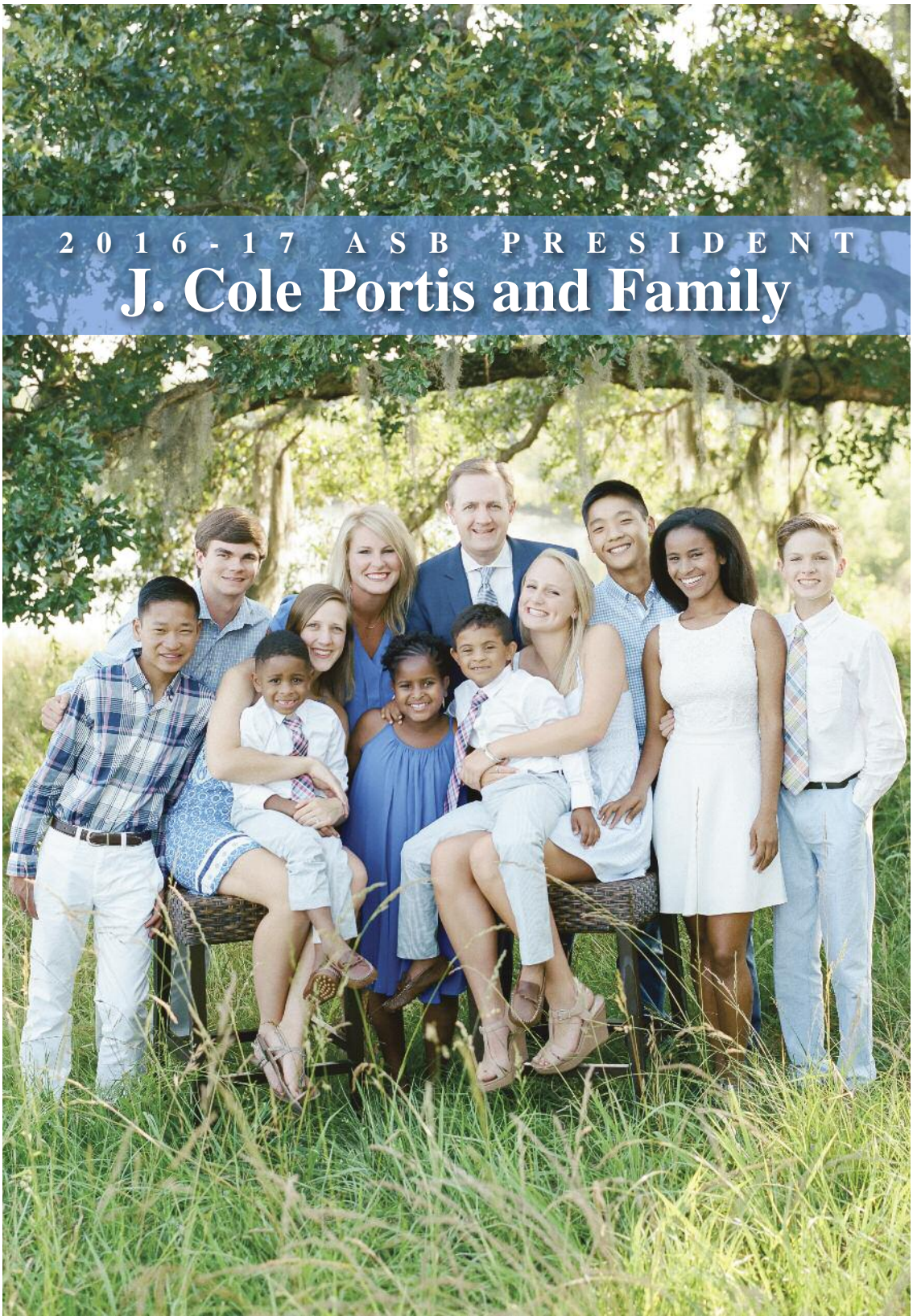
THE ALABAMA LAWYER

SEPTEMBER 2016 | VOLUME 77, NUMBER 5



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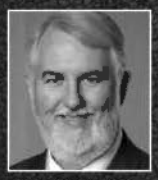
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30 Adult Guardianships & Conservatorships *Tuscaloosa*

OCTOBER

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19 Professionalism for New Admittees *Tuscaloosa*
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17 Professionalism for New Admittees *Birmingham*
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19 Trial Skills/Evidence *Birmingham*
20 Business Law *Tuscaloosa*

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On The Cover

Pictured on the cover with their children are 2016-2017 ASB President Cole Portis and wife Joy. Front row, left to right are Samuel, Sarah Kathryn with Traye, Emme, Elizabeth with Eli, Zoe and Jon Cole. Back row, left to right, are son-in-law Thomas, Joy, Cole and Jim.

Photo by Josh Moates, Kim Box Photography, *http://www.kimboxphotography.com/*

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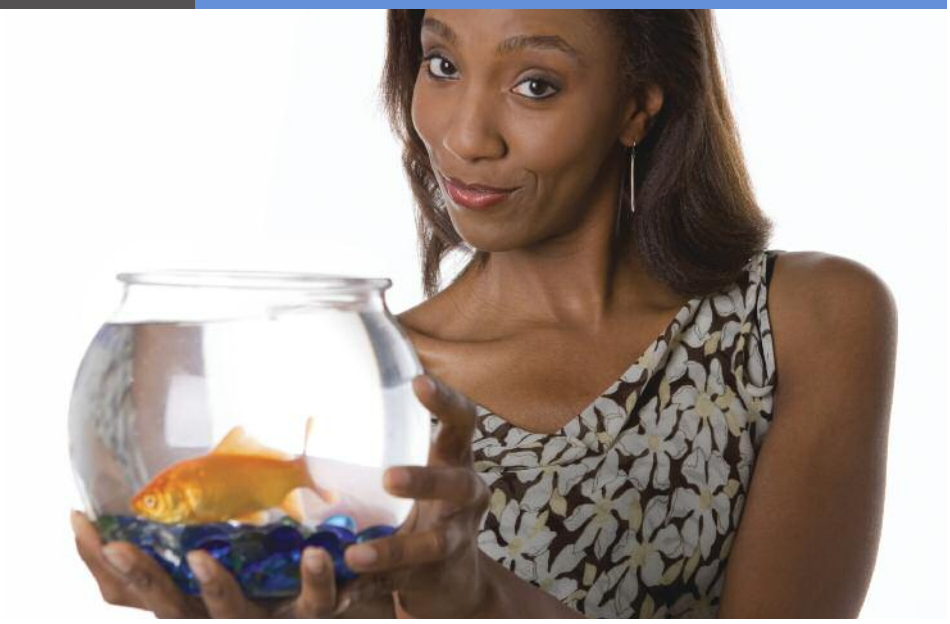

A Commitment to Transparency And Communication

Jesus was asked, "What is the greatest commandment?" Jesus replied, "Love God with all your heart, soul, mind and strength. And, love your neighbor as yourself." Somebody in the crowd raised their hand and said, "Well, who is my neighbor?" In response, Jesus told them a parable.

According to the parable, as a guy was walking along the road, he is robbed, beaten and left for dead. Two religious leaders see him, but they pass by on the other side of the road. You would think these religious leaders would love this particular neighbor because this man who was beaten and left for dead held the same religious beliefs and cultural heritage as the religious leaders. Instead of stopping and rendering aid, however, they purposely ignored the hurting man.

And then along comes the very good Samaritan. The Good Samaritan notices this Israelite, who has been left for dead. Typically, the Samaritans and Israelites were enemies, but instead of hatred, the Good Samaritan displays selfless love to a stranger. He painstakingly cares for and nurtures this man until his needs are met. Jesus asked, "Who was this man's neighbor?"

Who are our neighbors? As lawyers in the Alabama State Bar, everything that we do as a bar must pass through a prism of our values: ***trust, integrity and service***. These values guide the Alabama State Bar.

Further, as we practice trust, integrity and service, we believe that lawyers in our bar are advocates of the profession and for the public. In other words, we must love our fellow lawyers and folks in our communities and state. What does that look like?

Most often, the Alabama State Bar is associated with discipline. I hear the comment often that the state bar is only about discipline. It is true that discipline is one of the tasks of our bar, but know this–discipline can and should be about love. Many of you have children, and so do I. Sometimes I have to discipline my children. Why do I do that–because I hate them? No. Because I love them. Our discipline system is designed to love our members and the public enough to discipline lawyers who violate our rules. If we do not discipline out of love, then we have failed.

We as a bar are far more than an agency that disciplines lawyers, however. What should we do to love our neighbor? I have given this a great deal of thought. One of the ways that I want to love you, love our bar, is to let you know that this is *your* bar. You have entrusted many leaders to work hard on your behalf and we gladly do so, but I want you to know that I am committed to ***transparency***. I am committed to ***communication*** with our members. Not only do I want to speak *to* our members, but I want to hear *from* our members. Because, you see, we have a great resource in our state bar and those resources are members who are bright, who maintain integrity, who possess great ideas and who love our profession. We want to listen to our lawyers and help them.

I recently sent a letter to you as a member of the bar to let you know that this is your bar. You should have received it by the time you read this message. The letter gave you three ways to contact me: the state bar website (click on the "Better Bar" banner on the home page, *www.alabar.org*), my email (*Cole.Portis@beasleyallen.com*) and my personal cell phone number (334-451-0856). ***I want to hear from you.*** I want to hear the good and the bad. I want to hear praise. I want to hear criticism. And, mostly, I want to listen to your ideas about how we can improve our bar.

We must strive to improve because there are many members of our bar who are hurting. I have been blessed over the last two years to travel the state and to listen to lawyers. You know them. They are in your communities. They are in your local bars and they are hurting. We need to listen to them. How can we as a state bar love them? How can we meet their needs?

In addition to building relationships with lawyers across the state, we are going to help love our lawyers in other ways. One of the initiatives that we will move forward with this year has to do with health and wellness.

We have a great **Alabama Lawyer Assistance Program** (ALAP). We have lawyers who, because of stress and many other reasons, have gone into a deep, dark place in their lives. They have not dealt well with stress. They have not dealt well with life. They have made poor decisions. Within ALAP, we have a great staff and volunteer lawyers who address the needs of these hurting lawyers. They display love to the lawyers and others. The lawyers' poor choices do not just affect that lawyer. Their conduct affects their clients, families and all other relationships. So what else can we do to help lawyers before they make poor decisions?

We will lay the foundation and the process for a health and wellness initiative. This initiative will deal with mind, body and spirit. Already, I have had many people volunteer, who know much more than I. They exercise more than I do. They engage their minds more than I do. They are much more faithful in their faith than I am. These volunteers will love us enough to encourage our growth in mind, body and spirit.

NOTE FROM THE EDITOR


Hawley

I am pleased to report that *The Alabama Lawyer* Editorial Board has surveyed Alabama State Bar members about the usefulness of the digital publication, the *Addendum*. Over the last 18 months, board member **Allison Skinner** chaired a committee of the Editorial Board, during which she and her committee developed the survey and led a discussion of the results with the entire board. In general, members of our bar place great value in the *Addendum* and would like to see more information set forth in it.

Based on the survey, the Editorial Board has decided to develop a standing committee of the board–the *Addendum* Committee. The primary function of the *Addendum* Committee will be to work with the director of publications in developing and publishing a more robust and informative *Addendum*. Allison has graciously agreed to chair this committee, and Linda Flippo has agreed to serve as vice chair.

Over the next few months, you will see changes in the *Addendum,* both in content and style, which will be the result of the work of this new committee. If you have suggestions about the *Addendum* and how it can help you and your law practice, feel free to share your thoughts with Margaret Murphy (*margaret.murphy@alabar.org*), Allison Skinner (*askinner@acesin.com*) or Linda Flippo (*lflippo@whitearnolddowd.com*).

–***Gregory H. Hawley***, *ghawley@joneshawley.com*

(Continued from page 325)

We are also going to begin the process of looking into what I call **Lawyer University**. Within Lawyer University, there will be three tracks. First, there is a track related to *technology*. I want lawyers to understand the scope of the technology that is available to them, and to be enthusiastic about discovering technology that is available to them to help them in their practice.

The second track is related to *business operations*. I want speakers to come in and engage with our members to say, "Listen, I know that you love practicing law, but this is also a business. Let me tell you about the latest and greatest business ideas. Let me tell you about the foundational business principles that you need to consider. Let me tell you about the latest marketing principles that you need to consider. Let me allow you to understand you are part of the fabric of your community. Thus, you need to be engaged in your community and love your neighbor in your community. As a result, when they do need your help and they need you to advocate for them, they know who you are."

The third track is going to be *emerging areas of law*. These emerging areas would be related to current practice areas as well as new areas of law that exist that most lawyers have never considered.

Also, we will meet the needs of our members by increasing member benefits. The bar already has some amazing benefits (click on the homepage banner at *www.alabar.org* to see the many benefits), but we will bring greater value by offering unique items to help our members practice law.

Monet Gaines is the new vice president of the Alabama State Bar. She is an amazing and capable woman who will help the bar tremendously. She will be leading the charge to address increasing minorities in Alabama law schools, and in helping our local and state bars increase minority participation. I am looking forward to working with Monet.

Gaines

Additionally, our state bar has not implemented a **long-range strategic plan** since 2005. It is hoped that by the end of this year, we will have such a plan in place. This is vitally important because we will have a new executive director in place in mid-2017. The strategic plan will assist the incoming executive director, future presidents and future bar commissioners in helping lead our bar.

Our love, though, must not stop with helping one another. As I mentioned, we must also love the public. One way we can love our neighbors is to continue to improve our **Access to Justice** efforts. Equal justice under the law is not attainable for far too many of Alabama citizens. Poverty levels continue to increase and our legal funding continues to be woefully insufficient. This is exacerbated by our state's failure to properly fund our judiciary. We have many lawyers who sacrificially serve. They are small-town lawyers who do this every day for no credit. They do it out of love for their neighbor. There are lawyers in large and small firms who donate thousands of hours, but we must improve, and we will do so.

Another way that I envision our bar loving our neighbor and that is through the **foster care system**. My wife and I are foster parents and we have had amazing opportunities to impact the lives of more than 30 children in Alabama's foster system. This year our bar will engage with the Department of Human Resources and with the court system. Lawyers, judges and DHR have asked for our assistance and we will help them and the innocent children they serve.

It is also critical that we, as lawyers, engage the public in the political realm as **public servants**. I do not care if you are Republican or Democrat. During this election season, I do not care if you are a proponent for Donald Trump. I do not care if you are voting for Hillary Clinton. I do not care if you are a Libertarian. I care if you are a lawyer. I pray that you will consider being engaged as a public servant in the legislative process. Love your neighbor enough to become a public servant. We are a nation of laws. Yet, our legislative body has very few lawyers. Engage yourself in public service and love your neighbor.

And, there is so much more to do: legislative help, court funding, solo- and small-practice issues, lawyers helping Alabama citizens during state emergencies, the unauthorized practice of law, young lawyer education and mentoring, and engaging our state law schools. The plate is full and the agenda is aggressive. We will move forward, but I greatly need your help. In order for us to love our neighbors and be a better bar, we must work together to meet the challenges that we have before us. We have a great foundation. We have a wonderful group of lawyers who have dedicated themselves to loving others through service. I hope that our love for others will be both constant and consistent.

I look forward to serving you. ▲

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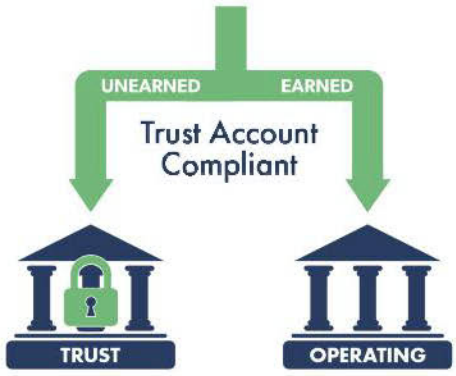

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EXECUTIVE DIRECTOR'S REPORT

Keith B. Norman
keith.norman@alabar.org

Proposed Changes to Law School Accreditation Address Lower Pass Rates

Two proposed changes to the American Bar Association (ABA) accreditation standards have been circulated for notice and comment. The changes are largely in response to concerns that have been expressed about the nationwide drop in bar passage rates over the last several years.

In Alabama, we have experienced these declines as well. For graduates of accredited schools taking the Alabama Bar Exam for the first time, the pass rate for February 2013 was 79 percent. The February 2016 pass rate for first-time takers was 65 percent. Similarly, the pass rate for the July 2013 administration for first-time takers was 91 percent. The pass rate for first-timers in July 2015 was 78 percent. The July 2016 results will be announced at the end of this month.

Under current ABA standards, a law school meets the bar-pass requirement in one of two ways. The law school can show that its pass rate for first-time takers is no more than 15 percentage points below the average bar-pass rate for ABA-approved schools in the state where their graduates take the bar exam. Or, the law school may show that 75 percent of its graduates who took the bar exam in three of the previous five years passed.

The ABA's Section of Legal Education and Admission to the Bar has asked for comments for the proposals that were drafted by the Standards Review Committee. The first proposed change would eliminate the first option. The 75 percent pass rate requirement of the second option would be retained, but modified so that the time period to demonstrate compliance would be shortened to two years. Moreover, law schools would no longer be permitted to base pass-rate compliance on only 70 percent of its total number of graduates. Instead, a law school would have to account for as many of its graduates as possible.

The second of the two proposals being circulated would establish a rebuttable presumption that a law school attrition rate above 20 percent (not including transfers) is not in compliance with the requirement that law schools not admit students who appear unable either to graduate or pass the bar exam.

There appears to be a strong correlation in the declining pass rate and the recent decline of the law school applicant pool. For example, the graduating class in the spring of 2015 entered law school in the fall of 2012 when the total law school applicant pool was 67,900.

This was a 13.5 percent decline from the 2011 level of 78,500. With 48,697 students enrolled in law school in 2011 and only 44,481 enrolled in 2012, there was an enrollment decline of 8.7 percent. This meant that there was a net decline of 4.8 percent of the applicant pool after adjusting for the decline in enrollment (13.5 percent decline in applicants – 8.77 percent decline in enrollment = 4.85 net decline in applicant pool).[1] Thus, law schools may be more likely to reach deeper in the applicant pool than in the past, possibly replacing higher-performing applicants with lower-performing ones.[2]

The section council will review the comments to the proposed standards at its meeting in October. If the standards are approved by the council at that time, they would be presented to the ABA House of Delegates (HOD). The HOD can concur or send the standards back to the council with proposed amendments. The council has the final say on any amendments that might be offered by the HOD. If the proposals are approved, they will be a year or more away from implementation.

Education Debt Update

Sixty-eight percent of those taking the February 2016 bar exam for the first time had education loans. The average of those loans was *$119,695.*

Endnotes

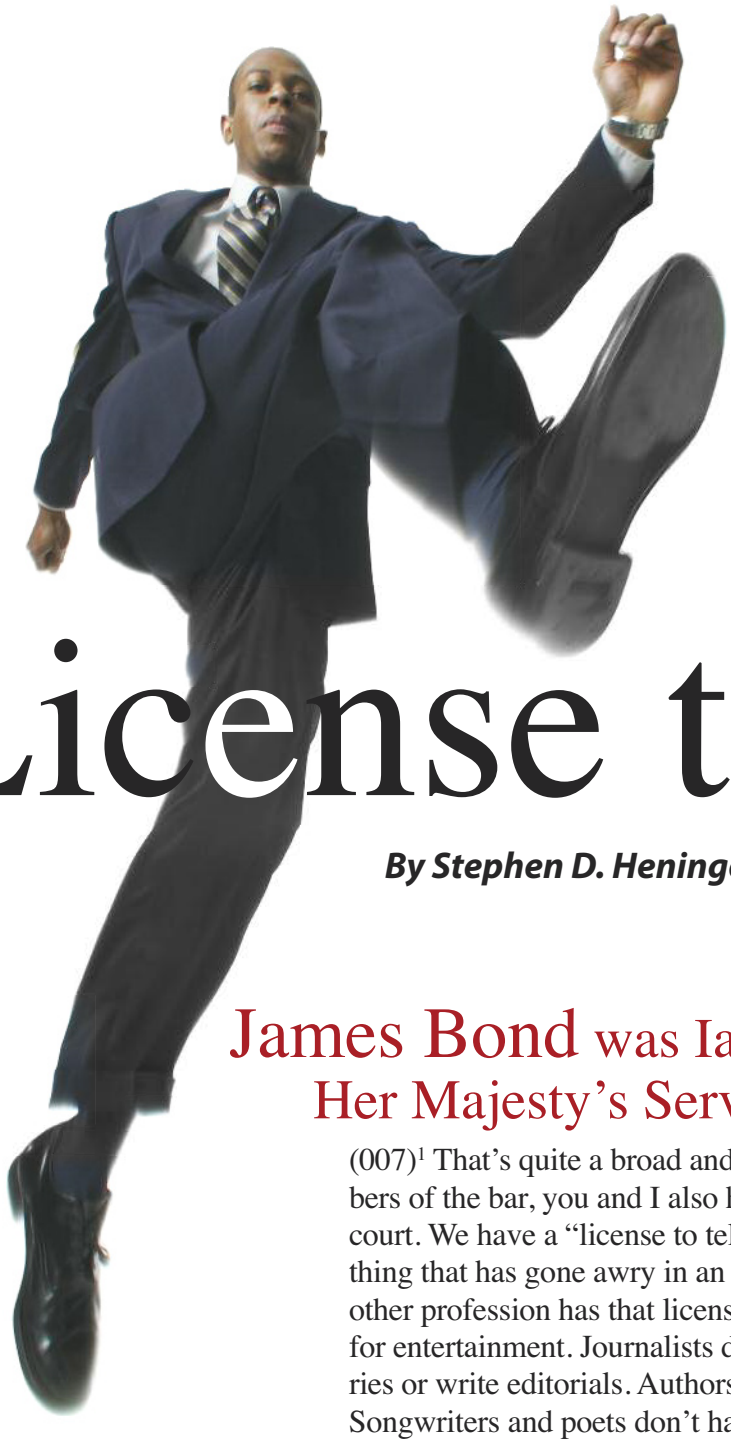
1. The Bar Examiner, June 2016, "Decline, Desertions, Defections, and Deferrals: Factors Affecting Law School Passing Rates," p. 53.
2. Id.

OPEN POSITION

Alabama State Bar Executive Director

With the upcoming retirement of long-time Executive Director Keith Norman, the Alabama State Bar is seeking a new executive director. Those interested should send a résumé and letter of interest to *executivedirectorjob@alabar.org* by **September 30, 2016**.

The Alabama State Bar is an Equal Opportunity Employer.



License to Tell

By Stephen D. Heninger

James Bond was Ian Fleming's character on Her Majesty's Service with a license to kill.

(007)[1] That's quite a broad and terrifying governmental license. As members of the bar, you and I also have a unique license issued by our supreme court. We have a "license to tell" stories, our client's stories about something that has gone awry in an ordered society. Think about that license. No other profession has that license even though they tell stories for a living or for entertainment. Journalists don't have a governmental license to tell stories or write editorials. Authors don't have a license–they have a publisher. Songwriters and poets don't have a license. Matthew, Mark, Luke and John didn't have a license. The *Federalist Papers* weren't written by people with a license. All of those professional storytellers had a story and point of view but they didn't have a "license to tell."

We have stories, points of view *and* a "license to tell." Unlike those other professional storytellers, however, we have restrictions that put boundaries and burdens of proof on our craft. We must tell stories that are supported by factual evidence, legitimate inferences and the law. We don't just write or speak stories–we use the dynamic examination of witnesses and documents to tell the story. Moreover, our audiences are summoned by force of law to come to court and serve as jurors as opposed to people who voluntarily consume and pay for other storytellers' works.

Despite those differences, the elements of what makes a good story are common ingredients. A good story (whether told in court or elsewhere) answers three basic questions: 1) What?, 2) So what? and 3) Now what?

What happened and why did it happen? So what– "why should I care?" Now that we know the story and have some interest in it, what happens next that wouldn't cause us to consider something important without this stimulation? "Now what?"

While we have the right (indeed, the legal duty) to rise and speak on behalf of our clients, there is no corresponding duty on the judge or the jury to listen or pay attention if they find the story unworthy of their efforts. The message of the story is doomed if there is no answer to each juror's internal questions: "Why should I care?" or "So what?" It is only when this "license to tell" is used effectively to convey a compelling and interesting story that the words are actually heard, felt and embedded in the hearts and minds of our audience. Our bar cards give us the opportunity to rise and speak in court, but our brains and common humanity will dictate how successfully we meet that opportunity. The passion of the story must infect the storyteller and then the telling must move that passion to the audience.

Storytelling is a fascinating interaction among: 1) the story, 2) the storyteller and 3) the audience. All three have to engage and interact with each other. Stories are loans, not possessions. Even though (on the surface) they are about specific individuals, they must have an underlying universal message and feeling that is easily transferred to all of our experiences, emotions and human condition. The story is on loan to the storyteller and retelling is a payment on that loan. Stories live to be retold. If told only once, they die. This observation holds true in the courtroom just as strongly as it does at the kitchen table, the office coffee station or over a drink with friends. If the jury isn't interested, engaged and involved enough to be retelling the story to themselves during the trial, retelling it to their fellow jurors during deliberations or to their family/friends after the trial, it has died with our telling. We have killed it by suffocating its natural, inherent breath with a sterile, uninteresting and simple recitation. *Reciting* stories makes them nothing more than words that have been reduced to cookie-cutter products. *Telling* the stories is different. The words, messages and feelings are mixed in with the pace, expression and style of the story. The factual ghosts of the story as it took place when it was actually happening in real time become alive and rise again to speak.

The passion of the story must infect the storyteller and then the telling must move that passion to the audience.

Pablo Picasso once said, "The meaning of life is to find your gift; the purpose of life is to give it away." This profound observation gives valuable instruction to us as licensed storytellers. The meaning of our task is to find the client's story. Identify its shape, its heartbeat and its message. Then we give it away to our audience in a way that can help them answer the three essential questions: What? So what? Now what?

The best teachers do not tell us what we must see. The best teachers show us where to look and spark an interest so we can see for ourselves. The same holds true for us. We cannot effectively force jurors to see what we see. It is much more effective to show them where to look so they can see for themselves. Self-persuasion is much more impactful because it embeds itself in the personal experiences and feelings of the audience to illuminate its likely *truth*. Our task is to identify those points of reference that enrich the curiosity and interest that will cause the jurors to be motivated to give them their attention and to be open to feeling the force behind them.

Every story is founded upon a network of assumptions, assumptions that are based on the probability (not certainty) that most of us share some common beliefs, attitudes and experiences. The stories we tell must be compatible with that hard-drive network or the transmission of energy will be blocked. Connection is the key. Disconnection is a death sentence to the story. The selection of assumptions must undergo a risk/benefit analysis. What assumptions are likely to be very risky and not likely to exist in the hearts and minds of most of the audience? What assumptions are so universal that they are likely to connect with just about everyone? Safety, security, self-respect and honesty are usually reliable and universal. Personal quirks, eccentricities and over-reliance on technicalities are less likely to have universal appeal.

For example, rules and laws are good starting points, but jurors may look to find holes in them because of their personal experiences. The *reasons* behind such rules and laws (e.g. safety, security), however, are more basic and easily confirmed. Meaning is what matters–not just details. Details are simply naked dots in the story until they are connected by meaning. Context is just as important as content. Content is the factual record. Of course, those facts took place in a context at the time of the events at issue. However, context gets expanded in the courtroom when the story is retold because the jury brings in their attitudes, beliefs and experiences. If you think of the analogy of a garden, these attitudes, beliefs and experiences are the composite in which that the story is placed. This fertilization is natural if they welcome each other. The content will be filtered through the context they choose to apply. This is why we need to frame the story in a way that will most likely find support in universal attitudes and feelings. In short, we have to help the details find their way through the filters. The context in which the event took place gives way to the context of its retelling in the courtroom. Both must be considered.

A story is facts wrapped in emotion/logic that connects with our human condition and compels us to take action or realize that something inside of us all has been confirmed or refuted. Specific details and rules are important, but they are not enough to gain attention that compels action. Judge Leonard Hand once made this remarkable observation:

> "I often wonder whether we do not rest our hopes too much upon Constitutions, upon laws, upon Courts. These are false hopes; believe me, these are false hopes. Liberty lies in the *hearts* of men and women. When it dies there, no Constitution, no law, no Court can save it."

Judge Hand did not say that liberty or legal rights lie in the logical minds and rational thinking of men and women. He did not say that the party with the most facts and the best legal precedent wins the case. He recognized that legal rights must connect with "the hearts of men and women." If it does not, no rules, laws, constitutions or courts can protect these rights. Therein lies the power of the story, a power that is generated by a retelling that is based upon fact and embraced by assumed feelings and attitudes common to all of us. A story whose "What?" carries a clear and

inherent answer to "So what?", and "Why should we care?"–a story that compels taking a stand to give it a resounding ending "Now what?"

We have all become good at telling juries what we want them to know, what facts are the most important and what rules govern those facts. Have we forgotten what our jurors want us to understand about them–their needs, their concerns, their desires, what they care about and why? Your story is not just what you say it is. It's more about what your jury says it is. A good storyteller invites the jury to join in the narrative conversation and add to it (or subtract from the other sides' version). Is it a battle of stories or a battle of storytellers? It is both! A story doesn't exist without a storyteller. A storyteller doesn't exist without a story. Neither of them becomes alive without an audience. None of this matters unless it resonates its vibrations in the chords of the facts strummed by the teller and appreciated by the audience. Stories aren't lectures. You can't catch a fish by lecturing and cajoling a fish onto your hook. There must be bait–bait that the fish finds appealing to its needs and worth the risk of swallowing it. We have all heard the old maxim, "You can lead a horse to water but you can't make him drink it." There's another side to that story–you can feed a horse salt and make him thirsty. I'm not saying that our stories are simply bait or salt, however, these analogies serve to remind us that the focus must be on the wants, needs and beliefs of the jury. I close with a great reminder to all of us who are licensed to tell. Brian McDonald wrote in his book, *The Golden Theme*:

"As a storyteller, you are a servant of your story, not its master. You must do what it requires, not what you want it to do. You must remove your ego from it. Art is not to show people who you are; it is to show people who they are. Or to put it more accurately, it is to show us who *we* are–as human beings." ▲

Endnote

1. It is a little weird that my bar card was issued as "HEN-007."

Stephen D. Heninger

*Steve Heninger earned a B.A. degree from the University of Illinois. After spending two years as a lieutenant in the U.S. Army, he earned his J.D. degree (*summa cum laude*) from Cumberland School of Law. He served as a law clerk to Honorable James H. Hancock, district judge for the Northern District of Alabama. He is a past president of the Birmingham Bar Association and the American Board of Trial Advocates (ABOTA), Alabama Chapter.*

Judicial Arbiter Group congratulates Judge Kenneth O. Simon of our Birmingham office upon his election as Chair Pro Tempore of the University of South Alabama Board of Trustees.

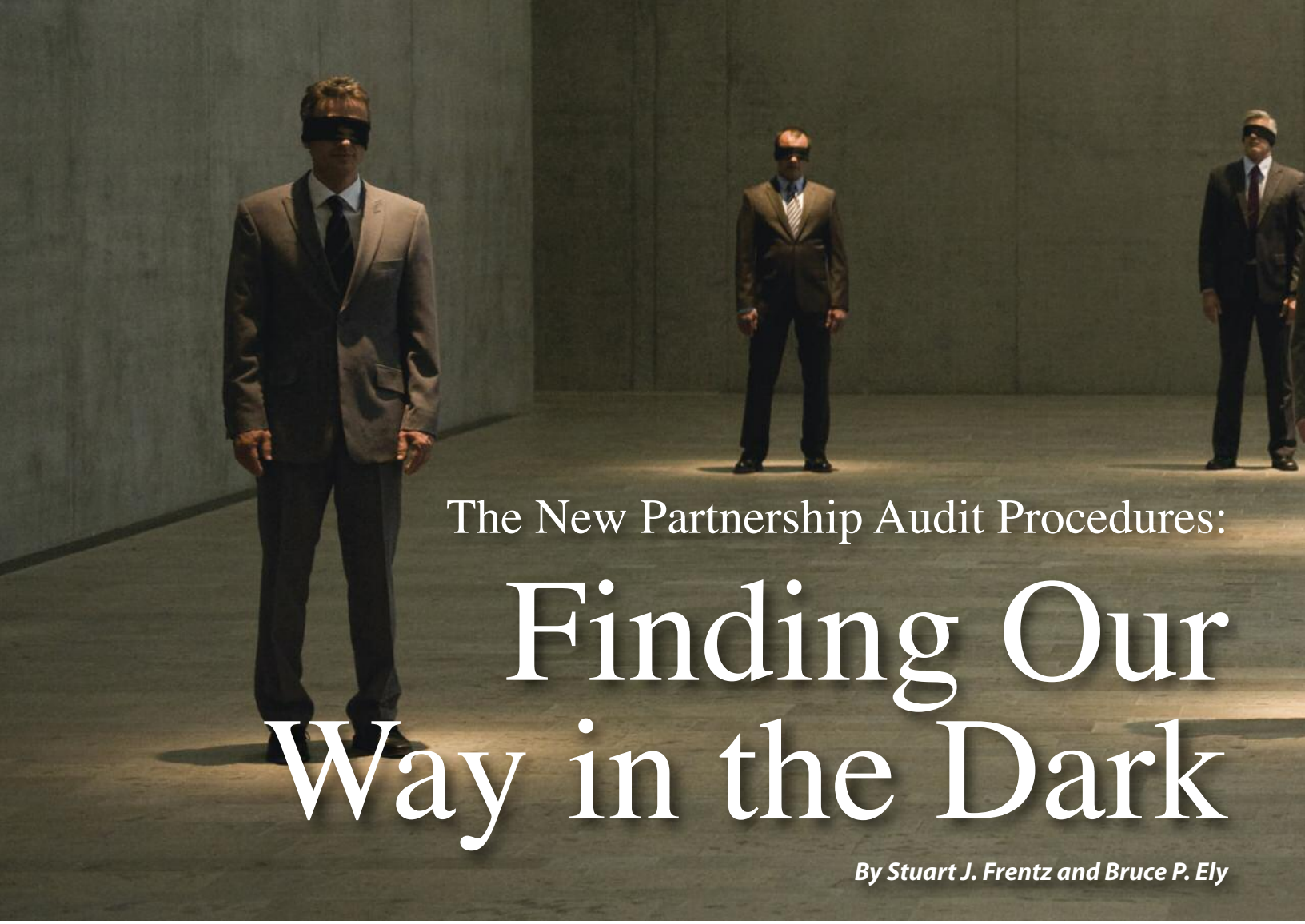
Ken Simon is a 1976 graduate of the University of South Alabama, where he served as Student Government Association president, vice president and senator, and was a member of the varsity debate team. In 1983, he was one of 13 persons selected as a White House Fellows and served his Fellows' appointment as a special assistant to U.S. Attorney General William French Smith. He is a 2007 recipient of a USA Distinguished Alumni Award.

Ken Simon has more than 30 years' experience as a judge, litigator and mediator. He has served as a circuit judge in Jefferson County, the state's largest judicial district, and has developed a reputation as a skilled litigator, mediator/arbitrator, advisor to public agencies and expert in securities law. He is presently a mediator/arbitrator with the Denver based Judicial Arbiter Group, Inc. (JAG), for which he recently established a Southeastern office in Birmingham.

JAG Southeast

Judicial Arbiter Group Southeast, LLC
420 20th Street North, Suite 2200
Birmingham, Alabama 35203
205-379-1029

Judicial Arbiter Group, Inc.
Birmingham / Denver / Colorado Springs
1-800-ARBITER www.jaginc.com



The New Partnership Audit Procedures:

Finding Our Way in the Dark

By Stuart J. Frentz and Bruce P. Ely

The Door in the Dark

In going from room to room in the dark
I reached out blindly to save my face
But neglected, however lightly, to lace
My fingers and close my arms in an arc.
A slim door got in past my guard,
And hit me a blow in the head so hard
I had my native simile jarred.
So people and things don't pair any more
With what they used to pair with before.

–Robert Frost

Alabama lawyers who are trying to understand the new partnership audit procedures scheduled to be effective after 2017 should identify with Robert Frost. The statutes rushed into enactment late last year as part of the Bipartisan Budget Act of 2015[1] leave many questions unanswered, with several gaping holes to be filled with guidance from the Treasury Department and the IRS. And opportunities for confusion will multiply as Alabama and other states develop their own separate responses to the federal changes.[2] The challenges posed for those of us drafting partnership agreements

and related ownership transfer documents in the absence of guidance are a bit like trying to traverse a furniture-filled room in pitch darkness.

In this article, we'll first take a look at what we *do* know about the new audit procedures based primarily on the statutes enacted and amended late last year and the joint committee's Bluebook, which is as close as we get to legislative history. Then we'll list some of the important things we *do not* know, and *will not* know until regulations and other procedural guidance trickle out of Washington.[3] Finally, we'll offer a few suggestions for what practitioners might consider doing to avoid figuratively smacking their heads into doors in the dark or tripping over furniture with regard to drafting partnership or operating agreements while waiting for the Treasury and the IRS, and perhaps Congress, to start turning on the lights.

Some Things We Know (or Think We Know) Until Things Change[4]

The current TEFRA audit[5] are repealed prospectively, and the new rules will apply to tax years beginning after 2017–which, as of the date of this publication, is only a little over a year away. Partnerships can elect to opt in under the new rules early, although there are not likely to be many takers.[6]

Congress projected the new procedures to generate more than *$9.3 billion* in new revenue over a 10-year period.[7] Many states are considering adopting all or part of these procedures for their own income tax codes and to enhance their budgets. Arizona has already enacted partial conforming legislation.[8]

There are a couple of defined terms we need to keep in mind. "Reviewed Year" means the tax year of the partnership under audit, and "Adjustment Year" means the year in which partnership return adjustments are finally determined.[9]

The new default rule under the Budget Act requires the IRS to assess the partnership on the "imputed underpayment" if filing errors are detected during an audit. The assessment is made in the Adjustment Year, so the financial burden of a payment by the partnership will fall on the partners in the Adjustment Year, even if some or all of them were not partners in the Reviewed Year. *Law firms that operate as partnerships, especially those with a large number of partners, should consider how these rules will apply to your own partners and partnership.*

The partnership's imputed underpayment is computed by netting all adjustments as finally determined and multiplying that by the highest rate of tax applicable to individuals or corporations–*i.e.*, 39.6 percent based on 2016 rates. In an especially taxpayer-unfriendly twist, adjustments that reallocate items from one partner to another (e.g., a disregarded special allocation of interest expense or gain) are not netted; the portions of the adjustment that increase items of loss or deduction or decrease items of income or gain are disregarded in determining the partnership's imputed underpayment.[10] So, for example, if a partnership is found to have allocated to partner A $100,000 of income that should have been allocated to partner B in the Reviewed Year, the partnership would have a $39,600 imputed underpayment in the Adjustment Year, even if A or B or both have departed and are no longer partners in that year.

If the partnership can show that an item of adjustment is allocable to a tax-exempt partner or to a partner that would be taxable at a lower rate (i.e., capital gains rate for individuals or a C corporation taxable at 35 percent), the partnership's imputed underpayment can be reduced accordingly.[11] An imputed underpayment can also be reduced to the extent that partners for the reviewed year file amended returns to reflect their shares of the audit adjustments and pay the additional taxes due.[12]

There will be no role for a "tax matters partner" or "tax matters member" for years after 2017. Instead, the new and greatly empowered "partnership representative" ("PR") will be the sole contact person for the IRS auditor and will be authorized under the law to make all decisions regarding how to handle the audit, whether to appeal the assessment, settle or litigate, and whether the partnership will "push out" the assessment to the former partners or pay the assessment itself. The partnership and all its partners will be bound by actions taken by the PR in connection with partnership audits, while (so far) having no rights to participate. And the PR need not be an individual, or even a partner.[13]

Certain partnerships will be permitted to opt out of the new audit procedures.[14] Those that opt out will fall back into the pre-TEFRA audit procedures, under which the IRS must audit, assess and collect tax deficiencies from each ultimate partner, separately. We think that change is near the top of the Treasury's wish list for a technical corrections bill. The first step in determining whether the opt-out election is available is based on a head count.[15] A partnership can opt out only if it has 100 or fewer partners, all of which must be individuals, S corporations, C corporations or estates of deceased partners.[16] And if the partnership has an S corporation partner, it must count each of its shareholders against the 100-partner limit.[17] Unless the IRS issues guidance to the contrary, if even *one* partner is another partnership, or a disregarded single-member LLC or a grantor trust or any other type of trust, the partnership will be thrown irretrievably into the new regime–no opt-out.[18]

Opt-out elections will be effective for one taxable year only. An eligible partnership that desires to get out from under the new audit procedures must file opt-out elections every year, on a timely filed return. We cannot expect the IRS to extend much grace in that regard.

Thankfully, partnerships that can't opt out of the new procedures, or fail to timely do so, can avoid having to pay an imputed underpayment by making a so-called "push-out" election under I.R.C. section 6226, which will shift the burden of audit adjustments back onto the Reviewed

Year partners. The PR (we think) must make this election within 45 days of receiving a notice of final partnership adjustment closing out the audit. The partnership must then furnish "statements" (commonly referred to as "Adjustment K-1s"), reporting to each partner for the Reviewed Year and to the IRS the partner's allocable share of the partnership adjustments. A partner who receives an Adjustment K-1 is required to pay the additional taxes for the Adjustment Year (i.e., the current year), but the amount of tax due is computed by determining the amount by which the partner's federal income tax would have increased in the *Reviewed Year* had the adjustments been properly taken into account in that year, plus the amount by which the partner's tax would have increased in *any intervening year* as a result of changes in tax attributes caused by the adjustments. Only *increases* in tax are taken into account; adjustments to tax attributes that reduce taxes are ignored. In addition, interest is charged from the date the original returns were due, at a rate two percent higher than is normally charged as deficiency interest.[19]

Some Things We Won't Know Until Guidance Is Issued

- Whether partnerships having single-member LLCs, grantor trusts, other types of simple trusts or other partnerships as partners will be eligible to elect out of the new procedures under any circumstances. The new law authorizes the Treasury to issue regulations or other guidance extending treatment similar to that afforded S corporations to other types of partners, but the extent to which the Treasury and IRS may be willing to do so is unclear. If such guidance is issued, each person holding a direct *or indirect* interest in the partnership will be counted toward the 100-partner limit for electing-out, and the partnership will be required to furnish identifying information about each such person to the IRS. This may pose all sorts of practical problems.
- Will the PR be involved in opting out? The effect of an opt-out is that the new rules won't apply to the partnership for the taxable year for which the election is filed, and of course, the provisions governing PR functions are contained in those rules. Does this arrangement create a Catch-22 situation if a PR were to file an opt-out? Until guidance says otherwise, we should assume that someone other than the PR should file an opt-out–probably a manager-member, a member authorized by the board or management committee or the general partner should do so.
- How will the new procedures affect S corporations and their shareholders?[20]
  - Will all the S corporation shareholders be required to file amended returns and pay the taxes due in order for an audited partnership in which the S corporation is a partner to obtain a modification of its imputed underpayment?
  - Can a partnership's imputed underpayment be modified on the basis that one or more shareholders of a partner S corporation are tax-exempt?
  - If an S corporation receives an Adjustment K-1 from a partnership, will the S corporation be required to pay tax, or will the S corporation have an opportunity to "push out" the effects of the adjustments to its shareholders?
- How will the new procedures apply to tiered pass-through structures?
  - Will a push-out election stop at the first tier? If the first tier is itself a partnership? What if the first-tier partnership itself has elected out? Will a partnership be forced to pay a partnership-level tax due to a push-out election made by a lower tier partnership regardless of the fact that it has successfully opted out of the new procedures?
  - Conversely, how will the modification rules apply if guidance permits multi-tier pass-through? Will the ultimate taxpaying partners be required to amend their returns and pay taxes in order for a lower-tier partnership to obtain a modification of an imputed underpayment?
  - If push-out elections are allowed to cascade upward through multiple partnership tiers, will each higher-tier partnership have the option of either paying tax or filing its own push-out election?
- How will tax effects that can be determined only at the *partner* level be taken into account?
- How will penalties determined at the partnership level under

I.R.C. section 6226(c)(1)[21] be apportioned among partners?

- Will any limits be placed on who can serve as PR? On who the IRS will be able to designate in the absence of a valid designation by the partnership?
- Will partners have any rights to participate in audits, appeals or tax litigation?
- Will there be any incentives or benefits for small partnerships *not* to opt out? If not, it's difficult to imagine a situation in which an eligible partnership and its partners would be better off under the new procedures than they would under the rules that were in effect before TEFRA was enacted in 1982. Perhaps in some situations the potential economies of scale in a unified proceeding might outweigh the disadvantages of the new procedures or the partner in charge of the tax and accounting functions of the partnership may wish to solidify that role by having itself or one of its employees appointed PR.
- Will Congress take up additional technical corrections? Don't hold your breath this election year.
- Will the effective date be delayed? It is hard to assess whether the IRS and Treasury will be able to produce workable guidance, reorganize and gear up for the new audit procedures by January 1, 2018. It is possible that we won't see truly useful guidance until well after the effective date of the Budget Act; the Treasury has said its first priority is to develop procedures for electing-*in* before the effective date.
- An important question that must be answered in litigation (and in the partnership agreement itself) and not by IRS or Treasury guidance is whether and to what extent PRs will owe fiduciary duties to the partners–and which set of partners, i.e., those in the Reviewed Year or those in the Adjustment Year.
- How often will a partnership be able to change its PR? Will a partnership be able to pull the rug out from under its designated PR if an audit, appeal or litigation does not appear to be proceeding in a way that suits the partners?

Things to Do and Think About While Awaiting Guidance

- If you're stuck in a dark and unfamiliar room filled with hazards, one way to avoid injury is simply to stay put until daylight, or until the lights come on. Similarly, if existing partnership agreements do not otherwise have to be amended, it would be wise to wait until more is known about what the Treasury and the IRS will say about the new audit procedures, before trying to draft provisions taking those procedures into account.
- However, if your client is contemplating a new business venture that will be classified as a partnership for income tax purposes (including an LLC or joint venture) or if a client needs to amend an existing agreement for other reasons, these changes should be incorporated into the new or revised agreement *immediately*, with a warning to the partnership and the prospective PR (once you decide who your client is) that detailed guidance on many aspects of the Budget Act isn't expected to be released for some length of time. We urge our fellow practitioners to monitor Treasury, IRS and Congressional efforts in this regard. The IRS has pledged that the guidance process will go forward whether or not Congress steps back in to fill legislative gaps in the Budget Act provisions.[22] Depending on how the fall elections go, a technical corrections bill may see the light of day next year. We certainly hope so.
- Partnership clients should be thinking about: (1) who the new PR should be; (2) what level of indemnification will be afforded the PR against any claims, costs or liabilities that may be incurred by acting in that role; and (3) the level of accountability they will have to the company and its partners. For example, must the PR seek advance approval of its actions or non-actions from the managing member, or board of managers, or general partner(s), or perhaps the majority owners?

- Partners who won't be serving as the PR may want to specify the duties and obligations the PR will have to act in the best interest of the partners. PRs may want their decisions to be reviewed and approved by the partners so as to reduce the chances of being held personally liable for those decisions.
- Conversely, especially if you're the attorney for the prospective PR, consider provisions reimbursing the PR for expenses incurred in that role, and indemnifying the PR against claims, damages, etc. asserted against or suffered by the PR as a result of their service. Typically, a gross negligence standard has been used for TMP provisions, but that doesn't necessarily hold true for the non-PR partners who lack any right to participate in audits and litigation under the new rules, but who are bound by actions taken by the PR on behalf of the partnership. They may sue the PR if they feel the PR acted out of selfish motives and violated a fiduciary duty to the partners (especially minority partners).[23] Thus, consider expressly limiting the PR's fiduciary duties to the former or current partners–to the extent relevant state law permits. Consider potential conflicts of interest for PRs who currently are partners, or former partners. For example, what if a former partner is appointed the new PR, and later is faced with the decision whether to push out the proposed assessment to those who were partners in the Reviewed Year–which happens to include her?
- Consider including mandatory opt-out provisions for any taxable year in which the partnership is eligible to opt out. Be as specific as possible about who will be responsible for determining eligibility, gathering the necessary information and filing the election. Until guidance indicates otherwise, though, we think it best not to designate the PR to do these things (see discussion above).
- Most partnership agreements should require the partners (and former partners) to be responsible for their allocable shares of any taxes (including penalties and interest) paid by the partnership under the new procedures.
- Give consideration to how partnership-level taxes should be allocated among the partners for capital account and basis purposes. I.R.C. section 6241(4) provides that no deduction shall be allowed for any payment required to be made by a partnership under the new audit procedures. The Bluebook adds that payments by a partner under an indemnification or similar agreement are also nondeductible. Basic capital accounting rules under federal income tax regulations require that a partner's capital account be decreased by allocations of expenditures described in I.R.C. section 704(a)(2)(B), i.e., expenditures of the partnership that are not deductible in computing its taxable income and not properly chargeable to capital accounts.
- Finally, warn your client (once you decide who that is) that provisions in their partnership agreement dealing with the new audit procedures need to be revisited periodically, as and when the IRS and Congress act and the state legislatures and state departments of revenue join in.

All comments herein are those of the authors only and not necessarily their law firm, the ABA Tax Section, the Alabama State Bar or any other organization or any client with which they are affiliated. The authors thank their Huntsville partner and business entity guru, Scott E. Ludwig, for his helpful comments in the preparation of this article.

 ▲

Endnotes

1. Section 1101 of Pub. L. No. 114-74 (Nov. 2, 2015) (herein, the "Budget Act"). Throughout this article we'll refer to partners, partnerships and partnership agreements but that is intended to include members, LLCs and operating agreement as well.

2. Amy Hamilton "Stakeholders Mobilizing State Response to New IRS Partnership Audit Regine," Tax Notes Today (May 9, 2016).

3. Donald Rumsfeld's widely-publicized response to a question at a DoD news briefing on February 12, 2002 seems apropos here: "As we know, there are known knowns; there are things we know we know. We also know there are known unknowns; that is to say, we know there are some things we do not know. But there are also unknown unknowns–the ones we don't know we don't know. And if one looks throughout the history of our country and other free countries, it is the latter category that tends to be the difficult one." All three categories of knowledge, or lack thereof, are present with regard to the new partnership audit procedures at this point in time.

4. As of early July 2016. At this time, the only official sources of information are the statutes themselves–Subchapter C of Chapter 63, Subtitle A, consisting of I.R.C. sections 6221 through 6241–and the *General Explanation of Tax Legislation Enacted in 2015*, prepared by the staff of the Joint Committee on Taxation, JCS-1-16, March 2016 (herein, the "Bluebook"). References in this article to I.R.C. sections 6221 through 6241 are to the new provisions that are due to become effective for taxable years beginning after December 31, 2017.

5. Originally enacted by the Tax Equity and Fiscal Responsibility Act of 1982, or "TEFRA."

6. Id.

7. Section 1101 of the Budget Act did not change any substantive tax rules of Subchapter K, so this revenue projection must indicate Congress' belief that every year about $1 Billion–or likely much more–due in federal income taxes from partners under current law goes uncollected due to ineffective audit procedures.

8. Amy Hamilton, "News Analysis: Arizona Official Dives Deep into Aspects of New Partnership Audit Law," Tax Analysts Doc. No. 2016-11284 (June 7, 2016).

9. I.e., the year in which a partnership adjustment becomes final under a court decision, the year in which an adjustment is made at the partnership's initiative by filing an administrative adjustment request, or the year in which a notice of final partnership adjustment is mailed. I.R.C. section 6225(d).

10. I.R.C. section 6225(b)(2).

11. I.R.C. section 6225(c)(3) and (4).

12. I.R.C. section 6225(c)(2).

13. I.R.C. section 6223 requires only that the PR be a person with a substantial presence in the United States. The statute provides that the PR "shall have the sole authority to act on behalf of the partnership under this subchapter."

14. Procedures for the election-out are to be established by the Treasury Secretary. As of this writing, no information on what these procedures might look like is available.

15. Technically, the count is based on the number of K-1s the partnership is required to furnish to its partners for the taxable year. I.R.C. section 6221(b)(1)(B).

16. I.R.C. section 6221(b)(1)(C).

17. I.R.C. section 6221(b)(2)(A). The special rules for counting the number of shareholders for S corporation eligibility do not apply (e.g., counting husband and wife and certain members of a family as one shareholder). Instead, the number of K-1s the S corporation is required to furnish to its shareholders for the taxable year count toward the 100-partner limitation. Some S corporations may be required to furnish many more than 100 K-1s. *See* Stuart J. Frentz, S Corporation Corner: *Predicting How the New Partnership Audit Rules Will Affect S Corporations and Their Shareholders,* J. Passthrough entities, Mar.-Apr. 2016, at 27.

18. IRS Chief Counsel William J. Wilkins warned attendees at the Texas Federal Tax Institute that, "I wouldn't be confident of your ability to elect out if you had a partner that was a disregarded entity unless and until there's guidance or a legislative change confirming that." Amy S. Elliott, "Wilkins Noncommittal on Impartial Partnership Audit Changes," Tax Notes Today (June 14, 2016).

19. I.R.C. section 6226(b) and (c).

20. For a more detailed discussion of issues for S corporations under the new audit procedures, see Stuart's article cited in fn. 17 above.

21. This section provides that notwithstanding a push-out election requiring Reviewed Year partners to pay taxes and interest due as a result of taking their shares of partnership adjustments into account, "any penalties, additions to tax, or additional amounts shall be determined as provided under section 6221 [at the partnership level] and the partners of the partnership for the reviewed year shall be liable for any such penalty, addition to tax, or additional amount."

22. Amy S. Elliott, "IRS to Give More Weight to JCT's View of Partnership Audit Rules, "Tax Notes Today (June 27, 2016).

23. In an effort to reflect the "freedom of contract" principle articulated by Delaware and other states, effective January 1, 2017, the Alabama Limited Liability Company Law and Alabama Limited Partnership Law will allow members and partners to expand, restrict or eliminate certain duties in a written limited liability company agreement or written partnership agreement; however, neither a limited liability company agreement nor a partnership agreement may eliminate the implied contractual covenant of good faith and fair dealing. It should be noted that a number of Delaware decisions have admonished practitioners to take care in drafting agreements under the "freedom of contract" principle, as the agreements themselves may create additional and unintended duties. Also, duties which arise under federal statutes may not be subject to the contractual freedoms provided by the Alabama Limited Liability Company Law and Alabama Limited Partnership Law.

Stuart J. Frentz

Stuart Frentz is a partner with Bradley Arant Boult Cummings LLP in the Birmingham office, where he has practiced federal tax law for more than 30 years. Frentz has been a columnist for the CCH Journal of Passthrough Entities *covering S corporation tax developments.*

Bruce P. Ely

Bruce Ely is a partner with Bradley Arant Boult Cummings LLP in the Birmingham office and is co-chair of a new ABA Tax Section SALT task force on the new partnership audit rules. Ely is a graduate of the University of Alabama School of Law and of the New York University School of Law's Graduate Tax Program.

BANKRUPTCY AND UNBUNDLING:

Oil and Water?

By Professor Gary E. Sullivan and Jessica M. Zorn

Unbundling legal services–also known as "limited scope representation" or "discrete task representation"–allows an attorney to restrict her representation of a client to a specific task or issue instead of handling a client's matter comprehensively from beginning to end. *Alabama Rule of Professional Conduct* 1.2 has always allowed for limited scope representation, but the practice was sparsely used until specific procedures and forms became available in 2012.[1] There are three general categories for discrete task representation: consultation and advice, limited representation in court and document preparation.[2] Although unbundling in general litigation or simple transactional matters can create benefits that inure to both lawyer and client, unbundling and bankruptcy practice make strange bedfellows.

Generally, any attorney/client agreement involving an unbundled legal service must comply with the *Rules of Professional Conduct* and other applicable laws.[3] In the context of bankruptcy, attorneys must also comply with the local rules of the particular bankruptcy court, the *Federal Rules of Bankruptcy Procedure* and the *U.S. Bankruptcy Code*. The difficulty of rectifying a limited scope representation agreement with bankruptcy rules and practice raises serious doubts as to the feasibility of unbundling services when representing debtors in bankruptcy courts in Alabama.

The Merits of Limited Scope Representation Generally

Limited scope representation increases access to the legal system for lower- and middle-income litigants who may not be able to afford an attorney offering comprehensive services.[4]

This argument is particularly persuasive in the bankruptcy context because attorneys' fees have increased since the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).[5] Attorney fees after BAPCPA increased as much as 24 percent for Chapter 13 filers and–notably–48 percent for Chapter 7 debtors.[6] BAPCPA's enactment likely caused such cost increases because debtors must file more documents than before,[7] the means test may require complicated calculations and the statute made attorneys responsible for errors in a debtor's schedule. "Just as insurers charge higher premiums for greater risks and increased work, attorneys have charged higher fees to offset their new risks."[8] As filing bankruptcy becomes more expensive, fewer debtors can afford an attorney; limited scope representation has been proposed as a solution to this problem.

Unbundling provides certain benefits to attorneys as well. Discrete task representation ostensibly creates an opportunity for lawyers to expand their practice and market to lower-income clients.[9] Lawyers may be able to provide assistance to clients they might otherwise not have the time or inclination to fully represent.[10] These opportunities allow attorneys to collect additional fees where none existed (although, on the other hand, litigants who would have hired a full-service attorney may now choose to only hire an attorney for one or two tasks, thereby actually lowering the fees an attorney collects).

The Challenges of Unbundling Bankruptcy Services

As a general rule, unbundled service agreements must comply with all applicable ethical and procedural rules. In bankruptcy, however, attorneys may face difficulty rectifying a limited scope agreement with specific rules governing bankruptcy practice. The *Bankruptcy Code* does not mandate that an attorney fully represent a client, but most local rules nationally signal that an attorney *should* comprehensively represent her client.[11] The *Alabama Rules of Professional Conduct* allow an attorney to limit the scope of representation if the agreement is reasonable under the circumstances.[12] Lawyers should decline to offer unbundled legal services in the practice of bankruptcy because limited scope agreements raise serious concerns as to the attorney's compliance with other rules, thereby rendering a limited scope representation *unreasonable* under the circumstances.

A. Informed Consent Concerns

In general, "[a] lawyer may limit the scope of representation if . . . the client gives *informed consent*."[13] In order for a client to give informed consent, the attorney must disclose a wide array of information.[14] Bankruptcy attorneys face an ethical dilemma: the bankruptcy landscape is unusually complicated and technical. Can a client *really* give informed consent?

A debtor may wrongly assume that excluded services–like representation in adversary proceedings–are unnecessary, or that there is little risk to foregoing representation on those matters. The ethical concerns are heightened when one considers that the limited scope agreement ". . . comes at the suggestion of an attorney who often benefits from and has superior knowledge of the possible ramifications of excluding certain services."[15] Will attorneys fully disclose the risks of limited representation, including the decreased probability of the debtor receiving a discharge? In a related vein, the pressure of needing to file bankruptcy might cause a debtor to accept whatever terms are presented to her. The reliance on a lawyer's guidance is therefore heightened in bankruptcy proceedings. A debtor's ability to provide valid, informed consent is highly suspect considering a client's likely inability to grasp the materiality of a service and the consequences of its omission.[16]

B. Competency Concerns

An attorney must provide competent representation to her clients.[17] This duty is not waived by entering into a limited scope agreement.

Competent representation in the context of bankruptcy means that an attorney must help meet the debtor's objective of obtaining a discharge,[18] and yet largely *pro se* litigants are far less likely to receive a discharge.[19]

Can representation be considered competent if it fails to achieve the client's objectives for obtaining representation (i.e. obtaining a successful discharge)? Some courts have already answered "no"–competent representation precludes lawyers from picking aspects of bankruptcy cases to work on and neglecting others.[20] The issue remains to be squarely addressed in Alabama.

C. Diligence Concerns

A lawyer may face difficulty reconciling the duty of diligence[21] under a discrete task representation scheme. The duty of diligence–in the civil litigation context–is somewhat relaxed when it comes to filing pleadings. Whereas normally an attorney must investigate good grounds to support a pleading, attorneys who are only representing their clients in a limited capacity have the ability to rely on the client's communications *unless* there is reason not to do so.[22] Less diligence is required of an attorney drafting a civil pleading as an unbundled service.

In bankruptcy proceedings, however, attorneys are bound by local rules of the particular bankruptcy court, the *Federal Rules of Bankruptcy Procedure* and the *U.S. Bankruptcy Code*. Neither *Fed. R. Bankr. Proc*. 9011(b) nor 11 *U.S. Code* §707(b)(4)(C), governing pleadings, allows for a relaxation of the duty of diligence for bankruptcy attorneys offering unbundled services. This may render a wide swath of limited scope representation infeasible; for example, it might defeat the purpose of unbundling for an attorney to exercise diligence and research all aspects of a limited client's petition if the attorney is getting paid a nominal amount to simply prepare a schedule. Limited scope bankruptcy attorneys, held to a higher standard of diligence by the *Federal Rules of Bankruptcy Procedure* and the *Bankruptcy Code*, must be careful to satisfy their duty of diligence.

Whereas normally an attorney must investigate good grounds to support a pleading, attorneys who are only representing their clients in a limited capacity have the ability to rely on the client's communications *unless* there is reason not to do so.[22]

D. Administration of Justice Concerns

The administration of justice in bankruptcy courts would suffer if litigants choose to forego outright representation for representation in a limited capacity.

First, limited scope representation may increase overall access to the bankruptcy system, but it would also likely increase the number of functionally *pro se* litigants. This would likely not lead to favorable outcomes for debtors. In 2007, the Consumer Bankruptcy Project found that the percentage of *pro se* litigants rose after the passage of BAPCPA, but the percentage of *pro se* litigants who received a successful discharge fell.[23] Shockingly, "[t]he entire post-BAPCPA increase in negative *pro se* outcomes is attributable to cases in which the debtors were alleged to have made technical errors."[24] Bankruptcy is simply too complicated for unrepresented debtors to navigate and discharges are being withheld on the basis of procedural, technical errors instead of on the merits of the filing.

Not only do the debtors themselves suffer if they litigate functionally *pro se*, but the courts themselves suffer. Debtors who are *pro se* or who only received assistance with documents are more likely to miss deadlines, neglect legal responsibilities and experience difficulties applying both procedural and substantive law.[25] Bankruptcy courts are likely to be increasingly burdened because "[s]elf-represented [or largely self-represented] litigants consume a disproportional amount of staff and judicial time."[26]

Lastly, the widespread implementation of limited scope representation may hamper the administration of justice because it has a disparate effect on debtors versus creditors. Creditors are unlikely to forego outright, complete representation, but debtors in financial distress are looking for the least expensive route. Overall, debtors may receive worse judicial outcomes and creditors would remain unaffected.

The practice of discrete task representation therefore gives rise to very serious ethical concerns in the context of bankruptcy practice. Empirically, it is difficult to rectify professional rules with a constrained representation agreement; although jurisdictions are increasingly recognizing the permissibility of unbundling, findings that bankruptcy attorneys followed the ethical rules in doing so are rare.[27] The merits of

limited scope agreements may render the practice helpful and even necessary in some areas of law, but bankruptcy attorneys should proceed with caution or altogether avoid it.

Endnotes

1. Alabama Access to Justice Commission, *Frequently Asked Questions* (Oct. 16, 2015, 06:30 AM), *http://alabamaatj.org/wp-content/uploads/2013/08/Limited-Scope-Representation-for-Lawyers-Color.pdf*.
2. J. Anthony McLain, *Opinions of the General Counsel: The Unbundling of Legal Services and "Ghostwriting,"* 71 Ala. Law. 401, 401-2 (2010).
3. Alabama Rules of Prof'l Conduct R. 1.2 cmt.
4. McLain, 71 Ala. Law. at 402.
5. Lois R. Lupica & Nancy B. Rapoport, *Best Practices for Limited Services Representation in Consumer Bankruptcy Cases* 49 (Final Report of the ABI National Ethics Task Force, 2013).
6. Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 Am. Bankr. Inst. L. Rev. 17 (2012).
7. Andrew P. MacArthur, *Pay to Play: The Poor's Problems in the BAPCPA*, 25 Emory Bankr. Dev. J. 407, 419 (2009)(BAPCPA newly requires a debtor to file, among other things, a credit counseling certificate, a document explaining potential increases in expenses or income in the next year, a copy of all documents outlining any money obtained 60 days before the petition was filed and a federal income tax return before the creditors' meeting).
8. MacArthur, 25 Emory Bankr. Dev. J. at 434.
9. Henry A. Callaway, *Alabama's New Limited-Scope Representation Rules*, 73 Ala. Law. 262, 262 (2012).
10. McLain, 71 Ala. Law at 402.
11. Carrie A. Zuniga, *The Ethics of Unbundling Legal Services in Consumer Cases*, 32-OCT Am. Bankr. Inst. J. 14, 14 (2013).
12. Alabama Rules of Prof'l Conduct R. 1.2(c).
13. Alabama Rules of Prof'l Conduct R. 1.2(c)(emphasis added).
14. The Restatement (Third) of Law Governing Lawyers offers the following guidelines:

    (i) a client must be informed of and consent to any "problems that might arise related to the limitation,"

    (ii) a contract limiting the representation is construed "from the standpoint of a reasonable client,"

    (iii) if any fee is charged, it must be reasonable in light of the scope of the representation,

    (iv) changes to representation me after an unreasonably long time after beginning representation must "meet the more stringent tests. . . for post inception contracts or modifications," and

    (v) the limitation's terms must be reasonable in light of the client's sophistication level and circumstances.

    Restatement (Third) of Law Governing Lawyers § 19 cmt. c. (2000).
15. Zuniga, 32-OCT Am. Bankr. Inst. J. at 14.

16. Lois R. Lupica & Nancy B. Rapoport, *Best Practices for Limited Services Representation in Consumer Bankruptcy Cases* 49 (Final Report of the ABI National Ethics Task Force, 2013).
17. Alabama Rules of Prof'l Conduct R. 1.1.
18. Zuniga, 32-OCT Am. Bankr. Inst. J. at 14.
19. Rafael I. Pardo, *An Empirical Examination of Access to Chapter 7 Relief by Pro Se Debtors,* 26 Emory Bankr. Dev. J. 5, 23 (2009)(outlining a study of debtors in the Western District of Washington–chosen because of its almost four million people in 19 counties, both rural and metropolitan–which found that 15.0 percent of post-BAPCPA *pro se* litigants failed to receive a discharge whereas only 1.04 percent of post-BAPCPA represented clients failed to receive a discharge).
20. Zuniga, 32-OCT Am. Bankr. Inst. J. at 15.
21. Alabama Rules of Prof'l Conduct R. 1.3.
22. Alabama Rules of Civil Procedure R. 11(b)("In providing such drafting assistance, the attorney may rely on the otherwise self-represented person's representation of the facts, unless the attorney has reason to believe that such representation is false or materially insufficient").
23. Angela Littwin, *The Affordability Paradox: How Consumer Bankruptcy's Great Weakness May Account for Its Surprising Success*, 52 Wm. & Mary L. Rev. 1933, 1957.
24. *Id.*
25. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 Am. U.L. Rev. 1537, 1548 (2005).
26. The Center on Court Access to Justice for All, Discrete Task Representation (Oct. 16, 2015, 06:45 AM), *http://www.ncsc.org/microsites/access-to-justice/home/Topics/Discrete-Task-Representation.aspx*.
27. Zuniga, 32-OCT Am. Bankr. Inst. J. at 15.

Professor Gary E. Sullivan

Gary Sullivan serves as associate professor of law in residence at the University of Alabama School of Law. His practice and scholarly interests focus on bankruptcy, commercial law and contracts. Professor Sullivan has presented papers and served on panels at academic and continuing education conferences in several states. He has been a member of the Alabama State Bar since 1996.

Jessica M. Zorn

Jessica Zorn is a 2016 graduate of the University of Alabama School of Law and works with Farris, Riley & Pitt LLP in Birmingham. She sat for the July 2016 Alabama bar exam.

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

FEBRUARY 2016 BAR EXAM STATISTICS OF INTEREST

Number sitting for exam	274
Number passing exam (includes MPRE deficient and AL course deficient)	116
Bar Exam Pass Percentage	42.3 percent

Bar Exam Passage by School

University of Alabama School of Law	92.3 percent
Cumberland School of Law	47.2 percent
Faulkner University Jones School of Law	45.8 percent
Birmingham School of Law	26.7 percent
Miles College of Law	0.0 percent

Certification Statistics*

Admission by Examination	113
Admission by Transfer of UBE Score	9
Admission without Examination (Reciprocity)	10

**Statistics of those individuals certified to the Supreme Court of Alabama for admission to the Alabama State Bar for the period November 2, 2015 through May 4, 2016. To be certified for admission, a candidate must satisfy all admission requirements as prescribed by the* Rules Governing Admission to the Alabama State Bar.

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

ALABAMA STATE BAR
SPRING 2016 ADMITTEES

David McCormack Allen
Jaqueline Aranda Osorno
Yurie Yeoul Bae
Jeremy Innocent Banks
Chadwick Thomas Barnett
Andrew Channing Bendall
Bryan Patrick Benson
Michelle Morris Bernstein
Christopher Austin Blackwell
Jonathan Michael Blocker
Sylvia Bowen
Reginald Renard Brown
Tamra Elaine Bryant
Johana Alexandra Bucci
Mechelle R. Buksar-Musgrove
Melissa Cain
Geoffrey Felix Calderaro
Mary Ruth Campbell
Jacqueline Lea Childers
Colin Stuart Clark
Justin Gregory Clark
Alain Haddad Clarke
Christine Alexandra Clolinger
David Paul Coates
Laura Elizabeth Collins
Matthew David Cone
Nathan R. Cordle
Megan Trenise Crenshaw
Rodney Jamael Davis
Jacqueline Desiree Dodd
Karl Elliott Dover
Valerie Prochazka Dray
Jack Mark Dubose, Jr.
Evan Julian Eberhardt
Donnetta Kamilah Ellis
Adam Eugene Emerton
Mark Allen English
Andrew Daniel Farley
Kevin David Finley
Amber Michelle Fite-Morgan
David Lee Flaherty
Kent William Frost
Mark Andrew Gable
Kristina Ashley Granger
Veronica Guerra
Seve Powers NeSmith Gunter
Jordan Ali Handley
Seth Andrew Hansard
Clayton Hardin
Paula Angelique Harris
Alyssa Lynn Hawkins
Brian Douglas Hayes
Frederick Schultz Hecht
Ryan Keith Hicks
David Austin Holcombe
Michael Ross Holden
Elizabeth Ann Hollie
Walter Richard Hudgens
Matthew Ross Huffstutler
Phoenix Iverson
Ainka M. Sanders Jackson
Jamie Leigh Jordan
Victor Herng-Chin Kang
Michael Scott Kelly
David Andrew Kidd
Jerry Lee Kilgo
Timothy Charles Kingston
Charlotte Anne Klenke
Andrew Seth Ladores
Caroline Elisabeth Larochelle Nadeau
Alessio Carlo Larrabee
David Lee
Joshua Alexander Leggett
Harris Marshall Long
William Mitchell Mann
Madelyn Kay Mauldin
Samuel Robert McCord, Jr.
Alexander Douglas McSwain
Matthew Paul McVay
Allen Porter Mendenhall
Brooke Menschel
Jonathan Bain Metz
Tina Louise Mills
Laci Anna Moore
Shari' Vernae Morris
Haley Elizabeth Namie
Alice Ann Nix
Dawn Michele Oliver
Lynn Ellen Osborn
Darla LaShay Persall
Ethan Picone
Caroline Marie Pruitt
TaRonda Marie Randall
Jamison Thomas Real
Robert Bradford Reasonover
Edward Donald Reed
Russell Baker Register
Joseph Michael Rich, Jr.
James Phillip Roberts
John Edward Rogers
Andrew John Scarborough
David Jeremy Schatz
William Joseph Schiffman, II
Russ Michael Schmidtberger
Stephanie Renee' Schuman
Daniel Thornton Seawell
Neil Everett Senkbeil
Carl Ray Sewell, III
Jacob Thomas Shillig
Michael Shawqi Shunnarah
Michael Ray Simpson
Burt Richard Skiba
William Wayne Smith, Jr.
Caitlin Evelyn Margaret Smitherman
James Hayden Sneed
Allen Evans Sorrell
Keri Michelle Spiker
James Lawrence Spinks
Nicolas Miguel Stanojevich
Sean Patrick Sullivan
Megan Johnson Templeton
Amanda Katelyn Terry
John Isaac Thomason
Sara Nicole Tower
Camalyn Sarena Turner
Caroline McKibben Upchurch
Christina Vice Vineyard
Elizabeth Jane Walbom
Ellise Montrell Washington
Willie Christopher Weaver
Kacey Leigh Weddle
Rodney Wayne Wells
Micah West
Katherine George Woodfin
Paul McLaurin Woodfin, III
David Arthur Yergey, III
Karen Michelle York
Angela Beth Young
Jamila Mashavu E Young
Sarah Dowdy Young

LAWYERS IN THE FAMILY

Samuel Robert McCord, Jr. (2016) and Samuel Robert McCord (1976)
Admittee and father

William W. Smith, Jr. (2016) and Bill Smith (1966)
Admittee and father

Evan Eberhardt (2016) and Jan Eberhardt (1980)
Admittee and father

James Lawrence Spinks (2016) and Henry Agee (1973)
Admittee and uncle

Kent Frost (2016) and Lisa Frost Fraser (1989)
Admittee and aunt

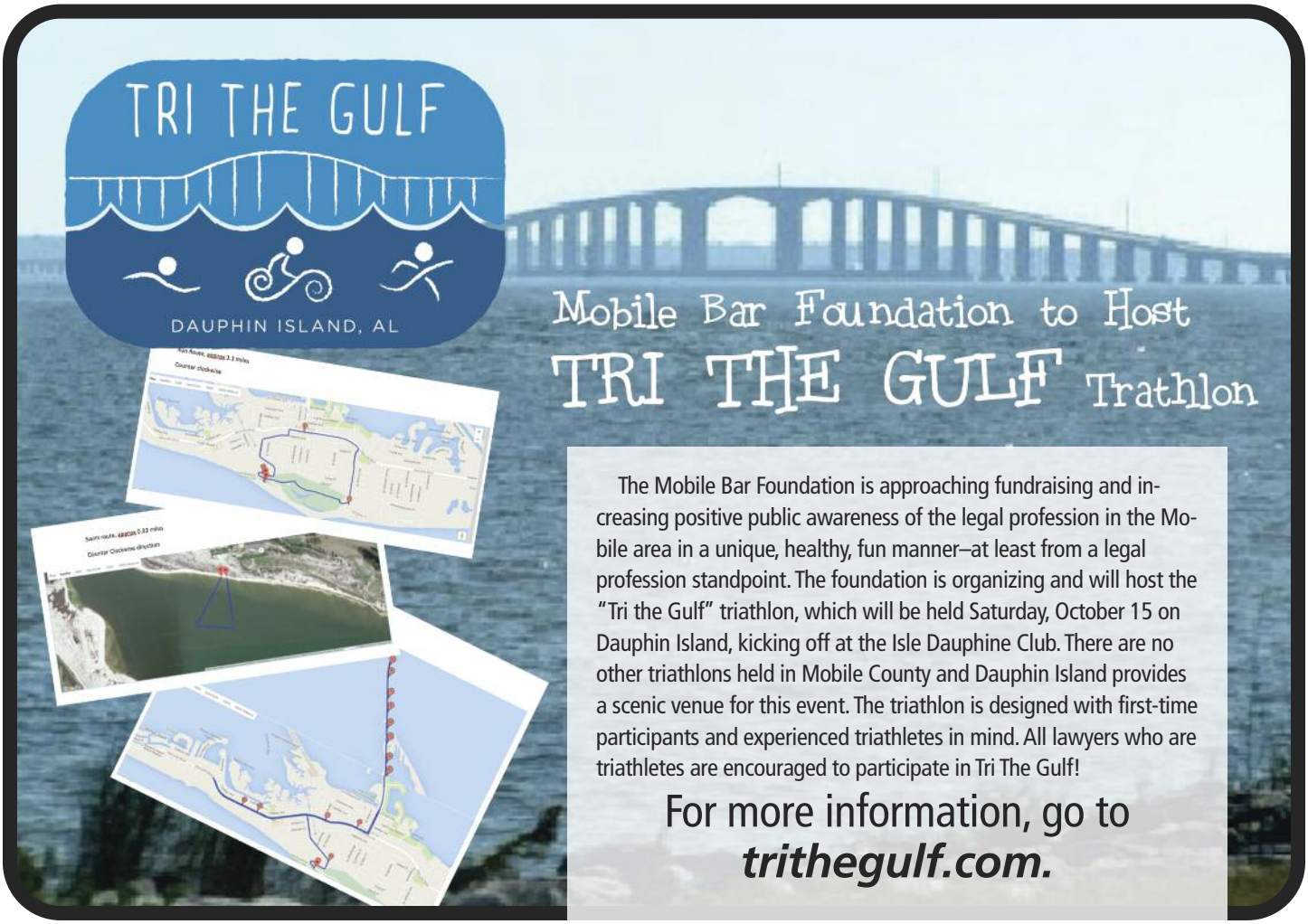
Alexander McSwain (2016) and Douglas McSwain (1995)
Admittee and father

John Isaac Thomason (2016) and Rebecca Green Thomason (1984)
Admittee and mother

Christine Clolinger (2016) and Leslie Fields (1995)
Admittee and stepmother

Joseph M. Rich, Jr. (2016) and Herbert James Lewis (1974)
Admittee and father-in-law

Mary Ruth Campbell Smitherman (2016), Harvey B. Campbell (1977), Megan C. Carpenter (2008) and Gabe Carpenter (2009)
Admittee, father, sister and brother-in-law



ALABAMA LAWYER ASSISTANCE PROGRAM

Second Annual Recovery Retreat

By Robert B. Thornhill

The Alabama Lawyer Assistance Program held its second annual "Recovery Retreat" in May in the mountains at beautiful Camp Sumatanga near Oneonta. This is an opportunity for our volunteer committee members to receive training to enhance their ability to serve effectively on our committee and give assistance and support to attorneys, judges or law students who may be struggling with a mental health issue or a substance use disorder. It also provides a time of fellowship and camaraderie with one another. I think we definitely accomplished this!

This year we had another outstanding lineup of speakers, including Laura Calloway, Service Programs director, and Mark Moody, assistant general counsel in the Office of General Counsel, who began the retreat by discussing the function and interaction of these two state bar programs.

They were followed by Lisa Holman, area director with the American Foundation for Suicide Prevention, and Mary Turner, board member and attorney, who addressed the tragic reality of suicide in our legal community, signs to look for that may indicate suicidal ideation and ways to intervene.

The next day, Elizabeth Mullins, licensed clinical social worker, discussed mindfulness therapy, a psychological technique that teaches how to be "in the moment" and how to avoid getting caught up in a cycle of negative thinking and the depressed mood that these thoughts can create.

Mullins's talk was followed by Dr. Joseph Schumacher's discussion on the topic of the high incidence of "co-occurring disorders" among professionals who present for residential treatment for a substance use disorder. Dr. Schumacher, a clinical addiction psychologist, demonstrated how a significant proportion of those with addictive disorders also suffer from one or more additional mental health maladies, such as depression, anxiety or bipolar disorder, stressing that all of these conditions must be treated to experience an effective and lasting recovery.

The two-day event also included an ALAP committee meeting, a foundation meeting and a 12-step speaker meeting.

Our courageous and self-motivated committee members are to be congratulated for the good work they do throughout the year. All of their work is completely voluntary and there is no monetary reward for their efforts. However, the satisfaction that comes from working with attorneys who are trouble, seeing them accept the help they need and witnessing the transformation that comes from genuinely working a program of recovery is priceless.

This work can be very challenging, and there are times when the support and assistance we offer is not accepted. There is also the tragic truth that some people with substance abuse disorders or mental health issues such as depression cannot or will not do what is necessary in order to get better. The outcomes are not always good ones, as anyone who has had a family member or loved one with addiction can attest. For those who truly surrender and become willing to take the suggestions of the "winners" in recovery, though, the outcome is bright. We get to see careers saved, families reunited and lives transformed. These are the memories that sustain us all and motivate us to continue to reach out. ▲

Robert B. Thornhill, MS, LPC, director, Alabama Lawyer Assistance Program, (334) 517-2238 or (334) 224-6920, *robert.thornhill@alabar.org*

Retreat attendees enjoy sharing a meal at Camp Sumatanga.

Pro Bono Attorneys Honored at Alabama Supreme Court

Each year, the Alabama State Bar takes part in a National Celebration of Pro Bono in October. Alabama's Pro Bono Month is filled with activities encouraging and recognizing pro bono service, as well as a host of opportunities for lawyers to volunteer their time at legal clinics around the state. During Pro Bono Month last fall, the Alabama Access to Justice Commission and Alabama Supreme Court held their first annual reception recognizing Alabama lawyers who generously devoted 50 or more hours of their time to pro bono service during the preceding year.

The event took place in the rotunda of the Alabama Supreme Court, and was attended by a number of the justices, other judges from around the state, commission members and many of the honorees. In his remarks, Chief Justice Roy Moore recognized the plight of many low-income Alabamians who struggle to navigate the justice system without help, and the ever-increasing need for Alabama attorneys to step forward to provide that help. He also noted how the funding crisis in the courts makes it even more difficult to achieve justice.

The 88 attorneys listed below were honored for their exemplary service to low-income people and to nonprofit organizations that assist the poor. The Access to Justice Commission and the court believe that many more Alabama lawyers are also deserving of this recognition, and encourage any attorney who may be eligible to visit the commission's website (*http://www.alabamaatj.org/i-can-help/recognizing-pro-bono-work/)* to review the criteria and report their 2015 pro bono hours before next year's event.

John M. Aaron, Alabaster
Samuel Adams, Montgomery
Jennifer M. Anderson, Birmingham
Melanie M. Atha, Birmingham
Kellie S. Avery-Tubb, Hoover
April E. Bauder, Hoover
Rebecca A. Beers, Birmingham
Elizabeth L. Blair, Birmingham
Lisa W. Borden, Birmingham
Coby M. Boswell, Huntsville
Henry H. Brewster, Jr., Mobile
Robin L. Burrell, Birmingham
Dana R. Burton, Huntsville
Bruce A. Burttram, Vestavia
James A. Byram, Jr., Montgomery
Joel T. Caldwell, Montgomery
J. Craig Campbell, Mobile
Abigail H. Clarkson, Vestavia
Patricia Clotfelter, Birmingham
Lula M. Cole, Leeds
Eric D. Coleman, Bessemer
Megan B. Comer, Mobile
Maureen K. Cooper, Huntsville
Catherine P. Crowe, Birmingham
Sydney G. Dean, Huntsville
Patricia A. Doblar, Hoover
Melissa L. Doggett, Birmingham
Royal C. Dumas, Montgomery
Linda A. Fiveash, Birmingham
Honora M. Gathings, Birmingham
James B. Griffin, Birmingham
Matthew A. Griffin, Hoover
William P. Hahn, Birmingham
Linda Hall, Birmingham
Ginger W. Hamilton, Helena
Lorrie L. Hargrove, Birmingham
Felicia D. Harris-Daniels, Birmingham
S. Scott Hickman, Tuscaloosa
Joshua L. Hornady, Birmingham
Jennifer L. Howard, Birmingham
Herndon Inge, III, Mobile
Jeffrey B. Irby, Huntsville
Frank S. James, III, Birmingham
John F. Janecky, Mobile
Leon K. Johnson, Alabaster
Jamie A. Johnston, Montgomery
Andrew M. Jones, Mobile
Loring S. Jones, III, Vestavia
Priscilla L. Kelley, Hoover
Pamela L. Bowlin Kilgore, Mountain Brook
J. Flint Liddon, III, Birmingham
Charles J. Lorant, Vestavia
E. De Martenson, Birmingham
Kimberly B. Martin, Huntsville
Allen W. May, Jr., Tuscaloosa
Samuel J. McLure, Montgomery
Mitchell D. McNaylor, Harvest
Kelly F. McTear, Montgomery
T. Anderson Mears, II, Birmingham
John B.D. Milledge, Birmingham
Louis M. Montgomery, Birmingham
Carolynn H. Moore, Birmingham
Harold D. Mooty, III, Huntsville
W. Ryan Myers, Birmingham
George R. Parker, Montgomery
Ashley N. Penhale, Montgomery
Staci M. Pierce, Birmingham
Anderia B. Powers, Birmingham
Honza Jan Ferdinand Prchal, Birmingham
William F. Prosch, Jr., Birmingham
Tiffany P. Rainbolt, Birmingham
Wesley Clyde Redmond, Birmingham
Ian D. Rosenthal, Mobile
L. Thomas Ryan, Jr., Huntsville
T. Shane Smith, Vestavia
Tiffin M. Taylor, Huntsville
Renee E. Thiry, Mobile
Ida L. Tyree-Hyche, Birmingham
William K. Uemura, Huntsville
Abigail P. Van Alstyne, Birmingham
Andrew P. Walsh, Birmingham
Patrick J.R. Ward, Mobile
Reilly K. Ward, Birmingham
Martin E. Weinberg, Shannon
Amber M. Whillock, Birmingham
Richard R. Williams, Mobile
Donald F. Winningham, III, Birmingham
Ricardo A. Woods, Mobile

"Magna Carta: Enduring Legacy 1215-2015"

Display Coming to Heflin-Torbert Judicial Building

Marking the 800th anniversary of the Magna Carta, a charter sealed by King John of England, recognized as the foundation of the rule of law in modern democracies, the American Bar Association's Standing Committee on the Law Library of Congress, the Library of Congress and its Law Library have selected the Heflin-Torbert Judicial Building in Montgomery to host the exhibit "Magna Carta: Enduring Legacy 1215-2015."

The Supreme Court of Alabama, the Federalist Society for Law & Public Policy Studies and the Blackstone Center for Law and Liberty at Thomas Goode Jones School of Law at Faulkner University are sponsoring the exhibit which will run October 11-31 in the rotunda of the Heflin-Torbert Judicial Building at 300 Dexter Avenue. The exhibit will be open from 8 am to 5 pm, Monday through Friday, and there is no charge for admission.

"The Supreme Court of Alabama is honored to host this exhibit in our building," acting Chief Justice Lyn Stuart said. "I am excited to have this exhibit and invite everyone to come and learn more about the Magna Carta, a document which greatly influenced the Founding Fathers of our country and the republic which they created."

The exhibit, featuring images of objects from Library of Congress collections, an interpretive video and other materials illustrating the Magna Carta's impact throughout the centuries and how it came to be recognized as the foundation of modern democracy, gives visitors the chance to learn more about the document's enduring legacy. It has traveled throughout the United States for the past year and a half, showing in public buildings such as courthouses, law schools, state capitol buildings, universities and public libraries.

The exhibit is a joint project by the American Bar Association Standing Committee on the Law Library of Congress, the Library of Congress and its Law Library.

For more information, contact the Alabama Supreme Court and State Law Library at (800) 236-4069 or (334) 229-0578. Information will also be available at *http://judicial.alabama.gov*.

With more than 400,000 members, the American Bar Association is one of the largest voluntary professional membership organizations in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education and works to build public understanding around the world of the importance of the rule of law.

The Law Library of Congress was established in 1832 with the mission to make its resources available to members of Congress, the Supreme Court, other branches of the U.S. government and the global legal community and to sustain and preserve a universal collection of law for future generations. With more than five million items in various formats, the Law Library of Congress contains the world's largest collection of law books and other resources from all countries and provides online databases and guides to legal information worldwide at *www.loc.gov/law/.*

The Library of Congress, the nation's oldest federal cultural institution and the largest library in the world, holds more than 158 million items in various languages, disciplines and formats. The Library serves the U.S. Congress and the nation both on-site in its reading rooms on Capitol Hill and through its award-winning website, *www.loc.gov*.

ASB Annual Meeting 2016 & Legal Expo
BAYTOWNE WHARF

2016 AWARD RECIPIENTS

President Copeland and Judge Burt Smithart

President Copeland and Penny Davis

Kate Musso and President Copeland

Judicial Award of Merit Recipient

The Judicial Award of Merit is presented to a judge who is not retired, whether state or federal court, trial or appellate, and is determined to have contributed significantly to the administration of justice in Alabama.

Judge Burt Smithart of Union Springs has been the presiding circuit judge for the 3rd Judicial Circuit (Barbour and Bullock counties) since 1999. His professional achievements include co-chair of the Judicial Education Committee for the Alabama Circuit Judges Association and Alabama Judicial College. He was the 2009-2010 recipient of the Judge Jerry M. White Award for Judicial Excellence. Judge Smithart received his undergraduate degree and his Juris Doctorate from the University of Alabama. Following law school, he practiced in Union Springs until he was elected to his current position.

His community service involvement includes coaching youth sports, helping at the food pantry, serving on educational committees and numerous leadership roles within his church.

Judge Smithart is married to Elizabeth Smithart, also a member of the state bar.

Award of Merit Recipients

This award recognizes outstanding constructive service to the legal profession in Alabama.

Mike Atchison retired last year after 47 years as a trial lawyer. The last 20 years of Atchison's practice were concentrated on complex business and commercial litigation including numerous securities cases. Atchison was also co-outside general counsel to a New York Stock Exchange-listed corporation, a frequent lecturer at legal seminars on a variety of topics and author/co-author of several published articles.

A graduate of Birmingham-Southern College and the Cumberland School of Law, Atchison was awarded an honorary doctorate of laws by Birmingham-Southern College where he served as chair of the board of trustees.

He is a member of the American Board of Trial Advocates, Birmingham Bar Association, Alabama State Bar, American Bar Association and Alabama Defense Lawyers Association and is a fellow of the Alabama Law Foundation and the American College of Trial Lawyers.

Penny Davis graduated from the University of Alabama with a B.S. in education and her M.A. in guidance and counseling and her J.D. During law school, she was the student work editor for the *Alabama Law Review*. Following graduation, she clerked for the Hon. Walter P. Gewin, senior judge of the 5th Circuit Court of Appeals. She recently retired as the associate director at the Alabama Law Institute and has taught at the University of Alabama School of Law since 1984.

Katharine "Kate" Musso is a graduate of Harvard College and Harvard Law School. She is a certified fraud examiner and certified anti-money laundering specialist. Musso advised financial industry clients on regulatory matters and compliance. She retired from Jones Walker LLP at the end of 2015. She and her husband now spend more time in the garden with their rescue dogs.

Jeanne Marie Leslie Service Award

John Brinkley

Squire Gwin

This award recognizes exemplary service to lawyers in need in the areas of substance abuse and mental health and is presented by the Alabama Lawyer Assistance Program Committee.

John Brinkley is a north Alabama lawyer who is active in his local bar, where he was elected as a bar commissioner and serves as the Madison County Volunteer Lawyers Program chair. He is involved in several committees/task forces with the Alabama State Bar. Service to others is an integral part of his life and practice.

Robert W. "Squire" Gwin, Jr., a Birmingham native, is a graduate of Howard College (now Samford University) and the Cumberland School of Law. His practice has been that of a practitioner with a focus on elder law. He is a founding member of the Alabama Lawyer Assistance Program (ALAP), which has been in existence since 1998, and has also served as chair of ALAP for several years.

Rocky Watson and family

William D."Bill" Scruggs, Jr., Award Recipient

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.

For nearly 40 years, **W.N. "Rocky" Watson** has handled civil and criminal trials, domestic relations and business matters including the representation of various local banks.

He graduated from Auburn University with honors in 1971. He then attended the University of Alabama School of Law on scholarship. Upon graduating from law school, he returned to Fort Payne and entered the private practice of law with his father.

After serving two years as the president of the DeKalb County Bar Association at the urging of William D. "Bill" Scruggs, Watson became active with the Alabama State Bar. He served as the bar commissioner from the 9th Judicial Circuit from 1986-1987 and again from 1993-2003. He returned to the Board of Bar Commissioners in 2006 and is still serving. Watson has served in several other capacities with the bar including as a member of the Executive Committee (2000-2001; 2011-2014), vice president of the bar (2011-2012; 2013-2014), member of the Disciplinary Commission (1994-2000; 2001-2003; 2006-present) and as chair of the Disciplinary Commission since 2012. He serves on the Finance and Audit Committee as well as the Personnel Committee of the Alabama State Bar.

Additionally, Watson was the president of the Alabama Law Foundation and is a member of the Board of Trustees for the Alabama Law Foundation. Legal honors include selection as a fellow of the Alabama Bar Foundation and fellow of the American Bar Foundation, and the Alabama State Bar President's Award (2002-2003).

President's Award Presented in Recognition of Exemplary Service to the Profession

President Copeland has chosen to recognize the following members who best exemplify the ASB motto, "Lawyers Render Service."

This is being awarded posthumously following **Mike Turner's** passing on April 8, 2016. Turner attended the University of Alabama in Huntsville. He obtained a B.S. degree in business from the University of Alabama at Birmingham. He then graduated from Lippert's College of Court Reporting, and started practicing as a court reporter in Birmingham.

He took more than 11,000 depositions in places ranging from Ghana, Africa, to Seoul, South Korea, and points in-between. He and his wife, Mickey, owned and operated Freedom Reporting, which is one of the largest privately-owned court reporting companies in the United States, providing more than 100 court reporters, videographers and trial technicians to clients throughout the country.

The Turners were honored with the Alabama State Bar President's Award in 2008 and 2011.

Mike and Mickey Turner

Mickey Turner is a business owner with more than 30 years of leadership and entrepreneurial experience and has been a court reporter for 37 years. She co-founded a firm and sold that firm to a consolidator in the industry and managed it for them for six years. She owns and operates Freedom Reporting, which is one of the largest privately-owned court reporting companies in the United States, providing more than 100 court reporters, videographers and trial technicians to clients throughout the country.

She and her husband, the late Mike Turner, were honored with the Alabama State Bar President's Award in 2008 and 2011.

She is actively involved in the community, legal field and personal development programs.

David Boyd is a partner at Balch & Bingham LLP, practicing in the firm's Alabama offices.

Boyd has served as chair of the Alabama Board of Bar Examiners, a member of the Alabama State Bar's Board of Bar Commissioners, Alabama State Bar vice president and chair of the bar's Disciplinary Commission.

He is past chair of the National Conference of Bar Examiners (NCBE) and former chair and current member of NCBE's Multistate Bar Examination Committee.

Dave Boyd, President Copeland and Sam Franklin

He is chair of the Middle District of Alabama's History Committee, serves on the Executive Committee of the Alabama Law Institute and as a member of the Alabama Supreme Court's Advisory Committee on the Rules of Civil Procedure. He is a fellow and former president of the Alabama Law Foundation and a fellow of the American Bar Foundation.

Samuel H. Franklin is a native of Brewton and a founding member of Lightfoot Franklin White LLC. Although oral arguments before the Alabama Supreme Court are less frequent now, he has had the privilege to argue before them on several occasions.

Franklin is a fellow in the American College of Trial Lawyers and an advocate of the American Board of Trial Advocates. He served on the Board of Regents of the American College of Trial Lawyers and also as secretary. He is a former president of the Alabama Defense Lawyers Association, and has been active in the Alabama State Bar. He is a fellow of the Litigation Counsel of America and has been presented with the association's Peter Perlman Service Award. In 2006, he received the Commissioners' Award from the Alabama State Bar.

He currently serves on the board of the Birmingham Bar Association Volunteer Lawyers' Program and served as chair of the BVLP Private Bar.

Prior to graduating from Auburn University in 1975 with a degree in journalism, **Dennis R. Bailey** was a scholarship baseball player who received Academic All-SEC honors. He attended the Cumberland School of Law at Samford University where he served on the editorial board of the *Cumberland Law Review*. After serving as a federal law clerk in the Middle District of Alabama for one year, Bailey began practicing law with the Rushton Stakely firm in Montgomery where he is a shareholder.

A former newspaper reporter, cartoonist and magazine editor, he has been involved in media law since 1980, particularly matters involving First Amendment rights and open government. He has served for years as general counsel for the Alabama Press Association and other media clients, and now supervises a statewide media hotline. The Alabama Legislature has recognized him as being instrumental in the process leading to the passage of the Open Meetings Act. He is a member of the American Board of Trial Advocates and a member of the Board of Directors of the Alabama Defense Lawyers Association.

Tony McLain and Prof. Charles Gamble

J. Anthony "Tony" McLain Professionalism Award

This award is given to recognize members for distinguished service in the advancement of professionalism.

Professor Charles W. Gamble received his B.S. degree from Jacksonville State University, J.D. degree from the University of Alabama (where he served on the *Alabama Law Review* and was elected to Order of the Coif) and a LL.M. degree from Harvard University.

He practiced with Lybrand, Sides & Hamner in Anniston after joining the business law faculty of Jacksonville State University. Professor Gamble taught for 10 years at the Cumberland School of Law where he last served as the J. Russell McElroy Professor of Law. He joined the University of Alabama School of Law as acting dean and professor of law in 1982. He was dean of the law school from 1984 to 1987 and served as the Henry Upson Sims Professor of Law from 1987 to 2006.

He received the University of Alabama National Alumni Association Outstanding Commitment to Teaching Award, the Jacksonville State University Alumnus of the Year Award, the Student Bar Association's Outstanding Faculty Award and the Sam W. Pipes Distinguished Alumnus Award. He was reporter to the Committee on the *Alabama Rules of Evidence*, a member of the Alabama Pattern Jury Instructions Committee Civil and a member of the Civil Justice Reform Working Committee. Professor Gamble is the author of several books and numerous law review articles.

ASB Annual Meeting 2016 & Legal Expo

BAYTOWNE WHARF

Judge Sharon Yates (photo by Eugene R. Verin)

Maud McLure Kelly Award

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

Judge Sharon Yates obtained her bachelor of science degree, her M.A. and her J.D. from the University of Alabama School of Law.

Judge Yates was the first woman elected to serve on the Alabama Court of Civil Appeals and served her last four years as the first female presiding judge. Judge Yates also served as a district court judge in Montgomery County, where she created and implemented, with the cooperation of the district attorney, the first Misdemeanor Drug Court and Misdemeanor Pre-Trial Diversion Program.

Currently an associate professor of law at Jones School of Law, Judge Yates teaches evidence, professional responsibility, criminal law and appellate advocacy.

Judge Yates was inducted into the Alabama Women's Academy of Honor by the Alabama Business and Professional Women's Foundation and was honored by the Girl Scouts of Southern Alabama, Inc. as one of its "Women of Distinction."

Local Bar Achievement Awards Recipients

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.

Accepting for the Tuscaloosa County Bar Association is Scott Holmes with President Copeland.

Accepting for the Mobile Bar Association is Pete Mackey with President Copeland.

Accepting for the Covington County Bar Association is Bill Alverson with President Copeland.

Accepting for the Montgomery County Bar Association is Royal Dumas with President Copeland.

Volunteer Lawyers Program Pro Bono Awards Recipients

Jeanne Dowdle Rasco and President Copeland

Pat Clotfelter, Lisa Borden and President Copeland

Accepting for Carly Calhoun is Glory McLaughlin with President Copeland

Al Vreeland Award Recipient

Jeanne Dowdle Rasco, with the City Attorney's Office in Huntsville, became involved in the Alabama State Bar Volunteer Lawyers Program in 2006 while in private practice in Talladega County. From the time Rasco took her first VLP case, there was no looking back.

She became more and more involved in the program, initially setting up a wills clinic at the Talladega Alabama Industries for the Blind, as well as accepting case referrals through the program. Rasco was placed on the first Pro Bono Celebration Task Force and served as chair of the Law School Involvement Committee. She served as vice chair of the task force in an effort to develop a CLE program that served as a national model for the ABA and Rasco also served as chair of the task force. She served as vice chair and chair of the Pro Bono and Public Service Committee. Rasco was involved in the Social Return on Investment study and the Community Conversations held around the state as a result.

Her leadership has made the Volunteer Lawyers Program stronger and resulted in national recognition of Alabama's Pro Bono Celebration and more importantly the increased provision of legal services to those in need around the state.

Firm/Group Award Recipient

Baker Donelson Bearman Caldwell & Berkowitz in Birmingham is the only law firm in Alabama that devotes the majority of the time of a full-time, partner-level attorney to developing and expanding its pro bono program.

More than 50 Baker Donelson lawyers contributed pro bono hours during 2015 and the firm has contributed more than 20,000 pro bono hours over the last five years. The majority of these hours have been devoted to civil advice and litigation on behalf of indigent Alabamians. These civil matters have included numerous divorce, adoption, probate and consumer credit cases referred by the Birmingham Volunteer Lawyers Program.

Baker Donelson has also represented individual and class plaintiffs in litigation involving violations of civil rights in Alabama's prison system. Their litigation against the City of Harpersville, Alabama for running a debtors' prison in connection with its municipal court succeeded in shutting down the municipal court and having fines and fees of dozen of clients dismissed. The Shelby County Circuit Court enjoined the practices of the municipal court and its private probation company, Judicial Correction Services, in an order that called their practices a "judicially sanctioned extortion racket." Judicial Correction Services ultimately left the State of Alabama altogether, abandoning more than 100 contracts with municipalities in the state.

Law Student Award Recipient

Carly Calhoun, a student at the University of Alabama School of Law, has been an active volunteer since her first day of law school. Before her first-year orientation program even began, she signed up for a voluntary Day of Service organized by Alabama's Public Interest Student Board. Since then, she has been a regular participant in nearly every pro bono project offered through the law school.

She has volunteered with the Long-Term Care Ombudsman Program, Veterans' Legal Assistance Clinic, Prison Reentry Clinic, Habitat for Humanity Wills Clinic, Project Homeless Connect and Wills for Heroes. Calhoun has contributed more than 75 hours of community service and pro bono work during her first two years of law school.

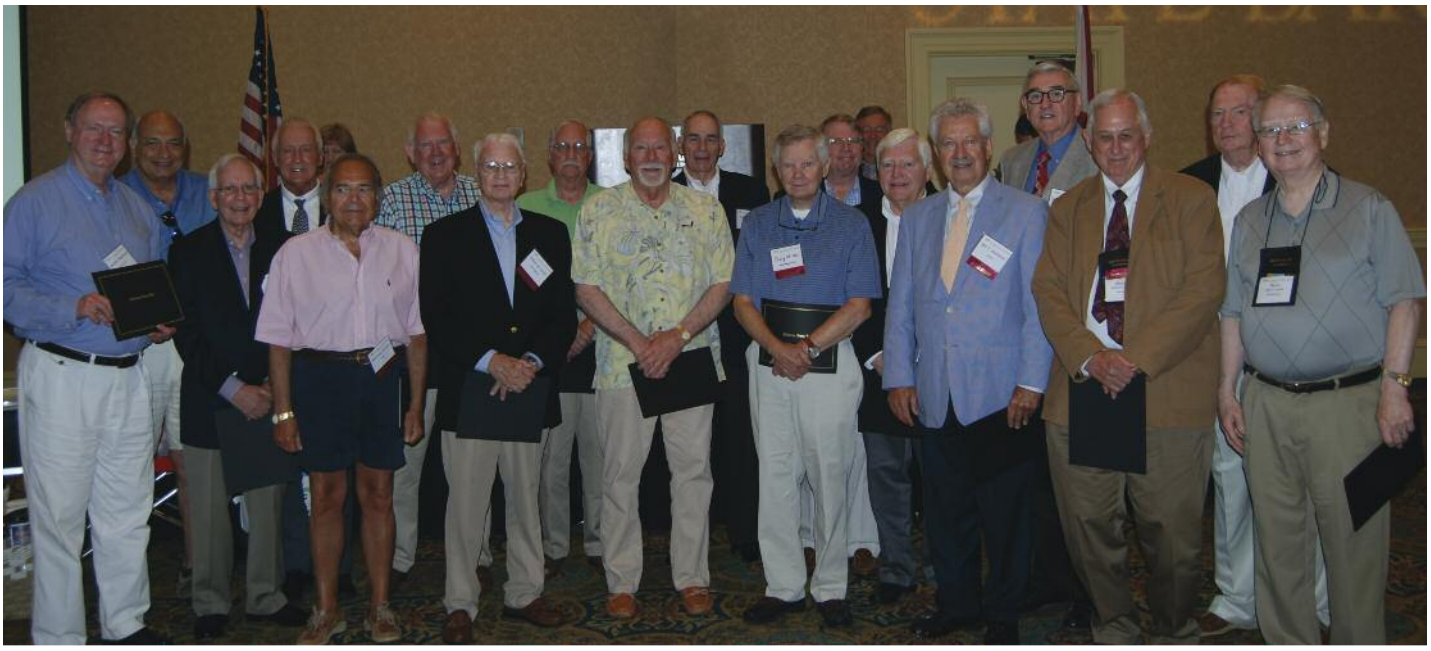
Not only is she a consistent and reliable presence at the Public Interest Institute's events and pro bono programs, she always shows up with a smile on her face and a willingness to do whatever is needed. She regularly goes above and beyond what is expected of her and in doing so exemplifies what it means to be a servant leader.

Cassandra Adams and President Copeland

Mediation Award Recipient

Thanks to **Cassandra W. Adams'** efforts, more than 180 hours of pro bono mediation assistance was provided last year, which helped 75 clients. Additionally, as the director of the Cumberland Community Mediation Center, Adams has trained volunteers to provide free and confidential mediation services to the greater Birmingham community. These services have also saved the courts untold hours.

Pro bono services developed under her leadership and offered by the center include the Samford Residential Life Mediations Program, which provides mediation services to students in Samford University's resident halls; providing mediation services to schools needing assistance to resolve disputes arising between students, parent-teacher issues, student-teacher, etc.; providing mediation to the courts; working with Tarrant City Schools and the Birmingham Bar Foundation to launch the Resolve to Solve Peer Mediation Program; partnering with the Alabama Cooperative Extension System to develop a community mediation center/family mediation curriculum to assist senior citizens with conflict resolution and transitional aging issues; and conducting educational workshops to inform the community about the benefit of mediation and availability of free confidential services.



50-Year Members

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ANNUAL MEETING PHOTO HIGHLIGHTS

WEDNESDAY
June 22, 2016

David Skinner, Allison Skinner and Mark Moody kick-start the 2016 Annual Meeting!

President-elect Cole Portis takes a break with daughter Emme and sons Samuel and Jim.

Past presidents are still appreciated!

Winners of most annual meetings attended are Mary Jane Oakley and her brother, Michael Oakley.

The heat and humidity couldn't dampen the spirits of the Family Night Party.

THURSDAY
June 23, 2016

Tom Heflin visits with plenary speaker Mike House.

Bill Broome and Terrie Morgan get their copies of Between Black and White *autographed by author Robert Bailey.*

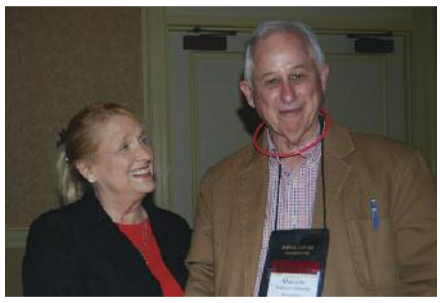
Attendees, including Elizabeth Smithart, enjoy the annual Bloody Mary and Mimosa Reception.

Attendees relax and enjoy a "Mindful Movement" on the hotel veranda.

Maybe Cassandra Adams's boa is the reason for the big smiles!

Mike Stewart and his daughter prove annual meetings are for families, too.

The Diversity Reception is fun for everyone…



…Including "young-at-heart" Malcolm Wheeler and his wife.

FRIDAY
June 24, 2016

Cooper Shattuck thanks Chance Corbett (left) after his very popular interactive workshop on active shooter awareness training.

Enjoying their annual get-together are past presidents, front row, left to right, Boots Gale, Sam Crosby, Justice Sonny Hornsby, Fred Gray, Johnny Owens and Larry Morris. Middle row: Mark White, Jim Pratt, Phillip McCallum, Doug McElvy, Alva Caine, Bill Clark and Rich Raleigh. Back row: Phil Adams, Tom Methvin and "AJ" Joseph

"Diversity" CLE moderator Augusta Dowd (third from left) with panelists Shane Smith, Hope Cannon, Tamula Yelling, Kendall Dunson and Anil Mujumdar

Everyone enjoyed listening to The WingNuts with lead singer District Judge Alan Furr.

Acting Chief Justice Lyn Stuart supports the Women's Section Silent Auction by getting her bid number.

President Copeland and son Albert show off their matching "accessories."

Past President Doug McElvy watches grandson Jack dance.

SATURDAY
June 25, 2016

Past President Sam Crosby, attorney/author Liz Huntley and plenary speaker Mike House chat Saturday morning.

Enjoying a laugh and looking forward to the future are President Lee Copeland and Executive Director Keith Norman.

Rich Raleigh presents a plaque to Michelle Mosley, President Copeland's legal assistant, recognizing her extraordinary efforts during the past year.

Music provided by the Sean Dietrich Jazz Trio was enjoyed at the Presidential Reception.

Mark Debro and his wife at the Presidential Reception honoring 2016-17 President Cole Portis

Getting their ducks in a row after the Grand Convocation are past President Lee Copeland with wife Jessica and sons Hall and Albert.

Keith Norman seems to enjoy his new rocking chair while watching his "swan song" video at his last annual meeting as executive director.

Soon-to-be past President Lee Copeland gives soon-to-be President Cole Portis that one important piece of advice.

YLS UPDATE

Hughston Nichols
hnichols@hwnn.com

If you are a young lawyer, please join our section. We are constantly making efforts to provide valuable opportunities to serve the legal profession and our communities, to obtain CLE credits and to network with other young lawyers from around the state.

We have another big year planned for the section which will include the **Iron Bowl CLEs**, the award-winning **Minority Pre-Law Conferences** and our annual **Orange Beach CLE**. This past year, we saw more than 700 young lawyers join the section and we are hoping to surpass 1,000 for this upcoming bar year.

We are an opt-in section, which means you must join our section at the beginning of the state bar's fiscal year. Becoming an opt-in section has allowed the YLS leadership to identify those young lawyers who are interested in participating in ASB and YLS activities.

This is my last column as YLS president and I thank my firm, Hare Wynn, for giving me the opportunity to serve on the YLS Executive Committee for the past nine years. Leadership in the YLS has been both a rewarding and challenging experience, and I encourage any servant-minded young lawyers interested in getting involved in state bar activities and meeting exceptional people from around the state to contact a committee member for more information. The section will be in good hands with the new slate of officers:

Parker Miller, president (Montgomery)
Lee Johnsey, vice president (Birmingham)
Rachel Miller, secretary (Montgomery)
Robert Shreve, treasurer (Mobile)

The YLS Executive Committee includes **Evan Allen, Jesse Anderson, Lance Baxter, Chris Burrell, Joel Caldwell, Rachel Cash, Aaron Chastain, Megan Comer, Emily Crow, Beau Darley, Lisha Graham, Harris Hagood, Morgan Hofferber, Janine McAdory, Rachel Miller, Wyatt Montgomery, Hal Mooty, Amy Nation, Nathan Ryan, Scott Sasser, Julia Shreve, Miland Simpler** and **Danielle Starks**. And we welcome the following new members to the Executive Committee this year: **Joe Aguirre, Jeremy Glassford, Brett Holsombeck, Jameson Hughston, Ainka Jackson, Carol Montgomery, Leslie Pescia, Zac Turner, Roger Varner** and **Kimberly Waldrop**. The officers and committee members have exciting things planned for this year and I know the new section leadership will serve the young lawyers in this state well.

Be sure to keep up with the YLS through our social media platforms at *https://facebook.com/ABSyounglawyers, https://twitter.com/absyounglawyers* and/or *https://instagram.com/asbyounglawyers*.

For more information on getting involved in the YLS or helping out with any of our upcoming events, contact any of our executive committee members or Parker Miller at *parker.miller@beasleyallen.com*.

ARTICLE SUBMISSION REQUIREMENTS

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

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

All articles to be considered for publication must be submitted to the editor via email (*ghawley@joneshawley.com*) in Word format. A typical article is 13 to 18 letter-size pages in length, double-spaced and 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.

DISCIPLINARY NOTICES

Notices

- Notice is hereby given to **Jason Michael Barnhart,** who practiced in Birmingham and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated May 12, 2016, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2015. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 16-692]
- Notice is hereby given to **Lesa Greene Chandler,** who practiced in Athens and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated May 12, 2016, she has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2015. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 16-695]
- Notice is hereby given to **Elizabeth Schadt Gordon,** who practiced in Tuscaloosa and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated May 12, 2016, she has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2015. Noncompliance with the MCLE requirements shall result in a suspension of her license. [CLE No. 16-705]

Transfer to Disability Inactive Status

- Birmingham attorney **Gregory Lee Case** was transferred to disability inactive status pursuant to Rule 27(b), *Alabama Rules of Disciplinary Procedure*, effective April 26, 2016, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the April 26, 2016 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to a petition submitted to the Office of General Counsel requesting Case be transferred to disability inactive status. [Rule 27(c), Pet. No. 2016-615]

Suspensions

- Tuscaloosa attorney **Donnis Cowart** was suspended from the practice of law in Alabama for 180 days, effective May 6, 2016. In ASB No. 2015-623, Cowart violated Rules 1.2 (d), 4.1, 1.16 (a) and 8.4 (a) and (g), *Ala. R. Prof. C.* Cowart admitted that he allowed his trust account to be used in a sham investment scheme wherein he defrauded his client. The complainant, relying on Cowart's involvement and his statements regarding the validity of the transaction, wired funds to Cowart's trust account. Cowart disbursed the funds to himself and others upon the direction of his client, and repeatedly assured the complainant the return on his investment was forthcoming, even though he knew or should have known the scheme was predicated upon plainly fraudulent, forged or meaningless documents. Cowart was ordered to make restitution to the complainant as a pre-condition of reinstatement. [ASB No. 15-623]

- Montgomery attorney **Joseph Lee Fitzpatrick, Jr.** was summarily suspended from the practice of law in Alabama by the Disciplinary Commission of the Alabama State Bar, effective June 8, 2016, for failing to respond to formal requests for a written response concerning a disciplinary matter. Fitzpatrick subsequently submitted a written response and petitioned for dissolution of the summary suspension. The Disciplinary Commission granted the petition and ordered that the summary suspension be dissolved on June 10, 2016. [Rule 20(a), Pet. No. 2016-838]

- Gadsden attorney **David Keith McWhorter** was suspended from the practice of law in Alabama for 42 months, effective May 1, 2016. In ASB No. 2014-1035, McWhorter violated Rules 1.15(a), (b), (c) and (n) and 8.4 (a) and (g), *Ala. R. Prof. C.* McWhorter obtained an advance from a third party secured by his fee in a specific matter. Thereafter, he failed to deposit or preserve the portion of the client's settlement in which the third party had an interest in his trust

(Continued from page 371)

account, to notify the third party of receipt of the funds or to disburse to the third party its funds.

In ASB No. 2015-1132 McWhorter violated Rules 1.1, 1.3, 1.4, 1.15 (a), (b), (e) and (n) and 8.4 (a) and (g), *Ala. R. Prof. C.* McWhorter failed to deposit a $1,100 advance payment of legal fees into his trust account. Thereafter, he failed to communicate with his client or perform the legal services for which he was hired, and failed to appear at the client's hearing. After the client terminated the representation, McWhorter failed to refund the unearned fees until a bar complaint was filed.

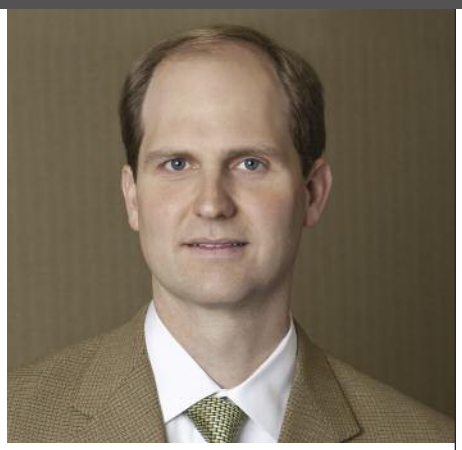
In ASB No. 2015-1379 McWhorter violated Rules 1.15 (a), (e) and (n) and 8.4 (a) and (g), *Ala. R. Prof. C.* McWhorter comingled his personal funds with client funds in his trust account, used his trust account for personal transactions and disbursed funds from his trust accounts to cash via ATM withdrawals.

In all these matters McWhorter failed to maintain or produce upon the request of the Office of General Counsel records he is required to maintain and produce by the *Alabama Rules of Professional Conduct*. [ASB Nos. 14-1035, 15-1132 and 15-1379]

- Mobile attorney **Richard Leigh Watters** was suspended from the practice of law in Alabama for three years and 90 days by the Disciplinary Commission of the Alabama State Bar. Watters will serve the 90-day suspension beginning June 15, 2016, while the three-year suspension will be

held in abeyance at which time Watters will be placed on probation, with conditions, for the three-year period. On May 12, 2016, the Supreme Court of Alabama entered a notation of Watters's suspension. The supreme court entered its notation based upon the Disciplinary Commission's acceptance of Watters's conditional guilty plea, wherein Watters pleaded guilty to violating Rules 1.8(a), 5.3, 5.5(a)(2), 8.4(a) and 8.4(g), *Ala. R. Prof. C.* Watters admitted he entered into a business transaction with a client and employed a disbarred attorney. [ASB Nos. 2013-1447 and 2015-678]

- Mobile attorney **Kimberly Leona Bell** was suspended from the practice of law in Alabama for 60 days, by order of the Supreme Court of Alabama, effective April 21, 2016. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Bell's conditional guilty plea, wherein Bell pled guilty to violating Rules 3.4(c) and 8.4(g), *Ala. R. Prof. C.* Bell had requested to be transferred to disability inactive status in September 2013. After being transferred to disability inactive status, Bell returned to her law firm where she performed secretarial and other paralegal duties. Bell failed to obtain permission of the Disciplinary Commission to work for the law firm. On March 7, 2016, Bell petitioned for reinstatement to the active practice of law in Alabama and was subsequently reinstated by order of the Supreme Court of Alabama, effective April 12, 2016. [ASB No. 2011-1497] ▲



Wilson F. Green

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

Marc A. Starrett

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

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Mandamus

***Ex parte Watters*, No. 1140526 (Ala. June 3, 2016)**

Summary judgment order rejecting statute of limitations defense, which did not involve a complaint which on its face was time-barred, is not an order from which mandamus relief is available.

Set-Off

***Har-Mar Collisions, Inc. v. Scottsdale Insurance Company*, No. 1141230 (Ala. June 3, 2016)**

Trial court's order of set-off based on settlements with other parties was improper because the settlements did not implicate a joint obligation those entities might have with the judgment defendant.

Rule 27

***Ex parte City of Montgomery*, No. 1150439 (Ala. June 10, 2016)**

Rule 27(a) explicitly requires a petitioner to show that she is presently unable to bring an action; the rule also limits pre-action discovery to the purpose of preserving evidence. Rule 27(a) does not allow pre-action discovery for evaluating a claim.

Relation Back; Fictitious Parties

***Ex parte Lucas*, No. 1150382 (Ala. June 10, 2016)**

Plaintiff failed to exercise due diligence in ascertaining the identity of Lucas as potential defendant; Lucas was not identified on the original accident report, but was identified on the second accident report prepared by the officer, which was public record.

Amendments; Good Cause

***Ex parte Alfa Mut. Ins. Co.*, No. 1141038 (Ala. June 10, 2016)**

Plaintiffs failed to demonstrate good cause for excessive delay in amending complaint when they should have known of the claims when they filed their original complaint. Defendants could not fully and fairly defend against the claims added by amendment because a key witness had died.

Open Records; Student Financial Records

***Kendrick v. The Advertiser Co.*, No. 1150275 (Ala. June 24, 2016)**

Financial-record privacy requirements in the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g, prohibited disclosure even of students' names and sports on their financial aid forms, because those would necessarily disclose financial aid status.

IRAs; Contract

***Dees v. Dees*, No. 1150107 (Ala. June 24, 2016)**

Father's IRA provided that beneficiary(ies) designated in account agreement would receive proceeds upon death, or, if no beneficiary was designated, benefits would go to surviving spouse. Account agreement with purported designation was destroyed. At time of agreement, father was married to mother and had three children. Later, mother died; father remarried wife 2, then wife 3 and then he later died. For a number of years, father received notices that he had not designated a beneficiary, and that he needed to do so to avoid the default designation. No designation occurred. However, children testified that father had told them that they were receiving the proceeds of the IRA. The circuit court held that default beneficiary provision in original IRA agreement was unambiguous, entitling wife 3 to proceeds. The supreme court reversed, holding that genuine issue of

(Continued from page 375)

material fact existed as to designation based on children's testimony of what father had designated.

Venue; Forum Non Conveniens

***Ex parte Interstate Freight USA, Inc.*, No. 1141422 (Ala. June 24, 2016)**

(1) venue was proper in Baldwin County (county of plaintiff's residence), because Interstate was doing business by agent in Baldwin County based on evidence that Interstate delivered 61 loads of freight there in a 54-week period and thus was physically present there continually, and thus venue was proper there, but (2) interests of justice mandated transfer to St. Clair County, because that is where the alleged wrongful conduct occurred and where the alleged misrepresentations were made–thus, St. Clair County had a comparatively stronger connection to the dispute.

Personal Jurisdiction

***Hinrichs v. General Motors of Canada, Ltd.*, No. 1140711 (Ala. June 24, 2016)**

Two-plus years into this products liability litigation, GM Canada moved to dismiss for lack of personal jurisdiction, which was eventually granted. In 101 pages of opinions, the majority opinion of which is a compendium of law concerning personal jurisdiction in product-liability cases regarding interstate movement of goods, the court held: (1) GM Canada's contacts with Alabama were not so continuous and systematic as to render GM Canada "at home" in Alabama for purposes of establishing general personal jurisdiction; and (2) GM Canada's contacts with Alabama related to the accident were not sufficient to trigger specific jurisdiction, because for specific jurisdiction to exist, GM Canada's in-state activity must give rise to the episode-in-suit and involve adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction (and there was no evidence of such contacts in this case). Foreseeability of movement of goods into forum standing alone is not sufficient to subject a nonresident defendant to specific jurisdiction in the forum state. Justice Shaw was recused, leaving an eight-member court. The majority opinion on general jurisdiction and plurality opinion on specific jurisdiction is *per curiam*, joined by four justices, one being retired Justice Lyons.

Legal Services Liability

***Cockrell v. Pruitt*, No. 1140849 (Ala. June 30, 2016)**

Fraud committed by an attorney that defrauds the attorney's client as to the status of the client's underlying claim is actionable under the Alabama Legal Services Liability Act, separate and apart from the attorney's failure to timely file a complaint on the underlying claim.

Wrongful Death; Standing and Capacity of Personal Representative

***Northstar Anesthesia of Alabama, LLC v. Noble*, No. 1141158 (Ala. July 8, 2016)**

Decedent died; estate was opened and a PR appointed. Estate was later closed and PR discharged. PR later filed wrongful death case within the two-year statute of limitations; PR moved probate court to reopen estate and to reappoint her as PR. That reappointment was granted after the limitations period had expired. Defendants did not raise lack of standing or capacity in their answers, but later moved for summary judgment, contending that the wrongful death complaint was a nullity because PR lacked capacity and standing at the time of suit, and that reappointment did not relate back. The supreme court agreed, holding that the action was a nullity when filed, and that nothing can relate back to a nullity.

Medical Malpractice; Statute of Repose; Accrual

***Cutler v. University of Alabama Health Services Foundation, P.C.*, No. 1150546 (Ala. July 8, 2016)**

Alleged medical negligence (failure to inform patient of presence of tumor) occurred in 2005. However, plaintiff maintained that his cause of action did not accrue until February 11, 2015, when, he says, he first suffered a legal injury–a seizure requiring him to undergo a surgical resection of the tumor. The claim was barred by the four-year rule of repose under section 6-5-482, however, because plaintiff specifically alleged that the tumor grew in the four years after June 2005.

Wrongful Death; Action a "Nullity"

***Ex parte Bio-Medical Applications of Alabama, Inc.*, No. 1150362 (Ala. July 15, 2016)**

Wrongful-death action commenced by someone not a personal representative is a nullity; plaintiff could not substitute actual personal representative after expiration of the statute of limitations.

From the Alabama Court of Civil Appeals

Workers' Compensation; "Going and Coming" Rule

***Hospice Family Care v. Allen*, No. 2140861 (Ala. Civ. App. June 10, 2016)**

Evidence supported trial court's conclusion that death was compensable under an exception to the "going and coming" rule. HFC had encouraged nurse employees to complete integral parts of their duties at home or in any other location they chose. Employee's stop at pharmacy on a purely personal errand en route home did not render the death noncompensable, because the deviation was not an abandonment of employee's duties.

Administrative Law; Venue

***Ex parte Alabama Board of Cosmetology and Barbering*, No. 2150652 (Ala. Civ. App. June 17, 2016)**

Ala. Code § 34-7B-11(b) requires that venue for any appeal of administrative action lies in the Circuit Court of Montgomery County.

Fraud; Reasonable Reliance

***Price v. Alabama One Credit Union*, No. 2141012 (Ala. Civ. App. June 17, 2016)**

(Continued from page 377)

Plaintiff could not reasonably rely on oral misrepresentations concerning identity of purchaser of ownership interests in development entity; closing statement in plaintiff's possession and provided contemporaneously clearly disclosed identity of purchaser.

Easements

***Hall v. Hall*, No. 2150266 (Ala. Civ. App. June 24, 2016)**
Evidence did not support finding of an easement by prescription, by necessity or by implication, because (1) as to prescription, there was no exclusive and continuous hostile use; (2) as to necessity, there was no unity of original ownership; and (3) as to implication, there was no active use.

Unlawful Detainer; Time for Appeal

***McWhorter v. Parsons*, No. 2150555 (Ala. Civ. App. July 8, 2016)**
Time for taking appeal from district court to circuit court in unlawful detainer under *Ala. Code* § 35-9A-461(d) is seven calendar days.

Easements

***Quinn v. Morgan*, No. 2150189 (Ala. Civ. App. July 15, 2016)**
Evidence supported grant of an easement by prescription, based on the use of a driveway, without permission from the driveway's owner, and which was the only means of vehicular ingress and egress to plaintiff's property.

Workers' Compensation

***Smith v. Brett/Robinson Construction Company, Inc.*, No. 2140245 (Ala. Civ. App. July 22, 2016)**
Substantial evidence supported trial court's conclusion that surgery for torn meniscus was non-compensable, given treating physician's records and testimony that worker's main problems now stemmed from pre-existing arthritis.

Municipal Law

***East Central Baldwin County Water, Sewer and Fire Protection Authority v. Town of Summerdale*, No. 2130708 (Ala. Civ. App. July 22, 2016)**
Held: (1) although review of a county commission's actions is subject to "arbitrary and capricious" review when the commission exercises discretion, in this case, *Ala. Code* § 11-88-5(d) imposes a mandatory duty on the commission to deny an application if the commission finds that the statements in the application are not true, and thus deferential review is not appropriate; (2) "adequate" in section 11-88-5 means "capable of providing service," and thus the towns' undisputed ability to provide service in the ECB expanded territory (despite the towns' apparent decision to choose not to provide such service) rendered ECB's application factually wrong.

From the United States Supreme Court

Administrative Law

***U.S. Army Corps of Engineers v. Hawkes Corp.*, No. 15-290 (U.S. May 31, 2016)**
Corps' jurisdictional determination as to whether certain waters were navigable and thus subject to Corps jurisdiction is a final agency action subject to review under the Administrative Procedure Act.

Jury Trials

***Dietz v. Bouldin*, No. 15-458 (U.S. June 9, 2016)**
Federal district court has a limited inherent power to rescind a jury discharge order and recall a jury in a civil case for further deliberations after identifying an error in the jury's verdict, under circumstances where the jury members had not left the courthouse (with perhaps one exception, as to a juror who may have briefly left).

False Claims Act

***Universal Health Services, Inc. v. U.S. ex rel. Escobar*, No. 15-7 (U.S. June 16, 2016)**
The implied false certification theory can be a basis for FCA liability. A defendant submitting a claim for payment to the government which makes specific representations about the goods or services provided, but fails to disclose noncompliance with material statutory, regulatory or contractual requirements that make those representations misleading with respect to those goods or services, gives rise to an FCA claim if the certification was material to the government's decision to pay the claim.

Copyright

***Kirtsaeng v. John Wiley & Sons, Inc.*, No. 15-375 (U.S. June 16, 2016)**

When deciding whether to award attorney's fees under § 505 of the Copyright Act, a district court should give substantial weight to the objective reasonableness of the losing party's position, while still taking into account all other circumstances relevant to granting fees.

Patent

***Halo Electronics, Inc. v. Pulse Electronics, Inc.*, No. 14-1513 (U.S. June 13, 2016)**

Section 284 of the Patent Act provides that, in a case of infringement, courts "may increase the damages up to three times the amount found or assessed." 35 U.S.C. § 284. The federal circuit had adopted a two-part test, called the *Seagate* test, for determining whether damages may be increased pursuant to § 284. The Supreme Court rejected *Seagate* as being inconsonant with the language of section 284, because the test is "unduly rigid, and . . . impermissibly encumbers the statutory grant of discretion to district courts."

Puerto Rico; Bankruptcy Preemption

***Commonwealth of Puerto Rico v. California Tax-Free Trust*, No. 15-233 (U.S. June 13, 2016)**

Puerto Rico passed legislation, known as the Recovery Act, which mirrored Chapters 9 and 11 of the *Federal Bankruptcy Code* and would have enabled Puerto Rico's public utility corporations to restructure their climbing debt. The Supreme Court held that the *Bankruptcy Code*, particularly section 903(1), preempts the Recovery Act.

RICO; International Law

***RJR Nabisco, Inc. v. European Community*, No. 15-138 (U.S. June 20, 2016)**

RICO evinces intent by Congress to reach extraterritorial acts with respect to those predicate acts falling within the purview of RICO. Thus, foreign enterprises can be enterprises under RICO, but foreign enterprises will qualify only if they engage in, or significantly affect, commerce directly involving the United States. Additionally, RICO civil liability can extend only to damages which are incurred domestically.

Administrative Law

***Encino Motor Cars, Inc. v. Navarro*, No. 15-415 (U.S. June 20, 2016)**

Courts do not apply *Chevron* deference where a regulation is "procedurally defective"–where the agency errs by failing to follow the correct procedures in issuing the regulation.

Affirmative Action

***Fisher v. University of Texas at Austin*, No. 14-981 (U.S. June 23, 2016)**

The Court upheld, under strict-scrutiny review, UT's use of race as one permissible factor in admissions decisions. As to the "compelling governmental interest" component of the test, "the decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." Additionally, when determining whether the use of race is narrowly tailored to achieve the university's permissible goals, the school satisfied its burden of demonstrating that "available" and "workable" "race-neutral alternatives" do not suffice.

Immigration

***United States v. Texas*, No. 15-674 (U.S. June 23, 2016)**

The Fifth Circuit had affirmed an injunction stopping implementation of the President's immigration policy concerning deportation rankings. The Supreme Court affirmed by an equally-divided Court, so this holding is non-precedential.

Indian Law

***Dollar General Stores, Inc. v. Mississippi Band of Choctaw Indians*, No. 13-1496 (U.S. June 23, 2016)**

An equally-divided Court affirmed the Fifth Circuit's holding that Indian tribal courts have jurisdiction to adjudicate civil tort claims against nonmembers, including as a means of regulating the conduct of nonmembers who enter into consensual relationships with a tribe or its members.

Abortion

***Whole Woman's Health v. Hellerstedt*, No. 15-274 (U.S. June 27, 2016)**

The Court (5-3) invalidated two Texas statutes which (1) required physicians performing abortions to have hospital-admitting privileges at a nearby hospital, and (2) required establishments performing abortions to have facilities akin to surgical centers. The Court (per Justice Breyer) reasoned that these laws place substantial obstacles in the path of a woman's right to abortion and, thus, imposed an undue burden on the exercise of that right. The Court's majority embraced the undue burden test from the plurality opinion from *Planned Parenthood v. Casey*.

(Continued from page 379)

From the Eleventh Circuit Court of Appeals

Labor

***NLRB v. Gaylord Chemical Co.*, No. 15-10006 (11th Cir. June 3, 2016)**

Employer had bargaining relationship with union that predated employer's change of location, employer's operation in new location was continuation of prior operation and, thus, employer had continuing obligation to bargain after the move.

Tax

***Scott v. U.S.*, No. 14-14649 (11th Cir. June 14, 2016)**

Under 26 U.S.C. § 6672, one becomes a "a responsible person" who is required to pay over to the Internal Revenue Service trust fund taxes–i.e., taxes withheld by a business from employees' wages, if that person was "required to collect, truthfully account for, and pay over any tax;" and a responsible person becomes personally liable if the person acted willfully in failing to do collect and pay over the withholdings. Held: evidence was conflicting as to the scope of Scott's check-writing authority and other job duties, which created fact question on "responsible person" issue.

Copyright

***Home Design Services, Inc. v. Turner Heritage Homes, Inc.*, No. 15-11912 (11th Cir. June 17, 2016)**

Judges are necessarily better able than juries to resolve whether the "average lay observer" would find "substantial similarity" between two architectural works.

Securities; Administrative Law

***Hill v. SEC*, No. 15-12831 (11th Cir. June 17, 2016)**

This is an important decision on a hot issue–the constitutionality of the SEC Administrative tribunals. The Eleventh Circuit vacated a district court order enjoining an administrative proceeding, holding that the district court lacked jurisdiction over lawsuits collaterally attacking an administrative action. The Court concluded it "fairly discernible" from the review scheme provided in 15 U.S.C. § 78y that Congress intended the respondents' claims to be resolved first in the administrative forum, not the district court, and then, if necessary, on appeal to the appropriate federal court of appeals.

Arbitration; Contract Formation

***Bazemore v. Jefferson Capital Systems, Inc.*, No. 15-12607 (11th Cir. July 5, 2016)**

Order denying arbitration was affirmed; under Georgia law (the state law applicable to contract formation), there was no evidence that an agreement to arbitrate was ever entered into in connection with a "click-wrap" agreement (agreeing to terms by clicking on acceptance).

FCRA

***Hinkle v. Midland Credit Mgmt., Inc.*, No. 15-10398 (11th Cir. July 11, 2016)**

Downstream debt buyer could not satisfy its investigatory duty under 15 U.S.C. § 1681s-2(b), so as to support summary judgment in its favor on a reinvestigation claim, by simply relying on internal data to verify a consumer's identity and liability, when the buyer had no underlying documents relating to the debt. Given the evidence of Midland's system for handling these type disputes, the evidence was sufficient to support a finding that its violation was willful under section 1681n.

Rule 60; Settlement

***Hartford Cas. Ins. Co. v. Crum & Forster Spec. Ins. Co.*, No. 15-12781 (11th Cir. July 12, 2016)**

Courts are to apply an equitable approach that generally counsels against granting requests for vacatur made after the parties settle, but creates a carve-out for "exceptional circumstances;" such circumstances were present in this case.

RECENT CRIMINAL DECISIONS

From the United States Supreme Court

Criminal Procedure

***Utah v. Streiff*, No. 14-1373 (U.S. June 20, 2016)**

Evidence obtained in a search incident to arrest, where the arrest was legal but the initial stop was not, was nevertheless admissible because there was no flagrant police misconduct; discovery of a valid, pre-existing and untainted arrest warrant attenuated the connection between the unconstitutional stop and the evidence.

Criminal Procedure

***Birchfield v. North Dakota*, No. 14-1468 (U.S. June 23, 2016)**

The Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving, but not warrantless blood tests.

From the Court of Criminal Appeals

Search

***Rice v. State*, No. CR-15-0043 (Ala. Crim. App. July 8, 2016)**

Trial court erred in refusing to suppress cocaine discovered by an officer during a pat-down search of a driver following a traffic stop; driver's nervousness alone cannot suffice to create reasonable suspicion to support a *Terry* pat-down search.

Retroactivity of *Miller v. Alabama*

***Click v. State*, No. CR-12-0941 (Ala. Crim. App. July 8, 2016)**

Under *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), prohibition against mandatory life without parole punishment for juvenile defendants announced in *Miller v. Alabama*, 132 S. Ct. 2455 (2012) is retroactive.

Constitutionality of Death Penalty

***Ex parte State (v. Billups)*, No. CR-15-0619 (Ala. Crim. App. June 17, 2016)**

Trial court's order that had declared the death penalty unconstitutional was set aside; the court ordered the trial court to permit the state to seek the death penalty in capital cases.

Open-Court Sentencing

***Benn v. State*, No. CR-14-0714 (Ala. Crim. App. June 3, 2016)**

Defendant's appeal dismissed as premature because trial court failed to pronounce sentence in open court; case remained pending awaiting the entry of judgment.

Admissibility of Plea in De Novo Trial

***Woods v. State*, No. CR-14-0845 (Ala. Crim. App. June 3, 2016)**

Overruling *Phillips v. City of Dothan,* 534 So. 2d 381 (Ala. Crim. App. 1988), Defendant's guilty plea on a DUI charge in district court is inadmissible in his circuit court trial *de novo*.

Admissibility of NCIC Report

***Ingmire v. State*, No. CR-14-1447 (Ala. Crim. App. June 3, 2016)**

Deputy's testimony regarding contents of National Crime Information Center ("NCIC") report is inadmissible hearsay not within the business-records exception. Officer did not testify as to regularity of preparation of NCIC reports or that reports were regularly relied upon by sheriff's department.

Stand Your Ground Defense

***Malone v. State*, No. CR-14-1326 (Ala. Crim. App. June 3, 2016)**

Defendant who claims to have been justified in using deadly force under *Ala. Code* § 13A-3-23 must have complied with the common-law rules regarding the duty to retreat, unless he meets § 13A-3-23(b)'s "Stand Your Ground" provision exempting from the common-law rules anyone who was not engaged in an unlawful activity and who was in a place where they had the right to be. The defendant's entitlement to immunity from prosecution is determined through a pretrial evidentiary hearing.

Demand Reduction Act

***Hall v. State*, No. CR-15-0273 (Ala. Crim. App. July 8, 2016)**

While fine assessed under Demand Reduction Assessment Act, *Ala. Code* § 13A-12-212, is mandatory, a claim alleging sentencing error in the trial court's failure to assess that fine is not jurisdictional and therefore is subject to Rule 32 preclusion. ▲

MEMORIALS

Allison, Matthew Scott
Trussville
Admitted: 2008
Died: May 19, 2016

Berry, Joseph Morgan
Huntsville
Admitted: 1959
Died: June 24, 2016

Booth, Ronnie Dean
Trussville
Admitted: 1985
Died: May 5, 2016

Chitwood, Carey Jones
Birmingham
Admitted: 1957
Died: May 19, 2016

Gardner, William Marshall
Florence
Admitted: 1995
Died: May 13, 2016

Knowles, Ralph Irving, Jr.
Atlanta
Admitted: 1969
Died: May 17, 2016

Russell, George Mark
Anniston
Admitted: 1994
Died: May 17, 2016

CLE Program Remembers Beloved Lawyer and Raises Funds For Fellowship in His Honor

On November 11, Samford University's Cumberland School of Law and the Alabama Fellows of the American College of Trial Lawyers will present the Jere F. White, Jr. Trial Advocacy Institute. The Trial Advocacy Institute serves as the primary fundraising event for the Jere F. White, Jr. Fellows Program at Cumberland.

Prior to his death October 3, 2011, Jere and his wife, Lyda, established the fellows program. The program seeks to recruit outstanding students with strong academic credentials and also a history of leadership and commitment to service, thereby promoting the development of lawyers who share ideals that were so important to Jere. Each year, the fellows program provides one entering Cumberland School of Law student a full-tuition scholarship, an annual stipend, tuition and lodging at the law school's Cambridge, England Study Abroad Program and several mentoring opportunities.

Jere F. White, Jr.

This year's institute promises to be a unique continuing legal education program with giveaways such as two tickets to the Iron Bowl Football Game and two tickets to the SEC Championship Football Game. Civil rights attorney, preacher and former elected official Fred Gray is the keynote speaker. Gray's clients have included Martin Luther King, Jr., Rosa Parks and the victims of the Tuskegee Syphilis Study, and he played a pivotal role in dismantling legal segregation in the state of Alabama. The CLE program offers an outstanding range of presenters and moderators and is preapproved for credits in Alabama, Florida, Mississippi, Tennessee and Georgia. Institute details and registration are available at *samford.edu/cumberland law/continuing-education*.

Jere will be long recognized as one of the most outstanding lawyers in the country. More importantly, he will be remembered as a great person, friend and mentor. A graduate of the University of Georgia and Cumberland School of Law, Jere was a founding member of Lightfoot, Franklin & White LLC in Birmingham. He held himself and others to the highest standard of the practice of law. A third-generation lawyer, he was truly a lawyer's lawyer. He cherished his relationship with the bench and lawyers on both sides of the bar. Jere balanced his success as a lawyer with an even stronger devotion to his faith, family, friends and community.

Gifts can be made to the Jere F. White, Jr. Fellows Program at *samford.edu/cumberlandlaw/make-a-gift* by clicking "Give Online," checking "Designate My Gift" and then selecting "Jere F. White, Jr. Fellows Program" or by checks made payable to "Cumberland School of Law" with "White Fellows" in the memo line and sent to: Attention H.C. Strickland, III, Cumberland School of Law, Samford University, 800 Lakeshore Dr., Birmingham 35229.

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

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

Co-authored by

Paul DeMarco[1]

Constitutional Reform Continues

On November 8, 2016, we will have the right to exercise one of the greatest privileges in America as we vote. Most of the country will be focused on the outcome of one of the more interesting presidential elections of all time, the outcome of congressional races and, in some instances, gubernatorial and other state races. However, in addition to all of those races, here in Alabama we will also have the opportunity to vote on a number of amendments to our state constitution.

We are all too familiar with the many facts and some folklore associated with our 1901 Constitution, its foundation, its length and the many failed efforts to replace it. Nevertheless, we are in the midst of one of the most positive efforts in its 115-year history to improve it. As was more fully discussed in this column in January 2012,[2] the legislature created the Constitution Revision Commission in 2011. That commission, chaired by former Governor Albert Brewer, was charged with leading the effort to revise the Alabama Constitution on an article-by-article basis. This article-by-article approach is the only mechanism available to the legislature.[3]

The article-by-article approach has been successful three times in the past. In 1973, Article VI, relating to the judiciary, was revised in an effort led by then-Chief Justice Howell Heflin. The article-by-article approach was followed again in 1996 when Representative Jack Venable led the effort to revise Article VIII, relating to suffrage and elections. Finally, in 2012, Articles XII (corporations) and XIII (banking) were ratified following their passage upon the recommendation of the Constitutional Revision Commission. The endeavor to revise Articles XII and XIII began in 2007, with proposed revised articles being introduced in the legislature each session since. The revisions actually passed one of the houses of the legislature on numerous occasions, but could not get through both houses until 2012. With the installation of the commission, the effort was re-energized. After minor tweaking of the proposed revisions to these articles, the commission recommended their passage and the legislature responded with enormous support by passing both articles with near-unanimous votes and both were subsequently ratified in November 2012.

Following upon the success of the 2012 effort, the Alabama Legislature has since passed four more significant proposed constitutional amendments. These include revisions to Article III (distribution of power), Article VII (impeachments), county administrative powers and revisions to Section 284.01 dealing with local constitutional amendments. These four amendments will appear on the ballot in November.

Passage of these four amendments would further validate the process by which we are trying to modernize our constitution and give momentum to continue working on the harder portions, including those articles dealing with the executive and legislative branches of government.

Constitutional Reform Measures On November Ballot

Revisions to Section 284.01 (Act 2015-44)

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.

Another significant aspect of the amendment would be that a proposed local amendment that is sent statewide would only be ratified if both the local affected community and the state as a whole voted in favor. Under current law, so long as the statewide vote favors ratification, the amendment is passed even if the affected community votes overwhelmingly against it.

County Administrative Powers (Act 2015-220)

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.

This amendment expressly prohibits the exercising of police, land use and taxing powers through this process. The powers would also be limited to those things not addressed by general or local law. Finally, in order to exercise any power that impacts the office of another elected official, the county commission must have sign-off from that official.

Article III Revisions (Act 2015-200)

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. Each of these has a defined role and powers.

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)

Article VII of the Constitution of Alabama of 1901 provides for impeachments in Alabama. The work on and passage of this amendment by the legislature long predates current circumstances in our state and should not be viewed in any way as a reaction to it.

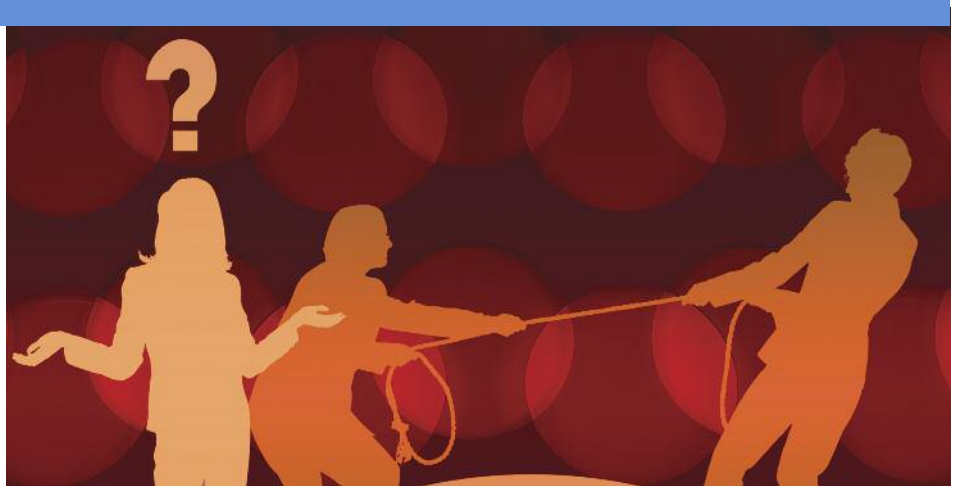
This amendment proposes a number of non-substantive technical amendments, including renumbering sections, capitalization and gender-neutral references. The amendment would also modernize the impeachment article by removing the State Superintendent of Education and including the members of the State Board 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."

These amendments are significant not only for the changes and improvements they make, but also because they continue our progress on the path of significantly improving our constitution on an article-by-article basis. We hope that you will support them and help us get the word out about them to all interested citizens. ▲

Endnotes

1. Paul DeMarco served as vice-chair of the Constitutional Revision Commission.
2. Robert McCurley, Jr., "Legislative Wrap-Up," *The Alabama Lawyer* Vol. 73, No. 1, January 2012.
3. *See, State v. Manley* . 441 So.2d 864 (Ala. 1983) (Holds that the legislature cannot propose a completely new constitution.)

J. Anthony McLain



Representation of an Estate and Client Identity

QUESTION #1:

When a lawyer is retained to assist in the administration or probate of an estate, whom does the lawyer represent?

QUESTON #2:

What is a lawyer's ethical responsibility when he discovers that the personal representative has misappropriated estate funds or property?

ANSWER #1:

Generally, the lawyer represents the individual who hired him to assist in the administration or probate of the estate. If that person has only one role and is not a fiduciary, the lawyer represents only that person, unless the client and lawyer agree otherwise. If the person is the personal representative,[1] the lawyer represents the personal representative individually, unless the personal representative and lawyer agree otherwise. The lawyer must be careful not to, either by affirmative action or omission, give the impression that he also represents the beneficiaries of the estate. As a result, if the client is the personal representative only, the lawyer must advise the heirs and devisees ("beneficiaries") and other interested parties in the estate known to the lawyer that the lawyer's only client is the personal representative in order to avoid violating Rule 4.3.[2] A lawyer must comply with certain duties upon undertaking representation of a fiduciary or risk violating certain rules of professional conduct. If the lawyer failed to give such notice, it could be found that he has undertaken to represent both the fiduciary and the beneficiaries of the estate.

ANSWER #2:

When a lawyer has actual knowledge that the personal representative has misappropriated estate funds, the lawyer's first duty is to remonstrate with the personal representative in an effort to convince the personal representative to either replace the misappropriated funds or to inform the court of the personal representative's misappropriation. If the personal representative refuses to do so, the lawyer should withdraw from the matter and, upon withdrawal, ask the court to order an accounting of the estate.

DISCUSSION:

The Office of General Counsel frequently receives telephone calls from lawyers requesting ethics opinions concerning the representation of an estate. In explaining the ethical dilemma the lawyer is facing, the lawyer often refers to himself as "representing the estate." The lawyer then goes on to describe a situation in which the interests of the estate or the fiduciary for the estate or a beneficiary may be in conflict. Oftentimes, whether a conflict of interest exists is entirely dependent on whom the lawyer actually represents in regard to the estate. Additionally, the bar sometimes receives complaints filed against the lawyer by the beneficiaries of the estate or the fiduciary of the estate. In those cases, identifying the true client will often determine whether the lawyer has breached any ethical duties. As a result, defining the lawyer's actual client in an estate or probate matter is critical in determining whether a conflict of interest may exist and what duties a lawyer owes to the fiduciary and beneficiaries of the estate.

The Disciplinary Commission has never directly addressed the issue of whom the lawyer represents when assisting in the administration or probate of an estate. At best, the Disciplinary Commission indirectly addressed the issue in RO 1989-105, wherein the Disciplinary Commission was asked to provide a formal opinion on a lawyer's ethical duties when an executrix absconded with the assets of the estate. In that situation, the lawyer prepared a will for a client who subsequently died. Upon the client's death, the lawyer was asked by the deceased client's widow to probate her husband's will which named her as executrix. The testator was survived by his widow, an adult son and a minor son. After the lawyer assisted

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the executrix in collecting the assets of the estate, including cash, the executrix moved to Tennessee, taking with her the cash assets of the estate. Thereafter, the executrix refused to communicate any further with the lawyer. The lawyer requested an opinion as to whether he could disclose the executrix's actions to the other beneficiaries of the estate or to the court.

Relying on the former *Code of Professional Responsibility*, the Disciplinary Commission opined that the lawyer should first call upon the client to rectify the fraud and, if the client refused, then the lawyer should withdraw from the matter. The Disciplinary Commission went on to state that under the disciplinary rules, the lawyer had an obligation not to disclose the confidences and secrets of the client. Therefore, the lawyer could not disclose the executrix's apparent fraud to the beneficiaries or the court. While not directly addressing the issue of client identity, it is clear that the Disciplinary Commission considered the executrix to be the lawyer's sole client.

The Disciplinary Commission is also aware that the Office of General Counsel has given recent informal opinions concerning this issue. In their informal opinions, the Office of General Counsel has opined that the client is the estate. The lawyer represents the estate by acting for and through the fiduciary of the estate for the ultimate benefit of the beneficiaries of the estate. Because the lawyer is retained by the personal representative to represent the estate and because the personal representative is legally required to serve the beneficiaries, the lawyer also has an obligation to the beneficiaries. This relationship has been characterized as one where the fiduciary is not the only client, but merely the "primary client," while the beneficiary is the "derivative client." In some situations where there is a sole beneficiary of the estate, that beneficiary (ostensibly a non-client) may be entitled to the loyalty of the lawyer to much the same extent as the fiduciary.

In light of the lack of clarity as to the identity of the true client and the lawyer's resulting professional responsibilities, the Disciplinary Commission has determined that it is necessary to issue a formal opinion on the matter in order to provide greater guidance to lawyers practicing in the area of estates and trusts.

There are three theories regarding the identity of the client when a lawyer handles an estate. The American Bar Association in Formal Opinion 94-380 recognized that the majority view is that the lawyer represents only the personal representative or fiduciary of the estate and not the beneficiaries of the estate, either jointly or individually. In reaching a similar conclusion, a number of other state bars have relied, in part, on state law that indicated that an estate is not a separate legal entity. In Ethics Opinion No. 91-2, the Alaska State Bar noted that an estate is "for probate purposes a collection of assets rather than an organization, and is not an entity involved in the probate proceedings."[3] In Formal Opinion 1989-4, the Delaware State Bar also concluded that under state law, the term "estate" only referred to the actual property of the decedent and did not have an independent legal existence. As such, the Delaware State Bar concluded that the estate could not be a "client" under their rules of professional conduct.

A number of state courts have also held that the lawyer's sole client is the fiduciary of the estate. However, most of these decisions arise in the context of malpractice litigation and not as a result of an ethical dispute. For example, in *Spinner v. Nutt*, 631 N.E.2d 542 (Mass. 1994), the Supreme Court of Massachusetts held that the lawyers for two trustees of a testamentary trust owed no duties of care to the beneficiaries of the trust. In *Spinner*, beneficiaries of a testamentary trust sued the lawyers for the trustees of the trust after the trustees allowed the value of the trust to decline. The court determined that the lawyers' only clients were the trustees and, therefore, the lawyers were insulated from any liability as a result of the trustees' actions.[4] In *Goldberg v. Frye*, the California Court of Appeals stated as follows:

> While the fiduciary, in the performance of this service, may be exposed to the potential of malpractice (and hence is subject to surcharge when his administration is completed), the attorney, by definition, represents only one party, the fiduciary. It would be very dangerous to conclude that the attorney, through performances of service to the administrator, and by way of communication to estate beneficiaries, subjects himself to claims of negligence from the beneficiaries. The beneficiaries are entitled to even-handed administration by the fiduciary. They are not owed a duty directly by the fiduciary's attorney.

217 Cal. App. P.3d 1258, 1268 (1990). Likewise, other state courts have also determined that a lawyer's only client is the fiduciary of the estate. *See, Huie v. DeShazo*, 922 S.W. 2d 920

(Tex. 1996); *The Estate of Fogelman v. Fegen*, 3 P.3d 1172 (Ariz. 2000); *In re Estate of Wagner*, 386 N.W.2d 448, 450 (Neb. 1986).

The second approach to client identity in estate representation holds that the client is the estate itself. This view is identical to the entity theory of representation most commonly employed under Rule 1.13, *Ala. R. Prof. C.*, when representing businesses and corporations. Under this approach, the lawyer represents the "estate" as a freestanding legal entity. The lawyer does not have a lawyer-client relationship with either the fiduciary or beneficiaries of the estate.[5] One argument in favor of this position is that estates and trusts are treated as separate legal entities for taxation purposes and that, therefore, an estate or trust is a recognizable legal entity.[6] Under this approach, the fiduciary of the estate is merely an agent of the entity.[7]

Other courts have adopted the entity theory of representation for other reasons. In *Steinway v. Bolden*, the Michigan Court of Appeals, in adopting the entity theory or representation, noted that the lawyer is paid by the estate and not the personal representative:

> We conclude that the clear intent of the *Revised Probate Code* and of the court rules is that, although the personal representative retains the attorney, the attorney's client is the estate, rather than the personal representative. The fact that the probate court must approve the attorney's fees for services rendered on behalf of the estate and that the fees are paid out of the estate further supports this conclusion.

185 Mich. App. 234, 238 (Mich. Ct. App. 1990).[8] The Illinois Court of Appeals has also adopted the entity theory of representation. *Grimes v. Saikley*, 904 N.E.2d 184 (Ill. Ct. App. 2009).

The third view holds that the lawyer jointly represents the fiduciary and beneficiaries of the estate. This view of estate representation has been most prominently advocated by Geoffrey C. Hazard, Jr. and W. William Hodes in *The Law of Lawyering*, § 57.3, 4. 3rd Edition (2005), in which the authors argue the following:

> Where the lawyer's client is a fiduciary, however, there is a third party in the picture (namely the beneficiary) who does not stand at arm's length from the client; as a consequence, the lawyer also cannot stand at arm's length from the beneficiary. Clients with such responsibilities include trustees, partners, vis-à-vis other partners, spouses, corporate directors and officers vis-à-vis their corporations, and many others, including parents. Because, in

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> the situations posited, the lawyer is hired to represent the fiduciary, and because the fiduciary is legally required to serve the beneficiary, the lawyer must be deemed employed to further that service as well.
>
> It is only a small additional semantic step, and not a large analytic one, to say that in such situations the fiduciary is not the only client, but merely the "primary" client. [Footnote omitted] In this view, the beneficiary is the "derivative" client. The beneficiary, strictly speaking a non-client, may be entitled to the loyalty of the lawyer almost as if he were a client. [Footnote omitted]
>
> A number of consequences follow from adopting the derivative client approach to representation of a fiduciary. First, the lawyer's obligation to avoid participating in a client's fraud . . . is engaged by a more sensitive trigger. The fiduciary is subject to a high standard of fair dealing as regards the beneficiary, but may face temptation to engage in improper overreaching. The lawyer therefore faces a correspondingly greater risk of being implicated in the fiduciary's misconduct, and also has a greater duty to ensure that the purpose of the representation is not subverted.

Hazard & Hodes, *The Law of Lawyering*, § 2.7, 2-11 3rd Edition (2005). The derivative client approach as described above is most closely akin to that of where an insurance company hires a lawyer to represent one of its insureds. In *Mitchum v. Hudgens*, 533 So.2d 194 (Ala. 1988), the Alabama Supreme Court described that relationship as follows: "When an insurance company retains an attorney to defend an action against an insured, the attorney represents the insured as well as the insurance company in furthering the interests of each." *Id*. at 198. However, where a conflict arises between the interests of the insured and insurer, "the primary obligation is to the insured." *Lifestar Response of Alabama, Inc. v. Admiral Ins. Co.,* 17 So.3d 200, 217 (Ala. 2009).

The *Alabama Rules of Professional Conduct* do not determine whether an attorney-client relationship has been formed. Likewise, they do not identify a lawyer's client in an estate administration. Unlike the Comment to *Florida Rule of Professional Conduct* 4-1.7 which specifies that the personal representative is the client, the Comment to Rules 1.2 and 1.7, *Ala. R. Prof. C.*, does not provide a clear answer as to the identity of the client in estate representation. Rather, the Comment to Rules 1.2 and 1.7, *Ala. R. Prof.* C., state as follows:

Rule 1.2. Scope of Representation

Comment

* * *

> Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

Rule 1.7. Conflicts of Interest

Comment

* * *

> Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration, the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view, the client is the estate or trust, including its beneficiaries. The lawyer should make clear the relationship to the parties involved.

Many other state bars that have addressed this issue have often relied on case law or statutes to reach a definitive resolution. Unfortunately, the appellate courts in Alabama appear to have never directly addressed the issue. However, the courts in Alabama have issued a "few instructive cases."[9] In *Wilkinson v. McCall*, 23 So.2d 577, 580 (Ala. 1945), the Supreme Court of Alabama noted that "[i]t is true usually that the executor employs counsel in his personal, not his representative capacity . . ." In *Smelser v. Trent*, 698 So.2d 873 (Ala. 1976), the court stated "[a] personal representative . . . has the power to hire attorneys to assist him in the administration of the estate." *Id*. at 1096.

The supreme court's holding is supported by various statutes in the *Alabama Code* of 1975. For instance, § 43-2-682, *Ala. Code* 1975, which allows a fiduciary or lawyer to be compensated from the assets of the estate, states, in pertinent part, as follows:

> Upon any annual, partial or final settlement made by any administrator or executor, the court having jurisdiction thereof may fix, determine and allow an attorney's fee or compensation . . . to be paid from such estate to *attorneys representing such administrator or executor* . . .

(emphasis added) Additionally, § 43-2-843(17), *Ala. Code* 1975, allows a personal representative to "[e]mploy necessary persons, including . . . attorneys . . . to advise or assist the personal representative in the performance of administrative duties . . ." Along with *McCall*, these statutes indicate that a lawyer is hired by the fiduciary to represent the fiduciary in his individual capacity. More recently, the Supreme Court of Alabama has stated that "a personal representative . . . has the power to hire attorneys to assist him in the administration of the estate." *Smelser v. Trent*, 698 So.2d 1094, 1096 (Ala. 1997).

In *Mills v. Neville*, 443 So.2d 935, 938 (Ala. 1983), the Supreme Court of Alabama indicated that the estate was the client. In *Mills*, the lawyer who drafted the testator's will later served as executor of the decedent's estate. While acting as executor, the lawyer hired himself to represent the estate and to pursue a wrongful-death action. In upholding the lawyer's actions, the court stated the following:

> However much the beneficiaries are interested parties in the outcome of the administration of the estate, and therefore in the ensuing litigation, it is the estate which is the client here, and it is the court which supervises and approves the allowances to the attorney for the estate. . . For these reasons, we are convinced that the respondent's failure to consult with the minor beneficiaries here, if he failed to do so, did not result in a violation of [the applicable rule of professional conduct].

While recognizing that the estate was the client in a wrongful death lawsuit, the court also indicated that the lawyer had no ethical duty to consult with the beneficiaries of the estate.

Finally, in *Robinson v. Benton*, 842 So.2d 631 (Ala. 2002), the beneficiaries of an estate sued a lawyer for failing to destroy the will of the testator. In *Benton*, the lawyer drafted a will for a client. Sometime later, the client delivered the will to the lawyer and asked him to destroy the will for the purpose of revoking it. The lawyer failed to follow the client's wishes and the client subsequently died. As a result, the will was later submitted for probate. The heirs and beneficiaries of the client sued the lawyer, claiming that had he followed the client's instructions, the beneficiaries would have received a larger portion of the estate. In rejecting the beneficiaries' claims, the Supreme Court of Alabama declined to change the law in Alabama "that bars an action for legal malpractice against a lawyer by a plaintiff for whom the lawyer has not undertaken a duty, either by contract or gratuitously." The Disciplinary Commission finds the holding in *Robinson* instructive irrespective of the fact that it concerns a malpractice action regarding a lawyer's liability to beneficiaries in estate planning and the preparation of wills.

Conclusion Regarding Client Identity

After considering the above-discussed cases, state bar opinions and other state cases, it is the opinion of the Disciplinary Commission that ordinarily, when a lawyer is hired by a personal representative to assist in the administration of an estate, the lawyer's sole client is the personal representative of the estate.[10] As a result, the lawyer would owe the personal representative a duty of loyalty and confidentiality just as he would any other client pursuant to Rule 1.6, *Ala. R. Prof. C.* The fact that the personal representative has obligations to the beneficiaries of the estate does not in itself either expand or limit the lawyer's obligations to the personal representative under the *Rules*, nor would it impose on the lawyer obligations toward the beneficiaries that the lawyer would not have toward other third parties.

Upon commencement of representation, the lawyer should clarify with the personal representative the role of the lawyer, the scope of representation and the personal representative's responsibilities toward the lawyer, the court, beneficiaries and other interested third parties.

Lawyers Duties to Third Parties

While the client would ordinarily be the personal representative, the lawyer must be careful not to, either by affirmative action or omission, give the impression that he also represents the beneficiaries of the estate. If the lawyer were to do so, it could be found that he has undertaken to represent both the personal representative and the beneficiaries of the estate which could result in conflicting loyalties and conflicts of interests. As a result, a lawyer must comply with certain duties upon undertaking representation of a personal representative or risk violating certain rules of professional conduct.

First and foremost, upon being hired by a personal representative to assist in the administration of an estate or trust, the lawyer should explain to the beneficiaries or other interested parties that the lawyer's sole client in the matter is the personal representative, individually. A lawyer who fails to do so could be in violation of Rule 4.3, *Ala. R. Prof. C.*, which states as follows:

> Rule 4.3. Dealing with Unrepresented Person
>
> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

In doing so, the lawyer should explain that he does not represent the beneficiaries' individual interests in the matter.

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One suggestion has been that the lawyer considers drafting an engagement letter that clearly defines the client and the scope of the lawyer's representation. This letter should then be sent to all interested persons.

Likewise, if a lawyer was to undertake to represent both a personal representative and a beneficiary or two co-personal representatives in an estate matter, and the parties' interests later diverged, the lawyer would be required to withdraw from the representation of each. Rule 1.7, *Ala. R. Prof. C*. By clearly identifying the client and advising the parties of the lawyer's role in the matter, the lawyer will be in a better position to identify and avoid possible conflicts of interests that may arise during the course of the representation.

Duties When the Personal Representative Misappropriates Estate Assets

First, this opinion does not impose an affirmative duty upon the lawyer to monitor or double-check all of the personal representative's actions in administering the estate or to investigate whether the personal representative has wasted or misappropriated estate assets. Rather, this opinion only imposes duties upon the lawyer once the lawyer has actual knowledge that the personal representative has engaged in misconduct with estate assets.

Determining the lawyer's ethical responsibilities when he discovers that the personal representative of the estate has misappropriated estate funds is a difficult question as it calls for a balance between the lawyer's obligations to his client, the personal representative and the lawyer's obligations as an officer of the court. Rule 1.6 provides as follows:

1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Pursuant to Rule 1.6, a lawyer would not be allowed to disclose the misconduct of the personal representative to the court, the beneficiaries or any other interested third party without the permission of the personal representative. However, Rule 3.3, places certain obligations on the lawyer to affirmatively disclose misconduct by a client:

RULE 3.3. Candor toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; or

(3) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding other than a grand jury proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Pursuant to Rule 3.3(a)(2), *Ala. R. Prof. C*., the lawyer has a duty to disclose to the court any facts necessary to avoid assisting a client who is committing an ongoing, continuing

criminal or fraudulent act. As the Comment to Rule 3.3, *Ala. R. Prof. C.*, states, "[t]here are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." As such, the dilemma the lawyer faces is whether the personal representative's misappropriation of estate assets is ongoing. If so, the lawyer would have an obligation to disclose such conduct to the court.

However, more often than not, the lawyer only learns of the misappropriation of estate assets after the fact. In such situations where the misconduct is not ongoing, the lawyer may not disclose the prior misconduct to the court pursuant to Rule 1.6. As a result, the lawyer's only recourse is to seek to persuade the personal representative to either replace any misappropriated funds or to voluntarily disclose to the court the personal representative's misconduct. If the personal representative refuses to do either, then the lawyer should withdraw from the representation and, upon withdrawal, request that the court order an accounting of the estate. By doing so, the lawyer avoids assisting the personal representative in any criminal or fraudulent acts. Further, by requesting that the court order an accounting upon the lawyer's withdrawal, the lawyer helps to shield himself from any accusations or allegations that he assisted or allowed the personal representative to engage in the misconduct. ▲

Endnotes

1. This opinion is limited to questions regarding the representation of a personal representative in a probate administration, except as otherwise stated. The Commission expresses no opinion herein on the duties owed by a lawyer representing the trustee of an express trust, a guardian, conservator or attorney-in-fact.
2. Unless otherwise indicated, all references to a "Rule" herein are to the *Alabama Rules of Professional Conduct* as they exist at the time this opinion is adopted.
3. The Alaska State Bar, however, did note that for purposes of taxation, an estate is treated as an entity.
4. The only exception being where the lawyer conspired with, approved or actively engaged in fraud committed by the trustees.
5. Virginia L. Blackwell, *Conflicts of Interest When An Attorney Represents An Estate*, 27 J. Legal Prof. 141 (2002-2003).
6. However, a number of state courts have specifically held that an estate is not a separate legal entity.
7. Jeffrey N. Pennell, *Representations Involving Fiduciary Entities: Who Is the Client?*, 62 Fordham L. Rev. 1319 (1994).
8. The Michigan Court of Appeals recently affirmed the entity theory of representation in *In re Estate of Graves*, 102709 MICA (Mich. Ct. App. 2009).
9. Peter M. Wright, *Ethics Issues Facing the Fiduciary Attorney*, Sirote & Permutt PC, Birmingham, Alabama.
10. Obviously, if the lawyer is hired by a beneficiary or other interested party, the beneficiary or interested party would be the lawyer's client.

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

Among Firms

Adams & Reese announces that **Craig D. Lawrence, Jr.** joined as an associate in the Birmingham office.

The **Alabama Department of Mental Health** announces that **Edward C. Hixon** is now an assistant attorney general.

Campbell Law PC announces that **Matthew W. Nicholson** and **R. Taylor Abbot, Jr.** joined the firm.

Law Offices of David M. Cowan LLC announces that **William J. Sinor** joined as an associate.

The Fisher Law Firm PC announces that **Chadwick T. Barnett** joined as an associate.

Hill Hill Carter Franco Cole & Black announces the opening of a Birmingham office.

The **Hon. Charles R. Malone** retired in March from the Sixth Judicial Circuit and formed **Malone & Associates PC**. **R. Chase Malone** and **Jessica W. Schaub** joined as associates. The firm announces that it joined with **Mark C. Nelson PC** to form **Malone & Nelson LLC.**

Preferred Capital Securities of Atlanta announces that **James P. Curtis** joined as general counsel and chief compliance officer.

Simpson, McMahan, Glick & Burford announces that **Lindsay P. Hembree** is now a partner.

Wilmer & Lee PA announces that **Christopher L. Lockwood** is now a shareholder in the Huntsville office. ▲

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