

THE

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On The Cover

Trees vanish in the dense fog on this winter morning from an overlook on Ruffner Mountain, Birmingham.

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A large turnout from the 6th Circuit for the latest Drive for Five visit

Finding Hope and Courage in 2023

There is something about starting a new year that feels like a fresh start – a chance to refocus, set new goals, and perhaps, resolve to make personal and professional improvements.

Whatever you set out to accomplish in 2023, I hope you'll welcome this new year with *hope* and *courage*, and let those words be the guide for you in the coming months.

Those words have become a big part of our Drive for Five tour this year – an initiative we started to bring more attention and resources to the legal profession's well-being problem.

With each mile we've driven, each circuit we have visited, and each CLE program we've given, our mission has been to offer hope to members through education and free counseling and to further remove the fear of stigma so lawyers can find the courage to get help.

If you're reading this and hoping to find the strength to overcome addiction or mental health challenges in the new

year, I will use the space in this column to share a story about a member and lawyer who, at times, had lost all hope. Through his experience with the Alabama Lawyer Assistance Program (ALAP), he is on the other side with a fulfilling life and successful law practice.

If you were a part of one of our first Drive for Five stops in Eufaula, where we had lunch and a CLE program in Judge Burt Smithart's courtroom in Barbour County, you heard General Counsel Roman Shaul briefly mention Montgomery and Eufaula attorney **Bill**

Robertson and his journey from addiction and disbarment to recovery and reinstatement. Bill is outspoken about his participation in ALAP, which guided him through recovery



Robertson

from an opioid addiction. He volunteers on the ALAP committee and is committed to speaking out about his experiences to provide hope to those who don't know where to turn. Bill explained:

"Regardless of how anyone who is struggling with an addiction gets there, and for me it started with back problems resulting in two back surgeries, it is tough to reach out for help because of the stigma and fear associated with addiction.

"Toward the end of my addiction, there were absolutely days where I could not see the light at the end of the tunnel, and not just to my recovery, but to any resemblance of a healthy and happy life in general.

"Thankfully, it was at that time I decided to turn my life and my will over to a Higher Power and not worry about what comes next. Believe me when I tell you though, stuff did come next, and specifically, some pretty serious consequences. However, with a solid recovery program, I was able to handle it.

"I would say this to anyone who might be reading this who is currently caught in the vicious cycle of addiction – no matter how bad it is, you can overcome it, but you must take the first step and reach out for help. No one else can do it for you. If you can find the courage to walk through that fear by reaching out and asking for help, you will find that every negative thing you believed would happen was all based on false assumptions driven by fear itself. And that is not my opinion, it is my experience.

"I will add that I remember trying to reach out to other attorneys who I was told that I could call. It was difficult because I wasn't sure what they had dealt with, and most were older attorneys who I didn't know. Additionally, I was driven by the fear that the Alabama State Bar and my law firm would find out about my problem, and they eventually did. Now, I wouldn't trade that life experience for anything. I feel it's what defines me as a person, and I am thankful for it.

"All that to say, I'm here for any attorney who is struggling and needs someone to call. It is that important."

As we continue our visits to every circuit to talk about our new Lawyers Helpline, we also plan to share more courageous stories, like Bill's, of members who have bravely overcome substance use and mental health disorders to find success and happiness on the other side.

Our hope is that seeing real names, hearing real stories, and seeing real recoveries will provide further hope to members who are frozen with fear. Addiction is a chronic disorder, not a personal failure. There is a human face behind every example, and there is real hope that addiction recovery can change your life.

The bottom line is that too many lawyers are not thriving and are unable to be their best for their clients, colleagues, communities, and families.

I hope you will do your part to provide hope and inspire courage among your fellow lawyers. Just a few words of encouragement or a simple act of kindness can determine whether a person gives up or is motivated to move forward. Moreover, I ask you to

rethink what the word courageous means to you.

Courage isn't ignoring a problem to seem strong. Courage isn't pretending you don't see your friend or colleague is struggling. Courage is finding the strength to put aside your fear of failure and take the first steps. Courage is offering support by starting the conversation about your concerns instead of waiting for a colleague to confide in you.

Thank you again to Bill Robertson for sharing his powerful testimonial. May your 2023 be filled with hope and courage.

Confidential help is just one call away. Call the Lawyers Helpline at (800) 605-8678 for immediate counseling resources and support. All Alabama lawyers receive five free hours of counseling each year, and the ASB will never know the identity of those who take advantage of the service. You can read more about the Drive for Five and Lawyers Helpline at alabar.org/driveforfive. If you're interested in learning more about the Alabama Lawyer Assistance Program, visit alap.alabar.org. ▲



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EXECUTIVE DIRECTOR'S REPORT

Terri Lovell
terri.lovell@alabar.org



The beginning of a new year is always an exciting time. It's an opportunity for a fresh start, reflecting on what we learned over the past year and using those experiences to make plans for a better future.

I feel so much momentum as we begin 2023. My vision and promise to you is that the challenges we have faced in the past have illuminated a path forward to a stronger bar in 2023 and beyond.

Over the past several months, we have worked tirelessly on much-needed revisions and updates to our governance policies. I'm so proud of the work our elected leaders and board members have put in to ensure our operational framework provides a foundation that drives the bar's goals and strategic plans.

Internally, our department heads and employees are focused on collaboration and communication, and the work they are doing together is impressive. The holiday season provided opportunities for celebrating and strengthening the bonds of our staff members. I am amazed at the leaders within the building and the positivity, hard work, and creativity they bring each day.

Later this month, we will gather in Mobile for our Midyear Meeting alongside the circuit and district judges, who are also meeting in Mobile during that time. In addition to the opportunities for networking, I hope you'll join us for some important conversations on improving access to justice, the next generation bar exam, and our keynote from Ryan Leaf on overcoming addiction. His message is truly inspiring, and it couldn't have come at a better time, as we continue to grow President Vance's wellness initiatives, including the Lawyers Helpline and the Drive for Five.

Another thing worth celebrating as we begin this new year is gratitude for our membership. Whether you have volunteered countless pro bono hours over the past year, mentored a new associate at your firm, assisted in planning bar events, engaged

in community service projects, attended a CLE or Zoom webinar, participated in board meetings, or any of the other many activities our members have undertaken over the past year – THANK YOU! We are grateful for your passion, dedication, and service to the profession and your communities.

As my staff will tell you, I remind them the way we respond to both success and adversity is what makes us better and stronger. Our desire is to serve our members and the public with excellence, and excellence isn't a one-time outcome. It is a dynamic learning process, and so is excellence in our profession.



Colee

As I do in most columns, I am highlighting an area of the bar to help you maximize your membership. I believe a focus on our Law Practice Management Program is the perfect way to start a new year. Our Practice Management Advisor Chris Colee is available to assist you in navigating the changing legal landscape and the increasing importance of legal technology. If you're looking to learn a new skill this year, for a better deal with organizing complex information, or simply how to improve upon your firm's efficiency and productivity, Chris's program is a great place to start.

Like all of us at the Alabama State Bar, I look forward to the opportunity to serve you well in 2023 and the years to come. ▲

Happy New Year!

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EDITOR'S CORNER

W. Gregory Ward
wgward@mindspring.com



Welcome to the January Issue of *The Alabama Lawyer*

I have a great story about our last edition, and I'll tell it in a moment, but first let me explain a few things.

As you will recall, the November issue had a bankruptcy theme. So does this one. Why, pray tell, would we do that?

In September we published "Are There Constitutional Issues With Alabama's Gubernatorial and Legislative Responses to the COVID-19 Pandemic?" In our November issue we made room for the excellent rebuttal article, "Rebuttal: Alabama's Gubernatorial and Legislative Responses to the COVID-19 Pandemic Were Valid, Constitutional, and Appropriate" which required us to bump three bankruptcy articles that we had already accepted for publication. So here they

are in the January issue with our thanks to the patient and excellent authors.

Danielle Mashburn-Myrick tells us all about "Getting Paid: Retention and Compensation of Special Counsel in Bankruptcy" (page 18). If you are not routinely involved in bankruptcy matters, and especially if you are involved in civil litigation, this is one you have to read. Did you know that there are special steps that you, as a civil litigation attorney, have to take when you settle a case involving a debtor who is in some form of bankruptcy? And did you know that there is authority saying that you now have to check and see if your client is in bankruptcy? Read on; this one will be quite a wake-up call.



Jay Bender, James Bailey, and Cathy Moore teach us all about bankruptcy sales. How do you buy and sell things – from equipment to entire businesses – if they are involved in bankruptcy? If you have any involvement in buying or selling, this one's for you (*page 24*).

Finally, Gary Sullivan tells us all about "Subchapter V: A New Reorganization Model for Small Businesses" (*page 30*). If you represent, deal with, or are in any way involved with advising small businesses, this is a brand-spanking-new tool that you will want to know about. We could not have asked for someone to do a better job explaining this than Gary. He helped – *helped* is too weak a word – put this and the last editions together. He was always at the ready to work with the authors and with me, and I can't thank him enough. Mention this edition to him when you see him.

Now for my story about the last issue. Yesterday I was at home when my phone rang. Someone had just received their November issue, and someone had questions. For the next 30 minutes I faced a tough and rigorous inquiry about bankruptcy, what it is, why some

people need it, and how people get in such tough financial scrapes.

Why was this call noteworthy? It came from a nine-year-old and her brother, age seven. Their two-year-old brother was in the background, but bankruptcy did not hold center stage with him. Their mother had picked up her mail, and as their mother drove to see Santa Claus the kids were flipping through her mail, picked up the magazine, and had questions for mom. She showed them my picture next to my column, told them what I do, and she referred them to me. They chatted with me until their mother parked the van and was getting them out to go see Santa.

If you ever wonder who reads the magazine, know that at least one nine-year-old and her brother do. The next generation of lawyers? We'll see.

Enjoy this edition; it is full of good things to know. Email me at wguard@mindspring.com if you have questions or comments or want to join the growing throng of authors. We are always looking for our next group of excellent writers.

And just wait till you see what we have for you in the March issue. ▲



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IMPORTANT NOTICES

▲ **Alabama Lawyers Hall of Fame**

▲ **Judicial Award of Merit**

▲ **J. Anthony “Tony” McLain Professionalism Award**

▲ **William D. “Bill” Scruggs, Jr. Service to the Bar Award**

▲ **Women’s Section Awards**

▲ **Notice of Election and Electronic Balloting**

Alabama Lawyers Hall of Fame

May is traditionally the month when new members are inducted into the Alabama Lawyers Hall of Fame, which is located at the state Judicial Building. The idea for a hall of fame first appeared in 2000 when Montgomery attorney Terry Brown wrote state bar President Sam Rumore with a proposal that the former supreme court building, adjacent to the state bar building and vacant at that time, should be turned into a museum memorializing the many great lawyers in the history of Alabama.

The implementation of the idea of an Alabama Lawyers Hall of Fame originated during the term of state bar President Fred Gray. He appointed a task force to study the concept, set up guidelines, and then provide a recommendation to the Board of Bar Commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004.

A 12-member selection committee consisting of the immediate past-president of the Alabama State Bar, a member appointed by the chief justice, one member appointed by each of the three presiding federal district court judges of Alabama, four

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Check out the upcoming events

- January 2023: CP Review (Knowledge & Skills)
- March 4, 2023: One-Day Seminar @ the State Park at Lake Guntersville
- April 2023: Career Fair, Montgomery, AL
- May 3, 2023: Paralegal Day
- August 4-5, 2023: Summer Conference and Annual Meeting @ Hampton Inn, Orange Beach, AL.

For specific details, please visit:

www.alabamaparalegals.net



members appointed by the Board of Bar Commissioners, the director of the Alabama Department of Archives and History, the chair of the Alabama Bench and Bar Historical Society, and the executive secretary of the Alabama State Bar meets annually to consider the nominees and to make selections for induction.

Inductees to the Alabama Lawyers Hall of Fame must have had a distinguished career in the law. This could be demonstrated through many different forms of achievement – leadership, service, mentorship, political courage, or professional success. Each inductee must have been deceased at least two years at the time of their selection. Also, for each year, at least one of the inductees must have been deceased a minimum of 100 years to give due recognition to historic figures as well as the more recent lawyers of the state.

The selection committee actively solicits suggestions from members of the bar and the general public for the nomination of inductees. We need nominations of historic figures as well as present-day lawyers for consideration. Great lawyers cannot be chosen if they have not been nominated. Nominations can be made throughout the year by downloading the nomination form from the bar's website and submitting the requested information. Plaques commemorating the inductees are located in the lower rotunda of the Judicial Building and profiles of all inductees are found at www.alabar.org.

Download an application form at <https://www.alabar.org/assets/2023/01/HOF-Nomination-Form-2023.pdf> and mail the completed form to:

Sam Rumore
Alabama Lawyers Hall of Fame
P.O. Box 671
Montgomery, AL 36101-0671

The deadline for submission is March 1.

Judicial Award of Merit

The Alabama State Bar Board of Bar Commissioners will receive nominations for the state bar's Judicial Award of Merit through **March 15**. Nominations should be mailed to:

Terri B. Lovell
Secretary
P.O. Box 671
Montgomery, AL 36101-0671

The Judicial Award of Merit was established in 1987. The award is not necessarily an annual award. It must be presented to a judge who is not retired, whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation. The award will be presented during the Alabama State Bar's Annual Meeting.

Nominations are considered by a three-member committee appointed by the president of the state bar, which then

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.

Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement.

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 **March 15**. Nominations should be prepared on the appropriate nomination form available at www.alabar.org and mailed to:

Terri B. Lovell
Secretary
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 recommendation 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 **March 15**. Nominations should be prepared on the appropriate nomination form available at www.alabar.org and mailed to:

Terri B. Lovell
Secretary
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

(Continued from page 15)

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.

Women's Section Awards

The Women's Section of the Alabama State Bar is accepting nominations for the following awards:

Maud McLure Kelly Award

This award is named for the first woman admitted to practice law in Alabama and is presented each year to a female attorney who has made a lasting impact on the legal profession and who has been a great pioneer and leader in Alabama. The Women's Section is honored to present an award named after a woman whose commitment to women's rights was and continues to be an inspiration for all women in the state. The award will be presented at the Maud McLure Kelly Luncheon at the Alabama State Bar Annual Meeting.

Susan Bevell Livingston Leadership Award

This Women's Section award is in memory of Susan Bevell Livingston, who practiced at Balch & Bingham. The recipient of this award must demonstrate a continual commitment to those around her as a mentor, a sustained level of leadership throughout her career, and a commitment to her community in which she practices, such as, but not limited to, bar-related activities, community service and/or activities which benefit women in the legal field and/or in her community. The candidate must be or have been in good standing with the Alabama State Bar and have at least 10 years of cumulative practice in the field of law. This award may be given posthumously. This award will be presented at a special reception.

Submission deadline for both awards is **March 15**.

Please submit your nominations to Sherri Phillips at sherriep@sasserlawfirm.com. Your submission should include the candidate's name and contact information, the candidate's current CV, and any letters of recommendations. If a nomination intends to use letters of recommendation previously submitted, please note your intentions.

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 15, 2023, and ending Friday, May 19, 2023.

On the third Monday in May (May 15, 2023), 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 5, 2023) 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 19, 2023) immediately following the opening of the election.

Nomination and Election of President-Elect

Candidates for the office of president-elect shall be members in good standing of the Alabama State Bar as of February 1, 2023 and shall possess a current privilege license or special membership. Candidates must be nominated by petition of at least 25 Alabama State Bar members in good standing. Such petitions must be filed with the secretary of the Alabama State Bar no later than 5:00 p.m. on February 1, 2023.

Nomination and Election of Board of Bar Commissioners

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

- 8th Judicial Circuit
- 10th Judicial Circuit, Place 4
- 10th Judicial Circuit, Place 7
- 10th Judicial Circuit, Bessemer Cut-off
- 11th Judicial Circuit
- 13th Judicial Circuit, Place 1
- 13th Judicial Circuit, Place 5
- 15th Judicial Circuit, Place 5
- 17th Judicial Circuit
- 18th Judicial Circuit, Place 1
- 18th Judicial Circuit, Place 3
- 19th Judicial Circuit

21st Judicial Circuit
22nd Judicial Circuit
23rd Judicial Circuit, Place 1
23rd Judicial Circuit, Place 4
28th Judicial Circuit, Place 2
30th Judicial Circuit
31st Judicial Circuit
33rd Judicial Circuit
34th Judicial Circuit
35th Judicial Circuit
36th Judicial Circuit
40th Judicial Circuit
41st 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, 2023 and vacancies certified by the secretary no later than March 15, 2023. 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 28, 2023).

Submission of Nominations

Nominating petitions or declarations of candidacy form, a high-resolution color photograph, and biographical and professional data of no more than one 8 ½ x 11 page and no smaller than 12-point type must be submitted by the appropriate deadline and addressed to Secretary, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101-0671.

Election of At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 6 and 9. Petitions for these positions, which are elected by the board of bar commissioners, are due by March 31, 2023. All terms will be for three years.

Submission of Nominations

Nominee's application outlining, among other things, the nominee's bar service and other related activities must be submitted by the appropriate deadline and addressed to Executive Council, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101-0671.

All submissions may also be sent by email to elections@alabar.org.

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

Election rules and petitions for all positions are available at <https://www.alabar.org/about/board-of-bar-commissioners/election-information/>. ▲



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GETTING PAID:

Retention and Compensation of Special Counsel in Bankruptcy

By Danielle Mashburn-Myrick

Ignorance of the law is no excuse.

We all learned that in law school. Still, you don't know what you don't know. And when it comes to bankruptcy law, too many of us just don't know some basics, like how to protect your fee. Non-bankruptcy lawyers routinely represent debtors or their litigation opponents in non-bankruptcy disputes, such as personal injury claims. To comply

with your duty to competently represent clients who are in bankruptcy or litigating against a debtor, and to protect your fee, know these fundamentals.

Filing a voluntary petition creates an estate consisting of "all legal or equitable interests of the debtor in property."¹ Claims of the debtor arising prepetition are property of the estate [hereinafter "POTE"].² In a case under Chapter 12 or 13, or an individual case

under Chapter 11, claims arising after the petition date, but before the case is closed, dismissed, or converted are also estate property.³ Proceeds of estate claims (i.e. settlement funds) are, similarly, estate property.⁴

In a Chapter 7 case, the Chapter 7 trustee, as the real party in interest, has authority and responsibility for prosecuting and resolving prepetition claims.⁵

In Chapters 11 and 12, the debtor-in-possession has all rights and powers of a trustee, including the right and power to prosecute and resolve estate claims.⁶

In Chapter 13, the debtor has authority and responsibility for prosecuting and resolving estate claims.⁷ When working on a matter involving an estate claim or a potential estate claim, do the following.

Before Representing An Estate Fiduciary, Have Your Employment Approved by the Bankruptcy Court


Before an attorney may represent an estate fiduciary, such as a trustee or debtor-in-possession, the fiduciary must obtain court approval of the terms of the professional's engagement. The Bankruptcy Code [the Code] provides that only attorneys "that do not hold or represent an interest

adverse to the estate, and that are disinterested persons" may be employed to assist the estate fiduciary in carrying out his duties under the code.⁸ A "disinterested person" is a person who (A) is not a creditor, an equity security holder, or an insider; (B) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor; and (C) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the debtor, or for any other reason.⁹

With court approval, under section 327(e), an estate fiduciary may employ an attorney that has represented the debtor, for a specified special purpose, if the attorney "does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed."¹⁰ Rule 2014 of the Federal Rules of Bankruptcy Procedure sets out the information that must be included in an employment application. It provides that such application must set forth specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation,

and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee¹¹ or any person employed in the office of the United States trustee.

The application must be accompanied by a verified statement of the person to be employed setting



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forth “the person’s connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee or any person employed in the office of the United States trustee.”¹²

Special counsel should communicate with bankruptcy counsel or the trustee at the beginning of the representation or commencement of the bankruptcy about having his employment and terms of engagement approved by the court. Too often, special counsel waits until settlement has been reached and then seeks to have his employment, compensation and the settlement all approved in one go, with the employment approved nunc pro tunc to the date of engagement. This practice is frowned upon and, considering a recent United States Supreme Court ruling, arguably impermissible.¹³

Before Settling an Estate Claim, Have the Settlement Approved By the Bankruptcy Court

In order to be enforceable, any settlement of estate claims must be approved by the bankruptcy court after notice and a hearing under Rule 9019.¹⁴ In other words, the compromise of estate claims has no effect until approved by the bankruptcy court. Rule 9019 provides that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to

creditors, the United States trustee, the debtor and indenture trustees as provided in Rule 2002 and to any other entity as the court may direct.” Rule 9019 gives bankruptcy courts broad discretion in approving compromises.¹⁵ In the 11th Circuit, courts consider the following

It is not the Court’s intent to unjustly deny a settlement agreement, but it does require a record upon which to base findings of fact and conclusions of law approving your settlement.



factors in determining whether to approve a settlement of estate claims: (a) The probability of success in the litigation; (b) the difficulties, if any, to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.¹⁶ Like

other courts, bankruptcy courts typically favor the consensual resolution of claims. It is not the Court’s intent to unjustly deny a settlement agreement, but it does require a record upon which to base findings of fact and conclusions of law approving your settlement. Be sure to provide this.

Before Taking Your Fee, Have Your Fees and Expenses Approved by The Bankruptcy Court

For professionals employed pursuant to section 327, section 330 governs the award of compensation and reimbursement.¹⁷ Compensation awarded under section 330 is entitled to administrative expense priority,¹⁸ which is paid ahead of general unsecured creditors.

As the statute makes plain, the bankruptcy court has discretion to determine reasonable attorney fees and expenses and an independent duty to satisfy itself that the fees and expenses requested are reasonable and necessary.¹⁹ To enable the bankruptcy court to award the fees and expenses requested, the applicant must provide the court with evidence of the time spent, fees charged, substance of the work performed, complexity of work performed, attorney’s skills and expertise and market rates for comparable work.

Rule 2016 of the Federal Rules of Bankruptcy Procedure sets forth the procedure for applying to the court for approval of compensation

for services rendered and reimbursement of expenses incurred. The application for compensation must include a detailed statement of “(1) the services rendered, time expended and expenses incurred and (2) the amounts requested.” CITE. It must also disclose any payments made or promised to the applicant in connection with the case, including details about the source of any such payments. Crucially, the application must also state whether any payments previously received by the attorney have been shared and whether any agreement exists for the sharing of compensation received in connection with the case.

Do Not Share Fees

Disclosure of the particulars of any agreement to share fees approved in connection with the case is crucial because the Code strictly prohibits fee sharing in bankruptcy cases.²⁰ It provides, “a person receiving compensation or reimbursement under section 503(b)(2) or 503(b)(4) of this title may not share or agree to share (1) any such compensation or reimbursement with another person; or (2) any compensation or reimbursement received by another person under such sections.” This prohibition encompasses typical referral fee agreements common among the plaintiffs’ bar, but is much broader than that. It also prohibits an attorney from contracting out legal work to a professional who is not a regular member of the court-approved attorney’s firm.

What You Don’t Know Absolutely Can Hurt You

Determining whether an individual or entity is the subject of a pending bankruptcy is free, quick and easy. The bankruptcy courts in Alabama expect you, a competent attorney, to (1) know how to determine whether an entity or individual is in bankruptcy, (2) know when to make such a determination, and (3) promptly inquire as the circumstances require.

How to Determine Whether a Party Is in Bankruptcy

The federal court electronic filing and records database, PACER, has a Case Locator function that allows you to locate bankruptcy cases nationwide by social security number [SSN] or employer identification number [EIN]. If you do not have this information and cannot obtain it, the advanced bankruptcy search option allows you to search by party name, narrow by date and sort by jurisdiction, among other features. You can train your staff to do this.

Relying on your client or another party’s representations about whether he or she is subject to a pending bankruptcy is not sufficient to fulfill your obligation to diligently inquire. In *In re Fisher*, a Chapter 13 debtor listed a claim arising from a prepetition car wreck, which was the subject of a

pending lawsuit, on her schedules.²¹ Over a year after the bankruptcy filing, while the bankruptcy case was pending, the debtor’s state court attorney settled her car wreck claim and took his fee from the settlement proceeds. The attorney’s employment, his fee, and the settlement itself had not been approved by the court. After receiving an order from the bankruptcy court to turnover his fee, an order that threatened sanctions and a report to the Alabama State Bar if he failed to comply, and then an order to show cause why he should not be sanctioned for failure to comply with the turnover order, the attorney pled ignorance of the

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whole bankruptcy situation. He showed the court a settlement memorandum, signed by the debtor-plaintiff, which said in numerous places “I am not a party to any bankruptcy proceedings and no trustees (sic) in bankruptcy or creditor is entitled to or even claims to be entitled to any of the funds paid out of this settlement.”²²

The court found the attorney’s reliance on this statement wholly inadequate, stating: Every trial attorney has or should have a PACER account with which to check federal court pleadings, including bankruptcy court pleadings. It takes only a few moments to check a client’s name on PACER before distributing settlement proceeds to determine whether that client is in bankruptcy. To rely on a client’s representation that he or she is not in bankruptcy is not enough. The client may not notice or understand the *not in bankruptcy* language; the client may be confused as to whether he or she is in bankruptcy; and (not surprisingly) sometimes clients will lie, particularly if they think that answering correctly may cause them to get less money. In this court’s view, if a lawyer fails to check PACER to confirm that a client is not in bankruptcy immediately before distributing settlement proceeds, the lawyer runs the risk of being held liable for the settlement funds that would have otherwise gone into the bankruptcy estate. Of course, a prudent lawyer should also check PACER upon initial retention as well so that her employment can be approved by the bankruptcy court on a timely basis.²³

When to Determine Whether a Party Is in Bankruptcy

Plaintiff’s counsel should determine whether his client is in a pending bankruptcy at the outset of the representation, as part of the file opening process and before any referral is made or accepted with an expectation of compensation. Plaintiff’s counsel should run a new bankruptcy search on his client immediately before finalizing any settlement terms. He should run yet another search before disbursing settlement proceeds to his client.

Diligent defense counsel should determine whether a plaintiff is in a pending bankruptcy, or has had prior bankruptcies, at the outset of her representation, as part of her initial investigation of the plaintiff. Defense counsel should update her bankruptcy search before finalizing settlement terms, to confirm plaintiff’s authority to settle and release claims. Finally, defense counsel should run a search immediately prior to disbursing settlement proceeds to a pro se plaintiff or to plaintiff’s counsel to confirm the settlement (and release) was properly approved by the court and will be enforceable.

What Could Happen If You Fail to Follow These Rules: A Cautionary Tale

In *In re McLemore*, a Chapter 13 debtor was involved in a car

accident post-petition.²⁴ His plan, which was confirmed in December 2020, shortly after the accident, provided that nonexempt proceeds of the claim would be paid to the Chapter 13 trustee for the benefit of unsecured creditors. In July 2021, seven months after the plan was confirmed, and apparently spurred by the Chapter 13 trustee’s investigation of the status of the pending claim, the debtor notified his bankruptcy counsel that he had engaged a plaintiff’s firm to represent him in the personal injury action. In August, the plaintiff’s lawyer contacted the Chapter 13 trustee. He notified her that the personal injury claim had been settled in June 2021 for \$40,000 and that \$16,788.26 in settlement proceeds had been disbursed to the debtor. In response, the trustee filed a Motion to Examine the Debtor’s Transactions with Attorneys, Motion to Examine Attorney Fees and Motion to Dismiss the bankruptcy case. The debtor amended his schedules to reflect receipt of the settlement proceeds and claim an exemption in a portion of the proceeds and filed a Motion to Modify Chapter 13 Plan Post Confirmation. In turn, the debtor filed a Motion to Employ Special Counsel, Nunc Pro Tunc, a Motion to Approve the Settlement, and an Application for Approval of Attorney Fees and Expenses.

The Court found that the settlement funds were property of the estate and that disbursement of the funds constituted conversion of estate property. Finding that plaintiff’s firm had a history of disbursing settlement funds without court approval, the Court denied

both the motion to employ and the fee application and ordered plaintiff’s counsel not only to disgorge his fees to the trustee, but to turn over the full \$40,000 in settlement proceeds to the trustee within 14 days.

In addressing violations of bankruptcy law, bankruptcy courts are not limited to ordering disgorgement of fees and return of converted property. Courts can and do refer counsel to state disciplinary boards, order sanctions and issue show cause orders, among other things. A client who is found to have converted estate assets may have her own complaints to file with the state bar.

Conclusion

When you run that PACER search and discover your client (or another party) is in bankruptcy, and you aren’t certain how that bankruptcy affects your case, there is a whole cast of characters in the bankruptcy world who can and will help you figure it out. You can find contact information for the debtor’s bankruptcy attorney, the Chapter 13 trustee, the Bankruptcy Administrator and/or the Chapter 7 trustee either at the top of the PACER docket report or on the court’s website.

Don’t put your engagement, your fee, or your settlement in jeopardy. When in doubt, reach out. ▲

Endnotes

1. 11 U.S.C. § 541(a)(1).
2. *In re Tarrant*, 349 B.R. 870, 873 (Bankr. N.D. Ala. 2006).
3. 11 U.S.C. §§ 1115(a)(1), 1207(a)(1), 1306(a)(1).
4. *In re McLemore*, No. 20-32131, 2022 WL 362915 (Bankr. M.D. Ala. Feb. 7, 2022).

5. *In re Tarrant*, 349 B.R. at 873.
6. 11 U.S.C. §§ 1107, 1203.
7. *Crosby v. Monroe County*, 394 F.3d 1328, 1331 n.2 (11th Cir. 2004) (citing with approval *In re Mosley*, 260 B.R. 590, 595 (Bankr. S.D. Ga. 2000)).
8. 11 U.S.C. § 327.
9. 11 U.S.C. § 101(14).
10. *In re Tarrant*, 349 B.R. at 875.
11. Bankruptcy cases are administered by the United States Trustees (“UST”), a division of the U.S. Department of

15. *In re Tarrant*, 349 B.R. at 893.
16. *Wallis v. Justice Oaks II, Ltd.* (In re Justice Oaks II, Ltd.), 898 F.2d 1544, 1549 (11th Cir. 1990).
17. *In re Tarrant*, 349 B.R. at 893.
18. 11 U.S.C. § 503(b)(2).
19. *In re Tarrant*, 349 B.R. at 895.
20. 11 U.S.C. § 504.
21. *In re Fisher*, No. 16-1911, 2019 WL 1875366 (Bankr. S.D. Ala. Mar. 27, 2019).
22. *Id.* at *2.
23. *Id.*
24. *In re McLemore*, No. 20-32131, 2022 WL 362915 (Bankr. M.D. Ala. Feb. 7, 2022).

A client who is found to have converted estate assets may have her own complaints to file with the state bar.



Justice, in all but two states: North Carolina and, you guessed it, Alabama. In Alabama, bankruptcy cases are administered by the Bankruptcy Administrator (“BA”). While UST’s and BA’s are not a perfect parallel, in Alabama, to construe code sections, cases, and secondary sources that reference the U.S. Trustee, substitute Bankruptcy Administrator.

12. Rule 2014 (a), FRCP.
13. *See Roman Cath. Archdiocese of San Juan v. Feliciano*, 140 S. Ct. 696, 700–701 (2020). *See also In re Osprey Utah, LLC*, Case No. 16-2270 (Bankr. S.D. Ala. Mar. 27, 2018) (doc. 295) (noting a circuit split on the permissibility of nunc pro tunc employment orders, adopting a more lenient approach allowing same, but requiring the nunc pro tunc applicant to demonstrate both suitability for employment and excusable neglect in failing to timely seek employment).
14. 11 U.S.C. § 363(b); *see also In re Tarrant*, 349 B.R. at 893.

Danielle Mashburn-Myrick



Danielle Mashburn-Myrick is counsel at Phelps Dunbar LLP. Her practice focuses on bankruptcy, creditors’ rights, and commercial litigation. Danielle

represents lenders, financial institutions, trade creditors, and buyers in individual, small business, SBRA, and complex Chapter 11 commercial cases.



BANKRUPTCY SALES

(And Non-Bankruptcy Alternatives) for Buying and Selling Distressed Assets

By Jay R. Bender, James B. Bailey, and Cathleen C. Moore

Introduction

Rising interest rates, inflation, and a global economic slowdown create the perfect storm, pushing some companies into financial distress. These conditions can also create opportunities for investors to make strategic acquisitions of distressed assets.

A sale of distressed assets can benefit creditors, by generating cash to pay down debt, as well as buyers, by providing a

means for savvy investors to enhance their own portfolio and expand into new markets through the targeted acquisition of assets for a relative bargain. A distressed asset sale may even be the centerpiece of a debtor's financial restructuring, enabling it to shed burdensome or unproductive assets and alleviate its debt load.

The best procedural vehicle for meeting the goals of the transaction will depend on the circumstances. Let's look at some of the most common types of distressed asset sales.

Sales Under Section 363 of the Bankruptcy Code

Section 363 of the Bankruptcy Code – which governs the use, sale, and lease of property of the estate – allows a debtor or bankruptcy trustee to sell assets outside the ordinary course of business.¹ A debtor may use section 363 to sell assets ranging from a single piece of equipment to its entire business. A section 363 sales offer multiple advantages for both buyers and sellers that are not available in other types of distressed asset sales. The most significant advantage is that buyers in a section 363 sale take the assets free and clear of all liens, claims, and encumbrances if certain conditions are satisfied.² This allows the debtor to sell its assets “as is” with limited representations and warranties, while enabling the buyer to acquire clean title and protection against successor liability claims and other liabilities arising from the debtor’s operation of the assets. The finality and certainty of a bankruptcy sale order can increase demand for the assets and generate a higher sales price, which in turn helps maximize value for the debtor’s bankruptcy estate and for the creditors.

Section 363 sales offer several additional advantages. Prospective buyers can choose which of the debtor’s executory contracts and leases they want to acquire. As long as the debtor or buyer satisfies outstanding amounts owing under the relevant agreements, and the buyer provides adequate assurance of future performance under the contract, then the debtor may assume the contract and assign it to the buyer as part of the section 363 sale. Typically, anti-assignment provisions in a debtor’s contracts will not be enforced in bankruptcy. This ability to choose valuable contracts to acquire in a sale, while leaving burdensome contracts with the debtor’s bankruptcy estate, makes a section 363 sale particularly attractive to buyers acquiring a debtor’s business.

Section 363 sales also provide good faith purchasers protections to prevent the unwinding of a sale by a later modification or reversal of the sale on appeal, so

long as the sale order includes a finding that the buyer has acted in good faith.³ Moreover, section 363 sales insulate buyers from fraudulent transfer liability, since the auction process ensures that the debtor receives the highest and best price for the assets, and sale orders typically bar future fraudulent transfer claims.

The Bankruptcy Code provides a detailed framework for section 363 sales. Sales under section 363 are frequently conducted by auction in furtherance of the Bankruptcy Code’s value maximization policy objectives. A typical section 363 sales process begins with the debtor marketing the assets and identifying prospective buyers, and then selecting one of the buyers to serve as what is referred to as the stalking horse bidder. The purpose of a stalking horse is to set the baseline purchase price at a public auction to be conducted later pursuant to court-approved procedures, and to entice other prospective bidders into the auction process.

After selecting the stalking horse, the debtor and the stalking horse will execute an asset purchase agreement governing the terms of the sale. Because the stalking horse incurs substantial transaction costs in negotiating a deal with the debtor that has no guarantee of closing, the asset purchase agreement will typically provide for certain bidding protections for the stalking horse. These protections usually include a break-up fee, overbid protections, and expense reimbursement in the event that the stalking horse is not the winning bidder or the debtor otherwise terminates the transaction.

The sales process is similar regardless of whether the 363 sales pleadings are filed with the bankruptcy petition or later in the case: (1) the debtor will file a motion to approve bidding procedures, which sets forth the terms of the auction process (including required qualifications for bidders and bids, bidding deadlines and deadlines for sale objections, and rules governing opening bids and the auction process); (2) the court will hold a hearing on the bidding procedures; (3) the court will approve the bidding procedures (or a modified version thereof); (4) the debtor will continue to market the assets and solicit additional

bids; (5) if the debtor receives additional qualifying bids, it will proceed to an auction; (6) at the conclusion of the auction, the debtor will select the bid that it deems to be the highest and best offer for the assets in accordance with its sound business judgment. The debtor's selection of the winning bidder is subject to bankruptcy court approval, and a hearing to approve the sale is typically held shortly after the conclusion of the auction. If the court approves the sale, it is statutorily stayed for 14 days unless the court waives the 14-day stay period (which routinely occurs), thus permitting the sale to close soon after court approval.

Even though a sale under section 363 occurs within the boundaries of a well-established statutory structure, and, as such, offers some degree of predictability, a 363 sale comes with inherent uncertainties associated with any type of court proceedings. Creditors and contract counterparties must receive notice of the proposed sale and have the right to object, competing bidders may complicate the process, and the court could deny the proposed bidding procedures (or override previously approved procedures if it deems it to be in the best interest of the estate to do so) or decline to approve the sale entirely. Thus, both the debtor and the proposed purchaser must be prepared to respond to unexpected disruptions as soon as the section 363 pleadings are filed.

The 363 sales process can involve negotiations with numerous stakeholders, and the final deal (and the final sale order) will often reflect concessions made to satisfy objections filed by interested parties. Notwithstanding the complications that may arise during the 363 sales process, once the court enters a final order approving a 363 sale (and relevant appeals periods expire), the parties to the transaction can enjoy a higher degree of certainty, finality, and protection than that afforded by other kinds of distressed asset sales.

Creditors and contract counterparties must receive notice of the proposed sale and have the right to object, competing bidders may complicate the process, and the court could deny the proposed bidding procedures (or override previously approved procedures if it deems it to be in the best interest of the estate to do so) or decline to approve the sale entirely.

UCC Article 9 Sales

Creditors with claims secured by personal property, such as equipment or inventory, often must take advantage of a sale under Article 9 of the Uniform Commercial Code to realize the value of their collateral. Such sales are often at discount prices and can have other advantages attractive to distressed asset purchasers.

Article 9 governs the relationship between debtors and their secured creditors with respect to personal property. In general, a secured creditor may enforce its rights in collateral after default by the borrower by repossessing and disposing of the property securing the loan. The secured creditor's remedies include the right to sell the collateral to a third party. To properly effectuate a sale under Article 9 after default by the debtor, a secured creditor must follow the statutory requirements for repossession, notice, and commercial reasonableness of the sale.

First, the secured creditor must repossess the collateral in accordance with the procedures set forth in Article 9 (which vary depending on the type of collateral). Once the secured creditor has repossessed the collateral, it must provide proper notice before it can sell the collateral to a third party. Article 9 sets forth detailed requirements with respect to which parties must receive notice of the sale,⁴ the content of the notice,⁵ and the timeliness of the notice.⁶

Compliance with these notice provisions ensures only that the notice of the sale is reasonable. In order to insulate the sale from future legal challenges, a creditor foreclosing on collateral is also required to conduct a sale that is commercially reasonable in method, manner, time, and place.⁷ For non-judicial sales, disposition, collection, and enforcement of collateral is considered commercially reasonable if it is 1) made in the usual manner on any recognized market; 2) at the current price in any recognized market at

the time of disposition; and 3) in conformity with reasonable commercial practices among dealers in the type of property being sold.⁸ Despite these general guidelines, the question of whether a sale was commercially reasonable may be a question of fact that turns on the underlying circumstances. Accordingly, the Alabama UCC recognizes that a transaction may still be commercially reasonable even if the secured party may obtain a greater amount for the assets using a different method.⁹

A commercially reasonable sale can take many forms: it can be a public or private sale, it can take place at any time or place and on any terms, it can be made by one or more contracts, and the collateral may be sold as a unit or in parcels.¹⁰ Courts consider the sales price, manner of sale, timing of sale, and conduct of sale in evaluating commercial reasonableness. With respect to the manner of sale, courts generally find public sales to be commercially reasonable if the secured creditor provides sufficient notice to the public.


Private sales are more likely to be deemed commercially reasonable if the creditor can show that it retained a broker to assist with the sales process, or at least solicited multiple offers before making a sale. The timing of the sale must also be commercially reasonable, and the secured creditor cannot delay a sale if doing so will cause the value of the collateral to decline.

An Article 9 sale may be an attractive option for buyers, debtors, and secured creditors. It is generally faster and less expensive than a sale in bankruptcy, so it may be beneficial in cases where the value of the assets is deteriorating rapidly. A debtor can benefit from an Article 9 sale by negotiating the secured creditor's release of deficiency claims, personal guarantees, or other collateral in exchange for the debtor's cooperation with the Article 9 sale.

Article 9 sales provide benefits for buyers as well, including the opportunity to purchase collateral at a discount while avoiding the expense and delay of a bankruptcy auction process. Upon completion of the Article 9 sale, the buyer takes whatever rights the debtor had in the collateral, free and clear of the foreclosing creditor's security interest and any subordinate security interests. And while an Article 9 sale cannot insulate the buyer from fraudulent transfer or successor liability in the way that a 363 sale can, the buyer may conclude that the risk of such claims is relatively low.

One obvious disadvantage of an Article 9 sale is that it is limited to personal property and cannot be used to sell real property. While an Article 9 sale may be sufficient to sell discrete items of personal property, it may not be practical to sell an entire business through this process. Moreover, an Article 9 sale may be disrupted by a bankruptcy filing at any time.

Also, the absence of a court order approving the sale and addressing any deficiency claims may increase the chances of later litigation over the transaction. Similarly, failure to comply with the strict statutory requirements and commercial reasonableness standards may result in challenges to the sale (and the fact that the commercial reasonableness standard is itself so fact-specific makes it more difficult for the parties to structure a completely attack-proof sale).



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Receivership Sales

Federal or state court receiverships provide another vehicle for buying and selling distressed assets. In a receivership, a third party (the receiver) is appointed by a court to administer assets that are subject to a dispute or claim. The receiver's mission is to safeguard and protect a defendant's assets pending the court's final disposition of the case at bar. Most often, the appointment of a receiver is sought by a creditor who believes that the debtor's assets are being or may be mismanaged to the detriment of the creditor's interests.

State and federal receivership statutes generally define a receiver's powers in broad and vague language, leaving it to the supervising court to tailor the scope of the receiver's authority to the specific needs of the case at bar.

State and federal receivership statutes generally define a receiver's powers in broad and vague language, leaving it to the supervising court to tailor the scope of the receiver's authority to the specific needs of the case at bar. The order appointing the receiver should specifically describe the receiver's powers. A receiver's duties generally include the power to locate, seize, and take title to the entity's assets; to manage the debtor's business; and to sell or

otherwise dispose of the receivership's assets, subject to court oversight and approval.

The sale of assets by federal receivers is governed by 28 U.S.C. §§ 2001, 2002, and 2004. These provisions offer specific guidelines regarding certain procedural requirements, such as notice provisions, but are vague regarding other procedural matters. A federal receiver may sell receivership property – whether real or personal property – through either a public or private sale. The federal receivership statute imposes certain additional requirements for appraisals, notice, and pricing with respect to private sales. Both public and private receivership sales have to be made upon such terms and conditions as the court directs.¹¹ Accordingly, before a receiver can sell receivership property, it should seek direction from the court regarding the terms and conditions upon which the sale may be made.

State receivership statutes may include their own provisions regarding receivership sales. But in many states, including Alabama, general receivership statutes are sparse and lack specific statutory guidance for receivership sales.¹² Accordingly, the court overseeing the receivership will impose the rules and procedures governing receivership sales in the case before it, either in the order appointing the receiver, an order authorizing the sale or governing sales procedures, or similar orders.

Selling assets in a receivership can have advantages over selling in bankruptcy. For example, a Chapter 11 bankruptcy case can be expensive. The costs of professionals and other administrative fees in bankruptcy



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can significantly reduce the recovery for creditors. Because receiverships are more flexible and have fewer statutory requirements than bankruptcy cases, a receivership generally is less expensive. And with fewer statutory requirements, receivership courts and the parties involved have more flexibility to tailor administration to the needs of the case.

There are disadvantages to selling assets in a receivership as well. The same lack of statutory structure that allows for flexibility can also create confusion and unpredictability. Receiverships are relatively uncommon, so judges frequently have little experience overseeing receivership cases (unlike bankruptcy judges, who are well-versed in the Bankruptcy Code and section 363 sales).

Also, while the Bankruptcy Code expressly provides for the sale of assets free and clear of liens, with the liens attaching to the sales proceeds, most receivership statutes lack similar provisions. Conflicting case law regarding whether a receivership court may order free and clear sales of receivership property, particularly where the property being sold is worth less than the value of all secured claims, can complicate the sale of encumbered assets. And as with Article 9 sales, a receivership may be superseded at any time by the filing of a bankruptcy case.

It is impossible to fully remove the “distress” from distressed asset sales, and there is no perfect procedure that will always guarantee top dollar return for creditors and sellers, a risk-free bargain for buyers, and an efficient, inexpensive, complication-free process. But each of the methods outlined offer certain advantages that parties can use strategically to acquire assets at a discount, generate much-needed cash for a business and its creditors, and potentially serve as the centerpiece of a more comprehensive debt restructuring. ▲

Endnotes

1. 11 U.S.C. § 363.
2. *Id.* at § 363(f).
3. *Id.* at § 363(m).
4. ALA. CODE § 7-9A-611.
5. *Id.* at § 7-9A-613(1).
6. *Id.* at § 7-9A-612.
7. *Id.* at § 7-9A-610.

8. *Id.* at § 7-9A-627(b).
9. *Id.* at § 7-9A-627(a).
10. *Id.* at § 7-9A-610(b).
11. 28 U.S.C. § 2001(a).
12. Alabama’s general receivership statute is found at Alabama Code §§ 6-6-620 to 6-6-228. Rule 66 of the Alabama Rules of Civil Procedure also govern state court receiverships. The Alabama Code includes specific receivership provisions governing matters such as insolvent bank receiverships, insolvent insurer receiverships, and corporate dissolution receiverships that are beyond the scope of this article.

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SUBCHAPTER V:

A New Reorganization Model for Small Businesses

By Gary E. Sullivan

Chapter 11 bankruptcy has been a graveyard

for far too many small businesses. Too often, small businesses enter a Chapter 11 bankruptcy case only to have the bankruptcy case subsequently dismissed or converted to liquidation in Chapter 7.

For several years prior to 2019, a brew of practitioners, academics, and judges weighed in on the probable causes of the high rate of failure of small business reorganizations in

Chapter 11. Among other explanations, traditional Chapter 11 cases were deemed to be too expensive, too complicated, and too drawn out for a typical small business to fund and survive. Following years of commentary and studies designed to recommend changes that could make Chapter 11 more effective for small businesses, Congress acknowledged in 2019 that “small business chapter 11 cases continue to encounter difficulty in successfully reorganizing.”¹

One provision of the CARES Act expanded the non-contingent, liquidated debt dollar limit to qualify as a “small business” for purposes of Subchapter V to \$7,500,000.⁵

Help arrived. Seeking to streamline the process² by which small businesses reorganize, Congress passed the Small Business Reorganization Act of 2019 [the “SBRA”]. The SBRA introduced a new small business subchapter of Chapter 11 that was codified as Subchapter V.³ This subchapter provides a new model for struggling small businesses seeking to reorganize.

Definition of “Small Business” for Purposes Of Subchapter V

Since the passage of SRBA, the definition of *small business* – those qualifying to file a small business case under Subchapter V – has expanded significantly. Using debt as the measure of the size of a

business, the SRBA originally limited eligibility for Subchapter V to businesses with non-contingent, liquidated debts of no more than \$2,725,625.⁴ Along came the pandemic and with it enactment of the CARES Act. One provision of the CARES Act expanded the non-contingent, liquidated debt dollar limit to qualify as a “small business” for purposes of Subchapter V to \$7,500,000.⁵ The higher dollar amount definition of small business was recently renewed and will remain in effect until 2024.⁶

Key Features of Subchapter V

In several important respects, Subchapter V differs from the traditional Chapter 11 model. This article highlights and briefly discusses

some (but certainly not all) of the features of this new small business reorganization model.

One central difference is the role of the bankruptcy trustee. In traditional Chapter 11 cases, existing management (the Debtor-In-Possession, or DIP) is empowered to administer the bankruptcy case, and the appointment of a bankruptcy trustee is disfavored and rarely occurs.

By contrast, Subchapter V requires the appointment of a trustee in every case, with the role of that trustee including a novel duty to “facilitate” development of a consensual reorganization plan.

A second difference is the abrogation of the absolute priority rule in Subchapter V cases, allowing existing small business owners to more confidently make additional

investments in the future of the reorganized business. Additionally, Subchapter V vests the exclusive power to propose a reorganization plan in the debtor, thereby streamlining the confirmation process and avoiding prolonged fights over competing plans proposed by creditors or other stakeholders.

Finally, Subchapter V enables the modification of a mortgage on the debtor's principal place of residence in certain circumstances.

Subchapter V Trustee : Overseer and... Mediator?

Subchapter V requires the appointment of a trustee in every case.⁷ The length of a Subchapter V reorganization plan is similar to the length of plans in chapter 13 individual reorganization cases – three to five years.

As for the trustee, the term served by the Subchapter V trustee is determined by the type of plan confirmed. If a consensual plan, agreed to by debtor and creditors alike, is confirmed by the court, the trustee's duties end following substantial consummation of the plan.⁸ If a contested plan is confirmed, the trustee's roles continue until the plan is complete.⁹ Many of the duties of a Subchapter V trustee are "traditional" bankruptcy trustee duties, including objecting to claims, administering payments, filing reports, and being heard on various matters such as valuation disputes, confirmation and any sale of property of the estate.¹⁰

In one important respect, however, a Subchapter V trustee takes on a duty foreign to trustees in Chapters

7 or 11 or 13: the duty to "facilitate the development of a consensual plan of reorganization."¹¹

The contours of what all a Subchapter V trustee might do to "facilitate" the development of a consensual plan are somewhat nascent and evolving given that Subchapter V was only codified a few years ago. The Bankruptcy Code provides little to no guidance.

Furthermore, during those few short years, the pandemic, along with the substantial monetary and fiscal stimulus provided by the federal government, caused a sharp drop in bankruptcy filings including business filings. As a result, the numbers of Subchapter V cases filed since 2019 has been relatively small; hence, caselaw discussing Subchapter V trustees' roles is predictably sparse.

Because the development of a consensual plan requires that the debtor and creditors reach an agreement, some commentators view the Subchapter V trustee's facilitation role as that of a mediator.¹² In this regard, arriving at a consensual plan of reorganization is simply "settling the case" with the trustee serving as mediator. Many of the practices and techniques employed by mediators in general will almost certainly serve Subchapter V trustees well as they attempt to bring debtors and creditors together with the goal of arriving at consensual plans of reorganization in Subchapter V cases.

Goodbye, Absolute Priority Rule; Hello, Disposable Income

Another important reform imbedded in Subchapter V is the

abrogation of the Absolute Priority Rule [APR]. APR is a general legal doctrine that requires that a class of claimants in the capital structure be paid in full before an inferior class may receive value. Chapter 11 requires that reorganization plans adhere to APR.¹³ In the context of a garden variety Chapter 11 case, APR requires, for instance, that objecting unsecured creditors receive full payment of their claims before equity holders can retain or receive any value.¹⁴ A plan of reorganization that violates the APR cannot be confirmed. As a result, the owners of a business in bankruptcy often have a disincentive to make additional equity investments in support of the reorganization and may even lose their equity to unsecured creditors.¹⁵

Subchapter V cases are free from the limitations of the APR. Owners of small businesses in bankruptcy can now seek confirmation of plans of reorganization that propose fresh investments from equity holders regardless of whether or not receiving value from the new investments would otherwise violate the APR.

Instead of applying the APR, Subchapter V requires that a small business dedicate all its "disposable income" toward paying creditors for a period of at least three years to as long as five years.¹⁶ This feature of Subchapter V is similar to the chapter 13 individual reorganization model. Central to this model is the quid pro quo requiring that unsecured or under-secured creditors accept less than full payment in exchange for the debtor's promise to dedicate all disposable income for a period of years to the payment of creditors' claims.¹⁷

The Exclusive Right to Propose a Plan of Reorganization

In addition to being free from the strictures of the APR, debtors in Subchapter V also enjoy the exclusive right to propose a plan of reorganization.¹⁸ The ability to propose a plan is a source of control in a bankruptcy case. In a traditional chapter 11 case, that control is vested in the DIP for a limited period of time, called the *exclusivity period*.¹⁹ Once the exclusivity period lapses, creditors are free to file their own competing plans.²⁰ The ability to file a competing plan provides a creditor leverage in several ways, not least of which is the ability to seek support from other creditors to have the competing plan confirmed.

By vesting the exclusive right to file a plan in the debtor, Subchapter V strengthens the debtor's hand in negotiations with its creditors. Paired with the trustee, aka the consensual plan facilitator, Subchapter V debtors are placed in a strong position in terms of seeking consensus among creditors regarding the terms of a reorganization plan. Anecdotes by bankruptcy practitioners support the notion that plans are being confirmed more quickly and more efficiently in Subchapter V versus traditional chapter 11 cases.²¹

Debtor's Shiny New Power: Cramming Down a Residential Mortgage

A debtor's ability to reduce the amount of a secured claim can be


a powerful tool in bankruptcy because secured claims generally must be paid in full only up the amount of value of the property.²² By way of example, if a creditor is owed \$50,000 secured by a security interest in collateral worth


\$10,000, bankruptcy allows the amount of that creditor's secured claim to be "crammed down" to \$10,000.

When a creditor's claim is secured by a mortgage on debtor's principal place of residence, however, the

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debtor is prevented from cramming down that claim in Chapter 11 or Chapter 13 cases.²³ Accordingly, bankruptcy has historically offered little to no respite from a mortgage taken out by a small business owner on his or her home.

Thanks to Subchapter V, small business owners can now cram down mortgages on their homes. Or at least some of them. There are two basic requirements for cramming down a mortgage on the small business debtor's home: (i) the mortgage loan proceeds were not used to acquire the home, and (ii) the loan proceeds were used primarily in connection with the small business of the debtor.²⁴ As to the latter requirement, a reasonable construction of "primarily" is that over half the proceeds were used in the small business.

Although the ability to cram down a home mortgage is doubtless a valuable right in a small business bankruptcy case, there is an obvious practical limitation: the value of the home must leave the secured claim under water. Because home values in most areas of our state have continued to climb over the past few years, the Subchapter V home mortgage cramdown provision may well be the proverbial solution in search of a problem. Or, just perhaps, the ongoing unwinding of the monetary stimulus that fueled the housing boom may breathe new life into this cramdown power. Only time will tell.

Final Thoughts

Struggling small businesses now have new tools available for reorganizing thanks to Subchapter V. This new model should lead to higher rates of confirmed plans of small business reorganizations and, hopefully, the preservation of more value for the benefit of debtors and creditors alike. ▲

Endnotes

1. H.R. REP. NO. 116-171, at 4 (2019).
2. *Id.* at 1.
3. Subchapter V is codified at 11 U.S.C. 1181 – 1195. All remaining citations in this article will be to sections of Title 11 of the U.S. Code unless otherwise indicated.
4. Small Business Reorganization Act of 2019, Pub. L. No. 116-54, §1182, 133 Stat. 1079, 1079 (2019).
5. CARES Act, Pub. L. No. 116-136, § 1182, 134 Stat. 281, 310-11 (2020).
6. Bankruptcy Threshold Adjustment and Technical Corrections Act, Pub. L. No. 117-151, §1182, 136 Stat. 1298, 1298 (2022).
7. 11 U.S.C. § 1183(a). By contrast, in traditional Chapter 11 cases, the DIP administers the case and a trustee can only be appointed under rare circumstances such as when current management engages in fraud, dishonesty, incompetence or gross mismanagement. § 1104(a)(1).
8. 11 U.S.C. § 1183(c).
9. *Id.*
10. *Id.* at § 1183(b).
11. *Id.* at § 1183(b)(7). To the extent there is a cousin to this facilitator role, it would be a Chapter 13 trustee whose duties include "assist[ing] the debtor in performance under the plan." § 1302(b)(4).
12. Given the statutory language and legislative goals of Subchapter V, the "facilitate" language "suggests that the Subchapter V trustee is cast in the role of mediator and overseer." Patricia Redmond, *Come Together: The Unique Role of Subchapter V Trustees and the Cautionary Tale of 218 Jackson*, 40 AM. BANKR. INST. J., 12 (2021).
13. § 1129(b)(2)(B)(ii).
14. *Id.*
15. Although beyond the scope of this article, there is an important exception to the APR called the *new value corollary*. Under certain limited circumstances, existing equity holders can receive value from fresh equity contributions even if receipt of that value would otherwise violate the APR. Bank of Am. Nat'l Trust and Savings

Assoc. v. 203 North LaSalle Street P'ship, 526 U.S. 434 (1999).

16. 11 U.S.C. § 1191(b).
17. The Subchapter V debtor maintains an important power in this regard: the exclusive right to seek post-confirmation modification of a non-consensual plan. See William L. Norton III & James B. Bailey, *The Pros and Cons of the Small Business Reorganization Act of 2019*, 36 EMORY BANKR. DEV. J. 383, 385-386 (2020).
18. § 1189(a).
19. The court can expand the length of the exclusivity period in traditional chapter 11 cases "for cause." § 1189. See also Chapter 11 – Bankruptcy Basics, UNITED STATES COURTS, <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics#:~:text=%C2%A7%201189,cause%22%20up%20to%2018%20months> (last visited Aug. 27, 2022).
20. Creditor-led negotiations for terms of alternative plans often begin well before the exclusivity period lapses. In many cases, negotiations among creditors begin before the debtor even files bankruptcy.
21. "My experience is that these new Subchapter V cases are being confirmed faster and for less professional fees. My opinion is that the success rate appears to be much higher than normal success rates for traditional Chapter 11 cases." Donald R. Calaiaro, *The New Subchapter V Chapter 11 Bankruptcy*, 24 J. ALLEGHENY CTY. BAR ASS'N Note 6, 7 (2022). For a more comprehensive look at how small businesses are faring in Subchapter V, see Paula S. Berran et al., *Has Subchapter V Solved the Problems of Small Business Bankruptcies? Views and Reflections of Subchapter V Trustees on the First Two Years of the New Law*, 31 BANKR. L. & PRAC. NL ART. 3, 1 (June 2022).
22. § 506(a)(1).
23. §§ 1123(b)(5), 1322(b)(2).
24. § 1190(3).

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Magdalene Kate Ogletree
Chanmee Praise Oh
Yahn Eric Olson
Anne Clark Ormond
Mason Joseph Osborn
Brett Michael Ostronic
Pierce Davis Ostwalt
Lauren Elizabeth Overstreet
John Braxton Owen
Nicole Ray Ozburn
Stacey Banu Ozdemir
McKenzie Lyn-Marie Parker
Rachel Elizabeth Parker Flynn
Taylor Brooke Payne
Francisco Antonio Pecci
Taylor Thomas Perry, III
Carolyn Danyel Peters
Morgan Chasity Peterson
Adam Michael Pflaum
Bailey Michelle Phillips
Lynette Elizabeth Potter
Julia Margaret Potts
Tanner Lee Potts
Jack Henry Pouchert
Gregory Keith Pridgen, Jr.
Mark Samuel Prine

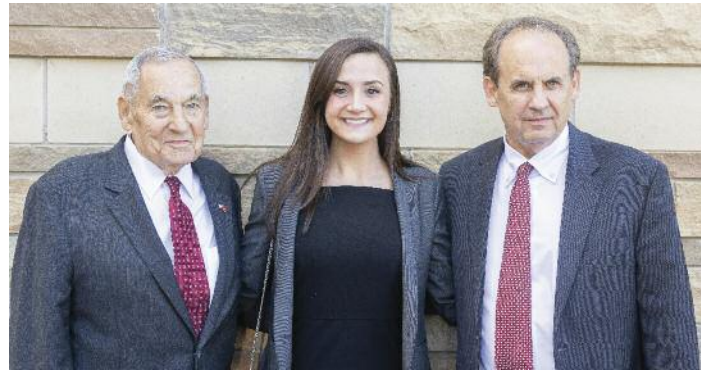
Amy Kathryn Privette
William Roy Privette
Antoinette La-Quise Pruitt
DeAndra Tyease Ragland
Ariel Fabricio Ramirez
Jessica Lynn Ratcliffe
Phillip Andrew Ray
Michael Reagan Reeves, Jr.
Samantha Jane Renshaw
Caitlin Love Rittenhouse
Emily Danielle Robinson
Josie Emily Robinson
Lucas Dixon Rockwell
Kaylee Chapel Rose
Samuel Isaac Rotenstreich
Thomas Wade Russell
William Tyler Sampley
Elijah Paul Sargent
Emily Ann Schaefer
Willie Edward Scott, Jr.
John Paul Segal
Varian Lewis Shaw
William Albert Shepherd
Betsy Ann Shields
Noelle Iman Sillmon
Judson Ted Sills
Terra LeAndrea Silva
George Laithan Simmerman
Julia Virginia Simmons
Taylor Jemelle Simmons
Taylor Renee Sims
Jared Carter Skinner
Martina Pelayo Slaughter
Destinee Campbell Small
Brendan Joseph Smith
Erin Elizabeth Smith
Johnathon Hugh Smith
Katrina Morgan Smith
Keely Renee Smith
Lindsey Caroline Smith
Rebecca Suzanne Smith
Ryne Peter Smith
Sidni Elise Smith
Alexander Gregory Spanos
Lorel Anastasia Stano
Anna-Drake Stephens
Camille Morgan Stephens
Joe Oliver Stevenson, III
Victoria Christian Parris Stigile
Austin Michael Stinnett
Kristen Helen Strickland
Kyle Bradley Stuart
Camryn Rebecca Suggs

Zuzanna Maria Sztul
Esther Karimi Taati
Meredith Smith Taylor
Brennen Terrill
Jason Reed Terry
Stewart Thames, IV
Solomon Schae Thomas
Xavier Malik Thomas
John Kenneth Thompson, Jr.
Whittney Clark Thompson
Thomas Melton Thorneycroft
Fredrick Earl Tippet, II
Andrew Joseph Triplett
McKala Rae Troxler
John William Tucker
John Austin Tully
Richard Dale Turley
Catherine Claire Turner
Kristen Lee Turner
Madison Nicole Vacarella
Jacob Wilson Wade
Collin Richard Walker
Isaac Clayton Wash
Charlotte Ellen Watters Toepke
William Hunter Webb
Amanda Jean West
Roxanna Christine West
Jesse Rogers Westerhouse
Elizabeth Grace Weyerman
Brooke Alexandria Whaley
Andrew George Wharton
Whit Walker Whitfield
Aubrey Brooke Whitten
Michael Andrew Wilkins
Adam Garrett Williams
Chandler Noel Williams
Madeline Oakes Williams
Rachel Sinclair Williams
Carneil DeShay Wilson
Lacey Amilia Wilson
William Tyler Windham
Taylor Allen Winkler
Nancy Taylor Wise
William Earl Wofford, IV
Margot Blaire Woolverton
Ethan Robert Wright
Oniquca Ashley Wright
Meghan Elizabeth Wynn
Cierra Nicole Yactayo
Emily Rodgers Yeager
Lindsey Helen Yerby
Jarrett Claire Young

LAWYERS IN THE FAMILY



James F. Hampton (1977), **Kyle Bradley Stuart** (2022), and Gail Ingram Hampton (1981)
Father-in-law, admittee, and mother-in-law



Jack J. Hall, Sr. (1955), **Olivia Hall** (2022), and Jack J. Hall, Jr. (1985)
Grandfather, admittee, and father



John E. Pilcher (1981), **William Yancey Jernigan** (2022), J. Thomas Pilcher (2009), and Laura A. Calloway (1981)
Uncle, admittee, cousin, and cousin



Gil Simmons (1992), **Julia Virginia Simmons** (2022), and Leigh Simmons (1992)
Father, admittee, and mother



Bryan Duhe' (1985), **Haley Carter** (2022), Kristin Dukes (1993), and Gil Dukes (1988)
Uncle, admittee, mother, and stepfather



Patrick Smith (1991), **Meredith Smith Taylor** (2022), and Melissa Kessler Smith (1994)
Father, admittee, and mother

LAWYERS IN THE FAMILY



Paul Anthony Irwin, III (2022)
and **Paul Anthony Irwin, Jr.** (2004)
Admittee and father



Kristin Lee Turner (2022) and
Alan G. Stabler (1991)
Admittee and uncle



Harold Cornelius Bone, II (2022)
and **Elizabeth Clark Bone** (2002)
Admittee and mother



J. Brent Burney (1995), **Schyler Brenton Burney**
(2022), and **Billy C. Burney, II** (1992)
Father, admittee, and uncle



Keith J. Pflaum (1989), **Adam M. Pflaum** (2022),
and **Tracy Marlowe Pflaum** (1992)
Father, admittee, and mother



Jackie Bradley (1984) and
Virginia Bradley (2022)
Mother and admittee



Judge Jack Meigs (1982) and
Joseph P. Meigs (2022)
Father and admittee



Clayton M. Hughes (2022) and
Judge R.O. Hughes (1969)
Admittee and grandfather

LAWYERS IN THE FAMILY



**Brian Howell (1992) and
Meredith Buckner (2022)**
Father and admittee



**Judge Todd Derrick (1994) and
J. Adam Derrick (2022)**
Father and admittee



**Steven C. Edge (2022) and
Connie Shaw Granata (1989)**
Admittee and cousin



**William Glenn Goggans (2022)
and Judge Glenn Goggans (1990)**
Admittee and father



**Shelby Andrews (2022) and
Michael Andrews (2001)**
Admittee and father



**Kenneth Graves (1993) and
Leslie Minor (2022)**
Uncle and admittee



**Christy Crow (1997) and
Emily Ellis (2022)**
Aunt and admittee



**Laura L. Barnes (2002) and
Jena Edrie Grayson (2022)**
Sister-in-law and admittee



**Katrinnah M. Harding (2022)
and Seth Vincent Harding (2020)**
Admittee and brother

LAWYERS IN THE FAMILY



Erin Amelia Haston (2022),
Tripp Haston (1993), and
Steve Nicholas (1984)
Admittee, father, and uncle



Cecile Nicolson (2022) and
Carson Irvine Nicolson (1987)
Admittee and mother



Bailee Curtis (2022) and
Barry Curtis (2011)
Admittee and father



Amanda Nelson Singh (2022)
and Mark C. Nelson (1993)
Admittee and father



Taylor T. Perry, III (2022) and
Taylor T. Perry, Jr. (1986)
Admittee and father



Victoria Parris Stigile (2022) and
Tammy Watkins Parris (1994)
Admittee and mother



Eric M. Fancher, Jr. (2022),
Sharonda Childs Fancher (2013), and
Hon. Eric M. Fancher, Sr. (ret.)
Admittee, wife, and father



FRONT ROW: Wendy Ghee Draper (1998), Laura Ghee Alexander (2006), M. Douglas Ghee (1975), Jonathan Draper (1998), and David Alexander (2006). **BACK ROW:** Lindsay Ghee McCarroll (2016), Jennifer Ghee Downey (2003), **Marshall Ghee, Jr. (2022)**, and Bruce Downey (2006)
Sister, sister, father, brother-in-law, brother-in-law, sister, sister, admittee, and brother-in-law



The VLP and a Tractor

By Pamela Bucy Pierson

Mrs. Annie Taylor learned she was being sued for conversion

when a man appeared at her apartment door and handed her a notice requiring her attendance in Tuscaloosa County Small Claims Court. The man told her she was being sued and that the lawsuit was scheduled for trial.

Six months after the trial, Mrs. Taylor welcomed me into her home, a tidy apartment in Tuscaloosa where she and her husband of 59 years lived before he died in January 2021.

Mrs. Taylor is 82 years old. She is tall, friendly, and spry and has one of the biggest smiles I've ever seen. Pictures of her family adorn every surface in her small living room. She proudly shows me her husband and each of her kids and grandkids.

We sat at her kitchen table where a big pot of greens soaked as she told me about the case. "When that man left after giving me the notice to be in court," she said, "I was so scared." She had never been to court, never seen a courtroom, thought court was the same as jail, and that she was being ordered to report to jail. After the man left,

she called her daughter and talked with other family members, one of whom knew about the Volunteer Lawyers Program (VLP) and contacted the VLP on Mrs. Taylor's behalf. Jon Townsend, a volunteer attorney with the VLP and partner at Dorroh & Mills PC in Tuscaloosa, took Mrs. Taylor's case.

On the day of the trial, March 7, 2022, one of Mrs. Taylor's daughters, as well as one of her granddaughters, an RN who lives in Atlanta, came to court with a terrified Mrs. Taylor. Jon Townsend met them at the courthouse.

The lawsuit filed against Mrs. Taylor was brought by a man she had known "all that boy's life." As Mrs. Taylor explained, he was the same age as one of her daughters, and when he was growing up, "was at our house all the time, and oh my, how that boy could eat!" The complaint sought \$3,600 in damages, plus court costs. At issue was an old, rusty, inoperable tractor that sat for years on a vacant lot in Coaling, Alabama, next to where Mrs. Taylor and her husband lived before moving to Tuscaloosa.

The plaintiff took the stand and claimed that in January 2020, he and Mr. Taylor entered into an agreement for the sale of the tractor, that he (the plaintiff) had paid for the tractor in installments, making the last payment in December 2020. He claimed that when he went to get the tractor, in early 2021 after Mr. Taylor had died, it was gone.

Mrs. Taylor also testified. She testified that she knew nothing about the tractor or any agreement regarding it. "My husband didn't tell me nothing about that tractor," she said. "He took care of everything outside and I took care of everything inside." She did not talk with her husband or with anyone else, including the plaintiff, about the tractor. She never got or saw any money for the tractor. She had no knowledge of what happened to the tractor or its present location.

The judge asked questions of both parties and concluded that the plaintiff failed to produce "any evidence

to establish that Defendant took possession of the property, denied Plaintiff the property, or allowed it to be disposed of to another." The court dismissed the plaintiff's case for failure to meet his burden of proof.

What did Mrs. Taylor think after her experience in court? One thing is clear. She thinks the world of Jon Townsend: "Oh, he was so good! He was just like the lawyers on television, asking questions and explaining the case. He is so sweet. I just love him to death."

Jon Townsend joined the VLP shortly after he began practicing law in Alabama. Why does he do it? "It's the right thing to do," Jon says. Created in 1990 by the Alabama State Bar, the Volunteer Lawyers Program matches attorneys who wish to do pro bono work with low-income clients in their communities who need civil legal assistance. Every year, more than 2,000 attorneys volunteer through the Alabama State Bar's VLP to give their time, service, and expertise to thousands of Alabamians who would not otherwise have access to justice. It doesn't take much time. The average VLP case takes only five hours. And, as Jon says, "There's nothing better about being a lawyer than experiencing the gratitude of someone like Mrs. Taylor."

If you would like the experience of helping someone in need and reminding yourself why you became a lawyer, go to <https://www.alabar.org/programs/volunteer-lawyers-program/enrollment/form/> to volunteer to become a VLP lawyer. ▲



Townsend

Pamela Bucy Pierson



Pamela Pierson is the Bainbridge Mims Emeritus Professor of Law at the University of Alabama School of Law. A former federal prosecutor, she also taught at the law school for 33 years. She serves of counsel to Frohsin, Barger & Walthall LLC, writes books, and works with community reentry programs. Pam is a longtime and ardent supporter of the Alabama State Bar Volunteer Lawyers Program.



MEMORIALS

▲ **Richard Heywood Ramsey, III**

▲ **Carlos Stanford Randall**

Richard Heywood Ramsey, III

Richard Ramsey, 89, passed away peacefully under hospice care in Panama City Beach, Florida on November 7, 2022.

He was born in Dothan to Richard H. Ramsey, Jr. and Lucile R. Ramsey on June 11, 1933. Richard was educated in the Dothan City Schools and graduated from The Baylor School where he excelled in football. While at the University of Alabama, he was a member of the Kappa Sigma fraternity and, upon graduation from the school of law, returned to his hometown, where he practiced law more than 50 years.



Ramsey

Throughout the years, he served on the board of the Salvation Army and The Wiregrass Area Food Bank. An avid world traveler (including mission trips) since his youth, he always had a special love for Panama City Beach. A member of the First United Methodist Church, Richard steadfastly loved God, his family, his community, and the University of Alabama's Crimson Tide.

He was predeceased by his parents; his brothers, Lester H. Ramsey and Jon A. Ramsey; and his beloved grandson, Jeffrey Todd Webb, Jr.

Surviving to cherish his memory are his children, Richard H. Ramsey, IV (Estella), Roberta Ramsey, and Rebecca Ramsey, all of Panama City Beach, and Rhonda Webb (Jeff) of Montgomery; grandchildren Nikki Purvis, Jordan Beaver, Jayden Erickson (Scott), and Ramsey Webb; and five great-grandchildren. Also surviving are his sister, Joy R. Doggett, and several nieces, nephews, and his dear friend, Nathan Mathis.

In lieu of flowers, memorial contributions may be made in Richard's name to The Todd Webb Scholarship Fund through Central Alabama Community Fund or to The Salvation Army.

Carlos Stanford Randall

Carl Randall, longtime prosecutor with the Jefferson County District Attorney's Office in Birmingham, passed away on October 20, 2021 after a hard-fought battle with cancer. In his dedication to justice and protecting the people of Jefferson County, Carl touched countless lives.

Carl was born in Mobile on June 29, 1970 and raised there. He matriculated at Rhodes College in Memphis, earning a degree in political science. Carl then returned to Alabama to attend the University of Alabama School of Law. After law school, he immediately began his career as a deputy district attorney with the Jefferson County District Attorney's Office. Despite many pressures, Carl never wavered in his career choice of



Randall

serving as a prosecutor and spent the next 25 years doing what he loved in a place that he loved.

Carl was without a doubt one of the most zealous advocates in Jefferson County, particularly in the criminal courts. He fought hard but always with a sense of righteousness, justice, and fairness. He was passionate about protecting his community and speaking for the victimized – as so aptly stated in his eulogy, “Carl was not a lawyer, he was a *prosecutor*.” In every one of his many eloquent closing arguments, he made it a point to mention why he did the job that he did – to make Birmingham a better and safer place for his daughters and family.

Throughout his career, Carl served as a mentor and teacher for countless young lawyers who began their legal careers at the district attorney’s office. In addition to teaching them the skills of a good trial lawyer, he would always instill that the job of a prosecutor is not always to “win” every case, but to make sure that the truth prevails, and the right thing is always done in the end. And, for those young lawyers in which he saw real promise, on the rare occasion,

he would even let them deliver his coveted “second close.”

Outside of the office, the tenets of Carl’s life were his faith, his family, and Alabama football. He was a devout member of the Cathedral Church of the Advent. Without a doubt, the most beloved parts of his life were “his girls” – wife Lisa and daughters Caroline and Bailey. Carl enjoyed travelling extensively with his family, especially to Disney and Alabama football games. He always wanted to make sure that his daughters were afforded every experience and every opportunity.

At the end of his illness, his physicians told him there was nothing more they could do and recommended that he forego the debilitating treatments for his final days. Carl’s response was, “I can’t, I have to keep fighting.” That’s who he was. Without a doubt, Carl was a fighter – just like he fought so zealously for the last 25 years for the victims and people of Jefferson County. He undeniably left his mark on the Jefferson County criminal justice system, and we are all indebted to him for his service and sacrifice. ▲

–J. Matthew Hart

Gerry Eugene Adams Cumming, GA Admitted: 1979 Died: October 8, 2022	Hon. Terry Lee Dempsey Russellville Admitted: 1992 Died: February 17, 2022	Douglas Alan McSwain Huntsville Admitted: 1995 Died: September 7, 2022	Clifford Morris Spencer, Jr. Birmingham Admitted: 1964 Died: November 27, 2022
George Bernard Azar Montgomery Admitted: 1956 Died: July 14, 2022	Dayton Foster Hale, Jr. Tuscaloosa Admitted: 1979 Died: August 8, 2022	John Hamilton Miglionico Birmingham Admitted: 1992 Died: November 25, 2022	Robert Troy Teague Letohatchee Admitted: 2003 Died: October 16, 2022
Daniel Jay Burnick Birmingham Admitted: 1983 Died: November 6, 2022	William Dallas Hasty, Jr. Birmingham Admitted: 1972 Died: October 16, 2022	Larry Ronald Newman Birmingham Admitted: 1973 Died: November 13, 2022	Bartley Eugene Tomlinson, III Montgomery Admitted: 1997 Died: February 12, 2022
Guy Louis Burns, Jr. Birmingham Admitted: 1983 Died: September 21, 2022	George Hugh Jones Montevallo Admitted: 1974 Died: July 2, 2022	Charles Neal Pope Atlanta, GA Admitted: 1966 Died: August 11, 2022	David Wayne Trotter Gadsden Admitted: 2004 Died: October 26, 2022
Marc Elliot Cavadel Birmingham Admitted: 1996 Died: July 5, 2022	Phillip Andrew Laird Jasper Admitted: 1969 Died: March 23, 2022	Robert Leslie Potts Florence Admitted: 1969 Died: October 28, 2022	Joe Walker Ozark Admitted: 1984 Died: November 12, 2022
Anthony Lee Cicio Birmingham Admitted: 1956 Died: November 21, 2021	Frank Edward Lankford, Jr. Birmingham Admitted: 1976 Died: November 21, 2022	Sydney Rhodes Prince, III Daphne Admitted: 1960 Died: October 19, 2022	John Ray Warren Montgomery Admitted: 1964 Died: October 12, 2022
Patricia Lynn Clem Aransas Pass, TX Admitted: 1987 Died: June 26, 2022	Lewis Milton McLean, Jr. Birmingham Admitted: 1984 Died: September 13, 2022	Jasper Beroujon Roberts Elmore Admitted: 1969 Died: November 20, 2022	



NOTICE

DISCIPLINARY NOTICES

- ▲ Notice
- ▲ Reinstatements
- ▲ Transfer to Inactive Status
- ▲ Disbarment
- ▲ Suspensions
- ▲ Public Reprimands

Notice

- **Larue Haigler, III**, who practiced in Mobile and New Orleans, and whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of date of this publication, or, thereafter, the charges contained therein shall be deemed admitted, and appropriate discipline shall be imposed against him in ASB Nos. 2022-207 and 2022-586 before the Disciplinary Board of the Alabama State Bar. [ASB Nos. 2022-207 and 2022-586] Alabama State Bar Disciplinary Board

Reinstatements

- Cullman attorney **Stuart Lynn Moore** was reinstated to the active practice of law in Alabama by order of the Supreme Court of Alabama, effective September 21, 2022. Moore was previously suspended for 91 days on December 13, 2021. [Rule 28, Pet. No. 2022-425]
- Tuscaloosa attorney **John Arthur Owens** was reinstated, effective September 14, 2022, by order of the Supreme Court of Alabama. The Supreme Court of Alabama entered its order based upon the August 23, 2022 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to a motion for reinstatement filed August 4, 2022 with the Office of General Counsel. Owens was transferred to inactive status effective August 13, 2020 by Panel II of the Disciplinary Board in response to a motion to transfer to inactive status filed on August 11, 2020. [Rule 27(g), Pet. No. 2022-812]

Transfer to Inactive Status

- Huntsville attorney **Michael Finley Robertson** was transferred to inactive status, effective August 23, 2022. The Supreme Court of Alabama entered a notation on the Supreme Court of Alabama's roll of attorneys based upon the August 23, 2022 order of the Disciplinary Board of the Alabama State Bar, in response to Robertson's petition filed with the Office of General Counsel requesting he be transferred to inactive status. [Rule 27(c), Pet. No. 2022-884]

Disbarment


- Pinson attorney **Harrison Royster Jones** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective September 7, 2022. The Supreme Court of Alabama entered its order based upon the August 15, 2022 order of Panel I of the Disciplinary Board of the Alabama State Bar. The Supreme Court of Alabama entered its order based on the Disciplinary Board's acceptance of Jones's consent to disbarment, which was based on Jones's recent arrest for attempting to smuggle heroin to a Jefferson County jail inmate. [Rule 23(a), Pet. No. 2022-840; ASB No. 2022-824]

Suspensions

- Birmingham attorney **Brian Christopher Bugge** was inter-
imly suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective September 14, 2022, pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure. The Supreme Court of Alabama noted the interim suspension based upon the Disciplinary Commission's order that Bugge be inter-
imly suspended for engaging in continued conduct that is causing, or is likely to cause, immediate and serious injury to a client or the public. [Rule 20(a), Pet. No. 2022-854]
- Birmingham attorney **Tremele Deshun Perry** was summarily suspended pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, from the practice of law in Alabama by the Alabama Supreme Court, effective March 23, 2022. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Perry be summarily suspended for failing to respond to requests for information in multiple disciplinary matters. [Rule 20(a), Pet. No. 2022-365]

Public Reprimands

- Birmingham attorney **Dantwann Sherrod Crane** was issued a public reprimand with general publication on September 16, 2022, as ordered by the Disciplinary Commission of the Alabama State Bar, for violating Rule 7.3(a) [Direct Contact with Prospective Clients] and Rule 8.4(g) [Misconduct], Alabama Rules of Professional Conduct. The pertinent facts are that in a physician's office an unknown female claiming to be Crane's representative solicited professional employment from a patient receiving treatment for injuries sustained in a motor vehicle accident. Shortly thereafter, Crane memorialized the events that took place in the physician's office in a letter to the patient. Crane is also required to pay any and all costs taxed against him, pursuant to Rule 33, Alabama Rules of Disciplinary Procedure, including but not limited to a \$1,000 administrative fee and publication costs. [ASB No. 2020-928]



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THE ALABAMA LAWYER

(Continued from page 47)

- Birmingham attorney **Neil John Halvorson** was issued a public reprimand with general publication on September 16, 2022, as ordered by the Disciplinary Commission for violating Rule 1.7 [Conflict of Interest: General Rule], Rule 1.8 [Conflict of Interest: Prohibited Transactions], and Rule 5.5 [Unauthorized Practice of Law], Alabama Rules of Professional Conduct. The Disciplinary Commission's order was based on a complaint filed with the Office of General Counsel wherein, after investigation, it was determined that Halvorson failed to obtain waivers regarding a potential conflict of interest. Further, Halvorson engaged in the unauthorized practice of law by preparing legal documents to be effectuated in another state in which Halvorson is not licensed to practice law. [ASB No. 2019-1079]
- Tuscaloosa attorney **Albert Jones** was issued a public reprimand without general publication for violating Rules 1.2 [Scope of Representation], 1.4 [Communication], and

8.4(g) [Misconduct], Alabama Rules of Professional Conduct. On or about August 11, 2015, Jones was hired to represent an individual on a personal injury case after the individual slipped and fell at a doctor's office. At the time Jones was hired, the client was in a Chapter 13 bankruptcy proceeding. After obtaining permission to represent the client on the personal injury claim from the bankruptcy court, Jones filed suit on the client's behalf. Thereafter, Jones failed to adequately and timely communicate with the client regarding the status of her case. On or about August 17, 2019, the client was contacted by Medicare requesting reimbursement as a result of the settlement of her personal injury case. That same day, the client contacted Jones and Jones informed her that her case had not been settled. Jones instructed the client to ignore the letter from Medicare. However, the next day, the client contacted the Tuscaloosa Circuit Court and obtained a copy of a "Joint Notice of Settlement" entered between

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the parties in her case on May 30, 2019. Jones subsequently admitted that he settled the client's case because he believed she was going to lose her case on summary judgment. Jones subsequently informed the investigator that he believed he had obtained the client's permission to settle the case. However, Jones was unable to produce any proof that he had obtained the client's permission or that of the bankruptcy court to settle the case. [ASB No. 2019-1050]

- Enterprise attorney **Christopher Mark Kaminski** was issued a public reprimand with general publication on September 16, 2022, as ordered by the Disciplinary Board of the Alabama State Bar, for violating Rules 8.4(a), (d), and (g) [Misconduct], Alabama Rules of Professional Conduct. In May 2015, Kaminski was appointed district court judge for Coffee County and subsequently elected to a full term on November 8, 2015. In September 2018, the Judicial Inquiry Commission began an investigation after receiving a complaint that Kaminski was involved in an extramarital relationship with attorney Amy Marshall. On July 16, 2019, the Office of General Counsel received a complaint filed by the Judicial Inquiry Commission alleging a number of violations of the Canons of Judicial Ethics. While engaged in the romantic relationship with Marshall, Kaminski routinely

appointed Marshall to cases over which Kaminski presided and took judicial action in cases where Marshall was counsel of record before and after the relationship became public. Kaminski subsequently admitted to violating Canons 1, 2, 2A, 2B, 2C, and 3C(1) of the Canons of Judicial Ethics. As a result, Kaminski resigned his position as district court judge and agreed to never seek judicial office again. [ASB No. 2019-1100]

- Enterprise attorney **Amy Cauthen Marshall** was issued a public reprimand with general publication on September 16, 2022, as ordered by the Disciplinary Board of the Alabama State Bar, for violating Rules 1.7(b) [Conflict of Interest: General Rule] and 8.4(f) and (g) [Misconduct], Alabama Rules of Professional Conduct. On or about July 16, 2019, the Office of General Counsel received a complaint filed by the Judicial Inquiry Commission alleging that Marshall was involved in an extramarital affair with District Court Judge Christopher Kaminsky. During the affair and before the relationship became public, Marshall failed to disclose her relationship with Judge Kaminski to her clients, opposing counsels, or opposing parties. Marshall also did not seek and did not obtain conflict waivers from her clients regarding her relationship with Kaminski. [ASB No. 2019-1130] ▲

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LEGISLATIVE WRAP-UP



Although it could rightly be said that the legislature is as old as our state's oldest Constitution, the reality is that there is a new Alabama Legislature every four years. This occurs upon the completion of the statewide general election when members of the house of representatives and the senate are elected to new terms of office. In fact, Alabama's Constitution actually mandates that legislative leadership elections must take place anew every four years for these new legislatures. With each new legislature, there is often a good mixture of new faces and existing members who are re-elected to the new term. However, each new term takes on a life of its own that includes new challenges and accomplishments waiting in the wings to be presented. Sometimes new legislatures maintain existing courses set by previous legislatures, and other times new leadership or different circumstances call for recalculations and new courses to navigate. This new legislature is poised to be no different.

The new legislature recently completed its 2023 organizational session, which takes place every four terms at the start of a new term (called a "quadrennium"). This brief but critical session is when the legislature officially kicks itself into gear as a new legislature that is ready to conduct the business of the people. In this session, as with

all organizational sessions, the legislature elected its leaders, adopted its rules, created its committees, and set the chairs and membership for its standing committees. These events, while somewhat ministerial, help to set the tone for the coming quadrennium and signal how the house and senate will go about their business.

The New Legislature

This quadrennium starts with relative consistency in the senate contrasted with dramatic changes in the makeup and leadership of the house of representatives.

Senate

In the senate, six new members joined the ranks with 29 incumbent senators who were reelected to new terms. Included among those returning for new terms was Senator Greg Reed of Walker County, who was reelected by the senate as president pro tempore, a position he was unanimously elected to in 2021 when former Senator Del Marsh stepped down from the role during the last legislative term. Returning Senators Clay Scofield of Blount County and Bobby Singleton of Hale County were reelected as majority leader and minority leader, respectively, by their caucus members.

House of Representatives

In the house of representatives, 31 new members were elected, and 74 incumbents were reelected to new terms. This represented approximately a 31 percent change in house membership, compared to the roughly 17 percent change in the senate. In addition to the new faces, an entirely new slate of legislative leadership was elected due to the retirements or career changes of previous leadership.

Representative Nathaniel Ledbetter of DeKalb County was elected speaker of the house. Ledbetter was first elected in 2014 and quickly rose in influence among the body, becoming the first freshman legislator to be elected as house majority leader by the majority caucus. Ledbetter served as majority leader for six years before his election as speaker.

Alongside Ledbetter, Representative Chris Pringle of Mobile County was elected as speaker pro tempore of the house. This position assists the speaker with leadership duties and serves as acting speaker in the house chamber when the speaker is absent or otherwise not presiding over the chamber while the house is in session. Pringle is one of the longest serving Republican members of the house, having first been elected in 1994.

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(Continued from page 51)

A new house clerk was also elected by the members of the house. The house elected John Treadwell of Lee County to serve as clerk of the house. The house clerk oversees all official business of the house, from staffing and security and facilities for members to the journaling and recording of all the official business of the house. Before being officially elected to the post, Treadwell was appointed as acting clerk upon the retirement of Jeff Woodard, who served as clerk of the house from 2001 until this year. Prior to serving in the clerk's office, Treadwell served as the deputy director of the Legislative Services Agency's Legal Division. He is a lawyer and a member of the Alabama State Bar.

Finally, returning house member Scott Stadthagen of Morgan County was elected majority leader, and returning house member Anthony Daniels of Madison County was elected minority leader by their respective caucuses.

Demographics of the Legislature

The members of the legislature make a representative cross-section of the population with each senator representing approximately 143,500 persons and each representative one-third that many. Below is a breakdown of the membership by some key political and social demographics:

PARTY

House: Republicans:	77
Democrats:	28
Senate: Republicans:	27
Democrats	8

OCCUPATION

House: Legal:	12
Architecture:	1
Agriculture:	2
Business:	22
Construction:	2
Engineering:	2
Finance:	9
Fire/Paramedic/Emergency:	1
Government:	5
Health Care:	4

Journalism/Media:	2
Law Enforcement:	4
Real Estate:	7
Religion/Faith:	3
Retired:	28
Technology:	1
Senate: Legal:	7
Agriculture:	4
Business:	7
Engineering:	1
Finance:	2
Government:	2
Health Care:	6
Real Estate:	3
Retired:	3

GENDER

House: Male:	85	Party:	18 (D), 67 (R)
Female:	20	Party:	10 (D), 10 (R)
Senate: Male:	31	Party:	5 (D), 26 (R)
Female:	4	Party:	3 (D), 1 (R)

RACE

House: White/Caucasian:	78	Party:	2 (D), 76 (R)
Black/Other Minority:	27	Party:	26 (D), 1 (R)
Senate: White/Caucasian:	28	Party:	1 (D), 27 (R)
Black/Other Minority:	7	Party:	7 (D), 0 (R)

Lawyers in the Legislature

Despite the general perception that the state house is "full of lawyers," the number of lawyers serving in the state legislature has been shrinking over the years. To start this quadrennium there are 19 licensed lawyers, making up approximately 13.5 percent of the legislative membership. They are:

- Senator Arthur Orr**District 3
(Limestone, Madison, and Morgan counties)
- Senator Sam Givhan**District 7 (Madison County)
- Senator Lance Bell**District 11
(Shelby, St. Clair, and Talladega counties)

- Senator Rodger Smitherman**District 18
(Jefferson County)
- Senator Merika Coleman**District 19 (Jefferson County)
- Senator Greg Albritton**.....District 22
(Baldwin, Escambia, Mobile, and Washington counties)
- Senator Will Barfoot**District 25
(Crenshaw, Elmore, and Montgomery counties)
- Representative Tim Wadsworth**District 14
(Winston, Walker, Cullman, and Jefferson counties)
- Representative Ben Robbins**District 33
(Coosa and Talladega counties)
- Representative David Faulkner**.....District 46
(Jefferson County)
- Representative Jim Hill**District 50 (St. Clair County)
- Representative Ontario Tillman**.....District 56
(Jefferson County)
- Representative Juandalynn Givan**District 60
(Jefferson County)
- Representative Cynthia Almond**.....District 63
(Tuscaloosa County)
- Representative Prince Chestnut**District 67
(Dallas and Perry counties)
- Representative Chris England**District 70
(Tuscaloosa County)
- Representative Phillip Ensler**District 74
(Montgomery County)
- Representative Penni McClammy**District 76
(Montgomery County)
- Representative Matt Simpson**District 96
(Baldwin County)

Lawyers in Leadership Positions

Despite being relatively small in number, the lawyers in the legislature often play influential roles and garner respect from their colleagues and all others involved with the legislative process due to their experience and understanding of the meanings and implications of the laws or decisions under legislative consideration. This influence is many times reflected in key leadership roles such as:

Senate

- Arthur Orr is beginning his fourth quadrennium as a budget chair, chairing the powerful Senate Finance and Taxation Education Committee for the last seven years. Having previously served as chair of the senate’s committee overseeing the general fund budget, few legislators have the background and depth of knowledge he does of state finances and expenditures.
- Greg Albritton has been reappointed chair of the Finance and Taxation General Fund Committee for his second quadrennium to serve in the position. Albritton’s hawkish eye toward wasteful government spending and his seasoned knowledge and understanding of the critical aspects of the General Fund Budget has earned the respect of all those involved with appropriations from the fund.
- Will Barfoot has been appointed to serve as chair of the Judiciary Committee. His experience as an attorney and his previous role as vice chair of the committee will serve him greatly as he faces one of the busiest and often most intense standing committees of the legislature.

House

- Jim Hill will continue his role as chair of the powerful Judiciary Committee. His experience as a retired circuit and district judge provides a much-needed practical viewpoint, and his previous tenure as the committee’s chair provides leadership experience that will, without a doubt, help provide influence and order to the committee, which (in similar fashion to its senate counterpart) is often the busiest and most intense committee in the house.
- Matt Simpson has been appointed chair of the Ethics and Campaign Finance Committee, which plays a vital role in the examination and debate of the ethical standards for all public officials and employees as well as the campaign finance rules that directly impact the electoral process for our state and federal elections.

With the 2023 Organizational Session completed, the pieces are now set for the new legislature to chart its course, face its challenges, and prioritize its objectives over the next quadrennium, starting with the 2023 Regular Session that begins on March 7th of this year. ▲



ABOUT MEMBERS, AMONG FIRMS

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

Among Firms

The 32nd Judicial Circuit announces that **R. Champ Crocker** is the **district attorney** and will assume office this month.

Governor Kay Ivey announces the appointment of **Mike O'Dell** as the supernumerary district attorney for the Ninth Judicial Circuit.

Alabama Personal Injury Lawyers LLC announces that **Nicole LeMier** joined as an associate, and the office relocated to 300 Richard Arrington Jr. Blvd. N, Ste. 500, Birmingham 35203. Phone (205) 855-2745.

Baker Donelson of Birmingham announces that **Aaliyah L. Locke** and **Lucas L. Lopez** joined as associates.

Balch & Bingham announces that **Nicholas Brown, John Collier, Christy Kuklinski, Samantha Renshaw,** and **Lindsey Yerby** joined as associates in the Birmingham office, and **Tripp DeMoss** joined as an associate in the Montgomery office.

Blount Hughes LLC of Trussville announces that **David Moore** joined as an associate.

Bradley Arant Boulton Cummings LLP of Birmingham announces that **O. Cobb Bostick** and **Brendan Smith** joined as associates.

Christian & Small announces that **Shauncey H. Ridgeway** and **Priscilla K. Williams** are now partners in the firm.

Dentons Sirote announces that **Jackson M. Reagan** joined as an associate in the Birmingham office.

Gaines Gault Hendrix PC announces that **Shelley Lewis** is a shareholder in the Huntsville office; **Marc Jaskolka** and **David Wilson** are shareholders in the Birmingham office; **Sam Rotenstreich, Jake Norwood,** and **Taylor Johnson** joined as associates in the Birmingham office; and **Nick Bottoms** joined as an associate in the Huntsville office.

Robert E. Patterson and **Hunter S. Garnett** announce the opening of **Garnett Patterson Injury Lawyers LLC** at 100 Jefferson St. S, Ste. 300, Huntsville 35801 and at 108 4th Ave. NE, Ste. 200, Decatur 35601. Phone (256) 539-8686.

Gregory Fann Law LLC of Birmingham announces that **Brian Turner** joined as a partner, and **Rebecca Boykins** joined as an associate. The new firm name is **Gregory Fann Turner LLC**.

Hand Arendall Harrison Sale LLC of Mobile announces that **Sean Dudley** joined as counsel, **Chase Pritchard** joined as an associate, and **Laurel H. Thorpe** joined of counsel.

Heninger Garrison Davis of Birmingham announces that **Jeanie S. Sleadd** and **Anna Carroll** are partners.

Huie, Fernambucq & Stewart LLP of Birmingham announces that **Curtis Graves** joined as an associate.

Johnston, Moore & Weston of Huntsville announces that **Allison K. Moody** joined as an associate.

Legal Services Alabama announces that **Kendra Johnson** is a practice group lead attorney in the Birmingham office.

Lloyd Legal LLC of Centre announces that **Laura T. Lloyd** joined as a partner.

Morris, Andrews, Talmadge & Driggers LLC of Dothan announces that **J. Adam Derrick** joined as an associate.

Pope & McMeekin PC of Birmingham announces that **Jared N. Wood** is a shareholder and **J. Vincent Swiney, II** joined the firm. The new firm name is **Pope, McMeekin & Wood PC**.

Smith, Spires, Peddy, Hamilton & Coleman PC of Birmingham announces that **Leslie J. Minor** and **Taylor T. Perry, III** joined as associates. ▲



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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.



J. Thomas Richie

J. Thomas Richie is a partner at Bradley Arant Boult Cummings LLP, where he co-chairs the class action team. He litigates procedurally-complex and high-stakes matters in Alabama and across the country. Richie is a 2007 summa cum laude graduate of the Cumberland School of Law and former law clerk to the Hon. R. David Proctor of the United States District Court for the Northern District of Alabama.

RECENT CRIMINAL DECISIONS From the Eleventh Circuit Court of Appeals

Cellphone Search Warrant Execution

United States v. Vedrine, No. 20-13259 (11th Cir. Nov. 29, 2022)

Law enforcement officers complied with Fed. R. Crim. P. 41(e)'s requirement that their warrant for cellphone data be executed within a specified time (no longer than 14 days), and that time limit refers to the seizure of the information, "not to any later off-site copying or review." The fact that the data was not forensically analyzed until a date outside of the 14-day execution period did not support suppression of the evidence. In agreement with other federal circuits, the court held that "[o]nce the data is seized and extracted by law enforcement, the warrant is considered executed for purposes of Rule 41, and under Rule 41(e)(2)(B), law enforcement may analyze that data at a later date."

Defendant's Removal From Courtroom

United States v. Truley, No. 21-14352 (11th Cir. Nov. 10, 2022)

Acknowledging that "[i]t is no small matter for a court to remove a criminal defendant from the courtroom[,]," the court found no violation of the defendant's procedural or Fifth Amendment due process rights in his removal for six minutes during a hearing on his motion to withdraw his guilty plea and 31 minutes prior to allocution in his sentencing hearing. The defendant's disruptive behavior led to his removal from the courtroom.

From the Alabama Supreme Court

Right to Counsel; Harmless Error

Ex parte Hicks, No. 1210013 (Ala. Nov. 18, 2022)

Relying heavily upon *Satterwhite v. Texas*, 482 U.S. 905 (1987), the court applied harmless error analysis to reject the capital murder defendant's argument that he was entitled to reversal due to an alleged denial of his Sixth Amendment right to counsel. Though defense counsel was appointed to represent the defendant two

days after his initial competency evaluation was ordered by the trial court, this did not contaminate the entire proceedings against him. A second evaluation was conducted after the appointment of counsel, and the psychologist opined that the defendant was competent to stand trial. Any error in the admission of the psychologist's report and testimony during the trial's penalty phase was harmless.

Emergency Aid Exception to Warrant Requirement

Ex parte Byrd, No. 1210155 (Ala. Nov. 10, 2022)

The trial court correctly denied the defendant's motion to suppress evidence of synthetic marijuana found in his jacket pocket by a police officer while rendering emergency aid. The officer responded to a 911 call from the defendant's home and retrieved a pill bottle containing the substance from the defendant's jacket to provide it to responding medical personnel. The officer's actions fell within the emergency aid exception to the Fourth Amendment's warrant requirement.

From the Alabama Court of Criminal Appeals

Criminal Contempt

Hernandez v. State, CR-21-0253 (Ala. Crim. App. Oct. 7, 2022)

The court found no evidence to support the trial court's finding that an attorney committed constructive criminal contempt by directing a process server to serve a subpoena on another attorney during an unrelated trial. Acknowledging that Ala. R. Crim. P. 33.1(b)(3)(a) defines constructive criminal contempt as "[m]isconduct of any person that obstructs the administration of justice and that is committed either in the court's presence or so near thereto as to interrupt, disturb, or hinder its proceedings[,]," the court found no evidence that the service incident, which took place during a recess in the trial, actually interfered with the trial. There was no evidence indicating that any juror saw the process server serve the attorney or interact with him.



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(Continued from page 57)

Aggravated Stalking; Ala. R. Evid. 404(b)

Latham v. State, CR-21-0459 (Ala. Crim. App. Oct. 7, 2022)

In affirming the defendant's conviction of first-degree aggravated stalking under Ala. Code § 13A-6-91, the court held as a matter of first impression that no unanimity jury instruction was required for that offense. Section 13A-6-91 requires the state to prove that the defendant engaged in a course of conduct whereby the defendant repeatedly followed or harassed the victim. The series of incidents that resulted in the offense of aggravated stalking constituted one criminal act for purposes of this offense, and a unanimity instruction is not required if the evidence shows only one criminal act. The court also rejected the defendant's argument that the evidence of his repeated acts of harassment was inadmissible under Ala. R. Evid. 404(b), because the evidence of the acts formed the basis for his indictment and was admissible as direct proof of his offense.

Consolidation of Offenses; Removal of Juror; Denial of Lesser-Included Offense Instruction; Theft

Bester v. State, CR-21-0334 (Ala. Crim. App. Oct. 7, 2022)

The court affirmed the defendant's rape, kidnapping, sexual abuse, and theft convictions, first rejecting his argument that his rape and kidnapping charges were erroneously consolidated for trial. Though the charges involved different victims, the cases were of similar character and appeared to be part of a common scheme or plan, and the jury was instructed that the evidence in each case "must be judged ... on its own accord." The trial court also did not err in denying the defendant's challenges for cause regarding several veniremembers who, despite revealing tendencies toward believing victims of sexual assault, indicated that they could be fair and impartial. There was also no error in the refusal to instruct the jury regarding sexual misconduct as a lesser-included offense of first-degree rape where there was no evidence to support any other charge. The defendant's theft conviction was also upheld because the evidence showed that he stole and attempted to use a debit card belonging to one of his victims.

Denial of Motion by Operation of Law; Alabama Habitual Felony Offender Act

Wells v. State, CR-20-0612 (Ala. Crim. App. Oct. 7, 2022)

Contrary to the defendant's claim that no adverse ruling existed from which to appeal, his motion to withdraw his guilty pleas was denied by operation of law pursuant to Ala. R. Crim. P. 24.4 when the date to rule on the motion was extended to a date certain but the motion was not expressly ruled upon by that date or again extended for consideration. However, the defendant's sentence on his second-degree assault conviction, though part of his plea agreement, was illegal because it fell outside of the range for his offense under the Alabama Habitual Felony Offender Act, Ala. Code § 13A-5-9. This required a remand for resentencing, but the court noted that the defendant could withdraw his guilty plea due to the change of his agreed-upon sentence.

Cause of Death; Dying Declaration; Victim's Toxicology Report

Bolling v. State, CR-21-0263 (Ala. Crim. App. Oct. 7, 2022)

The defendant was criminally responsible for the victim's death from pneumonia which stemmed from having been shot by the defendant; the death "would not have occurred but for his conduct" as required for criminal liability under Ala. Code § 13A-2-5(a). The victim's statement to a law enforcement officer after the shooting was properly admitted as a dying declaration pursuant to Ala. R. Evid. 804(b)(2) under the circumstances that he gave it, regardless that he did not expressly declare his belief that he would die. There was also no error in the exclusion of the victim's toxicology report, for his cognizance at the time of the shooting was not relevant to issues at hand. ▲

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