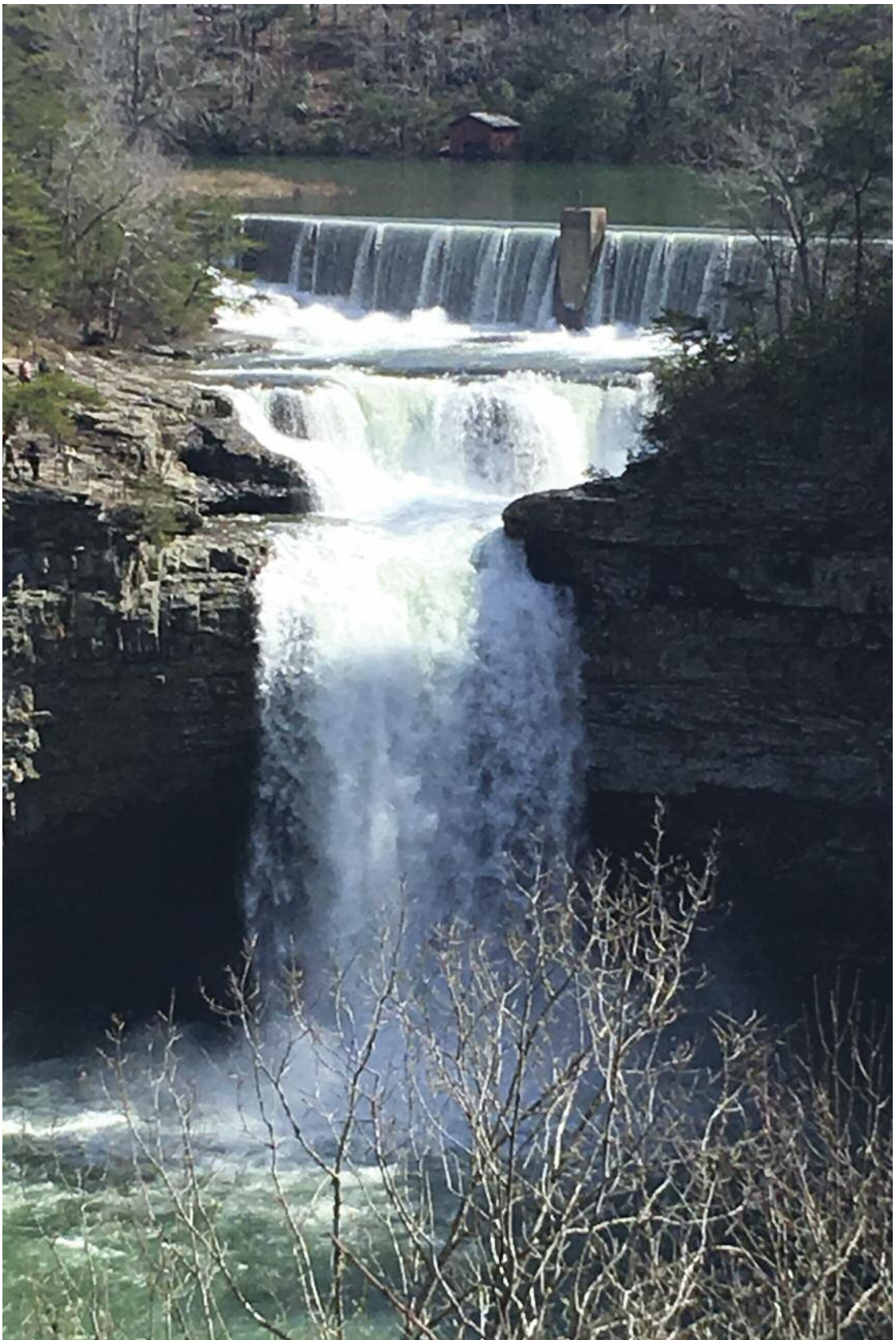
THE ALABAMA LAWYER

MARCH 2019 | VOLUME 80, NUMBER 2



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On The Cover

After 44 years on the circuit court bench, Judge Randall L. Cole recently retired from the Ninth Judicial Circuit. As he pointed out to us, there hasn't been a cover photo of DeSoto Falls on *The Alabama Lawyer* in many years. We are taking steps to remedy that oversight with this photograph taken by Judge Cole. Thanks Judge!

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COLUMNS

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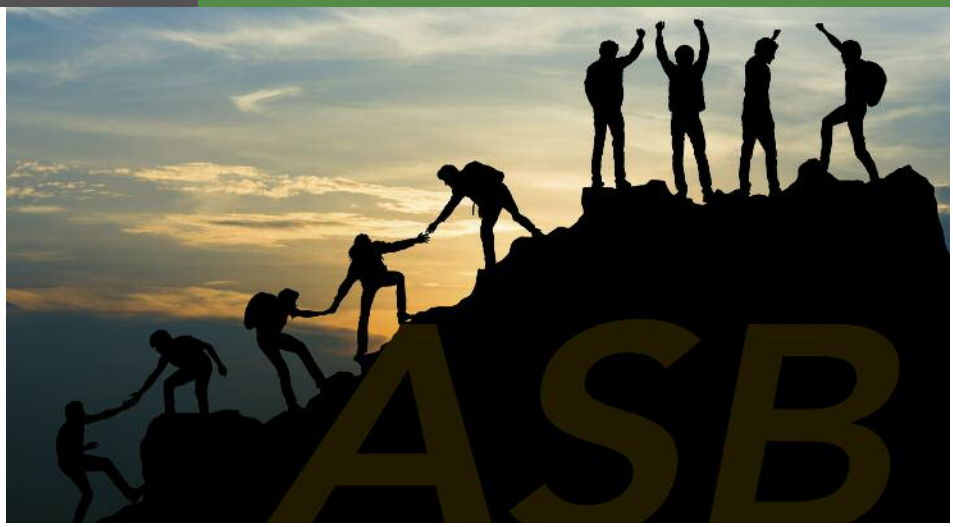


We Can All Be Servant-Leaders

The motto of the Alabama State Bar is "Lawyers Render Service." There are two sides to this: the service which the bar should render to its members and the public, and the service which all of us as lawyers should render to our clients, our profession and our communities. The focus of this article is on this second type of service and how it can be accomplished through always striving to act as servant-leaders.

There is a need for good leaders. Lawyers are uniquely situated to fulfill this need, whether it be through their work as judges, policy-makers, legal practitioners, business owners, government officials, politicians, scholars and teachers, or through involvement with churches and charitable organizations. To me, professionalism includes not only how lawyers treat each other, but also our impact on the community as a whole. We can influence the bar and the future of our state by taking on leadership roles and serving well in those roles.

What is leadership and what does it mean to be a good leader? Dictionaries are not much help. They define a leader as a person who leads and leadership as the office or position of a leader. To compensate for these circular definitions, dictionaries resort to providing examples of leaders (e.g. political leaders, orchestra conductors, military leaders, etc.). It appears as though dictionaries have the same problem the rest of us have when it comes to defining leadership–we know it when we see it.

I learned the term "servant-leadership" through my involvement with the ASB as a bar commissioner and committee member. This concept, which is part of

the curriculum for the ASB's award-winning Leadership Forum, actually encompasses much of what I have experienced over the years. Talking about leadership as a type of servitude simply provides a framework for understanding which character traits contribute to good leadership. Forum participants are taught that servant-leaders recognize the value of sharing power and helping others develop and perform to the best of their ability, and they are encouraged to strive to be servant-minded in all of their leadership capacities.

This servant-leadership ethic makes sense to me. Too often leaders think of themselves as the powerful person at the top of the pyramid. By comparison, the servant-leader shares power, puts the needs of the organization first and creates a team environment. Servant-leadership, in effect, turns the pyramid upside down. Instead of the followers working to serve the leader, the leader exists to serve the followers and, through them, the organization.

Each of us has the potential to become an effective lawyer-servant-leader. Self-awareness is key to this. We need to recognize that leadership is not about glorifying ourselves, but about bringing out the best in others. It is important to have passion and a vision or goal for the organization, but this can be accomplished without coming across as arrogant, dogmatic or pushy. As leaders, we should be ready to champion an environment of creativity and collaboration, which means not blindly following the status quo or encouraging divisiveness. And, we should commit to developing the whole team and improving the organization's productivity. If we always hold ourselves to the highest level of accountability, then other team members are likely to follow our example. It is important, though, to keep things fun and retain the ability to laugh at ourselves; we are all human and capable of making mistakes.

Leadership should be viewed not as something to step in and out of, but rather as a state of mind and a way of living our lives. We ought to be willing to take on various leadership roles and should strive to be servant-minded in performing those roles. We must aspire to become models of ethical and professional behavior, both within and outside the legal community. Even though we are not always on the clock, we are always attorneys and thus continuously represent our profession. By becoming active servant-leaders in our communities as well as in both local and state bar organizations, we can make our practices better, our communities healthier and our bar stronger.

Thanks to Mobile lawyer Mary Margaret Bailey for her assistance in preparing this article. I also thank my friend and lawyer, Dennis Harrison, for giving me his thoughts on leadership. ▲

Thank You, Greg Hawley

Greg Hawley has served as the editor of *The Alabama Lawyer* since November 2010. Due to his leadership and the countless hours he has devoted to this volunteer position, *The Alabama Lawyer* has consistently been the best state bar publication in the country. The motto of the Alabama State Bar is "Lawyers Render Service" and I know of no other lawyer who has provided more service to the members of the Alabama State Bar than Greg Hawley.

Greg, thank you for your service. You will be missed.

–President Sam W. Irby

Hawley

Times Flies When You're Having Fun!

That old saying is true–time truly does fly when you're having fun. And the past eight years, with Greg Hawley at the helm as editor of *The Alabama Lawyer* magazine, have been rewarding, enlightening and just plain fun!

Greg quickly agreed to take over as editor only a few weeks after the sudden and unexpected death of longtime editor Robert Huffaker and I instantly knew the magazine was in good hands. Actually, I knew it when everyone on the unofficial search committee (Executive Director Keith Norman, past President Mark White and President Alyce Spruell) and I all came up with one name and one name only–Greg Hawley.

Like Robert was, Greg is "scary smart," but he also has a way of putting those around him at ease, letting them know that he is truly interested in what they have to say. I always felt that my opinion mattered when it came to the content and look of the *Lawyer*.

Talking to someone several days a week, every week, discussing where to place a comma or how much to cut from an author's bio, could get stale. It never did, even after producing 50+ issues of the magazine, and I think our different perspectives helped prevent that.

Greg enjoys volunteering and giving back, so I know he will find another way in the very near future to give of his time and talents, whether in bar work or a community project. He stepped in during a stressful and unsure time and kept everything and everyone on track. And, he continued to do so for the next eight years. The Alabama State Bar and I can never truly thank him enough for his time, his patience and his dedication.

I look forward to working with newly-selected editor Greg Ward and seeing how he continues the tradition of constantly striving for improvement, while also having fun! ▲

–Margaret Murphy, Managing Editor

Robert G. Methvin

PRESIDENT-ELECT PROFILE

Get to Know Your President-Elect

Pursuant to the Alabama State Bar's Rules Governing the Election of President-elect, *the following biographical sketch is provided of* ***Robert G. Methvin****. Methvin was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 2019-2020 term and will assume the presidency in 2020.*

Bob Methvin grew up in Eufaula and attended the University of Alabama, graduating in 1991 with a degree in finance. He then obtained his law degree from Cumberland School of Law in 1994.

His family has been active in the legal profession for many years, including both grandfathers–Thomas James Methvin, who practiced in Georgia during and after the Great Depression, and Judge William G. Lindsey, of the First Judicial Circuit in Choctaw, Clarke and Washington counties–and his brother, Tom Methvin, a Montgomery attorney.

After a year with a small firm in Birmingham, Bob decided to become a solo practitioner. In 2000, he and Phillip McCallum teamed up to start McCallum & Methvin PC. The firm later became McCallum, Methvin & Terrell PC. In 2017, upon Phillip's departure to take over as executive director of the Alabama State Bar, the firm became Methvin, Terrell, Yancey, Stephens & Miller PC, with Bob's serving as the managing shareholder.

With approximately 25 years of experience in civil litigation, Bob continues to represent individuals and small businesses across the nation in an array of litigation matters, including business disputes, complex litigation, class actions and individual cases, often involving insurance matters, contractual disputes or claims of fraud and deceptive business practices. He frequently lectures on business litigation and class action litigation and serves as consulting counsel and litigation counsel to a number of small businesses in Alabama and throughout the country. Bob is also a registered mediator with the Alabama Center for Dispute Resolution and regularly assists Alabama attorneys and their clients in this capacity.

Early in his career, Bob became involved with the Young Lawyers' Section of the state bar and was elected president of the section in 2002. He was selected to be a member of the Alabama State Bar Leadership Forum, Class Two. With a strong appreciation for community leadership, he regularly serves on various committees for both the Alabama State Bar and Birmingham Bar Association.

Bob served on the Alabama State Bar Judicial Liaison Committee and now is on the Disciplinary Panel. He was elected to three consecutive terms as an Alabama Bar Commissioner for the Tenth Judicial Circuit. He was the 2011 recipient of the Alabama State Bar President's Award for Meritorious Service. Bob is co-chair of the state bar Local Bar Committee and serves on the Bench and Bar Relations Task Force, Unauthorized Practice of Law Committee, Member Benefits Committee, 19th Amendment Centennial Celebration Task Force and Pro Bono Innovation Task Force.

Bob served on the Birmingham Bar Association Grievance Committee, Executive Committee, Pro Bono Committee and Birmingham Bar Nominating Committee, and serves on the Court Liaison Committee. He also chaired the Crisis Relief Committee in 2011, which set up free legal clinics and provided extensive legal help to tornado victims in Pratt City and Pleasant Grove.

Bob served on the board of the Birmingham Volunteer Lawyers Program and remains committed to its mission to provide free legal representation to the poor. He supports the Alabama Civil Justice Foundation through its Pioneers of Justice Society and the Alabama Law Foundation through its Atticus Finch Society.

Bob works with several organizations to raise awareness of and support for those with cystic fibrosis, including founding and serving as chair of the Board of Cystic Fibrosis–Hope for Alabama, a local charity assisting low-income families with children suffering from cystic fibrosis. He has served as the chair of the Cystic Fibrosis Foundation for Alabama and on the advisory board for Laps for CF.

Other volunteer work includes serving on the board of Bigtime Ministries, which is dedicated to teaching children Christian principles, and with the Jones Valley Teaching Farm, an active farm in downtown Birmingham providing inner-city students with hands-on food and nutrition education.

Bob and wife Lee have three daughters, Hope (17), Kate (14) and Laine (10). He and his family are active members of Saint Luke's Episcopal Church. ▲

Thank You, Greg

When Robert Huffaker passed away in September 2010, having served as editor of *The Alabama Lawyer* for 27 years, finding someone able to follow Robert was no small task. Although Robert's death was untimely, he left as an enduring legacy one of the finest professional journals in the country. He set the bar very high for the magazine's next editor.

As I thought about the type of leader to be the *Lawyer's* editor, I knew we needed someone who was a first-rate lawyer possessing a fine academic mind, highly regarded in the legal community and who had the mettle to maintain the editorial integrity of *The Alabama Lawyer*. Pondering these qualities, it soon became quite clear that the next editor, who would be only its fourth in 70 years, ought to be Greg Hawley.

Greg was the ideal person, not only because he possessed the characteristics mentioned above, but also because he had the ideal temperament to work collaboratively with the long-time managing editor, Margaret Murphy, and the magazine's Board of Editors, as well as the ability to persuade and encourage lawyers to prepare articles to be considered for publication. The icing on the cake was that Greg had previously served on the Board of Editors and written articles for the *Lawyer*.

Prior to calling Greg to convince him to take the position, I discussed my idea with Margaret and state bar President Alyce Spruell. Both were excited by the prospect and encouraged me to call him. When I contacted Greg, I could not have wished for a better result. He said he was flattered to be considered and would be honored to serve. I was beyond elation. To have Greg agree to become the new editor meant that the excellent bar publication which lawyers had grown to expect would continue.

For the past eight years, *The Alabama Lawyer* has become a better publication than ever under Greg's leadership. The subtle changes in format, more color photography and a renewed emphasis on high-quality, substantive, but practical legal articles have made the *Lawyer* an even more useful resource for busy lawyers regardless of their area of practice.

Greg will have more time now to enjoy this Tennessee view.

I had the good fortune to work with Greg for six years before my retirement as executive director in 2017. I can honestly say that I never had a moment's worry about any aspect of the publication. The Editorial Board with Greg at the helm and Margaret as the managing editor all worked smoothly to turn out excellent issues of the magazine every two months. As effortlessly as those issues may have seemed to materialize, Greg was there with a "roll up your sleeves" attitude, thoroughly reviewing each article and every section of the magazine before any issue ever went to press. Other than the president of the Alabama State Bar, no other bar volunteer has to spend time virtually every day doing bar-related work except for the editor of *The Alabama Lawyer*–and presidents only serve a one-year term!

Thank you, Greg, for heeding the call when your fellow lawyers needed you. You have performed a valuable service to Alabama's legal profession. Through your selfless service and leadership of *The Alabama Lawyer*, you have helped make us all better lawyers. ▲

–Keith B. Norman, State Bar Executive Director, 1994-2017

EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum
phillip.mccallum@alabar.org

Volunteers Are the Backbone of the Bar

Our state bar is a unified bar and, as such, presents a unique situation. The benefits of a unified bar enable our profession to carry out our regulatory obligations and public services. You're required to be a member in order to practice law, but how you choose to be involved after your admissions ceremony is ultimately your choice. The fact is we need volunteer support–not only do the regulatory and licensing functions require strong support, but so do our programs that benefit the profession and the public.

This year, we embarked on a new journey with the Leadership Forum. As we announced last fall, the Leadership Forum is taking a "strategic pause" to evaluate the program moving forward. The summits we are holding this spring are the brainchild of past alumni, who are volunteering their time to make the Leadership Forum continue to be the award-winning, innovative program that it has been for the last 15 years. A lot of the forum's success is due to Ed Patterson, who retired in January. We thank Ed for the time he spent molding many young legal minds over the years. We very much owe the future of the Leadership Forum to the alumni who have spent the last several months crafting the program that will push it to new heights. By the time you read this, we will have completed at least one summit in February and are looking forward to two more.

Greg Hawley (left) and members of the program that reviewed Deepwater Horizon share a lighter moment at the 2011 ASB Annual Meeting.

We also had longtime editor of *The Alabama Lawyer*, Greg Hawley, retire after eight years of dedicated service. Being the editor of a quality publication like *The Alabama Lawyer* requires a significant amount of time working with contributors, a graphic designer, the Editorial Board and our state bar director of publications, Margaret Murphy. Greg has directed the publication of more than 50 issues of the *Lawyer,* all while practicing law.

A little insight into the positon of editor–it's basically a part-time, but unpaid, extra job. For each issue, Greg, like every editor before him, had to solicit and review prospective content at least two months in advance of each edition. He and Margaret would go through several drafts, editing some pieces numerous times, in order to make sure they are ready for publication. Unlike other bar communications that are sent via email, the *Lawyer* is mailed to every member in good standing, plus approximately 100 additional subscribers.

It's our legacy publication and we should be very proud of its content each and every issue. Volunteers like Greg Hawley are what make this organization tick–we appreciate his years of commitment to a job well done. This is Greg Hawley's last issue as editor, with Greg Ward's taking over with the May magazine. We look forward to many years of innovation and growth under his leadership.

Volunteers are the backbone of our bar. These last two examples are just a snapshot of the work lawyers do each year to help this organization run. Being a member-based organization, staff members, including me, understand the value of receiving input directly from lawyers. Each year, the incoming president has the opportunity to populate committees and task forces in order to carry out their initiatives for the year. If you have been serving on a section, committee or task force–***thank you***. Your time has been noticed and is appreciated. If you would like to get involved next year or in coming years, be thinking of how YOU can make an impact in this bar. ▲

Greg Hawley: Class, Character and Clarity

My first reaction when I was asked to pen a few words about Greg Hawley was *how*? I like to write, I have a history of writing, and I was named as his successor to do just that, but trying to say a few words to describe a man with whom I've so very much enjoyed working is asking a little much.

Only after I was chosen to replace him did I even begin to see the task he accomplished with such casual ease. And accomplish it he did. Six times a year, year after year, he loomed large over a product that has more than 18,000 readers scattered not only across Alabama, but across the United States, and even internationally. Daunting, that task.

He bore the singular and heavy responsibility of finding and publishing enough articles for every issue. For every article that came to him, he had to read every word, check the cites, and make certain that it met the high standards we hold for *The Alabama Lawyer*. Sometimes he had to ask the author to make

Hawley

changes. Sometimes he had to reject articles. And, he was able to accomplish all of this with a light touch, without giving offense, with class and with character.

I sent in an article once, and Greg called me. He liked the article, he said–he has a way of making you feel good, of bringing you inside–but he had a question. Could I tell him what I meant in one particular sentence? I read the sentence–it was an unimportant sentence, firmly placed in the middle of my article–and I, like all authors, thought that my words–my babies–were perfect. With great gentleness, he nudged me to give the words a bit of a different read. With that I took his point–my words contained a latent ambiguity. He helped me to clear it up with the tiniest of changes. I gladly accepted his suggestion, and the article was better for it.

He invited us to look beyond him–to never see him, actually–even though he was on every page, in every article, part and parcel of all that is our state bar's flagship magazine. Greg made a tough job look easy.

He once told me that he was never sure who read *The Alabama Lawyer* for more than the obituaries and the reprimands, and that sometimes he felt like he was working for himself and his mother. No, Greg, you worked for all of us. And you did a fine job. You left the magazine better than you found it (no mean task, considering the editor you replaced), and you left me with a daunting challenge: *Do better than I did*.

You will be a tough act to follow. All because you did the job so well.

Enjoy your time away from the editorial desk. You deserve it. ▲

–Greg Ward, Editor

NOTE FROM THE EDITOR

Gregory H. Hawley
ghawley@hawleynicholson.com

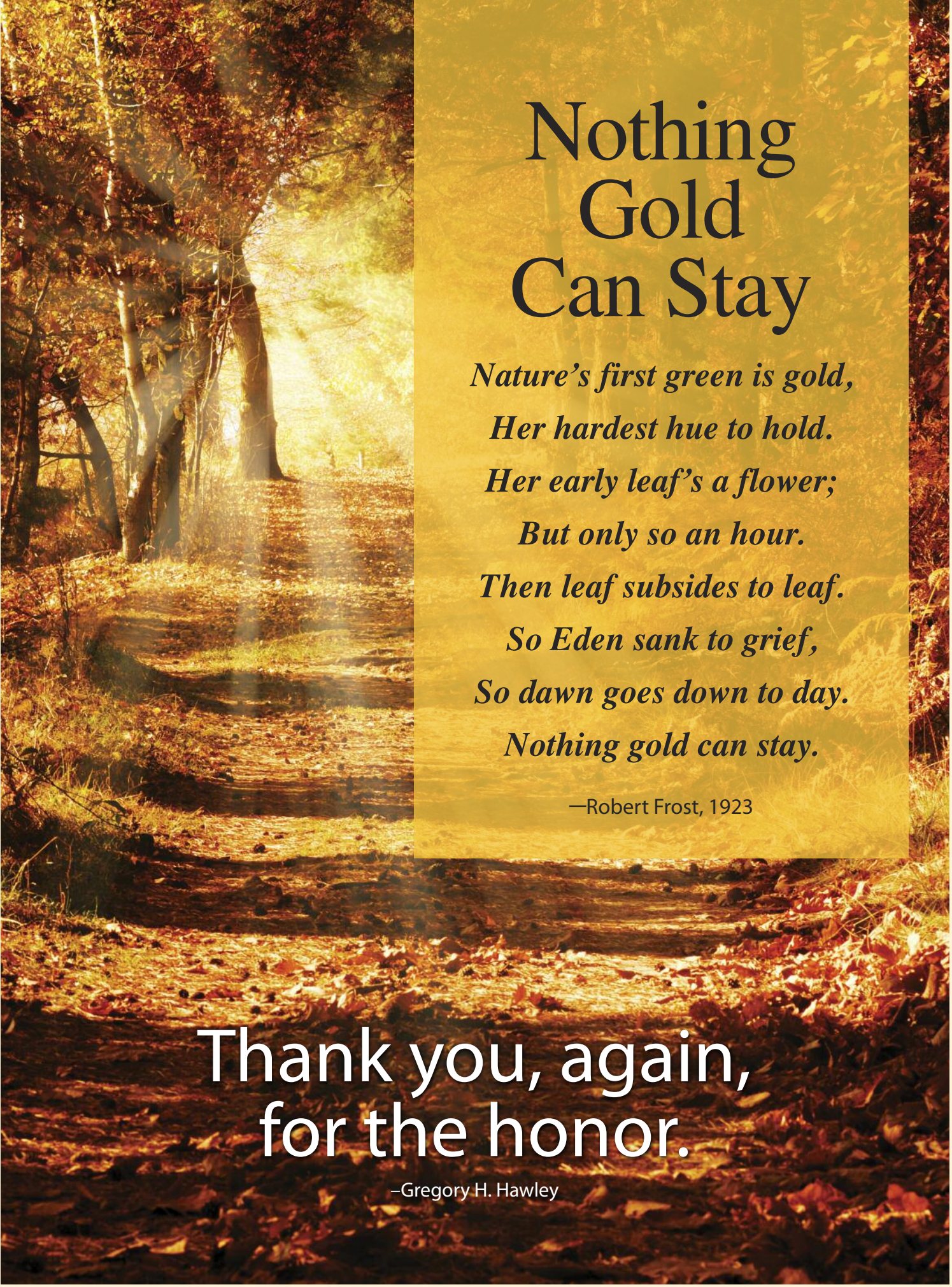
Members of the bar, I thank you.

Last fall, I informed Sam Irby that I wanted to retire as editor of *The Alabama Lawyer*. He and a committee conducted a thorough search, and they nominated and the Bar Commissioners selected Greg Ward, who will bring fresh ideas and a new perspective and will do a terrific job. Greg has been a member of the Editorial Board for some time, and he is already working hard to produce future issues, starting with the May publication.

Serving as editor of *The Alabama Lawyer* has been a rich, rewarding passion. Thank you for the opportunity to serve for several years, working with the excellent lawyers who serve on the Editorial Board. Thank you, too, for the articles submitted and for the helpful suggestions made over the years.

Three women in my life deserve special thanks and praise. First, my wife, **Sally Hawley**, was more than understanding on those occasions when I chose to enjoy an afternoon at the beach, sitting at the kitchen table with a red pen and a small pile of submissions. Fortunately, she enjoys her books as much as I enjoy editing articles! Second, my assistant, **Tyler Florence**, kept a calendar of articles submitted, tracked my edits (and prodded me when necessary) and ensured that we sent final versions in a timely manner to Publications Director Margaret Murphy. Finally, as some of you already know, **Margaret Murphy** deserves our appreciation for making *The Alabama Lawyer* a great publication. She handles the advertising, the budget, the printing, law firm news, memorials, staff-written pieces and deadlines. Oh, and she catches typos that I miss. It has been a joy to work with Margaret to produce a quality product. Laughter has been the most consistent ingredient in eight years of phone calls, emails and occasional meetings. No two people who live 90 miles apart have had more fun working together.

But, all good things come to an end. One of my favorite poems captures the last eight years of collaboration, as well as the closure that the publication of this issue of *The Alabama Lawyer* brings for me. ▲



Nothing Gold Can Stay

Nature's first green is gold,
Her hardest hue to hold.
Her early leaf's a flower;
But only so an hour.
Then leaf subsides to leaf.
So Eden sank to grief,
So dawn goes down to day.
Nothing gold can stay.

—Robert Frost, 1923

Thank you, again,
for the honor.

–Gregory H. Hawley

IMPORTANT NOTICES

Local Bar Award of Achievement

The Local Bar Award of Achievement recognizes local bars for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's Annual Meeting.

Local bar associations compete for these awards based on their size–large, medium or small.

The following criteria are used to judge the applications:

- The degree of participation by the individual bar in advancing programs to benefit the community;
- The quality and extent of the impact of the bar's participation on the citizens in that community; and
- The degree of enhancements to the bar's image in the community.

To be considered for this award, local bar associations must complete and submit an application by June 1. Applications may be downloaded from *www.alabar.org* or obtained by contacting Ashley Penhale at (334) 269-1515 or *ashley.penhale@alabar.org*.

J. Anthony "Tony" McLain Professionalism Award

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the J. Anthony "Tony" McLain Professionalism Award through April 15. Nominations should be prepared on the appropriate nomination form available at *www.alabar.org* and mailed to:

Phillip W. McCallum
Executive Director
Alabama State Bar
P.O. Box 671
Montgomery, AL 36101-0671

The purpose of the J. Anthony "Tony" McLain Professionalism Award is to honor the leadership of Tony McLain and to encourage the emulation of his deep devotion to professionalism and service to the Alabama State Bar by recognizing outstanding, long-term and distinguished service in the advancement of professionalism by living members of the Alabama State Bar.

Nominations are considered by a five-member committee which makes a recom-

mendation to the Board of Bar Commissioners with respect to a nominee or whether the award should be presented in any given year.

William D. "Bill" Scruggs, Jr. Service to The Bar Award

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the William D. "Bill" Scruggs, Jr. Service to the Bar Award through April 15. Nominations should be prepared on the appropriate nomination form available at *www.alabar.org* and mailed to:

Phillip W. McCallum
Executive Director
Alabama State Bar
P.O. Box 671
Montgomery, AL 36101-0671

The Bill Scruggs Service to the Bar Award was established in 2002 to honor the memory of and accomplishments on behalf of the bar of former state bar President Bill Scruggs. The award is not necessarily an annual award. It must be presented in recognition of outstanding and long-term service by living members of the bar of this state to the Alabama State Bar as an organization.

Nominations are considered by a five-member committee which makes a recommendation to the Board of Bar Commissioners with respect to a nominee or whether the award should be presented in any given year.

Notice of Election and Electronic Balloting

Notice is given here pursuant to the *Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners* that the election of these officers will be held beginning Monday, May 20, 2019 and ending Friday, May 24, 2019.

On the third Monday in May (May 20, 2019), members will be notified by email with instructions for accessing an electronic ballot. Members who wish to vote by paper ballot should notify the secretary in writing on or before the first Friday in May (May 3, 2019) requesting a paper ballot. A single written request will be sufficient for all elections, including run-offs and contested president-elect races, during this election cycle. All ballots (paper and electronic) must be voted and received by the Alabama State Bar by 5:00 p.m. on the Friday (May 24, 2019) immediately following the opening of the election.

(Continued from page 93)

Nomination and Election of Board of Bar Commissioners

Bar commissioners will be elected by those lawyers with their principal offices in the following circuits:

- 1st Judicial Circuit
- 3rd Judicial Circuit
- 5th Judicial Circuit
- 6th Judicial Circuit, Place 1
- 7th Judicial Circuit
- 10th Judicial Circuit, Place 3
- 10th Judicial Circuit, Place 6
- 13th Judicial Circuit, Place 3
- 13th Judicial Circuit, Place 4
- 14th Judicial Circuit
- 15th Judicial Circuit, Place 1
- 15th Judicial Circuit, Place 3
- 15th Judicial Circuit, Place 4
- 23rd Judicial Circuit, Place 3
- 25th Judicial Circuit
- 26th Judicial Circuit
- 28th Judicial Circuit, Place 1
- 32nd Judicial Circuit
- 37th Judicial Circuit

Additional commissioners will be elected for each 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits will be determined by a census on March 1, 2019 and vacancies certified by the secretary no later than March 15, 2019. All terms will be for three years.

A candidate for commissioner may be nominated by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Nomination forms and/or declarations of candidacy must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 26, 2019).

Election of At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 2, 5 and 8. Petitions for these positions, which are elected by the Board of Bar Commissioners, are due by April 1, 2019.

Submission of Nominations

Nomination forms, declaration of candidacy forms and applications for at-large commissioner positions must be submitted by the appropriate deadline and addressed to:

Phillip W. McCallum
Secretary
Alabama State Bar
P.O. Box 671
Montgomery, AL 36101-0671

These forms may also be sent by email to *elections@alabar.org* or by fax to (334) 261-6310.

It is the candidate's responsibility to ensure the secretary receives the nomination form by the deadline.

Election rules and petitions for all positions are available at *www.alabar.org.*

Notice of and Opportunity For Comment on Amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit

Pursuant to 28 U.S.C. § 2071(b), notice and opportunity for comment is hereby given of proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit. The public comment period is from April 1 to May 1, 2019.

A copy of the proposed amendments may be obtained on and after April 1, 2019 from the court's website at *http://www.ca11.uscourts.gov/rules/proposed-revisions*. A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., NW, Atlanta 30303 [phone: 404-335-6100].

Comments on the proposed amendments may be submitted in writing to the Clerk at the above address, or electronically at *http://www.ca11.uscourts.gov/rules/proposed-revisions*, by 5:00 pm Eastern time on May 1, 2019. ▲

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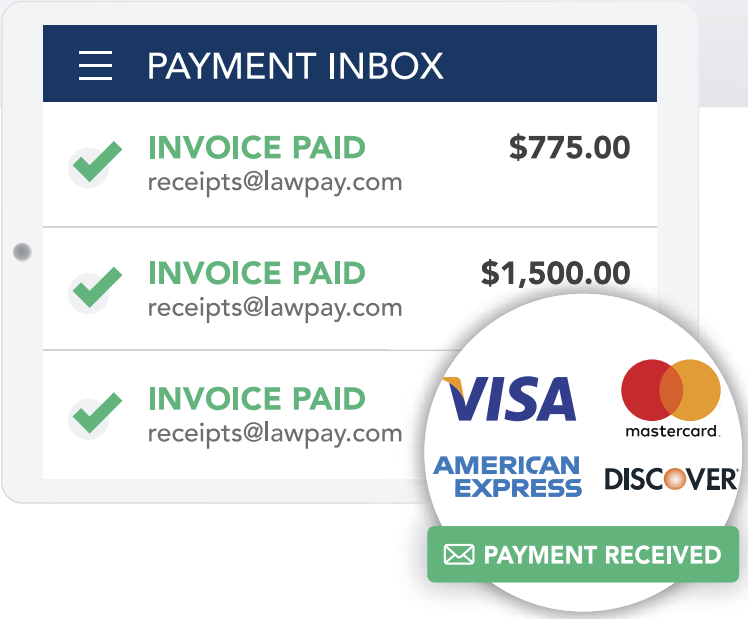

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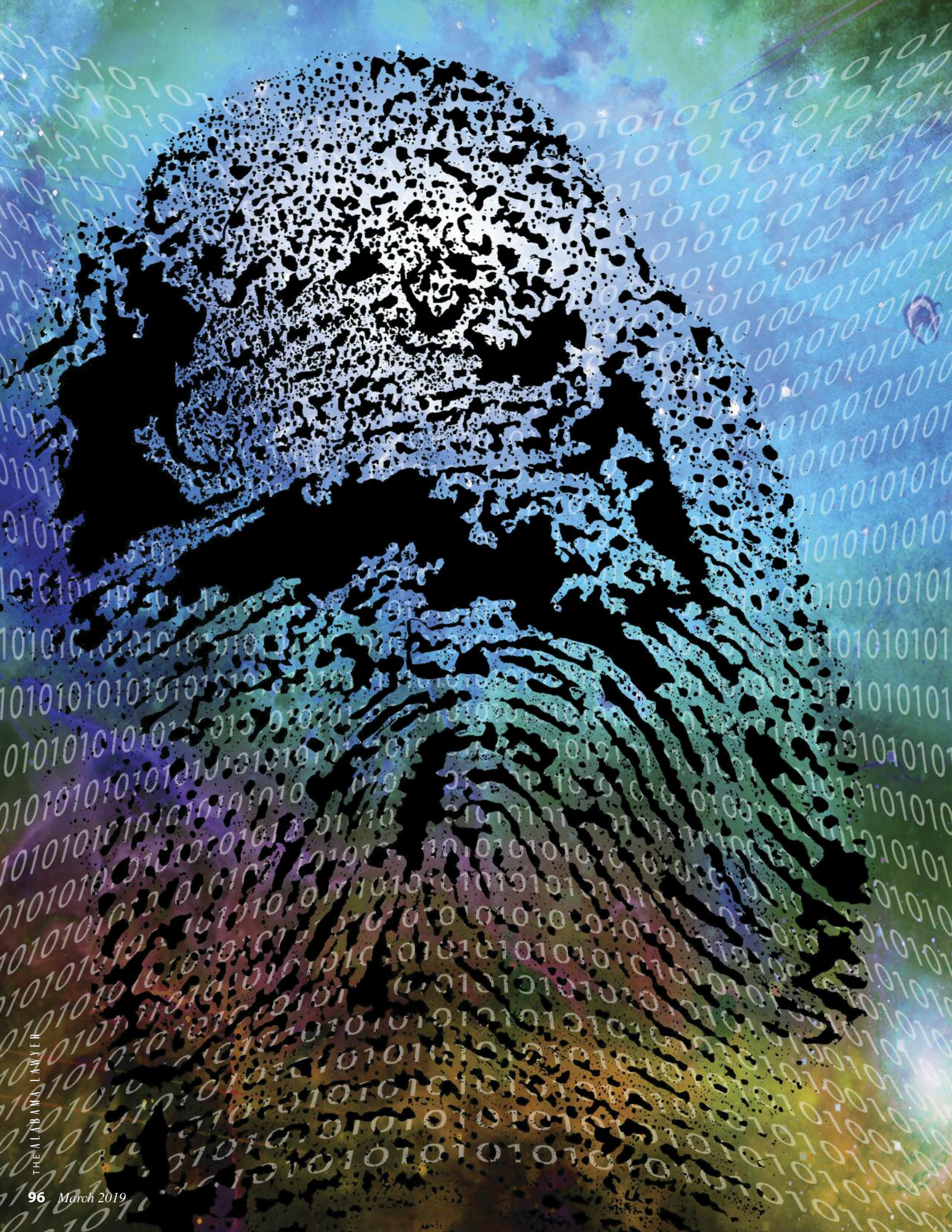


Alabama Supreme Court Amends Rules 26 and 37 to Address Proportionality and ESI

By Gregory C. Cook and Sloane M. Bell

The Alabama Supreme Court recently adopted important amendments to the Alabama Rules of Civil Procedure effective December 21, 2018. For the most part, these parallel the changes to the Federal Rules of Civil Procedure (Rules 26 and 37) in December 2015. The amendments include: (1) adding a proportionality standard in the definition of the scope of discovery, (2) expressly allowing courts to allocate discovery expenses in the context of a protective order and (3) instituting a new and complete framework for addressing a party's failure to preserve electronically-stored information ("ESI").

Discovery's New Scope–Rule 26(b)(1) Adds Proportionality

Rule 26(b)(1) sets forth the permissible scope of discovery in Alabama courts. Prior to the December amendments, proportionality was not part of Rule 26(b)(1). Instead, proportionality was only one of the considerations that a court could use to limit discovery under Rule 26(b)(2)(B). Thus, proportionality only became an issue if a motion was made for a protective order under Rule 26(c) (or if the court acted "upon its own initiative").

The amendment moves all proportionality factors to Rule 26(b)(1), which is the portion of Rule 26 which defines the *scope* of discovery. Rule 26(b)(1) now provides, in relevant part: "Parties may obtain discovery regarding any matter, not privileged, which is: relevant…and proportional to the needs of the case."

As the Committee Comments make clear, one reason for this move was to emphasize the importance of proportionality to all parties and the trial court. The Committee noted the information explosion and the potentially crippling costs for discovery and sought to "highlight the need to size discovery to the needs of a particular case." *See* Ala. R. Civ. P. 26(b), Comm. Cmts. This change underscores that proportionality is required and not optional.

The amendment specifies six factors to consider in deciding proportionality. These factors follow the federal rule exactly, and the Committee Comments indicate that federal caselaw is expected to be helpful in applying these factors. The six factors are: (1) "the importance of the issues at stake in the action," (2) "the amount in controversy," (3) "the parties' relative access to relevant information," (4) "the parties' resources," (5) "the importance of the discovery in resolving the issues" and (6) "whether the burden or expense of the proposed discovery outweighs its likely benefits."

Four of these factors were previously part of Rule 26(b)(2)(B) (but were slightly reworded) and two of these factors are new. These two new factors are: (1) the parties' relative access to relevant information and (2) the importance of the discovery in resolving the issues. As to the first of these new factors, the Committee Comments explain that parties may not have the same "access" to relevant information and therefore one party may need more discovery (this is referred to as "information asymmetry"). Thus, the fact that one party has produced more discovery than another party (for instance, an "individual plaintiff") is not necessarily indicative that discovery is not proportional. As to the second of these new factors, the Committee Comments explain that the "importance of the discovery in resolving the issues" was implied in the prior wording regarding the "needs of the case" from Rule 26(b)(3)(B)(iii).

The Committee Comments (as well as the Advisory Committee Notes for the federal rule) include a helpful discussion of the meaning of these factors. Notably, federal law indicates that the weight of these factors can vary from case to case (and request to request) and thus that the order of these factors in the Rule is not indicative of their importance.

The Committee Comments also state that "[a]ll parties should share the responsibility to honor these limits," and that the size of that responsibility may shift throughout the discovery process. For instance, the party requesting the discovery may have little information on the extent of the burden posed by particular discovery requests at the time the requests are issued. Conversely, the responding party may have little information on the importance of the discovery in resolving issues as understood by the requesting party. The parties should communicate during the discovery process and revise their positions accordingly. The responding party should considering explaining the burden rather than standing on boilerplate objections; the requesting party should explain why the discovery is important to the relevant issues during the meet-and-confer process. Again, it is clear that under the revised Rule, all parties now have a collective responsibility to consider proportionality on the front end and to provide the trial court with all appropriate information if they cannot reach a resolution.

The impact of this rule change should be small in routine cases. Proportionality is normally self-evident in such cases. In short, most cases will still rely on self-regulated discovery where the parties come to mutually-agreeable terms without court involvement. But, as noted by the Committee, the proportionality factors will be of particular importance for more

complex cases, including commercial disputes, class actions, multiparty actions, product liability actions and actions involving electronic discovery. It is those cases where this amendment will save parties and the judicial system significant time and money. With advances in technology come the increased costs of discovery, as well as the potential weaponization of the discovery process or to utilize the process as a stall-tactic. Given these considerations, the Committee recognized the need for judicial involvement in the more complex cases and provided the trial court with a detailed standard for making proportionality determinations.

Another change to Rule 26(b)(1) was the removal of specific examples of discoverable information, including "the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matters." The Committee justified this deletion by noting the discovery of such matters is so deeply entrenched in practice that it is no longer necessary in an already lengthy Rule.

It should be noted that the Alabama amendment did not adopt the changes in the federal rule which narrowed the definition of relevant discovery. In the Alabama version of Rule 26(b)(1), discovery must be "relevant to the *subject matter* involved in the pending action."

The federal version of Rule 26 previously included the same language, but narrowed this language in an amendment in 2000 to state "relevant to any *party's claim or defense*." The 2015 amendment to the federal version of Rule 26 eliminated the traditional "reasonably calculated" language in Rule 26(b)(1), thus arguably narrowing relevancy further. This change was also not made in the Alabama amendments and Ala. R. Civ. P. 26(b)(1) still reads: "It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Notably, discovery must be both "relevant . . . *and* . . . proportional." Thus, while the difference in the wording regarding relevancy may affect some discovery battles, it will not affect the independent requirement that discovery be proportional (and therefore federal caselaw on proportionality should be persuasive for Alabama courts).

Rule 26(c) Changed to Expressly Authorize Trial Courts to Allocate Discovery Expenses

Rule 26(c) governs the instances for which an Alabama court can issue a protective order, which may limit discovery in a case or even forbid certain discovery outright. Protective orders under this Rule protect responding parties from "annoyance, embarrassment, oppression, or undue burden or expense." To further this purpose, the Rule includes several measures a court can take when crafting a protective order. For example, a court may forbid the discovery sought altogether, order that a deposition be sealed and only opened on court order and limit discovery to a certain method.

Under the amendment, Rule 26(c) remains almost unchanged. The Committee's only substantive addition is providing the trial court with the express power to condition discovery upon the allocation of expenses of that discovery between the parties (allowing the court to order under Rule 26(c)(2) "the allocation of expenses"). In most cases, the amendment should not change the traditional Alabama practice that discovery expenses are borne by the responding party, because the "allocation of expenses" is only allowed upon the making of a motion for protective order and "good cause shown."

This change should be important in dealing with proportionality. For instance, this new authority allows the trial court to allocate some (or all) of the costs of discovery as a method to balance proportionality between the parties. This may be especially useful when the parties disagree about the true cost or the true importance of discovery. The authority would also seem to allow creative options for the court (for instance, dividing the costs, phasing the costs, taxing the costs to the losing party, tying cost allocation to the actual use of any discovery during trial, etc.). This change will also be helpful with respect to allocating costs of restoring or replacing lost ESI, which is governed by Rule 37(g) (see below).

Though the Rule may have implicitly allowed for the allocation of costs, the Committee sought to clarify the trial court's authority to allocate costs by including express language in the Rule because of the large potential costs associated with ESI, ensuring a more equitable process.

New (Complete) Roadmap for Loss of ESI

Rule 37(g) deals with sanctions for the loss of ESI. In 2010, the Alabama Supreme Court adopted Rule 37(g) which was consistent with the 2006 changes to its federal counterpart (FRCP 37(e)). However, since that time, the information explosion has continued and the courts (especially the federal courts) have encountered an avalanche of motion practice regarding ESI discovery and ESI sanctions. The prior version of Rule 37(g) led to conflicting federal precedent, caused parties to incur significant time and expense in ancillary disputes, threatened to confuse juries and had the potential to cause litigants to spend significant time and money on excessive preservation.

In December 2015, the federal version of Rule 37(g) was completely rewritten. The Alabama amendment adopts almost entirely the federal version, but provides helpful clarity on who should make the threshold determinations laid out in Rule 37. The Alabama Committee believed that the changes "provide specificity regarding the circumstances under which sanctions may be imposed when ESI is lost through negligence and when it is intentionally destroyed for the purpose of depriving the opposing party of its use." *See* Comm. Report, Sept. 21, 2018. These changes now provide a clearly defined, comprehensive roadmap.

The old Rule 37(g) was very narrow and only addressed one specific safe harbor: if a loss of ESI was a result of the "routine, good faith operation" of a party's computer system and there were no exceptional circumstances, the loss of ESI was not sanctionable. The prior version simply didn't speak to any other ESI situations, leaving courts without clear guidance.

Now, Rule 37(g) provides for a far broader inquiry by the court and a full roadmap to follow when dealing with the failure to preserve ESI. It essentially provides a flow chart for the trial court in deciding how to handle a loss of ESI.

Three-Part Test for the Nonintentional Loss of ESI

Under the new Rule, the first question is whether ESI "that should have been preserved in the

anticipation or conduct of litigation" was lost. For instance, if the information is not relevant (or not proportional), then this test would not be satisfied.

Second, the loss of the ESI must be "because a party failed to take reasonable steps to preserve it." The focus is on whether the steps were "reasonable" and therefore is an objective test.

Third, the ESI must be unable to be "restored or replaced through additional discovery." In other words, if ESI can be replaced or restored, it should be (given proportionality in Rule 26), and there will be no need for further consideration of sanctions.

If these three tests are met, the court must next consider whether there is "prejudice." If so, the trial court may only "order measures no greater than necessary to cure the prejudice" (assuming that the loss was not intentional). The Rule focuses upon advancing the merits of the litigation–attempting to cure the prejudice so that the merits of the case can be decided. The trial court's discretion under Rule 37(g)(1) includes the authority under Rule 26(c) to allocate the expenses of replacing or restoring the lost information. Importantly, the trial court should only order those measures that are proportional to the information lost. For example, if a small amount of relatively unimportant information is lost, the court should not order the restoration of such information if doing so would require great expense. Such a high cost of recovery would not be proportional to the information lost, as required by the Rule.

Rule 37(g) does not assign the burden of proof for proving prejudice. The Committee Comments state: "[t]he rule does not specify which party bears the burden of proving prejudice… This is left to the discretion of the trial court." The Committee Comments also quote the Advisory Committee Notes to the federal rule observing that the ease or difficulty of showing prejudice can vary between particular cases.

The Committee Comments also quote the Advisory Committee Notes to the federal rule observing that the ease or difficulty of showing prejudice can vary between particular cases.

Destruction of ESI with "Intent to Deprive Another Party of Use"

However, if the party "acted with the intent to deprive another party of use of the information in the litigation" (*and those three tests are met*), additional sanctions are possible. Those options available to the trial court include: (a) presuming that the lost information was unfavorable to that party, (b) instructing the jury that it may ***or*** must presume that the information was unfavorable to that party, and (c) dismissing the action (if the intentional deprivation is by a plaintiff) or entering a default judgment (if the intentional deprivation is by a defendant).

It is important to emphasize the high level of intent that must be found to apply the sanctions in Rule 37(g)(2). Anything short of the specific intent to deprive the other party of the use of the ESI ("in the litigation") is insufficient for application of 37(g)(2). Notably, the Rule includes only two levels of culpability for the loss of ESI–intentional and nonintentional. Anything short of this specific intent must be dealt with under Rule 37(g)(1) which focuses upon avoiding prejudice rather than applying a punitive sanction.

Rule 37(g) does not provide for sanctions if the discovery is not "lost." As the Committee Report to the supreme court explained:

> The Committee considered whether to diverge from F.R.C.P. 37 and recognize the power of the trial court to impose punitive sanctions if a party intentionally destroys ESI, but the information is restored or replaced. After discussing this issue at length, the Committee voted not to do so. The Committee felt that practitioners would benefit from uniformity of the Alabama and federal rules regarding discovery of ESI and the ability to rely on federal precedent. Further, the Committee worried about distracting the jury and occupying the time of the parties and the Court on non-merits

issues. The trial court retains its inherent authority to allow the jury to consider evidence of intentional destruction if it is relevant to the merits, rather than a sanction.

Who Decides?

While these changes largely follow the changes to FRCP 37, the Alabama Comments include an important clarification regarding who decides whether the threshold tests in Rule 37(g) have been met. Neither Fed. R. Civ. P. 37 nor its Committee Notes expressly state whether the judge or the jury makes the determinations under the Rule. However, the Alabama Committee Comments are clear that the trial court makes the determination of whether the threshold factors in Rule 37(g) have been satisfied and decides which sanction to impose. ("The amendment to our Rule 37(g) requires that the court, not the jury, determine not only whether the lost information should have been preserved, whether the loss resulted from a failure to take reasonable steps to preserve it, and whether it can be replaced or restored, but also whether another party has been prejudiced... and what measures should be taken to cure…"). Further, the Committee Comments state regarding Rule 37(g)(2) that the "Alabama rule requires that the court make the finding whether the relevant information was lost intentionally…"

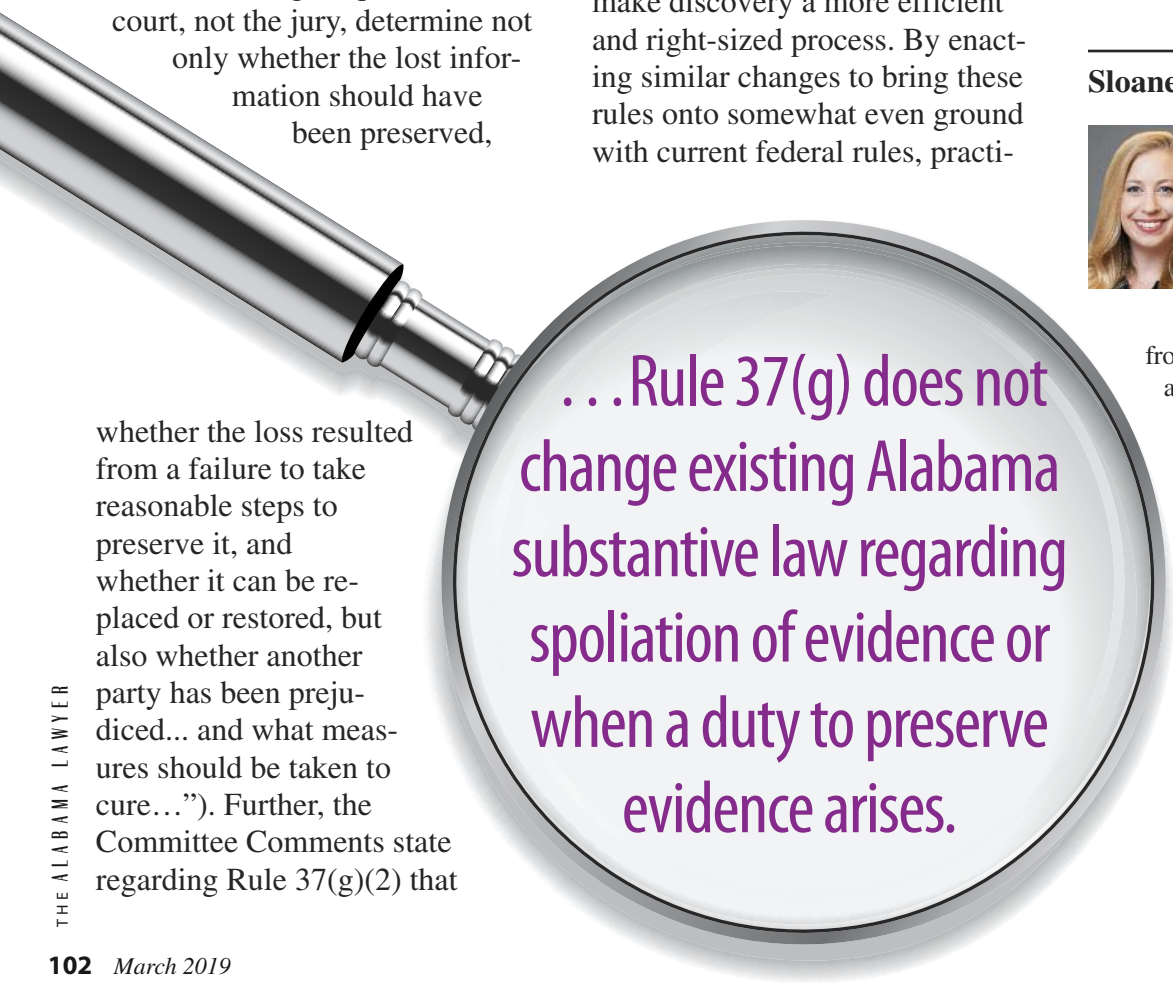
What Rule 37(g) Does And Does Not Do

The adoption of Rule 37(g) is intended to provide a complete roadmap for ESI sanctions issues and thus "forecloses reliance on the inherent authority of the court to determine when certain measures should be used."

However, Rule 37(g) does not change existing Alabama substantive law regarding spoliation of evidence or when a duty to preserve evidence arises. Further, rule 37(g) only addresses ESI.

Conclusion

The recent amendments to Ala. Civ P. 26 and 37 are intended to make discovery a more efficient and right-sized process. By enacting similar changes to bring these rules onto somewhat even ground with current federal rules, practitioners and courts will hopefully find more direction and efficiency as we head into 2019. While these rule changes should make little impact on routine cases, it is very important that Alabama trial courts have these new tools to handle complex litigation when it inevitably arises. ▲



Gregory C. Cook

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Sloane M. Bell

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No Batteries Required: A Primer on Gifts to Minors

By James P. Naftel, II and Jessica S. Grover

Introduction

This article will explore various methods of gifting to minors[1] that do not involve the latest "must-have" toy–which is to say, gifting when the intent is to confer a long-term benefit on the minor. There are two important points to bear in mind as we consider these options. First, making a gift, in this context, involves an intent to transfer and convey the asset (whether cash or another kind of property) out of the estate of the donor (the giver). A mere promise to do something, no matter how well-intentioned, is illusory and contingent, and is not covered here. Second, while this article does, at certain points, note the income and gift/estate tax consequences of certain options, there are tax complexities and consequences that we will not cover in this article, but which should be considered before undertaking significant gifting to a minor.

I. Outright Gifts

The first option to consider is also the simplest: a direct, outright gift to the minor. Under Internal Revenue Code ("I.R.C.") § 2503, gifts of up to $15,000[2] per year, per person, qualify for the annual gift tax exclusion (and for an annual generation-skipping transfer tax exclusion, provided that the gift is directly to the person[3]). Spouses can "gift split," meaning that one spouse can use the other's annual exclusion (with his or her consent) even if the other spouse does not own an interest in the property being gifted; so, parents, grandparents or other relatives can transfer $30,000 per year in assets to each of their children, grandchildren, nieces, nephews, etc.

An outright gift to a minor can include essentially any type of property: (1) cash, (2) tangible personal property, (3) real property, (4) securities or (5) interests in a closely-held entity (see below). In reality, it is not the gifting to the minor that is the issue; rather, it is the consequences, intended or unintended, of making a direct gift. Consider:

- If a gift of cash or marketable securities is placed in a bank or investment account in the minor's sole name, the donor immediately loses all control.[4]
- If a gift of an interest in real property is made to a minor, the minor, having no capacity to contract, cannot sell or dispose of the interest until attaining the age of majority–but what if it becomes necessary to do so? In that case, a conservator would have to be appointed, and that conservator would then have to petition for and receive specific permission from the probate court to sell the property.
- If a gift of valuable tangible personal property is made to a minor (jewelry, automobile, art, etc.), can the property be insured by the minor? How will it be titled and how will ownership be verified? How can the property be transferred during minority if necessary?

The ABLE Act allows a savings account to be established for a beneficiary who becomes disabled before the age of 26 for the purpose of meeting the qualified disability expenses of the beneficiary.

Another consideration: significant outright gifts to a minor may create a disincentive in the minor to work hard, go to college and become a productive member of society. Easy access to money may encourage frivolous spending habits early on in the minor's life, from which the minor may never recover.

Advantages:

- **Simplicity**
- **Removes assets from estate of donor**
- **Gifts of cash and cash equivalents are easy to quantify for purposes of gift tax annual exclusion.**

Disadvantages:

- **Ease of access by minor if gift is of cash or asset easily converted to cash**
- **Difficulty of disposing of or otherwise dealing with interest (if not cash) due to minor's incapacity to contract–may result in need for a conservatorship if sale/disposition become necessary**
- **Loss of control by donor or other responsible adult–minor may turn out to be irresponsible, have creditor problems, substance abuse problems, etc.**
- **Disincentive to minor to earn and be productive**

II. Outright Gifts with Strings Attached

A related option to consider is gifting LLC or other limited interests to the minor. This strategy can be particularly effective for non-income-producing assets such as a vacation property, although it can also be used for securities and other income-producing assets. The idea is that the donor forms an LLC or limited partnership, creating a one percent general partner ("GP") and 99 percent limited partnership ("LP") interests. The donor initially owns all of the interests. The GP controls all aspects of the entity, including

distributions and management of the underlying asset(s). Limited partners are restricted in what they can do, particularly regarding sale or alienation of their interests. The donor transfers vacation property, such as a lake house or a beach house, to the entity and then obtains a qualified valuation to determine the value of a $15,000 limited interest in the entity (i.e., the amount that can currently be transferred as an annual exclusion gift). The donor then transfers that exact percentage of interest to the minor donee (doubling to $30,000 if the donor is married and the donor's spouse consents to gift-splitting). Obtaining a valuation toward the end of a calendar year allows the donor to use the same valuation in consecutive years, for example, making a gift in December and then again immediately in January of the following year. In order to begin the clock running for the IRS to challenge the valuation and the gift (even though no gift tax is due because the gift was designed to utilize the donor's annual exclusion amount), the donor files a federal gift tax return reporting the gift(s).

While this is an outright gift, this type of interest is, by its very nature, subject to certain limitations or hedges. While the gift itself is complete, the minor's interest is such that it cannot be fully utilized or exploited by the minor without the concurrence of another party.

Advantages:

- **Limits minor's ability to irresponsibly access asset**
- **Maintains control over entity and therefore over underlying assets**
- **Can stop making gifts at any time**
- **Brings minor into family wealth discussions**
- **Over time, can transfer significant amount of wealth down to children**

Disadvantages:

- **Initial cost of setting up LLC or other limited liability entity**
- **Annual expenses to maintain LLC and administer entity, including distribution of K-1s, etc., filing of federal gift tax returns to report gifts**
- **Bi-annual cost of valuation (to determine how much interest in LLC = $15,000 for gifting purposes)**
- **Cost to unwind**

III. ABLE Accounts (Enable Savings Plan Alabama)

ABLE accounts represent a relatively new method for making gifts to certain minors who are disabled. In December 2014, Congress passed the Achieving a Better Life Experience (ABLE) Act, I.R.C. § 529A, authorizing state-sponsored, tax-deferred savings accounts for persons with disabilities, and in June 2015, the Alabama Legislature established an ABLE program pursuant to Ala. Code § 16-33c-1 *et seq*. Alabama contracted with the Nebraska State Treasurer to administer what is known as the Enable Savings Plan Alabama, which is intended to operate as a qualified ABLE program under I.R.C. § 529A.

The ABLE Act allows a savings account to be established for a beneficiary who becomes disabled before the age of 26 for the purpose of meeting the qualified disability expenses of the beneficiary. I.R.C. § 529A. Anyone can create the account or make contributions to it, but the disabled individual is considered to be both the beneficiary and owner, with full control over the account and its assets. I.R.C. § 529A(e)(3).[5] The funds in an Enable account[6] do not count as a resource for purposes of determining the beneficiary's eligibility for Supplemental Security Income (SSI) and Medicaid. Enable Savings Plan Alabama Program Disclosure Statement ("Disclosure Statement"), pp. 10, 34-35. Similar to a Qualified Tuition Plan (see VI, *infra*), an Enable account is funded with after-tax dollars and the assets in the account then grow tax-free. *Id*., pp. 2, 40.[7] The earnings portion of withdrawals from the account are tax-free provided that they are used for qualified disability expenses. *Id.*; *see also* Ala. Code § 40-18-19(11) (exempting from Alabama state income tax "all income, interest, dividends, gains or benefits of any kind received from ABLE savings accounts"). Qualified disability expenses include education, employment support, personal support services, preventative health and wellness programs, and transportation. I.R.C. § 529A(c)(1)(B).[8] A minimum contribution of $50 is required to establish an Enable account and the annual account maintenance fee is $45 (assessed $11.25 quarterly). *Id*., p. 28. Only cash contributions are permitted. I.R.C. § 529A(b)(2)(A). The investment option costs range from 0.50 percent to 0.56 percent, and there are no fees for enrollment, investment changes or distributions. *Id*., pp. 28-29.

An Enable account is subject to several key limitations, as follows:

(1) The total contributions to an account for one year from all sources cannot exceed $15,000 (or the amount of the gift tax annual exclusion then in effect). I.R.C. § 529A(b)(2)(B).[9]

(2) For an individual who receives SSI, if the total value of the account exceeds $100,000, the amount over $100,000 will count toward the SSI resource limit of $2,000, and if the resource limit is exceeded because of the Enable account, the beneficiary will lose eligibility for SSI until the resource limit falls below $2,000. (This loss of SSI eligibility does not impact the account owner's eligibility for Medicaid.) Disclosure Statement, pp. 34-35.

(3) The maximum account balance is $400,000. When that amount is reached, no additional contributions can be made, although the account assets may grow beyond that limit. Disclosure Statement, pp. 10, 15. (Note that the $400,000 limit would be relevant for a beneficiary who does not receive SSI; for a beneficiary receiving SSI, the $100,000 limit explained in (2) above should be observed.)

(4) Any amount remaining in the account at the death of the beneficiary is subject to Medicaid payback to the extent that the beneficiary has received Medicaid benefits since the time that the Enable account was created. I.R.C. § 529A(f).

Enable accounts may be particularly attractive to donors who want to provide for a disabled minor without jeopardizing the minor's entitlement to SSI, but who do not plan to gift more than $100,000 and for whom a special needs trust may be cost-prohibitive. In addition, some wealthier families may choose to establish an Enable account for a child in addition to a special needs trust, with the intent that the Enable account assets will be used for the beneficiary's short-term expenses and will be completely exhausted, so as to avoid the Medicaid payback, while the special needs trust assets will provide for the beneficiary's long-term special needs.

Advantages:

- **Allows donor to make a gift to a disabled beneficiary without impacting his or her entitlement to governmental benefits**
- **Simple and inexpensive to establish**
- **Administrative fees are very low**
- **Earnings are tax-free provided that they are used for qualified disability expenses.**
- **Contributions qualify for the annual gift tax exclusion.**

Disadvantages:

- **Limits on the amount that may be contributed to the account**
- **Only cash contributions are permitted.**
- **Assets are subject to Medicaid payback upon death of beneficiary.**
- **Beneficiary is the account owner and has control over the assets.**

IV. Gifts to a Custodian FBO Minor (UTMA)

Alabama's Uniform Transfers to Minors Act is codified at Alabama Code § 35-5A-1 *et seq*. Almost every state has a substantially similar act (South Carolina retains a version of the old Uniform Gifts to Minors Act). UTMA creates a framework in which a donor can make a gift of virtually any kind of property to a designated custodian for the benefit of a minor donee. Ala. Code § 35-5A-10 provides guidelines/requirements for how to create custodianships and title custodial assets. Generally, it is best practice to title or designate custodial assets exactly as prescribed by statute.

The custodian acts as fiduciary, but is not a trustee *per se*. The custodian can use the assets of the custodianship for the benefit of the minor, and is subject to a prudent person standard in investing and otherwise disposing of the property. Ala. Code § 35-5A-13(b). Income in a custodial account is taxed to the minor, and, if the minor dies prior to attaining the age of majority, the custodial property is considered to be an asset of the minor's estate (generally this would mean an intestate estate, since Ala. Code § 43-8-130 provides that 18 is the age at which a will may be executed). A custodian has power and authority only over custodial assets, and may not settle or release a claim of the minor against the transferor or a third party (*cf.* conservator or guardian ad litem). Ala. Code § 35-5A-12. A custodian has all of the powers and obligations imposed under UTMA, and only those powers and obligations–a donor cannot created a limited custodianship, or a super-custodianship. Ala. Code § 35-5A-12(c). A custodian is required to keep accurate records of the custodial property, and is required to keep custodial property

separate and distinct from all other property so that it can be readily identified (no intermingling!). Assets in a custodianship are subject to creditor and tort claims against the minor, but the minor may not voluntarily alienate the assets. Ala. Code § 35-5A-12.

UTMA requires a single custodian for a single minor–in other words, joint custodians are not permitted, nor can a custodial account be created for multiple beneficiaries. Ala. Code § 35-5A-11. Generally speaking, a donor should not act as custodian, as this creates the potential of the gift being disregarded for estate and gift tax purposes (particularly if the donor has an obligation to support the minor). There is not, however, an absolute prohibition on the donor also serving as custodian.

There is a $10,000 limit on transfers to a custodianship from an intestate estate, or if the will of a decedent does not provide that the assets to be distributed to the minor may be held in custody. Accordingly, it is good practice in will drafting always to provide that any assets or benefits that a minor may receive under the will, to the extent that a trust is not established for the minor's benefit, may be held in a custodial account by a custodian nominated by the executor.

One of the unusual features of Alabama's version of UTMA is that a custodial account may terminate at age 21 or at age 19, depending on how the assets in the custodianship came to be there:

- Custodianship terminates at age **21** if assets are placed into custodianship: (1) by irrevocable *inter vivos* gift or (2) by a will or trust that authorizes assets to be placed into a custodianship. Ala. Code § 35-5A-5-6;
- Custodianship terminates at age **19** if assets are placed into custodianship: (1) pursuant to intestacy ($10,000 limit), (2) through a will or trust that does not authorize assets to be held in custodianship ($10,000 limit), (3) by an obligor of a debt or judgment, (4) if the minor is the surviving joint owner or POD/TOD beneficiary of an account, (5) if the minor is the beneficiary of life insurance or a benefit plan payment and the beneficiary designation does not authorize custodianship. Contributions to a custodial account under (3)-(5) above are limited to $50,000 if no custodian has been nominated. Ala. Code § 35-5A-7-8.

UTMA creates a framework in which a donor can make a gift of virtually any kind of property to a designated custodian for the benefit of a minor donee.

Advantages:

- **Simplicity**
- **Recognized statutory scheme**
- **Can hold any type of asset**
- **Can choose custodian**
- **Can be used immediately for minor's benefit**
- **Minor has no direct access until age 21 or 19.**

Disadvantages:

- **Must terminate at statutory age of 21 or 19**
- **Can be difficult to establish successor custodians**
- **Perception that there is less accountability than with a trust or conservatorship**
- **If minor dies prior to majority, assets can inadvertently revert to parents if parents established the custodianship (thereby defeating intent to remove from parents' estate).**
- **Custodial property is treated as owned by minor for financial aid purposes.**

V. Direct Payment of Educational and Medical Expenses

Section 2503(e) of the Internal Revenue Code (*see also* 26 CFR 25.2503-6) permits direct payments of tuition and qualified medical expenses on behalf of a beneficiary without such payments counting as a taxable gift by the donor or as taxable income to the beneficiary. For wealthy families, this is an underutilized opportunity to transfer wealth from an older generation to benefit a younger generation without gift or generation-skipping transfer tax consequences. Note that payments by parents during minority do not (and need not) qualify, as parents have an obligation of support.

Education payments that qualify under I.R.C. § 2503(e) must be made *directly* to the educational institution or medical provider (insurance premiums may also be paid directly): this point cannot be overstressed. Qualifying education expenses include *tuition only* for primary, secondary, preparatory, high school and college, and include religious schools. I.R.C. § 170(b)(1)(A) and 26 CFR § 1.170A-9(c)(1). Pre-K/daycare programs are a gray area, as are trade and vocational schools. Books, supplies, uniforms, computers and other fees are not eligible for the exclusion. 26 CFR § 25.2503-6(b)(2). Note, however, that boarding schools often include room and board as a part of tuition and the full exclusion is generally claimed–at some point, the IRS may decide to challenge this practice. (26 CFR § 25.2503-6(b)(2) specifically states: "No unlimited exclusion is permitted for amounts paid for books, supplies, dormitory fees, board, or other similar expenses which do not constitute direct tuition costs.")

Medical expenses that qualify under I.R.C. § 2503(e)(2)(B) (cross-referencing I.R.C. § 213(d)) include expenses "incurred for the diagnosis, cure, mitigation, treatment or prevention of disease, or for the purpose of affecting any structure or function of the body or for transportation primarily for and essential to medical care. In addition, the unlimited exclusion from the gift tax includes amounts paid for medical insurance on behalf of any individual. The unlimited exclusion from the gift tax does not apply to amounts paid for medical care that are reimbursed by the donee's insurance. Thus, if payment for a medical expense is reimbursed by the donee's insurance company, the donor's payment for that expense, to the extent of the reimbursed amount, is not eligible for the unlimited exclusion from the gift tax and the gift is treated as having been made on the date the reimbursement is received by the donee." 26 CFR § 25.2503-6(b)(3). Cosmetic surgery does not qualify, except to correct a birth defect or disfigurement due to injury or disease. 26 U.S.C. § 213 (d)(9)(A).

Note, however, that Alabama is one of the few states that taxes gain on 529 Plan withdrawals from other state plans, even if the distributions are used for qualified education expenses–this can apparently be solved by creatively rolling over out-of-state plans into an Alabama plan, then withdrawing from the Alabama plan.

Advantages:

- **Simple if done correctly**
- **Unlimited amount (no phase out by AGI or cap on amount that can be paid); totally excluded from gift tax (does not count against $15,000 annual exclusion) and generation-skipping transfer tax ("GSTT")**
- **Can be used for multiple beneficiaries**
- **Great strategy for One Percenters**

Disadvantages:

- **Limited in scope to tuition and qualifying medical expenses**
- **Must be made directly to institution–have to do it right or lose the exclusion**

VI. Qualified Tuition Plans (Section 529 Plans)

Qualified Tuition Plans, or "529 Plans" as they are commonly known (again using the Internal Revenue Code section authorizing them as a shorthand) are designed to encourage saving for college by conferring certain tax advantages on participants. There are two types of 529 Plans: (1) prepaid tuition plans and (2) educational savings accounts. Funds in a 529 Plan account are exempt from federal income tax as long as distributions from the account are made for qualified higher education expenses of the designated beneficiary. 26 U.S.C. § 529 (b)(1). An important revision to I.R.C. § 529 occurred with the late 2017 Trump tax plan. Under the revised section 529, "qualified higher education expenses" now includes elementary and secondary school *tuition* of up to $10,000 per year, per child, from all 529 plans.[10] 26 U.S.C. § 529(c)(7) and 529(e)(3)(A)(iii). Note that other expenses related to elementary and secondary education are not currently qualified higher education expenses. For college and post-graduate education,

however, qualifying expenses include tuition, books and supplies, computer and related equipment (note: video game consoles such as a PS4 or Xbox are specifically excluded), fees, and room and board. 26 U.S.C. § 529 (e)(3). Also, it's important to keep in mind that since gains are not subject to income tax, neither can losses be deducted–a potential disadvantage.[11] Distributions that do not qualify are not only subject to federal income tax, but also to a 10 percent penalty tax. I.R.S. Pub. No. 970, Cat. No. 25221V (Jan. 31, 2018).

A 529 Plan account has an owner and a designated beneficiary, but any person can make a contribution to the account. 26 U.S.C. § 529(b)(1)(A). The account owner can change the designated beneficiary within the family tree of the account owner. I.R.S. Pub. No. 970, Cat. No. 25221V (Jan. 31, 2018). This is advantageous since the designated beneficiary may not always need the funds for college. There is no age limit on the designated beneficiary (cf. Coverdell ESA and UTMA).[12] Care must be given to the designation of the alternate beneficiary as GST tax may apply upon distribution (50 percent) if the new designated beneficiary is a generation younger than the original designated beneficiary. 26 U.S.C. § 529 (c)(5)(B). This is to prevent "abuse" by using 529 Plans as a way to hop-scotch generations.

A big advantage of 529 Plans is that there is an opportunity to quickly remove significant assets from a donor's estate. Contributions can be front-end loaded, i.e., a donor may contribute up to five years' worth of annual exclusion gifts in a single year in order to get the account up and running ($75,000 for an individual or $150,000 for married couple gift-splitting). I.R.C. § 529(c)(2)(B). This requires that the donor file a gift tax return reporting the gift (even though no gift tax is due), and the donor may not make additional gifts to the designated beneficiary until the appropriate number of years have elapsed.[13] If the donor does not survive the look-back period, then a portion of the transferred amount will be brought back in the donor's estate. I.R.C. § 529(c)(4)(C).

Contributions are not limited by AGI of donor (cf. Coverdell ESA). I.R.S. Pub. No. 970, Cat. No. 25221V (Jan. 31, 2018). There is, however, a limit on total contributions to 529 Plan accounts for a single beneficiary; in Alabama, the limit is $400,000 (varies by state).[14]

Alabama grants an income tax deduction of $5,000 per year ($10,000 for married filing jointly) for contributions to Alabama's CollegeCounts 529 Plan.[15] Funds can be rolled from another state's 529 Plan into an Alabama plan and the rollover will qualify for an income tax deduction.[16] Note, however, that Alabama is one of the few states that taxes gain on 529 Plan withdrawals from other state plans, even if the distributions are used for qualified education expenses–this can apparently be solved by creatively rolling over out-of-state plans into an Alabama plan, and then withdrawing from the Alabama plan.[17]

Funds in a 529 Plan account will impact financial aid determination, but not to the extent of funds owned by the minor (UTMA).[18]

Advantages:

- **Front-end load contributions for gift tax purposes**
- **High limit on total contributions**
- **Ability to contribute not limited by AGI of donor**
- **Income-tax-free growth within account as long as used for qualified education expenses**
- **Can change designated beneficiary if necessary**
- **Account owner controls–never reverts or passes to beneficiary**
- **Wide range of options because each state administers its own plan**
- **Alabama also allows state income tax deduction of contributions to Alabama 529 Plan.**

Disadvantages:

- **Can only be used for qualified education expenses without being subject to income tax and penalty**
- **Sponsor of plan may limit investment options**
- **Could inadvertently subject plan withdrawals to GST tax if new beneficiary is generation younger**
- **Can only be used for college or post-graduate expenses**

VII. Coverdell Educational Savings Account

Sometimes called an "education IRA," this gifting vehicle is authorized by I.R.C. § 530 and is named after the senator who sponsored the original legislation creating these accounts. Contributions to a Coverdell account or "CESA" grow tax-deferred, and are not subject to income tax upon withdrawal as long as the funds are used for qualified education expenses. 26 U.S.C. § 530 (a). There are, however, very low limits to annual contributions ($2,000 annually

per child) and on the income of donors who can make contributions to a CESA (phase out begins at $95,000 AGI for an individual), making this option less useful for donors who desire to make significant gifts to or for the benefit of a minor. 26 U.S.C. §§ 530(b)(1)(A)(iii)-(c)(1)(A) (2018).

Unlike a 529 plan, Coverdell accounts can be used for a broader range of elementary and secondary education expenses than merely tuition. 26 U.S.C. § 530(b)(2)(A). Qualified Elementary and Secondary Education Expenses ("QESEE"), which are not subject to income tax + 10 percent penalty tax, include: tuition, fees, tutoring, special needs services, books, supplies, computer and Internet, room and board, uniforms, transportation, supplementary items and services (including extended care). U.S.C. § 530(b)(2)(A).

Thought must be given to who owns the account. If a parent or the child owns the account, a portion of it will count as expected family contribution when determining financial aid eligibility, whereas the contributions will not be counted if a grandparent or other relative is designated as owner; however, withdrawals from an account that is not owned by the child or parent are added back in determining the next year's FAFSA, up to 50 percent of the value of the withdrawal, which can substantially reduce eligibility.

Advantages:

- **Simple to set up**
- **Wide range of investment options**
- **Can change beneficiary (must be to a qualified member of original beneficiary's family)**
- **Can be used for qualifying K-12 expenses, not just college (QESEE and QHEE)**
- **Earnings are tax-free if used for qualified expenses.**

Disadvantages:

- **Limited to $2,000 annually *per child*, even if spread across multiple accounts and multiple contributors; this is a hard number, not indexed for inflation**
- **Not for One-Percenters: income limit on contributions (not available if AGI is $110,000 person/$220,000 joint return, starts phasing out at $95,000)**
- **Must be withdrawn by the time beneficiary attains age 30**
- **Must start early: contributions for child 18 or over are subject to 6 percent excise tax**

VIII. Section 2503(C) Trusts and Crummey Trusts

Generally, contributions made to a trust for the benefit of a minor do not qualify for the annual gift tax exclusion under I.R.C. § 2503(b) because they are not gifts of a present interest (*i.e.*, the beneficiary does not have immediate control over the property). However, two specialized types of trusts, namely § 2503(c) trusts and Crummey trusts, allow a donor to take advantage of the non-tax benefits of the trust structure while making contributions that qualify for the annual gift tax exclusion. Both of these trusts are (i) *inter vivos*, meaning that the donor establishes the trust during his or her lifetime, and (ii) irrevocable, meaning the donor effectively relinquishes all ownership and control over property transferred to the trust and cannot unilaterally terminate or modify the trust.

A. I.R.C. § 2503(c) Trusts

A gift to a § 2503(c) trust for the benefit of a minor beneficiary qualifies for the annual gift tax exclusion (and, if the gift is for the benefit of a grandchild of the donor, it can qualify as a nontaxable direct skip for GST purposes under I.R.C. § 2642(c)(2)) if certain requirements are satisfied. First, the trustee must have discretion to distribute both income and principal to or for the benefit of the minor before he or she reaches the age of 21. I.R.C. § 2503(c)(1). The trust instrument must not place any "substantial restrictions" on the trustee's exercise of discretion in making distributions. Treas. Reg. § 25.2503-4(b)(1). Second, the minor must be entitled to outright distribution of the remaining trust assets upon the minor's attaining the age of 21. I.R.C. § 2503(c)(2)(A). Note that the minor may be given the power to extend the trust, but no other party (including the donor or trustee) may be authorized to do so.[19] Third, if the minor dies before attaining the age of 21, the trust assets must pass to the minor's estate or be subject to a general power of appointment granted to the minor. I.R.C. § 2503(c)(2)(B).

A major advantage of a § 2503(c) trust over an UTMA account is the discretion given to the trustee over distributions of income and principal. While the trustee must have discretion to determine the purposes for which such distributions are made, the donor may provide non-binding guidance in the governing instru-

ment with respect to the donor's intent for distributions. On the other hand, the expense and administrative requirements associated with a § 2503(c) trust are greater than those associated with an UTMA account. The donor must hire legal counsel to prepare the trust instrument and, once the trust is established, trustee's fees must be paid (unless the trustee agrees to serve without compensation) and annual tax returns must be filed for the trust.

While the donor may serve as trustee of a § 2503(c) trust, such practice should be discouraged as it may result in inclusion of the trust property in the donor's gross estate for estate tax purposes under I.R.C. § 2036 or § 2038. Nor should a parent of the minor beneficiary serve as trustee because the trustee's ability to make distributions that could discharge a parental obligation of support may also result in inclusion in the parent's estate under I.R.C. § 2041. Instead, a corporate trustee, friend or relative should be appointed as trustee. There are no restrictions on the type of property that may be transferred into a § 2503(c) trust and no restrictions on the investments that may be held by a § 2503(c) trust.

A gift to a § 2503(c) trust for the benefit of a minor beneficiary qualifies for the annual gift tax exclusion (and, if the gift is for the benefit of a grandchild of the donor, it can qualify as a nontaxable direct skip for GST purposes under I.R.C. § 2642(c)(2)) if certain requirements are satisfied.

A § 2503(c) trust can be a useful vehicle for transferring substantial assets over time that are free of gift and estate taxes, and is a good option for a donor contemplating a series of annual gifts. However, a donor may be reluctant to transfer significant amounts to the trust given that the minor must have the unrestricted right to withdraw the entire trust corpus at age 21. Even if the trust may continue beyond age 21 (if the beneficiary fails to exercise the right of withdrawal), relying upon a 21-year-old to refrain from exercising his or her withdrawal right is, at the very least, risky.

Advantages:

- **Contributions to trust qualify for annual gift tax exclusion; gifts by grandparents can be nontaxable direct skips for GST purposes.**
- **Trustee has broad discretion over distributions.**
- **Trust may continue past age 21 at beneficiary's election.**
- **No restrictions on assets that may be transferred to the trust**

Disadvantages:

- **Relatively expensive to establish**
- **Ongoing administrative costs (trustees' fees, preparation of tax returns)**
- **Beneficiary may exercise right to withdraw all of the funds at age 21, an age at which many donors do not trust a beneficiary to make a prudent decision.**

B. Crummey Trusts

Another option that allows a donor to make gifts to a trust for a minor that qualify for the annual gift tax exclusion is a so-called "Crummey trust." A Crummey trust allows a donor to avoid the requirement of a § 2503(c) trust that the beneficiary has the right to withdraw all the trust assets at age 21, the most problematic aspect of a § 2503(c) trust for many donors.

A Crummey trust, named for the Ninth Circuit's decision in *Crummey v. Comm'r*, 397 F.2d 82 (9th Cir. 1968), is a trust the contributions to which qualify for the annual exclusion from gift tax under I.R.C. § 2503(b) because the beneficiary has the unrestricted right to withdraw all, or a portion of, the annual contributions to the trust. This withdrawal right is known as a "Crummey" power and typically is limited to a specified period of time following a contribution to the trust, often 30 or 60 days. The Internal Revenue Service has ruled that because the beneficiary has the right to obtain immediate enjoyment of the contributed property, the beneficiary has a present interest in the trust property to the extent it is subject to the beneficiary's withdrawal power. Rev. Rul. 80-261, 1980-2 C.B. 279. Based on the beneficiary's present interest, the donor is entitled to the § 2503(b) annual exclusion with respect to contributions that are subject to the Crummey power. *Id*. Note that the beneficiary does

not actually have to exercise the Crummey power; it is simply the existence of such power that allows the contribution to qualify for the annual exclusion amount. If the beneficiary does not exercise the Crummey power within the specified time period, the power lapses, and the contributed property remains in the trust.

No I.R.C. § 2503(b) annual exclusion is available unless the beneficiary of a Crummey trust has actual notice of his or her withdrawal right and a reasonable time to exercise the right prior to its lapse. *See* Rev. Rul. 81-7, 1981-1 C.B. 474. It is the trustee's duty to provide such notice (sometimes referred to as a Crummey notice) each time a contribution is made to the trust. If the beneficiary is a minor, notice is given to the beneficiary's guardian and the guardian may exercise the Crummey power on behalf of the minor. While donors often operate under the assumption that the beneficiary will not exercise his or her Crummey power, the power must not be illusory, and there cannot be a prearranged understanding either that the beneficiary will not exercise the power or that the beneficiary's doing so will lead to adverse consequences. *See* TAM 9628004 (finding that contributions to a Crummey trust were not gifts of a present interest when, among other issues, the beneficiaries were given insufficient time to exercise their right of withdrawal).

As with a § 2503(c) trust, the trustee of a Crummey trust has discretion over distributions of income and principal from the trust. There are no restrictions on the type of property that may be transferred into a Crummey trust and no restrictions on the investments that may be held by a Crummey trust. One drawback that the Crummey trust shares with the § 2503(c) trust is that a Crummey trust is relatively expensive to establish and involves ongoing administrative costs, which in this case include not only the payment of trustee's fees and filing of tax returns, but also the sending of notices to the beneficiary each time a contribution is made to the trust. However, in contrast to a § 2503(c) trust, a major advantage of the Crummey trust is that it may continue for as long as the trust instrument provides, which allows the donor enhanced control over when and under what circumstances the beneficiary will ultimately receive the trust assets. In addition, the donor may continue to make gifts that are eligible for the annual exclusion amount after the beneficiary has turned 21.

Accordingly, a well-drafted will should always provide, at a minimum, that any interest thereunder that may be received by a minor may be held by a custodian selected by the personal representative in a form that complies with UTMA.

Advantages:

- **Contributions to trust qualify for annual gift tax exclusion**
- **Trustee has broad discretion over distributions**
- **Trust can continue as long as trust instrument provides**
- **No restrictions on assets that may be transferred to the trust**

Disadvantages:

- **Relatively expensive to establish**
- **Unlike § 2503(c) trusts, gifts by grandparent cannot qualify as nontaxable direct skip for GST purposes**
- **Ongoing administrative costs (trustees' fees, preparation of tax returns, sending of notices upon contributions)**
- **Beneficiary has the power to withdraw each time a contribution is made.**

IX. Testamentary Planning

While testamentary planning is not, strictly speaking, the subject of this article, it should be noted that a testator has several options available in considering passing property directly to or for the benefit of a minor. If a testator makes a gift to a minor but does not provide that the gift shall be held by a custodian or in trust, then generally a conservatorship must be established to hold and manage the interest until the minor attains the age of majority (note that for small

gifts–$10,000 and under–a custodianship may be established instead of a conservatorship; see part IV of this article). Accordingly, a well-drafted will should always provide, at a minimum, that any interest thereunder that may be received by a minor may be held by a custodian selected by the personal representative in a form that complies with UTMA. Alternatively, it is often far more desirable to establish a trust for the benefit of a minor. This allows the interest to be held in trust past the minor's attaining the age of majority, and can provide specific/custom distribution of assets. Depending on the amount of the interest, a corporate fiduciary may be best positioned to manage and invest the trust assets, or, if warranted, an individual such as a CPA or lawyer (Practice tip: Don't. Do. It.) may be named. ▲

Endnotes

1. In Alabama, the age of majority is generally 19 years. Ala. Code § 26-1-1 (although there have been recent legislative efforts to change the age of majority to 18 years). Except where otherwise noted, when this article refers to a "minor" it is referring to someone under the age of 19; which, keep in mind, is a full two years before that person can legally drink "real" eggnog.
2. Note that the $15,000/$30,000 annual exclusion amount began January 1, 2018.
3. Or to a trust that meets the requirements of I.R.C. § 2503(c). See I.R.C. § 2642(c)(2).
4. Ala. Code § 5-5A-37 explicitly provides that a minor may own and have use of funds in a bank account.
5. Alabama recently passed legislation allowing a beneficiary's guardian to open, invest in and manage an Enable Account on behalf of a beneficiary. Ala. Code § 16-33C-25(e).
6. The Enable Savings Plan Alabama refers to the accounts participating in Alabama's program as "Enable accounts."
7. Under the Tax Cuts and Jobs Act passed at the end of 2017, funds from a 529 account may be rolled over to an ABLE account. I.R.C. § 529(c)(3)(C)(i)(III).
8. Withdrawals may also be made to pay for housing-related expenses, including mortgage, rent and utilities, as long as the funds are spent within the month of withdrawal; if a housing expense is paid after the month of withdrawal, it counts as a resource for purposes of SSI. Disclosure Statement, pp. 34-35.
9. Note that once the annual contribution limit is reached, a beneficiary may be able to make additional contributions pursuant to the ABLE to Work Act if the beneficiary has earned income. I.R.C. § 529A(b)(2)(B)(ii).
10. Although this change was made to I.R.C. § 529, it is still incumbent upon the states who sponsor 529 plans to adopt the new change. As of the date of submission of this article, Alabama's CollegeCounts 529 plan was somewhat ambiguous about whether distributions from the Alabama-sponsored 529 plan to pay for tuition at an elementary or secondary school would qualify. *See Program Disclosure Statement and Account Agreement* dated June 28, 2018.
11. IRS, 529 Plans Questions and Answers, *https://www.irs.gov/newsroom/529-plans-questions-and-answers*.
12. CollegeCounts Alabama's 529 Fund, FAQs, *https://www.collegecounts529.com/faqs/*.
13. COLLEGECOUNTS 529 FUND PROGRAM DISCLOSURE STATEMENT 30 (2018), *https://www.collegecounts529.com/ pdf/pds.pdf.*
14. *Id.* at 5.
15. *Id.* at 3.
16. ALA. DEPARTMENT OF REV., ALABAMA 529 SAVINGS PLAN FAQ, *https://revenue.alabama.gov/individual-corporate/alabama-529-savings-plan-faq/*.
17. CollegeCounts Alabama's 529 Fund, Frequently Asked Q&A's, *https://www.collegecounts529.com/pdf/taxQA.pdf.*
18. SAVING FOR COLLEGE.COM, *Does a 529 Plan Affect Financial Aid,* (Dec. 15, 2017), *https://www.savingforcollege.com/intro-to-529s/does-a-529-plan-affect-financial-aid*.
19. Accordingly, the trust instrument may be drafted to provide that the minor, upon attaining the age of 21, either (i) has a continuing right to compel distribution of the trust assets or (ii) has a right during a limited period of time (such as 60 days) to compel distribution of the trust assets by written notice to the trustee, failing which the trust will continue on its own terms. Rev. Rul. 74-73.

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LAST WILL
AND TESTAMENT

Navigating Estate Planning

Before, During and After a Marriage

By Nancy Williams Ball

A divorce is certainly a trying time on the parties involved and typically the terms of their wills and other estate planning documents are the last thing they want to think about. However, the terms of their estate plan are important not only while the divorce is pending but also after the divorce is finalized. Moreover, the reality of the high divorce rate in the United States should be considered prior to entering into the marriage. This article will discuss important issues that all couples should consider with regard to their estate plan prior to entering into marriage and also if a marriage may be ending in the near future.

Estate Planning Before Marriage

A premarital agreement addresses the basic concept of what is yours is yours and what is mine is mine unless and until I give any of my assets or rights thereunder to you. However, this document can become complicated when addressing concepts such as (1) the right to elect to

Another matter a premarital agreement should address is the ability to leave assets to the surviving spouse.

utilize the deceased spouse's unused estate tax exemption (otherwise known as portability), (2) the right of the surviving spouse to serve as the personal representative of the deceased spouse's estate, (3) the right to serve as guardian or conservator for the other spouse, (4) the waiver of rights under ERISA, specifically §§ 401(a)(11) and 417 of the Internal Revenue Code of 1986, and (5) the right to claim an elective share (ALA. CODE § 43-8-70), intestate share (ALA. CODE § 43-8-41), omitted spouse's share (ALA. CODE § 43-8-90), homestead allowance (ALA. CODE § 43-8-110), exempt property allowance (§ 43-8-111) and family allowances (ALA. CODE §§ 43-8-112 & -113).[1]

It is desirable that these spousal rights be addressed in the premarital agreement.[2] For example, upon the passage of the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, the concept of portability was brought about with regard to transfer of a person's unused estate tax exemption from one spouse to another, and it was made permanent with the passage of the American Taxpayer Relief Act of 2012. This transfer is made by filing a simplified reporting of an estate tax return for the deceased spouse.[3] The concept is straightforward in principal, but can become complicated when consideration is given to whether a spouse has children from a prior marriage named as personal representative, who will file and pay for the preparation of the return and whether the spouse and the personal representative will get along.[4] Providing the terms of whether this election will be made and the procedure for such should be addressed in the premarital agreement.

As part of the premarital agreement process, the client should be advised of maintaining separate accounts and not titling assets in the names of both spouses unless the client specifically intends to convert the asset to a marital asset. It might even be desirable to place the client's assets in a revocable trust to better segregate the parties' assets.

Another matter a premarital agreement should address is the ability to leave assets to the surviving spouse. Without such a provision, a contestant in a will challenge may allege that the premarital agreement is violated if the agreement does not contemplate that the spouse may be designated as a beneficiary under the spouse's estate planning documents if that spouse chooses to do so. An interesting dispute can arise among the family members of the deceased spouse and the surviving spouse as to whether the premarital agreement was violated by the decedent in providing gifts for his or her spouse.

Occasionally, a client will be a beneficiary of a trust or trusts and both spouses essentially live off the trust. This can be a disaster for the "monied" spouse in terms of a divorce proceeding unless the parties have a premarital agreement in place. The applicable Code section is 30-2-51(a), which states in pertinent part: "If either spouse has no separate estate or if it is insufficient for the maintenance of a spouse, the judge, upon granting a divorce, at his or her discretion, may order to a spouse an allowance out of the estate of the other spouse, taking into consideration the value thereof and the condition of the spouse's family. Notwithstanding the foregoing, the judge may not take into consideration any property acquired prior to the marriage of the parties or by inheritance or gift *unless the judge finds from the evidence that the property, or income produced by*

the property, has been used regularly for the common benefit of the parties during their marriage." (emphasis added). The rights of the nonmonied spouse to access these trust assets can be limited through a premarital agreement.

Update Estate Planning Documents in The Middle of a Divorce

The Alabama Legislature passed Alabama Code § 30-4-17 with an effective date of September 1, 2015. This code section was designed to make clear that if a party does not update their estate planning documents or "will substitutes" (which are defined to include revocable inter-vivos trusts, life-insurance and retirement-plan beneficiary designations, transfer-on-death accounts and other revocable dispositions to the former spouse that the divorced individual established before the divorce), then the designation of or gift to the former spouse is revoked. Prior to the adoption of this provision, reliance was placed on Alabama Code § 43-8-137 to argue that such revocation had occurred. However, many practitioners were unsure as to whether this was fully incorporated into trusts by Alabama Uniform Trust Code § 19-3B-112 as § 137 may not necessarily be included as "a rule of construction" or "a miscellaneous provision" as stated in § 19-3B-112. Presumably, this issue was resolved with the adoption of Alabama Code § 30-4-17.

The terms of a client's other estate planning documents need to be updated during the process of a divorce. The relatively new Alabama Uniform Power of Attorney Act provides that upon the filing of a divorce or annulment action or legal separation, the agent's authority under a power of attorney ends with regard to acting on the principal's behalf unless the document provides otherwise. ALA. CODE § 26-1A-110(b)(3). However, the Act only applies to powers of attorney executed on or after January 1, 2012. Therefore, a new power of attorney needs to be executed during a divorce and the prior power of attorney revoked. Additionally, the spouse may wish to give notice to the divorcing spouse and perhaps others of the revocation so there is no question that the agent no longer has authority to act under the power of attorney. Many attorneys are not familiar with the terms of ALA. CODE § 26-1A-110(b)(3); therefore, the agent might not otherwise be informed that the filing for divorce resulted in a revocation. It is also interesting to note that ALA. CODE § 26-1A-110(b)(3) does not revoke a designation of a member of the divorcing spouse's family from serving as agent for the principal. The removal of the family member is, however, addressed in ALA. CODE § 30-4-17(b)(1)(c) which takes effect *after* the divorce is finalized.

The removal of the ability of a *divorcing* spouse to serve as a conservator or guardian of the other spouse is not provided by statute as Alabama's Power of Attorney Act provides. In other words, the court may appoint a divorcing spouse to serve in such capacity, as a spouse is ranked high on the list of priority, if that appointment

The removal of the ability of a divorcing spouse to serve as a conservator or guardian of the other spouse is not provided by statute as Alabama's Power of Attorney Act provides.

It is a good idea to discuss all potential issues that a client or clients may encounter prior to that point.

is deemed to be "in the best interest of the incapacitated person."[5] Additionally, if the incapacitated spouse designated the other spouse to serve in these capacities by an instrument, the court will need to consider if there has been a change in circumstances to override the designation. The main point is that there is no clear guidance on the issue because the appointment is made by a court based upon a motion. New documents should be drafted to make clear the client's intent. Once the divorce is finalized, the designation of a divorced spouse is revoked by in ALA. CODE § 30-4-17(b)(1)(c).

The Alabama Health Care Directive Act grants a person the ability to name a health care proxy "to make decisions regarding the providing, withholding or withdrawal of life-sustaining treatment and artificially provided nutrition and hydration."[6] The designation of a spouse is not automatically terminated upon the filing for divorce. Rather, the order for divorce must be entered in order to revoke the designation.[7] Therefore, a client in poor health or undergoing medical treatment would be wise to update their health care proxy designation during a pending divorce.

Death of a Spouse during Divorce

A spouse can die during the middle of a divorce. This can result in the spouse still being a beneficiary under the terms of the deceased's spouse's estate plan. If the surviving spouse is omitted, then the surviving spouse can elect against the estate *if* assets are included in the surviving spouse's estate. An elective share provided to the surviving spouse is the lesser of all of the deceased spouse's separate estate assets reduced by the value of the surviving spouse's separate estate or one-third of the deceased spouse's estate.[8]

Alabama uses a non-augmented estate for spousal election purposes. This means that a probate court considering a spousal election should not consider assets held outside of the estate, *i.e.*, assets in trust and other transfers made.[9] Therefore, a practitioner may want to consider placing the client's segregated assets in a trust or making gifts long before a divorce is contemplated. Of course, if the divorce is already contemplated, this may open up the estate to fraudulent conveyance arguments by the other spouse.[10]

If a client is in the middle of a divorce, it is also a good idea to make sure the client's will addresses the waiver of the homestead allowance (ALA. CODE § 43-8-110), exempt property allowance (§ 43-8-111) and family allowances (ALA. CODE §§ 43-8-112 &-113). Election of these items can be precluded by the deceased spouse's will.

Update of Estate Plan after Divorce

Once the parties are divorced, an update of the client's estate plan likely is necessary. It is desirable to remove all references to the prior spouse because even if the spouse would not be a beneficiary or serve as a fiduciary (as provided under ALA. CODE § 30-4-17[11]), this may result in litigation, especially if the estate-planning documents were signed prior to the effectiveness of

this code provision. If it is intended to leave the former spouse as a beneficiary, it is desirable to redesignate that individual after the date of the divorce agreement and property distribution. The client should also make sure that there are sufficient backup fiduciaries under his or her will, trust and power of attorney. Often, spouses do not contemplate a backup fiduciary actually serving or they do not even designate a backup fiduciary, such as an agent under the power of attorney, which could leave a divorced spouse without a desired fiduciary or a fiduciary at all.

After the divorce, spousal consent is no longer required to update the beneficiary of a 401(k) plan or other ERISA-qualified assets. The beneficiaries of these assets should be promptly updated.

A divorce agreement often requires a spouse to maintain certain terms in the spouse's estate planning documents or to maintain a certain level of life insurance coverage. The attorney advising the spouse should have as part of his or her standard estate-planning questionnaire questions pertaining to any divorces of the client and the underlying obligations. Instead of solely relying on what the client states, the attorney should also obtain a copy of the divorce agreement and any modifications thereto from the client. This will help to ensure that the terms of the agreement will be adhered to in the estate planning documents.

The purchase of a life insurance policy insuring the life of the other spouse or the parties' children is a common provision in divorce agreements. The specific requirements of holding the coverage should be specifically spelled out in the divorce agreement and preferably a trust agreement executed in conjunction with the divorce order being entered. Otherwise, the ambiguity of a vague requirement of holding a life insurance policy "in trust" as stated in the divorce agreement may open up the parties and their estates to litigation in the future. It may put the parties in the position of filing a claim against the estate and objecting to such claim if the terms of the divorce agreement are not adhered to.

Finally, consideration should be made throughout the course of representation whether the attorney can still represent both of the spouses if he or she has previously done so in their estate planning. It is common to engage in "joint" representation of spouses, however, divorcing spouses are in an inherent conflict that typically prevents continued representation of both parties.

The stress of a failing marriage can be quite overwhelming to a person. It is a good idea to discuss all potential issues that a client or clients may encounter prior to that point. If it is desirable to put a prenuptial agreement in place, a discussion with the client about that should occur well in advance of the marriage. If it is desirable to limit the ability of a spouse to serve as executor, trustee, agent, conservator or guardian, then a discussion on those issues should be had with the client. The client will be well-served if their attorney thinks through as many of these issues as possible to give the client peace of mind when they need it the most. ▲

Endnotes

1. *See* Ala. Code § 43-8-72.
2. Ala. Code § 43-8-70(c).
3. *See* C.F.R. § 20.2010-2(a)(7)(ii) for simplified reporting requirements.
4. For a picture of parties that do not get along with regard to the filing of an estate tax return, see the *In The Matter of The Estate of Vose*, 390 P.3d 238 (Okla. 2017). Even if the parties do not have a premarital agreement in place which addresses the ability of the surviving spouse to file a portability election, it may be desirable to address the topic in the parties' wills so hopefully the issues addressed by the *Vose* court can be avoided.
5. *See* Ala. Code § 26-2A-104 (regarding guardians) and Ala. Code § 26-2A-138 (regarding conservators).
6. Ala. Code § 22-8A-4(b).
7. *Id.* at (b)(3).
8. Ala. Code § 43-8-70.
9. *See Russell v. Russell*, 758 So.2d 533, 538 (Ala. Civ. App. 1999), *overruled on other grounds*: "Under the UPC at the time Alabama adopted its current Probate Code, the surviving spouse's elective share was a portion of the decedent's 'augmented estate,' which included the value of certain assets that the decedent had transferred during his lifetime. See UPC § 2–202. However, in enacting its Probate Code in 1982, Alabama rejected the UPC's augmented-estate concept. See § 43-8-70. Thus, we have no statutory authority for the proposition that a surviving spouse is entitled to a share of assets that were validly transferred by the decedent during his lifetime."
10. *See e.g., Prestwood v. Prestwood*, 523 So.2d 1071 (Ala. Civ. App. 1988).
11. Care should be taken in relying on this statute as it only applies to divorces occurring on or after September 1, 2015.

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Law Firm Marketing

By Jeremy W. Richter

For decades law firms approached client marketing with the same approach.

I'm here to tell you it's played out, and there are better ways to attract new clients and retain existing ones than to wine-'em-and-dine-'em. There are affirmative things you can do to communicate to your clients that you understand their needs and want to work with them to resolve their problems. You can provide lasting value to potential clients to begin building a trust-based relationship. First, though, we need to bust some marketing myths and open ourselves up to unconventional possibilities.

Myth 1:

Marketing Means Telling People How Great You Are

Your potential clients don't need to know how great you are. They couldn't care less about where you went to law school or how high falutin' you are. Among other things, this emphasis on ourselves is what lawyers get so wrong with their websites and marketing efforts.

If you go to most law firm websites, they spend the majority of space telling you how great the firm is, how accomplished their lawyers are and how extraordinary their results have been. They will tell you where they went to law school and all the important things they did while attending. There is a common misconception that by telling our clients and prospective clients how truly awesome we believe ourselves to be, they will be more inclined to work with us.

Here's the truth–clients and potential clients don't care what you did in law school five or 25 years ago. By and large, your pedigree is of little consequence to them. Clients are not convinced to work with you because of these things, because your pedigree does not address clients' concerns.

Most firms are making their websites and their communication about *themselves*, but what clients need to know is what you can do for them. They need to know they can trust you to efficiently and effectively handle their business. They need you to be a good steward of your time and their money.

When potential clients are considering doing business with you, there are certain things you need to address to put them at ease, and earn their trust and their business. Here are three questions potential clients need you to answer:

1. Is your proposal interesting to them?

Potential clients often answer the question of whether your proposal is interesting to them before ever making contact with you. If the answer is "no," then you will probably not ever hear from them. Your potential clients are often deciding whether your proposal is interesting based on your firm's marketing materials they first encounter. Maybe that's your firm's website, a billboard or an industry publication. If you fail to identify the problem they're experiencing, and how you can guide them to the solution, you've already lost.

To guide potential clients to an understanding that your services are interesting to them, you have to know who your target client is. If you've misidentified the people or businesses who are interested in your services or the services they're in need of, you will be unable to correctly identify for them the problem they are experiencing. You will not be communicating that you understand what they are experiencing and have the knowledge and skills to guide them to a resolution.

In the context of a firm website, here is how you can communicate to your client that you are offering a service that is of interest to them. Make the website about your client. Your potential client has a problem, or else they would not be seeking out your services. They have invented a new widget and need a patent. They had an employee injured on the job while their workers' compensation insurance was lapsed. They have a business partner who has stolen money from them. Or they may have a problem they're not even sure how to verbalize. If all your firm's website does is tell your client how great you are, it doesn't address their problem.

> Here's the truth–clients and potential clients don't care what you did in law school five or 25 years ago.

Your client needs you to help them identify their problem, but that's not all. They also need to know that you can help them resolve their problem. According to Donald Miller in his book, *Building a StoryBrand*, one of the most common mistakes businesses make is failing to focus on what they can offer that will help their customers

both survive and thrive. "The key," writes Miller, "is to make your company's message about something that helps the customer survive." (Donald Miller, *Building a StoryBrand,* HarperCollins Publishing, 2017, Kindle Loc. 352).

Miller contends that potential clients may hear about your firm "through word of mouth or social media, but they definitely go to our website to learn more. When they get to our website, their 'hopes need to be confirmed,' and they need to be convinced we have a solution to their problem." (Miller, Kindle Loc. 2024). You can't convince potential clients you have the solution to their problems if all your law firm website tells them is that you participated in a moot court competition 15 years ago and were the editor of the law review. Miller summarizes the crux of the issue: "The customer simply needs to know that you have something they want and you can be trusted to deliver whatever that is." (Miller, Kindle Loc. 2032).

Once you have your potential client's attention, you need to distinguish yourself from others who are seeking their business. You can accomplish this in part by establishing that your proposal is the one that best meets their needs.

2. Is your proposal right for them?

Have you ever been in a meeting where the salesperson is not listening to his audience's questions or has misdiagnosed the problem they need help with? It can be a cringe-inducing thing to witness. The salesperson keeps coming back to the talking points that are important to him. He insists on communicating what he came to say, even when the potential client asks questions about the things that more directly affect them. The offending salesman is oblivious, though. He hasn't given the client the opportunity to answer the question of whether the proposal is right for them. And, in so doing, he will lose the sale.

For you to answer a potential client's question as to whether your proposal is right for their needs, you must actively listen to discern their needs. This may require you to disregard any presuppositions you brought with you to the meeting. Otherwise, you will be answering the wrong question.

3. Can they trust you?

Trust is hard won but easily lost. You are likely familiar with the maxim, "People do business with people they know, like and trust." A trust relationship takes time to build, but you can certainly signal right away that you cannot be trusted. Some of the most effective ways to sow seeds of distrust from the outset are to oversell yourself, to be unduly critical of your competition and to fudge on facts.

To the contrary, you can establish a firm foundation of trust when you carry yourself with integrity and deal with everyone in an upright manner. There is a shortage of people who are genuine and honest. Being someone known for these characteristics will open doors for you that would otherwise have been closed and will give people the confidence to take their interactions with you at face value. We operate in a fairly small legal community. The people we work with on a daily basis, whether claims adjusters or opposing counsel, move from one company or firm to another. If you develop the reputation of a person who is not trustworthy, that reputation is going to be hard to shed.

Anthony Iannarino writes in *The Lost Art of Closing* that establishing new relationships can be effectively done by being others-minded and engaging your empathy. The way to develop a relationship from merely a contact to a client is by building "relationships on trust, creating value, collaborating, and delivering exceptional results."[1] Even more specifically, he proposes the key to these relationships is to "create value for your clients as someone who provides ideas and advice–and who also ensures that the outcomes they sell are delivered."[2]

Myth 2:
Marketing Is for Extroverts

In times gone by, marketing was done by wining and dining potential and existing clients. Wining and dining is the preference of extroverts, those personalities who thrive on engagement with others. It was the

way of the world. And there is still a place for that, but there are also plenty of other marketing methods available to us now. And by *us*, I mean introverts.

What is an introvert, and am I one of them?

There is a bit of a stigma attached to the word *introvert*. Upon hearing it, people sometimes envision homely hermits who would just as soon never see or interact with another human. That's rather a misconception. As with most things, there are degrees of introversion and extroversion. In fact you may be wondering now where you fit.

Here's a question that may help shed some light on the matter: When you've been at a party or around a large group of people for an evening, how do you feel afterward? If your batteries are fully charged and you'd like nothing more than to talk with someone and share your experience, you are likely an extrovert. If toward the end of the evening, all you can think about is curling into your favorite chair and reading a book because you are feeling a bit drained with all the interaction and stimulation, you are likely an introvert.

Susan Cain writes in *Quiet: The Power of Introverts in a World That Can't Stop Talking* that introverts "may have strong social skills and enjoy parties and business meetings, but after a while wish they were home in their pajamas. They prefer to devote their social energies to close friends, colleagues, and family. They listen more than they talk, think before they speak, and often feel as if they express themselves better in writing than in conversation. They tend to dislike conflict. Many have a horror of small talk, but enjoy deep discussions."[3]

I am squarely in the introvert camp. I'm not particularly shy, and I don't mind group events (although I wouldn't go so far as to say I look forward to them), but afterward I am wiped out. When I am looking at an upcoming conference, speaking engagement or client dinner, I have to mentally prepare myself. Most importantly, though, I try to make sure that the day or two after the event requires little socialization. My batteries need recharging. The best way for me to do that is to disengage from group social interaction.

If you are an introvert hoping I will tell you there is a way to market yourself to potential clients that doesn't require you to get out of your quiet comfort zone, you are going to be disappointed.

Law firm marketing is for introverts too.

If you are an introvert hoping I will tell you there is a way to market yourself to potential clients that doesn't require you to get out of your quiet comfort zone, you are going to be disappointed. If people are going to trust you enough to send you work to handle for them, you are going to have to get in front of them and build up some trust equity.

However, there are some things you can do to make things easier on yourself. If you aren't very good at small talk, read tips for having good conversations before going to a networking event. For example, people really enjoy talking about themselves. You can have a conversation with a stranger in which you start by asking him what he does for a living and stay engaged in the conversation by asking natural, follow-up questions. When you two part ways, he's going to think you just had the greatest interaction, and you are going to realize you only had to speak a couple dozen words and he did all the work.

Susan Cain writes: "Figure out what you are meant to contribute to the world and make sure you contribute it. If this requires public speaking or networking or other activities that make you uncomfortable, do them anyway. But accept that they're difficult, get the training you need to make them easier, and reward yourself when you're done. Here's a rule of thumb for networking events: one new honest-to-goodness relationship is worth ten fistfuls of business cards. Rush home afterward and kick back on your sofa. Carve out restorative niches."[4]

There are plenty of other things you can do to improve your marketing without increasing your interaction. This was part of my motivation for starting my law blog in June 2016. The blog enabled me to provide information and valuable content to clients and potential new clients in a way that would develop trust equity. They would learn about me and what I could do to help them without my having to sell them on it first.

There are other things I do to provide value to clients and people with whom I have relationships but who may not be clients (yet). If I write something on a substantive legal issue that may affect a client, I'll send it over. This has a two-fold effect: (1) it provides a service to my client by making them aware of a development in their field that could affect them and their business, and (2) it keeps me fresh in their mind in case a problem arises.

Think about the things you can do to add value and build up trust equity with clients and potential clients. There is so much more to effective marketing than wining, dining, and entertaining. The value in providing real substance and developing trusting, mutually beneficial relationships cannot be overstated.

Myth 3:

"Just Do Great Work"

How many times have you heard something to this effect: "The key to getting clients is to just do great work." That statement is a partial truth, at best.

Clients expect you to do great work

Clients *expect* great work. That's what happens when you pay thousands of dollars for someone's services. There are built-in expectations. So, for someone to tell you that if you just do great work, you'll get more clients, is mostly inaccurate, because the reality is, if you just do great work you'll be ... meeting expectations. And, nobody refers their friends, family and coworkers to businesses who *just* meet their expectations.

It is important that you be a good lawyer and do great work for your clients, but you cannot rely on doing great as a means of bringing in more business. I was talking with another lawyer about this topic recently, and this was his experience at a firm that allowed "just do great work" to serve as their core marketing strategy:

"I was at a midsized insurance defense firm at one point. They basically had this theory: 80 percent of work from one carrier. They did very well. Then the carrier did some internal shifts and they really had a decline in work and ended up scrambling to start marketing. While great work does help bring in clients, I don't think it's at an appreciable rate. It's just luck at that point. You have to make sure you are on potential clients' radars, and doing that at a low/moderate rate steadily is better than not at all and then if something goes south, trying to play catch-up.

"That firm imploded down from about 25 attorneys to 10, and I think they are back around 15 now over a five-ish-year period. And now their strategy includes regular marketing efforts. My current firm is very much doing great work and other work will come in, but they also encourage marketing, even if it's small amounts. And they, from what I understand in my time here and the history, have not had the size/business fluctuation."

Combine great work with other marketing efforts

All of the lawyers above have expressed what is the whole truth about doing great work for your clients–if you combine that with other marketing efforts, you can leverage yourself into a better situation. For most corporate and insurance defense lawyers, clients aren't going to come find you.

When I look at the work I've brought into my firm, none of it has been because some insurance company came calling: "Hey, Jeremy, we heard you're a good lawyer and you really make a priority of client communication and collaboration. And we've just got to add you as our panel counsel." Nope. It might happen to you once in a while, but it's not something you can count on.

You must to find ways to meet people who could send you business. You have to begin to build up trust with those people and add value for them. Then, perhaps when they have a need, they will think of you and send you work. And, when you do great work for them, it may result in their continuing to send you more work and being your client.

So here's the truth about the axiom, "Just do great work." Doing great work will help you maintain your

existing clients, and it *may* result in those clients recommending you to others, but it is not to be relied upon as the core marketing strategy for your firm.

Challenge conventional approaches to marketing

When I was in 10th grade, our basketball team was playing a school (who I'll refer to as "Metro") against whom we were pretty evenly matched. We did not have one particularly good player, but had several moderately good players. Metro, on the other hand, had one good player, while the rest of the team was made up of non-difference makers. My coach understood that if we played a conventional game, the odds of victory were in doubt, so he devised a plan.

I was not a good offensive player, but I loved defense and was good at it. I relished the opportunity to hassle the opposing point guard. Getting a five-second call on him at the top of the key was a rush. I envisioned myself as a white, suburban, 135-pound Joe Dumars. What I lacked in talent (and mind you, there was very little talent), I tried to compensate for with tenacity.

In the pre-game meeting, the coach instructed me: "Jeremy, I want you to play defense on #25 *the whole game*. When we're on offense. When we're on defense. I want you to tell me what kind of gum he's chewing, what kind of deodorant he wears. You stick on him the whole game. You'll get in his head." I've rarely smiled so broadly. This was to be my finest hour.

I did as instructed. When we were in man defense, I was on him. When we went to a box-and-one, I defended #25. When we were on offense and #25 was guarding our best player, I was glued to his hip. It didn't take long for him to realize things were not occurring in the traditional way. He started trash talking and getting frustrated. His foul total started to accumulate and his productivity decreased. The score was becoming lopsided in our favor. In the third quarter, #25 drew his fifth and final foul when, out of frustration, he shoved me and said some ... not nice things. I just beamed back at him. The game was not much of a contest after that.

By challenging conventions, my coach had put our opponent on their heels and attacked them with a strategy for which they were unprepared. He gave us the advantage by electing to put his offense at a strategic disadvantage.

> While great work does help bring in clients, I don't think it's at an appreciable rate.

There are lawyers who are more established and have more ties to the people with whom you want to do business, but don't let that deter you from going after clients. You just can't do it the traditional way. You have to approach marketing with innovation and play to your strengths. Do not comply with conventional approaches as a matter of course. Take a broad view and consider all of the possible strategies available to you. Get an outside perspective that may shed light on a tactic you had not considered. Do not concede to marketing in the manner that your competition is accustomed. Devise a strategy that is most effective for reaching your goals and your potential client, and execute your plan.

Endnotes

1. Anthony Iannarino, *The Lost Art of Closing*, Portfolio, 2017, p. 7.
2. Iannarino, p. 21.
3. Susan Cain, *Quiet: The Power of Introverts in a World That Can't Stop Talking*, Crown/Archetype, 2012, p. 11.
4. Cain, p. 264.

Jeremy W. Richter

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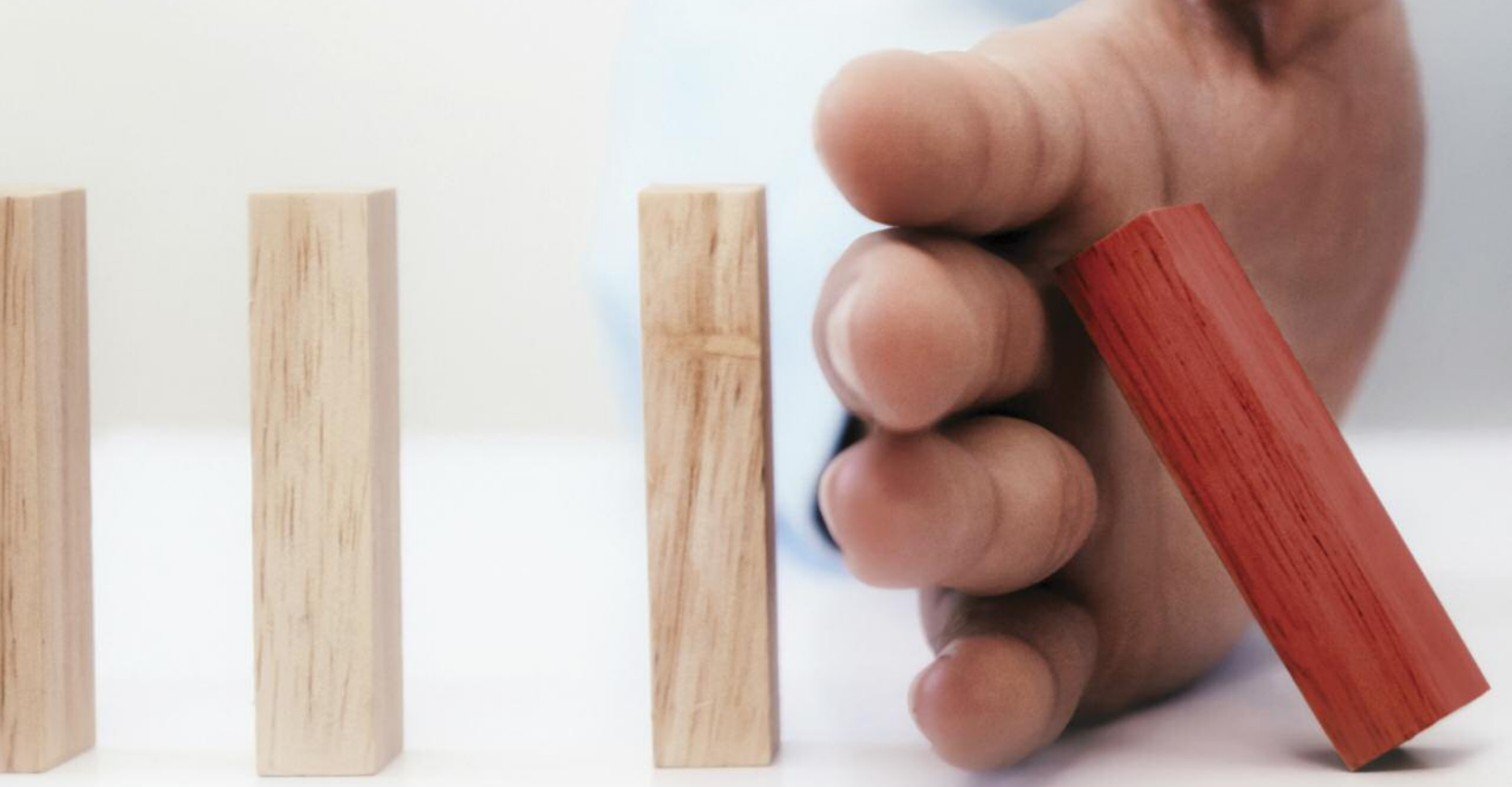


Mediation Best Practices in Alabama

By H. Harold Stephens

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser–in fees, expenses and waste of time." The quotation sounds like the words of a modern day trial judge. However, these words of wisdom actually come from lawyer turned president, Abraham Lincoln, in his "Notes from a Law Lecture." Although the words are more than 150 years old, the advice offered by President Lincoln still rings true for us today.

The idea of "compromise" is likely as old as our judicial system in Alabama. Settlement negotiations and settlement conferences have long been a part of our judicial process. However, in the early to mid-1990s, a new term was introduced to many of us as Alabama lawyers and judges: "mediation." While mediation came late to the Yellowhammer State, the concept of alternative dispute resolution is now clearly an integral part of our court system. Though perhaps not as fully embraced in Alabama as the "Big Three" (faith, family and football), mediation has become widely utilized across the state.

Indeed, the 2017 Annual Report for the Alabama Center for Dispute

Resolution provides a compilation from 1997 through 2017, showing that over this 20-year span in Alabama, 100,435 cases were mediated with 79,701 of those cases settled for a settlement rate of 79.4 percent. The success of mediation in Alabama is clearly shown in the center's report for 2017 alone, with 2,558 non-divorce civil cases mediated with 1,973 of those cases settled, for a settlement rate of 77 percent. In 2017, 891 divorce cases in Alabama were mediated, with 662 of those settled, for a success rate of 74 percent. Over the last 20 years, mediation truly has come of age in Alabama.

In fact, on July 17, 2003, the Alabama Supreme Court adopted Rule 55 of the Alabama Rules of Appellate Procedure, which provides for appellate mediation. Subsequently, on November 17, 2003, the supreme court adopted the Alabama Appellate Mediation Rules. Our state's appellate mediation program is definitely a model for appellate courts across the country. It is administered through the outstanding efforts of Michelle Ohme, as executive director and supreme court administrator, and Lynn DeVaughn, as court of civil appeals administrator. Almost since its inception, the Alabama appellate mediation program has consistently achieved resolution of approximately 50 percent of all appellate cases sent to mediation, a truly remarkable result!

With the widely successful use of mediation in the Alabama court system, how do we continue this successful track record? How do we best utilize mediation as an alternative dispute resolution tool? How are members of the public, the Alabama State Bar and the Alabama judiciary best served in the use of mediation? It is with these goals and thoughts in mind that the author offers the following best practices for mediation in Alabama.

I. Be Familiar with Mediation Rules And Statutes

The history of mediation in Alabama is not exactly a

time-consuming review. Following a study by a task force of the Alabama State Bar, the Alabama Supreme Court in 1992 adopted an amendment to Rule 16 of the Alabama Rules of Civil Procedure. In its current form, Rule 16(c) of the Alabama Rules of Civil Procedure provides that the parties at a pretrial conference may consider and take action with regard to a variety of subjects, including "(7) the possibility of settlement or the voluntary use by all parties of extra judicial procedures to resolve the dispute, including mediation conducted pursuant to the Alabama Civil Court Mediation Rules". ALA. R. CIV. PROC. 16(c)(7). The 1992 amendment of Rule 16 was to encourage the parties to consider resolution of disputes through alternative dispute resolution. Also, in 1992, the Alabama Supreme Court adopted the Alabama Civil Court Mediation Rules ("the Rules"). The starting point for mediation best practices in Alabama clearly begins with a review of and familiarization with the Rules. Subsequent to their implementation in 1992, the Rules have been amended in 1998 and later in 2002. The Rules are straightforward and concise. There are only 15 Rules at present and, in print edition, they cover less than 10 pages. A clear understanding of the Rules is vital to laying the groundwork for a successful mediation.

A couple of other major milestones in the development of mediation in Alabama occurred in 1994. In that year, the Alabama Supreme Court created the Alabama Supreme Court Commission on Dispute Resolution. The commission is made up of a variety of members appointed by the courts and various other organizations. The commission promotes alternative dispute resolution, provides education and training to the members of the state bar, the judiciary and the public about ADR, maintains statistical data related to the effectiveness of ADR in Alabama and helps to promote community-based ADR programs, such as the Parents Are Forever Family Mediation Program. This program assists low-income families who are going through an initial divorce or separation by providing a mediator at no cost to them. In 2017, the program helped more than 125 families and benefited 191 children with a settlement rate of 73 percent. Mediators in the program are compensated at a reduced rate and are expected to provide some pro bono service as a participant in the program. For those who may be interested in providing such community service as a mediator or if you want to include your local courts in the Parents Are Forever Family Mediation Program, contact Eileen Harris, executive director of the Alabama Center for Dispute Resolution.

Also, in 1994, the Alabama State Bar established a standing committee on alternative methods of dispute resolution. That committee has evolved and is now the Dispute Resolution Section of the Alabama State Bar. Again, for those interested in professional service opportunities and ADR issues, the ASB Dispute Resolution Section is a great opportunity for involvement.

The success of mediation at the trial court level was quickly recognized in Alabama. Consequently, as noted earlier, the Alabama Supreme Court in July 2003 adopted Rule 55 of the Alabama Rules of Appellate Procedure. Rule 55 of the appellate rules generally authorizes an appellate court to direct the attorneys and parties to appear before a mediator and to engage in privileged and confidential negotiations in an effort to resolve the litigation. ALA. R. APP. PROC. 55. Subsequently, on November 17, 2003, the Alabama Supreme Court adopted the Alabama Appellate Mediation Rules. Like their trial court counterpart, the Alabama Appellate Mediation Rules are quite brief and straightforward. At present, there are nine rules which address an overview of the Appellate Mediation Program, screening, referral, the mediator, mediation procedures and completion of the mediation process. A best-practices approach to appellate mediation in Alabama clearly begins with familiarity with Rule 55 of the Alabama Rules of Appellate Procedure and a review and understanding of the Appellate Mediation Rules.

Additionally, those engaged in alternative dispute resolution in Alabama should be familiar with the provisions of Sections 6-6-20 and 6-6-25 of the Code of Alabama. Although the statutory enactments in Alabama related to alternative dispute resolution/mediation are small in number, the provisions are very important to the overall process.

On May 17, 1996, the Alabama Legislature enacted a statute which provides for mandatory mediation prior to trial. The provisions of Section 6-6-20(b) of the Code of Alabama currently provide:

> Mediation is mandatory for all parties in the following instances:
>
> 1. At any time where all parties agree.
> 2. Upon motion by any party. The party asking for mediation shall pay the costs of mediation,

except attorney's fees, unless otherwise agreed.

3. In the event no party requests mediation, the trial court may on its own motion order mediation. The trial court may allocate the costs of mediation, except attorney's fees, among the parties.

ALA. CODE § 6-6-20(b).

While all of us as attorneys are certainly familiar with the use of mediation in Alabama courts, not everyone may be aware of the provision of Section 6-6-20(b)(2) which provides that mediation is mandatory "upon motion by any party." The only qualifying limitation is that the party who moves to compel mediation will be responsible for payment of the cost of mediation but not attorney's fees.

A significant portion of the Mandatory Mediation Act also deals expressly with domestic mediations. For example, the statute prohibits a court from ordering parties into mediation for resolution of issues in a petition for an order for protection or in any petition where domestic violence is alleged. ALA. CODE § 6-6-20(d) and (e). Furthermore, the statute requires that a mediator who receives an order to conduct mediation or a referral from a court for mediation shall screen for the occurrence of domestic or family violence between the parties and outlines procedures related to addressing the issue of domestic or family violence. ALA. CODE § 6-6-20(f). Moreover, the Mandatory Mediation Act provides that where a claim of immunity is asserted as a defense, that the trial court shall dispose of that issue prior to mediation. ALA. CODE § 6-6-20(g). Lastly, the statute provides that a court should not order parties into mediation if the action is one involving child support, adult protective services or child protective services where the Department of Human Resources is a party. ALA. CODE § 6-6-20(h).

A second Alabama statute addresses the issue of mediator confidentiality. In May 2008, the Alabama Legislature enacted a statute which generally provides that a mediator may not be compelled to divulge the contents of documents received or viewed during mediation or to otherwise testify regarding any statements made, actions taken or positions stated by a party during a mediation. ALA. CODE § 6-6-225.

Notably, if the litigation is in federal court, best practices certainly require review and familiarity with local ADR rules. Each of Alabama's federal district courts have their own specific provisions related to mediation and ADR (e.g., Local Rule 16.2 and the Alternative Dispute Resolution Plan for the Middle District of Alabama, Local Rule 16.1 and the Alternative Dispute Resolution Plan for the Northern District of Alabama and Local Rule 16 and the Alternative Dispute Resolution Plan for the Southern District of Alabama).

Finally, attorneys in Alabama, and especially those who serve as mediators, clearly should be aware of and familiar with the provisions of the Alabama Code of Ethics for Mediators. This code of ethics was originally adopted by order of the Alabama Supreme Court on December 14, 1995. This code outlines standards to be a guide for mediators and their practices.

In summary, a best-practices approach to mediation in Alabama certainly begins with reviewing and understanding the Alabama Mediation Rules and statutory provisions governing mediation.

II. Select the Optimum Time To Mediate

The provisions of Rule 2 of the Alabama Civil Court Mediation Rules declare that parties to a civil action "may engage in mediation by mutual consent at any time." ALA. CIV. MED. R. 2. So when is the optimum time to mediate a case? Clearly, there are no hard and fast rules as to when a case should go to mediation. Each case must be considered on its own merits based upon the issues involved, the parties and other relevant circumstances.

Undoubtedly, some matters can and should be mediated even before a lawsuit is filed. The advantage of confidentiality to protect one or both parties' privacy, the ability to continue or amicably end a business relationship or the avoidance of a lengthy and protracted litigation battle are all important reasons to consider pre-suit mediation.

The complaint has been filed, the defendant served and an answer provided. Is now the time to mediate? In some such instances, mediation will succeed. However, where no discovery has been undertaken, no documents exchanged and no depositions taken, the parties and their counsel often arrive at mediation with each party fully aware of his or her side of

the case and virtually oblivious as to the opposing party's views, evidence, credibility, strengths or weaknesses. Thus, once litigation has commenced, the author's general experience has been that mediation is more likely to succeed if some limited discovery has been completed. Interrogatory answers, document production and perhaps the depositions of the parties certainly allow a better understanding of the opposing side's case and evaluation of the credibility and appeal of the opposing party as a witness.

Some would suggest that an ideal time for mediation is with a pending motion for summary judgment. With a dispositive motion pending but not yet ruled upon, it certainly allows the mediator a clear opportunity to encourage both parties to heavily weigh the potential for two significantly different outcomes of the case if mediation does not succeed. The downside of waiting until this stage of the litigation to mediate is often voluminous documents have been produced and numerous depositions taken, including those of experts. When the parties arrive at mediation, each side has incurred significant time, fees and expenses and may have become deeply entrenched in their respective positions.

Neither side wanted to mediate or the early case mediation was unsuccessful. Discovery has been completed and dispositive motions filed. Summary judgment has been denied. A trial has taken place and the jury has announced its verdict. Is it too late to mediate? It clearly is not with the previously noted successful record of appellate mediation in Alabama. While mediation of a case on appeal presents its own difficulties, particularly where summary judgment has been granted or a successful jury verdict has been obtained, there still remains a window of opportunity for resolution even at this stage of the litigation.

Best practices for mediation require that both plaintiff's and defendant's counsel consider as a part of their preliminary case evaluation the optimum time for mediation.

III. Choose the Right Mediator

Rule 3 of the Alabama Civil Court of Mediation Rules provides that in ordering mediation the trial court should appoint "a qualified mediator." ALA. CIV. MED. R. 3. Rule 4 specifically addresses the issue of qualifications of a mediator. In general, this rule requires that in court-ordered mediations, a mediator shall meet those qualifications required by statute or by the Alabama Supreme Court Mediator Registration Standards or shall have those qualifications which the court "may deem appropriate given the subject matter of the mediation." *Id*. 4. As a current member of the Alabama Supreme Court Commission on Dispute Resolution, the author certainly encourages litigators to select individuals who are registered with the Alabama Center for Dispute Resolution.

Do you need a specialized mediator for your case? Certain types of cases may warrant use of a mediator with specialized knowledge, training or experience, especially with regard to cases such as tax disputes, patent or intellectual property litigation, domestic relation matters, environmental and/or regulatory claims and/or employment cases.

In addition to the type of litigation involved and the possible need for specialized knowledge, training or experience, a second consideration relates primarily to the style of the mediator. Depending upon the parties involved, the nature of the case or other circumstances, counsel may prefer a more facilitative or a more evaluative mediator.

While different states impose different rules upon mediators, Rule 9 of the Alabama Civil Court Mediation Rules states that the authority of a mediator includes "at the request of the parties, to make oral and written recommendations for settlement." ALA. CIV. MED. R. 9. Furthermore, the comment to Rule 9 emphasizes, "Nothing in this section would prohibit the parties from mutually requesting a mediator to propose a solution to the dispute or an amount to settle a dispute. Indeed, the revision is not intended to reduce a mediator's role in helping parties in joint or private sessions to create solutions." ALA. CIV. MED. R. 9, Comment. Mediation best practices in Alabama include selection of the best person to serve as mediator determined on a case by case basis.

IV. Prepare Your Client for Mediation

For insurance defense counsel this may be a simple or perhaps even an unnecessary step. The in-

surance claim representative attending the mediation may have participated in more mediations than the lawyers and mediator combined. Nevertheless, even for the sophisticated client or client representative, a pre-mediation discussion and/or meeting is generally helpful.

For the party, whether plaintiff or defendant, who has never attended a mediation, preparation is essential. Counsel should explain the mediation process to the client and answer any questions or concerns the client may raise with regard to the mediation procedure. Furthermore, even for the sophisticated business client, it should never be assumed that the client is familiar with the mediation process or understands what to expect on the day of mediation.

Mediation best practices in Alabama certainly include preparing the client for mediation.

V. Prepare Your Mediator for Mediation

When the author serves as a mediator, the letter generally provided to counsel requests that they forward a position statement outlining the significant factual and legal issues in the case, as well as copies of any pleadings, motions or other materials which would be beneficial prior to the mediation. In response to this request, I have received (without in any way violating any confidences and referring to no attorney or mediation in particular) the following: (1) nothing; (2) a short email on the morning of the mediation; (3) a short email the evening before the mediation; (4) a lengthy email; (5) a telephone call; (6) a one- to three-page position statement with no attachments; (7) a three- to five-page position statement with a copy of the complaint attached; (8) a five- to seven-page position statement with a copy of relevant pleadings attached; (9) a seven- to 20-page position statement with a copy of the motion for summary judgment and all documents submitted in support of and in opposition to such motion; (10) a four- to 10-page position statement with a copy of all depositions taken in the case; and (11) no position statement and three or four boxes of documents.

And which of these is the better practice? The answer is: all of the above. At times as a litigator, if forced to provide a position statement, the author would simply provide the mediator with a sheet of paper and the word "oops" or "sorry." Sometimes, there is nothing more to say. The mediator really does not always need a position statement.

However, generally, as a mediator, the author has been eternally grateful for a short email or a telephone call with counsel that gives a heads-up as to some particularly sensitive issue, some difficult legal question or some important relationship about which the mediator needs to know. Consequently, from a mediator's perspective, please do not view a request for a position statement as a burden or imposition. To the contrary, it is simply an invitation–an invitation to communicate any significant factual matters or legal issues which the mediator should be aware of prior to the mediation session. Sometimes it is useful to know that the parties should be kept on separate floors. In some cases, it is extremely helpful to have copies of summary judgment motions and briefs, depositions and, yes, even boxes of documents. On other occasions, a pre-mediation telephone call is simply all that needs to be done. The author encourages litigators to put themselves in the position of the mediator. If you were the mediator, what would you want to know about your client and your client's position in advance of the mediation?

Best mediation practices in Alabama include using the opportunity for a pre-mediation telephone conference or a mediation position statement to prepare your mediator for the mediation session.

VI. Have the Right Person or Persons Present For Mediation

While perhaps surprising to some, the provisions of Rule 6 of the Alabama Civil Court Mediation Rules do not require that a person with authority be physically present for the mediation. Indeed, Rule 6 of the Rules simply provides that "someone with authority to settle those issues must be present at the mediation session or reasonably available to authorize settlement during the mediation session." Ala. Civ. Ct. Med. R. 6. The concern of having the correct person physically present for a mediation is expressly addressed in the comment to Rule 6, in part, as follows:

> The Rule attempts to strike the proper balance between having a person with full settlement authority physically present at the mediation session and allowing such person to be within reasonable contact, such as by telephone. Mediation of disputes with small amounts in controversy or where the person with settlement authority would incur substantial cost to travel to the site of the mediation might best be accommodated by using a telephone conference or similar long-distance communication. On the other hand, one value of mediation is having the decision-maker, such as a corporation's chief financial officer or chief executive officer, present to hear the discussions during mediation to personally assess the pros and cons of pursuing litigation versus settlement of the controversy for a particular amount. Ala. Civ. Ct. Med. R. 6, Comment.

As noted in the comment, where the amount in dispute is quite small or travel is cost prohibitive or unduly expensive in relation to the amount in dispute, it may be entirely appropriate to have an insurance claims representative available by telephone. However, absent such factors, certainly the default preference should be to have a decision-maker personally present "to hear the discussions during mediation."

Mediation best practices in Alabama certainly dictate that the issue of "present at the mediation session" or "reasonably available to authorize settlement during the mediation session" should be considered, discussed and resolved in advance of the mediation session itself. Some trial judges do specifically require personal physical presence in their standing mediation order.

One should be particularly aware if in federal court of the provisions of any local alternative dispute resolution plan. For example, in the United States District Court for the Northern District of Alabama, under its ADR plan, the provisions of Rule IV(6), state, in part, as follows:

> The attorney primarily responsible for each party's case must personally attend the mediation conference and must be prepared and authorized to discuss all relevant issues, including settlement. The parties must also be present in person unless otherwise ordered by the Court or excused by the mediator. However, when a party is other than an individual or when a party's interests are being represented by an insurance company, an authorized representative of such party or insurance company, with full authority to settle, must attend in person unless otherwise ordered by the Court or excused by the mediator with notice to the opposing party. The mediator will report a party's willful failure to attend the mediation conference to the Court, including the failure to attend of an authorized representative with full authority to settle, which may impose appropriate sanctions. Failure to attend a mediation is not considered to be confidential for the purposes of Paragraph 9 below.

United States District Court for the Northern District of Alabama, Alternative Dispute Resolution Plan, Rule IV(6).

It has certainly been the author's experience that mediation is more likely to be successful where those with settlement authority are in personal attendance at the mediation. If personal attendance by a party or insurance representative is important to counsel, then consideration should be given to including required attendance as a part of the court's mediation order. On the other hand, if personal attendance at the mediation is not feasible or practical, this should also be addressed prior to mediation with the court and the mediator. Best practices in mediation are generally to have those with decision-making authority personally present for the mediation session.

VII. Give Appropriate Consideration To the Most Important Numbers

After more than 20 years' experience as a mediator, the author has concluded that the two most important numbers at a mediation are (1) plaintiff's first offer and (2) defendant's last offer.

Although not always the case, the success or failure of some mediations is directly linked to the plaintiff's first offer. An offer from plaintiff's counsel that is seen as

completely unrealistic and extremely high may precipitate a knee-jerk response, low-ball counteroffer from the defendant ensuring an early stalemate in the mediation process. At times, the parties come to mediation having already engaged in settlement negotiations. This is certainly a welcome development from the mediator's perspective and enables both sides to begin the mediation process with a clear understanding of the opposing party's opening position.

However, at other times, when there has been no settlement discussion at all between the parties prior to mediation, an opening offer is sometimes made with seemingly little, if any, prior thought or consideration of the impact. The author would encourage plaintiff's counsel to give significant thought in advance of the mediation to the plaintiff's first offer, a number which will set the stage for the negotiations to come. Certainly, it must be recognized that from the plaintiff's starting offer it is extremely difficult, though not impossible, to go backwards. Thus, the thought of allowing "room to move" is an entirely logical part of the analysis. However, this should not be the entire analysis. How will this first offer be perceived in the other room? It is a question which is not consistently asked, but should always be considered. One of the two most important numbers at mediation is the plaintiff's first offer.

A second critically important number at mediation is the defendant's last offer. As with plaintiff's first offer, counsel should give considerable thought and analysis before declaring a number to be the "best and final offer." Indeed, while an unrealistically high first offer can make for a difficult mediation, an unrealistically low last number can certainly assure the mediation's unsuccessful conclusion. Hopefully, the endpoint of a mediation is viewed by both parties as a target or goal as opposed to an arbitrarily selected number with a line drawn in the sand. With a healthy exchange of information, litigants on both sides may learn information about their case for the first time at mediation. Documents or witnesses may be disclosed or identified at mediation which were previously unknown. Views regarding a witness's testimony or a party's credibility may be changed as a result of information learned at the mediation. Indeed, one of the very advantages of mediation is to afford an opportunity for introspection and renewed self-critical analysis. Is that your final offer?

Best practices in mediation in Alabama require careful thought and objective insight into the most important numbers at mediation: the plaintiff's first offer and the defendant's last offer.

VIII. Not Everyone Lies to the Mediator

A well-known lawyer, talented magician and exceptional mediator, Don Spurrier (who practiced law for many years in Huntsville but sadly is no longer with us), was sometimes heard to say in his later days as a mediator, "Everyone lies to the mediator." For Don, this was simply a whimsical recognition that a certain amount of gamesmanship takes place in every mediation session. Don Spurrier, the magician, understood that at times a delicate sleight of hand may be in order to try to reach one's goal. And, certainly, Don Spurrier, the seasoned litigator, well understood the reluctance of counsel to fully disclose everything about one's case to a mediator who ultimately is not the decision maker for the other room. Thus, according to Don, "Everyone lies to the mediator."

Certainly, in many mediations, there simply are no "juicy secrets." The issue of disclosing some significant document, witness or fact, perhaps not known by the opposing party, does not arise in every case. However, there are instances when one side or sometimes even both come to a mediation with highly relevant information which is unknown to the opposing party. As an experienced litigator, the author fully and completely understands the reluctance to disclose such information. As a mediator, the author certainly understands an approach by counsel who discloses information for my ears only, but then states, "If we get close, I may let you tell this to the other side." In the adversarial world of litigation, this is an entirely reasonable and appropriate approach.

However, if the ultimate objective is to reach a resolution of the dispute at mediation, the full disclosure of known information definitely enhances such an opportunity. Under certain limited circumstances, the author would acknowledge that some "juicy secrets" simply cannot and should not be disclosed. Don, you were probably right, "Everyone lies to the mediator." Nonetheless, the

author urges participants in the mediation process to consider how the strategic use and timely disclosure of damaging information can be employed as a tactical advantage to achieve dispute resolution. Indeed, if one party evaluates a case based upon secret information known only to their side, it should come as no surprise that opposing counsel, lacking such information, will likely reach a very different evaluation of the case.

Best practices at mediation in Alabama require that not everyone lies to the mediator.

IX. The Ultimate Objective Must Be Resolution

In one theoretical sense, cases should never settle at mediation. After all, mediation becomes a process where two parties are brought together with entirely conflicting and, in fact, diametrically opposed objectives: (1) the plaintiff wants to get as much money as possible at mediation, and (2) the defendant wants to pay as little money as possible at mediation. With these two conflicting ideas, one would think that mediation most often is a failed process. However, as the numbers reported earlier from the Alabama Center for Dispute Resolution indicate, the exact opposite is true. Most cases in Alabama are settled at mediation.

How can this be possible? The answer is fairly simple but of upmost importance: both parties must want resolution. Settlement occurs at mediation when a defendant offers a dollar amount which the plaintiff feels that he or she cannot walk away from and/or when the plaintiff expresses a willingness to settle a case for an amount which is better than the risk of a trial. The parties come to mediation with differing objectives (one wanting more and one wanting less). Resolution occurs when it is the most important objective for both sides. Mediation ultimately is not about winning or losing. To resolve a case at mediation requires two parties who are willing to negotiate and compromise and who believe that resolution is more important than a time-consuming and destructive litigation battle.

Best practices in mediation in Alabama require both parties to approach mediation with the willingness to negotiate and a true desire to obtain a final resolution of their dispute.

X. Be Creative

If you want a fight, the courtroom is the place for you. If your client wants a protracted and expensive battle to be decided by arbitrarily selected strangers, then litigation is where they need to be. Remember, though, that a jury trial only has three possible outcomes: (1) a verdict for the plaintiff, (2) a verdict for the defendant or (3) a hung jury.

The possibilities for creative solutions to disputes at mediation are endless. The author has seen mediation prove to be effective in resolving disputes ranging from the International Space Station to neighbors quarreling. Solutions at mediation range from millions of dollars to "I'm sorry." Lawyers, as a group, are not just socially fun people; they are, on the whole, a creative bunch! When you go to mediation, put the swords and spears in the corner, put on your thinking caps and be willing to think outside the box to reach an acceptable resolution of the case. Be willing to work toward a creative solution no matter how difficult the circumstances.

Best practices in mediation in Alabama require that counsel for the parties and the mediator be willing to consider and identify creative methods to settle cases. Remember: "Blessed are the peacemakers." ▲

H. Harold Stephens

Harold Stephens is a partner with Bradley Arant Boult Cummings LLP. He serves as chair of the Alabama Supreme Court Commission on Alternative Dispute Resolution. Stephens is a charter member of the Alabama Academy of Attorney Mediators, a member of the National Association of Distinguished Neutrals and a member of the Panel of Neutrals for the United States District Court for the Northern District of Alabama. In addition to his mediation practice, he also handles a variety of litigation, including health care litigation, medical malpractice cases, products liability and personal injury matters, as well as business and commercial disputes. He serves as a member of the Alabama Pattern Jury Instruction Committee, is past chair of the Litigation Section of the Alabama State Bar and is a former member of the Board of Bar Commissioners.

2018-2019 BENCH AND BAR TASK FORCE:

A Progress Report

By J. Flynn Mozingo and Clinton L. Wilson

The Alabama State Bar Bench and Bar Task Force held its initial meeting in October. This joint task force, comprised of members of the bench and the bar, was created with the goal of enhancing and improving the communication, collaboration and overall relationship between the members of the bar and the judiciary. The goals of this task force are:

To examine issues of professionalism and civility between lawyers as well as between lawyers and judges with the goal of recommending and, if possible, implementing programs, guidelines or seminars to improve the level of professionalism and civility in the practice of law;

To examine, recommend and, if possible, implement collaborative educational programs on issues of interest to both the bench and the bar;

To examine and recommend ways in which the bar can assist the members of the judiciary in matters crucial to the administration of justice in Alabama including, without limitation, education of members of the judiciary and of the bar on issues related to judicial funding and court costs;

To examine and recommend other avenues of engagement to assist both the bench and the bar in ways to better serve one another and the general public; and

To examine, recommend and implement collaborative educational programs on issues of interest to both the bench and the bar.

At its October meeting, the task force implemented strategies to accomplish these goals. The task force will hold an educational seminar at the Mid-Year Judges' conference and will also offer an education seminar at Alabama State Bar Annual Meeting in July 2019.

The task force resolved that it would create an open communication forum for suggestions from both members of the bench and bar. In doing so, co-chairs Judge J. David Jordan (*dave.jordan@alacourt.gov*) and Michael E. Upchurch (*meu@frazergreene.com*) wish to hear from judges and attorneys from across the state on how the task force can facilitate better relations between the bench and bar. As this task force holds regular meetings, please copy both co-chairs with any suggestions via email and your suggestions will be shared at the next meeting. The Bench and Bar Task Force is excited to share its mission and goals with all of you and looks forward to providing regular updates as the committee progresses and evolves. The task force chairs, liaisons and members are:

Co-Chairs
James D. Jordan and Michael E. Upchurch

Supreme Court Liaison
Justice Michael F. Bolin

Executive Council Member
Jana Russell Garner

Members
Samuel N. Crosby; Elisabeth Ann French; Joseph R. Fuller; Tanganyika D. Gholston; Andrew J. Hairston; Douglas B. Hargett; Hon. R. Bernard Harwood, Jr.; Ralph E. Holt; J. Lister Hubbard, Sr.; Suzanne D. Huffaker; Anthony A. Joseph; Frederick T. Kuykendall, III; Marshall C. Martin; Barry D. Matson; Robert G. Methvin, Jr.; Thomas D. Moore; J. Flynn Mozingo; Gerald R. Paulk; John M. Peek; T. Thomas Perry, Jr.; J. Cole Portis; Thomas A. Radney; Katrina Ross; Curtis H. Seal; Roger W. Varner, Jr.; and Clinton L. Wilson ▲

J. Flynn Mozingo

Flynn Mozingo practices with Melton, Espy & Williams PC in Montgomery, where he is engaged in a diverse civil, administrative-law and appellate practice including health care regulation, public employment and advising various associations. He is a member of the Alabama State Bar Board of Bar Commissioners, a former state bar Disciplinary Hearing officer and serves on numerous bar committees.

Clinton L. Wilson

Clint Wilson practices in Auburn, where he is specializes in plaintiffs' law, business litigation and criminal defense with an emphasis on Auburn University students. He is the current secretary of the Lee County Bar and is involved with numerous charitable organizations in the Auburn/Lee County area.

DISCIPLINARY NOTICES

Transfers to Inactive Status

- Selma attorney **Carolyn Gaines-Varner** was transferred to inactive status, effective October 22, 2018, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the October 22, 2018 order of Panel III of the Disciplinary Board of the Alabama State Bar in response to Gaines-Varner's petition submitted to the Office of General Counsel requesting she be transferred to inactive status.
- Fairhope attorney **Michael Stephen McGlothren** was transferred to inactive status, effective July 25, 2018, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the July 25, 2018 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to the Office of General Counsel's petition requesting he be transferred to inactive status.
- Birmingham attorney **Thomas Lawson Selden** was transferred to inactive status, effective January 9, 2018, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the January 9, 2018 order of Panel III of the Disciplinary Board of the Alabama State Bar in response to Selden's petition submitted to the Office of General Counsel requesting he be transferred to inactive status.
- Morris attorney **Keith William Veigas, Jr.** was transferred to inactive status, effective November 8, 2018, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the November 8, 2018 order of Panel II of the Disciplinary Board of the Alabama State Bar in response to Veigas's petition submitted to the Office of General Counsel requesting he be transferred to inactive status.

Disbarments

- Daphne attorney **Russell Foster Bozeman** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective September 26, 2018. The supreme court entered its order based upon the September 26, 2018 order of Panel III of the Disciplinary Board of the Alabama State Bar. The supreme court entered its order based on the Disciplinary Board's acceptance of Bozeman's

consent to disbarment, wherein Bozeman admitted to failing to properly handle and account for client funds. [Rule 23(a), Pet. No. 2018-1101; ASB Nos. 2017-371, 2017-463, 2017-1229, 2018-41, 2018-254 and 2018-565; Rule 20(a), Pet. No. 2018-159]

- Homewood attorney **Chevene Neel Hill** was disbarred from the practice of law in Alabama, effective November 16, 2018. The supreme court entered its order based upon the finding of fact and final order entered November 2, 2017 by Panel I of the Disciplinary Board of the Alabama State Bar, disbarring Hill after he was found guilty of violating Rules 1.2(a) [Scope of Representation], 1.3 [Diligence], 1.4(a) and 1.4(b) [Communication], 1.5(a) and 1.5(b) [Fees], 1.15(a), 1.15(b), 1.15(d), 1.15(e), 1.15(f) and 1.15(g) [Safekeeping], and 8.4(a), 8.4(c) and 8.4(g) [Misconduct], Ala. R. Prof. C. An elderly client retained Hill's services for a criminal matter and corresponding civil suit. The client instructed Hill to communicate with her niece, who was her power of attorney, on all matters. After the criminal matter was dismissed, a contingency contract for the civil matter was executed. The contract did not require payment of fees and costs in addition to the contingency fee. However, Hill requested additional funds which she paid. A few months later, the client received a letter with an itemization of time from Hill and he again requested the client pay additional funds. The client and her niece attempted to contact Hill multiple times and set up a meeting due to concerns over the mounting bills. Hill failed or refused to communicate. A year and a half later, Hill contacted the client regarding a settlement offer. The client requested Hill call her niece, but he failed or refused to do so. Hill accepted the settlement offer without his client's consent. Over the next three months, Hill provided inconsistent itemizations to the client, each time claiming she owed a different amount to him and failing to acknowledge the amounts she previously paid. Hill provided the bar a copy of the front of the settlement check payable to the client which the client contended she never received. A copy of the cleared check obtained by subpoena confirmed Hill endorsed and deposited the check into his personal account. [ASB No. 2015-1640]
- Florence attorney **Mollie Hunter McCutchen** was disbarred from the practice of law in Alabama, effective October 23, 2018, by order of the Supreme Court of Alabama. McCutchen's disbarment was based upon her guilty plea entered in the Circuit Court of Lauderdale County to one count of theft of property, first degree and the corresponding sentence entered April 18, 2018 ordering McCutchen to serve 60 months in the custody of the Alabama Department of Corrections. [Rule 22(a), Pet. No. 2018-1136]
- Birmingham attorney **Richard Glynn Poff, Jr.** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective October 30, 2018.

(Continued from page 139)

The supreme court entered its order affirming the Disciplinary Board's order of disbarment, finding Poff guilty of the unauthorized practice of law. [ASB No. 2013-1811]

Suspensions

- Montgomery attorney **Joseph Lee Fitzpatrick, Jr.** was suspended from the practice of law in Alabama for 91 days by order of the Supreme Court of Alabama, effective September 27, 2018. The suspension was based upon the Disciplinary Commission's acceptance of Fitzpatrick's conditional guilty plea, wherein he pled guilty to violating Rules 1.4 [Communication], 1.15(b) [Safekeeping Property], 1.16(d) [Declining or Terminating Representation] and 8.4(g) [Misconduct], Ala. R. Prof. C. [ASB Nos. 2017-241 and 2017-934]
- Clanton attorney **Angie Avery Mayfield** was suspended from the practice of law in Alabama for 91 days with the suspension to be held in abeyance. Mayfield was placed on a two-year probationary period, effective October 30, 2018. The suspension was based upon the Disciplinary Commission's acceptance of Mayfield's conditional guilty plea, wherein she pled guilty to violating Rules 1.4 [Communication], 1.15(a) and (e) [Safekeeping Property] and 1.16(d) [Declining or Terminating Representation], Ala. R. Prof. C. [ASB No. 2017-780]
- Montgomery attorney **William Allen McGeachy** was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective September 26, 2018. The supreme court entered its order based upon the Disciplinary Commission's order that Wilson be suspended for failing to comply with the 2017 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2018-503]
- Lafayette attorney **Roland Lewis Sledge** was interimly suspended from the practice of law in Alabama pursuant to Rules 8(c) and 20(a), Ala. R. Disc. P., by order of the Disciplinary Commission of the Alabama State Bar, effective January 11, 2018. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing Sledge's arrest for one count of arson in the second degree. Sledge was previously arrested and released on bond in an unrelated matter involving Sledge's actions in a conservatorship proceeding. Because Sledge was arrested and charged with an additional offense, his bond was revoked. [Rule 20(a), Pet. No. 2018-38]
- Mobile attorney **Steven Lamar Terry** was suspended from the practice of law in Alabama for two years by the Supreme Court of Alabama, effective November 13, 2018. The supreme court entered its order based upon the Disciplinary Commission of the Alabama State Bar's order reflecting Terry's guilty plea to violations of Rules 1.1, 1.2(a), 1.2(c), 1.3, 1.4, 1.5(b), 3.2, 8.1(b), 8.4(a), 8.4(d) and 8.4(g), Ala. R. Prof. C. in ASB No. 2017-1287. Terry admitted he failed to timely notify his client of the final order issued in her matter and, as a result, the client lost approximately 18 days to prepare either her appeal or motion to alter, amend or vacate. Terry further admitted his client requested he file a motion to correct errors in the judge's order and he requested additional fees in order to complete this task and continue representing the client. Terry also failed to attend a hearing and failed to file a motion to withdraw. Terry admitted he violated Rules 1.1, 1.3, 1.4, 3.2, 8.1(d), 8.4(a), 8.4(d) and 8.4(g), Ala. R. Prof. C. in ASB No. 2017-1316. Terry admitted he was hired to represent a client in accessing her mother's bank account, the only asset of the estate. Terry opened the estate and arranged for a bond for the client to serve as administrator. The client experienced difficulty communicating with Terry over the course of two and a half years. Terry also failed to file various pleadings by the deadlines established by the court forcing his client to file them on her own. As a result, the court revoked the client's appointment as administratrix and joined the surety into the proceedings. The surety filed a petition of removal of estate from probate court due to Terry's failure to properly administer the estate and the surety received a judgment against the client for fees and expenses. Terry admitted he violated Rules 1.1, 1.3, 3.2, 8.4(a), 8.4(d) and 8.4(g), Ala. R. Prof. C. in ASB No. 2017-1018. Terry was hired to represent a client in an employment discrimination matter. Terry failed to file a response to the employer's motion to dismiss and the case was dismissed. Terry filed a second lawsuit and the employer again filed a motion to dismiss or alternatively for a more definite statement and the court ordered Terry to respond. Terry's complaint was dismissed for failure to properly state discrimination claims in the complaint. [ASB Nos. 2017-1018, 2017-1287 and 2017-1316]
- Huntsville attorney **Wendell Wesley Wilson** was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective September 26, 2018. The supreme court entered its order based upon the Disciplinary Commission's order that Wilson be suspended for failing to comply with the 2017 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2018-520]

Public Reprimands

- On April 11, 2018, the Disciplinary Commission determined Dothan attorney **Tracie Tawana Melvin** should receive a public reprimand with general publication for violating Rules 1.6, 3.4(c), 4.1(a), 4.4, 8.2(a), 8.4(a), 8.4(c), 8.4(d) and 8.4(g), Ala. R. Prof. C. Melvin appeared in district court and was using her cellular telephone during the docket call. When her case was called she approached the bench while continuing her call. The judge ordered her to end her telephone call; however she failed to follow the order. When her case was called, she continued the call and advised the court her client would proceed without Melvin. The judge informed her that was unacceptable and ordered her to leave the courtroom. After the client was unsuccessful in negotiating a settlement on her own behalf, Melvin completed her phone call, re-entered the courtroom and notified the court she would represent her client. Melvin called her client as the witness, asked a few questions and rested. She did not cross-examine witnesses or call additional witnesses. Her client's case was dismissed for failure of proof. After the hearing, the judge spoke with her regarding her conduct in the courtroom and she accused him of dismissing her client's case in retaliation. Later that evening, Melvin posted derogatory and untruthful statements about the judge and the incident in his courtroom on social media. Melvin is also required to pay any costs taxed against her pursuant to Rule 33, Ala. R. Disc. P., including but not limited to a $1,000 administrative fee. [ASB No. 2017-740]

- Haleyville attorney **Jerry Dean Roberson** received a public reprimand with general publication on October 26, 2018 for violating Rules 1.15(a) [Safekeeping Property], 8.4(a) and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct. Roberson admitted he paid his occupational license and Client Security Fund assessment with a check drawn from his trust account. He also admitted he wrote several checks out of the trust account for both personal and business expenses. With this conduct, Roberson violated Rules 1.15(a), 8.4(a) and 8.4(g), Alabama Rules of Professional Conduct, for failing to keep client property separate from his own property and engaging in conduct that adversely reflects on his fitness to practice law. Roberson is also required pay any costs taxed against him pursuant to Rule 33, Alabama Rules of Professional Conduct, including but not limited to a $1,000 administrative fee. [ASB No. 2015-1539]

- On July 24, 2018, the Disciplinary Commission determined Bessemer attorney **Jon Batton Terry** should receive a public reprimand with general publication for violating Rules

(Continued from page 141)

1.15(a), 1.15(c), 5.3(a), 5.3(b), 5.3(c)(2), 8.4(a) and 8.4(g), Alabama Rules of Professional Conduct. Terry admitted he held property of a client in his trust account which was not in connection with his representation of the client, he failed to hold property in his possession in which he and a third-party claimed an interest until severance of that interest, he failed to supervise and institute reasonable measures to ensure a non-lawyer employee's conduct complied with the Alabama Rules of Professional Conduct in handling his firm's trust account and he failed to take reasonable remedial action to correct said conduct. With Terry's conduct in this matter, he violated the Alabama Rules of Professional Conduct and engaged in conduct that adversely reflects on his fitness to practice law. Terry is also required pay any costs taxed against him pursuant to Rule 33, Alabama Rules of Professional Conduct, including but not limited to a $1,000 administrative fee. [ASB No. 2016-1378]

- Hamilton attorney **Oliver Frederick Wood** received a public reprimand with general publication for violating Rules 1.8(a) [Conflict of Interest: Prohibited Transaction], 8.4(a) and 8.4(g) [Misconduct], Ala. R. Prof. C. The pertinent facts are Wood represented his second cousin in a divorce and a related lawsuit. In addition to the attorney's fees, the client made loans to Wood and executed promissory notes in his client's favor. Wood never advised his client he should seek independent counsel prior to making the loans or that entering into the loans could be a conflict of interest. With this conduct, Wood violated Rules 1.8(a), 8.4(a) and 8.4(g), Ala. R. Prof. C., by failing to advise his client to seek independent counsel prior to entering into a business transaction with Wood. Wood is also required pay any costs taxed against him pursuant to Rule 33, Ala. R. Disc. P., including but not limited to a $1,000 administrative fee. [ASB No. 2017-663] ▲

ABOUT MEMBERS, AMONG FIRMS

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

About Members

Bennett L. Pugh announces the opening of **The Law Office of Bennett L. Pugh** at 300 N. Montgomery Ave., Sheffield 35660.

W. David Ryan announces the opening of **Ryan Law LLC** at 1629 McFarland Blvd. N., Ste. 402, Tuscaloosa 35406. Phone (205) 469-2800.

Among Firms

Adams & Reese announces that **Neal Townsend** is now a partner in the Mobile office.

Argent Trust Company announces that **Sidney O. Roebuck, Jr.** joined as senior vice president/trust officer in the Birmingham office.

Balch & Bingham announces that **Asher L. Kitchings** joined the Birmingham office and that **Joe Leavens** and **Corbitt Tate** are now partners.

Beasley, Allen, Crow, Methvin, Portis & Miles PC announces that **F. Beau Darley, III, J. Ryan Kral, Leslie L. Pescia, Robert S. Register, William R. Sutton, Joseph G. VanZandt** and **Sharon J. Zinns** are now principals, and that **Ryan Beattie, Paul Evans, Leon Hampton, Aigner Kolom, Lauren Miles, Jeff Price** and **Soo Seok Yang** are now associates.

Cartledge W. Blackwell, Jr., Virginia L. Blackwell and **Randall K. Bozeman** announce the formation of **Bozeman & Blackwell LLC** with offices in Selma, Hayneville and Camden. The **Honorable A. Ted Bozeman** is of counsel.

Burgess Roberts LLC announces that **Haas Byrd** joined as an associate.

Cabaniss Johnston announces that **Matthew M. Couch** is now a partner.

Capell & Howard PC announces that **Jerusha T. Adams** joined as a shareholder.

The Catholic Diocese of Birmingham announces that **John F. Whitaker** is now in-house general counsel.

Chason & Chason PC announces that **Joseph D. Thetford, Jr.** is now a partner.

Gaines Gault Hendrix PC announces that **Lynn Pulido** and **Sheena Johnson** joined as associates, in the Birmingham and Huntsville offices, respectively.

The Kullman Firm announces that **Kelly Reese** is now a shareholder.

Lightfoot, Franklin & White LLC announces that **Reid C. Carpenter** and **Jeffrey P. Doss** are now partners.

Maynard Cooper announces that **Allen B. Bennett, Christie Keifer Borton, Emily J. Chancey, H. Finn Cox, Jr., Starr Turner Drum, Jessica Shaver Everest, Evan P. Moltz, Bradley G. Siegal, Ryan D. Thompson** and **Ashley T. Wright** are now shareholders.

Starnes Davis Florie announces that **Jay Ezelle** is now the managing partner and that **Weathers Bolt** is a partner in the Mobile office.

Stockham, Cooper & Potts PC announces that **John K. Pocus** is a shareholder and **Hannah M. Thrasher** is of counsel.

Stone Crosby PC announces that **Erin B. Fleming** is now a shareholder.

Wallace, Jordan, Ratliff & Brandt LLC announces that **April Danielson** and **Roderick Evans** are now partners.

Webster, Henry, Bradwell, Cohan, Speagle & DeShazo PC announces that **Tamera K. Erskine** and **Jeremy W. Richter** are now shareholders in the Birmingham office.

Wilmer & Lee PA, **Clint L. Maze** and **Tracy L. Green** announce they have merged their practices, with offices in Huntsville, Athens, Decatur and Arab. ▲

Roman A. Shaul
roman.shaul@alabar.org

Lawyer Who Has Formerly Represented A Client May Not Represent Another Person in the Same or a Substantially Related Matter Where the Present Client's Interests Are Materially Adverse to the Former Client

QUESTION:

"The purpose of this letter is to request a formal opinion from your office regarding whether my law firm should be disqualified from representing the Plaintiff Corporation A in litigation.

"I believe that all of the relevant facts are set out in the following documents which are enclosed:

"1. Complaint filed by Corporation A against Corporation B and Mr. Jones for damages arising from an alleged breach of equipment lease and on a personal guaranty.

"2. Answer and counterclaims of Corporation B and Jones.

"3. Amendment to answer and counterclaims.

"4. Corporation A's answer to counterclaims.

"5. Appearance of Lawyer A as counsel for Corporation A.

"6. Defendant's Objection to Appearance of Attorney, with attached Exhibits A, B, and C.

"7. Letter from Lawyer X to Judge Rite, with referenced attachments.

"8. Response of Lawyer A's firm in opposition to Defendants' Objection to Appearance of Attorney' with attached Exhibits 1 through 6.

"Judge Rite has asked that I request this opinion from your office. Enclosed is a copy of the order which I am submitting to Judge Rite which I expect will be signed shortly."

ANSWER:

The documents submitted with your request for opinion show that your firm is presently representing Corporation A against Corporation B and Mr. Jones. Corporation B is in the business of designing and providing printed business forms. Jones is the president and sole stockholder. This lawsuit was filed on and deals with an alleged breach of an equipment lease/purchase agreement by Corporation B and Jones. There is a counterclaim and a third-party complaint as well. The lease agreement was entered into on July 29, 1988. Corporation A is claiming damages in the amount of $9,320 as a result of the breach.

During 1991, Lawyer A's partner ("Partner") represented Jones when he was considering the formation of another corporation which would offer consulting services to the same clientele that Corporation B serviced. Partner met with Jones on one occasion and with his accountant on another. Prior to this, Partner had never had any dealings with either man. Partner met with the accountant, Mr. Smith, and sent a letter the next day confirming "the key points we examined." In August, Partner met with Jones about forming the new company. The next day, he sent Jones a four-page letter setting out "the essential facts you imparted to me together with my recommendations for further consideration." After that, there was no further contact between Partner and Jones or the accountant. At the end of August, Partner sent a bill for his services. Partner has submitted an affidavit of his association with Jones and all documents from his file are attached as exhibits. There is no question that Jones was a client of Partner's for a brief period of time and that he obtained information in the course of the representation which would be confidential under Rule 1.6(a).

Since Jones is a former client of Lawyer A's firm, Rule 1.9 must be addressed when another member of the firm represents another party in a lawsuit against Jones. Any member of the firm is disqualified under Rule 1.10 if Partner himself would be disqualified by any type of conflict of interest. Rule 1.9(a) provides that a lawyer who has formerly represented a client may not represent another person in "the same or a substantially related matter where the present client's interests are materially adverse to the former client." In determining whether two matters are "substantially related," the scope and subject of the two matters must be examined. The issues involved must be very closely connected. Partner's representation of Jones appears to have been brief and limited in scope as opposed to an ongoing representation of Jones's business. If the trial court finds from the facts before it that Corporation A's suit is substantially related to the issues of Partner's prior consultation, then the firm is precluded from representing Corporation A against Jones in the instant case. If the finding is otherwise, then Rule 1.9(b) must be addressed.

Rule 1.9(b) is directed to the protection of client confidences gained by a lawyer during the former representation. Public information or information generally known is not encompassed in the rule. There is a presumption that a lawyer has gained confidential information in the prior representation of a client. That can be rebutted by the lawyer. There is also the presumption that if a lawyer possesses confidential information, he will potentially use it in a way adverse to the former client. In that sense, if the confidential information is in any possible way disadvantageous to the former client, the lawyer is disqualified.

If it is found that Partner could use the information he gathered during his short representation of Jones, in any adverse way, or that he would have an advantage because of his acquired knowledge, then he and the firm are disqualified from representing Corporation A. If an analysis of the information reveals that it could not be used by Partner, in any way, in the Corporation A case, then the firm is not disqualified.

The Disciplinary Commission is not going to make any factual or other finding determinative of this question. There is a motion to disqualify pending in the trial court and those matters are for the court to decide. The Commission would point out that the "appearance of impropriety" is not the standard at this time and, that, in and of itself, does not require a disqualification. That term is not used in the Rules of Professional Conduct. The application of such a standard tends to result in blanket disqualification because it does not take the actual relationship, if any, between the subject matter of the two representations into account. [RO 1994-13] ▲

- **Richard S. Manley**
- **Darryl Lee Webb**

Richard S. Manley

"Do not go where the path may lead, go instead where there is no path and leave a trail." –Ralph Waldo Emerson

Richard S. Manley, admitted to the Alabama State Bar in 1958, left that trail behind with his passing on January 5, 2019. His outstanding leadership in so many capacities has been well documented in his passing, recognition from so many of his service to our bar, to our state and to his community. As his daughter, I can attest to his heart for service and desire to help others to the best of his ability. Even as the awful Alzheimer's disease that eventually took his life began to impact his brilliant mind, he was still "lawyer Manley," reaching out to fellow patients to ask if he could help them in any way. Our family smiles deeply thinking about the reports from his caregivers that when they would take field trips, many thought Dad was a staff member, not a patient, because he was helping the other patients, showing them where to go or giving them his hand to lead their way.

It is that aspect of Rick Manley I wish to memorialize for our bar members–the man who mentored me and so many others, who loved helping the client who could only pay him in snap beans and cucumbers, but who equally relished the opportunity to advocate for our state with leaders from across our county and world, the man who loved being a

Burney, Hon. Billy Carpenter
Decatur
Admitted: 1966
Died: November 3, 2018

Carlson, William Tunstall, Jr.
Birmingham
Admitted: 1986
Died: November 18, 2018

Cheshire, James Patrick
Selma
Admitted: 1983
Died: February 10, 2018

Coleman, John James, Jr.
Birmingham
Admitted: 1950
Died: November 29, 2018

Fry, Hon. James Harold
Gulf Shores
Admitted: 1979
Died: November 12, 2018

Gullage, Hon. James Truett
Opelika
Admitted: 1960
Died: January 31, 2018

Inge, Zebulon Montgomery Pike, Jr.
Mobile
Admitted: 1974
Died: July 13, 2018

Monfroe, Robert Wayne, Jr.
Tuscaloosa
Admitted: 1977
Died: November 23, 2018

Perkins, Giles Gilpin
Birmingham
Admitted: 1992
Died: December 2, 2018

Quattlebaum, Harold G.
Anniston
Admitted: 1970
Died: January 6, 2018

Rutland, Wilmer T. Goodloe
Birmingham
Admitted: 1952
Died: November 18, 2018

Ward, William Joseph
Birmingham
Admitted: 1953
Died: October 20, 2018

White, Hon. James Mordecai
Brent
Admitted: 1962
Died: July 31, 2018

Williams, John Sterling
Birmingham
Admitted: 1978
Died: October 19, 2018

"small-town lawyer" in his beloved Demopolis in his beloved west Alabama, but who never, ever thought that was anything but the highest honor.

He worked so hard to be the best he could be in everything he did, whether serving as Speaker Pro Tem of the House of Representatives or as my brother's baseball coach. He read, he studied and he always worked to understand the issues and then would collaborate with others to try to solve the problem or reach the goal at hand. He was a loving father and grandfather, always there with a hug and word of encouragement, but also with a swift kick to our posterior if that was needed instead. Our family has been moved by the number of stories from others regarding Dad's kindness to them as a young attorney or young legislator regarding his efforts to reach out and put them at ease, and to help where he could to set them on a path to success in whatever the endeavor might be. He was always the mentor–always the teacher–always the leader who wanted to help you be your best and then inspire you to be better, no matter what you were doing.

Dad's path could have led him in so many directions, but he chose the path of family and of service. I watched him choose statesmanship over personal political gain many times over and, in my early years, I would ask why, and later never had to; his answer was always, "Because I am here to do what is best for the whole, not for just myself." Many times he would let me go with him to court or meetings to observe and learn. He was always willing to discuss matters afterwards, patiently explaining how or why he chose a certain advocacy path or course of discussion. Dad taught us all leadership that was infused with service, integrity and preparation, a lesson worth sharing with others no matter what the occasion.

Rick Manley's legacy, like so many others who we have all been privileged to know within our bar community, is one to be honored for its accomplishments and for its record of service. His choices–his path–his willingness to blaze trails where others were not willing or brave enough to go, especially in the face of certain adversity and almost guaranteed failure, is a legacy that inspires us all. The best memorials to my Dad are those of you, like me, who had the chance to know him, love him and learn from him. May we all honor him by paying his legacy forward with our time and our investment in others, especially our fellow bar members and new lawyers, so they can find and follow their path as well.

-Alyce Manley Spruell, Tuscaloosa

Darryl Lee Webb

My father, Darryl Lee Webb, passed away on November 11 in Tuscaloosa. He was 76 years old. Dad was born "in the Valley" in Langdale, Chambers County, Alabama. He loved the law, and introduced his family, and thousands of students at the University of Alabama, to the law. Two of his children, my sister, Alyson, and I, became lawyers because of Dad's influence.

Dad graduated from Samford University in 1963 and then enrolled in the Cumberland School of Law, graduating in 1967. Following graduation, he formed a law partnership in Birmingham with classmates, Corley, Church & Webb. In 1971, Dad took a position at the University of Alabama's College of Commerce and Business Administration as an assistant legal studies professor. This position would define his career until his retirement from the university in 2005. During those years, he also served as the Assistant Dean of Student Affairs and chair of the legal studies section in the College of Commerce and Business Administration. And, he taught in the Executive MBA program. For many years, he served enthusiastically as one of the faculty recruiters for the Crimson Tide football team.

In the course of his long career, Dad taught thousands of students, and always wanted to know where they were from and where they had gone to high school. He would remember these facts about each student. He always infused his classes with law stories, and taught with a witty sense of humor and good-natured jokes. During his tenure at the university, Dad received many awards and recognitions and was inducted into many campus organizations, including Jason's Men's Honor Society and ODK. He served in the Faculty Senate and was also a faculty advisor for Alpha Delta Pi Sorority and his own fraternity Pi Kappa Phi. Dad wrote many textbooks, all related to legal studies and business law which were used on college campuses across the country. He was a 50-year member of the Alabama State Bar.

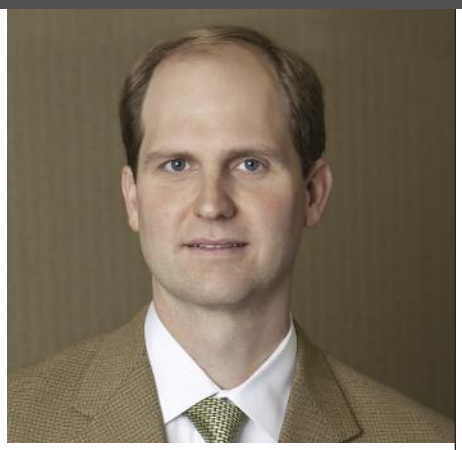
Dad was known by many names–Dr. Webb, Dean Webb, Professor Webb, Doc and Pop. He was a member of Calvary Baptist Church, across the street from Bryant-Denny Stadium, where he was a lifetime deacon, taught Sunday School in the college department and was a member of the Guyton Fellowship Class. He was a past member of the Tuscaloosa Kiwanis Club, and a longtime member of the University Club, where his favorite dessert was their famous almond ball.

His kind, congenial warmth and happiness were contagious to all who knew and loved him. Dad never met a stranger and loved nothing more than to engage in lighthearted conversations with everyone he encountered, whether a lifelong friend or a new acquaintance. He enjoyed playing golf at his beloved Woodland Forrest Country Club, now known as Tall Pines Golf Club at Woodland Forrest, and smoking cigars. He always followed his much-loved Crimson Tide. Dad was fun to be around and loved life immensely. He encouraged many students to pursue the study of law, and helped them get into law schools across our country.

Dad was a devoted husband, father, grandfather, brother and uncle who deeply loved his family, God and his Savior Jesus Christ. He is survived by his wife of 56 years, Connie Self Webb; three children, Jeffrey and wife Rhonda; Lee; and Alyson and husband Tim Mathews; and granddaughter Ramsey Lee Webb. Unfortunately, he lost his only grandson, Todd Webb, in 2015.

Dad was well known and blessed to have numerous loving friends, many of them former students, now practicing attorneys. He will be missed by all who knew him, especially me. ▲

—Jeffrey Todd Webb, Montgomery



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

Spoliation

***Hartung Commercial Properties, Inc. v. Buffi's Automotive Equipment and Supply Company, Inc.*, No. 1170482 (Ala. Dec. 7, 2018)**

Spoliation of evidence determinations are made by weighing five factors: (1) the importance of the evidence destroyed; (2) the culpability of the offending party; (3) fundamental fairness; (4) alternative sources of the information [that would have been available] from the evidence destroyed; and (5) the possible effectiveness of other sanctions less severe than dismissal. The supreme court reversed the dismissal of claims based on spoliation, concluding that factors 1, 2 and 4 were not supported by evidence, particularly because there appeared to be alternative sources of information available from which expert examinations could be made.

Discovery; Medical Liability

***Ex parte Mobile Infirmary Assn.*, No. 1170567 (Ala. Dec. 14, 2018)**

In medical liability action, trial court's protective order allowed plaintiff's counsel to use documents produced in the present action in another pending case against Mobile Infirmary. Mobile Infirmary objected to that language under Ala. Code § 6-5-551, which provides that "[a]ny party shall be prohibited from conducting discovery with regard to any other act or omission or from introducing at trial evidence of any other act or omission." Mobile Infirmary sought mandamus relief. In a 6-3 decision, the court granted mandamus relief, holding that the provision in the protective order contravened section 6-5-551.

Preemption

***State of Alabama v. Volkswagen AG*, No. 1170528 (Ala. Dec. 14, 2018)**

State's claims against VW for "tampering" and seeking penalties against VW and other defendants pursuant to the Alabama Environmental Management Act ("the AEMA"), § 22-22A-1 et seq., Ala. Code 1975, and the Alabama Air Pollution Control Act of 1971 ("the AAPCA"), § 22-28-1 et seq., Ala. Code 1975, were preempted by Section 209 of the Clean Air Act, 42 U.S.C. § 7543. The case is very fact-specific and is controlled largely by a ruling in the VW emissions MDL litigation.

Rule 59

***Ex parte Chmielewski*, No. 1171089 (Ala. Dec. 21, 2018)**

Trial court lacked jurisdiction to rule on a Rule 59 motion filed 31 days following entry of judgment of dismissal.

Immunity; Public School Teachers

***Ex parte Wilcox Co. Bd. of Educ.*, No. 1170621 (Ala. Dec. 21, 2018)**

In an action arising from a failure to renew contract of probationary teacher upon a vote of the board, where a board position was vacant and unfilled and where the teacher contended that the board vote was invalid, the court held: (1) claims against the board and against board members in their official capacities for money damages were barred by Ala. Const. Sec. 14; (2) official-capacity claims against superintendent for declaratory and injunctive relief regarding reinstatement were barred by immunity, because superintendent had only the authority to make a personnel recommendation to the board, and thus superintendent had not failed to perform a legal duty for immunity exception; (3) official-capacity claims against board members for declaratory and injunctive relief regarding the legality of the board vote under Ala. Code § 16-8-4 were not barred by immunity; (4) on individual-capacity claims, because personnel decisions fall within *Cranman* immunity, the burden shifted, even at the motion to dismiss stage, to the plaintiff to allege facts demonstrating that defendants acted maliciously, willfully, beyond authority or under mistaken interpretation of the law; (5) although Ala. Code § 16-8-4 states that no action or resolution of a board is valid unless concurred by a majority of the "whole board," Ala. Code § 16-24C-5(c), within the Students First Act, provides for a written termination of a probationary teacher by "a majority vote of the governing board."

Venue; Forum Non Conveniens

***Ex parte Maynard, Cooper & Gale, P.C.*, No. 1171102 (Ala. Dec. 21, 2018)**

Although venue was proper in action by former client against law firm in Jefferson County (where defendant had its principal office), interests of justice demanded transfer of action to Madison County, where the acts and omissions allegedly occurred out of defendant's office there.

Involuntary Dismissal

***Ace American Insurance Company v. Rouse's Enterprises, LLC*, No. 1170818 (Ala. Dec. 21, 2018)**

Dismissal for want of prosecution requires a finding that plaintiff committed "willful default or contumacious conduct."

Insurance; Failure to Procure

***Somnus Mattress Corporation v. Hilton*, No. 1170250 (Ala. Dec. 21, 2018)**

Trial court properly entered summary judgment for insurer and agent against insured on claims of failure to procure proper coverage for business income coverages. Insured failed to present substantial evidence as to what advice the agent actually provided to the insured concerning the appropriateness or extent of coverage. Additionally, agent and insurer had no affirmative duty to provide advice concerning the need for or extent of coverages: "jurisdictions throughout the country have overwhelmingly concluded that insurers have no such duty to advise clients."

Venue; Corporations

***Ex parte Mercedes-Benz U.S. International, Inc.*, No. 1170623 (Ala. Jan. 4, 2019)**

The court overruled *Ex parte Scott Bridge Co.*, 834 So. 2d 79 (Ala. 2002), under which a corporation could be deemed to be "doing business by agent" in a county by purchasing in that county significant materials or components for use in the subject corporation's operations. "The regular purchasing of parts or materials from a supplier located in a certain county, by itself, does not constitute "[doing] business by agent" in that county under § 6-3-7(a)(3)."

Venue; Surface Mining

***Ex parte Alabama Surface Mining Commission*, No. 1170222 (Ala. Jan. 11, 2019)**

Answering a narrow issue of first impression, the court concluded that venue for appeals from the commission's issuance of permits is required to be sited in Walker County

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under Ala. Code § 9-16-79(4)b., because the commission is required by Ala. Code § 9-16-73(h) to maintain its principal office in that county.

From the Court of Civil Appeals

Lambert Advance; Survival

***GEICO General Insurance Company v. Curtis*, No. 2170907 (Ala. Civ. App. Dec. 21, 2018)**

Before suit was filed, defendant Curtis's carrier Allstate offered its $25,000 limits; GEICO (plaintiff's UM carrier) refused to consent to settlement and advanced the funds under *Lambert*. Plaintiff then died. GEICO sued Curtis for recovery of the *Lambert* advance. Curtis moved to dismiss based on lack of survival of plaintiff's underlying claim; GEICO argued that the claim was actually in contract and not tort. The trial court granted summary judgment. The CCA affirmed, holding that the claim did not survive because "a UIM insurer's right to recover its *Lambert* advance, which is an amount within the tortfeasor's liability limits, is not a subrogation right."

Workers' Compensation; Mandate Compliance

***City of Gadsden v. Billingsley*, No. 2170873 (Ala. Civ. App. Dec. 21, 2018)**

In prior appeal, the CCA held that claimed psychological problems were not caused by the 2008 accident in issue, and the court's mandate was to "remand the cause for [the Circuit] court to determine the extent, if any, to which the employee's left-shoulder injury has affected her ability to earn income and to award the employee benefits in accordance with that determination." On remand, the trial court held that "the employee, because of injuries to "her left shoulder, neck, [and] lower back" and her "psychological problems caused by the August 11, 2008," collision, "lost 100% of her ability to earn a living."" Held: trial court's determination exceeded and contravened the CCA's mandate from the first appeal.

Workers' Compensation; Cumulative Stress Injuries

***Enterprise Leasing Company-South Central, LLC v. Drake*, No. 2170870 (Ala. Civ. App. Jan. 4, 2019)**

Under § 25-5-81(c), the burden of proof for an accidental injury differs from that of an injury due to cumulative physical stress. At the trial-court level, to establish medical causation [for an accidental injury], the employee must show, through a preponderance of the evidence, that the accident arising out of and in the course of the employment was, in fact, a contributing cause of the claimed injury. To prove that an injury arose from work-related cumulative trauma, an employee must present clear and convincing evidence of legal and medical causation. In this case, the trial court erred by applying a less-than-clear and convincing standard to the issues of medical and legal causation for the injury.

HOAs

***Great Bend Yacht Club, Inc. v. MacLeod*, No. 2170815 (Ala. Civ. App. Jan. 11, 2019)**

Provisions in HOA by-laws afforded discretion to the board to set assessments and charges against owners, and that discretion extended to an interpretation of the by-law providing that lot owners would be charged a "proportionate" share of expenses.

Unlawful Detainer; Service

***Mays v. Trinity Property Consultants, LLC*, No. 2170867 (Ala. Civ. App. Jan. 11, 2019)**

Landlord obtained service on tenant in unlawful detainer action. Landlord's process server averred in his affidavit that he had "knocked on the door, [and that,] after [he] did not receive a response, [he] posted a copy of the Summons and Complaint on the door, then placed a stamped copy in the first-class mail to the same address." The act of knocking on the door and receiving no response satisfied the statutory requirement of "reasonable effort" to obtain personal service, and thus service was proper pursuant to § 6-6-332(b) and § 35-9A-461(c).

Rule 54(b)

***Williams v. Fann*, No. 2170988 (Ala. Civ. App. Jan. 11, 2019)**

Trial court's partial summary judgment for defendant on a wantonness claim, and associated rulings concerning evidence, were improperly certified as a final judgment under Rule 54(b) and the intertwining doctrine. Pending claims remained and were intertwined with the wantonness claim.

Attorneys' Fees; Liens

***Harris v. Capell & Howard, P.C.*, No. 2170973 (Ala. Civ. App. Jan. 11, 2019)**

After settlement of a will contest which was approved in and reduced to judgment, a dispute arose between will

contestant and counsel concerning fees owed. Attorney filed a motion to set the fee styled under Rule 60(b)(6), arguing that the settlement agreement gave the trial court continuing jurisdiction to effectuate the agreement. The trial court granted the motion and set a fee of just over $54,000 on a $170,000 settlement. Contestant appealed. The CCA affirmed, holding: (1) the motion was not cognizable under Rule 60(b)(6) because the attorney was a non-party (among other reasons); (2) attorney's lien arose under Ala. Code § 34-3-61(b) because the amount of settlement was reduced to judgment, and under Ala. Code § 34-3-62, attorney properly filed a motion in the circuit court to enforce that lien, which procedure conferred jurisdiction on the trial court–"[b]ased on the language used in § 34-4-62, an attorney holding money from which his or her attorney fee may be deducted may file a motion in the circuit court of the county of his or her residence seeking to settle a dispute over the amount of compensation to which the attorney is entitled"; (3) attorney was not required to intervene or file a lien, because the lien arose by operation of law; and (4) amount of fees was reasonable.

Finality; Boundary Line Disputes

***Donald v. Kimberley*, No. 2170991 (Ala. Civ. App. Jan. 11, 2019)**

Trial court's order setting a boundary line, but "severing" issues of damages raised in complaint and counterclaim and reserving those for later proceeding (without setting up a new CV number), was not a final judgment for appeal.

From the United States Supreme Court

Arbitration

***Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 17-1272 (U.S. Jan. 8, 2019)**

Arbitration agreement provided carve-out for injunctive relief, but provided the arbitrator with authority to adjudicate arbitrability questions. In response to Archer's complaint which sought injunctive relief and other relief, HS

(Continued from page 153)

moved for arbitration, arguing that arbitrator should determine arbitrability of dispute. The district court and the Fifth Circuit determined arbitrability without referring the matter to arbitration, holding that HS's claim to entitlement to arbitration was "wholly groundless." The Supreme Court reversed, holding that the "wholly groundless" exception to "*First Options*" arbitrability (under which the arbitrator can decide the scope of authority when the arbitration agreement provides the arbitrator with that authority) was unsound and inconsistent with FAA law.

Social Security; Attorneys' Fees

***Culbertson v. Berryhill*, No. 17-773 (U.S. Jan. 8, 2019)**

The Social Security Act regulates the fees that attorneys may charge claimants seeking Title II benefits for representation both before the Social Security Administration and in federal court. For representation in administrative proceedings, the Act provides two ways to determine fees. If a fee agreement exists, fees are capped at the lesser of 25 percent of past-due benefits or a set dollar amount–currently $6,000. 42 U. S. C. §406(a (2)(A). Absent an agreement, the agency may set any "reasonable" fee. §406(a)(1). In either case, the agency is required to withhold up to 25 percent of past-due benefits for direct payment of any fee. §406(a)(4). For representation in court proceedings, fees are capped at 25 percent of past-due benefits, and the agency has authority to withhold such benefits to pay these fees. §406(b)(1)(A). Held: Section 406(b)(1)(A)'s 25 percent cap applies only to fees for court representation and not to the aggregate fees awarded under §§406(a) and (b).

Arbitration

***New Prime, Inc. v. Olivera*, No. 17-340 (U.S. Jan. 15, 2019)**

Section 1 of the FAA excludes from coverage of the FAA disputes involving the "contracts of employment" of certain transportation workers. 9 U. S. C. §1. That qualification has sparked these questions: When a contract delegates questions of arbitrability to an arbitrator, must a court leave disputes over the application of §1's exception for the arbitrator to resolve? And does the term "contracts of employment" refer only to contracts between employers and employees, or does it also reach contracts with independent contractors? Held: (1) district courts, not arbitrators, must consider and resolve whether a contract falls within section 1 of the FAA before considering whether to compel arbitration under sections 3 and 4, and in this regard the sequencing of the statute is strong supporting authority that Congress intended this result; and (2) the FAA's term "contract of employment" refers to any agreement to perform work, including independent contractor relationships–and in this regard, the Court looked to how the phrase "contracts of employment" would have been understood at the time of enactment of the FAA.

From the Eleventh Circuit Court of Appeals

Bankruptcy

***In re Dukes*, No. 16-16513 (11th Cir. Dec. 6, 2018)**

For a debt to be "provided for" by a plan under § 1328(a), the plan must make a provision for or stipulate to the debt in the plan. Because debtor's Chapter 13 plan did nothing more than state that the credit union's mortgage would be paid outside the plan, it was not "provided for" and was not discharged. Even if it was provided for, moreover, discharge of the credit union's debt would violate § 1322(b)(2) by modifying the credit union's right under the original loan documents to obtain a deficiency judgment against debtor. Failure to file a proof of claim did not discharge the credit union's mortgage because, again, discharge would violate § 1322(b)(2).

FDA Preemption; Lanham Act

***Hi-Tech Pharmaceuticals, Inc. v. HBS International Corp.*, No. 17-13884 (11th Cir. Dec. 4, 2018)**

Hi-Tech sued HBS under the Lanham Act and Georgia law, claiming that the label of a protein-powder supplement distributed by HBS misleads customers about the quantity and quality of protein in each serving. The district court dismissed the complaint on the grounds that the state-law claim was preempted by the Food, Drug and Cosmetic Act ("FDCA") and that the complaint failed to state a claim under the Lanham Act because it is not plausible that the label is misleading. Held: the FDCA preempts the state law claim because it would impose liability for labeling that does not violate the FDCA or the regulations that carry it into effect. A federal regulation expressly allows "[p]rotein content [to] be calculated on the basis of the factor 6.25 times the nitrogen

content of the food," 21 C.F.R. § 101.9(c)(7), and Hi-Tech does not dispute that HexaPro's labeling complies with this regulation. Any representations about the quality or sourcing of protein are not covered by the regulations and therefore cannot serve as the basis for a state-law claim. However, the label was plausibly misleading, and therefore the complaint stated a viable Lanham Act claim–and the FDCA did not bar the claim under the Lanham Act.

Eleventh Amendment

***Freyre v. Chronister*, No. 17-11231 (11th Cir. Dec. 14, 2018)**

Hillsborough County Sheriff's Office, in conducting child-protective investigations under a grant agreement with the Florida Department of Children and Families, was not an arm of the state and therefore not entitled to Eleventh Amendment immunity.

Erie Doctrine

***Carbone v. Cable News Network, Inc.*, No. 17-10812 (11th Cir. Dec. 13, 2018)**

The motion-to-strike procedure imposed under the Georgia anti-SLAPP (Strategic Lawsuits Against Public Participation) statute, O.C.G.A. § 9-11-11.1, does not apply in federal court, and thus the district court erred in dismissing the complaint for non-compliance.

Admiralty

***Caron v. NCL Bahamas Ltd.*, No. 17-15008 (11th Cir. Dec. 13, 2018)**

In a "case aris[ing] from a drunken tumble down an escape hatch on a cruise ship[,]" the Court held: (1) 28 U.S.C. § 1332(a)(2) does not grant "alienage diversity" jurisdiction over a suit between a corporation incorporated solely in a foreign state and another alien, regardless of the corporation's principal place of business; (2) admiralty jurisdiction was present, however, under section 1333(1) because a) the incident occurred on navigable water, or the injury was caused by a vessel on navigable water, and b) the incident is connected with maritime activity; (3) passenger waiver of suit after one year, printed on ticket, prevented relation back of over-service claim brought as amendment to complaint after the one-year bar, especially since the original complaint made no mention of alcohol and focused mostly on the physical condition of various areas of the ship, alleging various failures to maintain its "manholes, floors, walkways, or thresholds" in a safe condition; (4) there was no substantial evidence to support the general premises liability claim.

Iqbal/Twombly Standard for Pleading

***Colburn v. Odom*, No. 17-11404 (11th Cir. Dec. 21, 2018)**

Plaintiffs brought an action against magistrate judges and circuit clerk for failures to set timely preliminary hearings for purposes of setting bail after initial arrests. The district court granted a dismissal of the claims against the magistrates based on judicial immunity, but denied judicial immunity to the circuit clerk, and the circuit clerk appealed. The Eleventh Circuit vacated the district court's denial of the dismissal of the circuit clerk (there was no cross-appeal of the dismissal of the magistrates), reasoning that the complaint did not meet the *Iqbal/Twombly* standard of pleading because it did not identify when each plaintiff was arrested, before which magistrate each plaintiff was brought, when if at all each arrestee was given a bail hearing, etc.

Fourth Amendment; Public Employment

***Friedenburg v. School Bd. of Palm Beach County*, No. 17-12935 (11th Cir. Dec. 20, 2018)**

Issue of first impression: whether a county school board may require all applicants for substitute teacher positions to submit to and pass a drug test as a condition of employment, or whether the board may, without any suspicion of wrongdoing, collect and search–by testing–the urine of all prospective substitute teachers. Held: Yes; the board has a sufficiently compelling interest in screening its prospective teachers to justify this invasion of the privacy rights of job applicants.

Standing

***Aaron Private Clinic Mgmt. LLC v. Berry*, No. 17-15144 (11th Cir. Jan. 4, 2019)**

Putative methadone clinic operator's challenge to a statutory moratorium for new narcotic treatment facilities was moot because the moratorium had expired, (2) operator lacked standing to assert its claims for injunctive and declaratory relief, because the fact that it might open a clinic in the future, without any specific concrete plans, fails to rise to the level of actual or imminent injury or an immediate threat of future injury necessary for Article III standing. On that latter point, "[the operator] has failed to allege that it has taken any concrete steps–such as selecting a clinic location, securing a lease option, consulting with relevant government officials, applying for the necessary permits or certifications, or associating with potential clients–that suggest such an immediate intention or plan."

Bankruptcy; Coal

***In re Walter Energy, Inc.*, No. 16-13483 (11th Cir. Dec. 27, 2018)**

The legal issue involves the interplay between the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"), Pub. L. No. 102-486, 106 Stat. 2776, 3036-56 (1992), and the Retiree Benefits Bankruptcy Protection Act of 1988 ("RBBPA"), Pub. L. No. 100-334, 102 Stat. 610 (1988). Held: the RBBPA authorizes a bankruptcy court to terminate a debtor's statutory obligation under the Coal Act to pay premiums to the funds when the bankruptcy court finds that such termination is

(Continued from page 155)

necessary for the coal company to sell its assets as a going concern and avoid a piecemeal liquidation.

Qualified Immunity; First Amendment

***Echols v. Lawton*, No. 17-13843 (11th Cir. Jan. 24, 2019)**

Former prisoner who sued district attorney for First Amendment retaliation for prisoner's seeking legislative compensation for his wrongful convictions stated a claim for retaliation for exercise of First Amendment rights. As the Court explained, "[i]f a district attorney defamed a former prisoner for seeking legislative compensation for his wrongful convictions and derailed that legislative effort, a person of ordinary firmness would likely be deterred from speaking again on that matter lest the prosecutor continue to tarnish his reputation or, worse, initiate a wrongful prosecution. So Echols's complaint states a claim of retaliation under the First Amendment." However, because that right was not clearly established at the time of the conduct, district attorney enjoyed qualified immunity for any claims for damages because "our sister circuits are divided over whether an official's defamatory speech is actionable as retaliation under the First Amendment[,]" and there was no case on point within the Circuit.

RECENT CRIMINAL DECISIONS

From the Federal Courts

ACCA

***Stokeling v. USA*, No. 17-1554 (U.S. Jan. 15, 2019)**

A sentence enhancement is mandated by the Armed Career Criminal Act (ACCA) "for a violent felony," 18 U.S.C. §924(e), which ACCA defines, in relevant part, as "any crime punishable by imprisonment for a term exceeding one year" that "has as an element the use, at-tempted use, or threatened use of physical force against the person of another," §924(e)(2)(B)(i). Affirming the Eleventh Circuit, the Court held that ACCA's elements clause encompasses a robbery offense that requires the defendant to overcome the victim's resistance.

Ineffective Assistance of Counsel

***Brewster v. Hetzel*, No. 16-16350 (11th Cir. Jan. 22, 2019)**

Trial counsel rendered ineffective assistance of counsel by failing to object or move for mistrial when jury returned five or more messages to the trial judge about being deadlocked, and the trial judge gave multiple *Allen* charges, during the last of which the trial judge, when told that the one juror who wouldn't vote to convict was doing crossword puzzles, ordered all the reading materials taken out of the jury room.

From the Alabama Supreme Court

Stand Your Ground

***Ex parte Smith*, No. 1171025 (Ala. Jan. 11, 2019)**

The court denied mandamus relief from the trial court's refusal to grant "Stand Your Ground" immunity to the defendant arising from his fatal altercation with the victim while on police patrol. However, it directed the trial court to recuse itself from the case due to its statements made at the immunity hearing, in light of its previous widely publicized statements in social media regarding law enforcement. The court also granted mandamus relief on the defendant's claim that he was entitled to a change of venue due to pretrial publicity, departing from prior caselaw that this issue is reviewable only on appeal in criminal cases.

Rule 32; Ineffective Assistance

***Ex parte Gissendanner*, No. 1160762 (Ala. Jan. 4, 2019)**

Defendant was entitled to relief under Rule 32 on his ineffective assistance claims, finding that trial counsel's failure to adequately investigate his charges of capital murder and possession of a forged instrument prejudiced his defense under *Strickland v. Washington,* 466 U.S. 668 (1984).

From the Court of Criminal Appeals

Theft of Lost Property; Limitations

***Thomas v. State*, CR-17-0873 (Ala. Crim. App. Jan. 11, 2019)**

Because theft of lost property under Ala. Code § 13A-8-6 is a continuing offense, the statute of limitations for the defendant's offense began to run when the final erroneous payroll payment was made to her for work not performed.

Capital Murder; Provocation

***Petersen v. State*, CR-16-0652 (Ala. Crim. App. Jan. 11, 2019)**

Defendant was correctly denied a jury instruction on provocation manslaughter. The evidence showed that he was not assaulted while being escorted out of a nightclub by its employees, and he did not act in the heat of passion when he returned inside the nightclub and fatally shot several people.

Juvenile Delinquency

***D.A.H. v. State*, CR-17-1049 (Ala. Crim. App. Jan. 11, 2019)**

The court remanded for the juvenile court to enter a new restitution order pursuant to Ala. R. Crim. P. 26.11 (a) reflecting that it considered the juvenile's financial resources and his ability to reasonably meet his restitution obligation in the delinquency proceeding.

Child Endangerment

***State v. Martin*, CR-17-0745 (Ala. Crim. App. Jan. 11, 2019)**

Trial court erred in suppressing evidence of the defendant's urine and meconium test results following the birth of her baby in this child endangerment case. The "disclaimers" on the face of the test results did not bar their admission, and the trial court's premature ruling prevented their proponent from attempting to lay a proper predicate.

Split Sentence Act

***Wilson v. State*, CR-17-0814 (Ala. Crim. App. Jan. 11, 2019)**

Trial court had discretion to determine whether to suspend the minimum sentence required under Ala. Code § 15-18-8 (a), including the three-year "minimum period of confinement" required for sentences greater than 15 years but not more than 20 years, but it was not required to do so. ▲

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AND WE'RE OFF!
The Gasoline Tax

March 5th marked the first day of the 2019 Regular Session of the Alabama Legislature, the start of real business for this new quadrennium. Over the next few months, we will be getting a front-row seat to how the personality of this new legislature develops and how they will tackle some of the most pressing issues facing our state. This column is being written as we are closing pre-session budget hearings and all indications are that this is a group who will step up and do their best over the next four years.

Normally this is the time when the legislature is most likely to attempt to tackle some of the more difficult work of the cycle and this year is no exception. Governor Ivey and legislative leadership have been making it clear for some time that the first priority for this group would be to address the current problems facing our infrastructure in the state and the need to invest more in it.

The key funding component for our state's construction and maintenance of roads and bridges is the gasoline and motor fuel taxes. For purposes of space this article will focus on the gasoline side of that equation. The rate at which these taxes are levied was last increased in 1992. Like most taxes levied in the state, the gasoline tax is collected and distributed pursuant to a collection of constitutional and statutory provisions. In past columns I have tried to explain some of the resources our office prepares for the benefit of public officials and citizens to understand our fiscal policies and thought this subject would be a good time to publish an excerpt from one of them: *A Legislator's Guide to*

Alabama's Taxes. This is the portion of that publication that is devoted to the gasoline tax, but the publication brings the same information to bear on all state tax streams.

I hope this information is useful not only to your understanding of this important issue as it is being discussed, but also to alerting you to the kind of information that is available on this front. The complete version of this publication is available on the Legislative Services Agency website.

Gasoline Tax (and Gasoline Portion of the Motor Carrier Fuel Tax)

Constitutional Provisions

Amendment No. 93 to the *Constitution of Alabama of 1901*, by Amendment No. 354, now appearing as Section 111.06 of the Official Recompilation of the *Constitution of Alabama of 1901*

> Amendment No. 93 (proclaimed ratified November 19, 1952) provided that no monies derived from any fee, excise or license tax, levied by the state, relating to (1) registration, operation or use of vehicles or (2) fuels used for propelling vehicles except pump taxes shall be expended for any purpose other than costs of construction, reconstruction, maintenance and repair of public highways and bridges, costs of highway rights of way, payment of highway obligations, the cost of traffic regulation and the expense of enforcing state traffic and motor vehicle laws. Amendment No. 354 (proclaimed ratified November 10, 1976) expanded upon Amendment No. 93 to allow for the distribution of proceeds from charges for personalized license plates or tags in any manner prescribed by the legislature.
>
> **Note:** The above restriction does not apply to fees and taxes levied by counties and municipalities pursuant to authority granted by the state.

Statutory Authority

Sections 40-17-140 through 40-17-155 (Motor Carrier Fuel Tax) and Sections 40-17-320 through 40-17-363 (Gasoline Tax), *Code of Alabama 1975*

Tax Base

Excise tax on the removal, import, sale/transfer in the bulk transfer/terminal system and blending of motor fuel (Gasoline Tax). Excise tax upon motor carriers who operate or cause to be operated any motor vehicles on any highway in Alabama (Motor Carrier Fuel Tax)

Tax Rate

The State of Alabama collects three levies, of $.07, $.05 and $.06, for a total of $.18 per gallon. Pursuant to Act 2015-54,

(Continued from page 159)

effective October 1, 2016, the $.02 gasoline inspection fee was added to the $.04 excise tax, for a total of $.06 (See also Petroleum Commodities Inspection). Excise tax on motor carrier fuel is at the same rate as in effect for gasoline.

Note Regarding Local Rates:

Counties may levy a county gasoline tax if the legislature has passed a local act authorizing the county commission to do so. The local act usually sets the parameters of the tax and specifies use of the funds. The local act may provide for a credit of municipal gas taxes paid within that county against the county tax owed or may exempt payment of a portion of the county tax in municipalities which levy a gasoline tax.

Municipalities may levy a municipal gasoline tax by city ordinance. One-half of the amount levied in the municipality may be levied in the police jurisdiction. The ability of municipalities to levy a city gasoline tax may be limited by a legislative act which levies a county gasoline tax–i.e., cities within the county may be prohibited from levying a municipal gasoline tax, but be given a share of the county tax.

Collections

By the Department of Revenue due each month (gasoline tax), and before the last day of April, July, October and January (motor carrier fuel tax)

Fiscal Year	$.07	$.06[1]	$.05	Total[2]	% Change
2018	205,328,499	117,327,885	146,659,857	469,316,241	9.02
2017	188,325,897	107,614,798	134,518,498	430,459,192	10.48
2016	170,461,830	97,406,760	121,758,450	389,627,040	(5.87)
2015	181,093,551	103,482,030	129,352,537	413,928,118	3.74
2014	174,570,962	99,754,836	124,693,545	399,019,343	0.46

Source: State of Alabama, Department of Revenue, Motor Fuels Section

Distribution

(1) A total of 1.23% of the $.07 and $.05 per gallon ($.12 total) levied is distributed and allocated as follows:

(a) 35% of 1% is credited to the Water Safety Fund and the Seafood Fund.

(b) 70% of 1% is credited to the Game and Fish Fund.[3]

(c) 18% of 1% is credited to the Water Safety Fund and the Seafood Fund.

(2) 60% of the $.05 supplemental tax goes to the State Road and Bridge Fund. Of that amount, $500,000 each fiscal year is used for the construction, maintenance and repair of public roads in the state parks system. The remaining 40% is distributed according to the 45%/55% pattern below.

(3) The balance of the $.07 and $.05 levy after the 1.23% distribution, and 2/3 of the $.06 gasoline levy are distributed as follows:

(a) 45% to the State Road and Bridge Fund. The distributions to the Game and Fish Fund (70%) and the distributions to the Water Safety Fund and the Seafood Fund (18%) are deducted from the State Road and Bridge Fund.

(b) 55% to be shared by the counties and their municipalities as follows:

1) 25% of the net tax proceeds are distributed equally to the 67 counties;

2) 30% of the net tax proceeds are allocated to the 67 counties based on population.

a. 10% of the counties' share received shall be allocated to each municipality therein, based on a population ratio.

b. Remaining portion to the county

(4) The remaining 1/3 of the $.06 gasoline levy is distributed as described in "Petroleum Commodities Fees."

Major Exemptions

1. Motor fuel exported from the state for which proof of export is available in the form of a terminal issued destination state shipping document that is:
   a. Exported by a supplier who is licensed in the destination state or
   b. Sold by a supplier to a licensed exporter for immediate export to a state for which the applicable destination state motor fuel excise tax has been collected by the supplier who is licensed to remit the tax to the destination state.
2. K-1 kerosene or aviation jet fuel that is produced at a refinery in Alabama and is either exported directly by the operator of the refinery or sold for immediate export by the operator to a licensed exporter with proper documentation.
3. Sales of dyed diesel fuel
4. Gasoline blendstocks when sold to:
   a. Licensed supplier or
   b. Person who will not be using blendstocks in the manufacture of gasoline or as a motor fuel (with exemption certificate)
5. Motor fuel sold by licensed supplier or licensed permissive supplier to an exempt agency under Section 40-17-332 (United States government or agency thereof, any county governing body of state, any incorporated municipal

governing body of state, city and county boards of education of state, Alabama Institute for the Deaf and Blind and Alabama Department of Youth Services school district, and private and church schools as defined in Section 16-28-1, *Code of Alabama 1975*

6. Motor fuel delivered by a licensed supplier from one terminal to another terminal when ownership in the motor fuel has not changed or by a licensed supplier from a terminal to a refinery operated by the licensed supplier.
7. From the Motor Carrier Fuel Tax:
   a. Any department, board, bureau, commission or taxing area or other agency of the federal government, State of Alabama or any political subdivision thereof
   b. Any school bus operated by the State of Alabama, any political subdivision thereof or any private or privately-operated school or schools

Refund Eligibility

(1) Licensed distributor–on monthly basis on taxes paid on gallons sold by that distributor to licensed exempt agencies (as defined above)

(2) Exporter–on monthly basis on taxes paid to the state on gallons exported by exporter (with proof)

(3) Exempt entities (as defined above)–on quarterly basis for any purchases of motor fuel (or issuer of card if charged to credit card issued to the exempt entity)

(4) End users who first pay tax on gallons of gasoline blendstocks not used in manufacture of gasoline or as motor fuel–on quarterly basis

(5) Tax paid on motor fuel that is lost or destroyed as direct result of sudden and unexpected casualty or becomes unsalable or unusable as highway fuel due to such things as contamination by dye or mixture of gasoline and diesel.

(6) Tax paid on transmix not used as motor fuel or that is delivered to refinery for further processing–on quarterly basis

(7) Tax paid on motor fuel within the bulk transfer system with sufficient proof that a second tax had been paid pursuant to Section 40-17-325 or the fuel was exported to another state or country–on monthly basis.

Legislative History

Acts 1923, No. 62, p. 36
Established the excise tax on gasoline at $.02 per gallon

Acts 1927, No. 340, p. 326
Increased tax to $.04 per gallon

Acts 1931, No. 743, p. 859
Increased tax to $.05 per gallon

Acts 1932, No. 324, p. 314
Increased tax to $.06 per gallon

(Continued from page 161)

Acts 1955, 1st Ex. Sess., No. 44, p. 73
Increased tax to $.07 per gallon

Acts 1961, No. 674, p. 925
Provided further for the taxation of gasoline and/or motor fuel sold to or withdrawn from storage or used in the state by motor carriers by establishing a separate excise tax on motor carrier fuel

Acts 1980, No. 427, p. 590
Levied an additional excise tax of $.04 per gallon on gasoline, motor fuel and lubricating oil

Acts 1987, No. 675, p. 1205
Authorized municipalities to use proceeds from the $.04 tax on gasoline, motor fuel and lubricating oil for new road construction

Acts 1992, No. 203, p. 486
Levied an additional excise tax of $.05 per gallon on gasoline and provided for its distribution. Proportionately increased refund on gasoline for agricultural use and static testing of engines

Acts 2000, No. 736, p. 1608
Provided additional allocations from the gross $.07 and $.05 receipts of 70% of 1% to the Game and Fish Fund and 18% of 1% (60% to State Water Safety Fund and 40% to Seafood Fund). These allocations are deducted from the portion of gasoline tax revenues otherwise credited to the Public Road and Bridge Fund.

Acts 2011, No. 565, p. 1084
Effective October 1, 2012, amended, repealed and reestablished the state gasoline and motor fuel taxes at the same rates as the taxes were previously levied. Changed the point of collection of the taxes from the distributor to the supplier. Expanded the administrative discounts allowed to distributors and suppliers for the collection of fuel taxes. Appropriated $150,000 from the revenues collected to the Department of Revenue for the fiscal year ending September 30, 2012. Each fiscal year thereafter, an amount of revenue will be appropriated to the Department to offset its cost of administering the act.

Acts 2013, No. 402, p. 1541
Allowed the proceeds of the $.04 excise tax on gasoline and oil distributed to the counties to be used for vegetation management

Acts 2014, No. 105, p. 169
Amended current law relating to bonds and notes of the Alabama Federal Aid Highway Finance Authority to provide that so much of the state's share of net gasoline tax proceeds as shall be necessary shall be pledged and appropriated for the purpose of providing funds to enable the Authority to pay principal and interest of obligations.

Acts 2015, No. 54, p. 198
Transfers the collection of gasoline inspection fees from the Alabama Department of Agriculture and Industries to the Alabama Department of Revenue (ADOR); and included a change in the distribution of collected fees to allow an appropriation to ADOR for costs of administration and collection of fees.

Comparison with Neighboring States

Florida
Excise tax on gasoline of $.04 per gallon. An additional fuel sales tax is levied at a rate adjusted annually based on the change in the Consumer Price Index. For 2017, the total rate is $.309 per gallon (does not include all local taxes). In addition, gasoline is subject to the 6% sales tax. The motor carrier tax is at a rate that includes the motor and special fuel tax rates, the state comprehensive enhanced transportation system tax rate, the sales tax rate and the minimum local special fuels rates.

Georgia
Excise tax on gasoline of $.263 per gallon. Local taxes may also apply. The motor carrier fuel rate is equivalent to the taxes imposed by the motor fuels tax.

Mississippi
Excise tax on gasoline of $.18 per gallon and an additional $.004 for environmental protection. The motor carrier privilege tax is imposed at the prevailing excise tax rates for motor fuels.

Tennessee
As of July 2017, the tax on gasoline is $.24 per gallon, an additional $.004 environmental assurance fee, plus a $.01 per gallon special tax. Motor carriers are subject to a highway user fuel tax. The tax on gasoline will increase to $.25 on July 1, 2018 and to $.26 on July 1, 2019. ▲

Endnotes

1. The figures are net (after deduction of motor fuels and IFTA tax refunds). Figures shown are prior to deduction of Department of Revenue administrative expenses. Includes motor fuel excise taxes, IFTA taxes and truck decals.
2. Fiscal Year 2018 includes 13 months of distribution because September 2017 was distributed in October 2017.
3. Due to the early fiscal year closeout date, the Motor Fuel Distribution for September 2016 was not processed until October 3, 2016. The September 2016 distribution is included in FY 2017 instead of FY 2016.

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