

THE ALABAMA LAWYER

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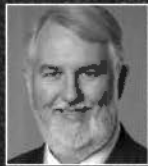
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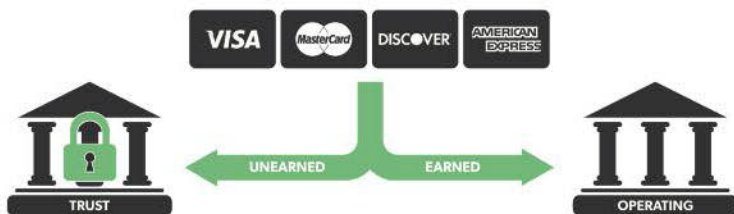


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One year ago, the National Park Service formally recognized the historical significance of Judge Frank Johnson and designated the Frank M. Johnson, Jr. Federal Building as a National Historic Landmark. Featured on the cover is Judge Johnson's courtroom, which was photographed by Alabama State Bar member **Steven L. Atha** of Birmingham, who also took the courthouse photographs accompanying the story beginning on page 276 of this issue.



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

All articles to be considered for publication must be submitted to the editor via email (ghawley@joneshawley.com) in Word format. A typical article is 13 to 18 letter-size pages in length, double-spaced and 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.





Lee H. Copeland



Interview with Myself

As most (well, not most—many—ok, a few) of you know, this is my last article for *The Alabama Lawyer*. I decided that I wanted someone to interview me in a question-and-answer format. Since I could think of no one more qualified than me to interview **me**, I did so.

Q: Why have you, this past year, made everyone call you Mr. President?

A: Well... they call President Obama Mr. President, so why can't they call me that?

Q: I understand you made your wife and children call you Mr. President. Is that right?

A: Only during the weekdays

Q: Do you think anyone realizes (or cares) that your year is complete, up, over and done as president of the Alabama State Bar?

A: Well, from what I know, people *do* realize it and are very upset.

Q: Okay, I will play along. Why would they be "very upset?"

A: Let me refine my answer. **Cole Portis** is the president following me. I know he has a very tough job to do. It is sort of like following Bear Bryant but I am sure that Cole will do an adequate job—and I plan on making my services available to him daily.

Q: I'm sure he will be thrilled with that.

A: I think so.

Q: Let's move on to something other than you.

A: Why?

Q: What do you think of the staff of the Alabama State Bar?



As the 2016 Grand Convocation comes to an end, Jessica, Lee, Hall and Albert Copeland are all smiles!

A: We are fortunate to have the best staff in the country for our state bar. As I go to the national conventions and hear other presidents talk, I am amazed at how much our bar does with our budget and the limited number of employees that we have. We are a unified bar. In other words, we perform both regulatory functions and association functions. Most of the employees of the bar have been there for years, and that speaks of their loyalty to the organization.

Q: With Keith Norman's pending retirement, will things change at the bar?

A: Keith has been with the bar for more than 30 years (as executive director since 1994) and has done a wonderful job. We continue to increase the benefits to our growing membership, as well as the level of service. There is a task force working on a successor to Keith. I am confident that we will have someone in place by the time he leaves, in mid-2017.

Q: Other than raising professional fees, which I understand was extremely popular, what else has taken place this past year at the bar?

A: Not much

Q: Really?

A: Well, other than my individual efforts, there are others who are working (at my direction).

One task force that I am particularly excited about is Senior Lawyer/New Lawyer. The task force is chaired by **Judge John Carroll** and it is looking at ways that lawyers who are retiring can transfer their practice to a younger lawyer. This will help both the new law school graduate find a job as well as provide some security for the retiring lawyer. This is a program that has been tried in at least one other state with great success. I am thrilled about the prospects of implementing this program in our state.

Q: I understand that there was some legislation this past year in which the bar was involved?

A: Yes, a bill was introduced to change and correct a law that passed a couple of years ago that required lawyers to be regulated by the Insurance Department when they perform title insurance work. The BBC overwhelming thought that the bill that would change this law should be passed. Many members of the bar worked very hard to accomplish this. I am happy to report that the bill did pass both houses and has now been signed by the governor.

Q: What is the best way to become more involved in with the bar?

A: I would first look to your local bar association. They would love to have volunteers help with various projects. On a state level, the best way to instantly get plugged in is through the sections. There is a list of the sections on the bar's website. Most of them have meetings throughout the state and many have their own annual or semi-annual conferences.

Q: Why do you always say that you love lawyers?

A: Because I do. As I said in my first article for *The Alabama Lawyer*, lawyers are different. The entire profession is geared toward providing a service to someone else. Unlike many professions, I find it is the lawyer who takes the desire to serve within their professional world and applies it in their communities. Wherever you live, I guarantee that it is the lawyers on the Rotary board, teaching Sunday school, helping out in the soup kitchens, coaching Little League and volunteering in hundreds of different ways.

Q: I know you have given a bunch of speeches this year. Did you like it?

A: Of course, I like hearing myself talk. I might add that everyone who heard my speeches was thrilled and elated. Hundreds of people came up to me after my moving and insightful messages to tell me how in awe they were to be in my presence.

Q: What do you think about the Alabama State Bar?

A: I am proud to have served as president of the Alabama State Bar and will suggest that I continue to serve in an honorary role wherein I get all of the privileges but I actually do not have to do any of the work. I will be the first to fill this new role for the Alabama State Bar. The title of my new job will be the Magnificent and Eternal President of the Alabama State Bar, Lee H. Copeland.

Thanks!





All Hail the President

By Michelle Moseley

Let me start by saying that I love my job, I really do.¹ Outside of working as a cashier at Walmart (for a grueling week while in college), I have worked in a law firm since I was 20 years old. I have been very fortunate to work at the same law firm—a well-respected law firm with great attorneys and a fabulous staff—for 20+ years. They have all become like family for me, and let’s face it, I probably spend more time with the people I work with than I do my own family. With that being said...

It all started back in 2014 when I was informed by one of “my” attorneys, with whom I have worked all of these 20+ years, he was running for president of the state bar. Sure enough, he garnered enough votes to win² the election. I had no idea what was coming but I immediately thought, “This will be really fun.” As time passed and we were waiting for him to take the “throne,” I was assured time and time again there really wasn’t much I had to do and it would be much like his time as a bar commissioner. After the swearing-in, dinners, receptions and congratulatory notes and letters, it only took a couple of days for the “fun” to wear off.

First and foremost, I must say the staff of the bar is on top of everything—so much so, I would receive 50

to 75 emails a day asking how he wanted to set up various groups, staff introducing themselves and what they handled, offers to help with anything I needed, picking out the presidential letterhead,³ documents that need signing and on and on. All of that is great information that is very much needed and was reiterated very, very often in the multiple emails.

It did not take long for the new president to have an epiphany—have everyone at the bar⁴ copy me on *all* emails. I believe 110 is currently my highest total of emails received in one day relating *only* to bar activities. It also became very clear that no one at the bar ever sleeps, EVER. I could stay up until midnight going through emails, only to find 30 more when my alarm went off at 5:00 a.m. I don’t know if they get overtime pay but they all certainly earn their salary and then some.

During his installation speech at the ASB Annual Meeting in 2015, *El Presidente* poetically offered to speak to any group, anywhere, anytime because he “loves” lawyers, he “loves” being a lawyer and he “loves” the profession. I’m thinking, that’s very nice of him—but, wait for it ... call my assistant to set it up—and they did. He has been spreading the “love” ever since.

I also realized very quickly that I could devote all of my work day (and then some) to *only* bar activities, and I have. The only problem with that—he also practices law! He has a full load of cases and, thankfully, the cases continued to roll in (a/k/a job security). He also mediates cases—a lot. It had already become somewhat of a struggle in allowing time for other cases, trying not to double book mediations and, now, carving out the time for all the meetings and conferences.

The wonderful firm I worked for gave some thought to my new struggles and stresses. The decision was made to hire another attorney and assign him to me. Not only did this attorney come with his case load of many, many years, he also conducts as many mediations he can. Now, I could juggle two mediation calendars!⁵ Wait a minute, did I mention that I work for two partners before the addition of the third? My “second” attorney has completely disowned me. He is now almost fully self-sufficient and has taken a liking to telling people that I do not work for him. It was funny in the beginning but as the months rolled on, I could no longer tell if he was joking or not. I plan on reintroducing myself in a couple of more months and, hopefully, he will take me back.

As we are coming to the end of “his” reign, I must send shout-outs.⁶ This one is for the girls...

Thank you to the staff of the Alabama State Bar—A very big THANK YOU—you are a well-oiled machine and I hope your machine can be repaired quickly after the rocks we threw into it are removed.

Diane Locke (a/k/a The Great and Powerful Oz)—Thank you! You are a tremendous person with power-packed information—all in that 4 ft. 3 in. little body—impressive!

Marcia Daniel (a/k/a The Bomb)—Thank you for not killing me because of T-shirt and Bag Gate.

Mary Frances Garner (a/k/a Sugar Crush)—Thank you for reminding me of what I need to do (three months ago), all with a spoon full of sugar.

Kristi Neal (a/k/a Financial Wizard)—Thank you for pretending to be happy when I dumped receipts in your lap to deal with months after an event. I could not do what you do, so you need to stay right where you are.

Christina Butler (a/k/a Now You See Her, Now You Don't)—Thank you for all of your help in the beginning.⁷

Kelley Lee (a/k/a Twitter Extraordinaire)—Thank you for teaching me 1) how to tweet and 2) what to tweet and what *not* to tweet and 3) setting up the president's fireside chat videos.

Angela Parks (a/k/a The Grim Reaper)—Thank you for keeping us updated on everything. Although I love seeing your name pop up on my email, I know it's bad news.

Lauren and Logan (a/k/a The Kids)—Thank you for reminding me that I work late, work on the weekends, you need money and you are hungry.

Copeland, Franco, Screws & Gill Assistants (a/k/a The Girls)—Thank you for staring at me while I drown in a sea of paperwork, reminding me of the phrase that no one likes to hear, “Glad it's you and not me,” and bringing me lunch because I can never leave my desk.

Ashley Penhale (a/k/a Thing One)—Thank you (from Thing Two) for stepping up and helping out while the “love” was being spread around everywhere. I'm sure our clients appreciate it as well.

Logging and Paper Mill Companies (a/k/a Masters of Copy Paper)—Thank you for cutting down over 1,000 acres of trees to support the printing of every single page of a document and email to come across my or *El Presidente's* desks—usually two copies of each because he would print one and then send it to me to print.

Board of Bar Commissioners (a/k/a BBC)—Thank you for having a rule that someone can only serve as president for one year. Don't ever change this rule!⁸ ▲

Endnotes

1. As everyone knows, this is what you say when you realize you shouldn't say what you are about to say but you do it anyway.
2. I don't consider it actually “running” when you are unopposed.
3. Yes, it is a big deal and FYI—you cannot change the color of the bar's logo just because you want to.
4. Plus, anyone else he could remotely think of.
5. It is really great when parties want dates from two possible mediators and those two just happen to be the same two I work for.
6. This is where you say, “I know I am going to miss someone” and I will. I can only remember what I did five minutes ago—if I am lucky. If I forget to mention someone by name, please remember that you are forever in my heart because you are all awesome!
7. Even though you broke your foot, had surgery and then just left me!
8. I really don't know if this is a real rule, if not, it should be. Diane, please put that on the agenda as a discussion item for the next BBC meeting.

Michelle Moseley



Michelle Moseley serves as legal assistant to Lee H. Copeland, David Martin and James H. Anderson with the firm of Copeland, Franco, Screws & Gill PA in Montgomery.



EXECUTIVE DIRECTOR'S REPORT

Keith B. Norman
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Title Legislation, License Fee Increase and A Legal Food Frenzy

Title Bill

This year's legislative session ended not so much with a bang, but more of a whimper. One bill signed by the governor, though, was of great interest to many Alabama lawyers who have real estate practices. Act 2016-296 amends the Alabama Title Insurance Act which was previously amended in 2012. The earlier amendment included lawyers who write title policies in the definition of "title agent" as defined under the Title Insurance Act, thereby making them subject to regulation for the first time by the Alabama Department of Insurance. As a result of that earlier amendment (it became effective in 2013), lawyers had to undergo a background check through the Criminal Justice Information Service Division of the Federal Bureau of Investigation, complete a pre-licensing course and examination (unless otherwise exempt) and take 24 hours of continuing education every two years.

When the 2012 amendments were introduced, the state bar was assured by the bill's principal sponsor, the Alabama Land Title Association, that the changes would not affect lawyers who were title agents or interfere with the regulation of lawyers, which is the sole province of the Alabama State Bar through rules promulgated by the Alabama Supreme Court. That assurance dissipated once the amendments passed and became effective. The Insurance Department informed the state bar that it intended to apply all provisions under the act to lawyers serving as title agents. Despite the state bar's best efforts to resolve these differences administratively, including an opinion of the state bar's Office of General Counsel stating that under the Separation of Powers Doctrine, "...the Supreme Court has exclusive plenary authority over lawyers licensed to practice law in Alabama," the Insurance Department felt compelled to impose these additional regulations on Alabama lawyers acting as title agents.

I will not belabor the histrionics of the legislation that was passed during this last session except to say that after the state bar's diligent efforts over the last two years failed to rectify the disagreement over dual regulation of lawyers, it was necessary to marshal our efforts to resolve the matter legislatively. Henry Henzel, president of Attorneys Insurance Mutual of the South (AIM), and its directors; Alabama State Bar President Lee Copeland; and past state bar presidents Jim Pratt, Phillip McCallum and Rich Raleigh, along with legislative counsel Suzi Huffaker, worked tirelessly to convince lawmakers that the dual regulation of lawyers in this instance was not only wrong legally but unnecessary. The Board of Bar Commissioners, in a rare move, went on record solidly supporting House Bill 129, which would remove lawyers from regulation by the Insurance Department. In addition, many lawyers made individual calls to their state representatives expressing support for HB 129 to help secure the bill's passage. Let me add that the Alabama Land Title Association was represented by lawyers Joe Powell and Ted Hosp who did so ably and professionally. Consequently, lawyers who have had to deal with this additional regulatory burden for the last three years can finally put it behind them.

\$25 Occupational License Fee Increase

At its May meeting, the Board of Bar Commissioners approved a \$25 increase in the occupational license fee, starting October 2016. The license fee will increase to \$325 and special member dues will increase from \$150 to \$162.50. This is only the sixth increase since 1959 with the last license fee increase in 2006. The commissioners received the report of the Task Force on a License Fee Increase which recommended a \$50 increase. After much discussion and debate, though, over the course of the March and May commission meetings, the Board of Bar Commissioners chose not to adopt the task force recommendation and instead approved a smaller increase.

A fee increase was clearly in order. Over the last 10 years, state bar expenses have exceeded its revenues for nine of those years. The difference has been made up using state bar reserves. During this time, a concerted effort has been made to cut personnel costs and program costs. By the end of 2016, the number of state bar staff members will have been reduced through attrition from 49 to 43. Similarly, program costs have been reduced by \$100,000. The \$25 increase will result in an approximate increase in revenue of

\$400,000 which, when coupled with staff reductions and other cuts as well as continued vigilance of bar expenditures, should amply cover agency expenditures and restore depleted reserves.

No one desires an increase in their license fee, but the bar's officers, commissioners and staff have made every effort to be good and responsible stewards of state bar funds while considering the future needs of the agency. In comparison to our colleagues in the Southern Conference of Bar Presidents (SCBP),¹ our current bar fees rank 13th lowest out of 18 states that comprise the SCBP. The increase will move us up to 11th. Despite the increase, your bar membership brings you benefits that are worth many times the cost of your license fee or special membership dues. As I highlighted in my "Executive Director's Report" in the May 2012 issue of *The Alabama Lawyer*, the discounted products and free services available to bar members can be worth from 35-70 times your annual occupational license fee or special membership dues. For a complete listing of those benefits available to you, visit www.alabar.org/membership/member-benefits/. If you are not already utilizing these, I encourage you to take full advantage of what your state bar membership provides in helpful, lower-cost services and products that will not only save you money but help you make money.



Alabama State Bar President Lee Copeland and VLP Director Linda Lund with a check for the Montgomery Area Food Bank

Legal Food Frenzy

Several months ago Alabama Attorney General Luther Strange and Alabama State Bar President Lee Copeland

(Continued from page 245)

kicked off the Legal Food Frenzy to gather food for the food banks in Alabama. The competition pitted law firms, solo practitioners and legal organizations against one another for this worthy cause. The equivalent of 140,930 pounds of food was raised for Alabama Food Banks, which will help them provide food to organizations that will prepare meals during the summer months for children who might otherwise go hungry because they are not receiving meals through school lunch programs. The winners and their categories are:

■ **ATTORNEY GENERAL'S CUP**

Maynard, Cooper & Gale (Huntsville)
 373.43 pounds per person for a total of 20,165 pounds
 Food Bank of North Alabama

■ **SOLO PRACTITIONERS (1-2 PEOPLE)**

Most pounds and most pounds/person:
 Annette M. Carwie, attorney at law
 42 total pounds
 Feeding the Gulf Coast

■ **SMALL FIRMS (3-20 PEOPLE)**

Most pounds:
 Prim & Mendheim LLC
 4,957.50 total pounds
 Wiregrass Area United Way Food Bank

Most pounds per person:
 Lewis, Feldman, Lehane & Snable LLC
 366.41 pounds per person
 Community Food Bank of Central Alabama

■ **MEDIUM FIRMS (21-40 PEOPLE)**

Most pounds:
 Bressler, Amery & Ross PC
 6,375 total pounds
 Community Food Bank of Central Alabama

Most pounds/person:
 Bressler, Amery & Ross PC
 159.38 pounds per person
 Community Food Bank of Central Alabama

■ **LARGE FIRMS (40+ PEOPLE)**

Most pounds:
 Sirote & Permutt PC
 24,523.75 total pounds
 Multiple cities

Most pounds/person:
 Maynard, Cooper & Gale (Huntsville)
 373.43 pounds per person
 Food Bank of North Alabama

■ **LEGAL ORGANIZATIONS**

Most pounds:
 Alabama State Bar
 6,510 total pounds
 Montgomery Area Food Bank

Most pounds/person:
 U.S. Bankruptcy Court, Northern District of Alabama,
 Western Division
 275.63 pounds per person
 West Alabama Food Bank

Spirit of Excellence:
 Hill, Hill, Carter, Franco, Cole & Black PC
 190.25 pounds per person for a total of 6,659 pounds
 Montgomery Area Food Bank

Congratulations to the winners of this worthwhile competition and thank you to those firms and lawyers who participated but did not receive an award. I especially thank the staff of the Alabama State Bar for their participation in the food frenzy and for winning the Legal Organizations category. With the state bar being a volunteer-driven agency, our staff works everyday with volunteers who help fulfill the state bar motto, "Lawyers Render Service." So, it is appropriate that our staff fully embraces this motto, as they did with their successful participation in the Legal Food Frenzy. Way to go team! ▲

Endnote

1. Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, Virgin Islands and West Virginia.



YLS UPDATE

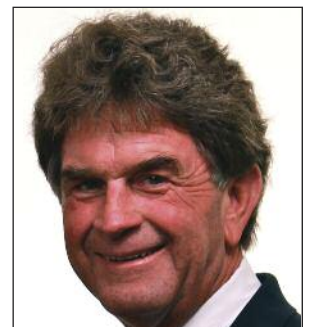
Hughston Nichols
hnichols@hwnn.com

As the first half of the year winds down, I'm pleased to report that the Young Lawyers' Section's **Orange Beach CLE** in May was an outstanding success! Thanks to the support of law firms statewide and the hard work of our Orange Beach CLE committee, chaired by **Robert Shreve** and further consisting of **Megan Comer, Brad Hicks, Brian Murphy, Rachel Cash, Julia Shreve** and **Miland Simpler**, our attendance was more than 100 young lawyers. Our group from around the state spent the weekend at The Caribe learning courtroom basics, getting tips on appellate brief writing, understanding what in-house counsel looks for when hiring outside counsel, hearing from experts on business development, networking with judges and other lawyers, reuniting with old friends and enjoying the beautiful weather in Orange Beach. I urge you to support this fantastic event again in 2017 and help the Young Lawyers' Section build on the momentum of the last two years to make next year's CLE even better.

In section news, 2016 was our first year to be an "opt-in" section. This change provided immediate benefits to all young lawyers. Our section membership exceeded 700 young lawyers from all over the state. By opting in, young lawyers had the opportunity to become involved in section projects and events. It gave the YLS leaders the greater ability to connect with, mobilize and serve its section members. We are encouraged by these numbers and hope that you will join the section next year, or encourage young lawyers to do so.

I would be remiss if I did not mention that on behalf of the Young Lawyers' Section, we mourn the loss of our good friend and section supporter, **Mike Turner of Freedom Court Reporting**. Mike and his wife, Mickey, have supported the YLS for many years. He will be greatly missed.

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



Mike Turner



IMPORTANT NOTICES

- ▲ **Harold Albritton Pro Bono Leadership Award**
- ▲ **Alabama Rules of Court-State for Sale**
- ▲ **2016-17 License Fee/Special Member Dues Increase**

Harold Albritton Pro Bono Leadership Award

The Harold Albritton Pro Bono Leadership Award seeks to identify and honor individual lawyers who through their leadership and commitment have enhanced the human dignity of others by improving pro bono legal services to our state's poor and disadvantaged. The award will be presented during Pro Bono Month 2016.

To nominate an individual for this award please submit no more than two single-spaced pages that provide specific, concrete examples of the nominee's performance of as many of the following criteria as apply:

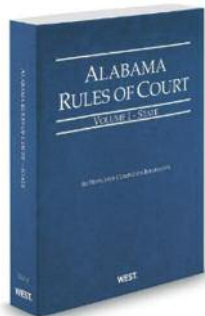
- Demonstrated dedication to the development and delivery of legal services to persons of limited means or low-income communities through a pro bono program;
- Contributed significant work toward developing innovative approaches to delivery of volunteer legal services;
- Participated in an activity that resulted in satisfying previously unmet needs or in extending services to underserved segments of the population; **or**
- Successfully achieved legislation or rule changes that contributed substantially to legal services to persons of limited means or low-income communities.

To the extent appropriate, include in the award criteria narrative a description of any bar association activities applicable to the above criteria.

To be considered for the award, nominations must be submitted by **August 1, 2016**. For more information about the nomination process, contact Linda Lund at (334) 517-2246 or linda.lund@alabar.org.

Alabama Rules of Court-State for Sale

The Supreme Court and State Law Library has a limited number of 2015 *Alabama Rules of Court-State* books for sale at \$40 each. The 2013 and 2014 *Rules* books are still available at \$10 and \$20, respectively. All rule changes and effective dates are available at <http://judicial.alabama.gov/rules/Rules.cfm>.



Please mail a check or money order made payable to AL Supreme Court and State Law Library to:

AL Supreme Court and State Law Library
ATTN: Public Services–Book Sale
300 Dexter Avenue
Montgomery AL 36104

Please contact any Public Services staff member at (334) 229-0563 prior to mailing payment to inquire about availability.



2016-17 License Fee/ Special Member Dues Increase

The 2016-17 Attorney Annual Fee and Reporting Statement will be mailed in late August and will reflect an increase approved by the Board of Bar Commissioners at its May meeting. The occupational license fee will increase to \$325 and special member dues will increase to \$162.50. Additional information about the increase can be found in the “Executive Director’s Report” in this issue of *The Alabama Lawyer*. Payments may be made online at www.alabar.org beginning September 1 or can be mailed to the Alabama State Bar with your annual fee and reporting statement. ▲



Post-Judgment Review of Punitive Damages

By William E. Shreve, Jr.

Punitive damages “pose an acute danger of arbitrary deprivation of property” through excessive punishment.¹ To address this danger, the U.S. and Alabama Supreme courts developed standards and procedures for post-judgment review of punitive-damages awards to determine whether the damages are excessive and should be reduced. This article aims to summarize these standards and procedures and outline the steps defendants should take to obtain effective review.

I. The Legal Foundations for Review

Federal and Alabama law provide separate legal bases for review of punitive damages. The federal grounds are the due-process clauses of the Fourteenth and Fifth amendments, which prohibit the states and the federal government, respectively, from depriving persons “of life, liberty, or property, without due process of law.” Due process “imposes a substantive limit on the size of punitive damages awards,” *Honda Motor Co. v. Oberg*, 512 U.S. 415, 420 (1994), in that courts may not inflict “grossly excessive or arbitrary punishments on a tortfeasor,” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Fourteenth Amendment due process applies to punitive damages awarded in state courts and in federal courts applying state law under diversity jurisdiction, while Fifth-Amendment due process limits punitive awards in federal courts under federal law. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562-68 (1996); *Eden Elec., Ltd. v. Amana Co.*, 258 F. Supp. 2d 958, 967 (N.D. Iowa 2003), *aff’d*, 370 F.3d 824 (8th Cir. 2004), *cert. denied*, 543 U.S. 1150 (2005); *Morgan v. Woessner*, 997 F.2d 1244, 1255 (9th Cir.

1993), *cert. dism'd*, 510 U.S. 1033 (1994). The analysis as to whether punitive damages violate due process is the same under both amendments. *See Morgan*, 997 F.2d at 1255.

Under Alabama law, as set forth in *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989), punitive damages “must not exceed an amount that will accomplish society’s goals of punishment and deterrence” (hereafter “the *Green Oil* standard”). *Id.* at 222. Punitive awards higher than that amount are “considered excessive, as a matter of law,” *Killough v. Jahandarfarid*, 578 So. 2d 1041, 1046 (Ala. 1991), and also violate due process under Alabama Constitution Art. I, § 13, *see Fuller v. Preferred Risk Life Ins. Co.*, 577 So. 2d 878, 885 (Ala. 1991).² The *Green Oil* standard applies in federal diversity cases as well as in state court. *See American Employers Ins. Co. v. Southern Seeding Servs., Inc.*, 931 F.2d 1453, 1457-58 (11th Cir. 1991); *Atchafalaya Marine, LLC v. National Union Fire Ins. Co.*, 959 F. Supp. 2d 1313, 1330-31 & n.17 (S.D. Ala. 2013). Thus, Alabama courts, and federal courts applying Alabama law, must examine punitive damages under *both* Fourteenth-Amendment due process *and* the *Green Oil* standard. *See Shiv-Ram, Inc. v. McCaleb*, 892 So. 2d 299, 315-16 (Ala. 2003). *But see McClain v. Metabolife Int’l, Inc.*, 259 F. Supp. 2d 1225, 1234, 1236 (N.D. Ala. 2003) (opining that *Green Oil* standard no longer applies in federal court in view of U.S. Supreme Court decisions establishing due-process review).

In addition to the *Green Oil* standard, the Alabama Legislature has enacted caps on punitive damages. *Ala. Code* § 6-11-21 provides that, except in “actions for wrongful death or for intentional infliction of physical injury,” a punitive award may not exceed (1) the greater of three times compensatory damages or \$500,000 (adjusted every three years for inflation, beginning January 1, 2003); (2) for a “small business”



Punitive damages that are reduced to or that are less than the applicable cap may still be excessive, however, and are therefore still subject to review.

as defined in § 6-11-21(c), the greater of \$50,000 (adjusted for inflation) or 10 percent of the business’s net worth; or (3) in cases of “physical injury,” the greater of three times compensatory damages or \$1.5 million (adjusted for inflation). § 6-11-21(a), -(b), -(d), -(f), & -(j) (emphasis added).³

Juries are not instructed on these caps, *see* § 6-11-21(g), so courts must apply the caps post-verdict. Punitive damages that are reduced to or that are less than the applicable cap may still be excessive, however, and are therefore still subject to review. *See* § 6-11-21(i) (“Nothing herein shall...limit the duty of the court, or the appellate courts, to scrutinize all punitive damage awards, ensure that all punitive damage awards comply with applicable procedural, evidentiary, and constitutional requirements,

and to order remittitur where appropriate.”); *Ross v. Rosen-Rager*, 67 So. 3d 29, 34, 41-45 (Ala. 2010) (reducing damages already within cap).

II. The *BMW* Guideposts And *Green Oil* Factors

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the U.S. Supreme Court set forth “guideposts” for determining whether punitive damages violate due process. The Alabama Supreme Court, with help from the Alabama Legislature, has also directed courts to consider certain factors in applying the *Green Oil* standard. Below are lists of these guideposts and factors.

BMW guideposts:

1. Degree of reprehensibility of the defendant’s conduct;
2. Ratio of punitive damages to the actual harm inflicted on the plaintiff; and

3. Civil or criminal penalties that could be imposed for comparable misconduct.

See *BMW*, 517 U.S. at 574-85.

Green Oil factors:

1. Culpability of the defendant's conduct;
2. Desirability of discouraging others from similar conduct;
3. Impact of the punitive award upon the parties;
4. Impact of the punitive award on innocent third parties;
5. Harm that is likely to occur from the defendant's conduct as well as the harm that actually has occurred;
6. Degree of reprehensibility of the defendant's conduct;
7. If the wrongful conduct was profitable to the defendant, the damages should remove the profit and be in excess of the profit;
8. Defendant's financial position;
9. Plaintiff's costs of litigation;
10. Criminal sanctions imposed on the defendant for his conduct, taken into account in mitigation of the punitive award;
11. Other civil actions against the defendant based on the same conduct, taken into account in mitigation of the punitive award;
12. Economic impact of the verdict on the defendant and on the plaintiff;
13. Amount of compensatory damages awarded;
14. Whether the defendant has been guilty of the same or similar acts in the past; and
15. Nature and the extent of any effort the defendant made to remedy the wrong and the opportunity or lack of opportunity the plaintiff gave the defendant to remedy the wrong.

See *Green Oil*, 539 So. 2d at 223-24; *Hammond v. City of Gadsden*, 493 So. 2d 1374, 1379 (Ala. 1986); *Ala. Code* § 6-11-23(b). These factors are not exclusive; a court may also consider "other relevant factors." *Killough*, 578 So. 2d at 1046; see also *Hammond*, 493 So. 2d at 1379.

This article will later examine the details of the *BMW* guideposts and *Green Oil* factors as developed in case law.

III. Post-Judgment Motions Necessary for Review

Post-judgment review of punitive damages is not automatic. A court has no obligation to reduce punitive damages to the statutory cap, to review such damages for excessiveness or to hold a hearing on whether the damages are excessive, unless the defendant moves the court to do so. See *Lifestar Response of Ala., Inc. v. Lemuel*, 908 So. 2d 207, 225-26 (Ala. 2004); *M & J Materials, Inc. v. Isbell*, 153 So. 3d 24, 26-27 n.2 (Ala. Civ. App. 2013) (plurality opinion); *Peete v. Blackwell*, 504 So. 2d 222, 225 (Ala. 1986). Therefore, faced with a jury's verdict or a trial court's judgment that includes punitive damages, the defendant should make several post-judgment filings challenging the damages and asking for a hearing.

Motion to apply statutory cap: If the damages exceed an applicable cap under *Ala. Code* § 6-11-21, the defendant should move the court to reduce the damages to the cap amount, without waiver of the defendant's rights to (a) challenge the sufficiency of the evidence to support punitive damages, and (b) have the court review the punitive award for excessiveness. A defendant who contends that the "small business" cap applies must prove that "at the time of the occurrence made the basis of the suit," the defendant was a "business having a net worth of [\$2 million] or less." § 6-11-21(c) (emphasis added); see also *Ross*, 67 So. 3d at 44-45. The defendant should provide evidence of net worth either by filing an affidavit with the motion or by moving for a post-judgment hearing and the right to introduce such evidence at the hearing. Evidence of the defendant's net worth should be specific, credible and persuasive, or else the trial court may decide not to accept it. See *Tanner v. Ebole*, 88 So. 3d 856, 877-81 (Ala. Civ. App. 2011); *Ross*, 67 So. 3d at 44-45.

Motion for new trial: The issue of an excessive verdict must be raised by motion for new trial. See *State v. Long*, 344 So. 2d 754, 756 (Ala. 1977). The motion should aver that the punitive award is grossly excessive in view of the pertinent *BMW* guideposts and *Green Oil* factors, and that it violates Fourteenth

(or Fifth) Amendment due process, the *Green Oil* standard and due process under Alabama Constitution Art. I, § 13. Motions that fail to do so may be considered inadequate to preserve the issue. See *Lifestar*, 908 So. 2d at 225-26; *Waldrip Wrecker Serv., Inc. v. Wallace*, 758 So. 2d 1110, 1115 (Ala. Civ. App. 1999); *Hill v. Jackson*, 669 So. 2d 921, 924 (Ala. Civ. App. 1995). The motion should ask alternatively for remittitur, a type of ruling on a new-trial motion in which the court orders a new trial unless the plaintiff agrees to accept reduced damages. A remittitur order, giving the plaintiff the choice of a new trial or a reduced verdict, is said to avoid infringement of the plaintiff's right to trial by jury, which can occur if the court simply reduces a jury's damages award. See *McCormick v. Alabama Power Co.*, 293 Ala. 481, 483-84, 306 So. 2d 233, 235-36 (1975). Whether a punitive award is excessive depends in part on the amount of compensatory damages, see *Ala. Code* § 6-11-23(b), so the motion should also challenge excessive compensatory amounts. The defendant may file affidavits with the motion, containing evidence relevant to the *BMW* guideposts and *Green Oil* factors, see *Ala. R. Civ. P.* 59(c), but the defendant may also or instead present testimony and evidence at the hearing on the motion (see below).

Motion for a hearing: Section 6-11-23(b) provides that “[i]n all cases wherein a verdict for punitive damages is awarded, the trial court shall, upon motion of any party, either conduct hearings or receive additional evidence, or both, concerning the amount of punitive damages” (emphasis added). *Ala. R. Civ. P.* 59(g) also gives the movant, upon request, the right to a hearing on a motion for new trial. See *Flagstar Enters., Inc. v. Foster*, 779 So. 2d 1220, 1221 (Ala. 2000). Hence, the defendant should move for a hearing on and the right to offer additional evidence concerning the amount of punitive damages, *i.e.*, evidence relevant to the *BMW* guideposts and *Green Oil* factors.

Motion for judgment as a matter of law (“JML”): The defendant should contest the plaintiff's right to any punitive damages, by moving for JML under *Ala. R. Civ. P.* 50 or *Fed. R. Civ. P.* 50 (or in a non-jury case, for judgment on partial findings under *Ala. R. Civ. P.* 52(c) or *Fed. R. Civ. P.* 52(c)) on the

ground that the plaintiff failed to produce sufficient evidence for punitive damages under *Ala. Code* § 6-11-20(a).⁴ This statute provides that, other than in wrongful-death cases,⁵ the plaintiff may not recover punitive damages unless the plaintiff has “proven by clear and convincing evidence that the defendant consciously or deliberately engaged in oppression, fraud, wantonness, or malice with regard to the plaintiff.” Again, since one of the *Green Oil* factors is the amount of compensatory damages, the defendant's motion should also challenge the sufficiency of the evidence to support compensatory damages.

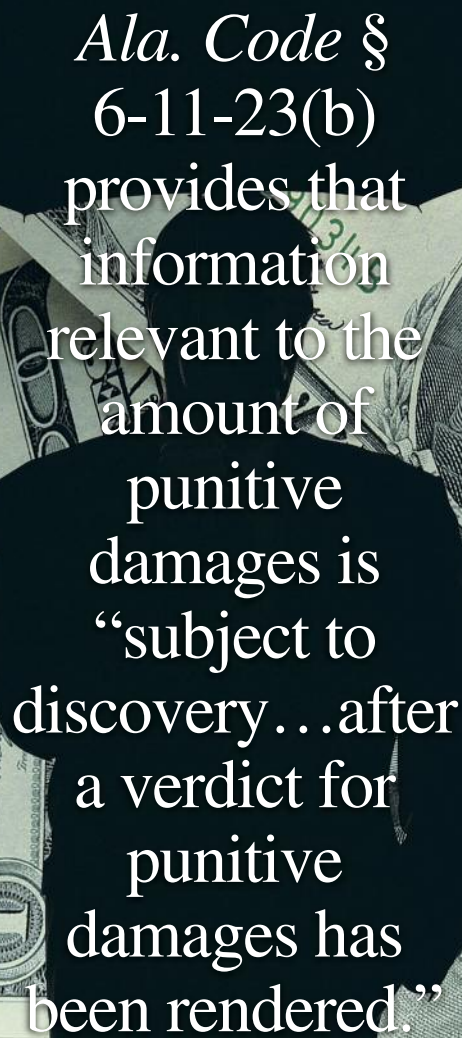
The motion for JML should also, like the motion for new trial, assert that the punitive award is grossly excessive and violates Fourteenth (or Fifth) Amendment due process, the *Green Oil* standard and due process under Alabama Constitution Art. I, § 13. The Eleventh Circuit has held that when punitive damages violate due process, the court need not order a new trial or remittitur, but may instead, as a matter of law, simply reduce the damages to the maximum that due process permits. See *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1328-33 & n.16 (11th Cir.), *cert. denied*, 528 U.S. 931 (1999). The court decided that excessive punitive damages constitute “legal error” and that a court can “strike the unconstitutional excess from a jury's punitive damage award and enter judgment for that amount.” *Id.*, 170 F.3d at 1330-31.⁶ Also, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Supreme Court stated that “the level of punitive damages is not really a ‘fact’ ‘tried’ by the jury” and so is not protected by the Seventh Amendment.⁷ *Id.* at 437 (some internal quotation marks omitted). While Alabama appellate courts have not yet adopted *Johansen's* position, and Alabama courts have traditionally employed remittitur upon finding that a jury's punitive award is excessive, it is reasonable to conclude that Alabama courts also have authority to reduce punitive damages as a matter of law. The Eleventh Circuit's reasoning in *Johansen* would apply equally in state court; the Alabama Supreme Court followed *Cooper Industries* in *Horton Homes, Inc. v. Brooks*, 832 So. 2d 44, 54-57 (Ala. 2001); the court has said that punitive awards violating the *Green Oil* standard are “excessive, as a matter of law,” *Killough*, 578 So. 2d at 1046; and § 6-11-23(b) and 6-11-24(b) state that trial and appellate courts “shall...reduce” excessive punitive damages.⁸

IV. Post-Judgment Discovery

Ala. Code § 6-11-23(b) provides that information relevant to the amount of punitive damages is “subject to discovery...after a verdict for punitive damages has been rendered.” Thus, the parties may conduct post-judgment discovery concerning matters relating to the *BMW* guideposts and *Green Oil* factors.

In *Ex parte Vulcan Materials Co.*, 992 So. 2d 1252 (Ala. 2008), the court held that since the factors used in reviewing punitive damages are “for the benefit of *defendants*, a defendant may waive the benefit of one or more of the factors” and thereby preclude the plaintiff from conducting discovery relating to those particular factors. *Id.* at 1261 (emphasis added). Vulcan refused to provide financial information sought by the plaintiff, and instead conceded “that its financial position does not warrant reduction of the punitive award.” *Id.* at 1257-59, 1261. The court stated that in view of Vulcan’s concession, the trial court had to weigh the *Green Oil* “financial position” factor “*against a remittitur*,” and that “[c]onsequently, financial discovery as to that factor is unnecessary and irrelevant.” *Id.* at 1261 (emphasis added). Since Alabama courts have no authority to “*order an additur of punitive damages*,” the plaintiff could not justify the discovery on the grounds that it was relevant to the *adequacy* of the punitive award. *Id.* at 1260-61 (emphasis in original). And because the discovery related to Vulcan’s “general financial status” rather than specific profit from the wrongful conduct, it was “far too attenuated for useful analysis” under the *Green Oil* factor concerning removal of profit. *Id.* at 1262.

Vulcan Materials also decided several other issues concerning post-judgment discovery relating to punitive



Ala. Code § 6-11-23(b) provides that information relevant to the amount of punitive damages is “subject to discovery...after a verdict for punitive damages has been rendered.”

damages, and is important to review in any case involving such issues.

V. The Post-Judgment Hearing

Section 6-11-23(b) provides that trial courts “shall, upon motion of any party, either conduct hearings or receive additional evidence, or both, concerning the amount of punitive damages.” When the defendant requests a hearing under this statute (or under *Ala. R. Civ. P.* 59(g), which provides for a hearing on a motion for new trial), it is error to deny or to fail to hold a hearing. See *Target Media Partners Op. Co. v. Specialty Mktg. Co.*, 177 So. 3d 843, 869-71 (Ala. 2013); *Southeast Envtl. Infrastructure, LLC v. Rivers*, 12 So. 3d 32, 50 (Ala. 2008). Sec-

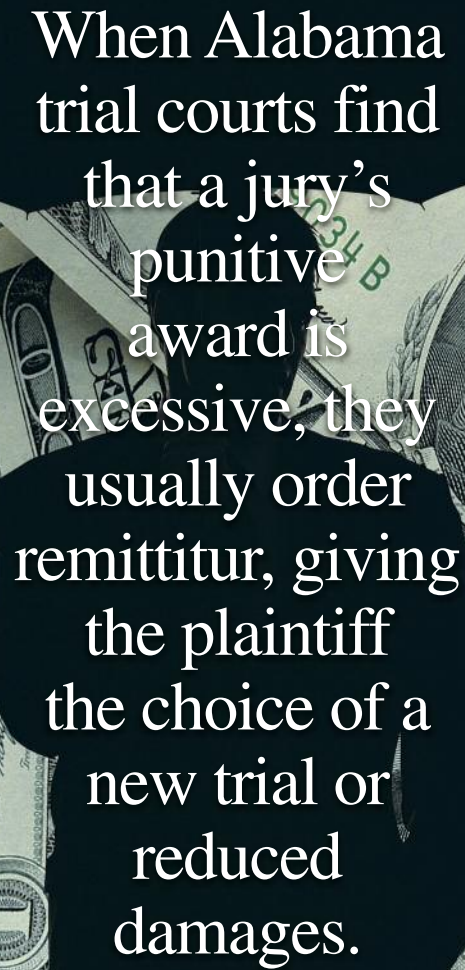
tion 6-11-23(b) also states that “[a]ny relevant evidence...shall be admissible” at the hearing. Therefore, the parties may introduce testimony and other evidence relevant to the *BMW* guideposts and *Green Oil* factors. The hearing may not be used to re-litigate the defendant’s *liability* for punitive damages, see *Akins Funeral Home, Inc. v. Miller*, 878 So. 2d 267, 279-80 (Ala. 2003); rather, the hearing is for the purpose of examining the *amount* of punitive damages.

VI. The Trial Court’s Review and Order

The U.S. and Alabama Supreme courts have held that *appellate courts* are to review the amount of punitive damages *de novo*, giving no deference to the amount the jury awarded or that the trial court approved. See *Cooper Indus., Inc. v. Leatherman Tool*

Group, Inc., 532 U.S. 424, 436-40 (2001); *Horton Homes, Inc. v. Brooks*, 832 So. 2d 44, 55-57 (Ala. 2001); *Acceptance Ins. Co. v. Brown*, 832 So. 2d 1, 24 (Ala. 2001). Though the courts did not say so, it stands to reason, and now seems well accepted, that *trial courts* are also to review punitive awards *de novo*.⁹ In *Target Media*, 177 So. 3d 843, the trial court's post-judgment order stated that the court had "given *de novo* review to each of the [*Green Oil*] factors" and "performed its own *de novo* examination of the amount of the verdict." *Id.* at 879, 882. The Alabama Supreme Court took no issue with this and described the order as "thorough and well-reasoned." *Id.* at 878.

Neither the U.S. nor Alabama Supreme Court has explained exactly *how* trial courts (or appellate courts) are to apply the *BMW* guideposts and *Green Oil* factors in deciding whether to reduce punitive damages, and, if so, by how much. In some cases, the Alabama Supreme Court has analyzed the *BMW* guideposts, summarized the results, separately analyzed the *Green Oil* factors, summarized the results, conducted a "final analysis" and reached a conclusion. *See, e.g., Shiv-Ram*, 892 So. 2d at 315-19. More recent opinions of the Alabama Supreme Court and Court of Civil Appeals have commingled review of the *BMW* guideposts and *Green Oil* factors as if they are all part of a single analysis, and then reached a conclusion. *See Pensacola Motor Sales, Inc. v. Daphne Automotive, LLC*, 155 So. 3d 930, 944-52 (Ala. 2013); *Ross*, 67 So. 3d at 41-45; *Engineered Cooling Servs., Inc. v. Star Serv., Inc.*, 108 So. 3d 1022, 1027, 1033-37 (Ala. Civ. App. 2012); *Tanner*, 88 So. 3d at 870-81. The Supreme Court has sometimes compared the total number of factors weighing in favor of reducing damages with the total number weighing against it, *see, e.g., Wal-Mart*, 789 So. 2d at 183, but the court has not announced any rule that the



When Alabama trial courts find that a jury's punitive award is excessive, they usually order remittitur, giving the plaintiff the choice of a new trial or reduced damages.

greater number is decisive. And since reprehensibility, as the "most important" guidepost, *Campbell*, 538 U.S. at 419, is weighted more heavily than other factors, mere arithmetic cannot be controlling. Also, if the punitive award is outsized in relation to the defendant's financial position, the damages are likely to be reduced even if the majority of other guideposts and factors weigh against it. Overall, courts seem to employ a partially objective and partially subjective weighing-and-balancing process to arrive at a result the court deems just, based on the facts of the particular case.

Trial courts must "state for the record the factors considered in either granting or denying a new trial [or remittitur] based upon the alleged excessiveness of a jury verdict." *Hammond*, 493 So. 2d at 1379. This "*Hammond* order" requirement also applies in non-jury cases; the trial court in ruling on a motion for a new trial must explain why its own judgment amount is or is not excessive. *See Oliver v. Towns*, 738 So. 2d 798, 803-04 (Ala. 1999). Courts may also render a *Hammond* order by making an oral statement on the record. *See Griggs v. Finley*, 565 So. 2d 154, 162-63 (Ala. 1990). The *Hammond* order should include review of all *BMW* guideposts and *Green Oil* factors. *See Independent Life & Acc. Ins. Co. v. Harrington*, 658 So. 2d 892, 902 (Ala. 1994); *Pensacola Motor*, 155 So. 3d at 945. The Eleventh Circuit has also required that a district court enter a *Hammond* order. *See American Employers*, 931 F.2d at 1458.

When Alabama trial courts find that a jury's punitive award is excessive, they usually order remittitur, giving the plaintiff the choice of a new trial or reduced damages. As discussed above, though, federal courts have the option of reducing punitive damages as a matter of law, and there is reason to conclude that Alabama courts also have this option.

VII. Appellate Review

If the defendant appeals on the basis of an excessive punitive award, and the trial court has not entered a *Hammond* order, Alabama appellate courts will temporarily remand the case for the trial court to do so. See *Target Media*, 177 So. 3d at 870-71. The Eleventh Circuit has done this as well. See *American Employers*, 931 F.2d at 1458.

In *Cooper Industries*, 532 U.S. 424, the U.S. Supreme Court held that “courts of appeals should apply a *de novo* standard of review when passing on district courts’ determinations of the constitutionality of punitive damages awards.” *Id.* at 436. The Court qualified this to some extent, stating that while “the District Court’s application of the [*BMW* guideposts]” is reviewed *de novo*, appellate courts are to “defer to the District Court’s findings of fact unless they are clearly erroneous.” *Id.* at 440 n.14. See also *Johansen*, 170 F.3d at 1334. The Alabama Supreme Court also adopted the *de novo* standard, and explained that this means the amount of punitive damages awarded by the jury or trial court is entitled to “no presumption of correctness” and the appellate court is to “review the evidence and the law without deference to the jury’s award or to the trial court’s rulings.” *Horton Homes*, 832 So. 2d at 57.

Alabama appellate courts typically order remittitur upon finding that punitive damages are excessive. See *Ala. Code* § 12-22-71; *Ross*, 67 So. 3d at 45. As noted above, federal courts have, and Alabama appellate courts probably also have, authority to reduce punitive damages as a matter of law.

VIII. Analysis of the *BMW* Guideposts and *Green Oil* Factors

This section examines the details of the *BMW* guideposts and *Green Oil* factors as developed in U.S. Supreme Court and Alabama case law.

Due process guideposts

1. Reprehensibility—The “degree of reprehensibility of the defendant’s conduct” is “the most important indicium of the reasonableness of a punitive damages

award.” *BMW*, 517 U.S. at 575. Courts are to consider the following in determining reprehensibility: (1) Whether “the harm caused was physical as opposed to economic”; (2) whether “the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others”; (3) whether “the target of the conduct had financial vulnerability”; (4) whether “the conduct involved repeated actions or was an isolated incident”; and (5) whether “the harm was the result of intentional malice, trickery, or deceit, or mere accident.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003); see also *BMW*, 517 U.S. at 575-77. “[A]ny one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” *Campbell*, 538 U.S. at 419.

The relevant conduct is that which harmed the plaintiff. See *id.* at 424. Other, dissimilar reprehensible acts are not to be considered, because the defendant is not to be punished “for being an unsavory individual or business.” *Id.* at 423. See also *Guyoungtech USA, Inc. v. Dees*, 156 So. 3d 374, 385-86 (Ala. 2014). Nor can a jury or court assess punitive damages for harm to persons other than the plaintiff. See *Philip Morris USA v. Williams*, 549 U.S. 346, 349, 353 (2007). Nonetheless, the plaintiff may introduce evidence of such harm “in order to demonstrate reprehensibility,” because “harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible.” *Id.* at 355. See also *Guyoungtech* 156 So. 3d at 385-86.

Regarding a defendant’s out-of-state conduct, the Supreme Court has held that a state cannot punish a defendant “for conduct that was lawful where it occurred and that had no impact on [the State] or its residents,” or impose a sanction “to deter conduct that is lawful in other jurisdictions.” *BMW*, 517 U.S. at 572-73. Also, “as a general rule, . . . a State [does not] have a legitimate concern in imposing punitive damages to punish a defendant for *unlawful* acts committed outside of the State’s jurisdiction.” *Campbell*, 538 U.S. at 421 (emphasis added). A defendant’s lawful or unlawful out-of-state conduct is relevant to reprehensibility, though, “when it demonstrates the deliberateness and culpability of the defendant’s action in the State where it is tortious,” as long as that conduct has a “nexus to the specific harm suffered by the plaintiff.” *Id.* at 422; see also *BMW*, 517 U.S. at 573-74 n.21.

2. Ratio—The second guidepost is the ratio of the punitive award to “the actual harm inflicted on the plaintiff,” as measured in compensatory damages. *BMW*, 517 U.S. at 580. While “reject[ing] the notion that the constitutional line is marked by a simple mathematical formula,” *id.* at 582, the Court has stated that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process”; that “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety”; and that “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” *Campbell*, 538 U.S. at 425. In *Southern Pine Electric Cooperative v. Burch*, 878 So. 2d 1120 (Ala. 2003), the Alabama Supreme Court described a ratio of three to one as a “benchmark” that is “presumptively reasonable.” *Id.* at 1128.

A higher ratio may be justified where compensatory damages are not substantial, such as where “a particularly egregious act has resulted in only a small amount of economic damages” or where “the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.” *BMW*, 517 U.S. at 582. For example, in *Engineered Cooling Services, Inc. v. Star Service, Inc.*, 108 So. 3d 1022 (Ala. Civ. App. 2012), the court affirmed \$30,000 in punitive damages where only \$1 was awarded as nominal compensatory damages, because the plaintiff “could not prove the specific amount of the profits it lost” as a result of the defendant’s wrongdoing. *Id.* at 1036.

In cases where the defendant’s conduct could have caused more harm than it actually did cause, the “likely” or “potential” harm can be added to the actual harm for purposes of the ratio guidepost. *See BMW*, 517 U.S. at 581-82. As an example, the Court in *BMW* noted that “in upholding the \$10 million [punitive] award in *TXO [Production Corp. v. Allied Resources Corp.]*, 509 U.S. 443 (1993), we relied on the [ratio] between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded.” *BMW*, 517 U.S. at 581 (emphasis added). Parts of the decisions in *TXO*, 509 U.S. at 460-61, and *BMW*, 517 U.S. at 582, indicate that likely or potential harm to persons other than the plaintiff may be

taken into account; but in *Philip Morris*, 549 U.S. 346, the Court stated that only the “harm potentially caused *the plaintiff*” can be considered. *Id.* at 354 (emphasis in original).

Since only punitive damages, and not compensatory damages, are recoverable for wrongful death under Alabama law, the ratio guidepost cannot and does not apply in wrongful-death cases. *See Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1218 (Ala. 1999).

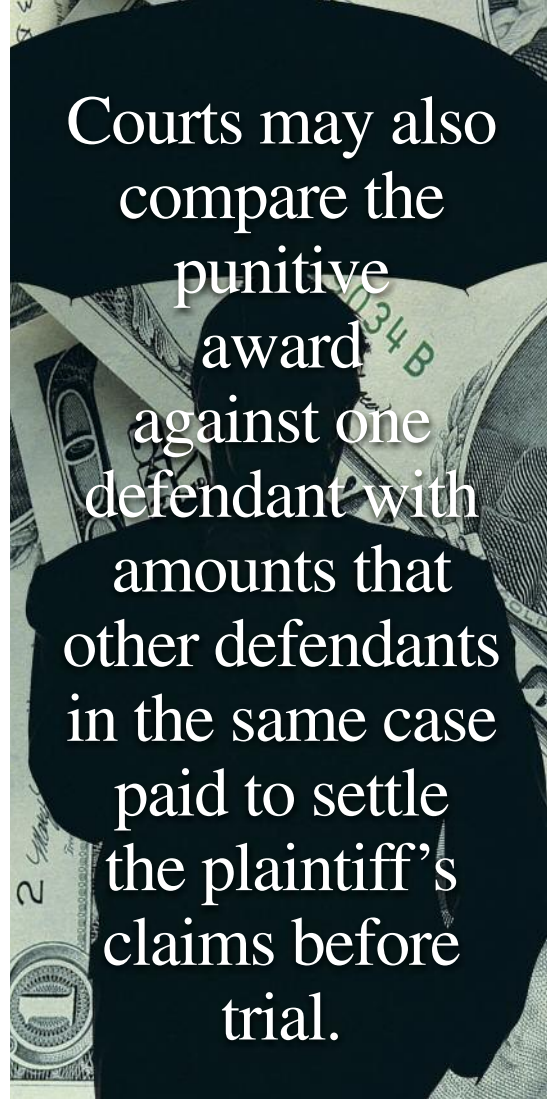
3. Comparable civil or criminal penalties—The third guidepost is comparison of “the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct.” *BMW*, 517 U.S. at 583. The reviewing court “should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.” *Id.* (internal quotation marks omitted). In *BMW*, the Court reviewed a \$2 million punitive award for fraud consisting of not informing car buyers “of pre-delivery damage to new cars when the cost of repair amounted to less than 3 percent of the car’s suggested retail price.” *Id.* at 562. The Court found that the \$2 million award was much higher than statutory penalties for comparable misconduct, noting that the maximum statutory penalty in Alabama for violation of the Deceptive Trade Practices Act was \$2,000, that other states had enacted penalties ranging from \$5-10,000 and that in some states the penalty depended on whether the violation was a first or subsequent offense. *Id.* at 584. The Court stated that “[n]one of these statutes would provide an out-of-state distributor with fair notice that the first violation—or, indeed the first 14 violations—of its provisions might subject an offender to a multimillion dollar penalty.” *Id.*

Despite the Supreme Court’s admonition to “accord substantial deference to legislative judgments,” the Alabama Supreme Court has given little if any weight to this guidepost when statutory penalties are minimal. *See, e.g., Life Ins. Co. of Ga. v. Parker*, 726 So. 2d 619, 622-23 (Ala. 1998) (“[b]ecause the legislature has set the statutory penalty for [insurance fraud] at such a low level [\$1,000], there is little basis for comparing it with any meaningful punitive damages award”); *Winn-Dixie of Montgomery, Inc. v. Colburn*, 709 So. 2d 1222, 1225 (Ala. 1998). When a statute provides a private right of action, though, courts may

consider, as a comparable civil penalty, what damages a plaintiff could recover in such an action. *See Ford Motor Co. v. Sperau*, 708 So. 2d 111, 121-22 (Ala. 1997) (plurality opinion) (fact that statute allowed recovery of treble damages, costs and attorney’s fees weighed against reduction of punitive damages); *Orkin Exterminating Co. v. Jeter*, 832 So. 2d 25, 40-41 (Ala. 2001).

In *BMW*, the Court stated “there does not appear to have been any judicial decision in Alabama or elsewhere indicating that [BMW’s conduct] might give rise to such severe punishment.” *Id.*, 517 U.S. at 584. This indicates that the reviewing court may take into account how the punitive award compares with others affirmed in similar cases. *See Lance*, 731 So. 2d at 1219. The Alabama Supreme Court has frequently done this in wrongful-death cases. *See id.*; *Boudreaux v. Pettaway*, 108 So. 3d 486, 504 (Ala. 2012), *abrogated on other grounds by Gillis v. Frazier*, 2014 WL 3796382 (Ala. Aug. 1, 2014); *McKowan v. Bentley*, 773 So. 2d 990, 999 (Ala. 1999); *Cherokee Elec. Co-op. v. Cochran*, 706 So. 2d 1188, 1194-95 (Ala. 1997).

Courts may also compare the punitive award against one defendant with amounts that other defendants in the same case paid to settle the plaintiff’s claims before trial. In *Lance*, 731 So. 2d 1204, the jury awarded \$13 million in punitive damages against Lance for wrongful death; another defendant, whose conduct was substantially culpable, settled for \$3 million; and the third defendant, whose conduct was the most reprehensible, settled for \$7 million. *Id.* at 1207, 1218-20. The court stated that “the opinions of able counsel in an adversarial system as to the proper measure of damages, as evidenced by the amounts paid in the *pro tanto* settlements, are highly credible benchmarks upon which to rely”; that the \$13-million verdict “wrongly treat[s] Lance as the most culpable



Courts may also compare the punitive award against one defendant with amounts that other defendants in the same case paid to settle the plaintiff’s claims before trial.

defendant”; and that reduction of the verdict to \$4 million was required for reasons including the “disparity between the [\$13-million] verdict and the amounts of the *pro tanto* settlements[.]” *Id.* at 1219-21. *See also Foremost Ins. Co. v. Parham*, 693 So. 2d 409, 434 (Ala. 1997) (noting amounts paid by co-defendant to settle fraud case).

As to comparable *criminal* penalties, courts are to consider criminal fines and also whether the defendant’s conduct was punishable by imprisonment. *See Myers v. Central Fla. Inv., Inc.*, 592 F.3d 1201, 1222 (11th Cir.), *cert. denied*, 562 U.S. 890 (2010). The latter circumstance has been cited as weighing against reducing damages. *See, e.g., Myers*, 592 F.3d at 1222-23; *Talent Tree Personnel Servs., Inc. v. Fleenor*, 703 So.

2d 917, 927 (Ala. 1997). The U.S. Supreme Court has cautioned, however, that while the “existence of a criminal penalty [has a] bearing on the seriousness with which a State views the wrongful action,” the criminal penalty “has less utility” in “determin[ing] the dollar amount of the award,” and that “care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed[.]” *Campbell*, 538 U.S. at 428.

Green Oil factors

Some of the *Green Oil* factors are duplicative; these are combined for purposes of this analysis.

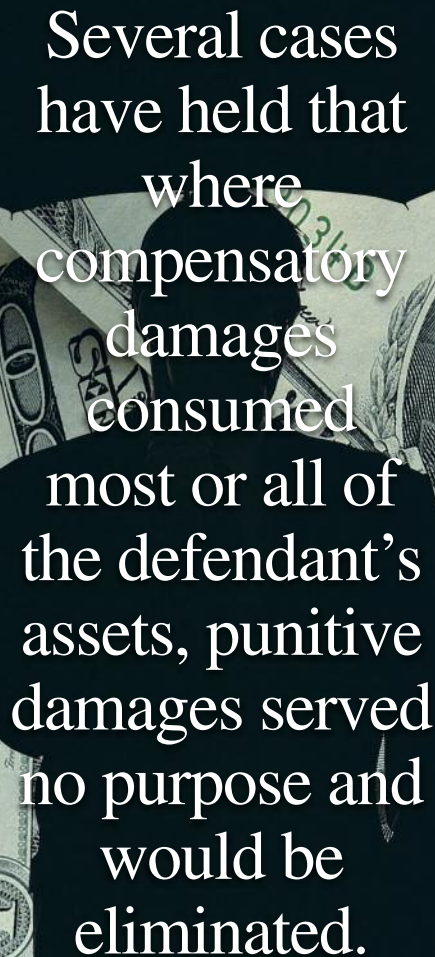
Culpability/reprehensibility—In *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), the court stated that the “culpability of the defendant’s conduct” is to be considered, *id.* at 1379, and in *Green Oil*, 539 So. 2d 218, that the “degree of reprehensibility of the defendant’s conduct” must be evaluated, *id.* at 223. There is no discernible difference between

these factors. In assessing reprehensibility, the court is to consider “the duration of [the] conduct, the degree of the defendant’s awareness of any hazard which [its] conduct has caused or is likely to cause, and any concealment or ‘cover-up’ of that hazard, and the existence and frequency of similar past conduct.” *Id.* The latter is the same as one of the factors listed in *Ala. Code* § 6-11-23(b): “whether or not the defendant has been guilty of the same or similar acts in the past.”

Desirability of discouraging others—This factor, listed in *Hammond*, 493 So. 2d at 1379, “calls for a balance between the severity of the conduct and society’s interest in preventing a recurrence of the conduct,” in that “the greater the severity of the conduct, the greater society’s interest in preventing recurrence.” *Industrial Chem. & Fiberglass Corp. v. Chandler*, 547 So. 2d 812, 831 (Ala. 1988).

Impact of the verdict on the defendant’s financial position—*Hammond* states that courts are to consider the “impact upon the parties,” *id.*, 493 So. 2d at 1379, which is “best fixed [as to the defendant] by post-judgment review of financial worth,” *Industrial Chem.*, 547 So. 2d at 832; *Green Oil* dictates assessment of the defendant’s “financial position,” *id.*, 539 So. 2d at 223; and § 6-11-23(b) mandates consideration of the “economic impact of the verdict on the defendant.” The idea is that punitive damages should “sting” but not destroy the defendant financially. *See Orkin*, 832 So. 2d at 42.

A defendant’s financial position is determined by the defendant’s “actual assets and liabilities,” or net worth. *Gillis v. Frazier*, 2014 WL 3796382, *6 (Ala. Aug. 1, 2014). Liability-insurance coverage for the judgment is considered an asset. *See Tillis Trucking Co. v. Moses*, 748 So. 2d 874, 887, 888 (Ala. 1999);



Several cases have held that where compensatory damages consumed most or all of the defendant’s assets, punitive damages served no purpose and would be eliminated.

Cherokee Elec., 706 So. 2d at 1195. A potential claim by the defendant, though, against the defendant’s liability insurer for bad faith or negligent failure to settle is not an asset, *see Gillis*, 2014 WL 3796382, *6, nor is a defendant’s spouse’s “portion of their jointly owned assets,” *id.* A defendant’s liabilities include any compensatory damages the jury or trial court awarded. *See Robbins v. Sanders*, 927 So. 2d 777, 791 (Ala. 2005); *Wilson v. Dukona Corp.*, 547 So. 2d 70, 73-74 (Ala. 1989). Several cases have held that where compensatory damages consumed most or all of the defendant’s assets, punitive damages served no purpose and would be eliminated. *See Robbins*, 927 So. 2d at 791; *Wilson*, 547 So. 2d at 73-74; *Williams v. Williams*, 786 So. 2d 477, 483-85 (Ala. 2000).

A punitive award should not be so high in relation to the defendant’s net worth that it permits “just bare survival”; rather, it should allow the “continued productive economic viability” of the defendant. *Industrial Chem.*, 547 So. 2d at 838 (quoting John C. Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 156 (1986)). In *BMW of North America, Inc. v. Gore*, 701 So. 2d 507 (Ala. 1997), the Alabama Supreme Court “suggest[ed] that a trial court might consider whether a punitive damages award that exceeds 10 percent of the defendant’s net worth crosses the line from punishment to destruction, particularly where the defendant’s conduct is not highly reprehensible,” and that “the fact that a punitive damages award exceeds 10 percent of the defendant’s net worth could suggest that the award should be reduced.” *Id.* *See also Orkin*, 832 So. 2d at 42. The court has cautioned, however, that it has not adopted any “definitive rule that a punitive-damages award may not exceed 10 percent of a defendant’s net worth.” *Boudreaux*, 108 So. 3d at 505. *See Hillcrest Ctr., Inc. v. Rone*, 711 So. 2d 901, 910 (Ala. 1997) (Butts, J., concurring in part

and dissenting in part) (noting that punitive award, as reduced by supreme court, still amounted to 44 percent of defendant's net worth). Also, the "10 percent recommendation" does not apply in wrongful-death cases. *Boudreaux*, 108 So. 3d at 505. See *Tillis Trucking*, 748 So. 2d at 887-88, 891 (wrongful-death case in which punitive damages consumed defendant's entire net worth).

A defendant's wealth is not enough to sustain a punitive award where other factors show that the amount is excessive. See *Campbell*, 538 U.S. at 427; *BMW*, 701 So. 2d at 514-15. The Alabama Supreme Court has reduced punitive damages that were substantially less than 10 percent of net worth and that represented only a small fraction of the defendant's worth. See *Wal-Mart Stores, Inc. v. Goodman*, 789 So. 2d 166, 183-84 (Ala. 2000); *Sperau*, 708 So. 2d at 124; *Parker*, 701 So. 2d at 533-34; *American Pioneer Life Ins. Co. v. Williamson*, 704 So. 2d 1361, 1366-67 (Ala. 1997); *BMW*, 701 So. 2d at 514-15. The court has also reduced punitive damages where the defendant had enough liability insurance to cover most or

all of the damages. See *Cooper & Co. v. Lester*, 832 So. 2d 628, 630, 644-45 (Ala. 2000); *Lance*, 731 So. 2d at 1220, 1221.

A defendant who relies on financial position as a ground for reducing punitive damages has the burden of proving its net worth. Cf. *Fraser v. Reynolds*, 588 So. 2d 448, 452 (Ala. 1991). The defendant should provide the court with specific, credible and persuasive evidence of assets and liabilities, rather than mere conclusory testimony with no documentary support. See *Tanner*, 88 So. 3d at 877-79; *Ross*, 67 So. 3d at 44-45.

Impact on the plaintiff and on innocent third parties—*Hammond* says that courts should consider the "impact upon the parties," *id.*, 493 So. 2d at 1379, and § 6-11-23(b) states that the "economic impact of the verdict on the...plaintiff" is relevant. Defendants have argued that punitive damages constituted a windfall to the plaintiff, see, e.g., *CNH Am., Inc. v. Ligon Capital, LLC*, 160 So. 3d 1195, 1212-13 (Ala. 2013), but that would seem to be true of all punitive awards. The author has not located any case expounding on this factor

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or relying upon it as a basis for reducing a punitive award.

Hammond also states that the “impact on innocent third parties” is relevant. *Id.*, 493 So. 2d at 1379. There appear to be no cases commenting directly on this factor. But in *American Pioneer Life Insurance Co. v. Williamson*, 704 So. 2d 1361 (Ala. 1997), the court stated that punitive damages should not be so high as to “prevent [the defendant-insurer] from meeting its obligations to its insureds,” *id.* at 1366, who would be innocent third parties. And in *Resolution Trust Corp. v. Mooney*, 592 So. 2d 186 (Ala. 1991), wherein the RTC had taken over as receiver of a failed financial institution that defrauded the plaintiffs, the court said that “[w]here the wrongful party is in receivership and the damages are to be paid by innocent creditors, punitive damages create an inequitable result.” *Id.* at 190. The court implied that the RTC was also an innocent third party, stating that “[i]t is improper to impose punitive damages upon RTC for conduct attributable to the failed First Federal before RTC was appointed receiver.” *Id.*

Relationship to actual harm (compensatory damages) and likely harm—Section 6-11-23(b) provides that the “amount of compensatory damages” is relevant, and *Green Oil* states that punitive damages “should bear a reasonable relationship to the harm that is *likely* to occur from the defendant’s conduct as well as to the harm that actually has occurred,” *id.*, 539 So. 2d at 223 (emphasis added). See *Shiv-Ram*, 892 So. 2d at 318-19 (noting other potential or likely harm); *TXO*, 509 U.S. at 460; *but see Philip Morris*, 549 U.S. at 354 (under due process, only potential harm to the plaintiff, not to others, can be considered). If the “actual or likely harm is slight, the [punitive] damages should be relatively small,” but “[i]f grievous, the damages should be much greater.” *Green Oil*, 539 So. 2d at 223.

Removal of profit—If the “wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit[.]” *Green Oil*, 539 So. 2d at 223. This factor is addressed to profit from the particular conduct that occasioned the punitive award, not to profits in general. See *Vulcan Materials*, 992 So. 2d at 1262. And “profit” means profit, not gross sales. See *Sperau*, 709

So. 2d at 123. Though punitive damages should exceed the profit, the fact that an award *greatly* exceeds the profit weighs in favor of reducing the damages. See *Orkin*, 832 So. 2d at 42; *BMW*, 701 So. 2d at 514.

Plaintiff’s costs of litigation—Punitive damages should be enough to include “[a]ll the [plaintiff’s] costs of litigation..., so as to encourage plaintiffs to bring wrongdoers to trial.” *Green Oil*, 539 So. 2d at 223; see also *Vulcan Materials*, 992 So. 2d at 1268. This factor is particularly important where the amount of compensatory damages is small. See *Parham*, 693 So. 2d at 434. “[S]ubstantial litigation costs, alone,” however, “will not justify a substantial [punitive] award.” *Wal-Mart*, 789 So. 2d at 183. If the plaintiff has already recovered attorney’s fees under a statute or contract permitting their recovery, this factor may not be used to support a punitive award. See *Horton Homes*, 832 So. 2d at 57.

Other civil actions and criminal sanctions, in mitigation—*Green Oil* states that “if there have been other civil actions against the same defendant, based on the same conduct,” this is a mitigating factor. *Id.*, 539 So. 2d at 224. This suggests that the mere fact other actions have been filed mitigates punitive damages. See also *BMW*, 701 So. 2d at 515. Other cases, however, indicate that the other civil actions must have resulted in *judgments* against the defendant in order to warrant mitigation. See, e.g., *Talent Tree*, 703 So. 2d at 928; *Life Ins. Co. of Ga. v. Johnson*, 701 So. 2d 524, 534 (Ala. 1997); *Williamson*, 704 So. 2d at 1366; *Enstar Group, Inc. v. Grassgreen*, 812 F. Supp. 1562, 1581 (M.D. Ala. 1993).

If “criminal sanctions have been imposed on the defendant for his conduct,” this is also a mitigating factor. *Green Oil*, 539 So. 2d at 223-24. The defendant should provide evidence as to what punishment was assessed in the criminal proceeding. Cf. *Harrelson v. R.J.*, 882 So. 2d 317, 324 (Ala. 2003). The degree of mitigation depends on the severity of the criminal sanction. See *Enstar*, 812 F. Supp. at 1581.

Efforts and opportunity to remedy the wrong—Section 6-11-23(b) requires consideration of the “nature and the extent of any effort the defendant made to remedy the wrong,” and the “opportunity or lack of opportunity the plaintiff gave the defendant to remedy

the wrong[.]” Remedial action “should be encouraged by th[e] Court’s acknowledging that action as a mitigating factor in a review of a punitive damages award.” *Harrington*, 658 So. 2d at 904. Failure to take pre- or post-verdict remedial action weighs against reduction of damages. See *Pensacola Motor*, 155 So. 3d at 948. Pre-verdict remedial action carries more weight than remedial action taken “only after the jury has returned a substantial punitive damages verdict.” *Harrington*, 658 So. 2d at 904. In *Talent Tree*, 703 So. 2d 917, the court cited the fact that the plaintiff had given the defendants “a reasonable opportunity to remedy the misconduct” as a factor supporting the punitive award. *Id.* at 926.

Conclusion

The standards and procedures for reviewing punitive damages, though not perfect, have proven reasonably successful in preventing excessive awards. Defendants need to take full advantage of these standards and procedures when faced with a judgment for punitive damages. ▲

Endnote

1. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994).
2. This state due-process aspect has seldom been noted in cases since *Fuller*.
3. In the annotated *Alabama Code*, cases listed concerning the “Constitutionality” of § 6-11-21 include *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993), which is described as holding, “This section violated the right to a trial by jury as guaranteed by *Ala. Const.*, Art. I, § 11.” *Henderson* actually held that a *prior* version of § 6-11-21, adopted in 1987 and capping punitive damages at \$250,000 (Act No. 87-185), was unconstitutional. See *Henderson*, 627 So. 2d at 880. The *current* version of § 6-11-21 is based on different legislation adopted in 1999 (Act No. 99-358), which impliedly repealed the 1987 Act. See *Shiv-Ram*, 892 So. 2d at 310-13. The current § 6-11-21 has *not* been ruled unconstitutional.
4. In jury trials, a motion for JML at the close of the evidence is ordinarily a prerequisite to filing a post-judgment motion for JML, and both motions are usually necessary to preserve sufficiency-of-evidence issues for appeal. See *Industrial Techs., Inc. v. Jacobs Bank*, 872 So. 2d 819, 825 (Ala. 2003). The Alabama Supreme Court, however, has held that a defendant may contest the sufficiency of evidence for punitive damages under § 6-11-20(a) for the first time in a post-judgment motion for JML. See *Sears Roebuck & Co. v. Harris*, 630 So. 2d 1018, 1031-32 (Ala. 1993). The author is not aware of any federal case so holding. The best practice, in state and federal courts, is to move for JML on the issue of punitive damages at the close of plaintiff’s case, at the close of all the evidence, and then again post-trial.
5. In wrongful-death cases, the plaintiff may recover punitive damages upon proof of mere negligence to the jury’s reasonable satisfaction. See *Carter v. City of Birmingham*, 444 So. 2d 373, 375 (Ala. 1983); *Alabama Power Co. v. Turner*, 575 So. 2d 551, 553, 556 (Ala. 1991); *Plant v. R.L. Reid, Inc.*, 365 So. 2d 305, 306, 307 (Ala. 1978).



6. *Johansen* indicates that federal courts may still elect the “cautious approach” of remittitur, and that courts *must* utilize remittitur if they decide that a reduction to *less than* the maximum permitted by due process is required. *Id.* 170 F.3d at 1331-32 & n.16, 20. Whether the latter is still true after *Cooper Industries* is unclear.
7. The Seventh Amendment to the U.S. Constitution, providing the right to trial by jury, states in part that “no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.”
8. The portion of § 6-11-23(b) stating that courts may “increase the award” was held unconstitutional. See *Bozeman v. Busby*, 639 So. 2d 501, 502-03 (Ala. 1994). See also *Ex parte Weyerhauser Co.*, 702 So. 2d 1227, 1229 (Ala. 1996) (plaintiff has no right to post-judgment hearing on “the adequacy of punitive damages”) (emphasis added).
9. The rationale supporting *de novo* review on appeal—particularly that “the level of punitive damages is not really a ‘fact’ ‘tried’ by the jury” within the Seventh Amendment, *Cooper Indus.*, 532 U.S. at 537 (some internal quotation marks omitted); *Horton Homes*, 832 So. 2d at 56—likewise supports *de novo* review by the trial court. Also, *Ala. Code* § 6-11-23(a) mandates trial-court review in which “[n]o presumption of correctness shall apply as to the amount of punitive damages awarded by the [jury].” This provision was held unconstitutional in *Armstrong v. Roger’s Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991), but the supreme court seemingly resurrected it in *Horton Homes*, 832 So. 2d at 57. See also *Pensacola Motor Sales, Inc. v. Daphne Automotive, LLC*, 155 So. 3d 930, 946 (Ala. 2013) (citing § 6-11-23(a)). Moreover, the trial court conducts *de novo* review almost by necessity, since the court applies standards (the *BMW* guideposts and *Green Oil* factors) and considers evidence (whatever the parties submitted post-verdict) that the jury does not.

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The Rules Have Just Changed:
DOJ Issues New
Guidance Targeting
Individuals in
Corporate Investigations

By G. Douglas Jones and Christopher J. Nicholson

The economic ravages wrought
by the Great Recession of 2008

altered the lives of millions of people around the country—and the world—in profound and sometimes irrevocable ways. So, too, did the recession change the legal landscape, with perhaps the most direct and well-known consequence being the enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act,¹ which the *Wall Street Journal* called “the biggest expansion of government power over banking and markets since the Depression.”² Nearly a decade after the Great Recession began in the United States, the causes of the financial downturn have been well documented, and they continue to be researched, studied, parsed and written about by some of the finest economic and legal scholars in the world.

And yet, even as the country slowly recovers and the roots of the global economic crisis are better understood, questions of ultimate accountability persist in the public consciousness. Who is to blame? Why has no one been held

accountable? Where are the indictments and the prosecutions? On April 14, 2011, the *New York Times* ran a front-page story with the headline, “In Financial Crisis, No Prosecutions of Top Figures.”³ Three years later, the *New York Times Magazine* published a story titled, “The Fall Guy” in its print version, now available online under the headline “Why Only One Top Banker Went to Jail for the Financial Crisis.”⁴ Last November, former Federal Reserve Chair Ben Bernanke expressed the belief that more corporate executives should have been jailed for their roles in causing the Great Recession.⁵ “[I]t would have been my preference to have more investigation of individual action, since obviously everything what went wrong or was illegal was done by some individual, not by an abstract firm.”⁶ There is also little doubt that the public’s frustration with the lack of prosecutions helped fuel the surprising campaign of Sen. Bernie Sanders, a Democratic Socialist who was never seen as a serious opponent of Hillary Clinton.

Although civil enforcement actions against corporations have resulted in record fines over the last few years, it appears that key officials within the Department of Justice (“DOJ” or “the Department”) have shared Bernanke’s and the general public’s frustrations that there have not been enough criminal charges or civil claims brought against individuals. On September 9, 2015, Deputy Attorney General Sally Quillian Yates⁷ issued a memorandum for general distribution to

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all of the DOJ’s prosecutors and civil litigators, as well as the directors of the Federal Bureau of Investigation and the Executive Office of United States Trustees.⁸ The memorandum is entitled “Individual Accountability for Corporate Wrongdoing,” and its contents—which reflect a blend of policy restatements, expansions and shifts—center on what the DAG characterizes as “six key steps to strengthen our pursuit of individual corporate wrongdoing.”⁹ In accord with the nomenclature given to memoranda authored by Deputy Attorneys General, this memorandum has come to be known simply as the Yates Memo.

The Yates Memo is by no means the first expression of the DOJ’s desire to hold individuals accountable for corporate wrongdoing. For instance, then-Deputy Attorney General Eric Holder issued a memorandum in 1999 to all DOJ

component heads and United States Attorneys entitled, “Bringing Criminal Charges Against Corporations.”¹⁰ Significantly, Holder wrote in that memorandum that

Charging a corporation ... does not mean that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Further, imposition of individual criminal liability on such individuals provides a strong deterrent against future corporate wrongdoing.¹¹

Clearly, however, the DOJ has struggled with developing a consistent, workable policy involving corporate versus individual criminal liability. The Holder Memo is the first in a line of memoranda from Deputy Attorneys General that include the Thompson Memo (2003),¹² the McNulty Memo (2006)¹³ and the Filip Memo (2008),¹⁴ all of which restated the Department’s desire to hold individuals accountable for corporate wrongdoing, and throughout which the principles applicable to the prosecution of corporate wrongdoing continued to be refined. This evolution included the adoption in the U.S. Attorneys’ Manual (“USAM”) of the Principles of Federal Prosecution of Business Organizations.¹⁵

Fifteen years after issuing the Holder Memo, Attorney General Holder echoed his 1999 writings

in remarks delivered at NYU regarding financial fraud cases.

“[W]henever we have resolved these cases—whether they were civil or criminal in nature—we have almost always reserved the right to continue our civil and criminal investigations into individual executives at the respective firms. This is because, when it comes to financial fraud, the department recognizes the inherent value of bringing enforcement actions against individuals, as opposed to simply the companies that employ them.”¹⁶

Elaborating on this theme, Attorney General Holder stated that civil and criminal investigations of individual corporate actors enhance accountability, promote fairness and constitute a powerful deterrent against future corporate wrongdoing.¹⁷ A year later, Deputy Attorney General Yates used the stage at NYU as the launching pad for the Yates Memo, referencing Holder’s words that highlighted the (at least rhetorical) consistency of the DOJ’s policy regarding individual accountability, and providing context to the “six key steps” of the Yates Memo.¹⁸

While the Yates Memo may not have changed the basic rhetoric of the DOJ, however, it most certainly, and arguably dramatically, altered the functional policy of DOJ prosecutors and civil litigators in ways that will affect general counsel, outside corporate counsel and litigators in their representation

of businesses and executives. Indeed, as the DAG herself stated, “The rules have just changed.”¹⁹

It is crucial to emphasize that the guidance set forth in the Yates Memo applies to federal prosecutors and litigators in both civil *and* criminal matters.²⁰ Further, Deputy Attorney General Yates expressly states that the principles of the memo apply not only prospectively to new matters, but should also be incorporated into pending matters to the extent practicable.²¹ When this article comes to print, many of you will likely already have seen certain subtle or overt shifts in the DOJ’s approach to cases involving corporate misconduct. Careful review of the Yates Memo’s “six key steps” is therefore critical for corporate counsel who may come to represent either the entity or an individual in the DOJ’s crosshairs.

What the Yates Memo Says

The Yates Memo outlines “six key steps” for DOJ lawyers to follow in order to broaden the focus on corporate wrongdoing to include individual responsibility.

“1. To be eligible for *any* cooperation credit, corporations must provide to the Department all relevant facts about the individuals involved in corporate misconduct.”^{22, 23}

Deputy Attorney General Yates leads with the strongest policy shift—the “teeth” of the changes

outlined in her memorandum. No longer will it be sufficient for a corporation to cooperate short of “giving up” individuals to the investigators. As the DAG made clear in her speech, there will no longer be any partial credit when it comes to identifying individuals.

Effective immediately, we have revised our policy guidance to require that if a company wants any credit for cooperation, any credit at all, it must identify all individuals involved in the wrongdoing, regardless of their position, status or seniority in the company and provide all relevant facts about their misconduct. It’s all or nothing. No more picking and choosing what gets disclosed. No more partial credit for cooperation that doesn’t include information about individuals.²⁴

Furthermore, Yates recognizes that this “all-or-nothing” approach is a significant departure from prior practice.

[U]ntil now, companies could cooperate with the government by voluntarily disclosing improper corporate practices, but then stop short of identifying who engaged in the wrongdoing and what exactly they did. While the companies weren’t entitled to full credit for cooperation, they could still get credit for what they did do and that credit could be enough to avoid indictment.²⁵

And, under the new policy, it will not be enough for a corporation to merely divulge what it already knows about potentially culpable individuals. The Yates Memo places an affirmative burden on a corporation to conduct an investigation focused on rooting out individual wrongdoers, if that corporation wants any cooperation credit. In Yates's words:

“The rules have just changed. Effective today, if a company wants any consideration for its cooperation, it must give up the individuals, no matter where they sit within the company. And we're not going to let corporations plead ignorance. If they don't know who is responsible, they will need to find out. If they want any cooperation credit, they will need to investigate and identify the responsible parties, then provide all non-privileged evidence implicating those individuals.”²⁶

Yates likened the new policy to that already routinely applied to individual cooperators in other types of criminal investigation, citing the example of a drug trafficker “flipping” against his co-conspirators.²⁷

While Deputy Attorney General Yates's remarks are heavy on the criminal investigation analogies, her memo is clear in its application to both criminal and civil matters. Utilizing an example from the False Claims Act, the memo states that in order for a corporation to be considered to have “fully cooperated”

with the government investigation, “at a minimum, all relevant facts about responsible individuals must be provided.”²⁸

Finally, a corporation's obligation to cooperate may not end even at resolution of the matter. The Yates Memo emphasizes that DOJ attorneys should, of course, attempt to learn as much about responsible individuals as possible during the course of the investigation.²⁹ The Memo also notes, however, that the government may include language in a settlement agreement or plea that requires a corporation to continue to provide information regarding culpable individuals, with the potential for specified penalties or other consequences for failure to comply.³⁰ In fact, Deputy Attorney General Yates's remarks accompanying the release of the memo indicate that such language will be standard practice in any settlement or plea agreement.³¹

“2. Both criminal and civil corporate investigations should focus on individuals from the inception of the investigation.”³²

The second policy announced by the Yates Memo is a logical, and logistical, outgrowth of the memo's general emphasis on individual accountability for corporate wrongdoing. If the Department's objective is to hold individuals accountable, it stands to reason that corporate investigations should hone in on individuals from the outset. As the DAG noted in her speech, “One of the things we have learned from experience is that it is extremely difficult to build a case against individuals,

civil or criminal, unless we focus on individuals from the very beginning.”³³ As a result of these lessons, all DOJ attorneys have now been directed to concentrate on individuals from the beginning of each investigation, be it civil or criminal.³⁴ The broader corporate investigation and the investigations of individuals are to proceed in parallel, and a delay in one should not affect the other.³⁵

The memo specifies three goals that it asserts can be accomplished through implementation of this second step.

- Maximize the discovery of corporate wrongdoing, because a corporation can only act through individuals;
- Increase the likelihood that individuals with knowledge will cooperate and provide information against individuals further up the corporate hierarchy; and
- Maximize the chances that the final resolution of the investigation will result in civil and/or criminal charges against not only the corporation, but also against culpable individual.³⁶

In short, the Department believes that it can maximize its effectiveness against not only culpable individuals, but also the target corporation as a whole, by focusing on individuals from the outset.

Interestingly, in her remarks on this section of the memo, Deputy Attorney General Yates pointed out, by way of example, that if an investigation focuses only on the corporation as a whole, it is frequently difficult to go back and

build a *criminal* case against individual defendants.³⁷ The corollary, of course, is that focusing on individuals from the outset will facilitate building criminal cases against them. While we hesitate to place too much emphasis on isolated sentences in the DAG’s speech, this could be perceived as a tipoff to the practitioner regarding the Department’s current mindset.

“3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another.”³⁸

The Department has had a longstanding policy that federal prosecutors and civil attorneys handling white-collar matters should communicate early and often in order to maximize the effectiveness of DOJ resources and bring the full range of its arsenal to bear.³⁹ While the stated policy may not be new, the Yates Memo “formaliz[es] these lines of communication”⁴⁰ with the goal of preserving all of the civil and criminal remedies available to the government under the laws applicable to each investigation’s circumstances, regardless of whether the investigation began as a civil or criminal inquiry.⁴¹

Practically speaking, this means that at the outset of either a civil or a criminal case, Department attorneys will be obligated to alert the “other side of the house” about the investigation.⁴² Under certain circumstances, it may not always be wise or permissible for DOJ attorneys to disclose information even internally to one another, such as when a criminal investigation involves undercover operations.⁴³

The corollary, of course, is that focusing on individuals from the outset will facilitate building criminal cases against them.

Civil attorneys and prosecutors are now directed, however, to coordinate to the fullest extent allowed by the law.⁴⁴ In order to facilitate this cooperation, prosecutors have been directed since before the Yates Memo to use tools other than grand jury subpoenas in conducting their investigations where possible, in order to permit the greatest amount of information sharing among government attorneys.⁴⁵ Corporate counsel should expect to see the use of this tactic continue and expand.

In what seems like an obvious directive, the Yates Memo instructs federal civil attorneys to alert their prosecutor counterparts when they discover evidence that would be helpful to an existing criminal investigation or lead to a new inquiry.⁴⁶ Likewise, when prosecutors discover evidence of civil liability, they are to share that information with their counterparts on the civil side.⁴⁷ This cooperation should take place regardless of the status of the civil or criminal investigations, and prosecutors are specifically directed to confer with DOJ civil attorneys if they decide

not to pursue criminal charges against individuals, so that the civil attorneys can make an assessment of civil liability at that time.⁴⁸

“4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals.”⁴⁹

The Yates Memo teaches that from now on, absent extraordinary circumstances or approved Department policy, the government will not enter into any agreement with a corporation whereby immunity for individual directors, officers or employees is provided or charges against such individuals are dismissed.⁵⁰ Likewise, absent extraordinary circumstances, the government will not enter into any agreement with a corporation whereby civil claims against individuals are released.⁵¹ To do otherwise requires personal approval, in writing, by the relevant Assistant Attorney General or United States Attorney.⁵²

“5. Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized.”⁵³

The fifth key step outlined by the Yates Memo conceptually ties into the fourth. While the government will usually resolve cases against individuals before or at the same time as the related corporate case—and should not let delays in corporate investigations delay the pursuit or resolution of individual

cases—there are circumstances in which the corporate matter will resolve first.⁵⁴ As discussed above, the fourth key step dictates that the corporate resolution must not protect individual wrongdoers from civil or criminal liability. The fifth key step of the Yates Memo requires that if a corporate resolution is reached prior to the resolution of all related individual investigations, DOJ attorneys must document the following in the prosecution or corporate authorization memorandum: 1) a discussion of the potentially liable individuals, 2) a description of the current status of the investigation of the individuals, including work remaining to be done, and 3) a plan to bring the investigation to a close within the applicable statute of limitations.⁵⁵ Likewise, DOJ attorneys must document at the conclusion of each investigation any decision not to bring civil claims or criminal charges against culpable individuals, and seek approval of the same from the United States Attorney or Assistant Attorney General in charge of the investigation, or a designee.⁵⁶

In combination, the fourth and fifth key steps of the Yates Memo will likely lead to an increase in the number and frequency of prosecutions and civil claims brought against individual corporate directors, officers and employees. The unavailability of individual protections in resolutions with corporations, the increased Department documentation and scrutiny of individual investigations and the supervisory approval requirement for declinations will put pressure

An individual's net worth, however, will no longer be a deciding factor in determining whether a monetary judgment will be sought.

on the government's prosecutors and civil litigators to pursue investigations to their ultimate conclusions.

“6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.”⁵⁷

The gist of the sixth key step of the Yates Memo is that DOJ civil attorneys should weigh the deterrent value of civil actions against individual corporate wrongdoers equally with the value of winning monetary recoveries, much like their prosecutor counterparts do.⁵⁸ In her remarks, Yates characterized this as a “broadening ... of [the DOJ's] civil enforcement strategy.”⁵⁹ The DAG noted that while some of the government's civil litigators had pursued culpable individuals in the past, others had prioritized targets with deeper pockets.⁶⁰ An individual's net worth, however, will no longer be a deciding factor in determining whether a monetary judgment will

be sought. Now, even if an individual defendant cannot satisfy the full amount of a judgment, the DAG believes that “we can take what they have and ensure that they don't benefit from their wrongdoing.”⁶¹ Furthermore, “[t]hese individual civil judgments will also become part of corporate wrongdoers' resumes that will follow them throughout their careers.”⁶² This stern calculus is expressly designed to change corporate culture and protect public resources in the future, rather than focusing on the dollar value of more immediate monetary recoveries.⁶³

Despite the Yates Memo's emphasis on future deterrence, an individual's ability to pay continues to be a factor to be weighed—though merely one of several—in the Department's decision of whether or not to bring civil claims against him or her.⁶⁴ Specifically, the government's civil litigators should consider “whether the person's misconduct was serious, whether it is actionable, whether the admissible evidence will probably be sufficient to obtain and sustain a judgment and whether pursuing the action reflects an important federal interest.”⁶⁵ Other factors include the individual's “past history, ... the circumstances relating to the commission of the misconduct, the needs of the communities [the DOJ] serve[s], and federal resources and priorities.”⁶⁶ Both the Yates Memo and her accompanying speech note that these factors are similar to those considered by federal prosecutors deciding whether to bring charges.⁶⁷

What the Yates Memo Does Not Say

As with practically all government directives, the Yates Memo leaves open for evolution a number of important, practical items, especially with regard to measuring a corporation's cooperation in any investigation. For instance, the all-or-nothing nature of corporate cooperation set forth in the Yates Memo could be problematic for a number of reasons, not the least of which is the lingering uncertainty about who makes the determination of whether a corporation has provided "all relevant facts" or not, and how that determination is made. Deputy Attorney General Yates sought to reassure the corporate bar in her remarks, stating that corporations need not "boil the ocean" and embark upon a multimillion-dollar investigation every time they learn about misconduct," but rather they should conduct a "thorough investigation[]" tailored to the wrongdoing."⁶⁸ When in doubt, she says, call the prosecutor.⁶⁹

Unfortunately, neither the memo nor Yates's accompanying remarks provide the public with much clarity about what will constitute a thorough investigation in the Department's judgment, leaving corporations and their counsel in an uncomfortable "wait-and-see" position which does not always lend itself to making good, informed decisions regarding cooperation. And, the DAG's reassurances aside, the memo will almost certainly have the effect of increasing the

cost of internal corporate investigations regardless of whether the corporation decides to cooperate with the government or not, as corporations seek to develop information on individual wrongdoing while simultaneously rooting out and correcting any systematic deficiencies.

Likewise, it is not clear what circumstances must exist in order for individuals to be absolved while resolving issues for the corporation. Neither the Yates Memo nor the speech delivered by the Deputy Attorney General in conjunction with its issuance provides any clarification about the "extraordinary circumstances" under which a criminal or civil resolution with the corporation might provide some protection for directors, officers or employees. Yates did take pains, however, to emphasize that only under the "rarest of circumstances" would this be possible.⁷⁰

Advice for the Practitioner

Now that we have unpacked the Yates Memo, what does it mean for corporate counsel and defense attorneys going forward? Deputy Attorney General Yates has said that, "[w]hile these policy shifts are effective immediately, the public won't see the impact of these steps overnight. Some of these policies will affect cases that are only beginning now and may take years to become public."⁷¹ Attorneys advising corporations or their directors, officers and employees, however, need to begin preparing their clients immediately, even as the

full impact of the memo may not become clear for some time yet.

The first response is education. The careful attorney should alert his or her clients to the shift in the DOJ's prosecutorial and civil focus on individual defendants before misconduct enters the picture, if possible. In Yates's words, the Department is looking to change corporate culture, to engender a shift away from the perception of "liability as a cost of doing business"⁷²—where a corporation may simply pay a fine—to an understanding that corporate directors, officers and employees have a real prospect of facing severe criminal or civil penalties if they engage in wrongdoing. Corporate clients and key personnel need this information quickly, so they can begin formulating companywide policies and procedures that protect both the corporate entity and its people.

Now is an ideal time for corporate clients to review their compliance programs, both internally and with outside counsel or compliance consultants. Even a robust compliance program should be carefully reexamined in light of the DOJ's new focus on individual accountability. Compliance programs that targeted and remedied primarily systemic failures will no longer be enough in the post-Yates world. Wise corporations that want to preserve the option of cooperation will, like the government, design their compliance regimes and internal investigations to generate evidence of individual wrongdoing, ideally under the protection of the attorney-client privilege. Corporate counsel may wish to review

the “Corporate Compliance Programs” section of the Principles of Federal Prosecution of Business Organizations, at USAM § 9-28.800, as they evaluate the effectiveness of current protocols and develop new measures.

As government investigations and litigation continue to develop post-Yates, corporate clients may find new challenges in compliance. It is possible that, while the policies set out in the Yates Memo may indeed deter corporate wrongdoing, they may also have a chilling effect on the willingness of individual corporate employees or officers to come forward with crucial evidence, as they consider the risk of becoming a target or as they assert their rights under the Fifth Amendment. Corporations may also increasingly find themselves in situations in which they have a conflict of interest with current or former employees, officers or directors, such that it becomes more frequently necessary to find separate counsel for those individuals.⁷³ Similarly, *Upjohn* warnings, always important in internal investigation interviews, are now paramount in the post-Yates world.⁷⁴ It would be prudent to add to the standard *Upjohn* warnings some language informing the interviewee that the corporation may choose to cooperate with the government, and that in so doing, the corporation may reveal information developed in the interview to the government.

Corporations will also continue to face difficult circumstances surrounding the internal investigations they conduct and the

ultimate decision whether or not to cooperate fully with the government, with stakes that have now been markedly raised. Well-designed internal investigations will be conducted under the protection of the corporation’s attorney-client privilege, and we do not advocate a change in that practice. Corporations seeking to qualify for cooperation credit post-Yates, however, will encounter situations in which they must seriously consider waiver issues, in order to either reveal information regarding individual wrongdoers or to demonstrate to the government the thoroughness and sufficiency of the corporate response to the wrongdoing, even (and perhaps especially) if the corporation is unable to identify the wrongdoers or their specific conduct.

This is true even though the DOJ has long since reversed course from the Thompson Memo, which in 2003 taught that federal prosecutors could, under certain circumstances, proactively request a waiver of privilege from the corporation, usually regarding the internal factual investigation.⁷⁵ For the past eight years, the DOJ has drawn a distinction between what it considers “core” attorney-client communications or work product, and the facts that are generated in an internal investigation.⁷⁶ Corporations have made, and will routinely and increasingly continue to make, waiver analyses, because while “[e]ligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection,”⁷⁷ it is dependent upon disclosure of the

relevant facts,⁷⁸ which will often be developed under those privileges. Under the all-or-nothing cooperation credit test of the Yates Memo, some corporations may simply decide that the risk outweighs the reward.

Last, but certainly not least, lawyers will need to brace their corporate clients for the answer to the question that is always first and foremost on the client’s mind: how much is this going to cost? The short answer is simply “a lot.” The longer answer gets more complicated because independent teams of lawyers, investigators and outside experts, such as forensic accountants, will be required to meet DOJ’s heightened expectations. Clearly, both governmental and internal investigations will take longer, and will be more complicated and more expensive than in times past.

Final Thoughts

It is generally thought that the United States Government has unlimited resources to throw at any investigation, civil or criminal. The reality, however, is that is not the case. With the growing emphasis on terrorism, cybercrime and increasingly complex global financial crimes, DOJ resources are stretched thin. While the Yates Memo is clearly a reaction to the desire for more individual accountability, the practical effect is just as clearly to shift the investigative burden to the private sector. In the future, no one should be surprised to see that for all practical purposes, outside corporate

counsel or their lead investigative professional will become the “case agent” for civil and criminal actions directed toward individuals.

It will also be interesting to see how enterprising lawyers for the defense will shape the practical effects of the Yates Memo. That the Yates Memo is the fifth such memo in only 17 years is due in part to the reactions, and sometimes exploitations, of a very intelligent defense bar. Expect nothing less in response to the Yates Memo.

One area that may be particularly fertile for some interesting clarifications is the concept of constitutional rights for corporations. There is a long line of cases essentially holding that a corporation does not enjoy the same constitutional rights as individuals. For instance, it is now well settled that a corporation has no Fifth Amendment privilege against self-incrimination,⁷⁹ but is that notion now shifting? Recent decisions of the United States Supreme Court have given corporations First Amendment protections in the context of political contributions.⁸⁰ If a corporation has the right of free speech, can the Government then force that corporation to exercise that speech, either through testimony or the production of documents?

As with any new government directive, especially one that appears to be as dramatic as the Yates Memo, lawyers who practice in the area of government investigations will need to be especially resourceful, efficient and strategic in representing their clients. In short, buckle up—it is going to be an interesting ride. ▲

In the future, no one should be surprised to see that for all practical purposes, outside corporate counsel or their lead investigative professional will become the “case agent” for civil and criminal actions directed toward individuals.

Endnote

1. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376.
2. Damian Paletta and Aaron Lucchetti, *Law Remakes U.S. Financial Landscape*, WALL STREET JOURNAL (Jul. 16, 2010), <http://www.wsj.com/articles/SB10001424052748704682604575369030061839958>.
3. Gretchen Morgenson and Louise Story, *In Financial Crisis, No Prosecutions of Top Figures*, N.Y. TIMES (Apr. 14, 2011), http://www.nytimes.com/2011/04/14/business/14prosecute.html?_r=2.
4. Jesse Eisinger, *Why Only One Top Banker Went to Jail for the Financial Crisis*, N.Y. TIMES MAGAZINE (Apr. 30, 2014), <http://www.nytimes.com/2014/05/04/magazine/only-one-top-banker-jail-financial-crisis.html>.
5. Susan Page, *Ben Bernanke: More Execs Should Have Gone to Jail for Causing Great Recession*, USA TODAY (Nov. 30, 2015), <http://www.usatoday.com/story/news/politics/2015/10/04/ben-bernanke-exec-jail-great-recession-federal-reserve/72959402/>.
6. *Id.*
7. Deputy Attorney General Yates will sometimes hereinafter be referenced as the “DAG.”
8. The full text of the Yates Memo may be found at <https://www.justice.gov/dag/file/769036/download>.
9. *Id.*
10. This document was known as the Holder Memo, the full text of which may be found at <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF>.
11. *Id.* at § I(B).
12. The full text of the Thompson Memo may be found at http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf.
13. The full text of the McNulty Memo may be found at https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf.
14. The full text of the Filip Memo may be found at <https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf>.
15. USAM 9-28.000 *et seq.*, available at <https://www.justice.gov/usam/usam-9-28000-principles-federal-prosecution-business-organizations#9-28.800>.
16. The full text of Attorney General Holder’s remarks may be found at <https://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law>.
17. *Id.*
18. The full text of Deputy Attorney General Yates’s remarks may be found at <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school>. Further citation herein to the DAG’s speech will be noted simply as the “Yates Speech.”
19. *Id.*
20. Yates Memo at 2.
21. *Id.* at 3.
22. *Id.* (emphasis in original); *see generally* USAM 9-28.700, 9-28.720.
23. Cooperation by the corporation will not entitle an entity to immunity (*see* USAM 9-28.740), but it is one of the only means by which a corporation can mitigate the consequences of a federal prosecution. *See* United States Sentencing Commission, *Guidelines Manual*, Ch. 8, intro. comment. (Nov. 2015). Pursuant to USSG §8C2.5(g), a corporation may be eligible for a reduction of its culpability score based on timely self-reporting, full cooperation and recognition and acceptance of culpability (a reduction of five points) or merely full cooperation and recognition and acceptance of culpability (a reduction of two points). A reduction of even two points in a corporation’s culpability score can have a significant effect on the sentence ultimately applied. *See generally* USSG Ch. 8 for a full discussion of sentencing issues pertaining to corporate defendants.

24. Yates Speech.
25. *Id.*
26. *Id.*
27. *Id.*
28. Yates Memo at 3-4.
29. *Id.* at 4.
30. *Id.*
31. Yates Speech.
32. Yates Memo at 4.
33. Yates Speech.
34. Yates Memo at 4; Yates Speech.
35. Yates Speech.
36. Yates Memo at 4.
37. Yates Speech.
38. Yates Memo at 4.
39. See, e.g. USAM 1-12.000, <https://www.justice.gov/usam/usam-1-12000-coordination-parallel-criminal-civil-regulatory-and-administrative-proceedings>; USAM, Organization and Functions Manual 27, Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings, <https://www.justice.gov/usam/organization-and-functions-manual-27-parallel-proceedings>.
40. Yates Speech.
41. *Id.*
42. *Id.*
43. USAM, Organization and Functions Manual 27, Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings, <https://www.justice.gov/usam/organization-and-functions-manual-27-parallel-proceedings>.
44. *Id.*
45. *Id.* Examples of these tools include administrative subpoenas, search warrants, consensual monitoring, interviews and False Claims Act civil investigative demands.
46. Yates Memo at 5.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* The memo gives the example of the Antitrust Division's Corporate Leniency Policy as one such exception. The reader may learn more about that policy at <https://www.justice.gov/atr/leniency-program>.
51. *Id.*
52. *Id.*
53. *Id.* at 6.
54. Yates Speech; see also Comment to USAM 9-28.210.

55. Yates Memo at 6; see also Comment to USAM 9-28.210.
56. Yates Memo at 6.
57. *Id.*
58. *Id.*
59. Yates Speech.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. Yates Memo at 6-7.
66. Yates Memo at 7.
67. *Id.*; Yates Speech; see also USAM 9-28.300, 9-27.220, and 9-27.230.
68. Yates Speech.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. Many corporations choose to advance or reimburse attorney's fees for directors, officers or employees who are under investigation or indictment. Note that federal prosecutors are instructed not to take this practice into account when evaluating cooperation, so long as the payment of fees is not used in a manner that otherwise constitutes an obstruction of justice. See USAM 9-28.730. Nor are prosecutors allowed to ask corporations refrain from such payments. *Id.* However, corporate clients may wish to think twice before entering into joint defense agreements with individual directors, officers or employees that might preclude corporations from revealing evidence that might help them qualify for cooperation credit. *Id.*
74. *Upjohn* warnings are derived from the United States Supreme Court's decision in *Upjohn v. United States*, 449 U.S. 383 (1981), and are designed to protect the corporation's privilege pertaining to interviews with employees or officers of the corporation. The White Collar Crime Committee Working Group of the American Bar Association developed a set of best practices for *Upjohn* warnings in 2009, which may be found on the website of the Association of Corporate Counsel at <https://www.acc.com/education/webcasts/upload/Upjohn-Warnings.pdf>.
75. Thompson Memo at 7 and 15; see generally USAM 9-28.710, USAM 9-28.750, and the Filip Memo at 9-12 regarding clarification of the former policy and protection of the attorney-client privilege and work-product doctrine.

76. Filip Memo at 9-12; USAM 9-28.710.
77. USAM 9-28.720.
78. *Id.*
79. See, e.g., *Doe v. U.S.*, 201, 206 (1988); *Bellis v. U.S.*, 417 U.S. 85, 90 (1974); *Amato v. U.S.*, 450 F.3d 46, 49 (1st Cir. 2006); *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 673 (5th Cir. 1999).
80. See *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

G. Douglas Jones



Doug Jones is a graduate of the University of Alabama and Cumberland School of Law. He began his career as staff counsel to the U.S. Senate Judiciary

Committee for the late Senator Howell Heflin. He then served as an Assistant U.S. Attorney and was in private practice until his appointment as U.S. Attorney for the Northern District of Alabama in 1997. As U.S. Attorney, Jones led the team of prosecutors in the 1963 bombing of the 16th Street Baptist Church which led to the conviction of Ku Klux Klansmen for the murder of four young girls killed in the bombing.

Christopher J. Nicholson



Chris Nicholson is a shareholder with Jones & Hawley PC. Prior to joining the firm, he served as clerk to the Hon. Tom King, Jr. in the 10th Judicial Circuit of

Alabama. Nicholson received his undergraduate degree from the University of Virginia in 2003 and his law degree in 2006 from the University of Alabama School of Law. During law school, he served as research assistant to Prof. William Henning, executive director, National Conference of Commissioners on Uniform State Laws.

ALABAMA LAWYERS’ *Hall of Fame*

The Alabama State Bar recently inducted five new members into the Alabama Lawyers’ Hall of Fame.

“Each of these inductees has played a pivotal role in the history and legacy that we as attorneys leave behind,” said Alabama State Bar President Lee Copeland. “It’s an honor to pay tribute to their lives and the work they did.”

The five lawyers inducted into the 2015 Alabama Lawyers’ Hall of Fame include:

Abe Berkowitz (1907-1985)–

Respected lawyer; longtime trustee of the Birmingham Bar Aid Trust; outspoken opponent for equity and fairness under the law; courageously challenged the Klan and other segregationists in Birmingham during the Civil Rights Era; played a significant role in changing Birmingham’s municipal government by forming the Citizens for Progress Committee that ousted Bull Connor and other segregationist city leaders



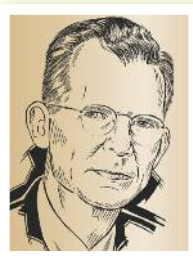
Reuben Chapman (1799-1882)–

Lawyer who practiced in the state’s early years; elected to state senate (1832-1835), Congress (1835-1847) and as 13th governor (1847-1849); successfully remedied state’s financial problems during his term as governor that were compounded by the failure of the state bank; in later years returned to the state legislature (1855-1856) and was a delegate to the Democratic National Conventions of 1856, 1860 and 1868, but was unsuccessful in his efforts to reconcile the deep split in the northern and southern delegates to those conventions



Martin Leigh Harrison (1907-1997)–

Practiced law in Birmingham until 1934 before obtaining an LL.M. from Harvard Law School in 1935. He then pursued an academic career; became a law professor at SMU and law professor (1938-1977) and dean (1950-1966) at his alma mater, the University of Alabama School of Law; as dean he enlarged and strengthened the faculty and continued to develop the law library; organized the law



school alumni association and the law school foundation; left an enduring mark as a teacher of the law

Holland McTyre Smith (1882-1967)–

Lawyer, soldier, patriot; known as “the father of modern U.S. amphibious warfare;” one of the top commanders in the Pacific during WWII; practiced law in Montgomery before receiving his appointment as 2d lieutenant in the U.S. Marine Corps; served in France in WWI; during WWII led Marines to victories with island-hopping strategy across the Pacific; led V Amphibious Corps and later named as First Commanding General, Fleet Marine Force Pacific, at Pearl Harbor; planned the Gilberts and Marshall Island operations and commanded Task Force 56 during the invasion of Iwo Jima before returning to the United States in July 1945 to head the Marine Training and Replacement Command at Camp Pendleton, California; retired as a General Officer of U.S. Marine Corps



Frank Edward Spain (1891-1986)–

Lawyer, philanthropist, civic leader and humanitarian; held the personal philosophy that lawyers have an obligation to do good as well as perform well for their clients; incorporated the Birmingham Housing Authority to assist local citizens in need of housing; active volunteer in numerous charities and causes as well as provided gifts that created Spain Rehabilitation Center and funded medical, scouting and religious facilities throughout the greater Birmingham area; was the first Alabamian to serve as president of Rotary International



The Alabama Lawyers’ Hall of Fame inducted its first class in 2004, and has since inducted 55 Alabama lawyers, including this year’s inductees. Inductees must have a distinguished career in law and each inductee must be deceased at least two years at the time of their selection. In addition, at least one of the inductees must be deceased a minimum of 100 years.

The newly unveiled plaques honoring each inductee are up for display in the Alabama Lawyers’ Hall of Fame located on the lower level of the Heflin-Torbert Judicial Building. ▲



Photo courtesy Steven L. Atha

INTRODUCTION

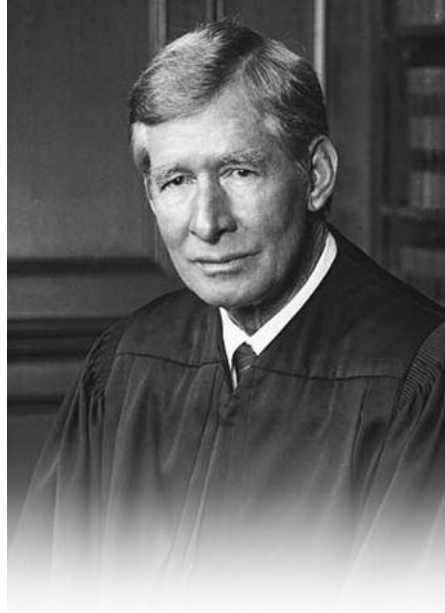
One year ago, on July 20, 2015, there was a significant ceremony in Montgomery—one of particular interest to lawyers. The National Park Service recognized the historical significance of Judge Frank Johnson, and it designated the Frank M. Johnson, Jr. Federal Building as a National Historic Landmark.

I was not aware of the occasion at the time. If you are like me, you receive too much information from too many sources without sufficient filters to help focus on events that are truly newsworthy and disregard those that amount to background noise. Fortunately, our colleague, Patrick Sims, brought the event to my attention and provided me with a copy of the transcript, and I want to bring it to the attention of all Alabama lawyers. In particular, we invite you to read the comments of Judge Myron Thompson and Judge Ed Carnes.

The transcript of the ceremony was too long to be re-published in full in *The Alabama Lawyer*. We have edited comments by certain speakers—introductory comments, concluding comments and the like—but have set forth in full the words of Judges Thompson and Carnes (with minor edits from the original by each judge—along the lines of “read and sign” edits that most lawyers face with their clients on a regular basis).

The Board of Editors thanks both judges for taking time to review their comments from one year ago. We also thank Editorial Board member, Professor Joi Montiel, for steering this project, and Alabama State Bar member **Steven Atha** for providing photographs of the courthouse and the beautiful landmark courtroom with which many Alabama lawyers are quite familiar.

—Gregory H. Hawley
Editor



Ceremony and Presentation Recognizing the Frank M. Johnson, Jr. Federal Building And United States Courthouse

As a National Historic Landmark

**United States District Court
Middle District of Alabama
Montgomery, Alabama**

**Presented by the National Park Service Courtroom 2—FMJ
Frank M. Johnson, Jr. Federal Building and United States Courthouse
One Church Street
Montgomery, Alabama
Monday, July 20, 2015**

MR. KEVIN LEAR: Thanks to everybody for coming today. This is a presentation as a National Historic Landmark for the Frank M. Johnson Courthouse.

My name is Kevin Lear. I'm from GSA. I am proud to introduce the first speaker today, Mayor Strange.

MAYOR TODD STRANGE: I am delighted to be here and to welcome Administrator Jarvis. Jon and I saw each other on a couple of occasions during the historic 50th anniversary. I've just met Administrator Jessup, and we

appreciate all the support that GSA has given to this historic opportunity that we have right here in Montgomery.

You might remember that about 46 years ago, a gentleman by the name of Neil Armstrong landed on the moon, and he took his historic small step, but giant step for mankind. I couldn't help but make the connectivity that four years before that, 50 years ago in March, there were thousands who took part in a march that changed mankind and changed this country forever. Where we are today played a very historic role in allowing that to happen.

Judge Myron Thompson was not there then, and Frank Johnson was.

So I'm honored to be here. I'm honored to be a part of this great occasion. We thank you personally for the efforts that each of you have made. I am honored to introduce a senior judge, the Honorable Myron H. Thompson, senior United States District Judge for the Middle District of Alabama. I wish I could come with some eloquence, but there are not many people who are legends in their own time. I get to introduce one today and, on Wednesday, I get to introduce another one. I get to introduce Nick Saban.

So with that, please welcome the Honorable Judge Myron Thompson.
(applause)

JUDGE MYRON THOMPSON:
Before I begin my remarks, first of all, I recognize Judge Carnes and mayor and other judges and people from the Park Service and General Services Administration, but I can't let Mayor Strange's Nick Saban comment go by. (laughter) Another judge referred to my chambers here as a sports wasteland because I know absolutely nothing about sports. And when my middle son played football in high school, I jokingly told my federal judges that I could finally learn the difference between football and basketball. They did not take that as a joke. (laughter)

Almost 20 years ago I spoke at the dedication of the new building next door. And I then noted that I would soon be 50, but that in one sense I would be 50 and in another sense I would be half that age. I explained that for the first 25 years of my life, there was only one place



Thompson



Photo courtesy Steven L. Abba

in the entire expanse of this state's government that allowed—let alone, wanted—me to be human. And that place was the plot of land on which sits this courthouse, the Frank M. Johnson Courthouse. It is a small plot, but it was the only institution of government of which I felt that I could be a part. Indeed, one of the principal reasons for my return south was to practice in this court on this plot of land. Home, for me, was here. And insofar as recognizing my dignity as a human being, home, for me, was only here. This court, this building, this courtroom, was an island of hope in a sea of hostility.

When I did return, however, I found that this plot, this island, this courthouse we are now in, had expanded. And now it is possible that I could be a full Alabama citizen, having waited 25 years of my life for that. I therefore measured my Alabama citizenship from that return. In that sense, unlike many of you who were born in this state but of a different hue from me, I measured my Alabama citizenship not from my birth, though I was born here, but from my return when I was 25 years old. In that sense, I was a young man, young to citizenship in the state in which I was born; and in that sense, this state was a young government, young to the old democratic notions of equality and full citizenship. Therefore, when I became chief judge and found that one of my first projects was the expansion of the federal courthouse, I knew that I was here for a purpose. I was old enough to remember what was and yet young enough to appreciate what is and what could still be.

I then went on to explain back then at the dedication the relationship between this current courthouse and the new courthouse. I explained that the semicircular structure which is next door was not merely a work of art, but

that in my view, it symbolized a crown, a headpiece of justice, with the old courthouse in which we have gathered sitting as its singular and foremost jewel.

It also was not without significance that that crown is only a half-circle. A half- or semicircle is incomplete, and the circle is incomplete only because it should be so. The other half of the circle is state government and, in particular, the state judicial system. With our system of federalism one arm of government can never be complete, in and of itself, without the other. The full circle is and should remain a partnership between our federal and state judicial systems.

But as I explained, the centerpiece of that full circle, the jewel in the crown, is and will remain the Frank M. Johnson Federal Building and Courthouse, that symbol of what all systems of justice, federal and state can, should and must be.

Now, 20 years later, I add another chapter to those comments. Without any knowledge of its history, this building is nothing more than brick, limestone and wood. In and of itself, it is meaningless. Only the peo-

ple who occupy it can give it meaning. And this realization was brought home to me in the research I did for the balcony, the one that hovers even now over all of your heads.

I asked several historians to find out whether that balcony was built for purposes of segregation. I suggested that they look at newspaper articles from about the time the building was built back in the 1930s. Ironically, as one historian aptly explained, we would find absolutely nothing in any newspaper explaining or affirming this balcony was built to segregate the races. The balcony would have made news only if it had been built for integration. Rather, the historian said that the most compelling direct support for the conclusion the balcony was for segregation was that one of the judges who sat here at this bench would, unfortunately, never have tolerated integrated seating in this courtroom.

The historian's comment that only an integrated balcony would have made news reminds me of Hannah Arendt's controversial statement in the coverage of the Eichmann trial about his participation in the Holocaust,

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what she called the banality of evil. In one sense, it connotes that evil is commonplace. It is everywhere. In another more controversial sense it connotes that evil is so commonplace that no one person bears responsibility; in that case, the Eichmann defense that I was obeying orders, that I was a bureaucrat or even that I was a bystander or I merely grew up and lived here—for Eichmann himself was not a soldier in the concentration camps. He did not pull the switch on the gas chambers.

What this courtroom, this building, symbolizes is not everyone has to be a bystander. Whether it is the gassing of Jews in Germany, the lynching of blacks in Alabama, the gay bashing in Laramie, Wyoming, the wrong is the same. Hatred of persons merely because of what they are—a black, a Jew, a homosexual—and not based on their character is wrong.

And this banality of evil was pervasive here in the South from hospitals to schools to lunch counters to swimming pools and, yes, even to churches. Let us not forget that when many blacks during that period knocked on the doors of southern churches for Sunday morning worship, the church deacons locked them out. I saw such with my own eyes on television and heard my stepfather, who was a minister, shake his head in despair and just total inability to understand this from fellow Christians.

But there sat in this courtroom one person who refused to be a bystander, who spoke out against the status quo, the banality of evil. The mere fact that he was a federal judge does not explain why he did what he did, for there were many federal judges who did nothing in the face of such evil. Judge Frank Johnson, for me, stands as a symbol that goodness may be unique and evil may be commonplace and banal and pervasive, but goodness in the hands of even just one person can overcome. He also stands for the notion that being the bystander is no excuse. He did something. He stands for the notion that the bystander excuse is no excuse.

A student once asked Hannah Arendt why she referred to the crimes against the Jews as crimes against humanity; for after all, the crimes were committed against the Jews. She responded that Jews are human and, as a result, crimes against them are crimes against humanity. In this sense, crimes against Jews, crimes

against blacks, crimes against gay people, all crimes against minorities because of merely what they are rather than who they are, are truly crimes against humanity.

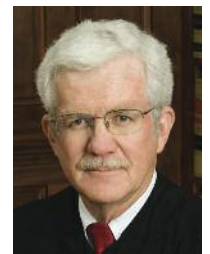
For Frank Johnson, “Jim Crowism,” the denial of humane treatment for the mentally ill and the mentally disabled, the inhuman treatment of prisoners, the denial of privacy to gay people were all crimes against humanity. Yes, this Alabamian from Winston County in the case of *Hardwick* recognized long before the Supreme Court the rights of homosexuals.

This courtroom, this courthouse, is indeed, as I said 20 years ago, a jewel in the crown of justice; but to sit behind this bench is no assurance that that symbol will be given meaning. This courthouse, this courtroom, is a reminder, a most important reminder to us all that each judge, sitting separately and individually, is responsible for living up to that symbol. That a segregated balcony—that one up there—with all the evil that it represents, hovers in this historic courtroom of justice, with all the good that it represents, as a reminder that any building can either be a symbol of evil or good, and that this courtroom, this courthouse, eventually came to be an historic symbol of good only because of the person who presided here.

This courthouse, to me, stands as a reminder to us all—judges, lawyers, all who live in this country—of the power of goodness as well as a reminder to all of us that one must step into the fray of injustice and fight against it or be responsible for that injustice.

And with that understanding, I welcome the plaque.

JUDGE ED CARNES: I’m honored to be here today representing the Eleventh Circuit Court of Appeals, although my charge is a little bit different. It’s to speak about the role of the old Fifth Circuit Court of Appeals in the Civil Rights Era as reflected in the plaque. As most of you know, in 1981, the Fifth Circuit was divided into two circuits with Texas, Louisiana and Mississippi staying in the old Fifth and with Alabama, Georgia and Florida becoming part of the new Eleventh. A lot of the judges from the old Fifth were divided geographically into the Eleventh at that time, so some of the Civil Rights Era judges became members of the Eleventh



Carnes

Circuit after the heyday of the Civil Rights Era was pretty much past.

Article III of the Constitution says that the judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as Congress may, from time to time, ordain and establish. So, all the federal district courts and all the federal courts of appeals are, in Article III terms, inferior courts, although we sometimes tend to forget that.

I know what you're thinking, Mayor. (laughter)

But there was nothing, really, about the Fifth Circuit Court of Appeals during the 1960s and '70s in civil rights cases that was inferior. It enforced the Constitution and the laws of the United States unflinchingly and unflinchingly. The opposition to civil rights was strong, although some of the arguments against civil rights were desperate and bordered on the absurd.

I don't have time to survey all the decisions of the old Fifth—that's a course or two in law school—but I'm going to give you two examples. And I picked the two



Photo courtesy Steven L. Abba

examples because they're a good reflection of what the Fifth was doing. And also I picked them, I'll admit, because they've got some good writing in them and I enjoy good writing.

In the early 1960s, the Fifth Circuit reviewed a district court's decision denying the federal government's request for an injunction that would have required Jackson, Mississippi authorities to remove segregation signs

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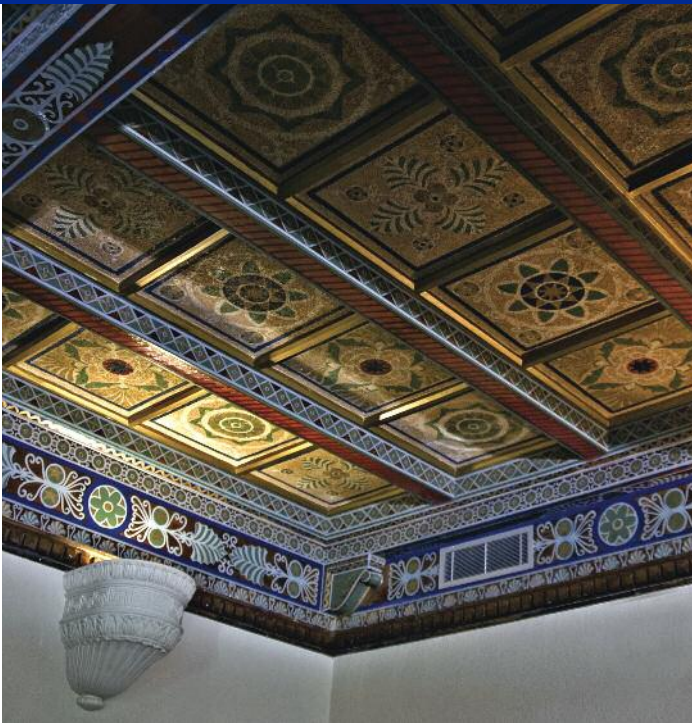
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that they had put outside of bus and railroad stations. If you're old enough, you remember the signs I'm talking about. They were throughout the South: White Entrance/Colored Entrance, White Restrooms/Colored Restrooms, White Fountain/Colored Fountain, and so forth. The city argued before the Fifth Circuit Court of Appeals that the signs were innocently designed only to assist whites and blacks in what the city described as their desire for voluntary separation. The city insisted that the black passengers who had been arrested at a terminal for ignoring the signs were charged not with violating Mississippi's unlawful segregation laws, but instead, with breaches of the peace for failure to obey signs designed to assist them with their efforts to voluntarily segregate. (laughter) I'm not making that up.

Judge Wisdom, in his opinion for the court, rejected the city's "segregation is all voluntary" argument, and he did it with well-fitting metaphors. He wrote: "We again take judicial notice that the State of Mississippi has a steel-hard, inflexible, undeviating official policy of segregation. The policy is stated in its laws. It is rooted in custom. The segregation signs at the terminals in Jackson carry out that policy. The Jackson police add muscle, bone, and sinew to the signs." He dismissed the city's argument to the contrary as: "A disingenuous quibble that must rest on the assumption that federal judges are more naive than ordinary men." The judges of the old Fifth were not naive.

My other example is on the subject of voting rights and is from our own Judge Rives, who wrote an opinion which Judge Brown joined excoriating state officials and lambasting the federal district judge who had let officials get away with race-based interference with people's right to vote.

Judge Rives's opinion contained this memorial passage: "The foundation of our form of government is the consent of the governed. Whenever any person interferes with the right of another person to vote or to vote as he may choose, he acts like a political termite or many termites may pass unnoticed, but each damages the foundation. And if that process is allowed to continue, the whole structure may crumble and fall. Eradication of political termites is necessary to prevent irreparable damage to our government."

The termite metaphor is delightfully apt because the name of the case, coincidentally or not, was *United States v. Wood*. (laughter) You have to think that name at least inspired Judge Rives.

There were, of course, scores, if not hundreds, of other decisions that the old Fifth Circuit and its judges handed down in civil rights cases. Now, to be sure and to be candid, a handful of judges on that court took positions that put them on the wrong side of history, but most of the judges on the court wrote and issued decisions on the right side of history. And we can say with assurance that throughout the Civil Rights Era, the Article III "inferior court" that was the old Fifth Circuit as a whole faithfully applied the Constitution and laws of the United States in a way that was anything but inferior. It will be good to have a plaque commemorating that.

And now I have the pleasure of introducing the 18th director of the National Park Service, Jonathan Jarvis, who will be presenting the historical plaque for our courthouse today. I'm glad I've got this privilege, because he's had quite a career and I'm going to have a little fun with him.

He began his career with the Park Service in 1976 serving as a seasonal interpreter in Washington, DC. Now, you would think at this point in human evolution we had reached the stage where we could tell what season it was without a federal government

employee. (laughter) But I figure, what the hey, it was Washington, DC.

During his 37-year career with the Park Service, Director Jarvis has served in many roles, including Ranger Resource Management Specialist, Park Biologist, Park Superintendent, Regional Director and, now, National Director.

He has a deep and thorough knowledge of our national parks at every level. He has described our park system aptly as “a gift from past generations to this and succeeding generations.”

Having personally enjoyed the gift of our national parks for more than a half-century, I thank you, Director Jarvis, for your role in preserving them.

He now oversees an agency with more than 22,000 employees, a \$3 billion budget—I thought we were talking about the GSA until I looked closer (laughter)—407 national parks that draw more than a quarter of a billion visitors a year and generate more than \$30 billion in economic benefit nationwide. That’s impressive.

But it’s not the most impressive thing about him. I’ll tell you the most impressive. I thought last night I better be thinking about what I was going to say today. And so I sat down in my chair and got the trusty remote and turned on the television. I was watching *60 Minutes*. And right there in one of the segments was Director Jarvis being interviewed by Morley Safer, no less. Now, I want to tell you: that is impressive.

And before he presents the plaque, I do want to pass on to you a pearl of wisdom from him which I ran across while doing a little bit of research, Googling a little bit. He once confided in an interviewer in a reflective moment what sounds to me like one of his deeply-felt, philosophical views about life. He said, and I quote, direct quote: “Even though the odds are very low that you’ll be eaten, always carry your bear spray.” (laughter)

Now, I know you could take that statement literally. Given how long he’s been in federal government service, I think he probably intended it as a metaphor about how to survive the perils of a career in government: Always carry your bear spray.

Please join me in welcoming Director Jarvis.
(applause)

DIRECTOR JONATHAN

JARVIS: Thank you all today for joining me in this great celebration and telling of the story of this incredible courthouse.

So we are really honored here today to make this Frank M. Johnson, Jr. Federal Building part of the National Historic Landmarks Program.

It has exceptional national significance as a property intimately associated with the preeminent role of the U.S. Fifth Circuit Court of Appeals and the U.S. District Court for the Middle District of Alabama in reshaping the South during the Modern Civil Rights Movement. These courts bore the burden of enforcing *Brown v. Board of Education* after the Supreme Court rendered its historic decisions. The jurisprudence of this court dealt effectively with southern massive resistance and obstructionism, as its rulings both fostered and implemented civil rights legislation.

The courthouse also has exceptional national significance for its association with the three judges considered critical to the social and political transformation of the segregationist South during the ‘50s and the ‘60s. Fifth Circuit Appellate Judges Richard T. Rives and John R. Brown and District Judge Frank M. Johnson, Jr. contributed to the emergence of civil rights in America and led the courts through a legal territory during a decade of social upheaval and the judicial remaking of the South.

The late Judge Johnson, Jr., a recipient of the Presidential Medal of Freedom, found it unconstitutional to segregate facilities based on race and often used *Brown v. Board of Education* as his foundation for subsequent rulings, including the Montgomery Bus Boycott. Were it not for the strength, foresight and integrity of these judges who ruled from this courthouse and this very courtroom, the journey from civil war to civil rights might have been very different.

And the plaque reads: This site possesses national significance for its association with the preeminent role that the U.S. Fifth Circuit Court of Appeals and the U.S. District Court for the Middle District of Alabama played in reshaping the South during the Modern Civil Rights Movement. 2015, National Park Service, U.S. Department of the Interior, National Historic Landmark. ▲



Jarvis

2016 LEADERSHIP FORUM: The Leadership Forum Prepares Lawyers to Change the Future

By Edward M. Patterson, Alabama State Bar Assistant Executive Director



The Leadership Forum recently completed its 12th year. On May 26, ASB President Lee Copeland, assisted by President-Elect Cole Portis, presented certificates and gifts to the 30 graduates of Class 12. A number of alumni from classes 2 and 6 returned for the event. This year's class was selected from 80 applicants, the largest number to apply in the forum's history.



The graduation guest speaker was Hon. W. Keith Watkins, chief judge, United States District Court, Middle District of Alabama, Montgomery. Andrew S. Nix, former chair of the Leadership Forum Section, presented Othni J. Lathram of Tuscaloosa, director of the Alabama Law Institute and interim director of the Legislative Reference Service and the Legislative Fiscal Office, with the 2016 Edward M. Patterson Servant Leadership Award. Previous honorees include Angela Slate Rawls, Richard J.R. Raleigh, Jr. and Rebecca G. DePalma. The award is presented annually to an outstanding alumnus of the forum.

Class 12 statistics show the average age for this group was 35 (oldest 40 and youngest 30); 60 percent

male and 40 percent female; 13 percent black and 87 percent white; and from 12 different cities, with 40 percent from Birmingham and 60 percent from the rest of the state. We had the highest number of smaller cities represented in the forum's history. Practice diversity included plaintiff practice, 27 percent; defense practice, 23 percent; corporate/transactional, 26 percent; and government/public service/legal education, 17 percent. Total composition of the forum always equals or exceeds the diversity statistics of the bar as a whole. In the past 12 years, the forum has received 800 applications, accepted 357 attorneys and

graduated 348 attorneys. Forty-five percent of those who apply have been chosen. A total of 348 men and women have graduated since the Leadership Forum's inception.

In awarding the Leadership Forum the 2013 E. Symthe Gambrell Professionalism Award, the nation's

highest award for professionalism programs, the American Bar Association commended the forum for its innovative, thoughtful and exceptional content, for its powerful and positive impact on emerging leaders and for the extraordinary



Lathram





example it has established that others might emulate.

With increased expectations from applicants who commit a substantial time block to participate in the seven days of mandatory sessions in Montgomery, Huntsville and Birmingham during five months, the program committee recognizes the profession is in a state of transition, and now seeks to prepare attorneys to change the future of the profession that is currently unseen rather than falling into the trap of trying to simply maximize a spot of the pecking order of the future which is currently seen. These skills require intentionality, deliberation and focused attention. With the help of expert faculty, we seek to establish a class norm of engagement, discussion, respectful debate and even disagreement.

The program continues to deliver what it promises: the legal profession has a special role in society to fulfill an opportunity to cultivate leadership skills moving from theory to practice, participation in self-discovery and forcing participants to be contemplative and learn from the inside out. Social events at a number of well-known restaurants and venues throughout the state, including the home of Rich and Shannon Raleigh in the historic downtown

district of Huntsville, added immensely to the overall experience.

The forum is designed to aid participants' development into innovative, critical thinkers equipped to respond to disruptive change. Throughout the years, the forum has tried four different personal assessment tools. For the past three years the Birkman Method has been by far the most effective. This year's primary faculty included Professors Steve Walton and Michael Sacks of the Goizueta Business School at Emory University, now in their fourth year of teaching. Both observed each new class performs stronger than the previous class because of the group dynamic engaging with them very quickly and robustly. Collectively they reaffirmed their belief that, *"Each class we have worked with has been an incredible group of professionals. As the program continues to evolve, the current class seems to be getting more and more out of the program. This year's class, like previous classes, was so dedicated to the work they were doing in the forum. They brought considerable energy and excitement to the sessions. We know how busy everyone is, and we were blown away by their ability to put aside other demands and focus concretely on the important leadership material. This is a*

group of thoughtful and engaged professionals, eager to learn more and apply the material back to their firms. We couldn't wish for a stronger group of participants."

This year, 14 hours of CLE credit was approved, including two hours of ethics/professionalism. The actual program content exceeded 55 hours. In response to alumni demand for skills on "how to lead," the core curriculum consists of 60 percent teaching self-awareness, awareness of others, influence without authority, organizational culture, decision-making, leading organizational change, delivering client value and meeting client expectations. Ten percent of the curriculum consisted of participants discussing the role of servant leadership, and working on solving complex problems involving hypotheticals based on real-life scenarios. The end result is to teach them how to lead others through an increasingly uncertain and changing career landscape. The remaining 30 percent consisted of hearing the variety of stories told by servant-minded judges, policy-makers, legal practitioners, business leaders, scholars and teachers at the community, state and national level who used a variety of teaching methods, as well as hearing from alumni of the forum.



To support the increasing sophistication and intentionality of the forum we had the largest number of individual, firm and corporate sponsors in the forum's history. Bradley Arant Boult Cummings LLP and Freedom Reporting-Freedom Litigation Support Services were medallion sponsors, and in-kind donations were received from 11 corporations or individuals. The support of the Alabama State Bar has been invaluable. With this combined support, the tuition for a program of this strength is more than 50 percent less than what similar programs charge.

Highlights of the seven days during January-May included intense training at Air University's Officer Training School at Maxwell AFB on a challenging reaction course designed to test participants' skills under pressure; a session at Regions Community Resource Room in Cooney Hall, the new business school at Samford University; a session at HudsonAlpha Institute for Biotechnology in Huntsville; and an all-day session at The Judicial College in the Judicial Building in Montgomery, 129 Coosa Street Conference Center and the boardroom of the Alabama State Bar. We added "Ted Talks" to some

of the evening sessions where the class heard from Senator Cam Ward, chair of the Judiciary Committee, and Mayor Thomas Battle of Huntsville. A partial list of other faculty members included Major General Timothy Leahy, vice-commander of Air University, Maxwell AFB; Sam Davidson, author, professional speaker and social entrepreneur; General Charles Krulak, U.S. Marine Corps, retired; Patricia Wallwork, chief executive officer, Milo's Tea Company, Inc.; Judge Stephen Louis A. Dillard, Georgia Court of Appeals; Judge Joel F. Dubina, senior U.S. Circuit Judge, U.S. Court of Appeals, Eleventh Circuit; Sue Bell Cobb, former chief justice, Alabama Supreme Court; Cathy S. Wright, principal, Clarus Consulting Group; Lt. General (retired) Ron Burgess, former acting director, U.S. Defense Intelligence Agency, and acting principal director, National Intelligence; and Richard F. Scruggs, former attorney, philanthropist and founder, SecondChance MS. New topics were added, including "Judging with Equals: The Inside Out of Multi-Judge Courts" and "Leadership in Multi-Party or Multi-District Complex Litigation."

Class 13 begins January 2017. Applications will be available in

July and class 2017 will be selected in the early fall. The future of the Leadership Forum is bright. The forum has consistently exceeded the expectations of 96 percent of its graduates. In the words of one participant, *"This is shaping up to be the best thing that has ever happened to me and that I have ever participated in professionally. I have long been someone with a tendency to 'live in his head' and it helps tremendously to get outside of oneself and learn about the styles, careers, fears, goals and characteristics of my classmates. Thank you for this amazing opportunity."*

Our passion is to continue to locate and develop talented, mid-level attorneys into better leaders with a generous heart to serve their profession, their clients and their communities in a changing world.

A future article will detail the accomplishments of the forum's graduates over the past 12 years. Firms are beginning to notice the "value added" benefit of their attorneys participation in the forum.

Special thanks go to Adam P. Plant, Battle & Winn LLP, and Henry S. Long, Butler Snow LLP, program committee co-chairs, and R. Thomas Warburton, Bradley Arant Boult Cummings LLP, selection committee chair. ▲

Class 12

PARTICIPANTS



Erica W. Barnes, U.S. Attorney's Office, Birmingham

D. Edgar Black, Black & Hughston PC, Muscle Shoals

Mary Margaret P. Carroll, Fine Geddie & Associates, Montgomery

Paige J. Casey, Lloyd, Gray, Whitehead & Monroe PC, Birmingham

Latisha V. Colvin, Federal Defenders Office, Mobile

Thomas G. DeLawrence, Balch & Bingham LLP, Birmingham

Starr T. Drum, Maynard Cooper & Gale PC, Birmingham

Christopher J. England, City Attorney's Office, Tuscaloosa

Heather R. Fann, Boyd Fernambucq Dunn & Fann PC, Vestavia

D. Brent Hargett, Sasser Sefton & Brown PC, Montgomery

David W. Holt, Bradley Arant Boulton Cummings LLP, Huntsville

Carmen F. Howell, Law Office of Carmen F. Howell LLC, Enterprise

E. Wilson Hunter, Alabama Board of Medical Examiners, Montgomery

Adam K. Israel, Balch & Bingham LLP, Birmingham

Lee F. Knowles, Knowles Law Office, Geneva

J. Parker Miller, Beasley Allen Crow Methvin Portis & Miles PC, Montgomery

George L. Morris, IV, Cabaniss Johnston Gardner Dumas & O'Neal, Birmingham

Tamara W. Neeley, Watson & Neeley LLC, Fort Payne

J. Levi Nichols, Lightfoot & Nichols, Luverne

Blake L. Oliver, Adams White Oliver Short & Forbus LLP, Opelika

Kathryn J. Osburne, University of Alabama System, Tuscaloosa

Ashley R. Peinhardt, Hare Wynn Newell & Newton LLP, Birmingham

Christopher K. Richardson, Espy Metcalf & Espy PC, Dothan

Ryan P. Robichaux, Bradley Arant Boulton Cummings LLP, Birmingham

Stephen D. Rygiel, Birmingham AIDS Outreach, Birmingham

Stephen A. Stetson, Alabama Arise, Montgomery

C. Samuel Todd, Vulcan Materials Company, Birmingham

Latanishia D. Watters, Hand Arendall LLC, Birmingham

J. Bennett White, Starnes Davis Florie LLP, Birmingham

Suntrese W. Williams-Maynard, U.S. Attorney's Office, Mobile



DISCIPLINARY NOTICES

- ▲ **Transfers to Disability Inactive Status**
- ▲ **Disbarment**
- ▲ **Suspensions**
- ▲ **Public Reprimands**

Transfers to Disability Inactive Status

- Loxley attorney **Peter Joseph Palughi, Jr.** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective March 10, 2016. [Rule 27(c), Pet. No. 16-390]
- Suspended Birmingham attorney **James William Woolley** was transferred to disability inactive status pursuant to Rule 27(c), *Ala. R. Disc. P.*, effective March 30, 2016, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(c), Pet. No. 2016-458]


Disbarment

- Eclectic attorney **Spence Arthur Singleton** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective May 23, 2016. The supreme court entered its order based on the Disciplinary Board's order accepting Singleton's consent to disbarment, based upon allegations that he violated Rule 1.15(c) and Rule 8.4(g), *Ala. R. Prof. C.* [Rule 23(a), Pet. No. 2016-613]

Suspensions

- Chelsea attorney **Andrea Hope Brown** was suspended from the practice of law in Alabama, effective March 24, 2016, for noncompliance with the 2014 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 15-562]
- Birmingham attorney **Steven Douglas Eversole** was suspended from the practice of law in Alabama for a 45 days, by order of the Supreme Court of Alabama, effective April 15, 2016. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Eversole's conditional guilty plea, wherein Eversole pled guilty to violating Rules 1.4(b), 1.5(b), 1.16(d) and 8.4(c), *Ala. R. Prof. C.* Eversole was suspended for 180 days, but was only required to serve 45 days of the 180-day suspension. The remaining 135 days will be held in abeyance. In addition, Eversole was placed on probation for two years, with conditions. [ASB Nos. 2014-454, 2014-812, 2015-1674 and 2015-1689]

- Georgia attorney **Willie Julius Huntley, III** was summarily suspended from the practice of law in Alabama pursuant to Rules 8(e) and 20(a), *Ala. R. Disc. P.*, by order of the Disciplinary Commission of the Alabama State Bar, effective February 5, 2016 until March 11, 2016, when he was reinstated to practice law. The Disciplinary Commission's suspension order was based on a petition filed by the Office of General Counsel evidencing Huntley failed or refused to provide subpoenaed documents and related material from his trust account to the Office of General Counsel during the course of a disciplinary investigation. However, the Disciplinary Commission reinstated his license upon his production of said subpoenaed documents. [Rule 20(a), Pet. No. 2016-250]
- Birmingham attorney **Stephen Frederick Humphreys** was suspended from the practice of law in Alabama, effective March 24, 2016, for noncompliance with the 2014 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 15-578]
- Thompsons Station, Tennessee attorney **Adam Michael McCord** was suspended from the practice of law in Alabama, effective March 24, 2016, for noncompliance with the 2014 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 15-583]
- Albertville attorney **Steven Vincent Smith** was intermily suspended from the practice of law in Alabama pursuant to Rules 8(c) and 20(a), *Ala. R. Disc. P.*, by order of the Disciplinary Commission of the Alabama State Bar, effective March 29, 2016. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing Smith's recent arrest for four counts of possession of obscene matter. [Rule 20(a), Pet. No. 2016-450]
- Rainsville attorney **Andrew Ashkaun Taheri** was suspended from the practice of law in Alabama, effective March 24, 2016, for noncompliance with the 2014 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 15-596]
- Birmingham attorney **Jonathan Kenton Vickers** was suspended from the practice of law in Alabama for five years by order of the Supreme Court of Alabama, effective April 4, 2016. On February 11, 2016, the Disciplinary Commission of the Alabama State Bar issued an order revoking Vickers's probation and imposing a five-year suspension from the practice of law in Alabama. Vickers had previously pled guilty to multiple violations of Rules 1.3, 1.4(a), 1.7(a), 8.1(a) and 8.4(g), *Ala. R. Prof. C.* Vickers was issued a five-year suspension that was held in abeyance pending his successful



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Alabama Lawyer Assistance Program

(Continued from page 289)

completion of the terms and conditions of his probation. After Vickers violated his probation, the Disciplinary Commission ordered that he serve the five-year suspension. [ASB Nos. 2011-1802, 2012-1876 and 2013-266]

Public Reprimands

- Birmingham attorney **Peter Johnson Davis** received a public reprimand with general publication on March 11, 2016 and was instructed to contact and complete the Practice Management Assistance Program, complete 10 hours of MCLE in the area of appellate criminal practice within six months of receipt of the reprimand and pay a \$750 administrative fee for violating Rules 1.4 and 8.4(a) and (g), *Ala. R. Prof. C.* On or about October 12, 2012, Davis filed a Rule 32, *Ala. R. Crim. P.*, petition for a client whose direct appeal was pending. After Davis was hired to draft and file this petition, he failed to communicate with the client throughout the pendency of the matter until after the trial court denied the petition, and, therefore, he violated Rule 1.4(a) by failing to keep his client reasonably informed about the status of his matter. Additionally, with this conduct, Davis violated Rules 8.4(a) and (g), *Ala. R. Prof. C.*, by engaging in conduct adversely reflecting on his fitness to practice law. [ASB No. 2014-766]
- On November 4, 2015, the Disciplinary Commission ordered that Dothan attorney **Mark Hampton Baxley** receive a public reprimand with general publication for violating Rules 1.1, 1.3 and 8.4(d) and (g), *Ala. R. Prof. C.* In or around August 2012, Baxley handled a divorce for a client. Pursuant to terms of the divorce, the ex-wife of Baxley's client was responsible for the payment of four credit cards. On or about January 2, 2013, the ex-wife filed a petition for Chapter 13 bankruptcy. On behalf of his client, Baxley filed a motion to object to discharge of marital debt/obligations as to the four credit cards. Baxley subsequently withdrew the objection after learning that the Chapter 13 bankruptcy petition did include the debts and provided for full repayment of the four credit card debts. At the direction of Baxley's client, he filed a petition to modify the final divorce decree with the Houston County Circuit Court. In the petition, Baxley asked the court to sanction the ex-wife for failing to pay off or keep current the credit cards despite the fact that such credit cards were included in the Chapter 13 bankruptcy. On November 5, 2013, the circuit court denied the petition to modify based, in part, on the fact that the credit cards were part of the Chapter 13 bankruptcy petition. On December 4, 2013, at the request of his client, Baxley filed a motion to alter and/or amend in which he represented to the court that the credit cards were not included within the Chapter 13 bankruptcy. Such representation to the court was inaccurate. Further, by filing the petition to modify and the motion to alter and/or amend without leave of the court, Baxley violated the automatic stay created by the filing of the Chapter 13 bankruptcy petition. [ASB No. 2015-762]
- On October 30, 2015, the Disciplinary Commission ordered that Theodore attorney **Ronald Ray Goleman, Jr.** receive a public reprimand without general publication for violating Rules 1.3, 1.4(a) and (b) and 8.4(d), *Ala. R. Prof. C.* Goleman represented a client in a divorce case and filed a complaint for divorce and certain discovery motions on March 30, 2015. The client and her husband then requested the appropriate paperwork for an uncontested divorce. Goleman prepared the paperwork and the parties signed on April 25, 2015. On May 18, 2015, the client's husband discovered the paperwork had yet to be filed and filed the paperwork pro se. On May 26, 2015, the court issued an order setting the matter for dismissal on August 7, 2015 if certain documents were not filed. Throughout June 2015, the client repeatedly requested Goleman to file the necessary paperwork to complete the divorce and on July 13, 2015, the client emailed Goleman and informed him that if he did not file the missing paperwork immediately, she would be filing a bar complaint. On July 20, 2015, Goleman filed the missing paperwork. On July 30, 2015, the parties were granted their divorce by the court. [ASB No. 2015-1159]
- Mobile attorney **Sidney Moxley Harrell, Jr.** received a public reprimand without general publication on March 11, 2016 for violating Rules 1.3 and 1.4(a), *Alabama Rules of Professional Conduct*. Harrell was retained to file a Rule 32 petition on behalf of an incarcerated client in July 2009. At the time the bar complaint was filed in July 2014, the Rule 32 petition still had not been filed. He did not

promptly file the petition or inform the client of any tactical or other reason why the filing would be delayed. Harrell did not diligently pursue the objective for which he was retained or keep the client reasonably informed of the status of the legal matter. [ASB No. 2014-1104]

- Hoover attorney **Kenneth Edward Sexton, II** received a public reprimand without general publication on March 11, 2016 for violating Rules 1.1, 1.3 and 1.4, *Alabama Rules of Professional Conduct*. Sexton was hired to defend a client who had been sued for defaulting on a promissory note. Sexton did not advise the client, whose liability had been conceded, of the hearing on damages. Sexton attended the hearing via telephone and did not offer any evidence on his client's behalf. Sexton did not inform the client of the judgment entered against him, to which the client was alerted by an uninvolved third party. Sexton did not notify the client that the court ordered him to appear at a show cause hearing for failure to respond to post-judgment discovery requests, and the client was held in contempt. Sexton did not notify the client of the contempt finding, and the client was arrested when the contempt was not purged within the time allotted by the

court. During the course of the representation, Sexton did not respond to the client's reasonable requests for information or communicate with him to the extent reasonably necessary to allow him to make informed decisions regarding the representation. [ASB No. 2013-612]

- On March 16, 2016, the Disciplinary Board of the Alabama State Bar ordered **Joseph Ryan Will** of Daytona Beach to receive reciprocal discipline of a public reprimand with general publication for violating Rules 1.3, and 8.4(d), *Ala. R. Prof. C*. The Disciplinary Board ordered that Will receive the identical discipline as that imposed by the Supreme Court of Florida. Will prosecuted a defendant for felony murder and robbery in Florida. During closing arguments, Will made inappropriate comments by repeatedly referring to the defendant as a "crackhead." In addition, Will mischaracterized a witness's testimony. Will also improperly disparaged opposing counsel's theory of defense and sought to have the jury show sympathy for the victim. In addition, Will's improper argument during closing was a partial basis for the reversal of the defendant's conviction. [ASB No. 2016-282] ▲

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Wilson F. Green

Wilson F. Green is a partner in Fleenor & Green LLP in Tuscaloosa. He is a summa cum laude graduate of the University of Alabama School of Law and a former law clerk to the Hon. Robert B. Propst, United States District Court for the Northern District of Alabama. From 2000-09, Green served as adjunct professor at the law school, where he taught courses in class actions and complex litigation. He represents consumers and businesses in consumer and commercial litigation.



Marc A. Starrett

Marc A. Starrett is an assistant attorney general for the State of Alabama and represents the state in criminal appeals and habeas corpus in all state and federal courts. He is a graduate of the University of Alabama School of Law. Starrett served as staff attorney to Justice Kenneth Ingram and Justice Mark Kennedy on the Alabama Supreme Court, and was engaged in civil and criminal practice in Montgomery before appointment to the Office of the Attorney General. Among other cases for the office, Starrett successfully prosecuted Bobby Frank Cherry on appeal from his murder convictions for the 1963 bombing of Birmingham's Sixteenth Street Baptist Church.

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Probate

Schulpf v. D'Olive, No. 1141365 (Ala. March 25, 2016)

Ala. Code § 43-2-442 authorizes an asset sale only "for the payment of debts;" mortgagee's failure to file a timely claim against the estate precluded such a finding, even though mortgagee retained foreclosure rights to obtain at least partial satisfaction of the debt absent the filing of any claim.

Probate Court; Appointment of Temporary Judges; Jurisdiction

Ex parte K.R., No. 1141274 (Ala. March 25, 2016)

Under *Ala. Code* § 12-13-37, when a probate judge has recused, that fact must be certified to the Chief Justice of the Alabama Supreme Court, who then is to appoint a temporary probate judge. *Ala. Code* § 12-1-14.1 allows the probate judge to certify his recusal to the presiding circuit judge, who may then also make an appointment. Failure to follow either procedure deprived the assigned judge of jurisdiction.

Insurance; Insurable Interests

Ex parte Liberty National Life Ins. Co., No. 1140612 (Ala. March 25, 2016)

Ala. Code § 27-14-3(f) requires that an insurable interest exist only at the time of policy procurement and not thereafter, and specifically not at the time of a loss.

Trusts; Statutes of Limitation; Attorneys' Fees

Ladd v. Stockham, No. 1140365 (Ala. March 25, 2016)

Beneficiary's receipt of annual financial reports through the late 1990s and 2000s barred, under the two-year limitations period of *Ala. Code* § 19-3B-1005 (part of the *Uniform Trust Code*), any claims for breach of fiduciary duty, because of the receipt of "reports" adequately disclosing the alleged misconduct.

Gaming Law

State of Alabama v. \$223,405.86, No. 1141044 (Ala. March 31, 2016)

The court reversed the circuit court's denial of forfeiture relief to the state on the recovery of cash and illegal gambling devices. Based on the court's prior precedents establishing the illegality of gaming activities at Victoryland, the state met its burden to demonstrate that the cash and devices were used in furtherance of illegal gaming activity.

Immunity

***Alabama State University v. Danley*, No. 1140907 (Ala. April 8, 2016)**

Section 14 barred money damage claims against Alabama State University and official-capacity claims for breach of contract and back-pay relief. Section 14 also barred individual-capacity claims for breach of contract because it implicated a contract right of the state. Individual-capacity claims for “wrongful withdrawal of pay” were barred by state-agent immunity, because those officials were acting in a supervisory role exercising judgment. Eleventh Amendment barred federal-law claims against Alabama State University and official-capacity claims; the back-pay award claim was also barred by the Eleventh Amendment, and qualified immunity barred the individual-capacity claims on wrongful withdrawal of pay. Because, at most, the plaintiff obtained a declaratory judgment of rights violations, plaintiff was not a prevailing party under 42 U.S.C. § 1983 claims, and thus was not entitled to fees under section 1988.

Venue

***Ex parte Southeastern Energy Corp.*, No. 1150033 (Ala. April 15, 2016)**

Because no stay was sought pending disposition of mandamus petition, trial court had jurisdiction to reconsider denial of transfer motion and to effect transfer to Lowndes County, because it was a proper venue (where defendant sought transfer to Montgomery County “or any other proper venue.”)

Peace Officer Immunity

***Kendrick v. City of Midfield*, No. 1130886 (Ala. April 15, 2016)**

Peace-officer immunity under *Ala. Code* § 32-5A-7 requires engagement of lights and siren; summary judgment was improper because evidence was disputed as to whether siren was engaged.

Jury Demand

***Ex parte North American Adjusters, Inc.*, No. 1150278 (Ala. Apr. 22, 2016)**

Ala. R. Civ. P. 38 requires only that a jury demand be in writing, not that it be signed.

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(Continued from page 293)

Summary Judgment Procedure

Cherry v. Pinson Termite and Pest Control, LLC, No. 1140369 (Ala. April 29, 2016)

Among other holdings, there was substantial evidence that a wood infestation report failed to satisfy regulatory requirements, and that bond provider's failure to follow administrative rules caused damages. Bond provider must affirmatively disclose to prospective transferees of a bond when certain impediments to preventing termites or exceptions to a complete prevention treatment exist.

Effect of Dismissal; Continuing Jurisdiction

Synovus Bank v. Mitchell, No. 1141046 (Ala. April 29, 2016)

(1) Joint stipulation of dismissal filed before answer or motion for summary Judgment was treated as a notice of dismissal, which operated as dismissal of action without order of the court; (2) although trial court lost jurisdiction over the matter generally upon dismissal, trial court nevertheless maintained jurisdiction to consider a Rule 60(b) motion to vacate the dismissal.

Negligence

Jim Bishop Chevrolet-Buick-Pontiac-GMC, Inc. v. Burden, No. 1141231 (Ala. May 6, 2016)

Defendant's failure to identify and repair the source of a car's burning odor, standing alone, was insufficient to establish a prima facie case of negligent repair. Plaintiff's failure to offer expert testimony as to cause of fire experienced in truck following unsuccessful repair precluded finding of breach of duty.

Recusal

Ex parte Adams, No. 1140732 (Ala. May 6, 2016)

Multiple adverse rulings by trial court against petitioner, and multiple favorable rulings to respondent often made one or two days after the filing of respondent's motions, were insufficient to establish clear legal right to recusal.

Redemption

E.B. Investments, LLC v. Pavilion Development, LLC, No. 1141259 (Ala. May 13, 2016)

Among other holdings: (1) redemptioner was entitled to redeem property despite having failed to name all necessary parties within one year following foreclosure, given the liberal

construction to be afforded redemption statutes; relation back principles apply to redemption proceedings, and redemptioner exercised due diligence in ascertaining parties to be substituted for fictitiously-named parties; (2) "when the mortgagee buys at foreclosure sale, the amount of the debt secured by the mortgage is treated as the purchase price rather than the amount bid;" (3) houses constructed upon lots subdivided for the purpose of residential development were "valuable and useful additions" and thus were recoverable as lawful charges under *Ala. Code* § 6-5-253(a)(1).

Ecclesiastical Affairs Doctrine

St. Union Baptist Church, Inc. v. Howard, No. 1141132 (Ala. May 13, 2016)

Whether defendant pastor could continue in his church position was an ecclesiastical matter not subject to the trial court's jurisdiction. Whether church directors wrongfully refused pastor access to financial records of the church and to church funds was not ecclesiastical in nature.

Statute of Limitations

Ex parte CVS Pharmacy, LLC, No. 1150355 (Ala. May 27, 2016)

Failure either to pay required filing fee or to secure trial court's approval of affidavit of substantial hardship was a jurisdictional prerequisite to the commencement of plaintiff's action.

Forum Non Conveniens

Ex parte Wayne Farms, LLC, No. 1150404 (Ala. May 27, 2016)

Interests of justice compelled transfer of action from Bullock County (where the defendant driver resided and wanted case to remain) to Pike County (where plaintiffs resided and where accident occurred, on plaintiff's farm).

Effect of Bankruptcy Filings

Gaddy v. SE Property Holdings, LLC, No. 1140578 (Ala. May 27, 2016)

Trial court was precluded by automatic stay from dismissing claims against guarantor who had filed petition under Title 11 before final judgment, where no relief from stay was sought before order was entered, which rendered the appeal from a non-final judgment.

Indemnity; Scope

Once Upon a Time, LLC v. Chappelle Properties, LLC, No. 1141052 (Ala. May 27, 2016)

Agreement by tenant to indemnify landlord from claims for damages occurring "in, on or about" the retail space subject to commercial lease did not encompass injuries occurring in vacant space in same building.

Arbitration

Regions Bank v. Rice, No. 1141154 (Ala. May 27, 2016)

Parties had clearly and unmistakably reserved to the arbitrator the issue of arbitrability (issue was scope of agreement).

From the Alabama Court of Civil Appeals

Probate

Leonard v. Woodruff, No. 2140822 (Ala. Civ. App. March 25, 2016)

Executrix of estate was properly entitled to reimbursement

for fees incurred by New York counsel for successful defense of action in that jurisdiction by sibling, whose claims against executrix in New York were deemed barred by *res judicata* effect of Alabama proceedings relating to estate. Fees were paid by reducing the distributive share of the challenging sibling under the will, for which circuit court (to which probate proceeding had been removed) had general equity power to award.

Corporations

Freemanville Water System, Inc. v. Drew, No. 2140569 (Ala. Civ. App. April 1, 2016)

Corporate bylaws, which would impose individual liability for debts of the entity on its members, were invalid because they were inconsistent with the corporate charter, under which individual member liability was prohibited.

Revival of Judgments

Gloor v. BancorpSouth Bank, No. 2140914 (Ala. Civ. App. April 1, 2016)

Ala. Code § 6-9-192, which authorizes proceedings to revive judgments, does not require the commencement of a new action for which a separate filing fee is required.

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(Continued from page 295)

Redemption (Three Cases)

Lee & Howard, LLC v. Wood, No. 2140946 (Ala. Civ. App. April 8, 2016)

Redemptioner that ultimately abandoned its challenge to the deficiency of notice in a tax sale of real property was, by virtue of abandoning that argument, precluded from challenging the payment of interest on the “overage” paid by the redemptionee at the tax sale.

Wall to Wall Properties, Inc. v. Cadence Bank, N.A., No. 2140683 (Ala. Civ. App. April 15, 2016) (second rehearing)

Wall (redemptionee) was not entitled to reimbursement of costs from Cadence (redemptioner) for insurance and improvements to a residential structure. Cadence’s failure to follow strictly the referee-appointment procedure in *Ala. Code* § 40-10-122(d) did not cause Cadence to waive its right to object to the amounts; Cadence provided sufficient notice under that section by filing a pleading in the AlaFile system and sending emails, served on counsel for Wall.

Wall to Wall Properties, Inc. v. Wells Fargo Bank, N.A., No. 2140837 (Ala. Civ. App. April 15, 2016) (second rehearing)

Wall (redemptionee) was not timely in seeking mandamus relief to challenge the probate court’s issuance of a certificate of redemption to Wells (redemptioner), where nearly one year passed from time certificate was issued to the time of mandamus (the challenge was based on probate court’s alleged failure to “ascertain whether all amounts due under *Ala. Code* § 40-10-122(c) had been paid in the redemption).

Ejectment

Williams v. Wells Fargo Bank, N.A., No. 2140890 (Ala. Civ. App. April 15, 2016)

Among other holdings: (1) Williams waived inadmissibility of testimony for failing to move to strike it; (2) Wells had right to exercise power of sale by virtue of holding the note; (3) failure to hold a hearing on a Rule 59 motion is harmless if the motion was properly denied as a matter of law.

Adverse Possession

Williams v. White, No. 2140958 (Ala. Civ. App. Apr. 22, 2016)

Adverse-possession determination was plainly and palpably wrong; evidence demonstrated that plaintiff had paid rent on the property up until 10 years before the filing of the action,

which conclusively demonstrated permissive rather than hostile possession.

Injunctions

Ex parte Alabama Dept. of Mental Health, No. 2150415 (Ala. Civ. App. Apr. 22, 2016)

ADMH’s petition for mandamus from trial court order preliminarily staying decertification of methadone clinic was actually an appeal from a preliminary injunction of the trial court, and that appeal was untimely because it was taken more than 14 days after the trial court’s order.

Fraud; Reasonable Reliance

Medical Park Station, LLC v. 72 Madison, LLC, No. 2141069 (Ala. Civ. App. Apr. 22, 2016)

Commercial tenant’s fraud claim against landlord for failure to include tenant improvement allowance (“TIA”) provision in final lease failed for lack of reasonable reliance; tenant was represented by counsel in negotiation and execution of lease, and final lease executed by tenant undisputedly did not contain TIA provision.

Workers’ Compensation

Leesburg Yarn Mills, Inc. v. Hood, No. 2140888 (Ala. Civ. App. April 29, 2016)

(1) Order determining that worker suffered compensable injury and awarding medical benefits and temporary compensation benefits, but leaving only the issue of compensation for any permanent disability for later proceedings, is immediately appealable; (2) employee satisfied the “clear and convincing” evidence standard for proving both medical and legal causation for linking cumulative trauma injury to 28-year work career; legal causation requires “that the performance of his or her duties as an employee exposed him or her to a danger or risk materially in excess of that to which people are normally exposed in their everyday lives[;]” and medical causation requires that the exposure in question was a contributing cause of the injury.

Sales Taxation

State Department of Revenue v. Omni Studio, LLC, No. 2140889 (Ala. Civ. App. April 29, 2016)

Professional photographer’s delivery of printed photos to clients was incidental to professional services, and thus photographer was not required to collect sales tax.

Civil Forfeiture

***Anderson v. State*, No. 2140972 (Ala. Civ. App. April 29, 2016)**

Because warrant was not executed by the officer(s) to whom it was directed (it was issued to the sheriff but executed by municipal officers), seizure of currency was unlawful under *Ala. Code* §§ 15-5-5 and 15-5-7.

Workers' Compensation

***Ex parte Lowe's Home Centers, LLC*, No. 2140855 (Ala. Civ. App. May 6, 2016)** (rehearing)

Judgment finding that an injury is compensable, ordering payment for medical treatment and awarding TTD benefits, but not awarding a specific amount, is immediately appealable. Substantial evidence of medical and legal causation supported compensability determination.

Credit Card Liability

***Cook v. Midland Funding, LLC*, No. 2140786 (Ala. Civ. App. May 13, 2016)** (rehearing)

Among other holdings: (1) claims by purchaser of credit-card debt against alleged debtor were not actually for open account (subject to three-year statute of limitations); as master of the complaint, Midland had the right to bring the claims as contract and account stated; (2) because Midland did not offer any contract into evidence, contract claim was not based on substantial evidence, and because Cook testified that he had no contract, Cook was entitled to summary judgment on that claim; (3) account stated claim was inappropriate for summary judgment, based on debtor's denial of debt, and creditor's failure to prove debtor's agreement or acquiescence in statement of account.

Summary Judgment Procedure

***Johnson v. Dunn*, No. 2150040 (Ala. Civ. App. May 13, 2016)**

Dispositive motion (styled a Rule 12 motion to dismiss, but in reality a motion for summary judgment because it contained matters outside the pleadings), filed one day before hearing on other matters and granted three days after the hearing, was improper 10-day requirement in Rule 56.

Appellate Procedure

***Drake v. Alabama Republican Party*, No. 2150157 (Ala. Civ. App. May 13, 2016)**

Failure of appellant to show error as to each ground which trial court cited constitutes a waiver of any argument as to the omitted ground and results in an automatic affirmance of the judgment.

Batson

***Kulakowski v. Cowart*, No. 2140860 (Ala. Civ. App. May 20, 2016)**

Among other holdings, trial court's denial of *Batson* motion was not clearly erroneous, because sheer number of struck venire persons of a particular race does not establish *prima facie* case of discriminatory animus.

Landlord-Tenant

***Selma Air Center, Inc. v. Craig Field Airport and Industrial Authority*, No. 2150339 (Ala. Civ. App. May 27, 2016)**

Trial court erred by granting preliminary injunction to landlord in holdover tenancy; landlord had adequate remedy at law in the form of unlawful detainer or for statutory ejection.

Workers' Compensation; Venue

***Ex parte Baptist Health System, Inc.*, No. 2150580 (Ala. Civ. App. May 27, 2016)**

Interests of justice demanded a transfer from Jefferson to Shelby County, where plaintiff was employed and injured.

From the United States Supreme Court

Second Amendment

***Caetano v. Massachusetts*, No. 14-10078 (U.S. March 21, 2016)**

The Court reversed a state court's upholding of a Massachusetts law prohibiting the possession of stun guns based on the state court's conclusion that a stun gun is not the type of weapon contemplated by Congress in 1789 as being protected by the Second Amendment.

Class Actions; Employment

***Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146 (U.S. March 21, 2016)**

Class certification of FLSA "donning and doffing" claims was not an abuse of discretion, where statistical modeling was used to estimate damages. The Court cautioned that it was not embracing all statistical modeling usages for damages in class cases.

(Continued from page 297)

Asset Forfeiture

Luiz v. US, No. 14-419 (U.S. March 30, 2016)

Pre-trial restraint of legitimate, untainted assets needed to retain counsel of choice violates the Sixth Amendment.

Legislative Districting

Evenwel v. Abbott, No. 14-940 (U.S. April 4, 2016)

A state may draw legislative districts constitutionally, without offending “one person, one vote” principles, by using total-population data rather than total registered voter population data.

Redistricting; Equal Protection

Harris v. Arizona Independent Redistricting Comm’n., No. 14-232 (U.S. April 20, 2016)

Population deviations of less than 10 percent in redistricting were primarily result of good-faith efforts to comply with Voting Rights Act; even if political partisanship played some role in drawing lines, they were constitutional.

Full Faith and Credit

Franchise Tax Board v. Hyatt, No. 14-1175 (U.S. April 19, 2016)

The Full Faith and Credit clause does not permit Nevada to apply a rule of Nevada law that awards damages against California that are greater than it could award against Nevada in similar circumstances.

Public Employment

Heffernan v. City of Patterson, No. 14-1280 (U.S. April 26, 2016)

When employer demotes employee out of desire to prevent employee from engaging in protected political activity, employee may sue for First Amendment violation and under §1983 even if employer’s actions are based on factual mistake about employee’s behavior.

Abortion

Zubik v. Burwell, No. 14-1418 et al. (U.S. May 16, 2016)

Challenge by religious and nonprofit organizations of the ACA’s “contraception mandate” required further development on remand, given petitioners’ post-argument concession that their religious exercise is not infringed if they provide no

ACA-required notice, but their employees receive cost-free contraceptive coverage from their insurance company.

Federal Jurisdiction

Merrill Lynch v. Manning, No. 14-1132 (U.S. May 16, 2016)

Federal jurisdiction exists either where federal law creates the cause of action, or where a state-law cause of action is “brought to enforce” a duty created by a federal law.

Bankruptcy

Husky Int’l. Electronics, Inc. v. Ritz, No. 15-145 (U.S. May 16, 2016)

The term “actual fraud” for 11 U.S.C. §523(a)(2)(A) non-dischargeability encompasses fraudulent conveyance schemes not involving a false representation.

Statutory Actions; Standing

Spokeo, Inc. v. Robins, No. 13-1339 (U.S. May 16, 2016)

Ninth Circuit held that Article III injury-in-fact was satisfied based on Robins’s allegation that “Spokeo violated his statutory rights” and the fact that Robins’s “personal interests in the handling of his credit information are individualized.” The Supreme Court vacated, holding that the analysis failed to require that Robins’s injury be both concrete and particularized. The Court cautioned that Robins may have standing.

FDCPA

Sheriff v. Gillie, No. 15-338 (U.S. May 16, 2016)

Outside counsel designated as “special counsel” for state attorney general used the letterhead of the AG, at the AG’s direction, to collect debts of state under contract. Held: use of AG letterhead was not false or misleading under the FDCPA.

Employment; “Prevailing Party”

CRST Van Expedited, Inc. v. EEOC, No. 14-1375 (U.S. May 19, 2016)

One need not necessarily obtain a ruling on the merits to be considered a prevailing party for purposes of Title VII.

Employment

Green v. Brennan, No. 14-613 (U.S. May 23, 2016)

Constructive discharge claim accrues—and limitations period begins to run—when the employee gives notice of his resignation, not on the effective date thereof.

Batson

Foster v. Chatman, No. 14-8349 (U.S. May 23, 2016)

State court's finding of no purposeful discrimination in prosecution's exercising strikes was clearly erroneous; prosecution's file obtained in post-conviction proceedings belied the prosecution's proffered nondiscriminatory reasons for several strikes and substantiated racial animus.

From the Eleventh Circuit Court of Appeals

Class Actions; Predominance

Brown v. Electrolux Home Products, Inc., No. 15-11455 (11th Cir. March 21, 2016)

In a "smelly washer" consumer class action, California class was unsuitable because there was no evidence any class member actually viewed the allegedly misleading marketing materials (the named plaintiff for the California class admitted he saw no such materials). The same was true for the Texas class, especially since the Texas DTPA requires proof of reliance.

FDCPA

Bishop v. Ross Earle & Bonan, P.A., No. 15-15285 (11th Cir. March 25, 2016)

(1) Debt-collection letter sent to the consumer's attorney—rather than directly to the consumer—qualifies as a "communication with a consumer;" (2) omitting the "in writing" requirement set forth in § 1692g amounts to waiver of that requirement by the debt collector; (3) omission of the "in writing" requirement states a claim for "false, deceptive, or misleading" behavior in violation of § 1692e. On this last issue, the Court rejected the "competent lawyer" standard for FDCPA communications directed to lawyers, holding that the "least sophisticated consumer" standard controls.

All Writs/Anti-Injunction

Original Brooklyn Water Bagel Co., Inc. v. Bersin Bagel Group, LLC, No. 15-11748 (11th Cir. March 25, 2016)

Anti-Injunction Act deprived the district court of the power to enjoin Bersin from prosecuting state court suit, based on *res judicata* effect of prior action.

Service of Process

DeGazelle Group, Inc. v. Tamaz Trading Establishment, No. 15-13543 (11th Cir. March 30, 2016)

FedEx is not a Rule-authorized method of service.

ADA

Frazier-White v. Gee, No. 15-12119 (11th Cir. April 7, 2016)

Neither plaintiff's request for an indefinite extension of "light duty" status nor her request for reassignment to an unspecified position was an identified reasonable accommodation, causing ADA claim to fail.

Title VII

Trask v. Secretary of Veterans Affairs, No. 15-11709 (11th Cir. April 5, 2016)

Plaintiffs failed to demonstrate that, though they were long-serving and highly-qualified clinical pharmacists, they were, in fact, qualified for the PACT positions for which promotions were sought, given their requirements (which plaintiffs lacked) of having "advanced scope" and providing independent mid-level care and holding independent prescription-writing authority.

Bankruptcy; Procedure

Rosenberg v. DVI Receivables XIV, LLC, No. 14-14620 (11th Cir. April 8, 2016)

When trying a case arising under title 11, a district court (just like a bankruptcy court) must apply the filing deadline found in the FRBP when addressing a Rule 50(b) motion (which requires filing within 14 days, unlike 28 days under FRCP).

Arbitration; Waiver

Collado v. J&G Transport, Inc., No. 15-14635 (11th Cir. April 21, 2016)

Waiver of the right to arbitrate a federal claim does not extend to later-asserted state claims added by amendment.

Qualified Immunity

Carter v. Butts County, No. 15-12529 (11th Cir. May 3, 2016)

Deputy lacked even arguable probable cause to effect arrests of lender's representatives because he knew that the agents were lawfully on deputy's property preparing for resale after foreclosure.

RESPA

Renfroe v. NationStar Mortgage, Inc., No. 15-10582 (11th Cir. May 12, 2016)

(1) RESPA plaintiff alleging that servicer failed to comply with qualified written request procedures, in violation of 12 U.S.C. § 2605, adequately pleaded (in light of CFPB regulations interpreting requirements for servicers in responding to disputes) that servicer failed to supply a statement of reasons it had concluded there was no error in the increase in payments; (2) that plaintiff adequately pleaded "actual damages" under RESPA for servicer's failure to refund allegedly wrongful increase; and (3) plaintiff adequately pleaded "pattern and practice" to trigger possible entitlement to statutory and punitive damages under RESPA.

(Continued from page 299)

Labor; Injunctions

Secretary, USDOL v. Lear Corp., No. 15-12060 (11th Cir. May 13, 2016)

District court erred by enjoining Lear from pursuing litigation against former employee without finding that such litigation was either baseless or preempted.

Class Actions; Predominance

Carruolo v. General Motors Co., No. 15-14442 (11th Cir. May 19, 2016)

District court proper grant of class certification to Florida purchasers of certain Cadillac CTS cars, based on GM's falsely stating on the window stickers that the car received all five-star ratings for certain crash tests (with some of the cars, no tests had then been performed; once the car was tested, it received all five stars except for a four-star as to passenger frontal collision). FDUTPA (Florida's deceptive trade practices act) does not require proof of reliance, and thus common issues predominated.

Statutes of Limitation

Foudy v. Miami-Dade County, FL, No. 15-12233 (11th Cir. May 19, 2016)

Four-year catch-all statute of limitations under 28 U.S.C. § 1658(a) applies to claims under the Drivers Privacy Protection Act.

FDCPA; Bankruptcy

Johnson v. Midland Funding LLC, No. 15-11240 (11th Cir. May 24, 2016)

Crawford v. LVNV Funding, LLC, 758 F.3d 1254, 1261 (11th Cir. 2014), under which a debt collector violates the FDCPA when it files a proof of claim in a bankruptcy case on a debt that it knows to be time-barred, does not create irreconcilable conflict between the *Code* and the FDCPA.

RECENT CRIMINAL DECISIONS

From the United States Supreme Court

Federal Sentencing Guidelines

Molina-Martinez v. U.S., No. No. 14-8913 (U.S. April 20, 2016)

Miscalculation of a guidelines range, even where eventual sentencing falls within the correct range, requires resentencing without presentation by defendant of "additional evidence" demonstrating the illegality of the sentence.

Hobbs Act

Ocasio v. U.S., No. 14-361 (U.S. May 2, 2016)

Defendant may be convicted of conspiring to violate the Hobbs Act based on proof he reached agreement with owner of property to obtain that property under color of official right.

Sentencing

Betterman v. Montana, No. 14-1457 (U.S. May 19, 2016)

Sixth Amendment right to speedy trial does not apply at sentencing phase.

From the Court of Criminal Appeals

Expungement

Bell v. State, CR-15-0618 (Ala. Crim. App. Apr. 29, 2016) and Levins v. State, CR-15-0612 (Ala. Crim. App. Apr. 29, 2016)

Trial court's disposition of expungement petition is reviewable only by mandamus, and only for abuse of discretion.

Right to Counsel

Colburn v. State, CR-14-1143 (Ala. Crim. App. Apr. 29, 2016)

Because motion to withdraw guilty plea is a "critical stage" of proceedings, trial court must have defendant either voluntarily waive right to counsel or appoint counsel and file a new motion to withdraw the plea.

Setting Aside Plea

Smith v. State, CR-14-1290 (Ala. Crim. App. Apr. 29, 2016)

Though hope of a specific sentence is not sufficient to set aside guilty plea, remand was needed to determine whether

guilty plea was involuntary due to defense counsel's alleged statement that defendant would receive either split sentence or probation.

Sex Crimes

Lucas v. State, CR-14-0744 (Ala. Crim. App. Apr. 29, 2016)

Defendant's act of placing penis against sleeping victim's nose and lips constituted first-degree sexual abuse, as those were "intimate parts" of the victim under *Ala. Code* § 13A-6-66. Actions did not constitute forcible compulsion and thus conviction for first-degree sodomy was error.

Capital Punishment; Intellectual Disability

Lane v. State, CR-10-1343 (Ala. Crim. App. Apr. 29, 2016)

The court overruled its previous refusal to adopt a margin of error in the evaluation of an IQ test score for claims of intellectual disability in capital cases. However, it affirmed defendant's death sentence because he was provided a hearing wherein the trial court was not barred from considering other evidence regarding his alleged intellectual disability.

Strip Searches

Redfearn v. State, CR-14-0500 (Ala. Crim. App. Apr. 29, 2016)

Several controlled buys of controlled substances provided probable cause to stop and arrest defendant several miles from his home, and search of his body, resulting in the discovery of drugs in his underwear, fell within search warrant's instruction to search both him and his residence.

DUI

Pierce v. State, CR-14-0994 Ala. Crim. App. Apr. 29, 2016)

Any alleged error in admission of breath test results due to alleged improper predicate for admission was harmless, in light of other evidence of defendant's intoxication.

Material Variances

Ex parte Hall, No. 1150089 (Ala. Mar. 25, 2016)

There was no material variance between the defendant's indictment charging him with theft of "currency" and State's proof that he committed the theft through the depositing of a check. ▲



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MEMORIALS

▲ **Thomas H. Henderson**

▲ **Justin W. Parsons**

Thomas H. Henderson

On the first day of law school Tom Henderson sat down across from me in the law library and said, “Hello. I am Tom Henderson.” I said, “Hello, I am Bob McCurley,” and thus began a 50+-year friendship. We studied together, went to Washington together, were roommates and celebrated the joys of our families together.

Tom Henderson passed away on February 12, 2016, surrounded by his loving family, after a long battle with lymphoma.

Tom was born in Birmingham and attended Auburn University, where he played basketball for the Auburn Tigers, graduating in 1961 with a BS in business administration. After college, he worked for the American Pipe Company, saving money to attend the University of Alabama School of Law, where he obtained his law degree in 1966. Later he attended George Washington University where he received an L.L.M. in legal ethics in 1987.

Tom went to Washington, DC where he began his 17-year career with the United States Justice Department. He took out time to be counsel to the Senate Judiciary Committee but returned to the Justice Department, where he held several senior positions. During his tenure, he served as the chief of the Public Integrity Section, where he was responsible for corruption prosecutions in the United States. After leaving the Justice Department, Tom served for four years as the bar counsel of the District of Columbia, where he prosecuted any of the 60,000 members of the District of Columbia Bar for misconduct.

In 1988, Tom became the chief executive of the American Trial Lawyers Association (ATLA), now named the American Association for Justice (AAJ). During his 18-year tenure with ATLA/AAJ, Tom was a fearless and passionate advocate to safeguard victims’ rights and strengthen the civil justice system. Immediately following the events of 2001, Tom helped ATLA create Trial Lawyers Care, the largest legal pro bono effort in the history of the United States, providing free legal services to victims of the September 11 disaster seeking assistance from the Victim Compensation Fund. Tom retired from ATLA in 2005 and was called back to AAJ in 2009, where he served as the CEO for

another year retiring again in 2010. Tom was a member of the District of Columbia and Alabama State bars.

In 2004, he served as a Distinguished Practitioner in Residence at the University of Alabama Law School. In 2004, he established the Thomas H. Henderson, Jr. Endowed Scholarship at the University of Alabama School of Law for second-year law students with financial need, with preference given to individuals from under-represented groups in the legal system, who are interested in representing individuals of personal injury.

Tom was married to Paulette Maehara and they resided in Chevy Chase, Maryland for 22 years. Tom and Paulette blended their family of four daughters. He loved hiking and in August 1994 at 55, he traveled to Tanzania, Africa and successfully summited Mount Kilimanjaro. He also hiked the Grand Canyon, El Capitan and one of the Alaska glaciers with his hiking buddies. In 2010, Tom and Paulette moved to Bluffton, SC. This allowed Tom to frequently return to Alabama to cheer his Alabama teams on to victory.

I have lost a great friend and the Alabama State Bar has lost another great lawyer.

—Bob McCurley, Tuscaloosa

Justin W. Parsons

Justin Wayne Parsons, a loving and devoted husband and father, passed away March 31, 2016, at the young age of 35. Justin and his family resided in Fairhope. Justin was a graduate of Sparkman High School and went on to the University of North Alabama where he earned his undergraduate degree. He earned his Juris Doctor from the University of Alabama School of Law. Justin was a partner with Carr Allison in Daphne. He was preceded in death by his grandparents, George and Velma Parsons. Justin is survived by his best friend and loving wife, Amy Love Parsons; two beautiful daughters, whom he loved and cherished, Perry and Palmer; his mother, Ginger Slaton (Jim); his father, George A. Parsons, Jr. (Catherine); a sister, Danielle Taylor; and his grandparents, Lewis and Ellen Sharpe. ▲

Capps, Hon. Deborah Ann Goodson

Jasper
Admitted: 1996
Died: March 16, 2016

Emond, Clifford, Jr.

Birmingham
Admitted: 1950
Died: April 21, 2016

Graves, Gregory Terence

Pike Road
Admitted: 2005
Died: April 30, 2016

Hall, Debbie Reeves

Sulligent
Admitted: 2001
Died: June 3, 2015

Hooper, Hon. Perry Ollie, Sr.

Montgomery
Admitted: 1953
Died: April 24, 2016

Morrow, Roger Stephen

Montgomery
Admitted: 1979
Died: February 27, 2016

O'Kelley, Madison Willis, Jr.

Birmingham
Admitted: 1967
Died: March 2, 2016

Relfe, Julien Massey, Jr.

Birmingham
Admitted: 1971
Died: March 14, 2016

Reynolds, Hon. George Ray

Warrior
Admitted: 1952
Died: April 26, 2016

Scott, Bobby Lee

Columbus, Georgia
Admitted: 2004
Died: April 9, 2016



LEGISLATIVE WRAP - UP

Othni J. Lathram

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

The 2016 Legislative Session was an interesting one. It has been a hard session to put a particular focus on, although it was very active. On the heels of two special sessions in 2015, it was a focus to deal with the General Fund budget early and the legislature passed it prior to its “spring break” hiatus. Likewise, the Education Trust Fund passed the second house on the 22nd legislative day, although a conference committee was needed to hammer out the differences between the two houses. With the budgets done early, the legislature was able to deal with a broad array of issues. In the final analysis, two of the major discussion points, prison construction and how to best make use of the BP settlement funds, went unfinished in the final hours.

Complete copies of the legislation addressed herein or any other legislation considered during the 2016 Regular Session can be found by visiting www.legislature.state.al.us and clicking on the “Session Information” tab.¹

Alabama Law Institute Legislation

Alabama Limited Partnership Law (Act 2016- 379)

Representative Bill Poole and Senator Cam Ward

- This act was proposed by the ALI Committee on Business Entities as the latest step toward modernizing our business formation and governance laws.
- This act will bring our LP statute into line with the significant improvements made last year for LLCs.

Noteworthy features of this act are:

■ *Contractual Nature*

Most features of a limited partnership can be modified by the partners to suit their needs in a partnership agreement. This act sets out the default rules, but provides maximum flexibility through freedom to contract.

■ *Mandatory Safeguards*

Despite the emphasis on allowing the partners to make their own contract, the new LP law maintains certain obligations, such as the implied contractual covenant of good faith and fair dealing, cannot be modified.

■ *Notice Filing*

In keeping with the contractual nature of the limited partnership, the filings required to form, dissolve, merge or convert a limited partnership are designed only to notify the state and third parties that the limited partnership exists and how to contact it.

■ *Agency*

Unlike a limited liability company, the agency of a limited partnership is set by statute, and is vested in the general partners. Thus, the certificate of formation requires that the general partners be listed.

■ *Harmonization*

This act harmonizes, to the extent possible, the various processes of formation, filings, notice, amendment and re-statement of certificates of formation, admission of limited partners and general partners, contributions and distributions, dissociation of partners and the effects thereof, transfers of interests, charging orders, rights of personal representatives, dissolution and winding up, direct and derivative actions and conversions and mergers.

■ *Conversions*

The process for conversions was slightly modified to take into account a request from the secretary of state—that is, when both the converting entity and the converted entity are domestic entities, to have the statement of conversion and the certificate of formation filed simultaneously with the secretary of state to resolve confusion that many practitioners were having utilizing the current LP law.

■ *Powers of Personal Representatives*

During the drafting process, the Alabama Supreme Court issued its ruling in *L.B. Whitfield, III Family LLC v. Virginia Ann Whitfield et al.*, 150 So.3d 171 (Ala 2014). The new LP law, along with the changes to the LLC law in Part 3 hereof, clarifies that the holding in that case should not apply to the default powers of a deceased partner's personal representative or other legal representative so long as that personal representative or other legal representative holds the deceased partner's transferable interests.

Grandparent Visitation (Act 2016-362)

Representative Mike Jones and Senator Gerald Allen

Alabama's current grandparent visitation statute has been declared unconstitutional. This was just the latest of what has been a number of challenges to grandparent visitation statutes nationwide. This proposal makes use of the guidance provided by various courts to try and draft a statute that will withstand scrutiny. The proposal provides a rebuttable presumption that a fit parent's decision denying or limiting visitation to the petitioner is in the best interest of the child and requires clear and convincing evidence to grant visitation.

To rebut a parental decision to deny visitation, the grandparent must prove a significant and viable relationship with the grandchild and that visitation with the grandparent is in the best interest of the grandchild. The factors for establishing both of these requirements are also set out in the proposal.

The proposal would allow courts to grant temporary visitation pending a final order under limited circumstances and the discretion to award any party reasonable expenses incurred by or on behalf of the party.

Common Law Marriage (Act 2016-306)

Representative Mike Jones and Senator Rodger Smitherman

Prior to the legislative session, the legislature asked the Law Institute Family Law Committee to provide a comprehensive look at common law marriage. Following that work, two bills were presented to the legislature—the first to add clarity while the second was an outright repeal. Following debate of the subject, the legislature moved forward with the repeal bill. This act will repeal the ability to enter into a common law marriage effective January 1, 2017, while continuing to hold valid those entered into prior to that date.

Alcohol Regulations

Brewery Direct Sales (Act 2016-97)

This bill allows small brewers to sell directly to consumers for off-premises consumption up to 265 ounces per day from their manufacturing location. It also removes the location restrictions for brewpubs.

Distillery Direct Sales (Act 2016-130)

This bill allows Alabama distillers to sell up to 750 ml per day per consumer in direct sales from their distillery for off-premises consumption.

Winery Direct Sales (Act 2016-131)

This bill allows wineries to have a satellite tasting room and sell up to a case of wine per day per consumer for off-premises consumption.

Criminal Law

Ava's Law (Act 2016-29)

This act amends the definition of murder to include the commission of aggravated child abuse that causes the death of a person during the act.

(Continued from page 305)

Aggravated Child Abuse (Act 2016-43)

Creates the crime of aggravated child abuse of a child less than six years of age and provides that it is a Class A felony if (1) a person, on more than two occasions, commits torture or willful abuse of a child under six years of age; (2) commits torture or willful abuse of a child under six years of age and is in violation of a court order or injunction; or (3) commits torture or willful abuse of a child under six years of age and causes serious physical injury to the child.

Cargo Theft (Act 2016-109)

This act creates new crimes for theft of cargo in commercial transportation and fifth-wheel tampering. The criminal penalties for theft of cargo range from Class A misdemeanors to Class B felonies, contingent upon the value of the cargo. A violator may be disqualified from driving a commercial motor vehicle for one year upon a first conviction and for life upon a second or subsequent conviction. The act provides that the crime of fifth-wheel tampering is a Class C felony.

Service Animals (Act 2016-168)

This act provides criminal penalties for harassing, injuring or causing the death of a service dog, or allowing a dog that is not contained by a fence, a leash or other containment system to harass or cause injury to a service dog.

Leni's Law (Act 2016-268)

The act establishes an affirmative and complete defense to prosecution for the unlawful possession of marijuana in the second degree if the defendant used or possessed cannabidiol (CBD), as defined by the act: (1) because he or she has a debilitating medical condition; or (2) he or she is the parent or legal guardian of a minor who has a debilitating medical condition, and the CBD is being used by the minor. The act also prohibits the state or a political subdivision of the state, including a law enforcement agency, from removing a child from a home initiating child protection action proceedings based solely upon the parent's or the child's use of CBD as authorized under the act.

Kratom (Act 2016-279)

This act adds Kratom to Schedule I of the controlled substances list.

Constitutional Amendments

Right to Work Amendment (Act 2016-18)

This proposed amendment would constitutionally declare Alabama as a right-to-work state.

State Parks (Act 2016-145)

This proposed amendment would limit the amount and conditions under which the legislature could transfer money from the Parks Revolving Fund for any purposes other than the operation of the state parks.

Relating to Lawyers and Courts

Natural Death Act Amendments (Act 2016-96)

Amends the Natural Death Act, to provide for the use of portable do-not-attempt-resuscitation orders ("DNAR") anywhere in the state in addition to advance directives for healthcare, subject to the same conditions. The act also requires the State Board of Health to adopt a form to be used for a portable DNAR order.

Election Law

Electronic Polling Books (Act 2016-317)

This bill would allow for the use of electronic polling books in lieu of printed lists. The bill would first authorize a pilot program for testing.

Ballot Order (Act 2016-204)

This act will allow the reordering of the offices and candidates' names as they appear on an election ballot.

Other Bills of Interest

Ethics Act Amendments (Act 2016-259)

This legislation allows a retired director, assistant director or division chief to be contracted with to work for a transition period with their former employer.

Minimum Wage (Act 2016-174)

This act prohibits a local governmental entity from requiring minimum leave, wages or other benefits for employees and provides that the state has exclusive jurisdiction to regulate such activity beyond federal law.

Unborn Infants Dignity of Life Act (Act 2016-140)

The act allows parents of deceased unborn infants to provide for the final disposition of the bodily remains. The act: (1) prohibits the sale or other unlawful disposition of the bodily remains of deceased unborn infants for research, therapy, transplantation or experimentation; (2) prohibits the use, for compensation, of an unborn infant, living or deceased, including fetal tissue, organs or other bodily remains

in research, therapy, transplantation or experimentation; and (3) prohibits a person from performing or offering to perform an abortion so that the bodily remains may be used for research, therapy, transplantation or experimentation. The act provides criminal penalties for violations and authorizes disciplinary action against healthcare providers who violate the act.

University Authority Act (Act 2016-201)

The act provides that authorities and university affiliates established under the act are instrumentalities of the sponsoring university and further authorizes authorities established by constitutionally-created public universities in the state or public universities operating schools of medicine under the Health Care Authorities Act of 1982 to reincorporate under this act. The act specifies the powers of the authority, including the power to form university affiliates, the power of eminent domain and the power to incur indebtedness. ▲

Endnote

1. Special thanks to John Treadwell of the Legislative Reference Service for his assistance in summarizing these acts. A complete summary of all acts, including those of a local nature, is available under the publications link at www.lrs.state.al.us.



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OPINIONS OF THE GENERAL COUNSEL

J. Anthony McLain



Law firm may not “choose” between conflicting present clients and withdraw from representation so as to relegate one present client to “former client” status in order to take advantage of less stringent conflict rules

QUESTION:

“I have found myself in a situation where my opponent in litigation contends that my law firm must withdraw from representation of a longtime client, A, for whom we have acted as general counsel, due to an alleged conflict of interest under Rule 1.7 of the new *Rules of Professional Conduct* which became effective January 1, 1991. I

would appreciate receiving a confidential opinion from you as to whether we can take advantage of the comments to Rule 1.7 and withdraw from representing client C and continue to represent client A under Rule 1.9.

“The situation arose when I filed suit on behalf of our longtime client A against B, an Alabama general partnership, and its general partners C and D, for breach of a

construction contract and a fraud in the inducement and during performance of the contract. We also alleged a pattern and practice of fraud based on other jobs handled by D who was overseeing the construction work for B. C did not get involved with the construction project and did not commit any of the alleged fraud and is not claimed to be part of a pattern and practice. C is only included in the lawsuit by virtue of being a general partner in B, and thus liable for the acts of B.

“Shortly after filing suit, I learned that another lawyer in our firm, Jane Doe, was representing C on a one-time matter which was totally unrelated to the litigation. This is the only time we have represented C. The unrelated matter involved preparing the necessary legal documents for a condominium development. The condominium project was not connected in any way with the project out of which the construction lawsuit arose. Different entities were the owners of the two projects and different people were involved in each project. The only connection of C with the construction project was that it was a general partner of the owner of the construction project, B, a general partnership.

“Legal work on the condominium project for C commenced in April 1989. For several years prior to this date, my law firm had acted as general counsel for A. In September 1989, A entered into a construction contract with B for a project which

was not in any way related to the condominium project. In November 1989, client A asked us questions concerning the construction contract. We periodically thereafter gave A advice concerning its rights under the construction contract. Matters deteriorated between A and B and in November 1990, A asked us to file suit against B. C was included as a defendant in the lawsuit since it was one of the general partners of B. Suit was filed November 13, 1990.

“In late November 1990, we discovered the potential conflict concerning C. We immediately notified A and C of the situation. We received verbal consent from both A and C to continue our representations in the respective matters.

“In January 1991, we were advised by counsel for C (Law Firm X) that C was withdrawing its consent to our representing A in the construction litigation because we had not fully informed C as to the extent of the potential conflict. This was surprising since C had a copy of the complaint and had in-house lawyers on staff. Nevertheless, C insisted that we withdraw from our representation of A in the construction litigation but continue to represent C in the condominium project. C contends we must withdraw from representing A because of Rule 1.7 of the *Rules of Professional Conduct* and cites a portion of the comments thereto (under subtitle “Conflicts in Litigation”) which states:

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(Continued from page 309)

‘Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated.’

“Since the matter involving C is wholly unrelated to the construction litigation, it seems to me that other comments to Rule 1.7 control how this claimed conflict could be resolved. The second sentence in the second paragraph of the Comments under “Loyalty to a Client” states:

‘Where more than one client is involved and the lawyer withdraws because a conflict arises after representation [has been undertaken], whether the lawyer may continue to represent any of the clients is determined by Rule 1.9.’

“Rule 1.9 would not seem to prevent us from continuing to represent A in the construction litigation, if we withdrew from representing C in the condominium project, since the construction litigation has no relationship or connection to the condominium project.

“This resolution of the asserted conflict was mentioned to C’s counsel who responded by citing Wolfram’s *Hornbook on Modern Legal Ethics* and the California bankruptcy case *In re California Cannery and Growers*, 74 B.P. 336 (1987). The cited authority stated that in the situations involved in the authority, the lawyer could not choose between clients as to who he would represent. However, the bankruptcy case seems to be distinguishable from our situation since the two matters involved here are totally unrelated and since the case deals with the old code. Additionally, the portions of Wolfram cited talk about simultaneous litigation which we do not have in our situation. Moreover, the references seem to be at odds with the Comment section to Rule 1.7 cited above which seems to require withdrawal from representation of at least one client but allows continued representation of another if such would not violate Rule 1.9.

“Thus, the question presented is whether we may withdraw from representing C in the condominium project and continue to represent our longtime client A in the construction litigation where C is a defendant by being a general partner of B, or whether we must do what C wants and withdraw from representing A in the construction litigation and to continue to represent C in the condominium project, or whether we should do something else.

“We would appreciate your confidential opinion as to what we should do in this situation and whether we can withdraw

from representation of C and continue to represent A in the construction litigation.”

ANSWER:

Your representation of client A in the construction litigation is directly adverse to client C and for that reason you must withdraw from representing A in that matter. You may continue to represent A and C in other matters totally unrelated to the construction litigation.

Additionally, you may not, by discontinuing your representation of C, take advantage of the less stringent conflict rule regarding former clients and thereby continue to represent A.

DISCUSSION:

Rule 1.7 of the *Rules of Professional Conduct* provides the following:

“Rule 1.7 Conflict of Interest: General Rule

- (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
 - (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
 - (2) each client consents after consultation.”

As pointed out in the Comment to Rule 1.7, “loyalty is an essential element in the lawyer’s relationship to a client.” In the situation where a lawyer takes part in litigation against an existing client “the propriety of the conduct must be measured not so much against the similarities in litigation, as against the duty of undivided loyalty which an attorney owes to each of his clients.” *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976).

Much more latitude is permitted with respect to litigation against a former client. In this regard, Rule 1.9 of the *Rules of Professional Conduct* provides the following:

“Rule 1.9 Conflict of Interest: Former Client

A lawyer who has formerly represented a client in a matter shall not thereafter:

- (a) represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interest of the former client, unless the former client consents after consultation; or

(b) use information relating to the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client or when the information has become generally known.”

Here the emphasis is on the similarities in the litigation (a substantially related matter), and use of client confidences to the disadvantage of the former client.

In the instant situation there is no question that you could not continue to represent both client A and C in non-substantially related matters while at the same time representing A in litigation against C. Rule 1.7 does not permit such divided loyalty unless the conflicting interest will not adversely affect the relationship of the other client and each client consents.

The more difficult question is whether you could cease to represent client C, thus relegating C to former client status and thereby take advantage of the former client rule (Rule 1.9). Indeed the Comment to Rule 1.7 seems to indicate that such a procedure would be ethically permissible. The second paragraph of the Comment provides that, “Where more than one client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may

continue to represent any of the clients is determined by Rule 1.9.” We do not believe that this Comment was intended, in situations such as this, to allow the lawyer to disregard one client in order to represent another client. To hold otherwise, would do great harm to the principle of loyalty which is bedrock in the relationship between lawyer and client.

We find support for this view in *United Sewerage Agency v. Jelco Inc.*, 646 F.2d 1339, (9th Cir. 1981) where the Court held that:

“The present-client standard applies if the attorney simultaneously represents clients with different interests. This standard continues even though the representation ceases prior to filing of the motion to disqualify. If this were not the case, the challenged attorney could always convert a present client to a ‘former client’ by choosing when to cease to represent the disfavored client.” (Supra at 1345, N.4, citing, *Fund of Funds Ltd. v. Arthur Anderson & Co.*, 567 F.2d 225(2d Cir. 1977).

For the above reason, it is our view that you must cease your representation of A in the litigation that is directly adverse to your client C. [RO-1991-08] ▲

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About Members

Meagan Yarbrough announces the opening of **Meagan Yarbrough LLC** at 1902 Central Pkwy. SW, Ste. E, Decatur 35601.

Nicole E. Bean and **Alyssa L. Hawkins** announce the opening of **Bean Hawkins LLC** at 250 Commerce St., Ste. 7, Montgomery 36104 Phone (334) 676-2133.

Campbell Guin LLC announces that **Hannah Baril Lansdon** is an equity member in the firm.

Carr Allison announces that **Daniel Harris** joined the firm in the Birmingham office.

Among Firms

Avaya Inc. of Santa Clara announces that **Wesley Sowell** is director of corporate counsel—worldwide law and contracting operations.

Fidelity National Title Group announces that **Joe Powell** is regional national agency counsel and will continue to serve as Alabama state counsel.

Baker Donelson announces the election of three shareholders, **Matthew M. Cahill, Andrea Bailey Powers** and **Michael D. Tucker**, and that **Brodie T. James** joined the firm, all in the Birmingham office. The firm also announces that **Andy Rotenstreich** was named managing shareholder for the Alabama offices.

The **Glenview Trust Company** in Louisville, KY announces that **Stephanie L. Morgan-White** is an administrative principal.

Harrison, Gammons & Rawlinson PC of Huntsville announces that **Sean C. Vanden Heuvel** joined the firm as an associate.

Maynard Cooper & Gale announces that **Benjamin L. McArthur** joined the Huntsville office and **Jennifer R. Smith, Taryn E. Hodinka** and **Callen B. Thistle** joined the Birmingham office.

Parkman White LLP announces that **Clayton Tartt** is a partner in the Birmingham office, and **M. John Steensland, III** is a partner in the Dothan office.

K. Mark Parnell and **Mary H. Thompson** announce the formation of **Parnell Thompson LLC** at 200 Office Park Dr., Ste. 328, Birmingham 35223. Phone (205) 582-2652.

The **Powell Law Firm PC** of Andalusia and Gulf Shores announces that **Thomas A. Hughes, Jr.** joined as an associate.

Rosen Harwood PA of Tuscaloosa announces that **Jillian L. Guin White** joined as an associate.

Smith & Staggs LLP of Tuscaloosa announces that **Jaime W. Conger** is a partner.

Trustmark announces that **Mark Eiland** is senior vice president and trust officer at the Mobile office.

Webster, Henry, Lyons, Bradwell, Cohan & Black PC announces a name change to **Webster, Henry, Lyons, Bradwell, Cohan & Speagle PC** and that **P. Vaughan Russell, Jr.** and **Keri Simms** are shareholders.

Wettermark Keith announces that **Craig Lewis** and **Will Hassinger** joined the firm. ▲



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BAR BRIEFS

- **Baker Donelson** announces that **Lisa W. Borden** recently received the American Bar Association (ABA) Section of Litigation's **2016 John Minor Wisdom Public Service and Professionalism Award**.

This national award honors those who have made outstanding contributions to the quality of justice in their communities, ensuring that the legal system is open and available to all.

Borden, with the firm's Birmingham office, has been Baker Donelson's pro bono shareholder since 2007. She is responsible for overseeing the development, growth and administration of the firm's pro bono programs.

- **Bradley Arant Boult Cummings LLP** announces that Birmingham partner **Beau Byrd** recently was elected chair of the **Auburn University Master of Real Estate Development (AUMRED) Program Advisory Council**. Byrd's term will last for two years.

AUMRED is a partnership between Auburn University's College of Architecture, Design and Construction and the Harbert College of Business. The multi-faceted program was designed to provide students with an understanding of design, construction, market research, finance and development management.

The firm also announces that Birmingham partner **Denson N. Franklin, III** was elected to a two-year term as vice-chair of the **Birmingham-Southern College Board of Trustees**.



Byrd



Franklin

- **Christian & Small LLP** of Birmingham announces that partner **Daniel D. Sparks** was recently appointed to the **Southeastern Bankruptcy Law Institute's (SBLI) Board of Directors**. Sparks was appointed a director by fellow SBLI board members.

- **Stone, Granade & Crosby PC** announces that **Sam Crosby** recently received the **2016 Sam W. Pipes Distinguished Alumnus Award** during the Farrah Law Society banquet at the University of Alabama School of Law. The award is given annually to an outstanding alumnus of the University of Alabama School of Law who has distinguished himself or herself through service to the bar, the University of Alabama and the School of Law.



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