THE ALABAMA LAWYER

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On The Cover

Join us at the Hilton Sandestin June 26-29 for the 147th annual meeting, and enjoy food, fun, and fireworks!

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PRESIDENT'S PAGE

Brannon J. Buck
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Justice4AL.com –
A Virtual Courthouse Door for Access to Justice

Where do people who live near or below the poverty line go for help with a legal problem in Alabama? They cannot afford a lawyer. They probably don't even know a lawyer. If they can find an attorney, they cannot afford to pay the legal fees. There are roughly one million Alabamians faced with this dilemma. How do they handle a collection dispute or a neglectful landlord? How do they obtain a will? What about a child support or custody problem? The potential list is endless. The Alabama State Bar receives dozens of calls every day from people who are looking for help with basic legal problems.

Although our state government spends fewer dollars on civil legal aid than virtually every other state, there are many great resources in Alabama to help those in need. Most of us know about the Volunteer Lawyers Programs and Legal Services Alabama, but there are many lesser-known legal aid providers. They can be hard to find, each having its own separate website dispersed across the internet. If we, as lawyers, are not familiar with all the available resources, how can we direct people to them? And how are those with lower educational attainment and limited resources supposed to find these legal aid providers?

This year, our state bar has developed a solution to the challenge of connecting those in need with the access to justice resources that exist. ***Justice4AL.com*** is a new "one-stop shop" for finding legal aid providers and accessing information about the justice system. With easy navigation, users answer a few basic questions, and the site directs them to available services in their geographical area. Now, instead of simply telling someone, "I cannot help you with that," judges, court clerks, law firm receptionists, lawyers, and really anyone else can direct people who need legal aid resources to the ***Justice4AL.com*** site. From there, individuals can easily find the information and organizations that can assist them.

In addition to helping people connect with legal aid providers, ***Justice4AL.com*** also facilitates easy access to information about courthouses and court personnel, all searchable by location. And the site will help individuals who can afford to pay for legal services find a lawyer in their community with relevant experience. Users will be able to search for lawyers by geography and practice areas. All state bar members can now self-select one or more practice areas in their state bar website profile. *Log in to your Alabama State Bar profile at* https://members.alabar.org/Member_Portal/Contact_Management/Sign_In *and use the drop-down menu to identify the practice areas in which you practice*.

The next step with ***Justice4AL.com*** is to make it known to those who need it, when they need it, wherever they live. To that end, we need your help with posting the ***Justice4AL.com QR Code*** in every courthouse and in other prominent places in your community. Our Board of Bar Commissioners will be coordinating the effort to place placards with the QR Code throughout each of their circuits. In addition, I encourage you to make the QR code available in your firms and to let your staff know about the website so that they can direct people to it when they call with a legal problem that your firm cannot handle. The goal is for Alabamians to recognize the ***Justice4AL.com QR Code*** and to know that by scanning it, they will be able to find the legal help they need.

This fantastic new access to justice resource could not have become a reality without the dedicated work of the Justice for All Task Force. Thank you to the entire task force for their fantastic effort and efficiency on this project. **Felicia Long** chaired and **Eileen Harris** and **Josh Hayes** co-chaired the task force. The other members include **Alexia Borden, Judge Henry Callaway, Judge Brent Craig, Chris Colee, Mark Debro, Peyton Faulk, Leon Hampton, Dawn Hathcock, Carmen Howell, Linda Lund, Matt McDonald, Holly Ray, Judge Burt Smithart, John Stamps, James Terrell, Judge Erin Welborn,** and **Leila Watson.** In addition, **Melissa Warnke,** the state bar's director of communications, and **Olivia Walker**, our communications coordinator, deserve special recognition for their contributions to the ***Justice4AL.com*** project.

Please, spend a few minutes checking out ***Justice4AL.com.*** It contains far more information than can be described here. And share it with others. Our hope is that ***Justice4AL.com*** will become a new virtual courthouse door that will ease the daunting challenge facing people with limited resources who need help with a legal problem.

A Fond Farewell to Editor, Greg Ward


Ward

Finally, one unrelated but important note – this issue of *The Alabama Lawyer* is Greg Ward's last as editor-in-chief. On behalf of all our members, I express deep appreciation to Greg. For the past five years, he has tirelessly served this publication, its readers, its writers, and our membership with dedication. Few people, including me, truly appreciate the amount of time and effort that is required of the editor of *The Alabama Lawyer.* With no paycheck, few accolades, and lots of headaches, the job demands someone with a servant's heart. Greg answered the call five years ago, and he has consistently demonstrated a passion for good writing, legal scholarship, and the advancement of our profession. While we mark the end of Greg's tenure with immense gratitude, we know that his work has resonated far beyond the pages of this publication.

Thank you, Greg, for your service. ▲

THE ALABAMA LAWYER

In Appreciation

Thank you, Greg Ward, for your service to *The Alabama Lawyer* magazine, its readers, and the profession!

EXECUTIVE DIRECTOR'S REPORT

Terri Lovell
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The Responsibility We All Share

May stands out as my favorite month, perhaps due to the flurry of activities marking the conclusion of the academic year, the onset of summer break, or the events surrounding Law Day, which afford opportunities to engage with classrooms statewide. Among the highlights are interactions with youth, whether through Law Day events, assisting local bars in establishing mock trial programs, engaging with law students, or witnessing the enthusiasm of eager minds drawn to the legal profession at the Young Lawyers' Section Minority Pre-Law Conference.

During my interactions with law students in particular, many express gratitude for individuals who inspired them to pursue a legal career. In those moments, it makes me remember the lasting impact we can make by sharing our own experiences, values, and passion. The things we do today plant seeds of inspiration that will shape the future of the legal profession.

During our travels across the state for our regional OutREACH CLE events, I have enjoyed hearing how our members are actively cultivating this inspiration. Whether through volunteer work, mentoring initiatives, or simply leading by example, there are countless ways you are effecting positive change in your communities.

This month, as we prepare to commemorate the 20th Class of the Alabama Lawyers Hall of Fame, we get the chance to pause and recognize those who have paved the way for us.

Hearing the inspiring stories of our honorees reminds us that our legacy isn't solely defined by grand achievements, but rather by our daily commitment to integrity and professionalism.

As we look ahead to the next few weeks, our focus shifts toward finalizing plans for our 147th Annual Meeting at the Hilton Sandestin. We are all eager to gather with fellow lawyers to learn, network, and connect. Our programming promises an enriching experience, highlighted by a keynote address from Brendan Hunt, who is best known for co-creating and starring in *Ted Lasso* as Coach Beard. His message on the power of kindness in the face of adversity aligns perfectly with President Buck's focus on civility in the profession.

You can earn all the CLE hours you need for the year during the meeting, including sessions on artificial intelligence, cybersecurity, and the always well-attended Alabama Supreme Court panel.

In addition, our ASB Litigation Section has secured Creighton Waters, the lead prosecutor on the *Murdaugh* case, as a speaker to a breakfast it's hosting during the annual meeting.

I hope you can join us this summer. If you haven't registered already, look for the link on the homepage of *alabar.org*. The hotel block is only available through May 27, so don't wait!

Something new on the horizon that I'm excited about is a luncheon to celebrate our 50-year members. As many of you may know, we typically honor members who have practiced law for 50 years during the Grand Convocation at our annual meeting each summer. To make sure these members get the recognition and appreciation they deserve, we decided to hold a standalone event on Sept. 19 at Ross Bridge. I look forward to sharing more details about this inaugural, expanded celebration soon.

May your summer be full of joy, laughter, and sunshine! I hope you'll continue to uplift, inspire, and shape a brighter future for the legal profession and the communities we serve. ▲

EDITOR'S CORNER

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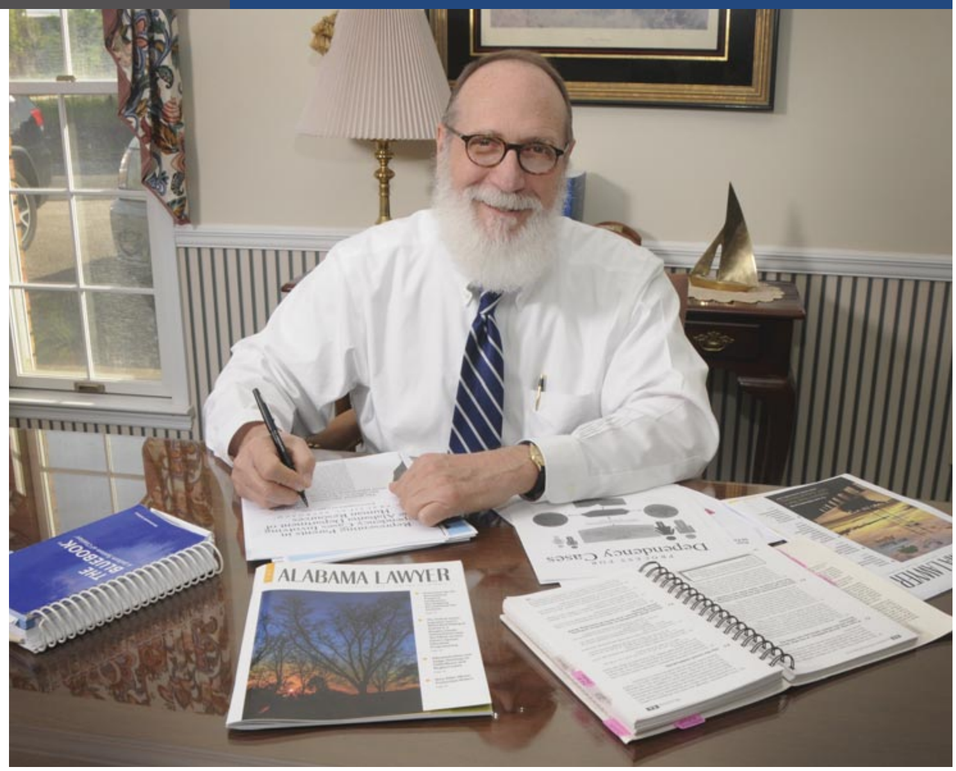

It is an odd thing to sit down to write my final column for *The Alabama Lawyer*.

How many ways can I say thank you to the six bar presidents who appointed me to the job? And especially to President Sam Irby, the first. Sam will forever be my friend.

Sam Irby and Greg

How many ways can I say thank you to the various board members who passed through during my tenure? If you are willing to accept the workload, being on the board of this magazine is just about the toughest and most time-demanding unpaid job in the bar. The board members, especially in the last year and a half, were especially busy. Their work carried no remuneration, not even CLE credit, and little thanks. They worked in small groups, were too often on Zooms and telephone calls, all done with no one peeking around the curtain to notice just how hard was their labor. And none of them ever asked for public credit.

We had board members who developed specialties and for whom my all-too-regular telephone calls became part and parcel of their work week. We had several small de facto committees who heard from me disproportionately, yet they worked without even a whisper of a complaint. I will miss our talks. You know who you are, and for all you did I am eternally grateful. The bar remains in your debt.

How many ways can I say thank you to the appellate court justices and judges, the circuit court judges, the law professors, and so many others who called with comments and suggestions, and who introduced me to some of our best writers?

But I may be proudest of the lawyers who published their first big-time article in our magazine. It is easy to keep asking the same dozen people to write. But seeking out the lawyers who are particularly knowledgeable in certain subjects but who have not been published, that was fun. And it was rewarding.

I'm happy that the audio version of the magazine remains available, and that we were able to find a way to include it for our hearing-impaired members at no cost to the bar. We are a better bar because we offer that service.

We tried to be an innovative group. Did you know that at least one other prominent magazine contacted to ask how we put our themed magazines together?

Your influence through the magazine is broader than you know. Not only does the magazine go to about 19,000 lawyers, it scatters all across the United States, and even internationally. Never underestimate the reach – geographically and intellectually – of your state bar journal.

But mostly, I owe many thanks to each of you for the wonderful time I've had.

Walt Whitman once wrote in "Once I Pass'd Through a Populous City," "Day by day and night by night we were together – all else has long been forgotten by me...."

I know just how he felt.

The last five years have been a rewarding walk through that populous city. Some streets were cast of smooth brick, some were hewn from rough cobblestone, but each was challenging, each was worthwhile, and each forged a path that brought something unique to the bar. Often those streets bore wagons laden with goods that had never before been seen on those roads. Those were the best.

For five years we were together. And I treasure that.

As Walt said, I forget the rest. ▲

ESG and Thee:

What to Know About Alabama's New Economic Boycotts Legislation

By Allen P. Mendenhall

Senate Bill 261 came as a surprise to many lawmakers when it was introduced in April 2023. Now codified at Ala. Code § 41-16-160 - § 41-16-166, this legislation is part of the "economic boycott reform" movement that targets Environmental, Social, and Governance (ESG) investing. Arkansas, Florida, North Dakota, Utah, Idaho, and Montana enacted similar laws last year.

What does Alabama's version prohibit? In short, two things: (1) state contracts with companies that boycott particular industries central to the Alabama economy and (2) state and local government mandates that companies boycott certain industries.

The first key section provides: "a governmental entity may not enter into a contract with a company for goods or services unless the contract contains a written verification from the company that the company, without violating controlling law or regulation, does not and will not, during the term of the contract, engage in economic boycotts."[1]

The second key section provides:

> No company in this state shall be required by a governmental entity to engage in economic boycotts, to establish or implement policies, procedures, guidelines, rules, reports, products, services, notices, disclosures, or rates or pricing; to provide or submit answers to surveys or other information requests or disclosures; to invest in or divest of certain securities, stocks, bonds, bills, partnerships, or other investment arrangements; or to initiate other corporate or business practices that further social, political, or ideological interests including, but not limited to, economic boycott criteria or other similarly oriented rating.[2]

The law furnishes numerous exceptions, too many to list here, and it protects companies from government penalties for refusing to engage in economic boycotts.[3]

Absent context, these prohibitions may seem odd. What's this talk about economic boycotts? If you're familiar with the history of ESG, you'll understand. Here, briefly, is a definition with some backstory.

ESG is "notoriously difficult to define because of its different applications in different contexts, but you can understand it in two ways: first, as a framework or strategy that individual corporations undertake internally; and second, as the nonfinancial standards, metrics, or factors that asset management firms, financial institutions, and institutional investors, among others, consider when they allocate capital or assess risk."[4]

What does Alabama's version prohibit? In short, two things: (1) state contracts with companies that boycott particular industries central to the Alabama economy and (2) state and local government mandates that companies boycott certain industries.

ESG evolved from theories of Corporate Social Responsibility. It gained prominence from the 2004 "Who Cares Wins" conference, hosted by the United Nations and the Government of Switzerland.[5] Attendees of that conference included representatives from prominent investment houses and financial institutions. The conference report, published months later, generated significant media attention but did not have substantial effects on the financial services industry until after the 2008 Financial Crisis, which exposed risk-management problems at big banks and provoked demands for accountability and regulatory scrutiny. Since then, the United Nations and intergovernmental organizations have strengthened their efforts to facilitate ESG through capital markets.[6] Consequently, investment in ESG-marketed portfolios has increased, reaching a peak during the coronavirus pandemic.

But ESG is not just about investment. It also involves shareholder engagement. For much of the 20th century, investors were chiefly retail or household, i.e., individuals who invested personal earnings or savings in the stock market. "Today," however, explains Columbia University's John C. Coffee, "retail investors account for only a modest minority of the ownership of large, publicly traded companies and probably only around 4% of the trading in NYSE-listed companies."[7] In fact, "institutional investors control the voting power with respect to approximately 71% of publicly traded equities."[8] Three asset management firms – BlackRock, State Street, and Vanguard – "now hold large (and in the not-so-distant future, controlling) stakes across the public market, which gives them ample influence over companies and their management."[9] Institutional investors with controlling stakes and widespread ownership in publicly traded companies exert pressure on firms to institute ESG in their processes and governance.

Recently, demand for ESG funds has declined.[10] Last year (2023) was their "worst calendar year on record," according to Alyssa Stankiewicz.[11] And a growing backlash against ESG is underway, especially in the U.S., where Republican state legislatures have introduced or passed "anti-ESG" bills, Republican governors have formed a coalition to oppose ESG, Republican state treasurers have divested state funds from asset managers that prioritize nonpecuniary criteria in investments, and Republican attorneys general have sued over various ESG-related matters.

Alabama's Economic Boycotts legislation is part of this pushback. Alabama's leading industries include agriculture, forestry, mining, firearms, oil and gas, coal, and manufacturing. Financial services institutions and asset managers that follow ESG principles and directives target many of these sectors because of the alleged negative externalities associated with these industries.

Institutional investors regularly employ "negative screens," categorically excluding shares of companies in certain industries from index funds or securities portfolios. Some engage in "impact investing," channeling client funds toward industries widely considered more sustainable or socially responsible. As stockholders, institutional investors often embrace shareholder activism, engaging corporate boards to advocate changes in company strategies or policy. Banks and investors, to various extents, have reshaped the risk-management landscape by evaluating corporations for potential long-term environmental or social risks. Some promote green bonds or sustainable loans as alternatives to more traditional investments that favor other sectors of the economy.

Other states have contemplated or enacted legislation resulting in divestment from banks or firms that employ ESG criteria to negatively screen industries from services or funds.

Because these and other common banking and investment practices implicated SB261 in its original form, the banking industry successfully lobbied to alter the initial language of the bill before its passage. The substituted language excludes much of the finance activity from the purview of Ala. Code § 41-16-161(b) (quoted earlier).[12]

Because finance and investing are driving catalysts of ESG, second only to government policy and regulation, Alabama's Economics Boycotts legislation may not have the same impact on our state's economic drivers as in others. But if national trends are any indication, we can expect more ESG-related legislation in Alabama. During the 2024 legislative session, lawmakers introduced an "anti-ESG" measure that aimed to restrict state depositories to companies that do not incorporate ESG practices into their operations."[13] In other words, according to this bill, as a condition for entering into government contracts for public funds, companies could not deny goods or services based on ESG factors. Another 2024 Alabama bill would have restricted state pension plan investments relying on nonfinancial ESG aggregators.[14] Other states have contemplated or enacted legislation resulting in divestment from banks or firms that employ ESG criteria to negatively screen industries from services or funds.

The Alabama Economics Boycotts legislation will have little effect on business in Alabama. However, the financial services industry and institutional investors – as well as lawyers working in those sectors – should prepare for another round, and perhaps rounds, of ESG legislation that will have a more substantial impact. We may see significant changes in this area during the 2025 legislative session. ▲

Endnotes

1. Ala. Code § 41-16-161(c).
2. Ala. Code § 41-16-163(a).
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4. Allen Mendenhall, *ESG En Route to Etatism*, 26 Q. J. Austrian Econ. 325 (2023).
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6. Consider, e.g., the United Nations Environmental Programme Finance Initiative (UNEP FI), the Principles for Responsible

Investment (a framework supported by the United Nations and established by UNEP FI), the United Nations Framework Convention on Climate Change (UNFCCC), The Paris Agreement (to which 195 members of UNFCCC are parties), and the United Nations 2030 Sustainability Development Goals.

7. John C. Coffee, Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, 2021 Colum. Bus. L. Rev. 602, 606 (2022).
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11. Alyssa Stankiewicz, *U.S. Sustainable Funds Register First Annual Outflows in 2023*, Morningstar, Jan. 17, 2024, https://www.reuters.com/sustainability/sustainable-finance-reporting/esg-equity-funds-suffer-big-outflows-buffeted-by-market-jitters-us-backlash-2023-07-06/.
12. The final version, as passed, states that § 41-16-161(b) does not apply "to a contract related to the issuance, incurrence, or management of debt obligations, to the deposit, custody, management, borrowing, or investment of funds, or to the procurement of insurance or other financial products, or financial advisory services, or a contract that would prevent the governmental entity from obtaining the supplies or services to be provided in an economically practicable manner." Ala. Code § 41-16-161(c).
13. Jacob Holmes, *Anti-ESG bill filed in House*, Ala. Pol. Rep., Feb. 1, 2024, https://www.alreporter.com/2024/02/01/anti-esg-bill-filed-in-house/.
14. Jacob Holmes, Senate committee passes anti-ESG bill, Ala. Pol. Rep., March 5, 2024, *https://www.alreporter.com/2024/03/05/senate-committee-passes-anti-esg-bill/*.

Allen P. Mendenhall is associate dean and the Grady Rosier Professor in the Sorrell College of Business at Troy University, where he is also executive director of the Manuel H. Johnson Center for Political Economy.

Board Duties and ESG

By William H. Dorton

It is uncomfortable when corporate directors must act without assurance that they are complying with their legal obligations. Many practitioners earn their livelihoods by advising corporate boards on precisely how they might avoid legal liability. It has long been a bedrock principle of Delaware corporate law that directors comply with their legal obligations if they act to maximize long-term shareholder value.[1] Indeed, the core of the fiduciary duty of loyalty is that directors act in good faith to maximize shareholder wealth.[2] A lawyer advising the board of a Delaware corporation has ample precedent and commentary upon which to rely when providing counsel in this way. So corporate directors and their advisors may view with trepidation the increasing volume of initiatives emanating from influential shareholders, business leaders, jurists, academics, politicians, and pundits which are either unconcerned about, or sometimes hostile to, shareholder value.[3]

The essential contours of the debate over shareholder wealth maximization are nearly a century old.[4] Of late, however, the notion that a corporate board must consider the interests of various stakeholders has gained significant traction, spilling into the mainstream of American culture and politics.[5] While practitioners should certainly monitor these trends, they should also remain comfortable that the fundamental legal obligations of Delaware corporate board members have not changed. Providing effective advice to board members in this context does, however, require the corporate practitioner to be aware of the current state-of-play and to anticipate how stakeholder-centric issues might present themselves going forward.

Serious contemporary challenges to the shareholder wealth maximization model landed, perhaps, their first material impact via a number of public pronouncements from Larry Fink, CEO of the investment behemoth BlackRock.[6] Fink stated in 2019, for example, that "[a] company cannot achieve long-term profits without embracing purpose and considering the needs of a broad range of stakeholders."[7] As leader of the world's largest shareholder, Fink's words understandably resonate with public companies' boards and executives. "We will be increasingly disposed," he proclaimed, "to vote against management and board directors when companies are not making sufficient progress on sustainability-related disclosures and the business practices underlying them."[8]

The Business Roundtable, a similarly influential coterie of corporate chief executives, famously revised its statement of corporate purpose to a stakeholder approach in 2019.[9] Many commentators viewed the Business Roundtable's shift as a watershed moment in the evolution of modern corporate law.[10] Klaus Schwab, the founder and executive chair of the World Economic Forum – host of the annual meeting of high-powered business and political leaders in Davos, Switzerland – has long advocated for a stakeholder-centric approach to corporate governance.[11]

"Isn't it time for all societally important business entities – not just public companies, but large private companies and money management firms as well – to have to use their power in a socially responsible manner?"[12]

Former Chief Justice of the Delaware Supreme Court Leo E. Strine, Jr. formulated the fundamental question in a recent article: "Isn't it time for all societally important business entities – not just public companies, but large private companies and money management firms as well – to have to use their power in a socially responsible manner?"[12] That a corporate director's duty of loyalty requires her to maximize the long-term value of the corporation to the shareholders by no means dictates any particular course of action guaranteed to insulate her from liability, but it at least provides a stationary target – supported by ample precedent and commentary – at which her lawyer may advise her to aim. From a purely practical standpoint, replacing this target with one that requires "socially responsible" ends would introduce significant uncertainty into the process whereby corporate directors ensure that they are complying with their legal obligations. Taken in concert with the rash of shareholder proposals, regulatory activity, and lawsuits in this area over the past several years, corporate directors and their counsel might feel justifiable pangs of anxiety.

Happily, the standard by which director conduct is measured under Delaware law appears, for now, on stable and predictable footing. The Delaware Supreme Court's landmark holding in *Revlon v. MacAndrews & Forbes Holdings* – namely, that a board may consider the interests of other constituencies "provided there are rationally related benefits accruing to the stockholders" – continues to provide a firm foundation for most corporations in the United States.[13] The debate regarding the appropriate objectives to which a director's fiduciary duties should align is best viewed, from a practitioner's perspective, as an intellectual and political exercise: in essence, it outlines what the law *ought to be*, not necessarily what it currently *is*. Although this aspirational quality does not diminish the significance of contests regarding the traditional understanding of fiduciary duty, practitioners may find comfort that the fundamental legal principles remain unchanged. Nonetheless, corporate directors and advisors should be aware of trends in this area because stakeholder-driven issues arise in many contexts.

For instance, most challenges to the stakeholder model in favor of the shareholder model have occurred under the banner of Environmental, Social, and Governance (ESG) measures. That ESG issues have become a political flashpoint in the U.S. should only serve as added impetus for boards to track and assess how their company interacts with them. Here is a summary of five primary means by which a corporate board might reckon with ESG.

Shareholder Proposals

Activist shareholders may put non-binding proposals to a shareholder vote at annual shareholder meetings. Recent proposals have included measures addressing climate-related targets and goals, sustainability issues, civil and human rights, racial justice, workforce diversity, and political spending and lobbying.[14] While support for such measures has fallen from its apotheosis in 2021, the potentially sensitive nature of the subject matter in such proposals might require special attention because they may implicate the company's reputation and financial wellbeing.

Regulatory Actions

No unified regulatory framework governing ESG-related issues exists; therefore, compliance and risk mitigation measures in this area are difficult. The SEC adopted several ESG-themed rules under the Dodd-Frank Act, including conflict minerals disclosures[15] and disclosure of the ratio between a CEO's annual total compensation and that of the company's median employee.[16] The SEC has issued guidance regarding how companies should disclose diversity considerations in selecting and nominating director candidates.[17] It also amended disclosure requirements to add human capital resources as a disclosure item.[18] Finally, it proposed new rules to enhance and standardize the disclosure of climate-related risks and opportunities in March 2022.[19] Finally, on March 6, 2024, the SEC released its much-anticipated final climate disclosure rules intended to enhance and standardize the disclosure of climate-related risks and opportunities. As disclosure is the principal means by which the SEC pursues its regulatory priorities, directors should ensure that their companies have sufficient controls and procedures in place to make accurate and reliable ESG disclosures.

Stock Exchange Requirements

Boards may encounter ESG issues arising from the listing standards of the stock exchange on which their company's stock is listed. The New York Stock Exchange (NYSE) and Nasdaq require listed companies to comply with certain qualitative corporate governance standards. In August 2021, the SEC approved Nasdaq's proposed rule change requiring listed companies to have two diverse directors or explain why they do not.[20] The rule also requires companies to disclose annual statistics regarding their directors' self-identified gender, race, and LGBTQ+ status via a "board diversity matrix."[21] The rules began to phase in during 2023 and require full compliance by 2025 or 2026, depending on which Nasdaq market the company is listed. The NYSE has yet to propose similar rules regarding board diversity. Both exchanges have issued ESG disclosure guidance for their listed companies and maintain repositories of ESG-related resources on their websites.

Securities Claims

Both the SEC and private plaintiffs may bring – and have brought – actions alleging false or misleading statements relating to ESG issues. Many of these suits accuse public companies of "greenwashing," which involves false or misleading statements purporting that a company's practices or products are environmentally sound.[22] Public companies may feel intense pressure to make such claims even when their actual operational framework may not support them. Few of these cases have been resolved. Most are ongoing. Therefore, boards and their advisors should monitor these lawsuits. Public scrutiny in this area can be intense.

Derivative Suits

Recent shareholder derivative suits have alleged that a board of directors breached its fiduciary duties to a company by failing to carry out certain ESG-related commitments. Recent suits involve shareholders of tech companies alleging that the company fell short of its commitment to diversity as expressed in its securities filings. The complaints allege that management knew that it had a diversity problem that it failed to address even as it issued contradictory public statements.[23] While many of these suits have been dismissed, board members should monitor this area to ensure that their public disclosures are thoughtful and accurate. A shareholder derivative lawsuit can cause reputational damage even if the case is dismissed.

Conclusion

The board of directors of a corporation bears ultimate responsibility for managing its business and affairs.[24] Amid the political tumult and COVID-19-related upheaval of the last several years, many influential shareholders, business leaders, regulators, academics, and politicians have sought through various means to influence director behavior toward ESG-related ends. These efforts are practical manifestations of a broader intellectual contest over the appropriate purpose of corporations and their activities. An influential segment of the business and financial community now openly questions whether directors must maximize shareholder value or whether they may consider the interests of non-shareholding stakeholders. ESG measures represent a practical means by which proponents of stakeholder governance seek to advance their aims. Due to the politically and culturally sensitive nature of many ESG-related issues, and the sophisticated means by which shareholders and regulators seek to implement them, boards and their counsel must stay informed and track fast-moving ESG developments.

While board members should monitor and be sensitive to ESG issues – and ensure that their companies are properly equipped to advance ESG measures and comply with new regulations as appropriate – they can take solace in the fact that their overarching fiduciary duties have not changed. Delaware law requires a director to exercise a duty of loyalty to the corporation that compels her to maximize the long-term value to the corporation's shareholders in most situations. Nothing, however, requires a board, in its day-to-day management of the firm, to maximize its company's daily share price for its shareholders' immediate benefit. Likewise, board members may consider the interests of corporate stakeholders and society-at-large so long as these interests are rationally related to shareholder value.

It is nearly impossible to reduce a board's residual liability to zero. Board members and their advisors may, though, take comfort that, despite the manifold issues churning the waters of corporate governance, their traditional fiduciary duties remain stable and intact. ▲

Endnotes

1. *See Katz v. Oak Industries, Inc*., 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders; that they may sometimes do so 'at the expense' of others … does not for that reason constitute a breach of duty.").
2. Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 Wake Forest L. Rev. 135, 155 (2012) ("corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders.").
3. For a summary of stakeholder-governance theories, *see* Cynthia A. Williams, *Corporate Social Responsibility and Corporate Governance* in The Oxford Handbook of Corporate Law and Governance 634 (Jeffrey N. Gordon and Wolf-Georg Ringe eds., 2018).
4. The debate between Adolfe A. Berle, Jr. and E. Merrick Dodd, Jr. in the aftermath of the 1929 stock market crash serves as a useful starting point for the modern debate. *See* Adolf A. Berle, Jr. *Corporate Powers as Powers in Trust*, 44 Harv. L. Rev. 1049 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?* 45 Harv. L. Rev. 1145 (1932); Adolf A. Berle, Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 Harv. L. Rev. 1365 (1932).
5. *See* Clara Hudson, *ESG's Political Side Bubbles Up in Tense Proxy Season Debates*, Blomberg Law (Apr. 13, 2023), https://news.bloomberglaw.com/esg/esgs-political-side-bubbles-up-in-tense-proxy-seas on-debates.
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11. *See* Klaus Schwab, *Davos Manifesto 2020: The Universal Purpose of a Company in the Fourth Industrial Revolution*, World Econ. F. (Dec. 2, 2019), https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/.

12. Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 Bus. Law. 397, 399 (2021).
13. *Revlon v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (oral decision announced in 1985).
14. Arthur B. Crozier, Gabrielle E. Wolf, and Jonathan L. Kovacs (Innisfree M&A Inc.), *2004 Proxy Season Trends: Zenith or Nadir, Harvard Law School Forum on Corporate Governance*, Harv. L. F. on Corp. Gov. (Feb. 28, 2024), https://corpgov.law.harvard.edu/2024/02/28/2024- proxy-season-trends-zenith-or-nadir/.
15. Conflict Minerals, Exchange Act Release No. 34-67716, 77 Fed. Reg. 56274 (Sept. 12, 2012).
16. Pay Ratio Disclosure, Securities Act Release No. 33-9877, Exchange Act Release No. 34-75610, 80 Fed. Reg. 50103 (Aug. 18, 2015).
17. Regulation S-K Compliance & Disclosure Interpretation Question 116.11, U.S. Sec. & Exch. Comm'n (Feb. 6, 2019); Regulation S-K Compliance & Disclosure Interpretation Question 133.13, U.S. Sec. & Exch. Comm'n (Feb. 6, 2019).
18. Modernization of Regulation S-K Items 101, 103, and 105, Securities Act Release No. 33-10825 85 Fed. Reg. 63726 (Oct. 8, 2020).
19. The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Release No. 33-11042, Exchange Act Release No. 34-94478, 87 Fed. Red. 21334 (Apr. 11, 2022).
20. Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving Proposed Rule Changes, Exchange Act Release No. 34-92590, 86 Fed. Reg. 44424 (Aug. 12, 2021); Nasdaq Rule 5605(f).
21. Nasdaq Rule 5606.
22. *See, e.g., In the Matter of BNY Mellon Investment Adviser, Inc.*, SEC Administrative Proceeding File No. 3-20867 (May 23, 2022); *Fagen v. Enviva Inc., et al.*, Case No. 8:22-cv-02844-DKC (D. Md.).
23. *See, e.g., Ocegueda v. Zuckerberg*, Case No. 20-cv-04444-LB, Dkt. No. 1 1-7 (N.D. Cal. Jul. 20, 2020).
24. *See, e.g.*, DGCL § 141(a).

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ESG, the SEC Climate Rule, and the Limits of Securities Regulation

By Kenneth M. Rosen

ESG, the denotation of the movement to evaluate enterprises on their adherence to certain environmental, social, and corporate governance goals, garners significant attention – both positive and negative – from the business community. While some might view the focus on ESG as a recent phenomenon, concentration on the relationship of corporations to social change is more long-standing. This attention includes that of government actors, who evaluate and affect that relationship. Among those currently experimenting in this area is the United States Securities and Exchange Commission (SEC) with its recently finalized climate rule.[1] And, this federal agency is not the only public actor seeking space in the area. This regulatory activity raises questions about the appropriateness and wisdom of the use of different regulatory schemes to address ESG issues. Accordingly, lawyers representing businesses should be interested in both the short-term and long-term implications of such activities for their clients and the U.S. economy as those activities are undertaken by securities regulators.

ESG and Its Predecessors

Scrutiny of the relationships among corporations, their shareholders, and society is hardly new. While the term "ESG" may be more recently minted, the legal focus on those relationships is not. A classic academic dialogue between E. Merrick Dodd, Jr. and A.A. Berle, Jr., evidencing different perspectives on shareholder primacy and to whom key corporate players owe a responsibility, played out in the pages of the *Harvard Law Review* in the early 1930s.[2] You even might remember cases from your introductory business organizations course that further illustrate this early attention. For instance, in *Dodge v. Ford Motor Company*, some shareholders objected to automaker Henry Ford's and his company's perceived emphasis on labor and social development over shareholder profits. The court in *Dodge* famously was reluctant to declare such considerations impermissible, employing an early version of a deferential, business judgment rule type analysis.[3]

Some states' "other constituency" statutes that affirmatively protect from liability directors considering other societal groups during decision-making seem consistent with the result in the *Dodge* case.[4] However, some have cautioned that codification of such matters in these statutes might have drawbacks.[5] In more recent times, some businesses have sought to advertise their emphasis on community-minded efforts in identifying with the corporate social responsibility (CSR) movement. In many ways, ESG appears to be another iteration of this phenomenon by a different name.

> Such efforts seem to illustrate the SEC's willingness to at least consider regulatory requirements of disclosure related to ESG that go beyond purely voluntary corporate action

Other government actors, such as the SEC, certainly have started to add their imprimatur to corporations' socially conscious acts related to specific issues. For example, in 2012, the SEC adopted a rule requiring disclosure of activities related to conflict minerals.[6] More recently, the Commission's efforts in this area seemed to broaden with its proposed rule for disclosure related to climate change that is closely linked to the environmental component of ESG.[7] That proposal was met with pushback, leaving it in limbo for numerous months rather than moving toward prompt adoption.[8] However, the SEC kept working toward a final rule,[9] and on March 6, 2024, the Commission voted to adopt a scaled-back version of the rule that still required certain disclosures.[10] Such efforts seem to illustrate the SEC's willingness to at least consider regulatory requirements of disclosure related to ESG that go beyond purely voluntary corporate action. The potential legal consequences deserve close attention by the bar.

Possible Immediate Concerns for Practitioners

In the short term, practitioners will need to carefully monitor both how the SEC climate rule will, and how other similar federal regulations might, impact their corporate clients. The SEC climate rule, as initially proposed, placed specific burdens on companies. The proposal contemplated detailed disclosures on a variety of climate-related issues.[11] Compliance with even the scaled-back version of the rule – a rule which still requires certain disclosures – undoubtedly will cause some companies to incur significant costs, including legal ones.

Moreover, a practitioner's attention should not only focus on federal regulation. Remember that while the federal government effectively preempts certain state securities regulation,[12] states remain active in some areas of securities law. Alabama features its own securities regulator, the Alabama Securities Commission (ASC).[13] And while the ASC may not dive into the climate arena as much as other states' public actors, Alabama businesses, depending on the nature and geographical scope of their operations, might face scrutiny from other states' regulators seeking to impose themselves in this area. A case in point: California legislation which has already been enacted, if fully implemented, would require disclosures related to the environment by certain companies doing business in the state.[14] Like the SEC Rule, the California law is not without detractors, and it prompted immediate legal challenge after enactment.[15]

Some companies might even need to look beyond national borders to satisfy regulatory requirements. For example, the European Union's Corporate Sustainability Reporting Directive from January 2023 requires member states to move forward on national legislation prescribed by the Directive.[16] These are only examples of some state and international climate regulatory efforts. Lawyers wanting to stay informed should continue to monitor legal requirements in non-EU countries as well as additional U.S. states.

Additional Longer-Term, Systemic Concerns

Lawyers' interest in potential ESG related compliance issues under securities laws, especially as implemented by government authorities, should go beyond the short-term. Implementation of social goals through business compliance with securities law requirements raises possible concerns, including the efficacy of the market regulation system.

Critical to the success of the U.S. economy is the presence of robust capital markets that provide U.S. businesses with access to financial resources to help bolster their growth.[17] It is no coincidence that the current strength of those markets is accompanied by a capital market regulator, the SEC, with nearly a century of experience and that is recognized as one of the most effective in the world. While adjusting to new challenges, the Commission traditionally adheres to a core mission of investor protection; maintenance of market fairness, order, and efficiency; and facilitation of the formation of capital.[18] To the extent the SEC climate rule represents movement away from the Commission's traditional, core mission, lawyers should consider several questions.

First, are securities regulators best situated to address societal issues such as climate change as compared to other regulators? The climate rule presumably seeks to minimize behavior negatively affecting the climate through pressure brought via public disclosure; this might make the rule popular with environmental activists. Whether one supports such a behavioral change or not, utilizing the Commission as a tool to achieve such ends appears to be a classic second-best solution.[19] Put another way, other regulators, such as the Environmental Protection Agency, would seem to have more expertise and direct interest on activities with hazardous environmental impacts than the SEC. An open, transparent debate on climate change, accounting for all arguments about the nature of climate change and the best way to address it, would seem best suited for the forum of a regulator with expertise in the field and more direct (and statutorily authorized) responsibility to oversee such issues. Forcing the SEC to become more of an expert on a potentially limitless range of social issues runs the risk of transforming the agency into a jack of all trades and the master of none.

Second, what is the cost of redirecting the SEC away from its core mission? Unfortunately, the Commission, like other federal agencies, does not possess unlimited resources. Accordingly, use of those limited resources for new rulemakings on a potentially large variety of ESG issues likely could come at the expense of important, traditional SEC activities. Wise regulators and those calling for new regulations should always ask if resources are more efficiently spent enforcing existing laws or promulgating new ones. And, the potential resource drain is not only in the new rules' promulgation, but also in their enforcement.[20] If regulation exists not only to punish violations, but to encourage proactively the regulated parties from violating the law in the first instance, it is fair to assess the cost to such deterrence in a world where potential violators see no likelihood of prosecution related to violations. Moreover, fewer resources for market integrity run the risk of harming investor confidence and capital market strength.

Third, will those the SEC traditionally seeks to help possibly be harmed by a new focus for its regulations? As noted, investor protection is at the top of the list of important priorities in the Commission's core mission. Insufficient information can harm investor decision-making, but so too might an overabundance of data. Flooding of the markets with large quantities of new figures on ESG issues might confuse investors with informational "noise" that distracts them from other disclosed issues – issues perhaps more vital to the success of their investments and personal livelihoods. Disclosure should always strike a balance: It should not only account for the cost of businesses gathering and disseminating information, but also the usefulness of that information to investors. Moreover, given investors' hard-earned trust of the SEC, the Commission does not want to inadvertently put its finger on the scale and signal some subjects of disclosure are more important than others.

Fourth, will entry into areas viewed as social reform increase legal attacks on the SEC? Of late, the SEC has been under scrutiny in cases questioning its operations and authority to regulate in certain areas. For example, its authority to promulgate its recent rules related to the private funds industry were quickly challenged.[21] Resulting litigation against the Commission based on its entry into novel areas risks potential losses in court that might generally decrease the credibility of the Commission and affect its other work. New litigation against the SEC also would occur in an environment seemingly less amenable to government actors, where some seek to afford less deference to federal agency work under doctrine previously established in cases like *Chevron*, the fate of which hangs in the balance even as this piece goes to press.[22] Of note, on the same day as the climate rule's adoption, multiple states seem to be gearing up for a legal challenge.[23]

Better lawyers, whether in favor or against such efforts, will contemplate utilizing such knowledge to engage proactively *during* the policy-making process.

Conclusion

Businesses are sometimes accused of wanting no regulation. A more nuanced view recognizes that what businesses often seek is greater legal certainty associated with applicable regulations. When operating effectively, the SEC can be as much the ally of businesses as investors in that investor confidence and robust capital markets also help businesses. Accordingly, those who work with companies should be keenly aware of any evolution of the Commission's core work. Undoubtedly, they will want to consider whether movement of regulatory efforts by the SEC in new directions might expose the Commission to changes based on political priorities or on whims of the moment during changing administrations. Flux in this regard may spawn more undesirable legal uncertainty.

In addition, lawyers need to educate themselves on rules when they are passed. Better lawyers, whether in favor or against such efforts, will contemplate utilizing such knowledge to engage proactively *during* the policy-making process. They can do so by offering comments on proposed rules' benefits and drawbacks, in coordination with each other and clients, as those rules are considered. This provides policymakers like the SEC with a more comprehensive view of those rules' potential economic and other impacts and, it is hoped, this will result in more optimum regulation. Through such dialogue, the SEC can more thoughtfully consider the advisable limits of securities regulation. ▲

Endnotes

1. *See* Press Release 2024-31, SEC, SEC Adopts Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 6, 2024).
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3. *See* 170 N.W. 668 (MI 1919).
4. *See* Charles Hansen, *Other Constituency Statutes: A Search for Perspective*, 46 Bus. Law. 1355 (1991).
5. *See* American Bar Association Committee on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 Bus. Law. 2253 (1990) (noting Committee declined to amend Model Business Corporation Act despite such statutes).
6. *See* Press Release 2012-163, SEC, SEC Adopts Rule for Disclosing Use of Conflict Minerals, (Aug. 22, 2012).
7. *See* Press Release 2022-46, SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022).
8. *See* Samantha Delouya, CNN, Dec. 30, 2023, *available at https://www.cnn.com/2023/12/30/business/sec-climate-change-rule-2024/index.html*.
9. *See* Douglas Gillison, *US SEC to Vote on Long-Awaited Climate Disclosure Rule, Notice Says*, Reuters, Feb 29, 2024.
10. *See* SEC Final Rules, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Rel. No. 33-11275, and Securities Exchange Act Rel. No. 34-99678, *available at https://www.sec.gov/files/rules/final/2024/33-11275.pdf* (Mar. 6, 2024).
11. *See* SEC Proposed Rule, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Securities Act Rel. No. 33-11042, 87 Fed. Reg. 21334 (Apr. 11, 2022).
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13. *See* Alabama Securities Commission, *https://asc.alabama.gov/*.
14. *See* Jordan Wolman, *Newman Signs First-in-the-Nation Corporate Climate Disclosure Bills*, Politico, Oct. 7, 2023.
15. *See* Clark Mindock, *California's Landmark Climate Disclosure Laws Challenged by Business Groups*, Reuters, Jan. 30, 2024.
16. *See* European Commission, *Corporate Sustainability Reporting*, *https://finance.ec.europa.eu/capital-markets-union-and-financial-markets/company-reporting-and-auditing/company-reporting/corporate-sustainability-reporting_en*.
17. *See generally*, SIFMA, 2023 Capital Markets Fact Book, *https://www.sifma.org/wp-content/uploads/2022/07/2023-SIFMA-Capital-Markets-Factbook.pdf*.
18. *See* SEC, *Mission*, *https://www.sec.gov/about/mission*.
19. *Cf.* Kenneth M. Rosen, *Limits on Exporting Corporate Social Responsibility*, 12 S.C. J. Intl. Law & Bus. 41, 62-63 (2015); Kenneth M. Rosen, *"Who Killed Katie Couric?" and Other Tales from the World of Executive Compensation Reform,* 76 Fordham L. Rev. 2907, 2931 (2008); Jill E. Fisch & Kenneth M. Rosen, *Is There a Role for Lawyers in Preventing Future Enrons?*, 48 Vill. L. Rev. 1097, 1122-31 (2003).
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ESG and Regulatory Policy

By Michael E. DeBow

A great deal of attention has recently been paid to the ESG – "Environmental, social, and governance" – features of the operations of American businesses. According to law professors Dorothy Lund and Elizabeth Pollman, the term first appeared in a 2005 United Nations report that – made the case that integrating ESG factors into corporate and investor decision-making was critical for the security of investments, prosperity, and growing markets. Shortly after, in collaboration with an international group representing institutional investors, the United Nations launched at the New York Stock Exchange the "Principles for Responsible Investment," promoting the integration of ESG issues within the investment industry.[1]

ESG now covers a wide-ranging complex of ideas and arguments, making it notoriously difficult to summarize.[2] Any attempt to do so may evoke memories of the story of the blind men and the elephant. However, there is one aspect of ESG that should enjoy broad assent: viewed properly, ESG differs significantly from arguments in favor of "corporate social responsibility" (CSR), which at times have urged corporations to dilute (or drop) profit maximization as the sole or primary corporate goal so that corporate resources could be directed to social ends rather than shareholder wealth maximization. By contrast, ESG proponents tend to argue that the changes they seek will not conflict with, but rather enhance, profit maximization – doing well by doing good, in other words.[3] This idea is illustrated in BlackRock CEO Larry Fink's 2022 "Letter to CEOs," which stated, "We focus on sustainability not because we're environmentalists, but because we are capitalists and fiduciaries to our clients."[4]

ESG now covers a wide-ranging complex of ideas and arguments, making it notoriously difficult to summarize.[2] Any attempt to do so may evoke memories of the story of the blind men and the elephant.

ESG skeptics reject the notion that corporate boards need any further encouragement to take proper account of ESG factors when making decisions. And when ESG supporters seek to make ESG mandatory through statutory and regulatory changes, skepticism can turn into opposition. Once ESG is explicitly folded into political activism, its skeptics understandably worry that ESG is a Trojan horse with a statist pedigree.[5] University of Virginia law professors Paul Mahoney and Julia Mahoney assert that "[t]here are good reasons to believe that [ESG activists'] purpose is in part to pursue public policy goals outside the normal political process."[6]

The Biden Administration has ardently embraced mandatory ESG policies, particularly regarding environmental issues. In May 2021, the President issued the "Executive Order on Climate-Related Financial Risk," directing numerous executive agencies to take action with respect to "the intensifying impacts of climate change."[7] Two subsequent rulemaking proceedings are probably the most visible manifestation to date of the ESG movement.

In December 2022, the U.S. Department of Labor adopted a regulation permitting managers of pension funds governed by ERISA to consider ESG factors in their investment decisions, and in the process repealed two regulations adopted by DOL during the Trump Administration which took the opposite position.[8] Reflecting the controversial nature of this decision, Congress disapproved the rule on a narrow vote, using its authority under the Congressional Review Act.[9] President Biden then vetoed the Congressional action and the rule went into effect on January 30, 2023.[10] Twenty-five state attorneys general challenged the new regulation, lost before the Northern District of Texas, and have appealed that decision to the Fifth Circuit Court of Appeals.[11]

On March 6, 2024, the Securities and Exchange Commission, on a party-line 3-2 vote, promulgated a lengthy regulation that will require publicly-traded companies to make a broad range of disclosures about the climate-related financial risks their operations entail and how these risks affect the companies' profitability.[12] The contentious rulemaking proceeding that generated the new "climate disclosure rule" began in March 2022[13] and elicited "more than 24,000 comment letters, including more than 4,500 unique letters."[14] Responding to critics, the Commission dropped the most controversial section of the proposed rule very near the end of the process.[15] Within days of the SEC's final action, nine appeals were filed in six different circuits challenging the rule, all of which have been consolidated in a single case in the Eighth Circuit.[16] As it stands, corporate efforts to comply with the rule will be phased in beginning in 2025 for filings due in 2026.[17]

While ESG has made headway during the Biden Administration,[18] there has also been significant pushback from state governments, particularly in those states with substantial oil and gas or coal industries. A recent article describes "the anti-ESG backlash" as taking "the form of state laws (and some executive actions) prohibiting state agencies or municipalities from doing business with financial institutions that are engaging with ESG issues."[19] Furthermore, some states "have often lumped these environmental- and climate-related analyses with other forms of ESG integration, such as issues related to guns, race, diversity, and other social issues of consequence."[20] To take just one dramatic state action, in October 2022, Louisiana withdrew $794 million in state funds from BlackRock's management because of its ESG policies, particularly its position on climate change.[21] Who is more nearly right about ESG – BlackRock CEO Larry Fink, who was quoted earlier, or Louisiana state treasurer John Schroder, who took the action to stop doing business with BlackRock?

There is a large body of research that asks whether ESG-conscious investment portfolios outperform portfolios that do not take ESG expressly into account. Such comparisons are possible because many privately estimated ESG performance ratings are available even without SEC-mandated disclosure requirements.[22] A 2022 study published by the management consultancy McKinsey & Company addressed the anti-ESG claim that "positive correlations with outperformance, when they exist, could be explained by other factors and, in any event, are not causative."[23] The McKinsey researchers continued:

> Several studies have questioned any causal link between ESG performance and financial performance.[24] While, according to a recent metastudy, the majority of ESG-focused investment funds do outperform the broader market,[25] some ESG funds do not, and even those companies and funds that have outperformed could well have an alternative explanation for their performance. (For example, technology and asset-light companies are often among broader market leaders in ESG ratings; because they have a relatively low carbon footprint, they tend to merit higher ESG scores.) The director of one recent study[26] proclaimed starkly: "There is no ESG alpha."[27](Alpha "is a term used in investing to describe an investment strategy's ability to beat the market, or its 'edge.'"[28])

If an accurate summary of the research holds that the results are mixed and do not provide strong confirmation of the outperformance hypothesis, it would be consistent with the basic tenets of the efficient capital markets hypothesis.[29] Because a corporation's ESG performance is open to public view, one should not expect investors to be able to base a profitable trading strategy on this public information. As Mahoney and Mahoney, quoted above, put it, there are "logical and empirical hurdles standing in the way of a conclusion that ESG investment strategies can generate excess returns above costs."[30] This conclusion returns us to the real possibility that ESG is not truly concerned with investor welfare, but rather is in pursuit of other, social goals including (most prominently) responding to the risks of climate change.

Because a corporation's ESG performance is open to public view, one should not expect investors to be able to base a profitable trading strategy on this public information.

Last October, the prestigious National Bureau of Economic Research published a working paper that should receive serious consideration by all engaged in the ESG debate. *An Economic View of Corporate Social Impact* [31] was written by four economists at elite institutions.[32] Although it is a highly technical piece of work and quite forbidding to a non-economist, the authors helpfully summarize their "four key results" in clear English.[33] Two of these are directly related to the assessment of ESG.

First, the authors found that "consumer surplus is the most important component of corporate social impact, dwarfing profits, worker surplus, and externalities."[34] Consumer surplus is the difference between the price that consumers pay for a product or service and the higher price they would be willing to pay. In other words, "[i]t's a measure of the additional benefit that consumers receive because they're paying less for something than what they [would be] willing to pay."[35] If you recall the graph of supply and demand from your college economics course, consumer surplus is shown as the triangle beneath the demand curve and above the equilibrium price.[36] This is where corporate value creation takes place. It's by far the most important aspect of our economy.

Second, the authors observed:

> [T]he company-level scores from several prominent ESG rating systems areessentially unrelated to our estimates of corporate social impact. Part of this may be because ESG rating systems are trying to measure something different than a firm's impact on social welfare, and part of this may be from measurement error in our estimates. But this lack of correlation also suggests that the current discussion of ESG investing and impact measurement might benefit from considering our economically grounded framework and measurement approaches.[37]

The paper ends by invoking the long debate "dating at least to" Milton Friedman's famous 1970 article[38] about "what firms should try to maximize. Our estimates suggest that the key to social impact is to do what many firms are already trying to do as they maximize profits: make more differentiated products that more consumers want to buy."[39] This insight should spur a larger debate as to whether ESG-based calls for ambitious federal policymaking will foster increased productivity in American enterprise, or not. ▲

Endnotes

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9. H.J. Res. 30, https://www.congress.gov/bill/118th-congress/house-joint-resolution/30.
10. Rachel Roosth et al., *ESG factors remain relevant to ERISA fiduciaries after Biden vetoes resolution targeting ERISA investing rule*, Norton Rose Fulbright, Mar. 2023, https://www.nortonrosefulbright.com/en/knowledge/publications/86c565e6/esg-factors-remain-relevant-to-erisa-fiduciaries-after-biden-vetoes-resolution.
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13. Press Release, *SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors*, Mar. 21, 2022, https://www.sec.gov/news/press-release/2022-46. For a useful backgrounder, see David Cifrino & Jacob Hollinger, *SEC Proposes Landmark Standardized Disclosure Rules on Climate-Related Risks*, Harv. L. Sch. F. Corp. Gov., Apr. 8, 2022, https://corpgov.law.harvard.edu/2022/04/08/sec-proposes-landmark-standardized-disclosure-rules-on-climate-related-risks/.
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Marc A. Starrett is an assistant attorney general for the State of Alabama and represents the state in criminal appeals and habeas corpus in all state and federal courts. He is a graduate of the University of Alabama School of Law. Starrett served as staff attorney to Justice Kenneth Ingram and Justice Mark Kennedy on the Alabama Supreme Court, and was engaged in civil and criminal practice in Montgomery before appointment to the Office of the Attorney General. Among other cases for the office, Starrett successfully prosecuted Bobby Frank Cherry on appeal from his murder convictions for the 1963 bombing of Birmingham's Sixteenth Street Baptist Church.

RECENT CRIMINAL DECISIONS
From the U.S. Supreme Court

Double Jeopardy

***McElrath v. Georgia*, 601 U.S. 87 (2024)**

Under Georgia law a jury verdict in a criminal trial may be set aside if it is "repugnant," meaning that the jury's findings are not "legally and logically possible if existing simultaneously." The defendant's jury found him "not guilty by reason of insanity" on a malice-murder charge but found him "guilty but mentally ill" on charges of felony murder and aggravated assault; each of the three charges arose from the same homicide. The Georgia courts nullified the verdicts and set the charges for retrial. The Supreme Court held that a new trial on the charges was barred by the Double Jeopardy Clause, concluding that the jury's "not guilty by reason of insanity" verdict constituted an acquittal regardless of its inconsistency with the guilty verdicts on the other charges.

"Safety-Valve" Relief From Mandatory Minimum Sentence

***Pulsifer v. United States*, 144 S. Ct. 718, 723 (2024)**

Under 18 U.S.C. § 3553(f), a defendant convicted of a federal drug offense may avoid a statutory minimum sentence through its "safety-valve" provision if five criteria are met. Three of the criteria focus on the circumstances of the offense, one pertains to the defendant's cooperation with the government, and one concerns the defendant's criminal history. The Court held that, for safety-valve eligibility, the criminal history provision creates an eligibility checklist demanding that the defendant satisfy each of its conditions. The eligible defendant must not have four criminal-history points, must not have a prior three-point offense, and must not have a prior two-point violent offense.

From the Eleventh Circuit Court of Appeals

Search and Seizure; Automobile Exception

***United States v. Morley*, No. 22-12988 (11th Cir. Apr. 30, 2024)**

Federal law enforcement officers had probable cause to search the defendant's car under the automobile exception to the warrant requirement. A confidential informant discussed a time and place for a cocaine transaction with a codefendant, and, after the codefendant told him that the drugs were their way, he clearly recognized the defendant and then directed the informant to retrieve the cocaine from the defendant's car.

Search and Seizure; Reasonable Suspicion

***United States v. Larche*, No. 21-12352 (11th Cir. Apr. 8, 2024)**

A deputy sheriff had reasonable suspicion to believe the defendant's truck contained contraband, and he could lawfully extend the stop for a short time to conduct a drug dog sniff. The deputy knew that the defendant was operating the truck with a license plate that did not belong to it, and, when conducting a pat down, he found the defendant in possession of a bag containing more than $5,000 in cash. These facts, taken together, were sufficient to give rise to a reasonable suspicion that the truck was being used for criminal activity and supported the extended detention.

From the Alabama Court of Criminal Appeals

Receiving Stolen Property; Preservation of Jury Instruction Error

***Calloway v. State*, No. CR-2023-0108 (Ala. Crim. App. Mar. 22, 2024)**

The State failed to produce sufficient evidence to support the defendant's conviction for first-degree receiving stolen property. The State's proof of the offense failed to include evidence showing the value of the stolen car at issue. Although the reporter's transcript exhibit index showed that a certain exhibit was admitted into evidence, the transcript itself did

(Continued from page 145)

not show that the exhibit, which reflected the car's value, was admitted; "the index of exhibits does not control over the actual transcript." The court further found that the defendant's argument in circuit court, "we just want to give the pattern [jury instruction]," failed to preserve his appellate argument that the State's requested jury instruction was misleading.

Charging Instrument Defect in De Novo Appeal

***City of Huntsville v. Fearn*, No. CR-2023-0348 (Ala. Crim. App. Mar. 22, 2024)**

In these de novo appeals from municipal court to circuit court, the circuit court erred in dismissing the defendants' charges due to alleged defects in the municipal court complaints. The complaints' allegations did not bestow jurisdiction to hear the cases upon the circuit court; rather, it had jurisdiction over the municipal court appeals under Ala. Code § 12-11-30. Because these were not true jurisdictional claims, the defendants waived their objections to the complaints by not raising them in municipal court.

Community-Corrections Revocation; Hearsay

***Thomas v. State*, No. CR-2023-0843 (Ala. Crim. App. Mar. 22, 2024)**

The circuit court erred in revoking the defendant's community-corrections sentence based only upon hearsay that he had committed a new offense. The State failed to present any nonhearsay evidence to establish his commission of the offense, and, like probation revocation proceedings, the revocation of a community-corrections sentence cannot be based on hearsay alone.

Attempted Murder; Discharge of Firearm Into Vehicle; Discovery Violation; Alabama Habitual Felony Offender Act

***Harris v. State*, No. CR-2022-0934 (Ala. Crim. App. Feb. 9, 2024)**

The evidence was sufficient to support the defendant's convictions of attempted murder and discharging a firearm into an occupied vehicle based on the victim's testimony regarding the incident. The defendant's arguments against the State's evidence, based on an alleged lack of corroborating evidence and his own testimony, went to the weight of the evidence and were for the jury to resolve. His complaint that his charges should have been dismissed due to the State's failure to provide DNA evidence in discovery was not preserved for review, and, regardless, the circuit court excluded the evidence under Ala. R. Crim. P. 16.5. The Alabama Court of Criminal Appeals remanded for resentencing on the discharge of a firearm conviction because the imposed sentence did not comply with the Alabama Habitual Felony Offender Act, Ala. Code § 13A-5-9.

Retrial After Mistrial; Impeachment; Excited Utterance; Conscience of Guilt

***Flynn v. State*, No. CR-21-0199 (Ala. Crim. App. Feb. 9, 2024)**

Absent a showing that the State intentionally goaded the defendant into successfully moving for a mistrial in his initial capital murder trial, the prohibition against double jeopardy set forth in the United States and Alabama Constitutions did not prohibit a retrial. In this retrial, the circuit court did not abuse its discretion in refusing to allow the defendant to impeach a witness's credibility under Ala. R. Evid. 609(a)(B)(2) with evidence of his prior conviction of lying to a police officer. The conviction was more than 10 years old, and the defendant's written notice of his intention to use the conviction – filed on the Saturday night before the trial began on Monday – was not "sufficient advance written notice" as required by Rule 609. The circuit court also did not err in admitting statements made by onlookers who saw the shooting under the "excited utterance" hearsay exception of Ala. R. Evid. 803, nor by charging the jury that "any act…on the part of the defendant to destroy evidence of a crime is relevant" and that it "may justly infer a consciousness of guilt" if the act is unexplained.

Probation Revocation; Split Sentence Act

***Spencer v. State*, No. CR-2023-0112 (Ala. Crim. App. Feb. 9, 2024)**

The circuit court had no jurisdiction to revoke probation where the "time served" portion of the probationer's sentence was illegal under the Split Sentence Act, Ala. Code § 15-18-8. The minimum split sentence under the Act for his offense was three years, but the "time served" was less than two years. The circuit court was thus required to conduct a new sentencing hearing regarding the sentence's execution, but could not change its length, because the 20-year sentence was statutorily authorized.

MEMORIALS

Walker Percy Badham, III
Birmingham
Died: February 26, 2024
Admitted: 1982

James Radford Berry
Albertville
Died: February 20, 2024
Admitted: 1989

Alan Dwight Blair
Pell City
Died: March 25, 2024
Admitted: 1975

Glen Porter Brock, Jr.
Mobile
Died: April 8, 2024
Admitted: 1963

Glynn Daniel Brown
Alex City
Died: February 5, 2024
Admitted: 1981

Robert Craig Campbell, III
Mobile
Died: March 27, 2024
Admitted: 1967

Carl Edward Chamblee
Warrior
Died: April 2, 2024
Admitted: 1970

Chad Ryan Christian
Huntsville
Died: March 25, 2024
Admitted: 2018

Hon. Virgil Cecil Curtis, Jr.
Phenix City
Died: October 4, 2023
Admitted: 1951

Dan Dumont
Mobile
Died: July 29, 2023
Admitted: 1975

Walter Michael Gillion
Mobile
Died: January 16, 2024
Admitted: 1971

Hon. William Ernest Hereford, Jr.
Pell City
Died: April 12, 2024
Admitted: 1970

Warren Candler Herlong, Jr.
Fairhope
Died: January 10, 2024
Admitted: 1974

Lindan Jerome Hill
Birmingham
Died: April 6, 2024
Admitted: 2005

Shirley Darby Howell
Auburn
Died: February 17, 2024
Admitted: 1981

James Harold LeMaster
Florence
Died: November 26, 2023
Admitted: 1981

Yancey Davis Lott, Jr.
Mobile
Died: April 4, 2024
Admitted: 1966

James Stuart McAtee
Birmingham
Died: February 17, 2024
Admitted: 1996

Hon. Charles Noel McKnight
Mobile
Died: March 28, 2024
Admitted: 1974

Hon. Philip Ben McLauchlin, Jr.
Ozark
Died: January 10, 2024
Admitted: 1966

Dana Tara Middleton
Birmingham
Died: March 8, 2024
Admitted: 1995

Lynn Christie Miller
Mobile
Died: March 4, 2024
Admitted: 1986

Robert Ellis Parsons
Birmingham
Died: February 26, 2024
Admitted: 1957

Clarence Glenn Powell
Tuscaloosa
Died: March 11, 2024
Admitted: 1966

Charles Daniel Rosser, Sr.
Gulf Shores
Died: July 2, 2023
Admitted: 1963

Hon. Robert Herschel Smith
Mobile
Died: April 8, 2024
Admitted: 1969

James Victor Spencer, III
Birmingham
Died: August 25, 2023
Admitted: 1998

Richard Douglas Stratton
Birmingham
Died: February 17, 2024
Admitted: 1986

Alfred Wilson Webb
Anniston
Died: February 19, 2024
Admitted: 1984

William Roberts Wilson, Jr.
Oxford, MS
Died: January 30, 2024
Admitted: 1972

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A Lawyer May Represent the Subsidiary of a Corporation While Simultaneously Suing the Parent Company Under Certain Circumstances

QUESTION:

May a lawyer represent a wholly owned subsidiary of a publicly traded parent company and then institute separate litigation against the parent company? For purposes of this question, the parent company and the wholly owned subsidiary are separate corporate entities. Further, what other facts or circumstances, if found to exist, would create a conflict of interest assuming that the separate corporate identities of these two corporate entities would normally, in and of itself, eliminate a conflict of interest under the general rule provided in Rule 1.7 of the Alabama Rules of Professional Conduct?

ANSWER:

You may represent a wholly owned subsidiary of a publicly traded corporation while, at the same time, instituting litigation against the parent company if the subsidiary and parent are separate corporate entities. You may represent both entities in unrelated litigation if both entities have separate corporate identities, there is no risk that confidential information will be misused, and your representation of the subsidiary is not limited by your litigation involving the parent.

DISCUSSION:

Rule 1.13 of the Alabama Rules of Professional Conduct recognizes that an organizational client is a legal entity and, thus, the entity is the client as opposed to its officers, directors, employees, shareholders, or other constituents. Consequently, the parent corporation, even when it owns 100 percent of the stock of the subsidiary, is still a shareholder and constituent of the subsidiary. See *California State Bar Ethics Opinion* 1989-113 (7/6/90).

The Disciplinary Commission of the Alabama State Bar reached a similar conclusion in RO-90-96 when it held that a law firm may represent a plaintiff in a suit against an insurance company that is a subsidiary of a large corporation, even though the firm represented other subsidiaries of the corporation in unrelated litigation, if each subsidiary has its own corporate identity and there is no risk that the firm will misuse confidential information.

From a practical standpoint, the entity theory has more validity when applied to large publicly held corporations. Professor Wolfram addressed this point in his hornbook on Modern Legal Ethics, as follows:

> "The position of the Code and the Model Rules, that the lawyer represents only the corporate entity, makes sense primarily in the setting of large, publicly held corporations. As corporate stock ownership is concentrated in fewer and fewer hands, the distinction between corporate entity and shareholders begins to blur. In the case of a sole-owner corporation, they may merge. Often a lawyer for such a partnership corporation will provide personal legal services for corporate principals interchangeably with services to the corporate entity. In recognition of that common reality, one court has held that for conflict of interest purposes, a small and closely held corporation and its shareholders are to be treated as virtually identical and inseparable." Wolfram, *Modern Legal Ethics*, West Publishing (1986) p.422, citing *In re Brownstein*, 602 P.2d 655, 656-657 (1979).

Thus, a lawyer may represent a client in an action against a corporation that is a wholly owned subsidiary of an existing corporate client so long as the parent corporation is not the alter ego of the subsidiary. See also *Maryland State Bar Ethics Opinion* 87-19. ▲

DISCIPLINARY NOTICES

Reinstatement

- Birmingham attorney **James Flint Liddon, III** was reinstated with conditions to the active practice of law in Alabama by order of the Supreme Court of Alabama, effective February 9, 2024. Liddon was previously suspended from the active practice of law for three years on September 9, 2020. [Rule 28, Pet. No. 2023-1343]

Surrender of Licenses

- On February 16, 2024, the Supreme Court of Alabama issued an order accepting the voluntary surrender of **Randy Allan Hames's** license to practice law in Alabama, with an effective date of January 25, 2024.
- On February 6, 2024, the Supreme Court of Alabama issued an order accepting the voluntary surrender of **Brent Lorne Parker's** license to practice law in Alabama, with an effective date of January 11, 2024.

Disbarment

- Lafayette attorney **Roland Lewis Sledge** was disbarred from the practice of law in Alabama, effective July 8, 2022. The Supreme Court of Alabama entered its order based on the Disciplinary Board's order disbarring Sledge for his conviction of theft of property first degree, a Class B felony, in the Circuit Court of Chambers County. [Rule 22(A), Pet. No. 2022-443]

Suspensions

- Tuscaloosa attorney **Thomas Matthew Jones** was suspended from the practice of law in Alabama for 181 days, with 90 days to be served and the remaining 91 days to be held in abeyance, followed by a two-year probation, effective February 9, 2024. The suspension was based upon the Disciplinary Commission's acceptance of Jones's conditional guilty plea, wherein he pled guilty to violating Rules1.4 [Communication], 1.7(b) [Conflict of Interest: General Rule], 1.16 [Declining or Terminating Representation], and 8.4(b) and (g) [Misconduct], Alabama Rules of Professional Conduct. [ASB No. 2023-744]

- Warrior, Alabama attorney **Matthew Owen Kinder** was summarily suspended from the practice of law in Alabama by the Disciplinary Commission of the Alabama State Bar, pursuant to Rule 20a, Alabama Rules of Disciplinary Procedure, effective December 8, 2023, for failing to pay disciplinary costs and fines as ordered by the Disciplinary Commission. Kinder subsequently paid the disciplinary costs and fines and petitioned for dissolution of the summary suspension. The Disciplinary Commission granted the petition and ordered that the summary suspension be dissolved on December 14, 2023. The Supreme Court of Alabama noted the summary suspension, effective December 8, 2023 through December 14, 2023. [Rule 20A, Pet. No. 2023-1742]
- Birmingham attorney **William Henry McGowen, III** was summarily suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective January 17, 2024, pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure. The Supreme Court of Alabama noted the summary suspension based upon the Disciplinary Commission's order that McGowen be summarily suspended for failing to respond to a pending disciplinary matter. [Rule 20 (a), Pet. No. 2024-169]
- Gulf Shores attorney **Michael Leonides Santos** was suspended from the practice of law for five years in Alabama by the Supreme Court of Alabama, effective February 9, 2024. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order, wherein Santos pled guilty to violating Rules 1.4 [Communication], 1.5(b) [Fees], 1.15 [Safekeeping Property], and 8.4 (b), (c), and(g) [Misconduct]. Santos represented a federal inmate who was being held at the Monroe County Detention Center. From November 2021 through February 2022, the inmate and Santos exchanged a series of "chirp" text messages discussing the purchase of paper soaked in "spice," a synthetic cannabinoid, that Santos was to smuggle into the prison. On February 18, 2022, Santos visited the inmate at the Monroe County Detention Center and provided him with papers soaked in spice so they could be resold in prison. After the papers were discovered by prison officials, Santos was detained, and his car searched. Federal agents found prepackaged baggies of tobacco, cell phones, charging cables, and other items consistent with prison contraband. Santos was arrested for possession of marijuana 2nd degree and convicted on April 11, 2023 in Monroe County District Court. Santos has since pled guilty to a violation of Title 18, United States Code, Section 1791(a)(1), providing prison contraband, a misdemeanor. Santos also smuggled spice-soaked papers to his client in December 2021. Santos admitted to charging clients non-refundable fees and failing to place unearned fees into his trust account. [ASB No. 2023-644]
- Gadsden attorney **Clark Vann Stewart** was suspended for one year, with a two-year probationary term, by the Disciplinary Commission of the Alabama State Bar on February 10, 2021. This suspension encompassed the following

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disciplinary matters: 20(a) Pet No. 2019-299 and ASB Nos. 2019-134, 2019-333, 2019-740, and 2019-794. In 2019-143, Stewart violated Rules 1.3 [Diligence], 1.4(a) [Communication], 1.15 [Safekeeping Property], 8.1 [Bar Admission and Disciplinary Matters], and 8.4(a), (b), (c), (d), and (g) [Misconduct], Alabama Rules of Professional Conduct. Stewart was summarily suspended from the practice of law in Alabama, pursuant to Rule 20(a), Alabama Rules of Disciplinary Procedure, by the Disciplinary Commission of the Alabama State Bar, effective May 6, 2019, for failing to respond to multiple requests by the Office of General Counsel that he provide a substantive written response concerning ASB No. 2019-134. In ASB No. 2019-333, Stewart violated Rules 5.5(a) [Unauthorized Practice of Law], 8.1(a) [Bar Admission and Disciplinary Matters], and 8.4(a), (b), (c), (d), and (g) [Misconduct], Alabama Rules of Professional Conduct. In 2017-740, Stewart violated Rules 1.1 [Competence], 1.3 [Diligence], 1.4(a) [Communication], 8.1(a) [Bar Admission and Disciplinary Matters], and 8.4(a), (d), and (g) [Misconduct], Alabama Rules of Professional Conduct. In 2019-794, Stewart violated Rules 1.1 [Competence], 1.3 [Diligence], 1.4(a) [Communication], 8.1(a) [Bar Admission and Disciplinary Matters], and 8.4(a), (d), and (g) [Misconduct], Alabama Rules of Professional Conduct. [ASB Nos. 2019-134, 2019-333, 2019-740, and 2019-794]

- Birmingham attorney **James Marion Wooten** was suspended from the practice of law for one year in Alabama by the Supreme Court of Alabama, effective February 9, 2024. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order, wherein Wooten pled guilty to violating Rules 3.3(a) [Candor Toward the Tribunal], 3.4(c) [Fairness to Opposing Party and Counsel], and 8.4(c), and (g) [Misconduct], Alabama Rules of Professional Conduct. While suspended, Wooten provided legal advice and assistance to the attorney who inherited his cases. [ASB No.2023-1489]

Public Reprimands

- Birmingham attorney **Daniel Houston Chambers** received a public reprimand with general publication as ordered by the Disciplinary Commission of the Alabama State Bar on January 19, 2024 for violating Rules 3.1(a) [Meritorious Claims and Contentions], 3.3(a)(1) [Candor Toward the Tribunal], 3.4 [Fairness to Opposing Party and Counsel], 4.4(b) [Respect for Rights of Third Persons], and 8.4(c) and (g) [Misconduct], Alabama Rules of Professional Conduct. The Disciplinary Commission determined the attorney obtained privileged communications between another lawyer and her client during a divorce proceeding. While representing a client in a divorce matter, the client obtained confidential and privileged emails between his wife and her attorney. The attorney failed to notify opposing counsel he had possession of the confidential and privileged emails. Instead, the attorney used these emails to shape his client's litigation strategy and to gain an unfair advantage in the proceedings. [ASB No. 2022-519]
- Hoover attorney **Bradley James Latta** was issued a public reprimand with general publication on January 19, 2024, as ordered by the Disciplinary Commission of the Alabama State Bar, for violating Rules 1.3 [Diligence], 1.4 [Communication], 1.5 [Fees], 1.15 [Safekeeping Property], 3.3 [Candor Toward the Tribunal], and 8.4 (c), (d), and (g) [Misconduct], Alabama Rules of Professional Conduct. Latta was hired to represent a client on a protection from abuse order entered against the client after the client's ex-husband alleged the client assaulted their son. After the client paid a retainer fee of $1,500, Latta failed to take substantive action on the client's behalf as promised and then attempted to bill for pleadings that were never filed. In addition, Latta deposited $1,500 retainer into his trust account and immediately removed the funds prior to earning the funds. [ASB No. 2023-772]
- Hoover attorney **Bradley James Latta** was issued a public reprimand with general publication on January 19, 2024, as ordered by the Disciplinary Commission of the Alabama State Bar, for violating Rules 1.3 [Diligence], 1.4 [Communication], 1.15 [Safekeeping Property], 8.1(a) [Bar Admission and Disciplinary Matters], and 8.4 (c), (d) and (g) [Misconduct], Alabama Rules of Professional Conduct. Latta failed to appear for hearings in a matter on two separate occasions. On the first occasion, Latta falsely represented that he had been in a car accident which caused him to miss the hearing. On the second occasion, Latta admitted to oversleeping and missing the hearing. Latta subsequently failed to pay court-ordered sanctions in a timely manner. Latta also failed to properly deposit the client's fee in trust. [ASB No. 2023-999]
- Birmingham attorney **Louis James Willie, III** received a public reprimand without general publication as ordered by the Disciplinary Commission of the Alabama State Bar, on January 19, 2024, for violating Rules 1.3 [Diligence], 1.4 [Communication], 1.15 [Safekeeping Property], 8.1(a) [Bar Admission and Disciplinary Matters], and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct. Willie failed to keep the client informed about the status of his case and failed to place fees in his trust account. [ASB No. 2023-836]

ABOUT MEMBERS, AMONG FIRMS

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

Among Firms

Baker Donelson PC announces that **Chuck Delorey** is a shareholder and that **Jay Saxon** joined as counsel, both in the Birmingham office.

Christian & Small LLP announces that **William A. Ellis** joined as a partner in the Birmingham office.

Dentons Sirote PC announces that **Matthew A. Mantle** joined as a shareholder in the Birmingham office.

Hand Arendall Harrison Sale LLC announces that **Richard Calhoun** joined the firm's Mobile office as counsel and that **Katherine Manning** joined the Birmingham office as an associate.

Hawthorne, Atchison & Riddle LLC of Montgomery announces that **Charles D. Hudson** joined as an associate.

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

The Law Firm of Kesa M. Johnston LLC of Roanoke announces that **James Lewis Farmer** joined as an associate.

Loftin Holt LLP and **Hall Tanner Hargett PC** announce their merger, effective May 1, and that the firm name is now **Loftin Holt Hall & Hargett LLP** with offices in Huntsville and Florence.

Morris, King & Hodge PC of Huntsville announces that **Foster Gregory** joined as an associate.

Patterson + Sheridan LLP announces the opening of a Huntsville office at 200 West Side Sq., Ste. 400, 35801 and that **Eric Moore, Eddie Kiessling,** and **Josh Noles** joined as managing partner, counsel, and associate, respectively. Phone (256) 679-8998.

Smith, Tozian, Daniel & Davis PA of Tampa announces that **Timothy P. Chinaris** joined as counsel.

Starnes Davis Florie LLP announces that **Virginia Powell** joined as an associate in the Mobile office.

Swift, Currie, McGhee & Hiers LLP announces that **Virginia Gambacurta** and **Emily Robinson** joined as associates in the Birmingham office.

The Fletcher School of Law and Diplomacy at Tufts University announces that **Ambassador Don Heflin** retired from the **U.S. Foreign Service** in April 2023 and joined the law school as a Senior Fellow in July 2023.

Upchurch Watson White & Max Mediation Group announces that **Timothy P. Donahue, Sr.** joined as a full-time neutral in the Birmingham office.

The Watson Firm of Birmingham announces that **JD Dickerson** joined as an associate.

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