

The Alabama Lawyer

May 2015 | Volume 76, Number 3

2015 Annual Meeting

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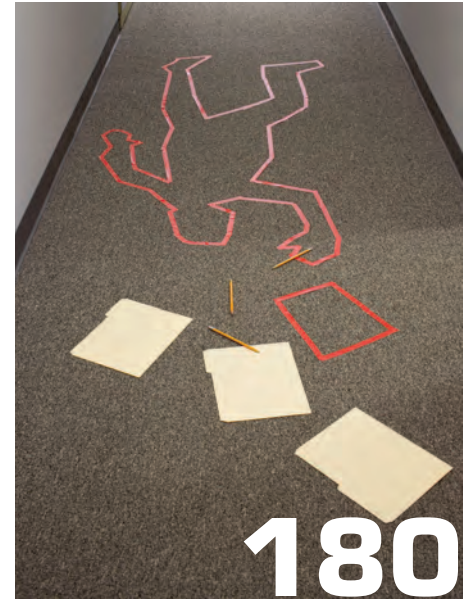
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On The Cover

The Alabama State Bar is back at the Grand Hotel this year! Join us July 15-18 at the Grand Hotel Marriott Resort, Golf Club & Spa. See meeting highlights inside and register at www.alabar.org/about-the-bar/annual-meeting.


SUNRISE JULEP POINT


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CONTRIBUTORS



David A. Bagwell has been a lawyer or judge for more than four decades. He is now a solo lawyer in Fairhope, where he still enjoys law practice and a hobby as a jackleg local historian. He and his wife live on Mobile Bay and catch their own crabs in their front yard.



Patrick H. Sims has practiced with Cabaniss, Johnston, Gardner, Dumas & O'Neal LLP since 1987. He graduated from the University of Alabama School of Law in 1974 (Order of the Coif). Sims clerked for the Hon. Frank M. Johnson, Jr. and later served as a United States Magistrate Judge for the Southern District of Alabama. Since 1987, Sims's practice has focused on civil litigation of all types, as well as cases involving international law, constitutional claims, major contract disputes and the related appeals. He is a frequent lecturer on issues of federal procedure.



Mark H. Taupeka practices real property and business law with Cassidy Taupeka PC in Baldwin County. He is also a principal in Orange Beach Title LLC. Taupeka was formerly a partner with Blackburn, Conner & Taupeka PC in Bay Minette. Special thanks go to Grant Blackburn for his editorial review.

ARTICLE SUBMISSION REQUIREMENTS

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

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

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

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





Richard J.R. Raleigh, Jr.
rraleigh@wilmerlee.com



Work Hard—At the Office, in the Community and at Home

I have three things I hope to convey in this month's column. First, our **Alabama State Bar Annual Meeting is July 15-18, 2015** at the Grand Hotel in Point Clear. My focus this year is to reach out to lawyers who are transitioning—from law school to practice, reentering practice after some time off, changing their practice focus, moving firms and the like. We're also concentrating on the changes our profession is experiencing. With the annual meeting, we'll be getting "Back to the Basics" with a lot of CLEs on law office skills and on "nuts and bolts" that lawyers in transition can use to become more successful.

Second, we have a terrific program to support the Volunteers Lawyers Program—"Pay It Forward." I'm asking for your help to pay it forward by expanding the membership of the Volunteer Lawyers Program. If you're not a member of the VLP, then please

register right now and join. If you are a member, then get ready to "pay it forward" and ask a colleague to join the program. The larger the VLP grows, the better equipped we are to bring legal services to those in need.

A recent study revealed a benefit of \$78 million to the state as a result of Alabama civil legal aid programs—programs that help residents in critical civil cases like evictions, domestic violence disputes and public benefits decisions, where there is no guaranteed right to an attorney. As John Byrnes, president of Community Services Analysis LLC, explained, "This Social Return on Investment total for Alabama was one of the highest rates of return that CSACO has seen in over 100 SROI analysis projects—both in the legal aid field and in other types of social service organizations." Alabama's high rate of social return on investment is directly linked to the high participation rate of Alabama

lawyers in the state's volunteer lawyer programs. Despite this extraordinary result, there is still an overwhelming need for civil legal assistance across the state. We need your help. Invite another lawyer to join the VLP. I challenge you to share this invitation until you have added at least one person who is willing to serve our state's volunteer lawyers programs. And, don't forget to ask them to "pay it forward." (For more information, see Linda Lund's article on page 164.)

And, third, until recently, Keith Norman and I thought I was the 138th president of the Alabama State Bar. I received an email from Keith, though, saying I might be the 139th, because we had two presidents split a year sometime in the 1800s. This started me thinking about "who am I?" We're still trying to figure things out here. Regardless, whether it is 138 or 139, that's not really who I am anyway. I am a God-fearing person of faith with plenty of questions who is thankful for grace; a husband who tries his best; a son who does not



call enough but is working on it; a proud father who does not deserve his blessings; and a lawyer who works hard to zealously advocate for his clients while being fair to everyone

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including (but not limited to) opposing counsel. I'm imperfect, but I'm trying.

A friend and classmate from law school recently died of a heart attack. Another one passed away last year. Both **Paul Sizemore** and **David Shipper** were great human beings and they died way too young. I know because they were my age. The Alabama State Bar has also recently lost great leaders—fellow Leadership Forum graduate and bar rising star **Wyndall Ivey**, former commissioner **Bob Jordan** from Ft. Payne and past **President Wade Baxley** from Dothan are just three. I was spending time with Wade in Houston at the ABA Midyear Meeting only a few weeks before he passed away.

All these things got me thinking. What we do in our paying jobs as lawyers is important. It makes a huge difference in so many peoples' lives. Who we are as human beings, though—as sons and daughters, sisters and brothers,



fathers and mothers, volunteers, neighbors and friends—matters much more. Life's a struggle. Keep on trying your best and hug those you love. | AL

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J. Cole Portis

W.N. “Rocky” Watson

Pursuant to the Alabama State Bar’s *Rules Governing the Election of President-elect*, the following biographical sketches are provided of J. Cole Portis and W.N. “Rocky” Watson. Portis and Watson were the qualifying candidates for the position of president-elect of the Alabama State Bar for the 2015-16 term and the winner will assume the presidency in July 2016.

J. Cole Portis

Cole is, first and foremost, a husband and a father to nine children. He is married to Joy and they have four daughters and five sons. Cole and Joy are strong advocates for adoption. They have adopted six of their nine children. The couple also serves as foster parents, having fostered 18 children in the last four years. Cole and his wife are the founders of Love 100 Ministry, which assists Alabama families with adoption costs.

Cole graduated from the University of Alabama School of Law in 1990 and joined Beasley, Allen, Crow, Methvin, Portis & Miles PC in 1991, where he is now a principal. Cole represents people and families who are injured or killed by defective products. This calling allows him to counsel his clients, to uphold the 7th Amendment right of individuals to a trial by jury and to help society as a whole by creating safer products for consumers. In addition to handling litigation matters at Beasley Allen, Cole manages the firm’s product liability/personal injury section.

Cole participates in multiple service organizations because he believes in helping others inside and outside the profession. Since 2007, he has served as a bar commissioner representing the 15th Judicial Circuit. As a commissioner, he serves on the Executive Council. He is a board member of the Alabama Law Foundation, where he is also a Fellow, a member of the Finance Committee and a member of the Atticus Finch Society. He supports the Alabama Civil Justice Foundation through its Pioneers of Justice Society and is a Montgomery County Bar Association volunteer lawyer. He is past president of the Alabama State Bar Young Lawyers’ Section, the Montgomery County Bar Association and the Montgomery County Trial Lawyers Association.

Recently, Cole was recognized as a finalist for Public Justice’s 2014 Trial Lawyer of the Year. He is an AV-rated lawyer by Martindale-Hubbell.

In the Montgomery community, Cole has been an active member of Morningview Baptist Church for more than 40 years. He previously served as lay elder and as chair of the deacons. In addition, he teaches a Sunday School class as a way to invest in the lives of young adults.



Cole is past president of the Jimmy Hitchcock Memorial Award, a prestigious award honoring Christian student athletes in Montgomery. He serves on the Board of Directors of Trinity Presbyterian School and the Fellowship of Christian Athletes, and is a YMCA basketball coach.

W.N. “Rocky” Watson

W.N. “Rocky” Watson was born in Tuscaloosa, Alabama while his father was attending law school after World War II. Rocky was raised in DeKalb County, Alabama where he graduated from the public schools of the city of Fort Payne and Fort Payne High School in 1967. After high school, Rocky attended Auburn University, where he graduated with honors in 1971. Subsequent to his graduation from Auburn, Rocky attended the University of Alabama School of Law on scholarship, graduating in 1974.

While attending law school, Rocky participated in the John A. Campbell Court Board, and served as chair during the 1973-1974 school year. Rocky was also selected to the Order of the Coif and the Order of Barristers. Additionally, he served on various student-faculty committees while at the law school.

Rocky entered the private practice of law with his father in 1974. W.W. Watson had been practicing since 1950 in Fort Payne. Rocky and his father continued to practice together until his father's death in 1994. He then participated in the formation of the firm of Watson, Gillis & Carver with Terry Gillis and Sheri Carver; that firm became Watson & Gillis after Sheri Carver was elected to the bench. The firm is now Watson & Neeley, and his daughter and son-in-law (Tamara and Aubrey Neeley) joined the firm October 1, 2011.

After having served two years as the president of the DeKalb County Bar Association in the late 1970s, in the mid-1980s, at the urging of William D. “Bill” Scruggs, Rocky



became active with the Alabama State Bar. He served one year as the bar commissioner from the Ninth Judicial Circuit (1986-1987) while Bill Scruggs vacated that seat to serve as president. Upon Bill's retirement as a bar commissioner in 1993, Rocky served an additional 10-year stint as commissioner of the Ninth Judicial Circuit (1993-2003). Rocky returned to the bar commission in 2006 and is currently serving.

Rocky has served in several other capacities with the Alabama State Bar, including as a member of the Executive Committee (2000-2001 and 2011-2014), vice president of the bar (2011-2012 and 2013-2014), member of the Disciplinary Commission (1994-2000, 2001-2003 and 2006-present), and has been chair of the Disciplinary Commission since 2012. He is currently serving on the state bar's Finance and Audit Committee, as well as the Personnel Committee. He has also served as a member of the Chief Justices' Alabama Judicial System Study Commission, the Alabama State Bar Liaison for Redrafting Judicial Inquiry Commission Rules and was a charter member of the Atticus Finch Society. Additionally, Rocky was president of the Alabama Law Foundation from 2011-2013, and served on the board of trustees for the Law Foundation in 2003-2009 and again from 2013-present.

Legal honors received by Rocky include selection as a Fellow of the Alabama Bar Foundation and Fellow of the American Bar Foundation, and receipt of the Alabama State Bar President's Award for services rendered to the state bar in 2002-2003.

During his time in Fort Payne, Rocky has been active in many religious, civic and community organizations, including as two-time president of the Fort Payne Chamber of Commerce, president of the DeKalb County Arts Council, member of the DeKalb County Economic Development Authority and as a Sunday School teacher at the First United Methodist Church of Fort Payne.

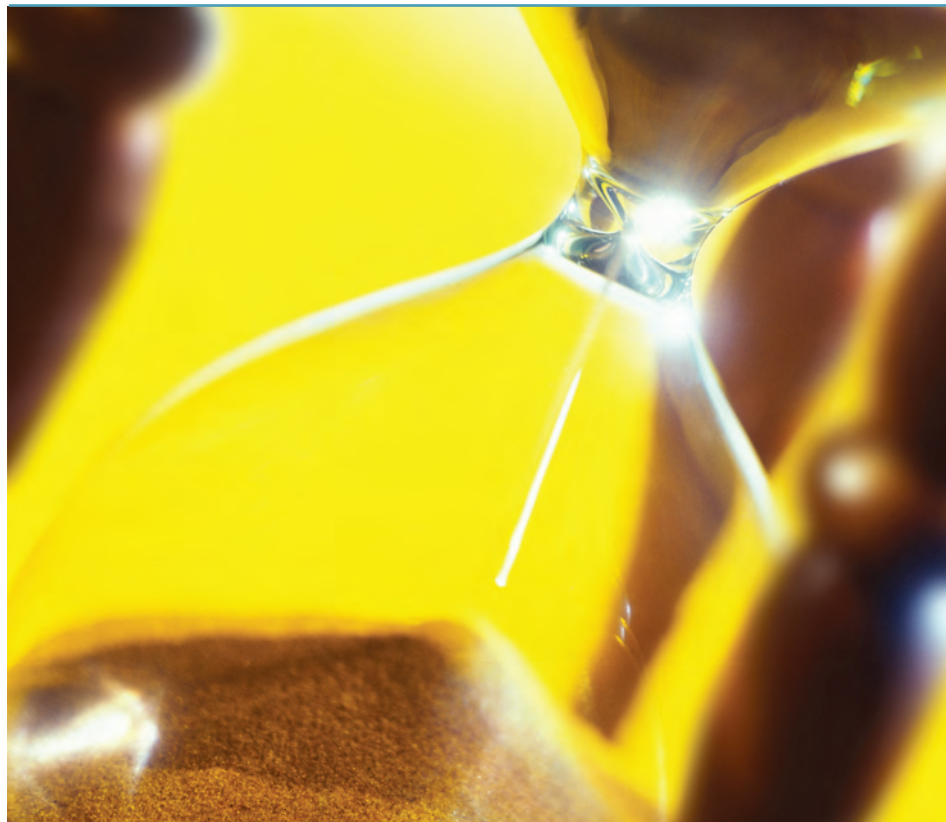
Rocky's practice can only be described as the practice of a country lawyer. For almost 40 years, he has handled civil and criminal trials, domestic relations and business matters, including the representation of various local banks. He has represented the City of Fort Payne since 2000 and the Water Works Board of the City of Fort Payne since 1984. Additionally, Rocky is a qualified mediator and serves in that capacity when called upon.

Rocky is married to Donna M. Watson and they have three children, Alyson, Tamara and Derek. In addition, he is a doting grandfather to four delightful granddaughters, Libba, Kady, Braelyn and Finley. | AL



Keith B. Norman

keith.norman@alabar.org



The 2015 Annual Meeting— 138 and Counting!

This year's annual meeting will be held July 15-18 at the Grand Hotel in Point Clear. We are very excited about this year's get-together, our 138th since the bar's founding in 1879. It promises to be one of our best and will feature programs for the solo and small firm practitioners, as well as specialty programs for lawyers with a more particularized practice. As they have for many years, our sections will play a pivotal role in the programs at the annual meeting.

One of the general session programs that we believe will be of great interest coincides with the 70-year anniversary of the liberation of the Nazi death camps of World War II and the war crime trials that followed. The presentation will feature Joshua M. Greene, author of *Justice at Dachau*, the story of **William Denson**, the Alabama

lawyer who served as the chief American prosecutor of the guards and officers at the death camps at Dachau, Mauthausen and Flossenburg.

In addition, the meeting will focus on President Raleigh's theme for this year, "Lawyers in Transition," with programs to address the needs and concerns of lawyers coping with changes in their professional lives and a profession that is also experiencing rapid change. Finally, there will be an impressive array of family programs and social activities sure to make the meeting an enjoyable time for everyone. A more detailed listing of this year's annual meeting programs, as well as hotel and meeting registration information, is available at www.alabar.org/about-the-bar/annual-meeting.

It is interesting to examine how much our meetings have changed over the

years. For example, the 38th annual meeting was held in Montgomery, July 9-10, 1915, in the hall of the House of Representatives at the state capitol. The meeting consisted of the election of association officers, the presentations of numerous committee reports¹ and other association business, including the necrology of bar members.² The annual address was given by Hannis Taylor and entitled, "Our Rights and Duties as a Neutral Nation." One of the several scholarly papers delivered was "Doctrine of Comparative Negligence" by J.T. Denson. Finally, President **Ray Rushton** of Montgomery included a recap of legislation passed during the year in other states and a review of Alabama legislation important to the lawyers of that day. Expenses for the 1915 Annual Meeting reflect that a social event costing \$225 was held that year at the Beauvoir Club in Montgomery. All the proceedings of the meeting were transcribed and published in a bound volume for dissemination.³

The 63rd Annual Meeting was held June 14-15, 1940 in Huntsville at the Russell Erskine Hotel. There were distinct differences in the format and program compared to earlier annual meetings. For example, the circuit judges, circuit solicitors and legal fraternities were very active during this meeting. There were more social activities, including a general membership luncheon and luncheons for several groups, including the Alabama Women Lawyers' Association, a reception at the Huntsville Country Club, a dinner and dance at the hotel and a picnic at Monte Santo Park on the last day to conclude the meeting. President **Richard Rives** of Montgomery, who would be appointed 11 years later to serve on the Fifth Circuit Court of Appeals, gave the president's address and concluded the business meeting of the association with the election of officers. The keynote address for the 1940 meeting was given by the chair of the Judiciary Committee of the U.S. House of Representatives, Congressman Halton Summers. His remarks were entitled, "The Relation of State Government to the Federal Government." More than 400 lawyers registered for the meeting.

Twenty-five years later, the 1965 Annual Meeting (the 88th) was held at the Parliament House Hotel in Birmingham, July 15-17. By the time of this meeting, the annual meetings had become a mid-July, Thursday-Saturday event, with few exceptions. President **Frank Tipler** of Andalusia presided at the meeting. Except for the presentation of committee reports on Thursday morning, the meeting format consisted of state bar sections providing programs.⁴ Although continuing legal education (CLE) was not mandatory at that time, a practical skills seminar on federal pleading and procedure was offered. There was a host of social events, including a reception and luncheon for lawyers' wives, a cocktail party and a dinner and dance for the general membership, as well

as a barbeque at the Birmingham Country Club. A breakfast for past state bar presidents was held at the hotel Saturday morning and the meeting concluded with the business session and election of officers that morning.

In 1990, just 25 years later, the 113th Annual Meeting was held in Mobile at the Riverview Hotel, July 18-21. CLE had become mandatory just a few years before, so this meeting (and all future annual meetings) included quality and diverse programs qualifying for MCLE credit. Sections continued to be responsible for producing the bulk of the programs. This meeting included, and future meetings would witness, more social events for annual meeting registrants including the participation of law schools sponsoring a luncheon for alumni. Likewise, annual meetings would no longer rotate to locations across the state but would shift primarily to more desirable resort locations such as those along the Gulf. The 1990 meeting saw President **Alva Caine** of Birmingham presiding over the annual business meeting on Saturday morning and the installation of officers who had been elected by a mail ballot rather than the previous practice of officer elections held at the annual meeting.

The Alabama State Bar Annual Meeting has evolved over the last 137 years. With more family-oriented activities and CLE-related programming designed to address the needs of a diverse practicing bar, the annual meeting has become a way lawyer moms, dads and even grandparents can enjoy their families as they support their professional development.

Education Debt Update

Education debt for those taking the bar examination continues to increase. For those sitting for the February 2015 exam, debt ranged from a low of \$7,000 to more than \$300,000. Of those taking the exam for the first time, 69 percent had educational loans, averaging \$109,860. | [AL](#)

Endnotes

1. These included, among others, the report of the Special Committee on Violation of the Code of Ethics and Law, the report of the Committee on Judicial Administration and Remedial Procedure and the report of the Committee on Legal Education and Admission to the Bar.
2. The necrology for the 1915 annual meeting, prepared by Thomas A. Owens, director of the Alabama State Department of Archives and History, included the personal histories of just three association members.
3. The proceedings of the annual meeting were transcribed and bound through the late 1940s.
4. The Criminal Law Section; the Practice and Procedure Section; the Corporations, Partnerships & Business Law Section; the Real Property Section; the Tax Law Section and the Family Law Section had programs at the 1965 annual meeting.



The Economic Impact and Social Return on Investment of Alabama's Legal Aid Providers

By Linda Lund, director, Alabama State Bar Volunteer Lawyers Program

What would you guess is the return on each dollar invested

to provide pro bono legal assistance in Alabama? Would you be surprised to find out that Alabama's return on investment is higher than any other state in the United States?

The Alabama Civil Justice Foundation in September 2014 engaged Community Services Analysis LLC to answer these very questions by performing an analysis of the financial values of the civil legal aid service providers in Alabama and to document the immediate and long-term consequential effects to their communities. The results were staggering. In 2014 alone, Alabama's five legal aid providers, the Alabama State Bar Volunteer Lawyers Program, the Birmingham Bar Association Volunteer Lawyers Program, the Madison County Volunteer Lawyers Program, the

South Alabama Volunteer Lawyers Program and Legal Services Alabama, provided more than 200 different types of services, and handled more than 19,000 legal matters.

Community Services Analysis LLC (CSACO) is a leading provider of Social Return on Investment Analysis in the United States. Since 2007 CSACO has completed more than 100 SROI studies for local and state agencies around the country, including the State of Pennsylvania Department of Education, the State of California Department of Rehabilitation, the City of Philadelphia, United Way, United Cerebral Palsy, Habitat for Humanity and multiple legal aid organizations. Additionally, in 2013, following a detailed analysis, the National Legal Aid and Defenders Association selected CSACO as their exclusive SROI analysis national partner.

Social Return on Investment (SROI) is an approach to measure and understand the financial impact of a social services organization. While SROI is built on the logic of cost/benefit analysis, it is different in that it measures the comparable value of organizations whose results cannot be easily measured in money. In the same way that a business plan contains more information than simply financial projections, SROI provides information about actual and long-term results of services, and the qualitative, quantitative and financial information on which to base decisions about the delivery of social services by organizations.

An SROI analysis can fulfill a range of purposes. It can be used as a tool for strategic planning, as a basis for funding and investment decisions, as a basis for communicating impact and financial results to stakeholders and as a methodology for comparative evaluation of an organization's long-term effectiveness.

The Alabama Civil Justice Foundation project examined the detailed case transaction records of the four major volunteer lawyers programs and Legal Services Alabama. Each case was analyzed to determine both the immediate fiscal impact to Alabama—consisting of the fair market value of the legal services, plus the totals of any legal judgments awarded—plus the long-term consequential financial effects of the outcomes of these services.

The economic impacts of these legal aid services in Alabama were significant. For the total of the 19,601 legal matters closed during 2014, the legal aid services delivered a total gross value of more than \$78 million.

The total projected future amount of these unrealizable benefits total approximately \$1,700,000, resulting in a total net benefit to Alabama of \$77,100,000—on a total funding base of \$8,728,000.

The total Net Social Return on Investment for Alabama's legal aid programs during the 2014 fiscal year was 884 percent.

The 884 percent Social Return on Investment total for Alabama was one of the highest rates of return that CSACO has seen in over 100 SROI analysis projects—both in the legal aid field and in other types of social service organizations.

The long-term financial effects included many different types of outcomes, such as:

- Family law savings such as community child support services, medical costs and law enforcement costs;
- Housing matters resulting in long-term property devaluations, loss of tax revenues and increased community medical and support costs caused by evictions and sub-standard living conditions;
- Public benefit and reduced community support due to resolution of Social Security Disability Insurance, Supplemental Security Income and unemployment insurance issues;
- Other community issues with long-term consequential financial impacts, including—such varied areas as employment, education, health care and health insurance, mental health and disabilities, bankruptcy and consumer protection, wills and estates, powers of attorney and advance directives, veterans' benefits, health issues, taxes, licenses and other miscellaneous legal issues; and
- Reduced governmental and legal system expenses resulting from the ability of the legal aid providers to provide low-income people with the advice and guidance on how to navigate administrative and legal processes more efficiently. Multiple studies have shown that this legal aid guidance reduces the time requirements of government agencies and court systems by an average of four hours per case.

These results are reduced by several standard variables that are accounted for in the calculations: parents not making required child support payments, nonpayment of wage claims, nonpayment of housing claims and repairs and the death or relocation out of the state by benefit recipients.

Alabama's extremely high result is due to a combination of two major factors. The first and most important is the high number of pro bono hours of legal services provided by attorneys in Alabama in their local volunteer lawyer programs. The participation rates of these volunteers were among the highest seen in any state legal aid system. These pro bono services would be less effective and less efficient, however, if not for the operations of the legal aid organizations. These organizations provide the necessary infrastructure including client screening, administrative support,

technical assistance, training and follow-up services for clients and volunteers.

The second significant factor is the higher overall percentage of cases handled by the participating volunteer lawyer and legal service organizations that resulted in long-term consequential financial outcomes. These five Alabama legal aid providers handled a greater percentage of high-value cases during 2014 than seen in other legal aid SROI projects. While there have been several periods of unusually high legal activities in certain areas (i.e. the high numbers of mortgage foreclosure cases during 2008-09) which resulted in higher than normal SROI results for those periods, there was not a statistically significant variance in case distribution patterns in Alabama from previous periods.

So Alabama's volunteer lawyer programs and LSA are delivering a significant economic impact to our communities and are delivering those benefits very efficiently with a very high rate of return on the total funding investment.

Continued participation of volunteer lawyers is of critical importance to the life of Alabama's legal aid organizations. These providers do not have enough resources to offer services to all the people who need help, and often have to turn away people who need assistance—but whose need is less critical than others. This lack of sufficient resources is also projected to become worse in the future based on the anticipated downward trends in government funding. Currently, the federal government is the primary funder of civil legal aid in Alabama and these funds have been drastically reduced over the past several years. IOLTA (Interest on Lawyer Trust Accounts) funds, another primary source of funds for civil legal aid, has significantly declined since 2009 when interest on IOLTA accounts reached historically low rates.

Accordingly, it is very important that attorneys understand the personal benefit of serving as a volunteer lawyer. Consistently, volunteers tell us that they gain great satisfaction by helping others in need who could not otherwise afford legal assistance, and from realizing that being a volunteer lawyer has made a real difference. The results of the Social Return on Investment analysis prove that being a volunteer lawyer delivers measurable economic benefits to the community. | AL



REMOVING DIVERSITY CASES: The Thrill Is Gone

By Patrick H. Sims

Over the last seven years, thanks to two decisions of the Eleventh Circuit Court of Appeals,

one decision from the United States Supreme Court and some related statutory changes, formulating a notice of removal in a diversity case has gone from an often frantic process to a very simple one. These changes are significant, and every lawyer who has removed a diversity case in the past should note the new framework.

Basic Diversity Removal Principles

A defendant's ability to remove a lawsuit from state court to federal court is not a matter of Constitutional right. It is a federal statutory grant, and the chief relevant statutes are 28 U. S. C. §§ 1441 and 1446. There are several others that affect those two. Federal diversity jurisdiction is conferred by 28 U. S. C. § 1332, which vests in federal district courts jurisdiction of civil actions where the amount in controversy exceeds \$75,000 and the controversy is

between citizens of different states. For purposes of original diversity jurisdiction and removal, an individual is a citizen of the state in which he is domiciled¹ and a corporation is a citizen of both the state in which it was incorporated and the state where its principal place of business is located.² The phrase "principal place of business" was fairly recently explained by the Supreme Court to mean (usually) the corporation's "nerve center," that is, where corporate headquarters are located and its executives make significant corporate decisions. *Hertz Corp. v. Friend*, 559 US 77, 130 S. Ct. 1181 (2010).

Section 1441 (a) states that, in general, any civil action filed in a state court that could have been filed originally in federal court may be removed to the appropriate federal district court. Section 1441 (b) adds a significant limitation on diversity removals: Even though there is complete diversity jurisdiction, such that a state-court case could have been filed in federal court, it may not be removed if there is a "local defendant"—that is, if any defendant "properly joined and served" is a citizen of the forum state, the action is not removable. There are other types of cases that might otherwise be removable under diversity, notably workers' compensation cases, that are declared non-removable by 28 U. S. C. § 1445 (c).



The procedure for removal is set out in 28 U. S. C. § 1446. That section requires the filing of a notice of removal in the federal district court within 30 days of service on the defendant, which notice must contain “a short and plain statement of the grounds for removal.” Normally all served defendants must join in the removal. The notice must attach all pleadings, process and orders served on the defendant in the state action. There are provisions in § 1446 for cases that were not originally removable that become removable through later developments in the case. There is a one-year time limit on diversity-based removals.³ Other details of the removal process are discussed as needed below.

The Good Old Days

When B.B. King told us that the thrill was gone, he was not singing about events in a lawyer’s office.⁴ A different kind of “thrill” was associated with diversity based removals until quite recently, though. To appreciate fully the effect that recent decisions have had on removing cases to federal court, it is illuminating to consider the process before the recent changes took place.

Consider a hypothetical damage lawsuit filed in an Alabama circuit court in June 2008, before the first of the appellate cases alluded to above. There is a single plaintiff and three defendants, one of them a corporation. The complaint is in the basic form prescribed by one of the Official Forms appended to the *Alabama Rules of Civil Procedure*. That is significant because the complaint is a basic state-court complaint that does not contain the additional party residency/citizenship descriptions often found in state court complaints. These are not required by the *Alabama Rules of Civil Procedure*. After the complaint is filed, a lawyer for one of the defendants typically receives the complaint from her client, or its insurance carrier. That’s when the stress begins for the lawyer seeking to remove the case to federal court.

Despite the conservative tenor of the decisions of the Alabama Supreme Court this century, most corporate defendants, their lawyers and their insurance companies seek to flee state counsel by removal to federal court despite the general perception that federal court litigation is more complicated, more expensive and beset by needless rigmarole. In accord with that premise, the removing lawyer’s first action would probably be to review the last page of the complaint to see if there was a quantified *ad damnum* prayer. Though *Ala.R.Civ.P.* 8 (a)(2) requires a complaint to contain “a demand for judgment for the relief the pleader seeks,” no dollar demand needs to be specified in a state court complaint. Accordingly, a lawyer preparing a complaint

Despite the conservative tenor of the decisions of the Alabama Supreme Court this century, most corporate defendants, their lawyers and their insurance companies seek to flee state counsel by removal to federal court despite the general perception that federal court litigation is more complicated, more expensive and beset by needless rigmarole.

might try to avoid removal by not demanding a specific amount (at least not one exceeding \$75,000). In that case, the defense lawyer would likely find only a prayer for “such compensatory and punitive damages as the jury may impose.”

Next, the removing lawyer would need to know, from her client or from the insurance company, and would confirm with the circuit clerk, when service occurred and, thus, how many of her 30 days were remaining. Critically, because there were two other defendants involved, she needed to know when those other two defendants were served, because in June 2008 there were numerous decisions from Alabama federal district courts holding that a single 30-day removal window applied to all defendants, which started running when the first defendant was served.⁵ So our defense lawyer’s removal opportunity might have vanished even before she received the complaint.

Then, assuming the removal was not time-barred, she still had to sort out, during her remaining time, the questions of jurisdictional amount and actual diversity of citizenship. The complaint probably told her essentially nothing about either subject. Her burdens as to both were fairly well-defined by existing Eleventh Circuit precedent. As to the amount in controversy, it was the removing defendant’s burden “to show by a preponderance of the evidence that the amount in controversy can be satisfied.” *Friedman v. New York Life Insurance Co.*, 410 F. 3d 1350, 1353 (11th Cir. 2005). As to parties, there were numerous decisions remanding, or confirming the absence of diverse parties, because of deficient allegations of diversity. E. g., *Taylor v. Appleton*, 30 F. 3d 1365 (11th Cir. 1994). The decision that defined the diversity removal standards in the most exhausting detail was *Lowery v. Alabama Power Co.*, 483 F. 3d 1184 (11th Cir. 2007). *Lowery* and its 80 footnotes were cited in many removal notices and district court opinions evaluating those notices thereafter.

So our defense lawyer had to file a notice of removal that established party diversity and that “proved” that more than \$75,000 was in dispute. This process often involved the drafting and preparation of affidavits supporting the assertion that “plaintiffs are really claiming more than \$75,000” with accompanying exhibits that would be admissible in federal court.

A New Day

The stress formerly experienced by lawyers seeking to remove a case to federal court may now be gone. The Eleventh Circuit, the Supreme Court and Congress have prescribed several stress relievers that should provide nearly total relief.



First stress reliever: *Janssen Pharmaceutica*

In *Bailey v. Janssen Pharmaceutica, Inc.*, 536 F. 3d 1202 (11th Cir. 2008), the Eleventh Circuit eliminated what was, in most cases, not a serious problem, but was sometimes catastrophic to removal. The question presented and answered was whether there was only a single 30-day removal window available for all of multiple defendants, or whether each defendant had its own separate 30-day removal period. In a fairly short opinion, after reviewing the authorities from the Supreme Court and other circuits, the court stated its conclusion: “We hereby adopt the last-served defendant rule, which permits each defendant, upon formal service of process, thirty days to file a notice of removal pursuant to § 1446 (b).” *Id.* at 1209. The substance of this conclusion was incorporated into the removal statute by amendments effective in 2012, and § 1446 (b) (2) (D) now states: “Each defendant shall have thirty days after receipt . . . to file a notice of removal.”

Second stress reliever: *Artjen Complexus*

Corporate Management Advisors, Inc. v. Artjen Complexus Inc., 561 F. 3d 1294 (11th Cir. 2009), involved a fundamental change in the law effected through some subtle appellate court wizardry in avoiding the Prior Panel Rule. This was again a fairly short decision, which addressed the issue of the sufficiency in the notice of removal of the allegations of diversity of citizenship. That case reached the Eleventh Circuit after the district court had remanded it twice because of the insufficiency of the allegations of diverse citizenship. The Eleventh Circuit first found a way to reach the jurisdictional questions despite the plain language of 28 U. S. C. § 1447 (d) forbidding all review of remand orders. *Id.* at 1296.

The court then managed to avoid entirely every Eleventh Circuit decision announced since the formation of the circuit in October 1981 that required specificity in the identification of the citizenship of every party in a removal notice. It did this by finding an old Fifth Circuit case that negated such a requirement. *Bonner v. City of Prichard*, 661 F. 2d 1206 (11th Cir. 1981) (*en banc*), the Eleventh Circuit’s first decision, adopted the precedent of the former Fifth Circuit as binding precedent in the Eleventh Circuit. Under *Bonner*, panel decisions in the old Fifth Circuit were binding on panels in the Eleventh, absent some intervening change in the law. In *Artjen Complexus*, the Eleventh Circuit panel addressed *Firemen’s Insurance Co. v. Robbins Coal Co.*, 288 F. 2d 349 (5th Cir. 1961), a case in which the Fifth Circuit stated: “The general allegation in the original petition for removal in this case, ‘that the controversy in said case is entirely between citizens of different states,’ although conclusory in nature and possibly not sufficient if not amended, is sufficient to confer jurisdiction on the federal courts to permit the curing of the defect by amendment.” 288 F. 2d at 350 (citation omitted). The Eleventh Circuit noted that 28 U. S. C. § 1653 states that defective allegations of jurisdiction may be amended in either the trial or appellate courts and is applicable to removal notices. 561 F. 3d at 1297.

Third stress reliever: *Dart Cherokee*

Dart Cherokee Basin Operating Co. v. Owens, _____ U. S. _____, 135 S. Ct. 547 (2014), contains language that is rhapsodic

to a prospective removing defendant’s lawyer, both specifically as to the issue of jurisdictional amount and as to removal notices in general. As amended effective in 2012, 28 U. S. C. § 1446 (c) (2) (B) states that a diversity-based removal is proper “if the district court finds, by the preponderance of the evidence, that the amount in controversy exceeds the amount specified in Section 1332 (a).” In the *Dart Cherokee* case, which involved a removal under the parallel Class Action Fairness Act, the district court had remanded, and the Tenth Circuit affirmed, because the removal notice itself did not include evidence supporting the allegation that the required amount in controversy was present. The Supreme Court reversed, with four justices joining⁶ the following language by Justice Ginsburg:

As noted above, a defendant seeking to remove a case to a federal court must file in the federal forum a notice of removal “containing a short and plain statement of the grounds for removal.” § 1446 (a). By design, § 1446 (a) tracks the general pleading requirement stated in Rule 8 (a) of the Federal Rules of Civil Procedure. . . . The legislative history of § 1446 (a) is corroborative. Congress, by borrowing the familiar “short and plain statement,” standard from Rule 8 (a), intended to “simplify the ‘pleading’ requirements for removal” and to clarify that courts should “apply the same liberal rules [to removal allegations] that are applied to other matters of pleading.” . . .


When a plaintiff invokes federal-court jurisdiction, the plaintiff’s amount-in-controversy allegation is accepted if made in good faith. Similarly, when a defendant seeks federal court adjudication, the defendant’s amount-in-controversy should be accepted when not contested by the plaintiff or questioned by the court. . . .

. . . .
In sum, as specified in § 1446 (a) a defendant’s notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold. Evidence establishing the amount is required by § 1446 (c) (2) (B) only when the plaintiff contests, or the court questions, the defendant’s allegation.

Id. at 554 (emphasis added).

Where These Decisions, And the Statutory Amendments, Leave Us

The 2012 amendments to § 1446, the sweeping language of the Supreme Court in *Dart Cherokee*, and the similarly broad language in *Artjen Complexus* prompt this question: Remember *Conley v. Gibson*? That was the famous case⁷ from the Supreme Court, decided in 1957, that we all learned about in civil procedure class. It informed us that no complaint was subject to outright dismissal unless it could be said with positive assurance that there was no set of facts under which the plaintiff might prevail.



The application of *Conley* resulted in various nuances among the circuits. In the Eleventh, the relevant morphing of *Conley* is found in *Bank v. Pitt*, 928 F. 2d 1108 (11th Cir. 1991). There the court addressed *Conley* in connection with *Fed.R.Civ.P.* 15 (a) and announced a nearly absolute rule that if a complaint is defective, a plaintiff who desires to make an amendment must be given at least one opportunity to cure the defect, unless it is clear that a more carefully crafted complaint could not cure the defect. *Id.* at 1112. *Conley* has since been abrogated by the Supreme Court,⁸ but something like the *Bank v. Pitt* rule as a standard for judging removal notices is what emerges from these recent decisions.

If we return to the hypothetical 2008 complaint discussed above, if that case were filed today, our defense lawyer could proceed without aggravation. Her only urgent task would be to confirm the service date on her client. In the remaining time before the removal deadline she would make necessary investigation regarding the actual facts supporting diversity jurisdiction. She could then file a viable notice of removal (meaning it *should* not be remanded without an opportunity to amend) containing only these jurisdictional allegations:

1. This notice is filed within 30 days of service of process on this defendant.
2. The controversy in this case is entirely between citizens of different states, and no defendant is a citizen of Alabama or is attributed Alabama citizenship.
3. The amount in controversy, exclusive of costs and interest, exceeds \$75,000.
4. All defendants join in this removal, as confirmed by their consents filed contemporaneously.

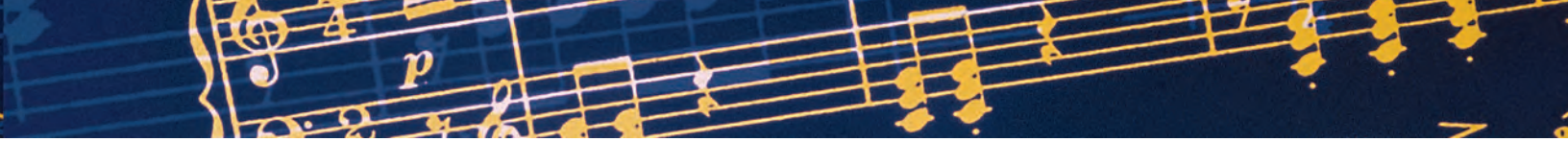
No additional details or embellishments should be required by any district court in Alabama or elsewhere in the Eleventh Circuit. Or, if she wanted to be particularly pithy, she might simply track § 1332 itself: “The amount in controversy in this action exceeds \$75,000, exclusive of costs and interest, and the action is entirely between citizens of different states, and no defendant is an Alabama citizen.”

Words of Caution

A. Everything set out above relates solely to the preparation of what we antiquarians still call the removal “paperwork.” These decisions and statutory amendments make the preparation of the notice of removal measurably simpler. They may not necessarily make the lawyer’s overall responsibility in the removal process that much simpler, because much of the complex activity might remain; it may just be postponed some number of weeks. That does not justify the lawyer’s deferring the necessary information gathering and evaluation, however, because, as mentioned above, the new liberal “pleading” standard contemplates that, when challenged, the removing defendant may be required both to amend the notice regarding the citizenship allegations and to prove the notice’s allegations

regarding jurisdictional amount.⁹ For that reason, a lawyer should not file the short-form notice without having confidence in his ability to follow through with those amendments and that proof. A notice of removal, like any other federal court filing, is subject to *Fed.R.Civ.P.* 11 (b) (1) and (3), so the lawyer who files a notice that alleges only that the parties are diverse and that the jurisdictional amount is present is certifying to the court that the notice is not being filed to delay the plaintiff’s cause, and that the contentions regarding diversity and jurisdictional amount have evidentiary support. Those certifications may be the basis for sanctions by the district court if it finds that they were improperly made. *Fed.R.Civ.P.* 11 (c). In addition, 28 U. S. C. § 1447 (c) provides for the imposition of costs, including attorney fees, as part of a remand order.

- B. Another problem with pleading a notice of removal without any detail, though not unique to diversity circumstances, is 28 U. S. C. § 1447 (d). That section reads: “An order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise . . .” with certain exceptions not applicable to a routine civil action. Though courts of appeals have occasionally found certain obscure (or abstruse) ways to avoid this restriction, in the main it is held to mean exactly what it says. Thus, a district judge who is wedded to the older era might grant, without elaboration, a motion to remand and the case would go back to state court (improperly) with no review available.
- C. There are many ways in which erroneous facts can be introduced into a detailed notice of removal. How does the new liberal pleading standard apply to a botched notice of removal? One recurring example will be used here. Limited liability companies are now a nearly ubiquitous form for new business enterprises. In *Rolling Greens MHP, L. P. v. Comcast SCH Holdings L. L. C.*, 374 F. 3d 1020 (11th Cir. 2004), the Eleventh Circuit announced that, for purposes of diversity jurisdiction (and hence removal), a limited liability company would be attributed the citizenship of each of its members. Despite the fact that this principle is now more than 10 years old, one continues to see, with disturbing frequency, allegations in removal notices such as this: “Defendant ACME, LLC is a corporation organized under the law of Georgia with its principal place of business in Atlanta, Georgia. For purposes of diversity and removal jurisdiction, it is a citizen of Georgia.” The filers of such notices display no apparent appreciation of either business organization principles or removal practice. In order properly to plead the citizenship of ACME, LLC, the lawyer would need to know who all of its members are. He would then need to set out in the notice that the individual members are domiciled in specified states, that each corporate member is incorporated in state X with PPB in state Y, and if other members are themselves LLCs, the same process for those members. The principal place of business of the defendant LLC is not relevant to removal, but what does the district court do with the completely erroneous allegation about



Though the defense lawyers' obligations in gathering facts and arguments regarding the validity of removal remain largely unchanged, the intense burden of doing so entirely in advance of preparing the notice has been greatly reduced.

ACME, LLC recited above? The answer is probably “nothing,” assuming there is elsewhere in the notice a general allegation of complete diversity. Under the language in *Dart Cherokee* and *Bank v. Pitt*, it would fall to the plaintiff to raise an issue about the true existence of diversity, pointing out the defective allegation, and it would then fall to the removing defendant to straighten out ACME's membership.

D. Another recent Eleventh Circuit case that bears mention here is *Goodwin v. Reynolds*, 757 F. 3d 1216 (11th Cir. 2014). That decision deals with the bar in § 1446 (b) to removal by a local defendant “properly joined and served.” The early proceedings in *Reynolds* illustrate that the revered adage “no good deed goes unpunished” is sometimes true in civil litigation. Goodwin sued three defendants in Alabama circuit court. Two defendants were foreign and an individual, Reynolds, was an Alabama citizen. Goodwin's lawyer sent “courtesy copies” of the complaint to all defendants.¹⁰ Four days later, before any defendant was served, the two foreign defendants removed the case, noting that since the forum defendant had not been “properly joined and served,” § 1446 (b) was no bar to removal. They simultaneously filed an answer. Considering herself slicker, Goodwin sought leave to dismiss, without prejudice, so that she could refile the action and execute service in a sequence that would prevent removal. The district court granted her Rule 41 (b) motion and the Eleventh Circuit affirmed. Several points about the opinion are noteworthy. First, defendants will assert that every “pro-plaintiff” statement in it mentioned below is dictum because the immediate issue was the propriety of a Rule 41 dismissal, not removal. Second, the opinion questions the existence of any “right” of a civil defendant to remove an action. *Id.* at 1221. Next, the court acknowledges that the true impact of the “and served” portion of that statutory phrase is the subject of much debate, citing in a footnote *North v. Precision Airmotive Corp.*, 600 F. Supp. 2d 1263 (M. D. Fla. 2009), which gathers the disparate authorities. Finally, the opinion observes that, if for nothing else, the “properly joined and served” language was put into the statute to protect plaintiffs from the gamesmanship the court concluded was practiced by defendants in the *Reynolds* case. *Id.* at 1221. Unlike the other cases mentioned above, *Reynolds* adds no clarity, but does suggest how there is still a little thrill left in diversity removals.

E. Is there, in these recent decisions, any comfort for plaintiffs seeking to avoid removal? Frankly I do not see much. The only guidance that emerges is the reaffirmation of the two long-standing fundamental bases for removal-avoidance. First, if upon realistic evaluation of the case, there is little chance of a jury verdict exceeding \$75,000, then make a con-

crete demand for less in the complaint. Second, if there is in the facts a claim with a Rule 11 basis against an Alabama defendant, then join him or it and shepherd the service of process so that he or it is served before any foreign defendant is served. Neither of these will assure that the defendants will not file a notice of removal, but your chances on motion to remand should be quite solid, as might be your claim for fees and expenses under § 1447 (c).

Conclusion

The *Dart Cherokee* case from the Supreme Court, and the earlier decisions from the Eleventh Circuit, portend a new era in the formulation of notices of removal in diversity jurisdiction cases. Though the defense lawyers' obligations in gathering facts and arguments regarding the validity of removal remain largely unchanged, the intense burden of doing so entirely in advance of preparing the notice has been greatly reduced. BB said the thrill is gone away for good. We'll have to wait and see if that's entirely true about removal notices. | AL

Endnotes

1. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 US 826, 109 S. Ct. 2218 (1989).
2. 28 U. S. C. § 1332 (c)(1).
3. 28 U. S. C. § 1446 (c)(1). This limit may be extended if the district court finds that “the plaintiff has acted in bad faith” to prevent removal. *Id.*
4. Okay, maybe a few times.
5. E.g., *Betts v. Larsen Intermodal Services, Inc.*, No. 05-0600-CG-C (S. D. Ala.) (unpublished order of June 21, 2006, remanding action); *Adams v. Charter Communications VII, LLC*, No. 2: 04-cv-1115-F (M. D. Ala.) (unpublished order of February 8, 2005, remanding action).
6. The dissents do not focus on the merits of the majority holding but on some niceties of Supreme Court procedure and jurisdiction.
7. 355 U. S. 41, 78 S. Ct. 99 (1957).
8. See *Bell Atlantic Corp. v. Twombly*, 550 U. S. 544, 127 S. Ct. 1955 (2007).
9. In that regard, in *Dart Cherokee* the Supreme Court's opinion quoted, without commenting on its correctness, a portion of § 1446 (c)(2)(B)'s legislative history stating that if a post-removal dispute arises over jurisdictional amount, “discovery may be taken with regard to that question.” 135 S. Ct. at 554.
10. In *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 US 344, 119 S. Ct. 1322 (1999), the Supreme Court established that only formal service of process (in Alabama, a summons) constitutes “service.”



The Interstate Land Sales Full Disclosure Act: The Law of Unintended Consequences As Applied to Condominiums

By Mark H. Taupeka

In the heyday of the robust real estate market in the first half of the 2000s, condominiums were a hot commodity for buyers, investors and speculators alike. And developers were more than eager to feed their seemingly insatiable appetite. Though south Florida was likely the epicenter of the nation's high-flying condominium market, regions across the country were not immune to the irrational exuberance, including Alabama and, particularly, the gulf coast. As the adage goes, a rising tide lifts all boats.

Bolstered by easy credit, low carrying costs (taxes, insurance, dues, etc.) and fair weather, Alabama gulf coast condominium development and sales skyrocketed. During that time, though unheard of before, it was not unusual to hear about an entire condominium being pre-sold in a single day. While other investments were flat or otherwise unappealing, condos were all the rage, and demand soared. Some likened the condo craze to a feeding frenzy in shark infested waters. Such was not an exaggeration according to this author's observations.

Speculators flooded the market, seeking, and for a while enjoying, never-before-seen

returns on their condominium investments. Many opportunists signed preconstruction purchase agreements for little to no money down, with little to no intention of closing, and assigned (or "flipped") their contracts to other buyers. Many condominium units were flipped several times before the first closing to an end user after construction was completed, with each and every intermediate flipper making a profit along the way. A typical earnest money deposit was 20 percent of the purchase price, which was often supplied by issuers of letters of credit for little or no security or collateral provided by buyers. It seemed as if everybody and his brother were buying condos.

Courts, too, recognized the euphoric condition of the market at the time. A Florida U.S. District Court noted, "During the housing boom there was no hotter commodity [than a condominium unit]. At the height of frenzied buying, people stood in long lines just for a chance to put a deposit down and secure a unit. Often the unit was immediately resold, or flipped, several times for a profit."¹

Alas, the euphoric market conditions could not, and did not, last. In August

2005, Hurricane Katrina made landfall on the northern gulf coast, and in addition to the unimaginable physical destruction the storm left in her wake, many believe she was the proverbial straw that broke the camel's back of the coastal real estate market. Like being splashed with a bucket of cold water, observers were doused with the reality that the market for high-end, resort-style, upscale coastal condominiums had been artificially supported by bad economics. Not surprisingly, in hindsight, the market suffered a dramatic, and emphatic, collapse in Katrina's aftermath. Demand vanished and values plummeted, as much as 50 percent in some cases. Against this backdrop, many preconstruction condominium buyers, especially flippers and other speculators, were left holding the bag, stuck with contracts and letters of credit but no resale market.

Many turned to the courts to bail them out, rescind their purchase agreements and refund their deposits. Certainly there were some legitimate claims, but many were looking for an insurance policy against the very risk they so willingly took before the market crash. The Trojan horse for developers was the Interstate Land Sales Full Disclosure Act ("ILSA"),² a federal consumer protection statute, and as some say, a law of unintended consequences as it has been applied to condominiums. Few anticipated the rising tide of these unintended consequences during the real estate and economic boom times, and it was not until about 2008 that condo buyers and their lawyers cleverly began to press ILSA into service in litigation against condominium developers.

In 2009, the Eleventh Circuit remarked in a case originating from a Florida U.S. District Court:

In a market-based economy the price of housing, like other goods, is subject to swings. There was a sharp upward swing in housing prices between late 2000 and the end of 2005 . . . All bubbles eventually burst, as this one did. The bigger the bubble, the bigger the pop. The bigger the pop, the bigger the losses. And the bigger the losses, the more likely litigation will ensue. Hence this case . . . After the housing bubble burst, the [plaintiffs] had second thoughts about their decision to purchase the condominium unit. Wanting out of their contract, they seized on to the Interstate Land Sales

Full Disclosure Act, a federal statute that has become an increasingly popular means of channeling buyer's remorse into a legal defense . . .³

Also in 2009, an Alabama U.S. District Court commented on the condominium market crash and the utilization of ILSA as a weapon that purchasers employed against developers:

Courts have uniformly held that a condominium is a subdivision of land, comprising elements of private and common ownership.

This action is one of many filed in federal and state courts along the Gulf Coast in recent years involving a condominium deal gone bad. Plaintiffs . . . entered into a contract . . . in the summer of 2005 to purchase a pre-construction condominium unit . . . at a development located in Gulf Shores, Alabama. Plaintiffs' expressed intention was to flip their unit at or before closing to obtain a sizeable and immediate return on their investment. [Plaintiffs] closed on the unit in September 2007, but later came to regret that decision when the real estate market stumbled badly, rendering them unable to resell their property for anything approaching (much less exceeding) the price they had paid.⁴

The Interstate Land Sales Full Disclosure Act

ILSA was enacted in 1968 to protect consumers from abuses in the sale of unimproved, subdivided land. A Virginia U.S. District Court noted, "[ILSA] was meant to prevent fraud in land sales by protecting unsuspecting and ill-informed investors from buying undesirable land."⁵ A Florida U.S. District Court remarked, "[ILSA] is an anti-fraud statute that uses disclosure as its primary tool to protect purchasers from unscrupulous sales of

undeveloped home sites."⁶ The 11th Circuit commented: "It is not disputed that Congress, in passing [ILSA], desired to protect purchasers from unscrupulous sales of undeveloped home sites, frequently involving out-of-state sales of land purportedly suitable for development but actually under water or useful only for grazing . . . The legislative history

of the Act indicates that Congress was concerned with the sale of fairly large numbers of undeveloped lots . . ."⁷ The proverbial sale of "Swampland in Florida" typifies the transaction from which ILSA was designed to protect the public.

ILSA and Condominiums

Prior to the latter half of the 2000s, it is doubtful that many people thought that ILSA applied to condominiums. However, a literal reading of the statute makes it clear. "Subdivision" is defined as "any land which is located in any State or in a foreign country and is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan."⁸ Courts have uniformly held that a condominium is a subdivision of land, comprising elements of private and common ownership. A condominium unit is a private element with the right, title and interest thereto belonging exclusively to its owner. Condominium unit ownership also includes an undivided interest in the condominium's common areas, or common elements: for example, swimming pools, tennis courts and other amenities for the use, benefit and enjoyment of all unit owners. A unit owner also has the right to the exclusive use, possession and enjoyment of limited common elements appurtenant to the owner's unit. Some are physically appurtenant to the unit: for example, a balcony. Some are not physically, but are

legally, appurtenant to the unit: for example, a boat slip in a marina that is part of the condominium property. A “common promotional plan” is ascribed a rather common sense definition in ILSA.⁹ It should be noted that not only developers, but also their agents, are subject to ILSA and can be found in violation of its statutory prohibitions.¹⁰ “Developer” is broadly defined in ILSA.¹¹ Fortunately for lawyers, an exception is made in the definition of “agent” for an attorney who renders legal services to a developer.¹²

ILSA—Prohibited Activities

Activities prohibited by ILSA are segregated into regulatory and reporting provisions on one hand, and anti-fraud provisions on the other.¹³ Generally, it is unlawful for a developer or agent thereof to promote, market, advertise, offer, sell or lease a nonexempt, unimproved, subdivided lot (including a condominium unit) without filing a truthful and consistent Statement of Record¹⁴ with the Consumer Financial Protection Bureau (“CFPB”) Interstate Land Sales Program. Developers must also furnish a truthful and consistent Property Report¹⁵ to potential buyers or lessees before signing any contract or agreement to purchase or lease.¹⁶ These are ILSA’s regulatory provisions in a nutshell. More detail can be found in the *Code of Federal Regulations*.¹⁷ Truthful and consistent disclosure is the key. Practitioners may note that prior to July 21, 2011, the agency charged with administering ILSA was the U.S. Department of Housing and Urban Development (“HUD”) Office of Interstate Land Sales. The change from HUD to CFPB was mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act.¹⁸

ILSA’s anti-fraud provisions generally make it unlawful for a developer or agent thereof to employ any device, scheme or

artifice to defraud any purchaser or lessee in connection with the promotion, marketing, advertising, offering, sale or lease of a nonexempt, unimproved, subdivided lot (including a condominium unit).¹⁹ Examples of misleading sales practices can be found in the *Code of Federal Regulations*.²⁰

ILSA Exemptions

There are two types of ILSA exemptions—those that apply to both the regulatory and anti-fraud provisions (full exemptions),²¹ and those that apply to only the regulatory provisions but not the anti-fraud provisions (partial exemptions).²² Obviously, a full exemption is preferred over a partial exemption. Developers, with good reason, have historically sought refuge under the improved lot, or two-year, full exemption.²³ ILSA does not apply to improved lots or condo units, nor does it apply to lots or condo units which the developer is contractually obligated to complete in two years.²⁴ There has been voluminous litigation over the issues of completion and whether the developer’s contractual obligation to complete within two years is real or illusory. A survey of such cases is beyond the scope of this article. Practitioners should familiarize themselves with pertinent opinions and draft developer contracts accordingly. The consequences of seeking refuge under an illusory obligation to complete within two years are harsh and unforgiving.

Purchasers have the statutory right under ILSA to revoke nonexempt contracts and receive reimbursement of monies paid under a variety of circumstances.²⁵ These revocation and reimbursement rights are in addition to relief available to purchasers for developer violations of ILSA regulatory and anti-fraud provisions.²⁶ Purchaser remedies for developer violations include money damages, interest, court costs, reasonable

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attorneys' fees as well as specific performance, rescission and other forms of equitable relief.²⁷ It is noteworthy that ILSA exemptions are generally self-determining. Developers need not seek prior approval for, or certification of, an exemption, but rather must ensure for themselves that all prerequisites for the application of an exemption are fully satisfied. Developers must further maintain adequate supporting documentation.²⁸ With two exceptions,²⁹ there is no application and approval process with the CFPB, however developers may discuss the CFPB's position in an informal hearing.³⁰ Developers may also request an advisory opinion from the CFPB.³¹ If the CFPB determines that ILSA reporting requirements apply but need not be enforced with respect to a particular subdivision of land, including a condominium, the CFPB may issue a No Action Letter.³² However, the issuance of a No Action Letter does not affect purchasers' rights under ILSA.³³

Developers need not seek prior approval for, or certification of, an exemption, but rather must ensure for themselves that all prerequisites for the application of an exemption are fully satisfied.

ILSA Amendment

Fortunately, Congress recognized that the good intentions supporting ILSA's broad policy initiatives resulted in unintended and undesirable consequences when the Act was applied to condominiums. In September 2014, Congress passed Public Law 113-167 and it was signed into law by the President. This legislation

added to ILSA's partial exemptions "the sale or lease of a condominium unit that is not exempt under subsection (a)."³⁴ ILSA exemptions under "subsection (a)" are full exemptions.³⁵ This ILSA amendment became effective September 26, 2014.³⁶ A review of the Congressional Record shows that members of Congress acknowledged the unintended consequences of ILSA's application to condominiums, its exploitation by

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– Henry Ford.



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preconstruction condominium buyers and their lawyers and the chilling effect it has had on condominium markets across the county.³⁷ Congress realized that the rigid reporting requirements for subdivided lots were either inapplicable or redundant as applied to condominiums: inapplicable because vertical condominiums are much different from subdivided lots, and redundant because condominiums are already heavily regulated by states via condominium acts.³⁸ In amending ILSA, Congress exempted condominiums from ILSA's regulatory provisions and reporting requirements, but not ILSA's anti-fraud provisions. Thus, for a condominium to be completely exempt from ILSA, it will still need to come within a full exemption, like the improved lot, or two-year, exemption discussed *supra*.

Conclusion

Like the "dot com" boom and bust that preceded it, the condominium market rose to stratospheric heights on financial speculation and came crashing back to earth because the boom lacked sound economics. The crash was exacerbated by preconstruction condo buyers who took the risk, but who did not want to suffer the consequences. They used ILSA to channel their buyers' remorse into litigation in federal and state courts across the country. Recognizing this, Congress responded, and by April 2015, ILSA's regulatory provisions and reporting requirements will no longer be applicable to condominiums. However, ILSA's anti-fraud provisions will continue to apply to condominiums, unless a particular condominium qualifies for a full exemption under ILSA. Lawyers should take great care in advising their clients about full exemption qualification and should pay

close attention to the fine print in ILSA's regulations as well as ILSA's statutes. Regardless, lawyers should consult with their clients about ILSA's anti-fraud provisions and misleading sales practices. It is doubtful that we will ever see again the kind of meteoric rise in the condominium market observed in the early half of the 2000s, but there has been evidence in recent years that it is showing signs of health, stability and growth. | [AL](#)

Endnotes

1. *Kalil v. Blue Heron Beach Resort Developer, LLC*, 720 F. Supp. 2d 1335, 1344 (M.D. Fla. 2010).
2. 15 U.S.C. §1701, et seq.
3. *Stein v. Paradigm Mirasol, LLC*, 586 F. 3d 849, 852 (11th Cir. 2009).
4. *Boatwright v. Carney Realty, Inc.*, 2009 WL 3615048, *1 (S.D. Ala. 2009).
5. *Zhou Jie Plant v. Merrifield Town Ctr. Ltd. P'ship*, 751 F.Supp.2d 857, 869 (E.D. Va. 2010).
6. *Stein v. Paradigm Mirasol, LLC*, 551 F.Supp.2d 1323, 1327 (M.D. Fla. 2008).
7. *Winter v. Hollingsworth Properties, Inc.*, 777 F.2d 1444, 1447 (11th Cir. 1985).
8. 15 U.S.C. §1701(3).
9. 15 U.S.C. §1701(4).
10. 15 U.S.C. §1703(a).
11. 15 U.S.C. §1701(5).
12. 15 U.S.C. §1701(6).
13. 15 U.S.C. §1703(a).
14. 15 U.S.C. §§1704-1706.
15. 15 U.S.C. §1707.
16. 15 U.S.C. §1703(a)(1).
17. 12 C.F.R. §1010.1, et seq.
18. *See* CFPB Bulletin 11-2.
19. 15 U.S.C. §1703(a)(2).
20. 12 C.F.R. §1011.25.
21. 15 U.S.C. §1702(a).
22. 15 U.S.C. §1702(b).
23. 15 U.S.C. §1702(a)(2).
24. *Id.*
25. 15 U.S.C. §1702(b), (c), (d), (e).
26. 15 U.S.C. §1702(a).
27. 15 U.S.C. §1709.
28. 12 C.F.R. §1010.4(d).
29. 12 C.F.R. §§1010.15, 1010.16.
30. 12 C.F.R. §1010.4(e).
31. 12 C.F.R. §1017.
32. 12 C.F.R. §1018.
33. *Id.*
34. Public Law 113-167, Sec. 1.
35. 15 U.S.C. §1702(a).
36. Public Law 113-167, Sec. 2.
37. 159 Cong. Rec. H5821-5823.
38. *Id.*

Lawyers should take great care in advising their clients about full exemption qualification and should pay close attention to the fine print in ILSA's regulations as well as ILSA's statutes.

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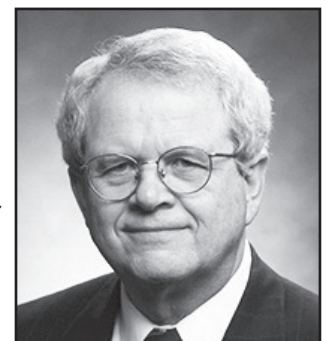
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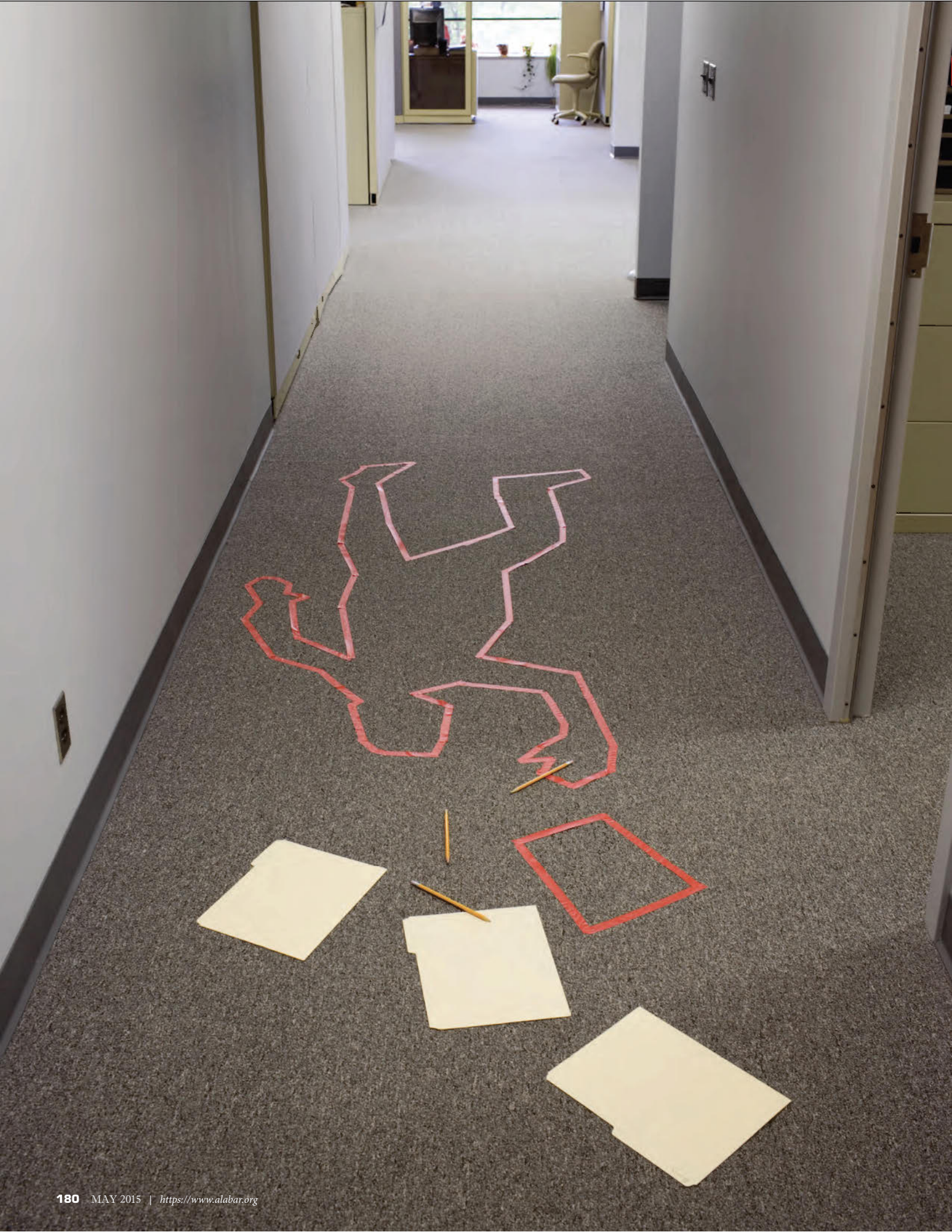
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It Is Barely Illegal to Kill a Lawyer

By David A. Bagwell

Mr. Harry Seale was the undisputed Don of the Mobile trial bar

in the mid-half of the 20th century. I don't remember exactly when Mr. Harry died, but I do remember that one reason he was such a great lawyer is that he could put it down where the hawks could get it, and keep it short. Here's how Mr. Harry described the Foster K. Hale murder, in the 1983 book *Stories of the Mobile Bar*:

While Judges Saffold Berney and Tisdale J. Touart were serving on the bench, there practiced before them Foster K. Hale, a most unusual gentleman, who reached nearly 60 years of age before he was shot to death at his desk. He represented more clients in the Inferior Court and the Records Court than all the other lawyers in the city combined. His standard fee was \$10, no more, no less. Upon arriving at this office around 7:30 a.m., he would find it jammed [sic] packed with clients who were being charged with misdemeanors and had to face the court in a preliminary hearing. He would ask those with money to stand. He would then direct the standing

clients to move to one side of the waiting room and directed all others to leave. He did not do a credit business and depended on low charges and volume. Mr. Hale was a great sportsman and frequently went fishing in his "Gulf" boat.¹ He also hunted ducks, quail, geese, dove and deer. He did not expect any favors from the judges but he delighted in furnishing them fish and game. They realized that he did not expect favors and they gave him none. They were honorable men. Unfortunately, Mr. Hale had an almost irresistible impulse to associate intimately with lovely women. As a result, he had a "girlfriend."² On an occasion she got into an argument with Mr. Hale over some trivial matter, and he fell dead at her feet while in her hand she held a blasting .38 caliber revolver pointed toward him. She was charged with murder and employed the great criminal lawyer, Samuel A. Johnston, to represent her. At the trial of the case, Mr. Johnston painted such a touching picture of the abuse she had allegedly suffered at the hands of Mr. Hale that she received a very light sentence. MORAL: *It is barely illegal to kill a lawyer.*³

This case clearly merits a closer look.

On June 17, 1931 a headline in the *Mobile Register* screamed, “Attorney is Shot to Death by Woman,” and the sub-head said, “Two Slugs are Fatal to Lawyer.” The zippy lead to the story just about said it all:

Quoted by her dying victim as vowing, “You will go to Hell with me,” Mrs. Willie Mae Clausen, 35-year-old mother, early last night sent a deadly stream of lead into the body of Foster Kr. Hale, Jr., 53-year-old lawyer, while they were alone in his law offices at 66 ½ St. Michael Street. Hale, wounded in the abdomen and the left side, lived only an hour. “She shot me for nothing,” Hale said just before he died in the city hospital, explaining he had been trying to break off relations with the woman. “He wrecked my life and he got what he deserved,” police quoted the woman as saying when they reached Hale’s offices to find him lying on the floor groaning, with Mrs. Clausen standing over him. Two feet from where Hale was lying, police picked up the death weapon, a 32-caliber revolver, containing three empty and two loaded cartridges.⁴

Mr. Hale was still a good enough lawyer to give two dying declarations,⁵ likely admissible whether or not he was current enough on the law⁶ to know it, both statements naming Mrs. Clausen as the killer, one made to a *Mobile Register* reporter, and one made to the police. Mrs. Clausen was booked at the police station and interrogated by Bart B. Chamberlain, Sr., universally called “Mr. Bart,” the remarkably effective circuit solicitor [the job is now called “district attorney”]. Mrs. Clausen’s statement to Mr. Chamberlain said that lawyer Hale had called Mrs. Clausen at the Bienville hotel, where she had just checked in after arriving from Atmore; that Mr. Hale cursed her and told her that he was through with her:

She loaded her pistol, wrapped it in brown paper and went to his office, where she laid it on his desk under her raincoat. Mr. Hale again cursed her, threatened to eject her from the office and grabbed at the pistol, . . . but she also got hold of it and fired it three times “toward the floor.” “When the pistol fired the second time, he still had hold of it, but when the third shot was fired he fell over,” she was quoted as having said.⁷

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Who was this Mrs. Clausen? This was 1931 and it was the *Mobile Register*, so listen to how they described what passed for her pedigree:

Mrs. Clausen, who is better known by her former name of Mrs. Pugh, returned to the city yesterday from Atmore, Alabama, after having been at Phoenix, Arizona, where she is said to have gone a year ago for her health. She was Willie Mae Hancock before her first marriage to Mr. Pugh of Mobile, by whom she has a son, Willie Pugh, 16. Several years ago she went to Seattle, Washington, where she married Frederick Clausen, after being divorced from her first husband. Later she was separated from Clausen.⁸

What else was in the paper that day? City attorney Vincent F. Kilborn and a legislator and a pilot were killed in an airplane crash at Bates Field, returning from having done business in Montgomery [and this was **1931!**]; the legislature, in an assault on prohibition sponsored by somebody from Washington County of all things, appeared poised to allow a referendum on the sale of “near beer”⁹ despite the lobbying of Republicans and over the objection of the Anti-Saloon League; the Mobile county jury list published had the name of every prominent white man in Mobile; and a black man was taken from the jail in Huntsville and apparently lynched.

As Mrs. Clausen’s trial approached, defense counsel—initially Sam Johnston of Mobile and C.L. Hybart of Atmore—subpoenaed the contents of Mr. Hale’s safe deposit box, where there were love letters from Mrs. Clausen to Hale. The prosecution called for the death penalty, and the defense announced plans to call psychiatric testimony to prove her insane.¹⁰ Also in the news that day? Airmail passenger service was about to begin from Mobile’s Bates Field on American Airways, there were plans for two *public* masked Mardi Gras balls at Mobile’s open-air banana wharf and former Mardi Gras king Roy Albright of Albright & Woods [later K&B] said there were insufficient donations to the Mardi Gras coronation, and they might have to cut back on Mardi Gras.

The court and lawyers in Mrs. Clausen’s case struck a jury on Thursday, January 28, 1932, bringing the defendant over what they called “The Bridge of Sighs”¹¹ separating the courtroom from the jail, and in court she kissed her son, Bobby Pugh, age 16. Spectators, mostly women, brought their lunches and bottles of water and frequently had to be admonished to be quiet. The prosecutors were “Mr. Bart” B. Chamberlain, Sr., and J.P. Courtney [grandfather of Mobile lawyer Rick Courtney, and Mr. Bart’s partner in the firm of Lyons, Chamberlain & Courtney (now Lyons, Pipes & Cook)]. The defense team at the tiny table numbered four: Mr. Sam Johnston, Percy Fountain [later U.S. Attorney], Miss Rosa Gerhardt, Mobile’s first woman lawyer [who was making her first appearance in an important murder

She loaded her
pistol, wrapped
it in brown
paper and went
to his office,
where she laid it
on his desk
under her
raincoat.

case], and Charles Hybart of Atmore.¹² Also in the news that day? Sen. Huey P. Long presented his credentials as a U.S. Senator, two young men drowned when their small boat out of Bon Secour swamped on January 28, Japan seized Shanghai and a large egg with three yolks was brought to the *Mobile Register* by a man from Chunchula, Alabama, a place where a three-yolked egg might make news.

At the trial, there was testimony that Hale had tried to help Mrs. Clausen with her education when she was only 13 and she asked him for a loan of occasional \$10 bills so that she could become a school-teacher. She matured, as girls will, and went to Mr. Hale’s office and told him that she could not pay back the loan. She said Mr. Hale responded that, “You have developed wonderfully, and you will not have to work if you’ll let me take care of you.” “She testified that the intimate relationship was started at that time,” that they developed an affair which lasted for many years and

through two of her marriages, that Hale had once locked her in his boat house and that he had finally offered her \$30,000 if she would just go away and leave him alone, since he was old and tired and had fallen on harder times. She testified that as each of her two husbands ultimately learned of the affair, they divorced or separated. A doctor from Tulane and records from Johns Hopkins were used by the defense to try to prove Mrs. Clausen insane. Also in the news that day: Representative Hamilton Fish, a Republican from New York,¹³ introduced a bill that no more than 10 percent dividends would be allowed, and that the rest of the corporate earnings had to be divided between the shareholders and the employees, announcing that “it is my suggestion to see that no person starves or is even undernourished.”¹⁴

The trial ran through Saturday but recessed for Sunday and reconvened on Monday, when Mrs. Clausen again took the stand and other witnesses testified.¹⁵ She admitted that she had seen Mr. Hale’s will, written in 1928, in which he would split his estate between his wife and her.¹⁶ She said Foster gave her \$65 a week and a house in Biloxi, where he would visit her, but not with her little son around. She also said he gave her a pistol, and said that if Mrs. Hale bothered her, to kill Mrs. Hale. In other news that day in 1932, the Navy rushed ships to protect and evacuate Americans from Shanghai, there seemed to be some hope to keep professional baseball in Mobile and a man was charged with manslaughter for running over and killing a three-year-old child in Spring Hill near Mobile, Cecil Fearn, Mobile’s famed “Automobile Hotel” [an early parking garage] was being enlarged and an auto-gyro aircraft was to visit the city.

Finally, on Wednesday, assistant Solicitor J.P. Courtney made a loud demand for the death penalty and the defendant wept.

There were closing arguments by just about all the lawyers on the defense. Miss Rosa Gerhardt of the Mobile Bar made her debut in an important murder case, and argued that the jury should consider how Mrs. Clausen met Hale when she was only 14, and that he gave her expensive clothing, homes, cars and money. Her lawyer, Charles Hybart, argued that when she walked into Foster's life, "it was like a fly walking into a spider's nest." Her lawyer, "Mr. Sam" Johnston, spoke for one hour, and then said he had a headache and would like to come back the next day. In other news that day, St. Joseph Street in Mobile, where the federal courthouse sits, was made one-way; four or five airplanes crashed, including a "giant airliner" carrying eight people from San Francisco to Los Angeles and a plane suspected of carrying whiskey between Miami and Bimini. Moonshiners in Hancock County, Mississippi murdered a revenuer during a raid on a still.¹⁷

On Wednesday afternoon at 5:05 p.m., the jury got the case, and they went to supper at 8:00. They came back and deliberated until 9:38 p.m., when they were locked up in the hotel.¹⁸ In other news, Erwin Craighead, beloved former editor of the *Mobile Register* and local historian,¹⁹ died.

On Thursday, the jury came to the jury room at 8:00 a.m. and about noon returned a verdict of manslaughter in the second degree. "Reading the verdict brought a demonstration never before witnessed in a Mobile court," said the *Register*; "the spectators, the majority of whom were women who had followed the case since its beginning last Thursday, cheered wildly." The judge gaveled court back to order and threatened fines. The sentence was one year in the county jail. In other news, a local real estate man fell down an elevator shaft and died, and Mardi Gras started.

I reckon the actual verdict was that killing Foster K. Hale wasn't so bad after all. Mr. Harry was right, as usual.

The *Mobile Register* of July 7, 1933 reported that Mr. Hale's estate was insolvent and that although Mr. Hale's will left half the residuary estate to Willie Mae, the circuit court awarded to the widow Mrs. Hale \$6,000 in dower rights, and Willie Mae got nothing.

Jim Johnston of the Mobile Bar, grandson of "Mr. Sam," says that the family lore is that one day several years later, Willie Mae came to Mr. Sam's office in a chauffeured limousine, just checking in with Mr. Sam, and reported that she had married a high-born and wealthy Englishman.

Miss Willie Mae must have really been something. | [AL](#)

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Endnotes

1. Incidentally, he also had a classic wooden launch, with glass casement windows all around it, which he used for hunting and fishing trips in the Mobile River Delta, and Lord knows what else. After his death, the Gilbert Russell Ladd family of Mobile owned it for three generations before giving it to Spring Hill College in the 1980s or so. It is again individually owned, and will be seen occasionally around the Mobile Bay area.
2. Mr. Harry didn't say this, but Mobile's famed criminal lawyer, Tommy Haas, said that he was told years ago that Mr. Hale occasionally sat as a substitute judge and once, in the prosecution of an insider of a house of ill repute ["Miss Edna's," for inquiring friends], Foster felt that as a judge he had to say something, so he asked an inane question of a policeman about the location of a piano, to which the prostitute replied from the dock, "Oh, Foster; you know exactly where it is, as many times as you have been there!"
3. Mobile Bar Association, *Stories of the Mobile Bar* (1983) at 24-25.
4. *Mobile Register*, June 17, 1931.
5. A "dying declaration," you may recall, is a statement offered in evidence at trial, which someone had said on her deathbed; since it was said out of court it is technically "hearsay," but under the common law it was admissible in evidence anyway, on the theory that it had sufficient trustworthiness to come into evidence despite having been said outside of court and not subject to cross-examination, since no God-fearing person on his deathbed would ever lie, knowing that he would face Saint Peter at the Pearly Gates in mere moments. Because of the religious underpinning to the doctrine, there was always a question whether the dying declaration of a Godless person would be admitted, but that question had been neatly solved by the Alabama courts just before the murder of Foster K. Hale, as is discussed in the next note.
6. As an amazing coincidence, on March 19, 1931 [three months before this murder], the Alabama Court of Appeals without dissent had held that the dying declaration of an atheist was not admissible in evidence, notwithstanding Section 3 of the Alabama Constitution of 1901 [which provides religious freedom]. Justice Samford writing the opinion, quoting Webster that "atheist" included "one who lives as if there was no God" and noting that, "There is no place in our whole governmental structure for a belief which ties men to the rocks and clods and places him on a level with the beasts of the field. Without a belief in a Supreme Being there can be no legal oath; without a legal oath a witness is not competent to testify in our courts." Upon rehearing on May 26, three weeks before this murder, Judges Rice and Bricken switched sides, holding for the court that Section 3 did require admission of the dying declaration of an atheist. Judge Rice quoted the rocks and clods and beasts language of Judge Samford, but said he didn't agree, and that "[i]t is, rather, my opinion that

ours is 'the land of the free, and the home of the brave. . .'. Six days after Hale's murder, the court of appeals denied rehearing. *Wright vs. State*, 24 Ala. App. 378, 135 So. 636 (1931). You ought to read it; God isn't a "Johnny-Come-Lately" in the Alabama appellate courts.

7. Mobile Register, June 17, 1931.
8. Mobile Register, June 17, 1931.
9. "Near beer," for the benefit of younger people, was something on the order of what today passes as non-alcoholic beer. In case you are wondering, it is not anywhere "near beer."
10. Mobile Register, January 24, 1932.
11. One of our educated predecessors named it after the Ponte de Sospiri, the small bridge in Venice which carried prisoners from the courtroom in the Palace of the Doge to the inquisition chambers. Actually, Lord Byron named it the "Bridge of Sighs" much later. Want to see a picture? Point your browser to <http://goeurope.about.com/library/venice/aa081197.htm?once=true&>.
12. Mobile Register, January 29, 1932.
13. And one-third of the butt of the depression-era repetitive jest by President Franklin Delano Roosevelt about the Republican troika "Martin, Barton, and Fish."
14. Mobile Register, January 30 and 31, 1932.
15. Mobile Register, February 1, 1932.
16. Mobile Register, February 2, 1932. Mr. Hale's house was later owned by Tommy Haas's mother, who conducted an antique business there. It is now known as "Magnolia Manor," 1624 Spring Hill Avenue; perhaps you have been to a wedding reception there. Next time, think of Mr. and Mrs. Foster K. Hale.
17. Mobile Register, February 3, 1932.
18. Mobile Register, February 4, 1932.
19. Mr. Craighead once wrote, "I am inclined to think that every community needs on Old Mortality to chisel anew the names of the dead and gone worthies, the memory of whom has been allowed to lapse from the general mind; and that research among the tombs will everywhere be rewarded." You got it, Erwin; that's just what we're doing here.



Upchurch Watson White & Max

Guided by Rodney A. Max, center, and Michael B. Walls, right, our experienced team also comprises Brad Wash, Arthur J. Hanes Jr. and Marty Van Tassel. They assist law firms and their clients in every phase of dispute resolution, settling major litigation in Alabama and nationwide.

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Senator Cam Ward



The Time for Prison Reform Is Now

*Co-authored by Senator Cam Ward, chair,
Alabama Prison Reform Task Force*

We have reached the point of no return. It is no longer possible to pretend that we do not have a problem in our state correctional system. Statistics show that as of September 2014, Alabama's prisons were the most crowded in the country, operating at 195 percent of capacity with 26,029 prisoners in a system designed to hold 13,318. Meanwhile, the expenditures of the Department of Corrections exceed \$370 million dollars in an ever-more difficult general fund budget. This means that we have to get smarter and more strategic in how we deal with our criminal justice system.

We took a major first step toward developing a strategic approach to dealing with these issues in early 2014 when the leadership of all three branches of government requested support from The Pew Charitable Trusts and the U.S. Department of Justice's Bureau of Justice Assistance to explore possible solutions. Additionally, the Council of State Governments Justice Center was invited in and given full access to the stakeholders to provide technical assistance in collecting and analyzing data to develop policy options.

The Alabama Legislature backed up this request with the passage of SJR20 in February 2014 to create the Alabama Prison Reform Task Force. This task force brought all three branches of government to the table with additional parties representing all interests in this issue to explore the current state of the system in Alabama and look at ways to improve the situation. The task force met multiple times to consider data and various policy recommendations before ultimately endorsing a policy framework and potential solutions.

Ultimately, the task force, along with the technical assistance of CSG's Justice Center, made recommendations in three strategic areas: strengthen community-based supervision and treatment, prioritize prison space for violent and dangerous offenders and provide supervision to every person released from prison and improve notification to victims regarding releases from prison.

Strengthen Community-Based Supervision And Treatment

The data on post-release supervision was very troubling. What the task force found was that probation officers carry average caseloads of nearly 200 persons. Additionally, the risk-and-needs assessments were not consistently utilized. The problems with these statistics are compounded by a system that has very limited sanctions available when a person on probation violates short of revoking parole and the lack of uniformity and universal availability of community corrections programs.

These findings led to five key recommendations:

- We must hire additional probation and parole officers.
- We must standardize the use of risk-and-needs assessments to target supervision resources where they are most in need.
- We must establish intermediate sanctions to respond to technical violations of parole to more quickly stop troubling behavior.
- We must fund community-based behavioral health treatment programs to help diminish recidivism.
- We must increase capacity of community corrections programs.

Prioritize Prison Space for Violent and Dangerous Offenders

The findings in this area were somewhat alarming from a resource allocation standpoint. The data showed that people revoked to prison for violating conditions of probation make up a significant portion of prison admissions. Equally troubling is that two-thirds of prison admissions are those convicted of property and drug offenses. There are also troublesome signs on the back end of the process showing that the parole board lacks structured decision-making and the volume of cases was very high.

The data in this area led the task force to make four significant policy recommendations:

- Change the response to serious technical probation and parole violations with periods of incarceration followed by more supervision.
- Create a new class of the least serious nonviolent felony offenses and update felony thresholds for certain property and drug offenses.

- Adopt guidelines to structure the parole board's release decisions.
- Hire parole administrative hearing officers to reduce the number cases each parole board member must review.

Provide Supervision to Every Person Released from Prison

The majority of persons released from prison without supervision are property and drug offenders. These are crimes with very high recidivism rates. Approximately half of all people under the parole board's jurisdiction complete their sentences in prison and are released without any form of supervision. And, the automated victim notification system is not operational so not all victims are being notified when the offender is released from prison.

These findings led to three policy recommendations:

- Require that persons sentenced to prison for Class C felony offenses receive a split sentence to ensure some period of supervision upon release.
- Require that persons serving straight sentences receive supervision upon release.
- Complete the development and utilization of the automated victim notification system.

Implementation

While a tremendous amount of effort and work went into studying the problems we face and coming up with possible solutions, progress can only be made through effective implementation. This legislative session, we are pushing for a comprehensive piece of prison reform legislation to address those issues that need legislation. We are also addressing a number of the solutions through the budgetary process. And, we are calling upon those agencies that need to implement rule of policy changes to do so.

Full implementation of these recommendations can reduce the number of persons in prison in Alabama by more than 4,500 by 2021, averting the need to spend \$407 million in new prison construction and operational costs.

Additional information on the Prison Reform Task Force, including minutes and presentations from each meeting, can be found at www.ali.state.al.us. | [AL](#)



Wilson F. Green

By Wilson F. Green

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

By Marc A. Starrett

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



Marc A. Starrett

The law relating to same-sex marriage in Alabama, and elsewhere, is on rapidly shifting ground. We have not reported on this barrage of recent cases, however, because on April 28, the U.S. Supreme Court heard oral argument in *Obergefell v. Hodges*, No. 14-556. *Obergefell* will definitively decide the constitutional questions concerning same-sex marriage. Stay tuned.

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Arbitration

***Porter v. Williamson*, No. 1130282 (Ala. Jan. 30, 2105)**

Arbitration agreement in shareholder agreement required that specific performance claims be judicially determined, while monetary claims must be arbitrated; the agreement itself required piecemeal litigation.

Workers' Compensation

***Ex parte Hanvey*, No. 1131235 (Ala. Jan. 30, 2015)**

Substantial evidence supported the trial court's determination that exposure to chemicals caused a worsening and substantial acceleration of employee's medical condition, which rendered her unable to perform her accustomed trade.

Rule 27

***Ex parte Ferrari*, No. 1130679 (Ala. Feb. 6, 2015)**

The court overruled *Ex parte Anderson*, 644 So. 2d 961 (Ala. 1994), holding that Rule 27 allows discovery before suit only for the purpose of perpetuating evidence.

Product Liability

***Reyes v. Better Living, Inc.*, No. 1130716 (Ala. Feb. 6, 2015)**

This is a no-opinion affirmance, the upshot of which (as determined from Chief Justice Moore's dissent) is that the 2011 amendment to *Ala. Code* § 6-5-521, which precluded liability findings against product distributors and others who do not alter or produce products, applies retroactively.

Ore Tenus Rule

***Moultrie v. Wall*, No. 1130697 (Ala. Feb. 6, 2015)**

Ore tenus rule supported trial court's determination as to ownership interests in a closely-held LLC, but precluded the trial court's determination that one shareholder had been divested of his interests because of plain language of the operating agreement.

Estates; Jurisdiction

***Ex parte Baker*, No. 1130810 (Ala. Feb. 13, 2015)**

The circuit court lacked jurisdiction over estate removal for the parties' failure to follow *DuBose v. Weaver*, 68 So. 3d 814, 821 (Ala. 2011), because "no administrator with the will annexed of Higgins's estate was appointed, nor were letters of general administration C.T.A. issued by the probate court, before the estate was removed to the circuit court."

Accident Reports

***Crusoe v. Davis*, No. 1130798 (Ala. Feb. 20, 2015)**

The supreme court affirmed the trial court's exclusion of a police accident report, holding: (1) although the portions of report that reflect officer's firsthand knowledge may be admissible, in this case the officer had no first-hand knowledge and did not have an independent recollection of recorded conversations, and thus the officer's report was not admissible under past recollection recorded (and because he had no memory of the conversations or the accident, his testimony could not be buttressed by the report under present recollection revived); and (2) report did not contain actual statements purportedly made by the defendant, and thus statements in report could not be admitted as non-hearsay as a party-opponent admission.

Class Actions

***Baldwin Mut. Ins. Co. v. McCain*, No. 1131058 (Ala. Feb. 20, 2015)**

Because plaintiff sought broader class certification in post-hearing briefing than set forth in the complaint and at the certification hearing, in order to comply with section 6-5-

641, the trial court should have set another evidentiary hearing on the certification motion.

Securities; Intentional Interference

***Walter Energy, Inc. v. Audley Capital Advisors LLP*, No. 1131104 (Ala. Feb. 20, 2015)**

Held: (1) ACA's complaint failed to state a claim under the Alabama Securities Act because it did not allege an offer to sell or buy within the state, and the fact that the trades were made on the NYSE did not mean that the offer was directed to Alabama or that it was received in Alabama; (2) ACA's two-part intentional interference claim, which was based on (a) WE's relationship with its other shareholders and (b) WE's relationship with lenders, failed under the "stranger" doctrine, because ACA was a fellow shareholder of WE and thus had a stake in the relationship between WE and its other shareholders and its lenders.

Default Judgments

***Hilyer v. Fortier*, No. 1131174 (Ala. Feb. 20, 2015)**

Because party seeking to vacate default judgment made a threshold showing of each of the three *Kirtland* factors, the motion therefore should be decided by the trial court's actually applying the *Kirtland* factors; denial by time under Rule 59.1 was therefore reversed.

Local Legislation

***Bynum v. City of Oneonta*, No. 1130305 (Ala. Feb. 27, 2015)**

In 1984, the legislature passed *Ala. Code* § 28-2A-1 et seq., which provided a procedure for municipalities having a population of 7,000 or more to hold an election to change the classification of the municipality from "dry" to "wet" or "wet" to "dry" regarding the sale of alcohol within the municipality. In 2009, the legislature amended that act to include municipalities having populations of 1,000 or more, except in Bibb, Randolph and Clay counties. The supreme court held that the 2009 amendment was unconstitutional on equal protection grounds, and that severability provision could not save the remainder of the amendment.

Domestic Relations

***Ex parte Jones*, No. 1131479 (Ala. Feb. 22, 2015)**

In *Ex parte Christopher*, 145 So. 3d 60 (Ala. 2013), the court held that the child-custody statute, § 30-3-1, *Ala. Code* 1975, did not authorize a trial court in a divorce action to require a noncustodial parent to pay educational support for a child who was over the age of 19. At issue in this case was

the application of *Christopher*, which was released after trial court proceedings and while the case was before the court of civil appeals. Held: because the trial court's order awarding post-minority educational support was pending on appeal in the court of civil appeals when *Christopher* was decided, the court of civil appeals erred in not applying *Christopher*.

Law of the Case

***Ex parte Vest*, No. 1131050 (Ala. Feb. 22, 2015)**

In an entangled series of appeals from a domestic case, the CCA had previously determined that the mother had waived abatement as a defense, and the supreme court had denied certiorari review. After that decision, the trial court held the mother in contempt and incarcerated her for five days; this is the appeal from that contempt finding. The supreme court, *ex mero motu*, ordered briefing on abatement and on whether law of the case would prohibit review of the abatement issue. The majority determined that law of the case would not prohibit its considering the abatement question, despite the court's prior denial of certiorari review, and that the action was due to be abated.

Alabama Accountability Act

***Magee v. Boyd*, No. 1130987 (Ala. March 2, 2015)**

The court upheld the constitutionality of the Alabama Accountability Act against a variety of state constitutional law attacks.

New Trial Motions

***Lemley v. Wilson*, No. 1130160 (Ala. March 6, 2015)**

After jury returned a verdict for defendant in negligence and wantonness case arising from MVA involving vehicle and worker on foot (worker died of his injuries), trial court granted plaintiff's motion for new trial. Defendant appealed. The supreme court reversed, holding that the evidence of negligence and wantonness was in conflict and was sufficient to support the jury's verdict. Given the conflicting evidence, the jury could have concluded that defendant's speed was not the proximate cause of decedent's injuries.

Notice Pleading

***Gilley v. Southern Research Institute*, No. 1131238 (Ala. March 13, 2015)**

Even under notice pleading standards, the complaint did not sufficiently put SRI on notice to a claim by former employee plaintiff to entitlement to shares in a successor entity after SRI transferred a patent developed by plaintiff to that entity.

Railroads

***Norfolk Southern Railway Company v. Goldthwaite*, No. 1131375 (Ala. March 13, 2015)**

Nuisance claims by landowner against a railroad regarding the railroad's use of contiguous property for car "staging" are preempted by Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10101 et seq.

Nuisance; Wantonness

***Crouch v. North Alabama Sand & Gravel, LLC*, No. 1131086 (Ala. March 27, 2015)**

The court reversed the trial court's grant of summary judgment for quarry operator and blaster on homeowners' negligence and wantonness claims arising from blasting operations; plaintiff in a blasting case is not always required to offer expert testimony on the issue of causation, and plaintiffs' own testimony that he heard and felt the blasts and observed damage created fact issue as to whether blasting was abnormally dangerous. Plaintiff's repeatedly notifying defendants that the blasting was causing problems created a fact issue on wantonness claims, as well as nuisance claims. However, trespass claim failed because mere concussion caused by blasting does not cause trespass.

From the Alabama Court Of Civil Appeals

Res Judicata; Real Property

***Bullock v. Howton*, No. 2130987 (Ala. Civ. App. Jan. 30, 2015)**

A 1974 boundary line dispute between defendant and plaintiff's predecessor in interest was res judicata in the present action for trespass and adverse possession as to the proper line, but not as to the actual trespass and adverse possession claims.

Injunction Bonds

***Consolidated Electrical Contractors & Engineers, Inc. v. Center Stage/Country Crossing Project, LLC*, No. 2110641 (Ala. Civ. App. Feb. 22, 2015)**

To recover on a wrongful injunction in an amount exceeding the injunction bond, a claimant must prove "bad faith," which requires the same proof as malicious prosecution, and thus requires an absence of probable cause in bringing the case.

Workers' Compensation

***Pollock v. Girl Scouts of Southern Alabama, Inc.*, No. 2130538 (Ala. Civ. App. Feb. 27, 2015)**

Circuit court denied benefits to Pollock, holding that that Pollock's injury resulting from a horseback ride did not arise out of or occur in the course of her employment with GSSA

because it was a voluntary recreational activity. The CCA affirmed, holding that whether the injury “arises out of” the employment is fact-intensive.

Workers' Compensation

Ex parte Fairhope Health & Rehab, LLC, No. 2131074 (Ala. Civ. App. Feb. 27, 2015)

Held: (1) Order directing FHB to pay for knee replacement carried an implicit finding of compensability under the act, and (2) there was insufficient evidence from which one could reasonably conclude that Durgin’s work-related injury continued to contribute to the preexisting degenerative condition of her right knee and her need for a knee replacement, but rather appears attributable to Durgin’s preexisting condition.

Foreign-Judgment Domestication

Evans v. Anderson, No. 2130468 (Ala. Civ. App. March 6, 2015)

A judgment entered by a court of another state is “domesticated” using the Uniform Enforcement of Foreign Judgments Act (“the Act”), *Ala. Code* § 6-9-230 et seq. A judgment debtor challenging the foreign court’s jurisdiction may seek to have that judgment vacated by filing a motion in the domestication proceeding under Rule 60(b)(4), *Ala. R. Civ. P.* A ruling denying the Rule 60(b)(4) motion is appealable, but the time for taking the appeal cannot be tolled using the provisions of Rule 59.1, *Ala. R. Civ. P.* In this case, Evans’s motion to reconsider the denial of his Rule 60(b)(4) motion did not toll the time for taking an appeal, and thus his notice of appeal was untimely.

Workers' Compensation

City of Thomasville v. Tate, No. 2130588 (Ala. Civ. App. March 6, 2015)

Trial court concluded that Tate’s injuries arose out of and occurred in the course of his employment with the city, appointed a new authorized treating physician for Tate and awarded Tate temporary-total-disability benefits, permanent-total disability benefits and past medical expenses relating to treatment from an unauthorized treating physician. The CCA affirmed that part of the judgment awarding Tate disability benefits. However, because Tate did not utilize the means provided in the act for an employee who is dissatisfied with an initial authorized treating physician to select a second physician, the court reversed appointment of new physician ordering the city to pay for the new physician’s expenses.

Adverse Possession

Dickinson v. Suggs, No. 2130899 (Ala. Civ. App. March 27, 2015)

In adverse possession (“AP”) case between coterminous

landowners, evidence supported trial court’s finding of AP based on demonstrated actual property use for over 70 years. As to a different parcel, however, a third party’s use of the property could not inure to the benefit of the plaintiff.

From the United States Supreme Court

Labor

M&G Polymers USA v. Tackett, No. 13-1010 (U.S. Jan. 26, 2015)

The Court eradicated the so-called “Yard-Man” rule, holding: 1) retiree healthcare benefits are not a form of deferred compensation; 2) requiring a contract to include a specific durational clause for retiree healthcare benefits to prevent vesting conflicts with the principle of contract law that the written agreement is presumed to encompass the whole agreement of the parties; and 3) when a contract is silent as to the duration of retiree benefits, a court may not infer that the parties intended those benefits to vest for life.

Statutory Construction

Yates v. U.S., No. 13-7451 (U.S. Feb. 25, 2015)

18 U. S. C. §1519, enacted as a part of the Sarbanes Oxley Act, provides that a person may be fined or imprisoned for up to 20 years if he “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence” a federal investigation. In this case, a commercial fisherman was convicted under section 1519 and sentenced to 30 days’ imprisonment for destroying certain illegal red snapper caught in violation of federal law. Held: a “tangible object” within §1519’s compass is one used to record or preserve information, not fish.

Antitrust

N.C. Bd. of Dental Examiners v. FTC, No. 13-534 (U.S. Feb. 25, 2015)

Because a controlling number of the board’s decision-makers are active market participants in the occupation the board regulates, the board can invoke state-action antitrust immunity only if it was subject to active supervision by the state, which requirement was not met in this case.

State Tax Procedure

Direct Marketing Assn. v. Brohl, No. 13-1032 (U.S. March 3, 2015)

Tax Injunction Act, 28 U.S.C. § 1341, did not bar action by trade association seeking to invalidate Colorado statute requiring non-collecting retailers to notify any Colorado customer of the state's sales and use tax requirement and to report tax-related information to those customers and the Colorado Department of Revenue.

Railroad Taxation (Alabama)

Alabama Dept. of Revenue v. CSX Transp., Inc., No. 13-553 (U.S. March 4, 2015)

Held: (1) The Eleventh Circuit properly concluded that CSX's competitors are an appropriate comparison class for its discrimination claim under the 4-R Act, 49 U.S.C. § 11501(b)(4), but (2) the Eleventh Circuit erred in refusing to consider whether Alabama could justify its decision to exempt motor carriers from its sales and use taxes through its decision to subject motor carriers to a fuel-excite tax.

Affordable Care Act

University of Notre Dame v. Burwell, 14-392 (U.S. March 9, 2015)

ND claimed a religious exemption from regulatory requirements under the Affordable Care Act regarding "abortion-inducing products, contraception, and sterilization." Rather than asking for the Court for plenary review, the university simply asked the Court to grant its petition for certiorari, vacate the judgment below and remand to the Seventh Circuit for further consideration in light of last term's *Burwell v. Hobby Lobby Stores, Inc.* Without an opinion, the Court granted ND's relief in full (granted certiorari, summarily vacated the Seventh Circuit's decision and remanded for reconsideration, called a "GVR" in Supreme Court lingo).

Administrative Law

Perez v. Mortgage Bankers Assn., No. 13-1041 (U.S. March 9, 2015)

Under the *Paralyzed Veterans* doctrine, an agency must use the Administrative Procedures Act's ("APA's") notice-and-comment procedures when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation. The Supreme Court held that the *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions and improperly imposes on agencies an obligation beyond the APA's maximum procedural requirements.

Securities

Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund, No. 13-435 (U.S. March 24, 2015)

In securities fraud action under section 11: 1) because a statement of opinion admits the possibility of error, such a statement remains true even if the opinion turns out to have been wrong; 2) a statement of opinion qualifies as an "untrue statement of fact" if the opinion expressed was not sincerely held; 3) if a registration statement omits material facts about the issuer's inquiry into, or knowledge concerning, a state of opinion, and those facts conflict with what a reasonable investor would take from the statement itself, then the section 11 omissions create liability.

Election Law; Redistricting (Alabama)

Alabama Legislative Black Caucus v. Alabama, No. 13-895 (U.S. March 25, 2015)

In 2012, Alabama redrew the boundaries of the state's house districts and senate districts. Plaintiffs claim that Alabama's new district boundaries constituted unconstitutional gerrymandering. The Supreme Court vacated and remanded the district court's judgment for the state, holding: 1) the district court's analysis of the racial gerrymandering claim as referring to the state "as a whole," rather than district-by-district, was legally erroneous; 2) the district court erred in deciding that plaintiff Alabama Democratic Conference lacked standing, as in these circumstances, elementary principles of procedural fairness required that the district court, rather than acting *sua sponte*, give the conference an opportunity to provide evidence of member residence; 3) the district court did not properly calculate "predominance" in its alternative holding that "race was not the predominant motivating factor" in the creation of any of the challenged districts; 4) there is strong evidence that race did predominate as a factor when the legislature drew the boundaries of Senate District 26; and 5) section 5 of the Voting Rights Act does not require a covered jurisdiction to maintain a particular numerical minority percentage; it requires that the jurisdiction maintain a minority's ability to elect a preferred candidate of choice.

Employment Law

Young v. United Parcel Service, Inc., No. 12-1226 (U.S. March 25, 2015)

The Supreme Court reversed a summary judgment for defendant in a Pregnancy Discrimination Act case, holding: 1) the PDA requires that employers provide similar accommodations as they do to any other persons who are similar in their ability or inability to work; 2) defendant's three separate accommodation policies, which cumulatively imposed significant burdens on pregnant women.

From the Eleventh Circuit Court of Appeals

Employment

Jarvela v. Crete Carrier Corp., No. 13-11601 (11th Cir. Jan. 28, 2015, on rehearing before panel quorum)

Crete employed Jarvela as a commercial vehicle driver, and later fired him because, a week before Crete terminated him, a substance abuse treatment center had discharged Jarvela with a diagnosis of alcohol dependence. Jarvela sued under the ADA and FMLA, and the district court granted summary judgment. The Eleventh Circuit affirmed, holding that Jarvela's inability to meet a criterion of the "physical qualification standards" regulation—in particular, the requirement that he have "no current clinical diagnosis of alcoholism"—precluded him from "performing" an essential function of his job as a motor vehicle driver.

Insurance (Alabama Law)

Bank of Brewton v. The Travelers Companies, No. 14-12472 (11th Cir. Feb. 9, 2015)

Issue: whether under Alabama law, the financial institution bond's definition of "counterfeit"—"an imitation which is intended to deceive and to be taken as an original"—encompasses a duly authorized stock certificate which was nonetheless procured under false pretenses, so as to cover the loss resulting from credit extended in reliance on the certificate. Held: the certificate is not a counterfeit.

Arbitration

Wiand v. Schneiderman, No. 14-11203 (11th Cir. Feb. 10, 2015)

Held: (1) clawback actions brought under federal statutory receivership authority in 28 U.S.C. § 754 are not categorically non-arbitrable; (2) argument that entire agreement was void did not render the arbitration agreement unenforceable; (3) scope of agreement included disputes in issue; and (4) arbitrator's decision was not assailable based on challenge premised upon weight of the evidence.

Arbitration; Class Actions

In Re: Checking Account Overdraft Litigation, No. 13-12082 (11th Cir. Feb. 10, 2015)

Issue: whether Wells Fargo's waiver of its right to compel arbitration of the named plaintiffs' claims also precludes Wells Fargo from compelling arbitration of the unnamed putative class members' claims. Held: because the case had

not been certified as a class action, the District Court lacked jurisdiction to resolve this question, and the named plaintiffs lack standing to defend that resolution on appeal.

Bankruptcy

In re Fisher Island Investments, Inc., No. 12-15595 (11th Cir. Feb. 20, 2015)

In a series of complex bankruptcy appeals the Court's analysis chiefly concerns bankruptcy court jurisdiction under *Stern v. Marshall*, 564 U.S. __, 131 S. Ct. 2594 (2011), and ultimately concludes that *Stern* does not preclude the bankruptcy court's having authority over the ownership issue in the debtor, since ownership of the debtor is a core bankruptcy matter.

Sanctions

Sciarietta v. Lincoln National Life Ins. Co., No. 13-12559 (11th Cir. Feb. 27, 2015)

Held: (1) the district court had inherent powers to sanction third-party corporation for unpreparedness of its 30(b)(6) representative subpoenaed for deposition and trial, (2) the sanctions were within the district court's discretion, because "[p]reparing a designated corporate witness with only the self-serving half of the story that is the subject of his testimony is not an act of good faith," and (3) the amount of sanctions in the amount of the attorneys' fees was not an abuse of discretion.

RESPA; Standing

Clements v. LSI Title Agency, Inc., No. 14-11636 (11th Cir. March 2, 2015)

Among the issues decided, the Court found that borrower had standing to sue under RESPA based on allegation that lender charged borrower for unearned fees.

Bankruptcy

In re: Seaside Engineering & Surveying, Inc., No. 14-11590 (11th Cir. March 12, 2015)

Under *In re Munford*, 97 F.3d 449 (11th Cir. 1996), bankruptcy courts may issue "bar orders," orders barring contribution or other third-party claims (and granting releases to non-debtors) against an entity making a substantial contribution to the estate's bankruptcy plan. This case develops this law further by explicitly adopting the seven-factor test from the Sixth Circuit's *Dow Corning* case to evaluate third-party releases.

False Claims Act

Urquila-Diaz v. Kaplan University, No. 13-13672 (11th Cir. March 11, 2015)

Though the actual holdings are too technical, this case is a must-read for practitioners regarding pleading standards under the FCA.

TCPA

Lary v. Trinity Physician Financial & Ins. Services, No. 14-11036 (11th Cir. March 13, 2015)

In a default judgment arising from a TCPA case, the Court held: (1) one fax can trigger multiple violations of the TCPA; (2) although the district court erred in concluding that one fax could trigger only one statutory damage claim, that error was harmless, because the complaint pleaded two violations but only one fax, and damages were wrongly assessed on two faxes, one not in the complaint, so two “doses” of statutory damages were appropriate; (3) the district court properly denied a requested increase in statutory damages for lack of allegations establishing a willful violation, because there was no allegation that the defendant knew it was sending an unsolicited fax to an emergency line.

RECENT CRIMINAL DECISIONS

From the Alabama Supreme Court

Ineffective Assistance

Ex parte Whited, No. 1130686 (Ala. Feb. 6, 2015)

Defense counsel’s decision to waive his closing argument constituted ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984) due to “seemingly strong arguments” against the state’s evidence, the length and emotional nature of the state’s closing argument and counsel’s testimony, given at a hearing on the defendant’s motion for a new trial, that he could not specifically recall why he waived the closing argument.

Criminal Law

Ex parte Williams, No. 1131160 (Ala. March 27, 2015)

The constitutional limitations on minor defendant’s life-without-parole sentence established in *Miller v. Alabama* do not apply retroactively to cases that became final before its pronouncement.

From the Court of Criminal Appeals

Probation Revocation; Hearsay

Moore v. State, CR-13-1815 (Ala. Crim. App. Feb. 6, 2015)

Though the burden of proof for revocation is lower than that required for a conviction, the state was nonetheless required to produce non-hearsay evidence to corroborate a police officer’s hearsay testimony that defendant had marijuana in his car in order to revoke his probation.

Probation Revocation

Wagner v. State, CR-13-1400 (Ala. Crim. App. Feb. 6, 2015)

The court reversed defendant’s probation revocation for failing to conduct a hearing.

Dismissal of Indictment “with Prejudice”

State v. Hendrix, CR-13-1149 Ala. Crim. App. Feb. 6, 2015)

The court found no error in the trial court’s dismissal of a manslaughter indictment where the trial court had previously dismissed, with prejudice, a vehicular homicide indictment arising from the same facts.

Rule 32; Sentencing Guidelines

Mosley v. State, CR-13-0613 (Ala. Crim. App. Feb. 6, 2015)

Though claims pertaining to the imposition of an illegal sentence are jurisdictional and thus may be raised at any time, the defendant’s challenge to his sentence imposed under the sentencing guidelines was precluded under Rule 32(a) (4) because it had been previously raised and addressed on appeal from the trial court’s denial of his motion to withdraw his guilty plea. Claim would have been meritless regardless, because guidelines authorized the trial court to suspend 20-year sentence despite the Split Sentence Act’s limitation of suspended sentences to terms no greater than 15 years’ imprisonment.

Rule 32; Ineffective Assistance

Walker v. State, CR-11-0241 (Ala. Crim. App. Feb. 6, 2015)

Trial court had discretion to exclude documents from hearing on Rule 32 petition as being irrelevant. The documents pertained in part to defense counsel’s disciplinary proceedings before the Alabama State Bar but were unrelated to defense counsel’s representation of the defendant. | [AL](#)



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

About Members

David R. Blount, formerly with USIC, LLC, announces the opening of **The Blount Law Firm LLC** at 2030 Gadsden Highway, Ste. B, Trussville 35235. Phone (205) 383-1875.

Among Firms

The **Alabama Department of Public Health's** Office of General Counsel announces that **Bethany L. Bolger** and **Karen S. Bishop** joined as assistant general counsels.

Armbrecht Jackson LLP announces that **Lacey Daughdrill Smith** is a partner.

Spencer T. Bachus, III, Steven M. Brom and **Bryan M. Taylor** announce the formation of **Bachus, Brom & Taylor LLC**.

Beckum Kittle LLP announces that **Anna L. Hart** joined as an associate.

Bradley Arant Boult Cummings LLP announces that **Jennifer F. Brinkley** joined the firm's Huntsville office as counsel and **Jenny Harris Henderson**, who was a partner in the Birmingham office, was appointed a **United States Bankruptcy Judge** for the Northern District of Alabama, Western Division.

Max Cassady, Topie Cassady and **Mark Taupeka** announce the formation of **Cassady Taupeka PC** with offices in Evergreen, Fairhope and Orange Beach. The partners also announce the formation of **Orange Beach Title LLC** in Orange Beach.

Faulkner University announces that **Bryan E. Morgan** has been named director of career services at Faulkner University's Jones School of Law in Montgomery. Phone (334) 386-7905.

This year marks the 100th year of **Hall, Conerly & Bolvig PC** and the 60th year of practice for **Jack J. Hall, Sr.**

Patrick Harris of **Harris & Harris LLC** was elected to a second four-year term as secretary of the **Alabama Senate**.

Housing First, Inc. announces that **Ron A. Address** joined as its general counsel.

Ian Rosenthal and **Rebecca D. Parks**, formerly of Cabaniss, Johnston, Gardner, Dumas & O'Neal LLP, announce the opening of **Rosenthal Parks LLP** at 202 S. Royal St., Mobile 36602. Phone (251) 338-0949.

Whitaker, Mudd, Luke & Wells LLC and **Hall, Conerly & Bolvig PC** announce their merger. The firm name will be **Whitaker, Mudd, Luke & Wells LLC**. **Jack J. Hall, Sr.; C. Peter Bolvig, Jack J. Hall, Jr.; Christy C. Glidewell; John F. Whitaker; William A. Mudd; K. Phillip Luke** and **David R. Wells** are members. Associate attorneys include **John S. Shashy** and **Brandon J. Clapp**. Offices are at 2011 4th Ave. N, Birmingham 35203. Phone (205) 639-5300.

Wilmer & Lee PA announces that **Andrew D. Dill, Kimberly N. Kelley** and **S. Dagnal Rowe, Jr.** are shareholders and **Katherine E. Amos** and **Andrew M. Townsley** joined as associates.

Wolfe, Jones announces that **Justin G. South** is a partner and the firm name is now **Wolfe, Jones, Wolfe, Hancock, Daniel & South LLC**.

Gregory Zarzaur, Anil Mujumdar and **Diandra Debrosse Zimmermann** announce the opening of **Zarzaur Mujumdar Debrosse Trial Lawyers** at 2332 Second Ave. N, Birmingham 35203. | [AL](#)



J. Anthony McLain

Lawyer Should Not Undertake Representation of Client in Matter Adverse To Former Client which Matter Is Substantially Related to Prior Representation and Where Lawyer Gained Confidential Information which May Be Used to Detriment of Former Client

QUESTION:

"Several years ago I talked to a person that I will refer to hereinafter as Ms. X. This relationship resulted in Ms. X's hiring me for the purpose of protecting her interest in an estate matter ongoing in another county. This matter concerned a disagreement that she was having with her brothers, sisters, etc. relative to the disposition of estate property. Ultimately, I was assisted by another attorney in the county where the estate property was located and the matter was resolved. I would estimate that my last contact with Ms. X relative to the estate or any other matter was approximately three years ago. At that point in time I not only conferred with Ms. X but also her husband. At no time on that occasion were any matters of a domestic nature discussed concerning Ms. X and her husband.

"Perhaps 18 months ago Ms. X contacted my office by telephone and requested to see me relative to a domestic matter. I refused to see her and instructed my secretary that I would not be interested in representing her in any other matters. No information on that occasion was received from Ms. X relative to any domestic entanglements.

"Several months ago or fall 1989, Ms. X filed a bill of complaint for divorce against her husband. Ms. X is being represented in this matter by an Anytown attorney. Ms. X's husband contacted me and retained me to defend this case. I have been doing so for the last several months. In the fact that I have never discussed with Ms. X any domestic matters and in the fact that I was not representing her currently on any other matters and had not for several years, I saw no problem in undertaking to represent her husband. As of late, a motion to recuse has been filed by Ms. X's attorney of which a copy I enclose for your inspection. She alleges in this petition that I have gained information from formerly representing her estate matters that can be used against her in the domestic matter. In my opinion, this is totally untrue. In any event, I would appreciate your opinion as to whether I should withdraw from this matter."

ADDITIONAL FACTS:

Attached as additional information is the motion to recuse filed in this matter.

ANSWER:

In previous opinions the Disciplinary Commission has opined that it is permissible for an attorney to undertake representation against a former client but has expressly conditioned that employment upon several considerations. First, the commission has held that there should be no substantial relationship between the first representation and the subsequent representation. Secondly, the commission has held that the attorney, by virtue of the first representation, should not have been in a position to have learned confidences or secrets of the first client that could subsequently be used to the detriment of, or to embarrass, the former client. Third, the commission has stated that the relationship between the attorney and the first client must not have been of such a character or nature so as to preclude the attorney from rendering, to the subsequent client, full, vigorous and undiluted loyalty. On occasion, the Disciplinary Commission has required waiver

from the former client before permitting the subsequent representation.

On the facts stated, and particularly in view of the fact that the former client has asserted that there is a substantial relationship between the prior representation and the present representation and further that certain confidences and secrets relating to the former client's mental and physical background, which could now be used to the detriment of, or to embarrass, the former client were made known to the attorney by virtue of the former representation, we are of the opinion that it would not be ethically proper for you to continue in your representation of Mr. X. The standards imposed by the commission are in large part subjective. When there is a conflict or a disagreement such as this between the attorney and the former client as to disqualification, in an abundance of caution, this conflict should be resolved in favor of the former client.

DISCUSSION:

In lieu of further discussion see Opinions 87-108, 88-06 and 88-69. [RO-1990-03] | AL



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Hon. Edwin D. Breland

T.J. Carnes

Garrett Hooper

Hon. Edwin D. Breland

Judge Edwin D. Breland Sr. passed away at his home in Decatur on July 31, 2014 at age 87.

Judge Breland was born March 23, 1927 on a farm in rural Perry County. The youngest of 12 brothers and sisters, he was the only member of that family to receive a college degree. His father was a farmer and logger.

He graduated from Perry County High School in Marion where he was a member and three-year letterman of the varsity basketball team and a member of the National Honor Society. Judge Breland often commented that his personal drive for education came from the teachers at Perry County High School, many of whom were also professors at Marion Military Institute or Judson College.

Judge Breland graduated from high school early, having enlisted in military service on his 18th birthday, and reported to basic training prior to the school's planned graduation ceremony. He proudly served in the U.S. Navy during World War II, aboard the USS Argonne in the Pacific Theatre of Operations. He also served in the occupation of Tokyo following hostilities.

Judge Breland's experience in the Navy helped to shape his sense of patriotism and love of country. He often joked that one of his brothers-in-law convinced him to join the Navy by saying, "As long as your ship doesn't go down, you will always have plenty of hot food, a dry bed and you rarely have to carry anything on your back!"

Until his passing, Judge Breland enjoyed reading about the history of the United States, particularly military history, and watching historical documentaries. He remained an active life member of the American Legion until his death. He was buried with full military honors.

After his honorable discharge, Judge Breland received a bachelor of arts in political science from the University of Alabama in 1950. In 1952, he earned a bachelor of laws from the university's school of law. While at the University of Alabama, he was a member of Theta Xi Fraternity. Until his death, he was an avid fan of all University of Alabama sports.

Also while at the University of Alabama, he met and later married Hazel Christine Dykes of Tuscaloosa, a fellow student and a member of the Million Dollar Band. They were married for almost 65 years until his death.

After graduation from law school and admission to the Alabama State Bar, Judge Breland and his wife located to Decatur to begin his legal career. In 1952, he became an attorney adjustor for the State Farm Insurance Company. In 1957, he went into private practice in Decatur.



In 1961, he was appointed federal referee of the Bankruptcy Court for the Northern District of Alabama. With this appointment, he was also able to continue his legal work in private practice, first as a partner in the Breland & Doss firm, and then for several years as a sole practitioner. He later created a partnership with Ben Britnell of Decatur. After Britnell's passing, he added H. M. Nowlin and David J. Breland, both of Decatur in the Britnell, Breland & Nowlin firm.

In 1981, Judge Breland left private practice to accept the full-time position of United States Bankruptcy Judge for the Northern District of Alabama. He continued to serve in this capacity until his retirement in 1994.

His humble beginnings helped in shaping him as a judge. Numerous attorneys and others have commented to his family members throughout the years about how Judge Breland had helped them in some way when they were starting out with their careers. Young attorneys especially commented on how he would take time and show patience with them. Perhaps these traits came about as a result of the actions of a fellow lawyer who had mentored him when he was a young attorney, new in town and with no connections.

One of his proudest moments was in January 1983 when he administered the oath of office to his oldest son, the Honorable David J. Breland, to become District Judge in Morgan County. Judge David Breland held this position until 2008. Father and son provided over 58 years of combined service to their state and nation.

Judge Breland was also active in the community. He was a member of the Decatur Jaycees and was the oldest living member of the Decatur Civitan Club at the time of his death.

Judge Breland was also a man of faith. He served as a trustee and chairman of deacons at Central Baptist Church of Decatur. He was an active member of First Baptist Church of Decatur at the time of his passing.

Judge Breland was also active in his high school's alumni association, where he was honored as the school's Alumnus of the Year. He was also inducted into the Perry County Hall of Fame. He loved attending events in Perry County, and always had exceptionally strong roots in that part of our state.

Judge Breland enjoyed his retirement years and was blessed with relatively good health until the time of his death. He spent much of his day visiting friends and lunching with friends and family. He loved to listen to classical music and

hymns. He also enjoyed watching sporting events, especially those in which his sons and grandchildren participated. Watching Alabama football was among his favorite activities. He was also a talented gardener, as his tomatoes were legendary among neighbors and family.

Most of all, Judge Breland was a devoted husband, father, grandfather and family member. He is survived by his wife of 64 years, Hazel Dykes Breland; two sons, Judge David J. Breland (Drama) of Decatur, Edwin D. Breland Jr. (Virginia) of Athens; and four grandchildren, Will Breland, Jordan Phillips, Mary Katherine Breland and Julia Phillips. He is also survived by one brother, Earl Breland of Marion, Alabama. He was preceded in death by his daughter, Carolyn Lee Breland of Decatur.

T.J. Carnes



T.J. Carnes, a well-known and respected attorney from Albertville, passed away October 2, 2014. Mr. Carnes was 87 years old and practiced law for more than 55 years. He is survived by his wife, Donna Carnes; two sons, Jimmy Carnes (Sharon) and Judge Ed Carnes (Becky); and a granddaughter, Julie Carnes. He was preceded in death by his first wife, Florine Carnes; four brothers; a sister and several half-brothers and sisters.

T.J. Carnes was born April 29, 1927, the son of a tenant farmer in Albertville. He grew up "poor but proud" as did many of his generation in the South. The deep depression and devalued prices of crops on the tenant farm helped him learn many difficult but valuable lessons in his life, the love of God, family and the value of an ongoing and growing education for a lifetime.

He loved school at Albertville and excelled in all his classes. While in high school, he became "Albertville's left-handed quarterback" and led the team to great success. After graduation in 1945, he immediately joined the U.S. Army. Two of his football teammates were killed in action before the war ended, but he was not deployed overseas by V-J day.

He would continue with the Army and the Alabama Army National Guard, and when the Korean War began, he was activated with the local Marshall County units for the war's duration.

He was separated from his main Dixie Division Unit and sent as an infantryman replacement to the 25 Infantry Division. He served in some of the hardest fighting of 1951-1952 in Korea. He was in the mountain fighting all around the 38th parallel. He told me of the extreme cold of the mountain tops and trying not to be pushed off by huge numbers of Chinese and North Koreans. Somehow they held on only with the aid of God and American Artillery support.

After the war he settled into life with his wife and two sons. He worked part-time jobs while attending the University of Alabama, including waiting tables and being a part-time tutor for veterans. He would be elected to ODK honorary and go on to law school where he was elected editor-in-chief of the *Alabama Law Review*. He wrote for the law review and graduated with honors. After law school, he served as a law clerk for Alabama Supreme Court Justice Robert Simpson.

He returned to Albertville in 1955 to begin his 55+ years of outstanding legal advocacy. He served as one of the youngest bar commissioners for the Alabama State Bar, became a long-time city attorney for Albertville and attorney for the Marshall County Commission and the Marshall County Board of Education. At the request of Chief Justice Howell Heflin, he served on the committee to rewrite the *Alabama Rules of Civil Procedure*.

He taught a Sunday school class at First Baptist Church of Albertville for more than 50 years, and was a founder of the Baptist Church Retreat Center at Lake Guntersville. He was active in numerous causes in Marshall County that he believed would better the social and moral fabric of the county.

He authored the book, *Out of the Sand*, which is a history of the school at Albertville, the City of Albertville, Sand Mountain and the growth of Albertville from 1850s to 1990s. He was working on a second book at his death.

Mr. Carnes was a mentor to me and many other younger lawyers of northeast Alabama. Even his legal opponents were in awe of his outstanding preparation and mastery of case law as it applied to a particular case. He once told me that legal brilliance happens about 1:00 a.m. in the law library. He tried thousands of cases, ranging from small claims to arguments before the Alabama Supreme Court and 11th U.S. Circuit Court of Appeals. Alabama Chief Justice Bo Tolbert once told me that, "T.J. Carnes has the audacity to lecture us on how we got the history and case law wrong in our opinions—it would be outrageous except he was always right." Lawyers, judges and justices were in awe of the appellate briefs he submitted.

He would often take the case of a widow or poor wife treated wrongly, or a farmer with no money to fight foreclosure. We worked hundreds of hours on cases without pay. When I once said we were owed over \$20,000, and with no end in sight to a very high-profile case, Mr. Carnes said, "Give up—give in already—fight on!" We did and won after seven years of courtroom drama.

He had a unique personality. He was stern, hardworking and very tough in the courtroom, but would often call the defeated lawyer and tell him or her how good they did. In the summer he would carry a leather brief case in one hand and a farmer's bucket in the other to present his home-grown beautiful roses to the ladies of the courthouse or legal secretaries of his opponents. He would wear his impeccable seersucker suits and ties as he carried the law in one hand and a bucket of roses in the other hand.

Mr. Carnes led a hike (only 23 miles) in the Smoky Mountains when I was a teenager along with about 20 other boys. He lectured me on the trail for capturing a green mountain snake and poking a bear with a stick. He told me it was not good to upset the balance of nature by removing the snake, and it was not good sense to poke bears with a stick. I freed the snake and have never poked another bear, but I still love the mountain trails.

In the last several years he was confined to a rehab center for various ailments, but his mind was sharp as ever. On our last visit we discussed hiking different trails on different mountains, and whether President Lincoln exceeded his war powers under the Constitution during the War Between the States.

As I told him on that last visit, he reminded me of Lincoln the Prairie Lawyer or of a Churchill or a Washington because he was the indispensable man to his clients and those in need. A few days later he was stricken with a stroke and I left the courthouse to spend at least a few hours by his side in the emergency room. He fought to the end.

He was an exceptional lawyer, charity fundraiser, Sunday school teacher, outdoorsman and gardener.

He could quote the Bible, Shakespeare, famous lawyer arguments of history and nature books in detail and all at great length.

Often in the morning before court he would quote the Bible and pray out loud like an Old Testament prophet or one of the Twelve, for God's will to be done.

He was very proud to the end that his sons, Jimmy, a successful and respected attorney, and Ed, chief judge of the

11th U.S. Circuit Court of Appeals, carried on his legal traditions. He dearly loved his first wife, Florine, and his second wife, Donna. He dearly loved his God and country. We shall not see another like him for a long time.

—Marshall County Circuit Judge Tim Riley

Garrett Hooper

Garrett Hooper was a war hero. He was my hero. His grandfather won the Kentucky Derby in 1945 with a horse name after Garrett's father, Hoop, Jr. He was my nephew and 44 years old and practiced law for a few years in Montgomery, being admitted to the Alabama State Bar in 1996, after being a Sigma Nu at Alabama.

After 9/11, while most of us sat around at parties or dinners and discussed what we should do to the terrorists, Garrett went and got the terrorists. He decided at the age of 32 that he wanted to go into the Army, and went to the

recruiting office in Prattville. They said as a lawyer, he should apply to OCS and be a JAG officer, but he wanted to go in as an enlisted man and go to boot camp, which he did. He went to paratrooper school and became a Ranger and then went into Special Ops. His special skill was the halo jump, which meant he jumped from a high altitude, and then pulled his chute at around 500 feet.

He was the third man in to the Jessica Lynch rescue. He either swore me to silence regarding the other ops he did or told me he could not talk about them now and that he would tell me later. He was deployed to Iraq, Afghanistan and North Africa nine times. He later became a well-decorated JAG officer as a captain. He died January 13, 2015 and a special light went out of our lives. It is devastating to our family, and we are grieving, but are celebrating his courageous life and dedication of service to our country. This is a different kind of warfare, and I do not know what we are doing for our veterans, but it is not enough.

—M. Fredrick Simpler, Jr.

Booth, Charles Houser, Jr.

Birmingham
Admitted: 1975
Died: January 16, 2015

Carter, James Douglas, Jr.

Desert Hot Springs, CA
Admitted: 1992
Died: October 24, 2014

Corina, Errante

Birmingham
Admitted: 1949
Died: December 29, 2014

Curtis, Carolyn Hubbard

Phenix City
Admitted: 1982
Died: November 17, 2014

Figures, Hon. Thomas Henry

Mobile
Admitted: 1974
Died: January 22, 2015

Hagler, Robert Lee, Jr.

Daphne
Admitted: 2007
Died: January 13, 2015

Hale, Patrick Brett

Montgomery
Admitted: 1997
Died: January 1, 2015

Hand, Linda Marie

Birmingham
Admitted: 1985
Died: January 28, 2015

Howell, Ally Windsor

Elmira, NY
Admitted: 1974
Died: March 1, 2015

Jordan, Robert Kane

Ft. Payne
Admitted: 1989
Died: January 27, 2015

Maxwell, Thomas Estes, Jr.

Birmingham
Admitted: 1966
Died: January 28, 2015

Oliver, Samuel William, Jr.

Birmingham
Admitted: 1962
Died: February 9, 2015

Perry, Ezra Bouchelle, Jr.

Birmingham
Admitted: 1972
Died: December 31, 2014

Pierce, Donald Fay

Mobile
Admitted: 1958
Died: February 5, 2015

Tucker, Jerry Bryson

Huntsville
Admitted: 1960
Died: January 30, 2015

Reinstatement

Disbarments

Suspensions

Public Reprimands

Reinstatement

- Mobile attorney **Sonya Ogletree-Bailey** was reinstated to the practice of law in Alabama, effective January 23, 2015, by order of the Supreme Court of Alabama. The supreme court's order was based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Ogletree-Bailey October 8, 2014. [Rule 28, Pet. No. 2014-1558]

Disbarments

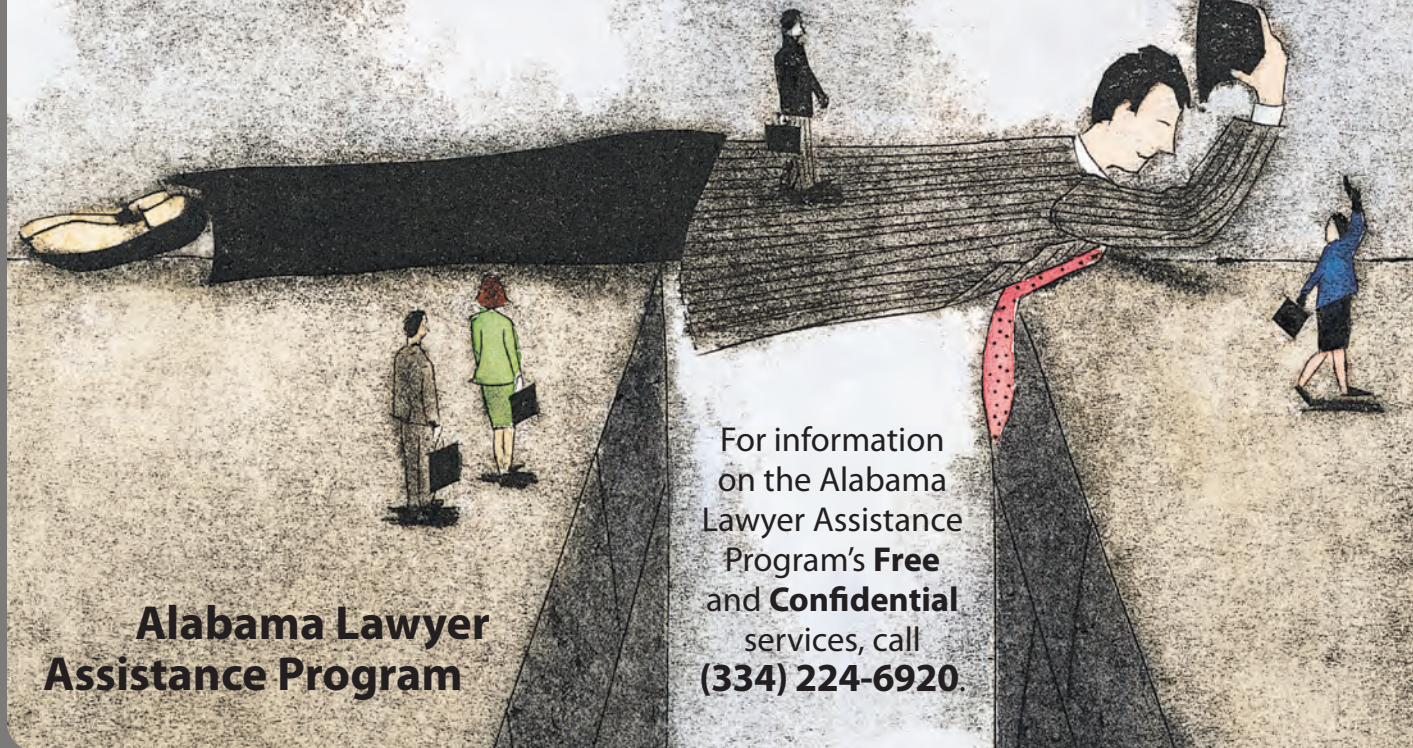
- Bessemer attorney **Millard Lynn Jones** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective April 23, 2014. The supreme court entered its order based upon the December 15, 2014 order of Panel III of the Disciplinary Board accepting Jones's consent to disbarment, pursuant to Rule 23, *Ala. R. Disc. P.*, and ordered that Jones's disbarment date be effective retroactive to April 23, 2014, the date of Jones's interim suspension from the practice of law in Alabama. Jones's consent to disbarment was based upon allegations that he misappropriated client funds. [Rule 23(a), Pet. 2014-1839; ASB No. 2014-340]
- Montgomery attorney **Asim Griggs Masood** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective October 14, 2014. The supreme court entered its order based upon the October 14, 2014 order entered by Panel III of the Disciplinary Board of the Alabama State Bar. Masood was found guilty of multiple violations of Rules 1.3, 1.4(a) and (b), 1.16(d), 8.1(b) and 8.4(a) and (g), *Alabama Rules of Professional Conduct*. Masood accepted fees and failed to substantially perform the services, failed to respond to requests for information from his client and, in some cases, refused to respond to communications from the Alabama State Bar in connection with the complaints. [ASB Nos. 2013-1060, 2013-1491, 2013-1513, 2013-1644, 2013-1685, 2013-1749, 2013-1942, 2013-1958, 2013-1981, 2013-2007 and 2013-2120]

- Birmingham attorney **Vann Allan Spray** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective December 4, 2014. The supreme court entered its order based upon the October 17, 2014 order of Panel I of the Disciplinary Board of the Alabama State Bar accepting Spray's consent to disbarment. Spray consented to disbarment based upon the following facts. Spray was the subject of a pending bar investigation concerning his failure to diligently represent his client with the Alabama Court of Civil Appeals and Alabama Supreme Court, wherein he failed to make appropriate efforts to stay execution, failed to file an appeal and failed to properly administer monies in trust. During the course of the investigation, it was determined Spray was in violation of Rules 1.5, 1.5(e), 1.15(a) and 8.4(a), (c), (d) and (g), *Ala. R. Prof. C.* Spray's consent to disbarment is also premised on an unrelated

potential class action lawsuit filed in the United States Bankruptcy Court for the Middle District of Alabama in which Spray, as the named local party along with other listed individuals and corporate entities, participated in a referral system whereby a California company comprised of non-attorneys was referring clients to Spray with the stated purpose of negotiated debt settlement in lieu of bankruptcy, yet little to no work can be substantiated. Based on the foregoing, Spray consented to disbarment in light of possible multiple violations of Rules 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.15, 3.3, 4.1, 5.3, 5.4, 5.5 and 8.4(a), (b), (c), (d) and (g), *Ala. R. Prof. C.*

- McIntosh attorney **Stacey Lashun Thomas** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective October 24, 2014. The supreme court entered its order based upon the

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October 24, 2014 order entered by Panel III of the Disciplinary Board of the Alabama State Bar. Thomas was found guilty of violating Rules 1.4(a) and (b), 1.5(a), 5.5(a)(1), 8.1(b) and 8.4(a), (c), (d) and (g), *Alabama Rules of Professional Conduct*. Thomas was previously suspended February 13, 2012. While suspended, Thomas accepted a case in February 2013, and performed legal services on behalf of a client. Thomas did not inform the client of her suspension, and tried to obtain compensation for services she was not lawfully allowed to perform. Once the client learned of Thomas's suspension, she terminated her relationship with Thomas. Thomas then sought reimbursement for services rendered by filing an attorney's lien for \$13,806.32. [ASB No. 2013-1416]

based on a petition filed by the office of general counsel evidencing McClusky was misappropriating funds in his IOLTA account and failed or refused to respond to a disciplinary matter, and that his continued practice of law was likely to cause substantial, immediate and serious harm to a client or to the public. [Rule 20(a), Pet. No. 2015-324]

- Millbrook attorney **John David Norris** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama, effective February 1, 2015. The supreme court entered its order based upon the January 7, 2015 order entered by the Disciplinary Commission of the Alabama State Bar accepting Norris's conditional guilty plea to violations of Rules 1.15(a), 1.15(e), 1.15(j), 8.1(a), 8.4(a), 8.4(c) and 8.4(g), *Ala. R. Prof. C.* Norris admitted he did not maintain an IOLTA or trust account. Norris also admitted he accepted funds from clients and did not place the funds into an IOLTA or trust account. [ASB No. 2013-932]

Suspensions

- Birmingham attorney **Michael Kevin Abernathy** was summarily suspended from the practice of law in Alabama, effective November 19, 2014. The supreme court entered its order based upon the Disciplinary Commission's order finding that Abernathy had failed to respond to a request for information concerning a disciplinary matter. [Rule 20(a), Pet. No. 2014-1709]
- Montgomery attorney **Donald Gordon Madison** was summarily suspended from the practice of law in Alabama by order of the Disciplinary Commission of the Alabama State Bar, pursuant to Rules 8(e) and 20(a), *Ala. R. Disc. P.*, effective February 11, 2015. The Disciplinary Commission's order was based on a petition filed by the office of general counsel evidencing that Madison failed or refused to respond to requests for information during the course of disciplinary investigations. [Rule 20(a), Pet. No. 2015-242]
- Birmingham attorney **John Price McClusky** was interimly and summarily suspended from the practice of law in Alabama pursuant to Rule 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective February 23, 2015. The order of the Disciplinary Commission was

Public Reprimands

- Birmingham attorney **Robert Douglas Cornelius** received a public reprimand without general publication on January 9, 2015 for a violation of Rule 8.4(c), *Ala. R. Prof. C.* In January 2014, the office of general counsel received a complaint from the Alabama Securities Commission regarding a recent audit of Cornelius's personal investment advisory firm, which he founded and operated prior to opening his law office. During the routine audit, it was discovered that Cornelius had overcharged and collected fees in excess of the fee as outlined in his client agreements, amounting to approximately \$33,000. In March 2013, Cornelius advised the complainant that he had reimbursed the clients who had been overcharged, but it was later discovered that the refunds were not paid to the clients until September and October 2013 because Cornelius was unable to make contact with one of the clients. In addition, Cornelius held one of the refund checks until an estate was open. In his response to the bar, Cornelius admitted to giving a false statement to the complainant as to the status of the refunds to his investment clients. [ASB No. 2014-193]

- Jasper attorney **David Michael Harrison** received a public reprimand with general publication on January 9, 2015 for violating Rules 1.1, 1.3, 1.4(b), 1.8(e), 1.8(j), 5.3, 8.4(a) and 8.4(g), *Ala. R. Prof. C.* The reprimand was issued subsequent to Harrison's completion of a one-year probation, effective November 8, 2013. A client retained Harrison to assist him with reinstatement of life insurance policies on his mother. During the course of the representation, Harrison provided an impermissible loan to his client. Harrison acquired a proprietary interest in the subject matter of litigation when he entered into an agreement to be paid by the proceeds of the life insurance policy for which he filed a lawsuit. Harrison did not properly supervise his office staff when he allowed or instructed his office to loan the client \$15,000 and to draft the supporting documents. [ASB No. 2013-715]

- Birmingham attorney **Cynthia Hooks Umstead** received a public reprimand with general publication on January 9, 2015 for violating Rules 1.15(a) and 8.4(g), *Ala. R. Prof. C.*, pursuant to the July 16, 2014 decision of the Disciplinary Commission. On September 23, 2013, the office of general counsel received notification the respondent attorney's trust account was overdrawn. In the respondent attorney's October 21, 2013 and June 6, 2014 responses, she acknowledged an overdrawn check from her trust account as a result of her mistake, as well as a retainer from one client appearing to be utilized to pay restitution costs of another client as a result of this mistake. [ASB No. 2013-1765] | [AL](#)

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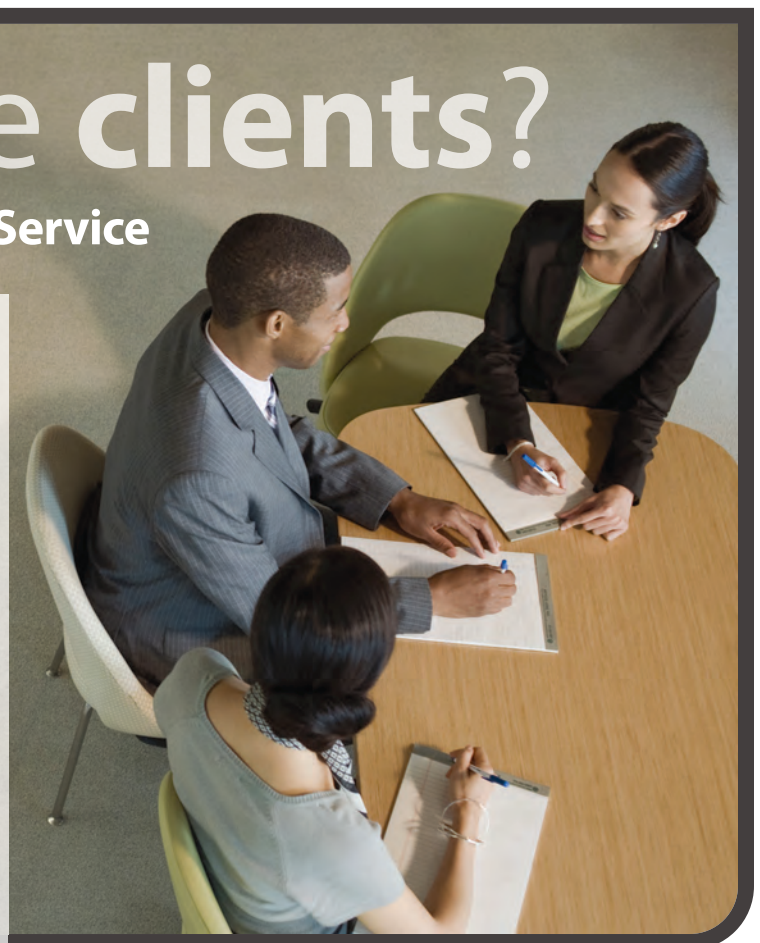
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Brandon Hughey
bdh@ajlaw.com

Orange Beach or Bust!

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

Looking ahead, we are only a couple of weeks away from our **Orange Beach CLE, May 14-16**. No doubt, many of you fondly recall attending the YLS beach CLE every spring as young lawyers. Now as leaders of your firms, you have the opportunity to send some of your own associates to this great event. This year, for a change of pace, we have moved the CLE from our usual locale of Sandestin to the **Perdido Beach Resort in Orange Beach**. We are excited about this move to our own beautiful Alabama beaches!

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

Our slate of speakers this year is incredible. We start with an interactive panel discussion among three judges and also host a roundtable to cover issues that arise when lawyers transition to new roles. There will be presentations discussing practical dispute resolution lessons, tips for cross-examining a plaintiff and the psychology of jury selection. Finally, two presentations will focus on the practical aspects of being a lawyer, such as how to bill better and how to be happy in the practice of law.

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

For more information, visit <https://www.alabar.org/membership/sections/young-lawyers/>. You can also stay up to date at www.facebook.com/ASByounglawyers or [@ASByounglawyers](https://twitter.com/ASByounglawyers) (Twitter and Instagram). Or, email our committee at ASByounglawyers@gmail.com or CLE chair **Megan B. Comer** at mcomer@handarendall.com. Sponsorships are still available for this event! The registration form for the CLE can be found on our website. Hotel rooms are filling up fast, so reserve your room and register for our CLE today! | [AL](#)

free•dom:

noun

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

free•dom court re•porting:

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