The Alabama Lawyer

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On The Cover

Pictured on the cover are 2015-16 Alabama State Bar President Lee H. Copeland and his wife, Jessica, with sons Hall (left) and Albert (right).

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COLUMNS

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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.

Lee H. Copeland

A Lucky Man

This summer, I was sworn in as president of the Alabama State Bar. At the Grand Convocation, I said that I was the luckiest man in the world and I am.

I am lucky to have a wonderful wife and two healthy and intellectually curious children. I am lucky to work at a firm–Copeland, Franco, Screws & Gill–who, in my humble opinion (well, in my opinion, whether it's humble or not), has more brain-power and professionalism per square inch than any other firm that I know.

I am really lucky, though, to work in our profession. The business of being a lawyer, whether it's negotiating a lease, litigating a civil issue or trying a criminal case, is entirely different from most professions. When two doctors are treating a patient, they have a common purpose–to save the patient. They are working toward the same resolution. When two architects design a building together, they have a singular purpose–to build the best building and to do it safely. When two lawyers are working on a case, they are on opposite sides. They are working together to achieve *opposite* results. It is in that working space that professionalism is crucial for attorneys.

Judge Paul Warner, a federal magistrate judge in Utah, recently wrote *Ten Tips on Civility and Professionalism*. To borrow (of course, I mean steal) from his points, below are three of his tips that I think are critical:

- What goes around comes around. You never know when you are going to be the lawyer who needs the extension on discovery or on a filing or has booked a family cruise vacation and needs scheduling help. Think about it before saying "no" to the other side because tomorrow it may be you who will be asking.
- Being reasonable and accommodating are not signs of weakness. In fact, I have found that the best lawyers are those who *are* accommodating and those who *are* reasonable.
- Do not be so concerned about winning the battle that you lose the war. The "war" in the professionalism context means how you are viewed by other lawyers, how you are viewed by the bench and how you are viewed in your community. Focusing on winning a motion at the cost of your reputation for honesty, integrity and professionalism is a short road to being that lawyer everyone hates.

Pro Bono

As you know, October is Pro Bono Month. The goals of the Alabama State Bar and its Pro Bono Celebration Task Force are to provide service to those who cannot afford it and to educate the public about the extensive work Alabama lawyers are doing to improve the lives of those amongst us who are most vulnerable.

Each local bar will be invited to participate in the celebration. A package created by the task force includes all of the materials needed to host a pro bono recruitment drive, a local pro bono clinic or a community legal education program and is available by simply contacting Linda Lund, VLP director, at *linda.lund@alabar.org* or (334) 269-1515, or by going to *https://www.alabar.org/for-the-public/pro-bono-month/*.

Every single lawyer I have ever met has taken pro bono cases–by doing free work for their neighbors, church members or distant family members. Those efforts should be rewarded. However, there is a formalized system in which the poorest in our state can obtain a lawyer. Their legal problems are not generally complicated, and they simply need someone to shepherd them through the process.

A worthy goal of each attorney would be to handle a certain number of pro bono cases each year. Whether it's two, four or 12 cases a year, I urge you to set a goal, and call your local pro bono group to volunteer.

Continued from page 293

New Programs

The bar looks to keep many of the programs started in the past few years that are working well now, but there are several new ones that we plan on implementing, including:

- Practice Buy-Out. Two-thirds of the attorneys in Alabama are in legal practices with five lawyers or less. There are many single practitioners who would like to be able to pass on their clients to either retire or move onto another career path. Other states have created a program that matches a young lawyer who has just graduated from law school with these older practitioners. The matching program would bring together the older lawyer with a younger lawyer, at a below-market rate, to begin the buy-in process of his practice. We are creating a task force for this issue and expect to have it in place very soon.
- As a general rule, people like their doctors young ("if they are just out of medical school, they know the cutting-edge trends"), but they like their lawyers old (wise, seasoned, have seen it all, etc.). We plan on having a concerted effort to reach out to lawyers who have been practicing for decades and make sure the bar, both the association as well as its members, are receiving the full benefits from these experienced attorneys.

Relaxing at this year's "Family Night Dinner" are Lee and Jessica Copeland and Rich and Shannon Raleigh.

- By the time you read this, I hope you will have seen a video highlighting various aspects of the bar. More information about these quarterly videos will be emailed to members. If you have a topic or idea you think would be of particular interest to our bar, please contact the ASB at (334) 269-1515.

I feel lucky. Although this may not be the easiest time to be a lawyer, it's certainly not the worst. We are all part of a proud profession and I am lucky and deeply honored to represent the Alabama State Bar this year. | AL

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Keith B. Norman
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Alabama's Civic Health in 2015

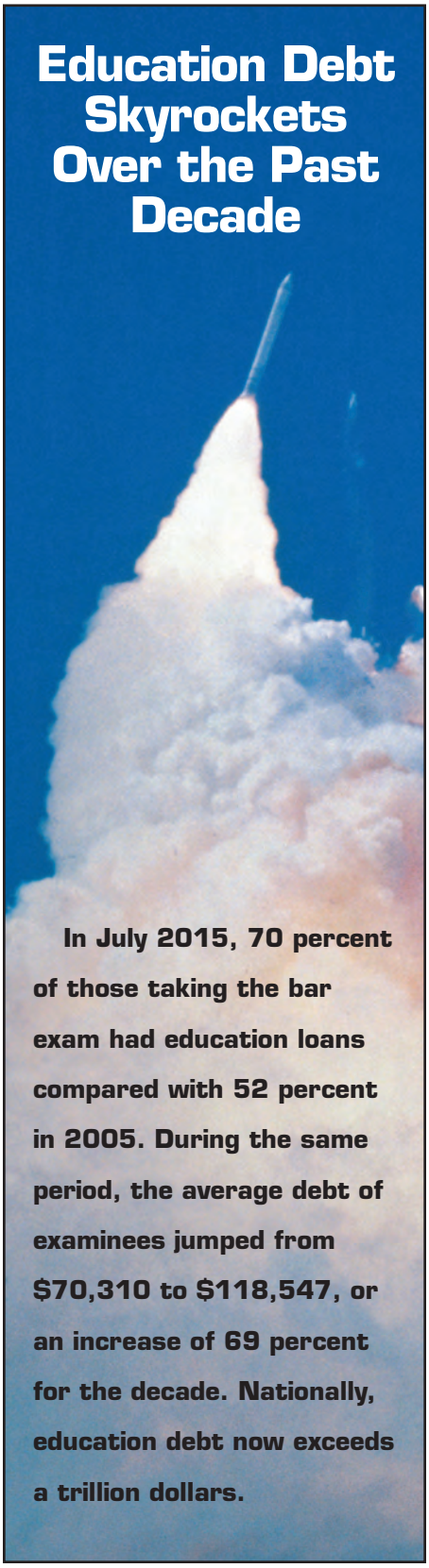
The David Mathews Center for Civic Life located at the University of Montevallo recently sent me a copy of the *2015 Alabama Civic Health Index*. The index is a joint effort of the Mathews Center, Auburn University College of Liberal Arts, the University of Alabama New College and the National Conference on Citizenship. This is the second in-depth report on our state's civic health. The first one was conducted in 2011. This report is essentially a "snapshot" of what is occurring in cities and towns across the state where thousands of citizens come together to identify and address community issues in locations as varied as town halls, coffee shops and school rooms.

The premise of the study and index is that in order for a democratic form of government, at all levels, to be successful, individuals must work together to address public issues and improve their communities. The 2015 index measures Alabama's civic health by studying formal and informal activities of citizens, including voting, discussing politics, participating in community groups and organizations and engaging with fellow citizens to solve community problems or improve local conditions. The four key findings of the index reveal:

- Nearly every indicator of civic health is positively rated with educational attainment. Alabamians who hold a bachelor's degree have higher rates of engagement in almost every measure of political action.
- Alabamians age 30 and over are nearly twice as likely as 18-29 year olds to vote in national (67.2 percent vs. 40.3 percent) and local (67.2 percent vs. 38.5 percent) elections.
- Urban Alabamians are more likely to vote and contact public officials, while rural Alabamians discuss politics with family and friends and exchange favors with neighbors more often.
- Trust forms an important component of any social bond, and 61.3 percent of Alabamians report trusting all or most of their neighbors. Nationally, only 55.8 percent of Americans reported trusting their neighbors.

The report's findings clearly detail that Alabama is "thriving" in several important areas. For example, Alabamians exhibit a strong social connection with friends and family. We regularly exchange favors with neighbors and give to charity at high rates. The report states that these characteristics affirm the state's reputation as being neighborly and hospitable. Moreover, Alabamians exceed national averages for frequently discussing politics with family and friends, as well as registering to vote, but these characteristics do not translate to high levels of public work. The report points out that Alabama ranks at or near the bottom in rates of attending public meetings and working with neighbors to fix or improve something in the community.

The report notes that while the 2015 index answers questions about the state of Alabama's civic health, it raises questions about how we can cooperate better with one another to strengthen civic life in Alabama. Toward this end, the Mathews Center will be conducting a series of community conversations on civic health across the state. As community leaders, lawyers have an opportunity to help promote the civic health of our state by encouraging broader civic discourse and more individual participation by Alabamians in their respective communities. To take part in the statewide conversation, join in online at *mathewscenter.org* and on Twitter with @DMCforCivicLife using hashtag #ALcivicstrong. A copy of the report can be found at *http://www.ncoc/net/ALCHI2015*. | AL



The Emerging Issue of Cognitive Impairment And the Alabama Lawyer Assistance Program

By Robert B. Thornhill, MS, LPC

The Alabama Lawyer Assistance Program is committed to providing confidential services and support to attorneys, judges and law students who may be struggling with alcohol or drug abuse, or mental health issues such as anxiety disorder, depression or bipolar disorder. However, with the aging of our society and the tendency for many in the legal profession to delay retirement, the issue of cognitive impairment is becoming a major concern. While much effort continues to be made to educate those in the legal profession regarding the inevitably worsening negative consequences of undiagnosed and untreated addiction or mental health issues, little has been done so far to address the increasingly prevalent issue of cognitive decline and cognitive impairment.

Age-based changes in cognition and cognitive abilities are normal for all of us as we get older. Declines in reaction time and processing speed can become evident as early as the late 20s, while other cognitive functions show decline in later decades. As we age, it is normal for information to be processed more slowly, retrieval of information to be less accurate and efficient and learning of new information to be more challenging. The ability to multi-task and to perform complex problem-solving also declines. On the positive side, our store of knowledge, emotional functioning, vocabulary and acquired wisdom can remain stable or even show improvement over time! These are all examples of normal cognitive aging.[1]

Abnormal cognitive changes that are not age-appropriate are biologically-based and are referred to as dementia, cognitive disorder or cognitive impairment. This kind of impairment manifests as problems with thinking abilities that represent a change or decline from a previous level of functioning, or cognitive deficits that cause significant impairment in occupational and/or social function. Examples include Alzheimer's disease, vascular dementia (poor blood-flow to the brain due to multiple small strokes, diabetes,

hypertension, etc.), Parkinson's disease dementia, traumatic brain injury (impact to the head or other mechanism of rapid-movement displacement of the brain within the skull), Huntington's disease and so on. Other behaviors and disorders that can negatively affect the brain and lead to cognitive impairment include Multiple Sclerosis, tobacco use, hypertension, heart disease, diabetes, brain tumor, elevated cholesterol, vitamin B 12 deficiency and alcohol/drug abuse.[2]

The most common cognitive disorders are neurodegenerative diseases that involve progressive deterioration of the brain over time. They generally have an insidious onset and gradually progress. The most commonly recognized is Alzheimer disease, but frontotemporal dementia, Diffuse Lewy Body disease and Parkinson's disease are also fairly common. It is known that neurodegenerative brain changes can begin years before symptoms become obvious or debilitating. Dementia is a term that is used to describe a decline in cognitive and behavioral skills that is severe enough to interfere with daily functioning and the ability to live independently. It is a significant clinical finding that strongly implies that an individual is disabled in key aspects of everyday life and may no longer be able to function in the workplace.[3]

Lawyer assistance programs around the country have become increasingly aware of the issue of cognitive impairment and the need to assist those attorneys and the families and colleagues who may be affected. In Alabama we are seeing an increase in calls from law partners, judges, family members, spouses and clients. Some fundamental questions and concerns need to be addressed. Lawyer assistance programs are accustomed to dealing with attorneys who may have a substance use disorder (alcoholism or addition) or a mental health problem, and the treatment processes are well-known. However, as Robert "Kim" Lusk, a Portland attorney who chairs their state Lawyer Assistance Committee, states, "Dementia is a progressive, debilitating condition there's not a lot you can do to unravel." He adds, "You can't develop a remedial program and get the lawyer to follow through. It's effectively an irreversible process. What exactly do we do with those cases? As an institution, how does the bar deal with the process?"[4]

In Alabama, as much as possible, we hope to provide compassionate assistance to these attorneys and their colleagues and loved ones to first identify the presence of a possible problem, assist with intervention, provide appropriate referrals for neurological and neuropsychological evaluation and then assist with an appropriate and non-disciplinary avenue to discontinue the practice of law when indicated. When colleagues or loved ones begin to recognize that an attorney may be experiencing cognitive impairment the best place to seek assistance is the Alabama Lawyer Assistance Program. We recognize that calling attention to an attorney who may be cognitively impaired may be very difficult, but assistance from the Alabama Lawyer Assistance Program is confidential. Cognitive impairment that goes unaddressed will inevitably result in violations of the *Rules of Professional Conduct.* It is our hope that we can provide this kind of confidential assistance before the impaired attorney's behaviors result in harm to clients and law firms, and before formal complaints are received at the Alabama State Bar that may lead to disciplinary actions.

It is our hope that we can provide this kind of confidential assistance before the impaired attorney's behaviors result in harm to clients and law firms, and before formal complaints are received at the Alabama State Bar that may lead to disciplinary actions.

Below is a partial list of signs and symptoms of cognitive impairment:

- Deteriorating performance at work
- Making mistakes on files or cases
- Difficulty functioning without help
- Committing obvious ethical violations
- Failing to remain current on changes in law; over-relying on experience
- Exhibiting confusion about timelines, deadlines, conflicts, trust accounting
- Inappropriate dress, poor grooming or hygiene
- Sexually inappropriate statements or behavior that is uncharacteristic
- Denial of any problem or highly defensive or paranoid
- Forgetting conversations, events, details of cases
- Frequently repeating questions or making requests for information
- Trouble staying on task or topics
- Difficulty adjusting to changes
- Problems with verbal expression, digression, distraction
- Confusion, lapses in attention, concentration
- Emotional distress, rapid mood shifts

It is very important to remember that some degree of cognitive decline is a normal process for most of us that happens very

slowly over decades, not years. More rapid and age-inappropriate cognitive decline should not be viewed as a normal, expected consequence of aging.[5] These signs and symptoms should be taken seriously. If you observe any of these in a colleague or loved one, that person may be struggling with one or more undiagnosed maladies such as a substance use disorder (alcoholism, drug addiction), a mental health issue such as anxiety or depression or a biologically-based cognitive disorder. It is also possible that one or more of these problems could be "co-occurring disorders." For example, undiagnosed and untreated alcoholism/addiction can also lead to symptoms of depression, anxiety and even cognitive impairment. There are often cases in which undiagnosed and untreated alcoholism/addiction have directly caused cognitive impairment. In such cases most people are able to demonstrate significantly improved cognition over time as they maintain abstinence from mood-altering substances and participate in a genuine recovery program. For a smaller but significant minority, the cognitive impairment is biologically-based and will persist, despite abstinence and recovery. It is also common to see symptoms of anxiety and depression improve over time with abstinence and recovery. Each person's challenge is unique and requires proper evaluation and treatment. The Alabama Lawyer Assistance Program can provide assistance with this process.

Below is a partial list of suggestions regarding the sensitive subject of approaching the impaired/declining lawyer:

- Partner with those who have first-hand observations of the behaviors that are causing concern about that lawyer's competence to practice law, and who are *trusted by that lawyer.*
- Contact the Alabama Lawyer Assistance Program for assistance.
- Arrange for a non-confrontational meeting with the lawyer and concerned individuals.
- Provide objective and supportive statements such as:
  a. I am concerned about you because . . .
  b. We have worked together a long time so I hope you won't think I'm interfering when I tell you I am worried about you.
  c. I've noticed you haven't been yourself lately, and I am concerned.
- Get the lawyer to talk; listen, do not lecture.
- While listening, add responsive and reflective comments.

- Express concern with gentleness and respect.
- Share first-hand observations of the lawyer's objective behavior that is raising questions or causing concern.
- Review the lawyer's good qualities, achievements and positive memories.
- Approach as a respectful and concerned colleague, not an authority figure.
- Act with kindness, dignity and privacy, not in crisis mode.
- If the lawyer is not persuaded that his/her level of professional functioning has declined or is impaired, suggest an evaluation by a specific professional (in most instances, a neuropsychologist) and have contact information ready.
- When appropriate, offer assistance and make recommendations for a plan providing oversight (such as a buddy system or part-time practice with co-counsel).
- When appropriate, propose a voluntary transfer of licensure status to an available non-practicing option, such as inactive status.
- Remember that this is often a process and not just a onetime event.[6]

It is important to never ignore the situation or do nothing when confronted with the issue of cognitive impairment. These symptoms and behaviors are a strong signal that assistance and appropriate intervention are needed. The Alabama Lawyer Assistance Program can provide guidance, support and assistance through the process of intervention, referral for evaluation, diagnosis and treatment, interpretation of clinical findings and recommendations regarding fitness to practice. We are here to help with this difficult challenge! | AL

Endnotes

1. ABA CoLAP Senior Lawyer Assistance Program, Working Paper on Cognitive Impairment and Cognitive Decline, 11 April, 2014.
2. Presentation by Dr. Delisa West, neuropsychologist, 15 April, 2015.
3. ABA CoLAP Senior Lawyer Assistance Program, Working Paper on Cognitive Impairment and Cognitive Decline, 11 April, 2014.
4. "Ready or Not, When Colleagues Experience Cognitive Decline," Oregon State Bar Bulletin, November 2014.
5. "Age and Ageing," Oxford Journals, November 2011, 40 (6), 684-689.
6. ABA CoLAP Senior Lawyer Assistance Program, Working Paper on Cognitive Impairment and Cognitive Decline, 11 April, 2014.

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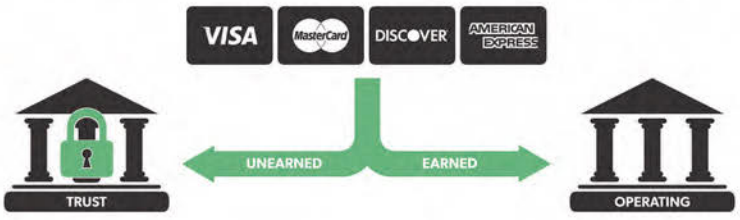

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The Shifting Sands of Mandamus Review

By William W. Watts, III

On the desert plains, strong winds will slowly move mountains of sand, peaks becoming valleys and valleys peaks. Several recent decisions of the Alabama Supreme Court have begun to shift some well-settled peaks and valleys of mandamus review of interlocutory trial court rulings. A ruling on the "standing" of a party to bring an action is no longer a sturdy peak for mandamus review. On the other hand, interlocutory decisions denying motions to dismiss or for summary judgment, traditionally an unpromising valley for mandamus review, have begun to form some peaks: mandamus petitions have been granted where the action is time-barred on the face of the complaint or where a conflicts of law issue is outcome-determinative. The contours of these new formations are still ill-defined, but the sands are shifting. Counsel should be aware of both the new opportunities for, and new limitations on, mandamus review.

General Requirement for Mandamus Review: The Inadequacy of Appeal as a Remedy

The standard by which the appellate courts will consider a petition for writ of mandamus is well established:

> "Mandamus is a drastic and extraordinary writ, to be issued only where there is (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the Court."

Ex parte Integon Corp., 672 So.2d 497, 499 (Ala. 1995).

Under this standard, mandamus is unavailable for many interlocutory rulings because of the "adequacy" of another remedy, i.e., an eventual appeal from those rulings. However, if an eventual appeal is incapable "of protecting parties from the injury immediately resulting from the error of the Court," it is not an adequate remedy. *Ex parte Hodge*, 153 So.2d 734, 750 (Ala. 2014) (quoting Justice Murdock's special concurrence in *Ex parte Alamo Title Co.*, 128 So.3d 700, 714-15 (Ala. 2013), quoting in turn *First National Bank of Anniston v. Chaney*, 120 Ala. 117, 121-22, 23 So. 733, 734 (1898)). For this reason, mandamus review is available for certain discovery rulings requiring the disclosure of privileged matters or effectively eviscerating an entire action or defense; for a trial court's failure to comply with the appellate court's mandate or to grant the right to a jury trial; and for certain interlocutory rulings in divorce cases. *Ex parte LSB*, 800 So.2d at 578 (and cases cited therein). Similarly, the court treats erroneous rulings on certain defenses–such as immunity, subject matter jurisdiction, *in personam* jurisdiction, venue and some statute of limitations defenses–to be "of such a nature that a party simply ought not to be put to the expense and effort of litigation." *Ex parte Alamo Title Co.,* 128 So.3d at 716 (Murdock, J., concurring specially). An eventual appeal of these rulings does not protect parties from the immediate injury the defense was designed to prevent–the cost of litigating the merits of a claim that should not have to be litigated, either against this party, or at this particular time, or in this particular forum. *See Ex parte U.S. National Bank Ass'n*, 148 So.3d 1060, 1076 (Ala. 2014) (Murdock, J., dissenting) ("Where no court properly can adjudicate the merits of a claim, or where a claim ought to be, or ought to have been, tried on its merits in some different tribunal, mandamus review of the trial court's decision to insist on adjudicating the merits of the claim has been granted by this Court"). Other "threshold issues," unrelated to the merits, that the court has determined can be reviewed by mandamus, and should not have to await an eventual appeal, include the denial of a motion to dismiss or for summary judgment based on abatement, *Ex parte J. E. Estes Wood Co.*, 42 So.3d 104 (Ala. 2010), or based on the doctrine of *res judicata*, *Ex parte LCS, Inc.*, 12 So.3d 55, 56 (Ala. 2008); the refusal to permit the opt-out of a UIM insurer, *Ex parte Geico Cas. Co.*, 558 So.3d 741 (Ala. 2002); a ruling on a motion to sever claims, *Ex parte American Heritage Life Ins. Co.*, 46 So.3d 474 (Ala. 2010); the denial of a motion objecting to the appointment of a special master, *Ex parte Alabama State Personnel Board*, 54 So.3d 886 (Ala. 2010); the grant of a motion to set aside a previous supersedeas bond amount, *Ex parte Mohabbat*, 93 So.3d 79 (Ala. 2012); an indefinite stay of an action, *Ex parte American Family Care, Inc.*, 91 So.3d 682 (Ala. 2012); and the failure to exhaust administrative remedies. *Ex parte Blue Cross and Blue Shield of Ala.*, 90 So.3d 158 (Ala. 2012). These are merely exemplary of the innumerable kinds of rulings that need to be reviewed immediately if the injury from the ruling is to be remedied. So, in considering mandamus review of an interlocutory ruling, the critical inquiry should be whether an injury may immediately flow from the erroneous ruling, and whether an eventual appeal can adequately remedy that injury.

So, in considering mandamus review of an interlocutory ruling, the critical inquiry should be whether an injury may immediately flow from the erroneous ruling, and whether an eventual appeal can adequately remedy that injury.

As a side note, the Alabama Supreme Court has held that the potential availability of a permissive appeal under Rule 5, *A.R.C.P.*, is not an adequate alternative remedy so as to make mandamus unavailable. *See Ex parte Hodge*, 153 So.3d 734, 748 (Ala. 2014). Permissive appeals under Rule 5 are, first of all, limited to "controlling questions of law as to which there is a substantial ground for difference of opinion, ..." More importantly, Rule 5 certification is within the "wide discretion" of the trial judge as well as that of the supreme court. *Id.* This is not to say that an effort to certify a question for permissive appeal cannot strengthen a subsequent petition for writ of mandamus. In *Ex parte U.S. Bank National Association*, 148 So.3d 1060 (Ala. 2014), the court took note of the petitioner's unsuccessful attempt to certify the matter for permissive appeal, thus leaving a petition for a writ of mandamus as the petitioner's "only adequate remedy . . . ." *Id.* at 1065.

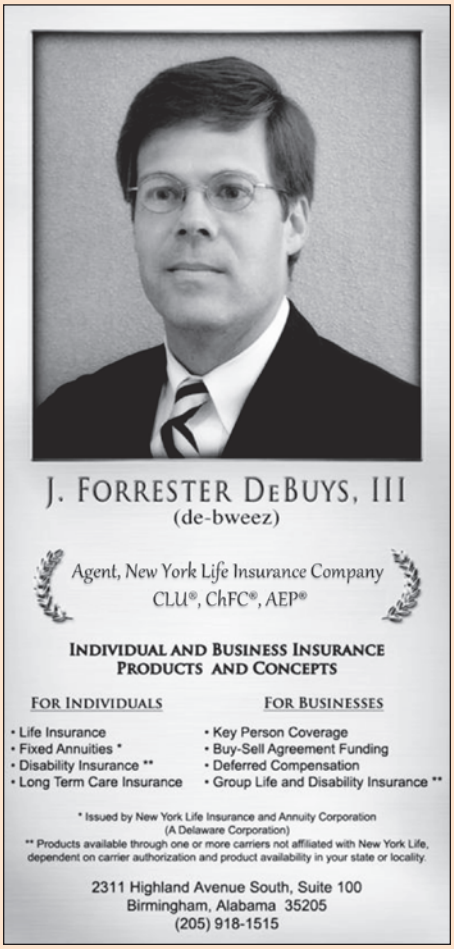
Shrinking Mandamus Review of Issues of "Standing"

A well-entrenched ground for mandamus review is a trial court's ruling on its own subject matter jurisdiction over the dispute. If there is no justiciable controversy, the trial court lacks subject matter jurisdiction, and mandamus is available to review a refusal to dismiss the action. *See Ex parte Valloze*, 142 So.3d 504 (Ala. 2013) (trial court lacked subject matter jurisdiction over action seeking declaration of non-liability of potential tort defendants); *South Alabama Gas District v. Knight*, 138 So.3d 971 (Ala. 2013) (trial court lacks subject matter jurisdiction over action where actual controversy between parties ceases and case thereby becomes moot). Another aspect

of justiciability, and, thus, subject matter jurisdiction, has been the concept of the "standing" of a plaintiff to bring a claim. *See Finn v. Ozark City School Board of Education*, 9 So.3d 44, 46 (Ala. 2008) ("'Chief among these elements [composing the concept of justiciability] is the requirement that a plaintiff have 'standing to invoke the power of the court in his behalf' [citations]'") (quoting *Ex parte State Ex rel James*, 711 So.2d 952, 960 (Ala. 1998)). This concept emerged in the federal courts as a way of limiting the category of plaintiffs who may challenge governmental action that affects the public generally. Standing was reserved to those who had some "direct injury" as a result of the governmental action, thus ensuring a sufficient "adverseness" for a justiciable "case" or "controversy" under the Constitution. *See generally* Wright & Miller, 13A *Fed.Prac & Proc. Juris.*, §3531 (3d Ed. 2008). Over the years, however, the courts introduced "standing" as a concept in private controversies, not involving governmental action. *Id.* Plaintiffs in "private law" cases could be challenged as not having "standing" because they could not prove some element of their cause of action, such as having title to the property allegedly damaged or taken. *See, e.g.*, *Cadle v. Shabani*, 950 So.2d 277 (Ala 2006), *overruled*, *Ex parte BAC Home Loans*, 159 So.3d 31 (Ala. 2013). If the failure of the plaintiff to satisfy some element of his claim could be characterized as a lack of "standing," mandamus review of an otherwise unreviewable interlocutory order could be obtained. Treating a plaintiff as having no "standing," thus depriving the court of subject matter jurisdiction, has other far-reaching effects upon the finality and reliability of judgments in private-law actions: a judgment by a court without subject matter jurisdiction is void and subject to attack at any time; the defense cannot be waived. *See Ex parte Full Circle Distribution, LLC*, 883 So.2d 638 (Ala. 2003). Dismissal of the action for lack of subject matter jurisdiction does not have the claim-preclusive effect that a Rule 12(b)(6) dismissal would have. And, if the court is without subject matter jurisdiction, there is no power to cure the defect by amendment and save the claim from a potential bar of the statute of limitations by relation-back principles, as Rule 17, *A.R.C.P.*, would do if the matter were treated as the failure to join the real party in interest rather than as a lack of "standing." *See State v. Property at 2018 Rainbow Drive*, 740 So.2d 1025 (Ala. 1999).

For these reasons, among others, Justice Murdock has waged a long campaign over the years against the loose way the concept of "standing" was employed by the court, particularly in "private law" cases, where the elements of the cause of action and other legal concepts such as capacity and real party in interest are usually sufficient to ensure the necessary adversity and, thus, justiciability of the action; in such cases, "standing" is a superfluous requirement. *See Ex parte Kohlberg Kravis Roberts & Co., L.P.*, 78 So.3d 959, 978-79 (Ala. 2011) (Murdock, J., quoting Justice Lyons's concurring opinion in *Hamm v. Norfolk So. Ry. Co.*, 52 So.3d 484, 499 (Ala. 2010)); *Ex parte McKinney*, 139 So.3d 512-518 (Ala. 2011) (Murdock, J., dissenting); *South Alabama Gas District v. Knight*, 138 So.3d 971, 980 (Ala. 2013) (Murdock, J., concurring in rationale in part and concurring in result); *Ex parte Drummond Co., Inc.*, 139 So.3d 798, 800 (Ala. 2013) (Murdock, J., concurring specially). An article published in *The Alabama Lawyer* by Professor Jerome Hoffman, repeatedly cited by Justice Murdock, similarly critiqued the court's "standing" jurisprudence, contending that the concept had "no legitimate part to play in private law cases." *See* Hoffman, "The Malignant Mystique of 'Standing,'" 73 Ala. Law 360, 361 (2012).

Finally, Justice Murdock's position won the day in an opinion authored by him, *Ex parte BAC Home Loans Servicing LP*, 159 So.3d 31 (Ala. 2013). On an appeal from a final judgment in a post-foreclosure ejectment action, the court held that the alleged defect in plaintiff's title to the



property did not deprive it of "standing" so as to deprive the trial court of subject matter jurisdiction. The defective title was simply the failure of the plaintiff to prove one of the elements of its claim. In an opinion joined by four other justices (the remaining four concurring in the result only), Justice Murdock noted that the concept of standing was "out of place" and "had no necessary role to play" in "private-law cases." *Id*. at 44. Unlike public-law cases, private law actions have well-established elements built into the cause of action that, if met, necessarily create the adverseness needed to justify judicial intervention. *Id*. The concurring opinion of Justice Main, joined by Justice Bryan, found any discussion of "public law" and "private law," as it relates to standing, unnecessary to a resolution of the cases. *Id*. at 47.

The rationale of *Ex parte BAC Home Loans* was subsequently adopted in a case involving mandamus review–*Ex parte Merscorp, Inc.*, 141 So.3d 984 (Ala. 2013). In a unanimous opinion authored by Justice Murdock, the court held that subject matter jurisdiction was not implicated, and, thus, mandamus review was not available to review the trial courts' denials of motions to dismiss filed by the defendants, who had argued that the plaintiffs lacked "standing" because the recording statutes did not impose a duty on the defendants to record loan assignments and transfers. The court held that these challenges went to the viability of the plaintiffs' theories of liability, not their "standing." The petitions were a "further example of the understandable, but repeated, confusion in our jurisprudence between the issues of standing and of the failure to state, or prove, a cognizable claim." *Id*. at 992 (quoting *Wyeth Inc, v. Blue Cross & Blue Shield of Alabama*, 42 So. 2d 1216, 1219 (Ala. 2010)).

BAC Home Loans was again followed in a factually similar case involving a petition for mandamus–*Ex parte Rhodes*, 144 So.3d 316 (Ala. 2013). In a unanimous panel decision, a mandamus petition was denied for review of an order denying a motion to dismiss a mortgagee's ejectment action based on the mortgagee's defective title. This alleged defect did not deprive the plaintiff of standing. The trial court therefore had subject matter jurisdiction.

The distinction made by the court in *Ex parte BAC Home Loans* between a lack of "standing" and the mere failure to prove the elements of a viable cause of action calls into question not only the case expressly overruled by the court–*Cadle Co. v. Shabani*, 950 So. 2d 277 (Ala. 2006)–but also a whole series of earlier cases that ignored such a distinction in granting mandamus review or dismissing appeals for lack of standing. *See, e.g.*, *Ex parte McKinney*, 87 So.3d 502 (Ala. 2011) (unlicensed contractor without legal title

to or actual possession of real property lacked standing to bring ejectment action); *Bernals, Inc. v. Kessler-Greystone, LLC*, 70 So.3d 315 (Ala. 2011) (Plaintiff who was not party to lease agreement had no standing to sue for its breach; appeal dismissed); *Ex parte Synovus Trust Company*, 41 So. 3d 70 (Ala. 2009) (fiduciary duties of trustees of revocable trust owed exclusively to settlor; beneficiaries lacked standing to sue trustees); *Ex parte Regions Financial Corporation,* 67 So. 3d 45 (Ala 2010) (Shareholders' failure to comply with conditions precedent to shareholders' derivative action under Rule 23.1, *ARCP*, deprived them of standing); *Ex parte Stenum Hospital*, 81 So. 3d 314 (Ala. 2011) (Defendant mall owner lacked standing to file third-party complaint against hospital and plaintiff's treating doctors based on their medical malpractice having injured plaintiff); *Ex parte Callan Associates, Inc*., 87 So. 3d 1161 (Ala. 2011) (trust beneficiary's failure to make demand on trustees before commencing derivative action on behalf of trust deprived her of standing).

Since *BAC Homes*, all of the members of the court have concurred with Justice Murdock's contention that the concept of standing should be reserved for public law cases and has "no necessary role to play in respect to private-law actions." *Poiroux v. Rich*, 150 So.3d 1027, 1039 (Ala. 2014); *Cadence Bank N.A. v. Goodall-Brown Associates, LP*, 2014 WL 4723471, *16, n. 22 (Ala.S.Ct. Sept. 19, 2014). However, concepts of standing are still applied in "public law" cases where governmental action is being challenged. *See e.g.*, *McDaniel v. Ezell*, 2015 WL 403076 (Ala.S.Ct. Jan. 30, 2015) (lack of standing of disappointed city employee to appeal from decision of city civil service board promoting others over him) (plurality opinion); *Poiroux v. Rich*, *supra* (standing of plaintiffs to bring claims against various state officials relating to constitutionality of bail bond fees); *Ex parte Aull*, 149 So.3d 582 (Ala. 2014) (plaintiffs lacked standing to pursue injunctive relief against state university chief of police); *Ex parte Alabama Educational Television Commission*, 151 So.3d 283 (Ala. 2013) (plaintiffs lacked standing to bring action against commission alleging violations of Open Meetings Act).

Conceivably, there are situations where the plaintiff may be so situated as to deprive the case of the requisite "adverseness" necessary for justiciability.

Whether standing concepts may still be legitimately applied to particular plaintiffs in any private-law cases remains unresolved. Conceivably, there are situations where the plaintiff may be so situated as to deprive the case of the requisite "adverseness" necessary for justiciability. *See Ex parte Boys & Girls Club of South Alabama, Inc.*, 2014 WL 3012523, *5 (Ala.S.Ct. July 3, 2014) (analyzing standing of party to private-law action in terms of the necessary "adverseness"); *Hamm v. Norfolk So. Ry.*, 52 So.3d 484, 500 (Ala. 2010) (Lyons, J., concurring specially) ("Standing is properly limited to circumstances stemming from a lack of justiciability"). For instance, in *Ex parte Door Components, LLC*, 2014 WL 7202974 (Ala.Civ.App. Dec. 19, 2014), the court of civil appeals recently concluded that an employer lacked standing to assert the due process rights of its workers' compensation insurance carrier and, therefore, the appellate court had no appellate jurisdiction over a mandamus petition filed by that employer seeking relief. Even where the plaintiff is the wrong party to bring a private-law action, though, labeling this defect as a matter of "standing"–and, thus, a matter of subject matter jurisdiction–rather than treating it merely as the absence of an element of the claim, seems unjustified: the trial court is called upon to resolve such controversies in private law actions all the time. And such rulings do not create any more immediate injury, requiring immediate mandamus review, than any number of interlocutory rulings on the merits of the claim. "Standing" has been said to turn on "whether the party has been injured in fact and whether the injury is to a legally protected right." *State v. Property at 2018 Rainbow Drive*, 740 So.2d 1025, 1027 (Ala. 1999) (quoting *Romer v. Board of County Commi'rs*, 956 So.2d 566, 581 (Colo. 1998) (Kourlis, J., dissenting)). Such requirements, however, are built into the elements of a cause of action and are necessary to state a claim under Rule 12(b)(6). *See* Hoffman, "The Malignant Mystique of Standing," 73 Ala. Law. at 362. The necessary "adversity" is ensured by the requirement that the plaintiff prove these elements of the claim. If the trial judge wrongly determines the plaintiff has satisfied these elements, either as a matter of pleading or of sufficient evidence to avoid summary dismissal, such a ruling on the merits of the claim works no immediate injury that can only be remedied by an immediate review.

Perhaps for such reasons the supreme court recently denied without opinion a petition for writ of mandamus in *Ex parte Scottsdale Ins. Co.*, 2015 WL 1779564 (Ala.S.Ct. April 17, 2015). In a concurring opinion, Justice Murdock noted that Scottsdale asserted a lack of subject matter jurisdiction on the grounds that the plaintiff had no "standing" to file the action for breach of contract and bad faith because it was not a party to the insurance contract at issue. Justice Murdock described it as "axiomatic" that "a party who claims a private right of

action against another has standing to assert its claim in our courts." Any failure of proof of the existence of a contract between the plaintiff and the defendant was a failure on the merits, not a failure of standing on the part of the plaintiff to assert its claim. The prospect of failure of a claim on such grounds does not deprive the court of subject matter jurisdiction to decide whether the claim can be made. Justice Murdock described the court's precedents as now "clear to this effect."

In summary, except for "public law" cases, where "standing" concepts are needed to set limits on who can challenge governmental action affecting the public generally, challenges to the subject matter jurisdiction of the court, based on a party's lack of standing, should have little chance of obtaining mandamus relief.

Appeal is not an adequate remedy in such situations because it does not prevent the "evil the statute intends to avoid," i.e., having to defend stale claims on the merits.

Expanding Mandamus Review for Dispositive Questions of Law

In contrast to the shrinking mandamus review of interlocutory rulings on the "standing" of the plaintiff, the sands of mandamus review have recently shifted *in favor of* petitions involving interlocutory orders that resolve dispositive questions of law that potentially entitle the defendant to dismissal of the action, at least where the right to dismiss is apparent "on the face of the complaint." The first of these shifts came in the area of statute-of-limitations defenses.

1. Mandamus Review of Interlocutory Orders Denying Dismissal of Actions Time Barred on Their Face

Historically, except for a narrow exception involving fictitious parties and the relation-back doctrine, see *Ex parte Jackson*, 780 So. 2d 681, 684 (Ala. 2000), an interlocutory order refusing to dismiss an action on a statute of limitations defense has not been a candidate for mandamus review, because of the adequacy of a remedy by appeal. See *Ex parte Southland Bank*, 514 So. 2d 954, 955 (Ala. 1987). However, in *Ex parte Hodge*, 153 So.3d 734 (Ala. 2014), the court granted a mandamus petition from an order denying a summary judgment motion based on Section 6-5-482(a), *Code of Ala.*, barring all medical malpractice actions commenced more than four years after the alleged wrongful act, regardless of the discoverability of the act. Justice Bolin authored a plurality opinion, joined by three others, in which he concluded that the defendants demonstrated "from the face of the complaint" a clear legal right to have the action dismissed based on the four year period of repose. He also concluded that appeal was an inadequate remedy because of the "substantial expense, time, and effort of litigating a matter as to which [defendants] have demonstrated from the face of [plaintiff's] complaint a clear legal right to have dismissed." *Id.* at 245. He emphasized that the case should not be read "as a general extension of mandamus practice in the context of statute-of-limitations defense" but only as extending relief where defendants have "demonstrated from the face of the complaint a clear legal right to relief and the absence of another adequate remedy." *Id.* at 749.

Justice Murdock, with "some trepidation," concurred specially. He emphasized that the case did not involve the merits of the action but rather a legal rule–the statute of limitations–the very purpose of which is to insulate defendants from having to defend against "stale" claims, which by definition are claims filed so late that the defendant's ability to defend on the merits has been compromised. Appeal is not an adequate remedy in such situations because it does not prevent the "evil the statute intends to avoid," i.e., having to defend stale claims on the merits. *Id.* at 750-51. He also emphasized that the new exception applied only where the defendant's right to dismissal was "plainly reflected on the face of the complaint." *Id.* at 750.

Justice Shaw also concurred specially, reasoning that the court's precedent, allowing mandamus review of a decision involving the bar of the statute of limitations as to a claim against *one party* substituted for

a fictitiously named defendant, should logically lead to allowing review in this case where the *entire action* would be dismissed if the statute barred the action. Apparently agreeing with Judge Bolin's opinion regarding the inadequacy of appeal as a remedy, he considered it was "no adequate remedy to require a defendant to try a case and then subsequently, on appeal, to seek the exact relief that was available earlier in the process." *Id*. at 751.

Justice Bryan concurred in the result. *Id*. at 750. Chief Justice Moore dissented, finding no basis for creating another exception for cases involving a statute of limitations. *Id*. at 751-52.

The opinions of a majority of the justices in *Ex parte Hodge*–those joining the plurality opinion and the concurring opinion of Justice Shaw–seem to render nugatory the independent requirement of showing the absence of another adequate remedy, in order to obtain review by mandamus. The inadequacy of a remedy by appeal, in their opinions, was the expense, trial and effort in litigating a matter that clearly should have been dismissed. If this were a sufficient showing of the inadequacy of an appeal remedy, then practically every attempt to obtain mandamus review of a facially erroneous interlocutory order should be successful. The fact that the petition shows a "clear legal right" to relief should not be sufficient to show that an appeal remedy is inadequate: that inadequacy is an independent requirement for mandamus review. Only Justice Murdock's analysis–focusing on the immediate injury to a defendant forced to litigate a stale, time-barred claim–preserves some independent "teeth" to the "no other adequate remedy" requirement. The opinions of the other justices leave no room to distinguish this case, on a principled basis, from any other where the petitioner can show a clear, legal right to dismissal of the action, whether on the merits or not.

The abiding question after *Ex parte Hodge* is to what extent this decision opens the door to mandamus review of other interlocutory orders where the legal right to relief is clear. Is this simply a new exception for statute of limitations defenses? And, must the defense be apparent "on the face of the complaint" or is it sufficient that the undisputed facts show this? The court seemed to answer this latter question in *Ex parte International Refining & Mfg. Co*., 153 So.3d 774 (Ala. 2014), where it found that the *Hodge* exception did not apply because the defendants, who had shown by undisputed evidence that certain claims were time-barred, had not demonstrated that this was "apparent on the face of" the complaint. *Id*. at 782. Although the limitation seems arbitrary and not consistent with the equitable underpinnings of mandamus relief, the *Hodge* exception for now is available only where the defendant can show that, on the face of the complaint, a statute of limitations defense clearly bars the action. Why the equitable remedy of mandamus ought not to be equally available where the right to dismissal appears as a matter of undisputed fact, albeit outside the allegations of the complaint, is not apparent. Artful pleading by plaintiffs may avoid the application of the *Hodge* exception and, thus, defeat mandamus review even where the undisputed facts show without dispute that the action is time-barred.

2. Mandamus Review of Interlocutory Orders Denying Dismissal Where Applicable Law Requires Dismissal

On the same day that it released its opinion in *Ex parte Hodge*, the court issued another watershed decision that potentially opens the gates of mandamus review to any interlocutory order denying dismissal of an action where the defendant can show that, on the face of the complaint, the applicable law requires such dismissal.

In *Ex parte U.S. Bank National Association*, 148 So.3d 1060 (Ala. 2014), the defendant, U.S. Bank, sought a writ of mandamus to compel the trial court to dismiss a malicious prosecution action because the complaint showed on its face that Washington law applied and clearly

mandated dismissal. The trial court had concluded that Alabama law applied. There was, apparently, no dispute that, under Washington law, the action was due to be dismissed. In an opinion authored by Justice Bolin, joined by four others, the court concluded that mandamus review was available because the petitioner could show its clear legal right to dismissal on the face of the complaint under Washington law. Justices Shaw and Bryan concurred specially on the grounds that the court had the power to issue mandamus relief where there is an obvious "conflicts of law" issue that is dispositive of the case. Justices Murdock and Moore dissented.

This opinion is a potentially radical expansion of mandamus review. Typically, mandamus review is reserved for "threshold" issues that must be resolved before reaching the merits, such as whether the action is brought in an appropriate court with subject-matter jurisdiction and proper venue, and by the correct parties against the correct parties who can lawfully be brought before the court; or whether the action is due to be dismissed for other reasons not going to the merits, such as abatement due to another action pending or res judicata due to a prior adjudication; or whether the case otherwise involves a justiciable controversy. Justice Murdock, in his dissent, succinctly synthesizes these decisions as embodying the following rule for mandamus review: "Where no court properly can adjudicate the merits of a claim, or where a claim ought to be, or ought to have been, tried on its merits in some different tribunal, mandamus review of the trial court's decision to insist on adjudicating the merits of the claim has been granted by this Court." *Id.* at 1076.

In contrast to these kind of issues unrelated to the merits, the "choice of law" question presented by the petition in *U.S. Bank*, although in a sense a threshold issue, was in fact dispositive of the case on its merits if, in fact, Washington law applied. The court suggested that its prior decision in *Ex parte Exxon*, 725 So. 2d 930 (Ala. 1998), provided a precedent for mandamus review because the issue in that case also involved resolution of a conflicts of law issue. However, the conflicts of law issue in that case was only dispositive of the threshold issue of whether a class should be certified; it did not resolve the merits of the dispute. *See U.S. Bank*, 148 So.3d at 1076 (Murdock, J., dissenting).

So, in ruling that review by writ of mandamus was available for resolution of this "conflicts of law" issue, the court launched itself into uncharted waters. Again, as in *Ex parte Hodge*, *supra*, the court made short shrift of the requirement for mandamus that no other adequate remedy existed, such as appeal. It only obliquely mentioned that "[i]t would waste the resources of the court and the parties" if the defendants had to await an appeal from a final judgment. 148 So.3d at 1065.

The upshot of the opinion, as Justice Murdock points out, is a "slippery slope" on which any future petitions for mandamus review must logically slide, where the right to dismissal under the applicable law is apparent on the face of the complaint. 148 So.3d at 1076. "Choices" regarding the applicable legal rules are inevitable in practically any litigation. How can the *U.S. Bank* case be distinguished from one where the issue is which of two different statutes is applicable, or even which of two different case precedents is controlling? *Id*. How, in fact, can one distinguish, on a principled basis, *any* decision that wrongly denies dismissal on the merits even where the correct law is chosen? If, for instance, a case is clearly due to be dismissed on its merits, as a matter of law, under applicable principles of Washington law, and the trial court correctly chooses Washington law but wrongfully denies dismissal of the action, such a decision would not generally be reviewable before an appeal from a final judgment. So what serves to justify immediate mandamus review in a factually identical case, where the trial court similarly denies dismissal, but only after wrongfully choosing another state's law, as in *Ex parte U.S. Bank*? Both cases involve the same facts, both involve a "clear legal right" to dismissal under applicable Washington law and both will equally entail the wasted expense and trouble of further litigation if review must await a final judgment. The only difference is that, in denying dismissal, one court applied the wrong state's laws and the other wrongfully applied the correct state's laws.

Finally, the *Ex parte U.S. Bank* decision seems to rest again on an artificial distinction between facts established "on the face of the complaint" and facts that might be established as undisputed but not established by the pleadings. Apparently, at present, only the former kinds of facts can establish the necessary foundation for mandamus review under these circumstances. Whether the Court will, in the future, find any compelling reason to deny mandamus review to a dispositive "conflict of laws" issue, where the petition is based on undisputed facts, albeit not reflected on the face of the complaint, remains to be seen.

Conclusion

The contours of the shifting sands of mandamus review are not yet clearly marked, but those changes are clearly restricting the availability of mandamus review of interlocutory decisions that turn on the "standing" of parties in private-law actions, and favoring review of rulings on dispositive questions of law evident on the face of the complaint. How far the sands will shift awaits future decisions of the court. It is hoped that the court can provide greater guidance to practitioners by a sustained focus on the nature of the injury flowing from an erroneous ruling and whether that injury can be remedied by an eventual appeal. The time and expense of litigation itself should not be a sufficient basis for immediate review unless the applicable issue entails a law or rule designed to protect a defendant from having to litigate the merits and incur such expenses at all, either generally or in that forum. | AL

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NO! — You do not have to submit a certification!

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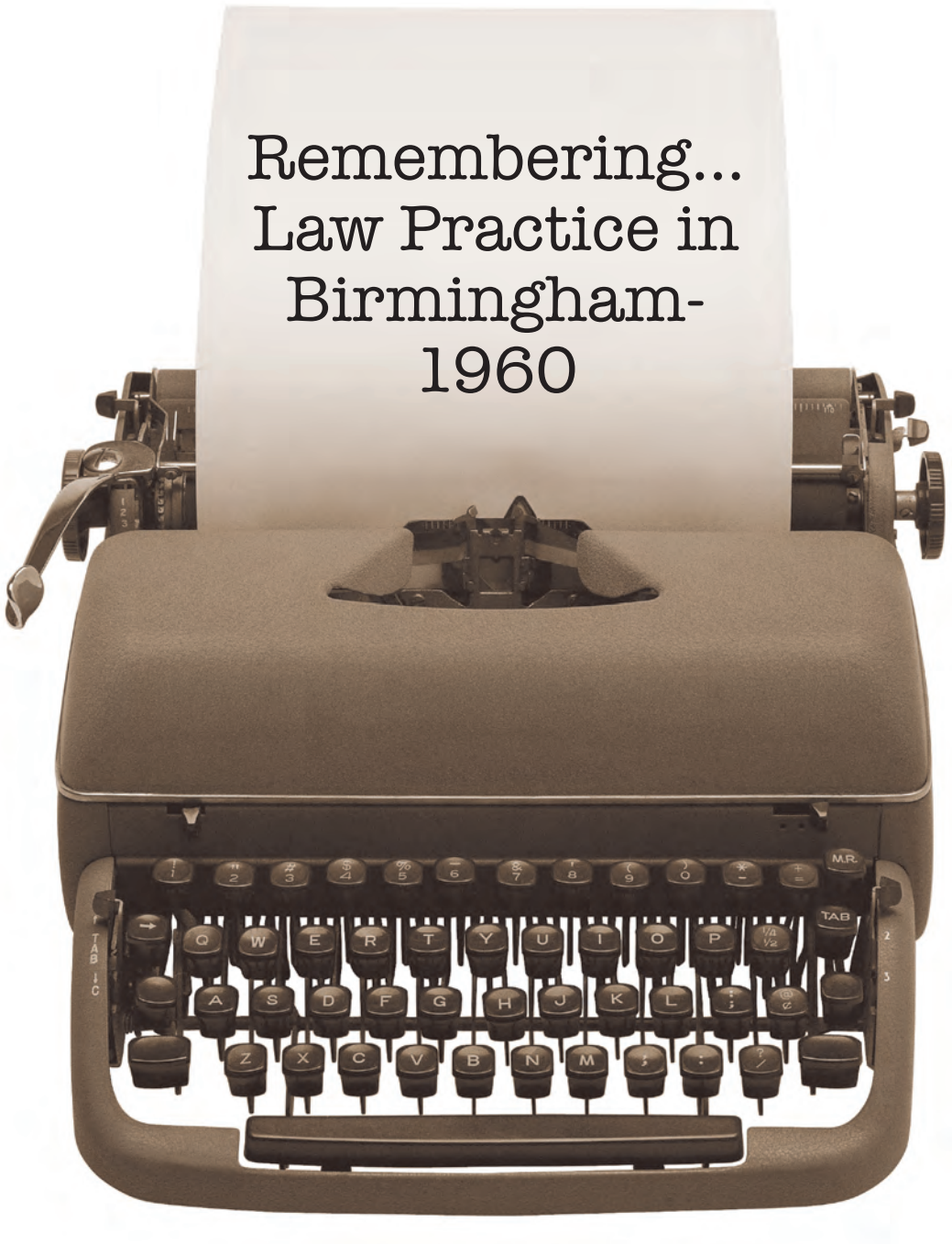


By Maurice Rogers

I recently found a 1960

Birmingham telephone book and after slowly reading and remembering the 500 or so lawyers listed in the Yellow Pages, I decided to write an article about my law practice that year.

I never throw away anything, and I found my 1960 records pretty much intact, including case files and an exact record of income and expenses. This was my 11th year of practice and my work as a solo practitioner was about 80 percent civil and 20 percent criminal. Recorded fees earned in 1960 were:

Divorce	$850
Probate	$4,550
Damage Suits	$7,057
Collections	$7,110
Criminal	$2,425
Real Estate Closings	$2,110
Prepared Wills	$725
Real Estate Individuals	$3,618
Civil Defense	$1,100
Debtors Court/ Bankrupt Petitions	$362
Miscellaneous	$2,025
Total	$31,932

My office deductible expenses were $9,405 (29.5 percent of income,) leaving net income of $22,527.00. I did uncontested divorces for $125, simple wills for $25 and deeds for $10. The good news was that a loaf of bread sold for 20 cents, a new automobile sold for $2,600 and the average house cost $12,700. My largest fee payment recorded on my 50 weekly reports was $1,600, and I found one payment of 90 cents.

In the office, there was no computer, fax machine, electric typewriter, copier, telephone answering machine, portable telephone, calculator or cell phone–not even a word processor yet. The wonderful world of forms was mostly on the horizon and it was considered class for most papers to be typed in detail. Typewriter mistakes were corrected on the original and carbon copy with rubber erasers, necessitating frequent dusting of the rubber bits out of the typewriter.

I had a crude belt Dictaphone, but all serious dictation was to a secretary who used Gregg shorthand. Almost no lawyers ever touched a typewriter and that included me.

A good thing every day, regardless of the work load, was that everyone took a coffee break at 10 a.m. and at 3 p.m. sharp. These 15-minutes breaks often ran into 20 or 30 minutes as employees at offices near a restaurant went out for these breaks.

The boss was expected to be at work before 8 a.m. and leave after 5 p.m. Nobody ate lunch in the office as the office coffee room had not yet been invented.

The first coffee rooms I remember were spaces in the courthouse near where the dockets were called each morning. Everybody seemed to have more leisure time in 1960 than in 2014.

A huge difference between then and now was the openness of the courthouse. Lawyers could walk freely into and around in the clerk's office and friendships were developed. Lawyers had access to files and there was a telephone available to us.

In 1960, the word "security" referred only to stuff put up as collateral for a loan. Fear–and respect–for the law kept even the nuts at bay and the only hell-raiser in the courtroom was the judge–at least occasionally.

Circuit court civil cases, jury trials, would be set for docket call on Monday morning in the courtroom of the presiding judge. Dozens of lawyers were there and the order of trial setting for the week would be established; any case not reached by 2 p.m. Thursday would be continued. In these "good ole' days" you would find only one judge at work on Fridays. Cases set for the first time would usually not be reached, but you had to be ready and you expected to be in the trial court within 30 minutes after a call from the case clerk.

After you and your client showed up for trial, the judge would normally tell both lawyers, privately, what a rotten case you had, and many settlements were thus reached. **Judge C.B. ("Sett'lin'") Smith** was a champion at this art and settled most of his cases.

A plague on the house of plaintiff lawyers in 1960 was the demurrer, abolished a few years later. With the demurrer, a relic of the common law, good pleading specialists such as **Reid Barnes** at Lange, Simpson often could keep you out of court with demurrer expertise. The demurrer consisted of all the legal reasons your complaint should be dismissed. If you survived the demurrer, then you filed an answer and went to trial.

I filed a contract action against American Life Insurance Company. **Raymond Ingram** (a tough old bird!) and **Hugh Locke, Sr.** filed 116 grounds for demurrer in **Judge Whit Windham's** court (a very capable judge).

We met every few months to argue each assigned ground in the demurrer and, after two years, the complaint survived,

was amended several times and we went to trial before 12 men, (no women). I lost!

Incidentally, on June 5, 1967, **Jim Haley** (later a circuit judge) and I tried the first case in Alabama with women on the jury. The verdict was a very meager amount for my client.

Laymen and title companies were not engaged in real estate transactions so much at that time. I have examined hundreds of abstracts (usually at home after work) and title policies were only a threat on the horizon. Actually, title policies were a blessing; they never affected my lawyer fee and lawyers were relieved of the title responsibility. This was especially good for me as I never purchased a lawyers' liability policy, even now. No policy will help you be really careful.

I did loan closings for Iron and Steel Workers Credit Union (now America's First Credit Union) for 37 years. In 1960, it usually consisted of three documents: a mortgage, a promissory note and a closing statement. With a lot of federal help, the paperwork now is closer to 20 documents.

Divorces were a simplified procedure with virtually no discovery allowed. You just sat down with "your client" and the other lawyer had "his client" and you told the judge what happened. A huge fly in the ointment then was a strict legal requirement that you had to have real grounds ("He hit me!"), and if the plaintiff was also guilty of "real" grounds, there was no relief–no divorce. Incompatibility did not exist until years later.

A case I will never forget was one where the greatest lawyer of my time, **Roderick Beddow, Sr.**, whipped on me and my client for three and a half days in **Judge Bailes's** court. His client had illegally intercepted a small suitcase of salacious love letters written by my client to her secret lover. Beddow started reading these letters on the second day and read every one of them to a packed court room. This case involved custody of a small child and if we had been on a high enough floor to do the job, I would have jumped out the window!

Finally, in searching among my records, I found one that I won in 1960, 271 Alabama Supreme Court 437 *Fulmer v. Robinson*, November 17, 1960.

This most agonizing case of my entire career involved child custody. I handled the adoption of a child born to an unwed mother who was 16 or 17 years old, too young to give legal consent. Our probate court granted the adoption although we all knew the decree might be on shaky grounds.

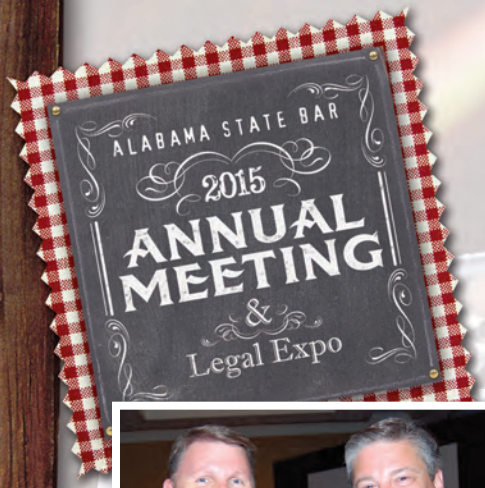
A couple of years later, the mother and her family employed the Beddow firm to gain custody of the child. **Eric Embry** and **Roderick Beddow, Jr.** vigorously presented the mother's case. Judge Bailes, ignoring the legal consent matter, gave my client custody based on the "best interest of the child" catch-all doctrine.

The mother appealed to the supreme court with a very strong legal position. The appeal took over a year and the custody was very much in doubt. When the decision arrived in November 1960, I did not open the envelope for two or three hours, wondering how I would tell my clients they had lost their child, now four or five years old. Thank God, we won. The supreme court, like Judge Bailes, totally ignored the legality of the consent to adoption and granted us custody on the basis of the best interest of the child. Whew!

The Equity division, now abolished, was a part of the circuit court and it handled mostly non-jury matters like divorce and fraud. Equity court pleading evolved more than 200 years or so, and it was tricky and fraught with danger.

In addition to these changes, almost all of the substantive law has had major revision, but two things remain unchanged: lawyers are serving clients to the best of their ability and one of the best things a person can have is a law license. | AL

2015 AWARD RECIPIENTS



Judge Langford Floyd and President Rich Raleigh

Judicial Award of Merit

The Judicial Award of Merit is the highest honor given by the Alabama State Bar to a sitting judge, whether state or federal court, trial or appellate, who has contributed significantly to the administration of justice in Alabama.

Judge J. Langford Floyd, a native of Dothan, Alabama, moved to Baldwin County in 1984 after completing law school. A former municipal judge for the City of Fairhope, Judge Floyd was also a city prosecutor for the City of Daphne and an assistant district attorney, before becoming a district judge in 1997. He became a circuit judge in 2001.

Judge Floyd is a graduate of Troy State University (now Troy University) where he earned a Bachelor of Science degree in accounting in 1978 and Cumberland School of Law at Samford University where he earned his J.D. in 1984.

Judge Floyd is a lieutenant colonel in the U.S. Army Reserve Judge Advocate General Corps, a past member of the Troy University Alumni Association Board of Directors and a member of the Executive Board of the Alabama Circuit Judges' Association. He serves on the Military Law Committee and the Advisory Committee of the *Alabama Rules of Evidence* of the Alabama State Bar. He also serves on the Resolution Committee and Judicial Education Committee of the Circuit Judges' Association and as chair of the Court Technology Commission for the Administrative Office of Courts.

Award of Merit

The Award of Merit is the highest honor given by the Alabama State Bar to a lawyer, and serves to recognize outstanding constructive service to the legal profession in Alabama.

David G. Hymer is a trial lawyer with Bradley Arant Boult Cummings LLP in Birmingham. Hymer's practice focuses on complex business and commercial litigation, including a significant plaintiff's practice on behalf of corporate clients as well as more traditional corporate defense practice.

Hymer is chair of the Alabama State Bar Board of Bar Examiners, and has served on the board since 2001. He was instrumental in Alabama becoming the first deep-South state to adopt the Uniform Bar Examination (UBE) in 2011, developed by the National Conference of Bar Examiners (NCBE).

Hymer is a graduate of the University of Alabama where he received his Bachelor of Science degree in 1982, and later his J.D. from the University of Alabama School of Law in 1985. He is a member of the American Board of Trial Advocates, Alabama Defense Lawyers Association, American Bar Association, Alabama State Bar and Birmingham Bar Association and a fellow of the Alabama Law Foundation.

Leon Garrett is a native of Piedmont, and served as a lay member of the Alabama State Bar Disciplinary Board Panel I. Garrett received his Bachelor of Science degree in English from the Tuskegee Institute (now Tuskegee University). After teaching for several years, he received his Master's in English from Columbia University in New York. Garrett later received his Master's in education administration from the University of Alabama.

President Raleigh, Leon Garrett, David Hymer and Mike Ballard

Garrett taught English at Ouachita County High School in Camden, Arkansas, and later came to the Anniston City Schools. He became vice principal at Anniston High School, principal at Cobb Junior High School, assistant superintendent for the Anniston City Schools and superintendent for the Anniston City Schools.

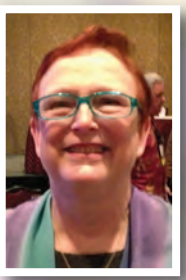
Mike Ballard, a native of Mobile, has been in private practice for 17 years and is an instructor at the University of South Alabama within the Continuing Education Program.

Ballard received his undergraduate degree in accounting from the University of Alabama in 1975, his MBA from the University of Alabama in 1977 and his J.D. from the University of Alabama School of Law in 1978. In 1980, he received his Master of Laws in taxation from Emory University.

Ballard is a member of the Alabama State Bar Probate Section and Client Security Fund Committee, as well as the Mobile Bar Association Probate and Bankruptcy sections. He is also active with the Baldwin Bar Association and Mobile Volunteer Lawyers Program and is a member of the Mobile Estate Planning Council Executive Committee.

Maud McLure Kelly Award

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



Judge Caryl Privett

Judge Caryl P. Privett is a graduate of Vanderbilt University where she received her Bachelor of Arts degree in 1970. She then received her J.D. from New York University in 1973, and became a circuit judge for Jefferson County in January 2003.

Judge Privett worked for Crawford & Blacksher from 1973 to 1974, Adams Baker & Clemon from 1974 to 1976, Office of the U.S. Attorney from 1976 to 1998, U.S. Attorney for the Northern District of Alabama from 1995 to 1998 and was in private practice from 1998 to 2003. Judge Privett is also an adjunct professor at Cumberland School of Law at Samford University.

Judge Privett is active in the American Bar Association, National Conference of Women's Bar Association, Alabama State Bar and Alabama Academy of Attorney Mediators.

President Raleigh, Alabama Supreme Court Chief Justice Roy Moore and Robert Denniston

Chief Justice's Professionalism Award

The Chief Justice's Professionalism Award was created jointly by the Chief Justice's Commission on Professionalism and the Alabama State Bar. It recognizes a judge or lawyer for his or her outstanding contribution in advancing the professionalism of the legal profession in Alabama.

Robert P. Denniston was admitted to the bar shortly before his 21st birthday in 1941. During his service as a Mobile attorney, he has twice been awarded the Alabama State Bar Certificate of Merit for service to his profession. He has served on committees of the Alabama Law Institute and as a member of the Alabama Law Foundation and the American Bar Foundation. In 2011, Mr. Denniston was honored with a joint resolution of the Alabama Legislature commending him for 70 years of service. He is a past president of the Mobile Bar Association, Mobile County Chapter of the Red Cross and Mobile Arts Council. Mr. Denniston served in the U.S. Navy, where he fought in both World War II and the Korean War. During his naval service, he received 13 campaign ribbons and retired as a Commander.

Commissioners' Award

This award was created by the Board of Bar Commissioners in 1998 to recognize individuals who have had a long-standing commitment to the improvement of the administration of justice in Alabama.

President Raleigh and Pat Harris

D. Patrick Harris is a graduate of Auburn University and Thomas Goode Jones School of Law. An attorney since 1983, Harris has practiced law as managing partner of Harris & Harris PC of Montgomery, serves as a special probate judge and a hearing officer for several state boards and is the secretary of the Alabama Senate.

Harris has a 40-year association with the Alabama Senate, having first worked there while a high school student and continuing through his college years and afterward. In 1991, Harris was elected assistant secretary of the Alabama Senate and served in that capacity for 20 years. Harris was elected secretary of the Alabama Senate on December 8, 2010 to succeed McDowell Lee.

Harris is past chair of the American-Canadian Legislative and Parliamentary Clerks Committee. He serves on the Thomas Goode Jones School of Law Advisory Board, is past president of the Montgomery County Young Lawyers' Association, has served as legal counsel to the Alabama Supercomputer Authority and is a member of the Pike Road Planning Commission. He is a certified arbitrator and mediator and a member of the Alabama Center for Dispute Resolution.

ASB General Counsel Tony McLain, Jim Ward, Billy Bedsole, Richard Gill and President Raleigh

William D. Scruggs, Jr. Service to the Bar Award

This award was created in 2002 in honor of the late Bill Scruggs, former state bar president, to recognize outstanding and dedicated service to the Alabama State Bar.

Richard Gill is the senior partner at Copeland Franco Screws & Gill PA in Montgomery. He has been an active litigator in a broad range of civil matters, including securities fraud (both plaintiff and defense), trusts and trust investment management, complex business litigation, insurance coverage, employment, personal injury, pharmaceutical pricing and investments.

He is a fellow of both the American College of Trial Lawyers and the American Academy of Appellate Lawyers, and is one of only two or three attorneys in the United States to have that dual distinction. He has been engaged in major litigation in areas as geographically diverse as Alabama, Georgia, Minnesota, Florida and Illinois.

Gill received his Bachelor of Science degree from Vanderbilt University and graduated with his J.D. from the University of Virginia School of Law. In his career, Gill has served as senior associate counsel to the U.S. House of Representatives on the impeachment of President Richard Nixon, as vice chair of the committee which wrote Alabama's *Appellate Rules* (and is author of the Official Commentary to such rules), as a disciplinary judge for the Alabama State Bar for many years and as a member of the Eleventh U.S. Circuit Court of Appeals Disciplinary Committee.

James S. Ward is a member of the firm of Ward & Wilson LLC. He is a 1971 graduate of the University of Minnesota and a 1974 graduate of the University of Alabama School of Law. He is a member of the American Bar Association, Alabama State Bar and Birmingham Bar Association.

Ward's practice involves civil litigation, primarily representing businesses and also representing municipalities and state health regulatory boards, as well as healthcare professionals. He is also municipal judge of Tarrant.

Ward is currently a hearing officer for the Alabama Medicaid Agency and an administrative law judge for the State Health Planning Development Board.

Ward is a past member of the Executive Committee of the Birmingham Bar Association and former treasurer of the association. He is vice chair and was past chair of the Alabama State Bar Client Security Fund Committee. He also served for many years as a hearing officer for Disciplinary Panel III of the Alabama State Bar and has served on various committees of the Birmingham Bar Association.

Billy Bedsole is a graduate of the University of Alabama where he received his Bachelor of Science degree in Business and Commerce, and received his J.D. from the University of Alabama School of Law. Immediately following his admittance to the bar, Bedsole began his career in private practice.

Bedsole is chair of the Alabama Judicial Inquiry Commission, and has served on the commission since 2011. He is a past vice president of the Alabama State Bar (2010), served on the bar's Executive Committee (2007, 2008 and 2010) and was a member of the Alabama State Bar Board of Bar Commissioners (2003-2013). Bedsole was awarded the Howell Heflin Award for Honesty and Integrity in 2011 by the Mobile and Baldwin bar associations, recognized in 2013 by the Alabama State Bar and the Mobile Bar Association for 50 years of service and inducted into the Murphy High School Hall of Fame in 2014.

Local Bar Achievement Awards

This award was created in the early 1990s to recognize the work of local bar associations for the programs or activities conducted in a particular year.

President Raleigh and James Eric Coale, accepting for the Escambia County Bar Association

President Raleigh and Bob MacKenzie, accepting for the Birmingham Bar Association

President Raleigh and Jaime Conger, accepting for the Tuscaloosa County Bar Association

President Raleigh and Allison Miller, accepting for the Calhoun/Cleburne County Bar Association

President's Award

The President's Award is presented to members of the bar who best exemplify the Alabama State Bar motto, "Lawyers Render Service." The recipients are chosen by the current bar president.

Front row, left to right, Jeanne Dowdle Rasco, Robert Denniston, Jack Neal, Prof. Pam Pierson, Sam Irby, Rebecca DePalma and Brandon Hughey. Back row, left to right, Bryan Morgan, Dean Noah Funderburg, Judge Bill Bostick, Barry Ragsdale, David Hymer, Alyce Spruell and President Raleigh

J. Noah Funderburg, University of Alabama School of Law, Tuscaloosa
Angela Slate Rawls, Huntsville
Edward S. Sledge, IV, Bradley Arant Boult & Cummings LLP, Birmingham
Edward A. "Ted" Hosp, Maynard Cooper & Gale PC, Birmingham
Barry A. Ragsdale, Sirote & Permutt, Birmingham
David R. Boyd, Balch & Bingham LLP, Montgomery
Alyce M. Spruell, Rosen Harwood PA, Tuscaloosa
David G. Hymer, Balch & Bingham LLP, Birmingham
Othni J. Lathram, Alabama Law Institute, Tuscaloosa
Robert C. Lockwood, Wilmer & Lee PA, Huntsville
Daniel F. Johnson, Lewis Brackin Flowers & Johnson, Dothan
George M. "Jack" Neal, Jr., Sirote & Permutt PC, Birmingham
Hon. John E. Ott, Chief U.S. Magistrate Judge, Northern District
Robert P. "Bob" Denniston, Wright Green PC, Mobile
Samuel W. Irby, Irby & Heard PC, Fairhope
Jeanne Dowdle Rasco, City Attorney's Office, Huntsville
Brandon D. Hughey, Armbrecht Jackson LLP, Mobile
Bryan E. Morgan, Thomas Goode Jones School of Law, Montgomery
Hon. William H. "Bill" Bostick, III, Shelby County Circuit Court
Rebecca G. DePalma, White Arnold & Dowd PC, Birmingham
Pamela Bucy Pierson, University of Alabama School of Law, Tuscaloosa

Volunteer Lawyers Program Pro Bono Awards

ALBERT VREELAND PRO BONO AWARD–Amy S. Creech, Rhodes & Creech (Huntsville)

PRO BONO FIRM/GROUP AWARD–Cumberland Public Interest and Community Service Organization (Birmingham)

Jeanne Dowdle Rasco, President Raleigh, Jana Garner, Bradley Hargett, Jessica Caitlyn and Emily Irvin

PRO BONO LAW STUDENT AWARD–Bradley C. Hargett, University of Alabama School of Law (Tuscaloosa)

PRO BONO MEDIATION AWARD–Jana Russell Garner, Reeves & Stewart PC (Selma)

50-Year Members

Fifty-year members were recognized and honored for their long-time service to the profession.

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William T. Coplin, Jr. LLC
Workers' Compensation Law Section

ANNUAL MEETING PHOTO HIGHLIGHTS

WEDNESDAY JULY 15, 2015

President Raleigh thanked Daniel Marson for "Cognitive Decline and Dementia in an Aging Society: Impact on the Legal Profession."

Bill Bass chats with long-time friend and speaker Steve Parrish, after his presentation on products attorneys should include in their transition plan.

Glenda Snodgrass discussed how to safeguard client information, while Allen Howell concentrated on the profession in transition.

Perfect weather made for a perfect Family Night Dinner.

Assistant General Counsel Mark Moody, far right, explained to Cleve Poole and other attendees some of the possible pitfalls of social media.

Enjoying family time were Stephanie and Calvin Hunter and their daughter.

Wesley Thompson provided musical entertainment during Wednesday night's get-together by the pool and beach.

Having fun at "Frozen" Frenzy Craft Night

Beach volleyball was just one of the fun activities available.

Another perfect sunset at Point Clear

THURSDAY
JULY 16, 2015

Continuing the discussion on a profession in transition are, seated, Laura Calloway, Professor Pam Pierson and Anthony Joseph. Behind them are Stephen Gallagher and President Raleigh.

President Raleigh congratulates Mary Jane Oakley and her brother, Michael, on continuing their record of perfect annual meeting attendance!

Pat Harris tries to decide which plenary to attend next.

Presenters Allison Skinner and Kathryn Osburne keep the conversation going on adapting to change in our personal and professional lives.

Always a big hit is the cooking class with the Grand chef!

Judge Shelbonnie Hall, right, visits with newest member benefit provider Zue Farmer of Principal Financial Group.

Discussing ADR in Alabama are Harold Stephens, Graham Esdale, Judge Karon Bowdre, Judge William Filmore and Martha Cook.

FRIDAY
JULY 17, 2015

President Raleigh thanks Joshua Greene for his standing-room-only presentation, "Justice at Dachau: The Trials of an American Prosecutor."

Past presidents always seem to be smiling! Front row, left to right, are Alyce Spruell, Tom Methvin, Bobby Segall and Justice Sonny Hornsby. Back row, left to right, are Phillip McCallum, John Owens, Sam Crosby, Anthony Joseph, Larry Morris, Mark White, Phil Adams, Broox Holmes and Alva Caine.

Having fun at the President's Low-Country Boil!

Taking a break from shopping at the Silent Auction are Billy Bedsole, Mamie Bedsole, President Raleigh and his parents, Marcia and Richard Raleigh.

Robert Thornhill gets some "vocal backup" during the Bourbon and Cigar After-Party.

Joshua Lenon (center) visits with two attendees after he discussed where non-law firms are succeeding.

Watching the waves and listening to the music

Even without a booster seat, everyone can enjoy the great food at Friday's Family Celebration!

Dad gets some help shopping at the Silent Auction.

SATURDAY
JULY 18, 2015

The Raleigh family looking forward to more family time!

President Raleigh with the framed version of "President Raleigh" (from the September 2014 Alabama Lawyer *cover)*

Wonder what AJ and the president are up to?

Be sure to ask new President Lee Copeland about the bell.

Family members congratulate Everette Price on his 50-year recognition.

Joe Fawal and Mike and Mickey Turner help close out another great annual meeting.

Everyone enjoys a Presidential Reception, including Elijah Joye, Ellison Joye and Bradford Williams.

Judge J.R. Gaines, Judge Jimmy Pool and (future judge?) Trey Gaines waiting to congratulate the new president

Enjoying the final moments before the real work begins is President Lee Copeland with past President Mark White, Judge Truman Hobbs, Jessica Copeland and Debbie Hobbs.

A Few Tips for New Attorneys

By Amy M. Hampton

As I began thinking about giving advice to new lawyers, I considered what I like to read. I want to know how my peers do what they do, what they learned on their journey to their success and if they can help me succeed.

I have now been out of law school longer than I was in it, which seems like forever ago, but it has only been six years. I have had three jobs in that time and learned valuable lessons from each. Hopefully, I am at my last job; I am a shareholder in my firm with my law partner, whom I met in law school. I can honestly say that I love my job and I really enjoy the area of law that I practice. Of course there are days when I want to quit, but they are getting few and far between.

I mainly (99.8 percent) practice bankruptcy law, representing debtors. I always thought I would represent creditors, working in a big firm, in a big city, wearing power suits, on the 20th floor of a high-rise building, enjoying the hustle and bustle of the many attorneys and support staff around me. That is the opposite of what I do and where I am. I practice in a small city in old houses that have been converted into offices. We have five attorneys in the offices–my law partner, three associates and me–two secretaries and two closing specialists. I wear suits on the days I go to court and business casual the rest of the time. I love it, but it did not happen overnight. **Tip number one: Have several goals, but be willing to revise them often.**

I knew that hard work would pay off, or at least I believed that it would. I repeated to myself, "All good things come to those who wait" and "Slow and steady wins the race" mainly because patience is not my strength. I got a job the week before I found out the bar results, pending the outcome, of course. I was so excited to be able to say that I had job in the legal field, and not just a job.

It was with a one-attorney firm. I am grateful for that opportunity, and learned that family law was not what I enjoyed practicing. I can do it, but I really do not like it. My parents divorced when I was in my teens and that experience left a bitter taste in my mouth. My favorite law professor teaches family law. In class, she mentioned that children of divorce either embrace family law because they want to help others with their knowledge, or they run from it like the plague. I handled one divorce settlement–the big hang-up was a set of Pyrex. Pyrex–really? I even offered to go to Target and buy my client another set because she had two sets. Surely she could give the soon-to-be ex-husband that third set, right?

I was bored and not happy. I had taken bankruptcy in school and loved it. I am a numbers gal, so bankruptcy is a good fit. At this point in my life, I knew that I needed to enjoy the profession I had chosen, not to mention gone into debt to get.

My next job was with a bankruptcy firm. They taught me how to do what I wanted to do and sent me out into the world to do it. I am forever grateful to them for teaching me the basics and showing me the ropes. **Tip number two: Be willing to "try on" many types of law until you find your fit.**

When I went to work with my now-law partner, we started small, because that is what we could afford, renting cubicles in another office. We answered our own phones, first one line, and then adding another after a few months. We are now up to three lines and have two offices, one in Alexander City and another in Roanoke. Law school taught us how to be attorneys, but not how to run a business. Luckily for me, my law partner has his MBA and knows how to handle the business side of things. He kept saying, "Marginal costs have to equal marginal revenue." We kept expenses low because we had to and expanded when we could. We worked weekends, and still do. We meet clients at our office and in coffee shops or fast food places to make it easier on them.

We got a little busier each day. We were able to hire another attorney to handle criminal appointed cases and some more family law. This helped because we could now be in three places at one time. That was an exciting day; we knew our little firm was growing. Those cubicles seemed to be getting smaller and smaller by the day and more space was needed. An office building became available and we were able to purchase it. No more paying rent meant we were building equity. Why our banker lent us the money for the mortgage, we will never know; he must have seen something in our account receivables and the determination in us to take a chance! **Tip number three: Work with what you have, until you can afford more.**

Building slowly is the key. You do not hang out your shingle and, the next day, have clients line up to pay you to help them. We are now getting referrals from that first round of clients. Customer service skills are a must; if you cannot communicate with your clients, you need to quickly learn how to or find something else to do. I have had retail jobs in my past and my law partner had food-service experience. We both have been in the trenches and consider our service skills assets. You have all heard that nobody goes to see a lawyer when things are going great for them, and this is so true. Being able to listen and figure out what clients need is difficult when they do not know what they need; they just know something is not right. Many times they just need someone to listen to them and help point out options.

There is a vast responsibility to help your client do what is best for their situation. I strive to put them at ease, restate what I think they want and give them all the options that are available to them. I cannot make up their mind, but only offer advice and show the options.

I have many clients who do not understand how they got into their financial position. Many times having them list everything they owe is eye-opening to them because they have never done it. With this realization, they feel horrible–embarrassed, ashamed, mad, a whole plethora of emotions, and I have to calm them down and help build them up again. Sometimes, the stress overwhelms them and they burst into tears. I was not expecting all the tears. **Tip number four: Always have a box of tissues on your desk.**

It may seem simple, but having a system helps me all the time. I file cases in different federal districts and different divisions within those districts. Each division gets a differently colored file folder. Pretty simple, yes, and it has saved me from driving to the wrong courthouse many times. (I know that if I have blue folders, I need to drive to Opelika.) They are also filed on different shelves to keep it organized. Along with having a filing system that you can work with, have an order to how you complete daily tasks. **Tip number five: Have a system and stick with it.**

Like all litigators, I get emails for my cases from the courts. With those emails, I read them, print what is needed, add to the calendar and file the hard copy and the email to the client folder. I have the same order each time so that I do not miss adding a court date to the calendar. One of my recurring nightmares is that I have not added something to the calendar and I miss a court date, thus causing my client's case to get dismissed. Have a good calendar. In the beginning I kept three–one on my desk that I wrote on, a little one in my purse and one in the computer that I could also access on my phone. Now I am down to just the computer version, and it is color-coded like the file folders. Getting good systems in place does make the running of the office better. I use the notes sections to put in when deadlines are approaching so that I can have objections or other pleadings completed a few days in advance, in case multiple items are due that day, or I have to be out of the office meeting clients. Now I will admit that my desk is not always clear at the end of each day, but I know where everything should be and where and when I need to be away from the office. I want you to be so busy and successful that the reminders to pay your power bill are really needed. **Tip number six: Have a good calendar system.**

One reason I love my particular type of law is that I am not in adversarial situations daily. The other attorneys I see frequently are representing clients in bankruptcy, so I am not "going into battle" all the time. I have found the group of attorneys I see in court to be a huge wealth of knowledge for me. We are able to bounce ideas off each other. Do not be afraid to ask for help, and also do not be afraid to give help, when you can.

I talk with and email creditor attorneys daily. I make sure that if I file a case, which will stop a foreclosure, I call or email the attorney who has scheduled that foreclosure to let him or her know a case has been filed. I try to do so days before a scheduled foreclosure, but I do not always get that luxury. Sometimes it comes down to hours ahead of time, but I let them know as soon as I can. Taking this small extra step has paid off in developing good relationships with those attorneys. It has also helped my clients. One client had missed some payments to a mortgage company due to unexpected expenses; by calling the creditor's attorney and explaining this, I was able to get my client a little extra time to catch up on back payments without losing his house. Be honest with the attorneys you talk with, and treat them the way you want to be treated, it will be worth it. **Tip number seven: In the words of my grandfather, "You get more flies with honey than with vinegar."**

Opportunities present themselves in many ways. We were able to buy out another law office from a fellow classmate. That purchase got us into the real estate closing business (one of our long-term goals), and we also inherited another attorney and closing specialist. Since that purchase almost two years ago, my law partner and I have become title agents and have formed a separate closing business. One banker was in the office the other day for a closing and asked what type of law I mainly practiced, to which I replied with a big grin, "Bankruptcy, so if this doesn't work out well for them, we can solve that problem." I don't think he thought that was too funny, but those nervous first-time homebuyers cracked up. It was a good ice-breaker. **Tip number eight: When opportunity knocks on the door, don't pretend you are not at home; answer the door!**

Last tip: The only law I know that I will never have to look up and re-read is Murphy's Law. Not that I have a negative attitude, or that I expect the worst to happen, but knowing that you can plan for everything and do what you can to make it right, does not mean that it will turn out the way you plan (see tip number one). Practicing law is what we do. The laws change and we must be able to bend and adapt and maybe one day we can all get to Carnegie Hall. | AL

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

ALABAMA STATE BAR

SPRING 2015 Admittees

STATISTICS OF INTEREST

Number sitting for exam	**261**
Number passing exam (Includes MPRE-deficient and AL course-deficient)	**112**
Number certified to Supreme Court of Alabama	**75**
Certification rate*	**28.7 percent**

CERTIFICATION PERCENTAGES

University of Alabama School of Law	**58.3 percent**
Birmingham School of Law	**15.4 percent**
Cumberland School of Law	**52.0 percent**
Jones School of Law	**54.2 percent**
Miles College of Law	**0.0 percent**

**Includes only those examinees who, on the day of release of exam results, had satisfied the following admission requirements: (1) passage of the Academic Bar Exam; (2) passage of the MPRE and (3) completion of the online course on Alabama law.*

For full exam statistics for the February 2015 exam, go to *https://www.alabar.org/assets/uploads/2014/08/February-2015-Detailed-Statistics.pdf*

ALABAMA STATE BAR

SPRING 2015

New Admittees

Andria Naomi Allen
Jessica Clements Andrade
Ashton Leigh Arrington
Blakely Weston Barnes
Eric Scot Baswell
Jason Asa Baugher
William Thomas Bloodworth
William Dunn Bolling, III
Jessica Emma Bonds
Laura Jean Boures
Joshua Lynn Bradshaw
Ricardo Marc Brito
Adam Joseph Brown
Chalankis Ra'Mon Brown
Jessica Rhea Burgess
Crystal Nicole Burkhalter
Meredith Boykin Busby
Jacob Eli Butler
Ryan Joseph Canon
John Adam Chavez
Joshua Lee Clark
Jarrid DeWayne Coaxum
James Parrish Coleman, III
Jonathan Wesley Cooner
Amber Dawn Courtney
Taylor Ferrell Davenport
Richard Leon DeWeese, Jr.
William Kevin Diver
Lauren Kay Donaldson
Laura Rae Dove
Krista Coggins Dunning
Franklin Hollis Eaton, Jr.
Rachel Lynn Emfinger
George Allan Hartwell Eyrich, Jr.
Patricia Kay Farmer
Allyson Leigh Franks
Benjamin Caleb Fuller
Paul Henry Fullum
Tabitha Lynn Gorman
Daniel Christopher Granata
Erica Lynn Gray
Pamela JoAnn Hammett
Ashley Noelle Harris
Estelle Abekeh Serena Hebron-Jones
Richmond Ray Hill
Tyler Rockwell Hinton
Joseph Bryant Hornsby
Yu Huang
Stephen Taft Hughes
Thomas Alan Hughes, Jr.
Timothy O'Neal Hulsey
Benjamin Charles Hymas
Kendra Ardeen Johnson
Ann Collins Joiner
Irving William Jones, Jr.
Artem Mikhailovich Joukov
Jennifer Collins Karr
Philip Kegler
Alexis Leigh Chambers Kessler
Matthew Thomas Kidd
Jeramey Clyde Looney
Athena Brittney Louie
Aisha Zainab Mahmood
Catessa Nicole Malone
Michael Jason Marable
Melissa Kay Marler
Neal Eugene Marlow
Sebrina Lynn Martin
Benjamin Paul Mayer
Michelle Lynn McClafferty
Bryan James Mills
William Carter Montgomery
Michael Riley Moore
Jared Hughes Morris
Daniel Woodruff Parker
Christine Rolniak Patton
Ashley Wayne Phillips
Clay McLain Phillips
Clinton Lewis Phillips
Tarackia Tanae Phillips-Barge
Jeffery Wayne Pierce
Charles Arthur Pond, III
Christina Claire Porter
Sherman Blackstone Powell, IV
Benjamin Lee Preston
Charles Walton Prueter
William Hunter Raines
Stephan Alan Ray
John Burruss Riis, Jr.
Thomas Robert Robulack
Niquita Sanders
Stephen Scott Schofield
Jessica Lee Scholl
Erin Linley Shirley
Anthony Shawqi Shunnarah
Annuradha Sikka
David Letaw Silverstein, Jr.
Danielle Nicole Starks
James William Stone
Joshua Lynn Strickland
Steven Wade Strother, Jr.
Liliana Torres Valencia
Angela Lynn Trawick
Jere Cooper Trent, II
Haley Kathleen Tucker
Zachry Wadsworth Turner
Lanice Landa Turrens
Amie Adelia Vague
Brittany Eubanks Wainwright
Jarred Christopher Welborn
Jennifer Louise Williams
Cody Richard Wix
Danielle Elyse Yance

LAWYERS IN THE FAMILY

1. **David L. Silverstein, Jr.** (2015) and David L. Silverstein (1981)
Admittee and father

2. **Pamela JoAnn Hammett** (2015), Theresa Rankin Kisor (1998) and Valerie Kisor Chittom (1992)
Admittee, grandmother and aunt

3. **Cooper Trent** (2015) and Jere Trent (1965)
Admittee and grandfather

4. **John Burruss Riis, Jr.** (2015) and Buzzy Riis (1985)
Admittee and father

5. **James Parrish Coleman, III** (2015) and James Parrish Coleman, Jr. (2006)
Admittee and father

6. **Ben Fuller** (2015) and Judge Dan Reeves (1984)
Admittee and uncle

7. **Zachary W. Turner** (2015), Halron W. Turner (1984), Edward P. Turner, Jr. (1955) and E. Tatum Turner (1988)
Admittee, father, grandfather and uncle

LAWYERS IN THE FAMILY

8. **Erica Lynn Gray** (2015), Bret Gray (2000) and Ken Gray (1998)
Admittee, husband and brother-in-law

9. **Ashton Arrington** (2015) and Cindy B. Sirmon (1986)
Admittee and aunt

10. **Christina Claire Porter** (2015), John F. Porter, III (1978) and Adam M. Porter (1987)
Admittee, father and uncle

11. **Jarred C. Welborn** (2015), Erin B. Welborn (2007) and Richard W. Bell (1972)
Admittee, wife and father-in-law

12. **Daniel C. Granata** (2015), Connie Shaw Granata (1989) and Paul B. Shaw, Jr. (1987)
Admittee, mother and uncle

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

2015 Regular Session Recap

The 2015 Regular Session is now in the books. Most of the publicity of the session revolved around the condition of the general fund budget and the fact that the legislature will have to return for a special session on that subject; however, the legislature was busy passing a number of other significant pieces of legislation. While this column cannot contain a full summary of all of the legislation that passed, I attempted to briefly address those areas of most general interest to lawyers around the state.

Complete copies of the legislation addressed here or any other legislation considered during the 2015 Regular Session can be found at *www.legislature.state.al.us* (click on the "Session Information" tab).

Alabama Law Institute Legislation

Rights of Publicity Act (Act 2015-188)

Representative Givan and Senator Smitherman

This act protects a person from the wrongful commercial use of his or her likeness during life and creates a descendible right for a period of 55 years after death. The act recognizes that many uses are protected by the First Amendment, but creates a cause of action and statutory damages for those that are not.

Amendments to Alabama Limited Liability Company Act (Act 2015-165)

Representative Poole and Senator Orr

This act furthers our goal of making smaller incremental changes, when needed, to our business entities act. This act clarifies the governing law as it relates to the internal affairs doctrine for foreign LLCs. The act also clarifies the tax consequences for LLCs and tweaks the transition provisions of the 2014 LLC Act.

Amendments to Alabama Probate Code (Act 2015-312)

Representative Beckman and Senator Albritton

This act creates defaults for payable on death accounts, real property and other non-probate assets following a divorce. Under current Alabama law, unless specifically addressed, a former spouse is treated as pre-deceased for purposes of inheritance under a will. This act causes a similar result for most non-probate transfers at death while protecting those things addressed in the divorce decree or separately by the parties.

Military Deployed Child Custody Act (Act 2015-366)

Representative B. Moore and Senator Whatley

This act clarifies that deployment alone is not a grounds to re-visit child custody determinations. It is in conformity with a provision of the National Defense Authorization Act of 2014 passed by the United States Congress in December 2013. The act also provides clarification to the court on its ability to issue a pendent lite custody determination order in situations in which a case is continued or stayed based on federal law.

UIFSA Amendments (Act 2015-284)

Representative Black and Senator Ward

In 2008, amendments to the UIFSA were drafted to incorporate the provisions of the 2007 Hague Convention on the International Recovery of Child Support of Family Maintenance into state law ("the Convention"). The Convention contains numerous provisions that establish uniform procedures for the processing of international child support cases.

In 2014, Congress enacted the Preventing Sex Trafficking and Strengthening Families Act. That act required each state to expeditiously enact the UIFSA 2008 amendments during their 2015 legislative session as a condition for continued receipt of federal funds supporting state child support programs.

Additionally, the enactment of the 2008 UIFSA amendments improves the enforcement of American child support orders abroad and ensures that children residing in the United States receive the financial support due from parents, wherever the parents reside. The amendments provide guidelines and procedures for the registration, enforcement and modification of foreign support orders from countries that are parties to the Convention.

Restrictive Covenants Act (Act 2015-465)

Representative England and Senator Williams

Creates statutory scheme for employment covenants not to compete. The act begins with establishing what types of relationships warrant the parties having the ability to enter

Continued from page 331

into restrictive agreements; for example, franchise agreements, buy/sell agreements and certain employment relationships are covered. The act then defines what a protectable interest is. It must be a legitimate interest and not merely a basic job skill in order to be covered. The act also requires that these agreements be reduced to writing, be mutual and be entered into with adequate consideration. The act further addresses the burden of proof necessary to enforce a restrictive agreement and the remedies available to prevailing parties in the event of a breach. The act also attempts to limit judicial interference with these agreements so that parties may have better certainty with respect the terms they negotiate.

Constitutional Revision Commission Proposed Constitutional Amendments

Revisions to Section 284.01 (Act 2015-44)

Representative Scott and Senator Coleman

Section 284.01 sets forth the mechanism by which it is determined whether a constitutional amendment is local, and can thereby be voted on locally, or has statewide implications and must be voted on statewide. Under current law, a local amendment can be sent statewide if a single legislator casts a vote against it or if the Local Constitutional Amendment Commission determines its impact is not merely local.

This amendment would change the process so that the vote of the legislature would be bifurcated. The first vote would be passage of the amendment and would continue to require a two-thirds vote for passage. The second vote would be on a resolution on whether the amendment affects one or more counties by name. A single negative vote on this resolution would cause the amendment to be voted on statewide. This would allow the legislature to fully debate the substance of the amendment while isolating the issue of whether it has local or statewide impact.

County Administrative Powers (Act 2015-220)

Representative Davis and Senator Marsh

This amendment would grant county commissions the power to take certain limited administrative powers without a referendum or local legislation. These powers include: personnel functions, public property functions, transportation functions, county office functions and emergency assistance functions. These powers expressly prohibit the exercising of police, land use and taxing powers. The powers would also be limited to those things not addressed by general or local law. Finally, in order to exercise any power that has an impact on the office of another elected official, the county commission must have sign off from that official.

Article III Revisions (Act 2015-200)

Representative Shedd and Senator Albritton

This article deals with the distribution of power in state government. If passed, the amendment creates three branches (changed from "departments") of government: legislative, executive and judicial. The amendment further incorporates Amendment 582 that provides that a court does not have the power to order the disbursement of state funds and that such an order is only valid when approved by the legislature.

Article VII Revisions (Act 2015-199)

Representative Givan and Senator Albritton

Article VII of the Constitution of Alabama of 1901 provides for impeachments in Alabama. This amendment proposes a number of non-substantive technical amendments, including renumbering sections, capitalization and gender-neutral references. The amendment would also modernize the impeachment article by removing the state Superintendent of Education and including the members of the state Board of Education as officers who are subject to impeachment. The rewritten section would delete the outdated reference to chancellors, would include district court judges as officers subject to impeachment and would substitute the term district attorney for the outdated term solicitor.

Criminal Law

Prison Reform (Act 2015-185)

Representative Jones and Senator Ward

A thorough review of this significant legislation can be found in the May 2015 "Legislative Wrap-Up."

Domestic Violence (Act 2015-493)

Representative Jones and Senator Scofield

This act substantially revises domestic violence laws in a number of ways. It requires law enforcement officers to give a domestic violence victim a form outlining the victim's rights, phone numbers of local domestic violence centers and information on civil and criminal laws relating to domestic violence and to assist victims with obtaining transportation, at the time

of the incident, so that the victim may receive any necessary medical treatment for an injury which resulted from domestic violence. It increases the time for release on bail of a person charged with domestic violence or a violation of protection order from 12 hours to 24. The act requires law enforcement officers to give domestic violence victims a copy of any conditional release orders within 24 hours, if the current address of the victim is known. It provides that a temporary protective order can be granted by the court for 15 days, which may be expanded for good cause shown. Among other relief, the court may enjoin the defendant from having physical contact with the plaintiff or from coming within 300 feet of the plaintiff's residence (even if the residence is shared by with the defendant), school or place of employment of the plaintiff, children or any other person designated by the court. ADECA is given oversight responsibilities over domestic violence centers, including creating minimum standards, certifying, developing programs and determining equitable distribution of funds. The Alabama Coalition Against Domestic Violence shall assist and make recommendations to the director.

Stolen Valor Act (Act 2015-69)

Representative Clouse

This act makes fraudulent representation of being awarded a medal or decoration and the wearing, purchasing, selling or exchanging of a decoration or medal a criminal offense ("theft of valor"). The act makes theft of valor a Class B misdemeanor. However, if certain medals or decorations are part of the theft of valor, then the penalty is a Class A misdemeanor or a Class C felony.

Drag Racing (Act 2015-318)

Senator Singleton

This act amends *Ala. Code* § 32-5A-178 relating to drag racing. As amended, this section increases the current penalties for violations and provides additional penalties for subsequent violations. The scope of this section now includes those who participate in drag races as a spectator or organizer.

Powdered Alcohol (Act 2015-385)

Senator Figures

This act makes it a crime to possess, purchase or sell powdered alcohol.

Firearms (Act 2015-341)

Representative England

This act amends *Ala. Code* §§ 13A-11-57, 13A-11-61.2, 13A-11-72, 13A-11-76, 13A-11-79, 22-52-10.8 and 40-12-143. Among other things, these sections allow persons under the age of 18 to possess a pistol under certain conditions. These sections further provide for the entry of certain mental health information into the National Instant Criminal Background Check System (NICS).

Bail Bonds (Act 2015-407)

Representative M. Hill

This act adds Section 27-36-3.1 to the *Alabama Code*. Under this section, the commissioner of insurance may require surety or limited insurers to maintain a reserve on all bail bonds or other single-premium bonds without a definite expiration date. This reserve shall be reported as liability in financial statements to be filed with the commissioner.

Attorneys and Courts

Innovator Liability (Act 2015-106)

Senator Ward

This act prevents a manufacturer from being held liable for a product it did not design, manufacture, sell or lease under most circumstances. Additionally, a manufacturer is not liable for damages if its design is copied without its expressed authorization.

Small Claims Jurisdiction (Act 2015-224)

Representative J.D. Williams

This bill would expand the jurisdiction of the small claims division of district court to $6,000.

Electronic Filing of Business Entity Records (Act 2015-479)

Senator Livingston

This act provides for an electronic process for the recordation of business entity filings with the judge of probate and the secretary of state. It also requires the secretary of state to develop an electronic processing program and allow any county that voluntarily chooses to participate in the program to do so by written agreement. Finally, the act authorizes county commissions and judges to satisfy general and local law requirements by participating in the electronic processing program.

Circuit Clerk and District Attorney Retirement (Act 2015-342)

Senator Orr

This is a proposed constitutional amendment to allow the legislature to create a retirement system for district attorneys and circuit clerks and to do away with the supernumerary system.

Continued from page 333

Judicial, Circuit Clerk and District Attorney Retirement (Act 2015-498)

Senator Orr

This is the enabling legislation to create the retirement system for district attorneys and circuit clerks and to revise the retirement system for judges.

Child Support Garnishment (Act 2015-365)

Representative Nordgren

This act creates penalties for employers who help a person avoid garnishment for child support.

Exemptions (Act 2015-484)

Senator Ward

This act adds Sections 6-10-6.1, 6-10-12 and 43-8-116 to the *Alabama Code*; this act also amends *Ala. Code* §§ 6-10-2, 6-10-6, 6-10-11, 43-8-110, 43-8-111, 43-8-113 and 43-8-115. As amended, the permissible exemptions for a surviving spouse and an Alabama debtor is increased to a $15,000 homestead exemption and to $7,500 personal property exemption. Under the sections added, these allowances and deductions may be adjusted under certain conditions.

Real Property

Right of Redemption (Act 2015-79)

Senator Reed

This act reduces the right of redemption to 180 days for property on which a homestead exemption was claimed.

Elections

Polling Place Lines (Act 2015-288)

Representative Standridge

This act allows a voter who is physically disabled or over the age of 70 to move to the front of the line at a polling place if the voter so requests.

Voter Lists for Legislators (Act 2015-290)

Representative Wingo

This act allows legislators one free voter list of their district within 90 days of him or her assuming office rather than the current law that allows for two free voter lists.

Sharing of Voter Lists (Act 2015-459)

Representative Ainsworth

This act amends *Ala. Code* § 17-4-38. As amended, this section authorizes the secretary of state to provide a copy of the statewide voter list to the chief election officer of any other state. This act adds Section 17-4-38.1 to the *Alabama Code* which requires state agencies to provide the secretary of state with any information needed to maintain the statewide voter registration database.

Culling of Voter Lists (Act 2015-367)

Representative Davis

This act prescribes the manner in which a county board of registrars investigates a report that a registered voter is deceased or becomes a nonresident of the precinct in which the person has been registered to vote.

SEC Primary (Act 2015-239)

Senator Ross

This act changes the date of the presidential primary from the second Tuesday in March to the first Tuesday in March to join other southern states for an "SEC Super Tuesday."

Education

Amendments to Alabama Accountability Act (Act 2015-434)

Senator Marsh

This act amends *Ala. Code* §§ 16-6D-4 and 16-6D-9. As amended, these sections clarify that educational scholarships are provided to eligible students, not particular schools, and scholarship granting organizations shall determine the income eligibility of a scholarship recipient every other year. This act also clarifies that donors making contributions to scholarship-granting organizations cannot earmark their contributions for a particular school.

Charter Schools (Act 2015-3)

Senator Marsh

This act permits public charter schools to be established in Alabama and creates the Alabama Public Charter School Commission. The commission is an independent state entity and may authorize public charter schools. The process for establishing a public charter school and the terms and conditions of a charter are set forth in the act.

Virtual Schools (Act 2015-89)

Senator Brewbaker

This act requires that each local board of education adopt a policy providing a virtual education option for eligible students. The policy must allow an online pathway for earning a high school diploma, and a board providing this option shall be exempt from any provision of law or administrative rule that applies to the traditional delivery of instructions. Students enrolled in a virtual school program shall be treated as if he or she is attending his or her local school in the attendance zone in which they reside for purposes of participating in extracurricular activities.

Student Religious Liberties Act (Act 2015-129)

Representative Butler

This act prohibits the local boards of education from discriminating against students or parents based on religious beliefs. Additionally, this act allows students to express their religious beliefs in academic work and to participate in religious activities or expressions before, during and after the school day. Finally, this act applies to all religions and requires the local board of education to adopt a policy governing voluntary religious expression in its schools.

Waiver for Athletic Team Physicians (Act 2015-451)

Representative Ford

This act provides a limited waiver to athletic team physicians when traveling in this state with their team. This waiver permits such persons to provide medical services to any member of the official traveling party.

Government

Open Meetings (Act 2015-340)

Representative Davis and Senator Ward

This act amends *Ala. Code* §§ 36-25A-1, 36-25A-2, 36-25A-3 and 36-25A-9. As amended, these sections prohibit serial meetings or electronic communication from being utilized to circumvent any of the provisions in these sections. These sections also further define terms and procedures under the Open Meetings Act of 2005.

Official Crustacean (Act 2015-124)

Senator Pittman

This act declares the brown shrimp as the official crustacean of the state of Alabama.

Official Agricultural State Insect (Act 2015-461)

Representative Patterson

This act designates the queen honey bee as the official agricultural state insect of Alabama.

Haiwayi Robinson Emergency Missing Child Alert System Act (Act 2015-28)

Senator Figures

This act requires the secretary of the Alabama Law Enforcement Agency, or his or her designee, who shall serve as the state coordinator of the alert system, to develop and implement the Emergency Missing Child Alert System. All local law enforcement agencies shall participate in the alert system. If a missing child report is given and if the criteria adopted by the Alabama Law Enforcement Agency have been met, an emergency missing child alert and its procedures shall be activated.

Health

Authorization of Mental Health Services for Minors (Act 2015-476)

Senator Sanford

This act allows parents or legal guardians of a minor between 14 and 19 years to authorize medical treatment for mental health services, even if the minor has expressly refused treatment in certain circumstances.

Gabe Griffin Right to Try Act (Act 2015-320)

Senator Ward

This act permits manufacturers of an investigational drug, biological product or device to make available such drugs and eligible patients may request such drugs. Although this act does not expand the coverage required of an insurer or require the Alabama Medicaid Program to provide additional coverage, if a patient dies while using such drugs, the patient's heirs are not liable for any outstanding debt related to the treatment or lack of insurance. Additionally, this act does not establish a standard of care for physicians and does not create a private cause of action against a manufacturer of such drugs or any other person involved in the care of the eligible patient if the manufacturer or other person complied in good faith with the terms of this act, unless there was a failure to exercise reasonable care. | AL

Wilson F. Green

Marc A. Starrett

By Wilson F. Green

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

By Marc A. Starrett

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

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

Discovery

***Ex parte Fairfield Nursing and Rehabilitation Center, LLC*, No. 1140454 (Ala. May 29, 2015)**

Requested re-depositions of witnesses were unreasonably duplicative, because the same subject matters of testimony had been covered in previous depositions.

State-Agent Immunity; Psychotherapist-Patient Privilege

***Ex parte University of South Alabama*, No. 1140440 (Ala. May 29, 2015)**

Declaratory-judgment exception to Section 14 immunity applies to actions against state officials, not to actions against the state or state agencies. The court also granted mandamus relief as to a trial court's order for an *in camera* inspection of

psychotherapist's records was improper, because there is no necessity or causation exception to the privilege.

Personal Jurisdiction

***Ex parte Güdel AG*, No. 1131341 (Ala. May 29, 2015)**

Evidence tendered by Güdel on personal jurisdiction demonstrated that, contrary to the jurisdictional allegations in the complaint, Güdel's equipment was not causally linked to the injury. Plaintiff was not entitled to jurisdictional discovery because no explanation was offered as to why a counter-affidavit was not procured rebutting the no-causal-connection evidence.

Relation Back; Fictitious Parties

***Ex parte Nicholson Manufacturing Ltd.*, No. 1130411 (Ala. May 29, 2015)**

Amendment substituting machine manufacturer for fictitious party, filed five days after action commenced (at the expiration of the limitations period), did not relate back; plaintiff should have known the identity of manufacturer since it was identified in a sheriff's incident report and a pre-suit Department of Labor decision.

Review of Arbitral Award

***G. Don Gordon Construction, Inc. v. Brown*, No. 1131129 (Ala. June 5, 2015)**

Held: (1) arbitrator did not exceed his powers in entering award for two non-signatories to arbitration, since defendants never argued to the arbitrator that he lacked such authority; and (2) arbitrator's co-counsel relationship in unrelated matter with partners of plaintiff's counsel did not establish "reasonable impression of partiality," and plaintiff's procurement of arbitrator's affidavit to counter assertion of partiality was not itself evidence of partiality.

Jury Waiver

***Ex parte Acosta*, No. 1140200 (Ala. June 5, 2015)**

Jury waiver provisions contained in four assignment of rents documents, which applied to claims "arising out of, or based upon, this Assignment," did not apply to borrower's counterclaims for fraud and other torts arising from procurement of personal guaranty on debt.

Forum Non Conveniens

***Ex parte Quality Carriers, Inc.*, No. 1140202 (Ala. June 5, 2015)**

Autauga County PR filed wrongful death action for Autauga County decedent against interstate carrier, out-of-state carrier driver and Dallas County driver (who was driving car in which decedent was passenger), arising from MVA occurring in Autauga County. PR filed suit in Dallas County. Carrier and carrier's driver moved to transfer to Autauga County under the "interests of justice" prong of forum non conveniens, which the circuit court denied. Held: Autauga County had strongest connection to the case under the "nexus" test.

Stay of Civil Proceedings Due to Criminal Proceedings

***Ex parte Butts*, No. 1140438 (Ala. June 5, 2015)**

Civil litigant is not automatically entitled to stay of civil proceedings after indictment; rather, the multi-factor test of *Ex parte Rawls*, 953 So. 2d 374, 378 (Ala. 2006), determines whether a stay is warranted. Trial court had discretion to deny a stay due to the lack of substantial overlap between the facts underlying the civil and criminal matters.

Statute of Limitations; Mandamus

***Ex parte Courtyard Citiflats, LLC*, No. 1140264 (Ala. June 12, 2015)**

Complaint accompanied by an affidavit of substantial hardship (*see Ala. Code* § 12-19-70), where the hardship statement had not been approved by the trial court as required by § 12-19-70(b), failed to trigger jurisdiction in the circuit court.

Insurance; Opt Out

***Ex parte Alfa Mut. Ins. Co.*, No. 1140642 (Ala. June 26, 2015)**

Plaintiff in MVA sued Alfa (his UM carrier), but not the tortfeasor. Alfa impleaded the tortfeasor (Davis) as third-party defendant, and then moved to realign the parties in order to opt out from the case, though it (Alfa) would be defending Davis. The trial court denied the motion to realign, and Alfa sought mandamus relief. The supreme court granted the writ, reasoning that under *Lowe v. Nationwide*, Alfa had the right to opt out and to defend the tortfeasor. The court

Continued from page 337

rejected plaintiff's argument that *Ex parte Littrell*, 73 So. 3d 1213 (Ala. 2011), required that a UIM carrier waive any subrogation rights it might have against the UIM avoid a conflict of interest between the carrier and the party it is defending.

Post-Minority Educational Support

***Ex parte Duerr*, No. 1140294 (Ala. June 26, 2015)**

Under *Ex parte Jones*, [Ms. 1131479, February 27, 2015], post-minority support orders which were on appeal at the time the court decided *Ex parte Christopher*, 145 So. 3d 60 (Ala. 2013), are subject to the rule of the *Christopher* case.

Sealing of Material

***Ex parte Barze*, No. 1131394 (Ala. June 26, 2015)**

In sealing portions of record, trial court had not followed the procedure and reviewed the factors outlined in *Holland v. Eads*, 614 So. 2d 1012 (Ala. 1993).

Arbitration; Contract Formation (Insurance)

***American Bankers Ins. Co. v. Tellis*, No. 1131244 (Ala. June 26, 2015)**

Consumers sued ABIC for fraud and other claims. ABIC moved to compel arbitration based on arbitration provisions contained in a policy form, which the trial court denied based on affidavits from the consumers that they never received the form containing arbitration. The supreme court reversed, holding that the policyholders admittedly received some documents referencing the forms containing arbitration, and receipt of those documents put the consumers on "inquiry notice" to determine what the allegedly missing forms contained.

Insurance; Fraud

***Alfa Life Ins. Corp. v. Reese*, No. 1140053 (Ala. June 30, 2015)**

Held: (1) alleged misrepresentations by agents of insurer, that the life-insurance policy would be effective despite the false statements in the application regarding husband's health, did not relieve policy procurer from her duty to read the documents, which specified that agents had no authority to modify policy and that misrepresentations would nullify policy; (2) plaintiff is not relieved of her duty to read absent a special relationship or evidence of inability to read; and (3) information that an agent allegedly obtained in the application process is not imputed to the insurance company where the application agreement states, "No information or knowledge obtained by any agent … in connection with this Application shall be construed as having been made known to or binding upon the Company."

From the Alabama Court Of Civil Appeals

Attorneys' Fees; Evidence

***Major Millworks, Inc. v. MAE Hardwoods, Inc.*, No. 2130304 (Ala. Civ. App. June 12, 2015)**

The CCA reversed trial court's award of attorneys' fees, reasoning that there was no record evidence as to the amount of time spent by lawyer or reasonableness of rates claimed.

Common Fund Doctrine; UIM

***State Farm Mut. Auto. Ins. Co. v. Pritchard*, No. 2130989 (Ala. Civ. App. June 12, 2015)**

Common fund doctrine applies to UM proceeds. Judge Thomas's concurrence urges the supreme court to clarify what she perceives as confusion within the *Lambert* procedure for a UIM carrier's advancing proceeds.

Workers' Compensation; Outside-of-Schedule Compensation

***Goodyear Tire & Rubber Co. v. Bush*, No. 2140177 (Ala. Civ. App. June 19, 2015)**

Evidence at trial (primarily from treating orthopedic surgeon) was insufficient to support trial court's award of permanent total benefits based on injury to knee. Although the doctor assigned an impairment rating to the body as a whole, under the *Ex parte Drummond* rule, impairment to the body as a whole cannot be the basis for departing from the schedule. Under *Drummond*, evidence of vocational disability would not support permanent total finding.

Workers' Compensation; Settlements

***Tate v. Liberty Mutual Ins. Co.*, No. 2140639 (Ala. Civ. App. June 26, 2015)**

Settlement agreement of future medicals which was contingent on the trial court's approval was not binding on the

employer or its insurer, where the worker died of unrelated causes before the hearing on fairness took place.

Service by Publication

***Lovell v. Costigan*, No. 2140522 (Ala. Civ. App. July 10, 2015)**

Under *Ala. R. Civ. P.* 4.3(a)(2), service by publication is proper only where the defendant "avoids service." Because no evidence of service avoidance was presented, service by publication was improper.

Rule 77 Extensions of Time to Appeal

***Johnson v. Emerson*, No. 2130842 (Ala. Civ. App. July 10, 2015)**

Held: (1) trial court had jurisdiction to reconsider its order extending the time to appeal under Rule 77(d), and (2) trial court properly rescinded its order extending time to appeal because litigant failed to establish excusable neglect in missing appeal time; litigant was aware of order to be appealed from 32 days before the appeal time expired.

Domestic Relations Jurisdiction

***Ex parte Renasant Bank*, No. 2140552 (Ala. Civ. App. July 17, 2015)**

Domestic relations court had jurisdiction only to implement and interpret terms of agreement between husband and wife, but not to adjudicate claims by husband against bank arising from refinance of former marital property.

Hospital Liens

***Alfa Mut. Ins. Co. v. University of South Alabama*, No. 2140366 (Ala. Civ. App. July 17, 2015)**

Continued from page 339

The court declined to overrule (as Alfa was urging) *Progressive Specialty Insurance Co. v. University of Alabama Hospital*, 953 So. 2d 413 (Ala. Civ. App. 2006), in which the CCA held that the hospital-lien statute applies to tort claims and contractual or insurance proceeds.

Fraudulent Transfers; Domestic Relations

***Aliant Bank v. Davis*, No. 2140289 (Ala. Civ. App. July 17, 2015)**

Substantial evidence supported the trial court's finding that conveyance from one spouse to another in divorce property settlement was not done with intent to hinder or avoid bank, and, thus, bank's claim under the Alabama Fraudulent Transfer Act failed.

Domestic Relations; POD Designations

***Kowalski v. Upchurch*, No. 2131059 (Ala. Civ. App. July 17, 2015)**

Spousal beneficiary designations are to be given effect notwithstanding intervening domestic-relations agreements or judgments divesting beneficiaries of rights to personal property of an insurance policyholder.

Workers' Compensation; Outside-of-Schedule

***Billingsley v. City of Gadsden*, No. 2130863 (Ala. Civ. App. July 24, 2015)**

Trial court erred by failing to make an express finding regarding an employee's loss of ability to earn in case involving a nonscheduled permanent partial disability.

Forfeiture; Competing In Rem Jurisdiction

***Ruiz v. City of Montgomery*, No. 2140090 (Ala. Civ. App. May 29, 2015)**

In a forfeiture action over seized cash, federal court had jurisdiction over competing state court action because the federal agents had possession of the property when the state-court suit was filed.

From the United States Supreme Court

Bankruptcy; Jurisdiction over *Stern* Claims

***Wellness Int'l Network, Ltd. v. Sharif*, No. 13-935 (U.S. May 25, 2015)**

Under *Stern v. Marshall*, Article III forbids bankruptcy courts to enter a final judgment on claims that seek only to "augment" the bankruptcy estate and would otherwise "exis[t] without regard to any bankruptcy proceeding." In this Chapter 7 bankruptcy case involving a debtor's purported alter ego and a *Stern* claim, the court held that Article III permits bankruptcy judges to adjudicate *Stern* claims with the parties' knowing and voluntary consent.

Qualified Immunity

***Taylor v. Barkes*, No. 14-939 (U.S. June 1, 2015)**

The court reversed the Third Circuit's no-qualified-immunity determination arising from jail suicide, reasoning that even if the institution's suicide screening and prevention measures contained the shortcomings that plaintiffs allege, no precedent on the books in November 2004 would have "clearly established" that officers were overseeing a system that violated the Constitution.

Bankruptcy

***Bank of America, N. A. v. Caulkett*, No. 13-1421 (U.S. June 1, 2015)**

Debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien under 11 U.S.C. section 506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral if the creditor's claim is both secured by a lien and allowed under section 502 of the *Bankruptcy Code*.

Labor and Employment

***EEOC v. Abercrombie & Fitch Stores, Inc.*, No. 14-86 (U.S. June 1, 2015)**

To prevail in a Title VII disparate-treatment claim (arising from refusal to hire prospective employee due to religious head scarf), an applicant need show only that her need for an accommodation was a motivating factor in the employer's decision, not that the employer had knowledge of her need.

Bankruptcy; Attorneys' Fees

***Baker Botts L.L.P. v. ASARCO LLC*, No. 14-103 (U.S. June 15, 2015)**

Section 330(a)(1) of the *Bankruptcy Code* does not permit bankruptcy courts to award fees to Section 327(a) professionals for legal work defending the fee applications themselves.

First Amendment; Government Speech

***Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, No. 14-144 (U.S. June 18, 2015)**

Texas's specialty license plate designs constitute government speech, and the government may choose to speak (or not to speak) from a viewpoint without transgressing the First Amendment (in this case, Texas refused to issue a specialty license plate with a Confederate battle flag on the design).

First Amendment; Public Signs

***Reed v. Town of Gilbert*, No. 13-502 (U.S. June 18, 2015)**

Town's comprehensive sign ordinance, which imposed different restrictions on signs based on categories of content, were actually content-based regulations of speech, and failed to satisfy strict scrutiny.

Same-Sex Marriage

***Obergefell v. Hodges*, No. 14-556 (U.S. June 26, 2015)**

Fourteenth Amendment's substantive due process clause requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.

Affordable Care Act

***King v. Burwell*, No. 14-114 (U.S. June 25, 2015)**

In the context of the entire ACA, the phrase "established by the State" included insurance purchased on the federal exchange where the state was using the federal exchange but had not established its own exchange.

Fair Housing Act

***Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, No. 13-1371 (U.S. June 25, 2015)**

Disparate impact claims are cognizable under the FHA.

Takings

***Horne v. Dep't of Agriculture*, No. 14-275 (U.S. June 22, 2015)**

Fifth Amendment requires that the government pay just compensation when it takes personal property, just as when it takes real property, and the reserve requirements in issue (requiring that raisin growers set aside a certain percentage of their crop) constitute a taking.

Excessive Force

***Kingsley v. Hendrickson*, No. 14-6368 (U.S. June 22, 2015)**

To prevail on an excessive force section 1983 claim, a pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable.

Redistricting

***Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, No. 13-1314 (U.S. June 29, 2015)**

The Elections Clause and 2 U.S.C. § 2a(c) permit Arizona's use of an independent commission to adopt congressional districts, even though the Elections Clause gives districting authority to the "Legislatures."

Administrative Law

***Michigan v. EPA*, No. 14-46 (U.S. June 29, 2015)**

EPC's interpretation of the Clean Air Act, 42 U.S.C. § 7412(n)(1)(A) was unreasonable by deeming cost irrelevant to the decision to regulate power plants.

From the Eleventh Circuit Court of Appeals

FLSA

***Carlson v. FedEx Ground Package Systems, Inc.*, No. 13-14979 (11th Cir. May 25, 2015)**

Under the 10-factor test used by the Florida Supreme Court (from the *Restatement (Second) of Agency*), evidence conflicted as to whether FedEx maintained right of control over alleged independent contractors, creating a jury question in this FLSA collective action.

WARN Act

***Likes v. DHL Express (USA), Inc.*, No. 14-13076 (11th Cir. May 29, 2015)**

Continued from page 341

Under 20 C.F.R. § 639.3(i), the regulation interpreting "single site of employment," there were not more than 50 workers laid off from a single work site, and, thus, the WARN Act did not apply.

TILA

***Lankhorst v. Independent Savings Plan Co.*, No. 14-11449 (11th Cir. May 29, 2015)**

15 U.S.C. § 1635(a) and § 1637a(a)(9) did not apply to a credit agreement for financing of a home water-treatment system installed in the home, because it did not convey a security interest in the plaintiffs' residence.

Qualified Immunity

***Jackson v. West*, No. 14-13282 (11th Cir. June 1, 2015)**

Jail officers were entitled to qualified immunity on claims arising from inmate suicide, unless they had subjective knowledge of a serious risk of suicide; plaintiff did not offer substantial evidence of such subjective knowledge.

CGL Policies (Alabama Law)

***Penn. Nat'l. Mut. Cas. Ins. Co. v. St. Catherine of Siena Parish*, No. 14-12151 (11th Cir. June 10, 2015)**

Under Alabama law, the CGL contractual liability exclusion applies only where the insured has agreed contractually to indemnify a third party.

Second Amendment

***GeorgiaCarry.org v. U.S. Army Corps of Engineers*, No. 14-13739 (11th Cir. June 9, 2015)**

Federal regulation banning loaded firearms and ammunition on property managed by the Corps did not completely destroy the plaintiffs' right to bear arms, because its effect is cabined to a limited geographic area designed for recreation.

FMLA

***White v. Beltram Edge Tool Supply, Inc.*, No. 14-11750 (11th Cir. June 12, 2015)**

The Court reversed the district court's grant of summary judgment to employee on FMLA interference claims, holding that there were multiple disputes of fact about whether White had serious health condition, whether she gave proper notice to Beltram of her need for FMLA leave and whether Beltram extended the 15-day period under FMLA in which White was to provide a physician's certification form.

Employment Law; Pleadings

***Surtain v. Hamlin Terrace Foundation*, No. 14-1275 (11th Cir. June 16, 2015)**

District court erred by dismissing plaintiff's complaint for racial discrimination for failure to plead the *McDonnell Douglas* framework, because that framework is evidentiary.

Administrative Law

***Animal Legal Defense Fund v. U.S. Dept. of Agriculture*, No. 14-12260 (11th Cir. June 15, 2015)**

USDA's licensing regulations constitute a reasonable policy choice balancing the conflicting congressional aims of due process and animal welfare, and the Animal Welfare Act's licensing scheme is entitled to deference by the court.

Personal Jurisdiction

***Carmouche v. Tamborlee Management, Inc.*, No. 14-14325 (11th Cir. June 15, 2015)**

Contacts of Tamborlee (a Panama corporation which provides shore excursions for tourists in Belize) were not "so 'continuous and systematic' in Florida as to render [it] essentially at home" there, and, thus, the district court properly found no general personal jurisdiction.

ERISA

***Pruitt v. SunTrust Banks, Inc.*, No. 14-13207 (11th Cir. June 30, 2015)**

The Court vacated summary judgment to an ERISA fiduciary defendant in light of *Tibble v. Edison International*, 135 S. Ct. 1823, 1828 (2015), under which "a fiduciary normally has a continuing duty of some kind to monitor investments and remove imprudent ones."

FDCPA

***Miljkovic v. Shafritz & Dinkin, P.A.*, No. 14-13715 (11th Cir. June 30, 2015)**

Absent a statutory exception, documents filed in court in the course of judicial proceedings to collect on a debt are subject to the FDCPA.

"Shotgun" Pleadings

***Weiland v. Palm Beach County Sheriff's Office*, No. 13-14396 (11th Cir. July 8, 2015)**

District court erred by dismissing a complaint which plausibly alleged excessive force claims. The opinion contains an extensive discussion of "shotgun" pleadings by Chief Judge Ed Carnes, in which he takes aim at the Court's prior censorious firings, confessing they were sometimes off target.

Deceptive Trade Practices Act (Alabama Law)

***Lisk v. Lumber One Wood Preserving, LLC*, No. 14-11714 (11th Cir. July 10, 2015)**

Alabama's Deceptive Trade Practices Act contains a class-action prohibition, but Federal Rule 23 controls and allows DTPA class actions in federal courts.

Amendments to Pleadings

***Haynes v. McCalla Raymer*, No. 14-14036 (11th Cir. July 13, 2015)**

District court may find undue delay in seeking leave to amend when the movant knew of facts supporting the new claim long before the movant requested leave to amend, and amendment would further delay the proceedings.

Inconsistent Verdicts

***Reider v. Philip Morris USA*, No. 14-11494 (11th Cir. July 15, 2015)**

Party's post-trial claim that a jury verdict is inconsistent does not preserve for appeal the separate and legally distinct claim that the verdict was the result of an unlawful jury compromise.

Bankruptcy

***Bank of America, NA v. Waits*, No. 14-11408 (11th Cir. July 16, 2015)**

The Court overruled its precedent contrary to *Bank of America, N.A. v. Caulkett*, 135 S. Ct. 1995, 2001 (2015), under which "a debtor in a Chapter 7 bankruptcy proceeding may not void a junior mortgage lien under § 506(d) when the debt owed on a senior mortgage lien exceeds the current value of the collateral."

Bankruptcy; Discharge Injunction

***In re McLean*, No. 14-14002 (11th Cir. July 23, 2015)**

Creditor violates the discharge injunction under § 524(a)(2) by filing a proof of claim in a bankruptcy proceeding to collect a debt that was discharged in a previous bankruptcy proceeding. However, the award of non-compensatory damages was vacated for lack of procedural protections to creditor.

RECENT CRIMINAL DECISIONS

From the Court of Criminal Appeals

Sexual Misconduct

***Williams v. State*, No. CR-12-1385 (Ala. Crim. App. Jul. 2, 2015)**

Sexual misconduct provision of *Ala. Code* (1975) § 13A-6-65(a)(3), enacted to penalize all homosexual conduct regardless of consent, was unconstitutional as applied to the defendant in light of the United State Supreme Court's opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), deeming such statutes unconstitutional.

Sexual Misconduct

***Wesson v. State*, No. CR-13-0960 (Ala. Crim. App. July 2, 2015)**

In contrast to *Williams*, the defendant in *Wesson*, also charged with sexual misconduct under *Ala. Code* § 13A-6-65(a)(3), failed to show that he engaged in consensual "deviate sexual intercourse," and, thus, did not demonstrate that the statute was unconstitutional as applied to him under *Lawrence*.

Prior Bad Acts

***Frye v. State*, No. CR-13-1787 (Ala. Crim. App. May 29, 2015)**

Evidence that defendant had previously physically assaulted his victim was not admissible under Rule 404(b) to prove his later acts of rape and sodomy against the victim. Evidence did not show the defendant's motive to commit the acts in

Continued from page 343

question, intent was not an element of the charged offenses and the defendant's identity was not at issue to support its admission under the "common plan or scheme" exception.

Hearsay

***Acosta v. State*, CR-13-1763 (Ala. Crim. App. May 29, 2015)**

Trial court erred in excluding evidence that the victim told detective that defendant was not involved in the burglary of home. Though statement constituted hearsay and fell within no exceptions, strict application of the rules of evidence deprived defendant of opportunity to present evidence that he was not involved in the crime, thus preventing him from presenting complete defense.

Sufficiency of Indictment

***State v. Davis*, CR-13-1860 (Ala. Crim. App. May 29, 2015)**

Trial court erred in dismissing defendant's reckless manslaughter indictment for failure to specifically allege the defendant's reckless act that had resulted in victim's death. Indictment appropriately tracked the language of *Ala. Code* § 13A-6-3(a)(1) by alleging that defendant recklessly caused victim's death.

Probation

***Singleton v. State*, CR-14-0344 (Ala. Crim. App. May 29, 2015)**

Court reversed defendant's revocation probation on grounds that probation itself stemmed from illegal sentence. Trial court erred in sentencing the defendant, having pleaded guilty to attempted sexual abuse of a child under 12 years of age, to 15 years' imprisonment and splitting the term to include probation under Split Sentence Act. Because offense was sexual offense involving a child, it was barred from probation eligibility under *Ala. Code* § 13A-5-2(d).

From the Federal Courts

Cyber Threats

***Elonis v. US*, No. 13-983 (U.S. June 1, 2015)**

18 U.S.C. § 875(c), which proscribes transmitting "any communication containing any threat . . . to injure the person of another," requires more than negligence, but requires that defendant transmit communication for purpose of issuing threat or with knowledge that communication will be viewed as a threat.

Confrontation Clause

***Ohio v. Clark*, No. 13-1352 (U.S. June 18, 2015)**

Admission into evidence of a three-year-old abuse victim's statements to a teacher, identifying father as the abuser, did not violate the Confrontation Clause because the statements were not testimonial because they were gathered for ongoing emergency involving suspected child abuse.

Intellectual Disability

***Brumfield v. Cain*, No. 13-1433 (U.S. June 18, 2015)**

Brumfield was convicted of murder in a Louisiana court and sentenced to death before *Atkins v. Virginia*, 536 U. S. 304, which held that the Eighth Amendment prohibits execution of the intellectually disabled. Held: Brumfield was entitled to have his *Atkins* claim raised in a § 2254 petition considered on the merits.

Drug Offenses

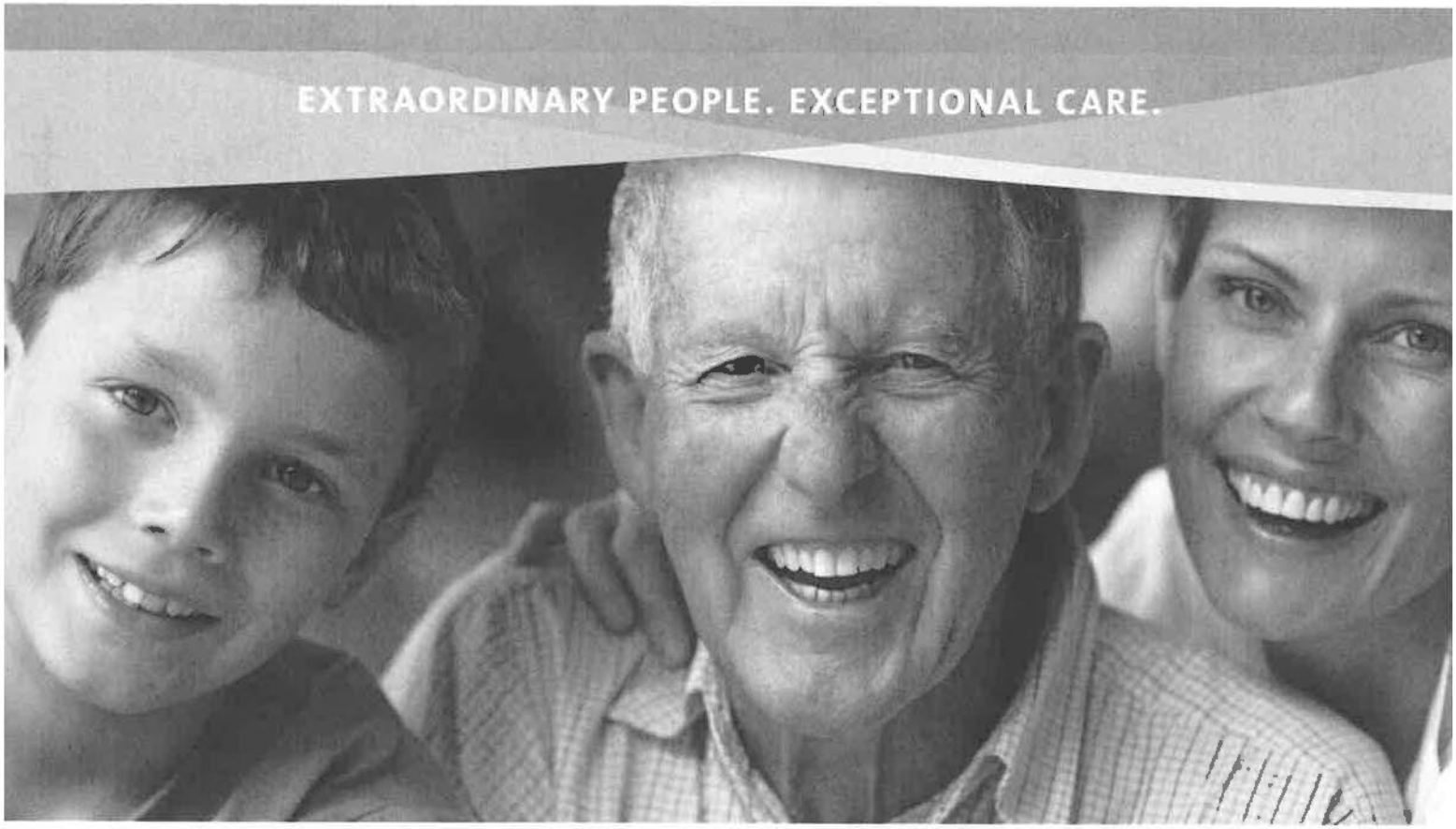
***McFadden v. US*, No. 14-378 (U.S. June 18, 2015)**

The "Analogue Act" identifies a category of substances substantially similar to those listed on the federal controlled substances schedules, 21 U.S.C. §802(32)(A). An "analogue" conviction requires the government to establish that the defendant knew he was dealing with a substance regulated under the Act.

Capital Punishment

***Glossip v. Gross*, No. 14-7955 (U.S. June 29, 2015)**

Oklahoma death-row inmates failed to establish a likelihood of success on the merits of their claim that the use of midazolam in lethal injection violates the Eighth Amendment. | AL



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About Members

Richard F. Matthews, Jr. announces the opening of **The Law Office of Richard F. Matthews, Jr. LLC** at 621 S. Hull St., Montgomery 36104. Phone (334) 398-8408.

Among Firms

Bressler, Amery & Ross PC announces that **A. Kathleen Bowers** joined as an associate.

Carr Allison announces that **Michael C. Guarino** joined as an associate in the Birmingham office.

The Gardner Firm PC announces that **Russ Copeland** joined as a partner in its Mobile office, and the opening of a Montgomery office, where **William Patty** joined as a partner.

Liles & Rushin LLC announces that **Brandon D. Hughey** joined the firm as a partner.

Najjar Denaburg PC announces that **Nathan C. Weinert** is a shareholder.

Rosen Harwood PA announces that **Thomas W. Scroggins** is a shareholder.

Scott Dukes & Geisler PC announces that **Forrest L. Adams, II** joined the firm as of counsel.

Stites & Harbison PLLC announces that **Katrina Lynn Dannheim** joined the Louisville, KY office.

Waldrep, Mullin & Callahan LLC in Columbus, Georgia announces that **David C. Rayfield** joined the firm as a partner.

M. Wayne Wheeler PC of Birmingham **announces** that **J. Cooper Trent** joined as an associate. | AL

Save the Date

ADR Section Members and Registered Mediators

On October 13, there will be a three-hour MCLE program, *Practical Tips from Top Mediators*. This mediation webinar is for all ADR Section members and registered mediators. Details to come soon from the Alabama Center for Dispute Resolution!

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J. Anthony McLain

"Someone's Knocking at the Door, Somebody's Ringing the Bell"

Remember that rhetorical line from Paul McCartney's song "Inside Thing"? And the lyrical response, "Open the door, and let 'em in." The ship has long since sailed on how sacrosanct lawyers and the public view such things as lawyer advertising, targeted mail solicitation, communicating ex parte with another lawyer's client and even the court. If you're old enough to have actually appeared before Judge Frank M. Johnson, you can list the ways the practice of law has changed in the last 35 years. If you're not that old, you probably still have some opinion as to whether the practice of law is like it was "back in the day." And I'm not talking about a horse and buggy, spittoons or courtrooms without air conditioning. Still, lawyering, most believe, is a true calling–a commitment of substantial time and effort to achieve the level of education necessary to qualify to sit for that forever-burned-in-your-mind life-altering experience, the bar exam.

Has the landscape really changed as to the practice of law today, compared to when Judge Johnson, in robe, sat on the bench with a full wall backdrop of the Stars and Stripes? (Pity the poor lawyer who remained sitting while addressing the court or examining a witness.) And those fortunate enough to be there, to experience that sacred time before such a jurist, realized that while there was trepidation seeping into your conscience as you presented yourself as an officer of the court, you were made more respectful and appreciative of the profession and our system of jurisprudence.

Today, bar complaints/grievances reflect a substantial erosion of civility and professionalism among our membership. The anonymity of digital communication grants license to say things which, if standing fact-to-face, most would not say. Does the ever-growing world of social media really amount to "progress"? Technology will allow more "free" time? Has it? Going paperless will save the trees

and our environment and make us more socially responsible? Sure.

You've been to those meetings, seminars or just lawyer "networking" socials where eventually the topic turns to a lack of trust among our members. Overheard any recent conversation involving criticism of our courts, judges, decisions, precedent (if any) and the overall growing dissatisfaction within our ranks? And no one is asking you to raise your hand or swear to "tell the truth, the whole truth and nothing but the truth, so help you God."

Yet there are those who were "called," who do pursue this profession with an eye on civility. They are lawyers because they want to serve their clients, their profession and uphold our system of justice. And that is the greater portion of those among us who call ourselves lawyers. At one recent gathering, such a conscientious lawyer was discussing Rule 4.2 of the *Alabama Rules of Professional Conduct*. She had been contacted by a client who was already being represented by counsel in a personal injury matter. The client had become disgruntled with her lawyer and wanted to meet with the conscientious lawyer to get a "second opinion." The lawyer who had been contacted about rendering a "second opinion" said, "Under our rules, I can't do that…can I?" Sure she can. Rule 4.2 applies only to a lawyer communicating with an opposing party who is being represented by counsel in that matter. Just as you may seek a second opinion, or other advice, from a physician, members of the public who have legal needs likewise have the right to seek counsel of their own choosing. And they may talk to as many lawyers as they want until they find that lawyer they trust and believe in, and who is willing to zealously advance their legal matter. (Word to the wise–if the potential client tells you that you are the sixth lawyer they are meeting with to discuss their case–red flag!)

The Rules of Professional Conduct are not there to make the practice of law more difficult or complicated. Rather, they are the de minimis guidelines to be followed by lawyers in their practice of law. Most lawyers would have a hard time immediately putting their hands on a copy of the *Alabama Rules of Professional Conduct*. "Ms. Jones, have you seen my rule book? I know it's around here somewhere." Kind of like some of those books on your nightstand which are gathering dust. You keep them close at hand just in case you need to refer to them in emergency situations.

The Alabama State Bar Center for Professional Responsibility houses the Office of General Counsel. The staff includes four lawyers who work for you, the practicing lawyer. They can give you informal ethics opinions over the phone, in response to an email and, for the really old fogies, respond to a written letter of inquiry seeking ethical guidance. And do NOT be too proud/scared/arrogant/hypocritical to ask. As Rear Admiral Grace Murray Hopper, USN, Ph.D., said, "It is better to beg forgiveness, than ask permission." Not so when it comes to ethical dilemmas and possible bar grievances.

Want to "market" your firm's services? While the Office of General Counsel can't engage in pre-censorship as to advertising and marketing schemes, the lawyers in our office can review your proposed ads/huggies/visors/snuggies/coolers/pharmacy bags, etc., to make sure before you incur the expense that the language, format, required disclaimer and method of delivery of the information is rule-compliant.

The Office of General Counsel presently has a substantial (almost 60,000) database of confidential informal opinions which have been issued to Alabama lawyers. These opinions are confidential as to the inquiring lawyer, and not disclosed to any third party without the inquiring lawyer's consent. So the opinion process is quite simple, easy and convenient. Lawyers who forge ahead with knowledge of a possible ethical dilemma looming on the horizon suffer possible enhanced discipline for any ethical violation just because the opinion process was available but the lawyer leaped before looking [calling].

Those called to the legal profession spend untold hours providing legal services to their clients, work in volunteer service to pro bono clients, participate in religious and civic organizations and have friends and families who demand (and deserve) their time and attention (and sometimes need some "free" legal advice). Why not let the resources of the Center for Professional Responsibility help you by availing yourself of the ethical guidance available? We are used to someone knocking at the door or someone ringing the bell. | AL

Albert C. Bowen, Jr.

Albert C. Bowen, Jr.

"Larger than Life"
March 11, 1933–May 8, 2015

A proud graduate of the University of Alabama, Al Bowen began his legal career as a prosecutor in the Jefferson County District Attorney's office. After several years of service to the citizens of Jefferson County, Al became an Assistant United States Attorney for the Northern District of Alabama. In 1975, Al went into private practice where, for 35 years, he defended criminal cases. Al's primary practice was defending high-profile white collar criminal cases in the federal courts. After his retirement from full-time law practice in 2010, Al enjoyed golf with his "Blue Tee" golf group at Vestavia Country Club, bass fishing in Lay Lake and attending his beloved University of Alabama football games and the Birmingham Red Elephant Club meetings. Most of all, Al enjoyed attending his church, Mountain Brook Baptist Church, and his Sunday school class, the Dotson Nelson Bible Study.

I heard a great sermon one time entitled "Larger than Life." Al truly personified that expression. The sermon was based on the premise that anyone who truly leads a life based on the Christian faith was, in fact, "Larger than Life." Professionally, spiritually and personally, Al Bowen was larger than life.

Thirty-plus years ago, I got a call from Jimmy Fullen. Jimmy asked me to join a trial team being assembled to represent several police officers. Judge Jimmy Hancock sought me out when he learned I was going to represent one of the officers and told me, "You are going to be in the company of Big Al Bowen, the single best trial lawyer I have ever seen." After all my years of trying cases with and without Al Bowen, it is without hesitation I say that Al Bowen was the single best trial lawyer I ever had the privilege to work with and learn from.

Al was fearless in his determination to defeat injustice. Any adversary who challenged Al's honesty or integrity quickly learned they had made a mistake. He did not suffer fools (or Auburn fans like me) lightly. No one ever left a conversation with Al and said, "I wonder what Al meant by that?" While he accepted that some people may lack the courage of their convictions, he did not accept people who had no convictions. If you were in the foxhole with Al Bowen, you never had to be concerned or afraid. As a lawyer, he was larger than life.

At the same time, under his tough exterior Al had a kind and soft heart. Someone once said, "It is only the great-hearted who can be true friends. The mean and the cowardly can never know what true friendship means." If Al was your friend, he would defend you, any time or any place, whether you were absent or standing right next to him.

My son, John, remembers Al coming to his defense when, at age eight, John took up golf and promptly hit a ball through his mother's greenhouse. Al did not hesitate to tell John's mother she had no business imposing any punishment since it was her fault for building a greenhouse in a fairway. As Al's friends, we always knew he had the ability to move the fairway for a friend, figuratively and sometimes literally. Friendship for Al was larger than life.

Al was the master storyteller, regardless of the subject or occasion. Anyone who ever heard Al comment on and critique the Dotson Nelson Sunday School class was in for a treat. Al enjoyed "translating" the scriptures to real life by giving some of his friends nicknames derived from people in the Bible or tweaking some parable to apply to a case. He truly appreciated the fact that, but for our faith, no one is larger than life.

At the core of Al Bowen was a love story he shared with Betty Bowen that truly was larger than life. When I first met Al, I had to learn that "Sonny" was not a different person than Al and that "Miss Betty" and Betty Bowen were the same person. Miss Betty is the person who encouraged us in our darkest and most stressful days with compassion, kindness and a genuine, gentle outpouring of love. Betty Bowen is the person who Al always credited with being responsible for keeping him and others from doing the wrong thing. No order of Betty Bowen's should be ignored. Al Bowen was the most fearless person I know, but when Betty Bowen spoke, the matter was concluded.

Al and Betty danced the dance of life as perfect partners–sometimes one had to lead when the other one could not, but their dance of true love never had a misstep. Miss Betty received any and all who came to see Al over his last few weeks with grace and hospitality. True love is always mutual, and true love stories never end.

We can celebrate the life well-lived of this person who was a friend to all. He was my friend. We can celebrate with a smile that he now is truly "Larger than Life."

—J. Mark White, Birmingham

Allen, Joseph Michael, Jr.
Mobile
Admitted: 1966
Died: May 23, 2015

Bowron, Harold Alfred, Jr.
Fairhope
Admitted: 1955
Died: June 16, 2015

Conerly, Edward Oliver
Birmingham
Admitted: 1955
Died: June, 2015

Gonce, Robert Lowery
Florence
Admitted: 1962
Died: June 13, 2015

Grant, Jim Bruce, Jr.
Autaugaville
Admitted: 1989
Died: May 20, 2015

Herring, Harold Francis
Gurley
Admitted: 1951
Died: October 30, 2010

Landrum, Hon. Roy Glenn
Lakewood Ranch, FL
Admitted: 1964
Died: April 25, 2015

McDorman, Clarence Leslie, Jr.
Birmingham
Admitted: 1961
Died: June 20, 2015

Vann, Brenda Lee
Montgomery
Admitted: 1994
Died: June 21, 2015

Reinstatements

- Scottsboro attorney **Grady Douglas Benson** was reinstated to the practice of law in Alabama, effective June 12, 2015, by order of the Supreme Court of Alabama. The supreme court's order was based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Benson on January 29, 2015. [Rule 28, Pet. No. 2015-250]

- Birmingham attorney **Otis Stewart, Jr.** was reinstated to the practice of law in Alabama, effective June 12, 2015, by order of the Supreme Court of Alabama. The supreme court's order was based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar granting the petition for reinstatement filed by Stewart on March 6, 2015. [Rule 28, Pet. No. 2015-393]

Disbarments

- Mobile attorney **Dwain Churchill Denniston, Jr.** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective April 1, 2015. Denniston consented to disbarment based upon allegations that he misappropriated client funds and fraudulently represented that his clients had signed settlement agreements when, in fact, they had not signed the agreements. [Rule 23(a), Pet. No. 2015-602; Rule 20(a), Pet. No. 2015-501; ASB No. 2015-500]

- St. Augustine, Florida attorney **Brenda Lee McCann,** also licensed in Alabama, was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective April 3, 2015. The court's order was based upon the Alabama State Bar Disciplinary Board's order disbarring McCann. On January 15, 2015, pursuant to Rule 25, *Ala. R. Disc. P.*, the Office of General Counsel of the Alabama State Bar filed a notice with the Disciplinary Board of the Alabama State Bar demonstrating that on October 31, 2014, the Supreme Court of Florida had permanently revoked the law license of Brenda Lee McCann. According to the order of the Supreme Court of Florida, the revocation of McCann's law license in Florida was tantamount to disbarment. The Supreme

Court of Florida's order was based upon a petition for disciplinary revocation that had been submitted by McCann in which she admitted to numerous violations of the *Florida Rules of Professional Conduct*. [Rule 25(a), Pet. No. 2015-145]

- Birmingham attorney **John Price McClusky** was disbarred from the practice of law, effective April 15, 2015, by order of the Supreme Court of Alabama. On April 15, 2015, the Disciplinary Board of the Alabama State Bar, Panel I, entered an order accepting the consent to disbarment submitted by McClusky pursuant to Rule 23, *Ala. R. Disc. P.* McClusky's consent to disbarment was based on his misappropriation of client funds from his IOLTA account as well as his failure to respond to a bar disciplinary matter, in violation of Rules 1.15(a), 8.1(b), 8.4(a), 8.4(c) and 8.4(g), *Ala. R. Prof. C.* [Rule 23, Pet. No. 2015-409; ASB No. 2014-1760]

Suspensions

- Phenix City attorney **Cecil Kerry Curtis** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama for three years, effective February 6, 2014, the date of Curtis's prior summary suspension. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Curtis's conditional guilty plea, wherein Curtis pled guilty to numerous charges that involved having insufficient funds in his trust account, failing to adequately and timely communicate with his client in a Chapter 7 bankruptcy petition, issuing an unemployment compensation tax check directly from his trust account, failing to adequately communicate with his client in an adoption and an estate case, failing to diligently represent a client and adequately communicate with her in a case where she received a house from her deceased

Continued from page 353

mother, failing to take any substantive action and adequately communicate with a client in a divorce case and failing to adequately communicate with a client in an appeal for Social Security benefits, thus violating Rules 1.15(a), 1.16(d), 1.3, 1.4(a) and (b), 8.1(b) and 8.4(a), (b) and (g), *Ala. R. Prof. C.* [ASB Nos. 2013-1636, 2013-1694, 2014-197, 2014-479, 2014-848, 2014-1321 and 2014-1398]

- Virginia Beach, Virginia attorney **Margaret Mary Fullmer** was suspended from the practice of law in Alabama, effective May 1, 2015, for noncompliance with the 2013 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 14-610]

- Bay Minette attorney **John Barry Gamble** was suspended from the practice of law in Alabama for five years by the Supreme Court of Alabama, retroactive to April 6, 2011, the date he was placed on disability inactive status. Gamble entered a conditional guilty plea to violations of Rules 1.7(b), 1.8(b), 8.1(a), 8.4(a), 8.4(b), 8.4(c) and 8.4(g), *Ala. R. Prof. C.* Gamble admitted he was guilty of inappropriate sexual conduct in a client interview and knowingly made material misrepresentations of fact regarding the circumstances surrounding his conduct during the course of the bar's investigation into the matter. [ASB No. 2008-30(A)]

- Mobile attorney **Steven John Giardini** was suspended from the practice of law in Alabama for three years by order of the Supreme Court of Alabama, effective February 23, 2015. Giardini pleaded guilty to violations of Rules 8.4(a), 8.4(d) and 8.4(g), *Ala. R. Prof. C.*, and a hearing was held before Panel I of the Disciplinary Board of the Alabama State Bar to determine what discipline would be imposed. The Alabama Supreme Court entered its order based upon the January 27, 2015 report and order by the board which ordered a three-year suspension. The facts upon which the discipline imposed by the board are as follows: in 2009, while Giardini was serving as a Mobile County Assistant District Attorney he engaged in multiple graphic sexual conversations both online and via telephone with females assumed to be minors. One of the persons with whom Giardini engaged in these graphic sexual conversations was an undercover FBI agent. Giardini was prosecuted criminally, but the circuit court issued an order both dismissing the charges and granting Giardini's motion for acquittal. [ASB No. 2012-1532]

- Clanton attorney **Mark Benjamin Huntley** was suspended from the practice of law in Alabama, effective May 1, 2015, for noncompliance with the 2013 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 14-612]

- Tuscaloosa attorney **Andrew Jackson Smithart, III** was suspended from the practice of law in Alabama by order of the Supreme Court of Alabama, effective February 6, 2014, for 15 months. In August 2013, the Office of General Counsel began receiving multiple insufficient funds notices regarding Smithart's IOLTA account. On multiple occasions, Smithart was asked to submit a written response to explain why multiple overdrafts were occurring on his IOLTA account. Smithart failed to respond and was subsequently summarily suspended from the practice of law. The Office of General Counsel obtained copies of Smithart's IOLTA account and discovered Smithart repeatedly made improper deposits of personal funds to his IOLTA account and he repeatedly made personal payments from the IOLTA account. Smithart submitted a conditional guilty plea, which was accepted by the Disciplinary Commission, and agreed to a 15-month suspension from the practice of law in Alabama, retroactive to the date of his summary suspension, February 6, 2014. [Rule 20(a), Pet. No. 2014-228; ASB No. 2013-1454]

- Montgomery attorney **Rachel Leah Turner** was suspended from the practice of law in Alabama, effective May 1, 2015, for noncompliance with the 2013 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE 14-618] | 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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