THE ALABAMA LAWYER

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On The Cover

The Court Square Fountain located on Dexter Avenue in Montgomery is illuminated in the national colors of France in a show of solidarity after the terrorist attacks in Paris on November 13, 2015. Shot taken with Canon 7D Mark II, ISO 100, F/20, 35mm, 15 second exposure

–Photo by Dolan L. Trout, *ASB director of information technology*

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415 Dexter Avenue
Montgomery, AL 36104
(334) 269-1515 • (800) 354-6154
FAX (334) 261-6310
www.alabar.org

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PRESIDENT'S PAGE

Lee H. Copeland

Pro Bono

Congratulations to our members for their generous spirit and support of pro bono events! Your efforts have not gone unnoticed. The American Bar Association recently released the winners of their 7th Annual National Celebration of Pro Bono awards. This year, we received the highest recognition for all three of our bar association levels. The Alabama State Bar was awarded *first place* for associations with 5,000+ members. The **Montgomery County Bar Association** was awarded *first place* for bar associations with members between 500 and 5,000 and the **Tuscaloosa Bar Association** was also awarded *first place* for bar associations under 500 members. You can't get much better than this!

Fred Gray

Civil Rights leader and Tuskegee attorney Fred Gray was recently honored as part of the 60th Anniversary of the Montgomery Bus Boycott. Fred, who is a past president of our organization, was recognized in December at the Dexter Avenue King Memorial Baptist Church. Speakers included Paulette Brown (president of the American Bar Association), Benjamin Crump (president of the National Bar Association), U.S. Representative Terri Sewell and former Secretary of State Hillary Clinton.

Fred was born in Montgomery on the appropriately named Hercules Street. Once he graduated from law school at age 24, he returned to Montgomery, where one of his first cases was representing Rosa Parks. Fred went on to have a long career filing dozens of lawsuits against the State of Alabama and its agencies to correct discriminatory practices. The recognition Fred received was well earned, and our bar likewise honors him.

Alabama Food Frenzy

In conjunction with the State Bar of Georgia and Georgia's Attorney General Sam Olens, the Alabama State Bar and Attorney General Luther Strange have agreed to be participants in the 2016 Alabama Legal Food Frenzy. More than 1.8 million Alabamians need some form of food assistance. Additionally, more than one in four children in Alabama comes from homes that experience food hardships. Once school is out, children who depend on access to breakfast and lunch at school no longer have that.

This spring, the Alabama State Bar, Attorney General Luther Strange and the Alabama Food Bank Association will launch the Alabama Legal Food Frenzy. The event will be held over a two-week period from April 25 through May 6. Law firms across the state will compete to see who can raise the most food and funds for each of Alabama's eight regional food banks. Beginning in March, your firm will have the opportunity to register. Please check out *http://allegalfoodfrenzy.org* for details and updates. It is hoped that this will accomplish two goals: at a time when the food banks traditionally run low, we can add to their inventories and help increase awareness of this growing problem.

Court Funding

Our bar is exploring ways to help our court system establish a long-term funding solution and has held meetings with members of the supreme court and the legislature about this. The goal is for the court system to have a mechanism that fully or partially funds costs, so that each year it does not have to fight and claw for the necessary monies to operate. We expect proposals to be coming in the next month.

Voting

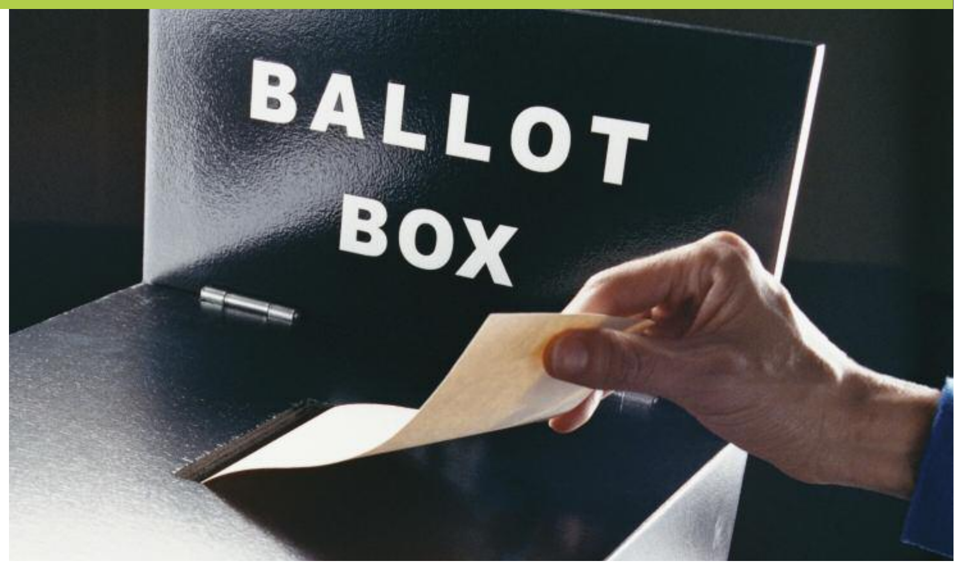
The Board of Bar Commissioners approved for an outside vendor to be hired to run and tabulate the annual elections of the bar. This outside independent firm will be in place by the next election cycle. It is envisioned that this company will send out the ballots for the presidential race, as well as the individual bar commissioner seats, and be responsible for calculating the results.

Annual Meeting

Remember to mark June 22-25 on your calendar for this year's annual meeting at Sandestin Baytowne Wharf in Destin. An array of exciting speakers has been lined up and I hope to see you there! ▲

EXECUTIVE DIRECTOR'S REPORT

Keith B. Norman
keith.norman@alabar.org



State Bar's Election Rules Improved and Streamlined

At its meeting this past November, the Board of Bar Commissioners amended the state bar's election rules that govern the election of president-elect and the commission. State bar **President Lee Copeland** appointed **President-elect Cole Portis**, **Commissioner Monet Gaines** and staff member **Justin Aday** to review the election rules, which were last amended in 2010, and recommend appropriate changes to update or streamline our election procedures.

Their recommendations, which were adopted by the commission, covered the following areas: 1) earlier deadline for president-elect nominations, 2) earlier time for publicizing president-elect candidates and campaigning, 3) restructuring of the Bar Election Supervision Committee and its scope of authority, 4) the length of the voting periods shortened and 5) a method to determine the winner in the event of a tie run-off election.

Earlier Deadline for President-Elect Nominations

The previous deadline for president-elect candidates to file their nominating petitions was 5:00 p.m. March 1. The deadline has now been moved to February 1. Petitions may be hand-delivered, mailed or emailed, but the candidate bears the responsibility to confirm its timely receipt by the state bar. (Petitions for commission races are still due the last Friday in April, but commission candidates now have the responsibility to verify they are timely filed.)

Earlier Time Frame for Publicizing President-Elect Candidates and Campaigning

Previously, candidates who qualified for office were announced in the May issue of *The Alabama Lawyer* and on the bar's website. Likewise, candidates could commence their campaigns on March 1. The new amendment requires that this information be published in the March issue of the magazine and included on the website as well so members have more time before the election period begins to consider the candidates. Bar members will also receive an email with each candidate's information. Campaigning for the office of president-elect can now begin February 1.

Bar Election Supervision Committee Restructured

Under the previous rules, the state bar Executive Committee supervised bar elections. The president will now appoint five bar members to serve in this capacity. Moreover, the committee's scope of authority has been streamlined.

Length of Voting Periods Shortened

Perhaps the most significant rule change has been shortening the length of voting to five days for both president-elect and commission elections and run-offs. Elections will now open on the third Monday in May and close at 5:00 p.m. on the Friday of that same week. Before the rule change, balloting remained open from the day the ballots became available (as soon as practicable after May 1) until the third Friday of May. When necessary, run-offs will now be held during the first week of June. Voting will begin on the first Monday in June and conclude at 5:00 p.m. on the Friday of that same week. The new rule not only shortens the voting period for elections and run-offs by at least two and a half weeks, but it also provides that an electronic balloting system be administered by an outside vendor. This last provision was adopted because there are now a number of providers who can administer elections more efficiently and cost-effectively than our current electronic balloting system, which was designed (more than a decade ago) and is administered by our staff.

Determining Winner in Event of Run-off Election Tie

If a tie occurred in a run-off election (either president-elect or commission), the previous rules were silent about how to break the tie. An amendment has been added to address this possibility.

These changes are effective and will be implemented for the 2016 election cycle. To read or download and print a complete copy of the election rules, please visit *https://www.alabar.org/assets/uploads/2014/08/Election-Rules-Master-Copy-10-30-2015.pdf*. ▲

Gregory H. Hawley
ghawley@joneshawley.com

NOTE FROM THE EDITOR

Honk if You Like the New Cover!

OK, it won't hurt our feelings if you didn't notice. Sometimes, though, guys need a new sport coat or women need a new dress, even if the old one still fits.

The same logic applies here. Your Editorial Board decided to make a change for 2016, updating the look of the cover and the regular columns featured in each issue. The old look was fine, but Margaret Murphy and I sought a fresh one to go with this new year. Of course, we collaborated with Noelle Buchannon of The Finklea Group, Inc. (*www.taplink.com*), who has used her creativity and design expertise on every issue for almost 25 years.

Noelle, Margaret and I gave the Editorial Board three different styles from which to choose a new design. The board overwhelmingly chose the cover that you now have in your hands. Please thank your local Editorial Board member for his or her stylish good taste!

While I have your attention, please know that we are interested in receiving articles from you. (Submission requirements are included in every issue.) Feel free to contact me or anyone on the Editorial Board if you have questions, ideas or thoughts about articles that you would like to submit to *The Alabama Lawyer*.

ARTICLE SUBMISSION REQUIREMENTS

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

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

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

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

The Best "Buy-Sell" For Your Firm

By Daniel E. Drennen, II

An ownership interest in your law firm is often the single largest asset of your estate. It usually provides the majority of income and support for your family. Understanding, realizing, developing and implementing a succession plan for the law firm is critical to your and your family's continued well-being. This is because a law firm can transition expectedly or unexpectedly through death, disability or retirement. Accordingly, it is important to plot a course toward protecting your business and minimizing the impact a change in ownership could have on those who most depend on the firm.

…it is important to ***plot a course*** *toward protecting your business and minimizing the impact a change in ownership could have on those who most depend on the firm.*

Proper planning addresses a number of concerns, such as:

1. What is the *liquidation value of the business* in the event it has to be sold under less than favorable circumstances? What value can be realized in the event of a forced sale?

2. What are the *short- and long-term financial impacts on your family?* How will your family survive without the income? How will the family continue to maintain its standard of living?

3. What is the *short-term impact on the business?* Can the business meet its short- and long-term cash needs? Can the business even survive?

4. What is the *long-term impact on the business?* Can the business be transferred to a successor without negatively impacting business operations and employees? Will the transferring shareholder realize full value for the transfer?

These questions illustrate the critical need for the owner(s) of a firm to plan properly before life-changing events occur. A buy-sell arrangement, funded with life insurance and/or disability-income insurance, can be just the tool to put this plan into action, with the help of your tax and your financial-services advisors.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Problems for The Surviving Owners

The deceased owner's heirs may:

- Insist upon an active role in management–whether or not they have the capability or compatibility to manage.
- Insist on dividends being paid, which may cause double taxation and impairment of the firm's ability to expand.
- Threaten to, or actually sell to "outsiders."
- Call for liquidation if they can't get their way–resulting in the loss of jobs as well as the loss of income-building and wealth-building opportunities for the surviving owners.

Employees may:

- Feel insecure and their morale may sag, along with their productivity.
- Resign–further crippling the firm, causing costly replacement problems.

Creditors may:

- Tighten up on credit because of the firm's weakened and uncertain condition.

Without a buy-sell agreement:

- Heirs are left with an asset of real value that has no guaranteed market, that they may be forced to sell at a distressed price.
- Heirs have lost the deceased owner's salary, but will receive no income to replace it.
- Heirs may encounter delays in administration of the estate caused by attempts to sell the business.

Protect Your Business and Family

These undesirable consequences can be minimized through the use of a buy-sell agreement. A buy-sell agreement is a legally binding contract that requires one party to sell and another party to buy a particular ownership interest in a business in the event of the death, disability or retirement of an owner. These agreements may be used by any type of business entity: sole proprietor, corporation, partnership, limited liability company (LLC), etc. Under this arrangement, when an owner dies, the agreement will assure the prompt and orderly sale of his or her interest in the business. This benefits the deceased owner's family and heirs, and the surviving owners of the business.

Two Preferred Types of Buy-Sell Agreements for Law Firms with Two or More Owners

1. Entity Plan

An entity-purchase buy-sell agreement is a legal agreement between a business entity and its owners. To illustrate how it works, assume a business is owned equally by A and B. They each enter into an agreement with the business for the sale and purchase of their respective interests. Typically, the agreement is binding in that it obligates both A and B, and their estates, to sell, and the business to buy, upon the death, disability or retirement of either one of them.

Entity plan funded with life insurance

The business entity procures a life insurance policy on each owner. The business is the owner, beneficiary and premium payor of each policy. Upon the death of an owner, the proceeds are received by the business. The business then uses the funds to purchase the interest of the deceased owner. The value of the remaining ownership interests is increased by the percentage amount of the purchase price. If the business is a corporation, the plan is generally known as a stock-redemption agreement. In a partnership context, the plan is called a liquidation of interest.

Advantages of entity plan

Generally, only one life insurance policy per owner is needed to fund an entity plan. The business is responsible for the premium, thus removing the burden of premium payment from the owners. Upon the death of an owner, the value of the interests held by the remaining owners is increased by the purchase price. Policy proceeds are received income-tax free by the business.

2. Trusteed Cross-Purchase Plan

A trusteed cross-purchase plan is a legal agreement between a third party (the trustee) and the business owners that provides for the planned disposition of their ownership interests in the event of a death, disability or retirement. The trustee acts to carry out their obligations.

Trusteed cross-purchase plan funded with life insurance

An impartial third party is appointed and acts as custodian of the insurance policies. To guarantee the continued existence of the third party, a corporate trustee may be selected. Typically, the trustee should be the owner and beneficiary of the policy. The agreement may provide that the trustee collects the premiums from the insureds. Upon the death of a business owner, the trustee collects the death benefit and distributes the proceeds to the deceased business owner's estate in exchange for the ownership interest.

Advantages of using a trusteed cross-purchase plan

An impartial third party is used to oversee the agreement. If a funding problem arises with one of the owners, the trustee can notify the remaining owners to alert them of the situation. The policy proceeds are received tax-free by the trustee. Pursuant to the agreement, he or she distributes the proceeds from the insurance policy to the decedent's estate in exchange for the ownership interest. A well-designed plan will guarantee that the business owner's family will receive a fair price for the ownership interest.

A well-designed plan will guarantee that the business owner's family will receive a fair price for the ownership interest.

Advantages of life insurance

Life insurance can be beneficial in funding a buy-sell agreement, as it provides the business with the funds when needed. The amount of the premiums paid is normally far below the purchase price, as the cumulative premiums are generally a small percentage of the total death benefit. The benefit is paid on the death of a business owner and, if structured properly, is equal to the amount required under the agreement. A variety of insurance products exists to match the owner's and firm's needs.

Life-insurance funding

Insurance owned by a corporation to fund a stock-redemption plan is not directly included in the insured stockholder's estate. In the absence of a binding buy-sell price, the proceeds will be considered in the valuation of the business and will increase the estate-tax value of the decedent's interest. Buy-sell agreements usually exclude life insurance in the buy-sell price, or reflect only the cash values, so this is not an issue.

3. Factors to Consider: Entity Redemption v. Cross-Purchase

a) Death of a Partner or LLC Member Dissolves the Entity

The death (or bankruptcy or expulsion) of any owner causes a technical dissolution of a partnership. Under Alabama law, this technical dissolution also occurs with an LLC. The remaining owners must wind up the business, collect accounts receivable, pay debts and liabilities and distribute cash and assets to the surviving owners and the decedent's estate. Dissolution can be avoided by providing that the surviving owners will continue the partnership or LLC, the decedent's estate is entitled to an accounting and distribution and the decedent's estate is not bound to continue as an owner.

b) Number of Insurance Policies

Only one life insurance policy per insured is needed with an entity plan, whereas multiple policies per insured are needed with a traditional cross-purchase plan.

c) Ages and Ownership Interests of the Insureds

Often there are differences in ages, insurability and proportionate interests. An entity plan tends to even out these differences since the premiums come out of the single partnership or LLC pot.

d) Partnership/LLC Income Taxed to the Decedent

In entity plans, the purchase price allocable to unrealized receivables and substantially appreciated inventory may be taxable as ordinary income, as well as payments for unstated goodwill.

COLI

Tax-deferred growth, tax-free death benefits and a wide range of investment options make corporate-owned life insurance (COLI) a compelling alternative to improve your firm's financial position. Benefit liability financing can also help you deliver on promises made to employees and enable your firm to provide competitive benefit programs. Utilizing life insurance may offer cost-recovery solutions and provide:

- a tax-efficient tool used to offset employee-retirement-program and employee-benefit-program liabilities
- an asset on your balance sheet
- an efficient tool for asset-and-liability management that can positively impact overall financials.

Corporate-owned life insurance (COLI) is an attractive investment alternative for buy-sell funding and nonqualified benefits because it allows the corporation to accumulate an asset, in the form of cash value, on a tax-deferred basis. The use of COLI provides a tax-free return through death-benefit proceeds.

Insurance-funding solutions afford the corporation the opportunity to recover all costs associated with a program, including lost earnings on the premium deposits. Cash value may be accessible via withdrawals of cumulative premium to basis and policy loans. As long as the loans are repaid through the tax-free death-benefit proceeds, no income tax is due on the distributions.

Plans may book the cash value to offset the accrued liability and pay distributions from the corporation's

The use of COLI provides a tax-free return through death-benefit proceeds.

current cash, recouping the cost through the tax-free death-benefit proceeds. By utilizing variable life insurance products, firms can establish programs that allow the investment performance of the funding to closely match the investment allocation selected by participants. The participants' investment choices can mirror the returns of the funds offered within the variable products.

Since the cash values are not subject to taxation during the accumulation period, the corporation does not need to pay the income-tax costs incurred with mutual funds. The full gain remains within the asset, and enjoys the benefits of tax-deferred growth and/or compound returns. Therefore, the corporation achieves improved after-tax results.

The corporation pays non-deductible premiums, receives tax-deferred cash-value accumulation and tax-free death-benefit proceeds and is able to book an asset to offset the account-balance liability.

Much has been written about COLI recently, and Congress has affirmed that COLI is a useful asset. Over the last 10 years, rules have changed with regard to insurability of the insured, how many people may be covered on a percentage basis and how these policies are taxed depending on the benefits the employer offers the employee as part of the coverage.

With COLI, the corporation is the owner, payor and beneficiary of a life insurance policy on a key employee. The premium is paid with after-tax money, but the cash usually grows tax deferred and the company will ultimately recognize tax-free death proceeds. The life insurance is usually valued at its cash surrender value, which is advantageous over normal pay-as-you-go or mutual-fund funding.

Policies are purchased by a corporation in conjunction with the implementation of a SERP (supplemental executive benefit plan), or to help recover or finance the benefit costs of their existing welfare-benefit programs. These policies are an asset of the corporation and can be very useful in funding these benefit plans over the life of the insured employee.

Unlike individual policies where the cash surrender value is low in the first year, the cash surrender value of COLI policies is usually close to the initial premium or may even exceed it based upon the crediting rate of interest in the first year. Underwriting is limited and there are even guaranteed-issue policies (depending on the number of insureds).

Insurance companies now hold COLI in their investment portfolios because it creates three advantages:

1) favorable impact to risk-based capital, 2) favorable tax treatment and 3) the ability to reposition balance-sheet assets.

There are two types of COLI policies: general account and separate account. A general-account policy invests in the general assets of the insurance company, and credits a fixed rate of return based upon the overall portfolio of the insurance company. Current general-account rates of return average between three to four percent. General-account policies are usually subject to the claims of creditors in the event of bankruptcy. A separate-account policy is not subject to the claims of creditors and usually offers dozens of investment choices in a number of asset classes with several money managers.

The risk-based capital treatment afforded COLI depends on the rating agency and whether the COLI is a general-account or separate-account policy. Insurance-rating agencies place a COLI policy in the same classification as a top-rated bond, regardless of whether it is a separate-account or general-account policy. It gets the same rating as the insurance company that issues the COLI, even if the separate account is used and policy assets are invested in equities.

Standard and Poor rates general-account COLI similar to a highly rated bond of a 10-year duration. For separate-account COLI, one "looks through" to the actual investments selected. When investing in COLI, some insurance companies move their more highly-rated equities into COLI to significantly change their risk-based-capital and tax status. Others seek to duplicate the current debt-to-equity ratio of their existing portfolio.

COLI earnings are not taxed unless the policy is surrendered. They are, however, recognized as income on the income statement of the owner.

COLI affords the opportunity to favorably reposition assets on the balance sheet. There are classes of assets that are treated with more risk assessment than equities. These include any hedging investment strategies, but insurance companies prefer to keep hedging assets to a minimum. The legal justification for this type of COLI transaction, insuring a company's key people, is IRC Sec. 101(j), which was created by the Pension Protection Act of 2006. ▲

Endnote

1. The author thanks Jacqueline Ellisor Wiggins, JD, LLM, CLU, ChFC, Kathryn Wakefield, JD, LLM, CLU, ChFC and Cynthia Brodeur, CLW, advanced sales consultant, for their invaluable constant assistance in buy-sell-agreement life insurance funding, and Jack Burke, senior intern, for editorial assistance.

Daniel E. Drennen, II

Daniel E. Drennen, II of Birmingham graduated from Washington & Lee University, Cumberland Law School and Emory School of Law. He has been a member of the Alabama State Bar since 1980. Drennen practiced law in Mobile and Birmingham, and has been an investment banker for 10 years and an insurance executive for 11 years.

Small Firms Poised to Thrive in Today's Legal Market

By Prof. Pamela Bucy Pierson and Emily Kornegay Price

This article is dedicated to the memory of our good friend, Tedford Taylor, who saw the future of the legal profession and knew it was good.

Pyramids, Diamonds And Starfish

Today's legal profession is undergoing dramatic changes. Attorneys who understand these changes and adapt to them will thrive. Those who do not will struggle. The changing legal market presents opportunities for all law firms. This article focuses on the opportunities uniquely presented to small and solo practices. While there will always be a need for large law firms and the work of the many excellent attorneys at such firms, the legal profession today presents unprecedented opportunities for small and solo firms.

The "Cravath" business model dominated American law firms from the late 1800s until the 21st century. Under the "Cravath" model, named for Paul Cravath, a New York attorney, a law firm sought to hire the best new lawyers it could, train its new hires in the firm's culture, promote from within and reward its associates with the "golden key" to partner status after associates had proven themselves. Clients were loyal to a firm, remaining with a firm as partners passed their clients on to the associates who became partners. Under the Cravath model, partners' billing rates were roughly the same and partners shared equally in the firm's profits. The Cravath business model resembled a pyramid, where new associates were plentiful and partnership positions less so.

Today, the successful business model of law offices is a starfish, with a small group of equity partners in the center of the starfish, and "arms" of the starfish consisting of associates and contract lawyers, of counsel and non-equity partners, outsourced legal and support service, administrative staff and paralegals and affiliate law firms.

Beginning in the 1980s and 1990s, several factors contributed to the erosion of the pyramid business model. Businesses began growing their in-house counsel offices and keeping more work in house. Clients became more cost-conscious. Because of available metrics, clients could compare law firms' billing rates, expenses, resolution outcomes and time-to-resolution and, accordingly, began shopping around among law firms for the best value. Some practice areas became commoditized, leading to inequities in the profitability of lawyers and practice groups within a firm.

In response to these market realities, law firms created multiple tiers of staffing: equity partners, non-equity partners, of counsel, senior associate, associate, contract lawyer. The stability of the Cravath model gave way to the diamond business model with a small group of equity partners at the top, a small group of associates at the bottom and a greater number of lawyers, of multiple staff designations, in the middle.

Today, the successful business model of law offices is a starfish, with a small group of equity partners in the center of the starfish, and "arms" of the starfish consisting of associates and contract lawyers, of counsel and non-equity partners, outsourced legal and support service, administrative staff and paralegals and affiliate law firms. The starfish model is apt. A starfish grows back an arm if it loses it. If a law firm no longer needs an "arm" of services, it "sheds" that arm, only to "grow" it again when the firm needs these services. Unlike the pyramid or diamond business model, the starfish business model is lean and nimble. Such versatility is essential in the legal market of today and the future.

There are at least three reasons small and solo practices are poised to thrive in a starfish business model: technology, cost savings and the advent of multiple support services. After reviewing why this is so, this article addresses the startup checklist for any budding small or solo firm and highlights resources available.

Technology

With the advent of electronic storage, e-discovery, social media platforms and "back office" support services, technology makes it possible for small and solo practices to handle large and complex cases that previously and exclusively were the domain of large firms. Utilizing cloud-based storage and document-sharing, a firm can accomplish complex tasks by hiring remote contract lawyers, creating work-sharing arrangements with other firms and outsourcing document analysis. When a task is complete, a small firm can pivot to the next case, unencumbered by overhead expenses and salaried support staff. Technology enables small and solo firms to embrace the starfish business model. As noted by Oscar M. Price, IV, who recently opened his practice, Price Armstrong LLC:

> "If you take the time on the front end to set up the technology for your firm, you don't need a lot of staff, a big office space with a lot of conference rooms or a library full of books. It is easier than it's ever been to go out on your own, be very professional and do a very good job for your client."[1]

Cost Savings

Clients increasingly shop around for the best value in legal services. They need to do so and are able to because of cost and efficiency metrics allowing them to compare law firms on billing rates, expenses, case resolutions and time-to-resolution. Small firms can excel in such comparisons. Whereas larger firms are often locked into high overhead costs resulting from expensive office space, payroll, unprofitable practice groups and lawyer salary structures, small firms can support complex cases with lower overhead cost and their greater ability to "ramp up and ramp down" depending on case load.

Clients can, and are, replacing large firms where attorneys charge a high billable hour rate with smaller firms where attorneys can deliver high quality service for a fraction of such rates. Eric Kobrick, deputy general counsel for American International Group (AIG), Inc., for example, spoke of small firms' rate flexibility when discussing AIG's decision to leave large firms for smaller firms: "Small firms, in general, are more flexible. They're able to use rate flexibility, and still provide excellent service."[2] *Corporate Counsel*, a publication by and for corporate counsel, reported on the trend of retaining smaller firms, noting that corporate counsel had "come to think that they were throwing money away by sending all their work to big firms."[3]

Support Resources

The advent of available support resources allows small and solo firms to compete as never before. Access to the Internet and free case law databases like Casemaker allow even the smallest firm to conduct sophisticated and in-depth research that previously could be done only by large law offices with their unlimited budgets for Westlaw or Lexis and armies of associates. Social media platforms allow firms of any size to create sophisticated websites and reach out to potential clients nationwide. With such access, a savvy solo practitioner can market herself as effectively as the largest law firm.

Today, production and analysis of metadata is a best practice in many cases. The need for such production has led to the growth of specialty firms with sophisticated predictive analysis programs that perform document analysis faster, cheaper, more accurately and safer than humans can possibly provide.[4] The growth of such firms has, in effect, made it possible for small law firms to handle complex cases they never could have handled in the past. The ability to outsource document analysis allows law firms of almost any size to take on complex cases that previously were beyond their manpower bandwidth.

The Alabama State Bar, through its Practice Management Assistance Program (PMAP) and its director, Laura Calloway, provides innumerable resources to help small firms and solo practitioners on topics including setting up a law firm, managing a practice, establishing fees, avoiding conflicts of interest and budgeting, as well as recommended resources (often with discounts negotiated for ASB members).[5] In 2015, the Alabama State Bar created the Solo & Small Firm Section. The section's listserve provides the mentoring and guidance of the equivalent of a virtual statewide law firm as lawyers consult with each other (almost in real-time!) on issues of law and office management.

Listed below are 10 topics that should be on every budding small and solo firm's startup checklist.

Law Firm Start-Up Check List

1. Establish a Clear Vision

A firm needs a clear, concise mission statement as well as a core services statement, a target market plan and a "firm ambiance" statement.[6] Focusing a firm's practice aids in securing capital, creating effective marketing and developing referral relationships. Firms should resist the temptation to deviate from the firm vision. While it may be tempting to welcome any and all work in a practice's uncertain early days, maintaining a clear vision will provide the bedrock for establishing a successful practice.

Law practice management experts[7] note that "a successful business should be planned out on paper well before" a firm opens its doors, as it is a firm's "roadmap to the future," and informs the bank that a practitioner is adequately prepared to launch and establish a law practice.[8] A law firm business plan should be a "concise and organized summary" of a firm's mission and strategy and include "a general description of your business, your financial plan, your management plan and your marketing plan."[9] To assist in formatting a business plan, the state bar's PMAP provides a "Lawyer's Guide to Creating a Business Plan" which includes a step-by-step software package and innumerable resources in the program's lending library.

2. Select a Firm Name and Corporate Model

Of course, a firm needs a name–but what letters to follow the name? A law firm may simply obtain a federal "employer identification number" (EIN) and exist as a solo practice. While "no entity form shields a lawyer from personal liability for his or her own professional negligence or that of lawyers he or she immediately supervises, [the corporate organization] affords some level of protection against the vicarious liability for the professional negligence of other lawyers in the firm…"[10] To obtain this protection, one must determine how best to incorporate.

In Alabama, a law firm may exist as: (1) a professional corporation ("PC"), (2) a limited liability corporation ("LLC"), (3) a limited partnership ("LLP") or (4) a limited liability limited partnership (LLLP"). The professional corporation model was the first corporate model available to law firms, and, accordingly, traditionally the most popular.[11] While a PC allows some tax savings on payroll taxation and funding retirement programs, it requires management of compensation flow that may become cumbersome and difficult in a small and growing entity.[12] Moreover, a PC can pose issues as a firm evolves, including arduous stock redemption procedures necessary to transition lawyers to and from shareholder status, compensation that generally must be tied to ownership rather than performance and complex corporate formalities that must be observed.[13]

By contrast, while LLCs and LLPs lack some tax benefits (*i.e.*, regarding payroll taxes and funding of pension benefits), these benefits often are of limited applicability[14] and, because LLCs and LLPs provide flexibility in the financial management of a law firm and movement of lawyers within it, these business structures are viewed as preferable to PCs.[15] However, if a firm is already in a PC, it likely will want to remain a PC since conversion to another structure could generate tax liability.[16] Historically, there were differences between the LLC and LLPs structures involving personal liability protections, but partial-shield LLP statutes have fallen from favor, and now most states, including Alabama, afford LLCs and LLPs the same tax characteristics and personal liability protections.[17]

Unless business and tax law are your areas of expertise, it is wise to consult with an accountant or tax attorney to determine which corporate model will best fit your situation. Issues to be addressed include determining rights of survivorship among partners, compensation issues and structure, methods and procedures for moving partners in and out of the organization, personal liability and insurance coverage needed in the event of death of one partner that allows other partners to "buy out" the deceased partner's share in the firm. To adequately assess these challenges, a good accountant, while an expense, should be a necessary part of your start-up costs.

3. Secure Capital and Create IOLTA Account

Unless you intend to start with an established, income-generating book of business, you likely will need to secure capital. Rule 5.4(d) of the *Alabama Rules of Professional Conduct* prohibits an outside investor from investing in a law firm. Accordingly, unless you have saved sufficient funds to pay overhead costs and case expenses, you likely will need to approach a bank for either a loan or a line of credit. Good preparation for this meeting is essential. You will need a clear mission statement and a business plan in which you describe your projected overhead costs, expected income streams and multi-stage goals (one-, two- and five-year projections).

Rule 1.15 of *the Alabama Rules of Professional Conduct* requires that a lawyer maintain an attorney trust account to hold any money received on behalf of a client or third party in connection with legal representation. Examples of such funds include earnest money deposits, down payments for loan closings, settlement proceeds or damage awards that have not yet been divided and distributed between the lawyer and client or advance payment for legal fees not yet earned.[18] The account must be held by an "eligible institution," which Rule 1.15 defines as a bank or savings and loan association whose deposits are insured by the federal government or an open-end investment company registered by the Securities & Exchange Commission.

Rule 1.15 also requires that all attorneys establish and maintain an IOLTA account. An IOLTA account is an interest- or dividend-bearing trust account used to deposit short-term funds for clients or third persons. The interest or dividend proceeds benefit the Alabama Law Foundation or the Alabama Civil Justice Foundation. An attorney may elect to create a separate trust account for a client for whom he is holding a significant sum, and in that instance, the client is entitled to the interest proceeds; however, all attorneys are required to maintain an IOLTA account and certify yearly its maintenance to the Alabama State Bar. For more information, see the article on the topic at *www.alabar.org/assets/uploads/2014/08/BP-PMAP-AMB-TAH.pdf.*

4. Procure Health and Malpractice Insurance

The notion of abandoning the insurance benefits portion of a compensation package unnerves many potential small/solo practitioners. With a little effort, however, obtaining health, disability and malpractice insurance on the open market can be easily and cost-efficiently accomplished.

To gain a general idea of the health insurance coverage available and possible costs, first go to *www.healthcare. gov*. The Alabama State Bar also suggests contacting independent insurance broker Insurance Specialists, Inc. (doing business as ISI Alabama). While the state bar does not offer a group health insurance policy for small firms or solo practitioners, ISI Alabama can procure individual policies, a firm group plan and discount prescription cards. Additionally, ISI Alabama offers accident and disability insurance, including accidental death and dismemberment coverage, guaranteed issue comprehensive accident coverage, long-term disability insurance and business overhead expense disability coverage–all through Prudential Financial, Inc. ISI Alabama also offers, through Voya Financial, association life insurance plans, an option a small firm must consider in case of the unexpected loss of firm member. See ISI Alabama's website, *www.isi1959.com*, as well as *www.alabar.org/membership/member-benefits* for more information.

While an attorney is not required to carry malpractice insurance, it is, of course, a best practice to do so. ISI Alabama offers brokerage of professional liability insurance and has an application on their website (*www.isi1959.com*). In addition, the ASB does not endorse a specific professional liability carrier, but it does provide a list of professional liability carriers at *www.alabar.org/programs-departments/practice-management-assistance-program-pmap/professional-liability-insurance.*

Technology is a powerful tool for firms that seek to achieve greater efficiency while providing quality representation.

5. Determine Where to Invest Resources

As with any startup business, you will need to determine how to best allocate limited resources as you establish and grow your practice. This step may require asking hard questions, and forgoing the "trappings" that larger firms enjoy. For example, an automated telephone system, while less personal, is far less expensive than a receptionist–and just as effective at recording messages. Or, one may opt for a virtual phone system such as Ruby®Receptionists, which provides a "bright, friendly team of live virtual receptionists [with] top-notch service at a fraction of the cost of an on-site receptionist."[19] Likewise, making a habit of reviewing documents on a computer screen, rather than printing them, will save in printing costs. Maintaining case files digitally, rather than in paper form, will also save printing costs, as well as the cost of space to house them.

Technology is a powerful tool for firms that seek to achieve greater efficiency while providing quality representation. Investing in excellent technology, while a significant initial expense, can enable a firm to elevate itself and broaden its work capabilities without committing to the long-term expense of additional support staff. Moreover, good technology is essential for a small firm to protect its data and client information. Rule 1.6(a) of the *Alabama Rules of Professional Conduct* prohibits a lawyer from revealing "information relating to representation of a client," and it is now commonly accepted that this duty applies to digital information as well.[20] Law practice management software program *Clio*, and others like it, provide data protection from online threats such as hackers, as well as data encryption–all within cloud-based storage that eliminates the need for a space-eating server and the staff required to maintain it.

Best practices for secure cloud use include: encrypting files before they are loaded into the cloud (and encrypting emails that refer to cloud-stored documents); terminating access to cloud storage documents once an individual no longer needs access; obtaining (and reviewing) periodic reports (from your cloud company) who has accessed your data; avoiding convenience tools that compromise security (such as limiting transfer ability from cloud to device); logging off when finishing a cloud project (rather than simply exiting); not selecting "remember me" on your devices; considering two factor authentication protocols (password plus use restricted to a particular device) or biometric access (password plus fingerprint, voice or facial recognition or eye scan).[21]

The Practice Management Assistance Program provides other helpful tips to consider when drafting a law firm budget at *www.alabar.org/assets/uploads/2014/08/Budgeting-Tips-for-Small-Firms.pdf*.

6. Build a Website and Create a Web Presence

The Internet and social media can be a great equalizer for the small firm. A well-designed website and a smartly executed social media marketing plan that connects your webpage with Facebook and Twitter accounts can elevate your firm well beyond its small/solo status. Of course, an aesthetically pleasing, easy-to-navigate website can be expensive to build and maintain. Fortunately there are alternative ways to build a site. If you are able to invest the time, *Rapid Weaver* is an excellent program to build and maintain a professional-looking website for a fraction of the cost of hiring a web developer. If time or tech-savviness prohibits this option, consider hiring a law student with a web development background to build a site. Law schools are full of such talent, and law students, working part-time while in school, can be a bargain for a firm. Once your website and social media platforms are established, update them as a part of your daily routine to keep your content fresh and your firm high on the Google results page.

A well-designed website and a smartly executed social media marketing plan that connects your webpage with Facebook and Twitter accounts can elevate your firm well beyond its small/solo status.

7. Utilize Practice Management Tools

As a small/solo practitioner, you need the right tools to manage your practice, including email, billing and accounting software, document storage and document hosting (depending on your practice)–and all of these tools need to integrate with each other. *Google Mail* is a good email platform that allows you to use your firm name as domain name, if available. *Clio* is an excellent general practice management program with tools for file organization, timekeeping, billing, data security and encryption, productivity reports and more. *Quickbooks* aids with accounting and tracking expenses. *Dropbox* is a free or inexpensive (depending on upgrades) program that allows you to store, edit and share documents within members of the firm. The ASB Practice Management Assistance Program provides a listing and summary of features for software available for all of these needs.[22]

One potential expense to consider is document hosting. If your practice includes the production, storage and review of large numbers of documents, you will need to subscribe to a web-based document-hosting platform. *Logikull* is a good choice and offers free trials and several subscription options. *Logikull*, and services like it, allow small and solo firms to store, produce, search and review documents with speed and ease, minus the expensive manpower required by larger firms. Document hosting and production services can be expensive, but prove less costly in the long term than the additional associates, staff or space a practice would otherwise require to review, organize and house discovery documents.

Whatever software your firm chooses, take the time to become proficient at using it. A comfort level with technology tools is a must–practically, and ethically.

Alabama Rule of Professional Responsibility 1.15 regarding client files pertains to electronic retention, storage and protection of client files. Ethics Opinion 2010-02 notes that when paper files are converted to electronic format, some paper documents ("intrinsically valuable property") cannot be destroyed; all records maintained electronically "must be secured and reasonable measures must be in place to protect the confidentiality, security and integrity of the document[s]," including necessary "installation of firewalls and intrusion detection software," and all electronically stored files must be backed up "onto another computer or media that can be accessed to restore data in case the lawyer's computer crashes, the file is corrupted, or … office damaged or destroyed."[23]

8. Develop Affiliation, Work-Sharing And Referral Relationships

Today, small law firms can handle large complex cases by working with other firms. Such firm affiliations are a key component of the starfish business model. Affiliate arrangements allow firms to come together to complete larger tasks, but remain nimble and pivot to something else when those tasks are complete. Consider hosting an open house to introduce local colleagues to your firm and its mission. Develop relationships with other lawyers who practice in areas similar or complementary to your firm's target area to build symbiotic referral and work-sharing arrangements. Join sections of the state bar relevant to your firm's practice, and participate in the section's activities. The Alabama State Bar established the Solo & Small Firm Section to facilitate statewide networking for members of small firms, to provide a forum to address problems and opportunities specific to small and solo practitioners and to promote participation in state bar activities by small firm attorneys. The section offers low-cost continuing education courses and technology training, an email discussion list and other networking opportunities and a bank of law forms.[24]

9. Optimize the Flexibility Small Firms Provide to Change with the Market

Small firms make it easier for law firms to transition to remain competitive. Sam Crosby, a founding partner of Stone, Granade & Crosby PC of Daphne, and Alabama State Bar president in 2007-2008, explains how his firm, now with 13 attorneys in three offices, used to practice in oil and gas law (and now does "zero" such law) and transitioned to other practices as needs arose–into plaintiffs' workers' compensation and automobile accident representation, real estate development, residential bankruptcy and, now, economic development and litigation and probate and business litigation. As practice areas dry up, lawyers need to remake themselves and their firms. Crosby explains:

> "Without question it is important to be able to remake yourself as a lawyer, be competitive in the marketplace, and also provide value. It's advantageous to be in a small firm and be able to make the changes needed to meet the needs of the public and your community. It is harder to turn the Queen Mary than a small boat."[25]

10. Let Your Priorities in Life Guide Your Practice

A small or solo practice allows lawyers more control over their lives. Lawyers in small firms can decide whether to take on one case versus another, cut back on the workload, ramp up the workload, who they will work with, how much they want to spend on overhead and how they will spend their time. Nicholas W. Armstrong explained his decision and that of his partner to open their own firm:

> "Starting your own firm involves a lot of risk. You work a lot of hours. But you don't have as much stress. You're in charge and it's less frustrating when you're the one who's wrong rather than someone else who's wrong. Setting up our own practice allows us to prioritize our family life. We get our work done, and we do it well, and that requires a high level of commitment. But it also means that if my kid is sick, I can take care of my kid. That is one of the reasons we made this choice to work for ourselves and set up our firm the way we did."[26]

Conclusion

Today's legal market is in a state of creative destruction. It creates opportunities for those lawyers who understand the changes afoot and adapt to them. It creates peril for those who do not. This article has focused on the advantages today's fluid legal profession brings to small and solo practices. Because they are small and nimble, such firms are able to respond quickly to changes in workload and trends in the legal market. This is an asset. Regardless of the type or size of law office in which one practices, however, one thing has not changed about the practice of law and never will. The late Tedford Taylor said it well:

> "When people come to me they have a problem. It's bigger than they can fix. It's probably bigger than anything they've dealt with. Sometimes they're simple problems but the idea that I can take that problem and resolve it is what makes me feel good about what I do."[27]

Endnotes

1. See Oscar M. Price IV, BBL Interview Video Library, *http://www.law.ua.edu/BBLvideos*.
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3. *Id*.
4. A. Clay Rankin, III, *What Every Litigator Needs to Know About using Web-Based Electronic Document Review Services*, 75 The Alabama Lawyer 36 (2014).
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6. *See* www.alabar.org/assets/uploads/2014/08/New-Office-Checklist.pdf.
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22. *https://www.alabar.org/programs-departments/practice-management-assistance-program-pmap/*.
23. Alabama State Bar, Office of General Counsel, Ethics Opinion 2010-02 *https://www.alabar.org/resources/opinions/2010-02/*.
24. See *www.alabar.org/membership/sections/*.
25. See Samuel N. Crosby, BBL Interview Video Library, *http://www.law.ua.edu/BBLvideos*.
26. See Nicholas W. Armstrong, BBL Interview Video Library, *http://www.law.ua.edu/BBLvideos*.
27. See Tedford Taylor, BBL Interview Video Library, *http://www.law.ua.edu/BBLvideos*.

Prof. Pamela Bucy Pierson

Pamela Bucy Pierson is the Bainbridge Mims Professor of Law, University of Alabama School of Law. Portions of this article are based upon her book, The Business of Being a Lawyer *(West Academic 2014).*

Emily Kornegay Price

Emily Kornegay Price practices with Price Armstrong LLC in Birmingham. Prior to joining Price Armstrong, she clerked for the Honorable Abdul K. Kallon and practiced in general civil defense litigation.

Eating an ELEPHANT

By Jason S. Isbell and Jeremy S. Walker

Introduction

"When eating an elephant," the saying goes, "take one bite at a time." Historically, Alabama law has granted to numerous interested parties the right to redeem certain pieces of sold real estate within one year from the date of the sale.[1] Parties with such rights under Alabama law range from the devisee of a debtor to the transferee of a judgment creditor. In recent years, professional trade associations such as the Alabama Bankers Association ("ABA") and the Alabama Association of Realtors ("AAR") unsuccessfully lobbied the Alabama Legislature to reduce this redemption period. Eating the entire elephant was unworkable.

Driven by industry data, and at the urging of the ABA and the AAR, the 2015 session of the Alabama legislature "took one bite" by overwhelmingly supporting a measure that halved the redemption period for properties meeting a specific, narrow definition. This measure, now Act 2015-79, also added a notification requirement to the redemption law for the mortgagee who forecloses on property fitting this definition. To prepare practitioners for these changes, which became effective on January 1, this article provides historical background into how the final legislative product was crafted, discusses the data used to drive the legislative debate, includes a practical discussion of the new law's requirements and gives several policy justifications for how reducing the redemption period will potentially benefit all parties in the real estate transaction.

Historical Background

The State of Alabama was barely 21 years old when, in 1842, the state legislature enshrined in statute a debtor's ability to redeem real estate that was "sold under execution, or by virtue of any decree in chancery, or under any deed of trust, or power of sale in a mortgage."[2] It would be another 127 years before the Alabama Legislature, in 1969, shortened the redemption period from two years to one year,[3] and yet another 46 years until, in 2015, the one-year time period was, for certain properties, shortened to six months. Though the ABA, AAR and other trade associations remained motivated to reduce the length of the redemption period, opponents of a shortened redemption period blocked all attempts to change the law until the 2015 session. In fact, in the six regular sessions of the Alabama Legislature immediately prior to the 2015 regular session, five bills were introduced that would have reduced the length of the redemption period, and none of the bills ever made it out of its house of origin.[4]

Although the earlier attempts failed to pass, they kept the conversation going. The annual ritual of discussing legislation to reduce the redemption period kept the idea fresh in the minds of legislators and, in the end, helped them better understand the arguments on both sides of the issue. The ABA and AAR sought to reduce the redemption period because shorter redemption periods could lead to increased real estate sales and more real estate loans. Opponents relied on two arguments to maintain the status quo: On the one hand, opponents argued that the extended time frame was a useful bargaining chip, especially in commercial foreclosure or buyout discussions. The short-on-cash real estate developer, for example, had a doubly better chance of finding a project-saving investor over a 12-month period than he or she did over a six-month period. On the other hand, opponents also believed that the longer redemption period preserved the slim chance that an original homeowner whose property had been foreclosed would come across a major financial windfall and redeem his or her property before the one-year expiration. On this point, data showed quite clearly that Alabama's redemption law was out of step with the rest of the country and was not working.

Data-driven Debate

The most comprehension repository for real estate data in Alabama is the Alabama Center for Real Estate (ACRE), which collects and maintains data on the state's real estate industry and provides unbiased analysis on real estate trends. The AAR commissioned ACRE's research division to analyze the effect of Alabama's current foreclosure redemption laws and provide statistical research and data.[5] The ACRE analysis yielded two conclusions: (1) Alabama's one-year statutory right of redemption is a minority view in the country and (2) the number of foreclosed properties redeemed in Alabama is shockingly low.

First, ACRE research showed that Alabama is one of only 11 states[6] to have a meaningful post-sale one-year redemption period.[7] Additionally, there are five states[8] that have a redemption right of at least 90 days and less than 365.[9] None of the states surrounding Alabama, however, provide any meaningful post-sale general redemption.[10] Similarly, none of the states in the "second ring" of Alabama's neighboring states–Louisiana, Texas, Arkansas, Kentucky, West Virginia, North Carolina and South Carolina–have a right-of-redemption process comparable to Alabama's.[11] Thus, Alabama's redemption statute is both a minority view in the country as well as unique to the southeast.

Second, even though the redemption option is, and has been, available in Alabama, the redemption rate in the state is miniscule. Foreclosure statistics from Fannie Mae showed that during the preceding five years, only 55 out of 14,111 foreclosed properties in Alabama were redeemed, an annual redemption rate of merely .4 percent.[12] For instance, there were 2,617 completed foreclosures in Alabama in 2012 and 1,949 completed foreclosures in Alabama in 2013. In each year, there was a total of eight properties redeemed.

ACRE's research conclusively showed that the standard redemption period around the country was less than one year and that the number of Alabama homeowners affected by a reduced redemption period would be microscopic, if at all. Thus, if the needle could be properly threaded–i.e., if the law could be written so that it did not threaten the commercial and agricultural real estate industries–then maybe the legislature would finally consider supporting legislation that reduced the redemption period.

Act 2015-79

Sponsored by Senate Majority Leader Greg Reed (R-Jasper), and handled in the house of representatives by Financial Services Committee Vice Chair Ken Johnson (R-Moulton), Act 2015-79 (previously Senate Bill 124) was signed into law by Governor Robert Bentley on April 16 after passing the senate by a vote of 34-0 and the house of representatives by a vote of 86-12. The new law, which became effective January 1, 2016, makes two substantial, data-driven changes to existing law. First, the law reduces the one-year length of the redemption period to six months for properties meeting a certain description. Second, the law requires the mortgagee foreclosing on these types of properties to notify the mortgagor of his or her redemption rights under Alabama law.

Affected Properties

The most important analysis under Act 2015-79 is the determination of whether a particular piece of property is subject to the standard one-year redemption period or the new 180-day redemption period. After the sale of a piece of real estate, if the property is "residential property on which a homestead exemption was claimed in the tax year during which the sale occurred," the right of redemption may be exercised within 180 days from the date of the sale.[13] This reduction is only

The most important analysis under Act 2015-79 is the determination of whether a particular piece of property is subject to the standard one-year redemption period or the new 180-day redemption period.

applicable if two additional caveats are also met. First, as discussed below, the mortgagor of the property must be properly notified of his or her redemption rights under Alabama law. In fact, the 180-day period cannot begin until the latter of the date the notification is made or the date of the sale. Second, if the property was sold under a power of sale contained in a mortgage or junior mortgage, pursuant to a statutory power of sale with respect to any mortgage or junior mortgage or by virtue of a judgment rendered by a court, the mortgage, junior mortgage or judgment must be dated on or after January 1, 2016.

Importantly, by narrowly tailoring the types of impacted properties, influential industry segments, especially those representing commercial and agricultural real estate interests, would remain unscathed by Act 2015-79. The historical one-year redemption period still applies to all other types of properties, such as residential homes occupied by tenants or newly constructed neighborhoods where the homes have not yet been sold.

The Four Notices

Some in the legislature wondered whether Alabama's low redemption rates were caused by a lack of knowledge on the part of the foreclosed homeowner.

To address these concerns, legislators asked for the legislation to include a provision requiring an affected homeowner to be notified multiple times of his or her redemption rights under Alabama law. Though these notification provisions place additional responsibilities on the mortgagee, the benefits of a shorter redemption period should outweigh any compliance burdens.

Under the old law, Section 35-10-13 provided that a mortgagor must be notified at least three times of any upcoming foreclosure sale of his or her property. The notification was to be given in a newspaper published in all counties in which the land was located, and the publication must have appeared once a

The shorter redemption period means a greater certainty in the real estate market, which will yield speedier and greater investments in properties and communities.

week for three successive weeks.[14] Under Act 2015-79, if the sale involves "residential property on which a homestead exemption was claimed in the tax year during which the sale occurred," the mortgagor must be notified of his or her redemption rights at least four times before the sale. Three of those four times are concurrent with the notification requirement of Section 35-10-13; in other words, the newspaper publication must include information about not only the upcoming foreclosure sale but also the mortgagor's redemption rights under Alabama law. The fourth notification is mailed to the mortgagor.

Specifically, the mortgagor who signed the mortgage must receive a notice substantially stating the following:

> Alabama law gives some persons who have an interest in property the right to redeem the property under certain circumstances. Programs may also exist that help persons avoid or delay the foreclosure process. An attorney should be consulted to help you understand these rights and programs as a part of the foreclosure process.

Act 2015-79 requires this notice to be mailed to the mortgagor at least 30 days prior to the date of the foreclosure sale. The notice must be mailed to the address of the property subject to foreclosure using certified mail with proof of mailing. This same notice language must also be included in the notification by newspaper publication required by Section 35-10-13. Though Act 2015-79 reduces the one-year redemption period to 180 days for foreclosed residential property on which a homestead exemption was claimed in the tax year during which the sale occurred, the right-of-redemption period could technically exceed 180 days for these properties, because the redemption period cannot begin until these four notices are properly given. Importantly, a defective notice, or the failure to give notice, will not affect the validity of the foreclosure, including the transfer of title to the property, and any actions related to the notice requirement must be brought within two years after the date of foreclosure.

Benefits of a Reduced Redemption Period

ACRE's research and analysis clearly showed that very few properties were ever redeemed in Alabama. Yet the mere possibility of redemption can produce negative effects on the lending and real estate markets. For example, the one-year redemption period worked against the homeowner in at least two ways. First, the lengthy redemption period gave the homeowner a false sense that he or she had ample time to renegotiate the terms of a lending agreement. Frequently, homeowners would avoid uncomfortable conversations with their lenders to the point where, when the homeowners finally approached the bargaining table, they were confronted with a snowball of fees that made a graceful exit unworkable. Second, the amount an investor is willing to pay at a foreclosure auction is directly tied to the redemption period. In other words, the longer it takes for the title to vest, the less the investor is willing to pay. Conversely, the shorter the vesting period, the higher the investor's bid. In this vein, a longer redemption period actually harms the very homeowners it was designed to protect.

The shorter redemption period, on the other hand, makes foreclosed property more marketable, which benefits surrounding neighborhoods' property-owners. Currently, to ensure full recovery of their investment expenses in the unlikely event of redemption, borrowers delay most property improvements until after the expiration of the one-year redemption period. Reducing that period to six months will cut that delay in half and jump-start the rehabilitation process on foreclosed properties, some of which have sat idle for as little as nine and as long as 18 months. The shorter redemption period means a greater certainty in the real estate market, which will yield speedier and greater investments in properties and communities.

Conclusion

Cutting the redemption period in half for certain residential properties will have a positive impact on homeowners, investors and neighborhoods across the state. By narrowly tailoring the new law so that it affects a small universe of properties and provides ample notification to the foreclosed homeowner, legislators made certain that changing Alabama's redemption statute for the third time in 173 years will harm few, if any, Alabama homeowners. Simply put, the passage of Act 2015-79 was a major step forward for Alabama's lending and real estate markets. This incremental modification–a "bite of the elephant," if you will–was well worth the efforts of the ABA and the AAR.[15]

Endnotes

1. See, generally, *Ala. Code* § 6-5-248.
2. *Posey v. Pressley*, 60 Ala. 243, 248 (Ala. 1877).
3. *Garris v. Federal Land Bank of Jackson*, 584 So. 2d 791, 795 (Ala. 1991).
4. In the 2014 Regular Legislative Session, then-Representative Wes Long introduced House Bill 158, which lowered the redemption period to 60 days. That bill never made it out of committee. In the 2012 Regular Legislative Session, Representative Mike Hill introduced House Bill 673, which lowered the redemption period to 90 days. That bill never made it out of committee. In the 2011 Regular Legislative Session, Representative Steve Clouse introduced House Bill 343, which lowered the redemption period to 90 days for non-agricultural and non-forestry properties. Also in the 2011 Regular Legislative Session, Senator Slade Blackwell introduced Senate Bill 263, which lowered the redemption period to 90 days for non-agricultural and non-forestry properties. That bill never made it out of the senate. In the 2009 Regular Legislative Session, Senator Quinton Ross introduced Senate Bill 245, which lowered the redemption period to six months for non-agricultural or non-forestry properties, but only if the foreclosure resulted from a missed mortgage payment. That bill never made it out of the senate.
5. The ACRE Research team for this project consisted of ACRE Executive Director Grayson Glaze, attorney David Skinner and graduate student Seve Gunter. More information about ACRE is available at *www.acre.cba.ua.edu*.
6. Alabama, Alaska, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, North Dakota, South Dakota and Wisconsin.
7. *Ala. Code* §6-5-248; *Alaska Stat.* §§ 09.35.250, 34.20.090, 34.20.100; *Iowa Code* §§ 628.3, 628.26, 654.5, 654.20, 654.26; *Kan. Stat. Ann.* §§ 60-2414, 60-2415; *Mich. Comp. Laws* §§ 600.3240, 600.3280; *Minn. Stat.* §§ 580.04, 580.23, 582.30; *Mo. Rev. Stat.* §§ 443.410, 443.420, 443.430; *MT Code* § 71-1-229; *N.D. Cent. Code* §§ 32-19-03, 32-19-18; *S.D. Codified Laws* §§ 21-47-16, 21-48-14, 21-48A-1, 21-49-12, 21-49-38, 21-52-11 and *Wis. Stat.* §§ 846.101, 846.13, 846.165.
8. Arizona, California, Maine, New Mexico and Wyoming.
9. *Ariz. Rev. Stat. Ann*. §§ 12-1282, 33-729, 33-814(G); *Cal. Code Civ. Proc.* §729.020; §729.030 §§ 580b, 580d, 26(b), 729.010; *Me. Rev. Stat. Ann.* Tit. 14 §§ 6322-6324; *NM Stat.* §§ 39-5-17 to 39-5-21 and 48-10-16; and *Wyo. Stat.* §§ 1-18-103, 34-4-113.
10. Alabama's closest neighbors–Mississippi, Tennessee, Georgia and Florida–all provide for mortgage foreclosure with no meaningful redemption right. *See Fla. Stat.* §§ 45.031(8), 45.0315, 702.06; *Ga. Code Ann.* § 44-14-161; *Miss. Code.* § 11-5-111; and *Tenn. Code Ann.* §§ 66-8-101 to 103.
11. *A.C.A.* §18-49-106; *Ky. Rev. Stat. Ann.* §§ 426.005, 426.220, 426.530; *La. Code Civ. Pro.* §§ 2771-2772; *N.C. Gen. Stat.* §§ 45-21.20, 45-21.27, 45-21.36, 45-21.38, 45-21.38A; *S.C. Code Ann.* §§ 15-39-610, 29-3-660, 29-3-680, 29-3-740; and *Tex. Prop. Code* §§ 51.002, 51.003.
12. In 2010, there 4,660 foreclosures and 18 redemptions (.4 percent). In 2011, there were 3,830 foreclosures and 16 redemptions (.4 percent). In 2012, there were 2,617 foreclosures and eight redemptions (.3 percent). In 2013, there were 1,949 foreclosures and eight redemptions (.4 percent). From January to August 2014, there were 1,055 foreclosures and five redemptions (.4 percent).
13. Property eligible for a homestead exemption, generally speaking, is a single-family owner-occupied dwelling and the land thereto, not exceeding 160 acres. Homestead exemptions are also available to certain other property owners, including residents of Alabama who are over 65 years of age, who are retired due to total or permanent disability or who are blind. See, generally, *Ala. Code* § 40-9-19.
14. *Ala. Code* § 35-10-13.
15. The long-serving general counsel of the ABA and AAR, Hamp Boles and Ham Wilson, played key roles in this effort.

Jason S. Isbell

***Jason S. Isbell** is the vice president of legal and governmental affairs for the Alabama Bankers Association. Isbell is a graduate of Faulkner University's Harris College of Business and the Thomas Goode Jones School of Law, where he serves as an adjunct professor. He is also a graduate of AUM's Graduate School of Business. He serves on the state bar's Character and Fitness Committee.*

Jeremy S. Walker

***Jeremy S. Walker** is senior vice president, general counsel and government affairs director for the Alabama Association of Realtors. Prior to joining the AAR, he practiced with Haskell Slaughter LLC. He received his B.S. from the University of Alabama and his J.D. from Faulkner University's Thomas Goode Jones School of Law.*


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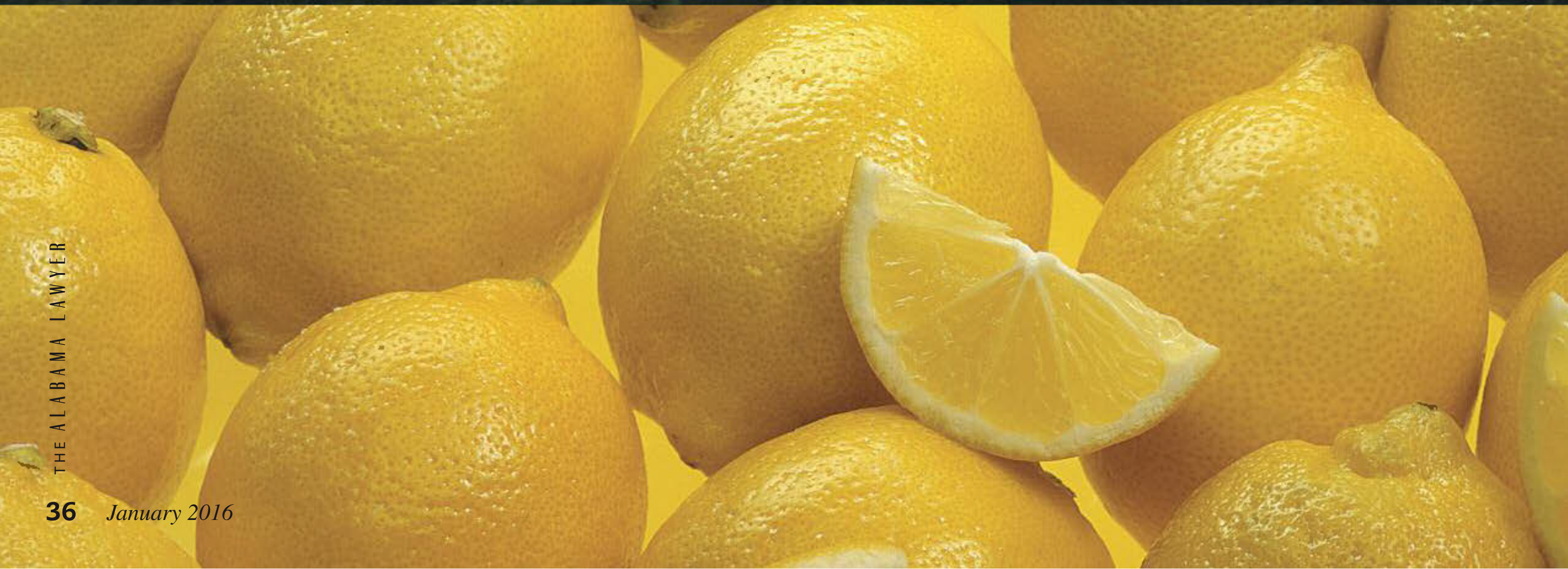


Minority Oppression in Limited Liability Companies:

The Birth of a New Claim or a Hole in the Law?

By Douglas B. Hargett and G. Bartley Loftin, III

"I don't like to think of laws as rules you have to follow, but more as suggestions."

George Carlin

George Carlin's clever one-liner about his approach to everyday life is not only followed by free-spirited comedians, but it is also the mantra of some business owners. Take a business that begins with a brilliant idea, a cutting-edge product or a unique service developed by two business partners who decide to form a company. For different reasons, ownership of the company is split 60/40, creating majority and minority owners. The majority owner assumes the roles of company president and chair of the board of directors. Everything is going great, until one day the owners disagree on a big decision, and then later, several smaller decisions. Things snowball, and the majority owner begins to unilaterally run the company, terminates the minority's employment, stops sharing the company's profits and cuts off the minority's access to credit cards and bank accounts. The minority owner has no control, needs a paycheck and has no way to sell his minority interest to anyone other than the majority owner, who is happy to buy the same at a deep discount. This is a clear-cut example of how a majority owner can use his or her control to oppress and squeeze out a minority owner. It happens every day, regardless of laws designed to prevent it. Those laws are many times considered, in George Carlin's words, mere suggestions to majority owners.

Minority shareholders in closely-held corporations can file a claim for corporate oppression and squeeze-out against abusive majority shareholders to remedy these actions. In Alabama, however, no clear legal precedent can be found, neither statutory nor common law, authorizing minority members of a limited liability company (LLC) to pursue an oppression claim under Alabama law. Alabama caselaw discussing oppression in LLCs is non-existent, which the Alabama Supreme Court alluded to in *DGB, LLC v. Hinds*.[1] Caselaw addressing LLC member disputes where oppression might have been raised is scarce. Alabama trial courts are left considering competing arguments in different cases involving oppression in LLCs, which has and will continue to lead to inconsistent rulings throughout the state at the trial level. This article discusses many of the arguments for and against the recognition of an oppression claim in the LLC context, taking into consideration standing precedent in closely-held corporation oppression cases.

What is Minority Oppression And Squeeze-Out?

The genesis of corporate oppression or squeeze-out can be found in the 1978 decision of the Alabama Supreme Court in *Burt v. Burt Boiler Works, Inc*.[2] The claim has evolved over the last 37 years, but the basic tenets of a corporate oppression claim set out in *Burt* remain intact: "Majority shareholders owe a duty to at least act fairly to the minority interests, and the majority cannot avoid that duty merely because the action taken was legally authorized."[3] Majority shareholders cannot "deprive the minority shareholders of their just share of the corporate gains."[4] Oppression typically occurs when majority shareholders assume the multiple roles of owners, directors and officers, creating the perfect environment for majority dominance over the minority. The only thing needed is a catalyst (*e.g.*, disagreement, greed or something else) to trigger the majority to abuse their power. This scenario leads to minority shareholders being denied a "voice in the operation of the business," deprived of "income from their interest in the business" and "holding stock which pays no dividends and which cannot, as a practical matter, be sold."[5] As the terms suggest, majority shareholders can use their control to "oppress" (*i.e.*, unfairly or unjustly use authority or power to prevent others from enjoying their rights) or "squeeze out" (*i.e.*, actions taken in an attempt to eliminate or reduce an interest) minority shareholders.[6]

Because closely-held companies are owned or controlled by a few individuals, unlike public or widely-held corporations, oppression in closely-held corporations was established in "recognition that a close corporation enterprise often 'acquires many of the attributes of a partnership or sole proprietorship and ceases to fit neatly into the classical corporate scheme.'"[7] Shareholders in closely-held corporations view themselves as business partners who will share in the company's gains; however, majority shareholders and members can systematically discriminate against the minority by refusing to pay distributions, bonuses and salaries, excluding the minority from positions and eliminating other privileges and benefits.[8] Oppression claims are often evaluated by comparing the benefits received by the majority to the benefits distributed to the minority to determine whether the company's gains have been proportionately shared.[9]

Oppression's Growing Pains: More Questions than Answers

There has been much debate about the nature of a shareholder oppression claim, leading to more questions than answers. Oppression is now almost four decades old in Alabama. By legal standards, oppression is still in its infancy when compared to other claims that have developed since the formation of Alabama's judiciary system two centuries ago. Oppression has had its fair share of growing pains since *Burt*. Considerable time has been spent by practicing attorneys, legal scholars and Alabama courts attempting to develop a workable, consistent body of law by reviewing and, in many instances, adopting oppression precedent from other jurisdictions, and comparing and contrasting oppression with similar causes of action in Alabama. Some early questions concerned whether oppression was a contract or tort claim, whether oppression was a derivative claim that must be brought on behalf of the company or a direct claim that can be asserted by and against an individual shareholder and whether a separate claim for oppression was necessary because the claim arguably falls under the umbrella of established breach of fiduciary duty law.[10] Even with decades of legal precedent, there are still conflicting answers to these questions. The side of the case an attorney represents (plaintiff or defendant, minority or majority, company or shareholder) will likely determine the answers he or she gives when arguing these issues before trial and appellate courts, and there is legal authority to support most positions taken.

This is not the case in the LLC context. To the contrary, there is no direct legal authority in Alabama that can be used to analyze a claim for oppression of a minority member of an LLC because this claim has not yet been formally recognized by Alabama appellate courts. Common sense and general principles of fairness and equity lead to the conclusion that the tactics used by majority shareholders in closely-held corporations can also be used by majority or controlling members of LLCs to oppress and squeeze out minority members. If a claim for minority oppression of LLC members is authorized in Alabama, existing corporate oppression law can be borrowed and tweaked by courts to resolve future cases and ease the growing pains associated with this new claim. However, the statutory framework governing LLCs, which does not contain an express duty owed by the majority to the minority, combined with the overtly contractual nature of the LLC entity, may lead courts to altogether dismiss this claim.

Common sense and general principles of fairness and equity lead to the conclusion that the tactics used by majority shareholders in closely-held corporations can also be used by majority or controlling members of LLCs to oppress and squeeze out minority members.

DGB, LLC v. Hinds: A Hole in The Law and Need for Clarity

Both proponents and opponents of a cause of action for minority oppression of LLC members frequently cite *Hinds*, a June 30, 2010 decision of the Alabama Supreme Court. In *Hinds*, three individual investors owned a 100 percent interest in DGB, LLC. DGB, LLC, in turn, owed a 40 percent minority member interest in Bon Harbor, LLC. The controlling 60 percent majority ownership interest of Bon Harbor, LLC was owned by other members. DGB, LLC and its three members asserted a cause of action for what they called "shareholder oppression" related to oppressive actions allegedly taken by the majority members of Bon Harbor, LLC that harmed the minority's interest in a multi-million dollar real estate development.[11] In support of their oppression claim, DGB, LLC and its three members relied on § 10-12-21(h), the predecessor to § 10A-5-3.03(h), arguing that "'[a] member shall discharge the duties to a member-managed company and its other members under this chapter or under the operating agreement and exercise any rights consistently with the obligation of good faith and fair dealing.'" Refusing this argument and affirming the trial court's dismissal of the oppression claim, the Alabama Supreme Court stated that the "investors have not cited any Alabama authority showing that § 10-12-21(h) applies … or that 10-12-21(h) supports a claim of 'shareholder oppression.'"[12] In its analysis and holding, the court's silence is deafening. The court did not hold in favor of or against the recognition of a claim for minority oppression of LLC members in Alabama. The court did not decide in the affirmative or negative that majority LLC members owed a duty to act fairly to the interests of minority LLC members. Rather, the court was silent on these issues, and limited its reasoning for affirming the dismissal of the oppression claim, stating: "It is not the function of this court to do a party's legal research or to make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument."[13] This conclusion revealed the gaping hole in the law when it comes to oppression in

LLCs. In effect, the Alabama Supreme Court in *Hinds* left the door open for minority LLC members to pursue a cause of action for oppression and squeeze-out in future cases if additional or different legal arguments are made, but would not assume that an actionable claim existed.

Three weeks before *Hinds* was decided, the United States Bankruptcy Court for the Northern District of Alabama reached an entirely different conclusion in *In re Dixie Pellets, LLC*.[14] There, minority members of Dixie Pellets, LLC filed a lawsuit against the majority, controlling member, Harbert DP, LLC, in Alabama state circuit court. Dixie Pellets, LLC later filed a voluntary petition for relief with the bankruptcy court, resulting in the state court lawsuit being removed to bankruptcy court and pursued in an adversary proceeding. The minority members of Dixie Pellets, LLC alleged that the majority member oppressed and attempted to squeeze them out of the LLC by allowing additional capital to be infused into Dixie Pellets, LLC that required repayment at an excessive rate of interest. In its motion to dismiss the oppression claim, the majority member argued that the minority members' claim was derivative in nature and could not be asserted by the individual LLC members as a direct action. Without addressing whether there is a valid cause of action for oppression in the LLC context or pointing to a specific fiduciary duty as the court did in *Burt*, the bankruptcy court simply cited to longstanding closely-held corporation law, stating: "Alabama courts 'recognize oppression and squeeze-out as a distinctly individual and direct cause of action.'"[15] By taking this approach, in stark contrast to the Alabama Supreme Court, the bankruptcy court put less emphasis on the type of entity and owners involved in the alleged oppression, and placed greater weight on the alleged conduct of the majority and oppressive impact on the minority. Moreover, unlike the Alabama Supreme Court in *Hinds*, the bankruptcy court in *Dixie Pellets* considered the oppression claim asserted by minority LLC members without determining whether such a claim had been formally authorized by Alabama appellate courts in the LLC context.

"Alabama courts 'recognize oppression and squeeze-out as a distinctly individual and direct cause of action.'"

Hinds and *Dixie Pellets* were decided in different jurisdictions with neither case setting binding precedent for the other to follow, but the complete opposite outcomes reached by the two courts illustrate the recurring conflict that state trial court judges and practicing attorneys face when a minority oppression claim is alleged by an LLC member. With the *Hinds* conclusion on oppression in LLCs remaining unaddressed, uncertainty will continue until the issue is settled by Alabama appellate courts or by the Alabama legislature. Until clarified, trial court judges must continue to sort through the arguments made on each side, leaving attorneys to argue their cases to the benefit of one client and other times failing to another client's detriment, even though the cases present virtually indistinguishable facts and the same legal question–does a cause of action for minority oppression exist in LLCs?

Silence of the LLC Statutes And Limit of Fiduciary Duties

LLCs and closely-held corporations are creatures of statute, meaning that the formation and governance of these entities are controlled by the applicable sections of the *Alabama Code*.[16] *Alabama Code* § 10A-2-8.31 of the Alabama Business Corporation Law, *Alabama Code* §§ 10A-2-1.01, *et seq.*, states that: "shareholders exercising control … whether by reason of ownership of a majority, or other controlling, interest" have "fiduciary obligations" to minority shareholders, and damages, an injunction and other relief may be awarded to prevent or remedy "oppression" by majority or controlling shareholders.[17] The language in this statute conveys a clear message: in corporations, majority shareholders' feet can be held to the fire if they oppress minority shareholders. There is an express statutory basis created by the legislature protecting minority shareholders from oppression and imposing a fiduciary duty on majority or controlling shareholders to treat minority shareholders fairly. The language of this statute first appeared in *Alabama Code* § 10-2B-8.31, the predecessor to § 10A-2-8.31, in 1994, and codified the shareholder oppression cause of action established in *Burt*. The second comment to § 10-2B-8.31 stated the reason for statutorily adopting minority shareholder oppression as follows:

> It is noteworthy that the provision applies to majority or controlling shareholders, to the extent fiduciary duties may be imposed upon them, as well as directors, officers, and employees of a corporation. There is a recent line of cases involving protection of minority holders against "freeze-out" activities by the majority, where, in small, closely-held corporations, a standard breach of fiduciary duty closer to that of partners is suggested.[18]

Thus, the "recent line of cases" (*i.e.*, common law created by Alabama courts prior to 1994) led the legislature to create a statutory fiduciary duty in favor of minority shareholders because the relationship between shareholders in closely-held corporations was, for all practical purposes, a partnership. The legislature's motivation for recognizing oppression in closely-held corporations by statute is important because the initial Alabama LLC Act also went into effect in 1994, creating the LLC entity in Alabama to offer business owners "the corporate characteristic of limited liability combined with the favorable tax treatment afforded to partnerships."[19] However, no anti-oppression statute was inserted into the Alabama LLC Act in 1994, and one has not been included in subsequent versions.

The current Alabama Limited Liability Company Law (ALLCL), Alabama Code §§ 10A-5-1.01*, et seq.*, provides that "[a] member owes to the company or its other members the duty of loyalty and duty of care …."[20] None of the LLC statutes impose a duty on a majority member to consider the effect of his or her actions on a minority member before acting, and the word "oppress" is not used in any form. In fact, § 10A-5-3.03(i) states that a "member of a member-managed company does not violate a duty or obligation under this chapter or under the operating agreement merely because the member's conduct furthers the member's own interest." An oppression claim would seem to conflict directly with this subsection of the statute. Moreover, the Alabama Supreme Court previously held in *Hinds* that the duty of "good faith and fair dealing" set out in *Alabama Code* § 10A-5-3.03(h) did not, standing along, create a claim for minority oppression in the LLC context. Proponents arguing for a cause of action for minority oppression in LLCs, therefore, find little help in the plain language of the ALLCL, and will find no additional assistance in the new ALLCL of 2014.[21]

Common "Seeds" of Oppression in LLCs and Other Closely-Held Businesses

While there is not a statutory duty forbidding majority or controlling LLC members from oppressing minority LLC members, make no mistake that LLCs, just like closely-held corporations, are equally susceptible to oppression. The chosen legal structure does not lessen the likelihood of oppression in a small company, irrespective of whether the entity is an LLC, closely-held corporation, partnership or sole proprietorship. The leading treatise on oppression, *O'Neal and Thompson's Oppression of Minority Shareholders and LLC Members*, sums up the dilemma faced by minority owners of LLCs and other small businesses as follows:

> LLCs are now set up to follow the experience of close corporations where participants similarly chose the corporation for liability and tax reasons and encountered unexpected problems down the line after a falling out among the parties when the corporate norms led to uses of centralized power that did not match the expectations of the parties. 'In short, the factors that contribute to a failure to effectively contract for protection in the close corporation are likely to produce the same outcome in the LLC. Those factors stem primarily from the traits of small business owners and the small business setting itself, rather than from characteristics of the legal structure that is used to conduct the business.'
>
> * * * * *
>
> [C]ourts regularly refer to both partnership and corporate precedents in interpreting LLC statutes…. It is not unusual for courts to simply

apply corporate law precedent and actually label the LLC as a corporation without acknowledgment of the difference…. LLCs have the same 'seeds' of oppression discussed elsewhere in this treatise–a lack of market for ownership interests and no exit via the statute, an intimate multifaceted relationship between the parties and statutory norms or contractual settings permitting exclusive majority control that may be difficult to square with parties' expectations. To that extent, oppression discussions common to close corporations recur in LLCs.[22]

Every small or closely-held business having more than one ownership group that is divided into majority and minority classes is susceptible to oppression–a reality accepted by different jurisdictions around the country.[23] This provides a strong, common-sense reason for acknowledging a cause of action for oppression in the LLC context.

"Specific Type" of Fiduciary Duty Owed by Majority to Minority Members

Burt was the seminal case in Alabama establishing a claim for shareholder oppression, and has served as the foundation and jumping-off point for the analysis of subsequent oppression cases. To understand oppression law in Alabama and determine if it should apply to LLCs, one must look to the reasoning of the Alabama Supreme Court at the time the cause of action was created. The court in *Burt* defined oppression as a breach of fiduciary duty–then a common law, judicially-created fiduciary duty owed by majority shareholders to minority shareholders–in the following manner:

> 'Where several owners carry on an enterprise together (as they usually do in a close corporation), their relationship should be considered a fiduciary one similar to the relationship among partners. The fact that the enterprise is incorporated should not substantially change the picture…. [C]ontrolling shareholders, in some circumstances at least, owe fiduciary duties to the minority shareholders … and the courts will require them (whether they act in their capacity as shareholders or through directors or officers whom they control) to observe accepted standards of business ethics in transactions affecting rights of minority shareholders.' …. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority, as much so as the corporation itself or its officers and directors.'"[24]

In *Brooks v. Hill*, the Alabama Supreme Court expounded upon the fiduciary duty created in *Burt*, stating that the oppression claim was meant to be a remedy for "a more specific type of unfairness" than that of a standard breach of fiduciary duty by an officer or director.[25] Thus, a run-of-the-mill breach of fiduciary duty claim against officers or directors for violating the duties of loyalty and care, which could be brought on behalf of the corporation derivatively or in some circumstances as a direct claim, was deemed insufficient to address the harms caused by oppression. This is because oppression results from a unique, specific "fiduciary duty running directly from shareholder to shareholder in a close corporation," resulting in direct injury to a minority owner.[26]

It is important to keep in mind that, when analyzing whether a minority oppression claim should be accepted in the LLC context, a cause of action for minority oppression is in the same legal family as breach of fiduciary duty. Alabama courts have, on several occasions, allowed a direct cause of action for breach of fiduciary duty against majority or controlling LLC members in cases where a claim for minority oppression could have been asserted but, for whatever reason, was not.[27] While none of these cases went so far as to adopt a claim for minority oppression in the LLC context, Alabama appellate courts in *Harbison v. Strickland* and *Polk v. Polk* borrowed from *Brooks* and *Fulton v. Callahan*, foundational shareholder oppression cases in Alabama, as well as general closely-held corporation law, to reach the conclusion that the controlling member of an LLC owed fiduciary duties to the non-controlling member comparable to the fiduciary duties owed in corporations, partnerships and limited partnerships.[28]

The court in *Harbison* stuck to the fiduciary duties stated in the LLC's operating agreement, and the duties of loyalty, care and good faith and fair dealing that the court deemed implicitly incorporated into the operating agreement from the *Alabama Code*. Had a minority oppression claim been asserted in *Harbison*, it may have provided the Alabama Supreme Court with a prime opportunity to resolve this issue in the LLC context.

In *Hinds*, the Alabama Supreme Court dismissed the minority oppression claim for lack of supporting legal arguments, but it reversed the trial court's dismissal of the breach of fiduciary duty claim, finding that a special "fiduciary and confidential relationship" exists between LLC members "as reasonably to inspire confidence that [a controlling member] will act in good faith for the other's interests," particularly where the controlling member has "influence or superiority over the other," "the parties do not deal on equal terms," "an unfair advantage is possible" and "dominion may be exercised by one person over another."[29] This language is remarkably similar to that used by Alabama courts to describe oppression and the relationship between majority and minority business owners. The court in *Hinds* went beyond simply citing to the fiduciary duties in the operating agreement and the implicit duties of loyalty, care and good faith and fair dealing, and extended the fiduciary duties of LLC members described in *Harbison* to include new common law duties. The language used to explain the "fiduciary and confidential relationship" between majority and minority LLC members in *Hinds* is virtually identical to the "specific type" of fiduciary duty described in the long line of shareholder oppression cases beginning with *Burt*.

LLCs have the same 'seeds' of oppression discussed elsewhere in this treatise–a lack of market for ownership interests and no exit via the statute, an intimate multifaceted relationship between the parties and statutory norms or contractual settings permitting exclusive majority control that may be difficult to square with parties' expectations.

Courts in other jurisdictions have reached similar conclusions, allowing direct claims by minority LLC members against majority or controlling members. In a Utah case, *Banyan Inv. Co., LLC v. Evans*, the majority member of an LLC argued that the minority should not be allowed to pursue a direct action against individual officers because Utah's closely-held corporation exception allowing a direct action by a minority shareholder against a majority or controlling shareholder (equivalent to shareholder oppression in Alabama) did not apply to LLCs.[30] The Utah Court of Appeals shot down the majority member's argument, noting that while a standard breach of fiduciary duty claim is derivative in nature and belongs to the corporation, an LLC member should be allowed to pursue a direct action when the injury is "distinct" from that suffered by the company, just like shareholders of closely-held corporations, because the "similarities between corporations and LLCs makes it illogical to limit the exception to corporations."[31]

The Road Ahead For Minority LLC Members

As Alabama law currently stands, minority LLC members cannot pursue a cause of action for minority oppression against a controlling or majority member. An oppressed LLC member is limited to asserting claims for breach of the operating agreement, statutory violations of the duties of loyalty, care and good faith and fair dealing and breach of fiduciary duty against officers or directors. *Hinds* left the door open for Alabama appellate courts to recognize a cause of action for minority oppression in future LLC cases. Good arguments can be made for and against a new claim to benefit oppressed, minority LLC members. The close legal relation between LLCs and other closely-held businesses that already allow a cause of action for oppression, combined with the significant overlap of language used by courts to describe the relationship of minority and majority owners across different entities, will make it difficult for Alabama courts to draw a distinction and avoid adopting minority oppression in LLCs. Regardless of the ultimate decision by

Alabama appellate courts, the need for clarification is obvious. The rights and interests of minority and majority LLC members alike are being decided inconsistently every time a motion to dismiss or motion for summary judgment is granted or denied by trial courts throughout Alabama who view minority oppression in the LLC context differently and have no clear precedent to follow. ▲

Endnotes

1. *DGB, LLC v. Hinds*, 55 So. 3d 218, 232-33 (Ala. 2010).
2. *Burt v. Burt Boiler Works, Inc.*, 360 So. 2d 327 (Ala. 1978). Earlier references to "oppression," "squeeze out" and "freeze-out" can be found in Alabama caselaw prior to 1978, but *Burt* was the first case to formally establish a separate cause of action.
3. *Id.* at 331.
4. *Id.* at 332; see also *Brooks v. Hill*, 717 So. 2d 759, 765 (Ala. 1998) (minority shareholders have a "right to fairness by the majority" and "basic expectation to share proportionally in corporate gains").
5. *Galbreath v. Scott*, 433 So. 2d 454, 457 (Ala. 1983) (quoting *Burt*).
6. OPPRESSION & SQUEEZE-OUT, Black's Law Dictionary (10th ed. 2014).
7. *Brooks*, 717 So. 2d at 764-66; *Galbreath*, 433 So. 2d at 457; *Stallworth v. AmSouth Bank of Alabama*, 709 So. 2d 458, 467 (Ala. 1997).
8. *See, e.g., Ex parte Brown,* 562 So. 2d 485, 493-94 (Ala. 1990); see also O'Neal and Thompson's Oppression of Minority Shareholders and LLC Members §§ 3:02, 3:7 & 3:8 (2008) (describing oppression and squeeze-out techniques).
9. *Ex parte Brown*, 562 So. 2d at 494.
10. *See generally* Andrew P. Campbell, *Litigating Minority Shareholder Rights and the New Tort of Oppression*, 53 Ala. Law 108 (1992); Michael E. DeBow, *"Oppression" of Minority Shareholders: Contract, Not Tort*, 54 Ala. Law 128 (1993).
11. *Hinds*, 55 So. 3d at 221-22.
12. *Id.* at 233.
13. *Id.* (citing *Jimmy Day Plumbing & Heating, Inc. v. Smith*, 964 So. 2d 1, 9 (Ala. 2007)).
14. *In re Dixie Pellets, LLC*, No. 09-05411, 2010 WL 2367326 (Bankr. N.D. Ala. June 9, 2010) (unreported) (citing *Davis v. Dorsey*, 495 F. Supp. 2d 1162, 1168 (M.D. Ala. 2007)).
15. *Dixie Pellets*, at *4-5.
16. *See* Ala. Code §§ 10A-5-1.01, *et seq.* ("Alabama Limited Liability Company Law" or "ALLCL"); Ala. Code §§ 10A-2-1.01, *et seq.* ("Alabama Business Corporation Law").
17. Ala. Code § 10A-2-8.31.
18. Ala. Code § 10-2B-8.31, cmt. 2 (citing pre-1994 oppression cases: *Burt*, *Galbreath* and *Ex parte Brown*).
19. *See* Laurel Wheeling Farrar and Susan Pace Hamill, *Dissociation from Alabama Limited Liability Companies in the Post Check-The-Box Era*, 49 Ala. L. Rev. 909, 910 (1998) (discussing history of LLCs in Alabama).
20. Ala. Code § 10A-5-3.03(e).
21. The ALLCL of 2014, Ala. Code §§ 10A-5A-1.01, *et seq.*, which repeals the current ALLCL effective January 1, 2015 (for LLCs formed on or after this date), and January 1, 2017 (for LLCs formed under the current ALLCL), does not contain an anti-oppression provision, and limits the fiduciary duties of LLC members to those of loyalty and care. The ALLCL of 2014 states in the comments that one of the significant features of the new law is that "[t]he Act focuses on the contractual nature of the [LLC]." Because there is not an anti-oppression provision, a strong argument can be made that it was the legislative intent to preclude minority oppression claims in the LLC context and limit duties of members to those set out in the statute or bargained for by the parties in the contractual formation documents.
22. O'Neal at §§ 6:2 and 6:3.
23. 2 Close Corp and LLCs: Law and Practice § 9:18 (Rev. 3d ed.) (including chart of all 50 states treatment of breach of fiduciary duty and minority oppression claims).
24. *Burt*, 360 So. 2d at 332 (citing *Southern Pacific Co. v. Bogert*, 250 U.S. 483, 487-88 (1919)). It would be logical to argue that the "accepted standards of business ethics" referred to in *Burt* is tantamount to the duty of "good faith and fair dealing" in the ALLCL.
25. *Brooks*, 717 So. 2d at 765.
26. Douglas Moll, *Minority Oppression and the Limited Liability Company: Learning (Or Not) From Close Corporation History*, 40 Wake Forest L. Rev. 883, 892-95 (2005).
27. See *Harbison v. Strickland*, 900 So. 2d 385, 386 (Ala. 2004) (reversing summary judgment in favor of LLC's controlling member-manager, who atypically was the minority member, and allowing majority, non-controlling member to maintain breach of fiduciary duty claim on remand); *Polk v. Polk*, 70 So. 3d 363, 370-72 (Ala. Civ. App. 2010) (citing closely-held corporation law to support individual cause of action for breach of fiduciary duty against controlling, majority member of LLC); see also *Love v. Fleetway Air Freight & Delivery Service, LLC*, 875 So. 2d 285, 289-91 (Ala. 2003) (reversing to allow direct claims against controlling, majority members of LLC, though neither oppression nor breach of fiduciary duty was alleged).
28. *Harbison*, 900 So. 2d at 389 (citing *Brooks*, 717 So. 2d 759, 764 (Ala. 1998) and *Fulton v. Callahan*, 621 So. 2d 1235, 1246-47 (Ala. 1993)); *Polk*, 70 So. 3d at 371 (citing portions of *Harbison* that refer to breach of fiduciary duty analysis in *Brooks* and *Fulton*).
29. *Hinds*, 55 So. 3d at 233-34 (citing *Bank of Red Bay v. King,* 482 So. 2d 274 (Ala.1985)); see also *Belcher v. Birmingham Trust National Bank*, 348 F. Supp. 61, 89-90 (N.D. Ala. 1968) (pre-*Burt* federal court decision cited by *Brooks* and *Fulton* describing "confidential relationship" among business partners and duty of "good faith and fair dealing," particularly when one partner is in position to exert influence over another).
30. *Banyan Inv. Co., LLC v. Evans*, 292 P.3d 698 (Utah App. 2012); see also *George Wasserman & Janice Wasserman Goldstein Family, LLC v. Kay*, 14 A. 3d 1193, 1218-19 (Md. App. 2011) (minority LLC members may bring individual claims for majority's abuse of control).
31. *Banyan*, 292 P.3d at 703.

Douglas B. Hargett

Douglas B. Hargett is a partner with Hall Tanner Hargett PC in Tuscumbia.

G. Bartley Loftin, III

G. Bartley Loftin, III is a partner with Bradley Arant Boult Cummings LLP in the Huntsville office.

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

JULY 2015 BAR EXAM STATISTICS OF INTEREST

Number sitting for exam	490
Number passing exam (includes MPRE deficient and AL course deficient)	294
Bar Exam Pass Percentage	60.0 percent

Bar Exam Passage by School

University of Alabama School of Law	92.2 percent
Birmingham School of Law	19.5 percent
Cumberland School of Law	74.7 percent
Faulkner University Jones School of Law	66.7 percent
Miles College of Law	4.8 percent

Certification Statistics*

Admission by Examination	296
Admission by Transfer of UBE Score	5
Admission without Examination (Reciprocity)	12

**Statistics of those certified to the Supreme Court of Alabama for admission to the Alabama State Bar for the period May 5, 2015 through November 1, 2015. 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 2015 ADMITTEES

Brett Warren Aaron
Avery Margaret Adcock
Salem Peter Afangideh
Tiffanie Lynette Agee
Joseph Myers Aguirre
Samuel Grey Alidor
Anastasia Michelle Allmon
Robert Alexander Andrade
Clayton Smith Armentrout
Joseph Olumuyiwa Babalola
Stefanie LaRee Back
Matthew Aaron Bailey
Amanda Christine Bass
Lance McCoy Baxter
Ryan Colter Beattie
James Daniel Bedsole
Charles Walker Beene
John Wesley Bishop
Stanley Edward Blackmon
Jonathan Patrick Bogh
Nicole Chasity Bohannon
Morgan Leigh Booker
Brock Philip Boone
Justin Tyler Bouchard
David Andrew Bozeman
Brittney Shae Bragg
Gloria Lauren Breland
Brock Elizabeth Brett
Jessica Danielle Brookshire
William Herman Broome, Jr.
Jessica Ruth Shaver Brown
Mallory Nakole Brown
David Lee Bruce
Carlivear Korehn Josie Bryant
Gregory Robert Buchanan
Stephen Frank Bulgarella
Dillon Kane Bullard
Nicholas Daniel Bulso
Susan Ellen Burgin
Jacqueline Victoria Butler
Amanda Diane Butterworth
Caleb Nathanial Byrd
Rachel Smithson Byrd
Robert Clayton Cain
Nashad Omar Carrington
Nathaniel Madison Cartmell, IV
Tyler Carr Cashbaugh
Jordan Elizabeth Cherry
Elliott Howard Clark
Aubrey Bernard Coleman, II
Jaley Ayn Cranford
Darius Antoine Crayton
Cassy L. Bingham Dailey
Alexandria Wendlin Darby
Adam Michael Davidson
Alexandra Lee Davis
Anna Rose Davis
Charles Evan Davis
Christi Pearl Davis
Judea Shechinah Davis
James Toliver Dawkins, IV
Kara Christine Deal
Alexander Jonathon Dean
Alan Jesser Dees
Alison Almeida Dennis
Garrett Parker Dennis
Marianalyn Dennis
Kristian Cherrelle Diggs
William Landon Dodd
Andrew Ruggiero Dolan
Faye Lynn Doss
James Victor Doyle
Christopher Baxter Driver
Virginia Blair Druhan Bullock
Courtney Brown Dubberly
Paige Allison Duncan
Joey Herman Eddy
Thomas Paul Edington
Blake Clifton Edwards
Jami Nicole Davis Edwards
Nicholas Paul Edwards
Brooks Hatton Emanuel
Durvatheheir V.L. Esquire
Adam Wesley Evans
Michael Edward Evans
Madison Lindsay Fair
Hugh Michael Farnsworth
Alexander David Flachsbart
Elizabeth Jones Flachsbart
Murray Scott Flint
Mark David Foley, Jr.
David Andrew Folkner
Malika Sanders Fortier
Roncheros Douglas Fortune
Bradley Sims Foster
Dakota John Fox
Luke Van Deusen Fredericks
Madison Michelle Fuller
James Tolbert Gafford
John Joseph Gamble
Matthew Gregory Garmon
Alyse Nicole Gillman
Robert Adam Gilmore
Angela Hamner Gooch
Caitlin Hardee Graham
James Nathaniel Guin
Carson Scott Hale
Matthew Steven Hale
Aisha Mishal Hall
Donna Brooke Hallmark
Bryan Joseph Hamlin
Arthur Bain Gleason Hanning
Timothy Chase Harris
Joshua Brenton Hembree
Jason Robert Herbert
Andrew Michael Hickman
James Jackson Hill, IV
Phylicia Helena Hill
Kenneth Bryant Hitson
Kimberly Rene Hobbs
Lauren Nicole Hodskins
Tiffany Ann Holford
Ana Victoria Hubickey
Andrew Craig Hudson
Lauren Ashleigh Hunnicutt
Lauren Statler Hunt
Mark Anthony Husted
Chase Russell Hutcheson
Cody Blake Isbell
Julie Jackson
Shanitra Janae Jackson
Justin Michael Moore Jenkins
Clay Caldwell Johnson
Matthew Taylor Johnson
Robert Whitaker Johnson, Jr.
Sheena Marie Johnson
Allen Gregory Jolley
Martin Christopher Jones
Nicole Brown Jones
Sarah Elizabeth Jones
Sara Mae Judah
Jessica Ribis Keir
Angela Evette Kennedy
Kendra Nicole Key

Laura Elise King
Chandler Osborn Kirby
Amanda Graham Kisor
Aigner Shanea Kolom
Sandra Katherine Koslin
Kathryn Marinda Kyatt
Tanika LaRosa Lakes
Barton Thomas Lee
Kendall Ann Lee
William Harrison Lee
Britley Cole Leonard
Nicholas Dean Leslie
Jon Davidson Levin
Andrew Stephen Lindsey
Audrey Megan Liston
Amy Dumas Logan
Caitlin Jordan Looney
Regan Coleman Loper
Aimee Roebke Lucas
Ayla Gabrielle Luers
Travis Edward Lynch
Edward Webb Lyons
Natalie Ann Lyons
Steven Michael Madison
Meredith Kay Maitrejean
Logan David Lee Manthey
Aaron Nicholas Maples
Jennifer Brooke Marshall
Taylor Grier Martin
Christopher Daniel Mauck
Terri Alexandria Mayweather-Jones
Amanda Leigh McCleney
Forrest Talma McConnell, IV
Randi Leigh McCoy
Paul William McDaniel
Katherine Elizabeth McGuire
Erika Rucker McKay
Andrew Randle McKinney

Nicholas Ray Medley
Stuart Hamilton Memory
Lauren Elizabeth Miles
Lindsay Catherine Mims
Patrick Nunnelley Mims
Justin Alexander Mitchell
Katherine Victoria Mitchell
Misha Leigh Mitchell
Carol Thetford Montgomery
Joshua Tyler Morgan
Mary Lena Morgan
Michael Franklin Morris
Anthony Lane Morrison
Rick Aidan Mula
Justin Raul Murray
Chuantae Alexandria Nichols
Matthew Wayne Nicholson
Jonathan Nomamiukor, II
Henry Francis O'Connor, III
Andrew Lee Odom
Vincent Edward Odom
Katie Cameron OMailia
Sarah Sutton Osborne
Lisa Woodard Overton
Tiffany Shaye Owens
Brian Leonard Padgett
Chelsey Coon Palmer
Ruby Kelly Panter
Ellie LaShea Parker
Emily Grace Peake
Stephen Alexander Perdue
Jasmine Till Peterson
Matthew Whiddon Peterson
Taylor Alan Pharr
Barbara Chelsea Phillips
Meredith Riley Phillips
Teresa Darwin Phillips
Samuel Carlton Pierce
Jessica Anna Piltch

Laura Alyn Pizzitola
Thomas Charlton Pope
Allyn Catherine Powell
Christopher Allen Ramanauskas
Shelley Elizabeth Rawlings
Jonathan Edward Ray
Tiffany Nicole Ray
Nannie Natisha Reed
Katherine Elizabeth Reeves
Rachele Alexandra Reis
Chrissy LaKay Riddle
Jon David Roberts, Jr.
Amanda Brooke Robinson
Sara Margaret Rossmanith
Queena Adriana Ruffin
Ryan Sikes Rummage
Sarah Elizabeth Rutledge
Patrick Wilson Saint
Renee Elizabeth Salley
Tereza Carolina Castro Sampaio
Lauren Nicole Sanchez
Evan Michael Sartin
John Christian Saylor
Robert Jackson Sewell
Sandy Susie Shannon
Parker Bryan Simpson
Caroline Collins Sims
Matthew Robert Slaughter
Alexandria West Smith
Brandon Nicholas Smith
Leonard James Smith
Thomas Scott Smith, III
Michael Calup Snider
John Robert Spade
Jillian Alexandra Sparks
Jeffrey Williams Speegle
Lauren Glass Spradling
James Alexander Steadman
Jordan Elizabeth Stephens

Ryan Lassiter Stinson
Mallory Storey
Jennifer Lev Susman
Ruth Mahoney Swift
Hunter James Tate
Dominik Jermaine Taylor
Leah Catherine Taylor
Spenser Hope Templeton
Renee Smith Thagard
Gretchen Denise Thomas
Allie Benae Thompson
Shelby Adams Thorpe
Rushton Glenn Thrift
Whitney E. Tillman
David Thornton Trice, Jr.
Lacy Michele Triplett
Joseph Anthony Tutone, Jr.
Kathryn Alyda Van Tol
Sean Christopher Vanden Heuvel
Roger Wayne Varner, Jr.
Leigh Catherine Veillette
Ashley Schaid Waldrop
Lauren Gessner Walker
Dylan Grant Wallace
Emily Slay Walters
Lance William Waters
Joel Philip Watson
Bradley James Watts
Katherine Edwards West
Andrew David Westcott
Austin Brock Whitten
Johnathan Norregaard Wilhelm
Kevin David Wilkerson
Joshua Alan Willis
Kaila Bryant Wilson
Lydia Michelle Wimberly
Rebecca Marie Winters
Matthew Dean Woodham
Marshall Alan Yates

LAWYERS IN THE FAMILY

Stephen A. Perdue (2015) and
D. Wayne Perdue (1976)
Admittee and father

John Gamble (2015) and
Michael Gamble (1987)
Admittee and father

Madison Michelle Fuller (2015)
and Judge Ben Fuller (1990)
Admittee and father

Alexander Flachsbart (2015),
Elizabeth Flachsbart (2015), Elizabeth Jones (1982)
Husband and wife co-admittees,
mother-in-law/mother

Kendall Lee (2015), David Lee (1986) and
Mark Lee (1977)
Admittee, father and uncle

Alexandria Smith (2015) and
Banks T. Smith, Sr. (1985)
Admittee and father

Lena Morgan (2015) and
Charles Morgan (1985)
Admittee and father

Katherine West (2015) and
Hal West (1987)
Admittee and father

Lindsay C. Mims (2015), **James N. Guin** (2015), L. Daniel Mims (1985), Judge James C. Guin (1980) and Sandra Guin (1985)
Wife and husband co-admittees, father/father-in-law, father-in-law/father, mother-in-law/mother

Aisha Mishal Hall (2015) and Thomas Dewayne Bonds (2003)
Admittee and father

William H. Broome, Jr. (2015) and William H. Broome (1977)
Admittee and father

Erika Rucker McKay (2015) and Christopher McKay (2012)
Admittee and husband

Kenneth Bryant Hitson (2015) and Kenneth Allen Hitson, Jr. (1989)
Admittee and father

Faye Doss Suggs (2015) and Chriss H. Doss (1968)
Admittee and grandfather

Chandler Osborn Kirby (2015) and Jeffrey C. Kirby (1981)
Admittee and father

Leah Catherine Taylor (2015), Ted Taylor (1966), Leah Oldacre Taylor (1983),
Tracy Taylor Sproule (1996) and Chris Reader (2014)
Admittee, father, mother, sister and fiancé

Allen Gregory Jolley (2015) and
Judge Tim Jolley (1981)
Admittee and father

Stephen Bulgarella (2015) and
Joseph Bulgarella (1989)
Admittee and father

Joshua Willis (2015) and
Jeff Willis (1982)
Admittee and father

Thomas Scott Smith, III (2015)
and Thomas Scott Smith, Jr. (1994)
Admittee and father

Austin Whitten (2015) and
Randy Whitten (1979)
Admittee and father

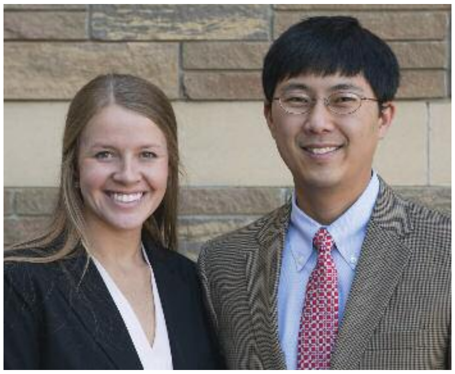
Lauren Elizabeth Miles (2015)
and Wilson Daniel Miles, III (1990)
Admittee and daughter

David Andrew Bozeman (2015), Russell F. Bozeman (2000),
Judge A. Ted Bozeman (1967) and Judge Terri Bozeman Lovell (1996)
Admittee, father, grandfather and aunt

Andrew McKinney (2015) and
Randy McKinney (1986)
Admittee and father

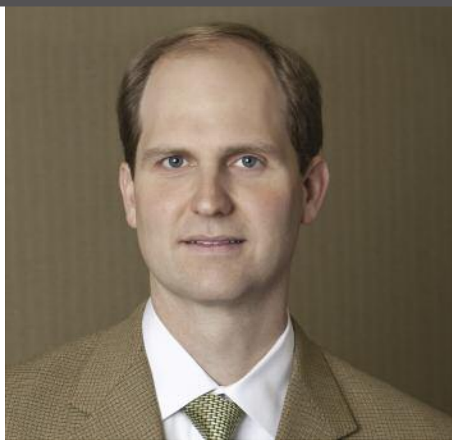
Roger W. Varner, Jr. (2015) and
Roger W. Varner, Sr. (1994)
Admittee and father

Forrest Talma McConnell, IV (2015) and
Forrest Talma McConnell, III (1983)
Admittee and father



Chelsea Phillips (2015) and
Tae Phillips (2009)
Admittee and husband

Carol Thetford Montgomery (2015), Joseph D. Thetford, Sr. (1981),
Robin B. Thetford (1981) and Joseph D. Thetford, Jr. (2013)
Admittee, father, mother and brother



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

Fictitious Parties; Relation Back; State Immunity

***Ex parte Talbott*, No. 1140596 (Ala. Sept. 30, 2015)**

Petition for mandamus granted, directing trial court to grant motion to dismiss. Claims subject to two-year statute asserted against parties substituted for fictitious entities were time-barred because (1) plaintiff failed to show she was unaware of the identities of the defendants when she filed the original complaint, (2) the original complaint did not describe the fictitious parties' conduct and (3) plaintiff did not exercise due diligence in ascertaining the identities of the parties. Other claims (by ex-professor at University of South Alabama against co-employees) were barred by section 14 immunity because plaintiff admitted that the logbook belonged to USA, and thus the complaint for damages and return of the logbook was against the State.

Public Employment; Employment Law

***Johnson v. City of Mobile*, No. 1140433 (Ala. Sept. 30, 2015)**

In Title VII retaliatory discrimination and ADA case, EEOC findings are merely an item of evidence, which can be weighed against other evidence, and are not entitled to preclusive effect. Trial court's no-retaliation determination was not clearly erroneous, because unsatisfactory job review, without tangible consequences, was not adverse employment action.

Public Employment

***Ex parte Hampton*, No. 1140341 (Ala. Sept. 30, 2015)**

Section 14 immunity barred money damage claims by non-tenured teacher against superintendent because superintendent cannot make termination decisions unilaterally.

Arbitration; Capacity (Nursing Home Contracts)

***Diversicare Leasing Corp. v. Hubbard*, No. 1131027 (Ala. Sept. 30, 2015)**

PR of profoundly intellectually disabled decedent filed wrongful death action against facility operator. In his admission documents, PR (mother of decedent) executed the documents as decedent's "Responsible Party." Arbitration agreement was signed by mother as "Resident's Representative," but mother/PR did not have a POA or guardianship power. Operator moved to compel arbitration, which PR opposed, claiming lack of legal authority to bind decedent because decedent was incapacitated but over 21, and PR had no POA or guardianship power. The circuit court denied arbitration. The supreme court affirmed, reasoning that resident lacked capacity to contract for himself or to hold out mother as his representative, and mother lacked authority to conduct business for resident.

Elections; Determination of Domicile (Students)

***Horwitz v. Kirby*, No. 1130246 (Ala. Sept, 30, 2015)**

In determining residency for eligibility to vote under *Ala. Code* § 11-46-38(b), a college student makes the college town her new domicile only if she shows (1) a decided intention to abandon one's former domicile as such, and (2) a "certain state of mind" as to making the new locale one's home.

Medical Liability; Sexual Abuse of Patient Not Subsumed into AMLA

***Ex parte Vanderwall*, No. 1130036 (Ala. Sept. 30, 2015)**

The court overruled *Mock v. Allen*, 783 So. 2d 828 (Ala. 2000); sexual assault claims allegedly occurring during the course of treatment are not subsumed by the AMLA. There is an interesting parry-and-thrust in concurrence and dissent between Justices Murdock and Shaw, regarding the propriety of overruling prior decisions when a litigant has not asked the court for such relief.

Summary Judgment Procedure

***Krause v. Vanderbilt Minerals, LLC*, No. 1121382 (Ala. Sept. 30, 2015)**

In asbestos exposure case, the court reversed trial court's summary judgment to defendant, reasoning that the motion did not inform plaintiff of lack of evidence as to asbestos-containing status of the subject talc. Plaintiff presented substantial evidence of asbestos-containing in its Rule 59(e) motion, which properly brought this evidence to the court, and was not improperly tardy.

Professional Negligence (Appraisers); Juror Misconduct

***Riverstone Development Co., Inc. v. Garrett & Associates Appraisals, Inc.*, No. 1140555 (Ala. Oct. 23, 2015)**

The court extended that rule requiring expert testimony for professional negligence matters against real-estate appraisers requires expert testimony as to the standard of care and breach thereof. Motion for new trial based on failure of a venire-person to answer truthfully whether she had been a defendant in a civil case was properly denied. There was no evidence establishing that a truthful answer would have caused plaintiff to exercise a preemptory strike or that bias was evident, and thus probable prejudice was not shown.

Statute of Limitations; Savings Clause

***Limon v. Sandlin*, No. 1140544 (Ala. Oct. 23, 2015)**

The court reversed a Rule 12(b)(6) dismissal on fraud, negligence and other claims based on the statutes of limitation. Parents of minor girl sued parents of minor boy, claiming that boy's parents falsely obtained girl's parents' consent for girl to accompany boy and boy's parents on trip to New York, ostensibly to see Broadway shows, but actually to obtain abortion without parental consent. Girl's parents discovered the cause of action, they claimed, after daughter confessed to her parents many months later. Complaint adequately alleged that plaintiffs could not have discovered the cause of action within the two-year period, and thus that all claims (not merely fraud claims) could be saved under the tolling provision of *Ala. Code* 6-2-3.

Arbitration; Non-Signatories

***Ameriprise Financial Services, Inc. v. Jones*, No. 1140893 (Ala. Oct. 30, 2015)**

Charles agreed to arbitration in Ameriprise agreement, covering any controversies "that may arise between us." Charles executed a power of attorney appointing Paul as agent. Paul, using the POA, had Ameriprise change death beneficiaries to Paul and Eleanor. Ameriprise represented to them that the change was made, but later contacted the sheriff and reported Charles as kidnapped. After Charles died, Ameriprise refused to pay accounts to Paul and Eleanor. Paul and Eleanor sued, alleging breach of contract, fraud and outrage. Ameriprise moved to compel arbitration; the trial court granted arbitration on all claims except outrage, accepting Paul and Eleanor's argument that the outrageous conduct

(Continued from page 53)

existed independent of any contract. The supreme court reversed as to the denial of arbitration on the outrage claim, concluding that (1) Paul and Eleanor's third-party beneficiary status of the contract was necessary to support their claims, because Paul was purportedly acting under Charles's POA in changing the death beneficiary, and (2) arbitration agreement was broad enough to cover outrage claims, because the agreement extended even to claims not relating to the contract.

Estates; Personal Representative Compensation

***Wehle v. Bradley*, No. 1101290 (Ala. March 14, 2014, on rehearing Oct. 30, 2015)**

The court affirmed $1.9 million compensation award paid to PRs in administration of $35+ million estate, under *Ala. Code* § 43-2-848(a). PRs, however, owed estate interest on fees which they received before obtaining court approval for those fees (in contravention of *Ala. Code* § § 43-2-844(7); two-year statute of limitations did not apply to that claim because, under *Ala. Code* § 43-2-509, PRs were obliged to refund interest, which can be asserted any time before final settlement. On rehearing, the PRs argued that the court should reconsider the propriety of denying interest claims of the daughters in light of *Ruttenberg v. Friedman*, 97 So. 3d 114, 122 (Ala. 2012). *Ruttenberg* did not decide the issue, and § 43-2-844(7) makes plain that, "[u]nless expressly authorized by the will, a personal representative, only after prior approval of court, may ... pay compensation of the personal representative."

CGL Insurance

***Mid-Continent Casualty Company v. Advantage Medical Electronics, LLC*, No. 1140908 (Ala. Nov. 6, 2015)**

Insured had been sued by vendor which had hired insured to inspect and move CT scanner; scanner was damaged in course of insured's work. In DJ action by insurer concerning defense and indemnity obligations under insured's CGL policy, the court concluded: (1) Rule 54(b) certification on duty to defend question was appropriate, even though duty to indemnify questions remained; (2) given narrowness of interpreting policy exclusions, four policy exclusions did not release insurer from defense obligation (including the "care, custody or control," "your work" and contractual exclusions).

Mistrial; New Trial

***Ross v. Marion*, No. 1140604 (Ala. Nov. 6, 2015)**

Circuit court erred by denying motion for new trial, preceded by motion for mistrial while jury was deliberating, based on trial court's answering jury question without providing parties and counsel notice and opportunity to state positions.

Venue; Mandate of the Court

***Ex parte Riverfront, LLC*, No. 1131061 (Ala. Nov. 6, 2015)**

In *Riverfront I*, 129 So. 3d 1008 (Ala. 2013), the court held that a forum-selection clause was enforceable and required that an action be transferred from Etowah to Tuscaloosa County. After the mandate in *Riverfront I*, the loser moved to transfer back to Etowah County, arguing that (1) the Tuscaloosa forum was "seriously inconvenient" and thus the clause was not enforceable, and (2) transfer was appropriate for *forum non conveniens*. The circuit court granted transfer. The supreme court granted mandamus relief, reasoning: (1) the "seriously inconvenient" issue was subsumed into *Riverfront I*, and revisiting it would violate the mandate of *Riverfront I*, and (2) *forum non conveniens* was not a persuasive defense to the forum selection clause.

Medical Liability

***Brookwood Health Services, Inc. v. Borden*, No. 1131284 (Ala. Nov. 13, 2015)**

Court reversed a $7.5 million judgment for plaintiff in medical liability action regarding actions of hospital nurses and rendered judgment for defendants. Plaintiffs did not present expert testimony to establish a breach of the applicable standard of care for the nurses. Want of skill or lack of care was not so apparent as to be understood by a layperson and required only common knowledge.

From the Alabama Court of Civil Appeals

Best Evidence (Copy of Document)

***Pepin Manufacturing, Inc. v. ESwallow USA, LLC*, N0. 2141406 (Ala. Civ. App. Oct. 3, 2015)**

Trial court improperly refused to admit copy of document into evidence merely because the original was available; Rule 1003 allows introduction of copy unless question of authenticity is raised or circumstances render the document unreliable.

Taxation; Appeals

***Ex parte Alabama Dept. of Revenue*, No. 2140926 (Ala. Civ. App. Oct. 3, 2015)**

Under *Ala. Code* § 40-2B-2(m)(2), a party seeking to appeal a decision of the tax tribunal will perfect the appeal by filing a notice to the circuit court within 30 days of the date of decision of the tax tribunal. The next sentence requires service on the tax tribunal within the same 30 days, but that latter mandate is procedural, not jurisdictional.

Real Property

***FSRJ Properties, LLC v. Walker*, No. 2140648 (Ala. Civ. App. Oct. 9, 2015)**

Claims regarding validity of foreclosure sale are subject to two-year statute of limitations, but claims of priority of interest are subject to the 10-year statute for recovery of lands under *Ala. Code* § 6-2-33(2).

UM; Reimbursement

***State Farm Mut. Auto. Ins. Co. v. Brown*, No. 2140316 (Ala. Civ. App. Oct. 9, 2015)**

Browns sued Kramer (tortfeasor) and SF (their UM carrier). USAA (Kramer's carrier) offered $200,000 limits; SF advanced the $200,000 under *Lambert* and opted out under *Lowe*. Jury returned verdict for $80,000 compensatory and $10,000 punitive damages. Because there was no punitive coverage, USAA deposited $80,000 into court. Browns contended that SF was obligated to pay the $10,000 punitive damages. Held: "Although the Browns were legally entitled to recover punitive damages from Kramer, the Browns unquestionably received, pursuant to State Farm's *Lambert* advance, more than the total sum of damages to which they were entitled."

Workers' Compensation

***Meadwestvaco Corporation v. Mitchell*, No. 2140315 (Ala. Civ. App. Oct. 9, 2015)**

Order granting motion to compel employer and TPA to provide panel of four physicians under *Ala. Code* 25-5-77(a) was not an appealable order as either a final order or an (alleged) civil sanction. The court refused to treat the improper appeal as a petition for mandamus for untimeliness.

Condominium Law

***Dorsett v. Singla*, No. 2140503 (Ala. Civ. App. Oct. 9, 2015)**

Limited common element cannot be separated from the unit to which it has been allocated without proper amendment to the declaration.

(Continued from page 55)

Workers' Compensation; Statute of Limitations

***Martin v. Austal USA, LLC*, No. 2140662 (Ala. Civ. App. Oct. 16, 2015)**

Employee argued that her two-year statute of limitations for filing a claim was tolled during the time, after her last date at work, she was on FMLA leave and received STD benefits. The court rejected that argument based on the "date of last exposure" standard for occupational disease in *Ala. Code* § 25-5-117(b). The trial court and the CCA rejected that argument.

Workers' Compensation; Independent Contractor; Extraterritoriality

***Jenkins v. American Transport, Inc.*, No. 2140153 (Ala. Civ. App. Oct. 16, 2015)**

Substantial evidence supported conclusion that driver was employee (vs. independent contractor) under multi-factor test, including (1) employer policies on touching loads exhibited control over manner or means of performance, and (2) employee's right to terminate on 30 days' notice suggested employment status. Employee could recover benefits under § 25-5-35(d) because his contract for hire was executed in Alabama but his work was not principally localized in any state.

Dismissal under Rule 41

***Progressive Ins. Co. v. Brown*, No. 2140778 (Ala. Civ. App. Oct. 30, 2015)**

Calendaring error by counsel does not justify a Rule 41 dismissal.

Rule 41 Dismissal; Arbitration

***Cartee v. Community Spirit Bank*, No. 2140650 (Ala. Civ. App. Oct. 30, 2015)**

Circuit court did not abuse its discretion in dismissing action with prejudice, after giving plaintiffs four months to commence arbitration after arbitration was compelled.

Personal Property Exemption

***Alabama Telco Credit Union v. Gibbons*, No. 2140604 (Ala. Civ. App. Oct. 30, 2015)**

Periodic wages, which can be subject to the $1,000 exemption from garnishment under Art. X, Sec. 204 of the Alabama Constitution, are not exempt so as to allow a recurring exemption for wages not exceeding $1,000; the judgment defendant receives only an exemption of up to $1,000 in the aggregate. Ed. note: this case notes a 2015 statute (not applicable to the case) under which wages are no longer subject to exemption.

Grandparent Visitation Act Held Unconstitutional

***Weldon v. Ballow*, No. 2140471 (Ala. Civ. App. Oct. 30, 2015)**

Custodial parent has a fundamental right to decide how grandparent visitation serves the best interests of his or her child. *Ala. Code* § 30-3-4.1(d) deprives custodial parents of due process by impermissibly authorizing unconstitutional judicial review of parental decisions regarding grandparent visitation based on the best interests of the child. Thus, that subsection, and by extension the entirety of the GVA, is facially unconstitutional.

District Court Appeals; Post-Appeal Amendments on Damages

***Ex parte Nunnelley*, No. 2141035 (Ala. Civ. App. Nov. 6, 2015)**

Rule 13(j), *Ala. R. Civ. P.*, limits a plaintiff who appeals a district-court judgment to the circuit court to recovery in the circuit court of no more than the jurisdictional limit of the district court.

Tax Sale Redemption

***Wall to Wall Properties, Inc. v. Cadence Bank, N.A.*, No. 2140683 (Ala. Civ. App. Nov. 6, 2015)**

In order to redeem real property from a tax sale to Wall, Cadence was not required to reimburse Wall for the insurance premiums regarding the property Wall had paid or for the permanent improvements Wall had made to the property.

Forfeiture Procedure

***Gray v. City of Opelika*, No. 2140658 (Ala. Civ. App. Nov. 6, 2015)**

Federal adoption of property seizure prior to the filing of circuit court action deprived circuit court of *in rem* jurisdiction.

Tax Appeals

***Target Corp. v. Jefferson County Board of Equalization*, No. 2140297 (Ala. Civ. App. Nov. 13, 2015)**

Court dismissed an appeal from an ad valorem tax assessment for failure to proceed under *Ala. Code* § 40-3-25, under which a notice of appeal must be filed with both the circuit court and the secretary of the board of equalization within 30 days to be timely. Judge Donaldson dissented, arguing that the Alabama Administrative Procedure Act ("the AAPA"), § 41-22-1, actually controls the appeal from an ad valorem tax assessment.

From the United States Supreme Court

Qualified Immunity

***Mullenix v. Luna*, No. 14-1143 (U.S. Nov. 9, 2015)**

Officer who shot a fleeing suspect driving in a high-speed chase, where the officer shot from an interstate overpass in an effort to disable the suspect's vehicle, was entitled to qualified immunity. The constitutional standard was not so clearly established in this context to render the officer's actions obviously excessive.

From the Eleventh Circuit Court of Appeals

Intellectual Disability; Constitutional Law

***J.R. v. Hansen*, No. No. 12-14212 (11th Cir. Oct. 15, 2015)**

Florida's statutory scheme for the involuntary confinement of intellectually disabled persons without providing a periodic hearing to assess capacity was facially unconstitutional.

Alabama Politics; Discovery

***In re Hubbard*, No. 13-10281 et al. (11th Cir. Oct. 14, 2015)**

District court abused its discretion in refusing to quash subpoenas seeking files of the Alabama Senate President Pro Tempore, the Speaker of the Alabama House of Representatives, the current Governor of Alabama and the former governor relating to passage of the Alabama Accountability Act.

Labor

***NLRB v. Allied Medical Transport, Inc.*, No. 14-15033 (11th Cir. Oct. 13, 2015)**

Court affirmed the board's injunction, reinstatement and back pay awards to employee union organizers. Employer illegally interfered with its employees' union activities and retaliated against the employees by firing them.

Employment

***Flowers v. Troup County*, No. 14-11498 (11th Cir. Oct. 16, 2015)**

Former football coach sued under Title VII for racial discrimination following his termination. Employer contended he was fired after discovery of recruiting violations which resulted in the enrolling of ineligible students. The court affirmed the district court's grant of summary judgment to employer.

Qualified Immunity; Excessive Force

***Singletary v. Vargas*, No. 14-14424 (11th Cir. Oct. 29, 2015)**

Denial of qualified immunity reversed; reasonable officer would have perceived that he was in imminent danger of being run over by car, so officer's firing weapon to stop the car was not excessive force.

First Amendment; Public Employment

***Alves v. Board of Regents of Univ. of Ga. System*, No. 14-14149 (11th Cir. Oct. 29, 2015)**

Plaintiffs claimed they were terminated in retaliation for submitting a memorandum to university officials complaining about poor leadership and mismanagement. Plaintiffs claimed their memorandum amounted to citizen speech on a matter of public concern. Held: Memorandum constituted professional speech not entitled to First Amendment protection.

Arbitration; Delegation to Arbitrator of Agreement Validity

***Parnell v. CashCall, Inc.*, No. 14-12082 (11th Cir. Oct. 28, 2015)**

Where arbitration agreement delegates to the arbitrator the threshold determination of whether the agreement to arbitrate is enforceable, courts retain jurisdiction only to review a challenge to that specific provision.

(Continued from page 57)

RECENT CRIMINAL DECISIONS

From the Court of Criminal Appeals

Rule 32; Equitable Tolling

***State v. Hurst*, CR-14-0726 (Ala. Crim. App. Oct. 23, 2015)**
Trial court was required to make specific findings of fact regarding the defendant's request for equitable tolling presented in his time-barred Rule 32 petition, because it granted the petition following an evidentiary hearing.

Impeachment

***Collins v. State*, CR-13-1199 (Ala. Crim. App. Oct. 23, 2015)**
Trial court did not err in excluding impeachment evidence regarding an accomplice's statement to a fellow inmate, because defendant did not lay a proper predicate for its admission. Defendant failed to confront the accomplice regarding time or place of statement after accomplice denied making it.

Hindering Prosecution

***Collier v. State*, CR-13-1937 (Ala. Crim. App. Oct. 2, 2015)**
Court reversed the defendant's conviction for hindering prosecution, a violation of *Ala. Code* § 13-10-43, because he did not provide "criminal assistance" to another defendant as required for proof under his indictment. False statements to the police were made after other defendant was apprehended, and his act of hiding a gun did not prevent other defendant's apprehension.

Courtroom Closure

***Demouey v. State*, CR-14-0289 (Ala. Crim. App. Sept. 18, 2015)**
Trial court erred in clearing the courtroom during the 14-year-old victim's testimony; state failed to provide an "overriding interest that [was] likely to be prejudiced" to justify total closure.

Rule 32; *Brady*

***Reynolds v. State*, CR-13-1907 (Ala. Crim. App. Sept. 18, 2015)**
Court reversed the summary dismissal of the defendant's Rule 32 petition, because he sufficiently pleaded that the state failed to produce exculpatory evidence pertaining to an alleged agreement with a prosecution witness.

Allocution

***Green v. State*, CR-14-1083 (Ala. Crim. App. Sept. 18, 2015)**
New sentencing hearing was necessary because defendant was not given opportunity to make statement on his own behalf before the trial court issued sentence.

Lesser-Included Offenses

***McDaniels v. State*, CR-13-1624 (Ala. Crim. App. Sept. 18, 2015)**
Trial court erred in not instructing jury on third-degree assault as a lesser-included offense, because, though he was convicted of manslaughter, evidence was presented that his striking victim may have only injured him and did not cause his death.

Split Sentence Act

***Goldsmith v. State*, CR-14-1156 (Ala. Crim. App. Sept. 18, 2015)**
Split sentence under *Ala. Code* § 15-18-8 was improper without imposing term of probation as part of the sentence.

Indictment Dismissal

***State v. Walker*, CR-14-0765 (Ala. Crim. App. Sept. 18, 2015)**
Trial court had no authority to dismiss defendant's theft indictment before trial for failure to pay funds to a business, which constituted a contractual matter rather than a crime. Defendant's intent was determinative whether his actions constituted a civil breach of contract or theft, and intent is a jury question.

Sexual Activity with Student

***Bonds v. State*, CR-13-1570 (Ala. Crim. App. Sept. 18, 2015)**
In a case of first impression, the court affirmed a school resource officer's conviction for engaging in a sex act with a student under the age of 19 years while serving as a school employee, a violation of *Ala. Code* § 13A-6-81. It rejected the defendant's argument that, because he was employed by the local police department, he was not a "school employee" under the statute.

MEMORIALS

Baskerville, James Victor
Vestavia
Admitted: 1980
Died: October 24, 2015

Bennett, Charlotte Pool
Birmingham
Admitted: 2013
Died: September 2015

Burttram, Fitzhugh Augustus
Ashville
Admitted: 1952
Died: March 27, 2015

Carmichael, Charles Elmore, Jr.
Tuscumbia
Admitted: 1949
Died: March 4, 2015

Coleman, Charles Michael
Tuscaloosa
Admitted: 1979
Died: May 22, 2015

Costello, Leo Edwin
Tuscaloosa
Admitted: 1969
Died: September 27, 2015

Cruse, Jerry Lee
Pine Level
Admitted: 1964
Died: August 28, 2015

Gilmore, Frank Clark, III
Birmingham
Admitted: 1999
Died: August 10, 2015

Harris, James Edward
Birmingham
Admitted: 1976
Died: October 22, 2015

Huffstutler, John Terry, Jr.
Guntersville
Admitted: 1957
Died: October 10, 2015

Jemison, Mays Russell
Montgomery
Admitted: 1977
Died: October 23, 2015

Koch, Alan Goodman
Prattville
Admitted: 1968
Died: May 22, 2015

LeMarr, Brad Elliott
Broken Arrow, OK
Admitted: 2010
Died: January 20, 2015

McAbee, Frank Timothy
Birmingham
Admitted: 1978
Died: October 25, 2015

Nihart, David Ashley
Mobile
Admitted: 1977
Died: September 27, 2015

Norton, Hon. Thomas Berry, Jr.
Gulf Shores
Admitted: 1974
Died: September 5, 2015

Pettigrew, Jamie Lucille
Montgomery
Admitted: 1967
Died: October 4, 2015

Riley, Wesley Blacklidge, Jr.
Abbeville
Admitted: 1974
Died: September 23, 2015

Taylor, Everette Tedford, Jr.
Birmingham
Admitted: 2005
Died: September 30, 2015

Walston, Robert Henderson
Vestavia
Admitted: 1960
Died: September 5, 2015

IMPORTANT NOTICES

- Alabama Lawyers' Hall of Fame
- Judicial Award of Merit
- Local Bar Award of Achievement
- J. Anthony "Tony" McLain Professionalism Award
- William D. "Bill" Scruggs, Jr. Service to the Bar Award
- Notice of Election and Electronic Balloting
- Electronic Filing–Mobile County Probate Court

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 the state of Alabama.

The implementation of the idea of an Alabama Lawyers' Hall of Fame originated during the term of state bar President Fred Gray. He appointed a task force to study the concept, set up guidelines and then to provide a recommendation to the board of bar commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004. Since then, 50 lawyers have become members of the hall of fame. The five newest members were inducted May 1, 2015.

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 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 on the bar's website at *https://www.alabar.org/ membership/ alabama-lawyers-hall-of-fame/2014-lawyers-hall-of-fame/*.

Download an application form at *https://www.alabar.org/ assets/uploads/2014 /08/Lawyers-Hall-of-Fame-Nomination-Form-2016-fillable.pdf* and mail the completed form to:

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

The deadline for submission is March 1, 2016.

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, 2016**. Nominations should be mailed to:

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

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

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

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

Local Bar Award of Achievement

The Alabama State Bar Local Bar Award of Achievement recognizes local bar associations for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's 2016 Annual Meeting at the Sandestin Golf and Beach Resort–Baytowne Wharf.

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

The following criteria will be used to judge the contestants for each category:

- 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 award application by May 6, 2016. Applications may be downloaded from *www.alabar.org* or obtained by contacting Christina Butler at (334) 269-1515 or *christina.butler@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, 2016**. Nominations should be prepared on the appropriate nomination form available at *www.alabar.org* and mailed to:

Keith B. Norman
Executive Director
Alabama State Bar
P.O. Box 671
Montgomery AL 36101

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.

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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, 2016.** Nominations should be prepared on the appropriate nomination form available at *www.alabar.org* and mailed to:

Keith B. Norman
Executive Director
Alabama State Bar
P.O. Box 671
Montgomery AL 36101

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.

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 Members of the Board of Bar Commissioners* that the election of these officers will be held beginning Monday, May 16, 2016 and ending Friday, May 20, 2016.

On the third Monday in May (May 16, 2016), members will be notified by email with a link to 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 6, 2016) requesting a paper ballot. A single written request will be sufficient for all contested elections (president-elect and commissioner) and run-offs, if necessary. All ballots (paper and electronic) must be voted and received by the Alabama State Bar by 5:00 p.m. on the Friday (May 20, 2016) 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, 2016, 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, 2016.

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, 2016 and vacancies certified by the secretary no later than March 15, 2016. 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 of the Alabama State Bar no later than 5:00 p.m. on the last Friday in April (April 29, 2016).

Election of At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 2, 5 and 8. Applications for these positions, which are elected by the Board of Bar Commissioners, are due by April 1, 2016.

Submission of Nominations

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

Keith B. Norman
Secretary
Alabama State Bar
P.O. Box 671
Montgomery AL 36101

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 confirm that the secretary receives the nomination form by the deadline.

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

Electronic Filing–Mobile County Probate Court

Pursuant to the June 23, 2015 order of the Alabama Supreme Court, notice is hereby given that the Probate Court of Mobile County commenced the acceptance of pleadings filed electronically, in accordance with the Probate Court of Mobile County's published policies and procedures, on January 4, 2016. All lawyers interested in this service and training on said service should review the Probate Court of Mobile County's website at *www.probate.mobilecountyal.gov* for more information. For more information, please contact Stacie Vitello, Judicial Division chief, at (251) 574-6008 or *svitello@probate.mobilecountyal.gov*.

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

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

Co-authored by

Gregory Butrus
Balch & Bingham LLP

The Continuing Evolution of Campaign Finance Laws

As the new year begins, we are in the midst of a general election year. In addition to the Presidential and Congressional races that are unfolding, a number of offices that are especially important to attorneys will be on the ballot in Alabama, including seats on the supreme court, circuit and district courts and all district attorneys. As the candidates prepare for these elections, one of the many items they must vigilantly track are the raising and spending of campaign funds. These activities are governed by the Alabama Fair Campaign Practices Act (FCPA), which is located in Chapter 5 of Title 17. This is an area of the law that is constantly evolving to keep up with the practices and technology of the day, as well as other priorities.

On June 4, 2015, the Alabama Legislature passed the latest amendment to the act: Senate Bill 241, sponsored by Senator Arthur Orr. This new law marks the seventh amendment in the past six years to the FCPA. These revisions make significant changes to the enforcement provisions of the FCPA while also making other revisions to clarify and simplify confusing or outdated provisions. The majority of these revisions came from recommendations made as part of a two-year review by a study committee created by legislative resolution. The revised FCPA now vests the Alabama Ethics Commission with the power to interpret and enforce the state's campaign finance laws. Governor Bentley signed this bill into law on June 12, 2015 (Act No. 2015-495), and these revisions took effect September 1, 2015. The significant changes set forth in this legislation include:

New Responsibilities for the Ethics Commission

The Ethics Commission is now responsible for working with the secretary of state to implement the reporting requirements of the FCPA. The Ethics Commission is also responsible for:

- Approving all forms required by the FCPA;
- Suggesting accounting methods for candidates and PACs;
- Approving a retention policy for all FCPA reports and filings;
- Approving a manual that shall be published by the secretary of state for candidates and PACs and describe the requirements of the FCPA;
- Investigating and holding hearings regarding alleged violations of the FCPA;
- Conducting or authorizing audits of FCPA filings upon the filing of a complaint or the existence of a material discrepancy;
- Affirming, setting aside or reducing civil penalties;
- Referring all evidence and information to the attorney general or appropriate district attorney for prosecution of any criminal violation of the FCPA;
- Conducting investigations and ordering audits in connection with a complaint or other filing alleging a violation of the FCPA;
- Issuing and publishing advisory opinions on the requirements of the FCPA; and
- Prescribing, publishing and enforcing rules to carry out the directives of the FCPA.

Composition of the Ethics Commission (And Staff)

Beginning with the first vacancy on the Ethics Commission after January 1, 2016, the commission must have one

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member who is a former elected public official who served at least two terms of office. The commission (with approval of the attorney general) may now appoint a group of attorneys to work on behalf of the commission in actions or proceedings brought by or against the commission (previously limited to one). The director of the commission may now hire up to eight full-time investigators (up from six).

Receipt of Contribution

The date of receipt of a contribution is the first date that the recipient of the contribution is able to make use of the contribution. For contributions made by check, the date of receipt is the earlier of:

- Ten days from the date that the check came within the recipient's control; or
- The date that the check was deposited into the recipient's account.

When Expenditure Is Made

An expenditure is considered to be made on the date that the instrument authorizes the expenditure. For expenditures made by check, the date of expenditure is the date on the check. For expenditures made by electronic payment, the date of expenditure is the date of the electronic payment.

Qualifying Fees

The payment of qualifying fees is now clearly an "expenditure" for purposes of reporting under the FCPA.

Closing of PCC after Death of Candidate

A candidate must designate an individual to dissolve his or her principal campaign committee in the event of death or incapacity of the candidate. If the designated person is incapable of serving in this capacity, the campaign account shall be dissolved by the candidate's personal representative. All funds in the account must be disposed in accordance with state law.

Termination of Dormant PACs

The secretary of state is now authorized to dissolve or terminate a PAC that has maintained a zero balance for one calendar year so long as the secretary of state first provides a 90-day notice of intent by certified mail.

Candidate's Bank Account

A candidate's principal campaign committee may now make use of a money market or similar account and may use debit cards, credit cards and electronic transfers. Previously, the law only allowed a candidate to have a checking account and use checks.

Legal Fees

Legal fees and costs associated with any civil action, criminal prosecution or investigation resulting from "conduct reasonably related to performing the duties of the office held" is now an explicit purpose for which campaign funds may be expended.

Disposal of Campaign Property

Any property purchased by–or contributed to–a campaign with a value of more than $500 must be liquidated at fair market value or donated as permitted by the FCPA within 120 days following the election. Any funds generated by the liquidation of such property must be deposited in the candidate's campaign account. If elected, the candidate can also use such property in the performance of the duties of his or her office.

Filing of Daily Reports

Daily reports are now only required to be filed on the specific day on which the campaign spends or receives $5,000. Previously, if a daily report was required on any day, the campaign was required to continue filing daily reports until election day, even if it did not have any more activity during that time.

Annual Reports

Annual reports are not required to be filed by public officials who have closed their campaign committees. Previously, the law suggested that such a public official had a filing obligation even though they had closed their committee.

Electronic Filing Threshold

The threshold for electronic filing of campaign finance reports is lowered from $10,000 to $5,000. It is not clear from the language of FCPA whether the $5,000 threshold applies to county candidates and county PACs in the same way it applies to state candidates and state PACs.

Electronic Filing

Commencing with the 2018 election cycle, all FCPA reports must be made with the secretary of state's electronic filing system–except for municipal candidates which will continue to be made with the probate judge. During the 2016 election cycle, county candidates and PACs (other than municipal) may elect to file their FCPA reports with the secretary of state's electronic filing system. If they choose to do so, these local candidates and PACs must notify the judge of probate of this decision (in a form prescribed by the judge of probate) and continue filing electronically until the candidate committee or PAC is terminated.

Statement of Economic Interests

The requirements for filing the statement of economic interests form by candidates have been changed so that the filing must now be made with the Ethics Commission simultaneously with the filing of the candidate's qualifying papers. The Ethics Commission must confirm to the appropriate election official within five business days that the candidate has filed the form as required.

Enforcement Provisions

Beginning with the **2018 election cycle**, a new process for the issuance of civil and criminal penalties will take effect. The secretary of state or probate judge (as appropriate) has the authority to levy civil penalties for the *untimely* filing of FCPA reports. The Ethics Commission has the authority to levy civil penalties for the "*materially inaccurate*" filing of FCPA reports.

Safe Harbor for Correcting Reports

A person who voluntarily files an amended report to correct an error in an otherwise timely-filed report without being prompted by an election official has not committed an offense and is not subject to any civil penalty. The failure to file a timely report is not an offense or subject to a civil penalty so long as it is the first failure to file in a timely manner by that candidate or PAC for that election cycle and the report is filed within 48 hours of the time that it was due.

Modified Civil Penalties

The civil penalties for reporting violations are modified as follows:

- First offense: Lesser of $300 or 10 percent of the amount not properly reported.
- Second offense: Lesser of $600 or 15 percent of the amount not properly reported.
- Third (and subsequent) offense: Lesser of $1,200 or 20 percent of the amount not properly reported.
- The fourth offense also establishes a rebuttable presumption of the intent necessary for a criminal violation.

The secretary of state or probate judge must notify the attorney general or district attorney of a fourth filing violation that would create a rebuttable presumption of the intent to violate the reporting requirements. The secretary of state or probate judge must notify the person by certified mail and electronic mail when a penalty is levied. Administrative fines must be paid within 45 days of any review being finalized. Fines may be paid with campaign funds.

Review of Civil Penalties

Any person upon whom a civil penalty is imposed may seek a review by filing a written notice with the secretary of state or probate judge within 14 days after the notification was mailed to that individual. Further review will be conducted by the Ethics Commission.

Administrative Rules

The secretary of state is authorized to promulgate administrative rules to implement and administer the FCPA.

Duties of the Secretary of State

The secretary of state shall perform the following duties regarding the FCPA:

- Maintain the electronic filing system;
- Levy and collect civil penalties; and
- Work cooperatively with the Ethics Commission to fully implement and enforce all campaign finance laws.

These changes should help to clarify many parts of the FCPA and make important revisions in a number of areas. A chief goal of the FCPA is to provide better information to Alabamians regarding elections. All of these filings can be viewed and searched at the secretary of state's election site, *www.alabamavotes.gov*. There are a number of useful resources there to help explain these evolving requirements. The Alabama Law Institute also works with the secretary of state's office and other officials responsible for elections to publish its *Alabama Election Handbook* available on the ALI website.

J. Anthony McLain

Lien Reduction and Double-Dipping

QUESTION:

The question before the Disciplinary Commission is whether a lawyer representing a client on a contingency fee basis may enter an agreement for, charge or collect an attorney's fee based on the gross recovery or settlement of a matter, and in the same matter charge an additional contingent fee for the negotiation of a reduction of third-party liens or claims, for example, medical bills, statutory liens and subrogated claims, where the liens or claims are related to, and to be satisfied from, the gross settlement proceeds from that matter.

ANSWER:

Absent extraordinary circumstances, a lawyer may not enter into an agreement for, charge or collect an attorney's fee based on the gross recovery or settlement of a matter, and in the same matter charge an additional contingent fee for the negotiation of a reduction of third-party liens or claims, where the liens or claims are related to, and to be satisfied from, the gross settlement proceeds from that matter.

DISCUSSION:

Rule 1.5(a), *Ala. R. Prof. C.*, requires "[a] lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee," and identifies nine factors to be considered when determining whether a fee is clearly excessive:

Rule 1.5.

Fees.

(a) A lawyer shall not enter into an agreement for, or charge, or collect a clearly excessive fee. In determining whether a fee is excessive the factors to be considered are the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent; and

(9) whether there is a written fee agreement signed by the client.

***

These factors, with the exception of paragraph (9) which provides for consideration of a written fee agreement signed by the client, are identical to those announced by the Supreme Court of Alabama in *Peebles v. Miley*, 439 So.2d 137 (Ala. 1983). While contingent fees are not permitted in criminal defense and domestic matters, see Rule 1.5(d), *Ala. R. Prof. C.*, they are permissible in a wide variety of matters provided they do not call for, charge or result in the collection of a "clearly excessive fee."

More than merely permissible, contingent fee agreements are normal and customary in plaintiff's practice, and particularly prevalent in personal injury representation. Among other requirements, Rule 1.5(c), *Ala. R. Prof. C.*, dictates these agreements must be "in writing" and "state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to

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be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated." Because all contingent fee agreements must be in writing, it is plainly impermissible for a lawyer to charge or collect a contingent fee for the negotiation of reductions in medical bills or hospital or subrogation liens or other third-party claims to be satisfied out of settlement funds if there is no written agreement to do so. Rule 1.5(c), *Ala. R. Prof. C.*

However, a lawyer may not, even if in writing and signed by the client, enter into an agreement or agreements which call for an attorney's fee based on the gross recovery or settlement of a matter and in the same matter charge an additional contingent fee for the negotiation of a reduction of third-party liens or claims which are related to, and to be satisfied from, the gross settlement proceeds from that matter. This is because the negotiation of a reduction of third-party liens and claims is incident to normal personal injury representation. Frequently necessary to reach a settlement of a client's personal injury claim, this service is a routine element of case management.

While Rule 1.2, *Ala. R. Prof. C.*, allows for limited-scope representation, the limitations must be "reasonable under the circumstances." Lawyers may not ethically abdicate their duty to timely address liens attaching to settlement proceeds. Rule 1.4(b), *Ala. R. Prof. C.*, requires a lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions about the representation." One of the most significant decisions to be made by a personal injury plaintiff is whether or upon what terms to propose or accept a settlement. Without an explanation of his or her obligations with regard to medical bills or hospital or other liens related to the injury giving rise to the claim, and any legal interest a third party may have in the client's settlement proceeds, a client cannot make an informed settlement decision. This is especially the case if the lawyer has a statutory obligation to protect a third party's interest in those funds, for example in the case of hospital or Medicaid liens, or an ethical obligation by virtue of the issuance of a protection letter. See Formal Opinion 2003-02.

It also stands to reason that typically the most advantageous time for negotiation of third-party liens or claims is prior to, rather than after, settlement of a tort claim. Whereas before settlement the lienholder or subrogated insurer will have to face the possibility of receiving no recovery at all, after settlement or judgment the lienholder will have no incentive to reduce its lien except as may be required by the common fund doctrine. A lawyer attempting to negotiate a reduction after settlement may not knowingly make a false statement of material fact or law to a third-party claimant, including a false statement about the settlement status of the related claim or the third party's right to settlement funds therefrom. Rule 4.1(a), *Ala. R. Prof. C.* Therefore, absent extraordinary circumstances, a lawyer representing a client in a personal injury matter may not enter an agreement with the client to exclude consideration of third-party liens or claims from the scope of representation. Rather, a lawyer's obligation to zealously represent the client's interests requires reasonable efforts to timely seek their reduction in conjunction with settlement.

Furthermore, the Rule 1.5(a) factors require that a fee for the negotiation of medical bills or hospital or subrogation liens, assessed *in addition to* an attorney's fee based on gross recovery, must be supported by some additional benefit to the client. However, as beneficiaries of the lawyer's services, third-party claimants and lienholders routinely reduce their liens or claims on a pro rata basis equal to their share of the attorney's fee paid by the client consistent with the common fund doctrine. A further reduction in a third party's lien upon or claim to settlement funds, in excess of the amount potentially recoverable pursuant to the common fund doctrine, is frequently necessary for the parties to reach a settlement. A lawyer negotiating these reductions in the process of reaching a settlement is compensated for his services by an attorney's fee calculated as a percentage of the gross settlement.

Thus, a lawyer charging a client a fee for negotiating reductions in third-party claims, including medical bills or hospital or other subrogation liens to be satisfied from settlement proceeds, in addition to an attorney's fee based upon the gross settlement, does so without providing any additional benefit to the client. This negotiation is incident to normal representation and requires no additional time or labor than that required of an attorney representing the client in the underlying claim. See Rule 1.5(a)(1), *Ala. R. Prof. C.* It is neither normal nor customary for lawyers to charge clients an additional amount for this "service." See Rule 1.5(a)(3), *Ala. R. Prof. C.* And a lien reduction granted by a medical provider or lienholder to facilitate the global settlement of the underlying claim, or consistent with the common fund doctrine, is the result of action already practically and ethically required of the lawyer and not the result of an additional service. See Rule 1.5(a)(4), *Ala. R. Prof. C.* It is therefore a violation of Rule 1.5(a), *Ala. R. Prof. C.*, for a lawyer to enter an agreement for, charge or collect such a "clearly excessive fee," which could be described as "double-dipping."

In sum, while circumstances may exist in which it is permissible for an attorney to enter into an agreement for, charge or collect a contingent fee for the reduction of medical bills or hospital or subrogation liens or other third-party liens or claims to be satisfied out of settlement funds, the Disciplinary Commission is of the opinion they are impermissible in routine contingent fee representation where the attorney's fee is based on the gross settlement or recovery. This opinion does not address an agreement for or charge of fees or expenses for the outsourcing of lien resolution in complex matters, for example Medicaid liens or ERISA subrogation, or the apportionment of those costs between the lawyer and client where both the lawyer and client are beneficiaries of the third-party service.

[RO-2015-01]

YLS UPDATE

Hughston Nichols
hnichols@hwnn.com

Opt to Join and Serve

As the 2015-16 president of the Alabama State Bar Young Lawyers' Section, I am taking this opportunity to re-acquaint you with the YLS and announce a number of events. For the first time ever, the YLS is now an opt-in section of the state bar. If you were 36 years or younger as of October 1, 2015, or have been licensed to practice in Alabama for three years or less, take a moment and join our section, which can be done at *www.alabar.org*. Then, reach out to the officers or other members of the Executive Committee and get involved. We want you!

Last year, **Brandon Hughey** did an outstanding job as president and we are all grateful for his service. He left big shoes to fill, but we are fortunate to have an excellent group of officers and Executive Committee members to carry the torch.

This year's officers are:

Charles "Chip" Tait, vice president (Mobile)

Parker Miller, secretary (Montgomery)

Lee Johnsey, treasurer (Birmingham)

The YLS Executive Committee includes: **Evan Allen, Jesse Anderson, Lance Baxter, Chris Burrell, Joel Caldwell, Rachel Cash, Aaron Chastain, Megan Comer, Emily Crow, Beau Darley, Latisha Davis, Nathan Dickson, Lisha Graham, Harris Hagood, Walton Hickman, Brad Hicks, Morgan Hofferber, Janine McAdory, Rachel Miller, Wyatt Montgomery, Hal Mooty, Brian Murphy, Amy Nation, Nathan Ryan, Scott**

Sasser, Julia Shreve, Robert Shreve, Miland Simpler and **Danielle Starks.**

In November, the YLS hosted our annual **Iron Bowl CLEs** in Huntsville, Birmingham, Montgomery, Mobile and, new to 2015, Tuscaloosa and Auburn. It was a great way to get those last-minute CLE credits and hear from some outstanding speakers.

Building on the success and momentum from last spring's annual CLE, the YLS is again hosting our Orange Beach CLE. This past year, attendance was almost doubled from previous years and our CLE committee has a goal to again double the number of attendees. If you've never attended the **Orange Beach Seminar**, it is a great opportunity to reunite with law school friends, network with lawyers of different practice areas and locations, interact with judges from around the state, experience a meaningful CLE targeted at young lawyers and have a great time at the beach. This year, we are excited to be at The Caribe on May 19-22. Rooms are filling up fast, so call (251) 980-9000 and reference "ASB Young Lawyers' CLE" to reserve your room.

In addition to hosting CLEs, the YLS will continue conducting the **Minority Pre-Law Conferences** in Huntsville, Birmingham, Montgomery and Mobile. We are extremely proud of this award-winning program. Additionally, we will conduct the spring **Bar Admission Ceremony**, as well as provide disaster relief assistance, if necessary, through our **FEMA Assistance Program**.

Our **YLS Student Division** is in its second year and our membership continues to grow. Students at Alabama law schools have the opportunity to join our section to become more connected with the state bar, network, be mentored by young lawyers and explore new job opportunities.

Be sure to keep up with the YLS through our social media platforms at *https://facebook.com/ABSyounglawyers*, *https://twitter.com/absyounglawyers* and/or *https://instagram.com/asbyounglawyers*. For more information on getting involved in the YLS or helping out with any of our upcoming events, contact any of our executive committee members or me. ▲

ABOUT MEMBERS, AMONG FIRMS

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

About Members

Mark H. Taupeka announces the opening of **Taupeka Law LLC** at 25299 Canal Rd., Ste. A-6, Orange Beach 36561. Phone (251) 301-8500.

Among Firms

Adams & Reese announces that **Anna Davis** joined as an associate in the Birmingham office.

Balch & Bingham LLP announces that **Mike Evans, Alexander D. Flachsbart, Elizabeth Flachsbart, Christopher Friedman, Scott A. Gray, S. Michael Madison, B. Chelsea Phillips** and **Michael Taunton** joined the Birmingham office as associates.

Bradley Arant Boult Cummings LLP announces that **Cullen J. Brown** joined the Huntsville office as an associate and **C. Meade Hartfield** joined as counsel in the Birmingham and Jackson, Mississippi offices. **Rachel S. Byrd; J. Daniel Feltham; Jr.; Jake M. Gipson; J. Jackson Hill, IV; Stephen Parsley** and **M. Riley Phillips** joined the Birmingham office as associates.

Carr Allison announces that **Robert D. Windsor** and **Kaila B. Wilson** joined as associates in the Birmingham office.

Chicago Title Insurance Company, Commonwealth Land Title Insurance Company and **Fidelity National Title Insurance Company** announce that **William C. Avant** joined as associate area counsel for Alabama, Mississippi and Arkansas.

Cleveland, Riddle & Atchison announces that **Raymond J. Hawthorne, Jr.** joined the Montgomery office.

J.P. Coleman Law LLC in Robertsdale announces that **James Parrish Coleman, III** joined as an associate.

The Finley Firm announces that **George W. Walker, III** joined the Auburn office.

Fuller Hampton LLC announces that **H. Michael Farnsworth** joined the firm as an associate in the Roanoke office.

Hare, Wynn, Newell & Newton announces that **Christopher Randolph, Jr.** and **Tempe Smith** joined as associates in the Birmingham office.

Hollis, Wright, Clay & Vail PC announces that **John R. Spade** joined as an associate.

Holtsford Gilliland Higgins Hitson & Howard PC announces that **K. Bryant Hitson** and **Hannah Torbert Kennedy** joined as associates in the central Alabama office and **Andrew W. Martin, Jr.** is of counsel in the Gulf Coast Office.

Huie Fernambucq & Stewart LLP announces that **Emily Slay Walters** joined as an associate.

The **Law Offices of Renee W. Lee LLC** announces that **Allyn C. Powell** joined as an associate.

Maynard Cooper & Gale announces that **Christie Borton** rejoined as of counsel and **Virginia McKibbens, Ashlee Riopka, Heather Ward, Drew Dolan, Mark Foley, Jacob Franz** and **Johnny Wilhelm** joined as associates, all in the Birmingham office. **Stephen Rogers** and **Drew Bozeman** joined as associates in the Huntsville office.

McDowell Knight Roedder & Sledge LLC announces that **Alex Steadman** joined as an associate.

Phelps Dunbar announces that **Joseph Aguirre** and **Danielle Mashburn-Myrick** joined as associates in the Mobile office.

Pope McGlamry announces that **Tom Willingham** and **Mary Leah Miller** joined the Atlanta office.

Reynolds, Reynolds & Little LLC announces that **Amelia K. Steindorff** joined as a partner in the Birmingham office.

Rosen Harwood PA announces that **Nicole C. Bohannon** joined the firm.

Ryals, Donaldson & Agricola PC announces that **Jeffrey W. Smith** joined as of counsel.

The **Law Office of David P. Shepherd** in Fairhope announces that **Asheton W. Sawyer** joined as an associate.

Alexander Shunnarah Personal Injury Attorneys PC announces that **Garrett Dennis** and **Cody Isbell** joined the firm.

Smith, Spires & Peddy PC announces that **Murray S. Flint** joined as an associate.

Swift, Currie, McGhee & Hiers LLP announces the opening of a Birmingham office and that **Lane Finch** joined as a partner and **Brian Richardson** joined as an associate.

White, Arnold & Dowd announces that **Robert E. Cooper** and **James A. Potts, II** joined as shareholders.

Yeager of Counsel PC of Fairhope announces a name change to **The Yeager Law Firm PC**.

DISCIPLINARY NOTICES

- Reinstatement
- Disbarments
- Suspensions
- Public Reprimands

Reinstatement

- Birmingham attorney **Emory Keith Mauldin** was reinstated to the practice of law in Alabama, effective September 18, 2015, by order of the Supreme Court of Alabama. The supreme court's order was based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Mauldin on April 6, 2015. [Rule 28, Pet. No. 2015-601]

Disbarments

- Decatur attorney **Daniel Lee Forman** was disbarred from the practice of law in Alabama, effective April 22, 2015. The supreme court entered its order based upon the Disciplinary Commission's order accepting Forman's consent to disbarment based upon allegations he misappropriated client funds. Prior to disbarment, Forman was summarily and interimly suspended from the practice of law in Alabama, effective April 22, 2015. The Disciplinary Commission entered an order finding that probable cause existed that Forman had misappropriated client funds, provided false information regarding client funds, collected fees from clients without providing any meaningful services and borrowed money from his clients, thus causing, or likely to cause, immediate and serious injury to a client and to the public. [Rule 23(a), Pet. No. 2015-1032 and Rule 20(a), Pet. No. 2015-685]
- Birmingham attorney **Bradley Ryan Overton** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective August 19, 2015. The supreme court entered its order based upon the Disciplinary Board's order disbarring Overton. Overton was found guilty of violating Rules 1.4(a) and (b), 1.16(a) and (d), 3.4(c), 5.5(a)(1), 8.1(b) and 8.4(a), (c) and (g), *Ala. R. Prof. C.* Overton was hired to represent a complainant in a criminal matter. Shortly thereafter, Overton was suspended from the practice of law in Alabama on October 15, 2012, for failing to certify his IOLTA account. Overton failed to inform the complainant that he had been suspended and continued to represent the complainant through the complainant's indictment on September 20, 2013. In addition, Overton asked the complainant to lie to the court regarding his representation. The complainant rejected Overton's instructions and informed the court that he had hired Overton. The complainant later requested from Overton a refund of the unearned portion of the $5,000 fee that was paid, of which the complainant stated Overton agreed to refund the entire fee. Subsequently, Overton failed to refund the fee and failed to return any of the complainant's phone calls. [ASB No. 2014-1110]

Suspensions

- Birmingham attorney **Rodger Keith Brannum** was suspended from the practice of law in Alabama for two years by order of the Disciplinary Commission of the Alabama State Bar, effective August 26, 2015. The suspension was ordered held in abeyance and Brannum was placed on probation for two years. The order of the Disciplinary Commission was based upon Brannum's conditional guilty plea to violating Rules 1.3, 1.4(a), 3.2, 8.4(a) and 8.4(g), *Ala. R. Prof. C.* Brannum admitted he failed to diligently represent his clients, failed to communicate with his clients and failed to expedite litigation. [ASB Nos. 2013-1862 and 2014-795]
- Centerville attorney **Thomas Michael Hobson** was summarily and interimly suspended from the practice of law in Alabama, effective May 15, 2015. The supreme court entered its order based upon the Disciplinary Commission's order finding probable cause existed that Hobson had failed to respond to a request for information concerning a disciplinary matter and was causing, or was likely to cause, immediate and serious injury to a client and to the public. [Rule 20(a), Pet. No. 2015-783]
- Pinson attorney **Richard Ellis Sandefer** was suspended from the practice of law in Alabama for 91 days by order of the Supreme Court of Alabama, effective September 4, 2015. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Sandefer's conditional guilty plea, wherein Sandefer admitted to violations of Rules 1.8(l) and (m), and 8.4(d) and (g), *Ala. R. Prof. C.* Sandefer admitted to engaging in a sexual relationship with a client, where he agreed to waive his legal fee in exchange for sexual favors. [ASB No. 2015-554]

Public Reprimands

- Columbus, Mississippi attorney **Wesley House Garrett**, who is also licensed in Alabama, received a public reprimand with general publication, after submitting a conditional guilty plea, on September 18, 2015, for violating Rules 1.3, 1.4(a) and (b) and 8.4(a) and (g), *Ala. R. Prof. C.* In or around January 2007, Garrett was retained to represent clients in a bankruptcy matter. Garrett filed a Chapter 13 bankruptcy petition for the clients. On April 20, 2011, the clients were discharged in the bankruptcy and believed all liens had been removed from their home. Garrett's employment contract stated she would not be responsible for filing any motions to have judicial liens removed or voided. On August 20, 2013, the clients attempted to refinance their home and were informed that

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their home could not be refinanced because two liens had been filed against their home. Garrett failed to adequately explain to the clients that the motions to avoid lien that she completed for two of the lienholder institutions were merely drafts for the clients' use and that Garrett had not previously filed the motions on their behalf. [ASB No. 2014-693]

- Mobile attorney **Jacqueline Rachel Macon** received a public reprimand without general publication on September 18, 2015 for violating Rules 7.2(b) and 7.3, *Ala. R. Prof. C*. Macon sent a potential client a solicitation letter. The solicitation letter was not submitted to the Office of General Counsel of the Alabama State Bar prior to or at the time of dissemination as required. In addition, the solicitation letter failed to include as its first sentence the following statement, "If you have already hired or retained a lawyer in connection with, please disregard this letter." Macon also failed to comply with time limitations for the sending of solicitation letters. [ASB No. 2014-1498]
- Birmingham attorney **Steven Paul Smith** received a public reprimand with general publication on September 18, 2015 for violating Rules 1.3, 1.4(a) and (b), 8.1(a) and 8.4(a) and (g), *Ala. R. Prof. C*. Smith was hired by a client and his wife to represent them in a car accident case. Smith filed suit on their behalf in Chilton County on August 16, 2013, but Smith was unable to obtain personal service of the defendant, resulting in the court issuing an order that the matter would be dismissed in 30 days if service upon the defendant was not had. Smith failed to take any action in the matter and the court dismissed the matter with prejudice on January 30, 2014. The clients attempted to contact Smith on multiple occasions, without success. Smith's secretary informed the clients on May 21, 2014 that the case was still pending, but Smith failed to subsequently communicate with the clients. Smith stated in his response to the bar that the case was still pending and the clients would be contacted when discovery needed to be completed. In fact, Smith did not disclose to the bar that the case had been dismissed with prejudice, despite the fact that Smith had filed a motion to have the case reinstated by the court the same day as his response to the bar. [ASB No. 2014-818]

ALABAMA STATE BAR

SAVE the DATE

2016 Annual Meeting

Baytowne Wharf in Sandestin

June 22-25

Thursday's Keynote Speaker: Mike House

The National Political Landscape: Views from the House

Alabamian W. Michael House, a partner at Hogan Lovells, is recognized as one of the top three legislative lawyers in Washington, DC by *Chambers USA* and is ranked in the top 10 on *Washingtonian* magazine's list of "50 Top Lobbyists." Mike concentrates on legislative and regulatory matters before the U.S. Congress, White House and various departments and independent agencies of the executive branch.