

T H E

ALABAMA LAWYER

NOVEMBER 2023 | VOLUME 84, NUMBER 6



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Questions and Answers**

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Ready or Not, Here It Comes**

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Terri B. Lovell, Secretary,
Board of Bar Commissioners, Alabama State Bar

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On The Cover

Rays of golden light pierce the canopy of a forest near Mobile, Alabama.

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2023
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P R E S I D E N T ' S P A G E

Brannon J. Buck
bbuck@badhambuck.com



The year 2023 has marked several milestones for the Alabama State Bar. By now, you may have well heard that we celebrated our 100th anniversary as the licensing and regulatory agency for the legal profession in Alabama. But there have been other, less conspicuous, milestones this year. At our annual meeting in July, without much fanfare, the board of bar commissioners took two critical votes that will shape the future of our bar and our profession.

First, the board adopted bylaws for the first time since we became a unified bar 100 years ago. You may ask, “What is a unified bar?” A unified bar combines the associational functions (professional development and support) with the regulatory functions (licensing and disci-

pline). There are 33 unified state bars across the country. “Unification” occurred in Alabama when our legislature adopted the Alabama State Bar’s enabling statutes in August 1923.

A devoted task force spent nearly a year drafting the bylaws. **Pat Sefton** and I had the privilege of chairing the hard-working group that consisted of **Greg Butrus, Tom Perry, Felicia Long, Judge Liles Burke, Justice Jay Mitchell, Alvin Hope, Terri Tompkins, Leila Watson, Johnny Lyle, and Terri Lovell**. Thank you to all these leaders for donating their time, energy, and intellect.

The bylaws are, of course, true to the bar’s statutory framework, but they fill significant gaps left by the statutes while also effectively codifying what

have been longstanding governance traditions. The bar will no longer have to rely on “common law” governance practices, which can present significant challenges during changes in leadership. The bylaws will bring continuity and stability to the bar’s internal governance structure.

In addition to the bylaws, the board approved a new three-year strategic plan for the bar at the annual meeting. The Strategic Planning Committee, made up of Chairs **Sam Ford, Tom Perry, and Terri Tompkins**, as well as committee members **Justice Mike Bolin, Christy Crow, Mark Debro, Kira Fonteneau, Fred Helmsing, Brett Holsombeck, Carmen Howell, Othni Lathram, Felicia Long, Judge Chuck Price, Andy Rutens, Allison Skinner,** and **Elizabeth Smithart**, developed a

concise plan that now serves as the bar’s North Star. It focuses all our efforts on four goals and explains how those goals will be achieved over the next three years.

Two areas of focus this year fall directly in line with the strategic plan. The **Justice for All** project seeks to accomplish Goal 2 – to improve access to justice for all Alabamians. A newly appointed **Justice for All Task Force** has already begun developing the content and design for a new website, which will consolidate information and legal resources into one easy-to-navigate site designed for people who do not know or cannot afford a lawyer.

Task force members will also soon formulate a plan to engage our members to distribute posters and placards with the **Justice for All QR Code** throughout

the state. By next summer, it should be far easier for those in need to connect with access to justice resources. Many thanks to the leadership of the Volunteer Lawyers programs, Legal Services Alabama, the Alabama Law Foundation, the Center for Dispute Resolution, and the Access to Justice Commission for supporting the **Justice for All** project and making it a collaborative endeavor.

This year’s second initiative, **Choose Civility**, falls in line with Goal 3 – to “establish the ASB as the leadership hub for the legal profession... by promoting efforts that encourage engagement, service, and civility among lawyers.” You should have already noticed the “Choose Civility” feature in the bar’s weekly *Sidebar* e-newsletter. In addition, our Bench & Bar Committee, led by **Scott Donaldson**, is developing

<p>GOAL 1 Serve and protect the public by maintaining and advancing the highest standards of the legal profession.</p>	<p>We will achieve this by:</p> <ol style="list-style-type: none"> 1. Navigating and successfully addressing the changes facing admissions, licensing, discipline, and the regulatory process. 2. Reviewing existing regulations and policies to ensure they are up-to-date and effective. 3. Implementing new technologies and systems that improve the membership and public experience. 4. Developing a resource management plan that optimizes the use of bar membership dues to efficiently carry out our mission and core functions.
<p>GOAL 2 Improve access to justice for all Alabamians.</p>	<p>We will achieve this by:</p> <ol style="list-style-type: none"> 1. Providing easily accessible legal resources and information to the public. 2. Facilitating coordination and collaboration among access to justice providers. 3. Leading efforts to identify and address gaps in legal services to underserved Alabamians. 4. Improving the administration of justice by engaging with our members and all branches of government.
<p>GOAL 3 Establish the Alabama State Bar as the leadership hub for the legal profession.</p>	<p>We will achieve this by:</p> <ol style="list-style-type: none"> 1. Partnering with other legal organizations to foster collaborative educational leadership and professional development programs. 2. Promoting efforts that encourage engagement, service, and civility among lawyers. 3. Helping members connect with the bar and our resources by improving outreach and communication efforts. 4. Engaging with lawyers around the state to learn how we can best serve our membership while highlighting the role of lawyers and the legal profession.
<p>GOAL 4 Promote and support the overall health and well-being of our members.</p>	<p>We will achieve this by:</p> <ol style="list-style-type: none"> 1. Providing resources and opportunities to help members find balance and satisfaction in the practice of law. 2. Continuing to evaluate wellness programs and member benefits to provide the best resources to our members. 3. Finding sustainable funding resources for wellness programs. 4. Developing programs to specifically address the underlying causes of the most common lapses in professional conduct.

(Continued from page 337)

a series of CLE programs focused on professionalism and civility that will be available at live events and in the bar's on-demand CLE library. If we commit to making civility and collegiality the engrained culture of our bar, our members and our clients will all be better for it.

We spent October celebrating **Pro Bono Month**. This annual commemoration, which included a weekly CLE series and special pro bono clinics, is designed to spotlight the pro bono work that our bar supports throughout the year. The month is also dedicated to the recruitment of more pro bono volunteers to meet our state's growing legal aid needs. **Pro Bono Month** is

another important part of the bar's execution of Goal 2 (access to justice) from the strategic plan.

I also acknowledge our outstanding volunteer leadership team for the 2023-2024 bar year. **Felicia Long** serves as our vice president and chairs the **Justice for All Task Force**. **Tom Perry** is our president-elect. The other members of the Executive Committee include **John Smyth, Josh Hayes, Raymond Bell, Sam Ford** (president of the Alabama Lawyers Association), **Christopher Driver** (president of the ASB Young Lawyers' Section), **Mark Boardman** (board parliamentarian), and **Gibson Vance** (immediate past president). This group provides wise

counsel and selflessly devotes many hours in service to the profession.

In this season of thanksgiving, I say "THANK YOU" to these service-minded leaders and to our many members serving on committees, task forces, and in local and affinity bar associations. Our bar could not have fulfilled its role as the regulatory agency for the profession for the last 100 years without continuous, selfless service from our members. Let us stay true to our bar's core values – trust, integrity, and service – so that the lawyers of 2123 will reflect on this year as a constructive and consequential time in our profession. ▲

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EXECUTIVE DIRECTOR'S REPORT

Terri Lovell
terri.lovell@alabar.org



Fall is a favorite time of year for many Alabamians. Not only does football return, but we all seem to rejoice in relief from the sweltering heat while we prepare for the traditions and togetherness that come with the holiday season.

I always find the changing of seasons to be symbolic. When the trees shed their beautiful fall foliage, they're reminding us that shedding the old should come with the confidence that future growth is coming.

The Alabama State Bar has also been embracing a similar shift this fall.

On September 1, we rolled out a new membership database – a years-long project that marked a digital transformation of our decades-old system. We hope this transition improves your online experience and makes it easier for you access the membership and licensing documents you need.

For example, you can print your own license, bar card, or certificate of good standing anytime from your member profile. Additionally, you can customize your profile, so that when members of the public use our member directory to

YOUR MEMBERSHIP ROADMAP



find an attorney, you can add details to help market your practice.

As with any large-scale tech transition, it takes time for everyone to get accustomed to changes. Our staff members are trained and available to help you navigate the process of setting up your new member portal and paying your annual dues, and they are always happy to help with any issue that arises.

Last month, we celebrated the Opening of Courts, Pro Bono Month, and the Admission Ceremony.

The Opening of Courts marks the ceremonial beginning of the new judicial year. Pro Bono Month celebrates the work of pro bono lawyers in our state while also recruiting more to the cause. Finally, the Admission Ceremony welcomes new admittees as official members of the Alabama State Bar.

All these events gave us an opportunity to celebrate the achievements of those in our profession as well as the duty and professional responsibilities that come along with it.

As we look toward the start of the new calendar year, we plan to kick off 2024 with a Bar Leadership Summit. We will bring together leaders of local and affinity bar associations, as well as chairs of our ASB sections, for a two-day meeting at the bar building in Montgomery. Our goal is to foster more

collaboration with these groups while also providing additional opportunities for training, networking, and resource-sharing.

The idea for this summit, which will coincide with the Circuit and District Judges' Mid-Winter Conference, was born from our strategic plan adopted over the summer by your bar commissioners.

One of the four areas we are focusing on this year is to establish the Alabama State Bar as the leadership hub for the legal profession in our state.

As we progress through the bar year, I look forward to sharing more details of our work to accomplish those goals and action steps we've taken.

You can find the strategic plan on the homepage of our website, www.alabar.org.

Our daily work is grounded in the Alabama State Bar's vision statement of **helping lawyers be their best, so they can better serve others**. We look forward to continuing to serve you to ensure your success in the profession. I hope you'll find the Membership Roadmap (adjacent to this page) enlightening on the ways we look to add value to your practice through your membership.

We consider ourselves to be your partner in law, and we look forward to helping you arrive at your destination of success. ▲



IMPORTANT NOTICES

- ▲ **Notice of Election and Electronic Balloting**
- ▲ **Notice of and Opportunity for Comment on Amendments to The Rules of the United States Court of Appeals for the Eleventh Circuit**
- ▲ **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

Notice is given here pursuant to the Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners that the election of these officers will be held beginning Monday, May 20, 2024, and ending Friday, May 24, 2024.

On the third Monday in May (May 20, 2024), members will be notified by email with instructions for accessing an electronic ballot. Members who wish to vote by paper ballot should notify the secretary in writing on or before the first Friday in May (May 3, 2024) requesting a paper ballot. A single written request will be sufficient for all elections, including run-offs and contested president-elect races during this election cycle. All ballots (paper and electronic) must be voted and received by the Alabama State Bar by 5:00 p.m. on the Friday (May 24, 2024) 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, 2024 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, 2024.

Nomination and Election of Board of Bar Commissioners

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

- | | |
|---------------------------------------|---------------------------------------|
| 2nd Judicial Circuit | 15th Judicial Circuit, Place 6 |
| 4th Judicial Circuit | 16th Judicial Circuit |
| 6th Judicial Circuit, Place 2 | 18th Judicial Circuit, Place 2 |
| 9th Judicial Circuit | 20th Judicial Circuit |
| 10th Judicial Circuit, Place 1 | 23rd Judicial Circuit, Place 2 |
| 10th Judicial Circuit, Place 2 | 23rd Judicial Circuit, Place 4 |
| 10th Judicial Circuit, Place 8 | 24th Judicial Circuit |
| 10th Judicial Circuit, Place 9 | 27th Judicial Circuit |
| 12th Judicial Circuit | 29th Judicial Circuit |
| 13th Judicial Circuit, Place 2 | 38th Judicial Circuit |
| 15th Judicial Circuit, Place 2 | 39th 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, 2024, and vacancies certified by the secretary no later than March 15, 2024. All terms will be for three years.

A candidate for commissioner may be nominated by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Nomination forms and/or declarations of candidacy must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 26, 2024).

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: **1, 3, 4, and 7**. Petitions for these positions, which are elected by the Board of Bar Commissioners, are due by April 1, 2024. All terms will be for three years.

Submission of At-Large 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 the executive council or secretary receives the nomination form by the deadline.

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

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

Pursuant to 28 U.S.C. § 2071(b), notice and opportunity for comment is hereby given of proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit. The public comment period is from Monday, December 4, 2023, to Wednesday, January 3, 2024.

A copy of the proposed amendments may be obtained on and after Monday, December 4, 2023, from the court's website at <http://www.ca11.uscourts.gov/rules/proposed-revisions>. A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., N.W., Atlanta, Georgia 30303 [phone: 404-335-6100].

Comments on the proposed amendments may be submitted in writing to the Clerk at the above address, or electronically at <http://www.ca11.uscourts.gov/rules/proposed-revisions>, by 5:00 PM Eastern Time on Wednesday, January 3, 2024.

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.

(Continued from page 343)

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 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/2023/10/2024-HOF-Nomination.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 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.

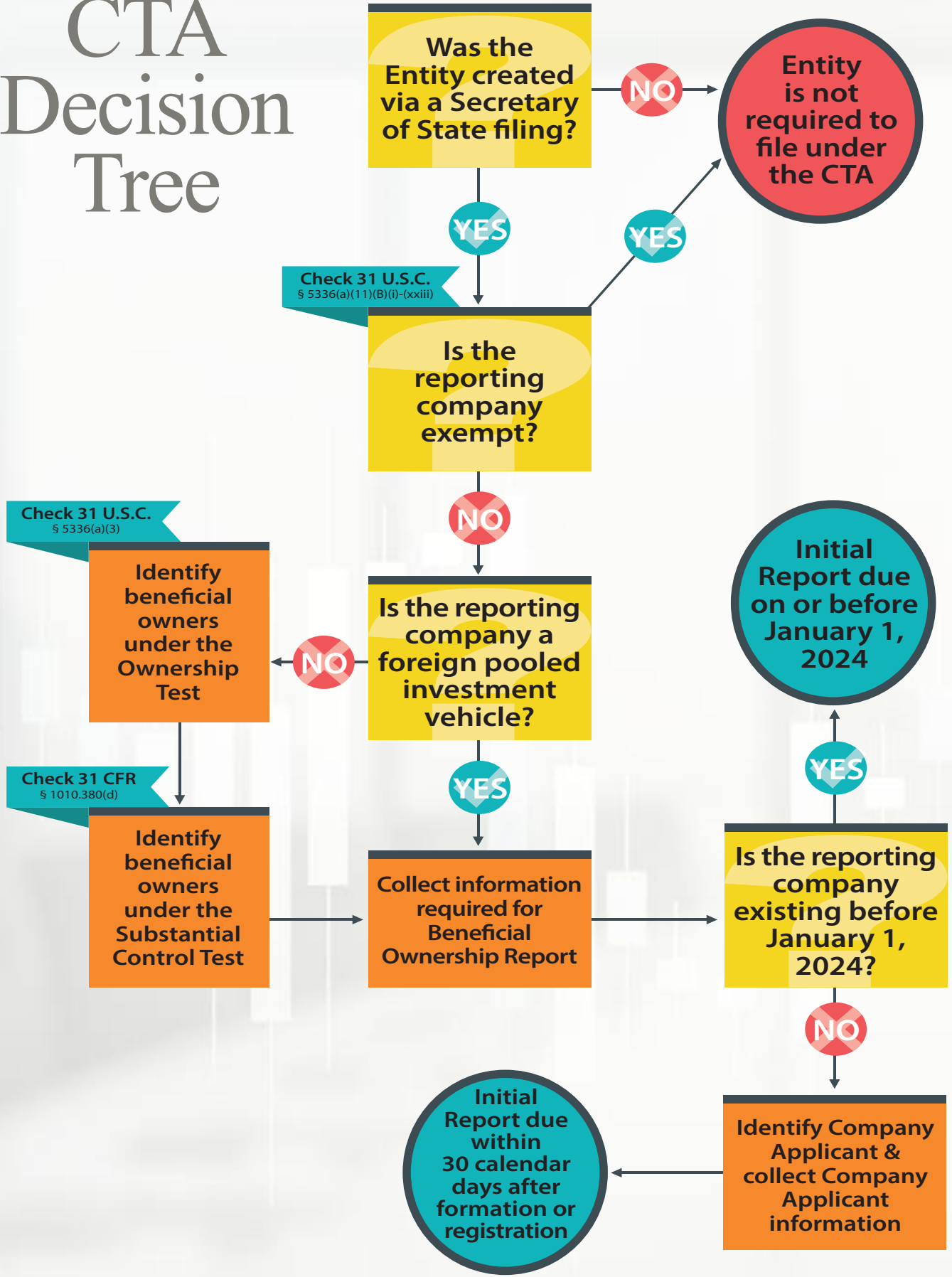
Susan Bevell Livingston Leadership Award

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 jbuettner@birminghambar.org. 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. ▲

CTA Decision Tree



The Corporate Transparency Act:

QUESTIONS AND ANSWERS

By Wesley K. Winborn

The Corporate Transparency Act is coming, be we ready or not,

on January 1, 2024. While the Final Rule has provided some information on the nuts and bolts of how the Act will work in theory, many questions remain about how the Act will work in practice. This Q & A aims to dive a little deeper into some of those questions, with a focus on those issues that are of special importance to attorneys who will have to advise clients on this novel regulatory obligation.

Q: Does my firm have a duty to notify our clients about the CTA and its various requirements?

A: Legally, no. Ethically, possibly. Some state bars have already begun publishing ethical notifications or other guidance concerning attorneys' duties to notify their clients about the CTA. The Maryland State Bar Association opined in May that Maryland lawyers have no obligation to notify *former* clients about the CTA.¹ This suggests that a duty to notify *current* clients does exist. The Oklahoma Bar Association recently reached that conclusion, advising its members that they are expected

to keep clients reasonably informed about changes in the law, and the CTA is one of the “most significant developments in entity law in decades.”² The safe assumption is that, at minimum, advising business entity clients of their obligations under the CTA is an ethical best practice.

Complicating this matter is an old question that can be more confusing than it appears to be at first glance: “Who is my client?” For example, many attorneys assist clients with setting up an LLC, but perform no services for the client after the company formation and registration. Now is a good time to inventory your clients and consider sending letters to one-off-entity-formation clients alerting them that your representation has concluded because the scope of the representation has been accomplished.

Q: It looks like we can't even sign up for the FinCEN website until January 2024. Is there anything we can be doing today to prepare our firm for dealing with CTA?

A: Based on the most recent guidance, rule commenters' exhortations to FinCEN to exclude attorneys (and their paralegals, administrative assistants, or other firm employees considered *company applicants* under 31 C.F.R. 1010.380(e)) fell largely on deaf ears, although a new paragraph was added to the regulations (at 31 C.F.R. 1010.380(e)(3)) to reduce the number of company applicants at law firms and business formation service providers. Since we seemingly aren't going to get a further exclusion, now is the time to educate our paralegals and other staff members who are tasked with actually filing the formation documents that we review so they are not surprised when they're being asked to divulge personal information in connection with their business-formation work activities.

Firms should consider adopting policies that require staff members who assist in business formation activities to willingly divulge the information that the CTA requires. This will eliminate the element of surprise

for staff come January 2024 and give firms the opportunity to reassign staff who feel uncomfortable divulging personal information in association with the clerical functions of filing business formation documents on behalf of their attorneys.

Finally, attorneys are uniquely positioned to assist clients in identifying those individuals who will need to be reported to FinCEN as Beneficial Owners. Firms that represent companies who will likely be required to report should consider reviewing client organizational documents, records of stock or membership transfers, employment agreements, among other things, to determine individuals within those client entities that will be reported as Beneficial Owners. Of course, this is also a prime opportunity to check in on clients' corporate housekeeping (such as annual minutes, bylaws/operating agreement updates, etc.).

Q: It's February 1, 2024, and I direct my secretary to prepare a Certificate of Formation for a client's new LLC. She prepares it, I review it, and I then direct her to transmit it to my paralegal for filing. My para-

legal files the certificate electronically. Who at my firm must report as a *company applicant* for this LLC formation?

A: The aforementioned amendment to 31 C.F.R. 1010.380 requires that anyone who actually causes formation documents to be filed is a *company applicant*, along with anyone who directed or supervised such filing. In this case, those would be the attorney (as supervisor) and the paralegal (as actual filer). The secretary, who drafted the document, need not be identified as a “company applicant” in this scenario — while she drafted it, she did not “direct[] or control[]” the filing. That's the attorney.³

Q: Will there be filing or administrative fees associated with making CTA reports?

A: No. It will be free to both register an account with FinCEN and to make reports under that account.

Firms should consider adopting policies that require staff members who assist in business formation activities to willingly divulge the information that the CTA requires.

Q: What needs to be done if my client or I discover that a mistake was made in a CTA report?

A: Under 31 C.F.R. § 1010.380(a)(3), if any report “was inaccurate when filed and remains inaccurate,”⁴ the reporting company can file a corrected report within 30 days after the date on which the reporting company became aware of or had reason to know of the inaccuracy. Additionally, the Act contains a safe harbor that provides that a person will not be subject to civil or criminal penalties under the Act if the person has reason to believe that any report submitted by the person is inaccurate and the person “voluntarily and promptly, and in no case later than 90 days after the date on which the person submitted the report, submits a report containing the corrected information.”⁵

Q: Does my firm face CTA liability if a Beneficial Owner of a client changes addresses and we don’t learn this until after the 30-day update period has lapsed?

A: The CTA provides penalties only for persons who willfully fail to comply with the Act’s requirements.⁶ While some commentators have reported that fines (and possible prison time) are enforceable only against Reporting Companies and Beneficial Owners, the plain text of the Act provides that “any person” who willfully provides or attempts to provide false information, or willfully fails to complete or update beneficial ownership information, may be punished under the Act.⁷ Therefore, it is vital that attorneys be cognizant of what changes in client information are reportable under the Act and take affirmative steps to update previous filings when such information is discovered.

Q: What are the exemptions to the CTA?

A: There are 23 types of entities that are excluded from the definition of *reporting company* under the CTA. These can be found at 31 U.S.C. § 5336(a)(11) (B)(i)–(xxiii):

- Certain issuers of securities;
- Domestic governmental authorities;
- Certain banks;
- Domestic credit unions;
- Depository institutions holding companies;
- Money transmitting businesses;

- Brokers or dealers in securities;
- Securities exchange or clearing agencies;
- Other entities registered pursuant to the Securities Exchange Act of 1934;
- Registered investment companies and advisors;
- Venture capital fund advisors;
- Insurance companies;
- State-licensed insurance producers;
- Entities registered pursuant to the Commodities Exchange Act;
- Accounting firms;
- Public utilities;
- Financial market utilities;
- Pooled investment vehicles;
- Tax-exempt entities;
- Entities assisting tax-exempt entities;
- Large operating companies;
- Subsidiaries of certain exempt entities; and
- Inactive businesses.

Q: Are there some categories of business clients who may be especially susceptible to innocently violating the CTA’s reporting requirements?

A: The most obvious candidate to be a company that innocently fails to comply with the CTA is a small business that is exempt from reporting under the “large operating company exemption,”⁸ only to fall outside of that exemption at some point in the future. The large operating company exemption exempts from reporting any company that has more than 20 full-time employees in the United States, has an operating presence in the United States, and filed a federal income tax return or information return for the previous year demonstrating more than \$5 million in gross receipts or sales.⁹ This will doubtlessly create scenarios where some companies will float in and out of the exemption’s umbrella from year to year, or, with respect to full-time employees, month to month. Regulatory relief on this is unlikely, as FinCEN has already advised that it “expects that companies will regularly evaluate whether they qualify (or no longer qualify) for the ex-

emption.”¹⁰ FinCEN has additionally declined to allow companies to average the number of employees it has over a period of time to qualify for the exemption,¹¹ so an exempted company with 21 full-time employees that elects to dismiss one of those full-time employees will have 30 days to report following that action.

Q: So, the large operating company exception requires 21 full-time employees, not 20 or more?

A: Yes, an entity with 20 full-time employees is not eligible for the large operating company exemption.

Q: I’ve got a client that will likely be exempt from reporting under the large-operating-companies exemption – what about that client’s subsidiaries?

A: If a subsidiary company’s parent company is exempt, the subsidiary company is exempt if it is “controlled or wholly owned, directly or indirectly”¹² by the exempt parent company.

Q: Is there any advice I can give clients who will likely be reporting companies to help them prepare now for reporting in 2024?

A: First, clients who are existing business entities need to be aware that their first report under the CTA is not due until January 1, 2025. Therefore, there is ample time to prepare reportable information that is both accurate and complete. Second, now is the time for companies to start developing a CTA compliance policy or program. A competent CTA compliance program might include the following:

- A register of the company’s Beneficial Owners, including each Beneficial Owner’s name, residential address, date of birth, and a copy of some form of government-issued identification;
- A requirement that Beneficial Owners notify the company when any of the aforementioned information changes;

- A scheduled review of reported information to check for accuracy and to catch any changes that may have transpired since the report or previous review (i.e. old addresses and/or expired drivers’ licenses);
- A requirement that all Beneficial Owners sign a written consent that acknowledges that the company may divulge all of the Beneficial Owners’ information to FinCEN necessary to comply with the CTA, and affirming that each Beneficial Owner will cooperate with the company in both providing that information and keeping it up to date; and
- Affirming that the company will utilize reasonable measures to keep Beneficial Owners’ reporting information confidential, but also releasing the company from liability if such information is leaked or inadvertently released due to reasons beyond the company’s control.

Additionally, clients may also wish to include requirements in their bylaws, operating agreements, or other governing documents that require shareholders, members, directors, officers, or other individuals having substantial control to comply with the CTA and the company’s policies and procedures regarding CTA reporting.

If a subsidiary company’s parent company is exempt, the subsidiary company is exempt if it is “controlled or wholly owned, directly or indirectly”¹² by the exempt parent company.

Q: What is an entity assisting tax exempt entities within the definition of that exemption?

A: An entity is exempt from CTA reporting if exist and operates *exclusively* to provide financial assistance to, or hold governance rights over, a tax exempt entity, as long as the assisting entity is a domestic entity or person, is beneficially owned or controlled by one or more United States persons that are United States citizens or are lawful permanent residents of the United States.¹³ The assisting entity must also derive at least a majority of its revenue from one or more United States persons that are United States citizens or lawful permanent residents of the United States.¹⁴

Q: Is access to reported information viewable only by FinCEN?

A: Clients should be aware that information to FinCEN is viewable to a wide variety of governmental authorities.¹⁵ After reports are made to FinCEN under the CTA, the information is also viewable by:

- U.S. federal agencies engaged in national security, intelligence, and law enforcement;
- State, local, and Tribal law enforcement agencies (with court authorization);
- The U.S. Department of the Treasury;
- Federal and state regulatory agencies assessing financial institutions for compliance with legally required customer due diligence obligations; and
- Foreign law enforcement agencies who submit qualifying requests through a U.S. agency.

Banks and other financial institutions can also access the information to conduct customer due diligence, but only with the consent of the customer. ▲

Endnotes

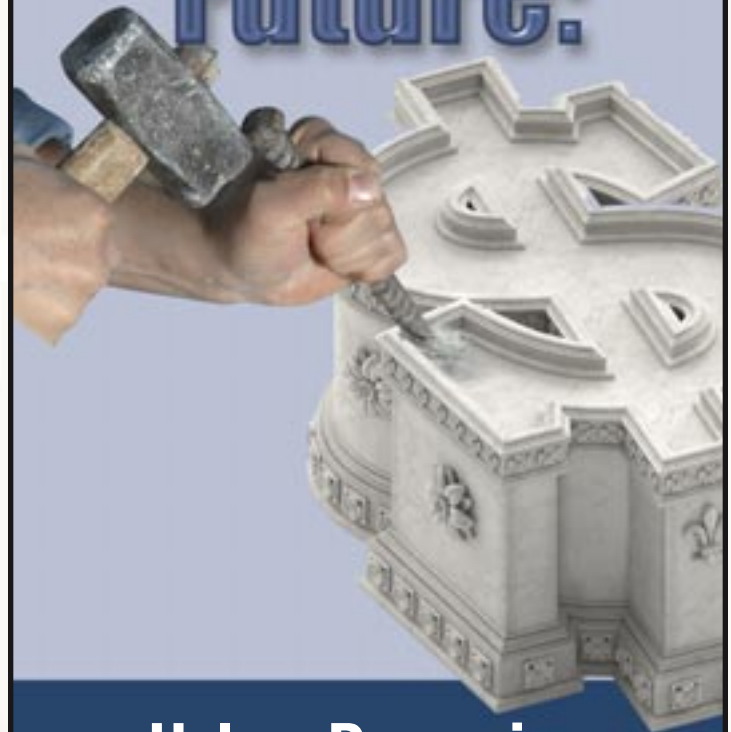
1. <https://www.msba.org/no-duty-to-notify-former-clients-of-the-corporate-transparency-act-and-regulations/>.
2. <https://www.okbar.org/barjournal/december-2022/lawyer-responsibilities-under-the-new-corporate-transparency-act/>.
3. 31 C.F.R. § 1010.380(e).
4. *Id.* § 1010.380(a)(3).
5. 31 U.S.C. § 5336(h)(3)(C)(i)(I)(bb).
6. *Id.* § 5336(h).
7. *Id.*
8. See generally 31 U.S.C. § 5336(a)(11)(B)(xxi).
9. 31 U.S.C. § 5336(a)(11)(B)(xxi).
10. 87 Fed. Reg. 59498, 59543.
11. *Id.*
12. 31 U.S.C. § 5336(a)(11)(B)(xxii).
13. *Id.* § 5336(a)(11)(B)(xx).
14. *Id.* § 5336(a)(11)(B)(xx).
15. *Id.* § 5336(c).

Wesley K. Winborn



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THE CORPORATE TRANSPARENCY ACT: Ready or Not, Here It Comes

By Jonathan A. Griffith and T. Adam Hoekenschnieder



By this time, you are likely to have at least heard of the Corporate Transparency Act,

which will soon take effect on January 1, 2024.¹ Depending on your point of view, you may see it as an aggravating example of government overreach, or a welcomed tool in the fight against “illicit actors” who use “corporate structures . . . to obfuscate their identities and launder their ill-gotten gains through the U.S. financial system,” resulting in “an uneven playing field for small U.S. businesses engaged in legitimate activity.”² Regardless of your take on the issue, major changes are coming down the line, and lawyers are scrambling – or at least wondering what they should do – to prepare.

On January 1, 2021, Congress enacted the Corporate Transparency Act (CTA) as part of the National Defense Authorization Act for Fiscal year 2021 (NDAA).³ On September 29, 2022, the U.S. Treasury Department’s Financial Crimes Enforcement Network (FinCEN) issued its Final Rule⁴ implementing the CTA’s reporting and compliance requirements, following its previous issuance of a proposed rule in December 2021. In short, **the CTA will require business entities (except those expressly exempted) to report certain information about their company, their Beneficial Owners, and the individuals who created or registered them to do business** (including their lawyers in some cases) to FinCEN. The reporting process requires an initial

In other words, a business entity is a reporting company and therefore required to make the necessary reporting under the CTA unless it is expressly exempt from doing so under the statute.

report, followed by updated reports to address any changes in the previously reported information.

According to FinCEN, the CTA is designed “to help prevent and combat money laundering, terrorist financing, corruption, tax fraud, and other illicit activity, while minimizing the burden on entities doing business in the United States.”⁵ The primary means of accomplishing this purpose is to require millions of business entities to report to FinCEN their *Beneficial Owners*, along with their personal information. The CTA imposes significant new compliance burdens on those entities who are not exempt from its requirements, and failure to comply can result in civil and criminal penalties, including a maximum civil penalty of \$500 per day (up to \$10,000) and a maximum criminal penalty of imprisonment of up to two years.

This article is intended to serve as an introduction and general desk reference for attorneys whose clients (and perhaps even their own law firms) will soon be faced with the CTA’s filing requirements when the Final Rule takes effect on January 1, 2024. However, as with any new statute in the early stages of its implementation, the prudent practitioner would be wise to stay abreast of the changing landscape. The CTA, in particular, has many unanswered questions surrounding its requirements and procedures at the time of this writing. For example, FinCEN has yet to publish the final forms for reporting the required information, and questions remain how FinCEN intends to safeguard such information once it is stored in its

database. Additional rules and procedures may certainly be in place by the time the Final Rule becomes effective in January 2024. FinCEN’s website is a helpful resource to stay up to date with the latest information.⁶

Who Must Report Under the CTA

The CTA requires certain business entities to report beneficial ownership information (*BOI*), disclose information regarding the individual(s) who created or registered the entity to do business in the U.S. (*Company Applicants*), and to report any changes to such information in the future. The CTA refers to such businesses as *reporting companies*, and defines the term as a corporation, limited liability company, or other similar entity that is created by the filing of a document with a secretary of state or similar office; a foreign entity that is registered to do business in the U.S. by the filing of a document with a secretary or state or similar office; and that does not fall within one of the CTA’s 23 exceptions.⁷ In other words, a business entity is a reporting company and therefore required to make the necessary reporting under the CTA unless it is expressly exempt from doing so under the statute.

The exemptions are numerous. However, the 23 categories of entities exempted from reporting are typically considered to be already subject to heightened reporting requirements. While lawyers and firms serving corporate entities should familiarize themselves with, and consult the full list of exemptions in the CTA,⁸ some of the most common are:

- Large companies (meaning those that have more than 20 full-time employees in the U.S.,⁹ a place of business physically located within the U.S., and more than \$5 million in gross sales reported on their federal tax returns – excluding gross receipts or sales from foreign sources);¹⁰
- Banks and credit unions;¹¹
- Public accounting firms;¹²
- Tax-exempt entities and those assisting such entities;¹³
- Inactive entities;¹⁴
- Government authorities and public utilities;¹⁵ and
- Investment companies or investment advisers.¹⁶

Noticeably absent from the exemptions are the entities that are most commonly formed, and those making up the majority of attorneys’ clients: the small, limited liability company or corporation with fewer than 20 full-time employees.

Information to Be Provided In BOI Reports

Reporting companies’ BOI reports must include the company’s full legal name; any trade name or d/b/a of the company; a complete current address of the primary location where the company conducts its business in the U.S. (principal place of business for domestic entities); the state, tribal, or foreign jurisdiction of formation of the company (or place of first registration for a foreign company); and the company’s taxpayer identification number and employer identification number (or a tax identification number issued by a foreign jurisdiction for a foreign company).¹⁷ A reporting company must also identify its

Beneficial Owners and, in certain cases, Company Applicants, and provide specific information regarding each, as explained below.¹⁸

Beneficial Owners


Reporting companies must report all of their Beneficial Owners, which means “any individual who, directly or indirectly, either exercises substantial control over [a] reporting company or owns or controls at least 25 percent of the ownership interests of such reporting company.”¹⁹ The regulations explain that an individual has substantial control if that individual:

- Serves as a senior officer of the company;
- Has authority to appoint or remove any senior officer or a majority of the company’s governing board;
- Directs, determines, or has substantial influence over the reporting company’s decision-making; or
- Has any other form of substantial control over the reporting company.²⁰

The regulations further provide that “an individual may directly or indirectly, including as a trustee of a trust or similar arrangement, exercise substantial control over a reporting company through: board representation, ownership or control of a majority of the voting power, rights associated with any financing arrangement or interest in a company, control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company, arrangements or financial or business relationships, whether formal or informal, with

other individuals or entities acting as nominees; or any other contract, arrangement, understanding, relationship, or otherwise.”²¹

The CTA does exempt certain individuals from its definition of a Beneficial Owner. Those include minor children; nominees, intermediaries, custodians, or agents of another individual; an individual whose control over an entity is derived solely from their position and activities as an employee of that entity; an individual whose only interest in such entity is through a right of inheritance; and creditors (unless they exercised substantial control over the entity or own at least 25 percent interest in the entity).²²



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Defining Ownership Interest And Determining the 25 Percent Threshold

An individual's ownership interest in a reporting company is to be calculated as a percentage of the reporting company's total outstanding ownership interests.²³ Of course, determining whether an individual holds at least a 25 percent interest in a reporting company may not be patently obvious. The lawyer should understand *ownership interest* to include anything and everything that may constitute an individual's ownership, including, but not limited to, stock; interests in a joint venture; certificates of interest in a business trust; convertible instruments; warrants or

rights to purchase, sell, or subscribe to a share or other interest; and puts, calls, straddles, or other options or privileges.²⁴

The regulations provide a seemingly exhaustive list of items that should be included when making that determination, before culminating with a catchall provision of any "instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership."²⁵

And, perhaps to drive the point home that when in doubt, one should err on the side of disclosure, the regulations state that in those situations where the calculations do not yield a clear answer, "any individual who owns or controls 25 percent or more of any class or type of ownership interest of a reporting company shall be deemed to own or control 25 percent or more of the ownership interests of the reporting company."²⁶

Company Applicants

Importantly for lawyers and law firms, reporting companies formed or registered on or after January 1, 2024 must also report their *Company Applicants*.²⁷ The CTA defines that term as an individual who files an application to form the reporting company under the laws of a state or Indian tribe, or registers or applies to register a foreign reporting company to do business in the U.S. by filing a document with the secretary of state or similar office under the laws of a state or Indian tribe.²⁸ The regulations also include within the definition "the individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing of the document," which

is particularly noteworthy for law firms (see below).²⁹

Disclosure Requirements for Beneficial Owners and Company Applicants

The CTA requires reporting companies to report the following information for every individual who is a Beneficial Owner or Company Applicant for that entity:

- Full legal name;
- Date of birth;
- Complete current address:
 - > In the case of a Company Applicant forming or registering the entity in the course of the Company Applicant's business, the street address of such business; or
 - > In any other case, the individual's residential street address;
- Unique identifying number and the issuing jurisdiction from one of the following documents:
 - > A non-expired passport issued by the U.S. government;
 - > A non-expired identification document issued to the individual by a state, local government, or Indian tribe;
 - > A non-expired driver's license issued to the individual by a state; or
 - > A non-expired foreign passport; and
- An image of the document from which the identifying number from the above list of documents was changed.³⁰

It is this requirement of gathering and submitting personally sensitive

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information to FinCEN that many individuals will view as the most burdensome and intrusive element of the CTA (aside from the requirement of filing updated reports).

While some clients may not take any issue with this step, it will very likely be a tough pill for many to swallow, and practitioners will almost certainly need to be prepared to field client questions regarding whether there is any way to avoid the disclosure requirements.

Additionally, attorneys (and perhaps their paralegals), as Company Applicants, will have to adapt and be prepared to provide similar information to their clients to include in their BOI reports. For example, FinCEN explains in the Final Rule:

There may be an attorney primarily responsible for overseeing the preparation and filing of incorporation documents and a paralegal who directly files them with a state office to create the reporting company. In this example, this reporting company would report two Company Applicants – the attorney and the paralegal – but additional individuals who may be indirectly involved in the filing would not need to be reported.³¹

Thus, attorneys and their firms should be considering their current processes for creating entities, and who among their staff will be designated (and willing) to share the information required of Company Applicants with FinCEN under the CTA. One can expect that no small number of paralegals and legal secretaries will be confused – if not hesitant – to produce their driver’s license or passport for the

sake of having it stored in perpetuity by the U.S. Government in connection with a client’s business.

The FinCEN Identifier Option

In lieu of providing the specific information outlined above that is required of Beneficial Owners and Company Applicants, FinCEN will allow individuals to produce a *FinCEN Identifier (FinCEN ID)* in BOI reports.³² If an individual has obtained a FinCEN ID, the individual may include the identifier in its report in place of the information required regarding that individual. For example, if an individual Beneficial Owner prefers to provide her personal information directly to FinCEN rather than through the reporting company, she can obtain a FinCEN ID and provide it to the reporting company, who can then include the identifier on its report. Company Applicants have the same option. This would be particularly helpful for those individuals who are likely to be identified as a Beneficial Owner or Company Applicant for multiple reporting companies. Of course, individuals who obtain FinCEN IDs must update or correct any information previously submitted to FinCEN in an application to FinCEN within 30 calendar days after which such change occurs.³³

The process for obtaining a FinCEN ID has yet to be determined at the time of writing. However, for individuals, FinCEN will issue an identifier if an individual submits to FinCEN the same four pieces of identifying information as would be required in a BOI report.³⁴ The Final Rule reports that FinCEN intends to provide individuals and reporting

One can expect that no small number of paralegals and legal secretaries will be confused – if not hesitant – to produce their driver’s license or passport for the sake of having it stored in perpetuity by the U.S. Government in connection with a client’s business.

The Final Rule reports that FinCEN intends to provide individuals and reporting companies that request a FinCEN ID with additional information about the application process, the processing time, the procedure, and guidance regarding other procedural questions.

companies that request a FinCEN ID with additional information about the application process, the processing time, the procedure, and guidance regarding other procedural questions. On January 17, 2023, FinCEN issued a notice and request for comments on its proposed application for collecting information from individuals who request a FinCEN ID.³⁵ The comment period closed on March 20, 2023, and no updates to the Rule are known to exist at the time of writing.

Filing Deadlines for Initial Reports

The CTA requires two types of reports: initial reports and updated reports. A reporting company created on or after January 1, 2024 must file its **initial report** with FinCEN within 30 calendar days of its formation (by filing with the secretary of state, for example).³⁶ However, on September 28, 2023, FinCEN published a Notice of Proposed Rulemaking proposing to amend the Rule to extend the filing deadline from 30 days to 90 days “for entities created or registered on or after January 1, 2024, and before January 1, 2025, to give those entities additional time to understand the new reporting obligation and collect the necessary information to complete their filings.”³⁷ For those reporting entities in existence before January 1, 2024, they must file a BOI report no later than January 1, 2025. Additionally, any entity that loses its exemption from the reporting requirements of the CTA must file its report with FinCEN within 30 calendar days after the date on which it no longer meets the criteria for any exemption.³⁸

Reporting companies must file an updated report within 30 calendar

days of any change regarding information previously submitted to FinCEN about the company or its Beneficial Owners, or if the company discovers any inaccuracy in the initial report.³⁹ Such updates should include any changes as to the identity of, or any previously reported information about, its Beneficial Owners. Practitioners should stress to their clients the importance of updated reports, as a simple change in a Beneficial Owner’s address or the expiration of a driver’s license could violate the CTA if an updated report is not timely filed. Additionally, if a reporting company has undergone or experienced a change that qualifies it as exempt from reporting, the company should file an updated report to that effect. The regulations also provide other scenarios that trigger updated reports, with which the practitioner should be familiar when assisting clients on everyday matters, such as ownership restructuring.⁴⁰

The Procedure for Filing BOI Reports

Each report submitted under the CTA will be filed with FinCEN “in the form and manner that FinCEN shall prescribe.”⁴¹ Aside from that helpful language, all that is known at the time of writing is that FinCEN has provided “[i]f you are required to report your company’s beneficial ownership information to FinCEN, you will do so electronically through a secure filing system available via FinCEN’s website. This system is currently being developed and will be available before your report must be filed.”⁴² Therefore, the system should be in place no later than January 31, 2024 – the earliest date a BOI report can be due.

Safeguarding BOI

Acknowledging the sensitivity of the BOI that FinCEN will be collecting from millions of businesses and individuals, the agency has assured the public that “the CTA imposes strict confidentiality, security, and access restrictions on the data FinCEN collects.”⁴³ It also acknowledges that the agency is authorized to disclose reported BOI in limited circumstances. For example, FinCEN may disclose such information to certain federal agencies when it will be used in furtherance of a national security, intelligence, or law enforcement activity, and to state and local law enforcement agencies when a court authorizes such agency to seek BOI as part of a criminal or civil investigation.⁴⁴ This raises a very interesting question in the criminal and civil litigation context regarding just how easily attorneys will be able to obtain such information in advocating for their clients.

Financial institutions will also be able to obtain BOI from FinCEN, with the consent of the reporting company, to help them comply with customer due diligence requirements.⁴⁵ FinCEN also provides that the CTA includes specific restrictions, requirements, and security protocols, and it authorizes FinCEN to implement this security framework. FinCEN intends to address the regulatory requirements related to access to information reported pursuant to the CTA through a future rulemaking process ahead of [January 1, 2024].⁴⁶

In other words, FinCEN is working on that.

The CTA does provide for criminal and civil penalties for unauthorized disclosure and use of BOI.

Any person who knowingly discloses or uses such information obtained from a report submitted to FinCEN, or a disclosure made by FinCEN, shall be liable for a civil penalty up to \$250,000, imprisoned for up to five years, or both.⁴⁷

Penalties for Incomplete, False, or Fraudulent BOI

“It shall be unlawful for any person to willfully provide, or attempt to provide, false or fraudulent beneficial ownership information,



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including a false or fraudulent identifying photograph or document, to FinCEN...or to willfully fail to report complete or updated ownership information to FinCEN.⁴⁸ Such individuals can face civil and criminal penalties, including fines up to \$10,000, up to two years imprisonment, or both.⁴⁹ The regulations define “person” to include “any individual, reporting company, or other entity,”⁵⁰ which means that **the practitioner or firm who knowingly files a report with incomplete or inaccurate information could be subject to such penalties.**

Wrapping It Up

While the CTA may appear, at first blush, to be a matter only of concern to corporate or transactional attorneys, its reporting requirements will be felt across various concentrations. For example, estate planning and probate attorneys will need to consider these reporting requirements if an owner’s interest is transferred to an inter vivos trust or as part of a distribution upon death. That attorney will also likely be called upon to determine beneficial ownership status from time to time, such as whether a particular trust is a Beneficial Owner of a reporting company (trusts cannot be Beneficial Owners, but rather their trustees or beneficiaries). Litigators should also be mindful of how BOI on FinCEN’s database may help or harm their clients’ cases and what arguments may be made to convince judges that such information should be disclosed or protected. Countless other situations and scenarios will likely come to mind as any given lawyer considers the potential effects of the CTA, and only

time will tell which of those effects will be most intensely felt in one’s own practice. ▲

Endnotes

1. Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (September 30, 2022).
2. *Id.*
3. Codified at 31 U.S.C.A. § 5336 et seq.
4. Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (September 30, 2022).
5. *Id.*
6. <https://www.fincen.gov/boi>.
7. See 31 U.S.C.A. § 5336(a)(11).
8. 31 U.S.C.A. § 5336(a)(11)(B).
9. See 31 C.F.R. § 1010.380(c)(2)(xxi).
10. See *id.*
11. 31 C.F.R. § 1010.380(c)(2)(xxi).
12. See 31 C.F.R. § 1010.380(c)(2)(xv).
13. See 31 C.F.R. § 1010.380(c)(2)(xix).
14. See 31 C.F.R. § 1010.380(c)(2)(xxiii).
15. 31 C.F.R. § 1010.380(c)(2)(ii),(xvi).
16. 31 C.F.R. § 1010.380(x).
17. 31 C.F.R. § 1010.380(b)(1)(i).
18. 31 U.S.C.A. § 5336(a)(2); 31 C.F.R. § 1010.380(e).
19. 31 C.F.R. § 1010.380(d).
20. *Id.*
21. 31 C.F.R. § 1010.380 (d)(1)(ii).
22. See C.F.R. § 1010.380 (d)(3).
23. 31 C.F.R. § 1010.380 (d)(2)(iii).
24. *Id.*
25. 31 C.F.R. § 1010.380(d)(2)(i).
26. 31 C.F.R. § 1010.380(d)(2)(iii)(D).
27. 31 C.F.R. § 1010.380(b)(2)(iv).
28. 31 U.S.C.A. § 5336(a)(2).
29. 31 C.F.R. § 1010.380(e).
30. 31 C.F.R. § 1010.380(b)(1)(ii).
31. Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (September 30, 2022).
32. 31 C.F.R. § 1010.380(b)(4)(i).
33. 31 C.F.R. § 1010.380 (b)(4)(iii).
34. 31 U.S.C. 5336(b)(3)(A)(i).
35. Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (September 30, 2022).
36. 31 C.F.R. § 1010.380(a).
37. See <https://www.federalregister.gov/documents/2023/09/28/2023-21226/beneficial-ownership-information-reporting-deadline-extension-for-reporting-companies-created-or>

38. 31 C.F.R. § 1010.380(a)(1).
39. 31 C.F.R. § 1010.380(a)(2)(i), (a)(3).
40. 31 C.F.R. § 1010.380(a)(2)(i)-(v).
41. 31 C.F.R. § 1010.380(b).
42. Beneficial Ownership Information Reporting, Frequently Asked Questions. Available at <https://www.fincen.gov/boi-faqs>.
43. Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (September 30, 2022).
44. 31 U.S.C.A. § 5336(c)(2)(B)(i)(II).
45. 31 U.S.C.A. § 5336(c)(2)(B)(i)(III).
46. Beneficial Ownership Information Reporting Requirements, 87 Fed. Reg. 59498 (September 30, 2022).
47. 31 U.S.C.A. § 5336(h)(3).
48. 31 U.S.C.A. § 5336(g).
49. 31 U.S.C.A. § 5336(h)(3).
50. 31 C.F.R. § 1010.380(g)(1).

Jonathan A. Griffith



Jonathan Griffith practices at Wallace, Jordan, Ratliff & Brandt LLC in Birmingham, and his practice includes advising local and national businesses and non-profits, as well as general litigation. He graduated summa cum laude from Cumberland School of Law in 2017.

T. Adam Hoekenschnieder



Adam Hoekenschnieder practices at Brodowski, McCurry, Miller & Hoekenschnieder in Huntsville. His practice focuses on business formation and planning, estate planning, and real estate matters. He is a graduate of the Cumberland School of Law at Samford University.



OPINIONS OF THE GENERAL COUNSEL

Roman A. Shaul
roman.shaul@alabar.org



Required Notice to the Client When an Attorney Leaves a Law Firm

QUESTION:

"This will follow up on the recent telephone call which I made to your office. I had some questions concerning a client who is a lawyer here in Alabama. I will refer to him as Mr. Lawyer. Mr. Lawyer has left the law firm with which he worked for approximately two and a half years. While Mr. Lawyer was with the firm, a number of clients entered into contracts with the firm because of their friendship/relationship with Mr. Lawyer. In other words, Mr. Lawyer 'brought' these clients into the firm. In one instance in question, the client came to the firm for other reasons, but Mr. Lawyer was primarily responsible for handling that file and as a result has established a strong friendship with the client.

"Mr. Lawyer has now voluntarily left the firm. His questions, and mine, concern his obligations and rights to those clients which he 'brought' to the firm and whose matters are still pending. He has similar questions regarding the one client who he did not 'bring' to the firm.

(Continued from page 361)

“The firm may or may not be a partnership. My best information regarding the manner in which the firm is structured is as follows: The firm was owned by an individual lawyer’s professional corporation (John Doe, P.C.) and the law firm did business as Doe, Jones & Smith. Mr. Lawyer was not named in the law firm name. The four most senior attorneys, including Mr. Lawyer (as well as Doe, Jones, and Smith), received in the form of compensation a draw plus a percentage of the firm revenue after a certain amount of money was made, for example \$1,000,000. (The youngest attorney, number five most recently employed, was on salary only.) Mr. Lawyer was told by Mr. Doe this was the amount of anticipated revenue for a year. However, if the law firm exceeded the anticipated revenue, Mr. Lawyer would receive the agreed-upon percentage. Likewise, if the law firm’s revenue was less than anticipated, Mr. Lawyer would not receive a percentage until the anticipated amount of revenue was reached, e.g. \$1,000,000.

“All contracts with regard to clients, including those which were ‘brought’ into the firm by Mr. Lawyer and in the one instance where the client was not ‘brought’ by Mr. Lawyer, were

between client and Doe, Jones & Smith. All of the client files are on a contingency fee contract with Doe, Jones & Smith.

“Several weeks ago, Mr. Lawyer submitted his resignation from Doe, Jones and Smith. Prior to leaving the law firm, Mr. Lawyer telephoned several of his clients and informed them he was leaving. Some of these clients expressed an interest in Mr. Lawyer continuing to work on their case.

“Please render an opinion as to the ethical considerations in the following conduct:

“(1) Is it permissible for Mr. Lawyer to contact these clients and explain to them that they have the right to select their own attorney and that they have basically three options, (a) for the client’s file to remain with Doe, Jones and Smith, (b) for the client to continue to be represented by Mr. Lawyer in his new law practice, and (c) for the client to take his file to some other lawyer.

“(2) In the event the client would like for Mr. Lawyer to continue to represent them, is it permissible for Mr. Lawyer to draft a letter to Doe, Jones and Smith, for the client’s signature, notifying Doe, Jones and Smith, of the client’s decision and requesting the client file be provided to Mr. Lawyer.

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“(3) Upon being notified by a client that an attorney’s services are no longer desired and Mr. Lawyer will be representing them, is it permissible for the firm to contact the client?”

ANSWER:

(1) Mr. Lawyer may contact the clients so affected and inform them that they have the right to designate where their files should go including: (1) staying with Doe, Jones and Smith; (2) going with Mr. Lawyer in his “new” law practice; or, (3) taking the file(s) to any other lawyer.

(2) If the client wants Mr. Lawyer to continue handling their legal matters, Mr. Lawyer, upon request of the client, may draft a letter to Doe, Jones and Smith, for the client’s signature, notifying Doe, Jones and Smith of the client’s decision and requesting transfer of the client’s file to Mr. Lawyer.

(3) Upon being notified by a client that a lawyer’s services are no longer desired and that Mr. Lawyer is now representing the client, the former lawyer, absent a specific request not to do so, may contact the client.

DISCUSSION:

The Disciplinary Commission has previously held that the files of a client belong to the client. In RO-86-02, the Commission reasoned that the materials in the file are furnished by or for the client and are therefore the client’s property. Building on this foundation, it would then follow that the files belong wherever the client wishes for them to belong. If the client directs that the files be in the possession of a particular lawyer or law firm, then they should be in the possession of that individual. The only exception would be in that instance where the lawyer is asserting a valid “attorney’s lien” for services rendered for the client.

The client has the right to counsel of his/her own choosing. If the client selects a lawyer the client has the obvious right to terminate that relationship. If substitute counsel is obtained, new counsel may prepare for the client formal notification of the termination of that relationship with previous counsel as well as a request that the client’s file be surrendered to new counsel. This all assumes the complete absence of any intentional interference by substitute/new counsel with the previous contractual relationship, or fraud, deceit or misrepresentation in inducing such termination of the previous lawyer-client relationship and/or creation of the “new” lawyer-client agreement.

Finally, absent this same intentional interference, fraud, etc., the former lawyer may continue contact with the client unless the client objects thereto. If the client objects to such contact, the former lawyer’s failure to accede to the desires of the former client would be considered as vexatious and/or harassing and, therefore, unethical. The former lawyer, however, could obviously contact the former client for certain, justifiable reasons, e.g., payment for services rendered.

If you have any questions about this opinion, or any other matter, please contact us here at the Alabama State Bar, or send an email to ethics@alabar.org. ▲

The graphic features a smiling man in a white shirt and tie, holding a smartphone. In the top left corner is the Alabama State Bar logo, which includes a scale of justice icon and the text "Alabama State Bar". The central text, in a large, white, cursive font, reads "Join the conversation on social media!". Below this, there are five social media icons with their corresponding handles: Facebook (facebook.com/AlabamaStateBar), Twitter (@AlabamaStateBar), Instagram (@AlabamaStateBar), LinkedIn (linkedin.com/AlabamaStateBar), and YouTube (youtube.com/TheAlabamaStateBar). The background is a dark, semi-transparent overlay on the man's image.



MEMORIALS

▲ Roger H. Bedford, Jr.

Roger H. Bedford, Jr.

Roger Bedford, 67, passed away on October 11, 2023 in Tuscaloosa following a recent illness. Born July 2, 1956 in Richmond, Virginia to Roger H. Bedford, Sr. and Jane Bonds Bedford, Roger graduated high school from Columbia Military Academy in Columbia, Tennessee. He graduated from the University of Alabama with a B.A. in political science with a minor in history in 1978. While at Alabama, Roger was initiated into the Alpha Beta Chapter of the Kappa Alpha Order and is counted among the chapter's distinguished alumni.

He served as a page for U.S. Rep. Tom Bevill of Jasper and as the national treasurer for the Young Democrats.

Roger graduated from Cumberland School of Law at Samford University in 1981, moving home to Russellville and beginning a career in law and politics that would span over four decades.

Roger began his legal career practicing with his father, uncle, and cousin in the Russellville firm that became Bedford, Rogers & Bowling PC. Roger was a trial lawyer. Like his law partners, he prided himself on being a "country lawyer," representing his friends and neighbors in their times of need. Later in his career, Roger served as the municipal court judge in both Russellville and Hackleburg.

Roger and his late wife, Maudie, prioritized family and service. They opened their home for celebrations large and small, always believing in the power of connection and community. Together, they chased sunsets from coast to coast. They enjoyed fine meals with dear friends in restaurants all over the world and around their own table, skillfully prepared by Maudie. For Roger and Maudie, there was no better place to be than Bryant-Denny Stadium on a Saturday night cheering on their beloved Crimson Tide with their son, Roge, who is the cherished center of their lives. They were both fiercely proud of Roge and all he has accomplished, most recently his position on Coach Nick Saban's staff.

An accomplished outdoorsman and committed conservationist, Roger instilled a love of the outdoors in Roge. They spent many happy times hunting and fishing together, including deep sea fishing in the Gulf, deer and turkey hunting in Wilcox County and Troy, salmon and trout fishing in Alaska, and shooting birds across Alabama. Roger was a lifetime member of Ducks Unlimited, the National Rifle Association, and the Cattleman's Association.

He was a Rotarian and an executive member of the American Cancer Society, Boys Scouts of America, and the Tennessee Valley Council. He served as an executive committee member of the Alabama Law Institute and on the Alabama State Bar's Board of Bar Commissioners representing the 34th Judicial Circuit. Roger was instrumental in



Bedford

the establishment of the David Mathews Center for Civic Life and a long-time member of its board.

When they made their home in Russellville, Maudie and Roger were active members of First Baptist Church, where Roger was a deacon. They were proud Southern Baptist missionaries, having served orphans and spread the good news of the Gospel in Moldova. Roger loved his labs, Max and Bruni; rescue dog Bear; University of Alabama athletics; prime steaks cooked rare; homegrown tomatoes; and seeing Maudie's roses in bloom.

In 1982, Roger was the youngest person ever elected to the Alabama State Senate at the age of 25. Roger went on to bring economic development, vital programs, and essential funding to District 2 and then District 6 for over 20 years. Dynamic and determined, Roger championed public education, workforce development, and progressive infrastructure projects. He supported full funding for the Education Trust Fund budget and Alabama Medicaid and helped secure the expansion of eligibility in the Children's Health Insurance Program. Roger was the hardest-working man in Alabama politics. He was fearless in advocating for the needs of his district, which was marked with blue and yellow billboards announcing to entering drivers that, "This is Bedford Country." Maudie was Roger's closest ally and staunchest supporter. Together, they worked to make Alabama better. With Roger as their state senator, the people of Northwest Alabama were well represented in Montgomery by a lawyer-legislator who worked tirelessly to ensure their voices were heard.

His success in delivering grants and services to his district resulted in well-deserved accolades, including being named

"Legislator of the Year" by the Fraternal Order of Police, Probate Judges Association, Alabama Resource Conservation & Development Councils, Alabama Nurses Association, Alabama State Employees Association, Alabama Association of Conservation Districts, and Discovering Alabama. Roger served in the Alabama Senate as Judiciary chair (1995-1998), Finance and Taxation General Fund chair (1999-2002, 2004-2005, 2007-2009), Energy and Natural Resources chair (2009-2010), and Minority Leader (2011-2013). Although Roger formally stepped away from political life in 2014, he continued to serve as advisor and trusted confidant to candidates, business leaders, and elected officials throughout the next decade.

His strong-willed nature and sheer force of determination served him well. Roger endured an astonishing number of earthly challenges and turned them into lasting legacies. After a bone-shattering three-wheeler accident left him in a halo brace, friends and family knew he and Maudie were destined for marriage by the loving way she cared for him. A multi-decade survivor of non-Hodgkin lymphoma, Roger used the lessons he learned as a patient at MD Anderson to advocate for and support innumerable Alabamians who walked the same path. After Maudie battled breast cancer, one of Roger's top legislative priorities was to sponsor bills to educate breast cancer patients about their treatment options. Passed unanimously with bi-partisan sponsorship, Alabama's Breast Cancer Patient Education Act went into effect on August 1, 2013 and remains a lasting part of Roger's legislative legacy. Roger faced each of life's challenges with the support of his family and friends, a strong belief in prayer, and trust in God and His saving grace. ▲

—Bob Rogers, Russellville, and Kitty Rogers Brown, Birmingham

William Floyd Addison

Montgomery
Died: September 4, 2023
Admitted: 1982

John Bigham Barnett, III

Monroeville
Died: November 11, 2023
Admitted: 1983

Billy Charles Bedsole

Mobile
Died: November 11, 2023
Admitted: 1963

Dr. Robert Earle Burney, II

Hamilton, GA
Died: April 9, 2023
Admitted: 1987

Brock Bingham Gordon

Anderson, SC
Died: August 27, 2023
Admitted: 1962

Col. David Lee Graves

Birmingham
Died: August 29, 2023
Admitted: 2010

Mary Fisher Gunter

Headland
Died: September 28, 2023
Admitted: 1985

Lawrence Johnson Hallett, Jr.

Mobile
Died: September 8, 2023
Admitted: 1976

David Elliott Hodges

Mobile
Died: August 19, 2023
Admitted: 1987

Douglas Lyndon Key

Birmingham
Died: September 20, 2023
Admitted: 1974

Charles Bennett Long

Mobile
Died: August 27, 2023
Admitted: 2005

Michael Steven Lusk

Anniston
Died: May 31, 2023
Admitted: 1983

William Dudley Melton

Evergreen
Died: October 10, 2023
Admitted: 1966

James Manson Murray

Mobile
Died: September 4, 2023
Admitted: 1953

Henry Herold Self, Jr.

Florence
Died: July 19, 2023
Admitted: 1975

Betty Jean Shinn

Pelham
Died: October 8, 2023
Admitted: 1996

Hilda Trapp Smith

Florence
Died: September 29, 2023
Admitted: 1993

Jacquelyn Demetrius Smith

Madison
Died: August 24, 2023
Admitted: 1996



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 Boulton 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 CIVIL DECISIONS

From the Alabama Supreme Court

AMLA

In re Woodard, No. 1210175 (Ala. May 5, 2023)

In a case claiming that the defendants unlawfully obtained the plaintiff's records of psychological treatment, the court held that the Alabama Medical Liability Act did not apply to require a change of venue because the defendants did not either (1) demonstrate that the complaint could not support a reasonable inference of the lack of a medical reason for the defendants' obtaining the medical records or (2) submit their own evidence supporting such a medical reason. The court also held that the defendants did not carry their burden of obtaining mandamus relief related to the trial court's order requiring them to return or destroy records summarizing the records at issue. Note: four justices concurred in the result, one concurred specially with opinion, and two dissented.

Arbitration

Alabama Somerby, LLC v. L.D., No. SC-2022-0828 (Ala. May 12, 2023)

One person executed an arbitration agreement on behalf a person diagnosed with dementia. The Alabama Supreme Court reversed the trial court's decision not to compel arbitration, holding that the executing party had apparent authority to enter the agreement and that the principal had not demonstrated her lack of capacity to grant authority to the agent. The principal suffered from dementia, but the Alabama Supreme Court found such an informal diagnosis insufficient to establish legal incompetency.

Taylor v. Methodist Home for the Aging, No. SC-2022-0681 (Ala. May 12, 2023)

The court held that an arbitrator's decision to rule against the plaintiff and not to accept the plaintiff's proffered expert witness did evidence partiality the arbitrator under 9 U.S.C. § 10(a)(2).

Hyundai Construction Equipment Americas, Inc. v. Southern Lift Trucks, LLC, Nos. SC-2022-0675 et al. (May 12, 2023)

The court reversed the trial court's decision not to compel arbitration of non-declaratory judgment claims and reversed the trial court's decision to enter an injunction as to equipment the plaintiff was not selling. The trial court's decisions were otherwise affirmed. Note: the main opinion was joined by three justices, with one justice partially dissenting and four justices concurring in the result.

Women's Care Specialists, P.C. v. Potter, No. SC-2022-0706 (Ala. May 19, 2023)

Contract and tort claims were required to be arbitrated because the court found that the arbitration clause covering "any and all disputes related in any manner whatsoever to [the plaintiff's] employment" was broad enough to cover claims of breach of contract, defamation, and tortious interference. The Alabama Supreme Court also found that the arbitration obligation survived termination of the plaintiff's contract in light of a provision that termination would not "not affect any liability of any other obligation of either party to the other which may have accrued prior to such termination." The judgment of the circuit court was reversed.

Premises Liability

Byrne v. Fisk, No. SC-2022-0560 (Ala. May 19, 2023)

The court reversed summary judgment for the defendant on a premises liability claim, determining that genuine issues of material fact existed as to the existence of a defect on the property, the defendant's knowledge of the defect, proximate cause, and whether the hazards were open and obvious.

Immunity

Ohio Valley Conference v. Jones, No. SC-2022-0930 (Ala. May 19, 2023)

Because it characterized a conference resignation fee as form of liquidated damages, the Alabama Supreme Court found that two university officials were not immune from suit in their official capacities; however, the court found the officials immune in their individual capacities.

Lis Pendens

Ex parte MUSA Properties, LLC, No. SC-2022-1061 (Ala. May 19, 2023)

The court issued a writ of mandamus directing the circuit court to vacate an order expunging a lis pendens notice relating to a property at issue in the case. The trial court had expunged the lis pendens because it granted partial summary judgment on the claim relating to the property, but the supreme court held that the circuit court should have waited until that summary judgment order was final because the order could be reversed on appeal.

Tax Sale / Redemption

Ex parte King, No. SC-2022-0653 (Ala. May 19, 2023)

Recognizing that the term "preservation improvements" as used in Alabama Code § 40-10-122 was taken verbatim from the definition of "permanent improvements" in the foreclosure redemption statute, the Alabama Supreme Court affirmed the court of civil appeals' decision to require a redeeming party to pay for valuable and useful additions to the property to be redeemed over and above the amounts necessary for ordinary repairs.

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Workers' Compensation

Ex parte Midsouth Paving, Inc., No. SC-2022-0860 (Ala. May 19, 2023)

Finding that a defendant had introduced un rebutted substantial evidence that the plaintiff was a "special employee" of that defendant, the court issued a writ of mandamus directing the circuit court to grant summary judgment for the defendants on workers' compensation immunity grounds. The plaintiff was employed through a temporary employment agency, signed a contract stating that she would be a special employee, and the special employer contributed to her workers' compensation insurance premiums.

Rule 60

Womble v. Moore, No. SC-2022-1018 (Ala. May 19, 2023)

The Alabama Supreme Court found that the trial court did not abuse its discretion in failing to excuse the pro se plaintiffs from missing their trial date.

Penrose v. Garcia, No. SC-2022-0871 (Ala. June 16, 2023)

The court construed a motion to reconsider or relief under Rule 60(b) as a Rule 60(b) motion, meaning that an appeal within 42 days of its denial was timely. Nevertheless, the court affirmed the denial of that Rule 60(b) motion, finding that the plaintiffs failed to demonstrate that the circuit court's dismissal of their case for failure to participate in discovery entitled them to relief.

Ex parte Huntingdon College, No. SC-2023-0001 (Ala. June 1, 2023)

The court held that a Rule 60(b)(5) motion filed 17 years after a consent judgment was not filed within a reasonable time. It reasoned that, even though the judgment permitted the parties to seek judicial instructions regarding the property subject to the judgment, the trial court did not have a clean slate to interpret and enforce that judgment. The court also noted that changes in the economy (specifically, the economic effects of the 2008 financial crisis) did not open the door for relitigation of the merits of the judgment.

Real Property

Ammons Properties, LLC v. Spraggins, No. SC-2022-0821 (Ala. May 19, 2023)

The court affirmed the circuit's order that a tract of property had an easement of necessity crossing a tract to its north, even though the property had previously been foreclosed upon, noting "an easement encumbers the servient, not the dominant, tenement." The court affirmed judgment for the plaintiff on all the defendant's counterclaims as well.

Wrongful Death

Sampson v. HeartWise Health Sys, Corp., No. SC-2022-0847 (Ala. May 26, 2023)

Among other rulings, the court reversed the entry of summary judgment on a plaintiff's negligence-based wrongful death claim when it found that the defendants to that claim had not moved for summary judgment as to it. It also held

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that a fraud-based wrongful death claim was not barred by Alabama Code § 6-5-462, distinguishing between a fraud claim (which could have been barred) and a fraud-based wrongful death claim (which accrues only upon death).

Limitations

***Protective Life Ins. Co. v. Jenkins*, No. SC-2022-1047 (Ala. July 17, 2023)**

The court held that a company's claim to recover amounts paid to the defendant in error was a claim for the recovery of wages governed by Alabama Code § 6-2-38(m)'s two-year statute of limitations. The court reasoned that the amounts paid to the defendant were the result of a data entry error, not any work by the defendant, so they could not be wages.

Appellate Procedure

***Ex parte Seibert*, No. SC-2023-0234 (Ala. June 2, 2023)**

The Alabama Supreme Court denied a writ of certiorari to an appellant seeking to challenge a ruling from the Alabama Court of Civil Appeals that a notice of appeal filed in the appellate court (instead of the trial court) is not a timely filing.

Injunctions

***Ingenuity Int'l, LLC v. Smith*, No. SC-2022-0501 (Ala. June 16, 2023)**

The Alabama Supreme Court construed a trial court's order as imposing both a preliminary and permanent injunction when it entered an order requiring the defendant to either pay a disputed sum to the plaintiff or else deposit a larger sum with the clerk of court pending litigation of the merits. The court construed the first option as amounting to an improper grant of summary judgment for the plaintiff when the plaintiff had not filed a motion for summary judgment or giving the defendants notice and an opportunity to be heard. The second option, the court decided, violated the defendants' due process rights because it required the defendants to pay into court more than the defendants had proposed to pay into court.

Probate

***Hilyer v. Hilyer*, No. SC-2022-1054 (Ala. June 16, 2023)**

Orders issued by the circuit court after the entry of a final settlement of a decedent's estate were void. The final settlement did not hold the estate open for any reason and it recited that all estate assets subject to distribution were on hand. It discharged the personal representative. As a result, the Alabama Supreme Court determined that the former personal representative had no authority to take further actions on the estate's behalf and (given the passage of more than 30 days from entry of the final judgment) the circuit court did not have jurisdiction to enter further orders. Note: two justices concurred and two concurred in the result.

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Verdict

Gross v. Dailey, No. SC-2022-1007 (Ala. July 13, 2023)

The Alabama Supreme Court reversed the circuit court's decision to order a new trial. The jury orally announced a verdict for the defendant and, when polled, each juror agreed that the verdict was for the defendant. But the jury signed two verdict forms: one finding for the defendant and the other finding for the plaintiff, though awarding \$0. The Alabama Supreme Court found that these verdicts were not inconsistent because both forms, the oral verdict, and the polling all agreed that the jury awarded nothing to the plaintiff.

Substantive Immunity

City of Orange Beach v. Boles, No. 1210055 (Ala. June 16, 2023)

Via a four-three decision for the result with two justices recused, the court reversed the trial court's decision to submit the plaintiff's damages claim against the defendant municipality to a jury. The court found that the defendant was entitled to substantive immunity because it characterized the defendant's alleged refusal to perform an inspection as a duty owed to the public at large. The chief justice, whose vote for the result was necessary to reverse the trial court, concurred in the result but urged future parties to argue for overturning the cases that provide for substantive immunity. The dissent focused on the application of substantive immunity, not whether substantive immunity should exist.

Gambling

Dream, Inc. v. Samuels, No. SC-2022-0808 (Ala. June 23, 2023)

The Alabama Supreme Court reversed a jury verdict for the plaintiff on fraud and contract claims against an electronic bingo business, stating that "Alabama courts will not enforce claims, whether in contract or in tort, which require the aid of an illegal agreement" and finding that the electronic bingo at issue was illegal gambling activity.

Foreclosure

Galea v. Secretary of Veterans Affairs, No. SC-2022-0906 (Ala. June 23, 2023)

The court affirmed summary judgment for a party that had acquired a property in a foreclosure sale and obtained judgment against the defaulting homeowners in an ejectment action. The court held that the defaulting homeowners had not

introduced evidence rebutting the acquiring party's showing that it was entitled to immediate possession.

Non-Compete Agreements

Amanda Howard Real Estate, LLC v. Lee, No. 1210193 (Ala. June 30, 2023)

The court affirmed the principle that a non-compete agreement must be signed by all parties and rejected various arguments that could have excused a signature, such as the argument that the non-compete agreement was part of a larger contract that was signed or that the non-signing party had fully performed the agreement.

Defamation

Luxottica of America, Inc. v. Bruce, No. SC-2022-0867 (Ala. June 30, 2023)

The court reversed judgment for the plaintiff on defamation and false-light invasion of privacy claims to the extent the claims relied on statements made to the speaker's fellow employee in the line and scope of their work duties. It reversed judgment for the plaintiff as to statements made by an employee reporting to Crimestoppers under qualified privilege, holding that the employee's responsibility to investigate shoplifting triggered the application of the privilege and that there was no evidence of malice sufficient to negate the privilege.

COVID-19

Johnson v. Alabama Secretary of Labor, No. SC-2022-0897 (Ala. June 30, 2023)

The court affirmed the dismissal of claims against the secretary of labor brought by applicants for unemployment benefits, agreeing with the trial court that the plaintiffs failed to exhaust administrative remedies. The court found Section 1983 did not require Alabama state courts to set aside administrative exhaustion requirements and that Section 1983 did not preempt those exhaustion requirements.

Rule 54(b)

Rogers v. Cedar Bluff Volunteer Fire Dept., No. SC-2022-0439 (Ala. June 30, 2023)

Two defendants that the plaintiff sought to hold vicariously liable obtained summary judgment in their favor and the trial court certified the judgment as final under Rule 54(b), even though direct claims for liability remained against another

defendant. The Alabama Supreme Court held that the 54(b) certification was an abuse of discretion because the outcome of the direct claims could moot the appeal.

From the Alabama Court of Civil Appeals

Custody and Child Support

***Ex parte K.B.L.*, No. CL-2023-0125 (Ala. Civ. App. May 5, 2023)**

The court issued a writ of mandamus voiding various orders by a circuit court after a party took an appeal from the juvenile court because the juvenile court's order was not final. The juvenile court's order addressed custody but not child support or visitation.

***M.L.W. v. J.W.*, No. CL-2022-0640 (Ala. Civ. App. May 12, 2023)**

The court affirmed juvenile court's judgment because it determined that the appellant failed to preserve her sole argument for appellate review. The trial court did not make specific findings of fact and the appellant did not file a post-judgment motion as required by Rule 52(b). In reaching this decision, the appellate court held that the juvenile court's orders regarding temporary custody did not terminate its jurisdiction and that the juvenile court retained jurisdiction under Alabama Code § 12-15-311(c).

***Clayton v. Clayton*, No. CL-2022-0840 (Ala. Civ. App. May 26, 2023)**

Because a custody order did not address child support, the rights of the parties were not fully disposed, and the custody order would not support an appeal. The court dismissed the appeal.

***Crenshaw v. Crenshaw*, No. CL-2022-0916 (Ala. Civ. App. June 9, 2023)**

The court reversed the termination of a parent's child support obligations, finding that the trial court's failure to explain its decision to depart from the application of the guidelines contained in Rule 32 of the Alabama Rules of Judicial Administration required reversal. The trial court's judgment was otherwise affirmed.

***Ex parte Sullivan*, No. CL-2022-0309 (Ala. Civ. App. June 23, 2023)**

The court issued a writ of mandamus directing the trial court to consider which state had "home-state jurisdiction" under the UCCJEA considering the father's initiation of a case in North Dakota before the mother initiated a case in Alabama.

***L.B. v. V.T.W.*, No. CL-2022-1010 (Ala. Civ. App. July 28, 2023)**

Finding itself unable to determine whether the juvenile court applied the *McClendon* standard, the court reversed the juvenile court's custody modification order.

Taxation

***Ala. Dept. of Revenue v. Cellular Express, Inc.*, No. CL-2022-0701 (Ala. Civ. App. May 12, 2023)**

The court held that, under a plain language analysis, a transaction number printed on a paper receipt did not constitute a "prepaid calling card or an authorization number" under the language of Alabama Code Section 40-23-1(a)(13) as it existed before 2014. The court also held that the trial court did not err in holding the 2014 amendment unconstitutional, reasoning that the amended statute's differential treatment of taxpayers was not supported by a legislative purpose furthered by rational means. The circuit court was affirmed.

Real Property

***Barber v. Landrum*, No. CL-2022-0848 (Ala. Civ. App. May 19, 2023)**

Evidence supported the trial court's decision that clear and convincing evidence did not support the conclusion that a public road had been abandoned. It noted that decreased use or the occasional use of a gate were not sufficient to establish that the public road was abandoned.

Paternity

***Ex parte Anderson*, No. SC-2023-0225 (Ala. Civ. App. May 19, 2023)**

Finding that a circuit court had no power to transfer to juvenile court actions that had been filed in the circuit court, the court of civil appeals issued writs of mandamus vacating the transfers.

Protection from Abuse

***Ex parte C.C.*, No. CL-2023-0368 (Ala. Civ. App. May 31, 2023)**

A husband against whom an ex parte protection-from-abuse ("PFA") order had been awarded had a clear legal right to a hearing within 10 days of service of the PFA petition. The court issued a writ of mandamus on May 31 directing the trial court to hold a hearing on or before June 1.

Termination of Parental Rights

***T.W. v. Calhoun Cty. D.H.R.*, No. CL-2022-0694 (Ala. Civ. App. June 2, 2023)**

On rehearing, the Alabama Court of Civil Appeals decided that, because maintenance of the status quo was a viable alternative to terminating the mother's parental rights, the juvenile court's order was due to be reversed. It found that the children could remain in foster care with supervised visitation by the mother. It also stated that, before proceeding to terminate the parental rights as to special-needs children, the juvenile court must consider whether the children will likely receive permanency through adoption.

***J.P. v. Madison Cty. DHR*, No. CL-2022-1182 (Ala. Civ. App. June 9, 2023)**

Because the DHR did not submit clear and convincing

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evidence showing that it investigated the suitability of the children's relatives to care for the children while the parents attempted to rehabilitate themselves, the court found that care by relatives was a viable alternative to terminating parental rights and reversed the juvenile court.

S.M. v. Madison Cty. DHR, No. CL-2022-0573 (Ala. Civ. App. June 16, 2023)

The court affirmed the juvenile court's decision to terminate a mother's parental rights, finding that she had failed to demonstrate that she had exerted reasonable steps to rehabilitate herself, including that she did not present documentary evidence that she had completed domestic-violence counseling that DHR had requested her to complete.

K.B. v. Jefferson Cty. DHR, No. CL-2022-0970 (Ala. Civ. App. June 30, 2023)

Finding that the record lacked evidence that DHR made reasonable efforts to reunite a child with its father, the Alabama Court of Civil Appeals reversed the trial court's decision to terminate the father's parental rights.

S.R.E. v. Shelby Cty. DHR, No. CL-2022-0737 (Ala. Civ. App. July 7, 2023)

The court reversed the termination of a man's parental rights by a juvenile court because it found that the record before the juvenile court did not affirmatively show that the man was the presumed or the legal father of the child and that therefore the juvenile court lacked jurisdiction to terminate parental rights as to him. The court dismissed the appeal with instructions for the juvenile court to vacate the portion of its order purporting to terminate his parental rights.

K.W. v. Lee Cty. DHR, No. CL-2022-1116 (Ala. Civ. App. July 7, 2023)

The court affirmed the termination of parental rights as to a mother and father. It affirmed the juvenile court's finding that the mother's history of relapsing into methamphetamine addiction supported terminating her parental rights, and it affirmed the finding that supervised visitation with a gradual transition back to the mother's care was not a viable alternative to termination because the child adamantly refused to visit with the mother. As to the father, the court determined that the father's felony conviction and resulting imprisonment alone could justify the inference that a parent cannot or will not properly parent a child.

R.A. v. Madison Cty. DHR, No. CL-2022-1021 (Ala. Civ. App. July 14, 2023)

The court affirmed the termination of a mother's parental rights, finding that record supported the conclusion that she continued to struggle with substance abuse and mental health that were not adequately addressed and that the mother's belligerence rendered the children the maintenance of continued visitation untenable.

N.L.C. v. Bibb Cty. DHR, No. CL-2022-1161 (Ala. Civ. App. July 28, 2023)

In affirming the termination of a mother's parental rights, the court found that a juvenile court need not identify the precise cause of a parenting incapacity in finding that grounds for termination exist. The juvenile court must consider the nature and duration of a parent's mental condition with concrete evidence that the condition prevents the parent from properly caring for the child but need not ascertain a precise diagnosis.

Administrative Law

Keith v. LeFleur, No. 2200821 (Ala. Civ. App. June 23, 2023)

Finding that grievance procedures adopted by ADEM did not comply with the timing provisions for notice and comment in Alabama Code § 41-22-5, the Alabama Court of Civil Appeals reversed summary judgment and remanded with instructions that the circuit court enter summary judgment for the plaintiff landowners who had sought declaratory judgment that the grievance procedures were invalid.

The Water Works Bd. of Birmingham v. Ala. Surface Mining Comm'n, No. CL-2022-1059 (Ala. Civ. App. July 7, 2023)

In a case involving an administrative proceeding that was appealed to a circuit court and then to the Alabama Court of Civil Appeals, the court dismissed an appeal upon determining that the appeal was taken from a non-final order. The court also determined that the parties' attempts to correct the lack of finality by dismissing the remaining challenges below could not cure the lack of jurisdiction. The court dismissed the appeal with directions for the circuit court to dismiss the appeal to it.

Day Care

Pooh Bear Academy v. Alabama DHR, No. CL-2022-0949 (Ala. Civ. App. June 23, 2023)

The court held that a day care's appeal of the suspension of its license under the Child Care Act of 1971 was moot considering DHR's decision to deny a license renewal to the day care. Before the decision on appeal, the day care's license had been reinstated.

Amount in Controversy

Woodruff v. Glenn, No. CL-2022-1019 (Ala. Civ. App. June 23, 2023)

Because complaint as filed did not seek at least \$6,000, the court determined that the defendant was not entitled to remove the case to the circuit court. It also noted that amounts put in controversy through a compulsory counterclaim did not count toward the amount in controversy for purposes of determining whether the case could be removed from the district court to the circuit court.

Adoption

Ex parte J.D.J., No. CL-2023-0027 (Ala. Civ. App. June 23, 2023)

The court held that prospective adoptive parents were entitled to a writ of mandamus reversing the probate court's order allowing the mother to withdraw her consent to the adoption, reasoning that the probate court was required to hold a hearing on the mother's motion to withdraw consent under Alabama Code § 26-10A-24.

Ex parte T.E.B., No. CL-2023-0261 (Ala. Civ. App. July 7, 2023)

The court determined that the prospective adoptive parents' mandamus petition was untimely because they could

have filed it months earlier when the probate court failed to issue an interlocutory order of adoption. Though it dismissed the petition, the court ordered the probate court to resolve the issue of the biological mother's consent to the adoption within seven days of the issuance of the opinion.

J.L. v. S.L., No. CL-2022-1051 (Ala. Civ. App. July 21, 2023)

The court held that Alabama Code Section 12-12-35 did not authorize a probate court to transfer an adoption proceeding to a juvenile court absent a motion for a party. The court dismissed the appeal from the juvenile court's adoption judgment with instructions that the juvenile court vacate its adoption judgment and for the probate court to resume jurisdiction.

Divorce

Ex parte Fraiser, No. CL-2023-0308 (Ala. Civ. App. July 14, 2023)

A husband was entitled to a writ of mandamus directing the trial court to provide an official court reporter under Alabama Code § 12-17-270.

Holden v. Holden, No. CL-2023-0085 (Ala. Civ. App. July 28, 2023)

The court affirmed the trial court's order enforcing the parties' agreement to modify the property settlement set

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forth in the divorce judgment because trial courts can enforce a valid bilateral contractual agreement entered into by the parties to a property settlement that modifies the terms of the settlement.

Dependency

G.W.K. v. B.W.M., No. CL-2022-0911 (Ala. Civ. App. July 14, 2023)

The court determined that maternal grandparents had failed to invoke the jurisdiction of the juvenile court properly because they did not allege dependency in their custody action. Instead, it found that the grandparents had merely alleged that the children had been residing with them, that their mother had died, that they were fit to have custody, and that the father did not contest their claim to custody. The court dismissed the appeals.

From the Eleventh Circuit Court of Appeals

Arbitration

NuVasive, Inc. v. Absolute Medical, LLC, No. 22-10214 (11th Cir. June 21, 2023)

The court held that a district court did not err in equitably tolling the deadline to move to vacate an arbitration award, following the Ninth Circuit and holding that Congress did not intend for equitable tolling not to apply to the FAA. It also held that the three-month window to seek to vacate an arbitration award is not jurisdictional. The court also found that the district court did not err in vacating the arbitration award or by declining to direct rehearing by the arbitration panel.

FMLA

Graves v. Brandstar, Inc., No. 21-13469 (11th Cir. May 9, 2023)

The court found that a plaintiff could not establish that she was harmed by her failure to receive notice of her FMLA rights when she received the leave she requested. It also held that she failed to establish for summary judgment purposes that the reasons the employer gave for her termination were pretextual. The court affirmed summary judgment for the employer.

Civil Procedure

Rosell v. VMSB, LLC, No. 22-11325 (11th Cir. May 12, 2023)

The court held that Rule 41(a)(2) provides only for the dismissal of an entire action, not a single claim or anything less than the entire action. It noted that litigants who wish to resolve less than an entire action can obtain a final judgment on the remainder of their claims by seeking partial final judgment under 54(b) or by amendment of the complaint under Rule 15.

Taxation

Gregory v. Commissioner, No. 22-10707 (11th Cir. May 30, 2023)

The court determined that deductions under Section 183(b)(2) for hobby losses are properly characterized as miscellaneous itemized deductions.

FLSA

Wright v. Waste Pro USA, Inc., No. 22-12261 (11th Cir. June 13, 2023)

The Eleventh Circuit determined that an action dismissed without prejudice did not toll the statute of limitations as to a later FLSA action and that the plaintiff had not acted with reasonable diligence to justify any equitable tolling. The court emphasized that the plaintiff had not filed a “protective” action or sought a legal remedy in the original action.

Discovery Sanctions

Consumer Financial Protection Bureau v. Brown, No. 21-14468 (11th Cir. June 12, 2023)

The court affirmed the dismissal of an action brought by CFPB under Federal Rule of Civil Procedure 37(b). The court found the district court acted within its discretion in requiring the CFPB to appoint a corporate representative to testify under Rule 30(b)(6) and answer questions regarding the factual underpinnings of its claims. The court criticized a witness’s reading from memory aids, the imposition of work product objections to factual questions, and the denial of the existence of exculpatory facts.

Class Actions

Green-Cooper v. Brinker Int’l, Inc., No. 21-13146 (11th Cir. July 11, 2023)

In a data breach action, the court found that three named plaintiffs had adequately alleged an Article III injury by alleging that their personal information was exposed for theft or sale

on the dark web. However, two of those plaintiffs failed to establish traceability because discovery showed that they dined at the restaurant affected by the data breach outside of the time when the breach was ongoing. The court remanded to allow the district court to address predominance in light of the court's standing decision. The court also found that the district court's approval of the plaintiff's proposed damages methodology based on averages was not an abuse of discretion.

***Terhakovec v. Ford Motor Co., Inc.*, No. 22-10575 (11th Cir. July 7, 2023)**

The court held that assessing predominance required, in the context of the plaintiffs' fraud-based claims, determining whether each cause of action included a reliance element and the circumstances under which reliance could be presumed. The court vacated class certification as to some state-specific subclasses (but not others) and required the district court to more clearly articulate a plan for addressing manageability issues arising from trying a multi-state class action.

Preemption

***Carson v. Monsanto Co.*, No. 21-10994 (11th Cir. July 10, 2023)**

The en banc court held that, when determining whether agency actions should be given the "force of law" such that they preempt state law, courts should apply ordinary principles of statutory interpretation to answer the question – "Congress may define the body of law that an express provision preempts."

Immunity

***Garcia v. Casey*, No. 21-136332 (11th Cir. July 28, 2023)**

Prosecutors and sheriff's deputies were entitled to qualified immunity as to false arrest claims because the court had arguable probable cause to believe that criminal defense lawyers were obstructing governmental operations by taking their client's property into their possession in the face of a search warrant aimed at obtaining that property. However, two prosecutors were held not to have state-agent immunity for defamation claims because defamation is an intentional tort for which state-agent immunity does not provide a defense.

Standing

***Drazen v. Godaddy.com, LLC*, No. 21-10199 (11th Cir. July 24, 2023)**

Reversing the panel decision, the en banc court decided in a case arising under the TCPA that a single unwanted, illegal text message suffers a concrete injury.

COVID-19

***Dixon v. University of Miami*, No. 23-10299 (11th Cir. July 31, 2023)**

The court affirmed summary judgment for a university against which a student brought claims asserting that she

was owed compensation as a result of the university's decision to not to provide in-person education and access to campus facilities. The court held that the student handbook permitted the university to switch to remote learning under the circumstances and that the plaintiff's unjust enrichment claims failed because the university lost money because of the pandemic and had little ability to hold in-person classes given executive orders in place at the university's location. It also held that the district court was correct not to consider an unsworn expert report at summary judgment.

First Amendment

***Green v. Finkelstein*, No. 21-13894 (11th Cir. July 17, 2023)**

Though the court determined that a public defender's comments on a podcast regarding her elected supervisor were protected by the First Amendment, it held that the supervisor was justified in terminating her because the government's interests outweighed the plaintiff's interest in expression. It found that some of the plaintiff's statements were not true, that the plaintiff held a position of trust in the office – a trust damaged by her statements – and that the reason for the plaintiff's firing was driven by office harmony.

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(Continued from page 375)

Data Breach

Global Network Management, LTD. v. CenturyLink Latin American Solutions, LLC, No. 21-13719 (11th Cir. May 18, 2023)

The court affirmed the dismissal of implied and express contract claims arising out of the theft of memory cards. The court agreed with the district court's dismissal of the implied contract claims, finding that the existence of an express contract barred a contract implied at law – even though there was no stand-alone security agreement – and also concluding that no contract implied-in-fact could apply where an express agreement existed. But the court reversed the district court's decision to dismiss the implied bailment claim, finding that the plaintiff had plausibly alleged that the defendant had practical physical control over the servers and memory cards at issue.

RECENT CRIMINAL DECISIONS From the Eleventh Circuit Court of Appeals

Writ of Habeas Corpus; Successive Petition

Jones v. United States, No. 20-13365 (11th Cir. Sept. 14, 2023)

A federal inmate may move to set aside his sentence under 28 U.S.C. § 2255(a), but, under 28 U.S.C. § 2255(h)(2), a successive habeas petition may be considered only if it is based on “a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.” The district court erred by failing to dismiss a petitioner's second habeas petition for lack of jurisdiction, because recent caselaw finding residual clauses in the Armed Career Criminal Act unconstitutionally vague did not announce new rules of constitutional law to support a challenge to the “three-strikes law” of 18 U.S.C. § 3559.

Writ of Habeas Corpus; Ineffective Assistance Of Counsel – Unpreserved Issue

Garcia v. Sec'y, Fla. Dep't. of Corr., No. 21-12461 (11th Cir. Sept. 12, 2023)

The district court correctly denied the petitioner relief from the state court's dismissal of his claim that his appellate counsel rendered ineffective assistance by not asserting error in the lack of a non-deadly force jury instruction. The state court could have reasonably concluded that the jury instruction issue was not preserved for appellate review, and, regardless, that the petitioner was not entitled to the instruction under state law. The court noted that state courts “are the final arbiters of state law,” and that “federal habeas courts should not second-guess them on such matters.”

Writ of Habeas Corpus; Ineffective Assistance Of Counsel – Failure to Produce Mitigation Evidence

Mashburn v. Comm'r, Alabama Dep't of Corr., No. 22-10329 (11th Cir. Sept. 5, 2023)

The state court's finding that habeas petitioner did not receive ineffective assistance of counsel was not unreasonable



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and thus was not subject to habeas relief. Though the petitioner claimed that defense counsel failed to produce sufficient mitigation evidence at his capital murder trial, the state court found that the attorney had presented evidence for twelve mitigating factors. Observing that the petitioner's argument was "not that he was prejudiced by his counsel's failure to produce any evidence, but that he was prejudiced by his counsel's failure to produce even more evidence[]" (emphasis in original), the court noted that counsel is not "required to present all mitigation evidence."

Writ of Habeas Corpus; Ineffective Assistance Of Counsel – Plea Offer

Washington v. Att’y Gen. of State of Alabama, 75 F.4th 1164 (11th Cir. 2023)

The court reversed the district court's denial of habeas relief in this murder case. It concluded that the state court's rejection of the defendant's claim that he was not informed of a plea offer – a finding based on affidavits from both the prosecutor and defense counsel, as well as the circuit court's own recollections of the trial – was unreasonable.

Unlicensed Firearms; Major Crimes Act

United States, v. Hollowell, No. 22-12905 (11th Cir. Sept. 13, 2023)

The court affirmed the Native American defendant's convictions for dealing firearms without a license and making false statements to a federally licensed firearms dealer, violations of 17 U.S.C. §§ 922 and 924. It rejected his arguments that, because he was member of the "Tsalagi Cherokee Nation" and his offenses did not fall within the Major Crimes Act, 18 U.S.C. § 1153, applicable to "crimes...within Indian country[,]," the district court had no jurisdiction over the case. The defendant's "status as a Native American is irrelevant" to his indictment for federal violations, and the suburban pawnshop where he committed the offenses was not within "any Indian reservation under the jurisdiction of the United States government."

From the Alabama Court of Criminal Appeals

Ala. R. Crim. P. 32; Motion to Stay

Capote v. State, CR-20-0537 (Ala. Crim. App. Aug. 18, 2023)

While finding meritless the Ala. R. Crim. P. 32 petitioner's numerous ineffective assistance of counsel claims, the court



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also rejected his claim that the circuit court erred in denying his motion to stay the postconviction proceedings. While he claimed that his current attorney had “not yet had a full opportunity” to investigate or prepare a petition “that present[ed] all of his claims,” the circuit court could reasonably determine that his former attorney had been investigating the case “anywhere from 7 to 20 months” and that the current attorney could have consulted with the former attorney to learn of any viable claims.

Ala. R. Crim. P. 32; Expired Sentence

State v. Tanniehill, No. CR-2022-1121 (Ala. Crim. App. Aug. 18, 2023)

The circuit court had no jurisdiction to grant the Ala. R. Crim. P. 32 petitioner relief from his sentence because the

sentence had already expired. That the sentence was an “illegal sentence” because the two-year confinement portion of his split sentence was less than the mandatory minimum of three years required by Ala. Code § 13A-12-231(2)(a) was inconsequential because he had already completed probation before his filed the petition.

Ala. R. Crim. P. 32; Out-of-Time Appeal

Johnson v. State, CR-2023-0287 (Ala. Crim. App. Aug. 18, 2023)

A petition seeking an out-of-time appeal from the dismissal of a prior Rule 32 petition is not precluded as successive under Ala. R. Crim. P. 32.2(b). Further, the petitioner’s allegations that he was incarcerated during the pendency of his petition, that he did not receive the circuit court’s dismissal order, and that he did not learn of the decision until a friend contacted the circuit clerk four months after the dismissal, were sufficiently pleaded to permit further proceedings on the petition.

Ala. R. Crim. P. 32; Ineffective Assistance of Counsel – Self-Defense


Bohannon v. State, CR-21-0148 (Ala. Crim. App. Aug. 18, 2023)

The circuit court did not err in denying the Ala. R. Crim. P. 32 petitioner’s claim that his trial counsel was ineffective by asserting the theory of self-defense at trial. Counsel had argued self-defense on the ground that the victims shot at the defendant first, and he attempted to persuade the jury by highlighting a security video recording and cross-examining the state’s witnesses. Citing *Scarpa v. Dubois*, 38 F.3d 1 (1st Cir. 1994), the court noted that “[t]here are times when even the most adroit advocate cannot extricate a criminal defendant from a pit,” but to attempt to do so “certainly does not constitute ineffective assistance.”

Reckless Manslaughter; Silent-Witness Theory

Harrison v. State, CR-21-0423 (Ala. Crim. App. Aug. 18, 2023)

The court first determined that the capital murder defendant was not entitled to a reckless manslaughter jury instruction on the ground that he fatally shot the victim while returning gunfire, because the evidence showed that he was the first to shoot. Then, as a matter of first impression, the court held that the foundational requirements for admission of a video under the silent-witness theory set forth by *Voudrie v. State*, 387 So. 2d 248 (Ala. Crim. App. 1980) “should



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be relaxed" when the state seeks to authenticate a video that was recorded and then posted on social media. Pursuant to Ala. R. Evid. 901, the state was required only to present evidence "sufficient to support a finding that the matter in question is what its proponent claims." Video recordings that had been posted on the defendant's Facebook page and viewed by the victim's brother were thus properly authenticated for admission into evidence.

Pretrial Appeal; Discovery Violation

State v. Shaw, CR-2022-1003 (Ala. Crim. App. Aug. 18, 2023)

The state appealed from the circuit court's pretrial evidentiary rulings pursuant to Ala. R. Crim. P. 15.7, but it had no right to appeal from the denial of its motion in limine. The court found no error in the circuit court's exclusion of evidence as an apparent sanction for the state's violation of a discovery order.

Comment on Failure to Testify; Death Qualification of Jury

Iervolino v. State, CR-21-0283 (Ala. Crim. App. Aug. 18, 2023)

Among many other issues in this capital murder case, the court found no error in the state's comment during closing argument that the victim was unable to testify due to his death. This was neither a direct nor an indirect comment on the defendant's failure to testify at trial. The court also rejected the defendant's claim that the trial court erred in death-qualifying prospective jurors, observing that Alabama appellate courts "have repeatedly held that there is no violation of state or federal law in death-qualifying prospective jurors in a capital case, even if it results in a more conviction-prone jury."

Jury Selection; Cross-Examination; Oral Notice of Sentence Enhancement

Thomas v. State, CR-2022-0789 (Ala. Crim. App. Aug. 18, 2023)

The circuit court did not err in denying the defendant's challenge for cause of a juror who said it would be a "red flag" if the defense did not inform the jury of the defendant's whereabouts at the time of the victim's death. The juror's responses showed his awareness of the state's burden of proof and that he had no absolute bias against the defendant. The

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(Continued from page 379)

circuit court also did not violate the defendant's right to cross-examination by holding that, if he cross-examined a witness regarding her prior inconsistent statement, the state could then question the witness regarding the circumstances surrounding her statement pursuant to Ala. R. Evid. 613(b). The court also rejected the defendant's claim that he was not adequately made aware of the state's intention to seek sentence enhancement under the Alabama Habitual Felony Offender Act, Ala. Code § 13A-5-9, concluding that the oral notice given before trial was sufficient.

Probation Revocation; Judicial Notice

Lawrence v. State, CR-21-0061 (Ala. Crim. App. Aug. 18, 2023)

The circuit court erred in fully revoking probation under Ala. Code § 13A-5-8.1, rather than ordering a 45-day "dunk" under Ala. Code § 15-22-54(e)(1)(d), after the probationer failed to complete a drug treatment program. The court found that § 13A-5-8.1 applies to defendants who are ordered into an alternative program before trial, who are between conviction and sentencing, or who have the treatment as a bond condition. The court also refused to take judicial notice of the circuit court's records found in *alacourt.com*, holding that it may not take judicial notice of another court's records.

Juvenile Capital Murder; Motion for Resentencing

Miller v. State, CR-20-0654 (Ala. Crim. App. Aug. 18, 2023)

The defendant, a juvenile at the time of his capital murder offense, was initially sentenced to life imprisonment without parole, the only available sentence at the time following the prohibition against juvenile death sentences pronounced in *Roper v. Simmons*, 543 U.S. 551 (2005). The United States Supreme Court subsequently also prohibited mandatory life imprisonment without parole sentences for juveniles in *Miller v. Alabama*, 567 U.S. 460 (2012). Reviewing the defendant's request to be resentenced to life with the possibility of parole under *Miller*, the circuit court did not err in considering his background, lack of remorse, victim-impact evidence, sentence proportionality, and other factors in denying his request. ▲



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▲ Disbarment

▲ Suspension

Disbarment

- Birmingham attorney **Tremele Deshun Perry** was disbarred from the practice of law in Alabama by order of the Alabama Supreme Court, effective August 9, 2023. The Alabama Supreme Court entered its order based on the order of the Disciplinary Commission of the Alabama State Bar disbarring Perry because of his failure to prosecute matters entrusted to him, demonstrating a pattern and practice of failing to respond to reasonable requests for information, misrepresenting information to clients, and continuing to practice law after he was summarily suspended from the practice of law in Alabama. [ASB Nos. 2021-693, 2022-137, 2022-149, 2022-218, 2022-339, 2022-446, and 2022-967]

Suspension

- Tuscaloosa attorney **Edward Hopkins Pradat** was suspended from the practice of law in Alabama for 180 days by order of the Supreme Court of Alabama, effective August 23, 2023. The Supreme Court of Alabama entered its order based on the Disciplinary Commission's order of July 18, 2023, accepting Pradat's conditional guilty plea wherein Pradat admitted to violating Rules 1.8(a), 1.15, and 8.4(b), (c), and (g), Alabama Rules of Professional Conduct. During the interview with the Office of General Counsel, Pradat initially denied having engaged in any type of sexual relationship with the client. Pradat subsequently admitted to having a consensual relationship with the client but claimed it was during a period in which he was not actively representing the client in any legal matter. Pradat also initially denied asking any client to procure prescription medication on his behalf, but later admitted to providing money to a client and having the client procure Adderall on his behalf. Pradat also borrowed trust account funds belonging to a client without complying with Rule 1.8(a), Ala. R. Prof. C. In addition, Pradat commingled personal and client funds in his trust account and failed to properly maintain trust account records. [ASB No. 2022-1047]



ABOUT MEMBERS, AMONG FIRMS

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Among Firms

Clark, May, Price, Lawley, Duncan & Paul LLC of Birmingham announces that **Andrew Harrell** joined as a partner in the new Gulf Shores office.

Chris Cochran and **John Bowers** announce the opening of **Cochran Bowers PC**, 2 Riverchase Ridge, Hoover 35244. Phone (205) 616-7662. The firm also announces that **Alexandria Nichols** joined as a shareholder.

Conchin, Cole, Jordan & Sherrod of Huntsville announces that **Patrick M. Lamar** joined as a partner and **Alicia O. Clark** joined as an associate.

Cunningham Bounds announces the opening of an Atlanta office at 5555 Glenridge Connector, Ste. 550, 30342.

Dentons Sirote announces that **Courtney Bradshaw, Meredith Moore, Samantha Reiersen, and Katie Sinclair** joined as associates in the Birmingham office.

Fish Nelson & Holden LLC of Birmingham announces that **Triston Leggett** joined as an associate, and **Paige Wells** joined as of counsel.

Fuller, Willingham & Carter LLC of Cullman announces that **Dean R. Smith** joined as an associate.

Gilpin Givhan PC of Montgomery announces that **Taylor Steen** joined as an associate.

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Holtsford Gilliland Hitson Howard Stevens Tuley & Savarese PC announces that **Chloe Dasinger** joined as an associate and **Reed M. Coleman** joined as of counsel, both in the Gulf Coast office.

Huie, Fernambucq & Stewart LLP of Birmingham announces that **Mary Beth Brown** joined as an associate.

Lightfoot, Franklin & White LLC of Birmingham announces that **Jacob Salow** joined as a lateral associate, and **Nicholas Langford, Kayla Williams, and Tyler Yarbrough** joined as associates.

Martinson & Beason PC of Huntsville announces that **Clay Martinson** joined as an associate.

Marsh, Rickard & Bryan LLC of Birmingham announces that **Jamie Cory** joined as an associate.

McGlinchey Stafford announces that **Colin T. Dean** joined as of counsel in the Birmingham office.

Starnes Davis Florie LLP announces that **Sam Cochran, John Hemmings, Anna Katherine Sherman, and Drew Tucker** joined as associates in the Birmingham office.

Stockham, Cooper & Potts PC of Birmingham announces that **Robert Cooper** is now of counsel and **Samuel Garner** joined as an associate.

Stone Crosby PC announces that **Caroline E. Pope** joined as an associate in the Daphne office.

Swift, Currie, McGhee & Hiers LLP of Atlanta announces that **Lindsey Phillips** joined as an associate.

The Vance Law Firm of Montgomery announces that **Devin Harrison, Elise Mimms, LaKeshia Parks, and John J. Watkins** joined the firm, and the firm's new address is 7079 University Ct., 36117. Phone (334) 333-3333

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