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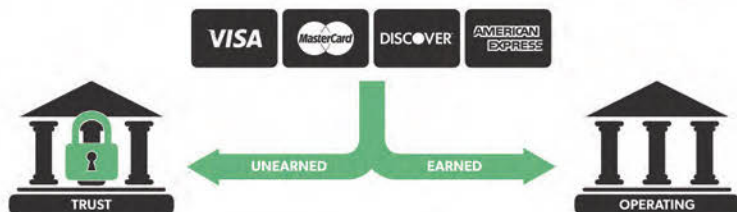


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On The Cover


One of the many wonderful water features at Jim Scott's garden, Lake Martin, AL. Taken April 27; Canon 7D Mark II camera with Sigma 50-500mm lens at 50mm, f/18 .4 sec -Photo by Dolan L. Trout, ASB director of information technology

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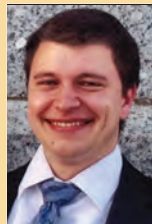
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ARTICLE SUBMISSION REQUIREMENTS

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

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

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

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





Richard J.R. Raleigh, Jr.

rraleigh@wilmerlee.com

Profession in Transition

This has been an exciting year as president, one which is quickly coming to a close for me. The focus of my term as president has been helping Alabama lawyers deal with the flood of changes in the legal profession. Of course, it is no secret that the legal profession has been experiencing change, both before and after the recent recession. Some of the change is driven by the economy itself, some is technology-driven, some is client-driven and some is driven by the changing demographics in our profession.

Frederic S. Ury, who spoke to several classes of the Alabama State Bar Leadership Forum, said, "The time is now for leaders in the legal profession to join the dialogue on—and thus be able to influence—how legal services will be delivered over the next five to 10 years, and what roles lawyers, judges and the courts will play in the delivery of those services. All signs point to a need for bold action by the bar and its members to stake a claim in the new global economy of fading borders where technology equals power."¹ As Yogi Berra said, "The future ain't what it used to be." Lawyers and the organized bar need to think about and approach the practice of law differently. I am very optimistic and excited about the opportunities for lawyers in this ever-changing landscape,

but one has to seize opportunities, and complacency is deadly.

"Today's lawyers face daunting challenges with the advent of new technologies resulting in increased access to information, standardization of services and pressure from clients to deliver routine services more cost-effectively. The real competition for the solo practitioner, who survived on real estate transactions and family estate work, is now LegalZoom and other one-stop, online, DIY services."² Of course, there has been, and will continue to be, disruption in our profession, but change is opportunity.

In the legal marketplace, managing transition means helping lawyers make that difficult process less painful and disruptive. Research indicates that organizations that prize interdependence and mutual responsibility among the generations are better prepared to help individuals, young and old, through periods of transition. Bar associations like ours should help lawyers transition through every stage of development—from starting out in their practice, to becoming established, through transitions and changes of practice areas and types of positions, and to retirement. We need to work with our members to rethink past patterns of success, embrace new behaviors and

reconfigure old patterns. Every bar association and every lawyer reach these critical transitional points that require fundamental changes. I believe our profession and the Alabama State Bar are at such a crossroad.

The Numbers

Our bar is getting older. Since 2000, the number of Alabama lawyers over 60 has increased a great deal. In 2000, we had 1,611 Alabama lawyers over 60, and now we have 5,047, an increase of 3,436. The 60-70 demographic increased 293.52 percent from 2000 to 2015. And, we had a 104.81 percent increase in lawyers 70 and over from 2000 to 2015. Baby boomers, who make up the majority of our bar, likely will be exiting the profession over the next 10 to 15 years.

At the same time, we have had a reduction in younger lawyers. Attorneys 34 and younger make up only 14.8 percent of our membership, a drop from 21.08 percent in 2000. Since 2000, the number of lawyers 30 and under in our bar



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went from 1,583 to 1,534, a decrease of 3.09 percent. Law school applications for fall 2014 were down 37 percent since 2010, and that first-year class was set to be the smallest in 40 years, according to an *ABA Journal* article



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that came out in July 2014, when I was beginning my presidency. In 2010, 52,488 started law school, and in 2014, 38,000 were slated to enter.

These numbers signal some great opportunity for younger lawyers, and they also alert us that the bar needs to be thinking about services to assist both younger and older lawyers in transitions they will face. In firms, baby boomers need the involvement of millennials to transition clients in the years leading up to retirement, and millennials need access to boomers to refine their lawyering skills and integrate themselves into knowledge communities. Our bar needs to integrate our new lawyers and find opportunities for more seasoned ones to meet with younger lawyers. The bar should offer senior lawyers new growth opportunities—and this process should benefit the broader legal community in many other ways.

Helping Alabama Lawyers

We have focused on “Lawyers in Transition” this year, including helping new lawyers as they transition from law school to the practice of law; assisting lawyers returning to practice after time off from the full-time practice of law; providing advice to lawyers transitioning from private practice to in-house practice or vice versa; supporting veterans (military lawyers exiting active duty and entering private practice); and providing guidance to lawyers transitioning from practice to retirement.

New sections have been created to address lawyers’ needs: the Solo & Small Firm Section, the In-House & Governmental Lawyers Section and the Government Contracts Section. And, our annual meeting will include more “Back to the Basics” CLEs. We continue to look at ways to support our members, and the bar appreciates your input.

Special Thanks

As this is my last “President’s Page,” I extend my thanks those who have supported me this year. I appreciate very much the support of my wonderful wife, Shannon, and the support of my firm, Wilmer & Lee. Thanks also to my terrific Executive Council, to General Counsel Tony McLain and to Executive Director Keith Norman for all your excellent advice and counsel. Many thanks also for the support and friendship of the Board of Bar Commissioners and the Leadership Forum Alumni Section. Finally, thank you very much to the fine staff of the Alabama State Bar, who all took really good care of me and made me feel like one of the team. | AL

Endnotes

1. ABA Standing Committee on Professionalism, Center for Professional Responsibility, *The Relevant Lawyer: Reimagining the Future of the Legal Profession*, at ch. 1, p. 5.
2. *The rise of the laptop lawyer? Senior members, lonely bowlers, and a way forward*, vol. 39, by Stephen P. Gallagher.

Court Funding Update

By Richard Raleigh

Court Funding and the State Budget

Most states’ court budgets make up a minute percentage of their overall state budgets, and generally range from one to three percent. The same is true for Alabama. Not a single state in America spends more than four percent of its annual budget on the judiciary. In 2013, only two percent of the Unified Judicial System budget came from general revenues in the general fund—increasingly users of the courts, through court costs and fees, are being asked to pay for the judicial system themselves. As the authors of DRI’s “Economics of Justice” study point out, “The sad reality facing America is that many of our state court systems are so poorly funded that they are at a tipping point of dysfunction.”¹

Alabama has limited resources, but the Judicial Branch needs to be adequately funded to ensure access to justice for all Alabama businesses and citizens. Courts do not have optional programs. They can’t trim their budgets without rationing court services. The overall trend in judicial funding in the United States since 2008 has been flat or declining funding.

Between 2009 and 2012, more than 40 percent of states reported budget cuts for the judicial branch, 34 percent reported layoffs or furloughs, 28 percent reported increased case backlogs and 23 percent reported reduced court operating hours. Alabama has been no different. Throughout a number of budget cycles, Alabama courts have made difficult operational decisions, and they have implemented a number of innovative solutions, which made the system more efficient. And, the courts collect and contribute to the general fund many millions of dollars each year through court costs and fees. However, the budget presently proposed by the house includes cuts of more than 15 percent in funding over the prior year. Past decreases in funding and the necessary layoffs of personnel have caused courts to be closed and trials to be delayed. Further cuts are likely to cause additional personnel layoffs that will have a significant impact on important operations, which will inevitably result in delays for litigants.

It seems clear at this point that the legislature is headed to a special session to deal with the state budget. If you are asked about the state budget or court funding, please explain how fully and adequately funding our courts is vitally important. We understand that Alabama’s state courts resolve the vast majority of civil, domestic and criminal conflicts in our state. We need to help others understand that courts are needed to resolve disputes in an orderly way, which provides for the stability necessary for economic growth. | AL

Endnote

1. Eric J. Magnuson, Steven M. Puiszis, Lisa M. Agrimonti, and Nicole S. Frank, “Economics of Justice,” DRI, July 17, 2014, <http://www.dri.org/Article/134>.]



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*Council for Disability Awareness, Long Term Disability Claims Review, 2012.

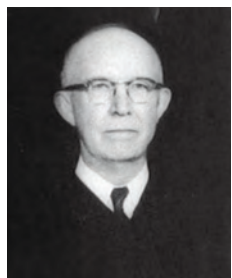
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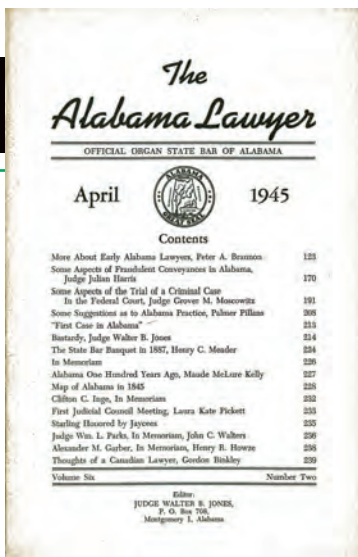


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The Alabama Lawyer Celebrates Its Diamond Jubilee

For 75 years, *The Alabama Lawyer* has been a fixture of the Alabama State Bar and our legal profession. The preface of the first issue published in 1940 introduced the new quarterly publication and stated that it hoped to bring "from the pens of able and experienced practitioners, and thoughtful members of the judiciary, legal articles of practical and permanent value to the profession." This principle has been the polestar that has guided the publication from the very beginning to the present. In the first president's column appearing in the *Lawyer*, **Richard T. Rives** opined that the new publication would serve as "a useful channel of communication among the lawyers of our State as well as a journal of educational value, and a source of much pleasant reading and reflection."

The Alabama Lawyer is one of the oldest, continuously-published state bar journals in the country. We have been fortunate all these years to have truly dedicated individuals serve as the publication's editors. Since 1940, the *Lawyer* has had five permanent editors and one interim. **Judge Walter B. Jones** served as editor from 1940 until his death in August 1963. The bar's executive director at the time, **Judge John B. Scott**, served as acting editor until **Richard W. Neal**, the newly-appointed clerk of the Alabama Supreme Court, became the editor, prior to the publication of the January 1964 issue. Dick served until his untimely death in May 1967. Judge Scott again served as acting editor for one issue—July 1967—until **J.O. Sentell** was named editor. He also followed Neal as clerk of the Alabama Supreme Court.



From October 1967 until October 1982, *The Alabama Lawyer* continued as a quarterly publication under the direction of J.O. Sentell. Upon his retirement from the supreme court at the end of 1982, J.O. also stepped down as editor of the *Lawyer*. *The Alabama Lawyer* remained largely unchanged until the 1983 issue. Starting with the January 1983 issue, publication frequency increased from four to six times a year. Also, the format changed from the law review journal style to a more appealing magazine format. Additional changes were made to make the *Lawyer* more readable and a “more effective tool for communication with bar members.”

The changes made to *The Alabama Lawyer* came about as a result of the recommendations of a committee chaired by **Mark White** of Birmingham, who would later serve as state bar president. One suggestion was the hiring of a full-time publications director. **Jen Nowell** was hired and served as publications director for two years. She was followed by Margaret Murphy, who serves as publications director of the Alabama State Bar. **Robert A. Huffaker** of Montgomery was appointed editor of the reformatted publication and served with distinction until his death in September 2010. Current editor **Gregory H. Hawley** of Birmingham followed Robert in early 2011 and has served admirably in the tradition of his four predecessors.



For 75 years, *The Alabama Lawyer* has provided lawyers with important information about the profession and served as a ready source of well-written articles to help lawyers improve their professional skills. Even in today's digital age, with means of communication barely imaginable only a few years ago, much less 75 years ago, *The Alabama Lawyer* has continued to thrive and flourish on new digital platforms. All issues since 1983 are archived on the bar's website and may be accessed by computer or mobile device. Likewise, issues back to 2006 (so far), are located on Casemaker and can be searched for relevant information using the powerful Casemaker search engine. *The Alabama Lawyer* continues to be relevant and accessible to Alabama lawyers regardless of the platform a member prefers.

The body of legal information over the past 75 years appearing on the pages of the *Lawyer* is staggering. Although much of the early information may lack educational value for the practicing lawyer today, it still serves as a record of historical significance, recording the changing jurisprudence and legal scholarship over the years. In my mind, though, the pages of *The Alabama Lawyer* serve as a tribute to the hundreds of lawyers who have voluntarily written articles, sharing their knowledge with fellow lawyers and thereby improving the profession. | [AL](#)



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Amendment of Alabama Rules of Appellate Procedure



Amendment of Alabama Rules of Appellate Procedure

In three separate orders, the Alabama Supreme Court has amended Rules 3(d)(1), 11(c), 39(d)(4) and 57(j)(1); Rules 22, 28(a)(5), 32(a)(7) and 40(f); and Rule 21(a)(1)(E), *Alabama Rules of Appellate Procedure*. The amendment of these rules is effective August 1, 2015. The order amending Rules 3(d)(1), 11(c), 39(d)(4) and 57(j)(1); the order amending Rules 22, 28(a)(5), 32(a)(7) and 40(f); and the order amending Rule 21(a)(1)(E) appear in an advance sheet of *Southern Reporter* dated on or about May 21, 2015. The amendment to Rule 11(c) provides that the clerk of the trial court shall notify the parties to an appeal of any extension granted for completion of the record. The amendment to Rule 21(a)(1)(E) provides that copies of any order, opinion or parts of the record included with a petition filed pursuant to Rule 21 be in the form of an appendix to the petition and that each document in the appendix be separated by a tab or divider. The amendment to Rule 28(a)(5) provides that in civil cases the brief on appeal shall identify the adverse ruling or rulings being appealed and asserted as error, with a citation to the page in the record at which the ruling can be found. The amendment to Rule 39(d)(4) provides that a petitioner for a writ of certiorari include with the petition a copy of the court of appeals' rehearing order or notice of rehearing, if an application for rehearing was filed in the lower appellate court. The other amendments are primarily of a housekeeping nature, e.g., the amendment to Rule 22 updates an outdated citation to the *Code of Alabama* 1975 and the amendment to Rule 32(a)(7) clarifies that the footnotes in appellate briefs should, like the text of the brief, be in Courier New 13 font. The text of these rules can be found at <http://www.judicial.state.al.us>, "Quick links–Rule changes." | [AL](#)

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The Criminalization Of America

By William N. Clark and Artem M. Joukov

When our country began there were three federal crimes: **treason, counterfeiting and piracy on the high seas.**¹

By 1982, when a Justice Department task force attempted to calculate the number of crimes in the federal code, there were approximately 3,000.² The word “approximately” is not used by mistake: the Justice Department could only come up with an estimate rather than the exact number even after two years of intensive legal research.³ Today it is reasonable to estimate that there are more than 4,500 federal crimes accompanied by 300,000 regulations that can be enforced with criminal sanctions.⁴ As a Louisiana State University Law Professor John Baker stated, “There is no one in the United States over the age of 18 who cannot be indicted for some federal crime.”⁵

Many of these federal crimes are referred to as “white collar crimes.” In essence, that term has been used to describe economic or business crimes whether committed by organizations or

their officers or employees. The pervasiveness of these criminal regulations against companies is untraditional and has increased the involvement of government in corporate activities which had not previously drawn the eye of concerned government officials, the public or anyone else save the parties involved. The concern has not brought with it an improvement of business conduct on the part of corporations, but rather the imprisonment of nonviolent people for acts that could have been resolved without burdening the federal prison system with another inmate and without removing an otherwise productive person from the ranks of society.

What has occurred in recent years has been an increasing tendency of the federal government, in particular, and the state governments to a lesser extent, to make conduct that once would have been of no consequence or treated as a civil or administrative matter to be treated as criminal conduct. In addition to this criminalization of conduct, there has also been an increase in the federalization of crime, i.e., the federal government expanding its

control into areas traditionally reserved to the states. This creates a great deal of overlapping statutes and regulations that effectively operate as a web, entrapping unwary people who might have good intentions but nevertheless find themselves violating one of a thousand laws of which they may have never heard. In a *Wall Street Journal* article a questionnaire was printed listing 25 common offenses. Most people interviewed for the article had indicated they had committed eight or more of the crimes. An Episcopal priest in Houston who admitted to having broken 12 laws on the chart said, “There are so many things legally one can get in trouble for breaking, it would be difficult not to be a lawbreaker in our society.” The priest said that presumably because it has become increasingly difficult to keep track of what laws are enacted, which have been repealed and which might be enacted in the next week, month or year. And that is precisely the point: in a society that generally holds that ignorance of the law is no excuse, the number of laws should not be so unreasonably high that a person could not help but be ignorant of them.⁶

The number of laws, particularly ones targeted at corporations, has not always been so high. Even if the laws were in the books, they were not necessarily enforced with such vigor that they yielded strange convictions against people who were probably never the targets of the enforcement provisions to start with. The expansion of the legal web and of federal enforcement practices began sometime in the 1980s. For example, prior to 1983, no major defense contractor had been convicted of procurement fraud.⁷ From 1983 to 1990, 20 of the largest 100 had been convicted.⁸ Recent data shows that between 2001 and 2011, the Department of Defense charged 54 companies with “fraudulent practices.”⁹

The expansion of the scope of criminal law has not been limited to corporations and fraud allegations. The highest appellate court of New York, the New York Court of Appeals, ruled in 1990 that state prosecutors could file criminal charges, including murder and assault charges, against employers for injuries to their employees at work.¹⁰ An article in *The New York Times* noted a growing tendency at that time around the country to prosecute crimes in the workplace.¹¹ Under OSHA, an employer can be held criminally liable for willful violations of OSHA rules that result in an employee’s death.¹²

Similar developments have occurred in the field of environmental criminal law. In 1985, there were 40 indictments and 37 pleas of guilty for environmental crimes.¹³ Four years later, there

This creates a great deal of overlapping statutes and regulations that effectively operate as a web, entrapping unwary people who might have good intentions but nevertheless find themselves violating one of a thousand laws of which they may have never heard.

were more than 100 indictments and an equally large number of pleas and convictions including Ashland Oil Company, Texaco, Inc. and Ocean Spray Cranberries.¹⁴ The Justice Department website states: “From October 1, 1998 through June 30, 2013, [the Environmental Crime Section (ECS)] concluded criminal cases against more than 1,005 individuals and 373 corporate defendants, leading to 729 years of incarceration and \$743 million in criminal fines and restitution (852 years with incarceration, halfway house and home detention).”¹⁵ One publication listed the top 100 corporate criminal corporations of the 1990s.¹⁶ Included were such national and international companies as Exxon, Pfizer, Rockwell, Royal Carmike Cinemas, Teledyne and GE, which paid fines varying from \$9.5 million to \$125 million.¹⁷ Should the threat of criminal prosecution as well as criminal prosecutors be allowed to control corporate conduct when civil

penalties seemed to serve this function effectively in the past?

Even the field of healthcare law has not escaped the rise of federal laws and regulations.¹⁸ With the passage of the Affordable Care Act came not only the possibility of additional criminal charges filed by crafty prosecutors, but also the lessened burden of proof that would ordinarily deter these prosecutors.¹⁹ Without restating many of the arguments made in an earlier article,²⁰ I can summarize the effect of the Affordable Care Act on criminal law as follows: it removed or greatly reduced the burden on the prosecution to produce evidence of *mens rea* or criminal intent in healthcare fraud cases.²¹ This, in turn, exposes more innocent citizens to serious criminal liability even when they act with nothing but good intentions and without any awareness that they are doing anything illegal.²² Is that really in the best interest of our society?

The federal government’s answer to that question thus far has been a resounding “yes!” In order to pursue all of these new targets, every federal agency increased the size of its enforcement office.²³ In addition to the FBI, the Postal Service, Custom Service, IRS, Department of Agriculture, Department of Defense, etc. have increased their enforcement offices.²⁴ The Defense Department Inspector General’s office went from two to three dozen people in the mid-80s to more than 1,400 people in the mid-90s.²⁵ Each major agency now has an Inspector General’s office which has both civil and criminal investigative power. This dual power is a shift from the former practice of keeping a clear line between civil and criminal agents, as in revenue and special agents of the IRS.

The Cost of a Bloated Criminal Code

The effect of this phenomenon has been to not only increase the costs of government but also to increase the costs of doing business for the private sector and to add layers of management and internal controls at every level necessary to cope with criminal investigations. We have come a long way from William Blackstone, the English legal scholar whose writings were the foundation of English Law when our Constitution was written. He wrote that a corporation could not commit a crime in its corporate capacity.²⁶ He believed that the criminal law was not made for businesses but for individuals.²⁷ The Federal Corporate Sentencing Guidelines established in 1987 make clear that Blackstone has been overruled.²⁸ The Guidelines outline a compliance program that corporations are expected to follow.²⁹

There are currently 4,500 criminal statutes and more than 300,000 federal regulations that can be enforced with criminal sanctions.³⁰ Amongst these are some statutes that are surprising not only because of the conduct they criminalize but also because

of the penalty they carry. For example, 18 U.S.C.A. § 607 (2014), prohibits the solicitation of donations in buildings where federal officers are employed. The offense is punishable by up to three years in prison and a fine of up to \$5,000.³¹ Presumably, the statute applies even to large office buildings where any one office might be occupied by a single federal employee (and perhaps even when the solicitor does not know this fact). Another statute, 21 U.S.C. § 331 (2014), forbids the sale of margarine unless it is marked as such or is cut in a triangular shape. What is the punishment for disobedience? Up to a year in prison for the first offense and up to three years for the second.³² How can a citizen or even a corporation keep up with all of these obscure rules? To be aware of these regulations might require hiring several lawyers just to be sure you are in compliance with all of the statutes and regulations in the federal code.

It has been suggested that a corporation should look at its history to decide where to focus its energies. Logically, if the corporation does business with the Defense Department, it should be concerned with Federal Procurement Laws. However, given the pervasive nature of criminal prosecutions that advice might be said to be “for the birds.” The case of *United States v. FMC Corp.*³³ is illustrative. FMC produces pesticides.³⁴ It is a sophisticated



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company, and its leaders and managers, if not the day-to-day staff, know the ins and outs of the law as it pertains to pollution.³⁵ However, its management apparently did not have much experience in the *Migratory Bird Treaty Act*.³⁶

FMC had a pond on its property, somewhat like the ponds around some corporate headquarters in Alabama.³⁷ From time to time, migratory birds stopped at the pond.³⁸ Unfortunately, the pond contained chemicals which the government said were unhealthy for birds.³⁹ FMC put out security guards and took other measures, such as using loud cannons, to try to keep the birds from landing.⁴⁰ To FMC's dismay, the cannons could not continue to be used because the noise disturbed the neighbors and the security guards had a tendency to snooze.⁴¹ FMC finally found out the source of the problem with the pond: undecomposed pesticides had been unwittingly dumped into the pond because of certain equipment malfunctions.⁴²

The government disregarded FMC's cannons, guards and other things which would indicate to a reasonable person FMC was acting in good faith, and obtained a criminal indictment for violation of the *Migratory Bird Treaty Act*.⁴³ Government prosecutors had no evidence of any actual intent but relied upon the admissions of maintenance employees and sleepy guards who failed to keep away the birds.⁴⁴ According to the Government, these facts, coupled with a claimed lack of interest of the corporate executives, constituted a criminal corporate intent.⁴⁵ The company was adjudged guilty of a felony and paid a \$500 fine.⁴⁶ One might question the cost benefit ratio of a trial that eventually yielded \$500 in fines and prosecuted people who were trying to run a business while going through formidable efforts to protect the environment.

The Supreme Court of the United States recently heard argument in a case where a fisherman was indicted on charges which carried a potential 20-year sentence for the egregious offense of throwing three fish into the Gulf of Mexico.⁴⁷ The case went before the Court on writ of certiorari to the Eleventh Circuit.⁴⁸ That circuit upheld a verdict that resulted in a 30-day imprisonment for John Yates, the captain of *Miss Katie*, who threw three fish back into the water after federal agents boarded the ship and concluded that the grouper were a few inches short of the required length that would permit their capture.⁴⁹ The reason that throwing the fish back into the water after a visit from federal agents can result in prolonged imprisonment of up to 20 years, a fate Yates fortunately escaped, is because it allegedly violated the *Sarbanes-Oxley Act*.⁵⁰ That act, passed in the wake of the Enron scandal, was likely intended to prevent what the executives at Enron did once they saw the writing on the wall: rampantly destroying papers, emails and computer files once corporate criminal sanctions were imminent.⁵¹ One would have to be a wary fisherman indeed to be on notice that throwing fish overboard violates the *Sarbanes-Oxley Act* just as much as burning incriminating letters or taking a sledge hammer to a hard drive filled with incriminating files. As Justice Kennedy put it during the oral arguments in this case: "Perhaps Congress should have called this the Sarbanes-Oxley-Grouper Act."⁵²

Yates was found guilty as charged: a jury of his peers so found after a crew member testified that Yates ordered him to throw the three grouper overboard.⁵³ During the oral argument before the Supreme Court in the *Yates* case, several of the justices seemed to indicate their displeasure with the prosecution. As Chief Justice Roberts commented during oral argument for this case, "You [the prosecutor] make [Yates] sound like a mob boss or something."⁵⁴ Perhaps Justice Scalia articulated the sentiment of the Court best by asking, "What kind of a mad prosecutor would try to send this guy up for twenty years?"⁵⁵ Accordingly, the Court reversed the Eleventh Circuit, stating that the *Sarbanes-Oxley Act* simply could not be construed to apply to the destruction of fish.⁵⁶

Unfortunately, Yates's close brush with a prolonged prison sentence is not such a novel development in modern American law. There is evidence that government agents and lawyers have been finding new ways to imprison people for acts that hardly justify a prison sentence. A former acting associate enforcement counsel of the EPA in an interview in the mid-90s said, "It has become a 'priority' to send wetlands violators to jail—even small landowners who may not fully understand the requirements."⁵⁷ Many examples are startling.

A 58-year-old Hungarian immigrant bought a 14-acre dump near his house in Morrisville, Pennsylvania, and put some clean fill on five acres to build a small truck repair garage.⁵⁸ He was put in jail for three years, fined over \$200,000 and ordered to return the land to its original condition.⁵⁹ The man earned about \$20,000 per year and had a negative net worth.⁶⁰ He claimed he had been told by the state before he bought the land that he would not need a permit to put a clean fill on it.⁶¹ The land was not on the National Wetland Inventory Map, and there was a serious dispute as to whether it had any connection to navigable waters.⁶² Nevertheless, the federal government pursued him and attained a conviction.⁶³

Another example involved a father and son putting clean dirt on a one-quarter acre water-front plot in Escambia Bay, Florida to prepare the land for construction of a home for their use.⁶⁴ They were sentenced to 21 months in jail followed by one year of supervised release, fined \$5,000 and required to restore the land to its prior state.⁶⁵ The judge in the case noted that the property did not particularly look like a wetland, since it "had no standing water on it, nor did it appear to be a marsh, swamp or bog."⁶⁶ The judge stated, though, that "this court must apply the law as it is exists," even if it seems contrary to "simple logic and common sense."⁶⁷

Perhaps the most egregious example of unwary citizens being convicted under obscure laws is a case in 2000 where four Americans were convicted of improper lobster importation.⁶⁸ In that case, there was not even a direct violation of American law: the defendants imported lobster tails in plastic bags instead of cardboard boxes as required by a regulation of Honduras.⁶⁹ However, under the *Lacey Act*, they were breaking an American law by not abiding by foreign rules about fishing and hunting, *even though the regulation was no longer being enforced by Honduras itself*.⁷⁰ What was the penalty for such an easily-overlooked transgression? *Eight years apiece for three of the four defendants*.⁷¹

The Justification

Some may defend these stiff punishments on the ground that some of the acts criminalized by the statutes discussed are very difficult to detect. After all, whether a person has thrown illegally caught fish overboard or has shipped lobster in a plastic bag instead of a cardboard box may be hard to discover for federal agents. Thus, the government's argument seems to be that because the threat of discovery is low and does not serve as a deterrent for this sort of activity, criminal charges and long sentences are properly imposed to add to the deterrence factor. Such sentences, the government argues, offset the low chance of discovery with the threat of high punishment if the unlikely discovery occurs.

Proposed Changes in Federal Criminal Law Policy

Deterrence and other justifications for criminal punishment aside, though, there is a graver danger lurking here that the Eighth Amendment was supposed to prevent: cruel and unusual punishment. By raising the stakes of conviction for crimes in order to deter their commission, the government necessarily punishes the people it catches disproportionately to what they may actually deserve. The person convicted is, in effect, bearing the weight of the sins of others without having committed them. While that is something that rings reminiscent of the New Testament, it is not something that our justice system should impose upon the people it imprisons, often for acts that they never knew were crimes.

When it comes to the prosecution of corporations or their executives, the average corporation or corporate executive, and sometimes even their corporate lawyers, cannot imagine the lengths to which creative prosecutors can extend federal criminal law. The honest, law-abiding but unwary CEO can suddenly find himself or herself caught up in our criminal justice system, because most do not realize the vast scope of some federal criminal statutes. How can a law have any deterrent or rehabilitative effect if its application is unknown to those it is supposed to deter?

For example, an allegation of fraud in a contract action can transform an ordinary state law claim into a federal racketeering, mail fraud or wire fraud charge. The government often investigates

Thus, the government's argument seems to be that because the **threat of discovery is low and does not serve as a deterrent for this sort of activity, criminal charges and long sentences are properly imposed to add to the deterrence factor.**

conduct and cannot find any specific violation of a regulation or criminal statute, but, unwilling to abandon what appears to have a smell of fraud, they often turn to the ubiquitous mail fraud statute.⁷² The essence of the elements of this offense is a scheme to defraud and use of the mails.⁷³ What constitutes fraud is as broad as the prosecutor's imagination. The use of the mails is the means by which the court gets federal jurisdiction. Almost any use for any purpose at any point in the transaction will allow the court to find federal jurisdiction.

In recent years, the federal government has used allegations of bribery by state or local officials where a certain federal threshold is involved to charge a federal offense under 18 U.S.C.A. § 666 (2015). Section 666 is a variation of 18 U.S.C.A. § 201 (2014), which is

the federal bribery statute where federal officials are involved. Certainly, Section 201 has its place, and the United States Supreme Court in *United States v. Sun Diamond*, 526 U.S. 398, 404 (1999) held that proof of a specific *quid pro quo* is required. However, the federal courts are split over whether § 666 includes the requirement for a "specific *quid pro quo*." The Eleventh Circuit has held it does not. See *United States v. McNair*, 605 F.3d 1152 (11th Cir. 2010). Several other circuits have taken a contrary position. See, e.g., *United States v. Jennings*, 605 F.3d 1152 (4th Cir. 1998); *United States v. Ganim*, 510 F.3d 134 (2nd Cir. 1993). As argued in the *McNair* case, without the requirement of a specific *quid pro quo*, the government is permitted to essentially rely on the catch phrase "*post hoc, ergo propter hoc*," "after this because of this," i.e., if a contractor has a friend of many years in some state position, and the contractor allows his workers to assist the official with a project at his home and then the contractor later gets business from the government entity he may be found guilty, without any proof of a *quid pro quo* having been discussed or even contemplated.

Another popular approach for prosecutors in white-collar crime cases is conspiracy. Two or more employees' efforts to figure out a federal regulation to decide on some method that results in favorable treatment for their company could later be construed by a federal agent as criminal conduct. Conspiracy law arose out of the concern that gangsters and racketeers might get away even though they had made plans to commit crimes but had not yet done all the specific elements of the crime.⁷⁴ Today, all that is required is that two or more people enter into some agreement to commit some unlawful act or some unlawful purpose and some overt act is done in furtherance of the conspiracy.⁷⁵ The criminal intent necessary can be established by circumstantial evidence and the overt act does not have to be

To a corporation's business or an executive's reputation, charges are big front page news—acquittals or dismissals often get little publicity.

criminal in and of itself, e.g., writing a letter, making a telephone call or going to a meeting could be sufficient.⁷⁶ As with mail fraud, if there are state statutes available, state officials should assume this burden. And tangential employees and others who have committed no crime should not be swept into the net of a prosecutor going after a bigger target who attempts to create government witnesses.

Where there is a prosecution, even if there is an acquittal, the fact of the charge can be devastating. To a corporation's business or an executive's reputation, charges are big front page news—acquittals or dismissals often get little publicity. Several years ago, I represented a defendant who had been charged with a form of fraud. After two trials and two trips to the Eleventh Circuit, he was finally found not guilty.

The effect of the increasing criminalization of corporate deviation from federal or state regulations is to desensitize the public to criminal convictions. The consequence of that desensitization may well be an increase in the number of white-collar crimes, i.e., it simply becomes a risk of doing business. This desensitization is in itself a problem because criminal law theory states that person should feel the weight of the moral disapproval of society upon conviction of a criminal act. The argument is that weighty disapproval alone, even if no harsh penalty is imposed, should deter future illegal conduct. That effect is eroded, though, if more and more people are held criminally liable. The blame becomes shared, the shame reduced and the desire to avoid the title of "criminal" lessens.

It has been estimated that for every dollar the government spends on regulatory enforcement, \$20 in compliance costs are inflicted on private citizens.⁷⁷ As rules and regulations proliferate that interfere with rather than aid business operations, the legitimacy of the laws and rules and regulations wanes in the minds of those they are intended to govern. And that process tends to promote a disregard for the law, or conscious efforts to circumvent the law.

A book review by Justice John Paul Stephens of the book, *The Collapse of American Criminal Justice* by William J. Stuntz in the *New York Review*, describes what Justice Stephens calls the "problems that pervade American criminal justice today—its overall severity and its disparate treatment of African-Americans."⁷⁸ He astutely notes that the "proliferation and breadth of criminal statutes has given prosecutors and the police so much enforcement discretion that they effectively define the law on the street."⁷⁹ According to Justice Stephens, our criminal justice system is getting increasingly severe.⁸⁰ He notes that "between 1972 and 2007, the nation's imprisonment rate more than quintupled—increasing from 93 to 491 per 100,000 people.⁸¹ The rate at the end of that period vastly exceeded the analogous rate in other western countries which varied from 132 for England and Wales to a mere 74 in Germany and 72 in France."⁸²

Mr. Stuntz puts his finger on what is a fundamental weakness in America's criminal justice system:

by spare legislators the need to spend more tax dollars on criminal law enforcement.⁸³

He suggests that constitutional law could reduce what he called the risk of "political collusion" by limiting legislators' "power to criminalize and punish."⁸⁴ Another suggestion that Stuntz makes is that he is opposed to legislation establishing mandatory minimum penalties.⁸⁵ Such statutes are often unreasonable, unnecessary and terribly expensive.⁸⁶

Attorney John D. Cline mentioned in a recent article, "It Is Time to Fix the Federal Criminal System," that the British legal icon Blackstone had once stated, "It is better that ten guilty persons escape, than that one innocent suffer."⁸⁷ Cline believes that because the current federal criminal system affords the prosecutors so many advantages, an innocent defendant has little chance of acquittal.⁸⁸ The article then outlines a plan for "fixing" the federal criminal system.⁸⁹ One disparity between the government and counsel for defendants in criminal cases is that the government can reward or pay witnesses for their testimony as long as it is careful to specify that the testimony must be "truthful," and as Cline says, "meaning, in practice, that is inculcates the defendant."⁹⁰ The government is permitted to offer "favorable plea deals, money, immigration benefits, conjugal visits in jail, and so on."⁹¹ If a defense attorney offered to pay a witness for "truthful" exculpatory testimony, however, he would be subject to prosecution under 18 U.S.C. § 201 for bribing a witness or obstruction of justice.⁹² Ten or so years ago when this issue was raised by a defendant, a panel of the Tenth Circuit initially held that the government must comply with Section 201, the federal bribery statute.⁹³ However, the court *en banc* quickly reversed the panel.⁹⁴ In essence, they said that the system could not function without the ability of the government to offer things in exchange for pleas.⁹⁵ Because of this view, Cline notes, "Today the government remains free to pay witnesses for inculpatory testimony it considers truthful, and defense lawyers remain subject to prosecution for doing the same to procure exculpatory testimony."⁹⁶

In the article, "The Criminalization of Negligence under the Clean Water Act," the authors raised the issue that the Federal Clean Water Act 33 U.S.C. § 1319 (c)(1) makes it a misdemeanor to negligently violate a "laundry list of CWA [sections]."⁹⁷ The authors point out that businesses today "operate in a world of complex, overlapping, and often bewildering laws, rules, and regulations."⁹⁸ It is dangerous

to our system of justice to permit a citizen to be prosecuted on such a “nebulous negligence standard.”⁹⁹ This is the sort of “trend” that Congress needs to curtail. Civil penalties may be appropriate, but the federal criminal code should not be used.

There has also been a tendency and trend toward eliminating the requirement for “mens rea.”¹⁰⁰ Under the common law with just a few exceptions, a person who acts with innocent intent is not prosecuted.¹⁰¹ However, the trend is toward minimizing the role of criminal intent, which Harvey A. Silvergate demonstrates in his article, “The Decline and Fall of Mens Rea.”¹⁰² The foregoing article notes that many judges who are former prosecutors “buy into the amorphous definitions of federal crimes favored by prosecutors, but they knowingly enable the tactics that allow prosecutors to present witnesses who bolstered nebulous prosecutions, thereby giving the patina of substance.”¹⁰³ The author concludes that the “Federal Criminal Justice System has become a crude conviction machine instead of an engine of truth and justice.”¹⁰⁴ The vagueness of the federal criminal code has “become too often a trap for the unwary honest citizen instead of a legitimate tool for protecting society.”¹⁰⁵

A judge on the U.S. Court of Appeals for the Ninth Circuit, Judge Alex Kozinski, reversed a conviction in December 2010 of a chief financial officer of a corporation and declared him innocent.¹⁰⁶ Judge Kozinski added this concurrence to the majority opinion:

This has consumed an inordinate amount of taxpayer resources and has no doubt devastated the defendant’s personal and professional life... And, in the end, the government could not prove that the defendant engaged in any criminal conduct. This is just one of a string of recent cases in which courts have found that federal prosecutors overreach by trying to stretch criminal law beyond its proper bounds. . . . This is not the way the criminal law is supposed to work. Civil law often covers conduct that falls in a grey area of arguable illegality. But criminal law should clearly separate conduct that is criminal from conduct that is legal.¹⁰⁷

Professor Craig Stern, a criminal law professor at Regent University School of Law, has pointed out that federal criminal statutes more and more are really *malum prohibitum* and lack any significant requirement that the prosecution prove a “guilty mind” on the part of the defendant.¹⁰⁸ This is alarming, and causes not only injustice but also uneasiness for even an innocent private citizen to speak to or interact with police or federal actions. In fact, one lawyer has argued that a person should never speak to police because even if he believes himself innocent, he cannot be sure that something he says does not reveal a violation of some federal statute of which the person would have no knowledge.¹⁰⁹

Several years ago, former Senator Jim Webb, a United States Senator from Virginia, introduced a bill in Congress which would create a National Criminal Justice Commission.¹¹⁰ Although the bill has not yet passed, a judiciary committee task force is currently working to combat the problem of the criminalization of America.¹¹¹ Webb believes that the criminal justice system needs to be fixed.¹¹² He points out America’s world-leading incarceration rate,¹¹³ and notes that, “Either we have the most evil people on

earth living in the U.S., or we are doing something dramatically wrong in terms of how to approach the issue of criminal justice.”¹¹⁴ Webb has a practical, reasonable approach.¹¹⁵ He says, “You treat the people who need to be treated and incarcerate the people who need to be incarcerated.”¹¹⁶

Conclusion

From 1989 to 1990, the U.S. rate of incarceration increased by 6.8 percent to 455 per 100,000.¹¹⁷ By 2000, the U.S. rate of incarceration was 699 inmates per 100,000 people, the highest in the world, ahead of Russia’s rate of 644 per 100,000.¹¹⁸ By 2008, the rate in the U.S. had increased to 751 for every 100,000 persons.¹¹⁹ That year, the rate of incarceration in England was 151, Germany 88 and Japan 63.¹²⁰ We are clearly number one in the world.¹²¹ The number of inmates in state and federal prisons increased more than six fold from less than 200,000 in 1970 to 1,381,900 by the end of 2000.¹²² Seventy percent of those sentenced in 1998 were convicted of non-violent crimes.¹²³ By 2008, the United States had 2.3 million people behind bars, more than any other nation.¹²⁴ China, with four times as many people, only had 1.5 million in prison, a distant second.¹²⁵ There has been a slight decline in incarceration rates in some states in recent years because of a recognition in those states that incarceration is simply too expensive,¹²⁶ but the United States remains the only advanced country that incarcerates people for minor property crimes like writing bad checks.¹²⁷ In 2009, there were 7.2 million people in the U.S. on probation, in jail or prison or on parole—one in every 31 adults.¹²⁸ These statistics raise a question heard increasingly in Congress, in courts, in the ABA and in the law reform circles: “Is the United States over-criminalized?”

So where do these comments lead us? Certainly not to the view that there should be no laws regulating the conduct of corporations, corporate executives and others, even criminal laws. Even though the crime rate has actually gone down, too often both our federal and state legislators advocate for more criminal laws and incarceration as punishment. In a writing by Sage Laozi from the sixth century B.C. called the *Dao De Jing*, Laozi suggested the opposite solution: “The more restrictions and prohibitions there are, the poorer the people will be. . . . The more laws and commands there are, the more thieves and robbers there will be.”¹²⁹

The next mandatory sentence may not just be for corporate executives or their lawyers, but for a friend or even a relative, or even for you. In closing, remember German pastor Martin Niemöller’s comments about the refusal of good Christians to speak out against the Nazis:

*First they came for the Socialists, and I did not speak out—
Because I was not a Socialist.*

*Then they came for the Trade Unionists, and I did not speak out—
Because I was not a Trade Unionist.*

*Then they came for the Jews, and I did not speak out—
Because I was not a Jew.*

*Then they came for me—
and there was no one left to speak for me.¹³⁰*

Pastor Niemöller spent seven years in Nazi concentration camps.¹³¹ The criminalization of America is not just the title of this article. Unfortunately, it has been an active process that has been going on for too many years. It is time for it to stop. | AL

Endnotes

1. Jarrett Decker, *The 1995 Crime Bills: Is the GOP the Party of Liberty and Limited Government?*, CATO POLICY ANALYSIS, June 1, 1995 available at <http://www.cato.org/pubs/pas/pa-229.html>.
2. Gary Fields and John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, THE WALL STREET JOURNAL, July 23, 2011 available at <http://www.wsj.com/articles/SB10001424052702304319804576389601079728920>.
3. Fields and Emshwiller, *supra* note 28.
4. Decker, *supra* note 27; Fields and Emshwiller, *supra* note 28; Gary Fields and John R. Emshwiller, *As Criminal Laws Proliferate, More are Ensnared*, THE WALL STREET JOURNAL, July 23, 2011 available at <http://www.wsj.com/articles/SB10001424052748703749504576172714184601654>; Evan Bernick, Paul Larkin, and Jordan Richardson, *Is Congress Addressing Our Over-Criminalization Problem? Reviewing the Progress of the Over-Criminalization Task Force*, THE HERITAGE FOUNDATION, Aug. 12, 2014 available at <http://www.heritage.org/research/reports/2014/08/is-congress-addressing-our-overcriminalization-problem-reviewing-the-progress-of-the-over-criminalization-task-force>.
5. Bernick, Larkin, and Richardson, *supra* note 30; Wendy Kaminer, *When Everyone is an Offender*, THE ATLANTIC, Sep. 28, 2011 available at <http://www.theatlantic.com/national/archive/2011/09/when-everyone-is-an-offender/245624/>.
6. See HARVEY SILVERGLATE, *THREE FELONIES A DAY: HOW THE FEDS TARGET THE INNOCENT* (2009).
7. Jonathan R. Macey, *Agency Theory and the Criminal Liability of Corporations*, YALE LAW SCHOOL LEGAL SCHOLARSHIP REPOSITORY, Jan. 1, 1991, at 332 available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2726&context=fss_papers, page 332.
8. Russell Mokhiber, *Top 100 Corporate Criminals of the Decade*, CORPORATE CRIME REPORTER available at <http://www.corporatecrimereporter.com/top100.html>.
9. REPORT TO CONGRESS ON CONTRACTING FRAUD, Oct. 2011, available at <http://www.sanders.senate.gov/imo/media/doc/102011%20-%20DOD%20Fraud%20Report.pdf>.
10. William Glaberson, *Court Says Job Hazards May Be a Crime*, THE NEW YORK TIMES, Oct. 17, 1990, available at <http://www.nytimes.com/1990/10/17/nyregion/court-says-job-hazards-may-be-a-crime.html>.
11. Glaberson, *supra* note 40.
12. 29 U.S.C.A. § 666 (2015).
13. Robert I. McMurry and Stephen D. Ramsey, *Environmental Crime: The Use of Criminal Sanctions in Enforcing Environmental Laws*, 19 LOYOLA OF LOS ANGELES L. REV. 1133, 1142 (1986) available at <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1537&context=llr>.
14. Mokhiber, *supra* note 38.
15. *Prosecutors Protect Our Nation's Ecological Heritage*, THE UNITED STATES DEPARTMENT OF JUSTICE available at http://www.justice.gov/enrd/ENRD_ecs.html.
16. Mokhiber, *supra* note 38.
17. Mokhiber, *supra* note 38.
18. William N. Clark, *Patient Protection and Affordable Health Care Act: Hidden Risks for Health Care Professionals and their Lawyers*, THE GUARDIAN (2014).
19. Clark, *supra* note 52.
20. Clark, *supra* note 52.
21. Clark, *supra* note 52.
22. Clark, *supra* note 52.
23. Louise Radnofsky, Gary Fields, and John R. Emshwiller, *Federal Police Ranks Swell to Enforce a Widening Array of Criminal Laws*, THE WALL STREET JOURNAL, Dec. 17, 2011 available at <http://www.wsj.com/articles/SB10001424052970203518404577094861497383678>.
24. See generally Radnofsky, Fields, and Emshwiller, *supra* note 57.
25. See generally Radnofsky, Fields, and Emshwiller, *supra* note 57.
26. 1 WILLIAM BLACKSTONE, COMMENTARIES *476; Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359, 1363 (2009).
27. See 4 WILLIAM BLACKSTONE, COMMENTARIES *27; Alschuler, *supra* note 60.
28. See also *New York Cent. & H.R.R. Co. v. United States*, 212 U.S. 481 (1909); Alschuler, *supra* note 60 (“Bye, Bye Blackstone: New York Central and Its Progeny”).
29. 2014 GUIDELINES MANUAL, UNITED STATES SENTENCING COMMISSION, Chapter VIII (2014) available at <http://www.ussc.gov/guidelines-manual/2014/2014-chapter-8#8b21>.
30. CATO POLICY ANALYSIS, *supra* note 27; Fields and Emshwiller, *supra* note 28; Fields and Emshwiller, *supra* note 30; Bernick, Larkin and Richardson, *supra* note 30.
31. 18 U.S.C. § 607 (2015).
32. 21 U.S.C. § 331 (2015).
33. 572 F.2d 902 (2nd Cir. 1978).
34. *FMC*, 572 F.2d at 904.
35. *Insecticides & Miticides*, FMC AGRICULTURAL SOLUTIONS available at <http://www.fmccrop.com/grower/products/insecticides-miticides.aspx>.
36. See *FMC*, 272 F.2d 902; 16 U.S.C. 703 (2015).
37. *FMC*, 272 F.2d at 904.
38. *Id.* at 905.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 904-906.
43. *Id.* at 905.
44. *Id.* at 905-906.
45. See *id.* at 904-907.

46. *Id.* at 904-906.
47. *For Want of a Grouper*, THE WALL STREET JOURNAL, November 7, 2014.
48. *Yates v. United States*, 134 S. Ct. 1935 (2014) (granting certiorari).
49. *United States v. Yates*, 733 F.3d 1059 (11th Cir. 2013) *cert. granted in part*, 134 S. Ct. 1935 (2014).
50. Mark Walsh, *The Sashimi Provision: After a fisherman is convicted of violating Sarbanes-Oxley, the justices will take the measure of his case*, ABA JOURNAL 19, Nov. 2014; 18 U.S.C.A. § 1519 (2014) (“Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.”).
51. Walsh, *supra* note 84.
52. HARPER’S MAGAZINE, Jan. 2015, at 22.
53. *United States v. Yates*, 2011 WL 3444093 (M.D. Fla. Aug. 8, 2011) *aff’d*, 733 F.3d 1059 (11th Cir. 2013); Walsh, *supra* note 84.
54. HARPER’S MAGAZINE, *supra* note 86, at 21.
55. HARPER’S MAGAZINE, *supra* note 86, at 21.
56. *Yates v. United States*, 574 U.S. ___ (2015).
57. 93 Law Weekly USA 481 (Oct. 11, 1993) at 9.
58. *United States v. Pozsgai*, 987 F.2d 524 (3d Cir.) (Table), *cert. denied*, 498 U.S. 812 (1990).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *United States v. Mills*, 817 F.Supp. 1546 (N.D.Fla. 1993).
65. *Id.* at 1548.
66. *Id.*
67. *Id.* at 1555.
68. *Rough Justice: America Locks up Too Many People, Some for Acts that Should Not Even Be Criminal*, THE ECONOMIST, July 24, 2010, at 13.
69. *Rough Justice*, *supra* note 101.
70. *Rough Justice*, *supra* note 101.



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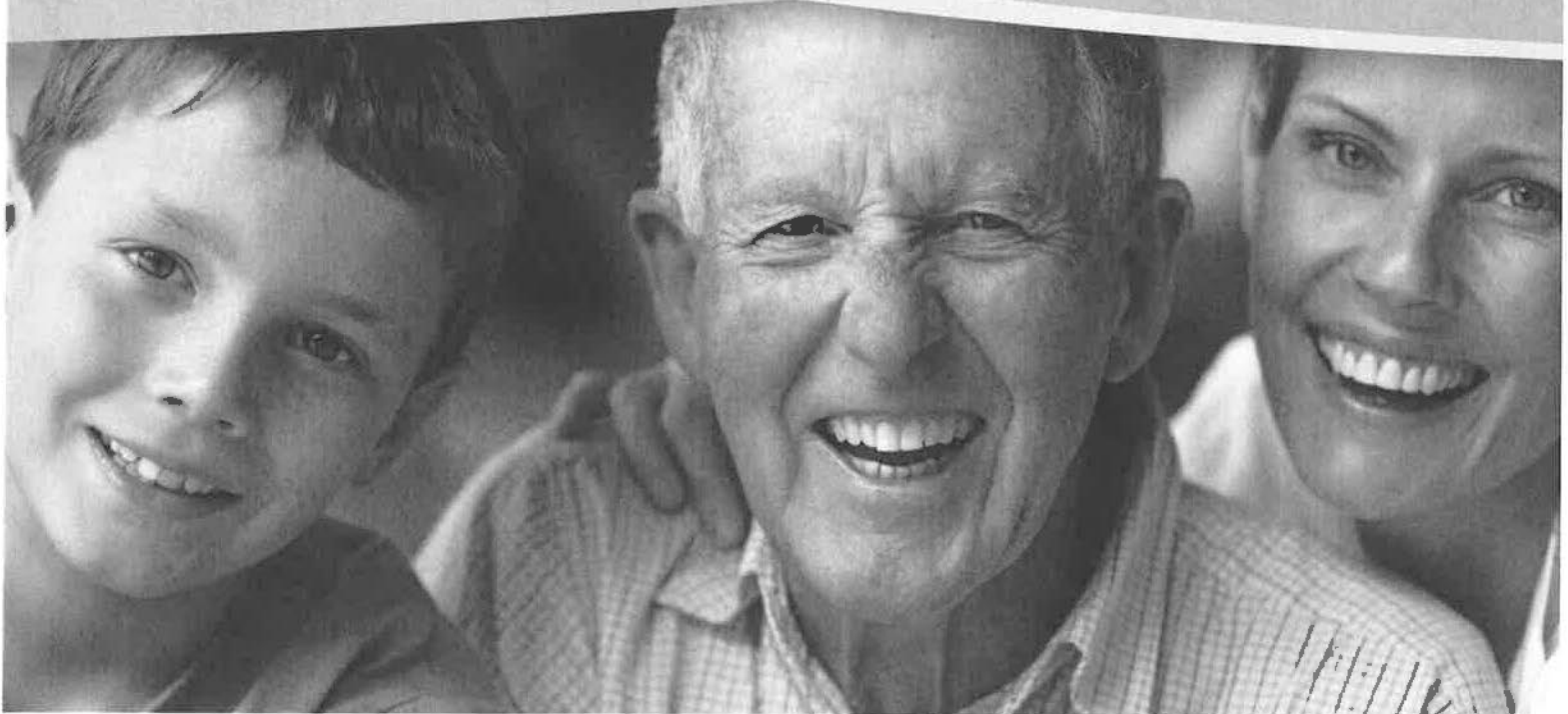
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71. *Rough Justice*, *supra* note 101.
72. 18 U.S.C.A. §§ 1341–1351 (2015).
73. 18 U.S.C.A. §§ 1341–1351.
74. Benjamin Levin, *American Gangsters: Rico, Criminal Syndicates, and Conspiracy Law as Market Control*, 48 HARV. C.R.-C.L. L. REV. 105 (2013).
75. 18 U.S.C.A. §§ 371–373 (2015).
76. 18 U.S.C.A. §§ 371–373.
77. Fidele Ndayisenga and Doug Blair, *Regulatory Expenditures and Compliance Costs: Verifying the Link Using US Data*, NORTH AMERICAN LINKAGES, May 2006, at 1 available at <http://dSPACE.africaportal.org/jspui/bitstream/123456789/415/1/Regulatory%20Expenditures%20and%20Compliance%20Costs%20Verifying%20the%20Link%20Using%20US%20Data.pdf?1>.
78. John Paul Stevens, *Our 'Broken System' of Criminal Justice*, THE NEW YORK REVIEW OF BOOKS, Nov. 10, 2011 available at <http://www.nybooks.com/articles/archives/2011/nov/10/our-broken-system-criminaljustice/>.
79. Stevens, *supra* note 113.
80. Stevens, *supra* note 113.
81. Stevens, *supra* note 113.
82. Stevens, *supra* note 113.
83. Stevens, *supra* note 113.
84. Stevens, *supra* note 113.
85. Stevens, *supra* note 113.
86. Stevens, *supra* note 113.
87. John D. Cline, *It Is Time to Fix the Federal Criminal System*, THE CHAMPION Sept. 2011, at 34.
88. Cline, *supra* note 122.
89. Cline, *supra* note 122.
90. Cline, *supra* note 122, at 35.
91. Cline, *supra* note 122, at 35.
92. Cline, *supra* note 122, at 35.
93. Cline, *supra* note 122, at 35; *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998).
94. Cline, *supra* note 122, at 35; *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) *en banc*.
95. Cline, *supra* note 122, at 35.
96. Cline, *supra* note 122, at 35.
97. David E. Roth, Stephen R. Spivack and Joseph G. Block, *The Criminalization of Negligence under the Clean Water Act*, ABA CRIMINAL JUSTICE MAGAZINE, winter 2009, at 5.
98. Roth, Spivack and Block, *supra* note 136, at 9.
99. Roth, Spivack and Block, *supra* note 136, at 9 (internal quotations omitted).
100. Harvey A. Silverglate, *The Decline and Fall of Mens Rea*, THE CHAMPION, Sept./Oct. 2009, at 14; Gary Fields and John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, THE WALL STREET JOURNAL, Sept. 27, 2011.
101. Silverglate, *supra* note 139, at 15.
102. Silverglate, *supra* note 139, at 14.
103. Silverglate, *supra* note 139, at 18.
104. Silverglate, *supra* note 139, at 19.
105. Silverglate, *supra* note 139, at 20.
106. H.A. Silverglate, *Prosecution with A Vengeance—Without an Unambiguous Statute in Site*, THE CHAMPION, Sept. 2011, at 50, 52.
107. *United States v. Goyal*, 629 F.3d 912, 922 (9th Cir. 2010) (Kozinski, J., concurring) (internal citations omitted).
108. C. Stern, *Crime in America: Too Much Of A Good Thing*, THE CHRISTIAN LAWYER, spring 2011, 13.
109. <http://www.youtube.com/watch?v=6wXkl4t7nuc>.
110. Andrew Romano, *Jim Webb's Criminal-Justice Crusade*, THE DAILY BEAST, Sept. 11, 2011.
111. Bernick, Larkin and Richardson, *supra* note 30.
112. Romano, *supra* note 149.
113. Romano, *supra* note 149.
114. Romano, *supra* note 149.
115. Romano, *supra* note 149.
116. Romano, *supra* note 149.
117. Elizabeth A. Gaynes, *The Urban Criminal Justice System: Where Young + Black + Male = Probable Cause*, 20 FORDHAM URBAN L. J. 621, 623 (1992) *citing* MARC MAUER, THE SENTENCING PROJECT, AMERICANS BEHIND BARS: ONE YEAR LATER 1 (1992).
118. *U.S. Continues to be World Leader in Rate of Incarceration*, THE SENTENCING PROJECT 1.
119. Liptak, *supra* note 4.
120. Liptak, *supra* note 4.
121. Liptak, *supra* note 4.
122. John Hagedorn, *Prison, Race, and the Community*, THE ENCYCLOPEDIA OF COMMUNITY, available at <http://gangresearch.net/Archives/hagedorn/prisoncom.html>.
123. *Facts about Prisons and Prisoners*, THE SENTENCING PROJECT 1.
124. J.P. Hanlon, Sean Hecker and David Gopstein, *Expanding the Zones: A Modest Proposal to Increase the Use of Alternatives to Incarceration in Federal Sentencing*, CRIMINAL JUSTICE, winter 2010, at 26.
125. Hanlon, Hecker and Gopstein, *supra* note 14.
126. Emily Badger and Christopher Ingraham, *These States Cut Their Incarceration Rates—and Still Had a Decline in Crime*, WASHINGTON POST, Sept. 12, 2014 available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/09/12/these-states-cut-their-incarceration-rates-and-still-had-a-decline-in-crime/>.
127. Liptak, *supra* note 4.
128. *One in 31: The Long Reach of American Corrections*, *supra* note 6.
129. LAOZI, DAO DE JING, CHAPTER 57 available at <http://www.taoistic.com/taoteching-laotzu/taoteching-57.htm>.
130. MARTIN NIEMÖLLER: "FIRST THEY CAME FOR THE SOCIALISTS...", HOLOCAUST ENCYCLOPEDIA, available at <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007392>.
131. MARTIN NIEMÖLLER, *supra* note 159.

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Responding to Subpoenas Received by Businesses

By James L. Mitchell

Your client received a subpoena and has just called you in a panic.

Questions abound on the other end of the telephone line. What does this subpoena mean? Why are we receiving it? Do we really have to respond this quickly? Should we fight it? What would be involved in responding to it? How disruptive will this be to our business? And what will it cost us to respond?

Fortunately, you have a firm grasp of the applicable rules, the process that must be followed, the critical traps inherent in that process and how to minimize expenses for your client as you guide them through that process.

Types of Subpoenas Most Commonly Received by Businesses

Depending upon the jurisdiction, numerous types of subpoenas are allowed as a means of assembling facts and information in a proceeding or investigation.

There are subpoenas for documents, testimony, inspection of physical premises, testing and sampling. For brevity, this article focuses on the types of subpoenas most commonly received by businesses across the industry spectrum—in the civil context, subpoenas for documents and testimony (either at trial or by deposition), and in the criminal context, subpoenas for documents or testimony (either at trial or before a grand jury).

Applicable Rules Of Procedure

It probably goes without saying, but you should always consult the applicable rules of procedure for whichever court or tribunal issues a subpoena to your client. This article focuses on the applicable rules in federal court and Alabama state court.¹

A. Federal court

Federal Rule of Civil Procedure 45 sets forth the requirements for issuing and complying with subpoenas in a federal civil proceeding. There can be interplay between Rule 45 and *Federal Rule of Civil Procedure* 26 (generally governing the conduct of discovery), *Federal Rule of Civil Procedure* 37 (governing the filing of motions to compel) and the *Federal Rules of Evidence* (and, in a case where there is

diversity of citizenship jurisdiction, applicable state rules concerning privilege).

Federal Rule of Criminal Procedure 17 generally governs the issuance of and compliance with subpoenas for documents or testimony in connection with a federal criminal proceeding. Rule 17 can interact with *Federal Rule of Criminal Procedure 16* (generally governing the conduct of discovery in a federal criminal proceeding) and the *Federal Rules of Evidence* concerning privilege.

In addition, it is important to consult and follow the rules for the CM/ECF electronic filing system, the applicable local rules and any standing orders of the federal district and/or the judge to which any motion for relief may be addressed.

B. Alabama state court

There are different rules that govern subpoenas in Alabama state court. *Alabama Rule of Civil Procedure 45* sets forth the requirements for issuing and complying with subpoenas for documents or testimony in a state civil proceeding. Like the federal system, *Alabama Rule of Civil Procedure 45* often interacts with *Alabama Rule of Civil Procedure 26* (generally governing the conduct of discovery), *Alabama Rule of Civil Procedure 37* (governing the filing of motions to compel) and the *Alabama Rules of Evidence* concerning privilege.

Alabama Rule of Civil Procedure 45 and its federal counterpart, although worded and organized differently, are in many ways substantively similar. The primary difference, however, is that *Alabama Rule of Civil Procedure 45* requires a party issuing a subpoena for documents to file with the court a “Notice of Intent to Serve Subpoena for Production” at least 15 days before the subpoena is issued (unless the court alters such time period), attach the subpoena itself and give every other party to the case an opportunity to serve objections to the subpoena within 10 days from the date the notice is filed.² *Federal Rule of Civil Procedure 45*, likewise, requires a party serving a subpoena for documents to provide notice and a copy of the subpoena to every other party to the case prior to service on the non-party, but does not specify the degree of notice.³

Subpoenas in connection with a criminal proceeding in Alabama state court are generally governed by *Alabama Rule of Criminal Procedure 17*. Rule 17 can interact with *Alabama Rule of Criminal Procedure 16* (generally governing the conduct of discovery in a state criminal proceeding) and the *Alabama Rules of Evidence* concerning privilege.

Intake and Analysis of a Subpoena

Once your client has contacted you about being served with a subpoena, it is time for you to swing into action.

A. Immediate steps to take upon learning that your client has received a subpoena

1. Review the subpoena.

The first step upon receiving a copy of the subpoena is simply to review it. The subpoena and its attachments should inform you of the court or tribunal from which the subpoena has been issued (thus leading you to the applicable rules of procedure), the party issuing the subpoena and that party’s counsel, the date for compliance, what exactly is being sought from your client, the applicable time period for information sought, definitions of key terms and nuances such as confidentiality requirements.

2. Calendar all applicable deadlines.

Second, you should ensure that both you and your client have calendared all applicable deadlines. In doing so, you should consult the subpoena itself, which should include a date for compliance and the applicable rules of procedure.

3. Instruct your client about how to maintain privilege.

Third, you should caution your client about the importance of maintaining the attorney-client privilege and work product protection. Instruct your client about how to safeguard those protections in the course of complying with the subpoena.

4. If the subpoena is for documents, facilitate issuance of an appropriate litigation hold memorandum.

Fourth, if the subpoena is for documents, it is prudent for your client to issue an appropriate litigation hold memorandum within the company that facilitates preservation of all documents and information (including electronically-stored information) that may potentially be responsive to the document requests listed in the subpoena. As it would be if your client were a party to a case, this will require an analysis by you and your client of, among other things, likely custodians of documents and how such documents should be segregated for possible collection in the future. Depending upon what documents are being sought by the subpoena and the subject matter of these documents, the litigation hold memorandum may also need to be circulated to people outside the company, including outside directors, consultants, vendors and attorneys.

5. Notify key personnel within the company or extended corporate family.

Fifth, you should assist your client in determining whether it is necessary to notify persons within the company or extended corporate family, who may not be directly involved in responding to the subpoena, that the subpoena has been served. For example, it may be necessary to notify officers, in-house counsel or other personnel in a parent corporation that the subpoena has been received, if not as a matter of corporate policy then perhaps as a matter of prudence.

6. Educate yourself and your client about any confidentiality requirements.

Sixth, you should educate yourself—and your client—about any confidentiality requirements that may come into play in responding to the subpoena. For example, your client may be asked to produce documents that are subject to a nondisclosure agreement. Another example is the Grand Jury Secrecy Act under Alabama state law, which is more restrictive than federal law in granting rights of disclosure to subpoena recipients being asked to provide documents or testimony in connection with a grand jury proceeding.

7. Create and maintain a privileged file memo documenting your efforts in responding to the subpoena.

Seventh, it is prudent to create and maintain a privileged file memo documenting the process you are undertaking with respect to intake and analysis of, and your client's ultimate response to, the subpoena. This file memo should be updated as you continue to guide your client through the process of responding to the subpoena. Should the response process become lengthy and cumbersome, this file memo will be invaluable in helping you to identify action items that remain incomplete and, if ever necessary, to demonstrate compliance with the subpoena to a court and to reconstruct efficiently what steps you and your client have taken in satisfying legal obligations.

B. Analysis of the subpoena and its attendant risks for your client

Once you have reviewed the subpoena and put your client on solid preliminary footing, it is time to analyze the subpoena more deeply and gain a better understanding of what is being sought by the subpoena and what will be required of your client to comply.

1. Educate yourself about the underlying litigation or investigation.

First, you should learn as much as possible (without going overboard) about the underlying litigation or investigation. If the subpoena has been issued in a civil case, it is helpful to obtain a copy of the complaint and any key pleadings (e.g., motion to dismiss; motion for summary judgment). If the subpoena has been issued in a criminal proceeding, your ability to access information about the proceeding will likely depend upon whether any relevant indictments have been publicly issued. If a grand jury is continuing to investigate underlying matters, that process will remain secret and your sources of information will likely be limited to consultation with the prosecutor and, if known, attorneys for the potential defendants or key witnesses in the investigation.

2. Contact counsel for the party that served the subpoena.

Second, as soon as possible after reviewing the subpoena, you should contact counsel for the party that served the subpoena. Consulting with counsel for the party that served the subpoena should enable you to learn more about the underlying litigation or investigation and how the requesting party believes your client "fits" in relation to those matters, identify areas of concern, gauge whether such counsel is agreeable to a deadline extension and determine whether it will be possible to narrow the scope of production or testimony by agreement.

In the event of a document or testimonial subpoena served by the government in connection with a criminal investigation, it is critically important to consult with the prosecution at the outset. You should confirm with the prosecution whether your client (or any employee or representative of your client) is a target or subject of the investigation, or whether your client is being subpoenaed merely in a fact-finding capacity. If your client (or an employee or representative of your client) is deemed to be a target or subject of the investigation, that should create great alarm for you and your client and prompt you (if it has not already) to involve white-collar criminal defense counsel in interacting with the prosecution going forward, maximizing protections for your client and conducting an internal investigation at the company to ascertain your client's legal exposure.

3. Contact counsel for other parties if your client receives a subpoena in a civil proceeding.

Finally, in the event your client receives a subpoena in a civil proceeding, you should also consider reaching out to counsel for the other parties to the proceeding in which the subpoena has been issued. Counsel for the other parties should be able (and are often very willing) to give you information that helps you (a) confirm (or debunk) what counsel for the requesting party tells you about the reasons for issuance of the subpoena and (b) develop potential bases for deflecting or minimizing the impact of

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the subpoena on your client and your client's business operations. It may also be possible to prompt counsel for a party that is adverse to the party that served the subpoena to oppose the subpoena. If such opposition succeeds, it may nullify or mitigate your client's obligation to comply with the subpoena.

C. Development of strategy for responding to the subpoena

As you analyze the subpoena and determine the risks faced by your client, you should also be developing a strategy for how to respond.

1. Determine your client's initial posture toward the subpoena.

First, using information that you learn from the steps outlined above, you should determine your client's initial posture toward the subpoena. For example, if the

subpoena is served by your client's competitor or adversary, your client may desire to fight the subpoena through a motion to quash and/or negotiate significant protections. If, on the other hand, the subpoena is served by the government in connection with a grand jury investigation—and the prosecution confirms that your client is merely being asked to provide information and is neither a target nor a subject of that investigation—then your client should strongly consider complying with the subpoena, perhaps after negotiating a reduced scope of what is being sought from your client, to avoid drawing unwanted attention to your client and to demonstrate to the prosecution that your client wishes to cooperate in the administration of criminal justice.

2. Assess the potential burdens associated with responding to the subpoena.

Second, you should work with your client to assess the potential burdens

associated with responding to the subpoena—including disruption to your client's business and the costs likely to be incurred by your client in obtaining documents and extracting information (e.g., having to pay a vendor to obtain electronically-stored information). If it will be expensive and time-consuming for your client to comply with the subpoena, particularly when considering the size and capacity of your client, those facts may weigh in favor of fighting the subpoena or, at a minimum, attempting to negotiate with counsel for the requesting party an agreement that results in acceptably reduced obligations for your client.

Learning this information—how your client views the subpoena and the likely burdens to be placed upon your client by complying with the subpoena—should help you define your strategic objectives. Generally, your options will be (1) fight the subpoena, (2) negotiate reduced obligations and certain protections for your

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client in responding to the subpoena or (3) comply with the subpoena.

Principles for Responding to The Subpoena

Once your strategic objectives have been developed, your client will be in a better position to respond to the subpoena. Below are key principles to assist in your client's response.

A. Formulation of objections to the subpoena

Regardless of whether your client decides to fight, negotiate or comply (or ultimately all three), it is prudent to formulate objections to the subpoena. First, you may have objections to the subpoena based on technical violations in issuing the subpoena. For example, with respect to a civil subpoena, the following objections may apply:

- The subpoena is facially deficient because it fails to set out the protective measures of *Federal Rule of Civil Procedure* 45(d)-(e) or *Alabama Rule of Civil Procedure* 45(c)-(d);⁷
- The subpoena does not give your client sufficient time to comply;⁸
- If the subpoena is for documents in a civil proceeding, the party that served the subpoena failed to provide the requisite degree of notice to the other parties prior to service of the subpoena on the non-party;⁹
- The subpoena was not properly served on your client;¹⁰
- The subpoena requires your client to appear for testimony beyond the territorial limitation prescribed by the applicable procedural rule;¹¹ and
- If the subpoena was issued by a state court outside of Alabama, the subpoena was not properly domesticated in Alabama prior to service on your client.¹²

Second, based on your assessment of the burdens associated with complying with the subpoena, you may object or decide to file a motion to quash or modify

the subpoena because the subpoena imposes an undue burden on your client. Both *Federal Rule of Civil Procedure* 45 and *Alabama Rule of Civil Procedure* 45 require courts to quash or modify subpoenas that impose excessive burdens on non-parties to litigation.¹³ Courts are mindful of that requirement when considering whether to enforce or modify subpoenas.¹⁴ Undue burden may be demonstrated by your client in a number of ways, including:

- Where the information sought can be obtained by the requesting party from another party in the litigation or through some other reasonably available means;¹⁵
- Where discovery of electronically stored information is sought that is “not reasonably accessible because of undue burden or cost”—though if the issue is brought before the court, your client will bear the burden of making this showing and such a showing, if made, may be overcome if the requesting party shows good cause;¹⁶
- Where the information sought by the requesting party is irrelevant to the claims in the underlying litigation and not reasonably calculated to the discovery of admissible evidence;¹⁷ and
- Where document requests are vague/ambiguous or overbroad (either in terms of subject matter contemplated or the prescribed time period).¹⁸

In attempting to demonstrate undue burden, you should endeavor to be as specific possible in your showing to the court. Generalized arguments are not favored and should be avoided.¹⁹ Instead, it is best to submit, generally through a declaration or affidavit from your client or others with knowledge, evidence that establishes the likely expense and level of disruption to be incurred by your client if required to comply with the subpoena as served.²⁰ Such evidence, if credible, puts the burden back on the requesting party to demonstrate a substantial need for the information, and may persuade the court to quash the subpoena or modify the subpoena in a way

that materially eases the compliance burden on your client.²¹

Third, you may have an objection to the subpoena because the subpoena seeks, in whole or in part, documents or testimony that are protected by the attorney-client privilege, the work product doctrine and/or some other legal protection.²² As with a subpoena that imposes an undue burden on a non-party, a court is required to quash or modify a subpoena that seeks to capture privileged information.²³ Note, however, that any claim of privilege or protection must be made with specificity, so that the court has sufficient information to adjudicate the claim.²⁴

Finally, you may have an objection to the subpoena because the subpoena seeks to harass or annoy your client.²⁵ This objection may be particularly apt where the subpoena is served on your client by a business competitor or an adversary that seeks to embarrass or gratuitously cause pain to your client.

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B. Procedures for advancing your objections to the subpoena

Once you have formulated objections to the subpoena, you should follow the applicable procedural requirements in serving objections to the subpoena and/or seeking relief from the court.

1. Civil subpoenas

Federal Rule of Civil Procedure 45 and *Alabama Rule of Civil Procedure* 45 set forth the procedures and deadlines for asserting objections to a civil subpoena and/or seeking relief from such subpoena in the respective courts.

■ For documents

With respect to a federal civil subpoena for documents, your client may suspend its obligation to produce documents by simply serving objections on the party that served the subpoena.²⁶ Such objections, including objections based on privilege, must be served on the requesting party “before the earlier of the time specified for compliance or 14 days after the subpoena is served.”²⁷ If the party that served the subpoena is subsequently unable to reach an agreement with your client about what documents to produce, the requesting party may file a motion to compel with the court.²⁸ *Alabama Rule of Civil Procedure* 45 also allows a party responding to a document subpoena to suspend its obligation to produce documents by serving objections, but there are some nuances to the state law procedures, including the fact that the Alabama rule does not include a 14-day default deadline for serving objections and instead requires compliance by the time specified in the subpoena.²⁹

Your client, of course, always has the option of filing a motion to quash or modify the subpoena on one or more of the grounds enumerated in the rules.³⁰ In the federal system, such a motion must be filed in the district where compliance is required, not the district where the underlying case is pending.³¹ Generally, such a motion must be filed before the deadline for serving objections to the subpoena.³² If you decide to file such a motion, you should keep several points in mind:

- Be sure to consult the local rules and any applicable standing orders to determine if you are required to meet and confer with counsel for the requesting party prior to filing the motion to quash or modify;
- If the court’s local rules or standing orders do not specify whether the mere filing of a motion to quash or modify suspends the obligation to comply with the subpoena, you should ask the court to immediately stay all compliance obligations by your client until the motion to quash or modify is decided; and
- Highlight in the body of your motion the objections to the subpoena that you timely served on the requesting party; you should also attach a copy of the objections to your motion. Inform the court that if the subpoena is not quashed or modified in the way you are seeking, you still have objections to particular document requests and you reserve your client’s right to meet and confer with counsel for the requesting party in the normal course, in an effort to reach an agreement about the production of documents.

If you are seeking to have a subpoena issued by an Alabama court quashed or modified, you must file such motion in the court from which the subpoena issued.³³ A motion to quash or modify the subpoena must be filed by the compliance date specified in the subpoena.³⁴ As with seeking relief from a document subpoena in the federal system, it is prudent to ask the court to stay your client’s compliance obligation while your objection is pending, and to inform the court prominently of your objections to particular requests contained in the subpoena and of the fact that you are reserving your right to meet and confer with counsel for the requesting party in the normal course in the event your motion is denied or insufficiently granted.

■ For testimony

If your client is responding to a civil subpoena for testimony, whether by deposition or at trial, the general path of resistance is by filing a motion to quash with the court. Such a motion should be

filed before the compliance deadline.³⁵ A deposition subpoena served on your client pursuant to *Federal Rule of Civil Procedure* 30(b)(6) raises additional considerations. Such a subpoena will require your client to educate and produce a representative (or representatives) to testify about stated topics. In addition to filing a motion to quash or modify, you will likely need to serve objections on the requesting party and meet and confer with counsel for the requesting party to determine if an agreement can be reached as to the scope and duration of the deposition.

As with a document subpoena, if the court’s local rules or standing orders do not specify whether the mere filing of a motion to quash or modify suspends the obligation to comply with the subpoena, you should ask the court to immediately stay any obligation that your client has to comply with the subpoena until the motion to quash or modify is decided.³⁶

2. Criminal subpoenas

Subpoenas in an active criminal case or in connection with a grand jury investigation are navigated differently and, of course, have the added overlay of the government endeavoring to administer criminal justice. As discussed, outreach to the prosecutor is always essential upon receipt of a subpoena in a criminal proceeding and, assuming your client is being asked to furnish documents or testimony purely as a fact witness, such communication with the prosecutor is an opportunity for you to discuss and potentially negotiate a reduction of your client’s compliance burden. Unlike with civil document subpoenas, however, there is no sequencing mechanism in the criminal courts for service of objections to document subpoenas, the occurrence of a meet-and-confer and the filing of discovery motions. If the prosecutor is being unreasonable or is otherwise unwilling to give your client the relief sought, you have the option of filing with the court a motion to quash or modify the document subpoena.³⁷ Any such motion should be filed before the date specified in the subpoena for compliance.³⁸ It is also prudent to ask the court to immediately stay your client’s compliance obligation until your motion to quash or modify has been decided.

C. Seeking recovery of fees and costs in connection with responding to the subpoena

Generally, outside of the prescribed witness fee for a testimonial appearance, it is difficult to recover the fees and costs incurred by your client in having to respond to a civil subpoena. That said, you may be able to seek recovery of fees and costs in particular circumstances. Both the *Federal Rules of Civil Procedure* and the *Alabama Rules of Civil Procedure* empower a court to shift costs to the requesting party if the court determines that your client will face undue burden in responding to a *document* subpoena.³⁹ In addition, in certain enumerated circumstances where a court has discretion to quash or modify a subpoena, the court may instead order compliance under specified conditions and shift the cost of compliance to the party that served the subpoena.⁴⁰

Generally, it is also difficult to recover the fees and costs incurred by your client in responding to a subpoena in connection with a criminal proceeding. *Federal Rule of Criminal Procedure* 17 and *Alabama Rule of Criminal Procedure* 17 do not expressly provide for cost-shifting in responding to a subpoena. Nevertheless, these rules do indicate that a *document* subpoena may be quashed or modified if deemed by the court to be “unreasonable” or “oppressive.”⁴¹ This language arguably creates grounds for cost-shifting to the prosecution in the event a court decides to modify a document subpoena on one of these bases.⁴²

D. Entering an agreement or seeking an order to protect your client’s confidential and proprietary information

Businesses generally operate, at least at a strategic level, based on the development and use of confidential and proprietary information. Such information may include profit margins, customer lists and key communications that illuminate a business’s “thought process” for approaching and making decisions. Understandably, businesses do not wish to see such sensitive

information land in the public domain, where such information may fall into the hands of competitors or adversaries that may use the information to damage the business, customers or vendors that may use the information to obtain a negotiating advantage against the business or media outlets that may focus unwanted attention on the business and its people. Accordingly, you would be prudent in counseling your client to seek maximum protection of any confidential and proprietary business information that your client may be responsive to the subpoena.⁴³

The most straightforward mechanism for obtaining confidentiality protection is when there is already an order or agreement in the underlying proceeding to protect confidential and proprietary information, and that order or agreement specifically contemplates protection of information provided by non-parties in connection with the proceeding. Of course, if such an order or agreement exists, it is important to analyze the order or agreement to ensure that the protection afforded to such information is broad enough to encompass the type and level of information that you would anticipate your client providing.

Alternatively, if no such order or agreement exists, you may negotiate and obtain a confidentiality agreement with the parties to the proceeding that would protect your client’s information. An extra measure of protection is asking the court, preferably through a joint motion, to adopt the confidentiality agreement through an order or otherwise enter an order that embraces the agreed-upon terms.

Absent a suitable order already in place or being able to reach a confidentiality agreement with the parties, you should consider asking the court to quash or modify the subpoena. *Federal Rule of Civil Procedure* 45(d)(3)(B) and *Alabama Rule of Civil Procedure* 45(c)(3)(B) allow courts to quash or modify a subpoena where the subpoena seeks disclosure of “a trade secret or other confidential research, development, or commercial information . . .”⁴⁴

In addition, you should consider seeking a protective order on behalf of your client. In seeking protection from a civil

subpoena, *Federal Rule of Civil Procedure* 26(c) and *Alabama Rule of Civil Procedure* 26(c) give courts the discretion to enter a protective order “for good cause” in order to prevent “annoyance, embarrassment, oppression, or undue burden or expense . . .”⁴⁵ Note, however, that there is a meet-and-confer requirement that must be satisfied prior to filing a motion for protective order.⁴⁶ Note also that the rules provide for the recovery of fees and costs associated with litigating a motion for protective order for the party or person who prevails on such motion.⁴⁷ Accordingly, it is prudent to ensure that your client is on solid legal footing prior to filing a motion for protective order.⁴⁸

Federal Rule of Criminal Procedure 16(d) and *Alabama Rule of Criminal Procedure* 16.4 likewise provide for the entry of protective orders in order to safeguard interests and address burdens imposed in the course of grand jury discovery.⁴⁹

E. Traps to avoid if your client decides simply to comply with the subpoena

Rather than fight the subpoena, your client may decide simply to comply without resistance. For example, your client may conclude that the documents or testimony being sought by the subpoena would not, at least on the face of the subpoena, impose significant burdens on its business. Or your client may determine that the potential rewards of fighting the subpoena are not worth the legal expenses that are likely to be incurred. Whatever calculation your client may make, there may be sound reasons for your client to pursue a path of compliance.

If your client chooses to comply, there are several potential traps you should help them avoid. First, your client (even with your sage counsel) may have a different understanding than the party that served the subpoena of what is necessary to comply. To bridge any discrepancy in expectations, it is often prudent to consult with counsel for the requesting party about what that party expects from your client. If the requesting party has a different expectation than your client, and your client is unable or unwilling to meet that expectation, you should negotiate an agreement, in writing, about what your

client is obligated to do. And even if your client is willing to meet the expectation of the requesting party, that understanding should be confirmed by you in writing, so that the risk of miscommunication with counsel for the requesting party is minimized and everyone is “on the same page” about what is expected from your client in order to achieve full compliance.

Second, it is often prudent to serve timely objections on the requesting party and, unless otherwise agreed with the requesting party, to produce documents or appear for testimony subject to those objections. That way, if the requesting party later asserts that your client did not fulfill its obligations under the subpoena, your objections have not been waived and you can continue to stand on your objections.

Finally, as discussed above, it is critical, particularly in responding to a civil subpoena, to seek an order or agreement in place that protects your client’s confidential and proprietary business information. Your client may, at the outset of a subpoena matter, believe that simple compliance is unlikely to risk the disclosure of sensitive business information, but your client may discover otherwise as it moves forward with meeting its compliance obligations. For example, your client may discover certain internal communications or other documents that are responsive to document requests in a civil subpoena, but that your client did not originally anticipate being subject to production. In an effort to head off this possibility, you should consider at the beginning of your matter whether to negotiate a confidentiality agreement or file for a protective order—or at a minimum, in serving your objections to the subpoena, reserve your client’s right to have adequate confidentiality protection as a precondition for producing documents.

Conclusion

Responding to a subpoena can range from simple and straightforward to highly complex. With businesses, which can house large repositories of documents and where there is often sensitivity about public disclosure of sensitive business information, subpoena responses generally involve

complexity. By following the steps discussed above, you can help your client create and execute a plan that simplifies a complex challenge, while putting your client on solid legal footing, containing your client’s exposure and minimizing legal costs.

Your client will be glad they called you. | [AL](#)

Endnotes

1. Non-party subpoenas are sometimes issued in connection with arbitration proceedings, but the legal authority to do so is debatable. *See, e.g., In re Sec. Life Ins. Co. of Am.*, 228 F.3d 865, 870-71 (8th Cir. 2000); *Am. Fed’n of Television and Radio Artists, AFL-CIO v. WJBK-TV (New World Communications of Detroit, Inc.)*, 164 F.3d 1004, 1009 (6th Cir. 1999); *but see Life Receivables Trust v. Syndicate 102 at Lloyd’s of London*, 549 F.3d 210, 212 (2d Cir. N.Y. 2008); *Hay Group, Inc. v. E.B.S. Acquisition Corp.*, 360 F.3d 404, 408-09 (3d Cir. Pa. 2004); *COMSAT Corp. v. NSF*, 190 F.3d 269, 275-76 (4th Cir. Va. 1999).
2. *See* Ala. R. Civ. P. 45(a)(3)(A)-(B).
3. *See* Fed. R. Civ. P. 45(a)(4).
4. *See, e.g., In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d 1060, 1068-69 (N.D. Cal. 2006) (noting that non-party who was investor in defendant company was under obligation to preserve documents based on subpoena served on non-party).
5. *See* Ala. Code §§ 12-16-215 and -216.
6. A “target” is defined by the *United States Attorney’s Manual* as “a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.” *United States Attorney’s Manual*, § 9-11.151. A “subject” is defined by the *United States Attorney’s Manual* as a “person whose conduct is within the scope of the grand jury’s investigation.” *Id.*
7. *See, e.g., Cramer v. Target Corp.*, No. 1:08-CV-1693-OWW-SKO, 2010 WL 1791148, at *2 (E.D. Cal. May 4, 2010) (quashing subpoenas for failing, *inter alia*, to set out text of Rule 45 protections); *Finley v. Count of Martin*, No. C-07-5922 EMC, 2009 WL 3320263, at *1 (N.D. Cal. Oct. 13, 2009) (quashing deposition subpoena because, *inter alia*, it failed to set out text of Rule 45 protections); *Kutrip v. City of St. Louis*, No. 4:05-CV-358, 2009 WL 2386072, at *1 (E.D. Mo. July 30, 2009) (quashing subpoena that purported to attach page setting out text of Rule 45 protections, but failed to include the attachment).
8. *See, e.g., Brown v. Hendler*, No. 09 Civ. 4486, 2011 WL 321139, at *2 (S.D.N.Y. Jan. 31, 2011) (quashing deposition subpoena that gave nine days to comply).
9. *See* Fed. R. Civ. P. 45(a)(4); Ala. R. Civ. P. 45(a)(3)(A). This basis is best asserted by a party to the litigation, who stands to be prejudiced by not having an opportunity to object to issuance of the subpoena. *Federal Rule of Civil Procedure* 45(a)(4) and *Alabama Rule of Civil Procedure* 45(a)(3)(A) do not, however, preclude subpoena recipients from asserting this basis as well.
10. *See* Fed. R. Civ. P. 45(b); Ala. R. Civ. P. 45(b).
11. *See* Fed. R. Civ. P. 45(d)(3)(A)(ii); Ala. R. Civ. P. 45(c)(3)(A)(ii).
12. *See, e.g.,* Ala. R. Civ. P. 28(c) (applying to deposition subpoenas).
13. *See* Fed. R. Civ. P. 45(d)(3)(A)(iv); Ala. R. Civ. P. 45(c)(1).
14. *See Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998) (“[C]oncern for the unwanted burden thrust upon non-parties is a factor entitled to special weight”); *Schaaf v. SmithKline Beecham Corp.*, 233 F.R.D. 451, 453 (E.D.N.C. 2005) (“In the context of evaluating subpoenas issued to third parties, a court will give extra consideration to the objections of a non-party, non-fact witness in weighing burdensomeness versus relevance.”) (citations and quotations omitted).
15. *See Haworth, Inc. v. Herman Miller, Inc.*, 998 F.2d 975, 978 (Fed. Cir. 1993) (affirming trial court’s decision

- to require discovery from a party before burdening a non-party); *Med. Components, Inc. v. Classic Med., Inc.*, 210 F.R.D. 175, 180 n.9 (M.D.N.C. 2002) (“The current generally prevailing view is that the Court may first consider whether information should be obtained by direct discovery from a party, as opposed to from a non-party, and that the court should give special weight to the unwanted burden thrust upon non-parties when evaluating the balance of competing needs.”).
16. See Fed. R. Civ. P. 45(e)(1)(D); Ala. R. Civ. P. 45(d)(5).
 17. See *Hatcher v. Precoat Metals*, 271 F.R.D. 674, 675 (N.D. Ala. 2010) (“A party may use a Rule 45 subpoena to obtain ‘discovery regarding any non-privilege [sic] matter that is relevant to any party’s claim or defense.’”) (quoting Fed. R. Civ. P. 26(b)(1)); *OptiStreams, Inc. v. Gahan*, No. CVF-05-0117REC SMS, 2006 WL 829113, at *12 (E.D. Cal. Mar. 28, 2006) (“If the sought-after documents are not relevant nor calculated to lead to the discovery of admissible evidence, then *any burden whatsoever* imposed upon [a person] would be by definition ‘undue.’”) (quoting *Compaq Computer Corp. v. Packard Bell Electronics, Inc.*, 163 F.R.D. 329, 335-36 (N.D. Cal. 1995)) (emphasis in *Compaq*) (alteration omitted).
 18. See *Concord Boat Corp. v. Brunswick Corp.*, 169 F.R.D. 44, 49-50 (S.D.N.Y. 1996).
 19. See *In re Subpoena Duces Tecum*, 461 B.R. 823, 830-31 (Bankr. C.D. Cal. 2011) (finding that movant did not establish undue burden because movant “cited no specific problem other than a generalized burden.”); *Diamond State Ins. Co. v. Rebel Oil Co., Inc.*, 157 F.R.D. 691, 696 (D. Nev. 1996) (“[A] generalized and unsupported allegation of undue burden is not sufficient to prevent enforcement of the subpoenas.”).
 20. See *id.*
 21. See, e.g., *In re Domestic Drywall Litig.*, 300 F.R.D. 234, 239 (E.D. Pa. 2014); *AFMS LLC v. United Parcel Service Co.*, No. 12 CV 1503 JLS (NLS), 2012 WL 3112000, at *6 (S.D. Cal. July 30, 2012).
 22. See Fed. R. Civ. P. 45(d)(3)(A)(iii) and advisory committee’s note (1991 amendments); Ala. R. Civ. P. 45(c)(3)(A)(iii).
 23. See *id.*
 24. See Fed. R. Civ. P. 45(e)(2)(A); Fed. R. Civ. P. 26(b)(5)(A); see also Ala. R. Civ. P. 45(d)(2) Ala. R. Civ. P. 26(b)(6)(A).
 25. See, e.g., *Bogosian v. Walaohajian Realty Corp.*, 323 F.3d 55, 66 (1st Cir. 2003) (noting that a factor in quashing a subpoena is whether “the subpoena was issued primarily for purposes of harassment”); *Mattel, Inc. v. Walking Mountain Productions*, 353 F.3d 792, 814 (9th Cir. 2003) (affirming lower court’s decision to quash subpoena “served for the purpose of annoying and harassment and not really for the purpose of getting information”) (internal quotations omitted).
 26. See Fed. R. Civ. P. 45(d)(2)(B).
 27. See *id.* Privilege objections should also be asserted at the time you serve objections. Courts may allow a party responding to a subpoena to serve general privilege objections at the time other objections are served, and provide a detailed privilege log within a “reasonable time” afterwards. See *In re DG Acquisition Corp.*, 151 F.3d 75, 81 (2d Cir. 1998); *Tuite v. Henry*, 98 F.3d 1411, 1416 (D.C. Cir. 1996).
 28. See Fed. R. Civ. P. 45(d)(2)(B)(i).
 29. See Ala. R. Civ. P. 45(c)(2)(B).
 30. See Fed. R. Civ. P. 45(d)(3); Ala. R. Civ. P. 45(c)(3).
 31. See Fed. R. Civ. P. 45(d)(3)(A). For example, if your client has its business in Birmingham, Alabama and is served with a subpoena in a case pending in the Northern District of California, any motion to quash or modify that you file would be filed in the Northern District of Alabama.
 32. See *Estate of Ungar v. Palestinian Auth.*, 451 F. Supp. 2d 607, 610 (S.D.N.Y. 2006).
 33. See Ala. R. Civ. P. 45(c)(3)(A).
 34. See *id.*
 35. See Fed. R. Civ. P. 45(d)(3)(A)-(B); Ala. R. Civ. P. 45(c)(3)(A)-(B).
 36. See *Stephen L. LaFrance Holdings, Inc. v. Sorensen*, 278 F.R.D. 429, 436 & n.40 (E.D. Ark. 2011) (finding that the filing of a motion to quash does not automatically stay a deposition).
 37. See Fed. R. Crim. P. 17(c)(2); Ala. R. Crim. P. 17.3(c).
 38. See *id.*
 39. See Fed. R. Civ. P. 45(d)(2)(B)(ii); Ala. R. Civ. P. 45(c)(2)(B).
 40. See Fed. R. Civ. P. 45(d)(3)(C); Ala. R. Civ. P. 45(c)(3)(B).
 41. See Fed. R. Crim. P. 17(c)(2); Ala. R. Crim. P. 17.3(c).
 42. See *In re Grand Jury Investigation*, 459 F. Supp. 1335, 1339 (E.D. Pa. 1978).
 43. Contrary to what a client’s expectations may be, however, not all documents and information held by a business are subject to being shielded from public disclosure. See Fed. R. Civ. P. 45(d)(3)(B)(i) (protecting “trade secret[s] or other confidential research, development, or commercial information”); Ala. R. Civ. P. 45(c)(3)(B)(i) (same).
 44. See Fed. R. Civ. P. 45(d)(3)(B)(i); Ala. R. Civ. P. 45(c)(3)(B)(i).
 45. See Fed. R. Civ. P. 26(c)(1); Ala. R. Civ. P. 26(c).
 46. See *id.*
 47. See Fed. R. Civ. P. 26(c)(3), 37(a)(5); Ala. R. Civ. P. 26(c), 37(a)(4).
 48. Given some courts’ concern about being over-inclusive in shielding information from public disclosure, you may consider proposing that the court enter a two-tiered or multi-tiered protective order. Although implementation of such an order can be cumbersome in discovery, particularly where redactions in discrete documents must occur, such an order can provide a degree of protection over your client’s most sensitive business information.
 49. See Fed. R. Crim. P. 16(d); Ala. R. Crim. P. 16.4.

HALL OF FAME

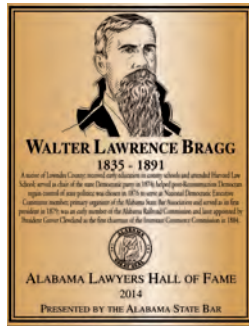
The Alabama State Bar recently inducted five new members into the Alabama Lawyers’ Hall of Fame.

“The lawyers we recognize today include heroes of our state, lawyers who paved the way for many others and lawyers who literally gave their lives to improve Alabama,” said Alabama State Bar President Richard J.R. Raleigh, Jr. of Huntsville. “Each of these honorees improved the community in which they lived, had a profound influence on the rule of law and improved society by pursuing justice.”

The five lawyers inducted into the 2014 Lawyers’ Hall of Fame are:

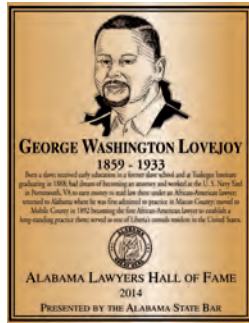
Walter Lawrence Bragg (1835-1891)–

A native of Lowndes County; received early education in county schools and attended Harvard Law School; served as chair of the state Democratic party in 1874; helped post-Reconstruction Democrats regain control of state politics; was chosen in 1876 to serve as National Democratic Executive Committee member; primary organizer of the Alabama State Bar Association and served as its first president in 1879; was an early member of the Alabama Railroad Commission and later appointed by President Grover Cleveland as the first chair of the Interstate Commerce Commission in 1884



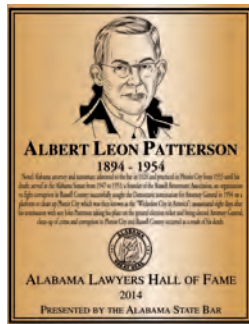
George Washington Lovejoy (1859-1933)–

Born a slave; received early education in a former slave school and at Tuskegee Institute graduating in 1888; had dreams of becoming an attorney and worked at the U.S. Navy Yard in Portsmouth, VA to earn money to read law there under an African-American lawyer; returned to Alabama where he was first admitted to practice in Macon County; moved to Mobile County in 1892, becoming the first African-American lawyer to establish a long-standing practice there; served as one of Liberia’s consuls resident in the United States



Albert Leon Patterson (1894-1954)–

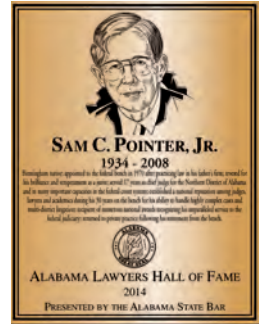
Noted Alabama attorney and statesman; admitted to the bar in 1926 and practiced in Phenix City from 1933 until his death; served in the Alabama Senate from 1947 to 1951; a founder of the Russell Betterment Association, an organization to fight corruption in Russell County; successfully sought the



Democratic nomination for attorney general in 1954 on a platform to clean up Phenix City, which was then known as the “Wickedest City in America”; assassinated eight days after his nomination with son John Patterson taking his place on the general election ticket and being elected attorney general; clean-up of crime and corruption in Phenix City and Russell County occurred as a result of his death

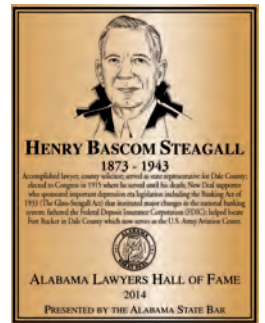
Hon. Sam C. Pointer, Jr. (1934-2008)–

Birmingham native; appointed to the federal bench in 1970 after practicing law in his father’s firm; revered for his brilliance and temperament as a jurist; served 17 years as chief judge for the Northern District of Alabama and in many important capacities in the federal court system; established a national reputation among judges, lawyers and academics during his 30 years on the bench for his ability to handle highly complex cases and multi-district litigation; recipient of numerous national awards recognizing his unparalleled service to the federal judiciary; returned to private practice following his retirement from the bench



Henry Bascom Steagall (1873-1943)–

Accomplished lawyer; county solicitor; served as state representative for Dale County; elected to Congress in 1915 where he served until his death; New Deal supporter who sponsored important Depression-era legislation including the Banking Act of 1933 (The Glass-Steagall Act) that instituted major changes in the national banking system; fathered the Federal Deposit Insurance Corporation (FDIC); helped locate Fort Rucker in Dale County which now serves as the U.S. Army Aviation Center



The Alabama Lawyers’ Hall of Fame inducted its first class in 2004, and has since inducted 50 Alabama lawyers, including this year’s inductees. Inductees must have a distinguished career in law and each inductee must be deceased at least two years at the time of their selection. In addition, at least one of the inductees must be deceased a minimum of 100 years.

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



LEADERSHIP FORUM :

Preparing Lawyers to Be Agents of Change

By Edward M. Patterson, Alabama State Bar assistant executive director



The Leadership Forum is completing its 11th year. On May 21, at the newly-renovated Florentine Building in downtown Birmingham, ASB President Richard Raleigh presented certificates and vintage wine gifts embossed with Leadership Forum logos on the bottles to the 31 graduates of Class 11, the largest number since the forum's inception. The guest speaker was William H. Haltom, senior partner at Lewis Thomason in Memphis. Haltom is a former president of the Tennessee Bar Association and the Memphis Bar Association and a Fellow of the American College of Trial Lawyers. He is an award-winning author, editor and newspaper and magazine humor columnist and is the author of five books. His remarks to Class 11 focused on life lessons he learned while writing his latest book, *The Other Fellow May Be Right: The Civility of Howard Baker*, challenging graduates to remember that civility, collegiality and teamwork are still treasured values even when we now argue for the sake of advantage and seek to demonize those with opposing views.

Class 11 statistics show the average age was 36 (oldest 41 and youngest 31); 74 percent male and 26 percent female; 6.5 percent black and 93.5 percent white; and from nine different cities and six different counties, with 52 percent from Birmingham and 48 percent from the rest of the state. Four practice areas include 60 percent in private practice: 23 percent in a plaintiff's practice, 37 percent in a defense practice, 23 percent in a corporate/transactional practice and 17 percent in government/public service/legal education. Total composition of the forum always equals or exceeds the diversity statistics of the bar as a whole. In the past 11 years, the forum has received 720 applications, accepted 327 attorneys and graduated 318 attorneys. Forty-four percent of those who applied have been chosen.

In awarding the Leadership Forum the 2013 E. Symthe Gambrell Professionalism Award, the nation's highest award for professionalism programs, the American Bar Association commended the forum for its innovative, thoughtful and exceptional content, its powerful and positive impact



on emerging leaders and the extraordinary example it has established that others might emulate. With increased expectations from applicants who commit a substantial time block to participate in the mandatory attendance sessions in Montgomery, Mobile and Birmingham over five months, the program committee recognizes the profession is in a state of transition, and now seeks to prepare attorneys to be agents of change, consistent with President Raleigh's theme this year. With the help of expert faculty and reading and problem-solving assignments, we seek to establish a class norm of engagement, discussion, respectful debate and even disagreement. The program continues to deliver what it promises: the legal profession has a special role in society to fulfill, an opportunity to cultivate leadership skills moving from theory to practice, participation in self-discovery and forcing participants to be contemplative, learning from the inside out.

The forum is designed to aid participants' development into innovative, critical thinkers equipped to respond to change. Over the years, the forum has tried four different personal assessment tools. For the past three years, the Birkman Method has been by far the most effective. This year's primary faculty included Professors Steve Walton and Michael Sacks of the Goizueta Business School at Emory University, who are in their third year of teaching. Both observed this year's class was the strongest yet because of the group dynamic engaging with them very quickly and robustly. Collectively they said, "Each class we have worked with has been an incredible group of professionals. As the program continues to evolve, the class seems to be getting more and more out of the program. This year's class, like previous classes, was so dedicated to the

work they were doing in the Forum. They brought considerable energy and excitement to the sessions. We know how busy everyone is, and we were blown away by their ability to put aside other demands and focus concretely on the important leadership material. This is a group of thoughtful and engaged professionals, eager to learn more and apply the material back to their firms. We couldn't wish for a stronger group of participants."

Twelve hours of CLE credit were approved including two hours of ethics, although the actual program content exceeded 50 hours. In response to demand for skills on "how to lead" the core curriculum consists of 60 percent teaching self-awareness, influence without authority, organizational culture, decision-making and leading organizational change. Ten percent of the curriculum consisted of class participants leading five discussions on the role of servant leadership and advocacy as an attorney. The remaining 30 percent consisted of access to servant-minded judges, policy-makers, legal practitioners, business leaders, scholars and teachers at the community, state and national level who used a variety of teaching methods and alumni of the forum teaching segments. To support the increasing sophistication and intentionality of the forum we had the largest number of individual, firm and corporate sponsors in 11 years.

Highlights of 2015 include seven days of intense training at Air University's Officer Training School at Maxwell AFB on a challenging reaction course designed to test participants' skills under pressure, a day at Hyundai Motor Manufacturing Alabama LLC to work with senior executives, a session in the original supreme court chambers at RSA/Dexter, a case study with the Office of General Counsel and staff

observing a public reprimand, hands-on training at the Alabama State House and lessons learned in leadership from Lt. General Steven L. Kwast, commander and president of Air University, Maxwell AFB; Jonathan McConnell, founder, Meridian Global Consulting; Aaron Beam, former CFO, HealthSouth; Dr. David G. Bronner; Gordon O. Tanner, general counsel, U.S. Department of the Air Force and chief legal and ethics officer; Professor Pamela Bucy Pierson; Hon. W. Keith Watkins, chief judge, United States District Court, Middle District of Alabama; Craig H. Baab, senior fellow, Alabama Appleseed Center for Law & Justice; and William "Lee" Thuston, managing partner, Burr Forman LLP; and the graduation ceremony itself.

Class 12 begins January 2016. Applications will be available by July 15, and the class of 2016 will be selected in the early fall.

The future of the Leadership Forum, which includes the alumni section, is indeed bright. Consistently the forum has exceeded the expectations of 95 percent of those who have graduated. In the words of one participant, "Hands down the best program available to lawyers in Alabama. Not only do you grow as a lawyer, but you do so in the company of the 'best of the best.' There is tremendous trust and continuity by making attendance mandatory."

The forum's passion is to continue to find and develop talented, mid-level attorneys into better leaders with a generous heart to serve their profession, their clients and their communities in a changing world. If you qualify, consider applying. If you know someone who is qualified, encourage them to apply. If you applied and were not accepted, apply again, as prior application to the forum is one consideration in the selection process. | [AL](#)





2015 LEADERSHIP FORUM

Class 11 Participants

William Reeves Andrews, Marsh Rickard & Bryan PC, Birmingham

Benjamin H. Barron, Lee Livingston Lee & Nichols PC, Dothan

Rebecca A. Beers, Rumberger Kirk & Caldwell, Birmingham

C. Patrick Bodden, Regions Financial Corporation, Birmingham

Kimberly C. Brown, Kimberly C. Brown Law Firm LLC, Huntsville

Haley A. Cox, Lightfoot Franklin & White LLC, Birmingham

H. Hube Dodd, Jr., The Dodd Firm LLC, Birmingham

C. Ramsey Duck, The Duck Law Firm, Homewood

Roy C. Dumas, Gilpan Givhan, Montgomery

Prim F. Escalona, Maynard Cooper & Gale PC, Birmingham

Brandon K. Essig, U.S. Attorney's Office, Montgomery

Andrew B. Freeman, Adams & Reese LLP, Mobile

Timothy J.F. Gallagher, Sasser Sefton & Brown PC, Montgomery

Shera C. Grant, Office of the Public Defender-Jefferson County, Birmingham

J. Matthew Hart, District Attorney's Office, Birmingham

Scott B. Holmes, City Attorney's Office, Tuscaloosa

G. Allen Howell, Cumberland School of Law, Birmingham

John W. Johnson, II, Christian & Small LLP, Birmingham

Henry S. Long, III, Butler Snow LLP, Birmingham

Thomas M. Loper, The Gardner Firm PC, Mobile

Glory R. McLaughlin, University of Alabama School of Law, Tuscaloosa

Harold D. Mooty, III, Bradley Arant Boulton Cummings LLP, Huntsville

Adam P. Plant, Battle & Winn LLP, Birmingham

J. Thomas Richie, Bradley Arant Boulton Cummings LLP, Birmingham

Rachel L. Riddle, Legislative Fiscal Office, Montgomery

Kathleen M. Shuey, HealthSouth Corporation, Birmingham

E. Glenn Smith, Jr., Carr Allison, Daphne

Kristofer D. Sodergren, Rosen Harwood PA, Tuscaloosa

Brian M. Vines, Hare Wynn Newell & Newton LLP, Birmingham

M. Jansen Voss, Scott, Sullivan, Streetman & Fox, Birmingham

W. Christopher Waller, Jr., Ball Ball Matthews & Novak LLC, Montgomery

Magna Carta: Symbol of Freedom under Law



Pictured above with this year's Law Day winners are ASB President Rich Raleigh and Law Day Chair Kelly Pate (at left) and the guest speaker, Alabama Supreme Court Justice Kelli Wise (far right). See more Law Day photos at www.flickr.com/photos/alabamastatebar.

The Alabama State Bar recently held its annual Law Day ceremony and awards presentation announcing the winners of the 2015 student competition.

This year, more than 400 entries were received from students across Alabama in three categories: posters, essays and social media. Submissions focused on the 2015 Law Day theme of "Magna Carta: Symbol of Freedom under Law," which was chosen by the American Bar Association to celebrate the 800th anniversary of the issuance of Magna Carta.

"One only needs to look at how problems, struggles and issues are dealt with around the world to gain a strong appreciation for the rule of law and the fundamental rights protected in our United States Constitution, some of which were influenced by Magna Carta," said Alabama State Bar President Richard J.R. Raleigh, Jr. of Huntsville. "This year's focus on Magna Carta celebrates the rule of law and provides young people with the opportunity to learn about the rule of law and its effects on our lives."

The student competition winners participated in a ceremony at the Alabama Supreme Court Courtroom with guest speaker **Alabama Supreme Court Justice A. Kelli Wise**. Justice Wise presented each winner with an engraved medal and a certificate. Each first-, second- and third-place winning student also received a monetary award:

- \$200, \$150 and \$100 in the essay and social media category;
- \$175, \$150 and \$100 in the poster category.

The winners' teachers also received \$50 for each winning entry from their classroom, and winners' schools will be awarded certificates. | [AL](#)

Winners of the 2015 Law Day competition include:

Posters K-3

- 1st—Riley Mason, Oneonta Elementary School, Oneonta
- 2nd—Buck McRight, Advent Episcopal School, Birmingham
- 3rd—Katie Adams, Memorial Park Elementary School, Jasper

Posters 4-6

- 1st—Ellie Wright, Edgewood Elementary School, Homewood
- 2nd—Brooklyn Black, Williams Intermediate School, Pell City
- 3rd—Taylor Hester, Bear Exploration Center, Montgomery

Essays 7-9

- 1st—Caroline Coleman, Central High School of Clay County, Lineville
- 2nd—Ian Irwin, Hilltop Montessori, Birmingham
- 3rd—Dylan Le, Hilltop Montessori, Birmingham

Essays 10-12

- 1st—David Sanders, Central High School, Phenix City
- 2nd—Ryan Dunkle, Central High School, Phenix City
- 3rd—James Taylor, Central High School, Phenix City

Social Media (Twitter)

- 1st—Kendal Stewart, Brewbaker Tech Magnet School, Montgomery
- 2nd—Skylar Saunders, Central High School, Phenix City
- 3rd—Jada Whittington, Brewbaker Tech Magnet School, Montgomery

Social Media (Facebook)

- 1st—Megan Bircheat, Brewbaker Tech Magnet School, Montgomery
- 2nd—Malik Lawrence, Brewbaker Tech Magnet School, Montgomery
- 3rd—Jordan Hendrix, Brewbaker Tech Magnet School, Montgomery

PARTICIPANTS

Posters K-3

Katie Adams
Riley Mason
Anna Holcombe
Taryn Billups
Lai'ana Reeves
Stella Linde
Isaiah Bingham
Julia Downs
Lauren Van Wezel
Smith Craig
Amelia Humes
Sydney Schneider
Kate Lowe
Gill Leffel
Wills Webster
Calvin Moore
Carl Grahns
Mollie Elgun
Simone McCray
Kyliah Ravizee
Eva Ledvina
Buck McRight
Estelle Petras
Chloe Smith
Meglan Welch
Hugh Taylor
Sadie Kelly
Grace Brown
Lizzy Tagtmeyer
Jessop O'Brien
LaResa Gopurala
Maggie Langloh
Eve Socolof
Ethan Wilson
Addison Doyle
Helen Bedsole
Rivers Barron
Ezra Burney
Shine Barron

Posters 4-6

Kalandra Feagins
Alexandria Lalley
Cheyenne Vanhoy
Emily Powell
Amare Porter
Kenneth Paige
Tripp Morrison
Kayla Osbon
Emilee Warren
Corviana Johnson
Devin Lawton
Maddie Jackson
Ava Ruiz
Taylor Camp
Emily Ellis
Erin Marshall
David Allen Fischer
Emily Wheat
Austin Evans

Chassidy Daniel
Monique Orozco
Madie Carter
Kevin Quevedo
Maggie Groat
Kiley Shankles
Teagan Dollar
Lilly Martin
Dalton Gray
Olivia Atkins
Aiden Smith
Abby Boatwright
Will Abbot
Cole Blalock
Ella McCallie
Ella Fowler
Abby McBrayer
Quinn Mcgee
Sawyer Burt
Emma Goggans
Hayoung Lee
Kiarna Thompson
Naomi Tyson
Josie Severance
Asher King
Joshua Kim
Eric Samelo
Daniel Park
Heidi Chiou
Halla Elmor
Ja'Kiyah Savage
Jenny Baek
Minkyung Cho
Ann Varghese
Jean Ryu
Jaebee Ashley
Brennan Lein
Yebin Lee
Will Murray
Sam Dunn
Sury Meza
Gabby
Madelyn Cohn
Jarely Cooper
Clara Rinker
Mary Hunter
Mason Cooper
Lilly Lowery
Katelyn Zinn
Ellie Wright
Lilly Janey
Brooklyn Black
Tamia Threatt
Ally Davis
Brooke Osborn
Abby Davis
Macie Holcombe
Tristen Gresslett
Frederick Charley
Mekhi Sanders
Evan Watson

Gabrielle Santiago
Victoria Vetra
Sloan Farr
Emily Macon
Alston Funderburg
Anna Hodgens
Nathan Connell
Justin Bain
Denim Garrett
Lorelei Powell
Sophie Gillilan
Laci Winfrey
Autumn Spencer
Taylor Bell
Will Thomas
Simon Coleman
Luke Bentley
Katherine Lamkin
Emma Thomas
Berkeley Wright
Ansley Hinson
Landon Perdue
Brady Mitchell
Rachel Schell
Owen O'Connor
Haley Herron
Jen Nguyen
Eva Phelps
Kip Brown
Josh Kreitz
Jeremy Flatt
Sydney Hudson
Garrett Lamar Davie, Jr.
Roman Mothershed
Emily Anderson
Ansley Olesen
Tyreanna Causey
Emma Duffee
Shelby Kelley
Zac Childs
Owen Williams
Aysha Mack
Amal Abdelaziz
Alex Peters
James Lamkin
Charles Norris
Katherine McKenny
Brax Woodson
LesLeigh Miller
Sarah Guilford
Trinity Phillips
Mattie Sellers
Christopher Marshall
Christian Frost
Leia Clark
Zachary Underwood
Clyde Pittman
Picasso Avezzano
Gracie Lowery
Terrance Stallworth
Zack Mills

Kaelyn Hall
Walker McQueen
Molly Mitchell
Grace Hunter
Allison Grant
Emma Moody
Garrison Campbell
Mashawn Sims
Grayson Hall
Michael Maddox
Whit Davis
Annsley Wallace
Taylor Hester
Riley Parker
Brayden Levangie
Lauren Ashlee Parker
Parker Hornbuckle
Kirtan Patel
Sarah Grace Burney
Zoe Veres
Charlotte Grace Smith
Denasia Pogue
Camden Shockley
Sam McCollum
Nevie Abernathy
Madelyn Waldrop
Holly Mizelle
Libby Malone
Jeremy Pearl
Hannah Russell
Logan Pilotte
Joshua Hall
Haley Riggins
Ethan Lowrey
Emma Gunsallus
Rachel Robertson
Ben Schuyler
Juliya Greynerovich
Noah Kucinski
Gabi Shideler
Cora Schantz
Emma Testman
Cooper Metz
Carson Morgan
Desirae Krut
Joe Hughes
Camryn Larsen
Evan Chamberlain
Bailey Douglass
Dominique Fuentes
Gonzalez
Camp Holden
Aalivia Abrams
Joseph Bischoff
Tate Colebaugh
Greta Schantz
Paige Houser
Bryson Bogart
Andrew Kennedy
Matthew Maher
Abby Thorson

Sean Rushton
Shushruth Yellumahanthi
Whitney Taylor
Adam Carlisle
Carley Bourland
Evan Putman
AnnaBeth Lemke
Charles McGill
Talmadge Womble
Madylin Morgan
Ty Stanley
Rani Ginn
Kylie Evans
Kate Roth
Hunter Newell
Nathan Moore
Meghan Meagher
Michelle Criswell
Carter Johnston
Patrick Reagan
Bennett Rogers
Marielle Larsson
Madison Wallace
Gabe Bridges
Rylee Horn
Daniel Vega
Ashlyn McMullen
William Farmer
Jennifer Dumbacher
Connor Goglick
Rachel Jones
Meghan Johnson
Aaron Johnston
Anna Weiler
Julia Dodson
Hailey Taylor
Jackson Smith
Brittany Jones
Jacey Harbin
Anabella Paris Hoang
Will McClusky
Ellie Harris
Nathan Allport
Emma Keel

Essays 7-9

Alan Montgomery
Rachel Sullivan
Destini Howard
Denver Benjamin
Alexandrea Ragan
Colton Reynolds
Jessica Riha
Gavin Hamilton
Omer Elkhier
Michael Chandler
Zachary Roberts
Finn Parkman
Jonathan Lewis
Ian Irwin
Dylan Le

Giovanni Garza
Alexandria Spencer
Deztini Stevens
Kweston Hill
Caroline Coleman
Lauren Sauer

Essays 10-12

Tatiana Thomas
John Butler
David Sanders
Joseph Prince
James Taylor
Ryan Dunkle
Brady Unzicker
Rashon Cook

Twitter

Skylar Saunders
Bailey Clayton
DaKendrek Patterson
Patrick Kelley
William Kelley
Joshua Jackson
Ethan Hall
Brittney Dixon
Kendal Stewart
Aman Patel
Kameron Smith
Jada Whittingten
Ty Hooks
Stan Ott
Christien Benefield
Cameron Baldwin
Aliyah Powell
Tatiana Thomas
India Richardson
Tahreem Gul
William Sumlin
Melissa Goggans
Breanna Mooney
Blake Grier
Will Percival
D'Cimber Robinson
Maria Hong
Lauryn Davis
Mallory Houlditch
Kate Blackwell
Michael Sippial
Taylor Hay
Madison Haynes
Law Day 2k15
Sierra
Catalea Siciliana
Holt Parker
princess han
Carson Logan
Marcon Sanders
Alison Frander
Xantrell
the fever

tlc
Trevor Marler
bailey

Facebook

Cody Kirton
Cameron Bivens
Richard Anderson
Zachary Debardlebon
Peyton Douglas
Madison Foster
Martavious Hails
Kenneth Hardin
Brandon Hurst
Mikala McCurry
Glendy Menendez
Savannah Morgan
Shunkeria Nixon
Monica Penny
Tar'Ja Perryman
Brodi Pickering
Kyle Robinson
William Turley
Briana Washington
Miranda Webster
Briana White
Kalyn Wright
Tatiana Thomas
Mohammad Abdelaziz
Alex Baldwin
Tyreek Bowden
Drew Brown
Jerbraia Day
Maegan Huebner
Kayla Jones
Malik Lawrence
Taelor Osborne
Shane Parker
Austin Reese
Toni Taite
Jaylen Williams
Ronald Williams
Rachel Allen
Megan Bircheat
Damien Bynum
Alexandria Gauntt
Jordan Hendrix
Jarett Hicks
Moriah Jones
Erleshia Lloyd
Chasely Matmanivong
Frankie McDonald
Courtney Salter
Kimari Steward
Christopher Swett
Lillian Washington
Kennedi White
Chloe Ashton

**University of Alabama
School of Law**

Birmingham School of Law

**Faulkner University Thomas
Goode Jones School of Law**

Miles Law School

**Samford University
Cumberland School of Law**

University of Alabama School of Law

With spring comes commencement, as graduates leave the school of law and make their way into professional careers. Alabama awarded the J.D. to 143 students and the LL.M. to 12 students. Mark Crosswhite, chair, president and CEO of Alabama Power Company, delivered the commencement address. He challenged each graduate to be open to exploring unexpected opportunities—including opportunities they might never expect to enjoy.

This was an impressive group of graduates. The median LSAT for this class was 165, and their collegiate GPA was 3.83. Members of the class came from 25 states and attended 75 different colleges.

The class of 2015 has raised more than \$10,000 to fund the Hector Dominic DeSimone Memorial Scholarship. In a key element of the fund-raising drive, students hosted “DomFit” in the law school’s courtyard, where fitness instructors provided advice on fitness and guided participants through a series of “boot camp” exercises. The event honored Dom DeSimone, a beloved, outgoing and generous law student, who died in a motorcycle accident during the spring of his 2L year.

Alabama School of Law is now tied for 22nd in the rankings of all law schools in the United States (up from 23rd the previous year), and is seventh among publicly-supported law schools. The law school’s primary focus, however, is on those things that contribute to the quality of life within the school of law: our faculty, curriculum and students; our excellent bar-passage rate; and our enviable employment record.

In February, the *Alabama Law Review* hosted a symposium on the 50th Anniversary of the Voting Rights Act. The symposium brought nationally renowned scholars to Tuscaloosa, and Judge Myron Thompson delivered a poignant and inspiring keynote address. In March, the *Alabama Civil Rights & Civil Liberties Law Review* hosted a symposium on the clash of rights—in the wake of the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.* (2014)—between religious adherents and claimants of reproductive and sexual liberty. In April, scholars from around the world participated in a workshop and symposium, sponsored by the law school, on the rights of nation-states under international law. Professors Dan Joyner of Alabama and Marco Roscini of the University of Westminster in the UK organized the workshop, and papers from it will comprise a special issue of the *Cambridge Journal of International & Comparative Law*. Professor Austin Sarat organized a symposium on “Law and Lies,” which investigated the ways in which law both condemns and tolerates deception. And, *The Journal of the Legal Profession* helped organize a symposium on “Imagining a More Just World,” in which legal scholars examined some of the moral dimensions of law, lawyers and judges.

The law school's Public Interest Institute organized "Pro Bono Spring Break" as a way for students to engage in community service. Nineteen students participated in five pro bono legal clinics during the week, coordinating with the Tuscaloosa Veteran's Administration, Habitat for Humanity, Legal Services Alabama, Project Homeless Connect, the Tuscaloosa County Bar Association and the Alabama State Bar Volunteer Lawyers Program. Eighteen attorneys volunteered to participate in these clinics. More than 85 low-income clients, with a wide variety of legal needs, were assisted over the course of the week.

Professor Julie A. Hill was one of 13 faculty members from across the university selected to receive the President's Faculty Research Award. Professor Hill has written about the regulatory environment in which financial institutions operate, and has prescribed ways to improve the regulatory process. She is especially interested in the distinctive ways in which regulations affect small banks.



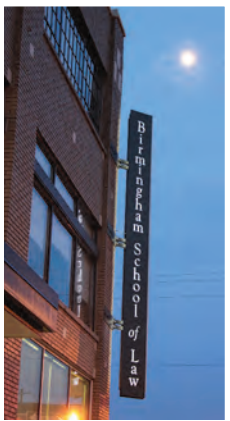
Pictured above is Birmingham School of Law's new facility and, below, a courtyard on top of the new parking deck.



Birmingham School of Law

100 Years and Counting!

This year marks the 100th anniversary of Birmingham School of Law and Judge Hugh Locke's vision of providing affordable quality legal educations for all. BSL began in 1915 in Judge Locke's offices, where he tutored young men in the law to help them pass the Alabama State Bar exam. The school continued to evolve and grow throughout the years, always focusing on accessibility to all interested individuals passionate to understand and learn the law.



With the expansion into Birmingham School of Law's own state-of-the-art facility, the school has continued this mission for future generations. BSL's current enrollment is approximately 386 students, but more than 170 new student applications have been submitted for the 2015 fall semester. This is the largest potential enrollment in years.

The 100th anniversary began the year with a reunion in January of alumni from all years and all walks of life, which included judges, legislators, well-known attorneys and successful business executives. In May, BSL celebrated the magic year with a spectacular graduate banquet and graduation ceremony, featuring alumni Congressman Mike Rogers and Judge Locke Donaldson as guest speakers.

Throughout 2015, BSL will be celebrating this accomplishment with special events to highlight this landmark event of 100 years of tradition to our community.

Faulkner University Thomas Goode Jones School of Law

Advocacy Program

Since 2012, Faulkner Law's advocates have won seven national advocacy championships and eight regional championships in moot court, trial advocacy and mediation competitions. Because of this winning record, Faulkner became one of four schools in the nation to receive an invitation to both the 2015 Andrews Kurth Moot Court National Championship and the 2014 National Top Gun Tournament—both of which are best-of-the-best tournaments. Faulkner advocate Sherri Mazur was named second-best advocate in the nation at Top Gun.

Clinics

Faulkner Law embodies a spirit of service to the community through its four clinical programs. Last year alone, Faulkner's Family Violence Clinic, Elder Law Clinic and Mediation Clinic assisted more than 120 clients and mediated more than 90 civil lawsuits. In addition to these clinics, Faulkner Law recently established a Non-Profit Legal Clinic that directly assists churches and other non-profit organizations with drafting critical legal documents and complying with new laws and regulations.

Because of the clinics' ability to impart real and lasting change within the community, the law school was awarded Leadership Montgomery's Unity Award in 2014, and it continues to be recognized for the positive impact made in the River Region.

Events

- Faulkner Law's Ernestine S. Sapp Chapter of the Black Law Students Association recently honored Judge Johnny Hardwick during the 10th Annual Scholar's Awards Dinner. Judge Hardwick was recognized for his dedication to the legal profession, as both an attorney and a judge.
- The law school hosted the 10th Annual Fred Gray Civil Rights Symposium, which marked the 50th anniversary of the Selma-to-Montgomery Civil Rights March and of the Voting Rights Act of 1965. Fred Gray opened the event and spoke on *The Role the Law and Lawyers for the Plaintiffs Played in the Movie "Selma."* After his

remarks, Chief Judge Keith Watkins and Judge Myron Thompson from the United States District Court for the Middle District of Alabama reflected on the events of 1965 and shared their experiences of growing up 50 miles apart during the Civil Rights era. The symposium is an annual event, and is open to the public.

- Faulkner University welcomed a new president, Mike Williams, on June 1. Prior to his role at Faulkner University, Williams served as vice president of advancement at Harding University, in Searcy, Arkansas. He will succeed current president Billy Hilyer. After 29 years as president, Hilyer is moving into a new role as chancellor. Williams is Faulkner's eighth president.
- Calling all Faulkner University Jones School of Law alumni and friends! Faulkner will host its annual Dessert Reception Thursday, July 16, during the Alabama State Bar Annual Meeting in Point Clear. Join us and meet Faulkner University's new president at the event.

Miles Law School

The Miles Law School Student Bar Association celebrated its annual Law Day banquet Saturday, April 25, 2015 in the new Dr. George T. French, Jr. Activity Center. The dinner was followed by the keynote address from Dr. George T. French, Jr. This year's Law Day theme was *Magna Carta: Symbol of Freedom under the Law: "No one, no matter how powerful, is above the law."* The event drew a record number of attendees, including alumni, members of the bench and bar, elected officials and other supporters.

Miles Law School has held its annual Law Day celebration for four decades, observing the law school's commitment to serving the community and providing access to the legal system for individuals across the city, state and nation.

One special highlight of the Law Day program was a tribute honoring, in memoriam, the longest-serving chair of the Board of Trustees of Miles Law School and one of its founders, the Honorable J. Richmond Pearson, who died October 22, 2014. Judge Pearson became the first black Assistant United States Attorney for the Northern District of Alabama in 1967, upon appointment by President Lyndon B. Johnson. In 1974, he was one of two black senators elected to the Alabama Senate post-Reconstruction. In 1984,

Governor George Wallace appointed Senator Pearson to the bench as a circuit judge in Jefferson County. As the first black judge in the Birmingham Division of the Tenth Judicial Circuit, Judge Pearson earned the reputation as a fair, knowledgeable jurist, dispensing “no-nonsense” justice tempered with mercy and compassion. In 1999, he retired from the bench after a 15-year tenure.

The Student Bar Association welcomed Dr. George T. French, Jr., president of Miles College and Miles Law School alumnus, class of 1999, as the featured speaker. President French co-authored the book, *Miles College: The First Hundred Years*, as well as the article, “Historically Black Colleges and Universities; Cultivating Global Citizenship” in the acclaimed book, *The State of America’s Black Colleges*.

The Student Bar Association also presented William A. Bell, Sr. with the 2015 Lifetime Achievement Award. Bell is the mayor of Birmingham and a 1982 alumnus of Miles Law School.

The Women Lawyers’ Section of the Birmingham Bar Association awarded a scholarship to Myra Armstead, a female student noted for community service and leadership.

Samford University Cumberland School of Law

Privacy and Data Security Symposium

The American Journal of Trial Advocacy hosted a privacy and data security symposium, “Practicing Law in the Age of Surveillance and Hackers: An Exploration of Privacy and Data Security,” Friday, February 27. The symposium featured keynote speaker James R. Silkenat, immediate past president of the American Bar Association and partner at Sullivan & Worcester LLP in New York, as well as two panel discussions led by privacy and data security experts from across the country, including lawyers from the U.S. Department of Justice and the American Bar Association Committee on Law and National Security. William T. Coplin, Jr., a Cumberland alumnus and veteran member of the ABA’s House of Delegates, assisted in planning and arranging speakers for the event.

Recent Trial Team Success

Samford University’s Cumberland School of Law is among the most decorated law schools in the country in trial advocacy

competitions. Currently ranked sixth for trial advocacy by *U.S. News & World Report’s* Best Grad Schools (2015), Cumberland’s trial teams continue to perform at the highest level. In February, a Cumberland team won the southeast regional at the National Trial Competition (NTC) in Orlando. The win was the law school’s sixth NTC regional championship in seven years. Over 325 teams participated in the competition at the regional level with the top two teams from each region winning the right to participate in the national finals.

The advancing Cumberland team made the final four at the National Trial Competition national finals in Houston in March, defeating teams from American University Washington College of Law, Wake Forest University School of Law and Loyola Los Angeles School of Law before losing a 4-3 decision in the semi-final round to eventual national champion Chicago-Kent College of Law. This year’s national finals marked the 40th anniversary of the National Trial Competition, the oldest and largest mock trial competition in the country. The NTC is sponsored by the Texas Young Lawyers’ Association and the American College of Trial Lawyers. As part of the celebration, the top 16 law schools based on number of appearances at the national finals over the past 40 years were invited to an event recognizing their success. As one of the top five schools in number of appearances at the national finals, Cumberland was honored to participate in the celebration.

Master of Science in Health Law & Policy

Cumberland is launching a new online Master of Science in Health Law and Policy program, and applications are being accepted for its first class beginning August 17. The 11-course, 32-credit-hour program includes coursework in health law, regulatory affairs, public policy, insurance and healthcare administration, with a particular emphasis in compliance. Experienced faculty from both Samford University’s Cumberland School of Law and College of Health Sciences participate in the program.

The M.S. in Health Law and Policy program is accredited by the Compliance Certification Board (CCB)[®]. Graduates of the program will be eligible to sit for any of the following credentialing exams offered by the Compliance Certification Board: Healthcare Compliance (CHC)[™], Healthcare Research Compliance (CHRC)[®], Healthcare Privacy Compliance (CHPC)[®] and Ethics Professional (CCEP)[®]. | [AL](#)



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



Lee Armstrong



Cooper Shattuck



Alabama's Right of Publicity Act

Co-authored by Lee Armstrong, general counsel, Auburn University, and Cooper Shattuck, general counsel, University of Alabama System

Alabama Passes Right of Publicity Act

Samsung dresses up a robot in a blonde wig, jewelry and a flashy dress and puts her in front of the "Wheel of Fortune" game board; Ford Motor Company uses Bette Midler's longtime backup singer as an impersonator; Mars, Inc. uses the image of an M&M dressed up as Robert Burck, the Naked Cowboy; and OutKast names a famous song "Rosa Parks"—these are all famous cases involving an individual's right of publicity. When Governor Bentley signed into law the Alabama Right of Publicity Act, Alabama joined at least 19 other states with a codified law outlining the scope and protections of the right of publicity. Alabama's new statute, and others like it, provides protection for an individual's name, image and likeness, among other attributes, from commercial exploitation without consent.

Birth of "Right of Publicity"

The right of publicity is a relatively new form of intellectual property with Second Circuit Judge Jerome Frank coining the term in *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), a case in which leading baseball players sued a company over use of their images in conjunction with the sale of bubble gum. The right was further recognized by the United States Supreme Court in *Zacchini v. Scripps-Howard Broadcasting*, 433 U.S. 562 (1977) when Zacchini sued the broadcasting company after it aired the entire 15 seconds of his famous "human cannonball" presentation. The Court, rejecting the broadcasting company's First and Fourteenth Amendment arguments, ruled in favor of Zacchini.

Alabama's Common Law Right of Publicity

While this statute is the first of its kind in this state, Alabama has long recognized an invasion of privacy tort from the Restatement (Second) of Torts. *See Bell v. Birmingham Broadcasting Co., Inc.*, 266 Ala. 266, 96 So.2d (1957) (recognizing that it is unlawful to make unauthorized use of a person's name for a commercial purpose). This tort generally falls into four distinct categories: "1) the intrusion upon the plaintiff's physical solitude or seclusion; 2) publicity which violates the ordinary decencies; 3) putting the plaintiff in a false, but not necessarily defamatory, position in the public eye; and 4) the appropriation of some element of the plaintiff's personality for a commercial use," with the fourth category resulting in about 20 state and federal cases in Alabama jurisprudence and providing a basis for the

Alabama Right of Publicity Act. *See Allison v. Vintage Sports Plaques*, 136 F.3d 1443, 1446 (11th Cir. 1998).

The interplay of commercial appropriation and the First Amendment is at the center of many Alabama cases. An example is a case filed in the Northern District of Alabama by Eric Esch, a.k.a. "Butterbean," against Universal Pictures regarding the movie *Despicable Me*. *See Esch v. Universal Pictures Co., Inc.*, 2010 WL 5600989 (N.D. Ala. Nov. 2, 2010). Butterbean, a former professional wrestler and an Alabama native, is bald, wears "American flag-like trunks" and uses Lynyrd Skynyrd's "Sweet Home Alabama" as his theme song. Butterbean argued that Universal Pictures used his likeness in the trailer for *Despicable Me* to promote ticket sales without his permission. Magistrate Judge John Ott disagreed, finding that Universal was entitled to First

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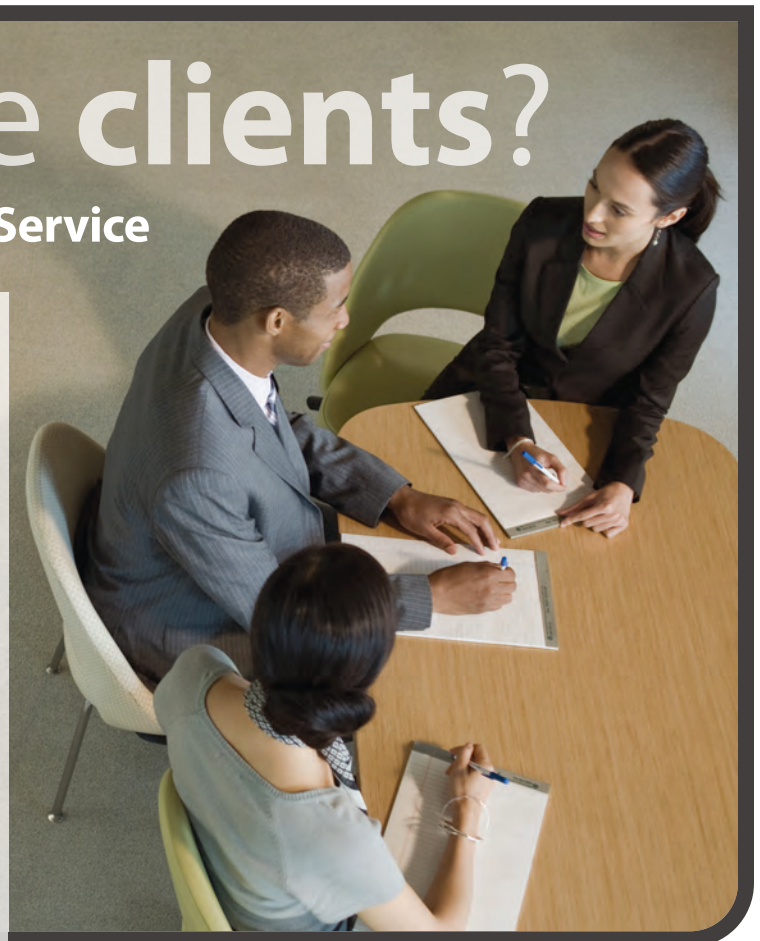
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Amendment protection as the trailer was a protected expressive work. Compare Butterbean's case with that of *Minnifield v. Ashcraft*, 903 So. 2d 818 (Ala. Civ. App. 2004), in which a tattoo parlor's client sued when the tattoo artist submitted an image of the client's tattoo for publication in a tattoo magazine. Importantly, the court of civil appeals held that the publication of the client's photographs was not protected by the legitimate public interest exception and that commercial appropriation protects both commercial and psychological interests.

While Alabama common law provides some guidance on right-of-publicity issues, it leaves several unanswered questions regarding scope, duration, descendability and the mechanics of litigation (e.g. statute of limitations, damages and defenses), hence the need for a statute.

Alabama Law Institute Takes on Right of Publicity

In 2013, Will Hill Tankersley made a presentation to the ALI Executive Committee on the need for greater clarity in the form of a statute to address the unanswered questions in this area of the law. Based upon that presentation, the Executive Committee recommended, and the ALI Council approved, the formation of a committee to draft a proposed right of publicity statute.

Serving as drafting committee members were:

- J. Hunter Adams**, Adams IP LLC;
- Lee F. Armstrong**, general counsel, Auburn University;
- Michael J. Douglas**, Friedman, Leak, Dazzio, Zulinas & Bowling PC;
- R. Bernard Harwood**, Rosen Harwood PA;
- Harriet Thomas Ivy**, Harriet Ivy Law;
- George P. Kobler**, Lanier Ford Shaver & Payne PC;
- Loren M. Lancaster**, Balch & Bingham LLP;
- Rebekah McKinney**, Watson McKinney;
- James P. Pewitt**, James P. Pewitt LLC;
- Harlan I. Prater**, Lightfoot Franklin & White LLC;
- Barry A. Ragsdale**, Sirote & Permutt PC;
- R. Cooper Shattuck**, general counsel, University of Alabama System;
- Thomas W. Thagard III**, Maynard Cooper & Gale PC;
- Arnold W. ("Trip") Umbach III**, Starnes Davis Florie LLP;

Lance Wilkerson, Bradley Arant Boult Cummings LLP;
Alex Wyatt, Parsons, Lee & Juliano PC; and
Will Hill Tankersley, Balch & Bingham LLP, who served as committee chair.

The process began over a year ago, with the committee meeting frequently to discuss the scope and details of the statute. Committee members benefited from a diversity of background and perspective. The committee began by reviewing the right-of-publicity statutes of each of the 19 states and discussing the strengths and weaknesses of each. For example, New York has a very narrow statute (it protects names, portraits, pictures and voices) while Indiana, a state with very broad protection, protects names, voices, signatures, photos, images, likenesses, distinctive appearances, gestures and mannerisms.

The committee had as its guiding principles:

- Make the act consistent with existing Alabama Common Law.
- Address the issues frequently raised by the right of publicity.
- Adopt best practices that balanced interests.
- Strive for a clear statute to guide judges, lawyers and citizens.

The bill sponsors were **Sen. Rodger Smitherman** and **Rep. Juandalynn Givan**. After the senate and house passed different versions of the bill, a conference committee ironed out the final details; its version passed unanimously and was signed by the governor on May 18, 2015, becoming Act 2015-188.

Specific Provisions of the Act

With a final draft complete, the statute was submitted to the Alabama Legislature for passage. The presentation of the statute attracted the interest of industry groups like the Motion Picture Association of America, the Southeastern Conference and the players' associations of the various major league sports, among others. The statute transformed into a stronger statute with input from these organizations. The final statute is the result of these combined efforts, skillfully navigated and considered by the Alabama Law Institute Committee and interested persons. The following is a summary of the statute as passed:

1. Scope

Alabama's right-of-publicity statute provides that "any person or entity who uses or causes the use of the indicia of identity of a person, on or in products, goods, merchandise, or services entered into commerce in this state, or for purposes of advertising or selling, or soliciting purchases of, products, goods, merchandise, or services, or for purposes of fundraising or solicitation of donations, or for false endorsement, without consent shall be liable under this act to that person, or to a holder of that person's rights." The act protects a person's attributes that identify that person to an ordinary, reasonable viewer or listener. The statute includes a non-exhaustive laundry list of these identifiers, including name, signature, photograph, image, likeness and voice. Key features of the statute also include: the act only protects natural persons and not corporations, the natural person must have resided or died in Alabama (or had his estate probated here) and the natural person need not have been famous to be entitled to protection. Liability may be found regardless of whether the use is for profit or not for profit.

2. Post-Mortem Duration

The act also specifies a 55-year post-mortem right, which the drafting committee, after much debate, settled on as it allows plenty of time for 50th-anniversary commemorations. The right is freely transferable and descendible and belongs to the estate of the decedent unless otherwise transferred. This duration of post-mortem rights puts Alabama at the mid-point of other statutes in other states.

3. Statute of Limitations

The act has a two-year statute of limitations from the act or omission giving rise to the claim. If the cause of action is not discovered and could not have been discovered within those two years, the action may be commenced within six months of such discovery. However, no action may be brought more than four years after the act or omission giving rise to the claim.

4. Exemptions

a. First Amendment

Most importantly, Alabama's statute clearly recognizes that the act does not allow for an abridgement of free speech rights under the First Amendment of the United States Constitution and the Constitution of Alabama.

b. Fair Use

The act includes a comprehensive fair use defense and is the only right-of-publicity statute in the country to include specific provisions for sports broadcasting. This exemption provides that the use of one's indicia of identity in connection with a news, public affairs or public interest account, political speech or a political campaign, live or prerecorded broadcast or streaming of a sporting event or photos, clips or highlights included in broadcasts or streaming sports news or talk shows or documentaries (or promotion of the same) will not result in a violation of the act.

c. "First Sale" Defense

The act protects those who lawfully obtain an authorized product containing someone's indicia of identity should that person decide to resell that product. This is a "first sale" or "rights exhaustion" defense.

5. Remedies

For violations of the Alabama Right of Publicity Act, a prevailing plaintiff will be entitled to either (a) \$5,000 per action (not per violation) or (b) compensatory damages, which will be measured by the defendant's profits from the unauthorized use. The statute further provides that the plaintiff must elect whether to receive statutory damages or to allow the fact-finder to determine the award. This election must be made within a reasonable time after the close of discovery. The option to receive statutory damages was meant to address Alabama's "dignity" cases, like the tattoo client in *Minnifield v. Ashcraft*. Additionally, the prevailing plaintiff will be entitled to receive any other damages available under Alabama law, including punitive damages. Finally, injunctive relief will be available, with a violation of the act constituting a rebuttable presumption of irreparable harm. Attorneys' fees will not be awarded to either party.

Conclusion

The ALI drafting committee, in conjunction with national groups and the bill sponsors, created a well-balanced act, surveying other states' statutes while considering existing jurisprudence from Alabama courts. The result is the Alabama Right of Publicity Act, which will successfully clarify existing common law and provide answers to right-of-publicity questions in Alabama. | [AL](#)



Wilson F. Green

By Wilson F. Green

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

By Marc A. Starrett

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



Marc A. Starrett

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

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Arbitration; Arbitral Bias

***Municipal Workers Compensation Fund, Inc. v. Morgan Keegan & Company, Inc.*, No. 1120532 (Ala. April 3, 2015)**

Under Alabama law, a threshold case for arbitrator partiality as a ground for vacatur is assessed under the “reasonable impression-of-partiality” standard, regardless of whether the arbitrator bias is premised on actual bias or nondisclosure (this was a nondisclosure case). The court rejected the test enunciated in *Gianelli Money Purchase Plan & Trust v. ADM Investor Services, Inc.*, 146 F.3d 1309 (11th Cir. 1998), relied on by MK, under which a reasonable impression of partiality cannot be found if the arbitrator lacked knowledge of a potential conflict. Instead, the court adopted the test from *Schmitz v. Zilveti*, 20 F. 3d 1043 (9th Cir. 1994), under which actual knowledge is not required.

Standing vs. Merits

***Ex parte Scottsdale Ins. Co.*, No. 1140361 (Ala. April 17, 2015)**

Though this mandamus petition was denied without opinion, Justice Murdock's special concurrence notes that this petition was yet another example of a petitioner's conflating "standing" with the merits of a claim (Scottsdale was challenging the standing of a plaintiff to bring a contract and bad faith action against the carrier because the plaintiff was not a party to the contract of insurance).

Guaranty Agreements; Pleading Practice

***Steinfurth v. Ski Lodge Apartments, Inc.*, No. 1130832 (Ala. April 17, 2015)**

Ski Lodge obtained a judgment against guarantors of a promissory note, and as a part of that disposition, the trial court held that guarantors had waived personal exemptions. Guarantors appealed. The supreme court reversed, holding: (1) Ski Lodge sufficiently pleaded waiver of personal exemptions by attaching copy of guaranty, because under Rule 10(c), attachments to a pleading are made a part thereof; but (2) guaranty agreement did not waive exemptions because the promissory note was the only document that included a waiver of exemptions.

State Agent Immunity

***Ex parte Kozlovski*, No. 1140317 (Ala. April 24, 2015)**

Physician was entitled to *Cranman* immunity due to exercise of professional judgment in discharging a patient, in wrongful death arising from the discharge from a state mental hospital.

Statute of Frauds

***Branch Banking & Trust Company v. Nichols*, No. 1130631 (Ala. April 24, 2015)**

Held: (1) Alabama's Statute of Frauds, *Ala. Code* § 8-9-2, requires any alleged promises to be in writing, and generalized contractual statements concerning survival of agreements made in connection with the loan, combined with an extra-contractual memorandum stating that loan would be repaid from future development, were not specific enough to support a promise to loan money in the future or to carry interest; (2) tort claims could not be premised upon alleged promise, the enforcement of which would be barred by the

statute of frauds; and (3) promissory estoppel cannot be used to support agreement barred by the statute of frauds.

Summary Judgment Procedure

***Adams v. Tractor & Eqpt. Co.*, No. 1121162 (Ala. May 1, 2015)**

Motion to dismiss was converted to an MSJ, and that affidavit submitted by purported guarantor denying that he signed the guaranty created issue of fact (the subscription was apparently printed and not signed).

Online Filing (State Court System)

***Geeslin v. On-Line Information Services, Inc.*, No. 1120666 (Ala. May 8, 2015)**

The chief justice's 2012 administrative order, making mandatory electronic filing in the courts, effected an alteration in court rules and procedure, which under Section 150 of the Alabama Constitution and *Ala. Code* § 12-2-19(a) required action by the court itself—meaning a concurrence of a majority of members.

Arbitration; Waiver

***IBI Group Michigan, LLC v. Outokumpu Stainless USA, LLC*, No. 1131456 (Ala. May 8, 2015)**

The court affirmed the circuit court's compelling of arbitration in a commercial dispute. The contract in issue provided that "[a]ny dispute arising out of or related to the contract[s] shall be subject to mediation, arbitration or the institution of legal or equitable proceedings at the sole discretion of [the steel companies]." At issue in this case was whether the commencement of one accepted method (litigation) effected an abandonment or waiver of all other methods.

Volunteer Services; Immunity

***Ex parte Dixon Mills Volunteer Fire Department, Inc.*, No. 1131484 (Ala. May 15, 2015)**

Assistant fire chief was immune under the Volunteer Services Act, *Ala. Code* § 6-5-336, on claims of negligence and wantonness arising from MVA occurring en route to fire call. The department was not entitled to VSA immunity, however, because a non-profit may incur respondeat superior liability despite VSA immunity afforded to an individual volunteer.

State Agent Immunity

***Ex parte Brown*, No. 1140048 (Ala. May 22, 2015)**

In action against officer arising from MVA occurring at completion of pursuit of fleeing suspect, the court held: (1) the department's policies and procedures for pursuits left officers with significant discretion and were therefore guidelines and not a "checklist," and thus officer's exercise of judgment was within scope of immunity.

From the Alabama Court Of Civil Appeals

Mortgages

***Lowery v. Wells Fargo Bank*, No. 2131060 (Ala. Civ. App. April 3, 2015)**

The court reversed judgment on the pleadings for WF in action by mortgagor claiming that several of her mortgage documents were notarized by someone with whom she had no contact, and, therefore, the mortgage was void. Complaint was sufficient to establish a claim that the mortgage was void for want of compliance with *Ala. Code* §§ 35-4-20 and 35-4-24.

Default Judgments

***Alfa Auto Sales, L.L.C. v. Miller*, No. 2140282 (Ala. Civ. App. April 3, 2015)**

The court reversed a trial court's denial of the Alfa defendants' motion to set aside a default entry, where the motion for default was taken 31 days after service, and where Alfa was in communication with plaintiff's counsel attempting to settle the matter during that time.

Recusal Procedures

***Ex parte Griffith*, No. 2140375 (Ala. Civ. App. April 3, 2015)**

The general rule is that a presiding circuit court judge who has recused from a case cannot reassign the case to a district court judge. However, if all the circuit-court judges have recused themselves, and the presiding circuit court judge has previously entered a standing order appointing a district court judge as an *ex officio* circuit court judge, then the last

circuit court judge to recuse may refer the case to that district court judge.

Real Property Licenses

***The Riverbend Association, Inc. v. Riverbend, LLC*, No. 2130579 (Ala. Civ. App. April 10, 2015)**

A license is generally personal to the licensee and is terminable at will, except that when expenditures contemplated by the licensor have been made by the licensee, the license, having been acted upon so as to greatly benefit the licensor, may become irrevocable.

State Immunity

***Burch v. Birdsong*, No. 2140278 (Ala. Civ. App. April 24, 2015)**

On Burch's complaint against superintendent and school board members (in their official capacities) for wrongful termination of her employment as CFO, the CCA held: (1) claims against superintendent were barred by immunity because the superintendent could not reinstate the CFO, and thus the trial court could not compel the superintendent to reinstate the CFO, but (2) claims against the members in their official capacities for reinstatement (as opposed to back pay) were not barred by section 14.

Common-Law Marriage

***Watkins v. Watkins*, No. 2131001 (Ala. Civ. App. May 1, 2015)**

The court affirmed the circuit court's determination of no common-law marriage against purported surviving spouse because substantial evidence supported conclusion that decedent kept the relationship secret in order to protect business relationship with his ex-spouse. The court noted the high burden associated with proving a common-law marriage.

Foreclosure; Lack of Negotiation of Note To Lender

***Smalls v. Wells Fargo Bank, NA*, No. 2130665 (Ala. Civ. App. May 1, 2015)**

The court reversed judgment for lender on judicial foreclosure claim, holding that genuine issue of fact precluded determination that lender had right to foreclose. Issue: whether Wells Fargo established that it had been assigned the right to the payment under the note. Evidence was insufficient on this

point because negotiation requires both a transfer of possession and an endorsement by the holder, if the instrument is payable to an identified person or transfer by possession only if the instrument is payable to bearer.

Relation Back; Due Diligence; Homebuilders

Barrett v. Roman, No. 2130824 (Ala. Civ. App. May 8, 2015)

In “bad house” case, an amendment substituting masonry and roofing subcontractors did not relate back because plaintiffs failed to exercise due diligence; plaintiffs knew the identity of the roofing subcontractor at time of closing, and further did not undertake to discover identity of masonry subcontractor at time of suit or thereafter for two years. Further, the subcontractors owed no duty to the homeowners because the homeowners were not even the intended

purchasers at the time of the work. Claims which original intended owner (the builder) had against subcontractors were also not viable because builder was not a licensed homebuilder under *Ala. Code* § 34-14A-6(5).

Forfeiture; Pre-Judgment Interest

State v. Hall, No. 2140207 (Ala. Civ. App. May 15, 2015)

The CCA reversed the trial court’s order requiring that the state pay pre-judgment interest on amounts on which the state had unsuccessfully sought forfeiture.

Attorneys’ Fees

Diamond Concrete & Slabs, LLC v. Andalusia-Opp Airport Authority, No. 2130629 (Ala. Civ. App. May 15, 2015)

On \$14,000 claim brought under the Little Miller Act and Prompt Pay Act, plaintiff sought attorneys’ fees of

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\$247,275, pursuant to an hourly-fee arrangement. The trial court awarded \$5,622 in fees, calculated as 40 percent of the amount owed. The CCA reversed, holding that setting the fee solely as a percentage of the amount actually recovered was improper for failing to consider the amount of time expended and whether such time was reasonable.

State Agent Immunity

Lewis v. Mitchell, No. 2140139 (Ala. Civ. App. May 23, 2015)

The CCA reversed summary judgment to teacher on claims brought for minor, holding that there was substantial evidence (through minor's testimony and that confirming scope of board policy) indicating that teacher deviated from and violated the board policy on corporal punishment.

From the United States Supreme Court

Supremacy Clause

Armstrong v. Exceptional Child Center, Inc., No. 14-15 (U.S. March 31, 2015)

Supremacy Clause does not confer a private right of action for violation of a federal standard.

Federal Tort Claims Act; Limitations

U.S. v. Wong, No. 13-1074 (U.S. April 22, 2015)

Time limits for filing claims under the Federal Tort Claims Act, 28 U. S. C. §2401(b), are subject to equitable tolling.

First Amendment; Judicial Elections

Williams-Yulee v. Florida Bar, No. 13-1499 (U.S. April 29, 2015)

In a closely-watched First Amendment case, the Court, by a 5-4 majority (with some plurality splitting as to reasoning), affirmed the Florida Bar's disciplinary sanctions on a judicial candidate who had mailed and posted online a generalized letter soliciting financial contributions for her campaign. Judicial canon in issue prohibited personal direct solicitation, but allowed candidate to write thank-you notes and to communicate directly with donors. The majority held that *Cannon* 7(C)(1) is narrowly tailored to serve the state's compelling

interest in maintaining integrity and the appearance of impartiality within the judiciary.

Employment

Mach Mining, LLC v. EEOC, No. 13-1019 (U.S. April 29, 2015)

Held: (1) courts have authority to review whether the EEOC has fulfilled its Title VII duty to attempt conciliation; but (2) the appropriate scope of judicial review of the EEOC's conciliation activities is narrow, enforcing only the EEOC's statutory obligation to give the employer notice and an opportunity to achieve voluntary compliance.

Bankruptcy

Bullard v. Blue Hills Bank, No. 14-116 (U.S. May 4, 2015)

Bankruptcy court's order denying confirmation of a debtor's proposed repayment plan is not a final order from which the debtor can immediately appeal.

Bankruptcy

Harris v. Viegelahn, No. 14-400 (U.S. May 18, 2015)

Chapter 13 debtor who converts to Chapter 7 is entitled to return of any post-petition wages not yet distributed by the Chapter 13 trustee.

ERISA

Tibble v. Edison Int'l, No. 13-550 (U.S. May 18, 2015)

In an ERISA action alleging breach of fiduciary duty connected with the addition of certain mutual funds to a 401(k) plan, the Ninth Circuit held that the complaint was barred by the six-year statute of limitations in 29 U. S. C. section 1113. The Supreme Court reversed, reasoning that the Ninth Circuit erred by confining its analysis of the breach of fiduciary duty claim to the initial selection of the investments because a trustee has a continuing duty to monitor, and remove, imprudent, trust investments.

Taxation; Interstate Commerce

Comptroller of Treasury of Maryland v. Wynne, No. 13-485 (U.S. May 18, 2015)

In a 5-4 decision with an unusual division of judges, the Court invalidated Maryland's personal income taxation scheme as violating the dormant Commerce Clause. Several prior cases had invalidated similar state tax schemes, which might lead

to double taxation of out-of-state income and which discriminated in favor of intrastate over interstate economic activity.

From the Eleventh Circuit Court of Appeals

Public Employment; First Amendment

***Moss v. City of Pembroke Pines*, No. 14-11240 (11th Cir. March 31, 2015)**

Assistant fire chief sued after the city eliminated his job, purportedly for budgetary reasons; chief contended firing was in retaliation for his speaking out about the city's handling of budget and pension issues. District court granted JML to city, reasoning that plaintiff had failed to show that his speech was protected by the First Amendment or that his interest in the speech outweighed the city's interest in avoiding dissension within the fire department. The Eleventh Circuit affirmed.

Maritime Insurance

***AIG Centennial Ins. Co. v. O'Neill*, No. 13-13243 (11th Cir. April 10, 2015)**

Vessel owner and mortgagee sued AIG concerning denial of loss claim, where owner's policy application misstated the purchase price, the listed owner's prior loss history and the owner's identity. The district court, after a bench trial, held that the denial was proper under the maritime doctrine of *uberrimae fidei*, or utmost good faith. The Eleventh Circuit affirmed.

Antitrust

***McWane, Inc. v. FTC*, No. 14-11363 (11th Cir. April 15, 2015)**

The FTC brought an enforcement action against McWane, alleging anticompetitive conduct in the ductile iron pipe-fittings market. After a two-month trial, the ALJ, affirmed later by a divided commission, found that McWane's actions constituted an illegal exclusive dealing policy used to maintain McWane's monopoly power in the domestic fittings market. The Eleventh Circuit affirmed, holding that the commission's factual and economic conclusions—identifying the relevant product market, finding that McWane had monopoly power in that market and determining that McWane's exclusivity program harmed competition—were supported by substantial evidence in the record.

Social Security

***Parks v. Comm'r.*, No. 14-12154 (11th Cir. April 20, 2015)**

This appeal presents two questions about Rachel Parks's application for supplemental security income on behalf of her minor son, D.P.: (1) whether the administrative law judge's denial of Parks's application was supported by substantial evidence and (2) whether the Social Security Appeals Council must make explicit findings of fact about new evidence that it adds to the record when it denies review. Held: (1) the administrative law judge's decision was supported by substantial evidence and (2) the appeals council was not required to make specific findings about Parks's new evidence.

National Bank Act Preemption; Whistleblowers

***Wiersum v. U.S. Bank, NA*, No. 14-12289 (11th Cir. May 5, 2015)**

A split panel held that claims brought by a National Bank officer under the Florida Whistleblower Act, designed to protect employees, are preempted by section 24 of the National Bank Act, which allows national banks to dismiss officers "at pleasure."

Qualified Immunity; Excessive Force

***Merricks v. Atkisson*, No. 14-12801 (11th Cir. May 15, 2015)**

Officer was entitled to qualified immunity on excessive force claim made in conjunction with stop because no clearly-established law notified officer that his conduct in stopping plaintiff and searching her car violated her constitutional rights.

RECENT CRIMINAL DECISIONS

From the Court of Criminal Appeals

Right to Counsel

***Bailey v. State*, No. CR-13-1840 (Ala. Crim. App. Apr. 17, 2015)**

Defendant's motion to withdraw his guilty plea constituted a "critical stage of the proceedings," requiring that defendant be afforded his right to counsel.

Destruction of Evidence

Pickering v. State, No. CR-13-1790 (Ala. Crim. App. Apr. 17, 2015)

Destruction of the defendant's urine samples did not warrant the suppression of their drug test results, because the evidence was not exculpatory, there was no showing that the state had acted in bad faith, the defendant had the opportunity to cross-examine witnesses regarding the results and other prosecution witnesses could testify regarding the defendant's drug use.

Juvenile *Miranda*

State v. R.C., No. CR-13-0983 (Ala. Crim. App. Apr. 17, 2015)

The court reversed the trial court's suppression of the juvenile defendant's statement, rejecting his argument that his juvenile *Miranda* warning was insufficient because it did not contain the specific words "if [his] parent, legal guardian, or legal custodian ... has not provided a child's attorney, one will be appointed" as set forth in *Ala. Code* (1975) § 12-15-202(b)(2). Defense counsel's unsupported statements at the suppression hearing that the defendant was an orphan, had no legal guardian and was unable to understand English did not constitute evidence.

Drug Trafficking

Schreiner v. State, No. CR-14-0003 (Ala. Crim. App. Apr. 17, 2015)

Possession of "meth oil" constitutes the possession of "any mixture containing methamphetamine" for purposes of trafficking in methamphetamine under *Ala. Code* § 13A-12-231(11).

Sentencing Reform Act

Hyde v. State, No. CR-13-0566 (Ala. Crim. App. Mar. 13, 2015)

Trial court abused its discretion in departing from the non-prison dispositional recommendation under the presumptive sentencing guidelines, because it did not follow the manual's procedure regarding notice and proof of aggravating factors to support the departure.

UTTC

State v. Thomas, No. CR-13-1859 (Ala. Crim. App. Mar. 13, 2015)

Alleged defects in the defendant's Uniform Traffic Ticket and Complaint (UTTC) did not deprive the trial court of subject matter jurisdiction over the ticket's alleged offenses; ticket

sufficiently apprised the defendant of offenses even without citation to code sections for each offense.

Hindering Prosecution

Collier v. State, No. CR-13-1937 (Ala. Crim. App. Apr. 17, 2015)

The court reversed the defendant's conviction for hindering prosecution; evidence showed only that he made false statements regarding a second defendant after that defendant had been apprehended, and his concealment of a gun related to the case did not prevent the second defendant's discovery or capture.

Interrogation after *Miranda*

Grizzell v. State, No. CR-14-0146 (Ala. Crim. App. Apr. 17, 2015)

Trial court erred in refusing to suppress the defendant's statement, given after visiting with family in jail, because he had previously invoked his *Miranda* rights and the sheriff's statements to the defendant during that visit constituted further interrogation.

From the Federal Courts

Fourth Amendment

Grady v. North Carolina, No. 14-593 (U.S. March 30, 2015)

Sex offender was ordered to satellite-based monitoring (SBM) for his life. The Supreme Court reversed, holding that the state's SBM program effected a "search" on the defendant, and that it was ordered without regard to reasonableness of the intrusion.

Fourth Amendment

Rodriguez v. United States, No. 13-9972 (U.S. Apr. 21, 2015)

Law enforcement officer, acting without reasonable suspicion of a crime, cannot extend the duration of a traffic stop to allow for a trained dog to sniff the stopped vehicle for the presence of drugs. "[A] seizure for a traffic violation justifies a police investigation of that violation" for the purpose of ensuring that motor vehicles are operated safely, but "[a] dog sniff, by contrast, is a measure aimed at 'detect[ing] evidence of ordinary criminal wrongdoing' and is not an ordinary part of the stop." | [AL](#)



Brandon Hughey

bdh@ajlaw.com

Past, Present and Future

As the first half of the year winds down, I'm pleased to report that the Young Lawyers' Section's **Orange Beach CLE** in May was an outstanding success! Thanks to the support of law firms statewide and the hard work of our Orange Beach CLE committee, chaired by **Megan Comer** and further consisting of **Brad Hicks, Brian Murphy, Robert Shreve, Julia Shreve** and **Rachel Cash**, our attendance substantially increased from last year. Nearly 100 young lawyers from around the state spent the weekend at the Perdido Beach Resort learning courtroom and mediation basics, getting tips on better billing practices, networking with judges and other lawyers, reuniting with old friends and enjoying the beautiful weather in Orange Beach. In addition, our silent auction, organized by **Amy Nation**, raised close to \$3,400 for our special grants program, which provides funding to law-related nonprofit organizations. I urge you to support this fantastic event again in 2016 and help the Young Lawyers' Section build on the momentum generated this year to make next year's CLE even better.

In section news, I am excited to announce that as of October 1, 2015, the section will be an *opt-in section*. No longer will an attorney be a "young lawyer" merely by virtue of being age 36 or younger or by having been admitted to practice in Alabama for three years or fewer at the beginning of the fiscal year. Instead, lawyers will have to choose to join our section and pay dues just as they do when they join various practice sections. The change to an opt-in section will benefit the YLS in a number of ways. Not only will it make it easier for YLS leadership to identify those young lawyers who are interested in participating in ASB and YLS activities, it will give the YLS leaders greater ability to connect with, mobilize and serve its section members. We are excited about this move and hope you are too.

Since this is my last column as YLS president, I'm taking a moment to thank my firm, **Armbrecht Jackson**, for giving me the opportunity to serve on the YLS Executive Committee for the past eight years. Leadership in the YLS has been both a rewarding and challenging experience, and I encourage any servant-minded young lawyers interested in getting involved in state bar activities and meeting exceptional people from around the state to contact a committee member for more information.

The future of the YLS is in good hands. **Hughston Nichols** took the reins as president July 1. The remaining officers for the 2015-16 year are Vice President **Chip Tait**, Secretary **Parker Miller** and newly-elected Treasurer **Lee Johnsey**. They have exciting things planned for the coming year, and I know the new section leadership will serve the young lawyers in this state well. | [AL](#)



Pictured above are Dennis Harrison, Craig Cargile, Jana Garner, Sam Irby, Audrey Strawbridge, Tut Wynne and Chris Nicholson.

Report of the Solo & Small Firm Practice Task Force

By Sam W. Irby

Introduction

On July 3, 2014, ASB President Anthony Joseph created the Solo & Small Firm Practice Task Force. This task force was “to determine whether sufficient interest exists among the solo and small practice lawyers licensed to practice in Alabama to recommend to the Board of Bar Commissioners to establish a Solo & Small Firm Practice Section.”

The task force consisted of more than 20 lawyers who practice as solos or in small firms from both urban and rural areas around the state. The full task force has met at the state bar three times since the order of appointment was issued, with almost all of the members

participating in at least one meeting in person and the other two by conference call. The chair appointed four sub-committees to consider potential offerings that the section might create and make available, and those sub-committees have been brainstorming and preparing a foundation for the future activities of the proposed section.

Background and General Information

Around two-thirds of the members of the Alabama State Bar who actively practice law do so in firms of five lawyers or fewer. Many practice alone, sometimes without support staff. In

addition to facing the difficulties of providing their clients with quality legal services in a timely fashion, these lawyers must also shoulder the responsibilities of the financial and other management duties of their firms. One of the goals of the task force has been to determine what steps the Alabama State Bar could take to provide outreach and communication, as well as aid and assistance in practice, to this currently underserved segment of our membership.

Survey Findings

One of the first tasks undertaken by the task force was a survey of Alabama lawyers who practice in firms with five or fewer attorneys.

The survey, which asked about potential offerings such as a section might provide and whether the respondents would be interested in joining such a section if it were formed, was distributed by way of an email message containing a link to the online survey to around 7,500 potential respondent attorneys. All had regular licenses to practice law and most were in Alabama with a few in Columbus, Georgia and coastal eastern Mississippi. It was difficult to tell how many within the survey pool were not actively engaged in the practice of law, although a number had addresses which appeared to be residential.

A total of 532 responded, with 455 of them on the same day the email was sent. The overall response rate was seven percent, which is well above the general response rate for all surveys (about three percent). Of the 532 respondents, 480 said that they would join such a section if it were formed. Most respondents rated the following as the most important benefits of section membership:

- Substantive law forms bank
- Practice management forms bank
- Low- or no-cost CLE programs
- Low- or no-cost technology training
- Low- or no-cost business and management training
- Email discussion list

Committee Findings

Following the survey, the chair appointed five committees. The Continuing Legal Education Committee, the Practice Management and Technology Information Committee, the Mentoring Committee and the Substantive Forms Bank Committee were charged to investigate the feasibility of providing the deliverables that the survey respondents ranked most highly. The chair also charged the Technology Communications Committee with investigating the best methods for facilitating communications among members of the

potential section. The results of the committee investigations were:

- **CLE Committee**—It would be quite feasible to provide the suggested continuing legal education programs, and that doing so as early as the Alabama State Bar Annual Meeting 2015 would be possible.
- **Mentoring Committee**—While this would be an extremely valuable service for the proposed section to provide, based on the bar's previous efforts at creating viable mentoring relationships, this should wait until the section has been up and running for a year or two.
- **Substantive Forms Bank Committee**—This would be a beneficial and feasible activity, however, the members of the task force will need to spearhead this effort by providing valuable and useful forms to induce other section members to participate.
- **Practice Management Committee**—The committee recommends working with the bar's Practice Management Assistance Program to supplement the information that is already available.
- **Technology Communications Committee**—The committee recommended the creation of a website, a Facebook page and a Twitter account to facilitate communications within the proposed section and to make certain offerings of the section closed to members only in order to enhance the value of membership.

Recommendations

1. Create a new section for solo practitioners and small-firm lawyers.

Creating a new section dedicated to those members who work as solo practitioners and in firms of five lawyers or

fewer will accomplish many of the goals that have been set for our task force and will meet many of the challenges facing this group of Alabama lawyers.

A dedicated section will give solo and small-firm lawyers around the state the opportunity to get to know each other, which will encourage greater involvement in the bar as a whole. Obviously, such lawyers will be more comfortable engaging in bar activities if they have met other similarly situated lawyers who want to become more involved in bar activities as well.

A new section will also enable these attorneys to target CLE opportunities that are more applicable and appropriate to their practice. Those networking opportunities should also foster greater volunteer opportunities and involvement as well and create opportunities for informal mentoring of newer lawyers.

2. Provide activities and CLE opportunities designed for solo and small-firm lawyers.

A dedicated section will provide an organizational structure to accomplish activities and CLE opportunities designed for solo and small-firm lawyers around the state.

To the extent possible, the CLE opportunities by the new section should be offered with reduced or minimal costs to encourage participation.

3. Waive or provide reduced section fees for at least one year.

To encourage membership in the newly-created section, the task force believes that waiving section membership fees for newly admitted lawyers and those who are engaged in their first year of practice as a solo or in a qualifying small firm would be appropriate and would encourage participation. Otherwise, dues should be set at \$15 per year to begin with, as reflected by the vote of 48 percent of the survey recipients. | [AL](#)



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

About Members

William V. Linne announces the opening of **William V. Linne Attorney at Law PLLC** at 17 West Cedar St., Ste. 3, Pensacola 32502. Phone (850) 433-2224.

Tedford Taylor announces the opening of **Tedford Taylor, Attorney at Law LLC** at 301 19th St. N, Ste. 585, Birmingham 35203. Phone (205) 206-9833.

Among Firms

The **Office of the Attorney General for the State of Alabama** announces that **Alice H. Martin** has been appointed chief deputy attorney general.

Lyn Head has been appointed district attorney in Tuscaloosa County, **6th Judicial Circuit of Alabama**. **Jonathan Cross** will serve as chief deputy district attorney and **Jill Ganus**, former district court judge in Jefferson County, will oversee all prosecutions involving child victims.

Baker Donelson announces that **Thomas J. Buchanan, Kevin R. Garrison** and **Catherine Crosby Long** are shareholders and that **David L. Silverstein, Jr.** joined as a member, all in the Birmingham office.

Burr & Forman announces that **Jackie Trimm** joined the Birmingham office as counsel.

Capell & Howard announces that **Carla Cole Gilmore** joined the firm as a shareholder.

Carr Allison announces that **Angel A. Darmer** is an associate in the Birmingham office.

The **Cochran Firm** announces that **Kenneth C. Randall**, former dean of the University of Alabama School of Law and current CEO/president of iLawVentures, LLC, joined as of counsel with the firm's Alabama offices in Birmingham, Huntsville and Dothan.

Copeland, Franco, Screws & Gill PA of Montgomery announces that **James H. Anderson** joined the firm of counsel.

Davidson, Davidson & Umbach LLC announces that **Stephen Clay** and **Samantha B. Copelan** joined as associates and **Amy Himmelwright** is of counsel.

Gilmore, Poole & Rowley Law Group LLC announces that **T. Wade Wilson** joined the firm.

Gordon & Rees LLP announces the opening of a Birmingham office and that **Jeffery W. Melcher** will serve as the managing partner.

Huff Smith Law LLC announces that **Brandon F. Poticny** joined as an associate.

Lewis, Brackin, Flowers & Johnson announces a name change to **Lewis, Brackin, Flowers, Johnson & Sawyer** and that **Holly L. Sawyer** is a partner.

McDowell Knight Roedder & Sledge LLC announces that **Matthew R. Griffith** joined the firm.

The State of New Mexico announces that **Jennifer R. James** is deputy general counsel at the **New Mexico Corrections Department**.

Reynolds, Reynolds & Little LLC announces that **Gilbert C. Steindorff, IV** and **J. Heath Loftin** are partners in

the Birmingham and Montgomery offices, respectively.

Scott, Sullivan, Streetman & Fox PC announces that **M. Jansen Voss** and **Robert M. Ronnlund** are members.

Law Offices of Candice J. Shockley, Attorney at Law LLC announces that **James J. Ransom, III** joined the firm.

Alexander Shunnarah Injury Lawyers PC announces that **J. Bryant Hornsby** and **Jonathan W. Cooner** joined the firm's Birmingham office and **Anthony Shunnarah** joined the Mobile office.

Starnes Davis Florie LLP announces that **Ginger L. Harrelson**

joined the firm's Mobile office as an associate.

Waller Lansden Dortch & Davis LLP announces that **Charles W. Prueter** joined as associate in the Birmingham office.

Ray Ward and **Thomas W. Powe, Jr.**, formerly with Ray, Oliver & Ward LLC, announce the opening of **Raymond E. Ward LLC** at 2216 14th St., Tuscaloosa 35401. Phone (205) 345-5564.

Webster, Henry, Lyons, Bradwell, Cohan & Black PC announces that **Michael S. Jackson** joined the firm as a shareholder and **Brannan W. Reaves** joined as of counsel.

J. Ralph White, Sharon L. Andrews and **Stella C.C. Shackelford** announce the formation of **White, Andrews & Shackelford LLC** (formerly, White Law Firm). **B. Alan Baker** is an associate and **William K. Duke** is of counsel to the firm. Offices are located in New Orleans and Oxford.

White Arnold Dowd announces that **Kelly Brennan Bolvig** joined as a partner and **Lisha L. Graham** is a partner.

Whitworth Real Estate LLC announces that **Charles Lane Jones** joined as CLO and general counsel.

Wolfe, Jones, Wolfe, Hancock, Daniel & South LLC announces that **Zachary L. Guyse** and **T. Riley Wolfe** joined as associates. | [AL](#)

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J. Anthony McLain



Contact Permitted with Employees of Opposing Party Who Are Non-Managerial, Who Are Not Responsible for Act for which Opposing Party Could Be Held Liable and Who Have No Authority To Make Decisions about the Litigation

QUESTION:

"I have a slip-and-fall case in a retail store and I would like an opinion as to whether I can contact directly some of the cashiers. It seems that my client slipped and fell in a certain area of the store. After she fell, she says that one of the cashiers told her that a store employee had been mopping or buffing in that area immediately before the fall and had left moisture. I would like to interview the cashiers to get that straight.

"I would be grateful if you would give me an opinion as to whether such an interview would be allowed under the circumstances. It is not my understanding that the cashiers were the people who had done the mopping or buffing."

ANSWER:

Pursuant to Rule 4.2 of the *Rules of Professional Conduct* of the Alabama State Bar, an attorney may communicate directly with an employee of a corporation or other organization who is the opposing party in pending litigation without the consent of opposing counsel if the employee does not have managerial responsibility in the organization, has not engaged in conduct for which the organization would be liable and is not someone whose statement may constitute an admission on the part of the organization. It is the opinion of the Disciplinary Commission of the Alabama State Bar that the third category, i.e., a "person . . . whose statement may constitute an admission on the part of the organization" should be limited to those employees who have authority on behalf of the organization to make decisions about the course of the litigation.

DISCUSSION:

Communication with persons represented by counsel is governed by Rule 4.2 of the *Rules of Professional Conduct*, which provides as follows:

“Rule 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”

When the represented party is a corporation or other organization, communication with some of the employees of the organization is also prohibited.¹

The Comment to Rule 4.2 delineates three categories of employees with whom communication is prohibited, viz:

“In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the

matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.”

The information provided in your letter indicates, and for purposes of this opinion it will be assumed, that the cashier does not fall within either of the first two categories, i.e., she does not have managerial responsibility nor did she engage in conduct for which the organization would be liable. The question, therefore, is whether the cashier falls into the third category, i.e., would her statement to you constitute an admission on the part of the retail store?

There is a significant divergence of opinion among various jurisdictions as to which employees fall within this third category. Some jurisdictions take the position that the prohibition extends broadly to all employees of a corporation. Others have held that the prohibition applies to any employee whose statement would constitute an “admission against interest”



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exception to the hearsay rule, as provided in Rule 801(d)(2) of the *Rules of Evidence*. Still others have interpreted the rule narrowly to prohibit contact with only a “control group,” which is limited to the company’s highest-level management. There appears to be no case law in Alabama which definitively addresses the issue.

A recent decision of the Massachusetts Supreme Judicial Court provides what the Office of General Counsel considers to be a rationally defensible and well-balanced approach to the question. In *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 436 Mass. 347, 764 N.E. 2d 825 (2002), a police sergeant with Harvard’s security department sued the school for sex discrimination. The plaintiff’s attorney interviewed five Harvard employees who were not accused in the lawsuit, two of whom had supervisory authority over the plaintiff. The trial court ordered sanctions against the attorney for violation of the Massachusetts version of Rule 4.2. The supreme judicial court reversed concluding, in pertinent part, as follows:

“The [trial] judge held that all five employees interviewed by MR&W were within the third category of the comment. He reached this result by concluding that the phrase ‘admission’ in the comment refers to statements admissible in court under the admissions exception to the rule against hearsay.

* * *

“However, other jurisdictions that have adopted the same or similar versions of Rule 4.2 are divided on whether their own versions of the rule are properly linked to the admissions exception to the hearsay rule, and disagree about the precise scope of the rule as applied to organizations.

* * *

“Some jurisdictions have adopted the broad reading of the rule endorsed by the judge in this case. (citations omitted) Courts reaching this result do so because, like the Superior Court, they read the word ‘admission’ in the third category of the comment as a reference to *Fed. R. Evid.* 801(d)(2)(D) and any corresponding state rule of evidence. *Id.* This rule forbids contact with practically all employees because ‘virtually every employee may conceivably make admissions binding on his or her employer.’

* * *

“At the other end of the spectrum, a small number of jurisdictions have interpreted the rule narrowly so as to allow an attorney for the opposing party to contact

most employees of a represented organization. These courts construe the rule to restrict contact with only those employees in the organization’s ‘control group,’ defined as those employees in the uppermost echelon of the organization’s management.

* * *

“Other jurisdictions have adopted yet a third test that, while allowing for some ex parte contacts with a represented organization’s employees, still maintains some protection of the organization.

* * *

“Although the comment’s reference to persons ‘whose statement may constitute an admission on the part of the organization’ was most likely intended as a reference to *Fed. R. Evid.* 801 (d)(2)(D), this interpretation would effectively prohibit the questioning of all employees who can offer information helpful to the litigation. We reject the comment as overly protective of the organization and too restrictive of an opposing attorney’s ability to contact and interview employees of an adversary organization.

* * *

“We instead interpret the rule to ban contact only with those employees who have the authority to ‘commit the organization to a position regarding the subject matter of representation.’ (citations omitted) The employees with whom contact is prohibited are those with ‘speaking authority’ for the corporation who ‘have managing authority sufficient to give them the right to speak for, and bind, the corporation.’

* * *

“This interpretation, when read in conjunction with the other two categories of the comment, would prohibit ex parte contact only with those employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation.

* * *

“Our test is consistent with the purposes of the rule, which are not to ‘protect a corporate party from the revelation of prejudicial facts’ (citations omitted) but to protect the attorney-client relationship and prevent clients from making ill-advised statements without the counsel of their attorney. Prohibiting contact with all employees of a represented organization restricts informal contacts far more

than is necessary to achieve these purposes. (citations omitted) The purposes of the rule are best served when it prohibits communication with those employees closely identified with the organization in the dispute. The interests of the organization are adequately protected by preventing contact with those employees empowered to make litigation decisions, and those employees whose actions or omissions are at issue in the case. We reject the ‘control group’ test, which includes only the most senior management, as insufficient to protect the ‘principles motivating [Rule 4.2].’ (citations omitted) The test we adopt protects an organizational party against improper advances and influence by an attorney, while still promoting access to relevant facts. (citations omitted) The Superior Court’s interpretation of the rule would grant an advantage to corporate litigants over non-organizational parties. It grants an unwarranted benefit to organizations to require that a party always seek prior judicial approval to conduct informal interviews with witnesses to an event when the opposing party happens to be an organization and the events at issue occurred at the workplace.

“While our interpretation of the rule may reduce the protection available to organizations provided by the attorney-client privilege, it allows a litigant to obtain more meaningful disclosure of the truth by conducting informal interviews with certain employees of an opposing organization. Our interpretation does not jeopardize legitimate organizational interests because it continues to disallow contacts with those members of the organization who are so closely tied with the organization or the events at issue that it would be unfair to interview them without the presence of the organization’s counsel. Fairness to the organization does not require the presence of an attorney every time an employee may make a statement admissible in evidence against his or her employer. The public policy of promoting efficient discovery is better advanced by adopting a rule which favors the revelation of the truth by making it more difficult for an organization to prevent the disclosure of relevant evidence.”

The Office of General Counsel hereby adopts the logic and reasoning of the Massachusetts Supreme Judicial Court as quoted above and concludes, therefore, that since the cashier does not “have authority on behalf of the corporation to make decisions about the course of the litigation,” you are not ethically prohibited from communicating with her.

However, there is an additional ethical consideration which should be addressed. The conclusion reached above means that the cashier is an unrepresented third person within the meaning of Rule 4.1 and Rule 4.3 of the *Rules of Professional Conduct*. Those rules provide, respectively, as follows:

“Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”

* * *

“Rule 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”

These rules mandate the use of extreme caution to avoid misleading the cashier with regard to any material issue of law or fact, and most particularly, to avoid any misunderstanding on the part of the cashier as to your role in the lawsuit. You should initiate any conversation with the cashier by acknowledging that you are an attorney representing a client with a claim against the cashier’s employer and that, by virtue of such representation, you have an adversarial relationship with her employer. If, following such disclosure, the cashier indicates a desire to terminate the conversation, you are ethically obligated to respect the cashier’s wishes and immediately discontinue any further attempt at communication. [RO-02-03]

The Alabama Supreme Court recently amended Rule 4.2. The amendment changes the text of the rule, now consistent with the rule title, by changing the word “party” to “person.” The rule was also modified to recognize representation of a person on a limited-scope basis, as now provided for under Rule 1.2(c), Ala. R. Prof. C. | [AL](#)

Endnote

1. Obviously, communication is also prohibited with any employee who is individually represented.



Judge Gardner F. Goodwyn, Jr.

Judge Gardner F. Goodwyn, Jr.

Judge Gardner Foster Goodwyn, Jr. died February 24 at the age of 100. He was born to Judge Gardner Foster Goodwyn, Sr. and Lora Williams Goodwyn in Bessemer on April 27, 1914. He was a member of a pioneer Montgomery family and the great-great-grandson of United States President John Tyler.

He is survived by his wife of 59 years, Margaret Williams Goodwyn; his daughter, Priscilla Anderson (Robert); his son, Tyler Williams Goodwyn (Jeanie); his grandson, Cooper Anderson; and his nephew, M. Williams Goodwyn (Maura).

After graduating from Bessemer High School, he attended Virginia Military Institute for two years. He received his undergraduate degree and law degree from the University of Alabama and completed post-graduate work at Harvard Law School.

After graduating from law school in 1938, he practiced in Bessemer until he enlisted in the United States Army in 1941. He served in the North African and Italian campaigns and received four battle stars, the Bronze Arrowhead for assault landing at Salerno and the Presidential Unit Citation. During Allied occupation, he was appointed judge of the Allied Government Court over Civilian Population, and later to the Appellate Court in Rome. He was honorably discharged in March 1946 as a lieutenant colonel.

He then spent four and a half years as an assistant attorney general of Alabama in trial and appellate work in various counties throughout the state and before the Alabama Supreme Court. In 1950, he was appointed by Governor Folsom to a circuit judgeship in the Tenth Judicial Circuit, Bessemer Division, Jefferson County. After 31 years on the bench, he retired in 1981.

One of the most publicized events occurred in the 1960s when an alleged Cosa Nostra gunman from New York and the district attorney in the Bessemer Division of Jefferson County were indicted for conspiracy to kill Judge Goodwyn. It was alleged that the plot arose after Judge Goodwyn accused the district attorney of corruption.

Scouting was his passion for many years. He was an Eagle Scout and as an adult leader he received the Silver Beaver Award.

Judge Goodwyn was a member of the Birmingham and Bessemer bar associations and served on the board of the Red Cross, Bessemer YMCA, Montevallo College and Bessemer Technical College. He was also a member of the First Christian Church of Bessemer, where he served as elder, trustee and Sunday school teacher.

—Tyler W. Goodwyn, *Gulf Shores*

Anyake, Samuel Afamefuna

Birmingham
Admitted: 2010
Died: March 24, 2015

Arnold, Timothy Lee

Hueytown
Admitted: 2003
Died: April 18, 2015

Baxley, Wade Hampton

Dothan
Admitted: 1968
Died: March 5, 2015

Brabston, Eugene Willis

Birmingham
Admitted: 1951
Died: March 10, 1995

Clem, James Steven

Mobile
Admitted: 1992
Died: July 19, 2014

Dean, Brenton Lawrence

Auburn
Admitted: 1998
Died: March 13, 2015

Doggett, Edward Whitfield

Florence
Admitted: 1973
Died: April 22, 2015

Flynn, Stephen Jay

Alexandria, VA
Admitted: 1977
Died: February 20, 2015

Greer, James Houston

Birmingham
Admitted: 1983
Died: March 22, 2015

Harper, Henry Johnson

Pike Road
Admitted: 1960
Died: April 8, 2015

Hartman, John Louis, III

Birmingham
Admitted: 1968
Died: March 27, 2015

Herrin, Elliott Clayton, Jr.

Birmingham
Admitted: 1963
Died: April 9, 2015

Howard, Linda Lou

Gulf Shores
Admitted: 1999
Died: February 8, 2015

Howell, George Harper

Prattville
Admitted: 1973
Died: April 24, 2015

Ivey, Wyndall Anthony

Birmingham
Admitted: 1999
Died: March 18, 2015

Lane, Wilford Jones

Anniston
Admitted: 1978
Died: March 19, 2015

Lovell, Arthur Fulton, Jr.

Birmingham
Admitted: 1954
Died: September 6, 2013

McGehee, David Elliott

Huntsville
Admitted: 1990
Died: April 3, 2015

Rigney, Gary Lee

Huntsville
Admitted: 1973
Died: April 4, 2015

Shipper, David Walter

Florence
Admitted: 1995
Died: March 15, 2015

Stevens, William Guy

Anderson, SC
Admitted: 1973
Died: March 1, 2015



Attendees enjoying a time of fellowship during the retreat



Jeremy McIntire, assistant general counsel, discussed the Rules of Professional Conduct and the interaction between ALAP and the OGC.

Fun, Fellowship and Training At the “Recovery Retreat”

By Robert B. Thornhill, Alabama State Bar ALAP director

Members of the Alabama Lawyer Assistance Program (ALAP) Committee, a group of dedicated attorneys who voluntarily serve the legal community in our state, came together on April 10 and 11 at beautiful Camp Sumatanga, near Oneonta, to participate in a two-day training. There was much fellowship and camaraderie. There was also an obvious dedication to the mission of the Alabama Lawyer Assistance Program: to provide programs and services to assist lawyers, judges and law students in Alabama who may be impaired. I was delighted to see such a good turnout to this two-day weekend event, and to witness the level of participation during the training.

We had an impressive lineup of speakers for this event. Roger Olson, M.Ed, gambling addiction therapist, began the training Friday evening with a program about the disease of compulsive gambling. Olson has played a central role in the establishment of the Alabama Council On Compulsive Gambling, Inc., which became the official state affiliate of the National Council on Problem Gambling in January

2010. It was of particular interest to learn that “gambling disorder” is now recognized as a legitimate and diagnosable mental disorder listed in the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5)*. An overview was given of the basic criteria that must be met to receive such a diagnosis and a very useful presentation on the devastating impact that undiagnosed and untreated compulsive gambling can have.

He was followed by Jeremy McIntire, assistant general counsel, Alabama State Bar, who discussed ethics and professionalism and focused on the reporting of professional misconduct, the disciplinary process, the *Rules of Disciplinary Procedure* and the rules most often violated by an impaired lawyer.

Saturday morning’s training schedule began with a presentation by Dr. Barry Lubin. He is the medical review officer for Affinity Online Solutions, ALAP’s third-party administrator for the random drug-screening program. Dr. Lubin discussed in depth random drug-screening, deliberate adulteration of drug screens and the



ALAP Committee members, left to right, Michael Stewart, V.J. Elmore, Hon. William B. Ogletree, Kay Laumer and David E. Hudgens and retreat attendee Bryan Andrews (in back)



Roger Olson, M.Ed, discussed gambling addiction symptoms to help identify colleagues struggling with it.

value of a reliable random drug-screening program to ensure compliance with monitoring and success with recovery from addiction.

He was followed by Jeremy Rakes, a therapist and interventionist with Bradford Health Services, who described the basic elements of an intervention, including several approaches that can be utilized when intervening with an addict and their family. Rakes stressed the importance of family members and loved ones listing those ways in which they have “enabled” or “perpetuated” the addiction, expressing their regret and committing to no longer engaging in those behaviors.

Dr. Delisa West, a board-certified neuropsychologist from Birmingham gave an overview of cognitive impairment, including domains of cognition, patterns of cognitive impairment, causes of cognitive impairment and the usefulness of the neuropsychological evaluation to determine

appropriateness to return to work. Committee members recognize that with the aging of the population and the need to continue to work well past the time that many attorneys had hoped to retire, the issue of cognitive impairment will become more prevalent.

A small panel of seasoned committee members responded to various questions and concerns. Overall feedback from those in attendance has been very positive, and numerous requests have been made to do something similar next year.

I am so thankful to have such a dedicated group of attorneys who are willing to serve with no expectation of monetary reward or public notoriety, but just an honest desire to give back and to be of service, and I thank you for your largely anonymous efforts. Many committee members have been directly involved in changing lives and had a powerful and positive impact on other attorneys who are in need! | [AL](#)



Dr. Delisa West, Ph.D., clinical psychologist, presented the symptoms of cognitive impairment.



Dr. Barry Lubin, medical review officer, Affinity Online Solutions, explained drug screening, adulteration and the value of reliable random drug screening for a successful recovery.

ALAP “Model Policy for Law Firms”

The Alabama Lawyer Assistance Program announces the new “Model Policy for Law Firms.” ALAP is devoted to providing assistance to attorneys, judges and law students who may be experiencing problems related to substance abuse or other mental health issues such as depression, anxiety or depression. David Wooldridge, a long-time member of the ALAP Committee, developed the “Model Policy” as a tool to be utilized when a law firm is faced with these kinds of issues. The policy was adopted by the full committee in April. The policy can be adopted as is or used as a guide when setting up a policy for a law firm or business, or when dealing with issues of possible impairment in the workplace. As always, a call to the Alabama Lawyer Assistance Program will result in immediate assistance, providing recommendations, referrals and the option of a monitoring program should this be appropriate. ALAP can also assist with interventions when needed. The model policy is located under ALAP at www.alabar.org. Phone (334) 517-2238 (office) or (334) 224-6920 (24-hour cell) or email robert.thornhill@alabar.org. | [AL](#)

Transfers to Disability Inactive Status

Disbarment

Suspensions

Public Reprimands

Transfers to Disability Inactive Status

- Bessemer attorney **Dan Cicero King, III** was transferred to disability inactive status by order of the Supreme Court of Alabama, effective February 17, 2015. The supreme court entered its order based upon the February 17, 2015 order of Panel II of the Disciplinary Board of the Alabama State Bar in response to King's petition submitted to the Office of General Counsel requesting to be transferred to disability inactive status. [Rule 27(c), Pet. No. 2015-306]
- Tuscaloosa attorney **William Bankhead McGuire, Jr.** was transferred to disability inactive status by order of the Supreme Court of Alabama, effective March 6, 2015. The supreme court entered its order based upon the March 6, 2015 order of Panel III of the Disciplinary Board of the Alabama State Bar in response to a petition submitted by the Office of General Counsel requesting McGuire to be transferred to disability inactive status. [Rule 27(b), Pet. No. 2015-383]

Disbarment

- Montgomery attorney **William Henry Robertson, V** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective January 29, 2015. The court's order was based upon the Alabama State Bar Disciplinary Board's order disbaring Robertson after he was found to have stolen funds belonging to the Montgomery County Trial Lawyers Association on multiple occasions from February 2013 through October 2013. Robertson also forged another individual's signature on two checks. Additionally, he stole funds belonging to the Young Lawyers' Section of the Alabama State Bar. According to Robertson, he stole the funds to support an addiction to prescription pills caused by a back injury. [ASB No. 2013-2203]

Suspensions

- Dothan attorney **Gregory Scott Sample** was summarily suspended from the practice of law in Alabama by order of the Disciplinary Commission of the

Alabama State Bar, pursuant to Rules 20(a)(2)(i) and 8(e), *Ala. R. Disc. P.*, effective February 23, 2015. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing that Sample failed to respond to requests for information during the course of a disciplinary investigation. On or about March 5, 2015, after responding to the bar's request for information, Sample filed a petition to dissolve summary suspension. On March 6, 2015, the Disciplinary Commission granted Sample's request that the summary suspension be dissolved and entered an order to that effect. [Rule 20(a), Pet. No. 2015-331]

- Alabama attorney **Melissa Nadine Tapp** was suspended from the practice of law in Alabama, effective March 6, 2015, for noncompliance with the 2014 Annual Mandatory Client Security Fund Assessment of the Alabama State Bar. [CSF No. 14-991]

Public Reprimands

- Former Birmingham attorney **Arnold Bush, Jr.** received a public reprimand with general publication on March 13, 2015 for violating Rules 1.1, 1.3, 1.4(a), 1.16(d) and 8.4(d) and (g), *Ala. R. Prof. C.* In 2007, Bush was retained by a client to represent her in a rule nisi hearing wherein Bush failed to complete the work necessary for the hearing, failed to appear at the hearing and failed to communicate with the client. Moreover, Bush admitted he failed to properly terminate his representation with the client which precluded her from having sufficient time to retain new counsel. Finally, Bush admitted he abandoned the client's case. [ASB No. 2007-171(A)]
- Huntsville attorney **Jennifer Dawn Gray** received a public reprimand without general publication for violations of Rules 3.3(a)(1), 4.1(a) and 8.4(a), (c), (d) and (g), *Ala. R.*



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Prof. C. In February 2014, Gray was appointed to represent a client on criminal charges. On or about April 3, 2014, Gray presented a plea agreement to the presiding judge providing that the client would be sentenced to eight years with the Department of Corrections. The plea agreement was silent as to whether the client would be required to go to the penitentiary or would be given an alternative sentence. In an “off-the-record” conversation before entering the plea, Gray represented to the court that the assigned assistant DA had agreed that the client could serve his sentence in the Community Corrections Program. At the time, the assigned assistant DA was handling other criminal matters in another courtroom and, therefore, unable to be present for the plea. Instead, another assistant DA handled the plea. Based upon Gray’s representation to the court, the judge accepted the plea and sentenced the client to community corrections. Shortly thereafter, the assigned assistant DA appeared and informed the judge that he had not agreed to community corrections and that was not part of the plea agreement. When the judge asked Gray why she had made a false representation to the court, she responded that she did not believe she was required to “do the prosecutor’s job.” [ASB No. 2014-1345]

- Phenix City attorney **Matthew Jon Landreau** received a public reprimand without general publication for violations of Rules 1.1, 1.3, 1.4(a) and (b), 1.16(d), and 8.4(a) and (g), *Ala. R. Prof. C.* In May 2012, Landreau was retained to defend a client and his companies in a 1981 action. According to the court’s scheduling order, all discovery was to be completed by January 16, 2013 and witness and exhibit lists were to be submitted by March 31, 2013. Landreau failed to file his witness and exhibit list prior to the deadline. Instead, on April 3, 2013, Landreau filed a motion to continue the trial date. According to the motion, Landreau had recently been appointed assistant DA for the Chattahoochee Judicial District in Georgia, and as a result, Landreau informed the court that he was going to withdraw from representation and that his clients would need additional time to retain other counsel. Upon initial consideration of the motion to continue the trial date, the court denied Landreau’s motion and ordered

Landreau to continue representing the defendants. In doing so, the court noted that the case had been set for trial for 10 months and that all deadlines in the case had passed. On April 12, 2013, Landreau filed a motion to reconsider, and also filed a motion to withdraw. The court subsequently granted the motion to reconsider and reset trial for September 20, 2013 and set pretrial for September 5, 2013. The motion to withdraw was held in abeyance pending the filing of a notice of appearance by new counsel. The court specifically ordered that Landreau continue as “responsible counsel of record” until appearance of new counsel. Thereafter, no other action was taken in the case by either party until July 9, 2013, when another attorney entered a notice of appearance on behalf of Landreau’s client. At that time, it was noted by the new attorney that Landreau had previously failed to take the deposition of the plaintiff, failed to file any dispositive motions and failed to file a witness and exhibit list as required. In addition, Landreau failed to take any action on behalf of the client from April 2013 to July 2013 despite the fact the court ordered Landreau to continue representing the defendants until such time as new counsel had appeared in the case. [ASB No. 2013-1365]

- Orange Beach attorney **Katherine Olivia Whiting** received a public reprimand without general publication for violations of Rules 1.1, 1.3, 1.4(a), 3.2 and 8.4(a) and (g), *Ala. R. Prof. C.* In January 2013, Whiting represented a client in a Chapter 7 bankruptcy proceeding and a divorce. Whiting was paid \$1,000 to represent the client in the bankruptcy matter and \$1,000 to represent the client in the divorce. On April 8, 2013, Whiting filed the Chapter 7 bankruptcy petition. After filing the petition, the court issued numerous notices advising Whiting that documents were missing or that the filed documents were deficient. Despite these notices, Whiting failed to take corrective action on behalf of the client. As a result, the client’s bankruptcy petition was dismissed on or about June 11, 2013. Whiting also failed to file a divorce petition on behalf of the client. Whiting has been ordered to refund the complainant the fee of \$2,000 and attend an MCLE seminar on professional responsibility within six months of the reprimand. [ASB No. 2013-1117] | [AL](#)

free•dom:

noun

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

free•dom court re•porting:

proper noun

**a company that gives you
more freedom by handling
your legal support needs.**



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