



ASB
Annual Meeting
2016
& Legal Expo



Meeting
Highlights
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Register at <https://www.alabar.org/about-the-bar/annual-meeting/>

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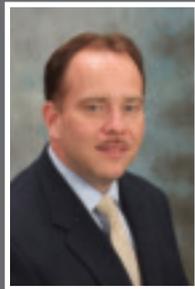
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2016 Annual Meeting

BAYTOWNE WHARF

June 22 - 25

Chance Corbett is an associate director in the Auburn University Department of Public Safety. His responsibilities include leading the Emergency Management Program for Auburn University which includes planning for and managing emergencies and disasters that affect Auburn University.



Corbett received his bachelor's degree in criminal justice and master's degree in education from Troy University. He is a POST-certified law enforcement officer, nationally registered paramedic and certified firefighter. He is also a certified emergency manager with the International Association of Emergency Managers.

Prior to working for Auburn University, Corbett served seven years as the Homeland Security/EMA director for Russell County and has more than 24 years of public safety experience, many in the law enforcement field. Corbett is a member of numerous national public safety and emergency management organizations.

During his career as a fulltime law enforcement officer, Corbett spent more than six years as a member of a local SWAT team, including

serving as the team leader for over three years. He is a senior instructor for the Alabama Law Enforcement Agency and teaches an advanced active shooter training program to law enforcement officers. Corbett leads the efforts to teach Active Shooter Response Training to the students and employees of Auburn University as well as other schools and organizations as needed.



Featuring the "**WingNuts**" Friday, June 24 at the Presidential Dinner and Young Lawyers'/Leadership Forum sections party, with lead singer **District Judge Alan Furr**, 30th Judicial Circuit, Pell City



On The Cover

The Alabama State Bar is back at the Village of Baytowne Wharf! Join us a little earlier this year, June 22-25, at the Sandestin Golf and Beach Resort—Baytowne Wharf. See meeting highlights inside and at <https://www.alabar.org/about-the-bar/annual-meeting/>.

—Photo courtesy of the Sandestin Golf and Beach Resort

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Book Review: The Power of Dissent

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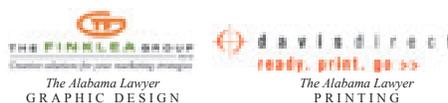
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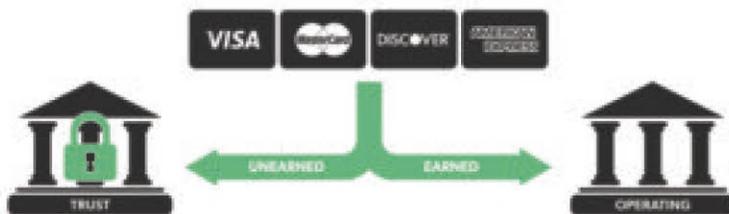


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Member Benefits

The Alabama State Bar takes seriously not only its obligation to regulate the practice of law to protect the public, but also to look out for the best interests of our lawyer-members. One of the ways it does that is through our varied member benefit offerings, which are selected with an eye toward making it easier and less expensive for private practice lawyers to work smarter and not harder.

The bar offers numerous discounted products and services that fill needs that many lawyers have in operating their practices. As an example, offerings include four different cloud-based practice management systems (Clio, CosmoLex, MyCase and RocketMatter) which facilitate the organization and handling of case file information as well as billing and trust accounting. LawPay provides an ethical and affordable way

to offer clients the option of paying with credit or debit cards or electronic checks. Ruby Receptionists specializes in remote legal receptionist and client intake services that can free a firm from a fulltime staff position and associated employee benefit costs. Our ABA Retirement Funds member benefit makes it possible for even solo lawyers to enjoy and offer to their staff managed 401(k) services at reasonable prices. There are also discounts on shipping (UPS), other legal software (Corel and EasySoft) and web-based client development (LocalLawyers.com). And no recital of the bar's member benefits would be complete without a mention of Casemaker, our free legal research service which offers Alabama materials and federal materials, as well as those of the other 49 states and the District of Columbia.

In addition, the bar has developed in-house programs that can ease the burdens of running a law office and practicing law. The Volunteer Lawyers Program makes it dead simple to get in

your pro bono hours by pre-screening those seeking free legal services and forwarding to you only clients who qualify with cases in the areas of practice that you select. The Practice Management Assistance Program provides a “hotline” for asking questions about available software and other resources, as well as a free statewide lending library of practice management information. And, the Alabama Lawyer Assistance Program staff stands ready to help with issues related to work-life balance and the stresses to which lawyers and their employees are often subject.

For more information on all the assistance available to you from the bar, go to www.alabar.org/memberhips/member-benefits/.

Annual Meeting

This year’s annual meeting will take place in Sandestin, Bayside on June 22-25 and we are particularly excited to have a number of intriguing programs and great speakers. One of the speakers will discuss what to do when there is an active shooting in the workplace. Another speaker, Mike House, who is year-in and year-out recognized as one of our nation’s top lobbyists, will discuss the current election cycle and what it has meant inside the Washington Beltway. There are panels and speakers on mediation and trial and business practices (small and solo), as well as a host of others. I hope to see you this summer!

Sections

In addition to the Alabama State Bar’s annual meeting, there are several sections and associations having meetings this summer.

Young Lawyers’ Section
May 19-21 (Orange Beach)

Family Law Section
June 2-4 (Destin)

Bankruptcy & Commercial Law Section
June 3-4 (Destin)

Alabama Criminal Defense Lawyers Association
June 9-11 (Florence)

Alabama Association of Justice
June 16-18 (Destin)

Alabama Defense Lawyers Association
June 16-19 (Destin)

Sections are a great way to stay connected with your practice and to network with folks who share a common practice with you. View the sections on the Alabama State Bar’s website at <https://www.alabar.org> and consider joining one.

Pricing Tool

Finally, many of our members provide services for low- and moderate-income clients and those clients make up a large percentage of their practice. How to “price” those services to this group has always been a challenge for our members. As attorneys are painfully realizing, technology firms, such as LegalZoom and others, are making it more difficult to compete in this space and by the same rules that have always existed. Many bars have studied this issue and the Chicago Bar Foundations Justice Entrepreneur Project has a pricing tool kit that may be of some help. This report can be found at www.chicagobarfoundation.org. ▲

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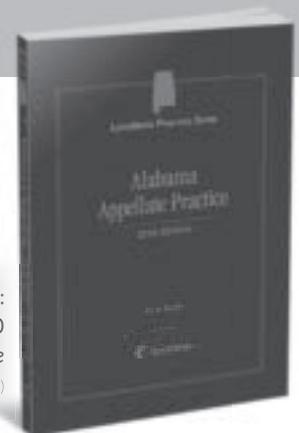
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EXECUTIVE DIRECTOR'S REPORT

Keith B. Norman
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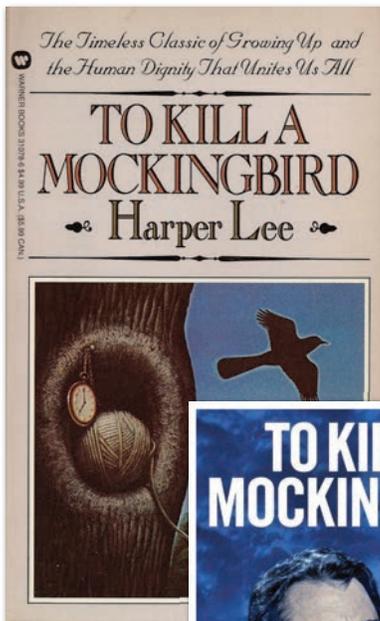


Atticus Is Still Atticus for Many Alabama Lawyers

In January, we sent out a survey to bar members to find out if the novel, *Go Set a Watchman* (“*Watchman*”), which was published last year, changed the perception of Alabama lawyers about the Atticus Finch character as originally portrayed in *To Kill a Mockingbird* (“*Mockingbird*”). The idea of the survey was inspired by a similar survey conducted last fall by the North Carolina Bar Association (“NCBA”). Sadly, Harper Lee died February 19, 2016 after the survey was circulated and concluded; however, I do not think her death would have significantly impacted the responses we received.

The results of the Alabama survey are remarkably similar to those of the NCBA survey. There is very little difference between the responses of Alabama lawyers and the responses of their colleagues in North Carolina. The Alabama survey generated a great deal of commentary, especially in regard to the question about whether or not the portrayal of Atticus in *Watchman* changed their “relationship” with the fictional character of Atticus. The responses generally fell into fairly definable categories.

For example, most of the comments were of the variety that *Watchman* did



not change their perspective of Atticus. They still considered Atticus to be a good man and an inspirational figure, but clearly a man of his times. Some commented that *Watchman's* portrayal of Atticus made him a "more complete" or "real" person. A fairly large segment of those responding indicated that they had not read *Watchman* and that they did not intend to do so. Yet, there were others who read the novel and expressed their disappointment, saying that they wished they had not "learned of his other side." Some respondents offered a more probing analysis of the two portrayals of Atticus. They noted that the *Mockingbird* portrayal of Atticus was that of a father through the eyes of his young daughter who saw him as a hero, while Atticus as portrayed in *Watchman* was through the eyes of a grown daughter who was capable of discerning the personal flaws of her father. Lastly, there were those respondents who questioned why *Watchman* was even published, while others dismissed the need for a fictional hero when the legal field is replete with real life heroes like Fred Gray, Clarence Darrow and Abraham Lincoln, just to name a few.

Did you read *To Kill a Mockingbird* before you graduated from high school?

Yes: 63.93 percent (319)

No: 28.46 percent (142)

Too many times to count: 7.62 percent (38)

Have you watched the 1962 film version of "*To Kill a Mockingbird*" starring Gregory Peck as Atticus Finch?

Never: 3.22 percent (16)

I've caught snippets of it: 4.63 percent (23)

At least once: 54.12 percent (269)

Too many times to count: 38.03 percent (189)

The character of Atticus Finch had some bearing on your decision to pursue law as a profession.

Agree: 30.77 percent (152)

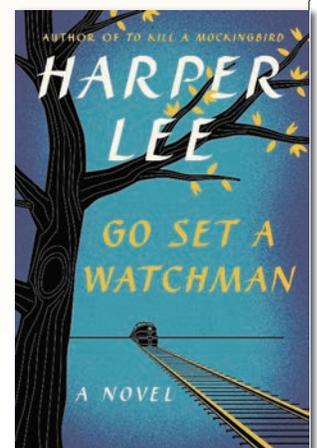
Disagree: 69.23 percent (342)

The portrayal of Atticus Finch in *Go Set a Watchman* changed your relationship with the fictional character...

Somewhat: 27.10 percent (113)

Profoundly: 6.00 percent (25)

Not much: 66.91 percent (279)



(Continued from page 167)

The following two comments speak discerningly to the apparent dichotomy of Atticus in *Mockingbird* and *Watchman*. Respondent #62 writes:

"...The *Watchman* Atticus Finch is a more realistic man of his times, and the *Watchman* story is the world that Ms. Lee knew, understood, and disliked (and, even, perhaps hated). She understood the hypocrisy and vile ways that often frequented the community in which she was born and reared. She used her voice (calling out from afar in Manhattan) to describe the troubles and inequities of her native land and the need for change. That *Watchman* was not publishable in the 1950s and that a different approach to Atticus Finch's character was story was required in order to allow a commercial publishing house to place its name on the title page is not much discussed, but should not be overlooked. *Mockingbird* was published in a time of racial unrest and political change. There was little reason for a commercial publisher to enter the fray. The more pragmatic approach was to deliver a story containing a clearly drawn lesson in the character of the man, Atticus Finch, who easily could have taken another road, but did not. In sum, both the realistic *Watchman* Atticus Finch and the idealized *Mockingbird* man warrant close study and comparison. Here is the same man—in *Watchman* as he possibly was and in *Mockingbird* as he could have been. In this comparison is a lesson which each of us should remember as we craft our own lives. We always should strive to be our better selves and to bridle our fears and uncertainties if we are to lead. There are those, past and present, among the bar in Alabama who set the standard in this way. It is they, not some fictional character, who deserve recognition.

If lawyers of the future need a new fictional icon to turn to for inspiration, a better character would be:

Judge Harry T. Stone: 1.26 percent (6)



Elle Woods: 2.73 percent (13)

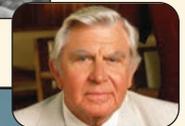


Perry Mason: 3.77 percent (18)

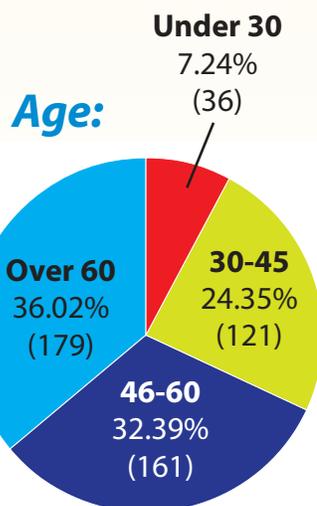


Matlock: 6.29 percent (30)

Other: 19.71 percent (94)



Atticus Finch is still worthy: 66.25 percent (316)



Gender:

Male: 65.52 percent (325)
Female: 33.67 percent (167)
Other: 0.81 percent (4)



Respondent 110 notes:

Atticus in *Go Set a Watchman* was fairly representative of Alabama lawyers as I remember them in the 1940s (that's as far back as I go). Though disappointingly typical for that era, Atticus was not without decency. I believe Harper Lee (through the eyes of Scout) saw that decency in her real father and built upon it to create our beloved Atticus in *Mockingbird*. In *Mockingbird*, she let him finally be the true self she saw him to be—the self he had dared not reveal in the prism of his time. I think Lee understood that had he done so, he would surely have been rendered unacceptable in the eyes of society and thereby jeopardized any chance to accomplish good within his profession. In *Watchman*, Scout was the voice of hope. In *Mockingbird*, written after Lee had further distanced herself from her life in Monroeville both geographically and in time, that hope came to fruition in Atticus. We just read them in reverse order.

Regardless of one's perspective of *Mockingbird* and *Watchman*, Atticus Finch remains an iconic, fictional hero to many lawyers and certainly to those who are not lawyers. Although

Atticus Finch now has a broader personal resume thanks to *Watchman*, his image in our mind's eye should still inspire us as lawyers to make decisions that are in the furtherance of justice and that protect the rights of our clients in spite of the foibles of real or imagined heroes or those ourselves. ▲

Education Debt Update

Of those first-time examinees who applied to sit for the February 2016 bar examination, 66 percent had education debt. The average debt was \$61,671.



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CONSTITUTIONAL
DIALOGUE

MELVIN I. UROFSKY

The Power of Dissent

BOOK REVIEW

Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue

By Melvin I. Urofsky
New York: Pantheon Books, 2015

Reviewed by Allen P. Mendenhall

In *Dissent and the Supreme Court*, Melvin I. Urofsky, a professor emeritus of history at Virginia Commonwealth University and the author of a celebrated biography of Justice Louis Brandeis,¹ explores the role of dissent in the shaping of our “constitutional dialogue,” a phrase that refers not just to cases handed down by our nation’s highest courts but to “discussions between and among jurists, members of Congress, the executive branch, administrative agencies, state and lower federal courts, the legal academy, and last, but certainly not least, the public.”²

Among the epigraphs opening the book is a quotation from Irving Dilliard: “Judicial dissent [is] wholly necessary. Dissent is no less a requirement in our legal system than it is in our political system. Historically, dissent is the way a prophecy is first heard.”³ The choice of the word *prophecy* is striking in light of Oliver Wendell Holmes, Jr.’s definition of law as “[t]he prophecies of what the courts will do in fact, and nothing more pretentious.”⁴ Holmes opined that our “body of reports, of treatises, and of statutes, in this country and in England, extending back for six hundred years,” consisted of “the scattered prophecies of the past upon the cases in which the axe will fall.”⁵ Holmes, who may have been an atheist, did not employ the term *prophecy* in the sense of a spiritual gift or divinely inspired word. He rather meant the ability to forecast or predict tractable outcomes based on recorded history, tested norms and lived experience. Dissents that reach beyond their moment to capture the prevailing ethos or attitude of some later moment can become prophecies, so defined, by their future vindication.

By multiplying the possible applications and perceptions of particular rules or principles, dissents also diversify the options for future judges and justices. Dissents provide practical alternatives and point out different, possibly better, approaches to pressing issues. Most dissents are forgotten, but some become “canonical” or “prophetic.”⁶ Just as

the several holdings of our highest courts combine to offer integrated direction to judges and justices confronted with concrete problems in need of urgent resolution, so dissents, with their persuasive appeals and less restrained rhetoric, serve as warnings and normative guides.

As just one example of the importance of dissenting opinions, Urofsky looks to *Dred Scott v. Sandford* (1857).⁷ Calling Chief Justice Roger B. Taney's leading opinion "one of the worst he ever wrote,"⁸ Urofsky examines the import and impact of the two dissents in *Dred Scott*, one authored by Justice John McLean and the other by Justice Benjamin Curtis. Justice Curtis considered his dissent so momentous that he forwarded a copy of it to a Boston newspaper before the case was released. Urofsky suggests that Abraham Lincoln learned from these dissents, which, he says, "played a key role in the political discourse of the 1858 and 1860 elections."⁹ By shaping political discourse for decades to come, Justice McLean's and Justice Curtis's dissents "not only refuted . . . bad law and even worse history; they pointed the way to what should be."¹⁰

Urofsky reminds us that our constitutional precedents would not look as they do absent the contributions of dissenting justices. Without Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* (1896),¹¹ for example, we probably would not have the landmark decision in *Brown v. Board of Education* (1954).¹² And without Justice Brandeis's dissent in *Olmstead v. United States* (1928),¹³ the right to privacy would not be as expansive as it is today. Such cases demonstrate the value and merit of writing dissents.

Urofsky devotes considerable attention to the so-called Great Dissenters: Justices Harlan, Holmes and Brandeis. His history does not stop there, though. He walks us through the entire 20th century, pausing over important cases and justices and indulging in literary flourishes and storytelling to enliven his treatment of facts or issues that might otherwise bore a casual reader unfamiliar with the law. When he deals with current judges and justices, he tries his own hand at prophecy, speculating, for instance, about the lasting influence of Justice William Brennan's dissent in *McCleskey v. Kemp* (1987),¹⁴ Justice Antonin Scalia's dissent in *Morrison v. Olson* (1988)¹⁵ and Justice Ruth Bader Ginsburg's dissent (in part) in *NFIB v. Sebelius* (2012).¹⁶

Those who work in the judiciary are often asked why judges and justices dissent if their views do not obtain as law. *Dissent and the Supreme Court* is, in effect, a lengthy answer to that question. The reason judges and justices dissent, in short, is to keep the conversation going, to open the textual record to

eventual change. Dissent, in a broader sense, is indispensable to democracy, ensuring that all views stand or fall on their merits rather than being suppressed or silenced by those who enjoy a disproportionate share of power or privilege.

"While contemporaries who agree with a dissent may proclaim it prophetic and bound for glory," Urofsky cautions, "for the most part we cannot tell at the time whether or not a dissent will succeed in its call to future generations."¹⁷ Only the winnowing effects of time and experience will reveal a dissent's staying power, but Urofsky makes clear that judges and justices who are passionate about their beliefs ought to dissent, lest some future court lack grounds or reasoning for reversing course. It's up to posterity to act on the textual record, but it's up to present jurists to supply reasons for prospective action. ▲

Endnotes

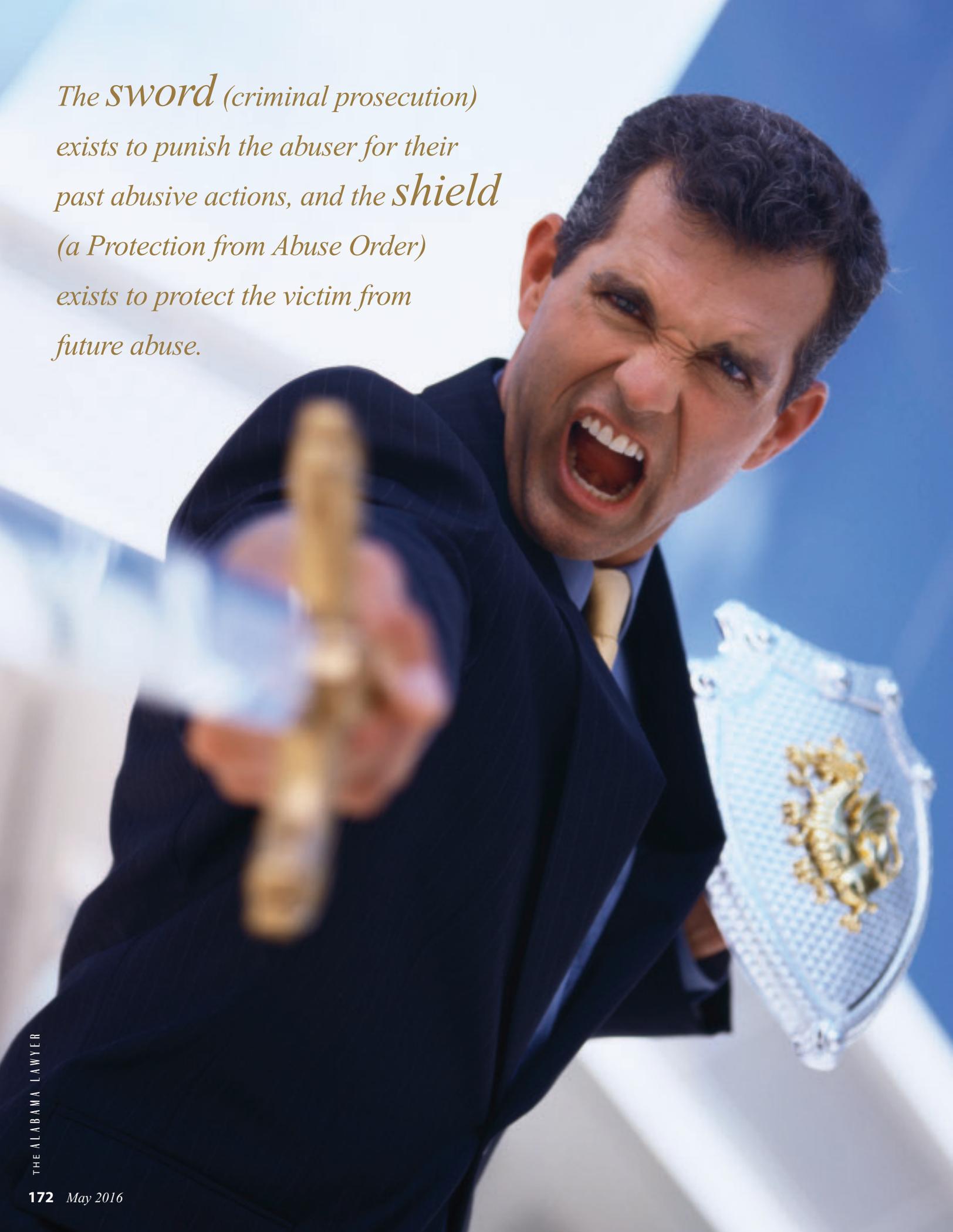
1. MELVIN UROFSKY, *LOUIS D. BRANDEIS: A LIFE* (2012).
2. MELVIN UROFSKY, *DISSSENT AND THE SUPREME COURT* 4 (2015).
3. *Id.* at 3.
4. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897).
5. *Id.* at 457.
6. Urofsky at 7.
7. 60 U.S. 393 (1857).
8. Urofsky at 67.
9. *Id.* at 79.
10. *Id.* at 78.
11. 163 U.S. 537 (1896).
12. 347 U.S. 483 (1954).
13. 277 U.S. 438 (1928).
14. 481 U.S. 279 (1987). See Urofsky at 416-18.
15. 487 U.S. 654 (1988). See Urofsky at 418-21.
16. 567 U.S. ____ (2012). See Urofsky at 421-23.
17. Urofsky at 414-15.

Allen P. Mendenhall



Allen P. Mendenhall is an assistant attorney general in the State of Alabama Office of the Attorney General. He earned his Ph.D. in English from Auburn University. He authored the book Literature and Liberty (2014) and has two books forthcoming: an edition of the essays of John William Corrington and a study of Justice Holmes's judicial dissents. Views expressed here are his own and do not reflect those of his employer.

*The **SWORD** (criminal prosecution) exists to punish the abuser for their past abusive actions, and the **SHIELD** (a Protection from Abuse Order) exists to protect the victim from future abuse.*



A Practical Primer on Protection from Abuse Law

By Kelly F. McTear

Introduction

On January 1, 2016, amendments to Alabama's Protection from Abuse Act¹ went into effect. These changes follow on the heels of substantial amendments in 2010. The remedies available to victims of domestic violence in this section are still largely unused by private attorneys representing victims despite the growing attention to the problem in media and public discourse.

Statistics estimate that one in three women and one in seven men in the United States have been physically assaulted by an intimate partner at some point in their lifetimes.² The odds are substantial that most attorneys will be confronted with a family member, acquaintance, employee or potential client who is being abused by a loved one. A basic understanding of the remedies available can be instrumental in protecting these victims from further injury, fear or harassment and could save lives.

Alabama law addresses domestic violence with criminal and civil remedies. Domestic violence is both a misdemeanor offense and a felony in Alabama, depending on the circumstances of the crime.³ Civil remedies

under the Alabama Protection from Abuse Act are also available. A judge once described the interplay between the criminal and civil avenues by likening them to a sword and shield. The sword (criminal prosecution) exists to punish the abuser for their past abusive actions, and the shield (a Protection from Abuse Order) exists to protect the victim from future abuse. Thus, the two areas work together to provide a well-rounded response to domestic abuse where, in many cases, one response would be insufficient by itself.

This article explains the Protection from Abuse Act currently in effect and examines situations in which a Protection from Abuse Order (PFA) might be useful to a client who is also a victim of domestic abuse.

Protection from Abuse Petitions

PFAs are essentially narrowly-tailored restraining orders. They are available to victims of crime who have one of a list of qualifying relationships with the perpetrator of that crime. Ex parte relief may be granted, and upon a hearing, that relief, along with

specific additional relief, may be granted indefinitely, or for a time determined and specified by the judge hearing the case.⁴ There is no filing fee for a victim of abuse filing a petition for Protection from Abuse.

Who may petition for a PFA?

Persons who have been or fear they will be victims of abuse may petition for PFAs. If the victim is a child or otherwise incompetent to file, another person or the State of Alabama Department of Human Resources may file on the victim's behalf,⁵ but for the purposes of this article, we will primarily focus on competent adults.

For relief to be granted, a victim must have one of a list of statutorily-defined relationships with the defendant.⁶

- Victim is defendant's spouse (including spouse at common law) or former spouse
- Victim and defendant have a common child
- Victim and defendant had a dating relationship (a relationship characterized by the expectation of affectionate or sexual involvement over a period of time and on a continuing basis, which relationship ended not more than one year before the filing of the petition⁷)
- Victim lived with defendant and (1) had an affectionate or sexual relationship with defendant *or* (2) was related to another person living in the home who had such a relationship
- Victim is the parent, child, stepparent or stepchild of the defendant and lives with defendant

The PFA Act's list of qualifying relationships has previously differed from those used for the purposes of criminal prosecution. It was possible that a person would be considered a victim of domestic violence for the purpose of filing criminal domestic violence charges, but not be eligible for relief under the PFA Act. The 2016 amendments to both the Protection from Abuse Act and the domestic violence criminal statutes standardize the definition of "victim" between the two bodies of law.⁸

What is abuse?

While the prevailing perception of domestic violence as physical assault certainly is not incorrect, it is also not sufficient. What conduct rises to the level of "domestic violence" is a question that may yield different answers from practitioners in various fields, be

it criminal prosecution, civil law or social services. To eliminate confusion, the Protection from Abuse Act defines domestic violence in terms of predicate crimes committed against a victim, with references to the criminal code.⁹ For example, a finding that a defendant committed harassment, as defined in *Ala. Code* §13A-11-8 (1975), against someone with whom the defendant has one of the qualifying relationships outlined above, constitutes domestic violence. The full listing of predicate crimes that may constitute domestic violence for the purposes of a PFA are codified at *Ala. Code* §30-5-2(1) (1975) and include physical crimes like assault, kidnapping and unlawful imprisonment, as well as property crimes such as arson, theft and criminal trespass, and what could best be called crimes of intimidation like harassment, menacing, criminal coercion and stalking.

What relief is available via a PFA?

Both ex parte relief and final relief are available to victims of domestic violence in a PFA. Any relief granted must be supported by facts in the initial petition or presented at trial.

Any or all of the following relief may be granted ex parte, based on the facts alleged in the initial petition.¹⁰ In addition to ordering the defendant to refrain from further acts of abuse or conduct that would cause the victim to be afraid of further abuse, a judge may also order the defendant to refrain from contacting the victim at all. The defendant may be ordered to stay 300 (or more) feet away from the victim's home, place of employment or school. If the parties have common children, the court can award ex parte temporary custody of those children to the victim and order the defendant to refrain from interfering with that custody until a hearing can be held. Temporary possession of a shared residence can be awarded solely to the victim, as well as use of personal effects and an automobile. The court can order the defendant not to dispose of, or otherwise encumber, property mutually owned or leased by the parties, in the victim's absence.¹¹

Once the defendant has been served and a hearing held on the merits, the relief above may be made final and additional relief is available to a victim, including visitation arrangements and child support determination, evicting the defendant from jointly-leased property, attorney's fees and possession of a vehicle for the victim, if defendant has other means of transportation.¹²

Procedural Considerations

Forms are created and promulgated by the Administrative Office of Courts for both petitions and orders. The statute requires that the form be used in issuing both ex parte and final PFAs, but additional pages may be attached if special relief is ordered.¹³ This requirement is, in large part, a safety consideration. Having all PFAs look the same throughout the state ensures that the orders are instantly recognizable as such when presented to law enforcement and encourages uniform enforcement of their provisions. A form order leaves little doubt as to its purpose, whereas drafting practice for other orders varies among the various courts and judges. The current forms for PFAs can be downloaded from the Alabama Administrative Office of Courts' e-forms page.¹⁴

The procedure for obtaining a PFA is intended to be an expedited one. The newly amended statute¹⁵ does not change current procedure in that respect. The procedure outlined requires a ruling on petitions for ex parte relief within three business days of filing¹⁶ and a hearing on the merits of the petition at the defendant's request¹⁷ or within 10 days of service on the defendant.¹⁸ This expedited hearing process ensures not only that the victim can quickly take advantage of the safety provided by a grant of relief, but also that a defendant is not encumbered by the limitations of an order without a speedy opportunity to be heard on the matter. There is no requirement that the defendant file any responsive pleading to be granted an opportunity to be heard.

The standard of proof for Protection from Abuse cases is preponderance of the evidence¹⁹ and apart from the considerations mentioned, Protection from Abuse cases are governed by the *Alabama Rules of Civil Procedure*.²⁰

Is a PFA Right for My Client?

Even if you think that your client (or friend or employee) qualifies for a Protection from Abuse Order, it is not necessarily the best course of action for every client/victim. Three primary questions should be a part of your legal counsel to your client about these orders.

Is the dangerous conduct ongoing?

If your client has been able to safely relocate and cut ties with the abuser, a PFA might not be the best choice for resolving any remaining issues. First, proving a threat of future harm is important to proving the case for a PFA at trial.²¹ If your client has a difficult time articulating recent conduct that rises to the level of domestic violence or does not believe future abuse is likely, the petition for protection from abuse is significantly weakened. Second, if no acts of abuse have occurred for a period of time, being served with an ex parte PFA could anger an abuser and encourage an attack where one would not have otherwise occurred. This second scenario is almost the inverse of the first. In this situation, the client has a greater fear of future abuse if

the order is issued than if things continue as they are.

If abusive or threatening acts are recent and ongoing, and your client is afraid of the abuser and does not believe abuse will stop, a petition for PFA is likely to offer some recourse. It must be noted here, as it often is by judges, attorneys, social service providers and law enforcement, that a PFA is "just a piece of paper." The FBI's Criminal Justice Information Services Division data shows that in 2010, a significant share of the nation's almost 13,000 homicides were

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committed by a person with a familial or intimate relationship with the victim.²² While PFAs are helpful in many situations, they do not guarantee safety. Victims of domestic violence should also be provided with information about shelters and social service providers for assistance with creating and implementing personal safety strategies and plans.

Will subsequent legal action be necessary?

If the answer to the first question is “no,” and you anticipate additional legal action will be forthcoming between the parties, you might pursue these (typically more cumbersome and longer-term) matters first. Every legal matter provides an opportunity for contact between the parties, and many clients want all matters resolved as quickly as possible, to eliminate any need to encounter their abuser ever again. In those situations, a PFA may only prolong the client’s healing process, and the client may choose to wait to file a PFA only if threats or abuse resume over the course of the other matters.

On the other hand, other legal action may not be necessary or your client may need relief that is only available in a PFA. It may be the case that the abuser has threatened harm if the client pursues a particular legal action (divorce or custody, for instance). In those circumstances, and given that the client’s facts are sufficient to meet the statutory requirements, filing a PFA, either by itself or concurrently with other suits, may be appropriate.

Does the client want to pursue a PFA?

While many clients may initially seem adamant in their desire to pursue a PFA, it is important to explain the details of the process, that they will be called upon to testify in court about specific occurrences of abuse and their fear for the future and that their abuser will have the opportunity to be present at the hearing and, either personally or via counsel, question the client at the hearing. The client should also understand that this is an entirely separate proceeding from any criminal prosecution that may be in progress.

An open and thorough discussion with the client is essential to evaluating the viability and utility of a PFA for any client.

Once the details are explained, a client may decide not to pursue a PFA. The prospect of additional trauma created by having to relive violent experiences might be emotionally overwhelming. The victim’s fear of the abuser may be so crippling that the idea of testifying in the abuser’s presence causes anxiety, perhaps in addition to anxiety that already exists at the thought of talking about personal trauma in public. The addition of another legal action and more time in court may be too much for a victim to handle. The desire to move on may outweigh the desire for protection. For the victim of domestic violence, many considerations influence a decision to pursue a PFA, beyond the simple merits of the case.

An open and thorough discussion with the client is essential to evaluating the viability and utility of a PFA for any client. While these questions are helpful in evaluating the case, they are not exhaustive, and should be used simply as a guide to effective evaluation of a potential PFA case.

Interaction with Other Legal Issues

As mentioned previously, additional legal action may be necessary to resolve the issues between the victim and abuser, particularly when the victim is married to or has children with the abuser. Divorces, custody actions and criminal cases can all impact or be impacted by a PFA.

Divorce

When a divorce is pending, a PFA can be filed in that pending matter or as a stand-alone matter. In some circuits, district court judges typically hear petitions for protection from abuse by standing order of the presiding circuit court judge.²³ In others, family court (or domestic relations) judges hear both divorce cases and PFAs.²⁴ Your decision about whether to file in the pending case or as a stand-alone action may be

governed to some extent by these local practices. Other considerations may also affect your decision, such as whether you have alleged cruelty or violence as grounds for divorce.

The PFA statute prohibits transferring or altering title to real property,²⁵ so in the case of spouses, a divorce (or legal separation) may be necessary for proper division of the parties' assets. Additionally, the PFA statute only provides "temporary custody." For reasons that will be discussed below, this means that custody will likely be re-litigated during the course of the divorce trial, even if it has been previously given to one party in the PFA. The determination of custody in the divorce is not a modification of custody, but an initial determination, and you are not prohibited from using the issuance of a PFA or the abuse giving rise to the relief granted therein in arguing your case for custody in the divorce trial.

Custody/Child Support

While temporary custody and child support are available relief in a PFA, it is likely that a PFA will not be the sole litigation involving those issues. Whether via a divorce or in a stand-alone case, custody and child support cases may have been initiated prior to the request for a PFA or may be filed subsequent to a final order being entered, it is important for you and the client to be aware of the implications the cases can have on one another.

A pending custody matter between the parties may influence your choice of venue for the case. Typically, venue is proper in the circuit or domestic relations court (even if cases are heard by a district court judge or specially sitting circuit court judge) in the county where one of the parties lives, where the victim has fled to escape abuse or where the abuse occurred.²⁶ Venue is also proper in any court in which a civil matter is pending between the parties.²⁷ Though the initial filing may occur in any of those courts, if a matter involving custody, child support or visitation is pending or has been determined in any other court, the case will be transferred to that court upon issuance of an ex parte order, for further action and final hearing.²⁸ This allows the opportunity for the temporary relief granted in an ex parte order to become a part of the existing custody case and allows a judge familiar with the broader case to make a further determination or modification of custody, child support or visitation

upon full hearing under applicable custody or modification law. It also prevents the possibility of conflicting orders in the separate cases, eliminating confusion and potential for further abuse.

When no custody or child support action has been filed at the time of filing a petition for a PFA, the potential for future cases may also influence your choice of venue. In a jurisdiction where the PFA and any subsequent custody litigation are likely to be heard by the same judge, it may benefit your client to have that judge hear all aspects of the case. Clients should be informed that custody and child support orders contained in a PFA are only valid for the duration of the PFA, or until a subsequent determination is made. If a final PFA is limited in duration to two years, clients should plan to complete subsequent custody litigation in a timely fashion, to ensure that there are no gaps or confusion in orders. Even if a final PFA is not time-limited, the defendant could initiate formal custody or child support proceedings post-PFA, and clients should be prepared for that possibility.

Other Civil Legal Considerations

To the extent that the 2016 amendments to the PFA Act allow for the filing of a PFA by an adult-parent/victim against an adult-child/stepchild/abuser, other actions for conversion, fraud, bankruptcy, etc. may arise in which the granting of a PFA may be influential in determining the outcome in favor of the client. Because PFAs have been, for some time, most frequently sought by victims with intimate relationships with their abusers, it is unclear just how much PFAs entered in non-intimate partner relationships may influence or be influenced by civil legal cases outside the family law arena.

Enforcement of PFAs And Interaction with Criminal Domestic Violence Law

Victims of domestic violence seeking legal assistance often have criminal prosecutions in progress in addition to pursuing civil legal remedies. Changes in

both civil and criminal domestic violence law over time have sought to create a body of complementary law that adequately addresses the various causes of abuse and barriers to escaping it. PFAs provide a variety of solutions to remedy concerns clients may have about the ability of a criminal conviction to address their safety concerns. Additionally, in contrast to other civil remedies where a contempt petition may be the sole redress for failure to follow a court's order, a violation of an *ex parte* or final PFA, once the defendant has notice of it, is itself a misdemeanor offense.²⁹ Finally, commission of a subsequent act of domestic violence in violation of a PFA triggers enhanced sentencing minimums, calling for double the minimum term of imprisonment required if the crime is committed and no PFA is in effect.³⁰

Often, conditions of bond in criminal domestic violence cases provide a victim with some measure of safety prior to the trial in a criminal matter, and conditions of probation may also be used in this manner. Incarceration of the abuser obviously creates some safety for the victim. However, conditions of bond are only in effect until the trial, and conditions of probation only so long as the offender is on probation. Once a defendant has fulfilled all the terms of the sentence, the criminal court lacks jurisdiction to further prohibit the defendant's conduct. A PFA has the benefit of being effective indefinitely or until a date certain. The victim, thus, has some awareness of the status of her protection and can plan accordingly. There are also remedies available in a PFA that go beyond those the criminal court is empowered to grant, such as possession of personal items or a car, eviction of the defendant from a jointly-leased home and temporary custody. In this way, a PFA can take a more victim-centered approach to protection, address many civil circumstances that create opportunities for abuse and more fully resolve the concerns the victim may have. Indeed, in some cases, a victim may choose to pursue a PFA in lieu of filing criminal charges against the abuser.

Once a defendant has been given notice that a PFA is in effect, a subsequent violation of that order is punishable as a Class A misdemeanor offense.³¹ Not only does this give some teeth to the PFA Act, it also helps guard against an abuser using the court system to further abuse his victim. Where contempt is the remedy for redress in most civil matters, contempt pe-

titions require time and preparation and victims often must wait long periods of time for a hearing, dragging out the victim's attempts to end the relationship with the abuser. In short, civil contempt proceedings keep the abuser on the victim's mind and in the victim's life, completely disregarding the purpose of a PFA. Being able to file criminal charges against the abuser for violating the terms of a PFA gives the victim a simple and straightforward way to enforce an order that is intended to help her cut ties with her abuser, not create avenues to bring them in contact more often.

Conduct which violates the terms of a PFA may not be conduct which rises to the level of domestic violence, as defined in the statutes, but if an abuser commits the crime of domestic violence (in the 1st, 2nd or 3rd degree) while a PFA is in effect, it almost certainly violates that PFA. In such cases, defendants may be charged with both the appropriate domestic violence charge and violation of a protection order. Felony domestic violence convictions carry minimum terms of 10 years for domestic violence 1st degree (Class A felony) and two years for domestic violence 2nd degree (Class B felony).³² Commission of these crimes in violation of a PFA results in those minimum sentences doubling.³³ If an abuser commits domestic violence 3rd degree (Class A misdemeanor) in violation of a PFA, the minimum sentence is a mandatory 30 days in jail.³⁴

From an evidentiary standpoint, prior convictions for domestic violence can be helpful in proving the case for past abuse at the PFA hearing. Because the defendant has already been found guilty of the conduct alleged beyond a reasonable doubt, proof of these convictions should be useful in establishing a pattern of past abuse and lend weight to arguments that the victim has attempted to stop the abuse in the past, to no avail. Both arguments support the victim's argument on the ultimate issue: that a PFA is necessary to prevent further abuse.

While there are some cases of abuse so severe that neither criminal penalties nor civil relief will be sufficient to stop the defendant's behavior, the complimentary provisions of the PFA Act and criminal code work together to provide a satisfactory resolution for many victims. The 2016 amendments to both the criminal code and PFA Act's definitions sections³⁵ facilitate that complimentary nature by using substantially consistent

terminology when addressing these issues. This will hopefully promote cooperation between prosecutors and civil attorneys and eliminate long-standing confusion over the differences between domestic violence in civil law and criminal law.

Conclusion

Since their present-day codification in 1981,³⁶ Protection from Abuse orders have provided victims of domestic violence in Alabama with an avenue for pursuing relief that will help them escape abuse, reestablish their lives in relative safety and re-identify themselves as survivors. Though the process is designed to be *pro se* litigant-friendly, with its use of form petitions and straightforward statutory language, being represented by an attorney increases odds for success, just as it does in any other legal matter.

Practitioners should be aware of this remedy and should recognize that deciding whether to file a petition for a PFA is a multi-faceted inquiry that takes into consideration the totality of the victim's circumstances, including the victim's emotional state, other legal involvements (criminal and civil), financial security and, above all, safety.

By understanding the legal considerations and processes associated with filing for protection from abuse, along with basic awareness of local resources for victims, practitioners can contribute in significant ways to eliminating domestic violence in our communities.

At the time of publication, a bill had been introduced in the Alabama House of Representatives (HB458) that, if enacted, would make additional changes, mostly technical, to the statutes discussed in this article. ▲

Endnotes

1. *Ala. Code* §30-5-1 *et seq.* (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
2. Centers for Disease Control and Prevention National Center for Injury Prevention and Control, *National Intimate Partner and Sexual Violence Survey 2010 Summary Report*, November 2011, at p.43.
3. *Ala. Code* §13A-6-130 *et seq.* (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
4. *Ala. Code* §30-5-7 (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
5. *Ala. Code* §30-5-5(a) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
6. *Ala. Code* §30-5-2(7) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
7. *Ala. Code* §30-5-2(3) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
8. *See Ala. Code* §30-5-2(7) and *Ala. Code* §13A-6-139.1(3) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
9. *Ala. Code* §30-5-2(2) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
10. *Ala. Code* §30-5-7(a)(1) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
11. *Ala. Code* §30-5-7(b) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
12. *Ala. Code* §30-5-7(c) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
13. *Ala. Code* §30-5-8(b) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
14. <http://eforms.alacourt.gov/Civil%20Forms/Forms/AllItems.aspx>.
15. *Ala. Code* §30-5-6 (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
16. *Ala. Code* §30-5-6(b) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
17. A form for this request can also be found on AOC's e-forms site, at the web address in Endnote 14.
18. *Ala. Code* §30-5-6(a) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
19. *Id.*
20. *Ala. Code* §30-5-11 (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
21. *See Ala. Code* §30-5-5(c) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.), (requiring sworn petitions to allege "that the plaintiff genuinely fears subsequent acts of abuse by the defendant).
22. Federal Bureau of Investigation, *Expanded Homicide Data Table 10: Murder Circumstances by Relationship* (2010), available at <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10shrtbl10.xls>.
23. *Ala. Code* §30-5-2(2) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
24. *Id.*
25. *Ala. Code* §30-5-7(e) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
26. *Ala. Code* §30-5-(c)(3) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
27. *Id.*
28. *Ala. Code* §30-5-3(d) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
29. *Ala. Code* §13A-6-142 (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
30. *See Ala. Code* §13A-6-130(b), §13A-6-131(b) and §13A-6-132(b) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
31. *Ala. Code* §13A-6-142(a) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
32. *Ala. Code* §13A-5-6 (a) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
33. *See Ala. Code* §13A-6-130(b) and §13A-6-131(b) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
34. *See Ala. Code* §13A-6-132(b) (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
35. *See Ala. Code* §30-5-2 and *Ala. Code* §13A-6-139.1 (West, Westlaw through Act 2016-148 of the 2016 Regular Sess.).
36. *See Acts* 1981, No. 81-46, p.26 *et seq.* (1981).

Kelly F. McTear



Kelly Forehand McTear is an associate clinical professor of law at Faulkner University Thomas Goode Jones School of Law and director of its Family Violence Clinic. She serves as president of the Montgomery County Bar Association Women's Section and secretary of the Montgomery Bar Foundation. Prof. McTear is a member of the Montgomery County Task Force on Domestic Violence and previously worked as a civil attorney representing victims of domestic violence in civil matters at Legal Services Alabama. Prof. McTear was a founding on-site partner at the Brooks-Sellers OnePlace Family Justice Center, a co-located services center for victims of domestic violence in Montgomery.





An Introduction to Multidistrict Litigation: Practice and Procedure

By Annesley H. DeGaris

Introduction

Multidistrict litigation (“MDL”) represents a staggering amount of the litigation currently pending in federal courts. However, many lawyers who do not regularly handle mass tort cases can be confused and frustrated by the MDL process as their individually filed case is swept up into a “consolidated proceeding” and transferred far away from the district in which it was originally filed. Here, court-appointed leadership, tasked with performing discovery and briefing common issues, handles the plaintiffs’ side of the case. This common issue litigation sometimes leads to a bellwether trial or, more often, a group settlement; less often does it lead to a remand of individual cases.

In the “world of multidistrict litigation,” something typically occurs that jump-starts the litigation. This can range from the discovery of a previously undisclosed side effect of a pharmaceutical drug to the recall of a defective implantable medical device. Sometimes an article in a medical journal or a warning letter from the FDA triggers the beginning of multiple case filings. Regardless of the catalyst, what often happens next is a motion to transfer that is filed (most often by plaintiffs’ counsel, but sometimes by defense counsel) with the Judicial Panel on Multidistrict Litigation. In this pleading, a request is made to send all cases involving “common questions of fact” to a particular judicial district for the coordination of all “pretrial proceedings.”



With multidistrict litigation involving cases ranging from automotive product liability, defective pharmaceuticals and defective medical devices to airplane crashes, train wrecks and various class actions, the likelihood of an attorney becoming involved in an MDL is substantial.

Authority for transfer is under 28 U.S.C. Section 1407(a) which provides that “when civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of the parties and witnesses and will promote the just and efficient conduct of such actions.”

With multidistrict litigation involving cases ranging from automotive product liability, defective pharmaceuticals and defective medical devices to airplane crashes, train wrecks and various class actions, the likelihood of an attorney becoming involved in an MDL is substantial. For this reason, a basic understanding of the MDL process from inception to settlement or remand to the “transferor court” is important. The purpose of this article is to examine the procedures for the transfer of civil actions under section 1407, including the intricacies of the MDL process. This article also attempts to provide lawyers with basic guidance for understanding and participating in MDL litigation. While this article provides basic information, any attorney intending to be significantly involved in an MDL should consult the Rules of Procedure of the United

States Judicial Panel on Multidistrict Litigation and the Judicial Panel for Multidistrict Litigation website.

Judicial Panel on Multidistrict Litigation

The Judicial Panel for Multidistrict Litigation (“JPML”) determines whether civil actions pending in various federal districts should be transferred to one federal district for coordinated pretrial proceedings and if so, selects the judge (the “transferee court”) to preside over these proceedings. The panel is made up of seven circuit and district court judges appointed by the Chief Justice of the United States. The MDL panel’s office is in Washington, DC, but holds bi-monthly hearings around the country. No two judges on the panel are from the same circuit. The panel has discretionary decision-making power. However, the function of the panel is to simplify case management at the pretrial stage, not to adjudicate the issues presented by the litigation. The panel does not have the authority to conduct a dispositive trial. However, it may terminate actions by motions to dismiss, summary judgments or settlements. United States District Court Judge



R. David Proctor from the Northern District of Alabama serves as a member of the panel.

Criteria for The Creation Of an MDL

Cases may be transferred to a transferee district for consolidated pretrial proceedings if three criteria are satisfied.

First, the cases must share more than one question of common fact. The issues must be material, contested and factual. Legal issues are not sufficient.

Second, transfer must advance just and efficient conduct of the actions. Many factors are considered in determining whether transfer will be just and efficient. The panel will examine the number of cases involved, the number of shared questions of fact and the nature of the questions. The potential to avoid duplicative discovery, conflicting rulings, unjust delay or needless complication will also be considered. An important factor that is also taken into account is the availability of the transferee judge to handle the cases.

Third, transfer must serve the convenience of the parties and witnesses. One of the purposes of transfer is to protect the parties from inconvenience, added expense

and loss of forum choice. The geographical location of pending cases and the residences of parties and witnesses are considered to determine the most convenient district to handle the actions. The panel must also rule out the possibility that any of the parties have ulterior motives, such as forum shopping, for transferring their action. Ultimately, the panel has the authority to transfer the litigation to any district it chooses but usually selects a district that is both convenient and has pending cases.

How an MDL Begins—the Details

The process of transferring cases to an MDL begins by filing a motion for centralization. To file a multidistrict litigation motion, the representing attorney must first obtain a JPML-issued CM/ECF login and password from the website of the Judicial Panel on Multidistrict Litigation. To qualify to register for a filing ID, an attorney must be admitted to practice in any federal district court as well as paid and active in his or her federal licensure, must complete and submit the attorney registration form and must complete a training course on the Case Management/ Electronic Case Filing system. Only one attorney

may file as a representing attorney for each plaintiff.

After registration is complete, an MDL number is assigned. The first document to be filed is the Notice of Related Actions. This document serves as the motion to transfer and consolidate. Several attachments are filed with the notice. The first attachment is a schedule of actions which includes the full names of each party, the district court and division of each action, each civil action number and the judge assigned to each action. The

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cases should be grouped in ascending order by district and then by action number within each district. The second attachment should be proof of service indicating service of papers on the clerk of each district court that may be affected by the motion. It must include the name, street address and email address of each attorney served, as well as the party represented by each attorney. If a party is unrepresented, service should be made at the last known address of the party. The complaint and

docket sheet for each action should be attached as exhibits.

Along with the notice of related actions, the representing attorney should file a notice of appearance. The notice of appearance is the official acknowledgement and notification to the court of the attorney's presence in the case. It is also the acknowledgement and acceptance by the attorney of the representative responsibility that he or she is expected to take on behalf of the client. It should include the full names of each represented party, a short caption of the case including districts and action numbers of each case and the name, address and telephone number of the representing attorney. The notice of appearance must be signed and dated by the attorney. The same schedule of actions that was filed with the notice of related actions should be included with the notice of appearance as well as proof of service.

The last document to be filed is the Interested Party Petition. The arguments for consolidation should be included in this document. The moving party bears the burden of proving that transfer is proper. To meet the burden of proof, the moving party must convince the panel that there is more than one common question of material fact between the pending cases, and that transfer would serve the convenience of the parties and witnesses and promote efficiency and avoidance of duplicative discovery. The same schedule

of actions and proof of service should be filed with the petition.

The JPML has specified that all filings must have uniform format. The first page must display the heading "Before the Judicial Panel on Multidistrict Litigation," the MDL number and name and the civil action number. The final page of each pleading must include the name, street address, email address, phone number of the representing attorney and the name of each party represented. All filings must be in PDF form.

Hearing before JPML

Once all of the required documents have been filed, the panel enters an order setting oral argument to determine (1) whether the case should be consolidated into an MDL and (2) what federal district court judge should be assigned the litigation. The panel gives notice of the time and place of hearing to any party who may be affected by the transfer of the pending cases. The panel meets six times per year to decide multiple motions for centralization in a variety of cases. JPML hearings are typically held in seasonably desirable locations throughout the country. The remaining hearings for 2016 will be Santa Barbara, Chicago, Seattle, Washington, DC and Charlotte.

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The atmosphere of a JPML hearing is akin to a legal conference. Far more lawyers show up to monitor the proceedings than will actually speak concerning the possible consolidation of any given case. As noted above, the panel is concerned with why the cases should be centralized and, if so, what is the most appropriate jurisdiction for centralization. As counsel is given only limited time to speak, his or her argument should focus on matters that are generally accepted to be the most pertinent to the panel.

These include: (1) how many common questions of fact exist; (2) how many cases have been filed, how many are in a particular venue and whether additional cases are expected to be filed and if so, how many; (3) will the transfer prevent duplicative work and the possibility of inconsistent rulings; (4) how far along is the litigation in any given district; (5) will centralization increase or decrease the possibility of settlement; and, (6) what is the availability of judge in any proposed transferee court?

If there is a significant number of pending cases that will make transfer a given or if the defendant(s) agree to centralization, the argument quickly shifts to the selection of an appropriate transferee court. The inquiry of the panel as to the transferee court includes: (1) whether the proposed district has adequate transportation and hotel facilities to handle counsel

from across the county; (2) the location of the defendant(s) in relation to the proposed venue; (3) the location of witnesses and evidence in relation to the proposed venue; (4) the presence or absence of other MDLs in the district; and, (5) the interest of the proposed transferee judge in handling the MDL.

Often, several plaintiffs' counsel will be advocating for the establishment of an MDL and simultaneously suggesting different districts (and judges) where the MDL should be sent. This can lead to questions for plaintiffs' counsel as to the interest of a particular judge in handling an MDL, a judge who usually has a case filed by that counsel. While the practice and protocols of "reaching out" to potential transferee judges have varied widely, after consultation with several sitting district court judges, the best practice is for plaintiff's counsel, with participation of defense counsel, to contact a potential transferee judge's chambers or the circuit clerk's office of the proposed federal district and ask if there is interest in an MDL. Of course, the ability of plaintiff's counsel to inquire as to a judge's interest can easily be thwarted by a refusal of defense counsel to participate.

After the hearing, the panel will consider the evidence and enter an order to grant or deny transfer and designate a transferee judge if appropriate. Typically, there is little drama over centralization; the anticipation is

While the practice and protocols of "reaching out" to potential transferee judges have varied widely, after consultation with several sitting district court judges, the best practice is for plaintiff's counsel, with participation of defense counsel, to contact a potential transferee judge's chambers or the circuit clerk's office of the proposed federal district and ask if there is interest in an MDL.



Once the panel's order is filed in the office of the circuit clerk of the transferee court, transfer becomes effective and the jurisdiction of the transferor court ceases and the jurisdiction of the transferee court is exclusive.

in the selection of the transferee court. Rulings on transfer are surprisingly quick, usually within two weeks of the hearing. A concurrence of four judges on the panel is required to direct or deny a transfer. Any order to transfer will be filed in the office of the clerk of the transferee court.

The Transferee Court

Once the panel's order is filed in the office of the circuit clerk of the transferee court, transfer becomes effective and the jurisdiction of the transferor court ceases and the jurisdiction of the transferee court is exclusive. The usual practice is for the transferee judge to promptly schedule a status conference with all the lawyers involved in the litigation. This conference will involve a variety of case management matters to be included in the first case management order ("CMO"). However, the Federal Judicial Center instructs judges that, "Early organization of the counsel that have filed the various cases is a critical case-management task." So, one of the most important issues initially addressed by the court is leadership of the plaintiffs' case.

In many cases, the court will appoint interim lead or liaison counsel to be spokespersons for each side until permanent leadership is appointed. Ultimately, the defen-

dants have chosen their counsel, but it is the judge who decides who directs the litigation for the plaintiffs. For plaintiffs' counsel this can be one of the most contentious parts of the case as competing attorneys or groups of attorneys vie for leadership positions. The court will appoint attorneys to serve as lead counsel and liaison counsel. The role of lead counsel is often divided between or among two or more attorneys who direct the litigation for plaintiffs. Liaison counsel is likely to be a local attorney who handles administrative matters and assists in the "coordination of communications between the court and other counsel." The next attorneys appointed by the court are members of the Plaintiff's Steering Committee ("PSC") or executive committee. Committees are usually organized by tasks such as discovery, briefing and science/experts. For the plaintiffs' case, it is in these committees that the work of the MDL is done.

There are two basic models for leadership selection. In the "competition model," the court invites applications for leadership positions, which are evaluated and appointments made. In the "consensus model," the court directs the plaintiffs to file a proposed leadership slate, subject to objections and to court approval. Both methods involve applications that are often lengthy recitations

worthy of an obituary. Based on experience, most MDL leadership contests end in negotiated slates approved by the court.

After the court appoints the leadership, the appointed lawyers control the MDL and litigate the cases on behalf of all plaintiffs' counsel. The work will include discovery (the Plaintiff's Fact Sheet ["PFS,"] depositions, expert disclosure), motion practice (*Daubert* hearings), screening and selection of potential bellwether cases and, often, negotiation of a group settlement. The leadership fronts the cost of the litigation and, for their efforts, they are awarded "common benefit" fees and expenses at the conclusion of the litigation.

Remand

In the unusual case where the pretrial litigation does not result in the settlement of the MDL, the transferee court will file a "suggestion of remand" with the panel recommending that the cases be remanded to their respective transferor districts. The complete record of the pretrial proceedings is sent to the transferor court in the form of a pretrial order. The order contains a summary of rulings, a chronology of proceedings, an outline of issues that remain undecided and an indication of the present state of the case. The remanded cases then proceed to trial

in their respective districts. If the plaintiffs' leadership has done its job, a "trial package" containing the common elements of the case such as depositions and key exhibits is available to counsel.

Conclusion

Complex litigation imposes a heavy burden on the federal judicial system. Combining cases for multidistrict litigation under § 1407 is a way to streamline and consolidate pretrial procedures for large numbers of cases with common questions of fact. MDL litigation has the primary purpose to promote efficiency. Because MDLs combine groups of cases that have very similar fact patterns and legal structures, it saves time and effort for the courts by avoiding duplicative discovery and motion practice. Even where cases are not resolved before the transferee court, remanded cases arrive back in their original district in a posture to quickly proceed to trial, again promoting efficiency. While many aspects of the MDL process have garnered much academic commentary as of late, the fact remains that without the ability to transfer cases to MDLs under section 1407 the federal system would not be able to handle the its caseload. The federal court system depends on this procedural device more so than any other. ▲

Annesley H. DeGaris



Annesley H. DeGaris is the founding partner of DeGaris Law Group LLC in Birmingham. He graduated magna cum laude from Samford University and earned his

J.D. at Cumberland School of Law, where he graduated magna cum laude in 1988. DeGaris served as a law clerk to the Hon. E.B. Haltom, Jr., U.S. District Judge, N.D. Alabama. As a Rotary scholar, he attended the University of Melbourne School of Law in Australia, where he received an LL.M. with a concentration in international law. DeGaris also served as a staff attorney for the Eleventh Circuit U.S. Court of Appeals.

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The Effective Counselor

By John Herbert Roth

Introduction

In the regulatory world, in-house lawyers and compliance professionals¹ are gatekeepers tasked with preventing or altering proposed actions (or inactions) in order to comply with law and/or internal policy.² Yet, this gatekeeping role is not a totalitarian one—there is no such thing as automatic adherence and seemingly everything is challenged. As well, in-house lawyers and compliance professionals are not issued keys to the proverbial ivory tower where they can contemplate the questions of their choosing in a legal vacuum. Rather, we are required to consider business goals and view issues through the lens of profitability. Finally, in many industries, whether something is “permitted,” “not permitted,” “encouraged most of the time” or “discouraged almost never” is hardly ever a black-and-white analysis. Similar to seeing a cool spring in the desert, unassailable solutions in such a vast of gray are usually just mirages that fail the test of reality.

With this backdrop, it is arguable that in-house lawyers and compliance professionals tend to fall into one of three categories. First is the “Yes Man,” a paper tiger who cowers to the “but we are trying to run a business” line of reasoning at the expense of permitting unacceptably risky behavior. In some cases, the Yes Man places his personal desires for acceptance and monetary gain ahead of the firm’s health. This is particularly true where the Yes Man is young and/or his compensation is largely comprised of a discretionary bonus that is determined by those who are trying to pass through the gate before which he stands guard. A Yes Man may justify his role by claiming team-player status, but in application his role as a gatekeeper is, at best, ceremonial, and at worst, similar to a fox guarding the hen house.

Second is the “Never Man,” a draconian figure who takes a chastity belt approach and would be most comfortable with a gate that resembles the Berlin Wall. The Never Man may have an unhealthy aversion to risk, but many times the Never Man simply is not sufficiently educated on the issues to overcome his bias for opposition. After all, saying “no” is usually the easiest answer. Not unlike the Yes Man, the Never Man’s motivation may reside in self-interest, albeit of the self-preservation variety. If the Never Man’s extreme conservatism is unchecked, the firm’s business mission may be thwarted by the resulting paralysis.

Third is the “Effective Counselor,” a champion of acceptable risk and a true member of the team. The Effective Counselor has an open-door policy, promotes approachability and seeks involvement. He spends his time providing input on a proactive basis rather than chasing problems resulting from bad decisions. He is similar to the doctor who advocates



The first step on the journey to becoming an Effective Counselor is to know what is knowable, as well as acknowledge what is unknowable.

health care rather than tending only to the sick. At the top of his game, the Effective Counselor can block a proposal while simultaneously garnering appreciation for having closed the gate. Likewise, an Effective Counselor is one who is not viewed as a speedbump to be run over or a roadblock to be rammed, but rather an asset to help navigate the firm toward optimal solutions. In sum, the Effective Counselor is regarded as critical and necessary to the pursuit of smart profit.

All in-house lawyers and compliance professionals should strive to be Effective Counselors. Yet, how can one obtain such a lofty status? How does a gatekeeper, who must say “no” at least some of the time, do so judiciously and without casting a pall on the pursuit of profit? Is it possible to protect the gate by discouraging those who would try to improperly pass through it from ever trying in the first place, not by promoting fear, but by establishing clear expectations of what is acceptable? How does an otherwise authoritarian figure avoid being viewed as a problem instead of a possible solution? How can the gatekeeper pursue a successful career without sacrificing his integrity in the process? These are the questions that perplex young professionals in industries such as the investment advisory industry, but also seasoned professionals who work in industries that are becoming increasingly regulated and otherwise complicated.

Knowledge

The first step on the journey to becoming an Effective Counselor is to know what is knowable, as well as acknowledge what is unknowable. And through the active process of discovering both, you will increase your capacity to make wise decisions. This means that

you must vigorously keep up with new developments—and the possibility of developments—in the applicable bodies of law and the business of the firm itself, and embrace the fluidity of both. Otherwise, you will find yourself on a rudderless ship, never certain where you are going and hardly capable of leading.

The requirement for knowledge and awareness is particularly important in industries where regulations, discoveries and methodologies are constantly changing, especially where such change fosters ambiguity in application. One must be aware of not only the black, white and otherwise well-defined boundaries, but understand the gray and blurry lines as well. After all, business profit is often awarded to those who can successfully navigate uncharted waters, whether by avoiding uncertainty when necessary or taking advantage of it where appropriate. Take, for example, the relaxation of a regulatory prohibition.³ The Never Man may be unwilling to wade into the previously off-limit waters, or the Yes Man may dive in with reckless abandon. In each case, the reaction is a result of an inability or unwillingness to see the new frontier for what it is (or is not). On the other hand, an Effective Counselor is aware of the change, identifies the possible risks and rewards, studies its internal and external ramifications and advises the firm how to wisely (if it can) dip its toes.

Expectation

In addition to singular knowledge, the Effective Counselor establishes and manages expectations, most effectively before issues arise. At its most basic, the fact that a particular external legal regime, internal policy⁴ or company mission will control or inform the consideration of an issue—or that certain issues need to be discussed in the first place—should be a surprise to no one.⁵ Likewise, one of the major tenets of the Effective Counselor’s larger dogma should be that a process and personnel exist for the very purpose of analyzing how or whether to proceed down a particular path, and that failure to utilize (or attempting to avoid altogether) that structure can result in actual, irreversible damage. For example, the expectation should be that it is better to ask for permission than for for-

givenness, not the other, oftentimes more popular, way around. And, whether through periodic training or the organic process of working through various issues over time, the Effective Counselor should establish a firm-wide understanding regarding how certain issues will be dealt with. This, in turn, should create for a more efficient, continuous flow of concerns through the legal or compliance department, as well as foster accountability throughout.⁶

Availability

Yet, knowledge, awareness, and expectation management are not enough. An Effective Counselor must also be accessible to those he counsels and interact with them with a healthy regularity. This does not mean sacrificing life on the altar of work by incessantly checking email late on a Saturday night. On the other hand, an Effective Counselor cannot hide in his office, making appearances only when a problem knocks on his door. Rather, an Effective Counselor must take the time to actively foster an environment that, in both theory and practice, encourages questions and honest conversations.

If done so correctly, dividends are all but guaranteed. First, employees will be less hesitant to seek advice and should be more candid when doing so. Second, you will get a peek into the mindset of employees, including what issues they deem important and—whether good or bad—how they might handle those issues absent legal or compliance input. Third, you can use situations as teachable moments, thereby diffusing knowledge and establishing a consistent mindset throughout firm. Fourth, simply interacting with business personnel will, over time, enable you to speak their language, which in turn will lead to better lines of communication and create a foundation for trust. Finally, you will be better equipped to deal with the issue at hand because you will be better informed about the business needs and ramifications of available options.

Perception

Assuming that the firm has been trained, expectations are established and problems are brought to the fore, the

Effective Counselor must be cognizant of perceptions prior to diving into substantive issues.⁷ Specifically, when addressing an issue and providing advice (or shutting the gate, as the case may be), it is critical to identify and acknowledge the perceptions through which each person views a particular problem. Perception, in the present context, can be simply defined as how one sees the world. In a broad sense, it can be how one views the legal system, such as the perception that regulation serves no purpose other than to restrict free enterprise. In a narrow sense, it can be what one thinks about lawyers in general (*e.g.*, lawyers always overcomplicate everything) or even the counselor himself (*e.g.*, the lawyer always says “no”). And, these perceptions can be based on direct experience (*e.g.*, the lawyer always tell me “no”) or acquired indirectly (*e.g.*, the lawyer has a reputation for always telling people “no”).

In addition to the perceptions of others, it is important to note that the counselor must take into account his own perceptions. For example, lawyers and compliance professionals tend to be more risk averse because we are trained to spot and plan for the worst possible outcomes. In simplified terms, we see the landscape as being covered with landmines, at least one of which is expected to explode. After all, American legal education largely consists of studying disputes after something has gone wrong or a crime committed. By comparison, business people are more likely to accept risk because they view it in relation to the possibility of profit, both personally and at the firm level. Therefore, while the Effective Counselor should not forsake his skepticism like the Yes Man tends to do, he should guard against seeing everything as a half-empty glass like the Never Man does.

After identifying perceptions, the counselor should attempt to work with, rather than against, them if possible. Working with a perception may take the form of identifying a correct and/or healthy perception (*e.g.*, the lawyer has the firm’s best interests in mind) and cultivating it via positive reinforcement. On the other hand, perceptions that are wrong and/or unhealthy (*e.g.*, the lawyer never says “yes”) should be challenged. Similarly, the Effective Counselor should explore his own perceptions (*e.g.*, this employee always puts his own interests ahead of the firm) and adjust

them to the situation as appropriate. It is important to note, however, that the process of altering perceptions can be very difficult and time-consuming, and may only change incrementally in inches rather than miles. In addition, care should be taken to not upset natural, healthy perceptions that stimulate fair debate.

Framing

If circumstances permit, an attempt should be made to control how issues are presented in order to encourage the most balanced consideration possible. The reason is that framing can, for better or worse, impact outcomes. Imagine that a doctor needs to recommend elective surgery. In presenting the option, the doctor could say that there is a 90 percent chance of surviving the surgery, or she could say that there is a 10 percent chance of dying on the operating table. Studies have shown that people are more likely to elect to proceed with surgery in the first instance as compared to the second, even though the surgery and anticipated mortality rate are identical. This can, at least in part, be attributed to how the question is framed.

In the present context, rather than require the gatekeeper to explain why passage is being denied (*e.g.*, “this is why you should not”), the conversation could be framed in a way that requires the person seeking passage to explain why opening the gate is appropriate (*e.g.*, “this is why I should”). The reason is that asking the gatekeeper to “tell me why I should not” puts him on the defensive and may feed into his natural skepticism and tendency to err on the side of safety. By comparison, asking the person seeking passage to prove his case (*e.g.*, “tell me why you should”) requires him to prove why the risk is acceptable relative to the possible reward.

The Effective Counselor has to be careful, however, to avoid framing in a way that negatively reinforces false or unhealthy perceptions. For example, if the business person’s perception is that the counselor always says “no,” putting the burden of proof on that person may reinforce this perception by making him believe that the issue has already been decided even before he has been given the opportunity to present his side. In such a nuanced situation, it may be appropriate to in-

stead frame the issue as “on its face this seems acceptable, but please tell me why you should proceed.” Similarly, the Effective Counselor must be careful not to frame an issue in a way that impedes honest, comprehensive consideration of the various possibilities unless the situation dictates otherwise, such as if the downside to a proposed situation is inherently great and, thus, caution should necessarily be baked into the discussion.

Discussion

Once an issue has been raised and primed for consideration, the Effective Counselor must decide whether a fulsome discussion is necessary, rather than default to a protocol that automatically requires it. After all, business decisions are often made in real time, such that efficiency is critical. A debate may be unnecessarily inefficient where an appropriate solution is readily apparent, when the fallout from an incorrect action is negligible, or making a “wrong” decision can be easily reversed at an insignificant cost. On the other hand, a discussion may be warranted—and should be encouraged—when the facts are complicated, body of law is uncertain, the downside is high or a conclusion is otherwise not easily reachable.

In such a case, the Effective Counselor should deliberately slow down the conversation and make the process as thoughtful as the situation permits so that knee-jerk reactions do not control. In this regard, it is good to remind those involved that the results of a business decision can sometimes have a shorter shelf life than the impact of a legal decision regarding the



Of course, the Effective Counselor cannot allow legal apprehension to artificially drive a discussion, whether because he wants to justify his own existence or to otherwise stroke his own ego, because by definition that is simply not what a team player does.

same issue. Put another way, in the investment world it might be possible to sell out of a bad investment, but impossible to trade away a lawsuit. In such a situation, legal concerns may need to take priority over business profits. Of course, the Effective Counselor cannot allow legal apprehension to artificially drive a discussion, whether because he wants to justify his own existence or to otherwise stroke his own ego, because by definition that is simply not what a team player does.

Resolution

After an issue has been considered, the natural progression is for the issue to be resolved. In doing so, the Effective Counselor would be wise to keep in mind a number of principles. First, the Effective Counselor should provide his input as quickly as possible—there is nothing that will reinforce the perception that lawyers overthink everything than responding too slowly. Second, the Effective Counselor must consider the extraneous issues, but sift through and discard that which is not germane or easily discounted. On a related note, the Effective Counselor should strike a fair balance between presenting the business side with too many options and provid-

ing the business side with only one or no option. Third, the Effective Counselor should spend his political capital judiciously, where in this context his currency is saying “no.” This means that the Effective Counselor should carefully pick his battles and say “no” where “no” is either the best or only resolution. To be clear, sometimes “no” is the only answer, but

even in such instances, the Effective Counselor must be mindful that closing the gate has a psychological impact. Fourth, the Effective Counselor should clearly communicate his rationale for agreeing to one solution over another, and convey a lesson in the process. It may not be possible to do so in the moment, but a situation can be turned into a teachable one via an appropriately timed postmortem. Fifth, the Effective Counselor should provide input on terms that are as definitive as possible, void of hedging concepts such as “it depends.” The reason is that business-minded people make decisions based on their view of risk versus reward, and if risk cannot be evaluated with any amount of clarity, the business-minded person will not be able to calculate whether the reward is commensurately sufficient. Sixth, the Effective Counselor must be mindful of not only the immediate impacts of a resolution, but also the precedential value it may have for the future (whether good or bad). This is particularly crucial when making an exception where it is likely that the exception will strive to become the rule. Finally, the Effective Counselor should not necessarily resist providing his business input, but if such input is offered, he should be careful to state that it is business input, not a legal or compliance opinion.⁸

Conclusion

Some might argue that becoming an Effective Counselor is its own pipe dream because real life never permits one to grow into such a specimen of wisdom and pragmatism. Some might add that there is simply too much natural—and even necessary—tension between the gatekeeping function and the pursuit of profit for there to ever be a truly symbiotic relationship between the two. Still others might dismiss the Effective Counselor ideal as one born of the gatekeeper’s fantasy of being more important to a business than he ever can be, or worse yet, than others would ever permit. Yet, even though there may be some substance to such pessimistic views, and even if the concept of an Effective Counselor is more of an aspirational, progressive journey than an obtainable state of being, it is still something for which in-house counsel and compliance professionals should strive. ▲

Endnotes

1. Pursuant to Rule 206(4)-7(c) of the Investment Advisers Act of 1940, as amended (the “Advisers Act”), investment advisers that are registered with the U.S. Securities and Exchange Commission (the “SEC”) pursuant to the Advisers Act are required to designate a chief compliance officer. Although not required by the Advisers Act, many investment adviser CCOs (especially in the private fund industry) have law degrees, and many also serve in an in-house counsel role. Note, however, that all business entities are required to appoint compliance professionals.
2. Although this article addresses in-house legal and compliance staff, many of the principles espoused are equally applicable to outside counsel, especially those who represent business entities that do not have in-house counsel.
3. For example, on July 10, 2013, the SEC adopted amendments to Rule 506 of Regulation D under the Securities Act of 1933, as amended, that removed, with certain conditions, a longstanding prohibition against general solicitation in connection with private securities offered under Rule 506. It remains to be seen what impact, if any, will result from this regulatory relaxation. Importantly, many compliance officers have struggled with how, or even whether, to advise their firms to take advantage of this new regulatory change. Many have adopted a “wait-and-see” approach due to the remaining uncertainties regarding its application, while some are getting comfortable and pursuing what their firms perceive to be a “first mover’s advantage” with respect to accessing additional capital sources.
4. For example, pursuant to Rule 206(4)-7(a) of the Advisers Act, SEC-registered investment advisers are required to “[a]dopt and implement written policies and procedures reasonably designed to prevent violation, by [the adviser] and [the adviser’s] supervised persons, of the [Advisers] Act and the rules that the [SEC] has adopted under the [Advisers] Act . . .” These policies typically take the form of a compliance manual, which serves as the rulebook of sorts for the advisory firm.
5. See generally, John H. Roth, *Power Down in the Hedge Fund Industry*, *The Hedge Fund L.J.* (Nov. 4, 2013), available at <http://www.thehedgefundjournal.com/node/8962> (last accessed on Jan. 22, 2016).
6. *Id.*
7. For more information regarding various psychology theories from which perception, framing and other psychology concepts were borrowed for purpose of this article, see DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).
8. When providing business input, care should be taken with respect to the application, or inability to claim the protection, of the attorney-client privilege.

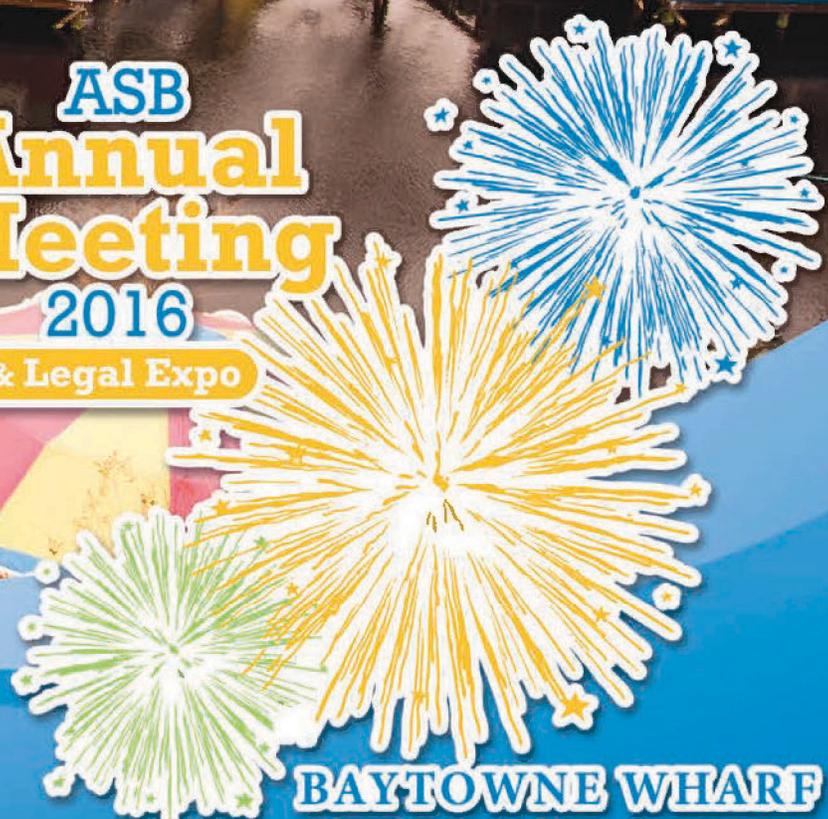
John Herbert Roth



John Herbert Roth is the general counsel and chief compliance officer of Venor Capital Management LP, a private fund manager located in New York, New York. Roth is admitted to the Alabama State Bar and the New York State Bar. Prior to taking his first in-house position at Harbert Management Corporation in 2007, Roth was an associate with Balch & Bingham LLP in Birmingham.



ASB
Annual Meeting
2016
& Legal Expo



BAYTOWNE WHARE
June 22-25, 2016

Optional Activities at Baytowne Wharf

The Village of Baytowne Wharf has many activities for kids and adults.

Adventure Land Playground is a fun place for kids to play mornings through evenings on the imaginative nautical-themed playground. Adventure Landing Playground is an enclosed fenced area where kids can safely climb, swing, run and play.

Baytowne Adventure Zone is open from 10 am-9 pm with a variety of reasons to "hang" around the village without having to get in the car to find fun! For an aerial view of the village and its surroundings, you may soar across the lagoon on the Baytowne Zipline, and then head over to the Sky Trail Ropes Course to test your balance and agility. If you still haven't had enough fun and excitement, the Tower Climb and Eurobungy are attractions sure to thrill you. Adventure Zone activities have a fee.

If you happen to come down a day early, you'll love the excitement of Boomin' Tuesday with a spectacular fireworks show over the Baytowne lagoon. Starting at 7 pm, kids may enjoy various activities, including inflatables and music on the Events Plaza Lawn. Then, at 9 pm, watch the sky light up with the fireworks show!

Experience a ride that brightens every child's smile on the Baytowne Carousel. From racecars to dragons to zebras and reindeer, let your child's adventurous side come alive with the festival lights and music at the carousel. The carousel is open Fridays from 4-9 pm, Saturdays from 12-9 pm, and Sundays from 12-6 pm.

Wednesday nights can tantalize your musical taste buds with the free concert from 7-9 pm on the Events Plaza Lawn.

On Magical Thursday, you may enjoy an extraordinary magic show by Captain Davy from 7-9 pm at the Events Plaza Lawn.

Friday will be a day to remember with options to attend the Build-A-Bear workshop where you may select an animal to build. Clothing and accessories for your new friend will be available for purchase.

Deano the Cartoonist will be on site Friday to draw your caricature as a treasured souvenir.

Blast Arcade and Laser Maze are open Sunday through Saturday from 3-8 pm. The fun-filled family entertainment center offers more than 60 redemption and video games that you can collect tickets for great prizes.

For a real getaway, consider sailing with Captain Rex. Daytime cruises appropriate for family groups, pirate-themed cruises for those with young kids, pizza party cruises, party cruises for young people or adults or a wine and cheese cruise. The three-hour outing under sail onboard a beautiful, traditional schooner is a perfect getaway. Contact Captain Rex at (850) 730-7744 for details and fees.

The pool, spa and fitness center are also available for use.



Photos and map courtesy of the Sandestin Golf and Beach Resort

ISI ALABAMA

KID'S PARTY

FEATURING

THE

PEANUTS MOVIE



ALABAMA STATE BAR 2016 ANNUAL MEETING

WEDNESDAY JUNE 22ND

6:30 P.M. FAMILY NIGHT BUFFET DINNER ON GRAND LAWN PATIO

8:00 P.M. SCREENING OF THE PEANUTS MOVIE ON THE GRAND LAWN

**ALL BROUGHT TO YOU
COMPLIMENTS OF**



PROGRAM

AT-A-GLANCE

Times and sessions are subject to change.

WEDNESDAY

June 22, 2016

Noon – 7:00 pm

2016 Annual Meeting
Registration Opens

1:00 – 2:30 pm

Alabama Law Foundation
Trustees' Meeting

2:30 – 4:00 pm

Board of Bar Commissioners'
Meeting

5:00 – 6:30 pm

Welcome Reception
*Sponsored by Elections, Ethics &
Government Relations and
In-House Counsel & Government
Lawyers sections*

6:30 – 8:00 pm

Family Night Dinner
(with movie to follow)

For registrants and their families,
no charge. Outstanding food, music
and fun for adults and children

THURSDAY

June 23, 2016

7:00 – 8:00 am

"Friends of Bill W." Meeting

7:30 am – 5:00 pm

Registration

7:30 – 9:30 am

Early Morning Continental
Breakfast

7:30 – 9:30 am

Coffee Bar

8:00 am – 5:00 pm

Legal Expo 2016

*Legal Expo is intended for registered
lawyer attendees and their office admin-
istrative staff. We regret that children
unaccompanied by a parent cannot be
admitted to the Legal Expo.*

8:30 – 9:30 am

OPENING PLENARY SESSION

The National Political Landscape:

Views from the House

Speaker: W. Michael House, Hogan
Lovells, McLean, Virginia

Sponsored by the Alabama State Bar

9:30 – 10:00 am

Break – Visit Legal Expo 2016

9:30 – 10:00 am

A Mindful Movement

*Quick breathing, stretching and
meditation tips to relieve stress*

10:00 am – Noon

Meet the Author –

Between Black and White

Book signing by Robert N. Bailey, II,
Lanier Ford Shaver & Payne PC,
Huntsville

Sponsored by the Alabama State Bar

BREAKOUT SESSIONS

(MCLE programs)

10:00 – 11:00 am

Super Lawyers' Tips for the
Plaintiff and Defense Bar – Part I

Sponsored by the Alabama State Bar

10:00 – 11:00 am

Mediation: What Works
Experienced Panel of Mediators

Sponsored by the Alabama State Bar

10:00 – 11:00 am

Development in Business and
Complex Litigation

*Sponsored by the Business Torts &
Antitrust Law Section*

10:00 – 11:00 am

State of the Alabama Federal
District Courts

*Sponsored by the Federal Court
Practice Section*





10:00 – 11:00 am

No Comment? Coping With Crises and Managing the Message – A Panel Discussion on Turning Lemons into Lemonade When the Pudding Hits the Fan

Sponsored by the In-House Counsel & Government Lawyers Section

10:00 – 11:00 am

Solo and Small Firm Practice from A to Z

Sponsored by the Solo & Small Firm Section

11:00 – 11:15 am

Break – Visit Legal Expo 2016

11:15 am – 12:15 pm

Common Mistakes Lawyers Make in Motion Practice – A Bench Perspective Panel of Trial Judges

Sponsored by the Alabama State Bar

11:15 am – 12:15 pm

Stepping Back from the Practice of Law – How What I Have Learned From a Two-Year Sabbatical Might Impact Your Life

Sponsored by the Litigation Section

11:15 am – 12:15 pm

My, How Time Flies! The Practice of Law 25 Years Ago, Then and Now

Sponsored by the Alabama State Bar Volunteer Lawyers Program

11:15 am – 12:15 pm

Alabama Water Policy and Law: Emerging Implications for Real Estate Practice

Sponsored by the Real Property, Probate & Trust Section

11:15 am – 12:15 pm

Funding Civil Legal Services: Millions for Alabamians

Sponsored by the Alabama Appleeed Center for Law and Justice, Inc.

11:15 am – 12:15 pm

Digital Evidence, Encryption of Digital Data

Sponsored by the Alabama District Attorneys Association

Noon – 12:30 pm

Bloody Mary and Mimosa Reception Honoring 2016 Alabama State Bar Award Winners

Sponsored by the Litigation Section

12:30 – 1:30 pm

Annual Bench & Bar Awards Luncheon

(\$35/person)

Presiding: Lee H. Copeland, Copeland Franco Screws & Gill PA, Montgomery, 140th president, Alabama State Bar

1:30 – 1:45 pm

Break – Visit Legal Expo 2016

BREAKOUT SESSIONS

(MCLE programs)

1:45 – 2:45 pm

Ethics in Social Media

Sponsored by the Office of General Counsel, Alabama State Bar

1:45 – 2:45 pm

2016 Intellectual Property and Entertainment Update

Sponsored by the Intellectual Property, Entertainment & Sports Law Section

1:45 – 2:45 pm

Getting Your Foot in the Door: The Crucial First Steps on Appeal

Sponsored by the Appellate Practice Section

1:45 – 2:45 pm

Hot Tips: Updates and Practice Pointers

Sponsored by the Family Law Section

Photos courtesy of the Sandestin Golf and Beach Resort

FRIDAY

June 24, 2016

1:45 – 2:45 pm

Alabama Labor and Employment Law Update – Important Cases, Regulatory Changes and Trends
Sponsored by the Labor & Employment Law Section

3:00 – 3:30 pm

A Mindful Movement
Quick breathing, stretching and meditation tips to relieve stress

3:00 – 4:00 pm

Importance of Communication with Clients and Jurors/Criminal Law Update
Sponsored by the Alabama Criminal Defense Lawyers Association

3:00 – 4:00 pm

Non-Resident Members Section – Organizational Business Meeting
Sponsored by the Non-Resident Members Section

3:00 – 4:00 pm

Common Sense Mediation: Insider Secrets for Successful Resolutions
Sponsored by the Dispute Resolution Section

3:00 – 4:00 pm

Workers' Compensation Case Law Update 2016
Sponsored by the Workers' Compensation Law Section

4:00 – 5:00 pm

The Alabama Lawyer Editorial Board Meeting

5:00 – 6:30 pm

20th Annual Alabama State Bar Volunteer Lawyers Program Reception

6:00 – 7:30 pm

Samford University Cumberland School of Law Alumni Reception

6:00 – 7:30 pm

University of Alabama School of Law Alumni Reception

7:30 – 8:30 pm

Jones School of Law Dessert Reception

8:00 pm – until

Celebrating the Diversity of Our Profession

7:00 – 8:00 am

"Friends of Bill W." Meeting

7:30 am – Noon

Registration

7:30 – 8:30 am

Early Morning Breakfasts:

- Alabama State Bar Past Presidents'
- University of Alabama Order of the Coif (\$25/person)
- Inns of Court Coffee
- Leadership Forum Alumni Breakfast & Meeting (\$25/person)

7:30 – 9:30 am

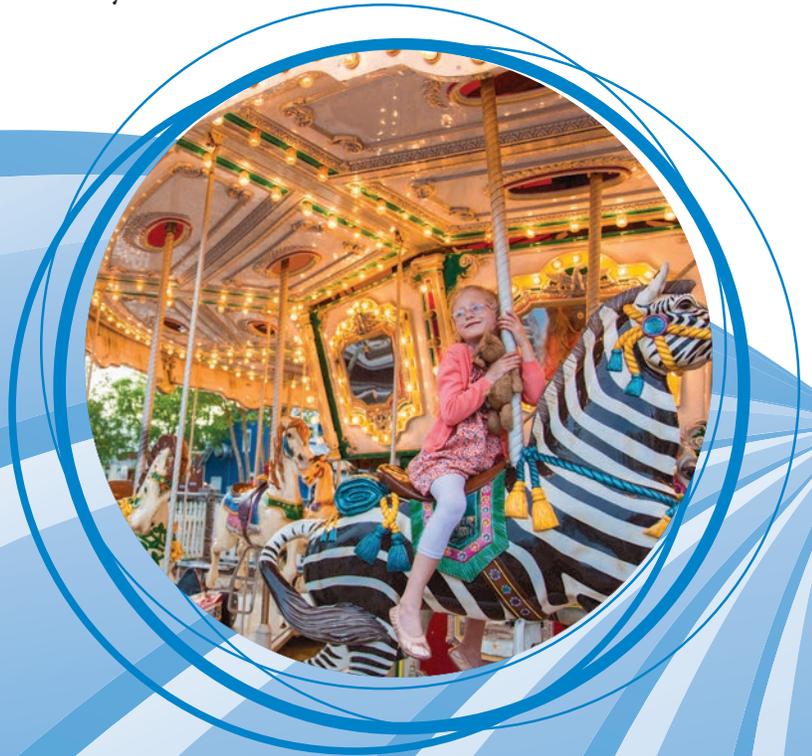
Early Morning Continental Breakfast

7:30 – 9:30 am

Coffee Bar

8:00 am – Noon

Legal Expo 2016





8:30 – 9:30 am

FEATURED WORKSHOP

Active Shooter Training – The New Norm – Awareness Required!

Presenter: Chance Corbett, associate director at Auburn University Department of Public Safety, Auburn
Sponsored by the Alabama State Bar

8:30 – 9:30 am

Business Law Section – Business Meeting

Sponsored by the Business Law Section

9:30 – 10:00 am

Break – Visit Legal Expo 2016

9:30 – 10:00 am

A Mindful Movement

Quick breathing, stretching and meditation tips to relieve stress

BREAKOUT SESSIONS

(MCLE programs)

9:30 – 11:00 am

Cybersecurity – Panel Discussion

Sponsored by the Business Law Section

10:00 – 11:00 am

Super Lawyers’ Tips for the Plaintiff and Defense Bar – Part II

Sponsored by the Alabama State Bar

10:00 – 11:00 am

Regulation Run Amok or Consumer Protection: What Does the FTC Really Want? An Update on Regulatory Oversight According to the FTC

Sponsored by the Administrative Law Section

10:00 – 11:00 am

Alabama Law Institute Legislative Update

Sponsored by the Alabama Law Institute

10:00 – 11:00 am

Introduction to Bankruptcy for the Non-Bankruptcy Practitioner – How to Avoid Getting in Trouble With the Bankruptcy Court

Sponsored by the Bankruptcy & Commercial Law Section and the Alabama State Bar

10:00 – 11:00 am

Lawyer Stress! What Causes It, Practical Ways to Deal with It and What Can Happen if You Don’t

Sponsored by the Alabama Lawyer Assistance Program

10:00 – 11:00 am

Imagining the Future of the Profession of Law in the 21st Century – Are You Ready for Artificial Intelligence and Trade Unions?

Sponsored by the Leadership Forum and Young Lawyers’ sections

11:15 am – 12:15 pm

Business Law Developments and Legislative and Judicial Updates

Sponsored by the Business Law Section

11:15 am – 12:15 pm

How to Make Diversity Work for You

Sponsored by the Diversity in the Profession Committee

11:15 am – 12:15 pm

Tips and Traps When Counseling the Elderly

Sponsored by the Elder Law Section

11:15 am – 12:15 pm

Update on Legislative and Ethics Issues for 2016

Sponsored by the Elections, Ethics & Government Relations Section

11:15 am – 12:15 pm

SPECIAL PRESENTATION – Panel Discussion

Speaker: Linda A. Klein, Atlanta, president-elect, American Bar Association

Sponsored by the Women’s and Litigation sections

Photos courtesy of the Sandestin Golf and Beach Resort



11:15 am – 12:15 pm

Tell Your Best Story: The Parallels Between Successfully Presenting a Case to a Jury and Writing a Bestselling Novel

Sponsored by the Alabama State Bar

12:30 – 1:00 pm

Women in the Law Reception

Sponsored by the Women's Section and the Alabama State Bar

1:00 – 2:00 pm

14th Annual Maud McLure Kelly Award Luncheon

(\$36/person)

Sponsored by the Women's Section

1:00 – 5:00 pm

Golfing at Sandestin Partners (G.A.S.P.) Golf Tournament

(\$150/player)

The Raven Golf Club, Sandestin

Registration includes practice rounds, warm-up, boxed lunch and 18 holes of golf with cart and greens fees included. Shotgun start begins tournament.

1:00 – 5:00 pm

Family Tennis Tournament

(\$25/player)

Sandestin Resort Tennis Center, Baytowne

2:00 – 4:00 pm

Build-A-Bear Special Event

(Children 12 and under)

2:00 – 4:00 pm

Cartoons by Deano Minton

2:30 – 3:30 pm

Women's Section Business Meeting

3:00 – 3:30 pm

A Mindful Movement

Quick breathing, stretching and meditation tips to relieve stress

6:00 – 8:30 pm

Silent Auction Fundraiser

Sponsored by the Women's Section

6:00 – 9:00 pm

Cartoons by Deano Minton

7:00 – 9:00 pm

President's Closing Night Family Dinner

(\$45/person)

We have planned an outstanding evening of fun with great food, beverages and special music featuring "The WingNuts" with lead singer District Judge Alan Furr, 30th Judicial Circuit, Pell City

Honoring Lee H. Copeland,

140th president, Alabama State Bar

9:00 – 11:00 pm

Afterglow Party

Sponsored by the Leadership Forum and Young Lawyers' sections

SATURDAY

June 25, 2016

7:00 – 8:00 am

Legal Run-Around 5K Run and 1-Mile Fun Run/Walk

Baytowne Loop/Village Lakeside Loop
Sponsored by Freedom Court
Reporting/Freedom Litigation Support

7:30 – 8:45 am

Christian Legal Society Breakfast

(\$25/person)
Sponsored by William T. Coplin, Jr.
LLC, Rosen Harwood PA and Stone
Granade & Crosby PC

7:30 – 9:30 am

Coffee Bar

8:30 – 9:15 am

Silent Auction Wrap-Up

Sponsored by the Women's Section

9:15 – 11:15 am

Grand Convocation:

State of the Judiciary

Presiding: Lee H. Copeland, Copeland
Franco Screws & Gill PA, Montgomery,
140th president, Alabama State Bar
State of the Judiciary Address: Chief
Justice Roy S. Moore, Supreme Court
of Alabama, Montgomery

11:15 am

Board of Bar Commissioners' Meeting

11:30 am – 1:30 pm

Presidential Reception Honoring

J. Cole Portis of Montgomery, 141st president, Alabama State Bar

Sponsored by Beasley Allen Crow
Methvin Portis & Miles PC and the
Alabama State Bar

ASB
Annual
Meeting
2016
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Registration is easy.

Just go to
[https://www.alabar.org/
about-the-bar/annual-meeting/](https://www.alabar.org/about-the-bar/annual-meeting/)
for details or scan this QR code
with your smart phone.



Photos courtesy of the Sandestin Golf and Beach Resort

GRAND PRIZE GIVEAWAY

Sunrise

IN PARK CITY

ALABAMA
= STATE BAR =

2016 ANNUAL MEETING

Register To Win



4 Nights & 5 Days

at Sunrise Lodge, A Hilton
Grand Vacations Club



\$500 Flight Voucher



Dinner for 2 at

The Farm Restaurant
in Park City

All Brought To You
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HOUSING REQUEST FORM

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 Call 800.320.8115 or Fax: 850.267.8221

ALABAMA STATE BAR 2016 ANNUAL MEETING

Tuesday, June 21 - Sunday, June 26, 2016 • GROUP CODE: 22N58R

Name _____ Number in Party: Adults _____ Children _____
 Company Name _____ Business Phone (_____) _____
 Address _____ E-Mail _____
 City _____ State _____ Zip _____
 Sharing With _____
 Arrival Day/Date _____ Departure Day/Date _____
 Please select method of payment:
 Credit Card # _____ Exp. Date _____ Signature _____
 Authorization # _____ (located on the reverse side of card) Check # _____

Your cut-off date for reservations is **May 21, 2016**, after which rooms will be sold on a space-available basis.

ACCOMMODATIONS AND RATES

A deposit of one night's room rate is required to secure rooms.

All room rates quoted **DO NOT** include 12% fees and 11.5% taxes.

Please circle your preferred accommodations. All requests are subject to availability at time booking request is received.

Any other type of accommodation besides what is in your block will vary in cost depending on location.

ACCOMMODATION	RATE	ACCOMMODATION	RATE	ACCOMMODATION	RATE
Beachside 1 Bdrm*	\$ 355	Luau Studio*	\$ 225	Village 2 Bdrm	\$ 349
Beachside 2 Bdrm*	\$ 489	Luau 1 Bdrm*	\$ 259	Village 3 Bdrm	\$ 424
Westwinds 1 Bdrm*	\$ 369	Luau 2 Bdrm*	\$ 359	Grand Complex Studio	\$ 219
Westwinds 2 Bdrm*	\$ 519	Lakeside 2 Bdrm	\$ 240	Grand Complex 1 Bdrm	\$ 239
Westwinds 3 Bdrm*	\$ 629	Lakeside 3 Bdrm	\$ 339	Grand Complex 2 Bdrm	\$ 359
Southside 2 Bdrm	\$ 325	Village – Studio	\$ 209	Grand Complex 3 Bdrm	\$ 459
Southside 3 Bdrm	\$ 419	Village 1 Bdrm	\$ 229		

*A minimum stay of 5 nights is required for Westwinds and Beachside Towers; 4 nights for Luau accommodations.
 The Grand Complex consists of accommodations in the Grand Sandestin®, Lasata, Bahia, and Elation

IF ONE OF THE ABOVE ROOM TYPES ARE UNAVAILABLE ON-LINE, PLEASE CALL OUR RESERVATIONS DEPARTMENT AT 800-320-8115 TO CHECK FOR AVAILABILITY.

Deposit is refundable in the event of individual room cancellation, provided notice is received by Sandestin® seven days prior to scheduled arrival date.

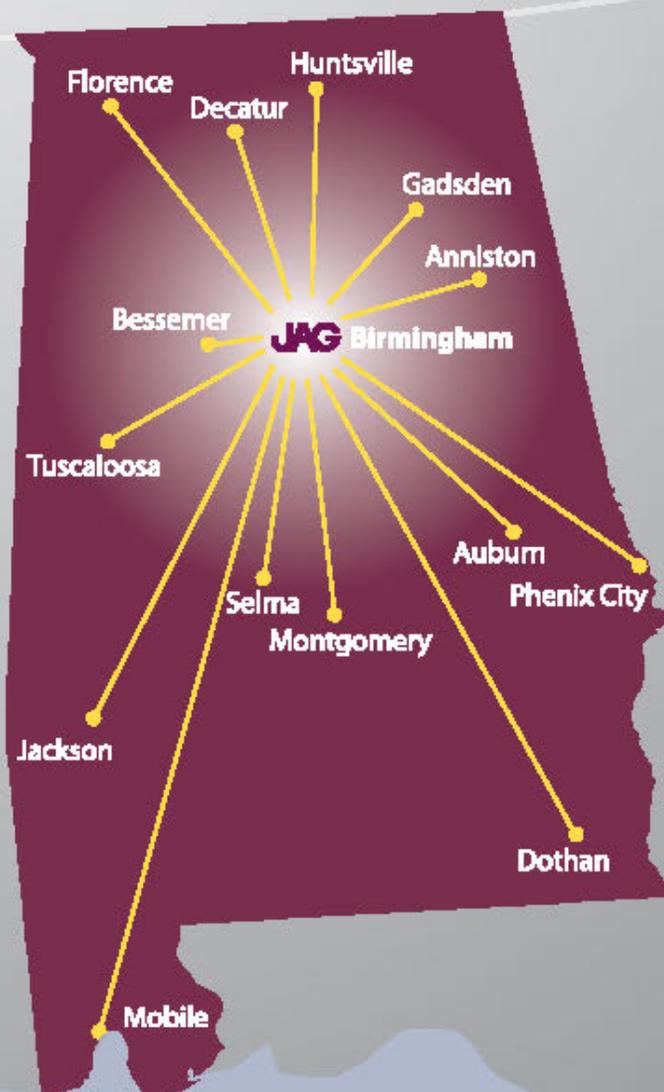
BOOK ONLINE AT www.Sandestin.com and enter group code 22N58R

See you next year at the
Grand Hotel Marriott Resort,
Golf Club & Spa in Point Clear
July 12-15, 2017!



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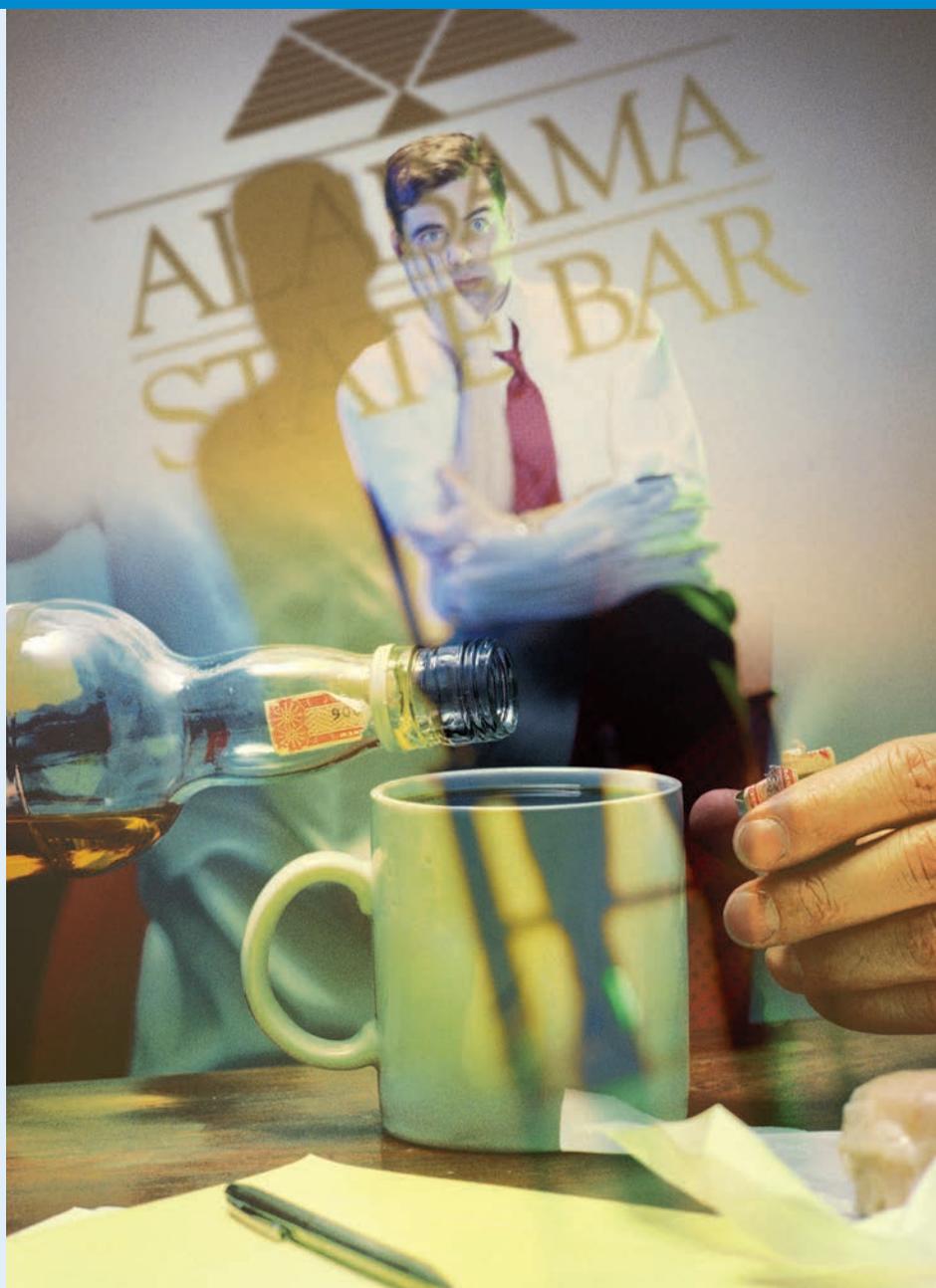
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Birmingham, Alabama 35203
205-979-1029

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Fear of the Bar!

The following article was submitted anonymously by a successful Alabama attorney and a former Alabama Lawyer Assistance Program (ALAP) participant. This man's life has been changed for the better simply because he finally became willing to make a call to the ALAP and sincerely reach out for help. He currently serves on our ALAP committee and is passionate about being of service to other Alabama attorneys who may be suffering in silence. One of our primary goals is to increase the number of attorneys we can assist before the inevitably worsening negative consequences of undiagnosed or untreated depression or a substance use disorder result in a formal complaint to the bar or involvement with law enforcement. Our program is voluntary and completely confidential. If you find yourself connecting with the message in this article, I encourage you to give us a call (334-517-2238) so that we can discuss your concerns and see if we can provide assistance.

—Robert B. Thornhill, MS, LPC, Alabama Lawyer Assistance Program director



I do not know when I started the descent to my personal and emotional “bottom.” I had never thought about being at the bottom of anything. I had always been a high achiever and rarely found a challenge I could not overcome. I graduated near the top of my class in law school, and as a result, I started a great job with a prominent law firm. I had a nice house and was beginning to start a family. In other words, I had achieved all of my life goals up to that point. Yet, even though I “had it all,” I was personally miserable.

My personal unhappiness made no sense to me. I was frustrated because someone with so many blessings in life should not feel so lost. At times I just felt paralyzed by a non-specific fear of the world around me. Eventually, after a few appointments with a psychologist and a counselor, I learned that I was probably suffering from depression and anxiety. Even with the knowledge of a potential diagnosis, I did not continue my treatment with either of these professionals. In retrospect, I was still ashamed of my

situation and I was probably not ready to do the work necessary to begin to change it.

Instead of professional treatment, I decided to try different career paths in order to find peace and happiness. Eventually I found myself practicing law as a solo practitioner. Even though I started to develop a decent business, the lack of any structure did not serve me well. My ability to deal with the pressures of my job and life began to further diminish. I was becoming more and more dependent on alcohol as a coping mechanism, drinking every night as a way to “unwind” or “relax.” I would drink when I had a tough day and I would drink to celebrate a success. In reality, I wanted to drink at every available opportunity. I had finally found a challenge that I could not overcome. I was an alcoholic and alcohol was my master. Most of my days were spent thinking about when I was going to get my next drink.

As a result, I found myself being non-responsive with clients, not opening mail for fear of what it might say and just generally developing a manner of acting that was putting my business and personal life at great risk. My behavior started to threaten the safety of my young children, yet I did nothing to change. As I experienced these personal “failings,” I became more and more depressed. I eventually reached a point where I assumed every letter I received from the Alabama State Bar was a bar complaint (only to be surprised to find an offer for life insurance or a notice about continuing education hours). The mere sight of the Alabama State Bar in Montgomery evoked feelings of fear and dread.

My life was spiraling out of control and it did not seem like the end would be a happy one. However, in one of those moments of a higher power working in my life, I came across an article about lawyer recovery and assistance programs. I had not even been aware that state bars offered such services. I had feared retribution and punishment

from the Alabama State Bar for so long that not once did I think about the bar as a source of assistance or hope.

At that point I felt I had nothing to lose, nor did I have any other place to turn, so I called the number for the Alabama Lawyer Assistance Program. I found myself immediately speaking

I eventually reached a point where I assumed every letter I received from the Alabama State Bar was a bar complaint (only to be surprised to find an offer for life insurance or a notice about continuing education hours).

with the then-director of the program, the late Jeanne Marie Leslie. She did not say much, but asked what I was doing the next day. When I could not come up with any plans, she told me to come to her office and, thankfully, I did not have enough mental energy to object.

That phone call was the start of a journey of recovery for me. I met with Jeanne Marie and, for the first time, was open and honest about my situation and my personal thoughts. Much to my surprise, I found a person who did not judge me or question me, but rather just listened and

seemed to understand me. She suggested I participate in a small group of professionals (mostly attorneys) and use that as an additional way to treat my depression and anxiety. I was shocked and relieved to learn that I was not the only one suffering with these feelings.

My recovery process next led me to my first Alcoholics Anonymous (AA) meeting. Ironically, one of the first people I saw was an attorney I knew. My initial feeling was panic and I almost turned around and left out of fear that he would see me and know that I was an alcoholic. My reasoning soon took over; I realized that he was an alcoholic, too, and that I really had nothing about which to be ashamed. He eventually became a good friend in my recovery process.

I began to work the sobriety process through the 12 steps of AA. I was so grateful for the recommendations and suggestions I received in early sobriety to “just go to meetings” and to “focus on not drinking today.” I also found a lot of camaraderie with fellow attorneys in the recovery process, even discovering a recovery meeting specifically for attorneys. There were fellow attorneys just like me, dealing with identical pressures and concerns. I soon realized that even though the details may be a little different, all of our stories were basically the same.

Today my life is completely different from that day I made the phone call to the bar. My law practice has grown and has become financially stable (and even fruitful). I just celebrated my five-year sobriety anniversary. I have a great relationship with my children and now I am more present and engaged with them. I am also able to pass on some of the emotional lessons I have learned in my recovery. Finally, I am a member of the Alabama Lawyer Assistance Program Committee, gratefully giving my time to an organization that helped save my life. I can even drive past the Alabama State Bar in Montgomery and feel a sense of gratitude, instead of fear and dread!



Alcohol Abuse and Mental Health Concerns among American Attorneys

By Robert B. Thornhill

A comprehensive national study funded by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs was recently published. The title of the study is, “The Prevalence of Substance Use and Other Mental Health Concerns among American Attorneys” (*Journal of Addiction Medicine*; February 2016–Volume 10- Issue 1-p 45-52). Prior to this study, the most recent and most widely-cited statistics and information regarding alcohol use and mental health concerns among attorneys came from a 1990 Washington state study involving some 1,200 attorneys. This recent study involved 12,825 licensed and employed attorneys in 19 states (Alabama participated in the study) and provides current and reliable statistics.

Here is a brief list of findings from the study:

- More than 20 percent of licensed lawyers drink at levels considered “hazardous, harmful and potentially alcohol-dependent”—three times higher than the rate of alcohol abuse among the general public.
- The highest problem drinking rate overall was among younger lawyers under age 30 (31.9 percent) and junior associates at law firms (31.1 percent).
- A high rate of depression—28 percent—compared to 8 percent of the general population experienced depression in a given year. (Forty-six percent reported concerns at some point in their career.)
- Symptoms of anxiety were experienced by 19 percent. (Sixty-one percent reported concerns with anxiety at some point in their career.)
- Twenty-three percent experienced symptoms of stress.

These findings clearly show that attorneys experience “drinking that is hazardous, harmful or otherwise generally consistent with alcohol use disorders at a rate much higher than other populations.” Depression, anxiety and stress are also significant problems for attorneys. We have known for many years that use of mood-altering substances such as alcohol have been strongly associated with stress, depression and anxiety. These “co-occurring disorders” are the rule and not the exception!

Many begin to abuse alcohol (or other substances) as a way to cope with stress, anxiety or depression. Many others begin to experience depression, stress or anxiety as a result of abusing alcohol or other substances.

The Alabama Lawyer Assistance Program (ALAP) is dedicated to providing confidential assistance to lawyers and law students who may be experiencing problems with alcohol or other substances, or a mental health issue such as depression or anxiety. The Alabama State Bar has demonstrated strong and consistent support for our program since its inception, and understands the supreme importance of maintaining complete confidentiality for those who have the courage and willingness to come forward and seek help. We have a dedicated committee of volunteer attorneys, most of whom are in recovery themselves, scattered around the state. They are ready and willing to assist! They have experienced the life-changing miracle of recovery, and the value of therapy and treatment.

Most attorneys are self-reliant, ambitious, perfectionistic and highly motivated to provide good service to their clients. As a group, however, attorneys are among the last to seek assistance, or to even acknowledge a problem. The fear of damaging their reputation is pervasive and keeps many attorneys from receiving the assistance and treatment that they need.

It is my hope that we can all use the information obtained in this new study as a motivation to actively reduce the stigma associated with addiction and mental health issues, and to encourage ourselves and our colleagues to reach out for help. We have seen many lives, families and careers transformed through our work in this program. Unfortunately, we have also seen families, careers and even lives lost due to untreated addiction or mental health issues. *These maladies do not get better on their own.* They are progressive and get worse over time without treatment. If you see yourself among these statistics, or know of a colleague who is suffering, please contact us. Your involvement with the Alabama Lawyer Assistance Program will be strictly confidential. We hope to hear from you! ▲

Robert B. Thornhill, MS, LPC, director, Alabama Lawyer Assistance Program, (334) 517-2238 or (334) 224-6920, robert.thornhill@alabar.org



DISCIPLINARY NOTICES

- ▲ Notices
- ▲ Transfer to Disability Inactive Status
- ▲ Disbarments
- ▲ Suspensions
- ▲ Public Reprimands

Notices

- **Tessie Patrice Clements**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 25, 2016 or thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB No. 2011-709 by the Disciplinary Board of the Alabama State Bar.
- **James William Woolley**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 25, 2016 or thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 2013-1908 by the Disciplinary Board of the Alabama State Bar.

Transfer to Disability Inactive Status

- Haleyville attorney **Jerry Dean Roberson** was transferred to disability inactive status pursuant to Rule 27(a), *Ala. R. Disc. P.*, effective January 19, 2016, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(a), Pet. No. 2016-169]

Disbarments

- Birmingham attorney **Ralph Bohanan, Jr.** was disbarred from the practice of law in Alabama, effective December 15, 2015, by order of the Alabama Supreme Court. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar finding Bohanan violated Rules 1.3, 1.4, 1.15(a), (b) and (n), 8.1 and 8.4(a), (b), (c) and (g), *Ala. R. Prof. C.* Bohanan failed to respond to or deny charges he accepted settlement funds on behalf of multiple clients in multiple cases, and then failed to disburse to the clients their share of the settlement proceeds. The clients' funds were not preserved in Bohanan's trust account, and were instead disbursed to Bohanan or third parties. Prior to disbarment, Bohanan was interimly and summarily suspended on May 13, 2015 by order of the Disciplinary Commission, finding probable cause that Bohanan's conduct was causing or likely to cause immediate and serious injury to a client or the public, and that he

failed to respond to requests for information during the course of a disciplinary investigation.

- Birmingham attorney **Thomas Christian Fernekes** was disbarred and excluded from the practice of law in Alabama, effective November 6, 2015, by order of the Alabama Supreme Court subject to the terms and conditions of the October 23, 2015 order entered by the Disciplinary Board of the Alabama State Bar, finding Fernekes guilty of violating Rules 1.3, 1.4(a), 1.15(a), 1.16(a)(2), 8.1(b), 8.4(a), 8.4(c) and 8.4(g), *Ala. R. Prof. C.* Fernekes failed or refused to communicate with his clients, failed or refused to perform the work for which he was paid and commingled the clients' fees with his personal funds. Fernekes had already been summarily suspended January 8, 2013. [ASB Nos. 2010-1212, 2012-1572 and 2012-1890]
- Mobile attorney **J. Stephen Legg** was disbarred from the practice of law in Alabama, effective January 20, 2016, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Legg's consent to disbarment, which was based upon his acknowledgement that there were pending investigations into his ethical conduct as a lawyer concerning alleged violations of Rules 1.3,

1.4(a), 1.5, 1.15(a), 1.15(b), 1.15(e), 1.15(f), 8.4(a) and 8.4(g), *Ala. R. Prof. C.*, which, if proven, would likely result in serious discipline by the bar, to include disbarment. [Rule 23, Pet. No. 16-136 et al]

- Fairhope attorney **Stephen Mark Middleton** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective September 2, 2015, pursuant to the order of the Disciplinary Board of the Alabama State Bar. Middleton was found guilty of having violated Rules 1.2(a), 1.4(a), 1.4(b), 1.5(b), 1.15(a), 1.15(b), 1.15(e), 1.15(f), 1.15(i), 1.15(n), 1.16(d), 5.3, 4.4, 7.2(c), 8.1(a), 8.4(a), 8.4(c) and 8.4(g), *Ala. R. Prof. C.* In 2013, one of Middleton's employees pled guilty to embezzling from Middleton's trust account, law office account and personal accounts for a period lasting more than two years. During this time, Middleton failed to review his bank statements, personally reconcile statements and/or perform a periodic accounting or audit of his bank accounts and properly supervise his employees. Middleton also improperly split fees with a non-lawyer, paid a non-lawyer for referrals and made false statements to the bar. [ASB Nos. 2011-1396; 2011-1481; 2011-1536; 2011-1679; 2011-1736; 2011-1762; 2012-213; 2012-1700; 2013-565 and 2015-510 and SC 1141125]



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Alabama Lawyer Assistance Program

(Continued from page 201)

Suspensions

- Birmingham attorney **Benjamin Howard Cooper** 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 January 8, 2016. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing Cooper failed or refused to respond to requests for information from a disciplinary authority during the course of disciplinary investigations. [Rule 20(a), Pet. No. 2016-128]
- On February 17, 2016, the Supreme Court of Alabama entered an order of reciprocal discipline suspending Alabama attorney **Beverly Lynn Gaines Towery, a/k/a Lynn Gaines Towery** for two years, effective November 15, 2015. On November 20, 2015, the State Bar of Texas issued an agreed judgment of active suspension which imposed a fine and other discipline on Towery, also admitted in Texas, including suspending her from the practice of law in Texas for two years, beginning November 15, 2015 and ending November 14, 2017. According to the agreed judgment of active suspension, Towery engaged in conduct involving dishonesty, fraud, deceit and misrepresentation, in violation of the Texas *Disciplinary Rules of Professional Conduct*. [Rule 25(a), Pet. No. 2015-1663]

Public Reprimands

- Decatur attorney **Howard McGriff Belser, III** was issued a public reprimand without general publication on January 8, 2016 for violating Rules 1.1, 1.3 and 8.4(d), *Ala. R. Prof. C.* On or about April 8, 2015, the clerk of the Alabama Court of Civil Appeals submitted to the Disciplinary Commission copies of three briefs filed by Belser on behalf of appointed clients. Belser submitted a brief on behalf of an appellant, whose parental rights were terminated by the Morgan County Juvenile Court. In its opinion affirming the judgment of the juvenile court, the court noted that the argument section of Belser's brief was just over a page long, the brief only cited to general propositions of law and it did not cite the current Alabama Juvenile Justice Act that controlled the issues in the case. Moreover, Belser misstated the standard of review

for termination of parental rights cases, misstated the gender of the client on multiple occasions and mistakenly incorporated facts that were from an unrelated case. As a result, the court found that Belser's brief failed to comply with Rule 28, *Ala. R. Civ. Proc.* In a separate case, Belser was retained to represent a client on concurrent appeals of a civil forfeiture stemming from a drug arrest. The court of civil appeals dismissed both appeals due to Belser's failure to file a timely notice of appeal in each matter. [ASB No. 2015-600]

- Huntsville attorney **Jackson Parker Burwell** was issued a public reprimand without general publication on January 8, 2016 for violating Rules 1.3, 1.4(a) and (b), 1.5(a), 1.15(b) and (e) and 8.4(g), *Ala. R. Prof. C.* Burwell created two irrevocable trusts for a client and her husband to benefit the couple's two children, who were minors at that time. Initially, Burwell charged a fee of \$150 per trust, per year, to handle making the premium payments. However, the client was not informed when Burwell began charging a \$500 (and later \$1,000) fee to handle tax returns and other matters as the trustee of the two trusts. Burwell also failed to provide an adequate accounting of the trust and failed to timely turn over dividends due to the trust. [ASB No. 2015-189]
- Vestavia attorney **Annesley Hodges Degaris** received a public reprimand with general publication on September 18, 2015 for violating Rules 7.1(a), 7.2(c), 7.3 and 8.4(a), *Ala. R. Prof. C.* Degaris was a partner in the firm of Cory, Watson, Crowder & DeGaris PC. While a partner, Degaris unknowingly, but negligently, participated in an improper solicitation scheme involving payment of "advanced referral fees" to two lawyers. These advanced referral fees were used by these lawyers to generate additional cases in violation of Rule 7.3 before the matters were referred to Degaris's firm. Degaris participated as a contact person at the firm, violating the *Alabama Rules of Professional Conduct*, through this improper solicitation. Degaris's firm also paid other attorneys and/or law firms to advertise for cases with the understanding that such cases were to be referred to the firm, but the arrangement was not disclosed in the advertising conducted by the attorneys or firms enlisted by Degaris's firm. [ASB No. 2014-1592]
- Birmingham attorney **Steven Douglas Eversole** received a public reprimand with general publication on January 8, 2016 for violating Rules 1.6 and 8.4(g), *Ala. R. Prof. C.* On or about January 29, 2015, the Office of General Counsel received copies of screen shots from a lawyer-rating website.

The website allows clients to post comments regarding their lawyers. On the website, a former client of Eversole's posted an anonymous negative review. Eversole responded to the negative review by posting an online response attacking his former client and revealing confidential information. In Eversole's posted response, he stated that the client was ignorant and then revealed that the client had been charged with DUI, a drug charge and also had a divorce case. Eversole also revealed that the client had been "locked up in the looney bin" for months due to "numerous and severe" psychological conditions. Eversole also told the client to "show some fortitude and man up boy." [ASB No. 2015-244]

- Birmingham attorney **Grover Patterson Keahey, Jr.** received a public reprimand with general publication on October 30, 2015 for violating Rules 1.4(a) 1.5(c) and 5.3(a) and (b), *Ala. R. Prof. C.* In or about January 2009, Keahey was hired by a client to file an asbestos-related lawsuit. During the course of this representation, Keahey failed to enter into a written contingency fee contract with the client, failed to keep the client reasonably informed about the status of the matter and promptly comply with reasonable requests for information and failed to properly supervise his non-lawyer employees because Keahey failed to review almost all of

the correspondence in this matter and his bookkeeper misappropriated non-client money. [ASB No. 2013-1923]

- Upon successful completion of a two-year probation for violating Rules 1.2(d), 8.4(a), 8/4(c) and 8.4(g), *Ala. R. Prof. C.*, Centreville attorney **Michael Lynn Murphy** received a public reprimand with general publication on January 8, 2016. On or about January 18, 2012, Murphy notarized a signed lease without the lessor or lessee signing the document in his presence. [ASB No. 2012-375]
- Saginaw attorney **Nancy Ingeborge Rhodes** was issued a public reprimand with general publication on January 8, 2016 for violating Rules 1.1, 1.4(a) and (b) and 8.4(g), *Ala. R. Prof. C.* On or about October 6, 2014, a complaint was filed against Rhodes, alleging that Rhodes had failed to competently represent a client on immigration matters. Rhodes initially accompanied the client to the Immigration Court in Atlanta for the removal proceedings. However, the hearing was cancelled at the last minute. Thereafter, Rhodes filed a U.S. Citizenship and Immigration Form I-130 Petition for Alien Relative on the client's behalf. However, Rhodes erred in filing the Form I-130 Petition because the client did not qualify for entry into the United States under its terms and conditions, a fact Rhodes of which should have been aware. [ASB No. 2014-1458] ▲



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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

Res Judicata

Regions Bank v. BP PLC, No. 1141170 (Ala. Jan. 29, 2016)

Res judicata did not bar Regions' claims against BP for damages to Regions-owned properties in the Deepwater Horizon spill; Regions was not a class member in the BP property-damage settlement because Regions fell within the "financial institutions" exception to class membership.

Arbitration

Dannelly Enterprises, LLC v. Palm Beach Grading, Inc., No. 1140504 (Ala. Jan. 29, 2016)

Sub-subcontractor could not be compelled to arbitrate under an upstream contract between contractor and sub-contractor pursuant to a third-party beneficiary theory because (a) the arbitration agreement in the upstream contract applied only to disputes between the subcontractor and the contractor, and (b) there was no evidence that sub-contractor derived any benefit from the upstream contract.

Marine Insurance

St. Paul Fire & Marine Ins. Co. v. Britt, No. 1140423 (Ala. Jan. 29, 2016)

Though it was not defined in the policy, the "mysterious disappearance" exclusion was not ambiguous and would include any loss arising under unknown, puzzling or baffling circumstances.

Common Fund; UIM

Ex parte State Farm Mutual Auto. Ins. Co., No. 1141039 (Ala. Jan. 29, 2016)

Since a UIM insurer does not have a subrogation interest in a Lambert advance, insured tort victim's recovery from the tortfeasor of the Lambert advance did not create a common fund from which insurer was required to pay its share of insured's attorney fee.

Wrongful Death; No Relation Back of PR Appointment to Suit Timely Filed

Alvarado v. Kidd, No. 1140706 (Ala. Jan. 29, 2016)

Marvin v. Healthcare Authority for Baptist Health, No. 1140581 (Ala. Jan. 29, 2016) (*Marvin* was affirmed without opinion)

Personal representative who both filed petition for letters of administration and commenced civil action before the two-year statute ran nevertheless lacked standing to bring wrongful death action when he filed the latter, where the probate court did not enter the order issuing letters until after expiration of the statute. Acknowledging the perceived unfairness of the result, Justice Bolin's special concurrence urged the legislature to amend the wrongful death statute.

Venue; Forum Non Conveniens

Ex parte Engineering Design Group, LLC, No. 1141219 (Ala. Feb. 5, 2016)

Interests of justice required a transfer of action from St. Clair County to Shelby County, where plaintiffs' property was situated on which the defendants had constructed an allegedly defective man-made lake.

Fraud; Reasonable Reliance

Farmers Ins. Exchange v. Morris, No. 1121091 (Ala. Feb. 12, 2016)

In a *per curiam* opinion, the court's plurality (four justices joining, with Justice Bryan concurring in the result) rejected Farmers' three arguments for judgment as a matter of law on a fraud claim, holding: (1) Agent's at-will status did not preclude agent from reasonably relying on alleged misrepresentation that he could become a Farmers agent while continuing work in an independent agency; he reasonably relied by altering his relationship with independent agency's business (i.e., by concentrating on selling Farmers policies); (2) presence of a merger and integration clause in the contract did not preclude reliance on earlier oral misrepresentations, because a statement in a contract that no other representations have been made does not bar a fraud action alleging that oral misrepresentations fraudulently induced the plaintiff to enter into the contract (the plurality block-quoted a pre-*Foremost* decision to establish this point); and (3) statement available to agent in its extra-contractual training materials did not negate reasonable reliance because it should have alerted him to a Farmers rule against maintaining an office in another



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(Continued from page 205)

insurance agency, because the policy was buried deep within training materials, and both agent and the farmers agents who trained him testified that they had never seen it and were not aware of it.

Trial Procedure; Rule of Repose

Thomas Jefferson Foundation, Inc. v. Jordan, No. 1140528 (Ala. Feb. 12, 2016)

Twenty-year rule of repose barred claims by lenders of historic furniture to TJF under agreements entered into in the 1970s for display at Monticello, after furniture items were allegedly devalued in the 1980s through alterations.

Insurance; Notice

Southern Cleaning Service, Inc. v. Essex Insurance Company, No. 1140870 (Ala. Feb. 19, 2016)

Whether insurer held independent agent (“IA”) out to create apparent authority for providing notice of claims was issue of fact; the policy itself listed the IA as the “agent,” and no other procedure or person for providing notice was identified in the policy.

Will Contests

Ussery v. Terry, No. 1141070 (Ala. Feb. 19, 2016)

It is not fatal to a will contest that the contestant failed to join as additional defendants all persons interested in the will, as contemplated by *Ala. Code* 43-8-200. Nor does the failure to join those parties require a dismissal under *Ala. R. Civ. P.* 19 for failure to join indispensable parties.

Arbitration; Waiver

Hoover General Contractors-Homewood, Inc. v. Key, No. 1141280 (Ala. Feb. 19, 2016)

HGCH’s participation in the case, which consisted of filing three separate pleadings, twice moving to continue the pre-trial conference and filing counterclaims, did not substantially invoke the litigation process, in light of the strong federal policy favoring arbitration and disfavoring a waiver finding.

Arbitration; Changes of Terms

Moore-Dennis v. Franklin, No. 1131142 (Ala. Feb. 26, 2016)

Bank’s posting of an arbitration agreement within a change of terms on an online banking portal, where the customer did not access his online banking and had neither Internet

access or email and where the bank never sent a notice of change of terms by mail (as contemplated in the account agreement), was not sufficient evidence that the customer assented to the change of terms. (plurality opinion)

Arbitration; Nursing Home Contracts; Capacity

Kindred Nursing Centers East, LLC v. Jones, No. 1140871 (Ala. Feb. 26, 2016)

Nursing home resident’s daughter signed arbitration agreement as resident’s “legal representative,” and agreement provided that operator had the right to rely on the legal representative’s representation of her authority to act for the resident. After the resident sued and the operator moved to compel arbitration, the resident claimed to have been mentally incompetent at the time daughter executed the agreement (she was under the influence of heavy medication). The court reversed the trial court’s denial of arbitration, reasoning (1) there was no evidence that the resident was mentally incompetent (pain medication influence was not sufficient to prove mental incompetency) and (2) resident’s competency caused daughter’s signing to bind the resident through “passive ratification” (Ed: apparent authority?)

Summary Judgment Procedure

Fleming v. Sanders Lead Co., No. 1141111 (Ala. Feb. 26, 2016)

While defendant’s summary judgment motion was pending on certain negligence claims, plaintiffs amended their complaint, but defendant did not amend its summary judgment motion to cover the newly-asserted claim. The trial court subsequently granted summary judgment on all claims and dismissed the case. The supreme court reversed, holding that because defendant never moved for summary judgment on the newly-asserted claim, the burden of production never shifted to plaintiff on that new claim.

Immunity

Ex parte Alabama Dept. of Corrections, No. 1141424 (Ala. Feb. 26, 2016)

PR of deceased prisoner who died from stabbing inflicted by fellow prisoner sued DOC, warden and officers. The trial court denied summary judgment. The supreme court granted mandamus relief and directed the trial court to dismiss the case,

holding (1) DOC is entitled to absolute immunity under Section 14 of the Alabama Constitution, (2) officers were entitled to state-agent immunity under *Cranman* for exercising judgment in returning the perpetrator prisoner to the inmate population after investigation of a prior incident and (3) officers were entitled to qualified immunity on section 1983 claims based on deliberate indifference. This is a plurality panel opinion.

Immunity

Ex parte Trimble, No. 1150029 (Ala. Feb. 26, 2016)

Mother of minor student sued acting principal and teacher (who was in charge of disability determinations at school) for failure to safeguard confidential medical information of student's disability, where principal directed aide to disseminate written report concerning student to certain teachers, and instead aide opened report, read it and then disseminated information. Held: defendants were entitled to immunity for acting within their authority in determining how to disseminate the reports concerning the student.

Wrongful Death; Parties

Ex parte Hubbard Properties, Inc., No. 1141196 (Ala. March 4, 2016) (plurality opinion)

Wrongful death action commenced by spouse of decedent, purporting to act as "attorney in fact" for the decedent (not his estate), after county administrator had been appointed as personal representative of estate, was a nullity.

Prisoner Litigation

Ex parte Cook, No. 1140610 (Ala. March 4, 2016)

(1) appellate jurisdiction over actions filed by incarcerated inmates seeking release from prison pursuant to the Alabama Prisoner Litigation Reform Act lies with the supreme court and (2) a circuit court considering whether to grant *in forma pauperis* status to a *pro se* prisoner for civil litigation should "look back" in the prisoner's prison account to determine whether the prisoner "could have saved" sufficient funds over the preceding 12 months to pay the filing fee.

Same-Sex Marriage

Ex parte State of Alabama ex rel. Alabama Policy Institute, No. 1140460 (Ala. March 4, 2016)

The court dismissed all pending motions and petitions in this original-jurisdiction proceeding in which relief was being sought against all Alabama judges regarding same-sex marriage.

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(Continued from page 207)

Workers' Compensation

Ex parte Rock Wool Manufacturing Company, No. 1141252 (Ala. March 18, 2016)

Claims against employer for failure to maintain safe conditions in workplace, even intentional claims, were barred by workers' compensation exclusivity.

Premises Liability

South Alabama Brick Co., Inc. v. Carwie, No. 1130345 (Ala. March 18, 2016)

Premises owner had no legal duty to warn independent roofing contractor or its employees of preexisting condition on roof, where contractor had significant previous experience repairing that roof under hire by owner and where employees of premises owner had never been on the roof.

From the Alabama Court of Civil Appeals

Workers' Compensation

Ex parte Reed Contracting Services, Inc., No. 2150230 (Ala. Civ. App. Jan. 29, 2016)

Substantial evidence supported (1) the trial court's findings that need for employee's knee surgeries was the result of on-the-job accident and not preexisting arthritic conditions and (2) trial court's holding, based on employee's not having reached MMI, directing employer to reinstate payment of temporary-total-disability benefits and to also pay employee "back pay" for the period during which employee unilaterally ended such payments.

Medicaid Eligibility

Alabama Medicaid Agency v. Hardy, No. 2140565 (Ala. Civ. App. Jan. 29, 2016)

ALJ properly determined that a trust holding a half-interest in a \$32,000-valued residence, established by the Medicaid applicant for her own benefit and allowing the trustee to distribute potentially the entirety of principal and interest, disqualified the applicant from Medicaid benefits under the \$2,000-asset threshold.

Condominium Law

Ross v. West Wind Condominium Association, Inc., No. 2140675 (Ala. Civ. App. Feb. 5, 2016)

Circuit court has discretion to allow or disallow attorney's fees to owner under *Ala. Code* § 35-8A-414, which states that the trial court "may" award fees "in an appropriate case."

Tax Sale Redemption; Timeliness in Challenging Redemption

Wall to Wall Properties, Inc. v. Wells Fargo Bank, N.A., No. 2140837 (Ala. Civ. App. Feb. 12, 2016)

Wall (redemptionee) was not timely in seeking mandamus relief to challenge the probate court's issuance of a certificate of redemption to Wells (redemptioneer), where (1) nearly one year passed from time certificate was issued to the time of mandamus and (2) the record contained no evidence of when Wall became aware that certificate was issued.

Tax Sale Redemption

Wall to Wall Properties, Inc. v. Cadence Bank, N.A., No. 2140683 (Ala. Civ. App. Feb. 12, 2016)

Probate court properly determined that redemptioneer (Cadence) did not owe for insurance and improvements to residence, rejecting Wall's argument that Cadence's failure to follow the referee-appointment procedure in *Ala. Code* § 40-10-122(d) caused Cadence to waive its right to object to the amounts. Cadence complied with the notice provisions of that section by filing a pleading in AlaFile, served on counsel for Wall.

Sale for Division

Barrow v. Myhand, No. 2140761 (Ala. Civ. App. Feb. 12, 2016)

Trial court properly concluded that (1) one-acre parcel with 13 cotenants could not be equitably divided to order a sale for division, (2) the property should be conveyed to one cotenant, who tendered into court the total amount of the price for which the property had been appraised by the court-appointed appraiser and (3) counsel for the purchasing cotenant who had petitioned for sale was entitled to fees from sale proceeds.

Reformation; Ambiguity and Mutual Mistake

Brown v. Butts, No. 2140962 (Ala. Civ. App. Feb. 12, 2016)

Circuit court erred by reforming a long-term lease-purchase agreement because the agreement unambiguously provided

that all rent payments could be converted toward option to purchase (the circuit court improperly found the payment terms to create an ambiguity because the purchase price would have been paid well before expiration of the lease). Discrepancy in the parties' intentions does not create ambiguity or constitute evidence of mutual mistake.

Civil Forfeiture; Appellate Procedure

***Okafor v. State*, No. 2140649 (Ala. Civ. App. Feb. 12, 2016)**

(1) Appeal was timely, even though the actual notice was not filed until after the 42nd day, because contestant's docketing statement contained the necessary information to notify all parties that an appeal was being taken and (2) there was substantial evidence that seizure of cash occurred based on statements obtained in violation of *Miranda*.

Materialmen's Liens

***Massey Asphalt Paving, Inc. v. Lee Land Development, Inc.*, No. 2140680 (Ala. Civ. App. March 4, 2016)**

Under *Ala. Code* § 35-11-215, general contractor must file statement of lien in probate court within six months after completion of "last item of work"; corrective work to repair formerly defective work was not a "last item of work."

Easement by Prescription

***Finley v. McCoy*, No. 2150031 (Ala. Civ. App. Mar. 11, 2016)**

Easement by prescription was supported by evidence demonstrating continuous use of a driveway over a 20-year period which constituted sole means of access to an otherwise landlocked parcel.

Default Judgments

***Poole v. Monteiro*, No. 2150028 (Ala. Civ. App. Mar. 11, 2016)**

Trial court must conduct analysis of three *Kirtland* factors for setting aside default judgment *only* after party seeking relief argues and offers evidence supporting the three factors.

Summary Judgment Practice

***Cook v. Midland Funding LLC*, No. 2140786 (Ala. Civ. App. Mar. 11, 2016)**

In action by credit-card debt buyer against debtor for breach of contract and account stated, where buyer and debtor filed cross-motions for summary judgment, held: (1) claims could be brought in contract and not for open account (subject to three-year statute of limitations), (2) because buyer did not offer contract into evidence, contract claim was not based on substantial evidence, and because debtor testified that he had no contract, debtor was actually entitled to have his cross-motion for summary judgment granted and (3) there was no evidence of a meeting of the minds with respect to any restatement of an



amount owed necessary for account stated claim, and, thus, debtor was entitled to summary judgment.

Unemployment Compensation

***Austal USA, LLC v. DOL*, No. 2141072 (Ala. Civ. App. March 18, 2016)**

Employee was disqualified from receiving unemployment-compensation benefits pursuant to *Ala. Code* § 25-4-78(3)a, under which compensation shall be disallowed "for the refusal to submit to or cooperate with a blood or urine test after previous warning."

Dismissal for Want of Prosecution

***Puckett v. Dunkle*, No. 2140880 (Ala. Civ. App. March 18, 2016)**

Trial court erred by denying Rule 59(e) motion to vacate dismissal for want of prosecution after plaintiff and his counsel failed to appear for trial; Rule 59 motion was accompanied by attorney affidavit stating that attorney did not receive notice of trial because of his having serious medical procedure at the time notice was sent.

From the United States Supreme Court

Equitable Tolling

***Menominee Tribe of Wisconsin v. US*, No. 14-510 (U.S. Jan. 25, 2016)**

Equitable tolling of a statute of limitations requires that a litigant establish both "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing."

(Continued from page 209)

ERISA Preemption

***Gobielle v. Liberty Mutual Ins. Co.*, No. 14-181 (U.S. Feb. 29, 2016)**

As to employee benefit plans, ERISA preempted Vermont law requiring certain entities, including health insurers, to report payments relating to healthcare claims to a state agency for inclusion in healthcare database.

Full Faith and Credit (Same-Sex Adoption Case)

***V.L. v. E.L.*, No. 15-648 (U.S. March 7, 2016)**

The court reversed the Alabama Supreme Court's refusal to give full faith and credit to the same-sex adoption which had previously been adjudicated by a Georgia court.

Diversity Jurisdiction

***Amercold Realty Trust v. Conagra Foods, Inc.*, No. 14-1382 (U.S. March 7, 2016)**

Citizenship of an REIT for diversity purposes is determined by the citizenship of its members.

From the Eleventh Circuit Court of Appeals

Administrative Law

***National Mining Assn. v. DOL*, No. 14-11942 (11th Cir. Jan. 25, 2016)**

The Court upheld (in a complex 83-page decision) a proposed regulation by the Mine Safety and Health Administration ("MSHA") relating to mine dust monitors.

Section 1983; Takings

***Hoefling v. City of Miami*, No. 14-12482 (11th Cir. Jan. 25, 2016)**

Plaintiff's complaint adequately pleaded section 1983 deprivation without procedural due process, where plaintiff's live-in maritime vessel was removed pursuant to a municipal clean-up program.

ERISA

***Gables Insurance Recovery, Inc. v. BCBS of Florida*, No. 15-10459 (11th Cir. Feb. 5, 2016)**

ERISA preempted claim by assignee of provider's for reimbursement charges against BCBS.

Tax; Conservation Easements; Valuation

***Palmer Ranch Holdings, Ltd. v. CIR*, No. 14-14167 (11th Cir. Feb. 5, 2016)**

Tax Court properly valued conservation easement at parcel's highest and best use, but improperly deviated from a comparable-sales method of valuation by employing a decade-old valuation data with assumed appreciations.

Statutory Damages Absent Actual Damages

***Vista Marketing, LLC v. Burkett*, No. 14-14068 (11th Cir. Feb. 4, 2016)**

Under the Stored Communications Act, 18 U.S.C. §§ 2701-2712 (the "SCA"), (1) there is no authority to award statutory damages absent a finding of actual damages and (2) attorney's fees are recoverable only in a "successful action to enforce liability."

Labor Relations; Employee vs. Independent Contractor

***Crew One Productions, Inc. v. NLRB*, No. 15-10429 (11th Cir. Feb. 3, 2016)**

Local hired freelance stagehands who obtained employment through a referral service, Crew One Productions, are independent contractors and not employees; thus, the board erred by directing Crew One to hold an election and certifying a stagehand union.

Affordable Care Act; Contraception Mandate

***Eternal Word Television Network, Inc. v. State of Alabama*, No. 14-12696 (11th Cir. Feb. 18, 2016)**

The Court upheld against First Amendment and RFRA attack the "contraceptive mandate" of the Affordable Care Act ("ACA").

Fair Housing Act

***Hunt v. AIMCO Properties, LP*, No. 14-14085 (11th Cir. Feb. 18, 2016)**

Landlord's threatening to evict tenant with Down's Syndrome son adequately pleaded failure to provide reasonable

accommodation to a person with a disability. An FHA plaintiff must plead and prove circumstances sufficient to cause reasonable housing provider to make appropriate inquiries about possible need for accommodation.

Firearm Manufacturer Liability; *Daubert*

Seamon v. Remington Arms Co., No. 14-15662 (11th Cir. Feb. 17, 2016)

District court improperly disallowed expert for lack of *Daubert* reliability; district court mischaracterized the expert's opinion and evidence supporting it.

Judicial Estoppel

Slater v. U.S. Steel Corp., No. 12-15548 (11th Cir. Feb. 24, 2016)

The panel affirmed the district court's reversal of the Bankruptcy Court's refusal to apply judicial estoppel to bar a Title VII claim which the plaintiff/debtor failed to disclose in her Chapter 7 bankruptcy schedules (the bankruptcy was filed 21 months after the Title VII case). Under existing Eleventh Circuit law, whether the plaintiff succeeded in maintaining the inconsistent positions was not dispositive. Judge Tjoflat specially concurred, calling for *en banc* review.

Title VII Mixed Motive

Quigg v. Thomas County School Dist., No. 14-14530 (11th Cir. Feb. 22, 2016)

Mixed-motive claims based on circumstantial evidence are evaluated under the test from *White v. Baxter Healthcare Corp.*, 533 F.3d 381 (6th Cir. 2008)—not the *McDonnell Douglas* framework; thus, plaintiff must offer substantial evidence that (1) defendant took an adverse employment action against the plaintiff and (2) the protected characteristic was a motivating factor for the defendant's adverse employment action.

TILA

Evanto v. FNMA, No. 15-11450 (11th Cir. March 1, 2016)

Assignee is not liable under the Truth in Lending Act for a servicer's failure to provide the borrower with a payoff balance; assignee liability under TILA is limited to violations "apparent on the face" of the documents.

Securities

Fried v. Stiefel Laboratories, Inc., No. 14-14790 (11th Cir. March 1, 2016)

Rule 10b-5(b) plaintiff must prove that defendant omitted material fact necessary to keep other statements from being

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(Continued from page 211)

materially misleading; district court properly rejected plaintiff's proposed instruction focusing solely on defendants' failure to disclose material information.

Defamation

Michel v. NYP Holdings, Inc., No. 15-11453 (11th Cir. March 7, 2016)

District court properly dismissed defamation complaint; although reasonable reader could conclude that subject article presented statements of fact (not just non-actionable opinion), plaintiff failed to plead facts giving rise to reasonable inference of actual malice. Dismissal should have been without prejudice so as to allow re-pleading.

Tax Procedure

Romano-Murphy v. CIR, No. 13-13186 (11th Cir. March 7, 2016)

Taxpayer is entitled to a pre-assessment administrative determination by the IRS of her proposed liability for trust fund taxes if she files a timely protest.

Eleventh Amendment

Nichols v. Alabama State Bar, No. 15-13248 (11th Cir. Mar. 10, 2016)

The Alabama State Bar is an arm of the state entitled to Eleventh Amendment immunity.

Constitutional Law

Blue Martini Kendall LLC v. Miami Dade County, FL, No. 14-13722 (11th Cir. March 17, 2016)

County and off-duty deputies moonlighting as private guards at nightclub were entitled to indemnity in suit by patrons; *Fla. Stat.* § 30.2905 makes a private employer "responsible for the acts or omissions of the deputy sheriff while performing services for that employer while off duty."

RECENT CRIMINAL DECISIONS

From the United States Supreme Court

Criminal Law

Musacchio v. US, No. 14-1095 (U.S. Jan. 25, 2016)

Sufficiency of evidence challenge should be assessed against the elements of the charged crime, not against the elements set forth in a jury instruction which erroneously heightened the burden on the prosecution by injecting an additional essential element not present in the charging statute.

Juvenile Convictions; Life without Parole

Montgomery v. Louisiana, No. 14-280 (U.S. Jan. 25, 2016)

The Court gave retroactive application (for cases on state collateral review) to *Miller v. Alabama*, which held that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.

Statutory Construction

Lockhardt v. US, No. 14-8358 (U.S. Feb. 29, 2016)

Statutory construction principle "rule of last antecedent" requires that a limiting phrase be deemed to modify only the immediately preceding phrase. The dissent argued that competing principle of statutory construction (the "series qualifier principle"), together with the natural reading of the phrase and the statute's application to child pornography offenses, created at least an ambiguity which under the rule of lenity would require a construction favoring the defendant.

From the Court of Criminal Appeals

Human Trafficking

Alonso v. State, CR-13-1546 (Ala. Crim. App. Feb. 12, 2016)

The provisions of *Ala. Code* § 13A-6-152 prohibiting human trafficking are not unconstitutionally vague, for they provide both fair notice to the public as to the conduct proscribed and guidelines to aid officials in the enforcement of that prescription. Defendant's acts of harboring, restraining and

transporting the victim and coercing her to perform sex acts in exchange for money fell within the statute.

Speedy Trial

State v. Pylant, CR-14-1628 (Ala. Crim. App. Feb. 12, 2016)

For purposes of speedy trial analysis under *Barker v. Wingo*, 407 U.S. 514 (1972), a 17-month delay between the DUI defendant's indictment and resulting trial was deemed presumptively prejudicial. However, after analyzing the remaining *Barker* factors, the court reversed the trial court's dismissal of the defendant's indictment, concluding that his *unsubstantiated* claim that he was unable to locate two witnesses was insufficient to show that he had been prejudiced by the delay.

Habitual Offender

Simons v. State, CR-14-0335 (Ala. Crim. App. Feb. 12, 2016)

Conviction for first-degree animal cruelty to a dog or cat under *Ala. Code* § 13A-11-241 cannot be subject to sentence enhancement under the Alabama Habitual Felony Offender Act, and it also may not be used to enhance another sentence under that act.

Child Abuse

Graham v. State, CR-14-1652 (Ala. Crim. App. Feb. 12, 2016)

State's evidence was sufficient to support the defendant's child abuse conviction, based on her willful failure to seek medical treatment for her child's multiple broken bones; a showing of severe physical injury was not required for proof under *Ala. Code* § 26-15-3.

Miranda

Jones v. State, CR-14-1332 (Ala. Crim. App. Feb. 12, 2016)

The court reversed the defendant's manslaughter conviction, finding that after the defendant invoked his *Miranda* rights, police initiated contact with him and interrogated him a second time, resulting in his participation in a lie-detector test. The trial court therefore erred in not excluding the defendant's statement resulting from that interrogation.

Probation Revocation

Marks v. State, CR-14-1666 (Ala. Crim. App. Feb. 12, 2016)

Though hearsay evidence is admissible in probation revocation hearings, the trial court's decision to revoke probation cannot be based solely upon hearsay. ▲

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THE ALABAMA LAWYER



▲ Jane V. Floyd

▲ Desmond Toler

Jane V. Floyd

Jane Vaughn Floyd was born September 28, 1938 and died January 28, 2016, after 23 years of law practice. To all of those who knew her in the law profession, judges, lawyers, administrative assistants, bailiffs, clerks, those in county government and law enforcement, she was “Miss Jane” (even in court). She was loved by all. She was the only lawyer in Etowah County ever to have all of the flags at the courthouse, judicial complex and detention center of Etowah County lowered to half-staff on the day of her death. It was an honor of love and dedication.

Dr. Norman Vincent Peale once said, “Everybody at one time or another has enthusiasm. Some people have enthusiasm for 30 minutes, some have it for 30 days, but the person who maintains enthusiasm for 30 years is one who packs real meaning and achievement into his or her life.” As a teacher and then a practicing lawyer, she maintained her enthusiasm for 55 years. She packed real meaning and achievement into her life. She had a special quality of doing thoughtful things for others.

Her life was forged in adversity. Her mother died while she was in high school. Her father died a short time later. She lived with a grandmother. To help support herself, she went to high school in the morning and worked in the office of Ed Miller, a Gadsden attorney, in the afternoons. After high school graduation, law became a fulltime job for her. She went to college at night and earned her undergraduate degree in education. She then began teaching at Disque Middle School, where she taught for 32 years while birthing two sons, caring for her children and going to school.

She again went back to college at the University of Alabama in 1975 and earned her master’s degree in 1982. She next earned her AA Certificate in education, but she did not stop there, as she wanted a law career. While still teaching, she enrolled in night law school at Birmingham School of Law where she and five others rode back and forth from Gadsden to Birmingham five nights a week for four years to complete law school. She graduated, passed the bar exam and was admitted to the practice of law that lasted the next 23 years.

In her practice, each day, people with trouble (most of whom she had taught) formed a line outside her door, confident that she could solve their problems. She attracted clients from every area of society with cases of all shapes and sizes. A lawyer said at her death, "She taught me in middle school. She was a tough, good teacher and lawyer. It was really intimidating to go to court against your teacher."

Drew Redden once said, "Ours is a profession of servants. It is a calling, not a job. An art, not a business. We are always instruments in God's own hands." She lived her profession and legal life that way. She was most happy representing children and prosecuting "deadbeat parents" for the Department of Human Resources.

She taught others in the legal profession that there were no shortcuts, that it took hard, disciplined work to be a real lawyer. She gave herself that way, 60 hours a week.

Jane often remarked that she did not dread the ending of her life. She said that she had been well loved by her family, students, law associates and friends.

She once wrote:

"A desire to succeed is taken for granted, but there are many concepts to success. In the end, it is measured by service and regard for our fellow man. If we have a record of diligence, faithfulness to duty, unselfish and honorable dealing in all of our contacts, then we have made a success of our lives. Do not be afraid of service to others—it is the road to contentment."

There was an article in the *Gadsden Times* about her second law career when she left teaching and began her law practice. In that article Jane said, "I tell kids that you can do whatever you want to do. The opportunities are there if you want to work for them." She was a living example. She practiced what she preached. She lived by the motto, "It's not what you gather, but what you scatter that tells what kind of life you have lived." In those 55 years she was an outstanding, loved lawyer and teacher.

Desmond Toler

Desmond was born January 25, 1941 and practiced law in Mobile until he entered into rest November 24, 2015 at his home. He was 74 years old. Mr. Toler is survived by his wife, Betty Toler, of Mobile; children John (Lisa) Toler of Dacula, Georgia; Elizabeth (John) Kavanagh of Fairhope and Peter (Bernadette) Toler of Mobile; and six grandchildren, Christopher Tice, Lauren Tice, Fran Toler, Joey Toler, Peter Toler, II, and Evelyn Toler. He was preceded in death by his parents, Ardie Desmond Toler and Goldie Fisher Toler, and his brother, Beryl Toler.

Even though Desmond got his law degree from the University of Alabama, he remained a strong LSU fan, where he received a bachelor of arts in sociology and where he met Betty, his wife of 51 years. He also received a master's of religious education from New Orleans Baptist Theological Seminary and served on staff at several churches. Along with running his own law firm, specializing in family and church law, Desmond served as Municipal Court Judge for the City of Mobile.

He was very involved in his community, church and family. He served on the Board of Directors for the National Safety Council, Greater Mobile Safety Council and Southern Skyline Community. He was chair of the deacons at Sage Avenue Baptist church and Cottage Hill Baptist Church. He was PTA president at both Phillips Middle School and Westlawn Elementary School. Desmond also served as the president of the Murphy High School Band Parents and was founder and chair for Helpline, Inc. and Manna House Drug Rehab Center.

Desmond and I met in 1963 when we began law school at the University of Alabama. We started a friendship—a forever friendship. My wife, Laura, and I married in June 1964 and Desmond and Betty married in August of that year. Our first year of married life and our second year of law school were hectic and stressful and God gave us Betty and Desmond as best friends—a gift of God's provision. We had dinners together;

(Continued from page 215)

played bridge and went to football games together. We traveled to Baton Rouge and stayed with Betty's family, the Bankstons, and went to the game at the dreaded Death Valley. The Bankstons still fed us even though Alabama beat LSU that year!

Homecomings were special in law school. I still have pictures of the four of us—Desmond and me in our long formal morning coats and hats and the girls all dressed up. We started with a steak breakfast with a speaker, and then we rode in the homecoming parade on a flatbed truck shouting law school cheers like, "Repel them, repel them, make them repel in the ball!" We sat as a group at the game—always.

Part of that tradition continued as we went back to homecomings for "Breakfast on the Porch" at law school. Betty and Desmond came to Montgomery on Friday and we went together to Tuscaloosa. Eventually, we stayed in Montgomery, having our own "Breakfast on Our Patio," watching the game on TV and playing cards into the wee hours.

For years, we attended the seminars for MCLE credits

together, like "Divorce on the Beach" in Destin. I remember Desmond calling me one year and saying, "Let's go to 'Divorce on the Beach.'" I said, "Desmond, how old are you?" "Sixty-five," he replied. I said, "Desmond, you are now exempt from needing MCLE credits. He said he would call me back. We did go together to the beach that year.

Our friendship consisted of praying together over family concerns, for cases, for leadership and wisdom and for decisions of our children.

Desmond became very ill, and after a lengthy illness, I was thrilled that Desmond was able to attend our 50th wedding anniversary party. Laura and I also attended their 50th wedding anniversary party.

My last visit with Desmond was a Sunday, just before he died. Laura and I drove down to see him and Betty. When I walked in, Desmond said, "Hello Barry."

He was a giant of a man: integrity, spiritually giant. Desmond always did the right thing. ▲

—Barry C. Leavell, Montgomery

Brackin, Dr. Brice Herald

Alabaster
Admitted: 1980
Died: January 11, 2016

Mauritson, David Richard

Fairhope
Admitted: 2008
Died: February 1, 2016

Rowe, Charles Warren

Enterprise
Admitted: 1972
Died: January 13, 2016

Childers, Hon. Benjamin Meek Miller

Selma
Admitted: 1951
Died: January 18, 2016

Phillips, Hon. Harry LaDon, Jr.

Greenville, SC
Admitted: 1996
Died: October 2, 2015

Smith, James Dwight

Tuscaloosa
Admitted: 1982
Died: December 28, 2015

Cochran, Charles William

Florence
Admitted: 1970
Died: September 22, 2015

Pitt, Charles Redding

Birmingham
Admitted: 1981
Died: February 7, 2016

Thomas, William Kenneth

Orange Beach
Admitted: 1977
Died: December 27, 2015

Fernandez, Vernon Wilson

Birmingham
Admitted: 1966
Died: January 4, 2012

Reeves, William Boyd

Mobile
Admitted: 1960
Died: January 18, 2016

Watson, Herman Austin, Jr.

Huntsville
Admitted: 1961
Died: January 26, 2016

Hartley, Gerald Wade, Sr.

Montgomery
Admitted: 1972
Died: January 27, 2016

Robertson, Ann Carroll

Birmingham
Admitted: 1974
Died: May 27, 2015

Williams, Henry Harold

Birmingham
Admitted: 1952
Died: January 28, 2016

ARTICLE SUBMISSION REQUIREMENTS

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

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

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

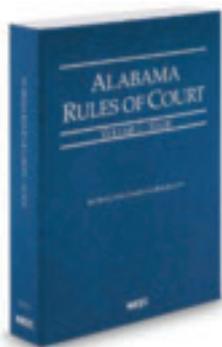
A brief biographical sketch and a recent color photograph (at least 300 dpi) of the author must be submitted with the article.





IMPORTANT NOTICES

- ▲ **Books for Sale: 2013 *Alabama Rules of Court–State***
- ▲ **Local Bar Award of Achievement**
- ▲ **Amendment of *Alabama Rules of Civil Procedure***



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The 2013 *Alabama Rules of Court–State* books are for sale at \$10 each. These are available for purchase in the Supreme Court and State Law Library by cash or check only. Note: All rule changes and effective dates are available at <http://judicial.alabama.gov/rules/Rules.cfm>.

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

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

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

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

To be considered for this award, local bar associations must complete and submit an award application by May 6, 2016. Applications may be downloaded from www.alabar.org or obtained by contacting Ed Patterson at (334) 269-1515 or ed.patterson@alabar.org.

Amendment of Alabama Rules of Civil Procedure

In two separate orders, the Alabama Supreme Court has amended Rule 4, "Process: General and Miscellaneous Provisions," and Rule 45(b)(1), *Alabama Rules of Civil Procedure*. The amendment of these rules is effective July 1, 2016. The orders amending Rules 4 and 45(b)(1) appear in an advance sheet of *Southern Reporter* dated on or about March 3, 2016. The amendment to Rule 4 makes certain changes to service of process, including, among others, providing that a judgment of default is a possible consequence of a served defendant's failure to respond rather than an automatic result; changing the age of a minor who must be served personally, including an incarcerated minor, from over the age of 12 years to over the age of 16 years; stating the manner for acceptance or waiver of service of process; increasing the age of persons designated to serve process to 19 years and providing that persons designated to serve process not be related within the third degree by blood or marriage to the party seeking service of process; setting out new, specific requirements as to how service of process and the return of service is to be made; and increasing to 60 days the time frame for failure of service. The amendment to Rule 45(b)(1) increases to 19 years the age at which a person can serve a subpoena and to further provide that such person shall not be related within the third degree by blood or marriage to the person seeking service. The text of these rules can be found at <http://www.judicial.state.al.us>, "Quick Links—Rule Changes." ▲

—Bilee Cauley, reporter of decisions,
Alabama Appellate Courts



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

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

LEGISLATIVE WRAP-UP

Family Law Matters

It is impossible to start this column without first recognizing the tremendous career of one of Alabama's great public servants, **Penny Davis**. On April 1, Penny retired after 36 years of service with the Law Institute. During that time, she worked on nearly every project of the Law Institute's history. She brought a level of skill and dedication that was tremendous. Her great passion was in the area of family law, and in addition to her work as associate director of the Law Institute, she also taught that area of law to more than a generation of lawyers who came through the University of Alabama School of Law. She also served as a great resource to probate judges around the state through the coordination of their education and as a trusted advisor any time they were in need. As citizens of Alabama, we are all better off because of Penny's hard work and dedication.

Over the past couple of years, the Law Institute has formed a number of standing committees. These committees cover an area of the law and are formed not to complete a single project, but rather to continuously study and provide improvements in that area and have continuity in the group that is involved. One area that lends itself to this approach is family law. This group was formed at the request of leadership in the Alabama Legislature who were concerned with the number of pieces of legislation that were being filed each year that affected this area without any coordination or overall direction in mind.

The committee is chaired by Dean Noah Funderberg and Penny Davis serves as the reporter. The committee consists of not only practitioners, but also trial judges, appellate judges and the chairs of the House and Senate Judiciary committees, Rep. Mike Jones and Sen. Cam Ward. Rep. Jones, who has an active practice in this area, is heavily involved in the work of the committee.

The committee often breaks into sub-committees to address specific topics. The work is dictated by concerns raised in case law and in reaction to legislation that is filed. The committee not only brings forward its own recommendations for legislation, but also reviews legislation from time to time at the request of individual legislators.

Both sides of Penny Davis



Pictured above at the State House are Penny Davis (center) and co-workers Teresa Norman, Tonya Watkins, Jill Colburn and Othni Lathram.



Pictured above are Penny Davis (second from right) and (retired) co-workers Linda Wilson, Bob McCurley and Nancy Foster.

The committee made a number of recommendations for consideration by the legislature during the 2016 Regular Session:

Alimony Amendments (HB330)

Over the past few years, the number of bills being introduced concerning alimony reform made clear that it was time to take a comprehensive look at the topic. The first recommendation was that any reforms that are adopted should be prospective only as the shock to the system from having to re-adjudicate past cases would be overwhelming.

The core of the proposal was to continue the court's discretion of awarding interim alimony, but to enumerate the factors for the court to consider when determining whether to award interim alimony. Courts may also order the litigation cost and expenses, including attorney fees, necessary to pursue or defend the action out of marital property.

The proposal also continues a court's discretion of awarding periodic alimony, including rehabilitative alimony after a final decree, while establishing priorities, limitations and factors to be considered when making an award. First, unless the court expressly finds that rehabilitative alimony is not feasible, the court is to only award rehabilitative alimony, which is limited to five years, absent extraordinary circumstances. Second, if the court determines that rehabilitative alimony is not feasible or has failed, the court may award periodic alimony. Generally, for marriages of less than 20 years, periodic alimony shall be limited to a period not to exceed the length of the marriage. Both rehabilitative and periodic alimony continue to terminate upon remarriage or cohabitation as provided in current law.

Modification of both rehabilitative and periodic alimony continues to be allowed based on a showing of a material change in circumstances. The proposal retains the current law that if there is neither an award of alimony nor a reservation of jurisdiction for awarding alimony at the time of the divorce, the court can never subsequently award alimony.

Custody Amendments (HB333)

Few areas of the law are more emotional than child custody arrangements. That emotion carries forward to even the consideration of legislation on this topic. This legislation amends and expands the current joint custody statutory law to all parental custody arrangements. It abolishes the concepts of one parent being awarded sole physical custody and the other parent being awarded visitation, and replaces it with the concept that if the parents are not awarded joint physical custody, then one parent will have primary physical custody and the other parent will be the non-residential custodial parent or will have restricted physical custody.

The proposal also extends the use of parenting plans by requiring both parents to submit parenting plans in all custody cases. If both parents submit to the court the same parenting plan, that parenting plan shall be granted in the final court order unless the court makes specific findings as to why the parenting plan jointly submitted by the parties should not be granted.

The proposal also enumerates the factors that the court shall consider when determining whether to award joint physical custody and the factors to be used to determine which parent shall be designated as the parent with primary physical custody if joint custody is not awarded.

Finally, the proposal provides additional remedies to a party when a parent, without proper cause, fails to adhere to the time-sharing schedule in a parenting plan. Makeup parenting time and reimbursement for costs and attorney fees are among the remedies available when a parent violates the time-sharing schedule in a parenting plan.

Grandparent Visitation (HB334)

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.

Division of Retirement Benefits upon Divorce Act (HB328)

Similar to alimony, this is an area of the law that is often implicated in legislative proposals. This bill would significantly amend Section 30-2-51 of the *Code of Alabama*, concerning the division of retirement benefits upon divorce.

Under the proposal the court retains the discretion to award retirement benefits to the non-employed spouse within certain limitations. The court may not award more than 50 percent of the non-employed spouse's retirement benefits accrued during the marriage [same as current law], however the proposal eliminates the threshold requirements that the parties must be married for at least 10 years before the court could consider awarding retirement benefits.

The court is granted broad discretion to use any equitable method of valuing, dividing and distribution of the benefits, but the proposal eliminates the costly requirement of providing evidence of the present value of the retirement benefits in all cases and provides a more equitable result by requiring that each party equally bear the burden or benefit of the passive gains or losses of the retirement benefits during the time between the award of the benefits and their distribution. ▲



OPINIONS OF THE GENERAL COUNSEL

J. Anthony McLain



Ethical Obligations of a Lawyer When His Client Has Committed Or Intends to Commit Perjury

QUESTION:

What are a lawyer's ethical obligations when his client reveals his intent to commit perjury? What are a lawyer's ethical obligations when a lawyer learns that a client has committed perjury?

ANSWER:

Regardless of whether the lawyer is representing a civil client or a criminal client, the lawyer's ethical obligations remain the same. Where a client informs counsel of his intent to commit perjury, a lawyer's first duty is to attempt to dissuade the client from committing per-

jury. In doing so, the lawyer should advise the client that if the client insists on committing the proposed perjury then the lawyer will be forced to move to withdraw from representation. The lawyer should further explain that he may be required to disclose the specific reason for withdrawal if required to do so by the court. If the client continues to insist that they will provide false testimony, the lawyer should move to withdraw from representation.

When a lawyer has actual knowledge that a client has committed perjury or submitted false evidence, the lawyer's

first duty is to remonstrate with the client in an effort to convince the client to voluntarily correct the perjured testimony or false evidence. If the client refuses to do so, the lawyer has an ethical obligation to disclose the perjured testimony and/or submission of false evidence to the court.¹

DISCUSSION:

Having a client threaten to commit perjury or actually committing perjury is one of the most difficult ethical dilemmas a lawyer can face. The lawyer is torn between his loyalties to the client and his duties as an officer of the court. In the context of the civil client, however, Rule 3.3, *Ala. R. Prof. C.*, and its Comment clearly require the lawyer to place his duties as an officer of the court above his duties of loyalty and confidentiality to the client. Rule 3.3 provides as follows:

Rule 3.3 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; or

(3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding other than a grand jury proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

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The Comment to Rule 3.3 provides in pertinent part as follows:

Comment

* * *

False Evidence

When evidence that a lawyer knows to be false is provided by a person who is not the client, the lawyer must refuse to offer it regardless of the client's wishes.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Except in the defense of a criminal accused, the rule generally recognized is that, if necessary to rectify the situation, an advocate must disclose the existence of the client's deception to the court or to the other party. Such a disclosure can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

* * *

Remedial Measures

If perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to re-monstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the

court. It is for the court then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial, or perhaps nothing. If the false testimony was that of the client, the client may controvert the lawyer's version of their communication when the lawyer discloses the situation to the court. If there is an issue whether the client has committed perjury, the lawyer cannot represent the client in resolution of the issue, and a mistrial may be unavoidable. An unscrupulous client might in this way attempt to produce a series of mistrials and thus escape prosecution. However, a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.

* * *

Duration of Obligation

A practical time limit on the obligation to rectify the presentation of false evidence has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation.

As such, a lawyer may not submit false evidence to a court or assist a client in doing so. When a lawyer learns that a client intends to commit perjury or to offer false testimony, the lawyer should counsel the client not to do so. The lawyer should inform the client that if he does testify falsely, the lawyer will have no choice but to withdraw from the matter and to inform the court of the client's misconduct. If the client insists on testifying falsely, the lawyer should refuse to offer the perjured testimony or should immediately move to withdraw from the representation.² In counseling the client, the lawyer should inform the client that if the client continues to insist on testifying falsely, then the lawyer will be required to withdraw. The lawyer should further explain that he may be required to disclose the client's intentions to the court, if the court requires the lawyer to disclose a specific reason for the withdrawal.

Some states, such as Florida, in Formal Opinion 04-1, require the lawyer to affirmatively disclose the client's intent to testify falsely to the court upon withdrawal. According to the opinion, "[i]f the lawyer knows that the client will testify falsely, withdrawal does not fulfill the lawyer's ethical obligations, because withdrawal alone does not prevent the client from committing perjury." However, Florida requires a lawyer

to reveal any information that is necessary to prevent a client from committing a crime, including the crime of perjury.

Alabama has no such counterpart in the *Rules of Professional Conduct*. Rather, Rule 1.6, *Ala. R. Prof. C.*, provides as follows:

1.6 Confidentiality of Information

- (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Under Rule 1.6, a lawyer is permissively allowed to disclose confidential information only when disclosure is required to



(Continued from page 225)

prevent a client from committing a criminal act that is “likely to result in imminent death or substantial bodily harm . . .” The crime of perjury does not fall within this narrow exception to Rule 1.6. As such, the lawyer is not, upon withdrawal, required to disclose the client’s intent to commit perjury. However, if the court requires the lawyer to disclose the specific reason for his withdrawal, the lawyer may disclose the client’s intent to commit perjury.

When a lawyer learns of the client’s perjury after the fact, Rule 3.3 requires the lawyer to immediately take remedial measures to correct the client’s misconduct. Ordinarily, the lawyer should first remonstrate with the client in an attempt to convince the client to, of his own volition, inform the court and/or the opposing party of his misconduct. In doing so, the lawyer should explain that if the client refuses to do so, the lawyer will have no choice but to inform the court of the client’s actions. If the client refuses to disclose his misconduct, then the lawyer has a duty to inform the court and/or opposing party of the false evidence or testimony.

Obviously, a lawyer’s ethical responsibilities do not continue *ad infinitum*. Rule 3.3(b), *Ala. R. Prof. C.*, provides that the duties under Rule 3.3 only continue to the conclusion of the proceeding. For example, if a lawyer learns that his client testified falsely after the conclusion of the case, the lawyer would not have a duty to disclose the fraud to the court. The Disciplinary Commission has determined that a proceeding is concluded when a certificate of judgment has been issued or the time has expired for all post-trial motions or pleadings.

It is also important to distinguish between a lawyer’s actual knowledge versus a reasonable belief or suspicion that the client has lied or offered false evidence. Where a lawyer has actual knowledge that a client has testified falsely, then the lawyer would be required to comply with Rule 3.3. When a lawyer does not have actual knowledge, but rather only a reasonable belief that the client has lied or offered false evidence, then lawyer would not have any obligation to disclose his suspicions to the court or the opposing party. Rather, “[a] lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact. . . a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client. . .” *ABA Annotated Model Rules of Professional Conduct*, 316-317, 6th Edition. (2007). However, Rule 3.3(c), *Ala. R. Prof. C.*, does allow a lawyer to refuse to offer evidence on behalf of a client that the lawyer reasonably believes to be false.

While the Comment to Rule 3.3 also addresses the ethical obligations of lawyers in their representation of criminal clients, the outcome is less clear. First and foremost, “[t]he level of knowledge sufficient to trigger the prohibition against presenting a client’s false testimony is high for criminal defense counsel.” *ABA, Annotated Model Rules of Professional Conduct*, 317, 6th Edition. (2007). Ordinarily, a lawyer must abide by the client’s decision to testify unless he actually knows that the testimony will be false. In regard to the representation of criminal clients, the Alabama Comment provides, in pertinent part as follows:

Comment

* * *

Perjury by a Criminal Defendant

Whether an advocate for a criminally accused has the same duty of disclosure has been intensely debated. While it is agreed that the lawyer should seek to persuade the client to refrain from perjurious testimony, there has been dispute concerning the lawyer’s duty when that persuasion fails. If the confrontation with the client occurs before trial, the lawyer ordinarily can withdraw. Withdrawal before trial may not be possible, however, either because trial is imminent, or because the confrontation with the client does not take place until the trial itself, or because no other counsel is available.

The most difficult situation, therefore, arises in a criminal case where the accused insists on testifying when the lawyer knows that the testimony is perjurious. The lawyer’s effort to rectify the situation can increase the likelihood of the client’s being convicted as well as open the possibility of a prosecution for perjury. On the other hand, if the lawyer does not exercise control over the proof, the lawyer participates, although in a merely passive way, in deception of the court.

Three resolutions of this dilemma have been proposed. One is to permit the accused to testify by a narrative without guidance through the lawyer’s questioning. This compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel. Another suggested resolution, of relatively recent origin, is that

the advocate be entirely excused from the duty to reveal perjury if the perjury is that of the client. This is a coherent solution but makes the advocate a knowing instrument of perjury.

The other resolution of the dilemma is that the lawyer must reveal the client's perjury if necessary to rectify the situation. A criminal accused has a right to the assistance of an advocate, a right to testify and a right of confidential communication with counsel. However, an accused should not have a right to assistance of counsel in committing perjury. Furthermore, an advocate has an obligation, not only in professional ethics but under the law as well, to avoid implication in the commission of perjury or other falsification of evidence. See Rule 1.2(d).

Under the Comment to Rule 3.3, it is clear that a lawyer cannot actively assist a criminal client in presenting false evidence or false testimony to the court. The closer question, however, appears to be whether a criminal defense lawyer may use the narrative approach so as to not infringe upon his client's Sixth Amendment rights and still be in compliance with his ethical responsibilities under Rule 3.3.

Both the *Annotated Model Rules of Professional Conduct* and *The Law of Lawyering* note that the Supreme Court of the United States disapproved of the narrative approach in dictum in *Nix v. Whiteside*, 475 U.S. 157 (1986).³ In *Nix*, the Court granted certiorari to decide whether the Sixth Amendment right of a criminal defendant to assistance of counsel was violated when a lawyer refused to cooperate with the defendant in presenting perjured testimony. The defendant was on trial for murder. The defendant had stabbed the victim after he believed that the victim was reaching for a gun. Throughout the representation, the defendant repeatedly told his lawyer that he had not actually seen a gun in the victim's hand. However, just prior to trial, the defendant announced to his lawyer that he would testify that he saw something "metallic" in the victim's hand.

The lawyer told the defendant that such testimony would be perjury and that he would withdraw from representation if the client insisted on testifying as such. The lawyer also told the defendant that if he did so testify, he would inform the court of the perjury. *Id.* at 161. After testifying truthfully at trial and being convicted of murder, the defendant moved

for a new trial based on the alleged denial of his Sixth Amendment right to effective assistance of counsel because his defense counsel would not allow him to testify that he saw a gun or something "metallic." *Id.* at 162.

In rejecting the defendant's claims, the Court noted that "[w]hatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely." *Id.* at 173. The Court went on to note that "the right to counsel includes no right to have a lawyer who will cooperate with planned perjury. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment." *Id.* As such, a criminal defendant does not have a right to testify falsely on his own behalf or have the assistance of counsel in doing so.

It is the opinion of the Disciplinary Commission that a lawyer's use of the narrative approach to allow a client to testify falsely would be inconsistent with the requirements of Rule 3.3 and inconsistent with a lawyer's obligations as an officer of the court. As a result, the Disciplinary Commission has determined that under Rule 3.3, a lawyer's ethical obligations remain the same, regardless of whether the lawyer is representing a criminal client or a client in a civil matter.

The Disciplinary Commission has also determined that these obligations apply equally to prosecutors in a criminal case. Just as a defense attorney would have an obligation to disclose perjury committed by a criminal defendant, a prosecutor would have a duty to disclose perjury committed by a prosecution witness during direct examination. The duty to disclose the false testimony of the witness would apply regardless of whether the prosecutor deems the false testimony as exculpatory or material under the *Brady*⁴ standard. [RO-2009-01] ▲

Endnotes

1. This opinion is consistent with ABA Formal Opinion 87-353.
2. Hazard & Hodes, *The Law of Lawyering*, § 29.13. 3rd Edition (2005).
3. Hazard & Hodes, *The Law of Lawyering*, § 29.19. 3rd Edition (2005). ABA, *Annotated Model Rules of Professional Conduct*, 317, 6th Edition (2007).
4. See *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).



Hughston Nichols
hnichols@hwnn.com



Orange Beach— A Must-Attend Event

Thank you to all of the young lawyers, judges, professors, students, law firms and vendors who either participated in or sponsored one of our four **Minority Pre-Law Conferences** in April. As usual, the conferences were an outstanding success, as minority high school students across the state were exposed to various aspects of prospective careers involving the legal profession. Many thanks to **Latisha R. Davis, Chris Burrell, Joel Caldwell, Morgan Hofferber, Hal Mooty, Janine McAdory, Danielle Starks and Miland Simpler** for their hard work in organizing the events in Huntsville, Birmingham, Montgomery and Mobile.

Looking ahead, we are only a couple of weeks away from our **Orange Beach CLE**, May 20-21. No doubt, many of you fondly recall attending the YLS beach CLE every spring as young lawyers. Now as leaders of your firms, you have the opportunity to send some of your own associates to this great event. This year's event will be held at **The Caribe** in Orange Beach.

Past attendees can attest that this CLE is a must-attend event for young lawyers. Not only is it an opportunity to reunite with former law school classmates, but it is also a chance to network with judges and other young lawyers from different practice areas and locations.

Our slate of speakers this year is incredible. We will hear from state bar **President Lee Copeland, Judge Sarah Stewart, Judge Eugene Reese, Judge Jim Hughey and Judge Scott Donaldson**. In addition, we will have presentations covering topics such as generating legal business, telling your client's story, tips for the solo attorney and general advice geared toward young lawyers. Finally, we will hear from an in-house attorney regarding what corporations look for when hiring outside counsel.

If you are a former attendee of the YLS beach CLE, we ask you to encourage the younger lawyers in your firm to attend this event. Our committee has worked hard to organize this CLE and ensure the presentations will benefit all young

lawyers of our bar, regardless of their areas of practice. You can book your room by calling The Caribe at (251) 980-9000 or (888) 607-7020 and referencing "ASB Young Lawyers' CLE" to receive a reduced rate. For additional information or for sponsorship opportunities, contact **Robert Shreve**, rshreve@lchclaw.com or (251) 694-9393.

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

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Tyler E. Mann announces the opening of **Tyler Mann Injury Law LLC** at 415 Church St., E10, Huntsville 35801. Phone (256) 333-2222.

Among Firms

Balch & Bingham LLP announces that **Karl Moor** joined as counsel.

Herbert E. Browder LLC of Tuscaloosa announces that **David B. Welborn** is a partner and the firm name is now **Browder & Welborn LLC**.

Collegiate Housing Foundation of Fairhope announces that **William B. Givhan** joined as general counsel and chief operating officer.

Gaines Gault Hendrix PC of Birmingham announces that **Christopher D. Mauck** joined as an associate.

Hand Arendall LLC announces that **Robert J. Riccio** is now a member.

Hobbs & Hain PC announces that **Elliott Owen Lipinsky** joined as an associate in the Selma office.

Holtsford Gilliland Higgins Hitson & Howard PC announces that **Jarred E. Kaplan** is now a partner in the central Alabama office.

Kreps Law Firm LLC announces that **Crystal Phillips** and **Caroline Pruitt** joined as associates.

Darrin R. Marlow and **Jeffrey W. Salyer** announce the formation of **Marlow & Salyer LLC** with offices in Calera.

Mills Paskert Divers PC announced that **P. Keith Lichtman** is now a registered mediator and arbitrator through the Georgia Commission on Dispute Resolution.

Pittman, Dutton & Hellums announces that **Austin B. Whitten** joined as an associate.

Starnes Davis Florie announces that **Beth Lee Liles** joined the Mobile office.

Sydney Cook & Associates LLC of Tuscaloosa announces that **Timothy H. Nunnally** joined of counsel.

United Bank announces that **Wes Young** joined as vice president and general counsel.

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40-44	\$72.50	\$57.50	\$139.20	\$110.40	\$278.40	\$220.80
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