product of the Great Depression, attended grade school in Glenwood and later graduated from Luverne High School. He was a gifted high school athlete, and joined the Army in the waning years of World War II. He was selected for pilot training and sent to North Georgia College. During that time, the Army decided it did not need any additional pilots, and closed the program. Joe was sent to Europe where he was assigned to air bases in England and France.

Following his discharge from the Army, he used the newly-created GI Bill and received his undergraduate and law degrees from the University of Alabama. In 1950, he became associated with Joe Calvin Yarbrough, who had come to Enterprise in 1917 to practice law. The firm later became Yarbrough & Cassady and represented clients such as Enterprise Banking Company, Enterprise Hospital Board, Sessions Company Inc, Enterprise Oil Company, Paschal's Dairy Company and a number of insurance companies.

Joe's practice consisted of criminal cases, domestic relations work, title searches, deeds, wills, taxes, probate, insurance defense, personal injury work and all manner of other services that needed to be done. He developed a loyal following and a reputation for honesty, competence, compassion and fearlessness. He proved to be a very good lawyer.

While engaged in the early practice of law, Joe was called to active duty by the Alabama Army National Guard in 1954-1955, and served in the cleanup of Phenix City following the assassination of Attorney General-elect Albert Patterson. Joe served in the military all week, and returned home on the weekends to "save his law practice." It was during that time that he hired a young high school graduate, Bernice Bain (now Trawick) as his secretary in 1955. She continued to assist Joe until her retirement in 1998. Joe also continued to serve in the Alabama Guard until his retirement in 1974.

In 1970, Joe formed a partnership with Kenneth T. Fuller and the firm was called Cassady & Fuller. When I graduated from the University of Alabama Law School in 1974, I was hired by the firm. The three of us got along splendidly, and loved practicing law together. In 1976, I was made partner and the firm became Cassady, Fuller & Marsh. Later, Joe Cassady, Jr., Mark Fuller, Rainer Cotter and Chad Tindol became partners in the firm.

Joe Cassady and our Circuit Judge Eris F. Paul both positively influenced my legal career. Both were my mentors. As I practiced law with Joe for 29 years, he was a constant source of encouragement, advice and guidance. We often tried difficult cases together. Joe had settled or tried so many legal issues that he knew how to handle every situation that came along in a country law practice.

Joe was a gifted trial lawyer. He was known for his enthusiasm, positive attitude and great trial instincts. He recognized the human frailties all men suffer from, but like fellow Alabama lawyer Atticus Finch in *To Kill A Mockingbird*, he truly believed that:

> "Our Courts have their faults, as does any human institution, but in this Country our Courts are the great levelers and in our Courts all men are created equal."

Joe also understood a lawyer can't obtain true justice in every case and believed the theology that the righteous will not perish and the wicked will be punished is true for an eternal standpoint, and ultimately justice will be done:

> "Do not be deceived, God is not mocked; for whatever a man sows, that he will also reap." Galatians 6:7.

Joe was a fine lawyer and always the consummate gentlemen, both in and out of the courtroom. He was recognized for his achievements as a trial lawyer by the American College of Trial Lawyers, which named him a fellow, and he served as president of the Alabama Defense Lawyers Association and vice president of the Alabama State Bar, and was a member of the Alabama Board of Bar Commissioners for more than 15 years. Joe represented all kind of people–rich, poor, corporate, educated and uneducated. He understood the needs of his clients and their peculiar legal problems, and dealt with his clients like Atticus Finch, who taught his daughter Scout:

> "You never really understand a person until you consider things from his point of view–until you climb into his skin and walk around in it."

Joe loved Enterprise and Coffee County. He served as both county attorney and attorney for the Enterprise City Board of Education. He was a devoted member of First Baptist Church, where he served as a deacon for many years. He enjoyed playing golf, attending Alabama football games and serving in the Alabama National Guard. He also liked enjoyed reading mystery novels and attending movies.

Above all, Joe was devoted to his family. He and his wife, Liz Cassady, raised two children, Ann Carmichael, who cared for Joe in his final months, and Joe Jr., his long-time law partner, who unfortunately predeceased his father. He is survived by a number of beloved grandchildren and great-grandchildren.

Joe will be greatly missed by his family, friends, law partners, colleagues, clients and many people who never knew him, but have been the beneficiaries of his years of service.

While I will miss my longtime friend and law partner, I do not mourn for him today as we all celebrate a life well-lived. His life can be summed up in familiar verses found in the Book of Micah Chapter 6, Verse 8:

> "He has shown you, O man, what is good. And what does the LORD require of you? To act justly and to love mercy and to walk humbly with your God."

—M. Dale Marsh, Enterprise

Atley A. Kitchings, Jr.

Born in Clinton, Mississippi on June 10, 1925, Atley attended Mississippi College where he played basketball and became a part of the Navy's V-12 officer candidate program. He was commissioned an ensign and, at age 19, he became Commander of a Navy sub-chaser vessel during World War II.

After the war, he finished his college degree and entered law school at the University of Virginia. Upon graduating in 1950, he passed the Alabama bar exam and entered private practice with the Birmingham firm of Davies & Williams. When the senior partner of the small firm died and the office closed, Atley became an Assistant United States Attorney. Shortly thereafter, he was appointed as Acting U.S. Attorney (N.D., Alabama) when Frank M. Johnson left that post to become a federal judge.

Later, Atley joined the legal department at the predecessor of BellSouth where he served for 25 years, ultimately holding positions as the chief legal officer for Mississippi and Alabama. He "retired" to private practice with Lange, Simpson, Robinson & Somerville as a partner from 1983-2004. Briefly, he was a partner with the Montgomery-based firm of Steiner, Crum & Byars before joining Wallace, Jordan, Ratliff & Brandt in 2007 as its "Distinguished Senior Member" where he actively practiced until a few weeks before his death. Atley was a recognized expert in telecommunications and regulatory law and taught courses in these subjects at Cumberland School of Law.

A member of the Alabama and Mississippi state bars, Atley was actively engaged in law practice for 68 years. He had a keen legal mind and impeccable character and ethics. He was dedicated to his profession and was known as a vigorous advocate for his clients and a person whose word and promises could be

(Continued from page 61)

relied upon without question. Atley also had a fondness for mentoring young lawyers, and numerous attorneys throughout the south had the privilege to receive his instruction and love.

Atley was a World War II veteran, serving in the Navy, and after the war remained in the Naval Reserves for 25 years, retiring with the rank of captain. Atley was active in Mountain Brook Baptist Church where he was a deacon for many years and chair of the personnel committee, and named a "Life Deacon" by the church. He also was a member of Kiwanis International for more than 50 years, serving as president of the Jackson, Mississippi club, an enthusiastic member of the downtown Kiwanis club of Birmingham and as district lieutenant governor. As a testimony to his character, one of his peers once said, "If you look in the dictionary for a definition of the word 'Gentlemen,' you will find the name 'Atley Kitchings.'"

Atley was married to Betty Jane Langley Kitchings for 71 years until her death and is survived by his children, Marlea Kitchings Foster (John) and A. Langley Kitchings (Edie) and grandchildren Ashley Jane Foster, Asher Langley Kitchings, Elisabeth Gaillard Foster and Andrew Connor Kitchings.

A scholarship has been established in his honor at the Birmingham Kiwanis Foundation–The Atley Kitchings Youth Service Scholarship, 2019 4th Ave. N, Birmingham 35203.

—Robert W. O'Neill and William B. Stewart, Birmingham

Vincent James McAlister, Jr.

Vincent James McAlister, Jr. of Sheffield passed away peacefully at home on October 6 surrounded by his family. Vincent was born May 26, 1931, the son of Vincent James and Ruby Leggett McAlister, in Birmingham. He lived a full and rewarding life, treasuring his family and friends, his work and the many memories made through a lifetime of travel.

Vincent graduated from Woodlawn High School in Birmingham in 1948. He attended Birmingham Southern College, where he met his future bride, DeFreese Johnson, of Piedmont, and graduated in 1952. He graduated from the University of Alabama School of Law in 1955, the University of Virginia Judge Advocate General's School (also in 1955) and went on to receive a master's degree in taxation from Georgetown University Law in 1958.

Vincent and DeFreese married March 25, 1953 in Piedmont and were married for 65 years. After spending three years in Arlington, Virginia, they settled in Sheffield in 1958. Vincent's proudest achievement was his family–his beautiful wife, three children, eight grandchildren and one great-grandchild. He led by example every day, and his family simply adored him.

Vincent enjoyed a challenging and diverse legal career spanning 60 years, beginning with three years at the Pentagon as a commissioned Army officer and member of the Judge Advocate General's Corps. He then joined the law practice of Mr. Clopper Almon in Sheffield in 1958, which also began a lifetime friendship with secretary Agnes Wiedemeyer. He practiced in all courts throughout Alabama, and had the honor of arguing a case before the United States Supreme Court in 1977. In conjunction with his law practice, he also valued his work for 40 years with the International Fertilizer Development Corporation under the leadership of Dr. Amit Roy. In addition, he served the City of Sheffield as city attorney for more than 50 years. Along with many other volunteer activities, Vincent especially enjoyed serving on the board of trustees for Birmingham Southern College, his beloved alma mater. He was also a longtime member of the First United Methodist Church of Sheffield.

Vincent enjoyed a great love of travel. Whether across the oceans, across the country or just across state lines, every trip was researched and planned and sure to be remembered. These trips also included 57 years of Alabama football, where a lifetime of memories was made with family and many friends. Although a lifelong Alabama fan, Vincent's favorite football player went to Auburn–Dennis Collier, a Sheffield High School standout.

Vincent is preceded in death by his parents, Vincent James and Ruby Leggett McAlister of Birmingham, and his sister, Janis Stoelker of New Jersey.

Vincent is survived by his wife, DeFreese Johnson McAlister; children Mark Vincent, Stephen Kennedy (Patricia) and Mary DeFreese (Stuart McMillan); eight grandchildren; one great-grandchild; two nieces; and one nephew.

Clarence M. Small, Jr.

It is with sad hearts that we report the death of our partner, friend and mentor, Clarence M. Small, Jr., who passed away on October 31 at his home in North Carolina. He is survived by his wife, Gretchen, and three children, Steve, Elizabeth and Laura.

Clarence was born July 24, 1934 and grew up in Montgomery, where his father

was a practicing attorney. He graduated from Auburn University in 1956. He attended the University of Alabama Law School and graduated in 1961 with an LLB degree. While at the law school, he was a member of Phi Delta Phi legal fraternity, Omicron Delta Kappa and the Farrah Order of Jurisprudence. He served on the Editorial Board of the *Alabama Law Review*.

Upon graduation and after serving our country in the U.S. Army, Clarence became associated with the Birmingham firm of Rives, Peterson, Pettus & Conway. Over the years, that firm went through several name changes, many of which included his name, including the firm with which he was associated at the time of his death, Christian & Small.

He was honored to be elected to serve as president of the Birmingham Bar Association (1979) and the Alabama State Bar (1992). His excellence as a lawyer was recognized by his induction in the American College of Trial Lawyers, the International Academy of Trial Lawyers, the American Bar Foundation and the American Board of Trial Advocates. Late in his career, he became a member of the National Academy of Distinguished Neutrals.

He was a member of the American Bar Association, and served in the House of Delegates from 1983 to 1990. He was a member of the Alabama Defense Lawyers Association. He served on the Alabama Appellate Rules Committee, the Jefferson County Judicial Commission and the Alabama Tort Reform Summit.

He was granted the AV Preeminent Peer Review rating by Martindale and Hubbell soon after he began to practice. He was selected for inclusion in *The Best Lawyers in America*® 2011 in the field of alternative dispute resolution; 2011-2018 in the field of Personal Injury Litigation–Defendants; 2012-2018 in the fields of arbitration and mediation. He was selected for inclusion in Alabama Super Lawyers® 2008-2010 in the fields of alternative dispute resolution and civil litigation defense, and also selected for inclusion in Benchmark Litigation's list of Alabama Litigation Stars in the field of commercial litigation (2010-2015).

Clarence tried cases in many jurisdictions around the country and was admitted to the following bars: United States Supreme Court; U.S. Court of Appeals, Third Circuit; U.S. Court of Appeals, Fifth Circuit; U.S. Court of Appeals, Sixth Circuit; U.S. Court of Appeals, Ninth Circuit; U.S. Court of Appeals, Eleventh Circuit; U.S. District Court, Northern District of Alabama; U.S. District Court, Middle District of Alabama; and U.S. District Court, Southern District of Alabama.

One of Clarence's memorial experiences was his admission to the bar of the U.S. Supreme Court. He and his senior partner at the time, Al Rives, traveled to Washington for the ceremony. Back then, a formal introduction to the Court was required by another member of the Supreme Court Bar. Following his introduction to the Court by Mr. Rives and his taking of the oath, a clerk of the court sent word to Mr. Rives that one of the justices would like for him to come to his chambers for a visit. Clarence enjoyed a visit in the chamber of Justice Hugo Black, a longtime friend of Mr. Rives. Clarence had said that he was reluctant to say much, but was enthralled with the stories shared that afternoon by Justice Black and Al Rives.

Clarence was a brilliant lawyer who was loved and respected by all members of the bar who knew him. His broad range of trial experience, his genuine friendship with other members of the bar, his patience and his ability to quickly and thoroughly grasp the most important points of any legal issue or dispute are qualities that his law partners and colleagues will always remember about Clarence. ▲

—Duncan Y. Manley, Birmingham

Ball, Helen Denice
Birmingham
Admitted: 2002
Died: October 5, 2018

Benn, John Raymond
Sheffield
Admitted: 1978
Died: September 5, 2018

Bowman, John Sanderson
Montgomery
Admitted: 1960
Died: October 1, 2018

Cloud, Earl Edward, Jr.
Huntsville
Admitted: 1977
Died: September 13, 2018

Cottle, John Isby, III
Sugar Hill, GA
Admitted: 1980
Died: January 20, 2018

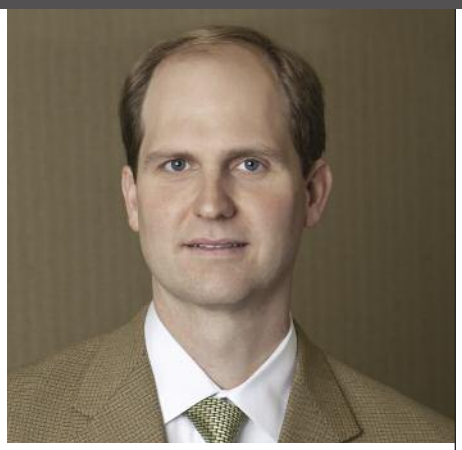
Demeranville, Margaret Frances
Mobile
Admitted: 2009
Died: October 12, 2018

Moore, Fred Sumner, Jr.
Birmingham
Admitted: 1971
Died: September 24, 2018

Ritchey, Ferris Salim, Jr.
Birmingham
Admitted: 1951
Died: September 9, 2018

Stinson, Charles Bradford
Atmore
Admitted: 2003
Died: September 24, 2018

Thomas, Blewett William
Columbus, MS
Admitted: 1987
Died: September 25, 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

Arbitration; Nursing Home Contracts

***Stephan v. Millennium Nursing and Rehab Center, Inc.*, No. 1170524 (Ala. Oct. 5, 2018)**

Stephan (daughter of decedent) signed documents (with arbitration) admitting decedent to nursing home. Stephan had no power of attorney or other authority. Decedent was suffering from long-term dementia at the time of contract. Stephan, as PR of decedent's estate, later sued for wrongful death. The trial court compelled arbitration. The supreme court reversed, holding that the evidence was disputed as to whether the decedent had permanent incapacity, but that same evidence was sufficient that there was "contractual incapacity," because at the time of execution of the agreement, decedent had no reasonable perception or understanding of the nature and terms of the contract, and, thus, no understanding that daughter was binding him to arbitration.

Standing vs. Merits; Abatement

***Norvell v. Norvell*, No. 1170544 (Ala. Oct. 19, 2018)**

Among other holdings: (1) "the concept of standing is generally inapplicable in a private-law case such as this...[;]" and (2)the abatement statute, *Ala. Code* § 6-5-440, could not be employed to abate a first-filed action in favor of a second-filed action, because only second-filed actions are properly abated.

Standing; Parentage

***Campbell v. J.R.C. et al.*, No. 1170385 (Ala. Oct. 19, 2018)**

Because decedent was the presumed father of children born during the marriage (under Alabama's Uniform Parentage Act, *Ala. Code* § 26-17-204(a)) and because decedent persisted in his paternity during his lifetime, decedent's mother lacked standing under the AUPA to challenge decedent's paternity as to them, notwithstanding that the AUPA (specifically *Ala. Code* § 26-17-602) identifies a broad range of individuals and agencies who have standing to bring a paternity action, including in § 26-17-602(7) "any interested person."

Premises Liability

***Unger v. Wal-Mart Stores, East, LP*, No. 1170657 (Ala. Oct. 19, 2018)**

In premises liability action arising from customer fall while trying to unbind two shopping carts, trial court properly granted summary judgment. Although Wal-Mart's operating procedure imposed on greeters a duty to unbind shopping carts, company

policy did not define its duty to invitee. Video evidence demonstrated that greeter had been unbinding carts in the moments before accident, but at time of accident, greeter was busy with another guest.

Administrative Law; Equalization; "Mailbox Rule"

***Ex parte Kennemer*, No. 1170095 (Ala. Oct. 26, 2018)**

Under *Ala. Code* § 40-3-25, taxpayer has 30 days from a Board of Equalization decision on property valuation to file an appeal with the secretary of the board of equalization Held: mailbox rule applies to a section 40-3-25 appeal, and, thus, deposit of notice in mail to secretary of board on 30th day was timely, even though not received until the 35th day.

Abatement; Standing

***Ex parte Skelton*, No. 1160641 (Ala. Oct. 26, 2018)**

Prior action by trust corpus beneficiaries (as heirs-at-law of deceased trustee and beneficiary) to appoint successor trustee and to make final distributions of trust assets, abated second action, seeking termination of the trust, and naming the plaintiffs from the first action and others as defendants. *Ala. Code* § 6-5-440 applied because two actions concerned same subject matter and second-action claims were compulsory counterclaims in the first action. Claim of no standing in first action did not destroy abatement because standing does not apply in private-law actions.

Immunity

***Ex parte Alabama Peace Officers' Standards and Training Commission*, No. 1170892 (Ala. Oct. 26, 2018)**

Commission is an agency of the state and therefore is absolutely immune under Section 14 of the Alabama Constitution. Amendment to the complaint adding the commission's executive secretary in his official capacity was a nullity, because the court did not have subject matter jurisdiction over the original complaint.

Life Insurance Proceeds; Revocation-On-Divorce

***Blalock v. Sutphin*, No. 1170879 (Ala. Oct. 26, 2018)**

(1) Alabama's revocation-on-divorce statute for life-insurance designations, *Ala. Code* § 30-4-17, under which a spousal beneficiary designation is void upon divorce, reflects a fundamental public policy of Alabama, and was therefore applied to the case even though contrary Tennessee law would otherwise apply; (2) the revocation-on-death statute does not violate the Contracts Clause, recently held in *Sveen v. Melin*, __ U.S. __, 138 S. Ct. 1815 (2018); and (3) the trial court's finding of no common-law marriage was not clearly erroneous.

Medical Liability; Necessity of Expert Witness

***Shadrick v. Grana*, No. 1170513 (Ala. Oct. 26, 2018)**

Trial court properly granted summary judgment to hospitalist (who was board-certified as an internist) in medical liability action concerning failure to conduct emergency heart catheterization. Hospitalist did not have the expertise to conduct procedure and properly consulted with on-call cardiologist. It was for cardiologist to determine proper course of care. Alleged dispute of fact between cardiologist and hospitalist as to their conversations did not excuse need for expert witness; the information being discussed was technical diagnostic information not readily understood by laypersons. There was no abuse of discretion in striking plaintiff's expert (a cardiologist) when the physician defendant was an internist.

MVA

***Campbell v. Kennedy*, No. 1160444 (Ala. Oct. 26, 2018)**

In affirming a $3 million verdict for plaintiff on negligence-based claims, the court held: (1) evidence was in dispute on whether plaintiff was justified in crossing double-yellow line in attempt to pass motor grader, whether the grader was actually engaged in work and whether grader was displaying any lights; (2) spoliation instruction was proper, based on breach of alleged inspection agreement; and (3) defendant was not entitled to remittitur of damages, where plaintiff was 27 years old

(Continued from page 65)

at time of accident, had his femur shattered and had his pelvis injured to the point of requiring screws for repair; was on crutches for six weeks and had to consume a liquid-only diet; broke both jaws; and incurred $77,000 in medicals.

Forum Selection Clauses

***Ex parte Killian Constr. Co.*, No. 1170696 (Ala. Nov. 2, 2018)**

Trial court exceeded its discretion in denying motion to dismiss based on outbound forum selection clause in commercial contract specifying the exclusive venue for litigation would be in Missouri. Inconvenience of witnesses (all witnesses were in Baldwin County) did not establish "serious inconvenience" for refusing enforcement; removal of action to federal court did not waive enforcement of the clause, where defendant filed transfer motion to Missouri federal court, and the clause did not specify litigation solely in a Missouri state court. Clause was enforceable as to claims against enforcing entity's employee, since he was closely related to the contract.

Trusts and Estates; Res Judicata

***Cooper v. Cooper*, No. 1170270 (Ala. Nov. 16, 2018)**

Action by trust beneficiary to terminate trust and to distribute remaining assets was barred by res judicata effect of prior action, in which same trust beneficiary sought unsuccessfully to obtain accounting of trust assets and to distribute remaining portions of trust. Res judicata did not, however, bar a claim for removal of an estate administrator, because at the time of the prior litigation, no estate administration had been commenced and therefore no administrator was properly in place.

Rule 59.1; Loss of Trial Court Jurisdiction

***Ex parte Cavalier Home Builders, LLC*, No. 1170287 (Ala. Nov. 16, 2018)**

Once the trial court registered an arbitral award as a judgment, arbitration loser's Rule 59 motion "quickened," and because the trial court took no action on it in 90 days, it was denied on the 91st day under Rule 59.1, after which the trial court lost jurisdiction to enter any further orders.

Venue

***Ex parte Nationwide Agribusiness Insurance Co.*, No. 1171081 (Ala. Nov. 16, 2018)**

Mandamus relief was granted, compelling trial court to rule on pending motion to transfer from Marshall to Morgan County, pursuant to Rule 82(d)(2). Trial court should rule on a motion alleging improper venue as expeditiously as possible.

State Immunity; Class Actions

***Barnhart v. Ingalls*, No. 1170253 (Ala. Nov. 21, 2018)**

State immunity did not bar state employees' claims against officials in their official capacities, seeking recomputing of longevity pay and compensation for paid holidays as allegedly required by statute for employees of Space and Rocket Center, because those claims were claims attempting to compel an officer to perform a ministerial act based upon a judicial construction of statutes. Trial court properly exercised its discretion in granting class certification to employees, because (1) despite differences in damages among class members, overriding common issue was whether the "benefit" statutes applied to the employer; (2) a statute of limitations defense applicable to the named plaintiffs did not destroy typicality because other class members were also subject to the defense; and (3) declaratory-relief claim was properly subject to Rule 23(b)(2) certification because it was a precursor to retrospective recovery for back pay.

Venue; Forum Non Conveniens

***Ex parte Tyson Chicken, Inc.*, No. 1170820 (Ala. Dec. 2, 2018)**

In a 5-4 decision authored by Justice Sellers, the court granted mandamus relief and ordered an "interests of justice" transfer (under *Ala. Code* § 6-3-21.1) of an MVA action from Marshall County (where both plaintiff and individual driver defendant resided, as well as where Tyson had presence, though not its primary business location) to Cullman County (county where accident occurred and where plaintiff's injuries were treated). Location of accident is paramount consideration in MVA cases. The court noted (without expressly approving) an argument from Tyson that the peculiarities of the terrain around the accident scene may have played a contributing factor in the accident. Justices Shaw, Wise, Bryan and Main dissented, noting particularly that this is not a case where the chosen forum had a "weak" connection with the case, given the residencies of plaintiff and defendant drivers and Tyson's presence there.

Consideration of Matters outside Pleadings On Dismissal Motions

***Robinson v. Harrigan Timberlands Limited Partnership*, No. 1170515 (Ala. Dec. 2, 2018)**

Trial court improperly granted Rule 12 motion by visiting a boundary-line dispute site and making its own finding of fact, which both considered matters outside the pleadings and was an improper grant of summary judgment.

From the Court of Civil Appeals

Fraudulent Transfers

***International Management Group, Inc. v. Bryant Bank*, No. 2170744 (Ala. Civ. App. Oct. 12, 2018)**

(1) Grantees in chain of title without a current ownership interest were not required to be joined in fraudulent transfer action; (2) bankruptcy discharge of personal guarantor did not bar action to set aside transfer borrower (the debtor's entity) to a third party; (3) bank's complaint's failure to reference § 8-9A-5(a) (for constructive fraudulent transfer), in light of the allegations of the complaint supporting relief under that section, did not bar the bank from proceeding under that statute that alternate theory; (4) claim under § 8-9A-5(a) was time-barred in that it attacked a seven-year old transfer, and bank did not offer substantial evidence to invoke savings clause of *Ala. Code* § 6-2-3 by showing it lacked knowledge of "inquiry notice" facts; (5) debtor's affidavit denying required intent precluded summary judgment on claim for actual fraud under § 8-9A-4(a), which requires proof that a debtor intended to "hinder, delay, or defraud" a creditor by transferring an asset.

Ejectment; Indispensable Parties

***Chandler v. BB&T*, No. 2160999 (Ala. Civ. App. Oct. 19, 2018)**

Joint property-owner spouse was indispensable party in ejectment action, even though spouse's interests were aligned with and protected by borrower defendant.

Administrative Law

***ALDOT v. Lee Outdoor Advertising, Inc.*, 2170774 (Ala. Civ. App. Oct. 26, 2018)**

Non-owner of billboard lacked necessary interest to take appeals from ALDOT administrative adjudications revoking billboard permit.

Construction

***Keller Construction Company of Northwest Florida, Inc. v. Hartford Fire Insurance Company*, No. 2170299 (Ala. Civ. App. Oct. 26, 2018)**

Trial court properly entered judgment for general contractor's surety and against subcontractor in action for non-payment. Subcontract specifically made owner's payments to general a condition precedent to general's obligation to pay subcontractor, and owner's refusal to pay general for amounts owed excused general's obligation to pay for work related to owner's non-payment.

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MVA

***Dennis v. Blackwell*, No. 2170633 (Ala. Civ. App. Oct. 26, 2018)**

Accidents produced exclusively by skidding on an ice-covered surface of a road, and which are not contributed to by nonobservance of some other precautionary requirement, will not support a cause of action based on negligence.

Garnishment

***Mays v. Yung*, No. 2170519 (Ala. Civ. App. Oct. 26, 2018)**

Trial court erred in garnishing funds for collection of judgment against Yung where monies were in account of "City Jet, Inc." Plaintiff made no allegation that the funds were subject to veil-piercing or that funds were not paid in ordinary course.

Forfeiture; Federal vs. State Authority

***Ex parte City of Montgomery*, No. 2180025 (Ala. Civ. App. Nov. 16, 2018)**

Actions regarding property seized by the federal government pursuant to 21 U.S.C. § 881 or by the state government pursuant to *Ala. Code* § 20-2-93 are in rem proceedings. Two courts cannot have concurrent in rem jurisdiction; the first court to acquire in rem jurisdiction does so to the exclusion of all other courts.

Sales Taxation

***Russell County Community Hospital, LLC v. ADOR*, No. 2170527 (Ala. Civ. App. Nov. 16, 2018)**

Under ADOR Rule 810-6-1-.37, canned computer software is tangible personal property subject to sales tax, but services rendered in customizing such software which are separately line-itemed by the installer are not taxable.

Notaries

***Fidelity National Title Ins. Co. v. Western Surety Co.*, No. 2170767 (Ala. Civ. App. Nov. 30, 2018)**

General two-year limitations period under *Ala. Code* § 6-2-38(l), rather than *Ala. Code* § 6-2-34(7)'s six-year statute (applicable to claims against sureties of public officials for the officials' misfeasance), is the proper limitations period for an action against the surety of a notary public based upon the notary's failure to personally witness the signatures affixed to a document upon which she had placed her notarial attestation and seal. (Ed.: One suspects a cert. petition will be filed.)

From the United States Supreme Court

ADEA

***Mt. Lemmon Fire Dist. v. Guido*, No. 17-587 (U.S. Nov. 6, 2018)**

Twenty-employee threshold triggering a private employer's subjection to the ADEA does not apply to states and their political subdivisions thereof. The ADEA applies to all states and their political subdivisions without regard to any 20-employee threshold. This is the first opinion of the new term; Justice Ginsburg wrote a unanimous opinion, though Justice Kavanaugh did not participate.

Environmental Law

***Weyerhaeuser Co. v. US Fish & Wildlife Service*, No. 17-71 (U.S. Nov. 27, 2018)**

Under the Endangered Species Act, an area is eligible for designation as critical habitat under §1533(a)(3)(A)(i) only if it is habitat for the species. Given that the Administrative Procedure Act creates a "basic presumption of judicial review" of agency action. The Secretary's decision not to exclude an area from critical habitat under §1533(b)(2) is subject to judicial review.

From the Eleventh Circuit Court of Appeals

Section 8 Housing

***Yarbrough v. Decatur Housing Auth.*, No. 17-11500 (11th Cir. Oct. 3, 2018)**

Tenant's indictment and arrest for drug-distribution offenses, standing alone, did not constitute sufficient evidence to support decision of public housing authority to terminate housing subsidies provided under Section 8 of the Housing and Community Development Act of 1937, 42 U.S.C. § 1437f.

Class Actions

***Muransky v. Godiva Chocolatier, Inc.*, 16-16486 (11th Cir. Oct. 3, 2018)**

The Eleventh Circuit affirmed the district court's approval of a class-action settlement of claims under the FACTA amendments to the Fair Credit Reporting Act. The settlement, reached about six months after commencement of the case, created a $6.3 million fund, with no money reverting to defendant. Each class member who filed a timely claim would receive about $253 on a claim. The named representative would seek a $10,000 incentive award. Finally, the notice disclosed that class counsel intended to apply for a court-approved fee of $2.1 million, or one-third of the total fund. The Court held: (1) class member who did not intervene in an opt-out settlement but who objected to the settlement had standing to appeal the district court's approval order; (2) under 11th Circuit law after *Spokeo, Inc. v. Robins*, 578 U.S. ___, 136 S. Ct. 1540 (2016), plaintiff had the requisite injury in fact and causation to establish Article III standing for a FACTA violation–improper truncation of a "credit card number is similar to the common law tort of breach of confidence" and "also resembles a modern version of a claim for breach of an implied bailment agreement[;]" (3) because Rule 23(h)(1) says that "[n]otice of the motion [for attorney's fees] must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner[,]" a preliminary approval schedule which provides for the filing of a motion for fees filed after expiration of an opt-out or objection deadline violates the Rule–but, in this case, the violation did not warrant reversal of court approval of the settlement because several objectors objected to the fee and made the arguments which would otherwise be made by any other objector; (4) award of one-third common-fund fee was within the district court's discretion, and common-fee standards for assessing fee awards are appropriate in cases where a fund is created, even if the underlying claim calls for fee-shifting and might otherwise be subject to a lodestar-based analysis; (5) incentive award of $10,000 was not excessive, noting that the impact on class members' claims was $0.21.

Bankruptcy

***In re: Teltronics, Inc.*, No. 16-16140 (11th Cir. Oct. 2, 2018)**

Bankruptcy Court dismissed a fraudulent conveyance claim by the trustee of the liquidating trust of Teltronics against Harris Corporation and RPX Corporation. The trustee claimed on appeal that the bankruptcy judge erred in (a) concluding that the trustee had not sustained his burden as to whether Teltronics received reasonably equivalent value in exchange for the transfer and (b) receiving certain expert testimony offered by defendants, ostensibly on the issue of whether Teltronics was insolvent at the time the transfer was made. The Eleventh Circuit affirmed, holding (1) the Bankruptcy Court made no material error in ruling on the admissibility of evidence and (2) there was no error in the conclusion that the trustee failed to prove that Teltronics was insolvent at the time of the transfer.

Qualified Immunity

***Estate of Cummings v. Davenport*, No. 17-13999 (11th Cir. Oct. 2, 2018)**

Warden was not entitled to qualified immunity on deliberate indifference Eighth Amendment claims; Warden's medical decisions, which included the entry of a do-not-resuscitate order and the decision to remove prisoner from artificial life support-did not necessarily fall within the scope of Warden's discretionary authority under Alabama law.

Qualified Immunity

***Alcocer v. Mills*, No. 17-14804 (11th Cir. Oct. 9, 2018)**

District court's grant of qualified immunity to officers was reversed for failure to conduct an individualized analysis of each defendant's actions and omissions, and whether they were causally related to the alleged violation of plaintiff's Fourth Amendment rights.

Ex Parte Young; Eleventh Amendment

***Green v. Graham*, No. 17-14704 (11th Cir. Oct. 12, 2018)**

Under *Stroud v. McIntosh*, 722 F.3d 1294 (11th Cir. 2013), immunity is divisible–state officials' removal of the action from state to federal court waives the state's immunity from suit, but not necessarily its immunity from liability. State officials either waived or forfeited any immunity from suit by removing the case, and removal by a predecessor state official waives the forum immunity of a later-joined state official, because the immunity being waived is that of the state. The Court lacked jurisdiction to consider the officials' claims of immunity from liability via interlocutory appeal.

False Claims Act

***USA v. Carver*, No. 17-13402 (11th Cir. Oct. 15, 2018)**

When the government supplants a qui tam case by choosing an "alternate remedy" (in this case, criminal forfeiture), the False Claims Act (FCA) gives the qui tam plaintiff the "same rights" in the "alternate" proceeding as she would have had if the qui tam action "had continued." Issue: whether this statute allows a qui tam plaintiff to intervene in criminal forfeiture proceedings when the government chooses to prosecute fraud rather than to intervene in the qui tam plaintiff's action. Held: the criminal forfeiture statutes specifically disallow intervention in such circumstances, and they control over section 3730(c)(5) of the FCA.

Copyright

***Code Revision Commission of GA v. Public.Resource.Org, Inc.*, No. 17-11589 (11th Cir. Oct. 19, 2018)**

Annotations contained in the Official Code of Georgia Annotated (OCGA), authored by the Georgia General Assembly and

(Continued from page 69)

made an inextricable part of the official codification of Georgia's laws, may not be copyrighted by the State of Georgia.

Copyright; Fair Use; Effect of Prior Mandate

***Cambridge Univ. Press v. Albert*, No. 16-15726 (11th Cir. Oct. 19, 2018)**

In a prior appeal, the Court reversed the district court in part for its use of a mathematical, all-factors-are-equal application of the four "fair use" factors, and for its inadequate consideration of the severe threat of market harm. On remand, the district court district court again applied a mathematical formula to balance the factors. It also revisited its market-harm analysis for a number of excerpts, but found that the threat of market harm supported fair use in all but six of 48 instances. Held: there was no abuse of its discretion in declining to reopen the record to allow the publishers to present new evidence about the availability of digital licenses, but the district court misinterpreted the earlier decision and again misapplied the statutory test of fair use.

Employment

***Hornsby-Culpepper v. Ware*, No. 17-14301 (11th Cir. Oct. 19, 2018)**

Merely disputing the wisdom of the supervisor's reasoning was insufficient to establish pretext. Because the issue is always whether unlawful discriminatory animus motivated the decision, the inquiry into pretext centers on the employer's beliefs, not the employee's beliefs, and a plaintiff is not allowed to merely recast an employer's proffered nondiscriminatory reasons or substitute her business judgment for that of the employer.

Judicial Immunity; Pleading Burden under *IQBAL*

***McCullough v. Finley*, No. 17-11554 (11th Cir. Oct. 29, 2018)**

Residents of Montgomery who were sentenced by its municipal court for traffic violations sued officials for allegedly operating a scheme to raise revenue by jailing indigent offenders for their failures to pay fines and court costs. The judges, mayor and police chiefs asserted various immunities and moved to dismiss the complaint. The district court denied those motions. The Eleventh Circuit reversed, reasoning (1) judges were acting in a judicial rather than administrative capacity in sentencing defendants to probation, setting probation terms, conducting (or not conducting) indigency hearings, making (or not making) provision of counsel, imposing sentences and implementing a jail-based work program–and, thus, were entitled to absolute judicial immunity; (2) mayor and police chief were entitled to qualified immunity on federal claims and state-agent immunity on state claims, because the allegations of the complaint which might otherwise trigger non-entitlement to those immunities were conclusory, simply parroting elements rather than pleading facts which if true would give rise to an immunity exception.

Federal Jurisdiction

***FastCase, Inc. v. LawWriter, LLC*, No. 17-14110 (11th Cir. Oct. 29, 2018)**

Among other holdings, district court erred in finding that the $75,000 amount for diversity jurisdiction was not satisfied, because the putative infringer, if it published, would be violating defendant's terms of use, which if violations were as few as four times would subject the putative infringer to a threat of liability in excess of $75,000, which was proper under the plaintiff-viewpoint rule of *Ericsson GE Mobile Commc'ns, Inc. v. Motorola Commc'ns & Elecs., Inc.*, 120 F.3d 216, 219 (11th Cir. 1997).

Arbitration; "Shrink-Wrap" Agreements

***Dye v. Tamko Building Products, Inc.*, No. 17-14052 (11th Cir. Nov. 2, 2018)**

Under Florida law, roofing-shingle manufacturer's display on the exterior wrapping of every package of shingles the entirety of its product-purchase agreement–including a mandatory-arbitration provision, created binding agreement; homeowners whose roofers ordered, opened and installed the shingles are bound by the agreement's terms.

Review of Magistrate Rulings; Subpoenas

***Jordan v. Ga. Dept. of Corr.*, No. 17-12948 (11th Cir. Nov. 19, 2018)**

Plaintiffs, who are prosecuting a section 1983 Eighth Amendment claim against the Mississippi Department of Corrections regarding its three-drug lethal injection procedure, subpoenaed the GDC through the Northern District of Georgia for testimony and documents concerning Georgia's one-drug protocol. The GDC filed a motion to quash, arguing that the information sought in the subpoena was irrelevant to the claims asserted in the underlying § 1983 litigation and, in any event, protected from disclosure by Georgia's Lethal Injection Secrecy Act and other privileges. The Magistrate Judge rejected the GDC's relevancy argument, but nevertheless granted the motion to quash pursuant to the Lethal Injection Secrecy Act, which precludes

the disclosure of the "identifying information" of any person or entity that participates in a Georgia execution or that supplies the drugs used by the state in executions. See O.C.G.A. § 42-5-36(d). On appeal, the Eleventh Circuit held: (1) the Magistrate's ruling was properly reviewed in the district court under only the "clearly erroneous or contrary to law" standard of Rule 72(a) because the matter was "non-dispositive"; and (2) the district court did not abuse its discretion in accepting the Magistrate's R&R on the issue.

RECENT CRIMINAL DECISIONS

From the Alabama Supreme Court

Transferred Intent; Evidence

***Ex parte Phillips*, No. 1160403 (Ala. Oct. 19, 2018)**

Two holdings of first impression: (1) the doctrine of transferred intent applied to convict the defendant of capital murder of two or more persons (defendant's wife and her unborn child) under *Ala. Code* § 13A-5-40 (a)(10), despite his contention that he intended to only kill his wife; and (2) graphic autopsy photographs depicting the dissection of the victim's uterus were admissible over the defendant's objection that they were overly gruesome.

Brady; Sanctions

***Ex parte State (v. Martin)*, No. 1170407 (Ala. Aug. 31, 2018)**

Trial court improperly dismissed defendant's indictment that followed its granting of a new trial on the basis of alleged *Brady* violations; dismissal was not warranted by the deaths or the loss of memory of certain witnesses or by the fact that prior transcribed testimony would be used in the new trial.

From the Court of Criminal Appeals

Withdrawal of Counsel

***DeBlase v. State*, CR-14-0482 (Ala. Crim. App. Nov. 16, 2018)**

Trial court had discretion to grant appointed defense counsels' motion to withdraw from representation seven months before trial. The circumstances indicated that the attorneys were not fully prepared for the penalty phase of the trial and that they "clearly and unequivocally indicated that they were no longer willing to represent" the defendant. Though the defendant has a right to counsel of choice, that right did not permit him "to force [appointed defense counsel] to represent him unwillingly."

Probation

***Grice v. State*, CR-17-0864 (Ala. Crim. App. Nov. 16, 2018)**

Service of a probation order under *Ala. R. Crim. P.* 27.1 must be made on the probationer, rather than defense counsel, to ensure that the probationer understands the terms and conditions of probation.

Juveniles; Life Without Parole

***Wilkerson v. State*, CR-17-0082 (Ala. Crim. App. Nov. 16, 2018)**

Trial court did not err in sentencing the juvenile capital murder defendant to imprisonment for life without the possibility of parole in a resentencing required by *Miller v. Alabama*, 567 U.S. 460 (2012). *Miller* does not require a presumption against a life-without-parole sentence for juveniles convicted of capital murder. The sentencing court is not required to make a finding regarding whether the juvenile offender is "rare" or "uncommon" before issuing a life-without-parole sentence.

Video-Game Defense; Ineffective Assistance

***Thompson v. State*, CR-16-1311 (Ala. Crim. App. Nov. 16, 2018)**

Defense counsel did not render ineffective assistance by failing to present adequately that defendant's frequent playing of a violent video game placed him in a dissociative state. Because that defense has not gained general acceptance in the scientific community and is inadmissible, defense counsel could not be held ineffective for failing to properly present it.

Contempt; Recusal

***Salvagio v. State*, CR-17-0095 (Ala. Crim. App. Oct. 12, 2018)**

Attorney held in contempt was entitled to the recusal of the judge presiding over the contempt proceeding, due to her questioning of the attorney regarding whether he had financially supported her political opponent in the prior judicial campaign.

Search and Seizure

***Tolbert v. State*, CR-17-0510 (Ala. Crim. App. Oct. 12, 2018)**

Because defendant had no expectation of privacy in his cellphone after abandoning it at the scene of his robbery, the warrantless search of the cellphone was not due to be excluded. ▲

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For more information, visit www.lsa.alabama.gov.

The New Legislature

At the time you are reading this article, the legislature will likely have just wrapped up its 2019 Organizational Session. This brief but critical session is when the legislature elects its leaders, adopts its rules, creates committees and sets the chairs and membership for all standing committees. These events, while somewhat ministerial, set the tone for the coming quadrennium and signal how the house and senate will go about their business.

This quadrennium starts with a great many new faces. In the senate, there are 12 new members (although some have served previously in the legislature) with an additional member who, while previously elected, has not served during a session day. The house has 28 new members.

In the house of representatives, Mac McCutcheon was re-elected speaker of the house. Speaker McCutcheon was first elected speaker in 2016 to fill out the last quadrennium and will now be starting his first full term in that office. He has been a member of the house since 2006, representing parts of Limestone and Madison counties and is a calming and steady force. Dr. Victor Gaston of Mobile was re-elected to a third term as speaker pro-tempore. Gaston has represented parts of Mobile County in the house since 1982.

In the senate, Del Marsh was re-elected to a third term as president pro-tempore. Marsh represents Calhoun and Talladega counties and has been a member of the senate since 1998. His organization and leadership have become mainstays in the senate. The past two years he has served as president of the senate in the absence of a lieutenant governor.

Demographics of the Legislature

The members of the legislature make a representative cross-section of the population with each senator representing approximately 135,000 persons and each representative one-third that many. Here is a breakdown of the membership by some key demographics:

PARTY

HOUSE:	Republicans:	77
	Democrats:	28
SENATE:	Republicans	27
	Democrats:	8

OCCUPATION

HOUSE:	Academics:	3
	Attorneys:	10
	Business:	28
	Government:	1
	Healthcare:	4
	Law Enforcement:	2
	Retired:	31
	Self-Employed:	26
SENATE:	Attorneys:	8
	Business:	1
	Government:	1
	Healthcare:	6
	Retired:	5
	Self-Employed:	14

GENDER

HOUSE:	Male:	87
	Female:	18
SENATE:	Male:	31
	Female:	4

Lawyers in the Legislature

One of the key demographics often asked about is how many lawyers there are in the legislature. The general perception is that the State House is "full of lawyers," however, the number has actually been shrinking. To start this quadrennium there are a total of 18 lawyers:

Senator Greg Albritton
District 22
(Baldwin, Clarke, Escambia, Monroe and Washington counties)

Senator Will Barfoot
District 25
(Crenshaw, Elmore and Montgomery counties)

Senator Sam Givhan
District 7
(Madison County)

Senator Arthur Orr
District 3
(Limestone, Madison and Morgan counties)

Senator Malika Sanders-Fortier
District 23
(Butler, Conecuh, Dallas, Lowndes, Marengo, Monroe, Perry and Wilcox counties)

Senator Rodger Smitherman
District 18
(Jefferson County)

Senator Cam Ward
District 14
(Bibb, Chilton and Shelby counties)

Senator Tom Whatley
District 27
(Lee, Russell and Tallapoosa counties)

Representative Prince Chestnut
District 67 (Dallas and Perry counties)

Representative Chris England
District 70
(Tuscaloosa County)

Representative David Faulkner
District 46
(Jefferson County)

Representative Matt Fridy
District 73
(Shelby County)

Representative Juandalynn Givan
District 60
(Jefferson County)

Representative Jim Hill
District 50
(St. Clair County)

Representative Mike Jones, Jr.
District 92 (Coffee, Covington and Escambia counties)

Representative Bill Poole
District 63
(Tuscaloosa County)

Representative Matt Simpson
District 96 (Baldwin and Mobile counties)

Representative Tim Wadsworth
District 14 (Winston, Walker and Jefferson counties)

(Continued from page 73)

Lawyers in Leadership Positions

Despite the relatively small number of lawyers, they do occupy many of the key roles. This is a reflection of the respect and influence these persons have both with their peers and all others in the legislative process.

HOUSE:

On the house side of the equation, Representative Mike Jones will again be Rules chair. Jones brought a focus for data and analytics to that position prior to the 2018 Session and will be starting his first full quadrennium in the spot.

Bill Poole will begin another quadrennium as chair of the Ways and Means Education Committee. Poole is well known for his methodical approach to the structure and funding of all levels of education in the state.

Jim Hill will continue his role as chair of the Judiciary Committee. The set of experiences he brings to that role as a retired circuit and district judge means there are very few issues that come before the committee that he has not seen from a practical standpoint.

Matt Fridy has been appointed chair of the Constitution, Campaign and Elections Committee which is the clearinghouse for numerous pieces of legislation affecting our constitution and democratic process.

Additionally, Chris England has been elected caucus chair of the House Democratic Caucus.

SENATE:

On the senate side, we start with Arthur Orr. Orr will be heading into his third quadrennium as a budget chair, chairing the Finance and Taxation, Education Committee. He has previously also served as chair on the general fund side so few legislators have the background and depth of knowledge he does of state finances and expenditures.

Greg Albritton has been appointed chair of the Finance and Taxation, General Fund Committee. Albritton brings a critical eye to state spending and an understanding from the bar on many critical aspects of that budget.

Cam Ward will continue in his role as chair of the Judiciary Committee for a third quadrennium. In this spot, Ward keeps one of the busiest standing committees of the legislature on track and organized.

Finally, Tom Whatley will serve another quadrennium as chair of the Agriculture, Conservation and Forestry Committee. This key committee plays an important role as agriculture is Alabama's largest industry.

The pieces are all set for what should be a very interesting and productive 2019 Regular Session and the start of a full quadrennium. ▲

Ed Patterson

One of the things that sets our profession apart from so many others is the generosity of past generations to the current. I have been exceedingly blessed in my life as a lawyer by great lawyers who have taken me under their wing over the years and offered so much more in the way of guidance than just technical help. No one exemplifies this spirit of giving more than Ed Patterson.

Ed has spent the bulk of his professional life giving true mean to the bar's motto "Lawyers Render Service." He has spent the last 20 years systematically changing the face and trajectory of the practice of law in our state. The creation and implementation of the Leadership Forum was a visionary course of action. The program not only improved the skill set and functioning of each person who came through, but prepared them to go forth and positively impact the community around them. This intentional and thoughtful approach caused the reach of the program to ripple through every part of the state. Ed gave a piece of himself to every lawyer who has passed through the program and asked them to go forth and be just as generous to those around them. ▲

–Othni Lathram

During an LF outing, Ed proves that he really does wear many hats as the state bar assistant executive director.

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