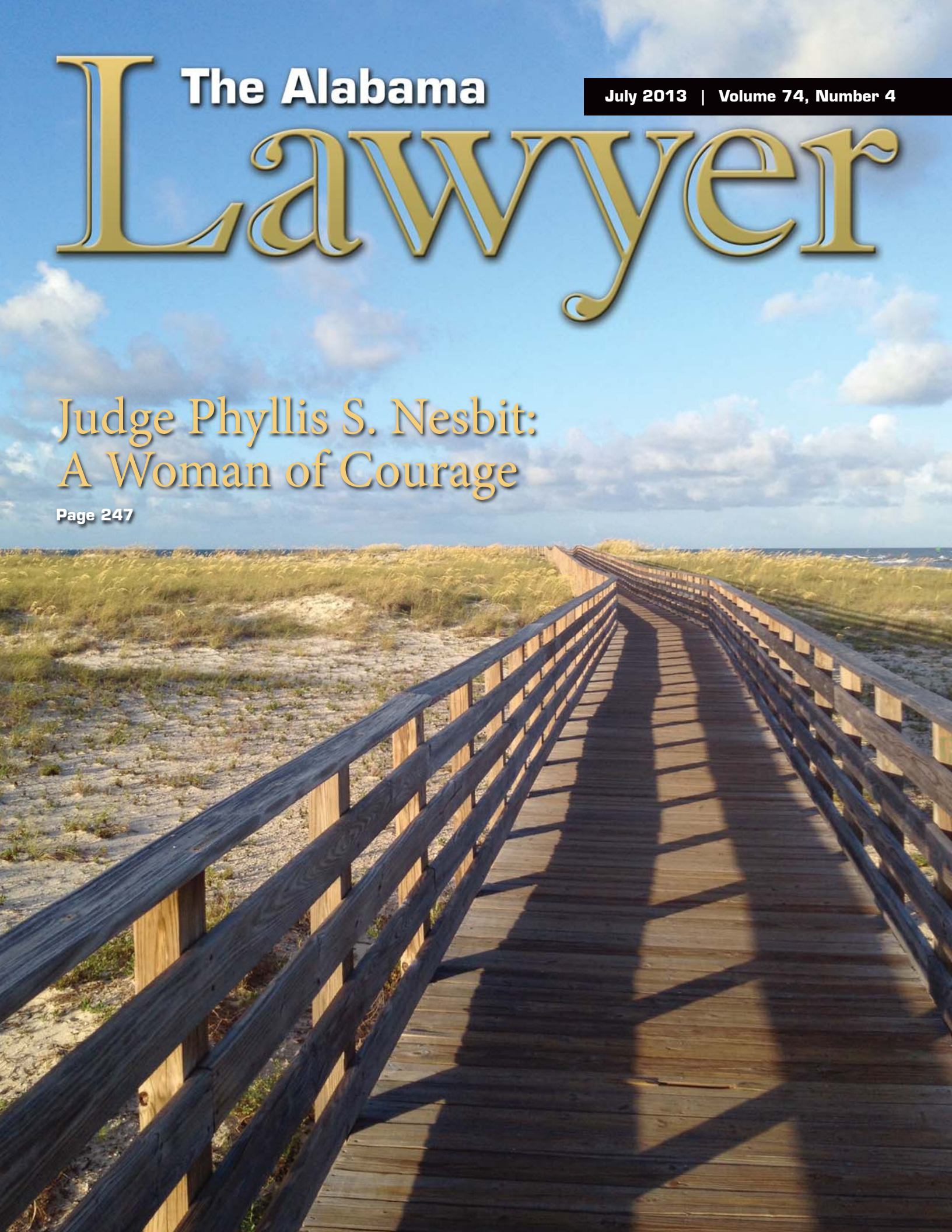
The Alabama Lawyer

July 2013 | Volume 74, Number 4

Judge Phyllis S. Nesbit: A Woman of Courage

Page 247



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The Alabama Lawyer

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ON THE COVER

Boardwalk to the beach, Gulf State Park, Baldwin County

–Anonymous submission

FEATURES

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

COLUMNS

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G. Whit Drake *is the owner, managing partner and founder of Drake Law Firm. For more than 22 years, he has limited his practice to personal injury and wrongful death claims. As a frequent speaker at MCLE Seminars in Alabama, he has authored hundreds of papers and articles addressing trial skills, the rules of evidence and issues involving personal injury claims. Drake Law Firm's website is* www.drakelawal.com.

William E. Shreve, Jr. *is counsel with Phelps Dunbar LLP in Mobile. He graduated from Davidson College and the University of Alabama School of Law. He is a member of the Appellate Practice and Insurance Coverage committees of the ABA's Litigation Section, the ABA's Council of Appellate Lawyers, the Amicus Curiae Committee of the Alabama Defense Lawyers Association, the Appellate Practice Section of the Alabama State Bar, and the Mobile Bar Association's Appellate Practice Committee.*

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*) or on a CD through regular mail (Jones & Hawley PC, 2001 Park Place N., Ste. 830, Birmingham, AL 35203) in Microsoft Word format. A typical article is 13 to 18 letter-size pages in length, double-spaced and utilizing endnotes and not footnotes.

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

Phillip W. McCallum
pwm@mmlaw.net

The Land of Oz:

The Alabama State Bar's Return to Relevance With the Alabama State Legislature

One of my favorite scenes in the 1939 movie *The Wizard of Oz* is when Dorothy and her companions, after dispatching the Wicked Witch of the West, re-present themselves to the great Wizard to claim their promised rewards of a heart, courage, a brain and safe passage home. After initially being rebuked by the Wizard, trusty Toto pulls back a curtain exposing an elderly illusionist busily pushing buttons and pulling levers to produce pyrotechnics. "Pay no attention to the man behind the curtain," booms the illusionist, as he attempts to maintain the facade.

Unfortunately, for way too long, the Alabama State Bar paid little attention to the folks "behind the curtain" in Montgomery, resulting in a diminished role of the Alabama State Bar within our state government. The reasons for this lack of attention may be attributed to several factors, some of which are identified below. Thankfully, however, due to the fine leadership and vision of some of my predecessors, significant progress is being made by the bar to restore a detached relationship between the bar and our legislature, to the benefit of our profession, the legislative process and the citizens of our state. In fact, through a thoughtfully-cultivated partnership between leaders in the bar and the legislature, the bar is now often invited to give input on important legislative issues, which, in turn, has increased the bar's relevance again in the legislature. The bar has become a neutral third-party conduit through which many pieces of important legislation are being negotiated and forged. This change is well-needed and appropriate; after all, the bar has a significant amount of resources and

lawyers with expertise in almost all areas of the law available to advise and help our legislators enact meaningful and appropriate legislation for our state, citizens and businesses.

Lost in Oz

Like other mandatory bar associations across the country, the Alabama State Bar is controlled by the *Keller Doctrine*[1] (1990), which restricts mandatory dues-paying bar associations from advancing political issues not germane to the central purposes of (1) regulation and licensing and (2) the improvement of the administration of justice. As such, from a political standpoint, from roughly 1990–2005, the Alabama State Bar had taken a hands-off approach. Other mandatory state bars found themselves in a similar situation, so much so that the subject has become an important topic of discussion within the Southern Conference of Bar Presidents.[2] Whether an overreaction to *Keller* or a product of apathy, it appears lawyers in many states have allowed themselves to become inconsequential players at the state governmental level.

"The bar has become an integral part of the legislative process."

–Rep. Paul DeMarco

While lawyers in Alabama have historically been involved in public offices and in setting public policy, starting in the 1980s, individually and collectively, we became less engaged in the legislature and in politics in general. This became increasingly apparent in early 2000 when less than 10 percent of legislators were lawyers! Lawyers had stopped taking part in the law-making process, and instead became foreign mercenaries in self-interest.

Continued from page 217

By the years 2005 and 2006, it was apparent the Alabama State Bar had lost its voice and influence in our state government and policy. Thankfully for me and the rest of us in this profession, it was in those years then-Alabama State Bar **President Bobby Segall** (2005) and **President Fournier "Boots" Gale** (2006) made Herculean, non-partisan efforts within the legislature to address the issue of appellate judicial elections, which, by that time, had degenerated into a bitter and embarrassing nuclear arms race meant to eviscerate the opponent. Qualifications, experience and reputation became meaningless attributes. All sides were to blame for the circus, and there was a sickening notion that justice could be bought in Alabama.[3] Try as they might in their push for the merit selection of appellate judges, and fully armed with empirical data and supporting resources, Presidents Segall and Gale could never get beyond the "Guardian of the Emerald City Gates." Thanks to their efforts, however, the stage was set for their successors to coalesce, formulate a plan and find a pathway back to relevance.

"In my 40 years of service with the Alabama Legislature, our relationship with the Alabama State Bar has never been stronger or more consequential than it is right now."

–Sen. Jabo Waggoner

The Yellow Brick Road

Crosby

White

In an association such as ours, with constantly-changing leadership, it is sometimes difficult to set direction and maintain continuity of purpose. However, in lock-step fashion, that is exactly what **Presidents Sam Crosby** (2007), **Mark White** (2008), **Tom Methvin** (2009), **Alyce Spruell** (2010), and **Jim Pratt** (2011) were able to accomplish.

President Crosby set about exploring why the Alabama Legislature would not address bar concerns, much less engage in a dialogue. I remember many stories shared by President Crosby–who actually had dubbed himself "Dorothy" and President-elect White "Toto"–about journeys over to the State House, which Sam described as a long walk down the yellow brick road to find the Wizard. President Crosby learned that lawyers had become impotent and were viewed as outsiders by our legislature. It was as if there was a bridgeless gulf, likely exacerbated by partisan politics and a "lack of participation by lawyers in the recent past."

Perhaps inspired by Dorothy's adventure to Oz, when she said "if we walk far enough, we shall sometime come to some place," Presidents Crosby and White did not give up on bridging this long-standing schism. In fact, when advised that the state bar would need to "prove itself" and when told that a controversial measure such as merit selection of judges was not the right "yellow brick road" to that path, Presidents Crosby and White advanced two seemingly non-confrontational issues–minimum standards for judges and statutory protection for mediators. Even though these issues finally did pass and become law, the road proved difficult, and began the bar's realization of the need for involvement and continuous presence.

In President White's term, further crucial steps were taken to nurture a stronger relationship between the Alabama State Bar and the Alabama Legislature. For example, a panel of neutrals was formed, made up of people who were highly trusted and beyond criticism–such as former **Governor Albert Brewer**, former university presidents and former federal state court judges–who could be called upon by state representatives as a resource for discernment, impartiality and the facilitation of difficult issues. The concept was embraced by influential people in the legislature, who, until that time, had to deal with lobbyist-driven agendas and legislation. In addition, and what turned out to be one of the wisest decisions by President White, was the designation of Jim Pratt as the liaison between the Alabama State Bar, the panel of neutrals and legislators.

Due to the speed of legislation during abbreviated sessions, and the need to spot fires that threatened to engulf any important legislation, it soon became apparent that the utilization of a panel to shepherd difficult legislation was neither practical nor efficient. Thus, by need and default, Jim Pratt[4] became the one-man panel and the key link between the state bar and the legislature. For example, in 2010, Governor Bob Riley called for a special session on ethics and sought the state bar's assistance. On behalf of the state bar,

who had no real interest in the policies driving the ethics reform bills, Jim led efforts to mediate very controversial measures. As a result of those efforts, the legislature successfully passed ethics bills that were hailed as some of the most progressive and strongest in the nation. For the first time in years, the Alabama State Bar had begun to earn the confidence of legislative leadership, thanks in large part to the tremendous work done by Jim.

Since that time, the relationship between the Alabama State Bar and the Alabama Legislature has continued to strengthen and grow. In 2010, Jim Pratt was again asked to mediate a new package of tort reform efforts advanced by business interests in Alabama, which he did so successfully. During the same year, President Spruell and then President-elect Jim Pratt were actively involved in mediating and facilitating several other important pieces of legislation, such as the Indigent Defense Bill, which the state bar had been actively requesting consideration of for 20 years, and amendments to the Taxpayer's Bill of Rights, on which substantial progress was made. Ironically, Jim Pratt, a plaintiff's trial lawyer, and then president-elect of the Alabama State Bar, had become the face of diplomacy and reason within the Alabama Legislature.

"There was a day not too long ago when a piece of legislation that was assigned to a subcommittee was considered dead; that is no more. Quite the opposite is now true because of the work you (the Alabama State Bar) have all participated in. I would venture to say that most legislators now welcome the opportunity to have a piece of legislation that is complicated or controversial (or in many cases both) sent to a subcommittee in which you all facilitate."

–Sen. Del Marsh

Over the Rainbow

Though I cannot report that we are over the rainbow–with nothing but sunny skies, fulfilled dreams and happy bluebirds–I am delighted by the progress that continues to be made. In furtherance of our efforts, a **Governmental Liaison Committee** was formally established as a mechanism to train and prepare bar leadership to provide assistance, facilitation and mediation to our state legislators during the entire course of the legislative session. This committee was established to help institutionalize the bar's increasing role in our partnership with the legislature and continue to provide "neutral" assistance.

This past year, I had the honor of furthering the important role of neutral assistance, which was the brainchild of President White and brought to relevance by the tireless efforts of Jim Pratt, by frequently utilizing the talents of **Suzi Edwards**, the bar's legislative counsel. Suzi has done an

Continued from page 219

extraordinary job during the bar's legislative evolutionary process, and she should be credited with much of our success. She has been critical in building healthy relationships between the bar and the legislature, while fostering neutrality. I cannot say enough about the efforts of Suzi and the committee members and how instrumental they were in providing resources on a wide variety of bills and agenda items.

Through the efforts and foresight of my predecessors and colleagues, I truly believe the Alabama State Bar is now positioned as an indispensable player and partner in the passage of meaningful, balanced and sound legislation in the state of Alabama. For their efforts, we should be grateful and proud; in their honor and in appreciation of the "yellow brick road" they have paved so well, we need to continue to strengthen and nurture the relationship between the Alabama State Bar and the Alabama Legislature, a relationship which will benefit our profession, our government and our citizens beyond measure. | AL

Endnotes

1. *Keller v. State Bar of California,* 496 U.S. 1 (1990).

2. The Southern Conference of Bar Presidents, established in 1969, is the largest of the state bar regional conferences, with 21 bars from 17 states (Alabama, Arkansas, Florida, Georgia, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, and West Virginia), Puerto Rico, and the Virgin Islands.

3. From 2001-2009, $40.9 million was raised and spent on Alabama Supreme Court candidates, more than any other state nationally. *www.Justiceatstake.org/resources/newpoliticsofjudicialelections20002009/*

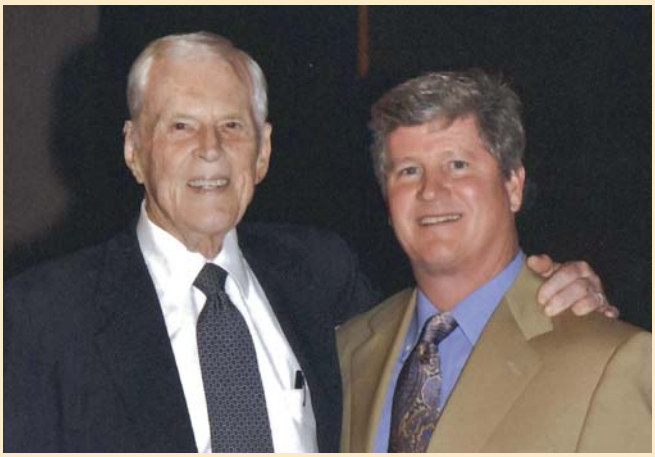
4. Jim Pratt will receive the state bar's Award of Merit at the 2013 Alabama State Bar Annual Meeting for the amazing efforts he has made in returning the ASB to relevance in Alabama government.

Robert G. Esdale: Well Done My Friend

The Alabama State Bar will dearly miss one of our most beloved lawyers. After 30 years of dedicated service, Robert G. Esdale retired as clerk of the Alabama Supreme Court on the last day of June this year.

It was deeply humbling to stand on stage with Mr. Esdale on May 20 as he participated in his last admission ceremony. With great delight I told the admittees of the historical significance of the certificate they were about to receive. I asked them to look at Mr. Esdale's signature on the certificate, and appreciate the fact that they would be the last lawyers in Alabama to receive one. It was no stretch to tell the admittees that it would be a difficult task to think of another lawyer who is as well liked, respected and committed to enhancing our profession as is Mr. Esdale.

The moment was particularly significant to me as not only had Mr. Esdale signed my admission certificate some 25 years ago, but I also refer to him as "Daddy Bob." You see, I grew up in the same community as Mr. Esdale and attended school with his four children, all who remain

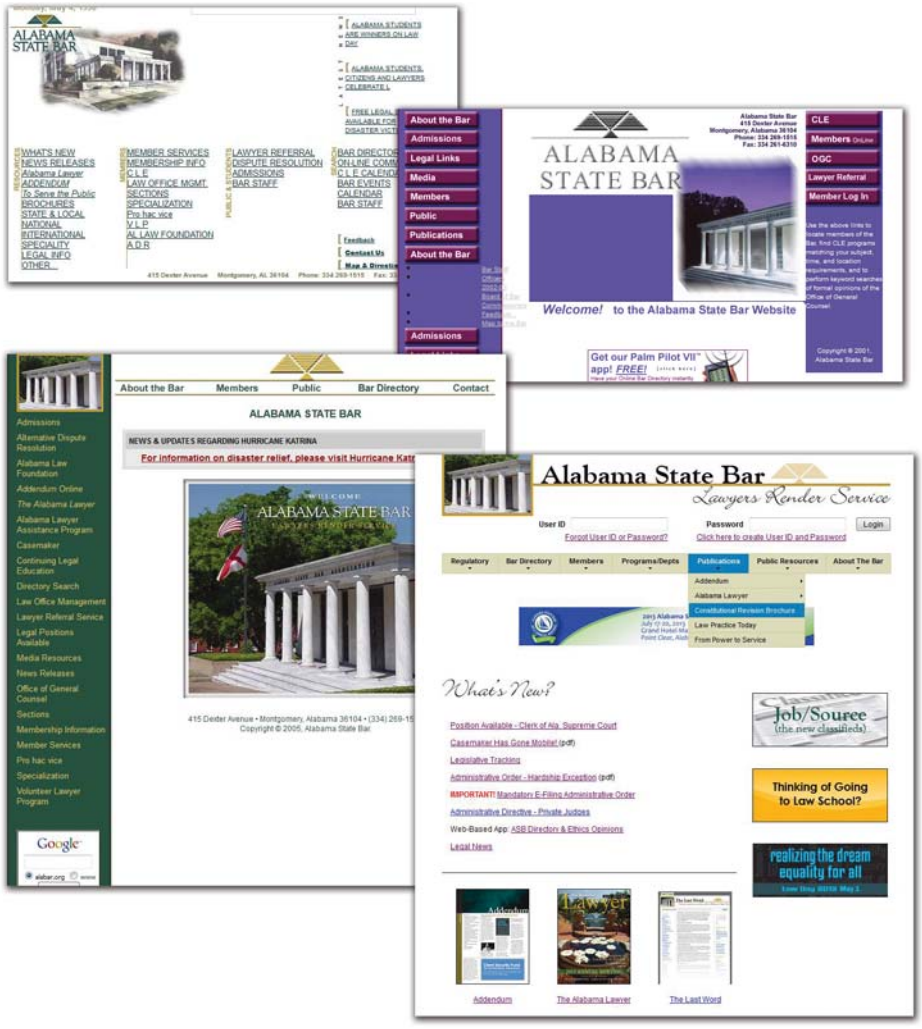


close friends of mine. In fact, Graham Esdale is the godfather to my son, Murphy. I have known Mr. Esdale my entire life and I truly do not know of any person who loves the law and lawyers more than he does.

"Daddy Bob," thank you for your legacy and showing us all how to live our lives to the fullest.

A great way to honor Bob Esdale is through a donation to the Alabama Law Foundation in his honor. Donations can be made online at *alabamalawfoundation.org* or mailed to P.O. Box 4129, Montgomery 36103. | AL

Keith B. Norman
keith.norman@alabar.org



Work Underway on a New Website for You

The Alabama State Bar's website, *www.alabar.org*, first went live in the spring of 1996. In the 17 years since then, we unveiled redesigned sites in 2000, 2003, 2006 and 2008. And, our website is undergoing another major redesign. The **Website and Internet Technology Task Force,** appointed by **President Phillip McCallum,** has been meeting for several months getting started on this project. Lead jointly by **Cleve Poole** of Greenville and **Harold Stephens** of Huntsville, the task force mission is to:

"…review the exiting website and make recommendations to improve the website so that it provides timely, accurate and useful information in a dynamic format about the Alabama State Bar for its members and for the public."

Since the website originally went live, its utilization has dramatically increased. Not long after it became operational, it was averaging 1,400 hits a day. Since 1996, we have continued to add more and more content, as well as an online legal research tool, **Casemaker**. Today, the site averages

Continued from page 221

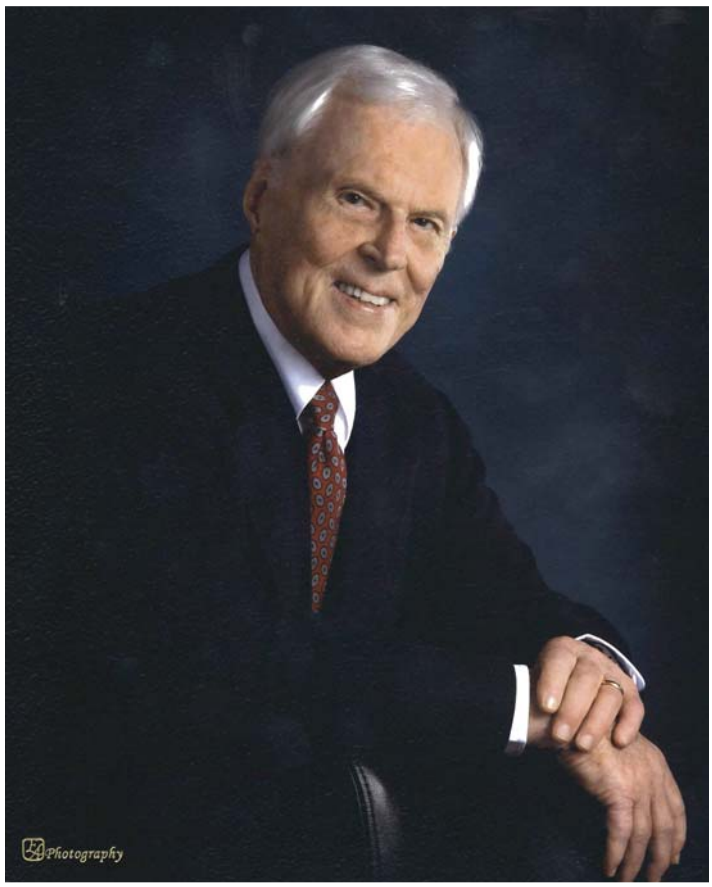
more than 16,000 daily page views. And, thanks to enhanced analytics, we know that the five most-visited areas, in order, are the online directory, member control panel, admissions, member central, and MCLE.

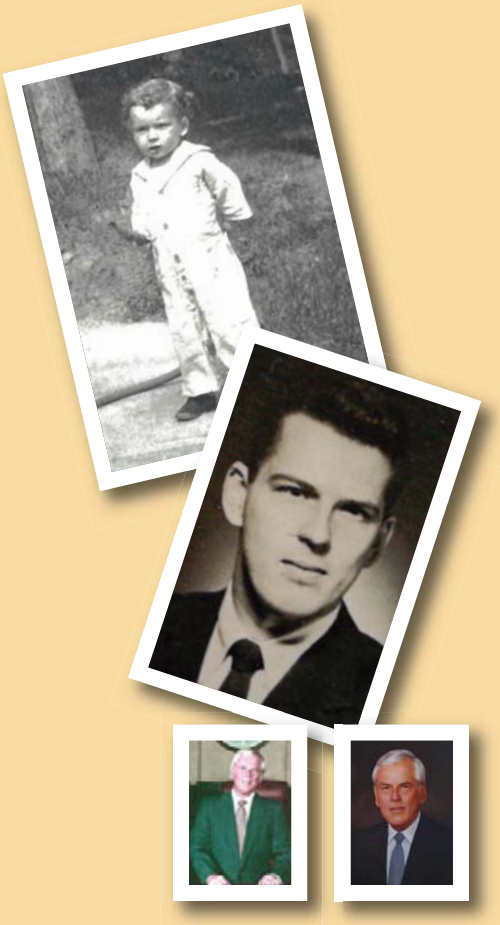
Although the site has grown more popular and useful since its inception, the time has come for a major upgrade. The task force is reviewing the website's current content, as well as parameters for adding future content, to ensure the inclusion of information that is important and useful to bar members and the public. Some of the most critical aspects of the task force's mission are the site's design, graphics, content placement and functionality. This includes a design that is adaptable to portable devices such as tablets and smart phones. The task force is also working closely with bar staff on all aspects of the site's design, as well as guidelines to help the site administrator and content manager maintain its currency and accuracy.

I am pleased to report that bar member **Eric Anderson**, who has a wealth of knowledge about IT and web development as a result of his tenure at Alabama's Administrative Office of Courts, is serving as the project manager for this endeavor. Because of his technical expertise, Eric is a tremendous resource for the task force and state bar staff.

Given the widespread use of the website and its importance as a source of information for members and the public alike, it is essential that it be current, functional and easy to use, as well as aesthetically pleasing. The task force has a great deal of work to do, but has already made much progress. If you have suggestions for the new site, especially regarding functionality and content, please send me an email (*keith.norman@alabar.org*). I look forward to hearing from you. | AL

Gregory H. Hawley
ghawley@joneshawley.com





Best Wishes, Mr. Esdale

It has been a fun project to pay tribute to Bob Esdale in this issue of *The Alabama Lawyer*. I have known Bob all my professional life and have enjoyed being in his company in all settings–whether seeking guidance on appeals, chatting at social settings, socializing at Alabama State Bar events, attending church-related events, or on many other occasions.

I have also had the pleasure, over my professional life, of enjoying wonderful relationships with our former chief justices. Our tribute to Bob's retirement has allowed me to reconnect with them.

In addition to the best wishes that our former chief justices express to Mr. Esdale in the letters we have reprinted in this issue, all of them send best wishes to all members of the Alabama Star Bar, as well. In my conversations planning this tribute, each of them enjoyed sharing memories not only about their work on the court with Mr. Esdale, but also their work with fellow lawyers. They enjoy the company of lawyers! Each of our chief justices holds a special place of distinction for serving our bar, our court and our state. As you review their tributes to Bob, I think that you will agree that we have been extraordinarily fortunate, as a profession, to have this remarkable succession of chiefs, and we have all benefitted from their collaboration with the Supreme Court Clerk, Mr. Esdale. | AL

A TRIBUTE TO ROBERT G. ESDALE

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April 16, 2013

Honorable Robert G. Esdale
Clerk of the Alabama Supreme Court
300 Dexter Avenue
Montgomery, Alabama 36104

Dear Bob:

Upon your retirement, I want to commend you for your exceptional service to the Alabama Supreme Court and the people of Alabama for nearly 30 years.

As Chief Justice of the Alabama Supreme Court, I want you to know that your presence will be missed, but your loyal service and commitment to duty shall never be forgotten. Since I first became Chief Justice over 13 years ago, you have always proven to be a faithful friend and trusted confidant. I will always remember the many experiences we shared as we worked to accomplish the greater good for our justice system.

You deserve a long and peaceful retirement and I hope that you will visit us as often as you can. On behalf of all of the Justices and Judges of the Appellate Courts of our State, I want to thank you for your service and dedication to our court system over many years.

May God grant you the joy and happiness which you so justly deserve as you continue to serve Him.

Sincerely,

Roy S. Moore
Chief Justice

RSM/wha

Sue Bell Cobb
Chief Justice(Retired)
837 Williamsburg Drive
Pike Road, AL 36064

May 2, 2013

The Hon. Robert G. Esdale
Clerk of the Supreme Court of Alabama
Heflin-Torbert Judicial Building
300 Dexter Avenue
Montgomery, AL 36104

Dear Bob:

It is an honor for me to provide to all members of the Bar my perspective upon your retirement. Having served on the Court of Criminal Appeals for 12 years, I always enjoyed every opportunity to be in your presence. You are simply one of those people that everyone enjoys being around. Yet, it was not until my tenure as Chief Justice that I learned how indispensable our Clerk was to the operation of the Supreme Court. I want to focus on three aspects of your remarkable service: to the Bar, to the Court, and to your staff.

First, thank you for your personal touch. For many years every new admittee received the honor of shaking your hand at the Bar admission ceremony as you handed the new lawyers their law license when they walked across the stage. Before the ceremony, you would often write a personal note of congratulations and support to the new admittees and roll the note up in the licenses of those new lawyers! You understood the sacrifices that they had made to be able to walk across that stage.

Second, thank you for your dedication to the Court. Your love of the Supreme Court could never be questioned. Justices and judges who retire are never hesitant about returning to the Clerk's Office to "see Mr. E." and get his input. Individual philosophies notwithstanding, you made sure that **all** members of the Supreme Court knew that you had their back, during their tenure on the Court and ever after!

Last, but not least, thank you for demonstrating that "true loyalty does not just go up, but must go down." I remember well when you gave every member of your staff a copy of the book Don't Sweat The Small Stuff, by Richard Carlson. Choose any quotation from that book — you've described the Esdale philosophy. "You are what you practice most," and "choose being kind over being right, and you'll be right every time." And that's all I have to say about that. (Forrest Gump, 1994)

Best,

Sue Bell Cobb

Sue Bell Cobb

A TRIBUTE TO ROBERT G. ESDALE

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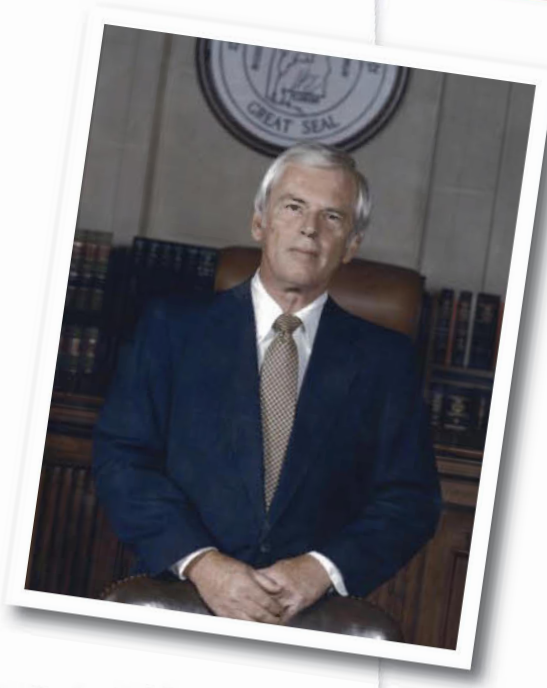

May 1, 2013

Hon. Robert G. Esdale
Supreme Court Clerk
Judicial Building
300 Dexter Avenue
Montgomery, AL 36104

Dear Bob:

As if it were yesterday, I remember August 1, 2011, my first day as Chief Justice. I walked down from the Governor's office, entered the front door, and was escorted to my chambers by Marshall James. I was introduced to my staff, and then turned around to see this spry older gentleman smiling from ear to ear. While you and I had spoken so many times on the phone through the years, it was my first meeting with Mr. Robert Esdale, Clerk of the Supreme Court of Alabama. Mr. Esdale, in the flesh! I was so honored and you were so gracious. It took me a while before I could call you "Bob". You were, and still are, a living legend.

Your professionalism and sense of humor (I will not repeat the humor due to confidentiality) made my time on the Court a real joy. You always knew what to do and gave me great guidance. I want you to know how much I respect you for all you have done and for the fact that you always had compassion and the highest regard for your employees.

Retirement is what you make of it, and I know you will make the best of it. Bob, we have discussed the fact that we all have a common destiny. (Ecclesiastes Chapter 9). So may God continue to bless you, keep you, and make His face shine upon you during your years of retirement.

Sincerely,
Your Friend,

Charles R. Malone
Circuit Judge

Mr. Bob Esdale
Clerk of the Alabama Supreme Court
300 Dexter Avenue
Montgomery, AL 36104

Dear Bob,

Congratulations on your retirement from serving as Chief Clerk of the Alabama Supreme Court. Not only have you been a dedicated and loyal public servant to the taxpayers of Alabama, but you have been a wonderful friend to the Justices and staff throughout the court system.

As you know, I committed to run for the state's highest Judicial office to try and make a difference in the lives of all Alabamians, and to improve the image of our state's court system. We had our challenges along the way, but none of the successes would have been possible without your expertise and passion for the court.

The state of Alabama is fortunate to have experienced your many wonderful years of service as Chief Clerk and will have an extremely difficult job finding someone with the knowledge, and commitment to excellence that you possess. I am thankful for the help and guidance that you offered me along the way, but I am more appreciative for your friendship. With your leadership, hard work and vision, the Alabama Supreme Court system flows smoothly every single day, and is admired across the United States.

It seems like yesterday when I was first elected that all the legal scholars told me that Bob Esdale was one of the greatest assets at the Alabama Supreme Court and I can promise you, they were right on the money. I am forever grateful for your many sacrifices to make the Alabama Supreme Court one of the finest courts in the country.

Thank you for your wonderful smile, attitude, and friendship. I wish you all the best in a Happy and Fruitful retirement!

All my best wishes,

Perry Hooper, Sr.
Retired, Chief Justice of the Alabama Supreme Court

A TRIBUTE TO ROBERT G. ESDALE

LIGHTFOOT
LIGHTFOOT FRANKLIN WHITE LLC
TRIAL & APPELLATE COUNSEL

J. Gorman Houston, Jr.
Writer's Direct Dial: 334-834-4414

April 25, 2013

The Honorable Robert G. Esdale
Clerk of the Supreme Court of Alabama
Heflin-Torbert Judicial Building
300 Dexter Avenue
Montgomery, Alabama 36104

Dear Bob:

You have been a friend to all of the Justices that have served on the Supreme Court of Alabama during your long tenure as Clerk of that Court. Thank you for that.

You have been a friend to all of the attorneys who have filed or defended cases and motions before that Court during your tenure as Clerk. Thank you for that.

When I retired from the Court, our mutual friend, Mark White, gave me a framed 21" by 24 ½" colored photograph of you and me, which I understand appeared on the front page of a major newspaper in Canada. In it, you are holding a gold box over your head and preparing to draw a name from that box, and I am reading the name you had previously drawn from the box. I have had that photograph hanging in my office since Mark gave it to me, and I see it daily. It reminds me that I served as Chief Justice during a sad, hard time on the Court for which there was no precedent. You were there to help. Together with the wonderful help of the other seven justices, we were able to do the work of nine justices in a timely manner. Thank you for that.

God bless you, my friend.

Cordially,

J. Gorman Houston, Jr.

JGH:ldh

C. C. "Bo" Torbert, Jr.
611 Terracewood Drive
Opelika, Alabama 36801

Honorable Robert G. Esdale
Clerk, Alabama Supreme Court
300 Dexter Avenue
Montgomery, Alabama 36104

Dear Bob:

I recently learned of your decision to retire from the Clerk's Office. I cannot imagine what the Court will do without you running that office. Every Justice and every lawyer who has ever filed an appeal owes you a debt of gratitude for the way that you managed the Clerk's Office.

I fondly remember the period when you came on board when I was on the Court. I enjoyed our collaboration, putting into practice the reforms embodied in the Judicial Article. I am sure that all of my fellow former Chief Justices and Associate Justices will agree that your steady hand over 30 years has allowed the Court system to operate smoothly and fairly. Thank you for your service.

On a personal level, I want to thank you for our friendship, and I hope that you will enjoy your retirement as much as I have enjoyed mine.

I hope that our paths will cross soon. Thanking you once again, I remain,

Very truly yours,

Bo

C. C. "Bo" Torbert, Jr.

A TRIBUTE TO ROBERT G. ESDALE

Drayton Nabers, Jr.
DIRECT 205.254.1118
EMAIL dnabers@maynardcooper.com

MAYNARD COOPER & GALE PC
ATTORNEYS AT LAW

April 29, 2013

Honorable Robert G. Esdale
Clerk of the Supreme Court of Alabama
Heflin-Torbert Judicial Building
300 Dexter Avenue
Montgomery, Alabama 36104

Dear Bob:

What a wonderful career you have had as Clerk of the Alabama Supreme Court and I treasure the friendship we developed while I was on the Court.

In the 30 years that you have served, you have earned the respect of all the lawyers who have practiced before the Court and been of inestimable benefit to the Justices who served on the Court. You will be sorely missed, but you have certainly earned the right to the enjoyment and rest that will be yours in retirement.

It was a great pleasure to work with you. You, and the great staff you assembled, handled every issue professionally and with a sense of balance and fairness that allowed the Court to accomplish its mission of providing a fair and just tribunal to all the litigants that came before us.

I wish you a rich and enjoyable retirement.

Sincerely,

Drayton

Drayton Nabers, Jr.

DNjr/mdl

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April 29th, 2013

Honorable Robert G. Esdale
Clerk, Alabama Supreme Court
300 Dexter Avenue
Montgomery, Alabama 36104

Dear Bob:

I heartedly congratulate you upon your retirement. I am deeply grateful for the time I had serving with you as Chief Justice from 1989 through 1995. You are a gifted administrator and an outstanding public servant. You will be missed.

You were extremely helpful to me in the implementation of the Appellate and Trial Court Time Standards. You have done a superior job in handling the deflecting of cases to the Court of Civil Appeals. Your help in the installation of the many new Rule changes during my term is greatly appreciated. You cooperation with the other appellate courts, the trial courts and the ADC caused the system to run smoothly.

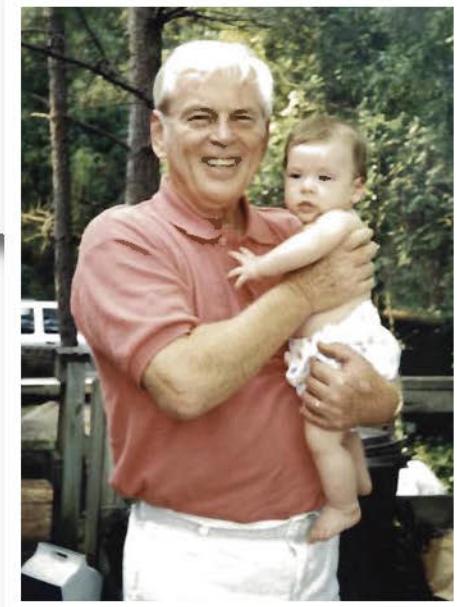
Bob, you are a people person with extraordinary management skills. Everyone who knows you likes you.

Thank you for being my friend.

I extend best wishes to you and Suzanne in your new life.

Very truly yours,

Ernest C. Hornsby



Effective Case Resolution In Today's Legal Environment

By G. Whit Drake

The Great Recession of 2008 created a number of obstacles to the speedy and efficient management of civil lawsuits.

The economic woes have also affected the efficiency and ability of some insurance companies to quickly and fairly resolve claims with personal injury claimants. Even "too big to fail" insurance companies like AIG had well-documented problems with their liquidity. Finally, as a result of the poor economic conditions and the lack of adequate revenue, the State of Alabama has not adequately funded the court system, which has resulted in budget cuts and lay-offs.

All of the these factors have created hurdles for the average practitioner, whether representing plaintiffs or defendants, in efficiently and speedily resolving all manner of civil claims involving personal injury, probate, divorce and other legal issues. The purpose of this article is to address the different ways in which attorneys can resolve their client's legal matter, while at the same time minimize their expense in this fragile economy.

Pre-Suit Resolution/Don't File the Case Just Yet!

Mediation can be an effective tool in resolving a dispute. There is no requirement that mediation must occur *after* the filing of a lawsuit. It can occur anytime upon agreement of the parties. Generally speaking, mediation is a voluntary process whereby parties to a dispute agree to allow a certified mediator to assist them in resolving the claim. The benefits of an early, pre-suit mediation are obvious. If the case can be resolved early on, the various expenses associated with litigation, such as filing fees, subpoenas, expert witnesses, depositions, and the like, can be avoided. Additionally, resolution by mediation takes the court system, and a potentially protracted litigation process, out of the equation.

For the plaintiff's attorney who is, for example, handling a personal injury claim, the best advice here is "don't be greedy!" For the most part, you can get a better result for your client by getting a reasonable amount of compensation *and* avoid the two- or three-year delay associated with the court system. In this instance, the present value of money and the avoidance of court delays and expenses should encourage a willingness to settle for a lower amount than what you really wanted for your client.

Rule 27 Petition

One of the most overlooked, but useful, tools in a litigant's arsenal is the Rule 27 pre-filing petition. This allows an attorney to conduct limited discovery–*before* a formal suit is filed–to identify the proper party defendants and essentially determine whether a claim should even be filed, thus potentially saving time and money by avoiding filing a formal lawsuit that would ultimately be dismissed. Rule 27 provides, in pertinent part, as follows:

(a) *Before action.*

(1) PETITION. A person who desires to perpetuate that person's own testimony or that of another person or to obtain discovery under Rule 34 or Rule 35 regarding any matter that may be cognizable in any court of this state may file a verified petition in the circuit court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show:

(1) that the petitioner expects to be a party to an action cognizable in a court of this state but is presently unable to bring it or cause it to be brought,

(2) the subject matter of the expected action and the petitioner's interest therein,

(3) the facts which the petitioner desires to establish by the proposed testimony and the petitioner's reasons for desiring to perpetuate it,

(4) the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and

(5) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each.

Rule 27 discovery tools include requests for production and depositions pursuant to Rules 34 and 30. These options may be useful in ascertaining the proper parties for the main lawsuit, as well as determining whether the claim should be pursued at all.

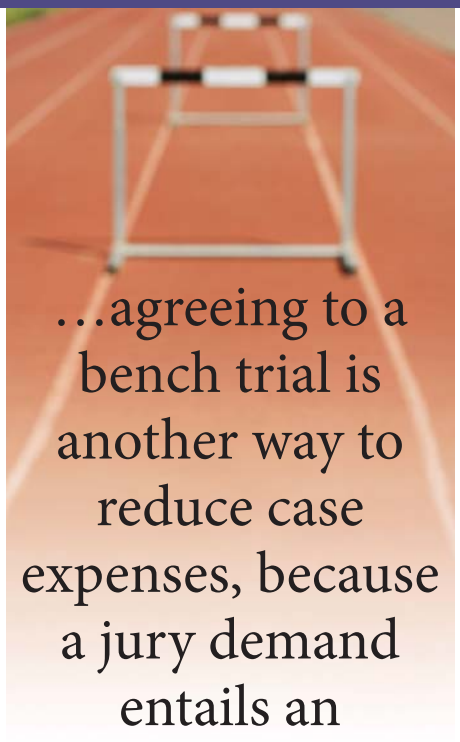
Invoking the Court System

In the event that all of the avenues of case resolution have failed, either through mediation or because you're dealing with an insurance company that is offering a less than desirable amount for your client's personal injury claim, it may be necessary to file suit. On a personal note, this author has noticed a significant slow-down in the number of civil cases successfully settled before filing suit. There are multiple insurance companies that use a computer algorithm to decide the value of a case. Once they have made that offer, they never go beyond it. So, it is common in today's economic environment for a suit to be filed due to the failure of an insurance adjuster to offer a reasonable value for the claim. Again, a post-suit

mediation may be helpful in resolving the claim once a different litigation adjuster has been assigned to the claim.

Jury vs. Non-Jury

In my early years of practice, it was standard procedure for plaintiff attorneys always to make a jury demand. However, Alabama juries have become more and more conservative. This has prompted some plaintiff attorneys to choose a bench trial over a jury trial. There are also other additional benefits from trying the case non-jury. For example, the case can normally be processed through the court system much quickly, much like a worker's compensation case. Additionally, without a jury, but with a seasoned Alabama Judge who can cut through all the issues, the parties are more likely to agree on most of the trial issues and be more amenable to enter into stipulations. Finally, agreeing to a bench trial is another way to reduce case expenses, because a jury demand entails an additional fee.



Early Mediation

While mediations usually occur shortly before trial, there is no rule mandating this. Immediately after filing suit, newly hired attorneys frequently may be more reasonable than the insurance adjuster, and may be willing to sit down and resolve the case via an early mediation. Additionally, by mediating the case immediately after filing suit, this can help eliminate the additional expenses associated with long-term litigation expenses.

Rule 16

With the current budget cuts and layoffs in the court system, it takes a long time to get to trial. Rule 16 provides as follows:

(a) *Pretrial conferences; objectives.* In any action, the court may in its discretion at any time direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) **expediting the disposition of the action**;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating the settlement of the case.

When the court has not ordered a conference, **any party may require** the scheduling of such conference on written notice served at such time in advance of trial so as to permit the conference to take place at least 21 days before the case is set for trial.

(b) *Scheduling and planning.* The court may enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order also may include

(4) **the date or dates for conferences before trial, a final pretrial conference, and trial**;

(5) provisions for discovery of electronically stored information;

(6) any agreements the parties reach for asserting claims of privilege or asserting that certain material is protected as trial-preparation material after the material has been produced; and

(7) any other matters appropriate in the circumstances of the case.

(Emphasis added).

By utilization of a Rule 16 Motion, you can frequently get your case set for trial and resolved sooner than it would be by the normal progression of the trial docket. While there is no Alabama case on point, the language of Rule 16 appears to be mandatory and requires the judge to order a pre-trial hearing. I have never heard of a Rule 16 motion being denied, so here is a useful tool to "nudge" along the court system.

Offer of Judgment

A Rule 68 Offer of Judgment can be a very powerful tool. It has always surprised me that it is not utilized more by defense attorneys; particularly, since it *only* applies to defendants, not plaintiffs. The Rule provides as follows:

> At any time more than fifteen (15) days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within ten (10) days after the service of the offer, the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. **If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.**

(Emphasis added).

As mentioned above, the clear language of Rule 68 indicates that it only applies to defendants. Why is this so? If this rule

could be used by plaintiff attorneys as well, it would surely prompt early case resolution, particularly when the settlement offer by the defendant is clearly unreasonable. As mandated by Rule 68, the fear of a party having to pay the other side's case expenses can be influential in forcing an early compromise settlement, particularly in complex litigation.

Recent legal articles have addressed the benefits of the offer of judgment when it is available to both the defendant and plaintiff. Many states have amended Rule 68 to allow an offer of judgment by the plaintiff.

In lieu of an offer of judgment, a plaintiff's attorney does have a similar mechanism that can be used as leverage to provoke a settlement: the bad faith/excess letter. This is where the plaintiff's attorney sends a letter to his opponent, requesting an offer of the applicable policy limits by a certain date, and that the demand will be withdrawn thereafter and judgment will be taken against the defendant for the full measure of damages. The leverage here lies in the prospect of the liability insurer being liable for any excess judgment. Notably, most courts look with disfavor upon these letters when they are clearly and solely written for the purpose of establishing a bad faith claim.

Only appeal those issues that materially have or will affect the outcome of your case and only in those instances where you're confident that the appellate court will rule in your favor.

Request for Admissions

Rule 36 requests for admissions are a useful tool that can be used to narrow the issues at trial and eliminate the necessity of certain depositions. If the opposing party objects to any of these, a Rule 37 Motion to Compel can be filed to obtain satisfactory answers. If these requests for admissions are properly admitted, this eliminates the need for action by the court, thereby narrowing the issues for trial. However, if an improper objection or refusal to admit is interposed in response to any of these, the discovering party can seek all reasonable costs and expenses associated with proving the un-admitted requests. Once again, here is another example of mitigating your expenses during the litigation process.

Deposition upon Written Questions

Rule 31 provides for a deposition upon written questions. This may be the most unused rule in all of *Alabama Rules of Civil Procedure*. However, by utilizing written questions, one can avoid the substantial expense associated with traveling out of state. The rules also provide that answers upon written questions have the same legal and binding effect as questions asked during a standard deposition.

Discovery Considerations

Interrogatories, requests for admissions and production are free of charge! Take advantage of them and reduce your client's expenses. Many times, well-drafted and tailor-made discovery requests can eliminate the formidable expenses associated with depositions. For example, rather than immediately deposing the treating physician in a car accident case in order to "prove" the treatment and medical bills, send a request for admission to the defense attorney. If he/she refuses to admit the reasonableness and necessity of the treatment, then you can claim the costs of deposing the treating physician pursuant to Rule 37.

Expense Management/ The Modern Paradigm

For effective case management and expense mitigation in today's legal environment, the smart lawyer realizes that today's law office should be much different from the law office 30 years ago. The modern paradigm for law offices includes going paperless, limited document retention except via digital coordination, small or non-existent hard copy libraries, etc. The old-style law offices with shelves and shelves of *Southern Reporters* and Federal Supplements are long gone. Now, whether you are in the courtroom or in the confines of your office, most of your tasks can be completed via your desktop computer or iPad. Additionally, by going paperless and streamlining the configuration and size of your office, a modern lawyer can substantially reduce his overhead and maximize his ability to resolve cases while, at the same time, minimizing expenses.

Summary Judgment

Other than stipulations, nothing is quite as effective at narrowing the issues at trial as a Rule 56 Summary Judgment. Unlike the offer of judgment pursuant to Rule 68, a summary judgment can be filed by any party. For plaintiff's counsel, the summary judgment process can narrow the issues at trial and establish liability on the part of the defendant, leaving only the issue of damages remaining. Additionally, such summary rulings will usually be appreciated by the court, in that the trial process will be much shorter and the issues to be resolved will be fewer and less substantial.

To Appeal or Not to Appeal

The mere fact that your trial judge made a ruling that you considered to be wrong or not based on the law does not mean that a Rule 5 Interlocutory Petition or Writ of Mandamus should be filed. Sit back and reflect on the real prejudice or harm the court's

ruling is causing your client's case. Does it really matter that much? If the judge had ruled the other way, would it significantly affect the settlement value of the case? Stated differently, if an adverse ruling does not materially affect the value of the case or the ultimate resolution of the issues that are important to your client, seriously consider not appealing the matter. Normally, an appeal will substantially delay the ultimate resolution and increase the total expenses to you and your client. Only appeal those issues that materially have or will affect the outcome of your case and only in those instances where you're confident that the appellate court will rule in your favor.

Pre-Trial Mediation

Mediation is most common in those situations where discovery is virtually complete and a trial date is looming. As outlined above, mediation can be an effective way in resolving a case short of going to trial and incurring additional expenses. For those instances where the opponent is hesitant to mediate, but you are confident the mediation will be successful, most trial judges are amenable to granting a motion to compel mediation. Attach a proposed order to your motion. The order should require all parties with authority to be in attendance at the mediation.

Conclusion

This article has only touched on some of the more obvious ways in which a case can be effectively resolved, while, at the same time, minimize your case expenses. Without a doubt, as technology advances increase, the ability to mitigate your expenses and resolve your cases sooner should correspondingly increase. However, the biggest problems that litigants currently have in Alabama are the budgetary cuts and lay-offs in the court system. It is hoped this presentation will assist you in getting around the hurdles that exist in today's legal environment and help you in adequately representing your client and resolving their case sooner versus later. | AL

Determining an Insurer's Duty to Defend

By William E. Shreve, Jr.

Under most policies of liability insurance, insurers have a duty to defend their insureds. This means that when a claimant sues an insured, and the lawsuit includes a claim that is covered by the insurer's policy, the insurer must hire defense counsel for the insured and pay the cost of defending. This duty is separate from the insurer's duty to indemnify the insured against covered damages.

Insurers who wrongfully refuse to defend expose themselves to liability for breach of contract and, in some cases, for bad faith. Also, when an insurer denies a defense, it loses control of the litigation against the insured, who may not adequately defend the suit. In fact, insureds have been known to consent to adverse judgments in exchange for the claimant's agreeing to attempt collection only from the insurer. As a result, the insurer may be faced with a demand to pay a judgment without having had any say-so in the defense. Thus, when a claimant sues an insured, it is important that the insurer make the right decision whether to defend.

The general rule controlling the duty to defend seems simple enough: "An insurance company's duty to defend its insured is governed by the language of the insurance policy and by the allegations of the complaint…. If the allegations accuse the insured of actions for which the insurance company has provided protection, the insurance company is obligated to defend the insured." *Ajdarodini v. State Auto Mut. Ins. Co.*, 628 So. 2d 312, 313 (Ala. 1993). But determining whether a complaint "accuse[s] the insured of actions for which the insurance company has provided protection" is not always easy. The policy may be unclear as worded, or as applied to the claimant's allegations. The complaint may assert a mixture of covered and non-covered claims, or it may be vague, ambiguous or contradictory. Facts outside the complaint may tend to show that coverage does or does not exist.

This article discusses the process of determining an insurer's defense obligation, including policy interpretation and construction, what to look for in the complaint and use of extrinsic facts to establish or negate a duty to defend. Since complaints often assert both covered and non-covered claims, or leave it uncertain whether the insurer owes a defense, the article also discusses defending under reservation of rights.

Reading the Policy

Insurance policies, like other contracts, are agreements expressing the parties' intent. *See Alabama Farm Bureau Mut. Cas. Ins. Co. v. Goodman*, 279 Ala. 538, 188 So. 2d 268, 270 (1966). They typically include a broad grant of coverage followed by exclusions that narrow coverage. When an insured tenders a complaint for defense, the insurer must review the coverage grant and exclusions to determine

When a policy is ambiguous, the "construction will be adopted which is favorable to the insured."

whether they (a) unambiguously express an intent that the insurer would defend the claims asserted, (b) unambiguously express an intent that the insurer would not defend the claims or (c) are ambiguous as to what the parties intended.

Certain principles guide the determination of intent. The law presumes the parties intended to adopt prior judicial constructions of words and phrases used. *See Alabama Plating Co. v. United States Fidelity & Guar. Co.*, 690 So. 2d 331, 336 (Ala. 1996) (quoting *Couch on Insurance* § 15:20 (2d ed. 1984)). Otherwise, the policy language should generally be given its "common interpretation," that is, the meaning that "persons with usual and ordinary understanding would [ascribe to the words] when used to express the purpose for which they were employed." *Alabama Farm Bureau*, 188 So. 2d at 270. However, words that have "acquired a peculiar sense distinct from [their] popular sense," as "by the known usage of trade," are to be "understood in [that] special and peculiar sense." *Mobile Marine Dock & Mut. Ins. Co. v. McMillan & Son*, 27 Ala. 77, 98-99 (1855) (construing marine policy). *See also* 2 Allan D. Windt, *Insurance Claims & Disputes* § 6:2 (5th ed. Westlaw 2012) ("For example, the words used in an aviation policy may have the technical meaning used in the aviation industry, such that the common everyday meaning of those words should not control."). Also, policy definitions are controlling, even if they are different from the defined terms' ordinary meanings. *See Twin City Fire Ins. Co. v. Alfa Mut. Ins. Co.*, 817 So. 2d 687, 692 (Ala. 2001); *Tate v. Allstate Ins. Co.*, 692 So. 2d 822, 824 (Ala. 1997). Dictionaries may be consulted to ascertain the ordinary meanings of terms that the policy does not define. *See Safeway Ins. Co. v. Herrera*, 912 So. 2d 1140, 1143-44 (Ala. 2005); *Carpet Installation & Supplies v. Alfa Mut. Ins. Co.*, 628 So. 2d 560, 562 (Ala. 1993).

Particular wording should be viewed in the context of the whole policy rather than in isolation. *See State Farm Fire & Cas. Co. v. Slade*, 747 So. 2d 293, 309 (Ala. 1999). Each term should be given effect if possible. *See Sentry Ins. Co. v. Miller*, 914 F. Supp. 496, 500 (M.D. Ala. 1996), *aff'd in part, rev'd in part*, 114 F.3d 1202 (11th Cir. 1997). The interpretation should be "rational and practical." *American Resources Ins. Co. v. H & H Stephens Constr., Inc.*, 939 So. 2d 868, 873 (Ala. 2006). Use of "strained or twisted reasoning" to try to create or avoid coverage is inappropriate. *Twin City*, 817 So. 2d at 692.

Policy language that is reasonably certain in its meaning, both as written and as applied to a particular claim, is unambiguous. *See State Farm Mut. Auto. Ins. Co. v. Brown*, 26 So. 3d 1167, 1169 (Ala. 2009); 2 David L. Leitner, Reagan W. Simpson & John M. Borkman, *Law & Practice of Insurance Coverage Litigation* § 23:16 n.9 (Westlaw 2012). In such cases, there is no need to resort to rules of construction, and the policy should be enforced as written *(i.e.*, as either providing or not providing a defense). *See Alabama Farm Bureau*, 188 So. 2d at 270; *Safeway*, 912 So. 2d at 1143. While courts sometimes state without qualification that policies are to be construed in favor of the insured and exclusions should be construed as narrowly as possible, those rules have no application if the policy is unambiguous. *See Jones v. Liberty Nat'l Life Ins. Co.*, 357 So. 2d 976, 977 (Ala. 1978); *St. Paul Mercury Ins. Co. v. Chilton-Shelby Mental Health Ctr.*, 595 So. 2d 1375, 1377 (Ala. 1992).

Policy language that is "reasonably susceptible to two or more constructions," or whose meaning is subject to "reasonable doubt or confusion," is ambiguous. *State Farm*, 747 So. 2d at 308-09. Ambiguity can be "patent, *i.e.*, existing on the face of the policy, or latent, *i.e.*, arising only when one attempts to apply the language to actual facts." Leitner, *et al.*, *supra* § 23:16 n.9. Since the latter depends on the factual context, a provision that is ambiguous as to one claim may be unambiguous as to another. *See Porterfield v. Audubon Indem. Co.*, 856 So. 2d 789, 805-06 (Ala. 2002) (pollution exclusion ambiguous as to lead paint flaking inside apartment); *Federated Mut. Ins. Co. v. Abston Petroleum, Inc.*, 967 So. 2d 705, 708-13 (Ala. 2007) (pollution exclusion unambiguous as to gasoline leaking from underground lines).

When a policy is ambiguous, the "construction will be adopted which is favorable to the insured." *State Farm Mut. Auto. Ins. Co. v. Hanna*, 277 Ala. 32, 166 So. 2d 872, 876 (1964). This is based on the doctrine of *contra proferentum*, that ambiguities in a contract are construed against the drafter. *See First Mercury Syndicate, Inc. v. Franklin County*, 623 So. 2d 1075, 1077 (Ala. 1993); *Jehle-Slauson Constr. Co. v. Hood-Rich Architects &*

Consulting Eng'rs, 435 So. 2d 716, 720 (Ala. 1983). This doctrine is applied in ordinary contract cases as a "last resort," after other rules of construction have failed to resolve ambiguity. *See Lackey v. Central Bank*, 710 So. 2d 419, 422 (Ala. 1998). In insurance cases, though, it has come to be applied automatically upon finding ambiguity. *See* 1 Leitner, *et al.*, *supra* § 1:11.

There are several justifications for this automatic application of *contra proferentum*: One, insurance policies are contracts of adhesion; two, there is usually no evidence of intent other than the policy itself; and three, the insurer could have better drafted the policy. *See id.*; *Arriaga v. Florida Pac. Farms, LLC*, 305 F.3d 1228, 1247-48 (11th Cir. 2002); *Castleberry v. Goldome Credit Corp.*, 418 F.3d 1267, 1271-72 (11th Cir. 2005). Automatic *contra proferentum* has been criticized, however, because it may result in coverage that the parties did not intend and for which the insured did not pay. *See* Leitner, *et al.*, *supra* § 1:11. In any event, some Alabama insurance cases indicate that where extrinsic evidence of intent does exist, a court or jury may consider such evidence before resorting to *contra proferentum*. *See Molton, Allen & Williams, Inc. v. St. Paul Fire & Marine Ins. Co.*, 347 So. 2d 95, 99 (Ala. 1977) (ambiguities construed against insurer if "circumstances surrounding the [policy] do not make the terms clear"); *Alfa Ins. Corp. v. Johnson*, 822 So. 2d 400, 404-05 (Ala. 2001); *United States Fidelity & Guar. Corp. v. Elba Wood Prods., Inc.*, 337 So. 2d 1305, 1308 (Ala. 1976); *see also* Windt, *supra* § 6:2.

The fact that the parties differ, or that courts have differed, in their interpretation of particular language does not alone make it ambiguous and subject to *contra proferentum*. *See Twin City*, 817 So. 2d at 692; *Trinity Universal Ins. Co. v. Robert P. Stapp, Inc.*, 278 Ala. 209, 177 So. 2d 102, 105 (1963). The *Trinity* court explained that if the rule were otherwise, "it would mean that every time two reasonable courts (or even two reasonable men) disagreed on the interpretation…, the issue should be resolved in favor of the insured." *Id.*, 177 So. 2d at 105. The court stated, "[w]e cannot accept such a theory." *Id.*

There are a number of other rules of policy interpretation and construction that pertain to various specific circumstances. For discussion of these, see Windt, *supra* § 6:2.

Reading the Complaint

When a complaint alleges a covered claim, that is, a claim within the coverage grant and outside all exclusions, the insurer has a duty to defend. *See United States Fidelity & Guar. Co. v. Armstrong*, 479 So. 2d 1164, 1167 (Ala. 1985). When a complaint alleges covered and non-covered claims, the insurer has a duty "to defend at least the allegations covered by the policy." *Acceptance Ins. Co. v. Brown*, 832 So. 2d 1, 14 (Ala. 2001). When a complaint leaves it uncertain whether it alleges a covered claim, the insurer has a duty to investigate beyond the complaint to determine whether the insurer owes a defense. *See id.* at 14-15. When a complaint leaves no uncertainty that it does *not* allege any covered claim, the insurer has no duty to investigate further and no duty to defend. *See Universal Underwriters Ins. Co. v. Stokes Chevrolet, Inc.*, 990 F.2d 598, 605-06 (11th Cir. 1993); *Ajdarodini*, 628 So. 2d at 313; *Carter v. Cincinnati Ins. Co.*, 435 So. 2d 42, 43-45 (Ala. 1983); *Thorn v. American States Ins. Co.*, 266 F. Supp. 2d 1346, 1350-53 (M.D. Ala. 2002), *aff'd without op.*, 66 Fed. Appx. 846 (11th Cir. 2003). The legal and factual merits of the complaint are irrelevant; the defense obligation depends solely on whether the complaint alleges "covered conduct." *Allstate Indem. Co. v. Lewis*, 985 F. Supp. 1341, 1348 (M.D. Ala. 1997). *See also State Farm Fire & Cas. Co. v. Lacks*, 840 F. Supp. 2d 1292, 1296 (M.D. Ala. 2012).

Courts have issued countless decisions on whether various kinds of claims were covered under various types of liability policies, so insurers should consider precedent involving similar claims and policies in deciding whether to defend. For example, many policies cover damages because of "bodily injury" or "property damage" caused by an "occurrence," and define these terms respectively as "bodily injury, sickness or disease," "[p]hysical injury to…[or] [l]oss of use of tangible property," and "an accident." *See, e.g., American Safety Indem. Co. v. T.H. Taylor, Inc.*, 2011 WL 1188433, *2 (M.D. Ala. March 29, 2011), *aff'd*, 2013 WL 978804 (11th Cir. March 14, 2013). Alabama courts have held that complaints claiming that the plaintiff suffered mental anguish allege "bodily injury," *see American Econ. Ins. Co. v. Fort Deposit Bank*, 890 F. Supp. 1011, 1015, 1017 (M.D. Ala. 1995); that complaints claiming "strictly economic losses like lost profits, loss of an anticipated benefit of a bargain, and loss of an investment," do *not* allege "property damage," *see American States Ins. Co. v. Martin*, 662 So. 2d 245, 248-49 (Ala. 1995); and that complaints claiming negligence may allege an "occurrence," *see United States Fidelity & Guar. Co. v. Bonitz Insulation Co.*, 424 So. 2d 569, 571 (Ala. 1982).

The Alabama Supreme Court has also stated that "[w]here facts are alleged in the complaint to support a cause of action, it is the facts, not the legal phraseology, that determine whether an insurer has a duty" to defend. *Hartford Cas. Ins. Co. v. Merchants & Farmers Bank*, 928 So. 2d 1006, 1012 (Ala. 2005). The policy in *Hartford* covered injury caused by an "occurrence," *i.e.*, "an accident." *Id.* at 1008. The complaint alleged the insured-bank purposefully and wrongfully took control of property. *Id.* at 1011-12. Nothing in the factual allegations indicated that the bank's actions or their consequences were an

accident. *Id.* at 1012. One paragraph claimed that the bank acted "negligently." *Id.* The court held that the insurer had no duty to defend, stating that "'negligence' merely dangles as a cause of action that is unrelated to any asserted facts," and that "when the complaint supplies descriptive facts and those facts are irreconcilable with a legal theory, such as 'negligence,' asserted in the complaint, the facts, not the mere assertion of the legal theory, determine an insurer's duty to defend." *Id.* at 1012.

The court distinguished *Tanner v. State Farm Fire & Casualty Co.*, 874 So. 2d 1058 (Ala. 2003), which held that claims for innocent and reckless misrepresentation alleged an "occurrence" and that the insurer owed a defense. *Id.* at 1065-66. The *Hartford* court stated "there was no finding…in *Tanner* that the descriptive facts asserted in the complaint contradicted the legal theories asserted in it." *Hartford*, 928 So. 2d at 1012. In other words, since the *Tanner* complaint did not plead facts showing that the fraud was actually *not* an "occurrence," the legal theories of innocent and reckless misrepresentation triggered a duty to defend.

Compare American Safety, 2011 WL 1188433, *3-5 (no duty to defend because factual allegations "controvert any notion of innocent misrepresentation").

Some policies cover damages arising out of "offenses" such as false arrest or imprisonment, malicious prosecution, defamation, invasion of privacy, and other torts. *See, e.g., Del Monte Fresh Produce N.A. v. Transportation Ins. Co.*, 500 F.3d 640, 641-42 (7th Cir. 2007). This insurance is typically included under "Coverage B" in commercial-general-liability policies, with covered "offenses" listed in the definitions of "personal injury" and "advertising injury." *See id.* The claimant's legal theories assume greater importance in determining whether an insurer owes a defense under such coverage. *See Parker Supply Co. v. Travelers Indem. Co.*, 588 F.2d 180, 182-83 (5th Cir. 1979) (policy covered "malicious prosecution"; complaint alleged wrongful garnishment and abuse of process; insurer had no duty to defend because "only a suit for [malicious prosecution] would have created an obligation…to defend"). But there is also authority that facts pled may activate a duty to defend under this kind of coverage, even when the legal theories do not. *See, e.g.*, *Norfolk & Dedham Mut. Fire Ins. Co. v. Cleary Consultants, Inc.*, 958 N.E.2d 853, 859 (Mass. Ct. App. 2011), *review denied*, 961 N.E.2d 591 (Mass. 2012); 1 Allan D. Windt, *Insurance Claims & Disputes* § 4:1 n.50 (5th ed. Westlaw 2012).

Insurers deciding whether to defend should keep in mind that courts "liberally construe the allegations of a claimant's pleadings toward a finding of coverage." Scott C. Turner, *Insurance Coverage of Construction Disputes* § 7:3 (Westlaw 2012). An example of this is *Pharmacists Mutual Insurance Co. v. Godbee Medical Distributors, Inc.*, 733 F. Supp. 2d 1281 (M.D. Ala. 2010). The insurer's policy excluded coverage for injury "to an 'employee' of the 'insured'…in the course of [such] employment." *Id.* at 1283. The claimant's complaint alleged she was "working in the line and scope of her employment for" the insured when she was injured, but it also alleged she was assisting another employee in a business that the latter "owned separate and apart from" the insured. *Id.* Thus, the complaint could "be read to allege two distinct theories…: that [the claimant's] injuries occurred 'in the course of her employment' with [the insured,] or that they did not." *Id.* The court stated that because "the allegations in a complaint 'should be liberally construed in favor of the insured' where they are ambiguous," the court would read the complaint as alleging the claimant "was not acting in the course of her employment," such that the exclusion was inapplicable and the insurer owed a defense. *Id.* at 1284-85.

Of course, a complaint can be amended. When the complaint does not plead a covered claim, the possibility that the claimant might amend it to allege one does not create a defense obligation. *See Ladner & Co. v. Southern Guar. Ins. Co.*, 347 So. 2d 100, 103-04 (Ala. 1977). But an actual amendment adding a covered claim does trigger the duty to defend. *See Blackburn v. Fidelity & Deposit Co.*, 667 So. 2d 661, 670 (Ala. 1995). And since *Ala. R. Civ. P.* 15(b) deems the pleadings amended to conform to the evidence when unpled issues are tried by express or implied consent, the duty to defend may arise even at trial. *See Ladner*, 347 So. 2d at 103-04; *Tapscott v. Allstate Ins. Co.* 526 So. 2d 570, 574 (Ala. 1988).

The insured should immediately notify the insurer of and request a defense for any amendment adding a potentially covered claim. If the insured waits until after trial, whether the insurer owes a defense may be considered moot. *See Ajdarodini*, 628 So. 2d at 313.

Using Extrinsic Facts to Establish a Duty To Defend

The Alabama Supreme Court has "rejected the argument that the insurer's obligation to defend must be determined solely from the facts alleged in the complaint." *Ladner*, 347 So. 2d at 103. Instead, "in deciding whether a complaint alleges [a covered] injury," a court "may also look to facts which may be proved by admissible evidence." *Id.* (quoting *Pacific Indem. Co. v. Run-A-Ford Co.*, 276 Ala. 311, 161 So. 2d 789, 795 (1964)). *See also Tanner*, 874 So. 2d at 1065 (if complaint "does not, on its face, allege a covered accident or occurrence, but the evidence proves one, then the insurer…owes the duty to defend"). Accordingly, "if there is any

uncertainty as to whether the complaint alleges facts that would invoke the duty to defend, the insurer must investigate the facts surrounding the incident that gave rise to the complaint in order to determine whether it has a duty to defend." *Blackburn*, 667 So. 2d at 668.

Evidence is relevant to the duty to defend when it supplies coverage-related facts omitted from the complaint, or it clarifies unclear or ambiguous allegations. For example, in *Pacific Indemnity*, 161 So. 2d 789, the insured was a package-delivery company whose auto policy covered damages "arising out of the ownership, maintenance or use of [an] automobile," and which defined "use" as including "loading or unloading." *Id.* at 789-90. The insured's employee delivered a package by leaving it in front of the claimant's door, where the claimant tripped on the package and fell. *Id.* at 789-90. The claimant's complaint alleged negligence in leaving the package in the doorway, and said nothing about any auto, so the auto insurer argued that it had no duty to defend. *Id.* at 790, 793-94. Evidence showed that the employee drove to the claimant's house in the insured's truck, removed the package from the truck, walked to the claimant's door, left the package, and then returned to the truck and drove away. *Id.* at 789-90. Based on this evidence, the court held that the package delivery involved "unloading" the truck, that the claim therefore arose out of use of the truck and that the insurer owed a defense. *Id.* at 791, 792, 795. *See also Acceptance*, 832 So. 2d at 14-15.

It is important to note that in *Pacific Indemnity*, the extrinsic facts supporting coverage did not contradict the complaint. An insured cannot create a defense obligation by proffering evidence that contradicts a complaint's material allegations, such as by denying those allegations. *See Sentry*, 914 F. Supp. at 500. The duty to defend depends on what the complaint *alleges*, not on whether the allegations are true.

Tapscott, 526 So. 2d 570, illustrates this principle. A claimant sued the insured for false imprisonment and intentional infliction of emotional distress. *Id.* at 571. The insurer argued that it had no duty to defend, based on an exclusion for damage "intentionally caused by" the insured. *Id.* at 571-72. The insured responded with an affidavit that he had "not intended to cause any harm." *Id.* at 572. The court held that this affidavit, contradicting the complaint's allegations of intent, was irrelevant and that the insurer had no duty to defend, stating:

> If there is any claim at all under the pleadings and evidence…, *it is a claim for an intentional tort*.… [T]he parties…*disagree over whether [the insured] actually intended* to imprison, detain, arrest, or inflict emotional distress on [the claimant]. *But that is a dispute that goes to the merits of the complaint rather than the issue in this case.* Our only consideration is whether, based on the allegations in the complaint and other admissible evidence, the plaintiff *alleges* intentional conduct. Therefore, we do not need to, nor will we, consider the substantive issue of whether [the insured] *actually intended* the acts, nor do we consider…whether there is any merit to [the] claims.
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> …[Allstate is not required to defend [the insured].… *[T]hat [the insured] filed an affidavit denying the allegations in the complaint in no way affects the nature of the plaintiff's claim for an intentional tort, and certainly, it has no bearing on Allstate's responsibility to defend*….

Id. at 572, 575 (emphasis added). *See also Ladner*, 347 So. 2d at 101, 103 (insurer did not owe defense for intentional-fraud claim that was based on insured's selling homes while knowing that the lots would flood; court stated that while the insured "denies knowing" that the lots would flood, the denial "in no way changes the nature of the claim"); *State Farm Fire & Cas. Co. v. Steinberg*, 393 F.3d 1226, 1230 (11th Cir. 2004) ("an insurance company's duty to defend…is determined solely from the allegations in the complaint…, not by the true facts of the cause of action against the insured, the insured's version of the facts or the insured's defenses") (applying Florida law).

Evidence contradicting allegations that are not material to the merits of the claimant's action likely *can* be used to establish a duty to defend. *Tapscott* only refused to consider contradicting evidence "go[ing] to the merits of the [claimant's] complaint," *id.*, 526 So. 2d at 572; *Ladner* refused to consider such evidence regarding a "matter to be determined in the

The duty to defend depends on what the complaint *alleges*, not on whether the allegations are true.

Just as an insured cannot use evidence contradicting the complaint to establish a duty to defend, an insurer cannot use such evidence to negate the duty.

[claimants'] lawsuit," *id.*, 347 So. 2d at 103; and *Sentry* stated it was improper to consider such evidence concerning "substantive issues pending in" the claimant's action, *id.*, 914 F. Supp. at 500. Furthermore, in *Pacific Indemnity*, the court described the following, hypothetical situation: The insured owns a Ford auto and a Nash auto, has a policy covering the Ford but not the Nash and is involved in an accident while driving the Ford. The claimant's complaint mistakenly avers the insured was driving the Nash. The insured may present evidence contradicting this allegation, proving that the insured was driving the Ford, so that the insurer owes a defense. *Id.*, 161 So. 2d at 796 (quoting *Hardware Mut. Cas. Co. v. Hilderbrandt*, 119 F.2d 291 (10th Cir. 1940)). Which car the insured was driving is, of course, immaterial as far as his liability to the claimant.

Specific policy language concerning the duty to defend may affect consideration of extrinsic facts. In *Correll v. Fireman's Fund Insurance Cos.*, 505 So. 2d 295 (Ala. 1986), the policy covered "liability for…[b]reach of duty…claim for which is made…by reason of any negligent act," and stated that the insurer would defend "any suit…alleging such negligent act." *Id.* at 295-96. Claimants sued the insured for intentional forgery and embezzlement. *Id.* at 296. The insured testified he forged the claimants' signatures "based upon prior dealings with [them] wherein [the insured] had done this in order to obtain money to make premium payments for [the claimants]." *Id.* The court refused to consider this testimony, stating that the policy "makes it clear that [the insurer] was to provide coverage…only in those suits in which a '*claim*' *for negligence* is *made*…[and] wherein a *negligent act* is '*alleged.*'" *Id.* (emphasis added). The court distinguished *Pacific Indemnity* on the basis of this policy language, considered only the allegations of the complaint and held that because the complaint alleged intentional acts rather than negligence, the insurer had no duty to defend. *Correll*, 505 So. 2d at 296-97.

Using Extrinsic Facts to Negate A Duty to Defend

In *Tanner v. State Farm Fire & Casualty Co.*, 874 So. 2d 1058 (Ala. 2003), the court stated: "[T]his Court has never held that, even though the allegations of a complaint do allege a covered accident or occurrence, the courts may consider evidence outside the allegations to *disestablish* the duty to defend." *Id.* at 1064 (emphasis added). The court was mistaken, however, because it had, in fact, held that such evidence disestablished insurers' duties to defend. It would have been accurate to state that courts may not consider evidence *contradicting the allegations of the claimant's complaint* to disestablish the duty to defend. Thus, insurers should consider whether there is evidence of facts outside the complaint, not contradicting the complaint that relieve the insurer from defending.

Such facts negated the insurer's duty in *Alfa Mutual Insurance Co. v. Jones*, 555 So. 2d 77 (Ala. 1989). A minor was killed while operating the insureds' go-cart. *Id.* The policy excluded coverage for injury arising out of the use of a motor vehicle. *Id.* at 77-78. The claimant's amended complaint alleged only that the insureds negligently supervised the minor, and it did not mention the go-cart. *Id.* at 77, 78. The trial court ruled that the insurer owed a defense. *Id.* at 77. On appeal, the insureds argued that the court was "forbidden to look beyond the complaint to determine [the insurer's defense] obligation." *Id.* at 78. The Alabama Supreme Court disagreed, quoting from *Pacific Indemnity* that "in deciding whether a complaint alleges [a covered] injury, the court is not limited to the bare allegations of the complaint…but may also look to facts which may be proved by admissible evidence." *Alfa*, 555 So. 2d at 78. Because evidence showed that the minor died while using a motor vehicle, the court held that the exclusion applied and that the insurer had no duty to defend. *Id. See also Rehburg v. Constitution States Ins. Co.*, 555 So. 2d 79, 80-81 (Ala. 1989) (considering extrinsic facts in finding that insurer had no duty to defend); *Miller v. Allstate Ins. Cos.*, 896 So. 2d 499, 500-02 (Ala. Civ. App. 2004); *Atlantic Mut. Fire Ins. Co. v. Cook*, 619 F.2d 553, 555 (5th Cir. 1980).

Just as an insured cannot use evidence contradicting the complaint to establish a duty to defend, an insurer cannot use such evidence to negate the duty. In *Tanner*, 874 So. 2d 1058, the policy covered injury caused by an "occurrence" (an "accident") and excluded coverage for intentional injury. *Id.* at 1061-62. The complaint

alleged innocent or reckless misrepresentation, which has been held to constitute an "occurrence" causing unintentional injury. *Id.* at 1065. At his deposition, the claimant testified he "'felt' or 'contended' that [the insured] injured him intentionally rather than accidentally." *Id.* at 1066. The trial court ruled that the insurer had no duty to defend, because the claimant's testimony "established that he was seeking damages only for intentional conduct." *Id.* at 1063. The supreme court reversed, stating that since the complaint pled innocent or reckless misrepresentation, the insurer owed a defense despite the claimant's testimony. *Id.* at 1066. *See also Mutual Fire, Marine & Inland Ins. Co. v. Safeco Ins. Co.*, 473 So. 2d 1012, 1013-14 (Ala. 1985) (reversing judgment that insurer had no duty defend, where judgment was based on evidence contradicting claimants' allegation that damage occurred during insurer's policy period); *cf. Sentry*, 914 F. Supp. at 500. *Compare Smith v. North River Ins. Co.*, 360 So. 2d 313, 314-16 (Ala. 1978) (affirming declaratory judgment, rendered during pendency of claimant's action alleging negligence and wantonness, that insurer had no duty to defend because evidence showed that insured expected or intended injury, stating that defense issue "turned on whether the injury…was 'expected or intended'" and that this was "not the issue in" claimant's action).

An insurer, like an insured, probably *can* use evidence that contradicts immaterial allegations. *See* 1 Allan D. Windt, *Insurance Claims & Disputes* § 4:4 (5th ed. Westlaw 2012) (evidence may show the "falsity of some extraneous fact alleged"). In the hypothetical discussed above regarding the Ford and Nash autos, for example, if the insured had been driving the non-covered Nash instead of the covered Ford, but the complaint mistakenly averred the insured was driving the Ford, the insurer would probably be permitted to show that the insured was in fact driving the Nash and that the insurer had no duty to defend. *Cf. id.*

Defending under Reservation of Rights

When a complaint pleads covered and non-covered claims, the insurer must "defend at least the allegations covered by the policy." *Acceptance*, 832 So. 2d at 14. The insurer should conduct this defense under reservation of rights, which means that the insurer advises the insured that coverage for some or all claims is doubtful or nonexistent and that the insurer reserves its rights to withdraw the defense and to deny indemnity. It is also prudent to defend under reservation when, after reviewing the complaint and/or conducting an investigation, the insurer remains uncertain whether it owes a defense. The insurer thus avoids potential liability for wrongfully refusing to defend and is able to select defense counsel and participate in settlement discussions, while it also keeps the option to withdraw if later developments warrant (for example, if it becomes clear that no claims are covered or the claimant dismisses all covered claims, *see* 14 *Couch on Insurance* § 200:52 (3d ed. Westlaw 2012)).

Insurers should reserve their rights before or contemporaneously with assuming the defense, or within a reasonable time afterwards. *See Burnham Shoes, Inc. v. West Am. Ins. Co.*, 504 So. 2d 238, 242 (Ala. 1987) (insurer who "undertake[s] to defend an insured without reserving the right to withdraw the defense...waives its right to do so"); 1 Allan D. Windt, *Insurance Claims & Disputes* § 2:7 (5th ed. Westlaw 2012) ("within a reasonable time"). The reservation letter to the insured should summarize the claimant's allegations and specify the policy provisions upon which the reservation is based, and should state why the insurer believes these provisions bar coverage. *See* Windt, *supra* § 2:14; *Couch, supra* § 202:47. If the insurer is facing a deadline to defend, such as the time within which the insured must answer the complaint, and lacks time to prepare a detailed reservation letter, it should send a letter reserving rights in general, and then supplement as soon as possible with a more specific letter. *See* Windt, *supra* § 2:14. If the insurer has no reason to question coverage upon reviewing the complaint, but then later discovers facts creating a coverage issue, the insurer should reserve its rights as soon as it learns that coverage is questionable. *See id.* § 2:7. And if the insurer, after reserving rights, later discovers additional grounds for non-coverage, it should send another letter advising the insured of the new grounds. *See id.* § 2:16. Finally, a reservation letter (as well as a letter denying a defense) should (1) state that the insurer's position is based on information received to date, (2) request the insured to provide any other information bearing on coverage and to advise the insurer if the insured has reason to disagree with the insurer's position and (3) state that the insurer will consider any information or reasons that the insured submits. *Cf. Gunnin v. State Farm & Cas. Co.*, 508 F. Supp. 2d 998, 1003 n.4 (M.D. Ala. 2007).

A reservation of rights creates potential conflicts of interest between insurer and insured in conducting the defense. If the complaint includes covered and non-covered claims, it is in the insurer's interest to have all covered claims dismissed, so that the insurer can withdraw from defending and stop paying defense costs. It is in the insured's interest that at least one covered claim remains so long as any claims remain, so that the insurer will have to defend through the end of the case. If the claimant offers to settle within policy limits, it is in the insured's interest that the insurer accept the offer and pay the settlement amount, so that the insured can

avoid potential exposure to a non-covered judgment. Accepting the offer may not be in the insurer's interest, since coverage is in question and the insurer may not owe anything.

Because of these and other potential conflicts, the Alabama Supreme Court has imposed an "enhanced obligation of good faith" on insurers when they defend under reservation. *See L & S Roofing Supply Co. v St. Paul Fire & Marine Ins. Co.*, 521 So. 2d 1298, 1303-04 (Ala. 1988). The insurer must (1) "thoroughly investigate the cause of the insured's accident and the nature and severity of the [claimant's] injuries," (2) "retain competent defense counsel" who "understand[s] that only the insured is the client," (3) "fully inform[] the insured not only of the reservation-of-rights defense itself, but of all developments relevant to his policy coverage and the progress of [the] lawsuit," including "disclosure of all settlement offers made by the company" and (4) "refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk." *Id.* at 1303 (quoting *Tank v. State Farm Fire & Cas. Co.*, 715 P.2d 1133 (Wash. 1986)). Reserving rights also imposes additional responsibilities on the lawyer hired by the insurer to defend the insured, *see L & S*, 521 So. 2d at 1303, so the insurer must notify the defense lawyer of the reservation and send the lawyer a copy of the reservation letter.

Insurers breaching the enhanced obligation may not only be precluded from withdrawing the defense but also from denying indemnity. *See Shelby Steel Fabricators, Inc. v. United States Fidelity & Guar. Co.*, 569 So. 2d 309, 312-13 (Ala. 1990). In view of these burdens and potential consequences, insurers should consider whether coverage issues in a particular case are substantial enough to justify reserving rights. The insurer may be better off defending without reservation, thereby avoiding the enhanced obligation.

After reserving rights, it is usually beneficial for the insurer to file a declaratory-judgment action, so that a court can determine whether the insurer owes a defense or indemnity. Otherwise, the uncertainty may linger throughout the pendency of the claimant's action, and the insurer will continue to incur costs for providing a defense that it may not owe. Uncertainty as to the duty to indemnify can also complicate decision-making for all parties regarding settlement, payment of a judgment against the insured and appeal of such a judgment.

A court will not render declaratory relief, however, where the issue controlling coverage is identical to an issue in the claimant's pending action. *See, e.g.*, *Home Ins. Co. v. Hillview 78 W. Fire Dist.*, 395 So. 2d 43, 44 (Ala. 1981). This is because "[a]n action for declaratory judgment may not supersede the determination of an issue already pending in another action." *Mathis v. Auto-Owners Ins. Co.*, 387 So. 2d 166, 167 (Ala. 1980). In this situation, the insurer will probably have to defend until the issue is finally resolved in the claimant's lawsuit. *Cf. Canal Ins. Co. v. M & G Tank Lines, Inc.*, 2001 WL 530450, *3-4 (S.D. Ala. May 10, 2001). If there is a chance the verdict or judgment in that suit will not make an express or implied finding on the coverage-controlling issue (*e.g.*, a general verdict that does not necessarily imply a particular finding on the issue), the insurer may need to seek intervention in the claimant's action. The intervening insurer can ask that the court or jury either decide coverage, *see Universal Underwriters Ins. Co. v. East Cent. Ala. Ford-Mercury, Inc.*, 574 So. 2d 716, 723-24 (Ala. 1990), or make a specific finding (through a verdict form or answers to jury interrogatories) on the relevant issue, so that a court in a separate declaratory action can then decide coverage, *see Thomas v. Henderson*, 297 F. Supp. 2d 1311, 1323-28 (S.D. Ala. 2003).

Conclusion

Alabama cases hold that insurers have a duty to defend where:

- The complaint alleges a covered claim. United States Fidelity & Guar., 479 So. 2d at 1167.
- The complaint is ambiguous as to whether it alleges a covered claim. Pharmacists, 733 F. Supp. 2d at 1283-85.
- The complaint is ambiguous as to whether it alleges a covered claim, but evidence shows that it alleges a covered claim. Acceptance, 832 So. 2d at 14-15.
- The complaint alleges a covered claim, and evidence tending to show the claim is not covered contradicts allegations of the complaint. Tanner, 874 So. 2d at 1066; Mutual Fire, 473 So. 2d at 1013-14; Sentry, 914 F. Supp. at 500.
- The complaint does not allege a covered claim, but evidence shows that the claim is covered, and this evidence does not contradict material allegations of the complaint. Pacific Indem., 161 So. 2d at 789-92, 795.

Alabama cases hold that insurers have no duty to defend where:

- The complaint leaves no uncertainty that it does not allege a covered claim. Universal, 990 F.2d at 605-06; Ajdarodini, 628 So. 2d at 313; Carter, 435 So. 2d at 43-45; Thorn, 266 F. Supp. 2d at 1350-53.
- The complaint does not allege a covered claim, and evidence confirms that the claimant is not asserting such a claim. Tapscott, 526 So. 2d at 575.
- The complaint does not allege a covered claim, and evidence tending to show the claim is covered contradicts material allegations of the complaint. Tapscott, 526 So. 2d at 572, 575; Ladner, 347 So. 2d at 103; Sentry, 914 F. Supp. at 500.
- The complaint alleges a covered claim, but evidence shows that the claim is not covered, and this evidence does not contradict allegations of the complaint. *Alfa*, 555 So. 2d at 77-78; *Rehburg*, 555 So. 2d at 80-81; *Miller*, 896 So. 2d at 500-02; *Atlantic Mut.*, 619 F.2d at 555.

When an insurer is in doubt whether it owes a defense, the safest course for the insurer is to defend under reservation of rights and file a declaratory-judgment action. The insurer must then meet an enhanced obligation of good faith, however, or it may be precluded from withdrawing the defense and also from denying indemnity. | AL

JUDGE PHYLLIS S. NESBIT: A Woman of Courage

By Elizabeth Cason Crosby Cheely

Every lawyer in Alabama can be encouraged and inspired by the life and accomplishments of the late Judge Phyllis S. Nesbit. She endured poverty as a child, discrimination as one of the state's early female lawyers and judicial candidates, personal tragedies and health problems throughout her life. With her true grit and faith in God, she established a successful law practice in Baldwin County and, eventually, became the first woman popularly elected as an Alabama trial judge. She died in Mobile in October 2005, but her inspirational career remains a model for lawyers and judges throughout the state.

Judge Nesbit was born Phyllis Lorain Schneider in Newkirk, Oklahoma on September 21, 1919. Her father was a bookkeeper who died when she was an infant, and her mother died of diabetes when her daughter was two years old. She was raised by her grandparents.

After graduating from Newkirk High School, she attended business college in Ponca City, Oklahoma in order to "learn to make a living."

In Judge Nesbit's own words, "You were considered a spinster if you did not get married before you were 20 years old, and I got married seven days before I turned 20." Her husband of more than 50 years was Pete Nesbit, whom she met on the way home from a Methodist church revival. They drank Coca-Colas and

danced to the Beer Barrel Polka on their first date. They soon eloped by hitching a ride from a candy salesman in his candy truck. They were married in the Methodist church in Nowata, Oklahoma, which had been decorated for a wedding later that night. The candy truck driver served as Pete's best man, and the preacher's wife served as the maid of honor.

Newly-married and in search of employment, the Nesbits moved to Kansas, then hitchhiked to Oklahoma and eventually landed in Orange, Texas in 1941, where Pete worked as a journeyman pipefitter on destroyers and she studied drafting. Two years later, both transferred to the Alabama Dry Docks in Mobile, where Pete served as a superintendent and Phyllis was a draftswoman.

The Nesbits next moved to Tuscaloosa, where both enrolled at the University of Alabama. Judge Nesbit received a degree in chemistry, but found it "impossible to get such work as a female." She temporarily settled for a job at B.F. Goodrich, where they gave her the job title of secretary but allowed her to do some engineering work.

In 1955, she began law school at the University of Alabama as one of five women in her class. Another of the five was Justice Janie Shores, whom Judge Nesbit remembered as "a brilliant student, excellent in every respect and better at drafting pleadings than the law professors."

According to Judge Nesbit, around the time of her graduation, a law school faculty member told her there was no place for women in the law.

"I'll find my own place," she replied.

And, although it was an uphill battle, she did. She interviewed with numerous Mobile law firms, none of whom would hire her. Thanks to a contact provided by Janie Shores, she finally secured employment on July 28, 1958 in the Robertsdale branch office of attorneys Harry J. Wilters, Jr. and Tolbert Brantley. Her salary was $100 per month, plus 20 percent of profits derived from the Robertsdale office.

She began as both a secretary and a lawyer, and remembers many clients responding, "I don't want no woman for a lawyer–I want a 'real' lawyer!"

Judge Nesbit had a good sense of humor and recalled one instance during her private practice in which a woman came to see her about her "wills." The woman had eight children and eight different wills. She told Judge Nesbit that a justice of the peace had prepared the wills in accordance with his advice to her that "she needed a different will for each child."[1]

While establishing her law practice in Baldwin County, she also cared lovingly for those in her charge. She raised as her own beloved daughter Pat, who is deaf and who was Pete's daughter by his first marriage. Pete's son by his first marriage, who had a seizure disorder, also visited often.

She understood her own motherhood broadly, as part and parcel of her professional work: "Pete and I also always wanted to have our own child. The only child I bore was a son who died when he was nine hours old. I believe that, had he lived, I would have devoted so much attention to him I never would have served as juvenile judge or been able to help the number of children I did during my tenure on the bench." From the bench, she helped at-risk children throughout Alabama.

Early in her career, she turned her attention–and her tenacity–toward the political sphere. She ran for four other political offices before her persistence paid off and she was elected to the office of district judge. She described her march to the bench:

> "In 1959, I ran for mayor of Daphne and came in third. In 1968, I ran for Daphne City Council and was defeated by nine votes. In 1970, I ran for circuit judge and got 42 percent of the vote despite being a woman, but lost to the incumbent. In 1974, I ran for judge of the inferior court and lost to a justice of the peace from Fairhope. In 1976, I ran for district judge of Baldwin County and became the first woman in Alabama elected as a trial judge by popular election."

In fact, she won by such a significant margin that T. H. Smallwood, Jr., president of the Alabama Municipal Judges Association, wrote her a congratulatory letter informing her that henceforth he would be calling her "Landslide" Nesbitt.

"Landslide" Nesbit was re-elected six years later without opposition.

Following in her footsteps, six of the next 10 lawyers who served as district judges of Baldwin County were women.

With her characteristic wit, Judge Nesbit recalled one young woman who appeared before her with a pet white mouse on her shoulder. Judge Nesbit signed an order to board the mouse at the veterinarian's office while the woman was in jail. The vet kept the mouse in a shoebox until the woman was released. Judge Nesbit included the expense of boarding the mouse as part of the court costs to be paid by the young woman.[2]

During her career, Judge Nesbit also served as municipal judge for Daphne and Silverhill and as city attorney for Loxley. She was president of the Municipal Judges Association, secretary-treasurer of the Juvenile Court Judges Association and the first woman ever selected to serve as president of the Baldwin County Bar Association, holding office from 1966-1967.

Judge Nesbit's Christian faith was at the heart of her service: "My faith has carried me through the important events in my life, and I have seen God's hand at work in my life. My grandparents took me to Sunday School, and I have always prayed about major events in my life."

As she courageously served Alabama and cared for her husband Pete, who had developed severe Parkinson's disease, her own health was declining due to diabetes. She retired from the bench on January 16, 1989. She and Pete celebrated their 50th wedding anniversary approximately eight months later.

Judge Nesbit's pastor, Michael Hudson, said she told him that she wanted to live long enough to receive the Maud McLure Kelly Award. The award is presented by the Women's Section of the Alabama State Bar in honor of the accomplishments of women lawyers who have excelled in their field and paved the way to success for other women lawyers. Judge Nesbit received it three months before her death in October 2005.

Judge Nesbit will be remembered as a woman of courage, compassion and faith, and as a determined trailblazer for women lawyers and judges in Alabama. | AL

The author thanks the Gulf Coast Newspapers for information contained in the April 29, 1992 article, "The Law of the Land," and to the Alabama Law Foundation for stories appearing in *The Sleeping Juror*, copyright 2002.

Endnotes

1. Sleeping Juror 85.
2. Sleeping Juror 86.

MAUD MCLURE KELLY

Award Luncheon

Please make plans to attend the Maud McLure Kelly Award Luncheon, hosted by the ASB's Women's Section, on **Friday, July 19, 2013** at the ASB Annual Meeting. The event begins with a cocktail reception at noon and the luncheon will start at 12:30 p.m.

Maud McLure Kelly was the first woman to be admitted to the practice of law in Alabama. In 1907, Kelly's performance on the entrance exam at the University of Alabama Law Department merited her admission to the school as a senior, the second woman ever to have been admitted.

Stapp

Mary Lee Stapp, the 2013 recipient of this prestigious award, is a 1951 Alabama law school graduate. Throughout her career, Stapp overcame gendered stereotypes to excel at her work. She worked tirelessly for the protection of children and adults throughout her life while an assistant attorney general. In 1981, the Southern Women's Archives presented Stapp with the Alabama Women Achievers' Award for her contribution toward elevating the status of Alabama women. She has been a mentor to several generations of lawyers, including Judge Vanzetta McPherson, Judge Sally Greenhaw and Morris Dees. She has been a trailblazer for women lawyers in Alabama.

Past recipients of the award are:

2002–Justice Janie Shores
2003–Miss Alice Lee
2004–Miss Nina Miglionico
2005–Judge Phyllis Nesbit
2006–Miss Mahala Ashley Dickerson
2007–Dean Camille Cook
2008–Jane Dishuck and Louise Turner
2009–Frankie Fields Smith
2010–Sara Dominick Clark
2011–Carol Jean Smith
2012–Marjorie Fine Knowles

Please join us in recognizing these pioneers in the legal field!

LAW DAY 2013

LAW DAY 2013 JUDGES

Posters

Tommy Klinner–Alabama Dept. of Mental Health & Retardation

Craig Baab–Alabama Appleseed

Chad Stewart–Beasley Allen

Essays

Alvin Benn–*Montgomery Advertiser*

Darlene Biehl–*River Region Magazine*

Juliana Dean–Alabama Dept. of Education

Social Media

David Rains–Law Day chair, Rosen Harwood (Facebook)

Ashley Swink Fincher–Phelps Dunbar (Facebook)

Mark Moody–ASB (Twitter)

Tripp Vickers–ASB (Twitter)

2013 LAW DAY WINNERS

Posters K-3

1st–**Jelan Smith**, Mixon Elementary School, Ozark

2nd–**Dalton Coleman**, Neal Elementary School, Evergreen

3rd–**Draven Preston**, Cherokee Elementary School, Cherokee

Posters 4-6

1st–**Piper Schneider**, Bear Exploration Center, Montgomery

2nd–**Brady Orr**, Bear Exploration Center, Montgomery

3rd–**Taleah Sadler**, Fort Payne Middle School, Fort Payne

Essays 7-9

1st–**Kara Green**, Prattville Christian Academy, Prattville

2nd–**Alex Lipscomb**, Hilltop Montessori School, Birmingham

3rd–**Katlin Thorn**, Cherokee High School, Cherokee

Essays 10-12

1st–**Dannielle Thompson**, B.T. Washington Magnet High School, Montgomery

2nd–**Taylor Thornton**, Colbert Heights High School, Russellville

3rd–**Adrian Rodriguez**, Central High School, Phenix City

Social Media–Twitter

1st–**Jordan Hendrix**, Brewbaker Technology Magnet High School, Montgomery

2nd–**Madison Loehr**, Brewbaker Technology Magnet High School, Montgomery

3rd–**Matthew Bailey**, Brewbaker Technology Magnet High School, Montgomery

Social Media–Facebook

1st–**Nicol Gauntt**, Brewbaker Technology Magnet High School, Montgomery

2nd–**Taylor Harris**, Pleasant Grove High School, Pleasant Grove

3rd–**Corey Johnson**, Brewbaker Technology Magnet High School, Montgomery

Featured speaker Morris Dees and his grandson, Elliott Buck

LAW DAY 2013 PARTICIPANTS

Posters K-3

Madison Predhomme
Frasier Horton
Megan Johnson
Laura Wilson
Sydney McLaughlin
Sam Jordan
Adeline Fischer
Ashli Parker
Dalton Coleman
Jahlia Spadaro
Olivia Harrison
Aleeya Claridy
Kalyn Bass
Ellison Laney
Kathryn Suchman
Carly Smith
Ella Nelson
Saiya Dudley
Jade Paul
Abbi Stockman
Cagla Hulin
Joshua Burbach
Molli Pickett
Sumi Shin
Christina Simmons
Deshawn Haywood
Vivian Gates
Reagan McClain
Kirrya Thompson
Chloe Sawicki
Benyonce Lloyd
Sauiya Allen
Lawsynn Little
Jaden McClain
Macey Martin
Abbey Peeples
Sandi Grace Waters
Aiden Magouyrk
Maggie Ross
Jonathan Ferdinand
Emma Traywick
Dylan Garner
Tessa Chevalier
Cobain Marcus Williamson
Alexis Baker
Chloe Bell
Isaiah Gonzalez
Frankie Solis Juan
Isabella Gaspar
Delilah Dominguez
Deborah Tomas
Lydia
Emily Zim
Kaylee
Elena
Johan
Lacy Tyler
Zack Gahr
Kaleb Bieber
Olga Gonzalez
Anna
Andrew Barclay
Curtis Benther
Fidel Ramirez
Willie Tomas
Natalie Hotalen
Rebecca
Molly Farmer
Daniella Castillo-Reyes
Jabez Sebastain
Hunter Austin Robinson
Alan Harcrew
Jay Manning
Talula Bella Scott
Sylasha Hayer
Samuel Elliot King
Scottie Smith
Asia Rivers
Khaniyah Perkins
Cindy Lopez
Cliffton James
Audrey Givens
Jameshia Drayton
Jakeleon Dortch
Amani Brown
Isabelle Roy
Kasli Knox
Ayunna Johnson
Dylan Freeman
Onna Crutchfield
Amarion Baldwin
Ayana Akbar
Derek Tolbert
Ah'Ryan Reed
Jose Martinez
Devona Lopez
Abbe Astol
Taleia Wigfall
Jennifer Ramyez
Kanelle Magwood
Courtney Borders
Amanda Pugh
Ziyon Powell
Halie Johnson
Keegan Erwin
Ingrid Espinoza Martinez
Kenyotta Jackson
Gavin McNair
Willie Baxter
Eliana Mahnken
Hannah Gamble
Jacob Hadaway
Katelyn Munkus
Jackson Roberts
Madison Paulus
Wilson Green
Tanner Golden
Cricket Davis
Anna McCormack
Sydney Porter
Anna Jones
Jack Swanner
Caroline Beisher
Isabella Palmieri
Caroline Settle
Christopher Bishop
Sawyer Smith
Olivia Brown
Lindsey Gardner
Lawson Robinson
James Downs
Tully Mitchell
Will Van Wezel
Parks McLain
Hayden Schell
Jack Langloh
Ella Robinett
Rebecca Brown
Emma Brown
Jules Horne
Caelen Hawkins
Emme Elgin
Sela Trimm
Emily Lloyd
Alan Alderson
Eva Marston
Liz Jason
Bijou Phillips
Tamara Frieson
Christopher Bradley
Draven Preston
Hayden Nelson
Walsh Nelson
Haylie Touchstone
Kael Wise
Keegan Grube
Keenan McGowen
Abbigail Moore
Victor Bedell
Melinda Tucker
Alex Aldenderfer
Jaydon Divins
Cody Gumpenberger
Michelle Kunis
Ryan Thomas
Samual Middleton
Jahiem Thomas
Jade Byars
Kayla Cohen
Zytarious Wright
Dwight Flores
Mahagoni Winn
Dailee Bell
Jamarvion Scott
Nakiyah McClendon
Miles Ainsley
Braxton
Kenya McGowan
Miles Ainsley
Alisabeth Jones
Steven McIntosh
Tamia Edwards
Jessica Arnette
Leah Henderson
Aiden Groomes
Ja'Colby Mcleod
Konnor Kilpatrick
Jelan Smith
Yumaca Wright
Emily Powell
Alivia Jones
Catlin Hutto
Collin Walters
Dayla Roman Cortes
Emma Dunn
John-David Tapia
Emma Dorenkott
Gavin Myers
Chloe Draper
Zane Jacobs
Jack Chancey
Terrell
Sarah Rouse
Kindel Ansley
Cameron
Demetrius Santiago
Jaelon Cohen
Rebekah Rouse
Luke Clark
Brooke Foist
Anna Carroll
Jonathan Lambert
Tristin Somers
Audrie McWhorter
Shardae Gray
Erin Fain
Aiden Bartley
Takoda McLeod
Gracie Lynn Jordan
Cameron Weed
Tayandrea March
Marianne Cazier
Jamya Maynor
Mykala Worley
Madelyne Little
Aiden Tolison
Holden Barefield
Nivah Brady
Gavin Smith
Tosh Teeter
Michael Wilson
Ja'Kayla Myhand
Michael Carter
Kentrell
Theondra Myhand
Felicity
Brian Jenkins
Arionn Myhand
Sarah Faucett Cobb
Savana Hamner
Thomas Session
Haley Sutherland
Amya Swafford

Posters 4-6

Laurel Carter
Jami Clark
Brayden Tripp
Sloan White
Tyler Wallace
Steven Clapp
Caitlyn Hughes
Gerry York
Jessica Hill
Brady Kraft
Michael Brannon
Joey Kimbrough
Lauren Knox
Mckenzie Cooper
Hannah Hale
Michael Gullage
Nalen DuBose
Katherine Thompson
Allie Stanley
Bailey Barnes
Amber Carroll
Hallie Whitton
Christopher Williamson
Angelina Miguel-Martin
Matthew Shaddix
Margaret Allen Camp
Taleah Sadler
Sharon Gallegos
Dawson Garrett
Noah Hughes
Gracie Groat
Jack Barker
Sarah Grace Ward
Mason Marshall
Casey Vice
Avery Payton
Kensley Brewis
Marvin Juarez-Chan
Harrison Davis
Raegan Ashley
Kaelan Shankles
Micah Simpson
Hannah Simpson
Kailey New
Carson Burt
Dawson Wilcox
Isabelle Wright
Hannah Bluffstone
Katilyn Stanton
Taylor Theakston
Liam Hulsey
Giles Roberts
Leah Williford
Beth Jones
Carter Pridmore
Jordan Elliott
Miller Hinson
Jenna Locklier
David Beam
Amiracus Brown
Brady Orr
Piper Schneider
Mycah Wells
Landon Jones
Kate McOmber
Gage Mann
Harrison Wingard
Aiden Steyer
Omar Abdelaziz
Luke Childrey
Zekeiria Robinson
Camryn Rosser
Sadie Davis
Clairborne Davis
Jada Burroughs
Will Chandler
Isabella Baker
William Davis
Venus Avezzano
Anna Grace Rief
Elaina Brooks
Deitrick Hill
Chase Wells
Taylor Penney
Destiny Jackson
Allyson Merriweather
Madelyn Stephens
JC Hardigree
Matthew Parker
Tyler Banks
Michelle Trammer
Riley Barrow
Caleb Campbell
Peter Nguyen
Claire Conway
Katherine Little
Aquazi Bell
Aaron Bates
Morgan Lanier
Meg Custard
Hannah Parker
Eli Nutt
Vicky Campbell
Chloe Mikels
Madison O'Conner
Sydney Faircloth
Ada Short
Aiko DelToro
Julie Chain
Ava Cochran
Kameryn Redd
Barbara Jean Saunders
Nyla Caldwell
Timothy Scarborough
Britney Nguyen
Emily Deaton
Jaiya Davis
Kylie Pritchett
Janie Messer
Kathleen Wade
Allison Hart
Brayden Walker
Mya Bolds
Cameron Dix
Terry Pickett, II
Chris Hodge

Billy Land
Celeste Moody
John Martes
Amber McVay
Jared Jackson
Jalavin Calloway-Smith
Alexa Mathis
Kylee Carson
Micah Nichols
Kayla Yeager
Rachel Peters
Andrew Hargrave
Allie Fordham
Joshua Lucas
Wes Maluda
Olivia Bearden
Noah Graves
Madison Knapp
Ashlyn Cryer
Abbie Lewis
Jackson Rochester
Sara Catoe
Claire Connor
Gaby Gutierrez
Ashley Palmer
Loggan Webber
Destiny Whitener
Jazmyne Starling
Nathaniel Smith
Jamal Lane
Halli Josey
Kayonna Hilliard
Ajani Brown
Zakyren Lias
Briar Taylorson
TyKerria Grey
Aaron Welch
Cadie Barnes
Angel Robinson
Caroline McGarey
Shannon England
Pearce Kross
Sara Davey Huckaby
Emma Dixon-Hadaway
Grace Abbott
Emma Ruth Nibblett
Rayegan Pate
Randi Morgan
Derin Dorough
Blake Wideman
John David Roberts
Luke Self
Jacob Messner
Cade Golden
Kaitlyn Wallace
Mason Price
Logan Wisdom
Mark Jones
Taylor Floyd
Jared Borden
Taylor Loveless
Abby McDaniel
Shay Willis
Olivia Murphy
Nick Goroll
Zeke Seal
Dorothy Patterson
Sara Matheny
Lillie Burns
Kinsley Cole
Kelsey Burns
Chelsey Thorne
Gracie Sides
David Owens
Giovanni Garza
Jonathan Lewis
Emma Burke
Lucas Moore
Mallory Barry
Christy Gee
Kanami Welchel
Kaylee Lassetter
Skylar Jackson
JR Proctor
Abbi Whitfield
Kayle Clayburn
Katelyn Duncan
Chloe Hammond
Brittany Swain
Audrey Millhouse
Samantha Le
Malik Baker
Isaiah Robinson
Kameron Brock
DeAndre Smith
Shania Lee
Aaliyah Baker
Kamryn Whatley
Bailey Goode
Alyssa Broughton
Montana Taylor
Abigail Fowler
Kana Luecke
Raafay Hamid
Erin Tucker
Emori Zieverink
Megann Koetter
Megan Sadler
Ashley Luecke
Macey Davis
Bragen Mahaffey
Lauren Wolfe
Lillian Anderson
Amy Hope
Landon Smith
Annamarie Kane
Maia Pearson
Mackenzie Wofford
Phillip Zuccala
Carly Tombo
Alexandria Ricketts
Knox Romeo
Mary Caroline Styles
Diane Snoddy
Franklin Carder
Caleb Rushin
Isabella Wright
Peter Gerontakis
James Carter Bolles
Queenie Samaha
Reilly Huie
Emelia Abts
William Howell
Isabella Gordon
Caplan Bahinsky
Kandyn Warren
Conway Jensen
Lauren Scruggs
Hunter Tucker
Dennis Guillen
Clayton Malke
Catherine Grace Dini
Cloe Gamble
Arden Plugge
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Mary Caitlin Russell
Khaleb Davis-Simmons
Jacob Johnston
Kristyn Quinn
Kayla Shands
Autumn Minyard
Katelin Whisenant
Maliyah Leverett
Caylie Moore
Davin Vasser
Faith Colegrove
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Cassie Rodgers
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Hallie Carter
Kaylee Grates-Patterson
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Katelyn Guilford
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Traevon Wright
Raven McGhee
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Brady Webster
Lily Lieberman
Valerie Jeffers
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Zachary Johnson
Chanice Spicer
Tyra Johnson
Callie Miles
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Ian Smith
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Erica Luckie
CJ Card
Sam Worthington
Abbie Rhoden
Dawson Corwin
Christian Sullen
Isabelle Goulet
Madison Mills
Donovan Williams
Lucas Alred
William Lawlor
Jordan Smithee
Camryn Skiba
Brianne Therrien
Mackenzie Wilson
Thomas Peaspanen
Justin Slater
Olivia Varnerad
Brian Officer
Perri Ella Gandy
Claire Harden
Lindsey Summerlin
Rusty Moseley
Sawyer Sharpe
William Grant
Seth Mann
Anderson Enslen
Gavin Allen
Hannah Thomas
Hailey Lushington
Caroline McCord
Trinity Meadows
Madison Freeman

Essays 7-9

Katlin Thorn
Lonnie Stumbaugh
Collin Maynor
Casey Durham
Plina Hester
Brooke Morris
Susan McPhie
Jasmine Williams
Brady Unzicker
Holly McGuire
Derkiah Williams
Alanna Andrews
John Butler
Abby Wesson
Emma Phillips
Hannah Francis
Robbie Hansen
Alexander Roberts
Alex Lipscomb
Sage Lucia
Harris Pigford
Kara Green
Anne Miles DeMott
Heidi Gilmore
Hallie Mobley
Shawntavia Simpson

Essays 10-12

Krista Tidwell
Savannah Wilson
Ally Judd
Maya Hoyt
Adrian Rodriguez
Jonas Shaw
Rynel Marshall
Noah Huguly
Carol Lynn Owens
Charlee Grace Butler
Randole Stone
Tori Mack
Santoria Dunlap
Sawyer Vernon
Lauren Bacon
Taylor Thornton
Danielle Thompson

Social Media–Facebook

Jaylyn Wright
Jaylon Adams
Lorenzo White
Taryn Skipwith
Trey Ross
Broderick Cheatham
Destiny Moore
Michelle Gibbs
Christopher Glover
JaTavia Cooper
Sharde Thomas
Tyler Anderson
Vandross Parker
Jack Hudson
Avery Anjard
Terry Reese
Madison Foster
Brianna Marshai'
Kayla Jones
Karla Olmos
Nicholas Yeend
Sara Head
Emily Miller
Seirra Taylor
Destynee Dosey
Malik Horton
Shunkeria Nixon
Jordan Mason
Anthony Manville
Tanner Van Gilder
Justin Hicks
Corey Johnson
Pam Ryles
Sontia Davenport
Nicol Gauntt
Autumn Huffman
Cydney Landreau
Brianna Lewis
Tanner Cantey
Christie Singleton
DeAndre Tucker
Taylor Randolph
Jules Grant
Jordan Pace
Kirsten King
Renee Washington
Mike Kruggel
Kelsie Morris
Taylor Harris
Jacqueline King
Noah Walton

Social Media–Twitter

Jordyn Denard
Nick Jackson
Isia Jenkins
Tristan Corley
Blair Corley
Corey Gibbs
Mary Jenkins
Naiman Hakeem
Mai West
Kimari S.
Sheliyah Glass
Courtney Blackman
Hannah Marcelino
Morgan Lee
DaJara Seals
Madison Loehr
Matthew Bailey
Christian Campbell
Yazen Shihab
Jordan Hendrix
Jacob Jones
Damien Long
Chasely Matman Ivong
Kaylah Callaway
Candance Carnegie
Brodi Pickering
Charlton Brackett
Orgil Erdenebat
Tabitha Forbus
Tiana Gilmore
Cameron Tomberlin
Kelsey Adams
Ulises Cardenas
TeShawnia Phillips
Dean Moore
Franki McDonald
Allayah Robinson
Maurice Webster
Daltin Smith
Erin Dacus
Mikaela Holley
Sarika Patel
Charles Asouzu
Nick Whitfield
Daijah Bruce
Andrea Reed
Erica Mahone
Olivia Crawford
Andrew Blake
Seth White
Danielle Green
Caleb Church
Caitlan Womelsdorf
Joseph Taylor Messner
Melanie Sue St. John
Travis Brasher
Spencer White
Kailey McKinnon
Brandon Patterson
Julia Roberts
Breanna Quinn
Lauren Wyatt
Brooke Wideman
Kali Kennedy
Jorden Messner
Candace Self
Roman Hill
Dustin Wallace
Leyden Skipper

Marvin McCoy Davidson, Jr.

C. Drew Demaray

John Smiley Key

Marvin McCoy Davidson, Jr.

Marvin McCoy Davidson, Jr. was born in Powderly, Alabama March 20, 1925, the son of an attorney who later went into the ministry and served as pastor of First United Methodist Church in Tuscaloosa from 1933-1937. He died December 13, 2011 at age 87.

At the age of 18, and after one semester at the University of Alabama, McCoy joined the United States Army, was assigned to the 4th Infantry Division and left for England in January 1944. On June 6, 1944, McCoy and his unit landed on Utah Beach in the D-Day invasion of Normandy, fought through the hedgerows to win Cherbourg, liberated Paris, fought through the Hurtgen Forest, survived the Battle of the Bulge, and eventually entered Berlin to meet the Russians. He was awarded four Bronze Stars for meritorious service during World War II, returned to the United States Army in 1952, served another 15 months in Germany on the Russian border and received another Bronze Star for exemplary service.

After McCoy received his L.L.M. degree from the University of Alabama in 1950, he opened a solo practice and supplemented his income by operating a trash collection business. In the early part of his career, he handled both civil and criminal matters. He eventually developed an insurance defense practice, representing clients in a wide variety of lawsuits, including medical, legal and other professional liability cases.

McCoy was admitted to practice before the Supreme Court of Alabama, the United States District Court for the Northern District of Alabama and the United States Court of Appeals for the 11th Circuit. He also served as president of the Tuscaloosa County Bar Association in 1958 and was a member of the American Bar Association, the Federation of Insurance Counsel, the Alabama Defense Lawyers Association, the Defense Research Institute, and the Tuscaloosa County Inns of Court. McCoy practiced law in Tuscaloosa County for more than 50 years, and was previously honored by the Tuscaloosa County Bar Association as a pillar of the bar.

McCoy was a faithful member of the First United Methodist Church, taught the Lee Sunday School class for 25 years, served on the administrative board and was chair of the trustees of his church for two consecutive terms.

He and Joan Newell Davidson, his wife of 65 years, have two sons, Marvin McCoy Davidson, III and John Newell Davidson, four grandsons, two great-grandsons and one great-granddaughter.

McCoy's reputation was that of a skilled advocate for his clients, a formidable trial attorney, a man of utmost integrity and character, a faithful friend, and a southern gentleman in the finest sense.

—John J. Lloyd, past president, Tuscaloosa County Bar Association

C. Drew Demaray

On February 18, 2013, the Alabama State Bar and the Birmingham Bar Association lost, much too young at only 55, a lawyer who exemplified the ideals of duty and principle. Drew Demaray practiced in a variety of settings: judicial law clerk, law firm associate and partner, in-house legal officer and sole practitioner. In each of those settings, Drew lived by a simple code–do the job in front of you in the best way you can, do it with honor and do the right thing.

Born in Houston, Drew grew up in Birmingham. After graduating from Indian Springs School in 1976, he went on to Vanderbilt and then to law school at Washington & Lee, where he was an editor of the *Law Review* and a member of the Order of the Coif. Graduating magna cum laude in 1983, Drew returned to Birmingham as law clerk to U.S. District Judge Robert B. Propst, learning much in his chambers and over lunch at Fife's. Drew then moved on to become an associate and partner at Haskell Slaughter, developing an expertise in corporate transactions and real estate. In 1991, Drew left to become vice president–legal services at HealthSouth Corporation, establishing the company's first legal department and closing deals across the country. After his time at HealthSouth, Drew became a sole practitioner, an arrangement which helped ensure that his practice did not conflict with any bird-hunting season.

Those who knew and worked and hunted with him would tell you that Drew was a man of extremes. He simply did not acknowledge the existence of grey areas. If something was right, it was right. If it was wrong, no power was strong enough to persuade him it was right. If you were his friend–and his friendships were broad in scope–there was nothing he would not do for you. If you had the misfortune to be his enemy, or the enemy of his client, he was implacable in his determination to see that you got your just desserts, but always within the bounds of ethics and honor.

As a lawyer, Drew's polestar was duty. If he had a job to do, he gave it his utmost, no matter how unpleasant or unglamorous it might be. Once he took on a task, he saw it through to the finish, no matter what. He brought this same attitude to the often unpleasant and certainly unglamorous job of serving on the Birmingham Bar Association's Grievance Committee, where his commitment to fairness and ethical behavior served our profession well.

Drew Demaray was not a leader of the bar in any conventional sense. He aspired to no bar association office. He did not write books or give CLE presentations or draft legislation. The old-timers will not gather to tell stories of his courtroom exploits. For those who were privileged to know and work with him, though, his commitment to hard work, to duty and to doing the right thing, let the chips fall where they may–those are leadership lessons that will not soon be forgotten. We honor his memory by remembering them.

—William W. Horton

John Smiley Key

The Alabama State Bar and Morgan County, Alabama lost a consummate gentleman and professional upon the untimely death on February 6, 2013 of John Smiley Key, a member of the Morgan County Bar and Alabama State Bar since 1964. John was born in Camden, Tennessee on August 4, 1940 to Jacklyn Smiley and Gilbert Jasper Key. He moved to Decatur when he was in the second grade and attended public school there, graduating from Decatur High School where he lettered in football.

John graduated from the University of Alabama and the University of Alabama School of Law where he was editor-in-chief of the *Alabama Law Review* and a member of the Order of the Coif. After graduation, John clerked for United States District Judge Clarence Allgood in the Northern District of Alabama and then returned to Decatur in 1964 where he joined the firm of Eyster & Eyster. He enjoyed a successful career as a defense lawyer trying hundreds of cases to a jury verdict, including defending physicians in more than 100 medical malpractice cases. One could not find a lawyer who dealt with Mr. Key–whether as co-counsel or as adversary in court–who did not walk away with the utmost respect for John's ability and integrity.

Continued from page 255

John was a past president of the Morgan County Bar Association, a member of the state bar Executive Committee and a Bar Commissioner for the Eighth Judicial District for two terms. He was a former director of the Alabama Defense Lawyers Association, an Advocate of the American Board of Trial Advocates, a Fellow of the American College of Trial Lawyers and a member of the International College of Trial Lawyers.

John was a lifelong member of St. John's Episcopal Church where he served on the vestry and as a senior warden. He was a past president of the Decatur Rotary Club, past board member of the Decatur-Morgan County Chamber of Commerce, a member of the Advisory Board of Directors of AmSouth Bank and served for more than 20 years as a member and chair of the Board of Trustees of Decatur General Hospital.

He was preceded in death by his parents, and is survived by his gracious wife of 52 years, Lucy Minot Key; one son, John Key, Jr. (Jack), of Birmingham; one daughter, Mary Scott Key Pizzitola, and husband Joey; grandson John Pizzitola; and granddaughter Anna Pizzitola, all of Birmingham; brother Gilbert Jasper Key, Jr. and wife Ann of Birmingham; sister Jacklyn Key Bailey and husband Foster; and many nieces and nephews.

When John became of counsel to Eyster, Key, Tubb, Roth, Middleton & Adams LLP at the end of 2006, he had completed 43 years of active litigation practice throughout Alabama in state and federal courts. During this time, he mentored dozens of young lawyers within the firm in which he practiced for 42 years, as well as many of his colleagues on all sides of the cases in which he was involved. John Key truly set an example of the friendship, compassion and professional excellence that every lawyer should attempt to emulate. John will be missed by everyone who knew him and is appreciated by everyone whose life he touched.

—Nicholas B. Roth, past president, Morgan County Bar Association

Booth, Joe Thomas, III
Montgomery
Admitted: 1954
Died: April 17, 2013

Brooks, Randy Burns
Anniston
Admitted: 1978
Died: October 17, 2012

Burrell, Robert Leon
Decatur
Admitted: 1977
Died: March 15, 2013

Chandler, Hon. Walter Brown, III
Gulf Shores
Admitted: 1974
Died: February 27, 2013

Coe, Jerry Logan
Las Vegas
Admitted: 1958
Died: February 20, 2013

Eyraud, George Victor
Birmingham
Admitted: 1955
Died: January 21, 2013

Foote, Timothy Jay
Huntsville
Admitted: 2003
Died: January 20, 2013

Harrison, Jack H.
Pelham
Admitted: 1957
Died: March 7, 2013

Henderson, Danny Dee
Decatur
Admitted: 1974
Died: February 13, 2013

Ramsey, Robert Stephen, Sr.
Vicksburg, MS
Admitted: 1984
Died: April 5, 2013

Wood, Ronald Eugene
Jacksonville
Admitted: 1989
Died: March 14, 2013

Wooldridge, Hon. Robert V., Jr.
Tuscaloosa
Admitted: 1951
Died: February 25, 2013

Alabama Lawyers Hall of Fame

A well-known former mayor who was a both a social activist and political reformer, the founding partner of one of the largest law firms in the state and the governor who created the Dept. of Archives & History are three of the five lawyers who will be inducted into the Alabama Lawyers' Hall of Fame.

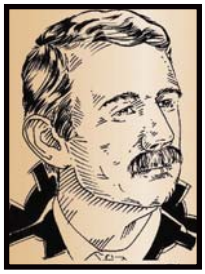
A special ceremony was held at the Alabama Supreme Court in May when the plaques of each inductee were unveiled and placed in the Hall of Fame (located on the lower level of the Heflin-Torbert Judicial Building).

Honorees must be Alabama lawyers who have made extraordinary contributions through the law at the state, national or international level.

Nominees must meet the award criteria which includes having a breadth of achievement in their lifetime, demonstrating a profound respect for professional ethics, being recognized as a leader in their community and leading, inspiring or mentoring others in the pursuit of justice. Only lawyers who have been deceased for a minimum of two years are considered.

THE 2012 HONOREES ARE:

William James Samford (1844–1901)



Successful Opelika attorney who practiced in surrounding counties of Alabama and Georgia; licensed Methodist Episcopal minister; gifted orator; elected city alderman (1872); elected to the U.S. House of Representatives (1879-1881); served in the Alabama House of Representatives (1882) and Alabama Senate (1884-1888 and 1892-1896); senate president *pro tem* (1886-1887); elected governor (1900); the Alabama Department of Archives and History created during his term

William Logan Martin, Jr. (1883–1959)

Graduate of the U.S. Military Academy; constitutional scholar and skilled advocate who helped develop Alabama's early industry; founding partner of what would become one of the state's largest law firms, Balch & Bingham LLP; attorney general (1914-1917); circuit judge (1919-1920); served on the American Bar Association's Board of Governors and was a longtime member of its House of Delegates; president of the Alabama State Bar (1946-1947)

David J. Vann (1928–2000)

Lawyer; social activist; political reformer who was instrumental in helping change Birmingham's racially oppressive form of government; elected to the Birmingham City Council (1971-1975); elected mayor of Birmingham (1975-1979); was guided by the principle of doing "what is right and what is just…without regard to political consequences"

Edwin Cary Page, Jr. (1906–1999)

Practiced for 71 years in Conecuh County (Evergreen); leader in the local community who epitomized the iconic image of the small town lawyer; served with distinction in the U.S. Navy during World War II; county solicitor for many years and served as a longtime member of the Alabama State Bar Board of Bar Commissioners

John A. Caddell (1910–2006)

Practiced law for 73 years and, at the time of his death, recognized as the dean of Alabama's legal profession; played an effective and wide-ranging public service role in his community and statewide for more than 50 years; member of numerous civic and professional organizations; served as chair of the Board of Trustees for the University of Alabama and briefly as interim university president; president of the University of Alabama National Alumni Association; founding member of the Farrah Law Society; member of the Alabama State Bar Board of Bar Commissioners, Board of Bar Examiners and president of the Alabama State Bar (1951-1952) | AL

Wilson F. Green

Marc A. Starrett

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.*

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Arbitration; Nursing Home Contracts

SSC Montgomery Cedar Crest Operating Company, LLC v. Bolding, **No. 1120122 (Ala. March 22, 2013)**

Means, an incompetent adult, was admitted to SSC nursing home by Pleasant, his daughter. Pleasant signed an arbitration agreement in which she represented that she had authority to bind Means; however, undisputed evidence showed that she did not have such authority. In negligence action brought on behalf of Means, SSC moved to compel arbitration, which the trial court denied. The supreme court affirmed, holding: (1) Pleasant lacked authority to bind Means to arbitration, and the contract's recital of such authority did not confer such authority; and (2) apparent authority did not apply because principal (Means) was incompetent, and thus he could not hold Pleasant out as having authority.

Personal Jurisdiction

Ex parte Alamo Title Co., **No. 1111541 (Ala. March 15, 2013)**

Held: out-of-state escrow agent's contacts with Alabama, in the form of calls and faxes, were insufficient to support specific jurisdiction under the "purposeful availment" standard, and (2) conspiracy allegations could not be relied upon because once movant supported its personal jurisdiction motion with testimony, the evidentiary burden shifted to plaintiffs to support jurisdictional allegations with some evidence.

Personal Representatives; Compensation

***Ex parte Rodgers,* No. 1111509 (Ala. March 29, 2013)**

PR was not entitled to a fee of a percentage of recovery of wrongful death proceeds under the "extraordinary services" provision in *Ala. Code* § 43-2-848(b), because wrongful death proceeds are not recoverable "for the estate," as the statute requires. Justice Bolin concurred specially, noting the inequities of the situation and proposing that the personal representative could be compensated under the law of trusts.

Work Product

***Ex parte Mobile Gas Service Corp.,* No. 1120229 (Ala. April 5, 2013)**

Plaintiffs had not demonstrated a substantial need under the Rule 26(b)(5) test for materials beyond the raw data from certain environmental testing. Though it did not appear strictly germane to the materials in question, the court also discussed some federal cases which hold that work product in one litigation (a regulatory action) could maintain its work product character in separate but related litigation (private civil litigation).

Medical Malpractice

***Hegarty v. Hudson,* No. 1110578 (Ala. April 5, 2013)**

Judgment for plaintiff reversed in medical malpractice action; under the plain language of *Ala. Code* § 6-5-548(c) and (e), plaintiff's expert was disqualified for failure to maintain the same board certification as the defendant.

Fraud

***Target Media Partners Operating Co., LLC v. Specialty Marketing Corp.,* No. 1091758 (Ala. April 19, 2013)**

On original submission (December 21, 2012), the court reversed in relevant part a fraud verdict for a commercial plaintiff, holding essentially that a fraud claim does not lie under Alabama law for misrepresentations made in connection with contractual performance, because such a claim is only in contract. On rehearing, the court withdrew its controversial decision on original submission, and affirmed *without opinion* the judgment for plaintiff.

Prepaid Tuition Case

***Perdue v. Green,* No. 1101337 (Ala. April 19, 2013)**

After remand from the supreme court, the circuit court held that a 2012 Act of the legislature needed to facilitate the settlement was retroactive and constitutional, and approved the settlement. The supreme court affirmed. The court reasoned that the 2012 Act itself did not impair vested rights; instead, it simply removed a legislative bar to the PACT Board's consideration of the settlement. The court also reasoned that no-opt-out certification was not inappropriate, even though the settlement released money damage claims. The court extensively analyzed the various factors for approval of a class action settlement and concluded, among others, that the presence of only 70 objectors from 30,000 class members evinced strong support for the settlement. Finally, the court affirmed the trial court's approval of the attorney-fee award of $5 million to class counsel. (Six justices were recused off of this case).

Abatement

***Ex parte Brooks Ins. Agency,* No. 1120165 (Ala. April 26, 2013)**

Nationwide sued insured in federal district court for declaration on coverage. Insured counterclaimed. Insured brought separate action in state court against Nationwide and agent, asserting fraud and failure to procure claims. Defendants in state action (Nationwide and agent) moved to abate under *Ala. Code* 6-5-440, due to prior pendency of federal action. The circuit court denied the motion to dismiss. The supreme court granted mandamus relief as to Nationwide, since compulsory counterclaims in a prior-filed action are subject to abatement when brought in a subsequent action. Claims against agent were not abated, however, because agent was not a party in federal action.

CGL Insurance

***Shane Traylor Cabinetmaker LLC v. American Resources Ins. Co.,* No. 1110418 (Ala. May 3, 2013)**

As it had concluded in *Town & Country Property, LLC v. Amerisure Insurance Co.*, No. 1100009 (Ala. Nov. 2, 2012), the court held that coverage for defense and indemnity on faulty workmanship claims under a standard CGL policy depends on whether damages are alleged to result to merely the product supplied by the insured, or whether collateral damage was alleged to have occurred, and only in the latter event is there coverage.

Commercial Law

***The Pantry, Inc. v. Mosley,* No. 1110759 (Ala. May 3, 2013)**

Held: On an issue of first impression in Alabama, landlord's withholding of consent to assignment of a commercial lease is unreasonable as a matter of law when motivated solely by desire to renegotiate rent terms from the rents provided in the lease. The court also held that a conversion claim failed as a matter of law, because real property cannot be converted.

Continued from page 259

Out-of-State *Forum Non Conveniens*

***Ex parte Transp. Leasing Corp.*, No. 1120326 (Ala. May 3, 2013)**

The court directed dismissal of truck accident case arising in Mississippi under *Ala. Code* § 6-5-430. The court rejected plaintiff's argument that negligent entrustment claim (where entrustee was the Alabama driver) actually arose in Alabama, because the entrustee's negligence (which occurred in MS) is just as essential an element of that claim.

Medical Malpractice; State Immunity

***Health Care Auth. for Baptist Health v. Davis*, No. 1090084 (Ala. Jan. 11, 2011, reversed in opinion on rehearing May 17, 2013)**

On original submission, the supreme court held that Baptist East in Montgomery was entitled to state immunity, because Baptist East was being operated by UAB Health System pursuant to an agreement between the Baptist HCA and UAB. On rehearing, the court reversed its original-submission disposition, holding (1) that Baptist HCA was not entitled to state immunity because, under the controlling tests for determining whether agencies affiliated with the state are entitled to immunity, the HCA was not an "immediate and strictly governmental agency" of the state, but rather was a "franchisee licensed for some beneficial purpose," the latter of which does not enjoy state immunity; and (2) Baptist HCA was not entitled to the $100,000 damage cap under *Ala. Code* 11-93-2.

Direct Actions

***Admiral Ins. Co. v. Price-Williams*, No. 1110993 (Ala. Jan. 11, 2013, reversed on rehearing, May 17, 2013)**

Price-Williams ("PW") obtained judgment against fraternity officers (Dean and Baber) covered by Admiral policy, on theories of (1) assault and battery by Dean, Baber and Howard (a non-officer member), and (2) negligence and wantonness in failing to implement fraternity risk management program. PW then brought direct action against Admiral under *Ala. Code* 27-23-2, the direct action statute. The trial court entered judgment for PW. The supreme court reversed, holding that an exclusion obviated coverage for injuries arising from an assault and battery in which any insured was involved.

From the Alabama Court Of Civil Appeals

Deeds

***Barter v. Burton Garland Revocable Trust*, No. 2111050 (Ala. April 5, 2013)**

Deed conveying a "roadway" to a group of landowners of a specified area was (a) conveyance of a fee interest and not merely an easement, given the unambiguous language of the *habendum* clauses, and (b) sufficiently specific in its identification of grantees, such as to render the deed valid and enforceable.

Wantonness

***Schubert v. Smith*, No. 2111217 (Ala. Civ. App. May 3, 2013)**

Evidence showed that driver was speeding before accident, had been told to slow down and was familiar with arguably hazardous conditions of road. After accident, driver wrote letter of apology to passenger, stating that he was distraught on day of accident and did not care whether he died at the time. The trial court, and the court of civil appeals, concluded that the evidence was not sufficient to create a triable issue on wantonness in action by passenger against driver.

Premises Liability

***Auburn's Gameday Center at Magnolia Corner Homeowners Association v. Murray*, No. 2110849 (Ala. Civ. App. May 10, 2013)**

HOA had a legal duty to prevent water intrusion to unit of private owner through its diversion from the common area patio into the unit's basement.

Forum Non Conveniens

***Ex parte West Fraser, Inc.*, No. 2020432 (Ala. Civ. App. May 10, 2013)**

The court granted mandamus relief and directed a transfer of comp action from county of employee's residence to county where employer was situated, on *forum non conveniens* "interests of justice" grounds.

Automobiles

***Pell v. Tidwell*, No. 2120313 (Ala. Civ. App. May 10, 2013)**

"Because a driver cannot delegate his or [her] responsibility for ensuring that it is safe to proceed across an intersection …, we now hold that, as a matter of law, a signaling motorist cannot be held liable for negligence when the signaled driver proceeds across an intersection without independently ensuring that it is safe to do so. In other words, the signaling motorist's conduct constitutes a courtesy to the signaled motorist, but it does not relieve the signaled motorist of his or her own duty to ensure that it is safe to proceed."

Restrictive Covenants

***Elliott Builders, Inc. v. Timbercreek Property Owners Association,* No. 2110758 (Ala. Civ. App. May 17, 2013)**

The court affirmed the trial court's enforcement of a developer's amendment to its restrictive covenants under the reasonableness standard imposed by *Miller v. Miller's Landing, LLC*, 29 So. 3d 228 (Ala. Civ. App. 2009), "which [reasonableness inquiry] necessarily entails consideration of whether the amendment in question was adopted "in compliance with the procedural requirements of the governing documents of the subdivision."

Contracts

***Grand Harbour Development, LLC v. Lattof,* No. 2120036 (Ala. Civ. App. May 17, 2013)**

In dispute concerning commercial real estate contract, the court held: (1) contract's provision on construction and purchase credits was not void for indefiniteness, but (2) there was a genuine issue of material fact regarding whether a reasonable time for performance was implied by the contract, and what was reasonable in light of market conditions, and whether the construction of the condominium units was a condition precedent to defendant's obligations under the contract.

From the United States Supreme Court

Medicare

***Wos v. EMA,* No. 12-98 (U.S. March 20, 2013)**

The Court held that the federal anti-lien provision preempts North Carolina's irrebuttable statutory presumption that one-third of a tort recovery is attributable to medical expenses.

Copyright

***Kirtsaeng v. John Wiley & Sons, Inc.,* No. 11-697 (U.S. March 19, 2013)**

The "first sale" doctrine, which provides that the owner of a particular copy lawfully made under the Copyright Act, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy, applies to copies of a copyrighted work lawfully made abroad.

Class Actions

***Standard Fire Ins. Co. v. Knowles,* No. 11-1450 (U.S. March 19, 2013)**

Putative class plaintiff's stipulation that he and the class would seek less than $5 million in damages does not defeat federal jurisdiction under the Class Action Fairness Act

Class Actions

***Comcast Corp. v. Behrend,* No. 11-864 (U.S. March 27, 2013)**

The Supreme Court held that defendant's arguments against plaintiffs' damages model bore on the propriety of class certification even though they would also be pertinent to the merits determination; and that plaintiffs' damages model did not establish a class-wide mechanism for proving damages, thus destroying predominance under Rule 23(b)(3).

Offers of Judgment; Mootness

***Genesis Healthcare Corp. v. Symczyk,* No. 11-1059 (U.S. April 16, 2013)**

Once defendant made offer of judgment to settle for all of her individual damages recoverable under the statute, plaintiff had no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness.

ERISA; Common-Fund Doctrine

***US Airways, Inc. v. McCutchen,* No. 11-1285 (U.S. April 16, 2013)**

ERISA plans may by contract abrogate the common-fund doctrine, under which an injured plaintiff who hires counsel to recover benefits subject to a subrogation claim may compel payment of a share of attorneys' fees against the subrogated fund.

Patents

***Bowman v. Monsanto Co.,* No. 11-796 (U.S. May 13, 2013)**

Continued from page 261

The doctrine of patent exhaustion does not permit a farmer to reproduce patented seeds through planting and harvesting without the patent holder's permission.

Bankruptcy

***Bullock v. BankChampaign, N.A.*, No. 11-1518 (U.S. May 13, 2013)**

The term "defalcation" in the 11 U.S.C. section 532(a)(4) of the Bankruptcy Code requires proof of a culpable state of mind requirement involving knowledge of, or gross recklessness in respect to, the improper nature of the fiduciary behavior, which is higher than an "objective recklessness" standard.

From the Eleventh Circuit Court of Appeals

Employment Law

***Owusu-Ansah v. Coca-Cola Co.*, No. 11-13663 (11th Cir. May 8, 2013)**

On the recommendation of an independent psychologist, Coca-Cola placed Owusu-Ansah, one of its employees, on paid leave and evaluation. After he was cleared to return to work, he sued Coca-Cola, alleging that the evaluation violated 42 U.S.C. § 12112(d)(4)(A) of the ADA. Held: the evaluation was both job-related and consistent with business necessity, and therefore permissible under the ADA.

Interstate Land Sales

***Dolphin, LLC v. WCI Communities, Inc.*, No. 12-14068 (11th Cir. May 1, 2013)**

Condominium buyer sued seller under Interstate Land Sales Full Disclosure Act ("ILSFDA"), 15 U.S.C. §§ 1701-1720. Seller obtained summary judgment, affirmed by the Eleventh Circuit, because development was exempt under section 1701(a) of the ILSFDA because it had fewer than 25 units, and because those units were not marketed under a common plan with other developments.

RECENT CRIMINAL DECISIONS

From the United States Supreme Court

Search and Seizure

***Missouri v. McNeely*, 133 S. Ct. 1552 (2013)**

The natural dissipation of alcohol in the body over time does not constitute *per se* exigent circumstances to support the warrantless, nonconsensual taking of a blood sample from a DUI suspect. The reasonableness of a warrantless blood test in DUI cases under the Fourth Amendment must be reviewed on a case-by-case basis.

Right to Counsel

***Marshall v. Rodgers*, 133 S. Ct. 1446 (2013)**

For purposes of habeas relief under 28 U.S.C. 2254(d), no clearly established federal law regarding the Sixth Amendment prohibited the state trial court's refusal to appoint counsel to assist defendant during post-trial proceedings. The defendant had waived his right to counsel on three previous occasions before and during trial.

From the Alabama Supreme Court

Parole

***Ex parte Upshaw*, No. 1120035 (Ala. Apr. 26, 2013)**

An Alabama inmate, convicted and sentenced in another state while on parole from his Alabama conviction and sentence, was not entitled to credit on his Alabama sentence under *Alabama Code* (1975) § 15-22-32 for the time spent in his out-of-state incarceration.

Conspiracy

***Ex parte Parker*, No. 1110566 (Ala. Apr. 5, 2013)**

The court found insufficient evidence to support the jury's guilty verdict on the charge of conspiracy to distribute cocaine, holding that the circumstantial evidence was insufficient to link the defendant to drugs found in another person's car. The presence of cash bundles in the defendant's car, without more, did not show that he conspired to distribute the drugs found in the other car.

From the Alabama Court Of Criminal Appeals

Prior Bad Acts Evidence

***Towles v. State*, CR-09-0396 (Ala. Crim. App. Mar. 29, 2013)**

Trial court erroneously admitted evidence under *Ala. R. Evid.* 404(b), that defendant assaulted his son three years before killing his younger son; evidence was inadmissible for proof of motive or identity.

"Consciousness of Innocence" Instruction

***Edwards v. State,* CR-12-0121 (Ala. Crim. App. Mar. 29, 2013)**

The court rejected the defendant's claim that, as a matter of law, he was entitled to a "consciousness of innocence" jury instruction–an instruction that the jury may infer the defendant's innocence from his acts of remaining at the crime scene and cooperation with police–but noted that he was free to argue these factual issues to the jury.

Voir Dire

***Bennison v. State,* CR-12-0041 (Ala. Crim. App. Mar. 29, 2013)**

A venire member's failure to disclose pending criminal charges against him resulted in prejudice to the defendant and required a remand for the trial court to conduct a hearing on the defendant's motion for a new trial.

Split Sentence Act

***Hicks v. State,* CR-11-1974 (Ala. Crim. App. Mar. 29, 2013)**

The trial court had no statutory authority to issue sentences and probation under the Split Sentence Act, *Alabama Code* (1975) § 15-18-8, on the defendant's convictions for rape and sexual abuse of a child, and thus could not subsequently revoke his probation on those sentences.

Lesser-Included Offenses

***Day v. State,* CR-11-1397 (Ala. Crim. App. Mar. 29, 2013)**

Because second-degree sexual abuse under *Alabama Code* (1975) § 13A-6-67(a)(2) requires proof of different and additional facts than the defendant's indicted offense of first-degree sexual abuse under *Alabama Code* (1975) § 13A-6-66(a)(3), the trial court erred in instructing the jury on the second degree offense. | AL

Reinstatement

- Lafayette attorney **William Lawrence Nix** was reinstated to the practice of law Alabama, with conditions, effective March 13, 2013, by order of the Supreme Court of Alabama. The supreme court's order was based upon the decision of Panel II of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Nix on January 31, 2013. Nix was previously transferred to disability inactive status, effective August 16, 2012, by order of the Disciplinary Board of the Alabama State Bar. [Rule 28, Pet. No. 2013-243]

Transfer to Disability Inactive Status

- Mobile attorney **Donald E. Brutkiewicz, Jr.** was transferred to disability inactive status pursuant to Rule 27(c), Alabama *Rules of Disciplinary Procedure*, effective April 8, 2013. [Rule 27(c), Pet. No. 13-466]

Disbarments

- By order of the Supreme Court of Alabama, Naples, Florida attorney **Allen David Brufsky** was disbarred from the practice of law in Alabama, effective March 29, 2013. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar disbarring Brufsky from the practice of law in Alabama for violations of rules 8.1(a), 8.1(b), 8.4(a), 8.4(c), and 8.4(g), *Ala. R. Prof. C.* The board found that Brufsky, who was admitted to the Alabama State Bar pursuant to Rule III, Rules Governing Admission to the Alabama State Bar, made material misrepresentations of fact during the application and admissions process. [Rule 20(a), Pet. No. 11-1303; Rule 23, Pet. No. 11-1538; and ASB No. 11-1488]

- The Supreme Court of Alabama adopted the February 11, 2013 order of the Alabama State Bar Disciplinary Board, Panel I, disbarring Montgomery attorney **Valerie Murry Smedley** from the practice of law in Alabama, effective March 1, 2013. On February 7, 2013, Smedley entered a consent to disbarment for neglecting clients' cases; her trust account containing insufficient funds; continuing to represent clients while her license was suspended; and being disbarred by the United States District Court for the Middle District of Alabama, Northern Division, on November 2, 2012. [Rule 23, Pet. No. 2013-278; ASB nos. 2012-1542, 2012-1704, 2012-1733, 2012-2047, 2012-2229, 2012-2290, 2013-119, 2013-124, 2013-125, and UPL No. 2012-1270]

Suspensions

- Brundidge attorney **Robert Jeffrey Davis** was suspended from the practice of law in Alabama for three years, three months and 15 days, by order of the Disciplinary Commission of the Alabama State Bar, with an effective date retroactive to October 30, 2009, the date of Davis's previously-ordered interim suspension. The order of the Disciplinary Commission was based on a petition to suspend or disbar filed by the Office of General Counsel after Davis pled guilty to attempted burglary III and attempted possession of burglary tools on October 9,

2012. Davis's convictions stem from his attempted burglary and break-in of Bryant-Denny Stadium in Tuscaloosa. [Rule 22(a), Pet. No. 2012-2192]

- Birmingham attorney **William Dowsing Davis, III** was suspended from the practice of law in Alabama for 90 days, effective May 1, 2013. On March 5, 2013, the Disciplinary Commission accepted Davis's conditional guilty plea to violations of rules 1.4(b), 1.15(b) and 8.4(a), *Ala. R. Prof. C.* Davis admitted that he failed to reasonably communicate with his client regarding the status of her case and the terms, conditions and amount of her settlement; that he collected a fee in excess of the amount allowed by statute; and that he failed to promptly notify his client upon receipt of settlement funds and promptly disburse the amount to which his client was entitled. [ASB No. 10-1349]

- Montgomery attorney **Asim Griggs Masood** 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 22, 2013. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing that Masood failed to respond to requests for information during the course of a disciplinary investigation. On February 25, 2013, after responding to the bar's request for information, Masood filed a petition to dissolve summary suspension. On February 26, 2013, the Disciplinary Commission granted Masood's request that the summary suspension be dissolved and entered an order to that effect. [Rule 20(a), Pet. No. 2013-370]

- Mobile attorney **John Dougles Rivers** was interimly suspended from the practice of law in Alabama pursuant to rules 8(c) and 20(a), *Ala. R. Disc. P.*, by order of the Disciplinary Commission of the Alabama State Bar, effective February 15, 2013. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing that probable cause exists that Rivers has abandoned his practice, his clients and their files, and, further, that confidential client files were removed from his office during an eviction and placed on the street. [Rule 20(a), Pet. No. 13-301]

- Birmingham attorney **Jonathan Kenton Vickers** was interimly suspended from the practice of law in Alabama by order of the Supreme Court of Alabama, effective January 24, 2013. The supreme court entered its order based upon the January 24, 2013 order of the Disciplinary Commission of the Alabama State Bar in response to a petition filed by the Office of General Counsel evidencing that Vickers's conduct is causing, or is likely to cause, immediate and serious injury to a client or to the public. On February 13, 2013, the Disciplinary Commission granted the Office of General Counsel's petition that the interim suspension be dissolved based on Vickers's subsequent conditional guilty plea in ASB nos. 2011-180 and 2013-266. Under the terms of the conditional guilty plea, Vickers plead guilty to multiple violations of rules 1.3, 1.4(a), 1.7(a), 8.1(a), 8.4(a), and 8.4(g), *Ala. R. Prof. C.*

  In ASB No. 2011-1802, Vickers was retained to represent a client on criminal charges involving the possession of a controlled substance. In the initial complaint, the client alleged Vickers failed to diligently represent him or communicate with him throughout the representation. In Vickers's response to the complaint, he stated the client had not yet been indicted, when, in fact, the client had been indicted three months prior. Vickers informed the client that he understood the client wished to plead guilty, but such plea would be against the client's best interests. Vickers further informed the client he was still waiting on the district attorney to decide if he/she was going to move forward on the case. However, the client was already being represented by another attorney, and, in fact, had submitted a guilty plea on the criminal charges.

  In ASB No. 2013- 266, the United States District Court for the Northern District (Southern Division) of Alabama issued an order disqualifying Vickers from representation in a matter. The Court had determined that Vickers had improperly undertaken to represent multiple co-defendants charged with drug trafficking offenses and that such conflicts were not waivable by the defendants. Based upon his plea, Vickers was suspended from the practice of law in Alabama for five years, with conditions. The suspension was ordered held in abeyance and Vickers was placed on probation for three years. [Rule 20(a), Pet. No. 2013-196; and ASB nos. 2011-1802 and 2013-266]

Public Reprimand

- Birmingham attorney **Mark David Pratt** received a public reprimand without general publication on March 29, 2013, for violations of rules 1.3 and 1.4(a), *Ala. R. Prof. C.* Additionally, Pratt was ordered to make a total refund to his client. On June 12, 2009, the client hired Pratt to assist her in collecting back alimony from her ex-husband. The client paid Pratt $1,400 via cashier's check. After numerous unreturned phone calls made by the client to Pratt between the date she hired Pratt and June 18, 2010, she sent him a letter demanding action be taken on her case or a refund of the retainer be made in full. Thereafter, Pratt acknowledged sending emails to the client at the wrong email address and failing to communicate with her via other communication methods. Moreover, after receiving this letter from the client, Pratt mailed correspondence to the wrong mailing address for the client. Pratt failed to communicate with the client after June 30, 2010 and refused to provide a refund. Pratt was not diligent in pursuing this matter and failed to properly communicate with the client. [ASB No. 2006-107(A)] | AL

J. Anthony McLain

Rule 5.4 Prohibits Fee-Splitting With Non-Lawyer, but Lawyer May Pay Non-Lawyer for Services Rendered to the Lawyer

QUESTION:

"The purpose of this letter is to request the Alabama State Bar to advise that Law Firm 1 may, consistent with the *Alabama Rules of Professional Conduct* (the '*Rules*'), compensate a non-lawyer for very valuable services rendered to Law Firm 1 in connection with its representation of certain plaintiffs in litigation that has been conducted in Delaware involving XYZ Company. We believe that such payment would not violate any of the *Rules*. The facts giving rise to this request are as follows:

> "In March 1985, Lawyer A, a partner in Law Firm 1, filed an objection pro se to a proposed settlement of a stockholder class action pending in the Chancery Court of the State of Delaware involving certain stockholders of XYZ Company, as plaintiffs, and XYZ Company ('XYZ'), ABC Corporation ('ABC') and related XYZ companies, as defendants. This class action ('Bear Action') arose out of a tender offer made by ABC in February 1984 for the stock of XYZ. Upon approval of a settlement of the Bear Action by the Delaware Chancery Court, Lawyer A appealed the settlement pro se to the Delaware Supreme Court in May 1985. Lawyer A briefed and argued the case on appeal. In December 1985, the Delaware Supreme Court approved the settlement.
>
> "On June 7, 1985, a wholly-owned subsidiary of ABC was merged into XYZ in a merger in which the public stockholders of XYZ were cashed out at $58 per share. Lawyer A, as a stockholder of XYZ, perfected his right to an appraisal arising out of this merger, and, in July 1985, filed a petition pro se in the Delaware Chancery Court seeking appraisal of the common stock of XYZ. In October 1985, Lawyer A amended his petition in the appraisal action to add allegations of unfair dealing with respect to a cash dividend declared by XYZ in May 1985 and unfair dealing in the merger of ABC and XYZ.

"As a result of Lawyer A's appeal of the settlement of the Bear Action, John Doe of Washington, D.C. ('Doe') approached Lawyer A in May 1985. At that time, Doe, who is not a lawyer, was executive director of the XYZ Shareholder's Committee ('Committee'), a non-profit Delaware corporation organized in 1984 by certain XYZ stockholders (at the instigation of Doe). During 1984, Doe, as executive director of the committee, urged XYZ stockholders to reject the tender offer made by ABC in February 1984 and to seek an appraisal. Doe spent all of his business time as executive director of the committee during 1984 trying to persuade XYZ stockholders to reject the ABC tender offer. His principal argument was that the XYZ stockholder had a viable alternative to the tender offer, i.e., to seek an appraisal of their XYZ stock if ABC succeeded in cashing out the public stockholders of XYZ.

"In a letter dated April 1985 distributed by the committee under the signature of Doe to all XYZ stockholders, Doe urged all the XYZ stockholders to seek an appraisal when the merger of XYZ and ABC took place. That same letter urged XYZ stockholders to become members of the committee.

"In September 1985, the committee employed a Wilmington, Delaware lawyer, Lawyer B, and his firm, Law Firm 2, to file a petition in the Delaware Chancery Court seeking an appraisal on behalf of certain officers of the committee who were XYZ stockholders. Thereafter, Lawyer A kept Lawyer B informed about Lawyer A's appraisal petition.

"In December 1985, Lawyer A prepared a class action complaint on behalf of XYZ stockholders to be filed in the Delaware Chancery Court alleging that ABC had breached its fiduciary duties to the public stockholders of XYZ by causing the merger of ABC and XYZ to occur on June 7, 1985 with the result that such stockholders lost a cash dividend of 50 cents per share, which had been declared by the board of directors of XYZ on May 30, 1985 with a record date later than June 7, 1985. Doe introduced Lawyer A to a lawyer named Lawyer C with Law Firm 3 with a view to employing that firm as Delaware counsel in the action against ABC arising out of the dividend. In addition, in late 1985, several members of the committee engaged Law Firm 4 to represent them in the appraisal action.

"In January 1986, Doe recommended to several XYZ stockholders that they contact Lawyer A with a view to engaging Lawyer A to file the dividend action on behalf of such XYZ stockholders. The XYZ stockholders included John Smith ('Smith'), North Carolina, Joe Jones, Missouri, and Jay Black, New York. These stockholders became named plaintiffs in the class action filed by Law Firm 1 and Law Firm 3 in February 1986 against ABC (the 'Bull Action'). Other XYZ stockholders, at Doe's recommendation, became clients of Law Firm 1 in the appraisal case.

"During February, March and April 1986, there were various discussions among the four law firms involved in the XYZ appraisal case and in the Smith class action.

"In March or April 1986, Doe strongly recommended to Lawyer A that Mr. X, vice president and an analyst with Company P, Inc. in New York, be employed in the appraisal action and the Bull Action to testify as to the value of the common stock of XYZ on the date of the ABC and XYZ merger. During 1984 and 1985, Doe had devoted a great deal of time and effort on his own and working with Mr. X to determine the most effective way to establish the value of XYZ in an appraisal proceeding. He developed a relationship with Mr. X during this time which was valuable. He gave Lawyer A the benefit of his views on appraisal valuation and recommended that the value of XYZ's reserves be determined independently of XYZ's publicly disclosed data.

"In April 1986, representatives of the four law firms met in Philadelphia to discuss coordination of the appraisal action and the Bull Action. At that meeting, it was decided that the four law firms would handle the two cases jointly and would share in the work and the fees equally in both cases. It was also decided to accept Doe's recommendation and meet with Mr. X to consider employing him as an expert witness. About June 10 or 11, 1986, Lawyer A contacted Mr. X to set up an appointment with him in New York. Doe had previously recommended to Mr. X that he meet with the attorneys. On June 17, 1986, representatives of the four law firms met with Mr. X to discuss engaging Mr. X to testify as an expert witness with respect to the value of the common stock of Shell in the appraisal case and the Bull Action. As a result of that conference with Mr. X, the four law firms engaged Mr. X to testify as an expert witness. Doe's relationship with Mr. X was very helpful in securing the services of Mr. X for the cases.

"The appraisal case and the Bull Action were subsequently tried in the Delaware Chancery Court, appealed to the Delaware Supreme Court by the defendants and, in each case, the decision of the Chancery Court was affirmed on appeal. The cases were concluded in 1992, and the Delaware Chancery Court awarded fees to the attorneys in both the appraisal case and the Bull Action. In 1992, Doe attempted to recover from the

Continued from page 267

common funds in the appraisal case and the Bull Action fees for his services in organizing and directing the activities of the committee in 1984 and 1985, but the Chancery Court denied Doe's petition on the grounds that his services were rendered prior to the beginning of the litigation. Doe has stated that the net compensation paid him for his work with the committee in 1984 and 1985 was $23,000.

"Doe believes that he should be compensated for his work which resulted in approximately one million shares of common stock of XYZ being included in the appraisal proceeding and for his services in providing advice and assistance on appraisal valuation and in finding and helping to secure Mr. X as an expert witness in both cases. In our opinion, the appraisal case was made feasible for the plaintiffs because the holders of approximately one million shares of common stock of XYZ sought appraisal of their shares, and the pendency of the appraisal case in turn made the Bull Action more feasible. Mr. X's testimony in both cases was crucial to obtaining the favorable result in both cases. In particular, Mr. X discovered that XYZ had omitted approximately $1 billion of proven reserves from its published financial reports. Neither Company Q, who was engaged by the plaintiff in the Bear Action, nor Company R, who testified for XYZ in the appraisal Bull & Bear Actions, discovered the omission.

"Law Firm 1 considers that Doe's advice to it to employ Mr. X as an expert witness, his assistance in securing Mr. X's services and his advice on appraisal were extremely valuable to both cases, and Mr. X's testimony was crucial to the successful result in both cases. The aggregate recoveries in both cases exceeded $150 million and the aggregate attorneys' fees were $16 million, a portion of which was received by Law Firm 1. In view of this, Law Firm 1 is prepared and wants to pay Mr. Doe $100,000 so long as such a payment is permissible under the *Rules*. We believe that such a payment to Doe can be analogized to a payment for the testimony of an expert witness or other non-lawyer services rendered to lawyers in the preparation and trial of a case. In this regard, it should be noticed that Doe's assistance in securing Mr. X as an expert witness took place at a point in time after both the appraisal case and the Bull case had been filed in the Delaware Chancery Court.

"Law Firm 1 did not have any agreement with Doe to pay him for his services to the committee or for his assistance in engaging Mr. X. Nevertheless, Doe rendered a valuable service, and Law Firm 1 is willing to pay him some fee for these services. Accordingly, Law Firm 1 hereby respectfully requests the Disciplinary Committee of the Center for Professional Responsibility to render its advice as to whether Law Firm 1, consistent with the *Rules*, including, without limitation, Rule 7.2 thereof, may pay Doe the sum of $100,000 under the circumstances described in this letter."

ANSWER:

Rule 5.4 of the *Rules of Professional Conduct of the Alabama State Bar* prohibits a lawyer from splitting a legal fee with a non-lawyer, however, you may pay a non-lawyer for services rendered to the lawyer. You may not under any circumstances compensate, from any source, a non-lawyer for soliciting or referring clients to the lawyer. Consequently, it is the view of the Disciplinary Commission that no rule of professional conduct is violated if you compensate Mr. Doe for advice and assistance in obtaining a qualified appraisal expert and other services performed during the course of the litigation. You may not, however, compensate Mr. Doe for recommending that several XYZ stockholders contact your firm with a view to engaging your firm.

DISCUSSION:

Rule 5.4 of the *Rules of Professional Conduct* and its predecessor, Disciplinary Rule 3-102(A) of the *Code of Professional Responsibility*, broadly prohibit a lawyer or law firm from sharing fees with a non-lawyer. The Comment to Rule 5.4 states that:

> "The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment."

The American Bar Association Committee on Ethics and Professional Responsibility, in Informal Opinion 86-1519, April 19, 1986, stated that:

> "The rationale for this long-standing general prohibition against the sharing of fees between lawyers and non-lawyers is that the public interest is best served by assuring that clients are represented by lawyers who, as members of a regulated profession, are an arm of and subject to the courts, are committed to court-approved standards of ethics and professional conduct, are not subject to conflicting interests or divided loyalties and are protected against possible control by others in the exercise of their professional judgment." (Informal Opinion 86-1519, p.3)

Put more simply, the rule prohibits "the possibility of control by the lay person, interested in his own profit, rather than the client's fate" *Gassman v. State Bar of California*, 553 P.2d 1147, 1151 (Cal. 1976). Another purpose is to discourage laypersons from engaging in the unauthorized practice of law. The rule also clearly prevents a lawyer from agreeing to pay a non-lawyer for referring clients to the lawyer. In *Florida State Bar v. Sagrans*, 388 So.2d 1040 (Fla. 1980), a lawyer was disciplined for violating Rule 5.4 when he agreed to compensate a chiropractor for medical malpractice cases referred to him. ABA Informal Opinion 86-1519 also points out that:

> "While a lawyer may employ a non-lawyer to provide services, payment for such services may not be based on a percentage of the lawyer's fee in the matter with respect to which the non-lawyer's services are rendered. Payment on the basis of a percentage of the lawyer's fee has long been considered a sharing of fees in violation of the applicable rules. See Formal Opinion 48 (1931)." (supra at page 2)

Applying the above principles, it clearly appears that the problems at which the rule is aimed, i.e., to prevent a non-lawyer from controlling the lawyer in a way detrimental to the interest of the lawyer's client and the prevention of the unauthorized practice of law, are not here present. Consequently, it is the view of the Commission that Mr. Doe may be compensated for services rendered during and before the above-described litigation. The Commission also notes that Mr. Doe, in January 1986, recommended to several XYZ shareholders that they contact the law firm with a view to engaging the firm. Care should be exercised to ensure that no part of the compensation provided to Mr. Doe can in any way be attributed to these recommendations. [RO-1993-20] | AL

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

This update is being written in the days just after adjournment sine die of the 2013 Regular Session of the Alabama Legislature. The session was busy and, at times, contentious. While the debate over the substance of some of the legislation passed might continue on for some time, there is no doubt that a lot was done. In the final tally, 1,176 bills were filed; 304 of those bills were passed by both houses, with more than one-third passed on the final day. Of the bills that passed both houses, more than 170 dealt with a single state agency or were local in nature.

The Law Institute had a good session in both the passage of ALI bills and the services provided to the legislature. This success is due to the tremendous legislative leadership provided by our president and vice president, Senator Cam Ward and Representative Marcel Black, respectively, and the other legislative members of our executive committee: senators Arthur Orr and Rodger Smitherman and representatives Paul DeMarco, Demetrius Newton and Bill Poole.

As of the writing of this article, a number of these bills have not been acted upon yet by the governor and, therefore, do not have act numbers. There is some possibility that by the time of publication some of these might have been vetoed, but the final status of any bill listed below without an act number can be found at *http://alisondb.legislature.state.al.us*.

Alabama Law Institute Legislation

Four pieces of legislation prepared by the Alabama Law Institute were passed during the 2013 Legislative Session. My column in the September issue of *The Alabama Lawyer* will focus more in depth on these acts.

HB394 Alabama Unitrust Act (Act 2013-336)

Sponsored by Representative Chris England and Senator Tammy Irons

HB396 Alabama Uniform Collaborative Law Act (Act 2013-355)

Sponsored by Representative Marcel Black and Senator Cam Ward

HB399 UCC Article 4A Amendments (Act 2013-337)

Sponsored by Representative Demetrius Newton and Senator Jerry Fielding

HB403 Amendments to Title 10A relating to Name Reservations (Act 2013-338)

Sponsored by Representative Bill Poole and Senator Jerry Fielding

Crimes, Punishment and Imprisonment

HB1 Failure to Report a Missing Child

This bill, to be known as Caylee's Law, creates crimes relating to failure to report or making a false report regarding a missing or deceased child 18 years old or younger.

HB14 Notification of Escapes (Act 2013-305)

This act creates a notification system to get information to state and local agencies as well as the media when a prisoner escapes.

HB27 Cruelty to Animals

This bill relates to the crime of cruelty to animals by eliminating the requirement of intent and instead requires only a person act recklessly or with criminal negligence. The bill also provides for increased penalties.

HB105 Trespass on a School Bus (Act 2013-347)

This bill creates the Charles "Chuck" Poland, Jr. Act which provides that a person commits the crime of trespass on a school bus in the 1st degree if he or she is found guilty of intentionally demolishing, destroying, defacing, burning, or damaging any public school bus, or entering a school bus without a lawful purpose.

HB262 Capital Murder Mini-Trials (Act 2013-354)

This act would limit the state's requirement to prove guilt despite a guilty plea (commonly referred to as a mini-trial) to those cases in which the death penalty is sought. Previously, this was also required in cases where the penalty sought was life without parole.

HB494 Pre-Trial Diversion

This act provides a generally available enabling statute for counties to establish pre-trial diversion programs.

HB648 Municipal Pre-Trial Diversion (Act 2013-353)

This act provides a generally available enabling statute for municipalities to establish pre-trial diversion programs.

SB29 Elder Abuse (Act 2013-307)

This bill creates the crime of elder abuse for persons who intentionally abuse or neglect an elderly person physically, mentally, emotionally or financially.

SB97 Scottsboro Boys Pardons (Act 2013-81)

This act provides for the procedure for posthumous pardon of certain felony convictions committed prior to 1932. This act allows for the pardon of all convictions of the Scottsboro Boys.

SB258 Amiyah White Act (Act 2013-287)

This act provides for criminal penalties for persons who, in certain circumstances, leave a child or incapacitated person unattended in a motor vehicle and that person is injured or dies.

SB268 Disclosure Requirements (Act 2013-172)

This act protects the disclosure of personal information of persons who are criminal justice employees.

SB361 Bail Bonds (Act 2013-193)

This act amends the court cost and bail bond fee act of 2012 to improve upon its enforcement and implementation. The act further provides that the 2012 act is now permanent rather than being sunsetted in 2015.

Civil Practice

HB227 State Contingency Contracts

This act requires certain disclosures when the state enters into a contingency fee arrangement with a private attorney or firm and also caps the contingency fee that can be paid.

SB4 Foreign Laws (Act 2013-269)

This act proposes a constitutional amendment to limit the applicability of foreign laws in Alabama.

SB106 Prisoner Litigation Reform Act (Act 2013-106)

This act creates a set of policies and procedures for pro se litigation by prisoners.

Continued from page 271

SB238 Aircraft Manufacturer Litigation (Act 2013-73)

This act will shorten the statute of repose and provide additional forum non-conveniens rules for litigation against commercial aircraft manufacturers.

Elections

HB373 First-Responders Absentee Voting (Act 2013-202)

This act enables the secretary of state to allow first-responders to vote absentee by emergency rule when needed.

SB445 Fair Campaign Practices Act Amendments (Act 2013-311)

This act amends the FCPA in a number of respects. First, it makes a number of necessary technical improvements to facilitate the move to electronic reporting. Second, it unifies the threshold for all candidates to start reporting at $1,000 raised or spent. Third, it eliminates the ban on corporate contributions. Fourth, it clarifies the criminal provisions of the act and creates a civil fine scheme for technical violations. The act also makes other general improvements to the act.

Firearms

HB8 Right to Bear Arms: Strict Scrutiny (Act 2013-267)

This bill proposes an amendment to Article 1 Section 26 of the Constitution of Alabama of 1901 to provide that every citizen has a fundamental right to bear arms and that any restriction would be subject to strict scrutiny.

SB133 Mental Commitments: Gun Rights (Act 2013-290)

This act expands the reporting requirement for mental commitmentees who are ineligible to purchase firearms, so that probate judges must report if there is any evidence presented by anyone in court of a history of the inappropriate use of or threats of use of firearms or other dangerous instruments or deadly weapons or the person poses a threat use of firearm or other dangerous weapons as defined in (defined in 13A-1-2). Prior law required the testimony to be provided by a law enforcement officer. The act also provides a mechanism to have gun rights reinstated.

SB286 Firearms (Act 2013-283)

This bill is known as the omnibus gun bill and addresses a number of issues relating to firearms including:

- Requires a sheriff to issue a concealed carry permit within 30 days unless there is a lawful reason to deny it and establishes an appeal route for denials.
- Allows a person to carry an unloaded pistol in a motor vehicle without having a concealed carry permit so long as it is in a compartment or container affixed to the vehicle and is out of reach of the driver and passengers.
- Creates a rebuttable presumption that the mere carrying of a visible pistol, holstered or secured, in a public place is not disorderly conduct.
- Prohibits a public or private employer from restricting the transportation and storage of a lawfully possessed firearm in a motor vehicle while parked or operated in a public or private parking area.

Education

HB84 Alabama Accountability Act (Act 2013-64)

This act provides for a mechanism for local schools to opt out of certain state requirements and also provides for a tax credit and scholarship program for students to transfer out of failing schools. The act was discussed in more detail in my May 2013 column in *The Alabama Lawyer*.

HB658 Alabama Accountability Act Amendments (Act 2013-329)

This act tweaked the Alabama Accountability Act in several key respects. First, it clarified that schools did not have to accept students who were not zoned for them. Second, this act clarified that transportation costs for students who transfer outside of their assigned districts are borne by the parents. Third, it clarified that transfer does not affect athletic eligibility, which is still exclusively governed by the AAHSA. Fourth, the act amended the definition of a failing school so that it is in the bottom six percent rather than 10 percent in reading and mathematics.

HB91 Emergency Drills

This act requires schools to conduct emergency drills including for safety, security, fire, severe weather, and code red drills.

HB424 College Tuition

This act expands the availability of residency for in-state tuition rates and admission with respect to certain active duty military and veteran families.

SB60 Education Accountability and Intervention Act

This act specifies the procedure and authority in certain circumstances for the state board of education to intervene and exercise direct control over the operational functions of a local board of education.

SB383 School Security (Act 2013-288)

Provides that under certain circumstances school security personnel and resource officers are authorized to carry a firearm

Real Property

HB19 Disability Homestead Exemption (Act 2013-295)

This act restores the homestead exemption for disabled persons over the age of 65 without regard to income. The act also provides details on how the exemption can be applied for.

HB47 Excess Funds from Sales

This act provides that if property is redeemed, any excess funds, including interest paid, may be remitted to the tax sale purchaser.

State Government

HB89 State Employee Insurance (Act 2013-245)

This act allows the State Employee Insurance Board to offer a high deductible plan along with health savings accounts to state employees.

HB101 Administrative Procedures Act (Act 2013-88)

This act is known as the Red Tape Reduction Act and requires agencies that propose rule changes to file a business economic impact statement for the proposed rule.

SB57 Fleet Management (Act 2013-282)

This act creates the Office of Fleet Management in the Department of Transportation to manage all state vehicle acquisition, allocation and maintenance.

SB146 Nepotism (Act 2013-242)

This act will prohibit nepotism in hiring decisions in state government.

Continued from page 273

SB231 Gulf State Park (Act 2013-222)

This act creates a set of policies and procedures to study the feasibility and move forward with the development of the Gulf State Park Property in Gulf Shores.

SB340 Medicaid (Act 213-261)

This act restructures the Medicaid Agency so that it will deliver medical services through regional care organizations throughout the state.

Family Law

HB57 Abortion (Act 2013-79)

This act mandates specific physician involvement in an abortion performed in an abortion or reproductive health center and that the physician have staff privileges at an acute care hospital.

HB301 Mandatory Reporting of Child Abuse (Act 2013-201)

This act amends the mandatory reporting statute by adding that employees of public and private institutions of postsecondary and higher education as individuals who have mandatory reporting responsibilities. And further adds physical therapists as individuals who have mandatory reporting responsibilities.

SB199 Uniform Transfer to Minors Amendments (Act 2013-250)

This act amends 35-5A-8 to delete the limitation on the amount transferred to a custodian (formally $10,000). The act further amends 35-5A-8 to increase the amount transferred (when no custodian has been nominated) to allow a transfer not to exceed $50,000 to a family member of the minor or a financial institution.

SB307 Termination of Parental Rights (Act 2013-157)

This act provides the Department of Human Resources must file a petition to terminate the parental rights of a parent of a child who has been in foster care for 12 of the most recent 22 months. The act further provides that the trial on a petition for termination of parental rights must be completed within 90 days after service of process has been perfected.

Miscellaneous

HB9 Homebrew (Act 2013-204)

This act permits individuals to brew beer, cider and wine in limited amounts for personal use.

HB112 Abandoned Property (Act 2013-91)

This act allows the parent of a deceased child to claim abandoned property in the child's name. The act also implements some consumer protection requirements for services that assist consumers in claims of abandoned property.

HB249 Move-Over Act

This act provides that vehicles are to yield the right-of-way, slow down or move over for garbage, trash, refuse and recycling collection vehicles and provides for enforcement.

HB286 Alternative Nicotine Products

This act would enact a definition for "alternative nicotine product," including an electronic cigarette or other products containing nicotine that can be chewed, smoked, absorbed, dissolved, inhaled, or otherwise ingested, other than cigarettes, tobacco products, drugs, devices, or combination products, and would impose penalties for use by minors in the same manner as traditional nicotine products.

HB419 Taxation for Government Projects (Act 2013-205)

This act will allow for certain contracts to be granted certificates for the tax-free purchase of goods used in construction projects for governmental entities. | AL

2013 ALABAMA STATE BAR SECTION
A P P L I C A T I O N

JULY 1, 2013 – JUNE 30, 2014

Date of Application ____/____/____ Name (type or print legibly) _____

Bar ID Number (type or print legibly) _____

Check the section(s) you wish to join and remit amount, OR RENEW ONLINE AT *WWW.ALABAR.ORG.*

(x)	SECTION	ANNUAL DUES
	Administrative Law	$20
	Appellate Practice	$20
	Bankruptcy & Commercial Law	$20
	Business Law	$20
	Business Torts & Anti-Trust Law	$20
	Communications Law	$15
	Construction Industry Law	$15
	Disabilities Law	$20
	Dispute Resolution	$15
	Elder Law	$25
	Elections, Ethics & Governmental Relations	$15 (regular members) $10 (practicing less than 5 years) $0 (government sector employee)
	Environmental Law	$20
	Family Law	$50
	Federal Court Practice Section	$20

(x)	SECTION	ANNUAL DUES
	Health Law	$15
	Intellectual Prop., Entertainment/Sports	$20
	International Law	$30
	Labor & Employment Law	$10 (practicing less than 5 years) $30 (practicing more than 5 years)
	Leadership Forum	$30
	Litigation Section	$15
	Oil, Gas & Mineral Law	$15 (65 yrs. older-no charge)
	Real Property, Probate & Trust	$10
	Senior Lawyers' Section	$25 (55 yrs. and older)
	Taxation Section	$30
	Women's Section	$20
	Workers' Compensation Law	$30
	Young Lawyers' Section	$0 (36 years and younger; or have been admitted to the barfor three years or less)

Return entire application with payment to:
Alabama State Bar, Attention: Sections c/o Mary Frances Garner, P.O. Box 671, Montgomery, Al 36101-0671

PLEASE READ CAREFULLY BEFORE REMITTING PAYMENT OR RENEW ONLINE AT *WWW.ALABAR.ORG*

- Checks should be **made payable to Alabama State Bar**, and not to the section.
- Use only one form per attorney. If a firm or business is paying for multiple attorneys, one form for each attorney must be returned with a single check.
- For individual attorneys submitting forms, payments for membership in more than one section may be combined on one check.
- Payment of section dues is due upon receipt of this application with payment included.
- This is the only notice you will receive. You must complete this section application for membership and pay your 2013-2014 section dues to join any section of the Alabama State Bar.
- This form may be downloaded at *www.alabar.org*, click under Members drop down box, select Sections and click on each individual section you would like to join or renew.
- A $30.00 fee will be charged for all returned checks.
- No refunds will be issued once checks are received at the Alabama State Bar.
- For those sections whose finances are **not** managed by the Alabama State Bar, the State Bar will send yearly to the section treasurer all dues received during July 1, 2013-June 30, 2014. Annual checks will be mailed week of October 15, 2013 as the State Bar begins its new fiscal year October 1st.
- Dues will **not** be prorated during 2013-2014 Section year. However, attorneys may join a section anytime during July 1, 2013- June 30, 2014 by completing this form and sending the entire annual payment.
- **Regardless of prior membership in or prior payment of dues to any section**, a new 2013-2014 membership database has been constructed at the Alabama State Bar Office in Montgomery for each section based upon current applications received and invoices paid.
- There is no charge to join the Young Lawyers Section which is open to all attorneys, ages 36 and under. The Young Lawyers Section of the Alabama State Bar is composed of all lawyers who are 36 years of age and under or who have been admitted to the bar for three years or less. If you are in this category, you will automatically be enrolled in the Young Lawyers Section at no charge. These are pulled each year and posted to State Bar members' database.
- The fiscal year for all sections is July 1 – June 30.

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

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

About Members
This section announces the opening of new solo firms.

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

About Members

Randall B. James announces the dissolution of **James & Pittman PC** and the opening of **Randall B. James PC**.

Arthur Leslie announces the opening of **Arthur Leslie Attorney at Law LLC**, with offices at 4240 Carmichael Rd., Ste. C, Montgomery 36106. Phone (334) 356-0699.

Allison O'Neal Skinner announces the opening of **Skinner Neutral Services LLC** at 1603 Richard Arrington Jr. Blvd., S., Birmingham 35205. Phone (205) 202-6050.

Among Firms

Armbrecht Jackson LLP announces that **Brandon D. Hughey** and **Mark B. Roberts** have been named partners.

Baker Donelson announces that **Joe W. Campbell** has joined as a shareholder and will maintain his office in Huntsville and that **Bill D. Bensinger** has joined as a shareholder in the Birmingham office.

Beckum Kittle LLP announces that **Mallory N. Beaton** has joined as an associate.

Burr & Forman LLP announces that **Matthew T. Scully** has joined as an associate in the Birmingham office.

Eyster Key Tubb Roth Middleton & Adams of Decatur announces that **Kenneth B. Cole, Jr.** has joined the firm and **Ta'Kisha Guster** has joined as an associate.

The Foundation for Moral Law, Inc. in Montgomery announces that **Joshua M. Pendergrass** has been named executive director and chief counsel.

Frohsin & Barger LLC announces that **Carrie M. Motes** has joined as an associate.

Gaines, Gault, Hendrix PC announces that **Lee H. Stewart** has joined as a partner and **J. Ross Massey** and **Todd Buchanan** have joined as associates, all in the Birmingham office.

Hale Sides LLC announces that **Catherine Glaze** has joined as an associate in the Birmingham office.

Hall, Conerly, & Bolvig PC announces that **Brandon J. Clapp** has joined as an associate.

Hollis, Wright & Couch PC is now **Hollis, Wright, Clay & Vail PC**. **C. Carter Clay** has joined as a partner and **Tyler C. Vail** has become a partner.

Johnston Barton Proctor & Rose LLP announces that **Austin A. Averitt** has joined the firm.

Doug Jones, Gregory H. Hawley and **Christopher J. Nicholson** announce the formation of **Jones & Hawley PC** at 2001 Park Place N., Ste. 830, Birmingham 35203. Phone (205) 490-2290.

The **McMath Law Firm PC** of Jasper announces that **Jason Overton** and **Tim Allen** have joined the firm.

Morris & Brumlow PC announces that **Ryan A. Carroll** has joined as an associate.

Morris, Cary, Andrews, Talmadge & Driggers LLC of Dothan and Montgomery announces that **Clinton C. Carter** has joined as of counsel and **William S. Morris** has joined as a new associate.

Porterfield, Harper, Mills, Motlow & Ireland PA announces that **M. Jeremy Dotson** has joined the firm.

The Ryder Law Firm PC of Huntsville announces that **Sarah E. Bryan** has joined as an associate.

Sirote & Permutt PC announces that **Marcus M. Maples** and **Kelli F. Robinson** have become shareholders and will practice in the Birmingham office.

Starnes Davis Florie LLP announces that **Jack St. John** has joined as an associate.

Stephens Millirons PC announces that **Kristy D. Shelton** has joined as an associate.

Tanner & Guin LLC announces that **Brooke M. Nixon** has become a member of the firm.

Waldrep Stewart & Kendrick LLC announces that **April B. Danielson** and **Kelvin W. Howard** have joined as associates.

White Arnold & Dowd PC and **Stockham & Stockham PC** announce they have merged and will be known as **White Arnold & Dowd PC**.

Williams, Elliott & Edwards announces that **Benjamin Cohn,** former law clerk to the Honorable Annetta H. Verin, has joined the firm.

Wolfe, Jones, Conchin, Wolfe, Hancock & Daniel LLC announces that **R. Dale Bryant** has recently joined as an associate. | AL

The International Academy of Trial Lawyers announces that Birmingham attorney **LaBella S. Alvis** was recently inducted as a Fellow. Alvis practices with Christian & Small.

Clarence Small, LaBella Alvis and 2012 IATL President Patrick McGroder

The Alabama Fellows of the American College of Trial Lawyers announce that **Stephen Shay Samples**, with Hare, Wynn, Newell & Newton LLP, has been inducted into the fellowship.

O. Tameka Wren, a litigation attorney with Wiggins Law Firm in Birmingham, is the 2013 President of the Magic City Bar Association and chair-elect of the Women Lawyers' Section of the Birmingham Bar Association. | AL

Wren


free•dom:
noun
the power to determine action without restraint.
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