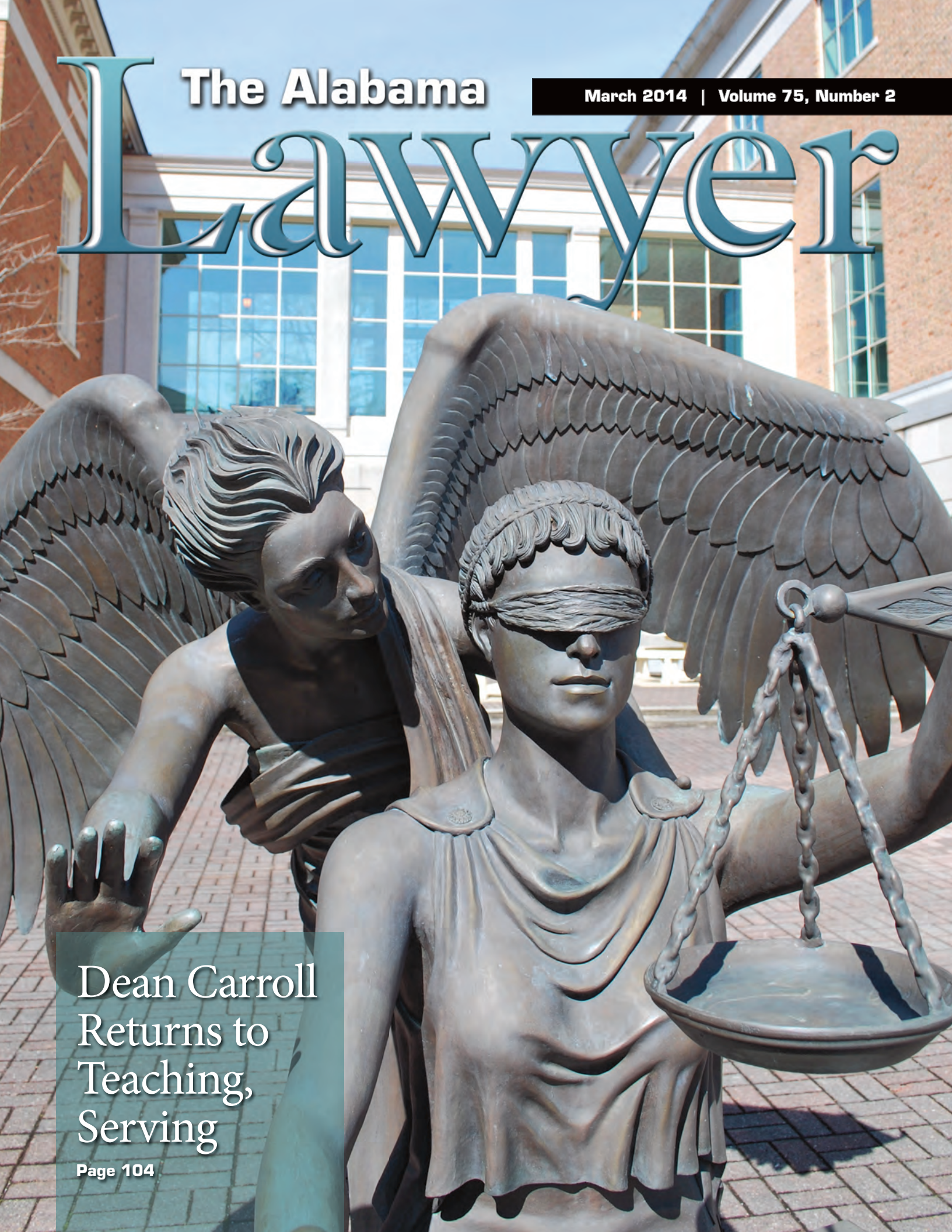


The Alabama Lawyer

March 2014 | Volume 75, Number 2

A bronze statue of Lady Justice, blindfolded and holding scales, with another winged figure behind her. The statue is set against a brick building with large windows.

Dean Carroll
Returns to
Teaching,
Serving

Page 104

How Does Your Malpractice Insurer Treat You When You Have A Claim?



**You can do better,
call AIM today.**

**We understand
the practice of law.
We were formed
by attorneys to
serve attorneys.**



**Attorneys Insurance Mutual
of the South®**

**200 Inverness Parkway
Birmingham, Alabama 35242**

**Telephone 205-980-0009
Toll Free 800-526-1246
Fax 205-980-9009**

www.AttysInsMut.com

“Insuring and Serving Practicing Attorneys Since 1989”

Copyright 2013 by Attorneys Insurance Mutual of the South®

Scan for Application



ABA TECHSHOW[®] 2014

CONFERENCE AND EXPO • MARCH 27-29, 2014

PRESENTED BY THE:

**ABA LAW
PRACTICE
DIVISION**
The Business of Practicing Law

Conference: March 27-29, 2014 • EXPO: March 27-28, 2014 • Hilton Chicago • Chicago, IL

Bringing Lawyers & Technology Together

Discount for Bar Association Members

Get the best legal technology with a discount on registration to ABA TECHSHOW for the members of
the Alabama State Bar

Register for ABA TECHSHOW under the Event Promoter rate and
enter your Association's unique code **EP1405**

James I. Keane Award

50+
CLE
Sessions

#ABATECHSHOW

100+
Technology
Vendors

Vendor
Track

Expert Faculty

Register now at www.techshow.com
@ABATECHSHOW #ABATECHSHOW



Spring 2014

APRIL

25-26 City and County Governments – Orange Beach

MAY

9 Mandatory Professionalism – Tuscaloosa

9 Bridge the Gap: The Must Know, Practical Information about Practicing Law That No One Ever Told You – Tuscaloosa

Available Soon!

Gamble's Alabama Rules of Evidence

A Trial Manual for Making and Answering Objections...Third Edition

Authors: Charles W. Gamble, Terrence W. McCarthy, Robert J. Goodwin

Gamble's Alabama Rules of Evidence has been the trial lawyer's essential resource for preparing and executing trial strategies. No lawyer should enter an Alabama courtroom without a copy of *Gamble's Alabama Rules of Evidence* in their briefcase. The updated comprehensive Third Edition includes 186 additional pages from the Second Edition. This edition also includes and references the recent changes to the *Alabama Rules of Evidence*. Never be caught unprepared to make and defend evidentiary objections at trial.

LIVE SEMINARS

Register at CLEalabama.com or call 800.627.6514 or 205.348.6230 for more information.

CAN'T ATTEND IN PERSON?

Check out our other opportunities.

Webcasts:

Many of our seminars will be webcast. Watch the seminar as it happens from your own computer!

On-line:

Visit CLEalabama.com for 24/7 access to over 200 online seminars and teleconferences.

THE UNIVERSITY OF
ALABAMA
SCHOOL OF LAW

Register now at CLEalabama.com



104



110



116



ON THE COVER

“Justice and Mercy” was commissioned by Lucille Stewart Beeson for Samford University’s Cumberland School of Law and dedicated February 15, 1996, the same day the Lucille Stewart Beeson Law Library was dedicated. The sculptor was L. Glynn Acree III.

Photo by Derrek G. Smith, director of law communication, Samford University

FEATURES

- 95** **The Bar Can Help Me with That?**
By Laura Calloway

- 98** **Note from the Editor**
Send Us Your Books!
By Gregory H. Hawley

- 103** **In the “Spirit of Recovery”**

- 104** **Dean Carroll Returns to Teaching, Serving**
By Robert P. MacKenzie, III, Cathy S. Wright, Edward A. Hosp and Lisa W. Borden

- 110** **Primer on Maritime Law**
By Gerald A. McGill

- 114** **Book Review:**
The Class Action Fairness Act: Law and Strategy
Edited by Gregory C. Cook
Reviewed by Othni J. Lathram

- 116** **Preventing Power of Attorney Abuse—
A Lawyer’s Role**
By John C. Craft

ADVERTISERS

Attorneys Insurance Mutual
of the South86

ABA Retirement Funds93

Alabama Crime Victims
Compensation Commission113

Bama By Distance101

Cain & Associates Engineers145

Phillip G. Cantrell
Expert Witness102

CLE Alabama88

Cumberland School of Law95

Davis Direct136

J. Forrester DeBuys, III146

Expedited Process
Serving, LLC125

The Finklea Group144

Freedom Court Reporting147

Gilsbar Management Services, LLC148

LawPay123

The Locker Room143

Professional Software Corporation119

Upchurch Watson White & Max127

ALABAMA STATE BAR

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

ALABAMA STATE BAR STAFF

Executive DirectorKeith B. Norman
Director of Personnel and Operations.....Diane Locke
ASB Foundation Assistant/
Executive AssistantAnn Rittenour
Assistant Executive Director.....Edward M. Patterson
Director of External Relations and
Projects/Annual MeetingChristina Butler
Administrative Assistants for External Relations
and ProjectsMary Frances Garner
Marcia N. Daniel
Director of Digital CommunicationsJ. Eric Anderson
Director of Information Technology.....Dolan L. Trout
ProgrammerLarry D. Pratt
Information Systems ManagerO. Hunter Harris
Public Information OfficerBrad Carr
Digital Communications Content Manager.....Kelley Lee
Director of PublicationsMargaret L. Murphy
Director of Regulatory ProgramsAngela Parks
MCLE Administrative AssistantCarol Thornton
Membership
Administrative Assistant.....Cathy Sue McCurry
Regulatory Programs
Administrative Assistant.....Doris McDaniel
Director of AdmissionsDorothy D. Johnson
Assistant Director of AdmissionsJustin C. Aday
Admissions Administrative Assistants.....Crystal Jones
Sonia Douglas
Financial AdministratorGale Skinner
Financial Assistant/Scanning OperatorKristi Neal
Graphic Arts DirectorRoderick Palmer
Receptionist.....Stephanie Oglesby
Director of Service ProgramsLaura A. Calloway
SP Administrative Assistant.....Kristi Skipper
Lawyer Referral Service RepresentativeJohn Dunn
Volunteer Lawyers Program DirectorLinda Lund
VLP AssistantKatherine L. Church
Intake Specialists.....Deborah Harper
Carrie Black-Phillips
Alabama Lawyer Assistance Program
DirectorRobert B. Thornhill (334-224-6920)
ALAP Case ManagerShannon Knight
ALAP Administrative AssistantSandra Dossett
Alabama Law Foundation, Inc. DirectorTracy Daniel
ALF Administrative AssistantsSharon McGuire
Sue Jones
Access to Justice Coordinator.....Chandler Barrett
Alabama Center for Dispute Resolution
DirectorJudith M. Keegan (269-0409)
ADR AssistantPatsy Shropshire

ALABAMA STATE BAR CENTER FOR PROFESSIONAL RESPONSIBILITY STAFF

General CounselJ. Anthony McLain
Secretary to General Counsel.....Julie Lee
Assistant General CounselJeremy W. McIntire
Assistant General Counsel.....Mark B. Moody
Assistant General CounselJohn E. Vickers, III
Complaints Intake CoordinatorKim Ellis
Disciplinary Clerk.....Bonnie Mainor
Client Security Fund CoordinatorLaurie Blazer
Client Security Fund AssistantYvette Williams
Paralegals/Investigators.....Dianne T. Gray
Cheryl L. Rankin
Carol M. Wright
ReceptionistSherry Langley

Gregory H. Hawley, BirminghamChair and Editor
ghawley@joneshawley.com
Linda G. Flippo, BirminghamVice Chair and Associate Editor
lflippo@whitearnold.com
Wilson F. Green, TuscaloosaVice Chair and Associate Editor
wgreen@fleenorgreen.com
Margaret L. Murphy, MontgomeryStaff Liaison and
Director of Publications
margaret.murphy@alabar.org

Robert A. Huffaker, Montgomery...Chair and Editor, 1983-2010

BOARD OF EDITORS

Melanie M. Atha, Birmingham • Marc J. Ayers, Birmingham • David A. Bagwell, Fairhope • LaVeeda M. Battle, Hoover • Jennifer M. Bedsole, Birmingham • H. Lanier Brown, II, Birmingham • Henry L. (Max) Cassidy, Jr., Fairhope • Rhonda P. Chambers, Birmingham • Cason Crosby Cheely, Daphne • Amy M. Hampton, Alexander City • Walter E. McGowan, Tuskegee • Rebecca Keith McKinney, Huntsville • Jeffrey R. McLaughlin, Guntersville • James R. Moncus, III, Birmingham • Joi T. Montiel, Montgomery • Anil A. Mujumdar, Birmingham • Sherrie L. Phillips, Montgomery • Allison O. Skinner, Birmingham • Marc A. Starrett, Montgomery • M. Chad Tindol, Tuscaloosa • Jason B. Tompkins, Birmingham

OFFICERS

Anthony A. Joseph, BirminghamPresident
Richard J.R. Raleigh, Jr., HuntsvillePresident-elect
Phillip W. McCallum, BirminghamImmediate Past President
W. N. (Rocky) Watson, Fort Payne.....Vice President
Keith B. Norman, MontgomerySecretary
W. Christopher Waller, Jr., MontgomeryYoung Lawyers' Section President

BOARD OF BAR COMMISSIONERS

1st Circuit, Halron W. Turner, Chatham • 2nd Circuit, Jerry L. Thornton, Hayneville • 3rd Circuit, Christina D. Crow, Union Springs • 4th Circuit, Jana Russell Garner, Selma • 5th Circuit, Charles G. Reynolds, Jr., Lanett • 6th Circuit, Place No. 1, Terri O. Tompkins, Tuscaloosa • Place No. 2, R. Hays Webb, Tuscaloosa • 7th Circuit, William H. (Bill) Broome, Anniston • 8th Circuit, Phil D. Mitchell, II, Decatur • 9th Circuit, W. N. (Rocky) Watson, Fort Payne • 10th Circuit, Place No. 1, Leslie R. Barneau, Birmingham • Place No. 2, S. Greg Burge, Birmingham • Place No. 3, Barry A. Ragsdale, Birmingham • Place No. 4, Robert G. Methvin, Jr., Birmingham • Place No. 5, Augusta S. Dowd, Birmingham • Place No. 6, Teresa G. Minor, Birmingham • Place No. 7, Joseph A. Fawal, Birmingham • Place No. 8, Brannon J. Buck, Birmingham • Place No. 9, Derrick A. Mills, Birmingham • Bessemer Cutoff, William A. (Pete) Short, Jr., Bessemer • 11th Circuit, Albert J. Trousdale, II, Florence • 12th Circuit, Thad Yancey, Jr., Troy • 13th Circuit, Place No. 1, Henry A. Callaway, III, Mobile • Place No. 2, Walter H. Honeycutt, Mobile • Place No. 3, Clay A. Lanham, Mobile • Place No. 4, Juan Ortega, Mobile • Place No. 5, Harry V. Satterwhite, Mobile • 14th Circuit, James R. Beaird, Jasper • 15th Circuit, Place No. 1, George R. Parker, Montgomery • Place No. 2, Les Pittman, Montgomery • Place No. 3, J. Flynn Moringo, Montgomery • Place No. 4, J. Cole Portis, Montgomery • Place No. 5, Jeffery C. Duffey, Montgomery • Place No. 6, Lee H. Copeland, Montgomery • 16th Circuit, Donald R. Rhea, Gadsden • 17th Circuit, K. Scott Stapp, Demopolis • 18th Circuit, Place No. 1, W. Randall May, Birmingham • Place No. 2, Julia C. Kimbrough, Birmingham • 19th Circuit, David A. McDowell, Prattville • 20th Circuit, Hamp Baxley, Dothan • 21st Circuit, John L. Jernigan, III, Brewton • 22nd Circuit, John M. Peek, Andalusia • 23rd Circuit, Place No. 1, H. Harold Stephens, Huntsville • Place No. 2, John A. Brinkley, Jr., Huntsville • Place No. 3, Rebekah Keith McKinney, Huntsville • 24th Circuit, Hon. John Earl Paluzzi, Carrollton • 25th Circuit, J. Daryl Burt, Winfield • 26th Circuit, F. Patrick Loftin, Phenix City • 27th Circuit, Jerry Wayne Baker, Jr., Albertville • 28th Circuit, Place No. 1, Allan R. Chason, Bay Minette • Place No. 2, Samuel W. Irby, Fairhope • 29th Circuit, Robert L. Rumsey, III, Sylacauga • 30th Circuit, Elizabeth S. Parsons, Pell City • 31st Circuit, Braxton W. Ashe, Tuscumbia • 32nd Circuit, Jason P. Knight, Cullman • 33rd Circuit, Robert H. Brogden, Ozark • 34th Circuit, Rebecca Green Thomason, Russellville • 35th Circuit, J. Milton Coxwell, Jr., Monroeville • 36th Circuit, H. Jerome Thompson, Moulton • 37th Circuit, Roger W. Pierce, Auburn • 38th Circuit, Stephen M. Kennamer, Scottsboro • 39th Circuit, John M. Plunk, Athens • 40th Circuit, Gregory M. Varner, Ashland • 41st Circuit, Alexander M. Smith, Oneonta

AT-LARGE BOARD MEMBERS

Diandra S. Debrosse, Hoover • R. Cooper Shattuck, Tuscaloosa • Meredith S. Peters, Andalusia • Rebecca G. DePalma, Birmingham • Alicia F. Bennett, Chelsea • LaBarron N. Boone, Montgomery • Jeanne Dowdle Rasco, Talladega • Monet M. Gaines, Montgomery • Ashley Swink Fincher, Auburn

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

The Alabama Lawyer is the official publication of the Alabama State Bar. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Subscriptions: Alabama State Bar members receive *The Alabama Lawyer* as part of their annual dues payment; \$15 of this goes toward subscriptions for *The Alabama Lawyer*. Advertising rates will be furnished upon request. Advertising copy is carefully reviewed and must receive approval from the Office of General Counsel, but publication herein does not necessarily imply endorsement of any product or service offered. *The Alabama Lawyer* reserves the right to reject any advertisement. Copyright 2014. The Alabama State Bar. All rights reserved.



COLUMNS



- 92 President's Page**
*Dean John L. Carroll:
Game Changer*
- 96 Executive Director's Report**
*Saving You Time—the New Annual
Fee and Reporting Statement*
- 99 Bar Briefs**
- 100 Important Notices**
*William D. "Bill" Scruggs, Jr.
Service to the Bar Award*
- Client Security Fund Annual
Assessment Fee*
- Election and Electronic Balloting*
- VLP Pro Bono Awards*
- Local Bar Award of Achievement*
- 124 The Appellate Corner**
- 130 Memorials**
- 134 Disciplinary Notices**
- 138 Opinions of the General Counsel**
*Third-Party Auditing of Lawyer's
Billings—Confidentiality Problems
And Interference with
Representation*
- 142 Legislative Wrap-Up**
The 2014 Session—One Week In
- 145 About Members, Among Firms**

CONTRIBUTORS



John C. Craft is a clinical assistant professor of law at Faulkner University, Jones School of Law. He teaches and supervises the law school's Elder Law Clinic. Upper-level students who take the Elder

Law Clinic provide pro bono legal services to Montgomery-area seniors. Professor Craft chairs the legislative advocacy committee for Alabama's Interagency Council for the Prevention of Elder Abuse and he serves as the chair of the Elder Law Section of the Alabama State Bar.



Robert P. MacKenzie, III received his undergraduate degree from the University of North Carolina and his Juris Doctorate in 1984 from Cumberland School of Law. He is a partner at Starnes Davis Florie

LLP in Birmingham where he has practiced since 1984.



Lisa W. Borden is a shareholder at Baker Donelson and oversees the firm's pro bono programs. She also serves as the assistant general counsel. Borden maintains her own active pro bono practice and

is a 1989 graduate of Emory University School of Law.



Gerald A. McGill graduated from the U.S. Coast Guard Academy receiving a bachelor's degree in engineering. He is the former commanding officer of two Coast Guard cutters. He is admitted to practice in

Florida, Alabama and Mississippi, and is board-certified in admiralty and maritime law by the Florida Bar, which is the only bar association to issue such certification. He has over 30 years' experience representing persons injured in all types of maritime claims.



Edward A. "Ted" Hosp served as legal advisor to the governor of Alabama from 1999 to 2003. He is the current chair of the state bar's Section on Ethics, Elections and Government Relations

Law. He serves on the Alabama Access to Justice Commission and served as the commission's first chair from 2007-2011.

Cathy S. Wright is a graduate of the University of Alabama (Phi Beta Kappa) and the university's school of law. After serving as a clerk for U.S. District Judge Frank M. Johnson, Wright practiced law in Birmingham for more than 20 years. Before co-founding Clarus Consulting Group in 2004, she had a private consultancy specializing in organizational development, communications, training, strategic and business planning, and facilitation.

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 Microsoft 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.



Anthony A. Joseph

ajoseph@maynardcooper.com



Dean John L. Carroll: Game Changer

Game Changer

In recent years, a new term has been added to our lexicon. The term is “game changer.” It is defined as “[a] newly introduced element or factor that changes an existing situation or activity in a significant way.”¹

Dean John L. Carroll will step down as dean of the Cumberland School of Law in July after serving in that capacity for over 13 years. That is noteworthy, as most deans only serve an average of about four years.

Dean Carroll came to the school with a sense of mission; he flourished because of the fruits of that effort, and he helped educate the next generation of lawyers. Simply stated, Dean Carroll assumed his position as a calling, and embraced it because of this passion.

During his illustrious career, he has worn many hats, and borne many labels—lawyer, law professor, judge, mediator, arbitrator, dean, media commentator, triathlete, and friend to many. While he has been successful in



Carroll

each endeavor, his role as dean has been transformative, influential, and yes, game changing.

The true measure of a dean rests with his understanding of the importance of a holistic view of the profession and the law school's role in preparing students to become a contributing part of that profession. Dean Carroll recently noted the correlation when he stated:

"The prevailing philosophy is simple: practical skills outweigh raw knowledge, and application transcends erudition. If the goal were to produce great law students, the tenets might be exactly the opposite. Our goal is to produce exceptional lawyers."²

That intent to impart knowledge, to provide practical skills, and develop exceptional practitioners has driven Dean Carroll in guiding and educating law students for over a decade.

Vision

One of Dean Carroll's inspirational quotes is derived from the Book of Proverbs:³

WHEN THERE IS NO VISION, THE PEOPLE PERISH.

Dean Carroll arrived at Cumberland with a vision for how to train the next generation of lawyers. He wanted to ensure that the law school environment reflected not only a solid educational foundation, but that it would also serve as a vehicle for creating principled lawyers. And he has succeeded in doing that. When students leave Cumberland, they have witnessed and experienced his commitment to the school, to them, to the profession and to the Rule of Law.

Community

A recurring theme that emanates from Dean Carroll is his focus on a "sense of community." Dean Carroll has stated:

"There are many roles the dean plays, but in my judgment, there is no more important role than that of emotional leader, and no more important aspect of that emotional leadership than the articulation of a vision that the many communities of the law school can understand and embrace."⁴ Dean Carroll

NO FIRM IS TOO SMALL
FOR A COMPREHENSIVE AND
AFFORDABLE RETIREMENT PLAN.



The **ABA RETIREMENT FUNDS PROGRAM** has provided retirement plan services to firms of all sizes – even solo practitioners – since 1963. We believe today, as we did then, that the unique needs of the legal community are best served by a retirement Program built exclusively to benefit its members.

Call an ABA Retirement Funds Program
Regional Representative today!
(866) 812-1510 | www.abaretirement.com
joinus@abaretirement.com

The Program is available through the Alabama State Bar as a member benefit. This communication shall not constitute an offer to sell or the solicitation of an offer to buy, or a request of the recipient to indicate an interest in, and is not a recommendation of any security. Securities offered through ING Financial Advisers, LLC (Member SIPC). The ABA Retirement Funds Program and ING Financial Advisers, LLC, are separate, unaffiliated companies and are not responsible for one another's products and services.

CN0228-8312-0315



has done much to bring together the alumni, faculty and students to advance the mission of the law school and the profession. He did this through his love of the students, dedication to the school and tremendous rapport with the alumni.

Professional Involvement

Dean Carroll also understands the importance of professional service. He models this in his walk and talk. Dean Carroll recognizes, and has recently noted, that “[n]o one has greater opportunity to influence the future of the profession than we as law school deans.”⁵

Dean Carroll’s actions speak loudly as well. He has served as a United States Magistrate Judge, a reporter to Electronic Discovery Act Project and a member of the United States Judicial Conference Advisory Committee on the Federal Rules of Civil Procedure. Also, while serving as dean, he worked pro bono on capital cases, and has served on a host of non-profit boards. He has also been an active member of the Alabama State Bar, the American Bar Association, the Birmingham Bar Association and the District of Columbia Bar Association.

On a different note, he is visible in his role as a legal commentator on television and in the print media. He is often asked to discuss a variety of legal matters. He has been the voice of legal knowledge and sound reasoning to many in the general community.

Service

Dean Carroll also believes it is our responsibility as lawyers to encourage community service and ethical behavior. In furtherance of that commitment, Cumberland, under Dean Carroll’s leadership, established the Cumberland Mediation Center in 2005 to provide free and confidential mediation services to the Greater Birmingham community in matters between organizations and individuals who could not afford the services of a paid mediator. This project has been conducted by volunteer law students, attorneys and community members, and is considered by all to be a tremendous success.

Additionally, under his tenure as dean, the Public Interest Fellowship Program was established. Through this program, law students work for judges, public defenders and with Volunteer Lawyer programs to gain practical experience while learning the meaning of public service.

Dean Carroll was also the catalyst for the establishment of the James E. Horton Inns of Court. The Inn is designed to promote professionalism and ethical behavior in the profes-



Judge Carroll serving with others

sion. Judges, lawyers and law students regularly meet during the school year to discuss relevant ethical dilemmas and challenges facing the students and the profession. The program also encourages and promotes mentoring between the participants.

Last, but not least, Dean Carroll also is engaged in very worthy, non-legal endeavors. He leads a Bible study group, known as the St. Thomas Moore Society, during the academic year. He also established a book club led by a number of law professors that encourages group interaction and better relationships between professors and students.

Conclusion

It has been said that “[t]rue leadership cannot be awarded, appointed, or assigned. It comes only from influence, and cannot be mandated. It must be earned.”⁶ That is so true.

Dean Carroll is that type of influential leader. He has demonstrated that through his vision for the law school and his example, teaching, philosophy and unwavering service to the profession. He has earned our respect and gratitude for a job well done. He leaves as a “Game Changer.” On behalf of the Alabama State Bar, I thank him for his service and example to us all. | AL

Endnotes

1. Merriam-Webster Dictionary.
2. Dean John L. Carroll’s address to the Cumberland School of Law’s 2006 graduation class.
3. Proverbs 29:18.
4. John L. Carroll, *Words of Wisdom for Deans from Mick Jagger and Others*, 36 U. Tol. L. Rev. 29 (2004).
5. *Id.*
6. *Id.*



The Bar Can Help Me with That?

By Laura Calloway
Director, Practice Management Assistance Program

I recently met with a tech-savvy lawyer who was getting along pretty well without clerical help but felt swamped by having to answer his always-ringing phone himself. He didn't think he could justify hiring someone just to answer the phone, but he really didn't want to use an answering service because of his previous experiences with them. He was astonished when I mentioned that the bar offers a discount for Ruby Receptionists (www.callruby.com), a firm that offers virtual receptionist services that are specialized for law practice.

Using Internet-based phone technology, Ruby's receptionists, all of whom have law

office training, function just as if they were on-site members of your staff—putting through the callers you want, taking messages from those you don't, making calls on your behalf to gather information and even screening potential clients and making appointments for them if you care to provide them with the information needed to do so. They function just as if they were members of your staff.

Needless to say, this lawyer was astounded, and a bit chagrined, to learn that he could have been taking advantage of this discounted service for the last two years. And I was disappointed that after working hard to seek out great member

benefits for the Alabama State Bar, many of our members still don't know all the useful benefits their membership has to offer.

In order to better serve you, beginning with the April issue of the *Addendum*, be on the lookout for "The Benefits Corner," a regular column that will cover the discounted products and services Alabama State Bar members have access to, and will feature any special deals that our many benefits providers are offering. Please be sure to check it out so that you can start taking advantage of the many valuable offerings your Alabama State Bar membership provides. | AL



Cumberland School of Law CLE offers a wide range of online courses.

Cumberland School of Law can help you meet your professional education requirements with numerous courses in various categories. Conveniently view anytime, anywhere, 24/7, in increments of time that are convenient for you, and without the time and expense of travel away from your office.

Start earning 2014 credits now. Go to www.cumberland.samford.edu/cle and select "Online On-demand Courses."

Find the information you need with these NEW online courses:

- Changes in Alabama Medicaid and RCOs
- Handling the Appeal of Your DUI Case from Municipal or District Court: A Judge's Perspective
- The Hot Seat: Current Issues in Chapter 13
- Recent Developments in Delaware Corporate Law
- Is "Packin'" Protected Activity? Alabama's New Take Your Gun to Work Law



cumberland.samford.edu/cle
205-726-2391 or 1-800-888-7454
lawcle@samford.edu

Samford University is an Equal Opportunity Educational Institution/Employer.



Keith B. Norman

keith.norman@alabar.org



Saving You Time—the New Annual Fee and Reporting Statement

Each year, Alabama State Bar members receive a number of mailings from the state bar that concern their practice. These mailings generally require a lawyer to respond by paying a fee—i.e., the license and membership renewal, the Client Security Fund fee (CSF)—or to certify his or her compliance with a mandatory rule—i.e., MCLE and trust account certification. Consequently, a lawyer must deal with payments or certifications multiple times during the year which is time-consuming.

In September, we will eliminate these numerous mailings by sending a single “Fee and Reporting Statement.” This new statement will cover license and membership fees, CSF fees and section dues, as well as trust account certification. The consolidated statement will also provide an early window on MCLE hours, although the MCLE compliance

and reporting deadline will still be December 31 and January 31, respectively. Moreover, the new consolidated statement will provide state bar members with the opportunity to make a voluntary contribution to the Alabama Law Foundation.

Consolidating five statements into one will save lawyers time by eliminating the need to respond to multiple statements. It will benefit the state bar by substantially reducing mailing and postage costs. Bar members will still be able to return the reporting statements with a check or go to www.alabar.org and make an online payment.

Abraham Lincoln once observed that “time” was a lawyer’s stock-in-trade. The consolidated fee and reporting statement will save lawyers time that can be better used to serve their clients. | [AL](#)

Makin' it relevant Makin' it fun



ANNUAL MEETING FAMILY EVENTS • JULY 9-12, 2014

WEDNESDAY, JULY 9TH

6:30 pm
**Opening Reception and
Beach Party**

Family Photo-ops
Sponsored by ISI ALABAMA

7:00 pm
**Make-a-Minion Craft
Activity during Beach Party**
Sponsored by ISI ALABAMA

9:00 pm - 11:00 pm
YLS Hospitality Suite
Sponsored by ISI ALABAMA

THURSDAY, JULY 10TH

6:00 pm
Law School Receptions

Teen Green Room
Open for Teens (13 and up)

6:00 pm - 8:30 pm
**Children's Pajama Party &
Movie Night (12 and under)**
'Despicable Me'
Sponsored by ISI ALABAMA

9:00 pm - 11:00 pm
YLS Hospitality Suite
Sponsored by ISI ALABAMA

FRIDAY, JULY 11TH

2:00 pm - 4:00 pm
YLS Wine Tasting
featuring **Carneros della
Notte Winery**
YLS Hospitality Suite
Sponsored by ISI ALABAMA

7:00 pm - 9:00 pm
President's Reception

8:00 pm - 9:00 pm
**Cupcake decorating for
Children during Reception**
Sponsored by ISI ALABAMA

9:00 pm - 10:00 pm
Brandy and Cigar After-party

SATURDAY, JULY 12TH

9:15 am
Grand Convocation

Grand Prize Drawing
upon
Annual Meeting conclusion
Compliments of ISI ALABAMA



NOTE FROM THE EDITOR



Gregory H. Hawley
ghawley@joneshawley.com



Send Us Your Books!

At *The Alabama Lawyer*, we are eager to support lawyers who write books. Lawyer-authored books reflect well on our bar, and we like to support such creativity and dedication to our profession. You have probably noticed a recent increase in published book reviews in *The Alabama Lawyer*—reviews of novels and scholarly works.

We ask a favor, though. If you have authored a book, please do not ask a colleague to review the book and then assume that we will publish your friend's book review.

Instead, feel free to contact us and ask about the possibility of our reviewing your book. Alternatively, you might consider sending us a courtesy copy—an editor's copy of the book—for us to review. But the process should start with *The Alabama Lawyer*.

Editorial control is important to us. We think that it keeps the publication fresh and unbiased.

In that light, please allow us to select the book reviewer. We might ask you if you have suggestions about whether a particular lawyer has the right background, experience or knowledge that would make her a good reviewer. Allow us to make the decision, though, and allow us to contact the reviewer and explain our expectations, format and timetable. The common understanding between the publication and the reviewer needs to be based on direct communication with *The Alabama Lawyer*.

Thank you for this indulgence. Please view it as an effort to maintain professionalism within the Alabama State Bar. Nothing more. Nothing less. | [AL](#)



Sirote & Permutt attorneys **Crystal H. Holmes** and **Cheryl Howell Oswald** have been installed as president and president-elect of Birmingham CREW, respectively. CREW is a commercial real estate association in Birmingham for women and men who work in the commercial real estate industry.



Holmes



Oswald

The Alabama Fellows of the American College of Trial Lawyers announce that **Gaynor L. St. John** (St. John & St. John), **George Edwards Knox, Jr.** (Lanier, Ford, Shaver



St. John



Knox



Jaffe



Peck

& Payne PC), **Richard S. Jaffe** (Jaffe & Drennan PC) and **Adam K. Peck** (Lightfoot, Franklin & White LLC) have been inducted into the fellowship.

G. Thomas Sullivan, with Cabaniss, Johnston, Gardner, Dumas & O'Neal LLP, has been appointed by the American Health Lawyers Association Board of Directors as chair of the Dispute Resolution Service Council.

Kathy R. Davis, with the Birmingham office of Carr Allison, has been appointed chair of the Defense Research Institute Construction Law Committee for 2014-2016. Davis is the first woman to be appointed chair of the committee.

Burr & Forman announces that the Practising Law Institute has released the new *Business Liability Insurance Answer Book 2014*, authored and edited by attorneys **Betsy P. Collins**, **Devin C. Dolive** and **Taylor N. Barr**.

Hand Arendall member **Blane H. Crutchfield** has been elected an officer of the Southeastern Admiralty Law Institute during its recent meeting and will become chair in 2017. | [AL](#)



Crutchfield



William D. “Bill” Scruggs, Jr. Service to the Bar Award

Client Security Fund Annual Assessment Fee

Election and Electronic Balloting

VLP Pro Bono Awards

Local Bar Award of Achievement

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, 2014**. Nominations should be prepared on the appropriate 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 Award was established in 2002 to honor the memory and accomplishments 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.

Client Security Fund Annual Assessment Fee

The Alabama State Bar is authorized to assess each lawyer \$25 who, on January 1 of each year:

- Holds a regular membership to practice law in the state of Alabama;
- Holds a special membership in the Alabama State Bar;
- Is registered as authorized house counsel; or
- Is admitted pro hac vice (\$25 per application)

Last month, bar members received a reminder notice by email with payment instructions. Bar members who do not have an email address received notice by regular mail. Payment instructions for the 2014 Client Security Fund Annual Assessment are available at www.alabar.org.

A lawyer who **fails to pay by March 31** of a particular year the assessed annual fee pursuant to Rule VIII shall be deemed to be not in compliance with these rules. Such a lawyer **is subject to suspension** pursuant to Rule 9 of the *Alabama Rules of Disciplinary Procedure*.

Any person admitted to practice in the state of Alabama who, upon attaining the age of 65 years and has elected to retire from the practice of law, may claim exemption from any assessment under these rules by notifying the Client Security Fund Assistant of the Alabama State Bar at (334) 269-1515 or by emailing such notice to yvette.williams@alabar.org.

Election and Electronic Balloting

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

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

8th Judicial Circuit
10th Judicial Circuit, Place 4
10th Judicial Circuit, Place 7
10th Judicial Circuit, Bessemer Cutoff
11th Judicial Circuit
13th Judicial Circuit, Place 1
13th Judicial Circuit, Place 5
15th Judicial Circuit, Place 5
17th Judicial Circuit

18th Judicial Circuit, Place 1
19th Judicial Circuit
21st Judicial Circuit
22nd Judicial Circuit
23rd Judicial Circuit, Place 1
28th Judicial Circuit, Place 2
30th Judicial Circuit
31st Judicial Circuit
33rd Judicial Circuit
34th Judicial Circuit
35th Judicial Circuit
36th Judicial Circuit
40th Judicial Circuit
41st 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, 2014 and

The best thing for your resume since spellcheck.

An **online** LL.M. concentration in Tax or Business from the University of Alabama School of Law is the best way to improve your resume since spellcheck. The degree demonstrates you received skill-based training from respected professors and practitioners throughout the country. It also proves you understand the innovation of an exceptional program offered through live, interactive technologies and the value of an affordable program delivered to you anywhere on the globe. An LL.M. from Alabama says it all. Visit www.AlabamaLLM.com/AL to learn more.

Online LL.M. degree programs
Tax and Business Law Concentrations



www.AlabamaLLM.com/AL

vacancies certified by the secretary no later than March 15, 2014. All terms will be for three years.

Nominations may be made 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. PDF or fax versions may be sent electronically to the secretary at:

Keith B. Norman, secretary
Alabama State Bar
P.O. Box 671, Montgomery AL 36101
keith.norman@alabar.org;
fax: (334) 517-2171

Paper or electronic nomination forms must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 25, 2014).

As soon as practical after May 1, 2014, members will be notified by email with a link to the Alabama State Bar website that includes an electronic ballot. *Members who do not have Internet access should notify the secretary in writing on or before **May 1** requesting a paper ballot.* A single written request will be sufficient for all elections, including run-offs and contested president-elect races during this election cycle. **Ballots must be voted and received by the Alabama State Bar by 5:00 p.m. on the third Friday in May (May 16, 2014).** Election rules and petitions are available at *www.alabar.org*.

At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 3, 6 and 9. Petitions for these positions which are elected by the Board of Bar Commissioners are due by April 1, 2014. A petition form to qualify for these positions is available at *www.alabar.org*.

**Expert Witness Services
For the Mortgage Industry**

Over 35 years experience!

PHILLIP G. CANTRELL
PCANTRELL49@GMAIL.COM

485 McCain Road
Eclectic, AL 36024
Phone: 334.224.9687
NMLS# 190932
References available

VLP Pro Bono Awards

Each year, the Alabama State Bar's Volunteer Lawyers Program seeks nominations for the Pro Bono Awards. These awards recognize dedicated members of our legal profession who are committed to providing legal services to the poor and disadvantaged in our state. **Nominations for the 2014 awards are due April 1, 2014.**

Attorneys are in a unique position to help those who cannot afford access to the legal system. The state bar seeks nominations of deserving individuals and entities that perform exceptional work in the field of legal services to the poor. Award recipients will be notified in June with the presentation made at the Bench & Bar Luncheon and Awards Program during the annual meeting. Forms will be available in March. Anyone interested in receiving a form should send an email request to *vp2@alabar.org*.

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 2014 Annual Meeting at the Hilton Sandestin Beach Golf Resort & Spa.

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 30, 2014. Applications may be downloaded from *www.alabar.org* or obtained by contacting Christina Butler at (334) 269-1515 or *christina.butler@alabar.org*. | **AL**



Anna L. Hart and Kim Davidson, co-chairs of the Alabama Lawyer Assistance Program



Hon. David Carpenter; Robert M. Lee, Sr.; Hon. Helen Shores Lee; ASB President Anthony A. Joseph; Hon. Houston Brown; and Hon. Eugene Verin



Hon. Houston Brown, Kim Davidson and Robert Thornhill, ALAP executive director

In the “Spirit of Recovery”

Last November, the Alabama Lawyer Assistance Foundation (ALAF)

honored the 50th Anniversary of the Birmingham Civil Rights Movement at *The Spirit of Recovery Celebration Dinner*. The foundation teamed up with FOCUS on Recovery for the event, raising money for both great causes. The ALAF is a non-profit corporation that works with the Alabama Lawyer Assistance Program (ALAP) and the ALAP Committee to provide monies for attorneys in need of evaluation or treatment for substance abuse or other mental health issues who lack the resources to secure appropriate help. FOCUS on Recovery is a Birmingham residence for women in early recovery from alcohol and drug addiction.

The **Honorable Helen Shores Lee** was the keynote speaker; the master of ceremony was the **Hon. Houston L. Brown**, presiding judge of the Tenth Judicial Circuit; and the honorary chair was **Anthony Joseph**, president of the Alabama State Bar. Among those recognized for service

to the bar were the **Hon. Raymond Chambliss**, the **Hon. Eugene Verin**, the **Hon. Carole Smitherman**, the **Hon. Caryl Privett**, **J. Mason Davis**, and **Robin Burrell**. Also in attendance were members of the Alabama Lawyer Assistance Program Committee, including chairs **Kim Davidson** and **Anna Hart**, **David Wooldridge**, **Squire Gwin**, and **Kay Laumer**.

The ALAP thanks those individuals, law firms and businesses that attended and supported this worthy cause. This event not only raised thousands of dollars for the Alabama Lawyer Assistance Foundation and FOCUS on Recovery, but also raised awareness of the issues of substance abuse, mental health and impairment among attorneys, law students and judges.

If you or another attorney is struggling with addiction, depression or any other mental health issue that may cause impairment, you are encouraged to contact **Robert Thornhill**, executive director of the Alabama Lawyer Assistance Program, for a free and confidential consultation. He can be reached at (334) 517-2238 or (334) 224-6920. | [AL](#)



David M. Wooldridge and Hon. Helen Shores Lee





Dean Carroll Returns to Teaching, Serving

By Robert P. MacKenzie, III, Cathy S. Wright, Edward A. Hosp and Lisa W. Borden

As Dean John Carroll prepares to return to full-time teaching,

he doesn't seem surprised that a Jesuit-educated young man from Washington, DC wound up as dean of a law school at a Baptist University in the South. In fact, he sees the path clearly, one marked by adherence to the principles of law and guided by a strong faith. Along the way, Carroll's legal career led from representing prisoners and death-row inmates, to an appointment on the federal bench and finally to academia as dean of Cumberland School of Law. As Judge Carroll looks back on his career, he might be tempted to wonder which leg of his path was more dangerous—his combat tours in a fighter plane over Vietnam or a midnight run through a small South Georgia town pursued by townspeople upset over a life sentence imposed in a death penalty case.

Both of these events were precipitated by Judge Carroll's acts of public service. This profile is a tribute to his service to the bar through his commitment both to his own career-long devotion to serving those in

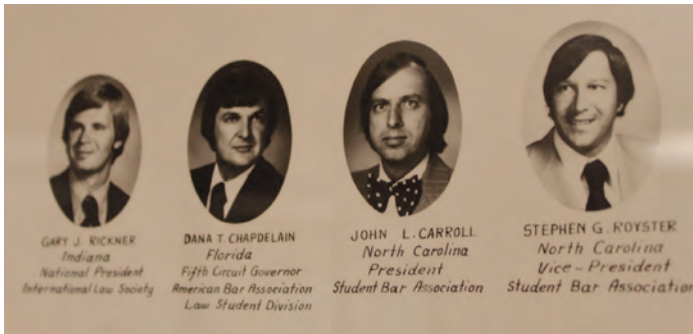
need and his understanding that pro bono service goes hand in hand with ethics and professionalism. Judge Carroll has been a leader with state and local bar associations in developing innovative and effective legal services for indigent populations, while providing lawyers with meaningful ways to offer pro bono services.

The law school's deep commitment to pro bono and community service must be highly ranked among the many lasting legacies of Judge Carroll's tenure as dean. Since Judge Carroll took the helm of Cumberland School of Law, he has continued to apply his passion for service to the bar and to those in need of legal services in many ways. Judge Carroll was one of the original appointees to the Alabama Access to Justice Commission. As chair of the Delivery of Services Committee, Carroll headed up the first comprehensive examination and evaluation of how legal services are delivered to the poor in Alabama. His work provided a road map that the ATJ continues to use in its efforts to improve access to legal services in Alabama. At the same time, he was part of a small core group who undertook a radical overhaul of the Birmingham Bar Association Volunteer Lawyers Program. The result

was the rapid revitalization and growth of the program, which had become stagnant. In both 2010 and 2012, he served as chair of the Birmingham Bar Association Judicial Campaign Oversight committee, formed to make judicial elections as fair and ethical as possible. Through his service, Judge Carroll's legacy to our state and the bar includes lawyers who are not just educated about law, but about justice, and who are motivated and enabled to serve.

Early Years

Judge Carroll did not grow up in a family of lawyers. He was born to an Irish/Catholic family in Washington, DC and attended Gonzaga High School, a Jesuit high school, with students from all races and socioeconomic backgrounds, and strict teachers for whom lack of effort was no excuse.



Upon graduation in 1961, Judge Carroll entered Tufts University. This became a time of “firsts”—the first in his family to go to college, his first airplane ride and the farthest he had ever been from home. He excelled early on in academics. Later, as Judge Carroll reflects, his academic achievement gently gave way to the “distractions” of college life in Boston. He graduated with a degree in economics. At his graduation in 1965, the Vietnam War, not the practice of law, was on Judge Carroll's mind.

Service in Vietnam

Judge Carroll was sworn in as an officer in the United States Marine Corps where he planned to become a fighter pilot. Eyesight issues led him to be trained as a bombardier/navigator for the A6A Intruder fighter jet, the nation's first all-weather attack aircraft. In October 1967, at the height of the Vietnam War, Judge Carroll was transferred to Da Nang Marine Air Base in the Republic of Vietnam. For the next year, Judge Carroll flew over 200 combat missions, more than 100 into North Vietnam.

In his first month in combat, Judge Carroll's squadron lost two planes. Four of his friends did not survive. He describes himself in those years as fearless, like the others around him, “thinking we were young, bulletproof and able to meet the challenge.” Judge Carroll was honorably discharged in 1969 with the rank of captain, having received several commendations for his service.

The best move of his military career, however, was a year-long assignment, following his Vietnam tour, at the Marine Corps Air Station at Cherry Point, North Carolina. There, Judge Carroll was



Captain Carroll



John and Susan Carroll

set up for a blind date with **Susan Gaskins**, who lived in New Bern, 10 miles away. One year later, they were married. This month, they will celebrate their 44th anniversary. They are the proud grandparents of **States Carroll Sanders**, who lives in Atlanta with their daughter, **Catherine**, and her husband, **Parker**.

Path to Law School

Upon return from Vietnam, Judge Carroll remembers that he faced what other veterans had witnessed. “The country had changed, as had the public's reception of the military. Add the unrest of the civil rights movement and the country was simply in turmoil.” Carroll recalls that his early education and Catholic faith emphasized social justice, and his military service had led him to an awareness of the challenges faced by black soldiers with whom he served. “A sergeant from Illinois and I became good friends, and I was able to see the challenges and frustrations he faced through his eyes. Back home after serving in Vietnam, he couldn't get a hotel room. That has stayed with me.”

Judge Carroll's first job, in furniture advertising sales, allowed him to travel the country and led to a turning point. On a visit to Chicago, he found himself near the Cabrini Green Public Housing Project. He describes the areas as “dangerous and impoverished, where there was little hope for its residents. I realized that there was so much hope and prosperity for most people and, yet, for places like Cabrini Green, it did not exist. It seemed to me that there was something that could be done.” Within a year, Judge Carroll recognized his calling was not sales, but the practice of law.

He entered the Cumberland School of Law in August 1971. He had never before been to Birmingham. During his three years at Cumberland, Judge Carroll served as president of the Student Bar Association, associate editor of *The Cumberland Law Review* and member of the National Moot Court Team.

He graduated magna cum laude and recalls his law school experience with pride, valuing the long-lasting friendships he made. The admiration was mutual. In 2011, **Cecil Cheves**, one of Judge Carroll's classmates, and his wife, **Bettye**, contributed more than \$1,000,000 to Cumberland for the renovation of the moot courtroom. The Cheves's only request was that the renovated courtroom be named in honor of Judge Carroll.

Representing Underrepresented at Southern Poverty Law Center

After Cumberland, he was accepted for the LLM program at Harvard Law School. His classmates at Harvard were offered lucrative positions with the large law firms, and Judge Carroll had the same opportunity. The temptation for a high-profile associate position gave way to a desire to represent those who needed help most of all. This passion led him to apply for a position as staff attorney with the Southern Poverty Law Center in Montgomery. So, when he was offered the chance to address injustices arising from race and class, he didn't hesitate. "I wanted to practice law with a commitment to both excellence and to making a difference, and the SPLC offered that opportunity."

Carroll soon confirmed that representing the poor and disadvantaged was not going to be the easy way to practice law. "My first case was a death penalty case in south Georgia, *Patterson v. Austin*, involving a black Marine Sergeant accused of killing two law enforcement officers. The SPLC's challenges during jury selection resulted in a significantly mixed race jury.

"Susan had come with me, and I went to pick her up during jury deliberations. That night, we were finally able to convince the court that a sentence of life rather than death had to be imposed. It was very late when court ended so she and I headed back to the Holiday Inn to get some sleep. Some local citizens, unhappy with the result, tried to run us off the road. We took the message and headed back to Montgomery that very night."

Back home in Montgomery, Carroll and the SPLC joined a team of lawyers in *Pugh v. Locke*, contesting the State of Alabama's treatment of prisoners. In addition to a groundbreaking holding that the 8th Amendment provided Constitutional protection for inhumane conditions of incarceration as cruel and unusual punishment, **U.S. District Judge Frank M. Johnson, Jr.** established a novel implementation and oversight structure to assure compliance with constitutional mandates. Carroll and his SPLC colleagues were instrumental in holding the state accountable to those requirements.

Carroll's work at the SPLC ranged from death penalty cases to plaintiffs' counsel in class actions, representing, among others, African American and women candidates for law enforcement positions. Carroll is proud of the representations he undertook at the SPLC. "It was the most interesting legal work. It was grueling, but we had the resources necessary to succeed. And, it was the right thing to do." Carroll says he learned a great deal from **Morris Dees**, the founder of the SPLC. "He taught me this—there is no point in making anybody dislike you."

Despite the controversial nature of much of their practice, Carroll says he found the bench and bar across the Southeast generally collegial. "Whatever misgivings they may have had initially, I think other lawyers, and especially judges, came to respect the professionalism and quality with which we tried to



Lawyer Carroll

conduct our practice." One of the lawyers Judge Carroll opposed was **Judge Joel Dubina**, who now serves on the United States Eleventh Circuit Court of Appeals. The paths of Judges Carroll and Dubina first crossed at Cumberland. They were reacquainted during *Wyatt v. Stickney* litigation involving the conditions of state mental health facilities in which Judge Dubina represented the State of Alabama. Judge Dubina recalls the *Wyatt* case as hard-fought, focusing on complex constitutional issues and voluminous discovery. At the end of long days of depositions, Judges Dubina and Carroll set aside their differences as advocates to have dinner together. Looking back, Dubina described Carroll as "representing his clients with great skill, advocacy and professionalism. He was the gentleman all lawyers should be. It is simply the way we ought to practice law."

Route to the Bench

After leaving the SPLC, Carroll entered private practice before being offered a faculty position at Mercer Law School in Georgia. He enjoyed this brief foray into academia, but soon received a call from colleagues in Montgomery about a U.S. Magistrate's position opening on the U.S. District Court for the Middle District of Alabama. He submitted his name and was selected, where he served from 1986 to 2001. Carroll recognized the importance of making the transition from advocacy to the bench. "It takes effort to take your judicial oath seriously and use facts and precedent to drive outcomes.

"It was an exciting time to be serving as a U.S. Magistrate," Carroll recalls, "and especially on the Middle District bench. The role of Magistrates was expanding, and our Court was committed to taking full advantage of the additional capacity. I got to do everything from traditional warrant work to trying cases to mediation." Magistrate Judge Carroll and U.S. District Judge Dubina served together on the bench. According to Judge Dubina, Judge Carroll's work was "superb."

Carroll's trial experience and academic background also led him to a significant role with the Federal Judicial Center where he chaired the Magistrate Judge's Committee charged with oversight of training for U.S. Magistrate Judges. He also was appointed by Chief Justice Rehnquist to serve on the United States Judicial Conference Advisory Committee for the *Federal Rules of Civil Procedure*. Judge Carroll was the only Magistrate Judge on the committee.

Judge Carroll Becomes Dean Carroll

In 2001, the position of dean and professor of law at Cumberland became open. A committee co-chaired by former **Alabama Governor Albert Brewer** and **Cumberland Professor Henry "Corky" Strickland** conducted a national search. The ideal candidate, however, was only 100 miles away. Governor Brewer recalls that Judge Carroll brought a unique background.

“Judge Carroll held the proper attention for scholastic achievement and scholarly works as academicians should. However, Judge Carroll’s practical experience as an attorney and federal Magistrate Judge and affection for the school made Judge Carroll stand out,” stated Governor Brewer.

Dean Carroll says his service as dean has been a great experience. “Samford University has been very supportive of the law school’s goals, and provides a wonderful, open community. We have a terrific faculty and strong students.”

Considering what Cumberland has accomplished during his tenure as dean, Carroll cites two trends of which he is most proud. “First, we have a very strong and active alumni base. They show up and participate and they are proud of their law school. They help us as well as our law students. We have tried to do a lot to stay connected with them and to keep them informed.” According to Governor Brewer, Judge Carroll’s ability to reach out to alumni has been outstanding. As a result, alumni have been “re-engaged” with the law school. Alumni groups are active throughout the country and alumni giving has substantially increased. Judge Carroll has also created an Alumni Advisory Board to provide guidance and assistance to the school.

The second area Carroll cites is the practical legal skills graduates attain while at Cumberland. “The legal education world is just now beginning to understand that law students need skills as well as theory in order to be prepared for legal careers. They are just catching on to what we have been doing so well at Cumberland for a long time.”

Each spring, Judge Carroll dresses in a black tie and, followed by students and faculty, leads the annual Rascal Day Parade around campus—to celebrate the life of a dog. Judge Carroll has encouraged his students to participate in athletics and, most notably, the Susan G. Komen Cure for Cancer Run. Every year, Judge Carroll issues a challenge to the student body—he offers to buy dinner for anyone who can beat him in the race. To date, there have been relatively few students to enjoy such a night. At 70 years old, however, Judge Carroll observes, the students are not only becoming smarter but they are also faster!

Consistent with his interest in public service, Judge Carroll expanded Cumberland’s outreach programs. Students now can participate in one of the country’s largest Summer Public Interest Fellowship programs, providing fellowships for students to volunteer in public service jobs during the summer. Separately, the Cumberland Community Mediation Center and the Cumberland Center for Children, Law and Ethics work to benefit the public.



Dean Carroll and former Governor Albert Brewer



Professor Carroll

Judge Carroll has not just requested the students to participate in outreach programs—he serves as a constant example.

Beyond the endowment, awards and improved alumni relations, Judge Carroll’s tenure may best be measured by his attention to professionalism. Reflecting upon the number of advocacy competitions students have participated in over the last 13 years, Judge Carroll admits being pleased with the championships won. He is most proud that in competitions where there is award for professionalism, Cumberland teams either have won or almost always been ranked at the top. In 2011, Judge Carroll himself was the recipient of the Professionalism Award by the Chief Justice’s Commission on Professionalism.

Judge Carroll also finds time to participate in active legal work. Both state and federal courts have appointed him as mediator in complex and difficult cases. He chaired two recent committees to assist the court in the selection of Magistrate judges and has been a member of the committee charged with making recommendations to the state’s elected federal officials concerning appointments to the United States District Courts and the United States Court of Appeals.

Judge Carroll also participates in national law reform organizations. He is a member of the Board of Directors of the American Inns of Court Foundation and the Sedona Conference, one of the nation’s leading litigation think tanks, and the Uniform Law Commission. Deeply interested in the transition to electronic documents, he was reporter to the committee drafting the Uniform Rules Relating to the Discovery of Electronically Stored Information and the Uniform Asset-Freezing Orders Act.

Professor Carroll and the Future

Judge Carroll's plan is to complete his tenure as dean after the spring 2014 semester. He will take a six-month sabbatical to allow him to travel with Susan. He also plans to use the opportunity to write on the issue of access to justice. He may also take some time to play the guitar, listen to classical music and The Rolling Stones, and keep up with the Atlanta Braves and the Washington Redskins. He will return to full-time teaching in 2015.

In reflecting on his career, Judge Carroll says he feels very fortunate. "I have been given great opportunities to be associated with fine people. I am not going to retire. I am looking forward to the next stage of my life and being surrounded by my family, friends and students."

As he returns to the classroom, Dean Carroll—Judge Carroll—is well prepared to impart the practical knowledge of what it takes to practice law with professionalism and excellence. He has the stories to prove it. | [AL](#)



Dean Carroll, active mode and relaxed mode

facebook

www.facebook.com/alabamastatebar

twitter

[@AlabamaStateBar](https://twitter.com/AlabamaStateBar)

Join the
conversation

Like us on Facebook and follow us on Twitter.





PRIMER ON Maritime Law

By Gerald A. McGill

Would you like to handle certain types of personal injury and wrongful death cases in Alabama

where the contributory negligence defense cannot be asserted by the defendant? If so, you need to consider cases in which the general maritime law of the United States, and not state law, governs.

The General Maritime Law Preempts State Law

It is important to recognize that the general maritime law applies to all injury and death cases involving a vessel on the navigable waters of the United States, superseding all state laws. The term “vessel” is defined as “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.”¹

The navigable waters of the United States consist of the inland river system, the Intracoastal Waterway, navigable lakes, rivers and canals, and the offshore waters of the United States. About the only bodies of water that are not considered navigable waters of the United States are lakes that are totally within the borders of one state. A landlocked lake that borders on two states is considered navigable.

Concurrent State and Federal Jurisdiction

Federal courts were given jurisdiction over admiralty and maritime claims by an express grant of jurisdiction in the United States Constitution.² However, state courts have concurrent jurisdiction with federal courts over some maritime cases. The statutory codification of federal court jurisdiction over most admiralty and maritime matters is found at 28 U.S.C. § 1333 which provides in part:

The district courts shall have original jurisdiction, exclusive of the courts of the states, of:



Passengers on a recreational vessel injured due to the negligence of the host/vessel operator have a cause of action against the operator, and in the case of a collision, may have a claim against both operators.

Any civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.* [Emphasis added].³

The last phrase, italicized above, is called the “saving to suitors” clause. It has been construed to allow state courts to exercise jurisdiction over maritime cases if the remedy sought was recognized under common law. This means that “in personam” claims arising out of maritime torts may be brought in state courts as well as federal courts.

The source of the substantive admiralty and maritime law is established by the federal courts and the United States Congress.⁴ Admiralty and maritime cases generally require application of substantive federal law whether the action is brought in federal or state court.⁵

However, the rules of procedure of the court exercising jurisdiction apply. Further, if the case is in a state court, the right to a jury trial is governed by state law.

Consequences Of Applying The General Maritime Law

The general maritime law requires that damages be apportioned between the plaintiff and defendant on a “pure comparative negligence” basis.⁶ This eliminates the contributory negligence defense in states that still have that defense, and it also eliminates the modified contributory negligence defenses (generally 50 percent or greater on the part of the plaintiff) in states where such a defense would otherwise be available.

Also, the general maritime law can change the statute of limitations for filing claims. The statute of limitations under the general maritime law is three years. Accordingly, if the case arose in Alabama, the general maritime statute of limitations of three years enlarges the Alabama statute for negligence actions from two years to three years.

Types of Cases

Generally speaking, there are four types of cases you are likely to encounter.

A. Pleasure Boats or Recreational Vessels

The term “pleasure boat” is not defined by statute. Under federal law, the term of choice is “recreational vessel,” which is defined as a vessel “manufactured or operated primarily for pleasure; or ... leased, rented or chartered to another for the latter’s pleasure.”⁷ The most common cases are those arising from the negligent operation of a recreational vessel causing a collision with other vessels or an allision, which means striking a fixed object. Passengers on a recreational vessel injured due to the negligence of the host/vessel operator have a cause of action against the operator, and in the case of a collision, may have a claim against both operators.

Also, the United States Supreme Court has recognized that products liability, including strict liability, is part of the general maritime law.⁸ This means that an operator or passenger in a vessel which causes an injury or death due to a defect in the design or manufacture of the vessel may bring a product liability suit against the manufacturer of the vessel.

B. Commercial Vessels

The second type of case involves commercial vessels carrying passengers for hire. Obvious cases involve charter fishing boats, dolphin viewing cruises, dive boats and dinner cruises. Not-so-obvious cases involve rental of personal watercraft such as Jet Skis or parasail operations.

C. Seamen's Cases

The third type of case involves injured seamen who are employed aboard a vessel in navigation. A seaman who is injured has a cause of action against the vessel owner for unseaworthiness under the general maritime law and an action against his/her employer for the negligence of the employer under the *Jones Act*.⁹ For Alabama residents, these cases usually involve seamen working on oil

production vessels in the Gulf of Mexico or the considerable number of seamen working on tugs pushing barges on the inland rivers of the United States. Alabama has over 1,800 miles of navigable waterways, the second highest in the United States. Hundreds of tugs pushing thousands of barges utilize these waterways each year. These are complex claims and beyond the scope of this article.

D. Cruise Line Passenger Claims

The fourth type of claim is passenger claims against the numerous cruise lines sailing out of ports throughout the United States. If you are contacted to represent an injured passenger, you must be aware that all passenger tickets contain a contractually-imposed one-year statute of limitations to file suit. The ticket also requires that all claims must be brought in a designated venue, usually Miami. It does not matter where the ticket was purchased or where the passenger boarded the ship. Therefore, you will have to refer the case to a Florida attorney who handles cruise passenger claims. Fortunately, the Florida Bar allows a 25 percent referral fee without any participation on the part of the referring attorneys.

Conclusion

Maritime injuries involve a body of law separate and distinct from common law negligence. However, the remedies available in specific cases allow injured parties a better chance to recover adequate compensation for their injuries. Therefore, if the injury occurs on, in or near the water, attorneys should look for some maritime cause of action. | [AL](#)

Endnotes

1. U.S.C. § 3.
2. U.S. Constitution Article III, § 2 "The judicial Power shall extend *** to all Cases of admiralty and maritime Jurisdiction. See Schoenbaum, ADMIRALTY AND MARITIME LAW § 1-1 (West Pub. Co. 4th Ed. 2004).
3. Section 1333 (1) of Title 28 of the *United States Code*, the successor to the Judiciary Act of 1789.
4. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L. Ed. 275 (1990).
5. *Pope & Talbot v. Hawn* 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953).
6. *United States v. Reliable Transfer Co.* 421 U.S. 397, 955 Ct. 1708, 44 L. Ed. 2d 251 (1795). See also *Schoenbaum*, supra § 3-4.
7. 46 U.S.C. § 2101 (25)
8. *East River Steamship Corp. v. Transamerican Delaval, Inc.* 476 U.S. 858, 106 S. Ct. 2295, 90L. Ed. 865 (1986).
9. 46 U.S.C. § 30104.

Do you represent a client who has filed a claim for medical benefits, lost wages, loss of support, counseling, or funeral and burial assistance with the Alabama Crime Victims' Compensation Commission?



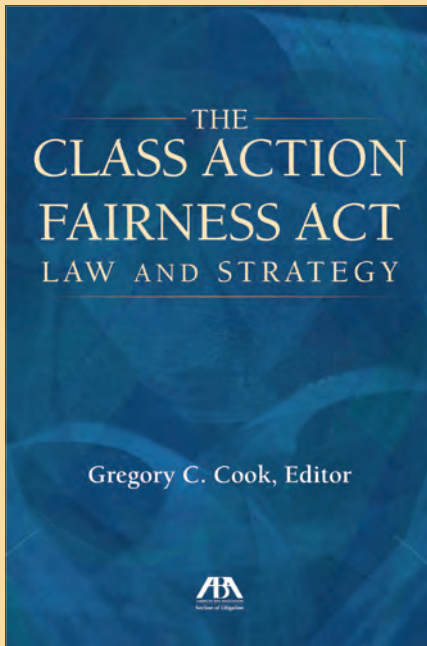
When your client applied for benefits, a subrogation agreement was signed pursuant to §15-23-14, Code of Alabama (1975). You must provide written notification to the Alabama Crime Victims' Compensation Commission upon filing a lawsuit or negotiating a settlement arising from your client's victimization.

For more information, contact Colette Gray, Restitution/Recovery Specialist for the Alabama Crime Victims' Compensation Commission at (334) 290-4420.



Alabama Crime Victims' Compensation Commission

PO BOX 231267
 Montgomery, Alabama 36123-1267
www.acvcc.alabama.gov
 (334) 290-4420



Gregory Cook

The Class Action Fairness Act: Law and Strategy

Edited by Gregory C. Cook¹

Reviewed by Othni J. Lathram

Nearly a decade ago, Congress passed the Class Action Fairness Act² (“CAFA”), drastically changing not only federal jurisdiction but also numerous other aspects of procedural and substantive law in cases covered by the act. The CAFA is a comprehensive statute that sweeps into the federal court system numerous cases that otherwise would be litigated in state courts. The statute’s jurisdictional requirements are highly technical, as are the exceptions and, once jurisdiction is established, the statute affects everything from appeal of remand orders to terms of settlement.

New ABA Treatise

The Class Action Fairness Act: Law and Strategy, edited by Gregory C. Cook and published by the American Bar Association Section of Litigation, is the first comprehensive practice guide for lawyers who are navigating CAFA. The book benefits from the experience and insights of 21 authors who represent a vast diversity of geography, practice type, firm focus and background. The tone of the work is balanced, perceptive and, above all, practical. One might ask why it took nearly a decade for this book to be written, but it is clear that this book would not be nearly so helpful without the development and maturation of the law during this time.

The book is easy to use and full of information that is not only academically interesting, but more importantly, helpful to the practitioner seeking guidance. The book is organized into 11 chapters that are logical, making it easy to quickly find relevant information. There are numerous charts, flowcharts and practice points throughout the book that make it easy to visualize some of the more technical aspects of the CAFA.

Scope

The start of this book lays a tremendous foundation for the consideration of the CAFA and its nuances. Chapter 1 provides a comprehensive introduction and overview and, in itself, would probably constitute one of the more helpful pieces of writing on the CAFA published to date. Chapter 2 focuses on the legislative history of the CAFA's enactment. Based on my research, this appears to be the only in-depth treatment of how and why Congress passed the CAFA. This information is extremely insightful and very helpful to lawyers in crafting arguments centered on the meaning of the statute and its purpose.

The middle portion of the book deals with the peculiar jurisdictional provisions of the CAFA. Chapters 3 through 6 deal with different aspects of jurisdictional requirements of the CAFA while chapter 7 deals with the exceptions. It is a fair characterization of the CAFA to think of it as an expansion of federal jurisdiction, and these chapters provide a detailed and balanced perspective for lawyers trying to take advantage of this fact or avoid its snare. This portion of the book provides helpful guidance on these topics while also pointing out various issues on which the federal circuits are split. It also includes a roadmap of the cases that lawyers need to read and understand to further the goals of their clients. Chapter 8 explores an often-overlooked aspect of the CAFA: how it expands federal jurisdiction to include certain mass actions. The mass action

provisions of the CAFA are particularly difficult to understand and implement. These provisions essentially created a new category of case, and they impose a class-action template for litigation. This chapter provides an excellent digest of how the courts have interpreted these provisions. Finally, chapter 9 deals with removal and remand issues, including a good guide to the strategic considerations surrounding these issues.

The final two chapters of the book deal with the conclusion of cases under the CAFA. Chapter 10 deals with the CAFA-related appeals. One of the interesting aspects of the CAFA is the imposition of certain appellate rights and differences in timelines for them. This chapter is very useful in understanding these variances from normal procedure. Chapter 12 tackles the thorny issues of settling cases under the CAFA. The settlement provisions of the CAFA include special notice procedures, limitations on fees and added protection for members of the class, and this chapter provides useful information on all of these topics.

Excellent Resource

Cook has done an excellent job of assembling a book that is both helpful and easy to use. It is an excellent resource for any lawyer who might be faced with a CAFA question, from the most seasoned class action lawyer to one who inadvertently gets swept up by its complex jurisdictional expansion. Copies may be purchased through the American Bar Association at www.shopaba.org and it retails for \$149.95 or \$119.95 for members of the Section of Litigation.

Endnotes

1. Greg Cook is a partner at Balch & Bingham LLP in their Birmingham office and serves as chair of the Financial Services Litigation Practice Group.
2. The Class Action Fairness Act of 2005 is codified at 28 U.S.C. §§1332(d), 1453, and 1711–1715.



A close-up photograph of a person's hair and shoulder, showing a mix of blonde and brown tones. The hair is styled in a short, textured cut. The shoulder is visible in the lower left corner, showing a light-colored garment.

Preventing Power of Attorney Abuse—

A LAWYER'S ROLE

By John C. Craft

The Story of Virginia Freck¹

At a young age, 98-year-old Virginia Freck learned to be frugal. She was given one quarter a week in allowance. If she spent the entire quarter that same week, she would owe her parents 50 cents the next week.

Freck would build a nice nest egg over her life. She graduated from Duke University and moved to New York City. There, she became a success and a bit of a New York socialite. Freck was a member of the Rockettes, modeled for Macy's department store, worked for CBS and volunteered for both the USO and Coast Guard. She was known to socialize with CBS and RCA executives.

Freck married late in life, but never had any children. When her husband died, she was living alone in Florida. Apparently, Freck needed some assistance and, at some point, started showing signs of dementia. Her husband's great-nephew, Joe, offered to assist, and Freck moved to Alabama where Joe had family.

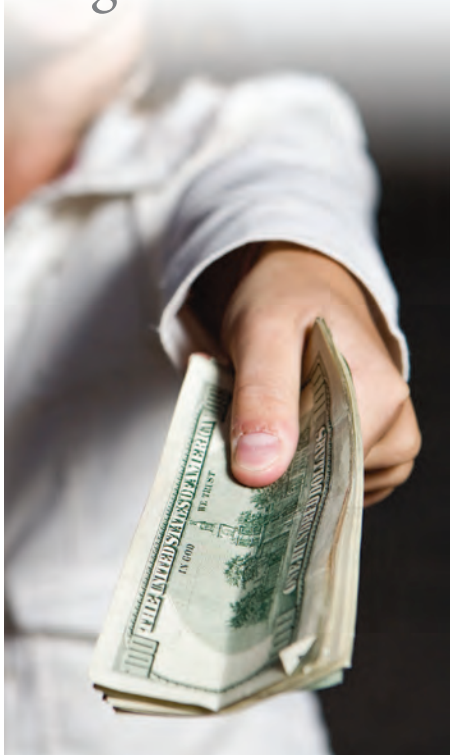
In 2006, Joe had Freck sign a power of attorney form appointing him as her agent. The power of attorney was not prepared with the assistance of an attorney,

but rather, was drafted by Joe's girlfriend. Joe proceeded to exploit Freck at the rate of \$53,000 per month. He spent Freck's money on casino gambling, alcohol, motorcycles, a house for himself, a convenience store, a bulldozer, and other property. The abuse did not come to light until one of Freck's bank accounts was overdrawn, and she was in danger of being evicted from her apartment. In 2012, a judgment was entered against Joe in a civil lawsuit, and he was convicted of criminal elder financial exploitation. All told, Joe exploited Freck for more than \$2.5 million dollars.

Prevention Is Key

Because civil remedies are inadequate and criminal prosecutions are rare, prevention is critical. Virginia Freck eventually received a measure of justice—a remedy—in the form of a civil judgment against and criminal conviction of her abuser. The unfortunate truth, however, is that for every Virginia Freck, there are dozens of seniors who live silently with the injustice of financial exploitation or never recover any of the money stolen from them. Remedies are often difficult

An agent found liable for breach of duty is required to “restore the value of the principal’s property to what it would have been had the violation not occurred” and must reimburse the principal for the attorney’s fees and costs paid on the agent’s behalf.⁹



to obtain and rarely fully compensate the victim in financial exploitation cases.

As an initial matter, elderly victims are not likely to report financial exploitation. Numerous studies have been conducted attempting to estimate the number of cases never reported to authorities. In 2005, the National Center on Elder Abuse (NCEA) estimated that only one out of every 25 financial exploitation cases was being reported, suggesting at least 5,000,000 victims of financial abuse each year.² The number of victims could be even higher if a 2011 New York report is accurate. In that study, 4,156 older New Yorkers or their proxies were interviewed, and 292 agencies reported on documented cases of elder abuse.³ The findings suggest that a mere one out of 42 cases of elder financial exploitation is reported to authorities.⁴ Victims of elder abuse or financial exploitation may not report the abuse for several reasons. They may desire to keep the abuse or exploitation private to avoid embarrassment, especially if they have been betrayed by those persons who are closest to them.⁵ Also, victims who are suffering from memory loss or deteriorating mental capacity are less likely to come forward and report abuse.⁶

Civil remedies available for victims of financial exploitation include traditional tort theories such as conversion, fraud and breach of fiduciary duty.⁷ Also, in Alabama, the Alabama Uniform Power of Attorney Act (UPOAA) includes statutory remedies for breach of duty to a principal. Under the UPOAA, an agent owes certain mandatory and default duties to the principal.⁸ An agent found liable for breach of duty is required to “restore the value of the principal’s property to what it would have been had the violation not occurred” and must reimburse the principal for the attorney’s fees and costs paid on the agent’s behalf.⁹ The remedies provided under the UPOAA are not exclusive.¹⁰

Despite the availability of civil remedies, the civil justice system will rarely hold agents fully accountable for abusing their authority under powers of attorney. There are several practical and circumstantial reasons for this. A victim of power of attorney abuse may lack the capacity to pursue civil litigation.¹¹ He or she may not have the financial resources to fund the often-costly litigation, perhaps because the agent has spent or dissipated the principal’s assets.¹² And, if litigation is ultimately pursued, efforts at restitution are likely to result in only partial recovery.¹³

Neither may criminal penalties be sufficient to fully curb power of attorney abuse. Some states distinctly criminalize power of attorney misuse.¹⁴ Alabama became one of those states with last year’s enactment of the Protecting Alabama’s Elders Act. That act penalizes elder financial exploitation up to a class B felony.¹⁵ Criminal power of attorney abuse, as a type of financial exploitation, is defined as “the breach of a fiduciary duty to an elderly person by the person’s guardian, conservator, or agent under a power of attorney which results in an unauthorized appropriation, sale, or transfer of the elderly person’s property.”¹⁶

Power of attorney abuse, though properly criminal, may not ultimately be prosecuted. Investigators, law enforcement officers and other authorities may not know that power of attorney abuse can be a crime, may fail to investigate the allegations or may ultimately advise the complainant or those concerned that “it’s a civil problem.”¹⁷ As a result, prosecutors may not receive case referrals. And, as one study has shown, of cases that are referred, only one-seventh are actually prosecuted.¹⁸

Several factors contribute to low rates of prosecution. Prosecutors may not have expertise in power of attorney abuse or the resources to prosecute these cases, which can be demanding and labor intensive.¹⁹ A prosecutor may not move forward with a case in which the principal granted broad authority to the agent, including the authority to make gifts with the principal’s property.²⁰ Such an extensive grant of authority could create a reasonable doubt that the agent acted beyond his or her authority.²¹

Prosecution may also be hindered due to the victim’s circumstances. Victims often are unwilling to prosecute immediate family members or close friends who are commonly appointed as their agents.²² In addition, an elderly victim may be viewed as an unreliable witness because of mental capacity impaired by old age, leading courts to be skeptical of accusations by “demented persons” because “paranoid suspicions are a common incident of dementia.”²³ An elderly victim suffering from mental deficiencies may not know or understand that abuse has occurred, and, thus, will be unable to testify in court.²⁴ Finally, the principal may have signed the power of attorney document of his or her own volition and in accordance with the jurisdiction’s proper procedures.²⁵ That fact likely strengthens a defendant’s

case even if the principal was unaware of what he or she was signing, or completely trusted the agent he or she was appointing only to be victimized later.²⁶

Given the insufficiency of remedies for power of attorney abuse, prevention is crucial. Ask yourself: If Virginia Freck had come to your office to complete a power of attorney, what could you have done to prevent the abuse that occurred? Anything? What can lawyers do to prevent power of attorney abuse when drafting and executing powers of attorney? The remainder of this article provides concrete suggestions on how lawyers can prevent power of attorney abuse. Lawyers who draft powers of attorney for elderly clients help prevent financial abuse in several ways. First, lawyers have certain ethical duties that reduce the risk of exploitation. Second, a power of attorney document can be drafted with built-in safeguards to avert abuse. Third, attorneys can counsel their clients on options the client might choose to reduce the risk of abuse.

Be the Professional

Virginia Freck's power of attorney was not completed with the assistance of a lawyer. Rather, it seems to have been downloaded from the Internet or obtained from some other source of do-it-yourself legal forms. Yes, a power of attorney is a form. The UPOAA contains an optional statutory power of attorney form for use by attorneys and the public alike.²⁷ It is also a potent and risky legal document that can be abused, as it was in Virginia Freck's case to the tune of \$2.5 million dollars. Had Virginia Freck gone to a lawyer, that lawyer may have been able to avert the abuse simply by following the standards of professional conduct.

Attorneys who regularly deal with elderly clients are familiar with what are referred to as the "Four C's" of elder law ethics.²⁸ They are: client identification, conflicts of interest, confidentiality and competency.²⁹ Each of these C's represents an ethical duty owed by an attorney to his or her client. By adhering to these duties, attorneys can help protect their clients from financial exploitation.

Elder law attorneys aspire to identify who the client is at the earliest possible stage and communicate that information to the persons immediately involved.³⁰ An

attorney owes professional duties of competence, diligence, loyalty and confidentiality to the client.³¹ Thus, identifying the elder law client is the first critical step in establishing an attorney-client relationship.³² This is particularly important in elder law because family members may be very involved in the legal affairs of an elderly client and may have a personal stake in the outcome.³³ Elder law attorneys must exercise care to observe signs of undue influence, and when undue influence appears, take steps to ensure their client is protected.³⁴

Lawyers should meet alone with their elderly clients.³⁵ Elder law attorneys aspire to meet with the prospective client "in private at the earliest stage possible so that the client's . . . voice can be engaged unencumbered" and uninfluenced by others.³⁶ Meeting alone with the client, not in the presence of a prospective agent, helps ensure the client is able to express his or her own wishes (not the agent's) regarding a power of attorney.³⁷ When an elderly client's family members are involved, a lawyer should take direction from the client, not the family members.³⁸ Thus, attorneys should not draft powers of attorney for non-clients who will be executing the documents, but should establish an attorney-client relationship with the principal prior to execution.³⁹

Attorneys have an ethical duty to avoid conflicts of interest.⁴⁰ In most situations, this means that a lawyer may represent only one individual.⁴¹ In drafting a power of attorney, a lawyer should identify that individual as the senior, the principal.⁴² If there is no apparent conflict of interest, joint representation, perhaps of spouses, may be a preferred form of representation.⁴³ Attorneys should ensure that family members understand who the clients are and the implications of separate or joint representation, especially with respect to the attorney's obligation to keep or share confidences.⁴⁴

Attorneys have a basic obligation to keep information relating to the representation of a client confidential unless the client consents to disclosure.⁴⁵ Elder law attorneys aspire to explain the duty of confidentiality to the client and involved parties early in the representation to avoid misunderstandings and to determine the client's wishes regarding disclosure of information.⁴⁶ If a client requests disclosure, the attorney should counsel the client on the possible risks and consequences of

disclosure.⁴⁷ For example, if a client asks the attorney to discuss the client's matter with only one of the client's children, the attorney should explain that disclosure could raise issues of undue influence or overreaching on the part of the favored child.⁴⁸ In sum, elder law attorneys aspire to "strictly" adhere to "the obligation of client confidentiality, especially in representation that may involve frequent contacts with family members, caretakers, or other involved parties who are not clients."⁴⁹

Lawyers should treat clients with diminished capacity with the same respect and attention as any other client.⁵⁰ "Attorneys have special ethical responsibilities when representing clients whose capacity for making decisions may be diminished."⁵¹ There are different thresholds for the client capacity required to complete a legal task depending on the type of task being undertaken.⁵² A client may have the capacity to perform some tasks but not others.⁵³ For example, a client might have the capacity to make a will but not a contract.⁵⁴ The capacity required to execute a power of attorney is a contractual standard.⁵⁵

CHILD SUPPORT CALCULATION SOFTWARE

For Alabama

Alabama Support Master™

Uses 2009 Guidelines
Prepares and prints forms
CS-41, CS-42, CS-43, and CS-47

Includes Interest and Arrearage
Calculator

Since 1989
Professional Software
Corporation

POB 716 Mount Vernon, IN 47620
812-781-1422

marc.edwin.hawley@gmail.com

www.SupportMasterSoftware.com

FREE DEMO



Springing powers of attorney are a type of safeguard against power of attorney abuse because they take effect only in specified circumstances, such as the principal's incapacity.⁶⁸

Attorneys may employ certain techniques to assess and determine their client's capacity to accomplish a legal task. The attorney should use appropriate skills and processes to make and document preliminary assessments of client capacity.⁵⁶ The attorney may also adapt the interview environment, meeting times, communications and decision-making processes to maximize a client's capacities.⁵⁷ Ultimately, the attorney should consider a number of factors, including the kind of decision being made and the applicable legal standard, when determining if the client has the capacity required to complete the task at hand.⁵⁸ In Virginia Freck's case, who determined if she had the requisite capacity to execute the power of attorney?

Counsel the Client on Appointing Agents

Attorneys should advise their clients regarding the need to select a trustworthy agent, but the advice should not stop there. Attorneys can counsel clients on the options available when a client wants to appoint two or more agents: co-agents acting independently, co-agents requiring agreement, or successor agents. The UPOAA provides several default rules that require careful consideration by the principal. When co-agents are appointed, the default rule is that each agent can exercise his or her authority independently.⁵⁹ A principal can override the default by requiring co-agents to act by majority or unanimous consensus.⁶⁰ A requirement that co-agents agree to actions taken under the power of attorney may impede its use.⁶¹ Financial institutions may be reluctant to accept a power of attorney that names co-agents without proof that the co-agents agree to the transaction.⁶² On the other hand, a requirement that co-agents agree may be exactly what a principal intends to limit the possibility of exploitation by one agent.⁶³ Attorneys help their clients weigh these agency options, considering the benefits and risks of each, and decide which one meets the client's objectives.

Counsel the Client on Immediate Effectiveness Versus Springing Effectiveness

Under the UPOAA, the default rule is that a power of attorney is effective when it is executed by the principal.⁶⁴ An agent has the authority to act on the principal's behalf immediately upon execution of the document. A principal can alter the default by making the power of attorney effective at a "future date or upon the occurrence of a future event or contingency."⁶⁵ Known as "springing" powers of attorney, these types of powers typically become effective upon a determination that the principal has become incapacitated. Careful planning requires considering whether an agent's authority is to be effective immediately or upon a future event such as the principal's incapacity.⁶⁶ Individual client circumstances will dictate the need for a springing power of attorney.⁶⁷

Springing powers of attorney are a type of safeguard against power of attorney abuse because they take effect only in specified circumstances, such as the principal's incapacity.⁶⁸ For one thing, a principal may never become incapacitated. In that case, his or her agent's authority never springs into effect, and there is no opportunity for the agent to misuse the power of attorney. Additionally, third-party involvement may prevent exploitation at the time an abusive transaction is attempted. If a financial institution is presented with a springing power of attorney as authority to conduct a transaction, it should, pursuant to the terms of the document, determine if the springing event (the principal's incapacity) has occurred. This determination will typically include an inquiry with the agent regarding the principal's status and a request for written certification by the principal's physician of the principal's incapacity.⁶⁹ This process, admittedly inconvenient for honest agents, may prevent an unscrupulous agent from conducting an abusive transaction.

Ensure the Client Determines the Extent of Authority Granted to the Agent

Power of attorney abuse may be avoided by limiting the authority granted to an agent and granting only the powers needed.⁷⁰ Principals should carefully consider the amount of power to be granted the agent, especially the types of authority that have the potential to dissipate the principal's property or alter the principal's estate plan.⁷¹ For that reason, attorneys should question their elderly clients to determine exactly what the client wants his or her agent to be authorized to do.⁷¹ For example, a client might want her daughter to make the client's monthly mortgage payment and pay other bills if the client undergoes long-term hospitalization and rehabilitation.⁷² Rather than draft a general power of attorney granting the daughter broad powers, a lawyer may draft a more limited power of attorney authorizing the daughter to pay the client's bills, but not to cash checks, withdraw money or sell the client's real property.⁷³

The power of an agent to make unlimited gifts of the principal's property and assets is "exceptionally dangerous" because it allows an agent to make gifts the principal may not have intended.⁷⁴ Lawyers should ask clients who want their agents to have gifting authority about the purpose of those gifts.⁷⁵ Perhaps the client wants their agent to be able to continue a pattern of giving cash to children and grandchildren on birthdays and holidays.⁷⁶ The attorney can then draft a gifting clause to accomplish that sole purpose.⁷⁷ Gifting clauses can be crafted in other ways to protect the principal from financial abuse: authorizing gifts for the sole purpose of continuing a pattern of charitable giving, clarifying that the gifting authority is not to be used to change the principal's estate plan, requiring that gifts to the principal's children be in equal amounts and to all at the same time, requiring the agent to provide

notice to a third party of any gifts over a certain amount or made to the agent, or requiring the agent to obtain the consent of the principal's children if a gift is to be made to the agent.⁷⁸ A lawyer who counsels his client on gifting authority helps the client make an informed decision, and the attorney can then draft the document accordingly.⁸⁰

Include Oversight Provisions

By including oversight provisions, drafting attorneys can increase the likelihood that power of attorney abuse is discovered.⁸¹ A principal may want to include an express accounting requirement in the power of attorney document.⁸² This provision sets forth the frequency of agent accountings and to whom the accountings should be provided.⁸³ Including a requirement to account to a third party, in addition to the principal, may be particularly important if the principal becomes incapacitated.⁸⁴ Another oversight provision a lawyer may include in the power of attorney is one requiring the agent to keep records.⁸⁵ This provision should specify which records must be kept and for how long.⁸⁶ It may also require the agent to turn over records to a designated third party if requested.⁸⁷

Educate the Client and the Agent

A lawyer should educate his or her client about the agent's responsibilities, such as a requirement to provide regular accountings.⁸⁸ A lawyer might make the client aware of the warning signs of financial abuse and provide instructions on what to do if suspicions arise, for example, revoking the power of attorney.⁸⁹ Lawyers can also reduce the risk of exploitation by educating the agent.⁹⁰ Agents who are aware of their responsibilities and limitations under a power of attorney are less likely to abuse their authority.⁹¹ Therefore, with the client's consent, an attorney may want to meet with the agent to discuss the agent's duties owed to the principal and

review the power of attorney document.⁹² The drafting attorney may also include a statement of the agent's fiduciary duties in the power of attorney and have the agent sign the statement acknowledging the agent's fiduciary duties owed to his or her principal.⁹³

Conclusion

None of these suggestions is a cure-all for power of attorney abuse. Lawyers who adhere to the *Rules of Professional Conduct* and aspire to even higher standards are not immune to having an elderly client's power of attorney abused. As for counseling, some clients might not be concerned about financial exploitation. Others might choose several of the options to reduce the possibility of abuse. In the end, it might take only one of these suggestions to prevent the type of injustice that Virginia Freck endured. As lawyers, we must encourage our elderly clients to come to us to help prepare powers of attorney, provide meaningful advice and counsel and draft a well-considered legal document. | AL

Endnotes

1. The story of Virginia Freck was reported in the *Montgomery Advertiser* on June 3, 2012. See Scott Johnson, *Betrayal of Trust: Elderly Woman's Life Savings of Millions Drained*, MONTGOMERY ADVERTISER, June 3, 2012, at 1A.
2. Nat'l Ctr. on Elder Abuse, *Fact Sheet: Elder Abuse Prevalence and Incidence*, 1 (2005), http://www.ncea.aoa.gov/main_site/pdf/publication/FinalStatistics050331.pdf.
3. New York State Office of Children and Family Services, *Under the Radar: New York State Elder Abuse Prevalence Study*, 1 (2011), <http://www.ocfs.state.ny.us/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf>.
4. *Id.* at 3.
5. Jane A. Black, Note, *The Not-So-Golden Years: Power of Attorney, Elder Abuse, and Why Our Laws are Failing a Vulnerable Population*, 82 ST. JOHN'S L. REV. 289, 294-95 (2008).
6. *Id.* at 295.
7. Julie A. Lemke & Seymour Moskowitz, *Protecting the Gold in the Golden Years: Practical Guidance for Professionals on Financial Exploitation*, 7 MARG. ELDER'S ADVISOR 1, 11 (2005).

8. ALA. CODE § 26-1A-114 (2013).
9. ALA. CODE § 26-1A-117.
10. ALA. CODE § 26-1A-123.
11. AARP Public Policy Institute, *Power of Attorney Abuse: What States Can Do About It*, 4 (2008), http://assets.aarp.org/rgcenter/consume/2008_17_poa.pdf.
12. *Id.*
13. Sandra L. Hughes, *Can Bank Tellers Tell? Legal Issues Related to Banks Reporting Financial Abuse of the Elderly*, 58 CONSUMER FIN. L.Q. REP. 293, 294 (2004).
14. See Black, *supra* note 5, at 303 (stating that about 10 states specifically criminalize power of attorney misuse via elder financial exploitation statutes).
15. 2013 Ala. Acts 2013-307, § 6.
16. 2013 Ala. Acts 2013-307, § 2.
17. AARP, *supra* note 11, at 6.
18. Thomas Hilliard, *Power Failures: Power of Attorney Authority and the Exploitation of Elderly New Yorkers*, SCHUYLER CTR. FOR ANALYSIS & ADVOCACY, 3 (2006), http://www.scaany.org/resources/documents/power_failures.pdf.
19. AARP, *supra* note 11, at 6.
20. Black, *supra* note 5, at 307.
21. *Id.*
22. Jonathan Federman & Meg Reed, *Abuse and the Durable Power of Attorney: Options for Reform*, 6 (Mar. 1994), http://www.governmentlaw.org/files/1993_Sandman.pdf.
23. See Black, *supra* note 5, at 306 (citing and quoting *Boyce v. Fernandes*, 77 F.3d 946, 948-49 (7th Cir. 1996)).
24. *Id.*
25. *Id.* at 307-08.
26. *Id.*
27. ALA. CODE § 26-1A-301.
28. ABA Commission on Law and Aging, *Understanding the Four C's of Elder Law Ethics* (2011) http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_4c_broch_jul_25_2011.authcheckdam.pdf.
29. *Id.*
30. Nat'l Academy of Elder Law Attorneys, *Aspirational Standards for the Practice of Elder Law with Commentaries*, 7 (2005), http://www.naela.org/App_Themes/Public/PDF/Media/AspirationalStandards.pdf.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 12.
35. Ellen J. Henningsen, *Preventing Financial Abuse by Agents under Powers of Attorney*, WIS. LAWYER, Vol. 73, No. 9 (Sept. 2000).
36. Nat'l Academy of Elder Law Attorneys, *supra* note 30, at 8.
37. Henningsen, *supra* note 35.
38. Betsy J. Abramson, *Ethical Considerations in Elder Law Cases*, WIS. LAWYER, Vol. 73, No. 9 (Sept. 2000) (citing a disciplinary proceeding against an attorney who transferred a client's property on the instruction of family members only, never meeting with the client, because the attorney "did not make house calls").
39. Nat'l Academy of Elder Law Attorneys, *supra* note 30, at 10.
40. See ALA. RULES OF PROF'L CONDUCT R 1.7.
41. ABA Commission on Law and Aging, *Understanding the Four C's of Elder Law Ethics* (2011) http://www.americanbar.org/content/dam/aba/uncategorized/2011/2011_aging_4c_broch_jul_25_2011.authcheckdam.pdf.
42. Nat'l Academy of Elder Law Attorneys, *supra* note 30, at 10.
43. *Id.* at 10-11.
44. *Id.* at 10.
45. See ALA. RULES OF PROF'L CONDUCT R 1.6.
46. Nat'l Academy of Elder Law Attorneys, *supra* note 30, at 15.
47. *Id.*
48. *Id.*
49. *Id.* at 16.
50. *Id.* at 19.
51. *Id.*; see also ALA. RULES OF PROF'L CONDUCT R 1.14.
52. *Id.* at 20.
53. *Id.*
54. *Id.*
55. "Case law consistently holds that a principal who appoints an agent under a power of attorney must have the capacity required to make a contract." Lawrence A. Frolik & Mary F. Radford, *Sufficient Capacity: The Contrasting Capacity Requirements for Different Documents*, 2 NAELA J. 303, 313 (2006). See also *Yates v. Rathbun*, 984 So. 2d 1189, 1195 (Ala. Civ. App. 2007) ("[T]he standard for determining whether a person is competent to execute a power of attorney is whether that person is able to understand and comprehend his or her actions.").
56. Nat'l Academy of Elder Law Attorneys, *supra* note 30, at 20.
57. *Id.* at 22.
58. *Id.* at 21.
59. ALA. CODE § 26-1A-111(a).
60. ALA. CODE § 26-1A-111 cmt.
61. *Id.*
62. Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 18 (2007).
63. See Lemke, *supra* note 7, at 10 (including the appointment of two trustworthy agents who are required to act jointly as a type of safeguard against power of attorney abuse).
64. ALA. CODE § 26-1A-109(a).
65. *Id.*
66. Whitton, *supra* note 64, at 19.
67. *Id.* at 20.
68. Lemke, *supra* note 7, at 10.
69. If a springing power of attorney does not specify who should make the determination of the principal's incapacity, or a person has been authorized but is unable or unwilling to make the determination, the default rule is the power of attorney "becomes effective upon a determination in a writing or other record by a physician or licensed psychologist that the principal is incapacitated . . ." ALA. CODE § 109(c)(1).
70. Black, *supra* note 5, at 309.
71. Whitton, *supra* note 64, at 18.
72. Black, *supra* note 5, at 309.
73. *Id.*
74. *Id.*
75. Henningsen, *supra* note 35.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. Henningsen, *supra* note 35.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. Henningsen, *supra* note 35.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* The UPOAA statutory form contains a section explaining the agent's legal duties, but does not require an agent's acknowledging signature. ALA. CODE § 26-1A-301.

LAWPAY

CREDIT CARD PROCESSING



THE CORRECT WAY TO ACCEPT PAYMENTS!

Trust your credit card transactions to the only merchant account provider recommended by 32 state and 48 local bar associations!

- ✓ Separate earned and unearned fees
- ✓ 100% protection of your Trust or IOLTA account
- ✓ Complies with ABA & State Bar Guidelines
- ✓ Safe, simple, and secure!

Reduce processing fees and avoid commingling funds through LawPay.



Process all major card brands through LawPay



Secure web payments

Mobile Swiper
iPhone, iPad, Android

866.376.0950
LawPay.com/alabar

TRUST YOUR TRANSACTIONS TO LAWPAY

THE PREMIER PROCESSOR FOR THE LEGAL INDUSTRY

AffinityPay is a registered ISO/MSP of BMO Harris Bank, N.A., Chicago, IL



Wilson F. Green

By 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.

By 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.



Marc A. Starrett

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Guardianships

***Sears v. Hampton*, No. 1120578 (Ala. Nov. 22, 2013)**

Under *Ala. Code* § 26-2B-302(b), an in-state transferee court of an extraterritorial guardianship can only accept the transfer and enter a conditional order. Justice Bolin's opinion traces the contours of the guardianship and conservatorship laws.

Door-Closing Statute

***Wausau Development Corporation v. Natural Gas & Oil, Inc.*, No. 1120614 (Ala. Nov. 22, 2013)**

Held: (1) interstate commerce is not an affirmative defense to operation of the door-closing statute, but, instead, is an exception to the affirmative defense of lack of capacity, and failure to comply with the door-closing statute is properly characterized as a defense of lack of capacity; and (2) since lack of capacity had not been raised, the trial court erred by adjudicating the case based on an affirmative defense not properly pleaded.

Personal Jurisdiction; Collateral Attack of Foreign Judgment

***Afassco, Inc. v. Sanders*, No. 1120801 (Ala. Nov. 22, 2013)**

In a domestication of judgment proceeding, a potential judgment defendant claiming lack of personal jurisdiction in the primary action may either ignore the proceedings and attack the judgment collaterally in an enforcement or domestication proceeding, or may appear in the primary action and challenge jurisdiction directly. Since defendant litigated the personal jurisdiction question in the prior primary action, he could not re-litigate the question in Alabama, even if the foreign court decided the personal jurisdiction question on procedural rather than substantive grounds.

Inverse Condemnation

Ex parte Alabama Department of Transportation, No. 1101439 (Ala. Dec. 6, 2013)

Complaint sufficiently alleged a physical intrusion onto plaintiff's property, thus satisfying the standard of *Willis v. University of North Alabama*, 826 So. 2d 118 (Ala. 2002). Justices Bolin, Shaw and Bryan concurred specially, noting their view that *Willis* should be overruled in that it wrongly requires a physical invasion of property, whereas injuries to property through governmental action should be compensable as takings.

Lost Profits; Mental Anguish; Punitive Damages

Pensacola Motor Sales, Inc., d/b/a Bob Tyler Toyota v. Daphne Automotive, LLC d/b/a Eastern Shore Toyota, No. 1110840 (Ala. Dec. 6, 2013)

EST is owned by Shawn Esfahani, an Iranian by birth but a U.S. citizen. EST and BTT are Toyota dealers and competitors. EST and Esfahani sued BTT and Keener (a BTT employee) for slander, based on statements made by BTT's employees calling EST "Taliban Toyota" and "Middle Eastern Shore Toyota." At trial, witnesses who were customers testified that BTT's employees told customers that EST was Iraqi and was funneling money to terrorists. EST offered lost-profits expert who testified that EST had lost \$7.1 million in profits from these defamatory statements. Jury returned a verdict for Esfahani on slander per se for \$1.25 million compensatory and \$2 million punitive damages, and for EST for \$1.25 million compensatory and \$3 million punitive damages. The supreme court unanimously affirmed, holding: (1) BTT failed to properly preserve for appeal the trial court's exclusion of evidence concerning parties' prior cybersquatting litigation in federal court; (2) alleged hearsay evidence, even if inadmissible, was harmless because it was cumulative as to similar admissible evidence of defamatory statements; (3) expert testimony was properly admitted, and could properly be attacked for credibility on cross-examination; (4) mental anguish and reputational damages of \$1.25 million to Esfahani was not excessive in light of nature of the harm and injury; (5) punitive damages of two times compensatory damages were reasonable and appropriate under the *Gore* and *Hammond* factors.

Expedited Process Serving, LLC

"We Serve You by Serving Others"

205-995-9633

www.ExpeditedProcessServing.com

NO MILEAGE FEE!!!

- >Status Available via Website<
- >Service Throughout Alabama and Beyond<
- >Automated Email Updates for Each Action on Your Case<
- >Member of National Association of Professional Process Servers<

Jury Waivers

Ex parte First Exchange Bank, No. 1111353 (Ala. Dec. 6, 2013)

In a per curiam no-opinion denial of a petition for mandamus, CJ Moore concurred specially, reasoning in a lengthy (50-page) writing that pre-dispute contractual jury waivers are unconstitutional as violating the right to a jury trial.

Indemnity; Joint Tortfeasors

Parker Towing Company, Inc. v. Triangle Aggregates, Inc., No. 1100510 (Ala. Dec. 13, 2013)

In a complex fact pattern, the court held: (1) no indemnity is owed as between joint tortfeasors under Alabama law (the court noted that there was no active-passive exception to the joint tortfeasor bar asserted in the case); (2) any payment deemed a "voluntary payment" would not form basis for claim of indemnity under the voluntary payment doctrine; (3) common-law indemnity for attorneys' fees would not lie where there was no basis for imposing indemnity obligation because of joint tortfeasor bar; but (4) a portion of attorneys' fees attributable to certain reclamation work claim was subject to contractual indemnity.

Fictitious Party Practice

Weaver v. Firestone, No. 1101403 (Ala. Jan. 11, 2013, modified on rehearing Dec. 13, 2013)

On original submission, the court controversially held that, where plaintiff does not know the identity of any defendant, "reasonable diligence" would require filing of a complaint against solely fictitious parties (under Rule 9(h)) within the applicable statute of limitations—even though there would be no one to serve. On rehearing, the court specifically rejected that position by a 7-2 margin, reasoning that the commencement

of a case against solely fictitious parties does not stop the running of the statute of limitations under Alabama precedent. Thus, equitable tolling suspends running of the statute where the identity of the responsible party is not known within the statutory period.

Mandamus

Ex parte Bay Area Physicians for Women, No. 1121069 (Ala. Dec. 13, 2013)

In filing a petition for mandamus which is outside ARAP 21's 42-day presumptively reasonable time, the petitioner must include a statement as to the timing and why the petition was filed outside the presumptively reasonable time.

State Agent Immunity; Timeliness of Mandamus

Ex parte Jones, No. 1120950 (Ala. Dec. 20, 2013)

After rejection of an untimely mandamus petition based on *Cranman* immunity, teacher defendant filed a "renewed" motion for summary judgment based on more recent law. Trial court denied motion; teacher filed timely mandamus petition. The supreme court denied the writ, reasoning that the intervening case in question did not fundamentally change immunity law, and that considering merits of petition would allow petitioner to cure a previously untimely petition.

Rule 54(b) Certification Improper

Meeks v. Morrow, No. 1120688 (Ala. Dec. 20, 2013)

Because remaining claims were dependent upon disposition of the claims which trial court had disposed of and certified under Rule 54(b), the trial court's Rule 54(b) certification was improper.

Arbitration; Post-Arbitral Review

Gower v. Turquoise Properties Gulf, Inc., No. 1120045 (Ala. Dec. 20, 2013)

In a unanimous panel decision (five justices) authored by Justice Murdock, the court reversed a trial court's entry of judgment on arbitration award, holding that an arbitrator exceeded his powers, under section 10 of the FAA, by adjudicating a statute of limitations issue which had not been raised by the developer, and which was, in fact, incorrect legally.

Rule 54(b) Certifications

Fuller v. Birmingham-Jefferson County Transit Authority, No. 1090436 (Ala. Dec. 20, 2013)

The court dismissed an appeal as being from an improper Rule 54(b) certification because of the intertwined nature of the claims and counterclaims. The separate writings of

Justices Murdock and Shaw are the most important aspect of the case, reflecting a debate on whether an immediate appeal from a faulty Rule 54(b) certification is even necessary. *The upshot: if you are the loser in an order containing an Rule 54(b) certification, appeal immediately, even if you contend the certification is improper.*

Post-Arbitral Review

Cavalier Manufacturing, Inc. v. Gant, No. 1080284 (Ala. Dec. 20, 2013)

The court refused to vacate an arbitration award based on the old "manifest disregard of the law" ground created at common law.

Duty on Voluntary Undertaking

Ex parte BASF Construction Chemicals, LLC, No. 1101204 (Ala. Dec. 30, 2013)

Where the facts upon which the existence of a duty depends are disputed, the factual dispute is for resolution by the jury, but when the facts upon which the existence of a duty depends are not genuinely disputed, the task remaining is simply for the court to determine whether the alleged duty arises from those facts.

Personal Jurisdiction

Pennsylvania National Mut. Cas. Ins. Co. v. Allen, No. 1121284 (Ala. Jan. 10, 2014)

Driving a car registered in Alabama, owned by an Alabama company and insured under a policy delivered in Alabama were not sufficient to subject out-of-state driver to personal jurisdiction in Alabama on claim arising from out-of-state accident.

From the Alabama Court of Civil Appeals

Damages

Bella Investments, Inc. v. Multi Family Services, Inc., No. 2120478 (Ala. Civ. App. Nov. 22, 2013)

In negligent construction action brought by hotel developer, owner testified as to cost of repairs needed as a result of the faulty construction of defendant. However, neither owner (not being a market expert in hotels) nor his expert testified as to other factors affecting the value of such commercial real estate, including occupancy rates, which would affect valuation of property. Without such evidence, the jury could not properly determine the diminution in value to the property proximately caused by the negligence of defendant.

Inconsistent Verdicts; Punitive Damages

M & J Materials, Inc. v. Stanford D. Isbell, No. 2080880 (Ala. Civ. App. Dec. 6, 2013)

Held: (1) trial court properly handled an inconsistent verdict situation by re-instructing the jury as to the inconsistency and explaining it, without suggesting the result which they should reach in re-deliberation, and, thus, the trial court acted within its discretion in denying a motion for new trial based on the recharging; and (2) remittitur of a punitive damage award of \$70,000 (14 times the compensatory award) was appropriate to \$20,000.

Amendments to Pleadings

Kraz, LLC v. Holliman, No. 2120722 (Ala. Civ. App. Dec. 6, 2013)

Trial court exceeded its discretion in denying motion to amend complaint, where amendment was sought outside 42 days before trial setting, and where opposition was based

solely on lack of merit of the claims to be added rather than any allegation of unfair prejudice or undue delay.

Foreclosure

Sturdivant v. BAC Home Loan Servicing, LP, No. 2100245 (Ala. Civ. App. Dec. 13, 2013)

Under *Ex parte GMAC Mortgage, LLC*, No. 1110547 (Ala. Sept. 13, 2013), the validity of a foreclosure sale by the mortgagee turns on whether the mortgagee had the power of sale at the time of actual foreclosure.

Estates; Right of Quarantine

Poulin v. Norwood, No. 2120041 (Ala. Civ. App. Dec. 31, 2013)

Surviving spouse's approval of sales contract by PR of estate did not evince a clear intent of survivor to waive the statutory right of quarantine under *Ala. Code* § 43-8-114, because a waiver would require evidence that Poulin had knowledge of right of quarantine and then voluntarily relinquished same.



Upchurch Watson White & Max Mediation Group is the leading alternative dispute resolution firm in the Southeast.

Led by Rodney Max, the firm's experienced local team includes Mike Walls, Brad Wash and former Circuit Court Judge Art Hanes.

This team of outstanding mediators serves to assist law firms and their clients in every phase of dispute resolution and has acquired a national reputation for settling major litigation in the state of Alabama and beyond.

Visit us at: uww-adr.com



Upchurch Watson White & Max
MEDIATION GROUP

uww-adr.com

Daytona Beach

Maitland/Orlando

Jacksonville

Miami

Birmingham

Foreclosure

Gray v. FNMA, No. 2120087 (Ala. Civ. App. Jan. 10, 2014)

Another in the series of cases illuminating the occluded recesses of foreclosure law when MERS lurks in dark corners of the probate records. Summary judgment for lender held improper on ejectment claim because undisputed evidence did not show that the foreclosing entity was the holder of the note at the time of the foreclosure sale.

Decedent's Estates

Keeling v. Keeling, No. 2120612 (Ala. Civ. App. Jan. 17, 2014)

Ala. Code § 43-2-354 allows an estate's PR to recover "costs" against an estate claimant who unsuccessfully pursues a claim against the estate. The court of civil appeals held, in a case of first impression, that "costs" do not include attorneys' fees, but that the award of costs under the statute is mandatory.

From the United States Supreme Court

Forum-Selection Clauses

Atlantic Marine Constr. v. USDC, No. No. 12-929 (U.S. Dec. 3, 2013)

Forum-selection clause may be enforced by a Rule 12(b)(3) dismissal motion or by a *forum non conveniens* motion to transfer under 28 USC §1404(a).

Younger Abstention

Sprint Communications, Inc. v. Jacobs, No. 12-815 (U.S. Dec. 10, 2013)

Younger abstention is limited in application to parallel state criminal proceedings, to particular state civil proceedings that are akin to criminal prosecutions or to instances implicating a state's interest in enforcing the orders and judgments of its courts.

ERISA

Heiemeshoff v. Hartford Life & Acc. Ins. Co., No. 12-729 (U.S. Dec. 16, 2013)

ERISA plan may shorten a statute of limitations within which benefits denials must be appealed, even where the

plan's limitations period would require that a claim be brought in court before the administrative process is completed (and, therefore, even before there is, theoretically, a ripe claim for judicial review).

CAFA

Mississippi ex rel. Hood v. AU Optronics Corp., No. 12-1036 (U.S. Jan. 14, 2014)

Parens patriae suit by state seeking consumer redress for its citizens is not a "mass action" removable under the Class Action Fairness Act, 28 U.S.C. §1332(d)(11)(B)(i).

Personal Jurisdiction; Corporations

Daimler AG v. Bauman, No. 11-965 (U.S. Jan. 14, 2014)

Foreign parent corporation was not amenable to suit in California for injuries allegedly caused by conduct of another foreign subsidiary (Mercedes Benz Argentina) that took place entirely in Argentina, where alleged basis for personal jurisdiction over parent was continuous and systematic contacts of a different domestic subsidiary (MBUSA).

From the Eleventh Circuit Court of Appeals

Personal Jurisdiction; Websites

Louis Vuitton v. Mosseri, No. 12-12501 (11th Cir. Dec. 2, 2013)

Operating an interactive website through which defendant sold goods to Florida residents constituted "purposeful availment" of defendant in Florida, exposing defendant to personal jurisdiction there.

Disability Education (IDEA)

K.A. v. Fulton County School Dist., No. 12-15483 (11th Cir. Dec. 20, 2013)

Procedural violations regarding notice of meetings and rights under the Individuals with Disabilities Education Act ("IDEA") are not actionable absent prejudice to the complaining party; and (2) once parents sue to challenge administrative determination, district court has discretion to consider the administrative record alone or to allow development of additional evidence.

ERISA; Bankruptcy

***Durango-Georgia Paper Co. v. HG Estate, LLC*, No. No. 11-15079 (11th Cir. Jan. 7, 2014)**

Trustee of bankrupt corporation that is a contributing sponsor and is in bankruptcy cannot maintain an ERISA action for the benefit of the bankruptcy estate and the estate's unsecured creditors against the corporation's former owner (as a former member of the controlled group) for liabilities arising from the termination of a pension plan.

Equity Funding (State of Alabama)

***I.L. v. State of Alabama*, No. No. 11-15464 (11th Cir. Jan. 10, 2014)**

The Eleventh Circuit affirmed Judge Lynwood Smith's 708-page order and opinion from late 2011, which had held that Alabama's property-tax system for funding public education was not unconstitutional.

ERISA; Consideration of SSA Disability Evidence

***Melech v. Life Ins. Co. of North America*, No. 12-14999 (11th Cir. Jan. 6, 2014)**

In appeal from denial of LTD benefits under ERISA, administrative appeals panel should have considered evidence favorable to claimant, developed after initial LTD claims denial, which supported claimant's successful SSA disability application granted after the initial claims denial.

RECENT CRIMINAL DECISIONS

From the Alabama Court Of Criminal Appeals

Probation Revocation

***Wescovich v. State*, CR-12-1452 (Ala. Crim. App. Nov. 8, 2013)**

Trial court erred in revoking the defendant's probation based only on hearsay testimony regarding his alleged act of receiving stolen goods and on his waiver of a preliminary hearing on the pending criminal charge.

Double Jeopardy

***Burnett v. State*, CR-12-1906 (Ala. Crim. App. Dec. 20, 2013)**

Defendant's two convictions arising from the same victim, based on the taking of the same property designated as both her property and that of her business, constituted a double jeopardy violation; however, his multiple robbery convictions arising from the same incident, resulting from his actions toward separate victims, did not.

Juvenile Miranda

***State v. Deramus*, CR-12-0540 (Ala. Crim. App. Dec. 20, 2013)**

Defendant over 18 at the time of his charged act and subsequent interrogation held not entitled to the additional "Juvenile *Miranda*" protections of *Ala. Code* § 12-15-202

Search and Seizure

***Woolen v. State*, CR-12-1434 (Ala. Crim. App. Dec. 20, 2013)**

There was no Fourth Amendment violation in the search of the defendant's car at a roadblock, because there was a preexisting plan limiting the officer's discretion, and the roadblock was carried out in a neutral and objective manner.

CNA

***Vann v. State*, CR-12-0037 (Ala. Crim. App. Dec. 20, 2013)**

The court rejected numerous constitutional challenges to the sex offender residency requirements of the Community Notification Act, *Ala. Code* § 15-20A-11(a); provisions prohibiting residency within 2,000 feet of a school are not impermissibly vague, fundamentally unfair or cruel as applied to indigent homeless sex offenders.

Evidence

***Lane v. State*, CR-10-1343 (Ala. Crim. App. Nov. 8, 2013)**

Notebook containing violent rap lyrics penned by defendant was properly admissible as proof of his motive and intent to commit robbery and murder. | [AL](#)



Nicholas Stallworth Hare, Sr.

Vera Smith Hollingsworth

Oakley Webster Melton, Jr.

Yetta G. Samford, Jr.

Nicholas Stallworth Hare, Sr.

Nicholas Stallworth Hare, Sr. was born in Monroe County, Alabama on October 11, 1911. His earthly life ended January 6, 2014. He lived a lot of life in between.

He was the son of Circuit Judge Francis W. Hare and the grandson of Probate Judge Nicholas James Stallworth.

He attended the public schools of Monroeville until the tenth grade and then transferred to Northwood School in Lake Placid, New York and graduated in 1930. He received his undergraduate degree, with honors, from Auburn University in 1932. He graduated from the Law School at the University of Alabama in 1935. He started his legal career with his cousin, Francis H. Hare, a well known trial lawyer.

His legal career was varied. He represented Southern Airways and the State Docks. He served as Chief Trial Counsel for the Attorney General under MacDonald Gallion. He was a Special Assistant Attorney General under John Patterson and prosecuted loan sharks. Later, during President Ronald Reagan's administration, he served the federal government as an appointee to represent the United States in legal seminars with the People's Republic of China. He was a successful litigator having won a class action suit against BlueCross/BlueShield of Alabama for mishandling \$321 million that should have been used to reduce premiums. He was a member of the law team that was successful in a lawsuit versus six international drug manufacturers for price fixing that resulted in a settlement of over \$100 million and brought about the reduction of the price of Tetracycline from one dollar per pill to only six cents. He opened his Monroeville law office in 1950. He was later joined in his practice by Nicholas S. Hare, Jr. and his wife, Dawn Wiggins Hare.

He made contributions to the legal system. During his term in the 1954 Alabama Legislature, he served as chairman of the Judiciary Advisory Committee and sponsored legislation which ultimately became the new Alabama Rules of Civil Procedure.

He held numerous patents, which covered a lifetime of inventions, ranging from an Electro-Static cotton picker to a two-cycle emission fire engine.

He served in the Army Air Corps in World War II and worked on The Manhattan Project.

Nick Hare was a special *bon vivant* to those who knew him. He welcomed the guests to his 90th birthday party with "*Laissez Les Bons Temps Rouler!*" For his 100th birthday celebration, the Monroe County Bar Association held a special ceremony for him. They also honored his 100 year old lawyer friend Miss Alice Lee. He was presented at this time a special award from the National Headquarters of the Kappa Alpha Order for being the oldest member. He was an initiate at Nu Chapter, Auburn University.

Nick Hare was a member of The First United Methodist Church of Monroeville. Dr. Thomas L. Butts, pastor *emeritus*, said:

"When he died, it was as if the doors of a great library had closed. He was universally loved and respected, and will long be remembered as a role model for integrity and the kind of inclusiveness that is so lacking in our world."

He is survived by a daughter, Bonnie Hare Shanahan, and a son, Nicholas Stallworth Hare, Jr. He had four grandchildren and four great-grandchildren.

The members of the bench and bar of the 35th Judicial Circuit mourn the loss of our learned friend and colleague.

—William Dudley Melton, *Evergreen*



Vera Smith Hollingsworth

Vera Smith Hollingsworth, a member of the Morgan, Cullman and Madison county bar associations, was born April 11, 1953 and died August 13, 2013, following an automobile accident. Vera was 60 years young at the time of her death. She was survived by her daughters, Heather McIngvale (Frank) and Cindy Hagemann, and four grandchildren, Effie Mae Hagemann, Stinnett Hagemann, Lawson McIngvale and Holleigh McIngvale.

Vera was one of 11 children born and raised in a four-room house in Cullman County where her 94-year-old mother still resides. She was preceded in death by her father, two brothers and a sister. Vera's parents were self-sufficient—working on their land and raising food for their family. She learned from her mother the meaning of hard work, the importance of education and the value of life's lessons. Vera knew that education was a means to elevate her family from poverty.

Vera was a member of MENSA and was passionate about education and the acquisition of knowledge. She was an avid reader, and loved the law. She began her legal career in the Cullman County Sheriff's Department and then became the paralegal of Grady Long in Hartselle. Vera worked for Mr. Long for many years, and she knew from her years with him that a career in law was her destiny.

She obtained her bachelor's degree from Athens State University and her law degree while working full-time with Philip Geddes, former standing Chapter 13 bankruptcy trustee. After passing the bar, Vera engaged in the general practice of law in Decatur and Cullman with an emphasis on bankruptcy law. She was extremely knowledgeable in all areas of bankruptcy law, and she was well-known and respected by the bankruptcy bar. Attorneys with problem bankruptcy cases would routinely seek Vera's legal counsel and help. She loved to be involved with complex litigation involving unique legal and factual issues.

Vera loved her two daughters, Heather and Cindy, and she taught them from an early age to study hard and be productive citizens. She put both daughters through college at Athens State University without monetary assistance from any other source but her own hard work. As much as Vera loved her daughters, she loved and adored her four grandchildren. Without hesitation, Vera would have fought a lion bare-handed if any of her grandchildren were in danger!

In honor of Vera's love of learning, her daughters and friend Steven Croomes have established a scholarship fund through the foundation at Athens State University in her name. Once endowed, the family has asked that scholarships be awarded to deserving female students at Athens State University.

Vera was a woman of dignity and integrity who will be forever missed by her family and friends.

—Hon. Sherrie W. Paler, former circuit court judge,
8th Judicial Circuit

Oakley Webster Melton, Jr.



Oakley Webster Melton, Jr., age 86, of Montgomery, died November 10, 2013, and is survived by his beloved wife of 62 years, Melba Studdard Melton; his children, daughter Ree Smith (Sage); son Oakley Melton, III (Diane); daughter Marcia Hudson (Adams); daughter Lee Hayes; and son Ben Melton; eight grandchildren, Marlee Smith Terry; Sage Burgett Smith, Jr.; Ben Smith; Davis Hudson; Bentley Hudson; Stead Hayes; Wylie Hayes; and Will Hayes; three great-grandchildren; four nephews; and two nieces.

Oakley was born in East Tallassee on July 26, 1927 to Oakley Webster Melton, Sr. and Dora Ashurst Melton. He grew up in Wetumpka, where his father practiced law, and was a circuit judge. His mother was a long-time first-grade school teacher and much loved by her students. Oakley's stellar career began at an early age.

In 1944, at age 16, Oakley became the youngest high school basketball coach in the United States when the Wetumpka High School's coach was drafted to serve in WWII. Because of a dislocated elbow suffered in Wetumpka's last football game of the season, Oakley was unable to play basketball. The principal asked Oakley to coach the basketball team; and in his tenure as basketball coach, Oakley's team compiled a winning record of 18 and 7.

After graduation from high school, he went to the University of Alabama where he enrolled in the Army Specialized Training Reserve Program, a highly-intensive study program to train officer candidates. He subsequently transferred to the Naval Air Corp to begin training as a Navy pilot. During this period of training, the war ended, and Oakley received an honorable discharge and left military service to return to his beloved University of Alabama. Oakley was a Number One (president) of the University of Alabama Chapter of the Kappa Alpha Fraternity at Alabama and, in 1950, was president of the University of Alabama Student Government Association. He received a bachelor's degree in accounting from the Commerce and Business Administration School of the university and his law degree from the university's school of law in 1951.

In 1951, Oakley began practicing law in Montgomery, with the firm of Rushton, Stakely & Johnston, and to supplement his income, he obtained a second job as the reading clerk for the Alabama House of Representatives, working there on a part-time and seasonal basis for the next six years. He later was elected by the house of representatives as clerk of the Alabama House and served from 1957 to 1962.

In 1964, Oakley opened the doors of his solo law practice, which ultimately led to the founding of the present firm of Melton, Espy & Williams PC. Oakley was always known in the

Alabama legal community as a “lawyer’s lawyer,” as he represented many lawyers and judges during his career.

Over the years, he made monumental contributions to the bench and bar. In 1971, he was appointed chair of the Alabama Supreme Court Advisory Committee on Civil Practice and Procedure and was instrumental in the writing and adoption by the Alabama Supreme Court of the current *Alabama Rules of Civil Procedure*. In 1974, he was elected president of the Montgomery County Bar Association, and in 1979, he was elected president of the Alabama State Bar. During his tenure as state bar president, Oakley proposed, and was successful in obtaining the approval of, the mandatory continuing legal education program for Alabama lawyers which is still in place today.

Throughout his career, Oakley was the attorney for the Montgomery Housing Authority and numerous local and national businesses, state agencies, commissions, and public officials. He was a confidant and advisor to five Alabama governors, as well as lieutenant governors, legislators and members of the trial and appellate courts.

Oakley became legal counsel for the Alabama Soft Drink Association in 1962; and for the next 40 years, he was instrumental in building a trade association so innovative it was long recognized as a model for state soft drink associations across the nation. In 1978, he was awarded the Distinguished Service Award by the Alabama Soft Drink Association, and, in 1985, he was inducted into the Beverage World Hall of Fame.

Numerous professional honors were bestowed upon Oakley, including Fellow of the International Society of Barristers and Fellow of the American College of Trial Lawyers. In 1983, he received the first annual “Boss of the Year” award of the Montgomery Association of Legal Secretaries. Throughout his career, Oakley held many prestigious professional positions including president of the Alabama Law Institute from 1985-1992; chair of the Character and Fitness Committee of the Alabama State Bar; chair of the Constitution and By-Laws of the Alabama State Bar Task Force; Alabama State chair of the American College of Trial Lawyers; charter master bencher of the Montgomery County Inn of Court; charter member of the Farrah Law Society; charter member of the Alabama Law Foundation; professor at Jones School of Law; member of the Montgomery County, Alabama State and American bar associations, Alabama and American trial lawyers associations, Alabama Defense Lawyers Association and American Judicature Society. He was a member and chair of the United States Middle District Court Historical Committee. He was the first, and long-time, attorney of the Alabama High School Athletic Association; and as such, he handled the historic merger in 1968 of the AHSAA and the Alabama Interscholastic Athletic Association.

Not only was Oakley a servant of the law, he was also a civic servant of his community. He always believed in the Bible quotation that, “To whom much is given, of him much is required” (Luke 12:48). Through the years, he actively

worked with and supported the Montgomery YMCA, serving as a chair of the YMCA Youth Legislature, vice president of the Montgomery YMCA and life member of the Montgomery YMCA Board of Directors. For his many years of service, the youth of Montgomery awarded him the Montgomery YMCA “Man of the Year” award in 1972.

Oakley was always willing to help his community with his time, his service and his resources. He served as a member of the City of Montgomery Planning Commission and of the Montgomery Lions Club. He enjoyed many friendships as a member of The American Legion. He was a charter member of the Krewe of the Phantom Host and was a former president and junior Chamber of Commerce “Man of the Year.”

One of Oakley’s great loves was the University of Alabama, especially Alabama football. In 1948, while a student at the University of Alabama, he was instrumental in lobbying the administrations of both Alabama and Auburn, and the Alabama Legislature, to resume the playing of the “Iron Bowl,” which had not been played since 1907. He was then present at the first game in 1948 when the Iron Bowl series was resumed after a 41-year hiatus, and he attended 62 consecutive Alabama/Auburn games from 1948 through 2010. In 1997, he founded the Alabama/Auburn Perfect Attendance Club (AAPAC) in celebration of the game for fans of both teams with perfect attendance records at every game since 1948. Oakley’s all-time favorite Crimson Tide football player was his brother, James A. “Bimbo” Melton, who was a star halfback for the Tide from 1948 through 1951. Because of his great love for the University of Alabama and its Law School, in 2006 the Oakley W. Melton, Jr. Endowed Scholarship Fund was established by Oakley and the Alabama Beverage Association (the former Alabama Soft Drink Association) for deserving students attending the University of Alabama School of Law.

Oakley was a dedicated lawyer, businessman and public servant, but, above all, he loved his family, and he dedicated his life to providing a good education and life for all of them. The Lake Martin house was one of his favorite places to spend time with his family and friends. He always made sure that everything was in good working order so they could swim, boat, ski, relax, and enjoy being together “at the lake.”

Oakley was a devoted and beloved member of the First United Methodist Church in Montgomery. He was a chair of the administrative board, and also a chair of the board of trustees. He loved his Lord, and was a servant to His people. He fully supported Melba’s numerous church activities, including the church’s annual bazaar which she chaired for many years.

Oakley’s generous heart, his endearing wisdom and his patience with his family, friends and clients will leave an indelible mark on those who knew him and who relied on his counsel and advice. He was a true patriot, a mentor, an entertaining speaker, an encourager, a civic leader, and a great lawyer; but, above all, he was a loving husband, father, grandfather, great-grandfather, uncle, and friend. He will be missed.

Memorial contributions may be sent to Oakley W. Melton Scholarship Fund at the University of Alabama School of Law, P.O. Box 870382, Tuscaloosa 35487-0382, the First United Methodist Church of Montgomery, 2416 W. Cloverdale Park, Montgomery 36106-1908, or to a charity of your choice.

Yetta G. Samford, Jr.

Yetta G. Samford, Jr., age 90, of Opelika, passed away December 28. He was born June 8, 1923 in Opelika and preceded in death by his parents, Yetta G. Samford, Sr. and Mary Denson Samford; his son, Yetta G. Samford, III; and his sister, Mary Vernon Samford Williams (Richard) of Decatur. He is survived by his wife, Mary Austill Samford, and two daughters, Mary Austill Samford Lott (Vic) of Mobile and Katherine Park Samford Alford (Farra) of Lexington, KY. There are five grandchildren and seven great-grandchildren.



Mr. Samford will always be remembered for his humility, generosity, wit and kindness to all. He served his country in World War II in the United States Army Air Force and was a B-17 bomber pilot stationed in England in 1945. Mr. Samford was educated in the public schools of Opelika and earned his bachelor's degree in 1947 from Auburn University (API). He was a member of the Alpha Tau Omega fraternity. The Auburn University landmark of Samford Hall is named for his great-grandfather, William J. Samford, who served as a governor of Alabama.

Mr. Samford graduated from the University of Alabama Law School with an LLB degree in 1949 and was president of the Phi Delta Phi legal fraternity. He was inducted into Omicron Delta Kappa as well as Quadrangle.

Upon graduation from law school in 1949, he married Mary Austill of Mobile and they moved back to Opelika for Mr. Samford to practice in the firm established in 1912 by his grandfather, Judge N.D. Denson, Sr. He joined his uncle, N.D. Denson, Jr., in Denson & Samford.

Mr. Samford was elected to the Alabama Senate and served from 1958-1962 representing Lee and Russell counties. He was elected to the University of Alabama Board of Trustees and served for 21 years, 1972-1993. During his tenure on the board, he was elected to a three-year term as president pro tem. He was awarded an honorary LLD degree in 1995 and served on the president's council of the University of Alabama until his death.

Mr. Samford continued his support for higher education in Alabama by being one of the founding trustees of Mobile College (now the University of Mobile) and served as trustee for over 50 years. He was awarded the honorary degree of humane studies in 2001. His devotion to his hometown of Opelika includes serving on the Board of Education for the City of Opelika for 15 years. He served on the Board of Deacons for First Baptist Church of Opelika for 60 years and taught a Sunday school class for 30 years. He was a member of the Opelika Kiwanis Club for over 50 years. The Opelika Sportsplex Center is built on land donated to the City of Opelika by Mr. Samford and his wife, Mary. Mr. Samford endowed numerous scholarships for graduates of Opelika High School and students attending the University of Alabama, the University of the South at Sewanee and the University of Mobile.

Mr. Samford served on numerous boards for various corporations and state institutions including Liberty National Life Insurance Company, Torchmark Corporation and West Point-Pepperell Inc., and as chair of the Farmers National Bank of Opelika. He also served on the Board of Corrections for the State of Alabama and the Advisory Board for the State Docks. He served on the state Chamber of Commerce and on the Business Council of Alabama. He was a member of the Executive Committee of the Alabama Law Institute Council and the Alabama Academy of Honor.

At the time of his death, Mr. Samford was the senior partner of Samford & Denson in Opelika, where he practiced law for over 60 years. He is widely recognized for his high standards of professionalism and ethics in his practice of law. | [AL](#)

—John Denson, Samford & Denson, Opelika

Acuff, Fred Moseley, Jr.

Memphis
Admitted: 1971
Died: December 6, 2013

Beaird, Hon. Hugh

Jasper
Admitted: 1959
Died: December 4, 2013

Latham, Bertice Edwin

Cedar Bluff
Admitted: 1965
Died: November 19, 2013

Parsons, Frank Ray

Birmingham
Admitted: 1965
Died: July 1, 2013

Stephens, William Taft

Montgomery
Admitted: 1969
Died: December 9, 2013

Taylor, Hon. Haffred Neil

Russellville
Admitted: 1951
Died: October 10, 2012

Uzzelle, George Hampton, III

Fairhope
Admitted: 1969
Died: December 9, 2013

Westmoreland, Darrell Zane

Montgomery
Admitted: 1995
Died: November 28, 2013

Notice

Transfer to Disability Inactive Status

Disbarment

Suspensions

Public Reprimands

Notice

- **Matthew Taylor Knight**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of March 25, 2014, or, thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 2009-1846(A) by the Disciplinary Board of the Alabama State Bar.

Transfer to Disability Inactive Status

- Birmingham attorney **Paul Archie Phillips** was transferred to disability inactive status pursuant to Rule 27(c), *Ala. R. Disc. P.*, effective October 21, 2013, by order of Panel I of the Disciplinary Board of the Alabama State Bar. [Rule 27(c), Pet. No. 2013-1892]

Disbarment

- On September 10, 2013, the Alabama Supreme Court issued a certification of judgment affirming the disbarment of Birmingham attorney **Douglas Howard Cooner**. The Alabama Supreme Court entered its order based upon the June 20, 2013 report and order of Panel III of the Disciplinary Board of the Alabama State Bar disbaring Cooner. Cooner was found guilty of violating Rules 1.7(b), 8.4(a), 8.4(c) and 8.4(g), *Ala. R. Prof. C.* Cooner started taking care of his client after the client's wife died, and assisted him with his finances and property. Shortly thereafter, Cooner denied his client access to his own home by taking his keys, sold his client's home without the client's knowledge and drafted an "Irrevocable Living Trust" appointing himself as beneficiary of the trust's residual assets. Cooner also refused to provide his client an accounting of the trust or copies of documents for an extended period of time. Cooner mismanaged, misappropriated and wasted at least \$38,032.09 of his client's trust assets. Cooner refused to provide explanations for questionable expenditures noted by his client's guardian ad litem. Cooner filed a lawsuit on his client's behalf but without his client's knowledge and utilized his client's trust monies to fund the defense of the lawsuit filed by his client. Finally, Cooner forged the signature of his client when he settled the lawsuit. [ASB No. 2002-150(A)]

Suspensions

- Tuscaloosa attorney **Laurie Ames Brantley** was interimsly suspended from the practice of law in Alabama, effective October 2, 2013, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the October 2, 2013 order of the Disciplinary Commission of the Alabama State Bar, in response to a petition filed by the office of general counsel evidencing that Brantley had mishandled and misappropriated client funds on multiple occasions in violation of Rule 1.15(a), *Ala. R. Prof. C.*, and Brantley's conduct was causing,

or was likely to cause, immediate and serious injury to a client or to the public. On October 10, 2013, Brantley was transferred to disability inactive status by order of the Supreme Court of Alabama. The supreme court entered its order based upon the October 14, 2013 order of the Disciplinary Board of the Alabama State Bar, in response to a petition to transfer to disability inactive status filed by Brantley. Pursuant to Rule 20(c)(3), upon Brantley's transfer to disability inactive status, the interim suspension was dissolved by order of the supreme court, effective October 10, 2013. [Rule 20(a), Pet. No. 2013-1803, and Rule 27(c), Pet. No. 2013-1853]

- Montgomery attorney **Dayna Renae Burnett** was suspended from the practice of law in Alabama for 91 days, by order of the Supreme Court of Alabama, effective September 1, 2013. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Burnett's conditional guilty plea, wherein Burnett pled guilty to violating Rules 1.15(a) and 8.4(g), *Ala. R. Prof. C.* Burnett was ordered to serve 45 days of the suspension, and the remaining 46 days to be held in abeyance. In addition, Burnett was placed on probation for a period of two years. From January 1, 2012 to May 24, 2013, Burnett deposited personal funds and earned legal fees into her client trust account, and repeatedly made personal payments directly from her client trust account. [ASB No. 2013-701]
- Alabama attorney **William Alexander Crowson, II** was suspended from the practice of law in Alabama, effective October 15, 2013, for noncompliance with the 2013 Annual Mandatory Client Security Fund Assessment of the Alabama State Bar. [CSF No. 13-1176]
- Alabama attorney **Leigh Ann Forman** was suspended from the practice of law Alabama, effective October 15, 2013, for noncompliance with the 2013 Annual Mandatory Client Security Fund Assessment of the Alabama State Bar. [CSF No. 13-1203]
- Auburn attorney **Julie Boggan Kaminsky** was suspended from the practice of law in Alabama for 91 days by the Supreme Court of Alabama, effective November 1, 2013. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Kaminsky's conditional guilty plea, wherein she pleaded guilty to violating Rules 1.15(b), 8.1(b), 8.4(a), 8.4(c), and 8.4(g), *Ala. R. Prof. C.*, in ASB No. 2013-702, and Rules 1.3, 8.1(b), 8.4(a) and 8.4(g), *Ala. R. Prof. C.*, in ASB No. 2013-1417. In ASB No. 2013-702, Kaminsky admitted she was inadvertently issued a check from the Social Security Administration and repeatedly failed to return the funds. In ASB No. 2013-1417, Kaminsky admitted she did not diligently pursue her client's case by requesting two extensions of time to file a brief in connection with her client's appeal of the termination of his parental rights and still failing to file the required appeal brief with the Alabama Court of Civil Appeals. In both matters, Kaminsky admitted she failed to respond to the Office of General Counsel. Kaminsky was initially summarily suspended on September 20, 2013 for her failure to respond to the Office of General Counsel in regard to these disciplinary matters. The summary suspension was dissolved on October 4, 2013 pursuant to Kaminsky's conditional guilty plea to the 91-day suspension. [ASB nos. 2013-702 and 2013-1417]
- Alabama attorney **Melissa Tomeka Knight** was suspended from the practice of law in Alabama, effective October 15, 2013, for noncompliance with the 2013 Annual Mandatory Client Security Fund Assessment of the Alabama State Bar. [CSF No. 13-1257]
- Dothan attorney **Frederick Mitchell McNab** was intermily suspended from the practice of law in Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective November 25, 2013. The order of the Disciplinary Commission was based on a petition filed by the Office of General Counsel evidencing McNab was engaging in activities that were prejudicial to the administration of justice and that his continued practice of law was likely to cause substantial, immediate and serious harm to a client or to the public. [Rule 20(a), Pet. No. 2013-2078]
- Alabama attorney **Jennifer Lyn Miller** was suspended from the practice of law in Alabama, effective October 15, 2013, for noncompliance with the 2013 Annual Mandatory Client Security Fund Assessment of the Alabama State Bar. [CSF No. 13-1287]
- Alabama attorney **William R. Mountcastle** was suspended from the practice of law in Alabama, effective October 15, 2013, for noncompliance with the 2013 Annual Mandatory Client Security Fund Assessment of the Alabama State Bar. [CSF No. 13-1295]

- Alabama attorney **Sonya A. Ogletree-Bailey** was suspended from the practice of law in Alabama, effective October 15, 2013, for noncompliance with the 2013 Annual Mandatory Client Security Fund Assessment of the Alabama State Bar. [CSF No. 13-1302]
- Alabama attorney **Karen J. Pugh** was suspended from the practice of law in Alabama, effective October 15, 2013, for noncompliance with the 2013 Annual Mandatory Client Security Fund Assessment of the Alabama State Bar. [CSF No. 13-1312]
- Prattville attorney **Andrew William Tampling, Jr.** was suspended from the practice of law in Alabama for 91 days by the Supreme Court of Alabama, effective October 31, 2013. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Tampling's conditional guilty plea wherein he pleaded guilty to violating Rules 1.8(e), 1.15(a), 1.15(c), 8.4(a) and 8.4(g), *Ala. R. Prof. C.* Tampling admitted he made numerous impermissible loans and payments from his trust account. Tampling also admitted he misappropriated funds in his trust account for the payoff of a lien and utilized other fees in order to fund the satisfaction of said lien. [ASB No. 2012-2093]
- Attorney **Gregory P. Thomas**, formerly of Dothan, was suspended from the practice of law in Alabama by order of the Alabama Supreme Court for 90 days on September 18, 2013, retroactive to June 1, 2013. On September 18, 2013, Panel I of the Disciplinary Board of the Alabama State Bar accepted Thomas's conditional guilty plea to violations of Rules 1.1, 1.3, 1.4(a) and (b), 8.1(b), and 8.4(c) and (g), *Ala. R. Prof. C.*, as follows: In ASB No. 94-248(A), Thomas admitted the allegations of the formal charges and plead guilty to violations of Rules 1.1, 1.3, 1.4(a), 1.4(b), and 8.1(b), *Ala. R. Prof. C.*, by virtue of his failure to file suit on behalf of his client during the limitations period, and then failing to respond to the complaint upon the request of the Alabama State Bar as charged in

MASTERS OF OUR DOMAIN

QUALIFIED BY

G7

MASTER

IDEAllIANCE

d a v i s d i r e c t

FSC

You don't have to take our word for it. We have the certification to prove it. IDEAlliance® recently certified Davis Direct as the only G7 Master printer in Alabama. This means your print job is produced according to the highest color standards in the industry, with the same crisp, clear, consistent quality from proof to finished piece when you print with Davis Direct.

Call us at 334.277.0878 or visit us online at davisdirect.com.

the formal charges. In ASB No. 95-204(A), Thomas admitted the allegations of the formal charges and plead guilty to violating rules 1.3, 8.4(c) and 8.4(g), *Ala. R. Prof. C.*, by virtue of his failure to file suit on behalf of his clients during the limitations period, and then defaulting on an agreement with the clients to compensate them for their lost claim, as charged in the formal charges. Thomas provided proof to the bar that he made full restitution to the complainants in this matter in the sum of \$13,000. In ASB No. 96-161(A), Thomas admitted the allegations of the formal charges and plead guilty to violating Rules 1.3, 1.4(a) and 8.4(g), *Ala. R. Prof. C.*, by virtue of his failure to communicate with his client regarding the status of his lawsuit and failure to diligently prosecute his client's claim, resulting in the dismissal of the claim for want of prosecution as charged in the formal charges.

Simultaneously at the hearing on September 18, 2013, the Disciplinary Board, Panel I, reinstated Thomas to the practice of law in the State of Alabama, subject to certain conditions, effective November 1, 2013, by order of the Alabama Supreme Court. [ASB nos. 94-248(A), 95-204(A) and 96-161(A) and Rule 28, Pet. No. 12-2265]

- Alabama attorney **Theresa Anne Tkacik** was suspended from the practice of law in Alabama, effective October 15, 2013, for noncompliance with the 2013 Annual Mandatory Client Security Fund Assessment of the Alabama State Bar. [CSF No. 13-1357]
- Alabama attorney **Jennifer Lee Ward** was suspended from the practice of law in Alabama, effective October 15, 2013, for noncompliance with the 2013 Annual Mandatory Client Security Fund Assessment of the Alabama State Bar. [CSF No. 13-1367]

discovery. Further, Carmichael failed to keep his client reasonably informed about the status of her claim. Summary judgment was entered against Carmichael's client and, despite his subsequent efforts on appeal, the trial court's decision was affirmed. [ASB No. 2010-199]

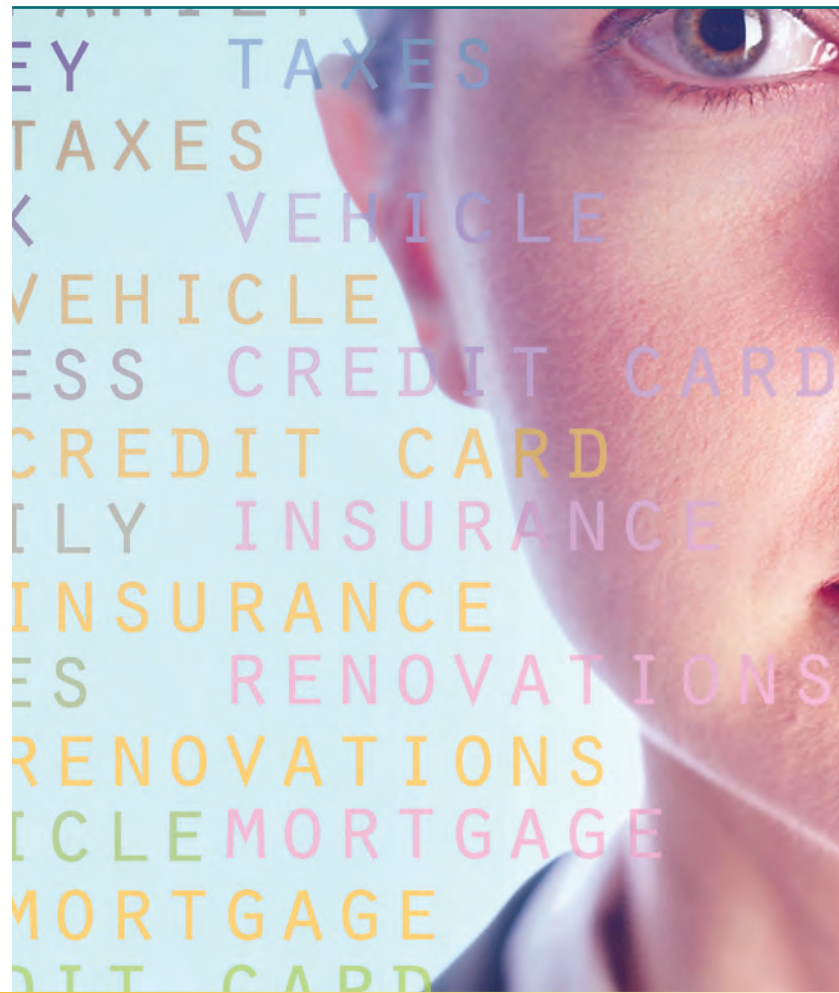
- Monroeville attorney **Robert Christopher King** received a public reprimand without general publication on November 1, 2013 for violations of Rules 1.7(a) and 1.15(b), *Alabama Rules of Professional Conduct*. King consulted with a husband and wife regarding the filing of a wrongful death action after their son was killed in an automobile accident. Thereafter, King and his law partner filed a wrongful death lawsuit on their behalf in the name of the father as next friend. The child's mother subsequently filed for divorce from the father. Despite King's involvement in the wrongful death action, King and his law partner agreed to represent the father/husband in the divorce matter. After the wrongful death action settled, King failed to notify the mother/wife that he was holding funds to which she was entitled. King continued to represent the husband/father in the divorce action and abided by his instructions to conceal the settlement from the wife/mother and allowed her portion of the settlement funds to remain in the firm's trust account until the divorce was concluded. [ASB No. 2013-426]
- Monroeville attorney **Jack Booker Weaver** received a public reprimand without general publication on November 1, 2013 for violations of Rules 1.7(a) and 1.15(b), *Alabama Rules of Professional Conduct*. Weaver's former law partner consulted with a husband and wife regarding the filing of a wrongful death action after their son was killed in an automobile accident. Thereafter, Weaver and his law partner filed a wrongful death lawsuit on their behalf in the name of the father as next friend. The child's mother subsequently filed for divorce from the father. Despite Weaver's involvement in the wrongful death action, Weaver and his law partner agreed to represent the father/husband in the divorce matter. After the wrongful death action settled, Weaver failed to notify the mother/wife that he was holding funds to which she was entitled. Weaver continued to represent the husband/father in the divorce action and abided by his instructions to conceal the settlement from the wife/mother and allowed her portion of the settlement funds to remain in the firm's trust account until the divorce was concluded. [ASB No. 2013-425] | [AL](#)

Public Reprimands

- Jasper attorney **Thomas Lavon Carmichael** received a public reprimand without general publication on November 1, 2013 for violating Rules 1.1, 1.3, 1.4 and 8.4(g), *Alabama Rules of Professional Conduct*. Carmichael was retained to file a medical malpractice lawsuit on behalf of a client. Carmichael failed to designate or make available an expert witness prior to the deadlines set forth in the court's scheduling order, or to seek relief from those deadlines during the subsequent months prior to the close of



J. Anthony McLain



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

QUESTION:

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

ANSWER:

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

DISCUSSION:

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

"Although you were retained to represent the insured by the insurance company and are paid by the company, your fiduciary duty of loyalty to the insured is the same as if he had directly engaged your services himself. See, RO-84-122; *Nationwide Mutual Insurance Company v. Smith*, 280 Ala. 343, 194 So.2d 505 (1966) and *Outboard Marine Corporation v. Liberty Mutual Insurance Company*, 536 F. 2d 730, 7th Cir. (1976). Since the interests of the two clients, the insurance company and the insured, do not fully coincide, the attorney's duty is first and primarily to the insured."

Similar conclusions were reached in RO-90-99 and RO-81-533. Additionally, the Alabama Supreme Court discussed the insurer-insured relationship in *Mitchum v. Hudgens*, 533 So.2d 194 (Ala. 1988) and confirmed the Disciplinary Commission's analysis of that relationship, viz: "It must be emphasized that the relationship between the insured and

attorney is that of attorney and client. That relationship is the same as if the attorney were hired and paid directly by the insured and therefore it imposes upon the attorney the same professional responsibilities that would exist had the attorney been personally retained by the insured. These responsibilities include ethical and fiduciary obligations as well as maintaining the appropriate standard of care in defending the action against the insured." 533 So.2d at 199.

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

"Rule 1.8 Conflict of Interest: Prohibited Transactions

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation or the lawyer is appointed pursuant to an insurance contract; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6."

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

"Rule 5.4 Professional Independence of a Lawyer

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

The Disciplinary Commission has examined a "Litigation Management Guidebook" which the commission understands to be one example among many of the procedures which some insurance companies have requested attorneys to follow in representing insureds. This guidebook contains various provisions and requirements which are of concern to the commission. The guidebook requires a "claims professional," who in most instances is a non-lawyer insurance adjuster, to "manage" all litigation. An excerpt from the guidebook provides:

"Accountability for the lawsuit rests with the defense team. This team is composed of the claims professional

and the defense attorney. The claims professional is charged with fulfilling all the responsibilities enumerated below and is the manager of the litigation.”

Other responsibilities of the claims professional include “evaluation of liability, evaluation of damages, recommendation of discovery and settlement/disposition.” The guidebook requires the claims professional and the defense attorney to jointly develop an “Initial Case Analysis” and “Integrated Defense Plan” which are “designed for the claims professional and defense attorney to reach agreement on the case strategy, investigation and disposition plan.” Furthermore, the attorney “must secure the consent of the claims professional before more than one attorney may be used at depositions, trials, conferences, or motions.” The claims professional must approve “[e]ngaging experts (medical and otherwise), preparation of charts and diagrams, use of detectives, motion pictures and other extraordinary preparation” The *Litigation Management Guidebook* also requires that all research, including computer time, over three hours be pre-approved by the insurance company and restricts deposition preparation by providing that the “person attending the deposition should not spend more time preparing for the deposition than the deposition lasts.” It is the opinion of the Disciplinary Commission of the Alabama State Bar that many of the requirements of the *Litigation Management Guidebook* such as described above could cause an “interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship” in violation of Rule 1.8(f)(2) and also possibly constitute an attempt “to direct or regulate the lawyer’s professional judgment” in violation of Rule 5.4 (c). The commission is of the opinion that foremost among an attorney’s ethical obligations is the duty to exercise his or her independent professional judgment on behalf of a client and nothing should be permitted to interfere with or restrict the attorney in fulfilling this obligation. An attorney should not allow litigation guidelines, or any other requirement or restriction imposed by the insurer, to in any way impair or influence the independent and unfettered exercise of the attorney’s best professional judgment in his or her representation of the insured.

The commission has also examined the insurance company’s “billing program” pursuant to which attorneys are required by the insurance company to submit their bills for representation of the insureds to a third-party auditor for review and approval. Not only are the bills themselves to be submitted to the auditor, but all invoices must be accompanied by the most recent Initial Case Analysis and Integrated Defense Plan which contains the defense attorney’s strategy, investigation and disposition plans. Each activity for which the

attorney bills “must be described adequately so that a person unfamiliar with the case may determine what activity is being performed.”

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

“Decisions do tend to mark out, although not with perfect consistency, a small circle of ‘others’ with whom information may be shared without loss of the privilege (e.g., secretaries, interpreters, counsel for a cooperating codefendant, a parent present when a child consults a lawyer). Although the decisions often describe such situations as one in which the client ‘intended’ the disclosure to remain confidential, the underlying concern is functional: that the lawyer be able to consult with others needed in the representation and that the client be allowed to bring closely related persons who are appropriate, even if not vital, to a consultation. An intent

to maintain confidentiality is ordinarily necessary to continue protection, but it is not sufficient. On the contrary, where the client chooses to share communications outside this magic circle, the courts have usually refused to extend the privilege.” 129 F.3d at 684.

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

Furthermore, while a client may ordinarily consent to the disclosure of confidential information, the commission questions whether an attorney may ethically seek the client’s consent if disclosure may result in a waiver of the client’s right to confidentiality, the attorney-client privilege or the work product privilege. This concern was specifically addressed by the State Bar of North Carolina in Proposed Ethics Opinion 10. The opinion points out that “the insured will not generally benefit from the release of any confidential information.” To the contrary, release of such information could work to the detriment of the insured. “The release of such information to a third party may constitute a waiver of the insured’s attorney-client or work product privileges. Therefore, in general, by consenting, the insured agrees to release confidential information that could possibly (even if remotely) be prejudicial to her or invade her privacy without any returned benefit.”

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

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

In reaching the above-stated conclusions, the Disciplinary Commission has examined and considered, in addition to opinion of the North Carolina Bar referenced above, opinions issued by, or on behalf of, the bar associations of Florida, Indiana, Kentucky, Louisiana, Missouri, Montana, North Carolina, Pennsylvania, South Carolina, Utah, Washington, and the District of Columbia. All of these opinions appear to be consistent with the conclusions and concerns expressed herein. Only Massachusetts and Nebraska have released opinions which may, in part, be inconsistent with this opinion, and it appears that the opinions from these two states are not official or formal opinions of those states’ bar associations.

In summary, and based upon the foregoing, it is the opinion of the Disciplinary Commission of the Alabama State Bar that a lawyer should not permit an insurance company, which pays the lawyer to render legal services to its insured, to interfere with the lawyer’s independence of professional judgment in rendering such legal services, through the acceptance of litigation management guidelines which have that effect. It is further the opinion of the commission that a lawyer should not permit the disclosure of information relating to the representation to a third party, such as a billing auditor, if there is a possibility that waiver of confidentiality, the attorney-client privilege or the work-product privilege would occur. The Disciplinary Commission expresses no opinion as to whether an attorney may ethically seek the consent of the insured to disclosure since this turns on the legal question of whether such disclosure results in waiver of client confidentiality. However, the commission cautions attorneys to err on the side of non-disclosure if, in the exercise of the attorney’s best professional judgment, there is a reasonable possibility that waiver would result. In other words, if an attorney has any reasonable basis to believe that disclosure could result in waiver of client confidentiality, then the attorney should decline to make such disclosure. [RO-1998-02] | [AL](#)



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

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

The 2014 Session—One Week In

The 2014 Legislative Session is underway, having just completed the first week. The legislature was off to a quick start with a three-legislative-day week and each body holding a number of committee meetings in order to get many bills moving through the process. While there has been talk that this session will not be controversial, there appears to still be a good bit of heavy lifting going on.

The first week began, as is customary, with an address from the governor on the state of affairs for Alabama. While Governor Bentley relayed an upbeat perspective, this presentation left little doubt that there will be significant labor that needs to be done on the budgets once again. While the budget stabilization act has left the Education Trust Fund in position to meet the needs of that budget, the General Fund continues to struggle. Alabama is well served with two lawyers in leadership positions on this very important front. **Senator Arthur Orr** chairs the Senate Finance and Taxation General Fund Committee and **Representative Bill Poole** chairs the House Ways and Means Education Committee.

In the early weeks of the session, the house of representatives will likely focus on the agenda set forth by the house Republican caucus that holds a significant majority. These bills are centered largely on tax relief and accountability:

Small Business Tax Relief Act—Rep. Barry Moore (HB 151)

The Small Business Tax Relief Act will raise the threshold for making estimated payments of sales tax from \$1,000 to \$2,500 per month.

Business Tax Streamlining Act—Rep. Greg Wren (HB 108)

This bill would simplify the process for filing business personal property taxes. The bill will create a new online tax filing system that provides a one-stop location for filing these taxes and will also allow businesses claiming \$10,000 or less in business personal property tax to file a short form that does not require them to itemize their property.

Tax Elimination Act—Rep. Jim Patterson (HB 97)

This bill would give authority to the Alabama Department of Revenue to suspend taxes and fees when the cost of collecting the tax exceeds the amount of revenue the tax brings in.

Taxpayers' Bill of Rights—Rep. Paul DeMarco (HB 105)

The bill would abolish the Administrative Law Division of the Alabama Department of Revenue and create the Alabama Tax Appeals Commission, an independent state agency, to hear tax appeals. The commission would also hear appeals of taxes administered by self-administered counties and municipalities unless they opt out of the commission's jurisdiction.

Alabama Taxpayer Audit Protection Act—Rep. Wayne Johnson (HB 42)

This bill would protect taxpayers against harassment and audit for improper or political reasons.

The Healthcare Rights of Conscience Act—Rep. Becky Nordgren (HB 31)

The Healthcare Rights of Conscience Act would provide that Alabama health care workers cannot be forced to provide a service that violates his or her conscience, specifically services relating to abortion, human cloning, human embryonic stem cell research and sterilization.

Adoption Tax Credit—Rep. Paul Lee (HB 48)

This legislation will give Alabama residents who adopt an Alabama child either through private adoption or through the state foster care system a one-time \$1,000 income tax credit that would apply in the tax year in which the adoption was finalized.

Statutory Immunity for Teachers and State Employees—Rep. Mike Jones (HB 64)

This bill would codify the current standards for immunity provided to state employees as established by the Alabama Supreme Court.

Likewise, in the senate, a number of bills appear to be on a fast track for adoption. While these are not part of an agenda, they seem to be on a path to take precedence in the early part of the session:

Revolving Door—Sen. Del Marsh (SB 36)

This bill would amend the revolving door of the Alabama Ethics Act to provide that the prohibition of a member of the legislature lobbying for a two-year period extends to the entire legislature and not just to the house in which the person served. The bill also provides that the ban extends for the duration of the term to which a person was elected if they resign from their position prior to the conclusion of the term.

Open Meeting Act Amendments—Sen. Arthur Orr (SB 548)

This bill would provide that certain governmental bodies may meet via telephone conference, videoconference or like technology. This bill also requires that a central location be available to the public to participate in meetings taking place in this manner.



**HE LOOKS
TWICE AS NICE**

**TWO EXPERTLY FITTED SUITS FOR
\$879 SAVINGS OF
OVER \$300!**

Two tropical-weight wool suits from our extensive collection. Made with outstanding quality and detail, ideal for year-round wear. Available in classic fit and trim fit.

1717 CARTER HILL RD.
MONTGOMERY, AL | 334.262.1788
MON-SAT 9AM - 6PM

127 EAST MAGNOLIA AVE.
AUBURN, AL | 334.321.4962
MON-SAT 10AM - 6PM

THE LOCKER ROOM  www.TLRClothiers.com   

Unfunded Mandates—Sen. Bill Brewbaker (SB 7)

This proposed constitutional amendment would remove the local board of education exemption from the unfunded mandate amendment of the Alabama Constitution appearing as Section 111.05 of the official recompilation. If ratified, this would make it more difficult for the legislature to impose certain obligations on local school boards.

Attorney General Luther Strange also has a legislative agenda for the 2014 session that is likely to get significant attention:

Fair Justice Act—Sen. Bill Holtzclaw and Rep. Lynn Greer (SB 193/HB 113)

This bill has a stated goal of shortening the amount of time for death penalty appeals. The bill would require capital defendants to file Rule 32 petitions within 180 days of filing their first direct appeal. The bill would also require a final decision by the circuit court on Rule 32 petitions within 180 days after the direct appeal is concluded.

The Child Protection and Safe Streets Act of 2014—Rep. Allen Treadaway (HB 186)

This bill would allow for wiretapping to monitor phone communications under certain circumstances and with a court order.

The Alabama Witness Safe Harbor—Rep. Mike Ball (HB 179)

This bill would streamline the process for granting immunity to a witness in exchange for testimony.

The above bills are only a handful of those that will be considered during this session. The house of representatives has already had 293 bills filed for consideration and the senate has 216 bills that have had first readings. You may track any of these bills, review committee schedules and follow the entire legislative process via the Alabama Legislative Information System Online (“ALISON”), <http://alisondb.legislature.state.al.us>. | **AL**

“A man who stops advertising to save money, is like a man who stops a clock to save time.”

— Henry Ford.



THE FINKLEA GROUP INC

Creative solutions for your marketing strategies

Design and Marketing Services

- | | |
|------------------------|-------------------------|
| Logos | Trade Show Exhibits |
| Websites | Publication Design |
| Brochures | Media Kits |
| Product Catalogs | Billboards |
| Print Ads | P.O.P. Displays |
| Product Packaging | Professional Portfolios |
| Sales Support Material | |

P.O. Box 231596 | Montgomery, AL 36123 | 334.273.9926

www.taplink.com





Please email announcements to Margaret Murphy, margaret.murphy@alabar.org.

Due to space constraints, *The Alabama Lawyer* no longer publishes address changes, additional addresses for firms or positions for attorneys that do not affect their employment, such as committee or board affiliations. We do **not** print information on attorneys who are not members of the Alabama State Bar.

About Members

This section announces the opening of new solo firms.

Among Firms

This section announces the opening of a new firm, a firm's name change, the new employment of an attorney or the promotion of an attorney within that firm.

About Members

Ronald W. McBay announces the opening of **McBay Law LLC** at 50 St. Emmanuel St., Mobile 36602. Phone (251) 445-0891.

A. Clay Rankin III announces the opening of **Rankin Law LLC** at 311 Magnolia Ave., Fairhope 36532. Phone (251) 509-2050.

Jaclyn Terry announces the opening of **Jaclyn Terry, Attorney at Law LLC** at 2820 Columbiana Rd., Ste. 210T, Birmingham 35216. Phone (205) 267-1119.

Jonathan H. Waller announces the opening of **Waller Law Office PC** at 2001 Park Place, Ste. 900, Birmingham 35203. Phone (205) 313-7330.

Among Firms

Baker Donelson announces **Julie Schiff** and **Emily Schwebke** joined the Birmingham office.

Balch & Bingham LLP announces that **Jennifer P. Decker** and **Daniel R. Hugunine** are now partners in the Birmingham office and **Joseph S. Moore** is a partner in the Montgomery office.

Jared Bevis and **Billy Love** announce the opening of **The Law Offices of Bevis & Love** in Florence.

Bradley Arant Boulton Cummings LLP announces that **John M. Perry, Jr.** joined as a partner and **Jeffrey T. Powell** joined as an associate in the Birmingham office.

Tom Burgess and **Scott Roberts** announce the formation of **Burgess Roberts LLC** at 2017 Morris Ave., Ste. 100, Birmingham 35203. Phone (205) 870-8611. **Ethan Dettling**, **Kerry Burgess** and **Amanda Mink** joined as associates.

Burr & Forman LLP announces that **Allen Sullivan, Jr.** is now a partner and **Ryan J. Hebson** joined as an associate in the Birmingham office.

Capell & Howard announces that **David B. Hughes**, **Patricia R. Osuch** and **April D. Wise** are now shareholders.

CONSTRUCTION & ENGINEERING EXPERTS

Forensic engineering and investigative inspection work for Commercial buildings, Residential, & Industrial facilities.

- Construction delay damages
- Construction defects
- Structural issues
- Foundations, settlement
- Sinkhole Evaluations
- Stucco & EIFS
- Toxic Sheetrock & Drywall
- Electrical issues
- Plumbing & Piping Problems
- Air Conditioning Systems
- Fire & Explosion Assessments
- Roofing problems
- Flooding & Retention Ponds
- Engineering Standard of Care issues
- Radio & Television Towers

CONTACT: HAL K. CAIN, PRINCIPAL ENGINEER
CAIN AND ASSOCIATES ENGINEERS & CONSTRUCTORS, INC.
HALKCAIN@AOL.COM • WWW.HKCAIN.COM
251.473.7781 • 251.689.8975

Christian & Small LLP announces that **Oscar Price** is now a partner.

Hand Arendall LLC announces that **Paul T. Beckmann, J. Craig Campbell, John E. Rollins** and **Jennifer L. Roselius** are now members.

Harrison, Gammons & Rawlinson PC of Huntsville announces that **M. Paul Killian** joined the firm as an associate.

Hill, Hill, Carter, Franco, Cole & Black PC announces that **Royal C. Dumas** is now a shareholder.

Holtsford Gilliland Higgins Hitson & Howard PC announces that **Steven P. Savarese, Jr.** is now a partner in the Daphne office.

Jackson Lewis PC announces that **Gene Marsh** joined the Birmingham office as *of counsel*.

The Law Offices of Troy King announces that **J. W. Godwin** joined as a partner.

Lanier Ford Shaver & Payne PC announces that **Charles A. Ray, IV** joined as a shareholder.

Leitman, Siegal, Payne & Campbell PC announces today that **Jason R. Smith** is now a partner.

Lloyd & Hogan announces that **Abbey Herrin Clarkson** joined as *of counsel* in the Rainsville office and **Thomas B. Glanton** and **Andrew R. Salsler** joined as associates in the Birmingham office.

Luther, Collier, Hodges & Cash LLP announces that **E. Barrett Hails** is an associate in the Mobile office.

Marsh & Cotter LLP of Enterprise announces that **James H. Tarbox** joined as an associate.

Maynard Cooper & Gale PC announces that **Brad Cherry, Todd Cox, Leland Murphree** and **Kathryn Perreault** are now shareholders.

Phelps, Jenkins, Gibson & Fowler LLP announces that **Jessica K. Boyd** joined as an associate.

Quarles & Brady LLP announces that **Sarah Ames** joined the Chicago office as a partner.

Rushton, Stakely, Johnston & Garrett PA announces that **T. Grant Sexton, Jr.** is now a shareholder.

Sasser, Sefton, Brown, Tipton & Davis PC announces that **Timothy J. Gallagher** is now a partner.

Scott Dukes & Geisler PC announces that **Stephen L. Poer** joined the firm as *of counsel*.

Sides, Oglesby, Held, Dick & Burgess LLC announces that **Julian Stephens, III** and **William S. Clay**

joined the firm as members, and **Jerry B. Oglesby** is *of counsel*. The firm name is now **Sides, Oglesby, Held, Dick, Stephens & Clay LLC**.

Sirote & Permutt PC announces that **Jaime Cowley Erdberg, Samuel Friedman, Kathryn Kasper, R. Michael Murphy, Diane Murray, Cheryl Howell Oswald, Rebecca Redmond, Andrew Saag,** and **Tanya Shunnara** are now shareholders with the firm, and that **Jahan Berns, Thomas Humphries** and **Emilee Hellums** joined the firm.

The **Law Offices of Thomas J. Skinner, IV LLC** in Birmingham announces that **Cherokee W. Wooley** is a partner.

Starnes Davis Florie LLP announces that **Allison J. Adams** and **C. Clayton Bromberg, Jr.** are now partners.

Taylor English Duma announces the addition of **Mitzi Hill, Raanon Gal** and **Christine Tenley**.

The Law Office of H. Arthur Edge, III PC announces that **Adam R. Colvin** is now a Foreign Service Officer with the **U.S. Department of State**.


Wallace, Jordan, Ratliff & Brandt LLC announces that **Annemarie C. Axon** is now a member of the firm.

Waller Lansden Dortch & Davis LLP announces that **Gilbert Dickey** and **Michael A. Fant** joined as associates in the Birmingham office.

Webster, Henry, Lyons, White, Bradwell & Black PC announces that **Thomas M. McCarthy** and **Frank E. Bankston, Jr.** are now shareholders.

Anderson Weidner LLC of Birmingham announces that **Jonathan R. Culwell** joined as an associate.

The **Law Offices of Thomas P. Willingham PC** announces that **Wyatt P. Montgomery** joined as an associate. | [AL](#)



J. FORRESTER DeBUYS, III
(de-bweez)

Agent, New York Life Insurance Company
CLU®, ChFC®, AEP®

INDIVIDUAL AND BUSINESS INSURANCE
PRODUCTS AND CONCEPTS

FOR INDIVIDUALS	FOR BUSINESSES
<ul style="list-style-type: none"> • Life Insurance • Fixed Annuities * • Disability Insurance ** • Long Term Care Insurance 	<ul style="list-style-type: none"> • Key Person Coverage • Buy-Sell Agreement Funding • Deferred Compensation • Group Life and Disability Insurance **

* Issued by New York Life Insurance and Annuity Corporation (A Delaware Corporation)

** Products available through one or more carriers not affiliated with New York Life, dependent on carrier authorization and product availability in your state or locality.

2311 Highland Avenue South, Suite 100
Birmingham, Alabama 35205
(205) 918-1515

free•dom:

noun

**the power to determine
action without restraint.**

free•dom court re•porting:

proper noun

**a company that gives you
more freedom by handling
your legal support needs.**



FREEDOM

FREEDOMREPORTING.COM

Feel the Freedom Difference

www.freedomreporting.com

Toll Free: 1-877-373-3660

Local: 205-397-2397

Fax: 205-397-2398

Periodical Postage
Paid
Montgomery, AL



Stronger. Faster. Competitive.

With over 50 years of experience, GilsbarPRO is the exclusive administrator for the CNA Lawyers Professional Liability Program in the State of Alabama. CNA is the largest underwriter of lawyers malpractice insurance in the United States and is A-rated by A.M. Best. This combination is your best alternative for peace of mind in today's challenging environment.

Expect Nothing Less. Call The PROs Today.

800.906.9654 • gilsbarpro.com

CNA  **GILSBARPRO**

One or more of the CNA insurance companies provide the products and/or services described. The information is intended to present a general overview for illustrative purposes only. It is not intended to constitute a binding contract. Please remember that only the relevant insurance policy can provide the actual terms, coverages, amounts, conditions and exclusions for an insured. All products and services are subject to change without notice. CNA is a registered trademark of CNA Financial Corporation. Copyright (c) 2013 CNA. All rights reserved.

