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On The Cover

Cruise ships have returned to the terminal at Mobile. They are particularly popular this time of year, so we thought it would be a good time to review legal issues pertaining to the cruise industry.

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THE ALABAMA LAWYER



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PRESIDENT'S PAGE



Loving your Neighbor: Foster Children

The call came in through our home phone about three in the morning. To be honest, I didn't hear the phone ring, but started to stir when I heard my wife say, "Sure, we will have a bed ready for them when you bring them." I quickly realized that "we" would become foster parents to "them" (turns out there were two children–a brother and a sister).

Earlier in the night, these two children were fast asleep in the back seat of the car driven by their mother's boyfriend (their mother was in the front passenger's seat). The boyfriend was speeding through Montgomery on the way home to Florida. He was pulled over by the police and illegal drugs were discovered. The boyfriend and mother were arrested. The children were transported to the police station and DHR was called. While my compassionate wife was on the phone with DHR, she told me later that she was horrified at the thought of these frightened children waiting in an intimidating place with strangers wearing police uniforms. In her mind, they immediately needed some love and a warm bed. Once they arrived, a gangly 12-year-old boy and a precious eightyear-old girl became part of our family. The next day, all of my kids enveloped them and continued to do so until they departed a couple of months later to go live with their sweet grandmother.

I never thought I would be a foster parent. In fact, long before I became a foster parent, I remember meeting **Roger Pierce**, a lawyer in Auburn who was a foster parent and a great role model for me. After hearing his story, I vividly remember thinking, "I would never do that." Why? A number of excuses flooded my mind:

Troubled kids in the house may upset my other children. I would become too attached and it would be hard to let them go. Foster kids have "issues" and I won't know how to respond. And finally (and sadly), these kids aren't my responsibility.

Fortunately, my attitude began to change. As many of you know, my faith is important to me. When I read in the Bible that pure and undefiled religion is to care for orphans and widows, I was convicted. My wife and I are far from perfect, but we possess the capacity to love and care for both orphans and widows. We have been blessed to be the foster parents to 35 children. I say that not to boast, but to make the point that if Joy and I can do this, the odds are very good that you can too.

I realize that not all of you are able to become foster parents, but, as lawyers who are leaders in our state, we should be a leading proponent of caring for children in the foster care system. We are called to be advocates for the public. Who needs a greater advocate than innocent children? What profession is better at advocacy than lawyers?

You may not be called to be a foster parent, but there are other roles where you can make a difference. You may decide that you can be an effective and engaged guardian ad litem for these children. Or, you may decide to go through DHR foster care training for the purpose of providing respite care (short-term relief) that provides some short relief for long-term foster families. Even if you cannot do the training, I hope you will consider mentoring a child who is void of much parental guidance. At a minimum, you should financially support charitable organizations that care for orphans.

All of these ideas may sound strange to some of you. After all, you are already busy with your families, your work and your leisure activities. I am asking you to consider stepping out of your comfort zone and sacrificially loving these children.

Two Alabama lawyers who answered the call to serve foster children are **Judge Angela Dawson Terry** and **Jennifer Sellers**. Independent of one another, these lawyers gathered new suitcases (usually when a child comes into our home they have all their belongings in a pillow case, duffel bag, mesh bag or worn-out suitcase) and filled these suitcases with necessities. Their efforts have positively impacted the lives of these children. Judge Terry describes the "Suitgrace Initiative" like this:

The "SuitGrace Initiative" has been one of the most rewarding projects of my legal career. The "SuitGrace Initiative" is a project to provide age-appropriate luggage with suitable personal items and "luxuries" for each foster child in our county. I first started thinking of this project when I attended a conference in spring 2015. It was at that conference that I was shown a book by Ashley Rhodes-Courter, *Three Little Words*. She was a former foster child in Florida and the book was her memoir. Repeatedly in the book she references her belongings being in garbage bags for a move. She referred to feeling as useless as the items in the bag. Later in 2015 I was on a panel for a conference and had the opportunity to question two ladies in their mid-20s who had aged out of the foster system in Jefferson County. I asked them if a suitcase would have meant very much to them. My thinking was we do not need to expend time, energy and resources on this if it is not consequential to the actual foster child. One told me she still had her suitcase and matching cosmetic bag she received when she was 13. They confirmed my thoughts that somehow these suitcases add much needed self-esteem and worth to the situation.

The Lawrence County Children's Policy Council approved the project at our September meeting. At that time, we had 25 foster children in Lawrence County. A committee was comprised of the director of the Policy Council, Dr. Jerry Armor; the director of the Lawrence County Department of Human Resources, Corey Williams; a representative from Mental Health, Shannon Cassidy; Chief Juvenile Probation Officer Karen Lang; and Pastor Stephen Bennefield of the First United Methodist Church in Moulton. We estimated that \$50 per child would cover the bag and the personal items to be included. Within a month we had bags, contributions, and commitments for all 25. Some donated the suitcases. Some gave \$50. Some took a particular child to provide the bag. Some of the children's lawyers became their suitcase sponsors.

We were interviewed by the local paper which gave us great publicity. I spoke to every organization and church that requested I come speak. I went as a representative of the Policy Council with the statistics and information I had on foster care in general and Lawrence County foster children in particular.

As anyone who works with the foster system knows, it is fluid. Since our original list, we have added a teenage boy and an infant girl and had one released from custody to go into state mental health custody. Our Policy Council was incorporated as a non-profit in 2012, so it was in an excellent position to be the umbrella for this project. As Juvenile Court deals with children otherwise before the court, a Children's Policy Council is to benefit all children within the particular county from birth to 19 years old.

I plan to ask Judge Terry and Jennifer to take this initiative statewide. I hope that you will participate. Through this small gesture, maybe you will be further encouraged to engage to an even greater extent. Our profession of advocates must advocate for the one of the most vulnerable groups among us, foster children and orphans, in spite of the risk and sacrifice that it entails. As individuals and as legal professions, I think that we know that there is greater joy to give rather than receive. All of us have been the recipients of the warmth and generosity of others. Let us pay that forward.

(For more on the "SuitGrace Initiative" and Judge Terry, see the December 2016 Addendum at https://www.alabar.org/ assets/uploads/2014/09/12-Addendum-December-2016.pdf.)



EXECUTIVE DIRECTOR'S REPORT

Keith B. Norman keith.norman@alabar.org



Two Important Reports Encourage New Directions For the Legal Profession

Recently, two reports were released which have great portent for the legal profession. The first is "Foundations for Practice: The Whole Lawyer and the Character Quotient," compiled by the Institute for the Advancement of the American Legal System (IAALS). The second is the "Report on the Future of Legal Services in the United States," released by the American Bar Association Commission (Commission) on the Future of Legal Services.

"Foundations for Practice" is a national, multiyear project that was designed to identify the foundational skills and characteristics that entry-level lawyers need to launch successful careers in the legal profession, to develop measureable models of legal education that support those foundations and to align market needs with hiring practices to incentivize positive improvements. A survey was distributed to lawyers across the country during 2014-2015 to which some 24,000 lawyers from all 50 states responded. The survey results indicate that the beginning lawyer needs a character quotient (CQ) and a blend of professional competencies and skills. These characteristics are what the report states comprise the "whole lawyer."

The report identifies 147 foundations (characteristics, skills, competencies) that are grouped into 15 categories. Survey respondents were asked to rank each foundation based on how critical it would be to the new lawyer's success. For example, the respondent had to indicate if a particular foundation is one necessary immediately for a new lawyer's success in the short term, is it one that can be acquired later, is the particular foundation not necessary, but merely advantageous to a lawyer's success, or, finally, it is not relevant to success?

More than half of the respondents indicated that 76 percent of characteristics (qualities such as integrity, work ethics, common sense, resilience, etc.) were necessary right out of law school. Yet, only 46 percent of professional competencies (punctuality, listening attentively, team work, etc.) were identified by half or more of the respondents as similarly necessary. Surprisingly, only 40 percent of the legal skills enumerated were identified as necessary for a new lawyer. The report stated that this result does not mean that legal skills were viewed as unnecessary by the respondents because 90 percent of the legal skills that were covered by the survey were deemed "important," but they were identified as foundations that could be acquired over time.

Essentially, the report finds that the survey results show that new lawyers need some legal skills, but that they are successful when they come to the job with a broad blend of legal skills, professional competencies and characteristics that constitute the whole lawyer.

To change current practices, the report suggests that law firms must be willing to eschew traditional hiring criteria such as class rank, law review and law school prestige and hire new, entry-level lawyers based on the skills, professional competencies and characteristics they desire. Only then, the report concludes, will law schools begin to produce new lawyers with these qualities that firms will want to hire. The report is posted on the IAALS website, *http://iaals.du.edu*.

On the other hand, the "Future of Legal Services" report delved into the various reasons that legal services remain inaccessible to many citizens. This study, conducted over a two-year period, examined traditional and evolving delivery models for legal services as well as studying the strengths and weaknesses of the profession and justice system that have an impact on access to legal service. The Commission, in formulating its recommendations to improve the effectiveness of the delivery of legal services, opined that it was guided by observing the profession's core values of serving the public interest and ensuring justice for all. The Commission acknowledges that the recommended changes were offered even if those changes might cause disruption or discomfort to the profession.

This report is divided into two parts. Part I deals with the Commission's findings about the delivery of legal services in the U.S. and identifies three specific categories of findings with multiple sub-findings under each. The categories are:

- 1. Despite sustained efforts to expand the public's access to legal services, significant needs persist;
- 2. Advancements in technology and other innovations continue to change how legal services can be accessed and delivered; and
- 3. Public trust and confidence in obtaining justice and in accessing legal services is compromised by bias, discrimination, complexity and lack of resources.

Part II is the Commission's 12 black-letter recommendations, each with multiple subparts. They are:

 The legal profession should support the goal of providing some form of effective assistance for essential civil legal needs to all persons otherwise unable to afford a lawyer;



- 2. Courts should consider regulatory innovations in the area of legal services delivery;
- 3. All members of the legal profession should keep abreast of relevant technologies;
- Individuals should have regular legal checkups, and the American Bar Association (ABA) should create guidelines for lawyers, bar associations and others who develop and administer such checkups;
- Courts should be accessible, user-centric and welcoming to all litigants, while ensuring fairness, impartiality and due process;
- 6. The ABA should establish a Center for Innovation;
- The legal profession should partner with other disciplines and the public for insights about innovating the delivery of legal services;
- The legal profession should adopt methods, policies, standards and practices to best advance diversity and inclusion;
- 9. The criminal justice system should be reformed;
- Resources should be vastly expanded to support longstanding efforts that have proven successful in addressing the public's unmet needs for legal services;
- 11. Outcomes derived from any established or new models for the delivery of legal services must be measured to evaluate effectiveness in fulfilling regulatory objectives;
- 12. The ABA and other bar associations should make the examination of the future of legal services part of their ongoing strategic long-range planning.

The report may be viewed and downloaded by visiting *ambar.org/ABAFuturesReport*.

Both reports reflect a profession that is searching to identify the riptides of change that are buffeting law schools, the legal establishment and justice system, while offering constructive and thoughtful ways to address these changes. Unquestionably, these forces pose very difficult challenges ahead for the legal profession, especially for a profession that has always embraced the notion of incrementalism and revered the concept of *stare decisis*.



IMPORTANT NOTICES

- Notice of Election and Electronic Balloting
- Amendment of the Alabama Rules of Appellate Procedure and Alabama Rules of Disciplinary Procedure
- Adoption of the Alabama Rules for Expedited Civil Actions
- ASB Women's Section– Request for Nominations
- ▲ Lawyers' Hall of Fame
- Judicial Award of Merit
- Local Bar Award of Achievement
- J. Anthony "Tony" McLain Professionalism Award
- William D. "Bill" Scruggs, Jr. Service to the Bar Award

Notice of Election and Electronic Balloting

Notice is given here pursuant to the *Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners* that the election of these officers will be held beginning Monday, May 15, 2017 and ending Friday, May 19, 2017.

On the third Monday in May (May 15, 2017), members will be notified by email with a link to an electronic ballot. Members who wish to vote by paper ballot should notify the secretary in writing on or before the first Friday in May (May 5, 2017) requesting a paper ballot. A single written request will be sufficient for all elections, including runoffs and contested president-elect races during this election cycle. All ballots (paper and electronic) must be voted and received by the Alabama State Bar by 5 p.m. on the Friday (May 19, 2017) immediately following the opening of the election.

Nomination and Election of President-Elect

Candidates for the office of president-elect shall be members in good standing of the Alabama State Bar as of February 1, 2017 and shall possess a current privilege license or special membership. Candidates must be nominated by petition of at least 25 Alabama State Bar members in good standing. **Such petitions must be filed with the secretary of the Alabama State Bar no later than 5 p.m. on February 1, 2017.**

Nomination and Election of Board of Bar Commissioners

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

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15th Judicial Circuit, Place 5 17th Judicial Circuit 18th Judicial Circuit, Place 1 18th Judicial Circuit, Place 3 19th Judicial Circuit 21st Judicial Circuit 22nd Judicial Circuit 23rd Judicial Circuit, Place 1 28th Judicial Circuit, Place 2 30th Judicial Circuit 31st Judicial Circuit 33rd Judicial Circuit 34th Judicial Circuit 35th Judicial Circuit 36th Judicial Circuit 40th Judicial Circuit 41st Judicial Circuit

Additional commissioners will be elected for each 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits will be determined by a census on March 1, 2017 and vacancies certified by the secretary no later than March 15, 2017. All terms will be for three years.

A candidate for commissioner may be nominated by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Nomination forms and/or declarations of candidacy must be received by the secretary no later than 5 p.m. on the last Friday in April (April 28, 2017).

Election of At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 3, 6 and 9. Petitions for these positions, which are elected by the Board of Bar Commissioners, are due by April 1, 2017.

Submission of Nominations

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

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



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These forms may also be emailed to *elections@alabar.org* or faxed to (334) 261-6310.

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

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

Amendment of the Alabama Rules of Appellate Procedure and Alabama Rules of Disciplinary Procedure

In two separate orders, the Alabama Supreme Court has amended Rule 2(c) and Rule 3(c) and adopted Rule 28A and Rule 28B, *Alabama Rules of Appellate Procedure*, and has amended Rule 8(a) and (b), Rule 10(a) and (b), Rule 17(f), Rule 18, Rule 26(h)(2), Rule 28(e), and Appendix A, *Alabama Rules of Disciplinary Procedure*. The amendment of these rules was effective January 1, 2017. The order amending Rule 2(c) and Rule 3(c) and adopting Rule 28A and Rule 28B, *Alabama Rules of Appellate Procedure*, and the order amending Rule 8(a) and (b), Rule 10(a) and (b), Rule 17(f), Rule 18, Rule 26(h)(2), Rule 28(e), and Appendix A, *Alabama Rules of Disciplinary Procedure*, appear in an advance sheet of *Southern Reporter* dated on or about October 27, 2016.

Alabama Rules of Appellate Procedure: The amendment to Rule 3(c) provides that the notice of appeal shall specify all parties to the appeal and prohibits the use of "etc." or "et al." to designate multiple parties. Rule 28A provides for supplemental briefs on return to remand and provides a briefing schedule and length restrictions for such briefs, and Rule 28B provides a method for citing new authority after a brief has been filed.

Alabama Rules of Disciplinary Procedure: The amendments to Rule 8(a) and (b) clarify that a suspended or disbarred attorney remains suspended or disbarred until the attorney has been reinstated. The amendment to Rule 10(a) provides for the payment of \$300 with the affidavit filed in response to a notice of noncompliance with MCLE requirements.

The text of these amendments can be found at *http://www.judicial.alabama.gov*, "Quick links–Rule changes."

-Bilee Cauley, reporter of decisions, Alabama Appellate Courts

Adoption of the Alabama Rules for Expedited Civil Actions

The Alabama Supreme Court has adopted the Alabama Rules for Expedited Civil Actions. These rules were effective January 1, 2017. The order adopting these rules appears in an advance sheet of Southern Reporter dated on or about October 27, 2016. The Alabama Rules for Expedited Civil Actions were drafted in response to Act No. 2012-492, Ala. Acts 2012, codified at § 6-1-3, Ala. Code 1975. The rules create a voluntary process intended to promote the just and efficient determination of the cases to which they apply: Civil actions in the circuit court where the damages, inclusive of interest, costs and attorney fees, do not exceed \$50,000. The rules do not apply to actions involving: (1) domestic relations or family law, (2) real property law, (3) tax law, (4) workers' compensation claims and (5) claims as to which no money damages are sought. The text of these rules can be found at http:// www.judicial.alabama.gov, "Quick links-Rule changes."

-Bilee Cauley, Reporter of Decisions, Alabama Appellate Courts

ASB Women's Section–Request For Nominations

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

Maud McLure Kelly Award

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

Previous recipients include Justice Janie Shores (ret.), Miss Alice Lee, Miss Nina Miglionico, Judge Phyllis Nesbitt, Mahala Ashley Dickerson, Dean Camille Cook, Jane Dishuck, Louise Turner, Frankie Fields Smith, Sara Dominick Clark, Carol Jean Smith, Marjorie Fine Knowles, Mary Lee Stapp, Ernestine Sapp, Judge Caryl Privett (ret.) and Judge Sharon G. Yates (ret.). The award will be presented at the Maud McLure Kelly Luncheon at the 2017 State Bar Annual Meeting.

Susan Bevill Livingston Leadership Award

This is the second year to solicit nominations for this new award for the Women's Section in memory of Susan Bevill Livingston, who practiced law at Balch & Bingham. The recipient of this award must demonstrate a continual commitment to those around her as a mentor; a sustained level of leadership throughout her career; and a commitment to her community in which she practices, such as, but not limited to, bar-related activities, community service and/or activities which benefit women in the legal field and/or in her community. The candidate must be or have been in good standing with the Alabama State Bar and has at least 10 years of cumulative practice in the field of law. This award may be given posthumously. This award will be presented at a special reception. Judge Tammy Montgomery is the 2016 award recipient.

Submission deadline is February 15, 2017.

Please submit your nominations to Allison Skinner, chair of the Women's Section, at *askinner@acesin.com*. Your submission should include the candidate's name and contact information, the candidate's current CV and any letters of recommendations. If a nomination intends to use letters of recommendation previously submitted in 2016, please note your intentions.

Alabama Lawyers' Hall of Fame

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

The implementation of the idea of an Alabama Lawyers' Hall of Fame originated during the term of state bar President Fred Gray. He appointed a task force to study the concept, set up guidelines and then provide a recommendation to the Board of Bar Commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004. Since then, 55 lawyers have become members of the hall of fame. The five newest members were inducted May 6, 2016.

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

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

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

Download an application form at https://www.alabar.org/ assets/uploads/2016/09/Lawyers-Hall-of-Fame-Nomination-Form-2017-fillable.pdf and mail the completed form to:

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

The deadline for submission is March 1, 2017.

Judicial Award of Merit

The Alabama State Bar Board of Bar Commissioners will receive nominations for the state bar's Judicial Award of Merit through March 15, 2017. Nominations should be mailed to:

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

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

Nominations are considered by a three-member committee appointed by the president of the state bar, which then makes a recommendation to the board of bar commissioners (Continued from page 15)

with respect to a nominee or whether the award should be presented in any given year.

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

Local Bar Award of Achievement

Cole Portis, Alabama State Bar president, and the ASB Local Bar Task Force want you to apply this year! This award recognizes local bars for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's 2017 Annual Meeting at the Grand Hotel Marriott Resort in Point Clear.

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

The following criteria are used to judge the applications:

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

To be considered for this award, local bar associations must complete and submit an application by Friday, June 2, 2017. Applications may be downloaded from *www.alabar.org* or obtained by contacting Mary Frances Garner at (334) 269-1515 or *maryfrances.garner@alabar.org*.

J. Anthony "Tony" McLain Professionalism Award

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the J. Anthony "Tony" McLain Professionalism Award through April 15, 2017. Nominations should be prepared on the appropriate nomination form available at *www.alabar.org* and mailed to: Keith B. Norman Executive Director Alabama State Bar P.O. Box 671 Montgomery, AL 36101

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

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

William D. "Bill" Scruggs, Jr. Service To the Bar Award

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the William D. "Bill" Scruggs, Jr. Service to the Bar Award through April 15, 2017. Nominations should be prepared on the appropriate nomination form available at *www.alabar.org* and mailed to:

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

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

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

Annual Marriott Resort Golf Club & Spa • Point Clear, Alabama July 12-15, 2017

All the meetings I attended were great. I enjoyed the subjects offered this year, and enjoyed networking as well.

Thank you very much for planning so many family activities and making the meeting so kid friendly. My whole family had a blast.

Overall, the conference was excellent, well organized, quality speakers and panels and plenty of networking opportunities.

This was my first time to attend and I brought my whole family. We have a 3-year old and a 1-year old. We found the whole event very family friendly! Big relief!

It's nice to have so many options!

•EVENT SPECIAL• ABA Foundation Fellows Dinner July 13, 2017 Speaker: Dr. Wayne Flynt, Alabama historian



Alabama Medical Records: PART 2

By David G. Wirtes, Jr. and George M. Dent, III

(Part 1 of this article appeared in the November 2016 issue of The Alabama Lawyer.)

III. Discovery

A. Discovery of Medical Records

1. State Law

Section 10 of the Alabama Constitution of 1901 guarantees the "Right to Prosecute Civil Cause:"

That the great, general, and essential principles of liberty and free government may be recognized and established, we declare: ... That no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause to which he is a party.

Ala. Const. 1901, Section 10.

This section "elucidates this state's commitment to protect an individual's right to attain an adjudication on the merits." Section 13 of the Alabama Constitution of 1901 guarantees a right to a remedy, stating "every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law." Ala. Constitution of 1901, Section 13.

Rule 26(b)(1), Ala. R. Civ. P., states the scope of discovery in Alabama as follows:

Rule 26. General Provisions Governing Discovery

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having

knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

$Id.^{92}$

According to the Committee Comments on the 1973 adoption of subdivision (b), "The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the presentation of his case." "In simplest parlance, it was, at an early date, held that discovery cannot be defeated by a cry of 'fishing expedition.'"93

Rule 401, Ala. R. Evid., provides the definition of "relevant evidence":

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

A 2010 amendment to Rule 26(b)(2), modeled after amendments to the corresponding federal rule, speaks to discovery of electronically stored information including electronic medical records:

2) Limitations.

(A) A party need not provide discovery of electronically stored information from sources that

It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

the party identifies to the requesting party as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause for compelling the discovery, considering the limitations of subdivision (b)(2)(B) of this rule. The court may specify conditions for such discovery.

Rule 26(b)(2). The Committee Comments concerning this new language are instructive.94

2. Federal Law

Discovery of medical records, including new electronic records, is governed largely by Fed. R. Civ. P. 2695 and 34.96 The 2006 and 2015 amendments to Rule 26(b) substantially rewrote the rule. The 2015 amendment, with its emphasis upon restricting discovery to what is "proportionate" to claims and defenses, will be construed in forthcoming opinions.

The Advisory Committee's Notes provide insight about what the Supreme Court intends through promulgation of the 2006 and 2015 amendments. The official notes concerning the 2006 amendment ensures medical records are discoverable even when objections based upon claims of privilege are asserted. The official notes to the 2015 amendments ensure continuing discoverability of electronic records, so long as "proportionate" to claims or defenses.97

IV. Admissibility

A. State Law

The State of Alabama considers hospital records trustworthy as shown by the codification of a statutory procedure allowing the introduction of certified copies of original hospital records without having to call to trial

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or depose records custodians or physicians to authenticate and/or establish an evidentiary foundation. Sections 12-21-5 through 7, Ala. Code 1975, provide a practical procedure whereby copies of patients' medical records are admitted in court proceedings without the unnecessary expense and delay in calling the custodian to lay a foundation or predicate for admissibility. Section 12-21-5 covers the admissibility of copies of hospital records,⁹⁸ while § 12-21-6 covers "subpoena duces tecum; inspection form; [and] weight" for copies of hospital records."99 Section 12-21-7 covers certificates of custodians for copies of hospital records.¹⁰⁰

In practical terms, once the hospital custodian receives a subpoena duces tecum, the custodian must copy the patient's medical records as provided in sections 12-21-6 and -7, and must forward the certified medical records to the court's clerk for admission at trial. Once submitted to the court under this statutory procedure, the records are considered self-authenticating business records. Specifically, medical records come within an exception to the hearsay rule as business records, Rule 803(6), Ala. R. Evid., and they contain statements for purposes of medical diagnosis and treatment, Rule 803(4), Ala. R. Evid. Such records come within the omnibus provision of Rule 901(b)(10), Ala. R. Evid., which allows for authentication by any means provided by statute or other rules prescribed by the Alabama Supreme Court, i.e., Rule 902(11), Ala. R. Evid., under which such records are self-authenticating as certified domestic records of a regularly conducted activity.

In Jackson v. Brown, 49 Ala. App. 55, 268 So. 2d 837, 841 (Ala. Civ. App. 1972), the court of civil appeals held that the custodian's certificate, including the language quoted above, "was evidence of the reasonableness of the hospital charges, which charges thus were properly before the jury for their consideration as elements of damages."



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B. Federal Law

The *Federal Rules of Evidence* allow electronic medical records to be admitted over a hearsay objection if two conditions are satisfied: (1) the record is made "in the course of a regularly conducted activity of a business ..."; and (2) it is "regular practice" to create such a record.¹⁰¹ Additionally, such records must be authenticated before they may properly be admitted.¹⁰²

V. Exceptions to Discoverability and Admissibility

A. Quality Assurance, Peer Review and Utilization Review Committee Statutes

Healthcare providers often object to the discoverability and admissibility of medical records and assert claims of privileges premised upon Alabama's socalled quality assurance, peer review, and utilization review committee statutes. Close evaluation of the plain language of the governing statutes provides clear insight into how the statutes should be construed. Further, state and federal reported opinions from Alabama and elsewhere construing Alabama's and other states' statutory schemes provide insight.

1. Quality Assurance

Section 22-21-8, *Ala. Code* 1975, governs the "Confidentiality of accreditation, quality assurance credentialing materials, etc."¹⁰³ What is this statute intended to do?

a. Definitions of the Terms in § 22-21-8

Section 22-21-8 refers to "accreditation materials" and "quality assurance credentialing materials," "accreditation function" and "quality assurance function," "an employee, adviser, or consultant of an accrediting agency or body," and to "an employee, adviser or consultant of a quality assurance agency or body". What do these words and phrases mean? "Accreditation" is defined as "the act or process of accrediting," while "accredit" is defined as "to give official authorization to or approval of ... to vouch for officially: recognize or clear officially as bona fide, approved, or in conformity with a standard."¹⁰⁴ As an adjective, "credential" is defined as "giving a title or claim to credit or confidence: ACCRED-ITING–used chiefly in the phrase *credential letters*."¹⁰⁵ As a noun, a "credential" is "something that gives a title to credit or confidence."¹⁰⁶ Thus, "accreditation" is to give official approval of, and "credentialing" is to give a title or a claim, i.e., a credential, to credit or confidence. An accrediting agency or body is therefore one that can give official approval, and a credentialing agency or body is one that can give a title or a claim to credit or confidence, i.e., can issue a credential. What then must a quality assurance credentialing agency or body be?

"Quality" has many definitions, but the ones best fitting the phrase "quality assurance" in § 22-21-8 are "degree of excellence" and "degree of conformance to a standard (as of a product or workmanship)."¹⁰⁷ "Assurance" includes "something that inspires or tends to inspire confidence," "the quality or state of being sure or certain: freedom from doubt: CERTAINTY," and "the quality or state of being sure or safe: SECURITY, SAFETY."¹⁰⁸ "To assure" is "to make safe (as from risks or against overthrow): insure, secure;" "to give confidence to: REASSURE, ENCOURAGE, STRENGTHEN;" "to inform positively: tell earnestly: declare confidently to" and, perhaps most applicable here, "to make certain the coming or attainment of: INSURE."¹⁰⁹

"Quality assurance credentialing" by a body that exists for that purpose would therefore be to grant a credential, a "title or claim," that the recipient has attained a degree of excellence or conformance to a standard.

This close examination of § 22-21-8's provisions thus reveals two legislative goals: First, the legislature evidently intended a narrow application of the phrase "quality assurance" to a "function" that involves presentation of materials to a "quality assurance or similar agency or similar body" for "evaluation and [or] review" by that body for the sake of determining whether to issue a credential. Second, it is only "evaluation and review" by an accreditation or credentialing body, or preparation of materials to present to such a body for evaluation or review, that are the functions intended to be protected from discovery or admissibility. These legal conclusions are confirmed in the fifth sentence of § 22-21-8, which expressly excepts documents available from original sources and testimony by persons regarding their own knowledge.

b. Construction and Application Of § 22-21-8

The Alabama Supreme Court construed § 22-21-8 in Ex parte Krothapalli, 762 So. 2d 836 (Ala. 2000), where it explained that § 22-21-8 was enacted: "[T]o provide for the confidentiality of all written materials and activities concerning the accreditation, quality assurance, or similar function of any hospital, clinic, or medical staff."¹¹⁰ "It seems clear to us ... that the purpose of a peer-review statute is to encourage full candor in peer-review proceedings and that this policy is advanced only if all documents considered by the committee or board during the peer-review or credentialing process are protected."111

In *Ex parte Anderson*, 789 So. 2d 190, 202 (Ala. 2000), the court explained: "Section 22-21-8 ... pro-

vides that ... information and documents produced by hospitals, their agencies, or bodies, in furtherance of their official duties and activities in regard to the peer-review process are not discoverable."

In *Ex parte Cryer*, 814 So. 2d 239 (Ala. 2001), the court held the phrase "medical staff" in § 22-21-8 does not extend to the activities of physicians within their own associations or corporations. The court asked "Did the Legislature intend for the shareholder physicians of a private corporation to qualify as a 'medical staff' under the provisions of § 22-21-8?" It answered "... the Legislature intended only to provide for the confidentiality of all written materials and activities concerning hospitals and clinics, not private associations or corporations or individual physicians."¹¹²

In *Ex parte St. Vincent's Hosp.*, 652 So.2d 225, 230 (Ala.1994), the court observed: "[t]he discovery sought by Zeneca is not privileged under ... § 22-21-8 The Infection Control Committee is a standing hospital committee St. Vincent's has produced ... no evidence that a function of that committee was accreditation or quality assurance."¹¹³

Insight may also be gleaned from how courts in other states treat comparable statutes. For example, *Atkins v. Pottstown Memorial Med. Ctr.*, 634 A. 2d

"Section 22-21-8 ... provides that ... information and documents produced by hospitals, their agencies, or bodies, in furtherance of their official duties and activities in regard to the peer-review process are not discoverable." .

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258 (Pa. Super. 1993) holds an incident report of a patient's fall before surgery at a hospital prepared by the hospital's risk manager was admissible over a claim of quality assurance and peer review privileges.¹¹⁴

2. Peer Review

Section 6-5-333, *Ala. Code* 1975, concerns "Dentists, chiropractors, physicians; professional committees."¹¹⁵

a. Definition of the Terms in § 6-5-333

Section 6-5-333(d) applies, by its express terms, to "information, interviews, reports, statements, or memoranda" "furnished to" "any committee as defined in this section." Of course, § 6-5-333(b) defines the meaning of "committee."

Section 6-5-333(d)'s privilege also applies to "any findings, conclusions, or recommendations resulting from the proceedings of such committees" as defined by § 6-5-333(b). Thus, according to its plain language, this statute renders privileged *only* information provided to, and findings, conclusions and recommendations from such committees of designated licensed Alabama healthcare providers formed or appointed to evaluate the diagnosis or performance of services of the other designated Alabama healthcare providers.

b. Construction and Application of § 6-5-333

In *Ex parte Anderson*, 789 So. 2d 190, 202 (Ala. 2000), the supreme court stated: "[t]his provision mandates that information gathered or formulated within the scope of business conducted by such [peer review] committees is privileged from external review."

In *Ex parte Mendel*, 942 So.2d 829 (Ala. 2006), the court held that the Alabama Dental Review Board constituted a "committee" for the purpose of cloaking its proceedings with the privilege afforded by \S 6-5-333.¹¹⁶

National commentators stress that such statutory peer review privileges are intended to be limited in scope.¹¹⁷

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3. Utilization Review

Section 34-24-58, *Ala. Code* 1975, covers "Decisions, opinions, etc., of utilization review committee privileges."¹¹⁸

a. Definition of the Terms in § 34-24-58

Unlike §§ 22-21-8 and 6-5-333(d), § 34-24-58 does not contain any provision rendering information, documents or medical records provided to or considered by utilization review committees privileged or confidential.

b. Construction and Application of § 34-24-58

Section 34-24-58 was construed in *Ex parte St. Vincent's Hospital*, 652 So. 2d 225, 230 (Ala. 1994), where the court wrote that the discovery plaintiff sought "is not privileged under ... § 34-24-58. The Infection Control Committee [("ICC")] is a

standing hospital committee, coordinated by [], a registered nurse. ... St. Vincent's has produced no evidence that the [ICC] served as a utilization review committee" More recently, Chief Justice Roy Moore described the statute in his dissenting opinion in *Lindsay v. Baptist Health System, Inc.*, 154 So. 3d 90 (Ala. 2014):

Section 34-24-58, *Ala. Code* 1975, protects from legal action the acts of any physicians' committee of a licensed hospital, but only if the committee's decisions were made "in good faith and without malice and on the basis of facts reasonably known or reasonably believed to exist." ... "The qualified immunity, however, is not absolute. In a majority of cases immunity only applies when the investigation is conducted in good faith, without malice, and based upon the reasonable belief that the committee's action is warranted."¹¹⁹

Id., 154 So. 3d at 92 (Moore, Chief J., dissenting).

4. Medical Records Are Discoverable from Original Sources Even when Privileged by §§ 22-21-8, 6-5-333(d) or 34-24-58

All information, interviews, reports, statements or memoranda furnished to any committee as defined in this section, and any findings, conclusions or recommendations resulting from the proceedings of such committee are declared to be privileged.

The statutes provide that medical evidence used or considered by accreditation, peer review and quality assurance committees are discoverable and admissible when obtained from sources *other than such committees*. Section § 22-21-8(b) specifies that:

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... Information, documents or records otherwise available from original sources are not to be construed as being unavailable for discovery or for use in any civil action merely because they were presented or used in preparation of accreditation, quality assurance or similar materials, nor should any person involved in preparation, evaluation, or review of such materials be prevented from testifying as to matters within his knowledge, but the witness testifying should not be asked about any opinions

or data given by him in preparation, evaluation, or review of accreditation, quality assurance or similar materials.

Id. Likewise, § 6-5-333(d) states:

All information, interviews, reports, statements or memoranda furnished to any committee as defined in this section, and any findings, conclusions or recommendations resulting from the proceedings of such committee are declared to be privileged. The records and proceedings of any such committee shall be confidential and shall be used by such committee and the members thereof only in the exercise of proper functions of the committee and shall not be public records nor be available for court subpoena or for discovery proceedings. Nothing contained herein shall apply to records made in the regular course of business by a hospital, dentist, dental auxiliary personnel, chiropractor, chiropractic auxiliary personnel, physician, physician auxiliary personnel or other provider of health care and information, documents or records otherwise

available from original sources are not to be construed as immune from discovery or use in any civil proceedings merely because they were presented during proceedings of such committee.

Id. Section 34-24-58, by contrast, contains no provision shielding information, documents or medical records used or considered by utilization review committees with any privilege or confidentiality.

In Ex parte Krothapalli, 762 So. 2d 836, 839 (Ala. 2000), the court construed § 22-21-8(b) to mean that documents obtainable from original sources are indeed discoverable and admissible as evidence at trial: "Accordingly, § 22-21-8 does not protect information if it is obtained from alternative sources. Hence, a plaintiff seeking discovery cannot obtain directly from a hospital review committee documents that are available from the original source, but may seek such documents from the original source." This language from Ex parte Krothapalli was quoted favorably in Ex parte Qureshi, 768 So. 2d 374, 380 (Ala. 2000): "Neither our decision in Krothapalli nor our holding here today prevents [the plaintiff] from obtaining documents that originated from sources other than Vaughan Regional's credentialing committee." The court expressly adopted the reasoning of the Arizona Court of Appeals in Humana Hospital Desert Valley v. Superior Court, 154 Ariz. 396, 742 P.2d 1382 (App. 1987), which recognized, in pertinent part, that: "... information which is available from original sources is not immune from discovery or use at trial merely because it was used by a medical review committee."¹²⁰ Therefore, even though documents, information, or medical records may have been used by a peer review or quality assurance committee, that fact does not exempt the materials from discovery or from use at trial.

In *Ex parte Anderson*, 789 So. 2d at 199, the court likewise held:

... discovery of information regarding Dr. Anderson's privileges is barred by § 6-5-333(d), *Ala. Code* 1975, ... [but] records made in the regular course of business, exclusive of official committee functions, and otherwise available from their original sources are discoverable and not privileged. Thus, [plaintiff] is not entitled to discover records or documents prepared by a hospital or other health-care provider unless they were prepared in its regular course of business; however, she is not precluded from seeking the same from Dr. Anderson as the original source.

The Anderson Court rejected Dr. Anderson's argument:

that the statutory framework ... serves to absolutely insulate him, his documents, and other information concerning the Trotter case, whether obtained from him personally, from the hospital, or from other committees. We do not completely agree. His contention regarding the material gathered from the hospital or review committees is correct; documents from those sources generated pursuant to hospital or committee business [are] absolutely not discoverable. ... However, the information and documents that specifically concern the Trotter incident and that can be obtained from Dr. Anderson himself as an "original source" are discoverable.¹²¹

5. The Party Opposing Discovery Bears the Burden of Proving Privilege and Prejudice

Rule 501, Ala. R. Evid., provides in full:

Except as otherwise provided by the Constitution or statute or by these or other rules promulgated by the Supreme Court of Alabama, no person has a privilege to:

- (1) Refuse to be a witness;
- (2) Refuse to disclose any matter;
- (3) Refuse to produce any object or writing; or
- (4) Prevent another from being a witness or disclosing any matter or producing any object or writing.

Id. All privileges are to be strictly construed.

"[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed."¹²² The public has the right "to every man's evidence, and exemptions from the general duty to give testimony that one is capable of giving are distinctly exceptional."¹²³

In *Ex parte Fairfield Nursing Center, L.L.C.*, 22 So. 3d 445, 448-50 (Ala. 2009), the court reaffirmed the principle that a party asserting a privilege as a reason for withholding documents sought in discovery has the burden of proving its existence and the prejudice that would be caused by their production:

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In *Ex parte Coosa Valley Health Care, Inc.*, 789 So. 2d 208 (Ala. 2000), this court reaffirmed the principle that the party asserting the privilege under § 22-21-8 has the burden of proving the existence of the privilege and the prejudicial effect of disclosing the information.¹²⁴

In that case, "Fairfield offered the affidavits of Donna Guthrie, the executive director of its facility, and Janie Dawson, the former director of nursing at the facility."¹²⁵ Based upon that *unopposed* evidentiary showing, the supreme court sustained a finding of privilege: "We agree with Fairfield that the evidence presented in the affidavits submitted in support of the assertion of the privilege is substantially similar to the evidence presented in the affidavits in *Kingsley* [*v. Sachitano*, 783 So. 2d 824 (Ala. 2000)] and *Ex parte Qureshi*[, 768 So. 2d 374 (Ala. 2000)]."¹²⁶

An "affidavit must be made on personal knowledge, must set forth facts that would be admissible in

evidence, and must show affirmatively that the affiant is competent to testify to the matters stated."¹²⁷ "Where it appears from the face of an affidavit that the affiant had no personal knowledge of the matters to which he deposed and that he must have secured his information concerning those matters from others, then the affidavit is based on hearsay and should not be admitted."¹²⁸

6. Privileges May Be Waived

Ala. R. Evid. 510, which covers "Waiver of Privilege by Voluntary Disclosure," provides: "A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged." *Id.* Professor Charles W. Gamble's "Author's Statement of the Rule"

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explains: "Even after a privilege attaches, its protection may be waived by the holder or a predecessor holder. Waiver customarily arises through the holder's disclosure, or consenting to disclosure, of the privileged matter to a third party."¹²⁹

Endnotes

92. Rule 401, Ala. R. Evid., provides the definition of "relevant evidence":

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

- Committee Comments on 1973 Adoption of Rule 26(b), Ala. R. Civ. P., quoting *Laverett v. Continental Briar Pipe Co.*, 25 F. Supp. 80, 82 (D.C. N.Y. 1938).
- 94. COMMITTEE COMMENTS TO AMENDMENT TO RULE 26 EFFECTIVE FEBRUARY 1, 2010

1. Introduction

The amendment to Rule 26 is a part of the comprehensive revisions to Rules 16, 26, 33(c), 34, 37, and 45 to accommodate the discovery of electronically stored information ("ESI"). The 2006

amendments to the Federal Rules of Civil Procedure ("FRCP") and the FRCP Advisory Committee Notes served as the Committee's benchmark, although many sources were consulted, including caselaw and the Uniform Rules Relating to Discovery of Electronically Stored Information published by the National Conference of Commissioners on Uniform State Laws. These Committee Comments quote many of the Federal Advisory Committee Notes to the 2006 amendments to the FRCP at length, but there are additional Federal Advisory Committee Notes, not quoted here, that should also be consulted. ...

- 95. See new Rule 26(b)(1) through (2).
- 96. See new Rule 34, Fed. R. Civ. P.
- For additional insights, see Vargas, Damian, ELECTRONIC DISCOVERY: 2006 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, 34 Rutgers Computer & Tech. L.J. 396 (2008).
- 98. See ALA. CODE § 12-21-5 (1975), pertaining to "Copy of hospital records-Admissibility."
- 99. See Ala. Code § 12-21-6 (1975), pertaining to "Copy of hospital records— Subpoena duces tecum; inspection form; weight."
- 100. See ALA. CODE § 12-21-7 (1975), pertaining to "Copy of hospital records— Certificate of custodian."
- 101. Fed. R. Evid. 803(6). See also, Fed. R. Civ. P. 34(b)(2)(E) ("[A] party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request.").
- 102. Fed. R. Evid. 901(a).
- 103. See Acts 1981, No. 81-801, p. 1409, now codified as Section 22-21-8, Ala. Code 1975. ALA. Code §22-21-8 (1975).

"Even after a privilege attaches, its protection may be waived by the holder or a predecessor holder. Waiver customarily arises through the holder's disclosure, or consenting to disclosure, of the privileged matter to a third party." 104. Webster's Third New International Dictionary (Unabridged) (1993).

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"Accreditation materials" and "similar materials" are also exempted, but "similar materials" must be "of the same nature or class as those named in the specific list." *Ex parte Mitchell*, 989 So. 2d 1083, 1091 (Ala. 2008) (stating the rule of *ejusdem generis*). Thus, for example, peer review proceedings to grant or retain a physician's staff privileges are in the nature of credentialing the physician. A hospital's ordinary personnel files, its bylaws, and its rules and regulations are not prepared for presentation to an accreditation agency or a credentialing body and so are outside the scope of § 22-21-8.

- 105. *Id*.
- 106. *Id*.
- 107. *Id*.
- 108. *Id*.
- 109. *Id*.
- 110. Id. at 837.
- 111. *Id.* at 839. See, also, *Ex parte Fairfield Nursing and Rehabilitation Center, LLC*, 22 So. 3d 445 (Ala. 2009).
- 112. *Id.* at 245.
- 113. Id. at 230.
- 114. See Julius W. Cohn, J.D., David C. Start, M.D., *Medical Malpractice—Use of Hospital Records*, 22 Am. Jur. Proof of Facts 2d 1, § 10.3 (1980 and Supp. 2016) (cataloguing cases); see also Annot., William D. Bremer, "Scope and Extent of Protection from Disclosure of Medical Peer Review Proceedings Relating to Claim in Medical Mal-practice Action," 69 A.L.R. 5th 559 (originally published in 1999). The introduction shows that such statutes apply to matters presented to, evaluated by, and reviewed by medical review committees.
- 115. See ALA. CODE §6-5-333 (1975), pertaining to peer review committees, quality control committees and the like.
- 116. This was so, even though the Alabama Administrative Procedures Act requires that public agencies like the Dental Board must make all final orders, decisions and opinions available for public inspection and copying (except those expressly made confidential or privileged by statute or order of court). The supreme court nevertheless held that § 6-5-333(d) rendered privileged any Dental Review Board materials that constitute final orders.
- 117. 81 Am. Jur.2d Witnesses, § 502 Peer Reviews; Academic Peer Review Privilege–Medical or Healthcare Peer Review Privilege (Nov. 2015), states:

The peer review privilege was enacted to prohibit discovery of records of internal proceedings where one member of the healthcare profession presents evidence of negligence or incompetence against another. The purpose of the peer review privilege is to promote candor and foster aggressive critiquing of medical care by the provider's peers and to encourage healthcare professionals to monitor the competence and professional conduct of their peers in order to safeguard and approve the quality of patient care. But the privilege does not extend so far as to permit the concealment of routinely accumulated information. The peer review privilege must not be permitted to become a shield behind

which a physician's incompetence, impairment, or institutional malfeasance resulting in medical malpractice can be hidden.

118. *Ala. Code* 34-24-58 (1975), "Decisions, opinions, etc., of utilization review committee privileges" states:

(a) The decisions, opinions, actions and proceedings rendered, entered or acted upon in good faith and without malice and on the basis of facts reasonably known or reasonably believed to exist of any committee of physicians or surgeons, acting as a committee of the Medical Association of the State of Alabama, or any state, county or municipal medical association or society, or as a committee of any licensed hospital or clinic, or the medical staff thereof, undertaken or performed within the scope and function of such committee as legally defined herein shall be privileged, and no member thereof shall be liable for such decision, opinion, action or proceeding.

(b) Within the words and meaning of this section, a committee shall include one formed or appointed as a utilization review committee, or similar committee, or committee of similar purpose, to evaluate or review the diagnosis or treatment or the performance of medical services which are performed with respect to private patients or under public medical programs of either state or federal design, with respect to any physical or mental disease, injury or ailment or to define, maintain or apply the professional or medical standards of the association, society, hospital, clinic or medical staff from, by or for which it was appointed.

- Id., 154 So. 3d at 92, quoting George E. Newton, II, Maintaining the Balance: Reconciling the Social and Judicial Costs of Medical Peer Review Protection, 52 Ala. L. Rev. 723, 730 (2001).
- 120. Ex parte Qureshi, 768 So. 2d at 374. Quoting Humana Hospital Desert Valley v. Superior Court, 154 Ariz. at 400, 742 P.2d at 1386, quoting, in turn, Shelton v. Morehead Mem. Hosp., 318 N.C. 76, 347 S.E. 2d 824 (1986).
- 121. 789 So. 2d at 203 (citations omitted). The court arguably got off track in *Fairfield Nursing*, stating: "The language of § 22-21-8 does not require that a quality-assurance 'committee' exist, nor does it limit the privilege to materials created solely *at the direction of* such a committee." 22 So. 3d at 452 (emphasis in original). As shown above, § 22-21-8 *does* require that the materials in question have been prepared for, produced to or presented to an agency or body with an accreditation or quality assurance credentialing function. Although the *Fairfield Nursing* Court correctly noted that the word "committee" does not appear in § 22-21-8, it failed to take into consideration that § 22-21-8 pertains only to materials prepared for, produced to an accrediting or credentialing "agency or body."
- 122. United States v. Nixon, 418 U.S. 683, 710 (1974).
- Garner v. Wolfinbarger, 430 F.2d 1093, 1100 (5th Cir.), cert. denied, 401 U.S. 974 (1970), on remand, 56 F.R.D. 499 (S.D. Ala. 1971).
- 124. Id., 22 So. 3d at 448 citing Ex parte Coosa Valley; 789 So. 2d at 219-20 (citing Ex parte St. Vincent's Hosp., 652 So. 2d 225, 230 (Ala. 1994)). In Ex parte Coosa Valley Health Care, Inc., supra, the Supreme Court reiterated that a healthcare provider seeking to invoke the privilege of § 22-21-8 bears the burden of proving that the privilege exists and of the prejudicial effect any disclosure would have:

Coosa Valley also argues that the information at issue was not discoverable because, Coosa Valley says, it is "quality-assurance information" and is therefore privileged under § 22-21-8, Ala. Code 1975. However, as this court noted in *Ex parte St. Vincent's Hospital*, 652 So. 2d 225, 230 (Ala. 1994), the burden of proving that a privilege exists and proving the prejudicial effect of disclosing the information is on the party asserting the privilege. Coosa Valley has offered no evidence to show that the information sought was maintained for purposes of quality assurance or for any other purpose covered by § 22-21-8. Compare *Ex parte Qureshi*, 768 So. 2d 374 (Ala. 2000); *Ex parte Krothapalli*, 762 So. 2d 836 (Ala. 2000) (in each of those cases, the petitioner submitted evidence in the form of affidavits establishing that the information sought by the discovery requests was privileged). Accordingly, Coosa Valley did not meet its burden of proving that the information sought by the discovery requests was privileged. *Id.* at 219.

- 125. Id., at 448.
- 126. Ex parte Fairfield Nursing, 22 So. 3d at 450.
- 127. Sanders v. Smitherman, 776 So. 2d 68, 72 (Ala. 2000).
- Home Bank of Guntersville v. Perpetual Federal Sav. and Loan Ass'n, 547 So. 2d 840, 841 (Ala. 1989), quoting Williams v. Dan River Mills, Inc., 286 Ala. 703, 246 So. 2d 431 (1971).
- 129. Charles W. Gamble, Gamble's Alabama Rules of Evidence, § 510, p. 154 (1995).

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Handling Cruise Line Passenger Claims

By Gerald A. McGill

Caveat Counselor

The cruise line industry is the fastest growing segment of the vacation market.

The cruise industry estimates that 12 million Americans will take a cruise this year. This number will only increase in the future. Industry leaders plan on constructing more than 50 new ships in the coming five years.

In addition to the traditional Florida ports of departure and those on the U.S. west coast, Carnival Cruise Lines has regularly scheduled weekly cruises departing from Galveston and New Orleans.

From October 2004 through October 2011, Carnival Cruise Lines operated several of its vessels from Mobile. As an inducement to Carnival, the City of Mobile spent \$26 million to build a cruise passenger terminal downtown. When Carnival moved out its last ship, the "Elation," in October 2011, the terminal sat vacant. Recently, Carnival returned to Mobile with the "Fantasy," making four- and five-day cruises to Cozumel and Costa Maya or Progresso, Mexico.

As more and more people take cruises, particularly for the first time, shipboard accidents and injuries inevitably will occur. Common shipboard accidents range from slip-and-fall and trip-and-fall cases to injuries sustained while participating in planned activities either aboard ship or during shore excursions. Less frequent injuries are caused by shipboard emergencies like fire and collisions, and assault by crew members or fellow passengers, including sexual battery or rape. Food-borne illnesses are also quite common.

With all of the southern cruise points of departure within a oneday's drive from Alabama, it is highly likely that at some point in the future you may be consulted by The most important limitation from an attorney's point of view is that the cruise lines are allowed to limit the time for filing a claim against them to one year.

a client who was injured during a cruise. To those of you who are consulted, I say: *Caveat Counselor*.

Representing a cruise line passenger against any of the numerous cruise lines is not for the uninitiated. The cruise lines have become very efficient at limiting their liability for shipboard accidents and injuries. In the roughly 10 pages of fine print at the back of the ticket, there are numerous limitations on passengers' rights and disclaimers of responsibility.

No other industry has the power to amend the laws of the United States by contractual provisions, thereby reducing their liability and responsibility to the passengers that the cruise lines carry.

Each cruise line posts its "ticket contract" on its website. In this article, I have referred to the Carnival Cruise Lines ticket contract because Carnival is the largest of the cruise lines and often for the cruise industry.

The First Thing A Lawyer Must Do

If you are contacted by a potential client about a cruise injury, the first thing you must do is go to the particular cruise line's website, download the ticket contract and review it in its entirety.

The following are just some of the limitations and obligations that the passenger has agreed to when accepting the cruise ticket contract.

a) One-Year Limit to File Claims

The most important limitation from an attorney's point of view is that the cruise lines are allowed to limit the time for filing a claim against them to one year.¹ In addition, by another paragraph in the ticket, the cruise lines can require that you notify them in detail of your claim within six months from the occurrence of the injury or accident.²

b) Forum Selection Clauses

Next, the cruise lines are allowed to insert forum selection clauses within their tickets. For example, if you are injured on a Royal Caribbean or Celebrity Cruises vessel, you will be limited by a ticket provision to file suit only in the state or federal courts of Dade County (Miami), Florida. Carnival Cruise Lines, which is the largest cruise line company, goes even further in its forum selection clause. Carnival specifies that suit can be filed only in the Federal District Court for the Southern District of Florida located in Dade County (Miami), Florida. As incredible as this may seem, these forum selection clauses have been upheld by the courts. Other selected forums for some cruise lines are Seattle and Los Angeles.

Further, the actual choice of forum has nothing to do with where the passenger boards the ship. The United States Supreme Court, in upholding a forum selection clause, required a cruise passenger who boarded a Carnival Cruise ship in Los Angeles, and was injured of the Pacific coast of Mexico, to bring her suit against Carnival Cruise Lines in Miami.³

Cruise Lines Are Not Liable For Ship's Doctor's Malpractice

In addition to the shortened statute of limitations and the forum selection clauses, there are numerous other limitations on passengers' rights. In a case of first impression, the Florida Supreme Court, in February 2007, ruled that Carnival Cruise Lines was not vicariously liable for the malpractice of the ship's doctor on a 14-yearold passenger because the ship's doctor was deemed to be an independent contractor.⁴ The facts set out in the Florida Supreme Court's decision were that, in March 1997, the Carlisle family embarked upon a cruise aboard the Carnival cruise ship, The Ecstasy. During the cruise, 14-year-old Elizabeth Carlisle fell ill with abdominal pain, lower back pain and diarrhea. She was seen several times in the ship's hospital by the ship's physician, Dr. Mauro Nari. Over the course of several days, Dr. Nari repeatedly advised the Carlisles that Elizabeth was suffering from the flu and assured the Carlisles in response to their questions that it was not appendicitis.

Ultimately, the Carlisle family decided to discontinue their cruise and return home at their expense to Michigan. Elizabeth was diagnosed as having a ruptured appendix. Her appendix was removed, but as a result of the rupture and subsequent infection, Elizabeth was rendered sterile.

The Florida Supreme Court reviewed what it considered to be controlling precedent in maritime law, including a statute enacted by Congress in 1882 dealing with the duty of late 19th century carriers to employ a competent and qualified physician for the benefit of passengers⁵ and a 1943 decision of the United States Supreme Court. The Florida Supreme Court concluded that the cruise line was not vicariously liable for the medical malpractice committed on a passenger by the shipboard doctor.⁶ The court noted that the only way a cruise line could be held liable was if an injured passenger could show that the cruise line was negligent in the hiring of the doctor. This is an extremely difficult burden to meet.

Even worse, most ship's doctors are not American citizens and it can be extremely difficult to get jurisdiction over them in an American court. In a case in the United States District Court for the Southern District of Florida, the plaintiff, Richard Laux, and his wife, sued Carnival Corporation d/b/a Carnival Cruise Lines, and Dr. Dianne Nichol, for damages arising out of medical care and treatment provided the plaintiff, Richard Laux, while he was a passenger aboard the Carnival Cruise vessel *Triumph*.

The facts in the case were that on June 19, 2004, plaintiffs boarded the Carnival cruise ship *Triumph* at the Port of Miami as passengers on a one-week cruise. The defendant, Dr. Nichols, was an Australian citizen licensed to practice medicine in Australia, who was employed by Carnival as the doctor on that vessel.

Late in the evening of June 23, 2004, and the early morning of June 24, 2004, while the *Triumph* was outside Florida's territorial boundaries, plaintiff Richard Laux went to the infirmary with complaints of a severe headache, loss of consciousness, involuntary passing of urine, facial tics and expressions, vomiting and subsequent combative behaviors. Dr. Nichol examined Mr. Laux and diagnosed the episode as a side effect from taking Viagra.

In addition to this visit, the plaintiffs claim that on June 26, 2004, when the *Triumph* returned to the Port of Miami, Mr. and Mrs. Laux again consulted with Dr. Nichol since Mr. Laux felt he was getting worse. Dr. Nichol advised Mr. Laux to wait and see his treating physicians at home in Pennsylvania. She did not re-examine him and would not let him stay on a cot in the infirmary until it was time for Mr. Laux to disembark.

Back in Pennsylvania, Mr. Laux's treating physicians determined that he had suffered from a brain bleed which should have had immediate medical attention.

On August 17, 2005, the plaintiffs filed a complaint against Carnival and Dr. Nichol for damages based on the negligent diagnosis and treatment of Mr. Laux. Dr. Nichol filed a motion to dismiss the complaint for lack of personal jurisdiction.

In her motion to dismiss, Dr. Nichol stated that she was a citizen of Australia, resided in Australia and was a medical doctor



licensed to practice in Australia. She further alleged that she was not a resident of Florida, maintained no accounts in Florida, conducted no business in Florida and was not engaged in any activities within Florida.

In Florida it is clear that courts have personal jurisdiction over medical malpractice torts that occur within Florida's territorial waters. In the instant case, there was a dispute as to whether any alleged malpractice occurred in Florida's territorial waters. The court indicated that had the malpractice taken place solely outside of Florida's territorial waters, there would be no basis for personal jurisdiction over the doctor in Florida courts. However, because the plaintiffs claimed that they spoke with the doctor and were given medical advice while the ship was in the port of Miami, which Dr. Nichol denied, the circuit judge referred the matter to the magistrate for an evidentiary hearing. The magistrate submitted a report and recommendation that the court deny the motion to dismiss on the basis that the testimony of Mrs. Laux and her daughter, Katie Laux, was compelling and credible that Mr. Laux did see Dr. Nichol on June 26, 2004 while the ship was moored in Ft. Lauderdale, Florida. However, if Dr. Nichol had merely seen Mr. Laux on June 23 and June 24, 2004, while the Triumph was outside Florida's territorial boundaries, then there would be no basis for personal jurisdiction over Dr. Nichol.⁷

Sexual Battery By Another Passenger

In another case in the United States District Court for the Southern District of Florida, the plaintiff, In Florida it is clear that courts have personal jurisdiction over medical malpractice torts that occur within Florida's territorial waters.

Erin Lynn Baker, sued Carnival Cruise Corporation, Carnival Cruise Lines and Denie and Shelley Hiestand, husband and wife, alleging that the Hiestands sexually abused her and that the cruise line was liable for negligence and breach of contract arising out of the serving of drinks to the passengers who later sexually abused her.

The plaintiff alleged that on June 16, 2005, while onboard the Carnival cruise ship *Destiny*, the plaintiff and some friends were in one of the ship's bars tended by *Destiny* crew members. They were joined by Mr. and Mrs. Hiestand, and alcoholic drinks were served to all. When taking another order of drinks, the waiter asked whether he should make the drinks stronger, and Mr. Hiestand replied in the affirmative.

Baker alleged that the Hiestands seemed to have added something to her drink, already made stronger by the waiter, which caused her to be rendered semiconscious. The Hiestands then picked up and carried the obviously impaired plaintiff to their cabin. The wait staff knew that the Hiestands were taking Baker to their own cabin. In the Hiestands' cabin, Baker was for several hours sexually assaulted, abused and raped by the two of them.

Baker eventually regained consciousness and struggled away from the Hiestands' cabin. After waiting several hours for the ship's infirmary to open, Baker was attended by the nurse and physician on duty, who performed only a perfunctory examination and prepared a rape kit. The nurse and physician did not take a complete history from Baker and did not conduct tests to confirm that Baker had been drugged. They also provided no counselling to Baker. Baker then provided a lengthy written statement to the ship's security and turned over two notes written to her by Ms. Hiestand following the assault. The security department did not interview the Hiestands, although they knew the Hiestands were leaving the ship to stay in Aruba. A security officer advised Baker that the FBI would be given the materials collected onboard and would investigate the matter.

Baker disembarked in Aruba on June 17 to return home, and left her contact information with the ship's security officer so that the FBI could contact her to further investigate the matter. No one advised Baker that if she disembarked in Aruba, before returning to the home port of Puerto Rico, an investigation by the authorities would be impaired. Yet, Carnival later claimed that her leaving precluded an investigation. Carnival also claimed it lost the rape kit.

Baker brought claims against Carnival for negligence and breach of contract. The cruise line moved to dismiss the case on the basis that it did not violate any duty to the plaintiff, since it did not have an obligation to ensure the passenger's safety. The court said that "... taken as true, Baker's allegations state a cause of action for breach of Carnival's duty to exercise reasonable care for the safety of its passengers." However, the court granted Carnival's motion to dismiss the contract claim on the grounds that there was no contractual provision guaranteeing a passenger safe passage and there was no contractual provision obligating the cruise line to report illegal activity. The court also questioned whether or not the negligence claims were supported by the law.8

Sexual Battery By a Cruise Line Employee On a Passenger

The United States Circuit Court for the Eleventh Circuit considered three United States Supreme Court cases in determining that a cruise line has a non-delegable duty to protect its passengers from crew member assaults and therefore the cruise line was strictly liable for crew member assaults on its passengers during the cruise.

The case arose out of a sexual battery of a cruise passenger by a cruise line employee while at a port-of-call in Bermuda.9 The plaintiff was a passenger on the *M/V Zenith* for a one-week round trip cruise from New York to Bermuda. As is customary on cruise ships, the plaintiff was assigned to the same dining table at every meal, and was served by the same waiter at every meal. The waiter recommended a disco club that he frequently visited for the plaintiff and her friends to visit while in Bermuda. The plaintiff and her friends went to the disco club and "hung out" with the waiter and several other crew members. After the club closed, the waiter and the plaintiff walked toward the ship. However, the two walked past the ship to a public park where the waiter forced nonconsensual sex on the plaintiff.

The Court recognized that the sexual battery took place on land and not aboard the cruise vessel and said "this case may represent the outer boundaries of admiralty jurisdiction over torts." However, the Court stated that because destinations or ports of call are not only integral to but frequently are the main attraction of cruises, a sexual battery of a passenger by a crew member at a port-of-call satisfied the requirements for admiralty jurisdiction.

Cruise Lines Not Liable for Shoreside Excursions

Another clause in the ticket specifies that shoreside excursions are performed by independent contractors, thus relieving the cruise lines of any responsibility for injuries incurred.¹⁰

Carnival Cruise Lines tickets contain a provision in Paragraph 11(a) and 11(b) found on page 6 of the contract:



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11. <u>INDEPENDENT</u> <u>CONTRACTORS, SHORE</u> <u>EXCURSIONS AND</u> <u>OTHER SERVICES</u>

(a) Guest acknowledges that all Shore excursions/tours (whether conducted in the water, on land or by air), airline flights and ground transportation, as well as the ship's physician, and on board concessions (including but not limited to, the gift shops, spa, beauty salon, fitness center, golf and art programs, video/snorkel concession) are either operated by or are independent contractors. Even though Carnival shall be entitled to collect a fee and earn a profit from the ticketing or sale of such services by such persons or entities, Carnival neither supervises nor controls their actions, nor makes any representation either expressed or implied as to their suitability. Carnival, in arranging for the services called for by the physician or nurse, all on board concessions, all shore excursion/tour tickets, all pre and post cruise airline flights or other transportation off of the ship and its tenders, does so only as a convenience for the Guest and Guests are free to use or not use these services. Guest agrees that Carnival assumes no responsibility, does not guarantee performance and in no event shall be liable for any negligent or intentional acts or omissions, loss, damage, injury or delay to Guest and/or Guest's baggage, property or effects

in connection with said services. Guests use the services of all independent contractors at the Guest's sole risk. Independent contractors are entitled to make a proper charge for any service performed with respect to a Guest.

(b) Guest acknowledges that the ship's masseuse, barber, hair dresser, manicurist, fitness or golf instructor, videographer, art auctioneer, gift shop personnel, wedding planners or other providers of personal services are employees of independent contractors and Carnival is not responsible for their actions. Guest further acknowledges that although independent contractors or their employees may use signage or clothing which contains the name "Carnival" or other related trade names or logos, the independent contractor status remains unchanged. Independent contractors, their employees and assistants are not agents, servants or employees of Carnival and have no authority to act on behalf of Carnival.

Thus, Carnival takes the position that they are not responsible for any of the shoreside activities even when those activities take place at an island in the Bahamas solely owned by Carnival Cruise Lines. To further continue the hypocrisy, the cost of these shore excursions are generally booked and paid for through the cruise ship offices.

Finally, a person who is injured on one of the shore excursions, whether on a jet ski, banana boat or other vessel or activity, will usually find that they have signed a release prior to taking the particular boat ride or activity and are left with their only option being to bring suit against a foreign corporation in the country of incorporation.

Limitations on Baggage Claims

Many of the cruise lines limit their liability for baggage, jewelry or other personal effects with the presumption that any one bag is limited to \$50 or \$100 per cabin, no matter how many bags, unless a declaration of a greater value is made prior to boarding the ship and a premium is paid for the additional coverage. A \$100 limitation was upheld on claims being asserted by two passengers for \$250,000 and \$150,000 respectively for loss of jewelry during a two-week cruise aboard the Oueen Elizabeth II. The ticket clause had a \$100 limitation unless a higher value was declared upon boarding the vessel. A higher value was not declared and partial summary judgment and limitation was entered in favor of Cunard Lines, who owned and operated the Queen Elizabeth II.11

Right to Skip Ports, Change Itinerary

Additionally, there are clauses inserted that give the ship the right to change its itinerary at any time. Many Alabamians might remember the New Year's "Cruise to Nowhere" that departed from Mobile several years ago. The Carnival cruise was supposed to go from Mobile to Cozumel, Mexico
and return. However, because of problems with one of its engines, which the cruise line knew about before sailing, the vessel never attempted to go to Cozumel. Instead, 1,700 passengers who were booked for the sold-out voyage got to cruise in the Gulf of Mexico for four days about 60 miles off the coast of Pensacola. The vessel never made any of the ports scheduled in Mexico. When the disappointed passengers consulted their tickets, they found that another fine-print paragraph allowed the ship to deviate from its itinerary and skip making any port.¹²

No Claims for Emotional Distress

Even in the absence of the paragraph in the ticket allowing the ship to deviate from its itinerary and skip making any port, another provision of the ticket probably would have protected the cruise line. Paragraph 12(d) at page 6 specified:¹³

Carnival shall not be liable to the passenger for damages for emotional distress, mental suffering/anguish or psychological injury of any kind under any circumstance, except when such damages were caused by the negligence of Carnival and resulted from the same passenger sustaining actual physical injury, or having been at risk of actual physical injury, or when such damages are held to be intentionally inflicted by Carnival.

This virtually eliminates any claim for cruises where the toilets don't work, avoidable rough weather is encountered, ports of call are cancelled or anything else that turns a voyage into a miserable experience.

Right to Put Ill or Injured Passenger off Vessel

Finally, and probably most frightening to passengers aboard a cruise ship, should a passenger become disabled while on the cruise, either because of injury or illness, the passenger, and a guardian of a minor, may be put off the vessel in some Third World port.

Betty and Ronald Coleman were sailing on a Panama Canal cruise aboard the NCL Norwegian Pearl when Mr. Coleman contracted norovirus, generally a food-borne illness. Mr. Coleman was described in a television news video as "... so sick that he could not sit up even to sign a paper," and was obviously so ill "NCL did not want him on its cruise ship."

When the

disappointed passengers

consulted their tickets,

they found that another

fine-print paragraph

allowed the ship to deviate

from its itinerary and skip

making any port.

NCL put the Colemans ashore in Cartegena, Colombia without contacting the elderly couple's adult son, even though they listed him as the emergency contact on the paperwork the cruise line required them to complete.

The couple's son first learned of his parents' situation after receiving a frantic call from his mother, who did not know where she was.

NCL subsequently told him that she was still on the cruise ship. Finally, her son had to contact the State Department to locate his parents.

NCL issued a press release sidestepping the norovirus issue, denying responsibility for not telling the family of the emergency and claiming the Colemans were "appreciative" of the cruise line agent's assistance ashore in Colombia.

What Can You Do

So what is a member of the Alabama bar to do when consulted by a potential client that has suffered an injury onboard a cruise ship? Because the case can most likely be brought only in Florida, it will be necessary to contact a Florida attorney who handles cruise line cases. From prior experience, I can assure you that any effort to settle directly with the cruise lines can only be handled on a pennieson-the-dollar basis. The cruise lines and their attorneys know that the limitations put on the bringing of claims by their passengers have been upheld in the courts and, in

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many cases, prove to be such an onerous burden that passengers do not bother with attempting to bring claims, particularly for less serious, but otherwise compensable injuries. This is particularly true when the passengers realize, generally after consultation with an attorney, that since the claim has to be filed in Miami, the clients will have to make at least one trip to Miami and possibly two or three if the case is actively litigated. Since the case is filed in Miami, the cruise lines insist on the plaintiffs' depositions being scheduled in Miami, and generally ask for a medical examination to be conducted in Miami using a physician of the cruise line's choice who will be available to testify live at trial.

Fortunately for an out-of-state attorney referring cases to a Florida attorney for handling, the Florida bar recognizes a 25 percent above-the-board referral fee to the referring attorney without the necessity of the referring attorney participating in the case in any manner. Unfortunately, because cruise line cases are tenaciously defended by the cruise lines' attorneys, many Florida attorneys who would otherwise handle cases are only willing to handle referrals on a reduced referral-fee basis.

Conclusion

Although cruises can be very enjoyable and are often a good value, should you become injured while on a cruise, your ability to be compensated is very limited, except in the most serious cases. This is particularly galling since most cruise lines are of foreign registry and pay very little in the way of taxes for the billions of dollars that they take in each year. Congress, of course, could change the laws regulating the cruise lines to put cruise line passengers on a more even footing, but until that day occurs, cruise line passengers are pretty much at the mercy of the cruise lines.

Endnotes

- 1. Authority for the six-month notice of claim provision contained in the passenger ticket is found in 46 USC Appx. 183(b)(a) which reads in part: "It shall be unlawful . . . to provide by . . . contract . . . a shorter period for giving notice of our filing claims for loss of life or bodily injury than six months." Authority for the one-year limitation contained in the passenger ticket is also found in 46 USC Appx. 183(b)(a), which provides in pertinent part: "It shall be unlawful . . . to provide by contract ... a shorter period for ... the institution of suits . . . than one year." The 1980 Uniform Statute of Limitations for Maritime Torts, 46 USC Appx. Section 763(a) provides a three-year limitation for maritime torts, but does not invalidate the one-year ticket limitation. State statutes of limitations do not apply.
- 2. Paragraphs 13(a) and (b) from page 7 of a 6-page ticket contract from Carnival Cruise Lines is printed below in the actual size print from the Carnival ticket contract.

13. JURISDICTION, VENUE, ARBITRATION, TIME LIMITS FOR CLAIMS AND GOVERNING LAW

(a) Carnival shall not be liable for any claims whatsoever for personal injury, illness or death of the guest, unless full particulars in writing are given to Carnival within 185 days after the date of the injury, event, illness or death giving rise to the claim. Suit to recover on any such claim shall not be maintainable unless filed within one year after the date of the injury, event, illness or death, and unless served on Carnival within 120 days after filing. Guest expressly waives all other potentially applicable state or federal limitations periods.

(b) Carnival shall not be liable for any claims whatsoever, other than for personal injury, illness or death of the Guest, unless full particulars in writing are given to Carnival within 30 days after the Guest is landed from the Vessel or in the case the Voyage is abandoned, within 30 days thereafter. Legal proceedings to recover on any claim whatsoever other than for personal injury, illness or death shall not be maintainable unless commenced within six months after the date Guest is landed from the Vessel or in the case the Voyage is abandoned, within six months thereafter, and unless served upon Carnival within 120 days after commencement. Guest expressly waives all other potentially applicable state or federal limitation periods for claims which include, but are not limited to, allegations concerning any and all civil rights, the ADA, trade practices and/or advertising.

- 3. The leading case standing for the proposition that forum selection clauses are enforceable is *Carnival* Cruise Lines, Inc. v. Shute, 499 US 585, 111 S.Ct. 1522, 113 L.Ed. 2nd 622 (1991). The Shutes, a Washington state couple, purchased passage on a ship owned by Carnival Cruise Lines, a Floridabased cruise line. Carnival sent the Shutes tickets containing a clause designating courts in Florida as the agreed-upon forum for the resolution of disputes. The Shutes boarded the ship in Los Angeles, and while in international waters off the Pacific coast of Mexico, Mrs. Shute suffered injuries when she slipped on a deck mat during a guided tour of the ship's galley (kitchen). The Shutes filed suit in the United States District Court for the Western District of Washington. Summary judgment was granted in that venue for Carnival Cruise Lines based upon the forum selection clause. Eventually, the case was decided by the U.S. Supreme Court, which ruled that the forum selection clause was valid.
- Carnival Corporation v. Darce Carlisle, Florida Supreme Court. No. SC 04-393 decided February 15, 20076. See also Walsh v. NCL (Bahamas) Ltd., 466 F.Supp.2d 1271 (S.D.Fla. 2006).
- 5. As the Florida Supreme Court noted in footnote 7 to its opinion: The Act of Congress of August 2, 1882, 22 Stat. 186, *repealed* by Pub.L. 98-89, Section 4(b), 97 Stat. 599-600 (1983) set forth the duty of late 19th-century carriers to employ a competent and qualified physician for the benefit of the passengers. The court in *O'Brien* interpreted that duty to include both hiring a competent physician and providing the necessary instruments and medical supplies that the physician would need in order to exercise the craft of providing medical treatment. *O'Brien* 28 N.E. at 267.
- 6. The Florida Supreme Court cited *DeZon v. American President Lines, Ltd.,* 318 US 660 (1943), which decided only that the ship owner could be held vicariously liable under the Jones Act for harm to a seaman caused by the negligence of the ship's doctor, but traditionally ship owners had not been found liable to passengers because the medical treatment was business between the doctor and the passenger rather than a fulfillment of the doctor's duty to the ship.

- 7. *Laux v. Carnival Corp.*, 470 F.Supp. 2d 1379 (S.D.Fla. 2007).
- The order on Carnival's motion to dismiss was entered on December 5, 2006. *Baker v. Carnival Corporation*, Case No. 06-21527 (S.D.Fla. 2006).
- 9. *Doe v. Celebrity Cruises, Inc.*, 394 Fed.3d 891 (11th Cir. 2004).
- 10. A copy of the Carnival contract, page 6, paragraph 11, is shown in its actual size:

11. INDEPENDENT CONTRACTORS, SHORE EXCURSIONS AND OTHER SERVICES

(a) Guest acknowledges that all Shore excursions/tours (whether conducted in the water, on land or by air), airline flights and ground transportation, as well as the ship's physician, and on board concessions (including but not limited to, the gift shops, spa, beauty salon, fitness center, golf and art programs, video/snorkel concession) are either operated by or are independent contractors. Even though Carnival shall be entitled to collect a fee and earn a profit from the ticketing or sale of such services by such persons or entities, Carnival neither supervises nor controls their actions, nor makes any representation either expressed or implied as to their suitability. Carnival, in arranging for the services called for by the physician or nurse, all on board concessions, all shore excursion/tour tickets, all pre and post cruise airline flights or other transportation off of the ship and its tenders, does so only as a convenience for the Guest and Guests are free to use or not use these services. Guest agrees that Carnival assumes no responsibility, does not guarantee performance and in no event shall be liable for any negligent or intentional acts or omissions, loss, damage, injury or delay to Guest and/or Guest's baggage, property or effects in connection with said services. Guests use the services of all independent contractors at the Guest's sole risk. Independent contractors are entitled to make a proper charge for any service performed with respect to a Guest.

(b) Guest acknowledges that the ship's masseuse, barber, hair dresser, manicurist, fitness or golf instructor, videographer, art auctioneer, gift shop personnel, wedding planners or other providers of personal services are employees of independent contractors and Carnival is not responsible for their actions. Guest further acknowledges that although independent contractors or their employees may use signage or clothing which contains the name "Carnival" or other related trade names or logos, the independent contractor status remains unchanged. Independent contractors, their employees and assistants are not agents, servants or employees of Carnival and have no authority to act on behalf of Carnival.

- 11. Hecht v. Cunard Line Ltd., 1982 AMC 656 (S.D.N.Y. 1981).
- 12. Paragraph 7(d) at Page 4 of the Carnival ticket contract provides in pertinent part: "The vessel shall be entitled to leave and enter ports . . . to return or enter any port at the Master's discretion and for any purpose and to deviate in any direction or for any purpose from the direct or usual course and to omit or change any or all port calls, arrival and departure times, with or without notice, for any reason whatsoever included but not limited to . . . all such deviations being considered as forming part of and included in the proposed voyage. Carnival shall have no liability for any compensation or other damages in such circumstances."
- 13. As an example of the lobbying power of the cruise line industry, in 1996, *46 u.s.c. Appx*. 183c was amended to provide an exception for emotional distress, mental suffering or psychological injury. *46 U.S.C. Appx*. 183c(b). As a result of that amendment, a cruise line may incorporate an exculpatory clause in the ticket that relieves the cruise line from any liability for mental suffering, emotional distress or psychological injury except in extremely limited circumstances.

Gerald A. McGill



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

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

Indestruction of Survivorship Is Best for Your Client?

By Sam W. Irby

It is common for a client to ask a lawyer to prepare a deed

conveying real property to the client and his or her spouse in what the client calls "with right of survivorship." If the lawyer asks the client what the client means by "with right of survivorship," the client may often respond by saying, "When I die, I want my spouse to inherit automatically, without the need to probate." Alabama lawyers should be aware that preparing a deed to two or more individuals with so-called "right of survivorship" is much more complex than the client may realize. It is important that the lawyer discuss the issues with his or her client and advise the client regarding the different types of survivorship recognized by Alabama law and the effect that the different types may have on the rights of the owners of the real property.

In March 1983, Robert P. Denniston published an excellent article in *The Alabama Lawyer*.¹ In his article, Mr. Denniston discussed the law in Alabama concerning the complex issues pertaining to indestructible and destructible survivorship of real property. The purpose of this article is to revisit some of the history of Alabama law pertaining to survivorship and to discuss the key issues in advising a client on what form of survivorship is best for the client to use in a deed.

What Is Survivorship?

Joint tenancy at common law was a form of ownership providing that a deed or conveyance to two or more people as joint tenants, if drafted properly, resulted in each joint tenant being seized of a share of the ownership of the property while at the same time each owning the whole. The joint tenants shared rights in the real property during their lives and upon the death of one of them, the interest of the deceased joint tenant terminated without the need to probate.²

The interest in the property of a deceased person ceases upon his or her death.³ When title is taken by two or more people as joint tenants with rights of survivorship, each joint tenant owns an undivided onehalf interest for life while at the same time a contingent remainder in the whole, and the interest in the property of a deceased person ceases upon his or her death. The *Fretwell* court held that when title

is held as joint tenants with rights of survivorship, the surviving joint tenant becomes the absolute owner of the property upon the death of the co-tenant, because, by virtue of the deed, the survivor does not acquire title through the deceased.⁴ The property described in a deed to joint tenants with rights of survivorship will become the property of the survivor upon the death of one of the joint tenants.⁵

What Is Tenancy in Common?

Tenancy in common at common law was generally described as an ownership by two or more persons, in equal or unequal undivided shares, with each person having an equal right to present possession of the whole property.⁶ Tenants in common share a single

Upon the death of one of the tenants in common, there is no right of survivorship in the surviving tenants in common.

unity of possession and if the single unity of possession does not exist, the estate is not a tenancy in common.⁷ Each tenant in common has a separate undivided interest with the other tenants in common.⁸ Tenants in common are not considered to own the entirety of a parcel; rather each tenant in common owns an undivided part of the parcel. Each tenant in common has the right to convey or encumber his or her interest without the consent or approval of the other tenants in common.⁹ Upon the death of one of the tenants in common, there is no right of survivorship in the surviving tenants in common. The interest of the deceased tenant in common descends to the benefici-

> aries under his or her will or by the laws of intestacy without affecting the ownership interests of the other tenants in common.

Early Alabama Case Law

At English common law, when a deed conveyed to two or more persons as joint tenants there was a

presumption of joint tenancy with right of survivorship.¹⁰ To create a joint tenancy with right of survivorship, four unities of title had to be present, namely, the unities of time, title, interest and possession. Any event that destroyed one of these unities destroyed the joint tenancy.¹¹ All joint tenants must have taken title by the same instrument, at the same time, with the same share and all joint tenants would have the same undivided right of possession to the property.¹² If these four unities of title were present, a joint tenancy with right of survivorship and not tenancy in common was presumed, and it was not necessary to express intent to create survivorship.¹³ For example, at English common law, a deed from a grantor to a grantee reciting that the deed was intended to create a joint tenancy between them would not have the element of unity of time and, therefore, would not have created a joint tenancy with right of survivorship.

Under earlier Alabama case law, a joint tenancy could be destroyed by the conveyance of the interest of one of the joint tenants.¹⁴ Following the creation of a joint tenancy, any subsequent conveyance by one of the joint tenants would destroy the joint tenancy and a tenancy in common would result.¹⁵

The common law presumption of joint tenancy was abolished in Alabama. The original version of the law, now codified as *Ala. Code*, §35-4-7 provided that, when one joint tenant dies, his or her interest does not survive to the other joint tenants. In 1945, the statute was amended to provide that this statutory presumption favoring tenancies in common can be overcome by clear language in a deed that a right of survivorship is intended. For a discussion of the history of the law in Alabama pertaining to join tenancies and tenancies in common, *see* Durant and the 1983 article by Robert P. Denniston.¹⁶

The courts in Alabama have ruled that unity of time is no longer required in order to create a joint tenancy.¹⁷ Therefore, a deed by a grantor to a grantee which clearly expresses an intention to create joint tenancy with right of survivorship in the grantor and grantee is now sufficient to create joint tenancy with right of survivorship. The *Germaine* court stated that *Ala*. *Code*, §35-4-7 requires the intent of survivorship to be expressed in the instrument of conveyance and eliminated the common law requirement of unity of time.

1983 Robert P. Denniston Article

In his 1983 Alabama Lawyer article, Robert Denniston discussed the issues and cases pertaining to "destructible" and "indestructible" survivorship. Mr. Denniston brought to the attention of the bar the cases of *Bernhard v. Bernhard*, *Nunn v. Keith* and *Durant v. Hamrick*.¹⁸

In the *Bernhard* case, a husband and wife took title to property as joint tenants with right of survivorship. The husband filed a bill seeking to have the property sold for division. The *Bernhard* court stated that the sole question to be decided was whether property held under a joint tenancy with right of survivorship may be sold for division at the insistence of one of the tenants over the objection of the other. The *Bernhard* court further stated that joint tenancies as known to the common law have been abolished by statute, but that if survivorship is clearly stated as an incident to the estate of tenancy in common, then a right of survivorship is allowed. The *Bernhard* court ruled that the parties had intended to create a tenancy in common with right of survivorship, with each party owning an undivided one-half interest for life, plus the right in the survivor to own the entire interest by way of contingent remainder. The *Bernhard* court further ruled that there can be no sale for division over the objection of one tenant during their joint lives and that a division may be had only with the consent of all grantees.

In the Nunn case, a husband and wife conveyed real property to themselves and their grandson as joint tenants with right of survivorship. The wife died and the husband remarried. The husband and his new spouse conveyed a one-half undivided interest in the real property to themselves for their joint lives with the remainder to the survivor. The Nunn court stated that the question before it involved the determination of the type of estate was created by the 1949 deed. The Nunn court overruled Bernhard and stated that Ala. Code, §35-4-7 was intended to and did revive the common law joint tenancy in Alabama. The court explained that the statute required that an intent to create a right of survivorship must be clearly expressed and clarified that the statute eliminated the common law unity of time formerly required to create a joint tenancy. The Nunn court further ruled that joint tenancy is destructible by one co-tenant and therefore the deed conveying one-half undivided interest to the husband and his second wife destroyed the joint tenancy. Consequently, upon the death of the husband the second wife became the sole owner of one-half interest and a tenant in common with the grandson. Although Nunn overturned Bernhard, the overruling effect of Nunn was later held to be prospective only, and applicable only to deeds created after the decision in Nunn.¹⁹ This created what the courts call the "Bernhard window." The Bernhard ruling continues to apply to deeds creating joint tenancies with right of survivorship executed between the date of the Bernhard decision (July 15, 1965) and the date of the Nunn decision (November 9, 1972). A deed created within the "Bernhard window" results in a joint tenancy that is indestructible.²⁰

In the *Durant* case, a husband and wife took title by deeds "as tenants in common and with equal rights and interest for the period or term that the said Grantees shall both survive and unto the survivor of the said Grantees, at death of the other...." Prior to the husband's death, the wife deeded her interest to her son subject to a life estate. The argument was made that *Nunn* ruled that joint tenancies with right of survivorship have been revived if clearly stated in the deed, that a joint tenant could convey his or her interest and that

such a conveyance would destroy the joint tenancy and result in a tenancy in common between the owners. *Durant* held that although *Nunn* was correct, it did not apply to the facts in *Durant* because the deed in *Durant* created a tenancy in common with survivorship. A tenancy in common with survivorship is a tenancy in common for life with a contingent remainder to the survivor. *Durant* also held that a tenancy in common

with right of survivorship is not destructible by a co-tenant. The *Durant* court stated: "We are persuaded that Alabama should likewise recognize a form of concurrent property ownership as tenants in common which provides for survivorship. This form of concurrent ownership can be characterized as creating concurrent life estates with cross-contingent remainders in fee; or a tenancy in common for life with a contingent remainder in favor of the survivor."

The result of these cases is that there are now two forms of survivorship in Alabama: joint tenancy with

right of survivorship, which is destructible, and tenancy in common with right of survivorship, which is indestructible keeping in mind the "*Bernhard* window."

Divorce, Sale for Division, Liens and Bankruptcy

In properly advising a client, the attorney should be aware of the cases pertaining to divorce, sale for division, liens against real property and bankruptcy.

Divorce

The Alabama courts have generally held that a divorce decree which is silent with respect to property held jointly with right of survivorship does not automatically destroy the existing survivorship provisions, but that if the parties submit themselves to the jurisdiction of the equity court for a divorce decree, then the court is empowered to supply the consent of the parties.²¹

In the case of *Porter v. Porter*,²² a husband and his first wife purchased a home under a 1963 deed as joint tenants with rights of survivorship. The husband and first wife were divorced pursuant to a 1976 divorce

The husband and his new spouse conveyed a one-half undivided interest in the real property to themselves for their joint lives with the remainder to the survivor.

decree that provided the first wife would have exclusive right to occupy the real property. The husband married a second wife and he remained married to the second wife until his death. The *Porter* court stated that the major distinction between a tenancy in common and a joint tenancy is that the interest held by tenants in common is divisible and descendible, whereas the interest held by joint tenants passes automatically to the last sur-

vivor. The second wife argued that because the divorce decree awarded the first wife exclusive occupancy of the real property, the first wife's exclusive possession of the property destroyed the unity of possession. Consequently, because the unity of possession had been destroyed, the joint tenancy was also destroyed resulting in a tenancy in common. The Porter court held that a divorce decree which is silent with respect to property held jointly with right of survivorship does not automatically destroy the existing survivorship provisions.

In the cases of *Summerlin v. Bowden* and *Owens v. Owens*,²³ the courts, relying on *Bernhard*, held that the circuit court has the power to adjust the ownership of property held by joint tenants who are parties to a divorce action when the parties invoke the jurisdiction of the equity court. The *Summerlin* court stated "... there can be no compulsory partition in the absence of consent of the tenants, except in those cases where the tenants have invoked the jurisdiction of the equity court in a divorce proceeding with regard to the property in question."

In the case of *Johnson v. Johnson*,²⁴ a question arose in a divorce action as to whether or not a husband and wife held title as joint tenants or tenants in common with right of survivorship. The *Johnson* court concluded that whether the husband and wife were joint tenants or tenants in common in the property was not dispositive. The *Johnson* court ruled that the parties had submitted themselves to the jurisdiction of the equity court for a divorce decree and when they did so had empowered the equity court to supply the consent of either party to a division of their property.²⁵

Sale for Division

The Alabama courts have held that a complaint for sale for division of land between joint owners or tenants in common is a matter of right.²⁶

In the case of *Granite Equipment Leasing Corporation v. Smith's Pride Foods, Inc.*,²⁷ a judgement debtor and his wife held title to real property as joint tenants with rights of survivorship. The question posed by the *Granite* court concerned the extent of execution available against the defendant's joint tenancy interest. The judgment debtor, relying on *Brown v.* Andrews,²⁸ contended that his interest in the joint tenancy was limited to a life estate. The *Brown* case, based on the *Bernhard* ruling, concluded that the two interests held by a joint tenant with right of survivorship are a life estate and a contingent remainder in the whole and that only the life estate is subject to execution. The

Granite court discussed the *Nunn* case observing that *Nunn* had expressly overruled *Bernhard*. The *Granite* court concluded that since *Nunn* expressed the current law in Alabama, there is no longer any reason to limit the leviable interest of a joint tenant to a life estate and that execution may proceed against the interest of the judgment debtor.

Liens and Bankruptcy

The bankruptcy courts have recognized the history of the *Bernhard* and *Nunn* cases and have ruled that the nature of the interest in property is to be determined by non-bankruptcy state law.²⁹

In the bankruptcy case of *In re Livingston*,³⁰ the Livingstons took

title by 1972 deed to real property "...for and during their joint lives, and upon the death of either of them, then to the survivor of them in fee simple, and to the heirs and assigns of such survivor." The Livingston court held that the 1972 deed to the Livingstons fell within the "Bernhard window" as a tenancy in common for life with cross-contingent remainders of survivorship and that such an interest was contemplated neither by Congress nor Alabama law as being embraced in the language in 11 U.S.C. §363(h). The Livingston court further held that the trustee could sell the debtor's complete interest, along with the nondebtor spouse's interest as a tenant in common, but that the trustee was not authorized by 11 U.S.C. §363(h) to force a sale of the non-debtor spouse's contingent remainder in survivorship. The Livingston court upheld the district court's ruling that a tenancy in common for life with a cross-contingent remainder

The argument is made that the onehalf interest in the property is actually non-existent due to the possibility that the debtor may predecease the owner of the other one-half interest.

of survivorship was not included within the range of estates laid out in 11 U.S.C. §363(h).

In the case of *In re Spain*,³¹ the debtor husband and non-debtor wife acquired title to a parcel of real property by 1973 deed "...for and during their joint lives and upon the death of either of them, then to the survivor of them in fee simple, together with every contingent remainder and right of reversion." The *Spain* court held that the 1973 deed created a joint tenancy with a destructible right of survivorship, not a tenancy in common with indestructible rights of survivorship, and the trustee was not prohibited under 11 U.S.C. §363(h) from selling the property.

> In the case of *In re Tibbetts*,³² the debtor husband and non-debtor wife had acquired real property by a 1965 deed which conveyed property to them "...as tenants in common, with equal interest for the period or term that said Grantees shall both survive, and unto the survivor of said Grantees at the death of the other...." The debtor husband and non-debtor wife were divorced and their 1989 divorce decree provided that the jointly owned home place would remain in the joint names of the parties, with right of survivorship, until the ex-wife remarried at which time the home place would be sold and the net proceeds equally divided between the parties. The Tibbetts court recognized the history

of the *Bernhard* and *Nunn* cases and the *In re Spain* and *In re Livingston* cases and ruled that the 1989 judgment of divorce converted the indestructible tenancy in common into a destructible joint tenancy which falls within the scope of 11 U.S.C. §363(h).

Tut Wynne, a prominent bankruptcy lawyer practicing in the United States Bankruptcy Court of the Southern District of Alabama, Mobile Division, informs the writer that it is the practice for some attorneys representing debtors to argue the position that the value of the debtors' interest in property held by tenancy in common with right of survivorship is less than the "fair market value." The argument is made that the one-half interest in the property is actually non-existent due to the possibility that the debtor may predecease the owner of the other one-half interest. The argument is further made that the older the debtor, the less value is in the debtor's life estate.

Recent Alabama Legislation

The Alabama legislature recently enacted *Ala*. *Code*, §30-4-17 that provides in part:

"...(b) Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage, divorce, or annulment, the divorce or annulment of a marriage:...

(2) severs the interests of the former spouses in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship transforming the interests of the former spouses into equal tenancies in common."

This statute does not speak specifically to tenancy in common with right of survivorship or to any of the issues addressed in this article. Only time will tell how the Alabama courts will interpret the provisions of this statute.

Suggested Language in Deeds

The drafter should be careful in drafting any deed and make sure that there is no conflict or ambiguity in the language between the granting clause, habendum clause and any other clauses in the deed. When conflicts exist in a deed, the courts often look to the granting clause to control.³³ All clauses in the deed should be consistent.

Suggested Language For Joint Tenants with Right of Survivorship

The following is an example of the language that can be used in a deed granting to joint tenants with destructible survivorship.

Granting Clause:

GRANT, BARGAIN, SELL AND CONVEY unto said Grantees, as joint tenants, and upon the death of either of them, to the survivor of said Grantees, in fee simple, subject to the provisions contained in this Warranty Deed, all that real property in the County of ______, State of Alabama, described as follows, to-wit:

Habendum Clause:

TO HAVE AND TO HOLD unto the said Grantees, during their joint lives, and upon the death of either of said Grantees, then to the survivor of said Grantees, and to the heirs and assigns of said survivor, in fee simple, FOREVER.

Warranty Clause:

And, except as to the above and taxes hereafter falling due, which are assumed by the Grantees, the Grantors, for the Grantors and for the heirs and assigns of the Grantors, COVENANT AND WAR-RANT to and with the said Grantees, the survivor of said Grantees, and the heirs and assigns of said survivor, that the Grantors are seized of an indefeasible estate in fee simple in and to said real property, and have a good and lawful right to sell and convey the same; that the Grantors are in quiet and peaceable possession of said real property; and that said real property is free and clear of all liens and encumbrances of every kind and nature whatsoever; and the Grantors do WARRANT AND WILL FOREVER DEFEND the title to said real property, and the possession of said real property, unto the said Grantees, the survivor of said Grantees, and the heirs and assigns of said survivor, against the lawful claims and demands of all persons whomsoever.

Suggested Language for Tenants in Common With Indestructible Survivorship

The following is an example of the language that can be used in a deed granting to tenants in common with indestructible survivorship.

Granting Clause:

GRANT, BARGAIN, SELL AND CONVEY unto the said Grantees, as tenants in common with equal interests during the period of their concurrent lives, and upon the death of either of said Grantees, the remainder to the survivor of said Grantees, in fee simple, subject to the provisions contained in this Warranty Deed, all that real property in the County of ______, State of Alabama, described as follows, to-wit:

Habendum Clause:

TO HAVE AND TO HOLD unto the said Grantees during their concurrent lives, and upon the death of either of said Grantees, to the survivor of said Grantees, and to the heirs and assigns of said survivor, in fee simple, FOREVER.

Warranty Clause:

And, except as to the above and taxes hereafter falling due, which are assumed by the Grantees, the Grantors, for the Grantors and for the heirs and assigns of the Grantors, COVENANT AND WARRANT to and with the said Grantees, the survivor of said Grantees, and the heirs and assigns of said survivor, that the Grantors are seized of an indefeasible estate in fee simple in and to said real property, and have a good and lawful right to sell and convey the said real property; that the Grantors are in quiet and peace-

able possession of said real property; and that said real property is free and clear of all liens and encumbrances of every kind and nature whatsoever; and the Grantors do WARRANT AND WILL FOREVER DEFEND the title to said real property, and the possession of said real property, unto the said Grantees, the survivor of said Grantees, and the heirs and assigns of said survivor, against the lawful claims and demands of all persons whomsoever.

Suggested Language for Tenants in Common Without Survivorship

The following is an example of the language that can be used in a deed granting to tenants in common without survivorship:

"...in drafting conveyances we must exercise great care to express in language that is clear and unambiguous as possible the intention of the parties."

Granting Clause:

GRANT, BARGAIN, SELL AND CONVEY unto the said Grantees, subject to the provisions contained in this Warranty Deed, all that real property in the County of ______, State of Alabama, described as follows, to-wit:

Habendum Clause:

TO HAVE AND TO HOLD unto the said Grantees, and the heirs and assigns of said Grantees, in fee simple, FOREVER.

Warranty Clause:

And, except as to the above and taxes hereafter falling due, which are assumed by the Grantees, the Grantors, for the Grantors and for the heirs and assigns of the Grantors, COVENANT AND WARRANT to and with the said Grantees, and the heirs and assigns of said Grantees, that the Grantors are seized of an indefeasible estate in fee simple in and to said real property and have a good and lawful right to sell and convey the same; that the Grantors are in quiet and peaceable possession of said real property; and that said

real property is free and clear of all liens and encumbrances of every kind and nature whatsoever; and the Grantors do WARRANT AND WILL FOREVER DEFEND the title to said real property, and the possession of said real property, unto the said Grantees, and the heirs and assigns of said Grantees, against the lawful claims and demands of all persons whomsoever.

Conclusions and Recommendations

The courts in Alabama recognize two different types of survivorship, namely, a tenancy in common with right of survivorship commonly referred to as indestructible survivorship and a joint tenancy with right of survivorship commonly referred to as destructible survivorship. Under both forms of survivorship, upon the death of any individual grantee the interest will vest in the survivor or survivors. The client may think the drafting of the deed is very simple and it is convenient for a husband and wife to put both their names in the deed as so-called "joint tenants with rights of survivorship." However, the drafter of a deed containing survivorship language needs to be aware that it is far more complex than it may first appear. This is a confusing area of Alabama law. As Mr. Denniston said in his 1983 article, "…in drafting conveyances we must exercise great care to express in language that is clear and unambiguous as possible the intention of the parties."

A lawyer should discuss all of the issues addressed in this article with his or her client in order for the client to make an informed decision about what type of deed the client wants the lawyer to draft. Each situation is different and will depend on the facts and the relationship of the parties.

I thank Mr. Dennison for his excellent 1983 article in *The Alabama Lawyer* and Jesse P. Evans, III, author of the treatise "Alabama Property Rights and Remedies, 5th Edition" published by CLE Alabama. Both the 1983 article by Mr. Dennison and the treatise by Jesse Evans were an invaluable aide to me in my research and the drafting of this article.

Endnotes

- 1. Robert P. Denniston, *Joint Tenancy and Tenancy in Common of Real Property—The Gulf Separating Them*, THE ALABAMA LAWYER, March 1983.
- 2. Nunn v. Keith, 268 So. 2d 792 (1972).
- 3. Fretwell v. Fretwell, 218 So. 2d 138 (Ala. 1969); Bernhard v. Bernhard, 177 So. 2d 565 (Ala. 1965).
- 4. Fretwell, 218 So. 2d.
- 5. *Id*.
- Kellum v. Williams, 39 So. 2d 573 (Ala. 1949); Van Meter v. Grice, 380 So. 2d 274 (Ala. 1980).
- 7. Van Meter, 380 So.2d 274 (Ala. 1980); Shepard v. Mt. Vernon Lumber Co., 68 So. 880 (Ala. 1915).
- 8. Gore v. Gore, 34 So. 2d 580 (Ala. 1948).
- 9. Lee v. Lee, 122 So. 2d 139 (Ala. 1960).
- 10. Durant v. Hamrick, 409 So. 2d 731 (Ala. 1981).
- 11. Bernhard v. Bernhard, 177 So. 2d 565 (Ala. 1965).
- 12. Nunn v. Keith, 268 So. 2d 792 (Ala. 1972).
- 4 G. THOMPSON, COMMENTARIES ON MODERN LAW OF REAL PROPERTY Section 1775 (1979); 4
 A. R. POWELL, THE LAW OF REAL PROPERTY Section 602 (Rohan ed. 1979).
- 14. Nunn v. Keith, 289 Ala. 518, 268 So. 2d 792 (Ala. 1972).
- 15. Durant v. Hamrick, 409 So. 2d 731 (Ala. 1981).

- 16. *Id.* Denniston, *supra* note 1.
- 17. Germaine v. Delaine, 318 So. 2d 681 (Ala. 1975); Nunn, 268 So. 2d.
- Bernhard v. Bernhard, 177 So. 2d 565 (Ala. 1965); Nunn, 268 So. 2d; Durant, 409 So. 2d.
- 19. Jackson v. Fillmore, 367 So. 2d 948 (Ala. 1979); Bringhurst v. Hardin, 387 So. 2d 186 (Ala. 1980).
- 20. Nettles v. Matthews, 627 So. 2d 870 (Ala. 1993).
- 21. Porter v. Porter, 472 So. 2d 630 (Ala. 1985); Johnson v. Johnson, 446 So. 2d 622 (Ala. Civ. App. 1983); Summerlin v. Bowden, 240 So. 2d 356 (Ala. 1970).
- 22. Porter, 472 So. 2d.
- 23. Summerlin, 240 So. 2d; Owens v. Owens, 201 So. 2d 396 (1967).
- 24. Johnson v. Johnson, 446 So.2d 622 (Ala. 1983)
- 25. Killingsworth v. Killingsworth, 226 So. 2d 308 (Ala. 1969); Owens, 201 So. 2d.
- Paper v. Belk, 162 So. 2d 465 (Ala. 1964); Ragland v. Walker, 387 So. 2d 184 (Ala. 1980); Leonard v. Meadows, 88 So. 2d 775 (Ala. 1956); Meador v. Meador, 53 So. 2d 546 (Ala. 1951).
- 27. *Granite Equip. Leasing Corp. v. Smith's Pride Foods, Inc.*, 431 F. Supp. 490 (N.D. Ala. 1977).
- 28. Brown v. Andrews, 257 So. 2d 356 (Ala. 1972).
- 29. In re Livingston, 804 F.2d 1219 (11th Cir. 1986).
- 30. *Id*.
- 31. In re Spain, 831 F.2d 236 (11th Cir. 1987).
- 32. In re Tibbetts, 186 B.R. 140 (Bankr. S.D.Ala. 1995).
- 33. Priest v Ball, 62 So. 3d 1013 (Ala. 2010).

Sam W. Irby



Sam W. Irby practices with Irby & Heard PC in Fairhope. He has always practiced as a solo or small firm practitioner. He serves as a member of the Board of Bar Commissioners for the 28th Judicial Circuit (Baldwin County) and is chair of the Alabama State Bar Solo & Small Firm Section.



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

JULY 2016 BAR EXAM STATISTICS OF INTEREST

Number sitting for exam	. 483
Number passing exam (includes MPRE deficient and AL course deficient)	. 282
Bar Exam Pass Percentage	. 58.4 percent
Bar Exam Passage by School	
University of Alabama School of Law	. 89.5 percent
Cumberland School of Law	. 63.7 percent
Faulkner University Jones School of Law	. 68.1 percent
Birmingham School of Law	. 22.7 percent
Miles College of Law	. 8.3 percent
Certification Statistics*	
Admission by Examination	. 264
Admission by Transfer of UBE Score	. 6

 Admission by Transfer of UBE Score
 6

 Admission without Examination (Reciprocity)
 9

 Statistics of those individuals certified to the Supreme Court of Alabama for admission to the Alabama St

*Statistics of those individuals certified to the Supreme Court of Alabama for admission to the Alabama State Bar for the period May 5, 2016 through October 3, 2016. To be certified for admission, a candidate must satisfy all admission requirements as prescribed by the Rules Governing Admission to the Alabama State Bar.

For detailed bar exam statistics, visit https://admissions.alabar.org/exam-statistics.

ALABAMA STATE BAR FALL 2016 ADMITTEES

Stewart James Alvis Neema Amini Lindsey Elizabeth Anderson Hilaire Rena Armstrong Seth Ashmore Kimberly Kee Augustus-Tucker Jason Wilton Bailey Madeline Sandra Bailey Ruth Elisabeth Bailey Marissa Taji Bakhshian Daniel Bammerlin Charles Joseph Barber, II Cydney Leigh Barnes Robert Vance Baxley Hope Elizabeth Beaton Lana Bell Mary Elizabeth Belser Kaasha Danielle Benjamin Christie Michelle Birdwell Baxter Alexander Bishop Donald Edward Blankenship, Jr. Johnny Lee Blankenship, II Caroline Lucile Blaylock Andrea Nicole Bolton Joi Marguerite Boone Alfred B. Booth Sarah Falkson Bothma Jennifer Alison Bottomley Dustin Keith Bowen Jordan Reeves Brooks Alexander Joseph Brown Caitlin Clark Brown Hunter Brown Nicholas Elliott Brown Oslynn Tiara Brown William Z Brown

Matthew P. Burnick Claire Elizabeth Burns Michelle Diane Bursell Tara Bush Jeb Stuart Caffee Jamie Golden Campbell Derek Troy Cantrell Jordan Carlisle James Michael Carra, Jr. Anna Maurine Carroll Heather Faith Carter Lindsay Rane Carter Bryant Clark Cashion Jessica Bradi-Lee Catlin Cayman Leigh Caven Caroline Chambers Cease Sarah Christine Chamberlain Chase Aaron Chesser Caleb Gavin Christian Kristen Nicole Clark Frederick Darrell Clarke, III Mattie Ramonda Clay Lindsey Drexler Cochran Blake William Cole Gerald Patrick Coleman, Jr. Caroline Mills Collins Dana Michelle Cone Amanda Russell Coolidge Hoyt Wayne Copeland, II Ryan Nicole Corley Jason Bradley Cosper Chadwick Aulden Cotant Ezekiel Martin Couch Valerie Craig Ashley Lyn Crank Serena Rene Cronier

Candace Marie Crook Caleb N. Crotts Daniel S. Culpepper Blair Elizabeth Darnell Brian Joseph Davis, Jr. Elizabeth Parker Davis Madison Rae Davis Sheena M. Delaney Clinton Len DeWitt Scott Michael DeZouche Travis Albin Drost Fabiani Alberto Duarte William McKinley Dunn Daniel Dylan Dwyer Chase Sanford Eley Austin Brian Ellard Tracy Leigh Emond Hugh Raymond Evans, IV Laura Elizabeth Ezell Mark Stuart Feldman Rachel M. Ferguson Kiara Michelle Fiegi Ian Michael Fisher Joseph Paul Florence Mateo Forero-Norena Amy Marie Frederickson Holly Ann Free Eleanor Anise Friedman Leland Pate Frost Joshua Blake Fuller Megan Nicole Garcia Amanda June Gargus Candace Kay Garner James Williams Garrett Lindsay Rebekah Ghee Andrew Parke Gidiere

Caroline Emily Elise Gilbert William Bowman Givhan, Jr. Erin Godwin Michael Dana Goggans Natalie Suzanne Gooch Mac Bell Greaves, Jr. Jonathan Hayden Green Samuel Stephen Grimes, Jr. Whitley Danielle Hall Ravina Handa Erin Skylar Hardin Eli Joseph Hare Bradley C Hargett Mallory Katelyn Harper Sera Elizabeth Harrison Caleigh Miller Hart Collin Day Hatcher Catherine Roberts Hawley Jessica Ann Hayslip Amanda Hope Herren Brittany Renee Herring Kyle Michael Heslop Hannah Elisabeth Hicks Caleb Mark Hindman Joshua Jared Holcomb Pruitt Kyle Holcombe Andreka Hollins Yaima Coto Holzman Warner O'Daniel Hornsby Alison Dyan Howell Jimmy Thomas Howell, Jr. Jordan Nicole Hudspith John Mark Hundscheid Nikki Morgan Hussey

(continued on page 50)

(continued from page 49)

Matthew Brian Jager Forrest Hood James, IV James Garrett Jeffreys Valynda Alexandrea Jerome-Williams Raqueal Lavishia Jones John Raymond Juricich, Jr Jacob Joel Key Asher Langley Kitchings Steven Michael Knapp Elizabeth Marie Knoblock Jonathan Ryan Koza Laura Jean LeCroy Katie Blaylock Lee Katherine Hoyt LeNoir Leia Tatum Leonard Ruth Roberts Lichtenfeld Daniel Lopez Rubio Mark Aaron Loudon-Brown Christopher Cameron Macon Zachary Allen Madonia Jason Bernard Malone Mary Kathryn Mangan John David Marsh Logan Matthews Jessica McKinney Robert Brook Meadows, III Jessica Machelle Meeks Leah Elizabeth Megginson William Randolph Merchant Amy Elizabeth Miller Lauren Joyce Miller Kyle Milo Megan Rhianne Mitchell Kayleigh Cheyenne Mohler Dylan M. Moore

Keyarrow Ashley Moore **Richard Jameson Moriarty** Madison Anne Morrow Donald Calvin Murphy Julie Ann Musolf Charles William Newman, III Thomas Lee Oliver, III John Mark Parker, Jr. Rudolph Woods Parker, Jr. Andrea Christine Pearson William Robertson Phillippi, III **Robert Bradley Phillips** Lindsay Ann Pickell Kyle David Pierce Cody Shea Poe Andrew David Poston Anne Drew Powers Olivia Macy Pratt Ryan Vincent Primerano Paul Chase Pritchard Harrison Proctor Thomas Brooks Proctor Wilson Alan Raines Andrew Hayden Rainwaters Zachary Rainwaters Emily-Ruth Smathers Ratliff Lisa Michelle Ray Sarah Grey Redmond Anna Claire Reilly Akya Shanelle Rice Donald Ray Riggins, Jr. Brook Virginia Robertson Norman Stuart Roman Bryan Richard Root Krystle Reshae Roper Evan Taylor Rosemore

Christina Marie Rossi Gary David Rowe Andrew Ethan Rudloff Aubrey Michelle Rush Tacara Lee Sabir Sulbha Rai Sankhla Stephen Paul Santiago Cameron Henry Alexander Saunders Sidney Jase Sayre Angela Marie Schaefer Hayley Noelle Scheer Courtney Schellack Kyle Anthony Scholl Lakia Scott Corey Gross Seale Jared Clayton Searls James Dale Self Hannah Goode Shackelford Elliott Gabriel Smith Martin Dunbar Smith Courtney Kayla Snow Brian Cory Spence Paul Anthony Spina, III Michael Travis Stallings Jazmin Dominique Standford Jennifer Ashley Stanley Hannah Hooks Stokes Ellen Jane Sullivan Allen Simpson Tate Michael Lee Tease David Scott Terry Nicholas George Theodore Bret Logan Thompson James Wesley Thurman Elizabeth Marie Tissot

Cameron Camilla Townes Sara Hays Vance Emily Traylor Vande Lune Luke Robert VanFleteren Cody Bryant Walker Spencer Ewing Walker James Aaron Conrad Walters Derek Alan Walton Brian Jefferson Ware Ashley Elizabeth Weaver Morgan Gabrielle West Ethan Andrew Wilkinson Bo Bryant Williams Casey Tyler Willis Justin Carl Wilson Megan Roe Wilson Christa Carol Wininger Ebony Nicole Winston Joshua Ross Wise Lindsey Alyss Wood Nichole Renee Woodburn Billy Joe Woods, Jr Melonie Shanee' Wright Michele Ann Yarbrough Shelby Camille Yarbrough Andrew Anthony Yerbey Carshala Tereese Youse Nino Christopher Cumba Yu Tiamco Dhvanil Smiteshkumar Zaveri Jessica Marie Zorn



Catherine Roberts Hawley (2016), Carleta R. Hawley (1980) and Gregory H. Hawley (1983) *Admittee, mother and uncle*



Alfred Brannon Booth (2016), Hon. Alfred Booth (1979) and Prentiss Christopher Booth (2000) Admittee, father and brother



Thomas Brooks Proctor (2016) and David W. Proctor (1984) Admittee and father



Stewart J. Alvis (2016), LaBella Stewart Alvis (1984), Jody Stewart (1994) and K. Rick Alvis (1984) *Admittee, mother, uncle and father*



Matthew Peter Burnick (2016) and Daniel Jay Burnick (1983) Admittee and father



Donald E. Blankenship, Jr. (2016), Hon. Donald E. Blankenship (1989), Lucien Blankenship (1996), Patrice Blankenship (2003) and Rose Blankenship (1988) *Admittee, father, cousin, cousin and stepmother*



Chase Eley (2016), Michael M. Eley (1981) and Landon Eley (2014) *Admittee, father and brother*



Warner O. Hornsby (2016), Hon. Sonny Hornsby (1960) and Clay Hornsby (1988) Admittee, grandfather and father



Bradley Christopher Hargett (2016) and Chris Hargett (1980) *Admittee and father*



Sam Grimes (2016) and Stephen Grimes (1977) Admittee and father



Jonathan Hayden Green (2016) and Tracy Lynn Green (2005) Admittee and mother



Caitlin Clark Brown (2016), Michael Burton Brown (1975) and Michael Barrett Brown (2011) *Admittee, father and brother*



Eli Joseph Hare (2016), Nicholas S. Hare, Jr. (1970) and Hon. Dawn Wiggins Hare (1982) *Admittee, father and mother*



Valynda Alexandrea Jerome-Williams (2016) and Derrick Vincent Williams (2007) Admittee and husband



H. Raymond Evans, IV (2016) and Hugh R. Evans, III (1988) *Admittee and father*



Jordan Reeves Brooks (2016) and Seth Roland Brooks (2014) Admittee and husband



Nicholas E. Brown (2016) and Hon. Cynthia W. Brown (1980) Admittee and mother



David Scott Terry (2016) and Nina L.J. Terry (1981) *Admittee and mother*



Sarah Grey Redmond (2016) and Wesley C. Redmond (1985) *Admittee and father*



Christopher Cameron Macon (2016) and Robert Russell Macon (1987) *Admittee and father*



Brian Joseph Davis, Jr. (2016) and Ric T. Edwards (2007) *Admittee and uncle*



Thomas Lee Oliver, III (2016) and Thomas Lee Oliver, II (1989) *Admittee and father*



Caroline L. Blaylock (2016) and C. Wilson Blaylock (1997) *Admittee and father*



Kaasha Danielle Benjamin (2016) and Judge Greg Griffin, Sr. (1985) Admittee and father-in-law



Jay Malone (2016) and Byron Todd Ford (1996) Admittee and uncle



Madison Anne Morrow (2016) and Randall Hodge Morrow (1988) Admittee and father



Laura Elizabeth Ezell (2016) and Mark Edward Ezell (1980) *Admittee and father*



Lindsay Rane Carter (2016) and Jimmy Rane (1971) Admittee and father



Elliott G. Smith (2016), Thomas Scott Smith, Jr. (1994) and Thomas Scott Smith, III (2015) *Admittee, father and brother*



William R. Phillippi, III (2016), Wylynn Gilmore Phillippi (1979), Wyman O. Gilmore, Jr. (1983) and Fredrick P. Gilmore (1998) Admittee, mother, uncle and uncle



Hoyt Wayne Copeland, II (2016), Hoyt Wayne Copeland (1951), James Milton Copeland (1985), William Timothy Copeland (1987) and Frank Wayne Bailey (1982) Admittee, grandfather, father, uncle and cousin



Leah E. Megginson (2016) and William Daniel Calhoun (1982) Admittee and uncle



Ellie Friedman (2016) and Jeff Friedman (1986) Admittee and father



Robert Vance Baxley (2016) and William J. Baxley (1964) *Admittee and father*



Bryant Clark Cashion (2016) and Hon. James Clark Cashion (1981) *Admittee and father*



Wilson Raines (2016) and Greg Griggers (1993) Admittee and uncle



Asher L. Kitchings (2016), A. Langley Kitchings (1985) and Atley A. Kitchings, Jr. (1950) Admittee, father and grandfather



Jacob J. Key (2016) and Claud E. McCoy, Jr. (1983) Admittee and father-in-law



Lindsay Ghee (2016), Bruce Johnson Downey, IV (2006), Laura Ghee Alexander (2006), David Alexander (2006), Jennifer Ghee Downey (2003), Jonathan Draper (1998), Wendy Ghee Draper (1998) and M. Douglas Ghee (1975) Admittee, brother-in-law, sister, brother-in-law, sister and father



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YLS UPDATE

Parker Miller parker.miller@beasleyallen.com

Orange Beach CLE and an Active Fall

We are pleased to announce that the annual Orange Beach CLE will take place May 4–6 at the Caribe Resort. Since re-locating to Orange Beach a few years ago, the program has drawn more than 100 lawyers each year, and remains the largest gathering of lawyers younger than age 38 in the state. While the program is still being developed, our panel of speakers, which will include judges, litigators and business people, promises once again to be outstanding. We are also putting together a number of events, including cocktail parties, a golf tournament and a beach party, that make the Orange Beach CLE the best young lawyer networking opportunity each year.

I have attended the Orange Beach CLE for seven years, and I have never known anyone who went who did not have a great time and establish relationships in our profession. Attendees are diverse, coming from all over the state and representing almost every practice area imaginable. They are from large firms and small firms, and focus on civil litigation, criminal law, family law, business / transactional work and real estate. In fact, I have seen a number of lawyers develop lasting relationships that lead to sustained referrals and new job opportunities–all of which were originally forged at this event.

If you have any questions about the Orange Beach CLE, please contact the program chair, Evan Allen, at *Evan.Allen@beasleyallen.com* or at (800) 898-2034. Also, follow the YLS Facebook Group, which is listed below, as we will be providing updated information on the Orange Beach CLE as it draws closer.

In other news, the YLS has been active this fall. We helped raise more than \$10,000 and collected numerous bins of supplies for victims of the Louisiana flooding. In addition, lawyers from the YLS spoke at the University of Alabama, and in so doing, provided perspective to law students beginning their search for legal work. The Iron Bowl CLE was once again a success, and we thank all of the lawyers who attended the Birmingham and Mobile events in November. We are also planning events at the law schools this coming spring to continue our focus of providing mentoring and outreach opportunities to law students. Our group continues to work hard in planning our Minority Pre-Law Conference this spring.

If you have not already done so, we invite you to join the YLS. In doing so, you will receive periodic email updates on YLS events in your area, as well as additional information on how you can get involved. Most importantly, you will gain access to high-character people who will no doubt enrich your professional life.

For more information on YLS events, follow us on *https://facebook.com/ABSyoung lawyers, https://twitter.com/asbyounglawyers* and *https://instagram.com/asbyoung lawyers*. We look forward to seeing you at one of our events this spring.



DISCIPLINARY NOTICES

- Reinstatements
- Transfer to Disability Inactive Status
- Disbarment
- Suspensions
- Public Reprimands

Reinstatements

- Birmingham attorney **Marc Cyrus Dawsey** was reinstated to the practice of law in Alabama, effective August 26, 2016, by order of the Supreme Court of Alabama. The supreme court's order was based upon the decision of Panel III of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Dawsey on May 5, 2016. [Rule 28, Pet. No. 2016-960]
- Daphne attorney **John Barry Gamble** was reinstated to the practice of law in Alabama, effective July 21, 2016, was placed on probation for three years and is required to meet certain conditions. On August 4, 2016, an amended order was entered assessing Gamble all costs, and all provisions and conditions contained in the July 21st order remained the same and in full effect. The Supreme Court of Alabama entered an order August 11, 2016 noting Gamble's reinstatement to the practice of law and inclusion on the official roster of attorneys. The supreme court's order was based upon the decision of Panel II of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Gamble on December 9, 2014 and updated April 22, 2016. [Rule 28, Pet. No. 2015-182]

Transfer to Disability Inactive Status

• Suspended Auburn attorney **Julie Boggan Kaminsky** was transferred to disability inactive status pursuant to Rule 27(c), *Ala. R. Disc. P.*, effective August 25, 2016. On September 15, 2016, the Supreme Court of Alabama entered a notation of Kaminsky's transfer to disability inactive status pursuant to the order of the Disciplinary Board, Panel III, of the Alabama State Bar in response to Kaminsky's petition submitted to the Office of General Counsel requesting to be transferred to disability inactive status. [Rule 27(c), Pet. No. 2016-1143]

Disbarments

- Birmingham attorney Michael Kevin Abernathy was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective September 16, 2016. The supreme court entered its order following affirmance of an appeal filed by Abernathy to the supreme court. The supreme court's order affirmed the Disciplinary Board's order of disbarment filed on June 2, 2015, finding Abernathy guilty of misappropriating client funds. [ASB No. 2014-893]
- Daphne attorney David Erickson Hudgens was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective September 30, 2016. The supreme court entered its order based on the Disciplinary Board's order accepting Hudgens's consent to disbarment, wherein Hudgens admitted to misappropriating client funds. [Rule 23(a), Pet. No. 2016-1306]

Suspensions

- Acworth, Georgia attorney Alan Bruce Clements was suspended from the practice of law Alabama, effective September 6, 2016, for noncompliance with the 2015 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 16-696]
- Birmingham attorney Linda Ann Munson Fiveash was suspended from the practice of law by notation of the supreme court on October 26, 2016, effective October 3, 2016 until January 1, 2017. The supreme court entered its notation based on the September 29, 2016 order entered by the Disciplinary Commission of the Alabama State Bar accepting Fiveash's conditional guilty plea wherein she admitted she failed or refused to respond completely to direct questions relating to someone signing her name on immigration forms while sharing office space with Douglas Howard Cooner, prior to his disbarment. Fiveash admitted her name was on a



(Continued from page 59)

government immigration form, although she denied to the Office of General Counsel she practiced immigration law, and she also admitted she knew Cooner and/or his staff had access to her clients' files. Fiveash hereby violated Rules 8.1(b) [Bar Admission and Disciplinary Matters] and 8.4(a) and 8.4(g) [Misconduct], *Ala. R. Prof. C.* [ASB No. 2014-1122]

- Theodore attorney **Ronald Ray Goleman, Jr.** was suspended from the practice of law in Alabama for eight months by order of the Supreme Court of Alabama, effective September 9, 2016. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Goleman's conditional guilty plea, wherein Goleman pled guilty to violating Rules 1.15(a), (e), and (n) and 1.16(d), *Ala. R. Prof. C.* Goleman failed to place unearned fees in trust and failed to return those unearned fees to the clients upon his termination.[ASB No. 2015-1240]
- Tuscaloosa attorney James Patrick Hackney was suspended from the practice of law in Alabama, effective September 6, 2016, for noncompliance with the 2015 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 16-706]
- Montgomery attorney Teresa Camille Harris was suspended from the practice of law in Alabama, effective May 2, 2016, for noncompliance with the 2014 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 15-574]
- Atlanta attorney Douglas Robert Kendrick was suspended from the practice of law in Alabama, effective September 6, 2016, for noncompliance with the 2015 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 16-708]
- Atlanta attorney Christopher Joseph Larkin was suspended from the practice of law in Alabama, effective September 6, 2016, for noncompliance with the 2015 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 16-709]
- Saginaw attorney **Nancy Ingeborge Rhodes** was interimly suspended from the practice of law in Alabama by the Disciplinary Commission of the Alabama State Bar, effective August 29, 2016, after Rhodes was found to have mismanaged her trust account, which resulted in missing and unaccounted for funds. [Rule 20(a), Pet. No. 2016-1129]

- Daphne attorney Matthew Alan Seymore was suspended from the practice of law in Alabama, effective May 2, 2016, for noncompliance with the 2014 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 15-590]
- Houston attorney Satinder Jit Singh was suspended from the practice of law in Alabama, effective October 3, 2016, for noncompliance with the 2015 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 16-723]
- Mobile attorney **Jacqueline Rachel Macon** was suspended from the practice of law in Alabama for 91 days by order of the Supreme Court of Alabama, effective November 1, 2016. On October 27, 2016, the Disciplinary Commission of the Alabama State Bar issued an order revoking Macon's probation and imposing a 91-day suspension from the practice of law in Alabama. Macon violated the terms of her probation by committing additional acts of professional misconduct by failing to remit employment taxes withheld from her employees' pay to the appropriate federal and state agencies. [ASB Nos. 2013-529, 2013-1481 and 2013-2202]
- Birmingham attorney Ira Lee Taylor was suspended from the practice of law in Alabama, effective October 3, 2016, for noncompliance with the 2015 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 16-724]
- Crestview, Florida attorney Jeffery Darryl Toney, who is also licensed in Alabama, was ordered by the Supreme Court of Alabama on September 15, 2016 to receive reciprocal discipline of a 90-day suspension from the practice of law in Alabama, effective August 6, 2016 through November 4, 2016, followed by two years of probation. The supreme court's order was based upon the Disciplinary Board of the Alabama State Bar's order requesting that Toney receive identical discipline as that imposed by the Supreme Court of Florida, wherein Toney was found to have violated the following rules regulating The Florida Bar: 4-1.1, 4-1.3, 4-1.4, 4-1.16(a), 4-3.2, 4-4.1, 4-5.4, 4-5.5, 4-8.1 and 4-8.4(a), (c) and (d). Toney was found to have assisted a disbarred attorney in the unauthorized practice of law from 2007–2009. [Rule 25(a), Pet. No. 2016-1114]

Public Reprimands

• Hueytown attorney Charles Isaac Brooks received a public reprimand with general publication on September 16, 2016 and was ordered to pay a \$750 administrative fee for violating Rules 1.2, 1.4(b) 1.5(b), 1.15(a) and 8.4(a), (c) and (g), Ala. R. Prof. C. Brooks entered into a contract to represent a client in an employment matter and was paid \$7,000. This contract included a clause stating the fee was non-refundable. Additionally, Brooks failed to obtain the required written consent from the client regarding his limited scope of representation and failed to properly explain the limited scope of the representation in the corresponding appeal and in connection with another related matter. Brooks violated Rules 1.2 and 1.4(b), Ala. R. Prof. C., as he failed to obtain the required written consent for the limited scope representation and failed to explain the matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation. Additionally, Brooks violated Rule 1.5, *Ala. R. Prof. C.*, as the contract contained a clause stating the fee was non-refundable. Moreover, with this conduct, Brooks violated Rule 1.15(a), *Ala. R. Prof. C.*, by depositing the \$7,000 fee directly into his operating account. Finally, Brooks violated Rules 8.4(a), (c), and (g), *Ala. R. Prof. C.*, by violating a rule of professional conduct and engaging in conduct which was dishonest and adversely reflects on his fitness to practice law. [ASB No. 2014-218]

• Hamilton attorney **James Tony Glenn** received a public reprimand with general publication on September 16, 2016 for violating Rules 1.1 [Competence] and 8.4(g) [Misconduct], *Ala. R. Prof. C.* Glenn filed a brief on behalf of a client with the Alabama Court of Criminal Appeals. As noted by the court in its memorandum opinion affirming Glenn's client's conviction, Glenn violated Rule 28(a)(10), *Ala. R. App. P.*, in two sections of the brief for failing to include any citation to the record and only including one citation to a case generally holding for a basic proposition of law. With this conduct Glenn violated Rule 1.1, *Ala. R. Prof.*

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(Continued from page 61)

C., for failing to provide competent representation to his client. Additionally, with this conduct, Glenn violated Rule 8.4(g), *Ala. R. Prof. C.*, for engaging in conduct which adversely reflects on his fitness to practice law. Glenn is also required to complete the Practice Management Assistance Program, provide proof of successful completion of same to the commission and pay any and all costs taxed against him pursuant to Rule 33, *Ala. R. Disc. P.*, including but not limited to a \$750 administrative fee. [ASB No. 2015-755]

• Fairhope attorney **Kyla Groff Kelim** received a public reprimand with general publication on September 16, 2016; was instructed to contact and complete the Practice Management Assistance Program and provide timely proof of successful completion thereof; will serve two years' supervised probation pursuant to Rule 21, *Ala. R. Disc. P.*; successfully complete five hours of MCLE in both law office practice management and probate and estate planning and provide proof of completion thereof; and pay a \$750 administrative fee pursuant to Rule 33, *Ala. R. Disc. P.*, for violating Rules 1.3, 1.4(a), and 1.5(a), Ala. R. Prof. C. Kelim willfully neglected clients' matters entrusted to her, failed to keep the clients reasonably informed about the status of their matters and failed to promptly comply with reasonable requests for information. In ASB No. 2014-1337, Kelim charged a clearly excessive fee because the results she obtained regarding a required accounting were either in error or incomplete and, as a result, the court relied upon the guardian ad litem's accounting. [ASB Nos. 2012-1303, 2013-2148, 2014-104 and 2014-1337]

Gadsden attorney John Stanley Morgan was issued a public reprimand with general publication on October 28, 2016 for violating Rules 1.15(a) and (e), Ala. R. Prof. C. Morgan failed to properly maintain his trust account records and paid personal expenses directly from his trust account using earned fees. [ASB No. 2015-1545]



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THE APPELLATE CORNER



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

Statute of Limitations; Accrual

Breland v. City of Fairhope, No. 1131057 (Ala. Sept. 30 F, 2016)

In a complex fact pattern arising from city's repeated enactments of ordinances designed to interfere with landowner's dredge and fill operations specifically permitted by ADEM and the Corps of Engineers, the court held: (1) landowner's declaratory claim challenging enforceability of municipal ordinances was not time-barred because it did not begin to run from the date of city's first stop-work order; ordinances were a continuing potential bar to landowner's use of land; and (2) claims for money damages, though subject to a two-year statute of limitations, could (at least as to damages causally related) run from issuance of 2011 stop-work order instead of 2008 stop-work order: "each time Fairhope enforced its ordinances to stop Breland from filling activity on his property Fairhope committed a new act that serves as a basis for a new claim. Fairhope's last stop-work order was issued in November 2011[.]"

Forum Non Conveniens

Ex parte Tier 1 Trucking, LLC, No. 1150740 (Ala. Sept. 30, 2016)

Wilcox County plaintiffs sued Conecuh County driver and Florida-based truck line in Wilcox Circuit Court for injuries arising from accident in Conecuh County. Trial court denied *forum non conveniens* transfer to Conecuh County. The supreme court granted mandamus relief, holding that under the court's substantial precedent addressing similar situations, "this Court gives great weight to the fact that the accident occurred in Conecuh County and to the fact that no material events occurred in Wilcox County."

Administrative Law

Ex parte Torbert, No. 1150774 (Ala. Sept. 30, 2016)

ADPH's interpretation of solid-waste transfer regulations (concerning the buffer zones of a proposed waste transfer station situated close to the challenger's residence) was arbitrary and unreasonable under *Ala. Code* § 41-22-20(k).

Estates

Wylie v. Estate of Cockrell, No. 1141405 (Ala. Sept. 30, 2016)

The court affirmed the probate court's order (affirmed by the circuit court) removing a PR from her position based on (1) her failure to file an accurate and complete accounting after being ordered to do so multiple times, (2) her improper transfer of estate assets to decedent's girlfriend based on misunderstanding of the meaning of the term "curtilage" in the will (where PR had not consulted attorney to determine same) and (3) her improper conversion of LLC membership interest to personal use in violation of Alabama LLC law, which vested in residual devisees the financial rights of the decedent upon his death. Probate court erred, however, in assessing GAL's attorney's fees against former PR, because the record did not demonstrate the GAL's time spent working on the case to justify the fee; remand was thus necessary to assess fees.

False Imprisonment/Arrest

Dolgencorp, LLC v. Spence, No. 1150124 (Ala. Sept. 30, 2016) Spence sued Dolgencorp and its manager Welch for tort claims arising from allegedly false accusation of shoplifting at Dollar General store. The supreme court reversed judgment for plaintiff, holding: (1) trial court did not err in submitting assault and battery claims to jury, because actions of Welch were for benefit of Dolgencorp and in furtherance of her employment duties; (2) negligent training claim was properly submitted to jury, even though actual training materials were not inadequate, because there was evidence that communication of the training to employees was given short shrift; (3) because facts were in dispute as to what manager saw at time of alleged shoplifting, there was sufficient evidence of lack of probable cause ("typically" a jury question) to support false imprisonment claim; (4) evidence of malice in malicious prosecution claim was insufficient, since carelessness can be evidence only "if at the same time [the act is] wrong and unlawful within the knowledge of the actor;" (5) because manager claimed to witness the act of shoplifting, there was no evidence of malice for purposes of defamation; (6) under "good count / bad count" principles, because jury returned a general verdict, new trial was necessary on claims for which there was sufficient evidence.

Leases; Condominium Law

Wilcox Investment Group, LLC v. P&D, LLC, No. 1150025 (Ala. Sept. 30, 2016)

In a rather abstruse fact pattern regarding sale-leaseback of condominium units from Sea Pines (developer) to P&D

(purchaser and lessor back to Sea Pines) for use as "model units" in an eventually-failed condo project, the court held that neither the Alabama Uniform Condominium Act nor the terms of the leases required Wilcox (which purchased Sea Pines' interests out of foreclosure) to assume obligations under the leases to pay rent back to P&D. The fact that "Wilcox Investment was a "successor declarant" under the AUCA does not render Wilcox a "successor" to Sea Pines under the leases."

Arbitration

The Hanover Insurance Company v. Kiva Lodge Condominium Owners' Association, Inc., No. 1141331 (Ala. Oct. 21, 2016)

(1) Contractual modification of an arbitration agreement– stating that claims "may at the election of either party" be arbitrated–made arbitration mandatory, once one party chose to arbitrate those claims; (2) timeliness of the claims was for the arbitrator, because those defenses went to the merits of the claims; and (3) the trial court had discretion to stay even non-arbitrable claims, especially where those claims were contingent upon the plaintiff's being successful on its claims.

Probate; Ancillary Proceedings

Ex parte Scott, No. 1140645 (Ala. October 28, 2016)

In complex probate case, Jefferson Probate Court entered escrow order for protection of Alabama resident, relating to assets undisputedly deriving from real property in England and, thus, not subject to jurisdiction of probate court. Because English court had issued no order relating to disposition of assets, "the assets of the estate that are the subject of the English administration are not subject to the jurisdiction of the probate court as part of the Jefferson County administration." Jefferson Probate Court was without jurisdiction to enter escrow order.

Will Contests

Daniel v. Moye, No. 1140819 (Ala. Nov. 10, 2016)

Among other holdings: (1) Circuit court erred by failing to enter an order of removal of an estate from probate court. Once petition for removal is filed, circuit court must enter removal order. Although petition for removal filed in probate court was a nullity, same petition filed in circuit court was effective, even though it contained error of naming the wrong court, because it was undisputedly filed in circuit court and assigned a CV number. (2) Pleadings filed by contestants to

(Continued from page 65)

will were sufficient to invoke court's jurisdiction and to state a will contest claim. Under *Ala. Code* 43-8-199, contest is to be commenced in circuit court within six months after admission of will to probate. Filing of the entire probate file clarified that there had been no previous litigated contest of the will and that the filing was within six months of the admission of the will to probate.

Insurance

Pharmacists Mutual Insurance Company v. Advanced Specialty Pharmacy LLC, No. 1140046 (Ala. Nov. 18, 2016)

Circuit court erred in holding that multiple occurrences causing damages to patients were both not included in the products/completed work coverage (for purposes of a \$4 million aggregate limit) and included in the same products/completed work coverage (so as to trigger separate \$3 million coverage). Because the parties agreed that those damages were not covered in the coverage, the court affirmed that aspect of the holding, but reversed circuit court's opposite conclusion in light of the contrary stipulation.

Arbitration

Bugs "R" Us, LLC v. McCants, No. 1150650 (Ala. Nov. 18, 2016)

Because agreement invoked AAA rules, under which the arbitrator has the power to decide her own jurisdiction, agreement contained the requisite "clear and unmistakable evidence" that parties agreed for arbitrator to decide issues of arbitrability.

Forum Selection Clauses

Ex parte PT Solutions Holdings, LLC, No. 1150687 (Ala. Nov. 23, 2016)

Employee's challenge to enforcement of forum selection clause-that the clause was contained in a non-compete agreement concerning her practice of physical therapy, which was a "profession" under Alabama law and rendered the non-compete agreement violative of Alabama public policy-was an attack on the non-compete, not on the forum selection clause. Attacks on enforcement of a forum selection clause (like a challenge to an arbitration agreement) must attack enforcement not of the contract generally, but of the forum selection clause specifically. Inconvenience of litigating in Fulton County, GA (155 miles from Barbour County) was not so oppressive as effectively to deprive White of her day in court.

Will Contests; Scope of Action

Ray v. Huett, No. 1150572 (Ala. Nov. 23, 2016)

In will contest filed in probate court under *Ala. Code* § 43-8-190 and removed to circuit court under § 43-8-198, circuit court's power to adjudicate extends only to issues of the validity of the will. Circuit court had no authority to construe the will in the will contest action.

From the Court of Civil Appeals

"Substantial Compliance" with Contract

Turner v. Wells Fargo Bank, N.A., No. 2150320 (Ala. Civ. App. Sept. 30, 2016)

Lender's failure to provide exact notice required by mortgage was not fatal to foreclosure procedure; notice provided constituted "substantial compliance" with contract.

Rule 35 Examinations; Workers' Compensation

Ex parte Tidra Corp., No. 2150940 (Ala. Civ. App. Oct. 7, 2016)

Circuit court lacked authority *sua sponte* to order mental examination of litigant under Rule 35, which allows examination "only on motion." Trial court exceeded its discretion in ordering employer to pay for physical therapy without determining compensability.

Recusals

Ex parte Crawford, No. 2150868 (Ala. Civ. App. Oct. 14, 2016)

Trial court in divorce action involving custody issues received *ex parte* contact from school superintendent relating to minor's participation in school trip. Trial court promptly disclosed the communication to the parties and stated that in the court's view it was not disqualifying. Wife eventually moved to disqualify, which was denied after evidentiary hearing. Wife petitioned for mandamus. The court denied relief; prompt disclosure of the communication and nature of communication did not cause court's impartiality to be reasonably questioned.

Venue

Ex parte Gentile Company, Inc., No. 2150901 (Ala. Civ. App. Oct. 14, 2016)

Trial court exceeded its discretion in transferring action because motion to transfer was unsupported by any evidence, leaving undisturbed the allegations of the complaint which at least arguably established venue in the chosen forum.

Students First Act; Teacher Termination

Boaz City School Board v. Stewart, No. 2150582 (Ala. Civ. App. Nov. 4, 2016)

The court reinstated teacher termination decision of board; hearing officer was required to review board's termination under arbitrary and capricious standard, which was not met because there were specific board policies speaking to conflicts of interest and abuse of sick leave, both of which were directly involved in the teacher's conduct.

Civil Forfeiture; Procedure for Service

Bharara Segar, LLC v. State, No. 2150663 (Ala. Civ. App. Nov. 4, 2016)

Procedure for service in civil forfeiture case brought under Controlled Substances Act is the procedure for service by publication under *Ala. R. Civ. P.* 4.3, under which service is complete on date of last publication.

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Premises Liability

Smith v. Wells Fargo Bank, N.A., No. 2150715 (Ala. Civ. App. Nov. 4, 2016)

Smith was injured when she sat in a chair at a WF branch and the chair collapsed. The court reversed the trial court's grant of summary judgment to WF, reasoning that WF's failure to allege no defect in the actual chair created a jury issue.

Administrative Law

Springhill Hospitals, Inc. v. SHPDA, No. 2150705 (Ala. Civ. App. Nov. 10, 2016)

Decisions on letters of non-reviewability are not directly appealable from SHPDA and the CONRB to the court of civil appeals, under *Ala. Code* 22-21-275(14).

Special Masters; Procedure

Parker v. Parker, No. 2150679 (Ala. Civ. App. Nov. 10, 2016)

(1) Circuit court had authority to appoint special master under *Ala. R. Civ. P.* 53(b), given complex nature of calculations in a \$2 million-plus estate; but (2) reversal and remand was necessary for non-compliance with the service and 10day requirements of Rule 53(e)(2).

Restrictive Covenants

Lancaster v. Evans, No. 2150627 (Ala. Civ. App. Nov. 18, 2016) Lancasters alleged that Evanses violated restrictive



covenants by building a boathouse. Trial court granted summary judgment to Evanses, finding that boathouse was built on third party's property and that latent ambiguity in restrictive covenants prevented enforcement of the covenants in the manner requested by the Lancasters. The CCA reversed in relevant part, holding that Evanses' construction of the boathouse was subject to the restrictive covenants because provisions of the restrictive covenants regarding boathouses touched and concerned the Evanses' property.

From the Eleventh Circuit Court of Appeals

First Amendment; Political Donations

Alabama Democratic Conference v. Attorney General, No. 15-13920 (11th Cir. Sept. 26, 2016)

The Court upheld Alabama's PAC-to-PAC transfer ban (*Ala. Code* § 17-5-15(b)) against a First Amendment challenge brought by the ADC.

FLSA

Calderone v. Scott, No. 15-14187 (11th Cir. Sept. 28, 2016) Joining the D.C., Second, Third, Seventh and Ninth circuits, an FLSA collective action and a Rule 23(b)(3) state-law class action may be maintained in the same proceeding.

FDCPA

Ray v. McCullough Payne and Haan LLC, No. 16-11518 (11th Cir. Sept. 29, 2016)

A post-judgment garnishment action under Georgia law is not against the consumer, but rather against the garnishee, and thus is not subject to the exclusive venue provisions of the FDCPA, 15 U.S.C. § 1692i(a)(2). The First and Eighth circuits have held likewise; the Ninth Circuit disagrees.

RESPA (Reg. X)

Lage v. Ocwen Loan Servicing, Inc., No. 15-15558 (11th Cir. Oct. 7, 2016)

Under Regulation X, a loan servicer's duty to evaluate a borrower's loss mitigation application is triggered only when the borrower submits the application more than 37 days before the foreclosure sale. The Court held that the timeliness of the borrowers' application is measured using the date the foreclosure sale was scheduled to occur when borrowers submitted their complete application.

Equitable Tolling; Forum Selection

Chang v. Carnival Corp., No. 14-13228 (11th Cir. Oct. 6, 2016)

State court action improperly filed in violation of forum selection clause did not equitably toll statute of limitations in otherwise untimely filed second action filed in the contractually chosen forum.

Standing

Nicklaw v. CitiMortgage, Inc., No. 15-14216 (11th Cir. Oct. 6, 2016)

Putative class action seeking statutory damages under New York law for mortgagee's failure to file timely discharge of mortgage failed to allege sufficient injury-in-fact under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), thus depriving plaintiff of standing.

Age Discrimination (En Banc)

Villareal v. R.J. Reynolds Tobacco Co., No. 15-10602 (11th Cir. Oct. 5, 2016)

Applicant for employment cannot sue an employer for age discrimination based on disparate impact because the applicant has no status as an employee. Plaintiff was not entitled to equitable tolling of disparate treatment claim because he admitted facts that establish that he did not diligently pursue his rights.

Bankruptcy; Foreclosure

In re Failla, No. 15-15626 (11th Cir. Oct. 4, 2016)

Because the word "surrender" in the bankruptcy code, 11 U.S.C. § 521(a)(2), requires that debtors relinquish their right to possess the property, a person who agrees to "surrender" his house in bankruptcy may oppose a foreclosure action in state court.

Labor

Mercedes-Benz U.S. International, Inc. v. NLRB, No. 15-10291 (11th Cir. Oct. 3, 2016)

NLRB had found that MBUSI violated the NLRA in three ways: (1) maintaining an overly broad solicitation and distribution rule that employees would reasonably understand to prohibit solicitation in work areas by employees not on working time of other employees not on working time; (2) prohibiting an employee not on working time from distributing union literature in one of MBUSI's team centers, which are mixed-use areas; and (3) prohibiting employees not on working time from distributing union literature in the MBUSI atrium, which is a mixed-use area. The Court enforced the board's order in part, affirming the atrium violation and the solicitation and distribution policy ruling. However, board's remedial order involving the team centers was overly broad, and remand was necessary for further findings as to whether MBUSI's team centers are converted mixed-use areas during the pre-shift period. And, on a 2-1 conclusion, the Court held that "the ALJ failed to recognize the distinction between converted and permanent mixed-use areas and failed to analyze the relative volume and nature of work and non-work activity in the team centers."

Qualified Immunity

Fish v. Brown, No. 15-12348 (11th Cir. Oct. 3, 2016)

Deputies who accompanied plaintiff's sometime lover into home, where lover entered residence with consent of plaintiff, were entitled to qualified immunity on Fourth Amendment claims; officers' entry was arguably lawful under either the "consent once removed" doctrine or the "impliedly open to public use" doctrine. The case contains a robust synopsis of qualified immunity law.

Qualified Immunity

Wate v. Kubler, No. 15-15611 (11th Cir. Oct. 12, 2016)

Officers who tased and struggled with decedent (arrestee died after the struggle) were not entitled to qualified immunity; substantial evidence demonstrated that decedent was not a flight risk or a threat to the safety of the officers or the public prior to the conclusion of the tasings.

Tribal Immunity

Williams v. Poarch Band of Creek Indians, No. 15-13552 (11th Cir. Oct. 18, 2016)

Tribal immunity barred plaintiff's ADEA claims against the tribe for alleged age discrimination in a firing decision.

(Continued from page 69)

Preliminary Injunctions

Wreal, LLC v. Amazon.com, Inc., No. 15-14390 (11th Cir. Oct. 28, 2016)

Delay in seeking a preliminary injunction of even only a few months, though not necessarily fatal, militates against a finding of irreparable harm.

Admiralty

Girard v. M/V "Blacksheep," No. 15-15803 (11th Cir. Nov. 3, 2016)

Marine salvor brought in rem action against vessel which his actions purportedly helped save at sea, seeking recovery of a "salvage award" for role in saving ship from impending sea peril. In reversing judgment for the defendant, the panel abrogated *Klein v. Unidentified Wrecked & Abandoned Sailing Vessel*, 758 F.2d 1511 (11th Cir. 1985), holding that "but for" causation was not properly an element of the claim based on prior panel precedent.

False Claims Act

USA ex rel. Saldivar v. Fresenius Medical Care Holdings, Inc., No. 15-15497 (11th Cir. Nov. 8, 2016)

District court lacked subject matter jurisdiction over qui tam claim because relator's knowledge of the actual overbilling in issue was secondhand, and thus he was not an original source, nor did he have "direct and independent knowledge of the information on which the allegations are based." 31 U.S.C. § 3730(e)(4)(B). Moreover, the information in issue was publicly disclosed.

Futility Doctrine

Chang v. J.P. Morgan Chase Bank, N.A., No. 15-13636 (11th Cir. Nov. 8, 2016)

District court abused its discretion in denying amendment to pleading, based on futility doctrine, where plaintiff had developed facts in discovery which, if found by a trier of fact, would have proven the essential elements of a cognizable claim.

Qualified Immunity

May v. City of Nahunta, No. 15-11749 (11th Cir. Nov. 15, 2016)

Officer was entitled to qualified immunity for decision to seize plaintiff for purpose of detaining her for mental health evaluation at hospital, given EMT's reports of her self-injury and behavior. However, officer was not entitled to qualified immunity for manner of seizure, where plaintiff offered substantial evidence that officer detained her in a closet for 20 minutes and forced her to disrobe in front of him.

Qualified Immunity

Melton v. Abston, No. 15-11412 (11th Cir. Nov. 18, 2016)

In deliberate indifference section 1983 case, nurse, physician who left broken arm untreated and unexamined and sheriffs were not entitled to summary judgment on qualified immunity, despite the lack of on-point case law, because medical need was "so obvious that even a lay person would easily recognize the necessity for a doctor's attention."

CAFA

Wright Transportation, Inc. v. Pilot Corp., No. 15-15184 (11th Cir. Nov. 23, 2016)

Federal courts that are given original subject-matter jurisdiction over state-law claims by the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), retain that jurisdiction even when the class claims are dismissed before the class is certified.

RECENT CRIMINAL DECISIONS From the Alabama Supreme Court

Capital Sentencing

Ex parte Bohanan, No. 1150640 (Ala. Sept. 30, 2016)

The court upheld Alabama's sentencing procedure for imposing the death penalty against a challenge based on *Hurst v. Florida*, 136 S. Ct. 616 (2016). Our supreme court interpreted *Hurst* as to require only that a jury find beyond a reasonable doubt the facts necessary to constitute an aggravating factor necessary to impose the death sentence.

This case seems destined for another certiorari petition to the U.S. Supreme Court (the *Tommy Arthur v. State* case raises a *Hurst* issue as well; that cert. petition was filed on November 3, 2016).

Batson

Ex parte Floyd, No. 1130527 (Ala. Nov. 18, 2016)

The Alabama courts had held that the prosecutor's notes indicating race and gender as to venirepersons, coupled with other circumstantial evidence, did not sufficiently prove a *Batson* violation. The U.S. Supreme Court "GVRed" (summarily granted certiorari, vacated the judgment, and remanded) in light of *Foster v. Chatman*, 136 S.Ct. 1737 (2016), which had similar facts. On remand, our supreme court held that the record did not establish a *Batson* violation because the *Batson* hearing did not occur in this case immediately after jury selection (it was raised during "plain error" review by the court of criminal appeals), and the prosecution's purported misrepresentations concerning the reasons for strikes may have been due to lack of memory, rather than deliberate prevarication.

"Stand Your Ground"

Ex parte Watters, No. 1150182 (Ala. Oct. 21, 2016)

Adopting *Harrison v. State*, CR–13–0429 (Ala. Crim. App. Dec. 18, 2015), defendant asserting immunity based on "Stand Your Ground" self-defense under *Ala. Code* § 13A-3-23 is entitled to an opportunity to prove that claim by a preponderance of the evidence at a pretrial hearing. Because general purpose of immunity is to shield litigation, pretrial hearing should occur as soon as practicable.

Rule 404(b)

Ex parte Boone, No. 1150387 (Ala. Sept. 23, 2016)

Because animosity between defendant and victim's family arose from dispute concerning controlled drug buys and not out of a gang affiliation, evidence of defendant's gang affiliation was inadmissible to prove motive under Rule 404(b).

Prison Mailbox Rule

Spencer v. State, No. 1150683 (Ala. Sept. 16, 2016)

Houston v. Lack, 487 U.S. 266 (1988) (holding that *pro se* inmate's filing is deemed filed when placed into institution's mail system) is inapplicable to pleadings not subject to a deadline. However, because repeal of *Ala. Code* § 13A-5-9.1 placed time limitation on motions for sentence reconsideration by expressly permitting review of motions filed before the repeal's effective date, "mailbox rule" applies to such motions.

From the Court of Criminal Appeals

Capital Sentencing

Phillips v. State, CR-12-0197 (Ala. Crim. App. Oct. 21, 2016)

Death sentence did not violate *Ring v. Arizona*, 536 U.S. 584 (2002), because existence of aggravating circumstance (his killing of wife and unborn child) was determined by the jury.

"Stand Your Ground"

Thomas v. State, CR-14-0723 (Ala. Crim. App. Oct. 21, 2016)

Defendant's murder conviction was improper because the jury was not charged pursuant to *Ala. Code* § 13A-3-23(b) that he had no duty to retreat unless he was acting in a way that was unlawful or was at a place where he did not have the right to be.

Rule 404(b)

Walden v. State, CR-15-0577 (Ala. Crim. App. Oct. 21, 2016)

In unlawful possession of marijuana and drug paraphernalia case, defendant's prior conviction for unlawful distribution of marijuana was admissible to demonstrate familiarity with its smell and that he had knowledge that substance was inside vehicle in which he was passenger.

Allocution

Green v. State, CR-15-0579 (Ala. Crim. App. Oct. 21, 2016) The court reversed defendant's sentencing order, entered following guilty plea without providing defendant opportunity to address the court before the pronouncement of sentence. Though the defendant did not object, lack of allocution is an exception to the general preservation rule.



MEMORIALS

- Ralph Irving Knowles, Jr.
- Mitchell Alan Spears

Ralph Irving Knowles, Jr.

My lifetime friend and former law partner, Ralph Knowles, died May 17, 2016 in Atlanta. Ralph practiced law in Tuscaloosa, from 1970 until 1977, and again from 1978 through 1990. In those years, Ralph helped bring about extraordinary changes in Alabama's legal and political systems and his life profoundly affected the entire state.

I am going to focus here only on what Ralph did while he lived in Alabama. I should, however, briefly acknowledge that he accomplished much while living in Washington, DC and in Atlanta. As a lawyer for the National Prison Project of the ACLU, he was lead counsel in litigation which reformed the entire prison systems in Colorado and New Mexico. In Atlanta, while a partner at Doffermyre, Shields, Canfield & Knowles, he served as plaintiffs' co-lead counsel in the multi-district litigation styled *In re Breast Implant Litigation*. Also in Atlanta, he was inducted into membership of the American College of Trial Lawyers and the International Academy of Trial Lawyers.

After Ralph and I graduated from the University of Alabama Law School, we both served as staff counsel at the Selma Inter-Religious Project, a civil rights organization. A few years later we formed our law firm, but continued our civil rights work.

While with the Selma Project, we provided legal services to a variety of organizations in the Black Belt, including groups like the Freedom Quilting Bee in Wilcox County and the Orville Day Care Center in Dallas County. In Greene County, we incorporated the Greene County Housing Authority and provided its early legal representation. We also served as lawyers for various candidates and political organizations in Greene County and other Black Belt counties. Many of the people we worked with throughout the Black Belt went on to become county commissioners, probate judges, sheriffs, county administrators and executives.

Ralph participated in several landmark lawsuits in Alabama, including:

- Wyatt v Stickney¹ held that persons involuntarily committed to mental institutions had a constitutional right to receive adequate treatment. The standards ordered to be implemented to ensure adequate treatment have been described by courts and historians as the model for the Americans with Disabilities Act legislation, as well as for legislation passed by numerous states and standards adopted in their national constitutions by various countries.
- Lynch v. Baxley² declared Alabama's civil commitment state unconstitutional. The court also ordered recommitment hearings for all persons committed under the statute. As a result of the recommitment process, the populations at Bryce and Searcy hospitals were significantly reduced.
- Davy v. Sullivan³ declared Alabama's sexual psychopath statute unconstitutional.
- Newman v. Alabama⁴ was the massive prison reform lawsuit in Alabama in which Ralph served as lead counsel. Later he was a member of the oversight committee appointed by the court to monitor the Alabama prison system.
- 1986 Gubernatorial Litigation, in which Ralph was one of several lawyers who represented Bill Baxley in litigation in both the Middle and Northern districts of the United States District courts, as well as in the election contest before the Alabama Democratic Party. The final court decision from the Alabama Supreme
Court resulted in Bill Baxley's being named the Democratic nominee for governor in 1986.⁵

While Ralph was involved with these and other major litigations, he maintained a varied, active law practice. Indeed, Ralph still holds the record for the largest punitive damages verdict in Tuscaloosa County history. He also served the Tuscaloosa County Bar Association as its president and as chair of the Grievance Committee. Ralph was also a founding member and Master of the Tuscaloosa Inns of Court.

Throughout his life, both personally and professionally, Ralph maintained the highest standards of honesty and integrity. The day he died I said that Ralph Knowles was the best person I had ever known. That is still my opinion today. –Jack Drake, Birmingham

Endnotes

- 1. Wyatt v. Stickney, 325 F.Supp. 781, 783 (M.D. Ala. 1971), aff'd in part, rev'd in part, sub. nom., Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).
- 2. Lynch v. Baxley, 386 F.Supp. 378 (1974) (M.D. Ala. 1971).
- 3. Davy v. Sullivan, 354 F.Supp. 1320 (M.D. Ala. 1973).
- 4. *Newman v. Alabama*, 349 F.Supp. 278 (M.D. Ala. 1972); *aff'd* in part, 503 F.2d 1320 (5th Cir. 1974).
- See, Henderson v. Graddick, 641 F.Supp. 1192 (M.D. Ala. 1986); Ex Parte Graddick, 495 So.2d 1367 (Al. 1986); Curry v. Baker, 802 F.2d 1302 (11th Cir. 1986).

Mitchell Alan Spears

Mitchell Alan Spears, 64, of Montevallo, was born November 16, 1951 and passed away at home with his family on October 12. He was born in Philadelphia, Mississippi to James Kenneth Spears and Plumer Lee DeWeese Spears.

> Dodd, Sarah Jane Stoner Birmingham Admitted: 1983 Died: April 15, 2016

Floyd, Jane Vaughn Gadsden Admitted: 1993 Died: January 28, 2016

Gordon, George Brady Tuscaloosa Admitted: 1974 Died: April 28, 2016

Hamm, Daniel Gary Montgomery Admitted: 1992 Died: October 8, 2016

Hollis, John Byron Ooltewah, TN Admitted: 1991 Died: September 17, 2016 Lee, Deidre White Fairhope Admitted: 1990 Died: March 29, 2016

McIntyre, Hon. Lester Lamar Saraland Admitted: 1973 Died: September 29, 2016

> **Ogle, Richard Ferrell** Birmingham Admitted: 1968 Died: October 27, 2016

Quinlivan, Joseph Desriebes, Jr. Mobile Admitted: 1967 Died: October 5, 2016

Reding, Curtis Cleveland, Jr. Montgomery Admitted: 1972 Died: October 9, 2016

Russell, Samuel Lee McCalla Admitted: 1976 Died: December 11, 2015

During his senior year at Montevallo High School, he was proud to be FFA president and Southern Regional Winner, 1969. Mitchell served in the U.S. Marine Corps from 1970 until his honorable discharge in 1976. He graduated from the University of Montevallo with a bachelor of science in 1979, and earned his doctor of jurisprudence from Cumberland School of Law in 1982. He received the Supreme Court of Alabama certificate of admission on September 28, 1982; admission to the District Court, Northern District of Alabama, on December 3, 1982; admission to Alabama State Bar, September 28, 1982; American Bar Association, 1982; the Association of Trial Lawyers of America, 1982 and served as president of the Shelby County Bar Association, 1998. He practiced law in Montevallo for 34 years.

He was an NRA lifetime member, lifetime member of Masonic Central Lodge #70 and member of American Legion Post #255 and Blue Star Salute of Alabama. He also served in the community on the Montevallo Zoning Board and Montevallo Parks and Recreation Board. He was awarded the Montevallo Business Hall of Fame Class of 2016 by the Montevallo Chamber of Commerce.

Mitchell loved God, and his hobbies included golf, playing pranks and range-shooting with his grandson. He was well loved by everyone, and exemplified a Christ-like love every day.

He was preceded in death by his parents; and his special nephew, Steven C. Spears, Jr. He is survived by his wife of 43 years, Pleasia Fochtmann Spears; daughter Audrey S. Chambers (Brad); grandchildren Mitchell B. Chambers, Nola L. Chambers and Caleb L. Chambers (Katie); great-grandsons Luke Chambers and Nix Chambers; brothers Steven Carlyle Spears, Sr. (Donnie Sue), Eddie Wayne Spears (Maureen) and James Dennis Spears (Debbie); and a host of brothers-in-law, sisters-in-law, nieces, nephews, great-nieces and great-nephews.

-Sandy F. Johnson (niece), Birmingham

Scott, Romaine Samples, III Fairhope Admitted: 1980 Died: September 19, 2016

Smith, Ollie Dalton Birmingham Admitted: 1947 Died: October 11, 2016

Sowa, Thomas Michael Anniston Admitted: 1975 Died: September 25, 2016

Thomason, James William Bessemer Admitted: 1971 Died: October 19, 2016

Treese, Robert Thomas, Jr. Selma Admitted: 1995 Died: September 14, 2016



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

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

Co-authored by



Senator Cam Ward, Alabama Law Institute President

LEGISLATIVE WRAP-UP



Revised Uniform Fiduciary Access to Digital Assets Act

The 2017 Regular Legislative Session will kick off February 7, 2017. As a reminder, this will be the third year of our quadrennium, meaning we are halfway between the legislative elections of 2014 and those coming in 2018. As always, the legislature can meet for 30 legislative days within a 105-calendar-day window. With the start of the session following so closely on the heels of the installation of a new administration in Washington, DC, it is sure to be fast-paced and exciting.

As always, there are a number of big issues looming that the legislature is sure to address over the coming months. First, the state budgets continue to need active tending. As an extremely conservative fiscal state, the discussion will again have to focus on how to make due with limited resources. Expect to see legislation and focus on accountability and cost reduction. Second, but related, there will likely be continued discussion of the trajectory and direction of Medicaid. As the single largest item in the general fund budget, Medicaid must be thoughtfully and carefully addressed. Third, our corrections system will also be a big item again this year. Alabama must continue to be strategic about how to address this system. You will likely see legislation ranging from continued tweaking to of our sentencing methods to potential construction of new prison facilities. While all of the above issues are likely to dominate the discussion over the next few months, we draw your attention to another piece of legislation that we believe to be a critical improvement to the laws of Alabama, the Revised Uniform Fiduciary Access to Digital Assets Act.

In the past 10 years, the nature of our property has changed dramatically, but the law governing it has not kept pace.

We used to keep our important documents in file cabinets and our family photos in photo albums, and our mail was delivered by a human being. Today, most of us store at least some of our documents and photos on remote computers accessed through the Internet, and many small businesses exist entirely online. These "digital assets" can have real value.

In the world of tangible property, we have a well-established process to ensure the orderly distribution of a deceased person's estate. A probate court appoints a person to execute the decedent's estate plan by gathering all of the property and distributing it to the rightful heirs. This personal representative is overseen by the court and has a legal duty to follow the decedent's plan. However, there are gaps that exist in the execution of this plan with regard to digital assets.

Even if the decedent included digital assets in his or her estate plan, the personal representative might be barred from accessing digital accounts by password protection, or by the click-through terms of service contract governing the account. If the decedent received bank or investment statements by email only, the executor may not even know where to look for financial assets. A new law is necessary for our probate courts to properly deal with our digital assets.

The Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA") was drafted by the non-partisan Uniform Law Commission and has been enacted in 20 states so far. In Alabama, the act was reviewed by the Law Institute's Standing Trust Committee to make sure that it would conform and integrate with our existing statutory framework. That committee is comprised of more than 20 experts in the field and is chaired by **Leonard Wertheimer** with **Brian Williams** serving as principal reporter on this particular project.

The act covers four common types of fiduciaries, executors, trustees, guardians and agents under a power of attorney, and gives fiduciaries a legal basis to execute the account user's instructions for digital assets.

The RUFADAA will allow Alabama citizens to plan for the distribution of their digital assets in the same way they can plan the distribution of their other property by naming another person to receive access either using an online tool, or by making a will, trust or power of attorney. The RUFADAA also allows Internet users to keep information private by directing its destruction in the event of the user's death.

The RUFADAA also provides default rules that balance access with privacy for those persons who die or become incapacitated without expressly addressing his or her digital assets. By default, the contents of your private digital communications will remain private, but your fiduciary will be able to access a list of the email addresses that sent you mail to check for online bills or financial statements.

Other types of digital assets are not communications, but intangible personal property. For example, an agent under a power of attorney who has authority to access the principal's business files will have access under RUFADAA to any files stored in "the cloud" as well as those stored in file cabinets. Similarly, an executor who is distributing funds from the decedent's bank account will also have access to the decedent's virtual currency account (e.g. bitcoin).

Under the RUFADAA, fiduciaries for digital assets are subject to the same fiduciary duties that normally apply to tangible assets. Thus, for example, an executor may not publish the decedent's confidential communications or impersonate the decedent by sending email from the decedent's account. A fiduciary's management of digital assets may also be limited by other law. For example, a fiduciary may not copy or distribute digital files in violation of copyright law, and may not exceed the user's authority under the account's terms of service.

The act also drives a good balance between the need for access and the need to protect the custodians of the data. In order to gain access to digital assets, the RUFADAA requires a fiduciary to send a request to the custodian, accompanied by a copy of the document granting fiduciary authority, such as a letter of appointment, court order or certification of trust. Custodians of digital assets who receive an apparently valid request for access are immune from any liability for acts done in good faith compliance.

Thanks to the work of the Law Institute Standing Trust Committee, the RUFADAA has been tailored to work in conjunction with our existing laws on probate, guardianship, trusts and powers of attorney. It is a vital statute for the digital age, and will be a useful tool upon its passage.

Senator Cam Ward serves in the Alabama Senate representing the people of District 14. He serves as president of the Alabama Law Institute and is very active in the Uniform Law Commission.



ABOUT MEMBERS, AMONG FIRMS

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

About Members

John F. Janecky announces the opening of his office in Mobile.

Among Firms

Adams & Reese announces that Raymond L. Bell, Jr. joined as special counsel in the Mobile office.

Adams, White, Oliver, Short & Forbus LLP announces that Julie Musolf joined as an associate.

Baker Donelson announces that Forrest Phillips joined its Birmingham office.

Bland, Harris & McClellan PC of Cullman announces that Erin Shirley Lyon joined as an associate. Bradley Arant Boult Cummings LLP announces that Stanley E. Blackmon, Blair Druhan Bullock, Kate R. Hawley, Nicole B. Jones, Caroline C. Muse, Trey L. Oliver, III, T. Brooks Proctor, Akya S. Rice, Jared C. Searls, James W. Thurman and Nino C.C. Yu Tiamco joined the Birmingham office; Daniel Culpepper joined the Huntsville office; and Sarah Sutton Osborne joined the Montgomery office, all as associates.

Carney Dye LLC announces that George D. Gaskin, III joined as an associate.

Carr Allison announces that **Kyle A. Scholl** and **Erin Godwin** joined as associates in the Birmingham office.

Fish Nelson & Holden LLC of Birmingham announces that **Chase S. Eley** joined as an associate.

Fuller Hampton LLC announces that **Mark Tindal** joined as an associate in the Roanoke office.

Huie announces that Hunter Carmichael and Elizabeth Davis joined as associates.

Nicholas Jones and Alyssa Hawkins announce the opening of Jones, Hawkins & Associates at 250 Commerce St., Ste. 9, Montgomery 36104.

Maynard Cooper & Gale announces that M. Allison Taylor joined the Birmingham office and that Michael P. Huff joined the Huntsville office, both as shareholders. The firm also announces that Braxton Thrash, Stewart Alvis, Laura Ezell, Bowman Givhan, Kendra Key, Irene Motles and Evan Parrott joined the Birmingham office, John Juricich joined the Huntsville office and Evan Parrott joined the Mobile office, all as associates.

McCallum, Methvin & Terrell PC of Birmingham announces that Courtney C. Gipson joined as an associate.

Phelps Jenkins Gibson & Fowler LLP announces that Corey Gross Seale and Cayman L. Caven joined as associates.

Red Oak Legal PC announces that **D. Michelle Cone** joined as an associate in the Montgomery office.

A major contributing author to *The Alabama Lawyer* and a long-serving member of the Editorial Board, **David A. Bagwell**, a solo lawyer in Fairhope, announces that after 43 years of lawyering and judging, he has become one of the very few lawyers actually to retire and, on Halloween, closed his office. After wrapping up his professional affairs, he plans to fish, shoot birds, sing to his grandchildren, travel with his wife, have no court-related emails and maintain a much-clearer calendar.

Simpson, McMahan, Glick & Burford announces that Erin Hollis joined as an associate.

Starnes Davis Florie LLP announces that Sarah C. Chamberlain joined as associate.

Wettermark & Keith LLC announces that Laura Hume and Henry A. Lawrence, III joined the firm.

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OPINIONS OF THE GENERAL COUNSEL

J. Anthony McLain



Criminal Defendant's Waiver Of Ineffective Assistance of Counsel Claims

QUESTION:

May a criminal defendant's lawyer advise a client to enter into a plea agreement that includes a provision requiring the client to waive all ineffective assistance of counsel claims against that lawyer? May a prosecutor include in a plea agreement a provision that would require the defendant to waive all ineffective assistance of counsel claim against the defendant's lawyer?

ANSWER:

Advising a criminal defendant to enter into an agreement prospectively waiving the client's right to bring an ineffective assistance of counsel claim against that lawyer would be a violation of Rules 1.7(b) and 1.8(h), *Ala. R. Prof. C.* Likewise, a prosecutor may not require a criminal defendant to waive such rights as a condition of any plea agreement because such would violate Rule 8.4(a), *Ala. R. Prof. C.*, which prohibits an attorney from "induc(ing) another" to violate the *Rules of Professional Conduct*.

DISCUSSION:

The Disciplinary Commission has been asked to issue an opinion regarding the ethical propriety of a criminal defense lawyer advising a client on whether to enter into a plea agreement that contains a provision requiring the client to waive the right to later bring an ineffective assistance of counsel claim against that attorney. The flipside to any such question is whether a prosecutor may require the defendant, as a condition of the plea agreement, to waive such rights. As an initial matter, the Disciplinary Commission stresses that this opinion does not address the legality or constitutionality of such waivers. Rather, this opinion deals solely with whether a criminal defense attorney or prosecutor may, under the *Alabama Rules of Professional Conduct*, participate in obtaining such a waiver.

A number of state bars and state supreme courts have addressed this identical issue and determined that a lawyer may not advise a criminal client as to whether to enter into a plea agreement that includes a provision requiring the defendant to waive a post-conviction right to bring an ineffective assistance of counsel claim against that same lawyer In doing so, those bars and courts have noted that a lawyer may not seek an agreement with a client prospectively limiting his liability for malpractice unless the client is independently represented in making the agreement. This rule is expressed in Rule 1.8(h), *Alabama Rules of Professional Conduct*, as follows:

RULE 1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

The Disciplinary Commission is aware that the both the Arizona and Texas bars find no such violation of Rule 1.8(h) and, therefore, allow defense lawyers to advise their clients on such waivers.² In Formal Opinion 95-08, the Arizona State Bar concluded that there was no violation of Rule 1.8(h) because the defense lawyer is not actually a party to the agreement between the client and the government. Additionally, the opinion concluded that the rule simply refers to "malpractice" claims and nothing more. In Opinion 571, the State Bar of Texas concluded that a violation of Rule 1.8(h) does not exist because a "plea agreement waiving a postconviction appeals based on ineffective assistance of counsel does not expressly limit the defense counsel's liability to the defendant for malpractice." However, the Disciplinary Commission finds that Rule 1.8(h), Ala. R. Prof. C., does prohibit defense counsel from advising a client on whether to enter into a plea agreement that requires a waiver of any right to bring an ineffective assistance of counsel claim.

In Opinion 2001-06, the Ohio Board of Bar Commissioners on Grievances and Discipline noted as follows:

While a waiver of claims of ineffective assistance of counsel does not eliminate the opportunity for a criminal defendant to bring a legal malpractice action against a criminal defense attorney, it significantly limits and may even destroy the defendant's ability to establish proximate cause, a necessary element of a legal malpractice claim. Given this relationship, it is the Board's view that a plea agreement provision that waives appellate or post-conviction claims of ineffective assistance of counsel does constitute an attempt to limit the liability of the criminal defense attorney for personal malpractice.

A civil claim of malpractice and a claim of ineffective assistance of counsel are legally distinct from one another; however, both involve claims by the client that the lawyer's representation was unreasonable or lacking and that the client was harmed as a result. Further, it is often the case that the underlying facts necessary to establish such claims are virtually identical. As the dissent argued in Arizona State Bar Opinion 95-08, "[c]riminal defendants should not be singled out for disparate treatment simply because they usually seek habeas corpus relief rather than malpractice damage awards."

The Disciplinary Commission also finds that, pursuant to Rule 1.7(b), a conflict of interest exists where a lawyer must

(Continued from page 79)

counsel his client on whether to waive any right to pursue an ineffective assistance of counsel claim against himself. Rule 1.7(b), *Ala. R. Prof. C.*, provides as follows:

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

* * *

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Under Rule 1.7(b), a conflict of interest exists where a client's interests conflict with the interests of his lawyer. The Disciplinary Commission finds it hard to conceive of a situation where it would be in the interests of a lawyer for his client to file an ineffective assistance of counsel claim. Such claims against a lawyer can harm that lawyer's reputation and subject that lawyer to discipline by the bar or the courts.

However, there are times when it may be in the client's best interest to file an ineffective assistance of counsel claim against his lawyer. It would be inappropriate under any scenario for the lawyer against whom the claim may be brought to counsel the client as to whether to bring that claim or to waive the right to bring such a claim. This is especially so in the context of a criminal case where the client's freedom and liberty may be at stake. As such, the lawyer may not counsel the client as to whether to waive his right to bring an ineffective assistance of counsel claim.

Because a criminal defense lawyer may not advise a client whether to enter into a plea agreement waiving the right to bring an ineffective assistance of counsel claim, a prosecutor may not seek such a waiver from a criminal defendant represented by counsel. Rule 8.4(a), *Ala. R. Prof. C.*, provides, in part, as follows:

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the *Rules of Professional Conduct*, knowingly assist or induce another to do so, or do so through the acts of another . . .

As discussed, a criminal defense lawyer may not counsel a client to waive his right to bring an ineffective assistance of counsel claim without violating Rules 1.7(b) and 1.8(h), *Ala. R. Prof. C.* Rule 8.4(a) provides that is an ethical violation for any lawyer to "induce another" to "violate the *Rules of Professional Conduct.*" If a prosecutor were to require a waiver of the right to bring an ineffective assistance of counsel claim in a plea agreement, the defense lawyer would be placed in the intolerable situation of either being forced to withdraw from representation or violate Rule 1.7(b) and 1.8(h).

Moreover, a lawyer's withdrawal would not cure the conflict. Rather, the lawyer's withdrawal would only pass on the conflict to the defendant's next lawyer. As a result, the defendant would either be forced to accept counsel who has a conflict of interest or to proceed pro se in executing the plea agreement in violation of his Sixth Amendment right to counsel. Additionally, the lawyer cannot simply refuse to explain such a provision to the client as he has a duty under Rules 1.1 [Competence], 1.2 [Scope of Representation] and 1.4 [Communication] to thoroughly explain each and every provision of the agreement to the client. A lawyer must do so to ensure that the client is knowingly and voluntarily entering into the agreement. As such, a prosecutor may not require a criminal defendant to waive such rights as a condition of any plea deal since, in doing so, he would be "inducing" the defendant's lawyer into violating Rules 1.7(b) and 1.8(h), Ala. R. Prof. C.; or, would place the defendant into the untenable situation of either accepting counsel that has an inherent conflict of interest or proceeding without the benefit of counsel. [RO 2011-02]

Endnotes

- See Advisory Committee of the Supreme Court of Missouri Formal Opinion 126, North Carolina State Bar Opinion RPC 129, Ohio Board of Commissioners on Grievances and Discipline Opinion 2001-06, Tennessee Board of Professional Responsibility Advisory Opinion 94-A-549 and Vermont Bar Association Advisory Ethics Opinion 95-04.
- 2. Arizona State Bar Committee on the *Rules of Professional Conduct* Opinion 95-08 and Texas Bar Opinion 571.

Alabama Attorneys Recognized for Pro Bono Work for Low-Income Alabama Citizens

The Alabama Access to Justice Commission recently honored Alabama attorneys who provided 50 or more hours of pro bono legal services to low income Alabama citizens in 2015. A reception in October at the Heflin-Torbert Judicial Building Rotunda recognized 95 attorneys from across Alabama for their dedication to providing pro bono legal services.

Nearly half of low-income households in Alabama experience one or more legal problems in a year. Alabama's perperson funding for access to justice in civil legal matters ranks lower than every other state. The attorneys honored represented the volunteerism by the legal profession to meet the needs of Alabama's underserved citizens. Last year, the Legal Services program and five volunteer lawyers programs in Alabama closed more than 17,000 cases, but approximately 84 percent of civil legal needs of low-income household in Alabama are still unmet.

The legal profession possesses unique skills and abilities that allow lawyers to serve the disadvantaged and promote the public interest in ways that no other profession can. As part of its mission, the Alabama Access to Justice Commission supports, facilitates and encourages the delivery of pro bono legal services. Each year, during Pro Bono Month, the Alabama Access to Justice Commission and the Alabama Supreme Court honor lawyers who provide 50 or more hours of gualified pro bono legal services. Appreciation of the lawyers being honored was expressed by Alabama Access to Justice Commission Chair Lisa Borden, who said, "We are pleased to recognize these generous lawyers as the model to which our profession, as a whole, should aspire. The privilege of practicing law carries with it a unique obligation and opportunity to advance access to justice. Those honored today have set the example for the rest of us."

The attorneys below were recognized for providing 50 or more hours of pro bono legal services to Alabama citizens:

Sara E. Adams, Birmingham Levi L. Alexander, Huntsville Rosemary Alexander, Birmingham Evan Allen, Montgomery Jennifer Anderson, Birmingham James Bailey, Birmingham Mandy Baker, Montgomery April Bauder, Birmingham James Bedsole, Birmingham Kimberly Bell, Birmingham Kevin Berry, Birmingham Jessica Betts, Birmingham Allen Brooks Blow, Birmingham Lisa Borden, Birmingham Coby M. Boswell, Huntsville Dana R. Burton, Huntsville Meredith Busby, Birmingham Henry Caddell, Birmingham Craig Campbell, Birmingham John Carney, Birmingham John W. Charles, Montgomery Marcus Chatterton, Birmingham Patricia Clotfelter, Birmingham Cedrick Coleman, Birmingham Maureen K. Cooper, Huntsville Laurel Crawford, Montgomery Amy S. Creech, Huntsville Jim G. Curenton, Jr., Fairhope **Richard Davis, Birmingham** Edward Dean, Birmingham Sydney G. Dean, Huntsville Patricia Doblar, Birmingham

Jessica Kirk Drennan, Mountain Brook Darlene U. Eason, Haleyville Joana Ellis, Montgomery Scott Steven Frederick, Birmingham Anne Christine Frieder, Huntsville Timothy Gallagher, Montgomery Kevin Ray Garrison, Birmingham Ann Gathings, Birmingham Amy Glenos, Birmingham Matthew Griffin, Birmingham Stephen Nathaniel Gordon, Birmingham William Patton Hahn, Birmingham Jessica Keating Hardy, Mountain Brook Walt S. Hayes, Tuscaloosa Chervis Isom, Birmingham Matthew Jackson, Birmingham Clay Caldwell Johnson, Birmingham Leon Johnson, Birmingham William Johnson, Birmingham Priscilla Kelley, Birmingham Pamela Kilgore, Birmingham Denise Killebrew, Birmingham James Lampkin, Montgomery Charles J. Lorant, Vestavia Preston Martin, Birmingham **Richard Matthews, Montgomery** Allen W. May, Tuscaloosa Mickey McDermott, Montgomery James McLaughlin, Birmingham Kelly F. McTear, Montgomery Anderson Mears, Birmingham John Milledge, Birmingham

Stephanie Stevens Monplaisir, Montgomery Louis Montgomery, Birmingham Ashley Penhale, Montgomery Tarackia Phillips-Barge, Birmingham Honza Prchal, Birmingham William Prosch, Birmingham Sreekanth B. Ravi, Huntsville Robert Riccio, Birmingham Michael F. Robertson, Huntsville L. Thomas Ryan, Huntsville Tazewell T. Shepard, III, Huntsville Griffin M. Shirley, Elba Jade Eleanor Sipes, Birmingham Deanna S. Smith, Huntsville Marshall E. Smith, III, Fairfield William Glassell Somerville, III, Birmingham Shaun Styers, Birmingham Spencer M. Taylor, Birmingham Joseph Thetford, Birmingham Renee Thiry, Birmingham William K. Uemura, Huntsville Royce Wadsworth, Montgomery Patrick Ward, Birmingham Andrew P. Walsh, Birmingham Andrew Wheeler-Berliner, Birmingham Richard Williams, Birmingham Michael Wing, Birmingham Donald Winningham, Birmingham Michael Winter, Montgomery Nesha Q. Wright, Huntsville Emily J. Young, Huntsville



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