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Keith B. Norman and Family

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On The Cover

Pictured on the cover are Alabama State Bar Executive Director Keith Norman and his family on the steps of the Heflin-Torbert Judicial Building. From left to right are Miller, 25, a private equity associate with Odyssey Investment Partners in New York City; Harry, 23, an investment banking analyst with Raymond James in Boston; Teresa, assistant director of the Alabama Law Institute; Keith; Johnson, 26, an admission counselor for Birmingham-Southern College in Birmingham; and Byrne, 27, an engineer with Torch Technologies in Huntsville.

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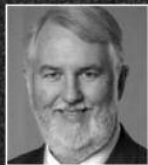
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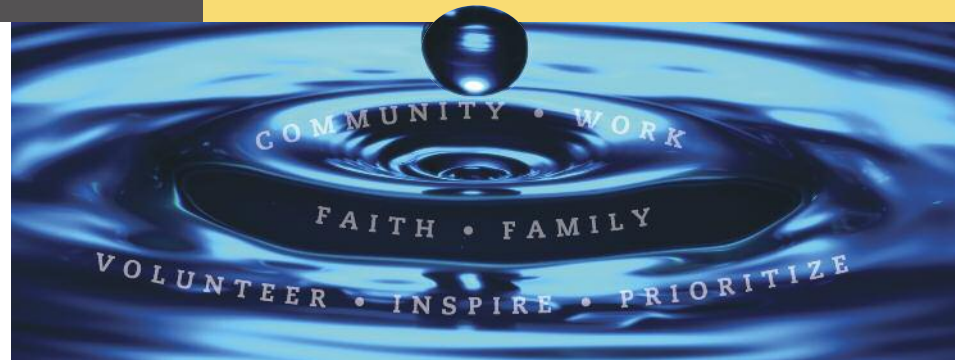
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Making Our Lives Count

He was curled up on his bed in the fetal position with his teeth chattering, his face turning blue and his breathing shallow and rapid. It was after 11 p.m. and I sat there telling my son, Samuel, to take deep breaths and relax. Even as I was thinking systematically about what I should do next to help Samuel overcome this unexpected medical emergency, I was also recalling our adoption of him when he was three years old.

Samuel was the first child Joy and I adopted. We were told by the agency that his heart was in bad shape. Yet, he looked and acted healthy in all of the materials we were given. Certainly, we thought, the government officials must be mistaken about his health condition. Therefore, after Samuel arrived in our home, we took him immediately to a heart doctor for a checkup to confirm our suspicions. Unfortunately, the doctor told us that Samuel's heart was in bad shape and there was nothing that could be done to help him. We were devastated, but did not give up. We found a doctor through a friend who was recognized as the top pediatric cardio-surgeon in the world. That doctor was scheduled to retire soon, but he agreed to examine

Samuel. He did and soon after performed one of his last surgeries in order to make a difference in Samuel's life and help strengthen his heart.

Now, 12 years after that important surgery, Samuel was struggling. His oxygen level stats were dangerously low. He was transported to a local hospital and then to Children's Hospital in Birmingham. There, he received great care and, by God's grace, made a wonderful recovery. As I reflect on these events, I am reminded that I have been blessed to be Samuel's father. I have prayed for him, laughed with him and shed tears for him. He is an amazing fighter who has taught me a great deal, including enjoying one day at a time.

All of us probably do a very poor job of enjoying one day at a time. Part of the reason that we don't enjoy each day is because we spend too much time chasing wasteful endeavors rather than focusing on things that matter. **Jere Beasley**, founder of my firm, has always instilled his guiding principle in the lawyers who work here. He told all of us that we must have our priorities in order if we want to be successful in life. Jere says the priorities should be God, Family, Work. I agree with him.

I really don't want to waste another day in my life. I want to savor every moment of every day and proceed with doing good works for others. After all, the days pass by much quicker as I age. The seconds, minutes, hours, days, weeks and years are clicking away. Time is more scarce every day. My desire is to make the remainder of my life count, to make an indelible mark on others. I am not gifted to make a mark in some ways (for example, I don't have the science background or opportunity to find a cure for cancer or to bring peace to the world), but I have been gifted in certain ways and I do have relationships with certain people and I do encounter circumstances that are unique to me that allow me to make a unique mark. Sometimes, the circumstances require courage and risk-taking. I pray that I am willing to be courageous and take risks when necessary in order to make my life count. Regardless, life should not be wasted.

This year, I have had the great pleasure to be the Alabama State Bar President. I have been provided many opportunities to love my neighbors—Alabama lawyers and the public that we serve. While I wish I could say not one of these days this year has been wasted, I know that when my tenure ends, I will have some regrets about not accomplishing everything I thought should be accomplished. Of course, I have only had one year which has brought an urgency to continue to work diligently for the bar and its members. Fortunately, I know that **Augusta Dowd** will succeed me and, because of her heart and intellect, will be able to correct my errors and accomplish significantly more during her tenure.

Another bar member, who also happens to be our retiring executive director, **Keith Norman**, has used his giftedness to serve the Alabama State Bar for almost as long as I have been a member. He has left an indelible mark and made the most of his days at the state bar. He is a man who has his priorities in order. Thus, he has been able to serve the Alabama State Bar well while also being devoted to his faith and family. And, I publicly thank him. I thank him for offering wisdom and counsel to me and others in bar leadership. I thank him for being a good financial steward of the monies that flow through the bar office. I thank him for devoting most of his professional career to working at the Alabama State Bar. He is a fine man. I am fortunate to know him and he will be greatly missed.



Norman

When I consider Samuel, his doctor, Jere, Augusta and Keith, I am blessed by their impact on my life. I urge all of us, both individually and collectively as lawyers, to consider the witness of those who have made their lasting mark on our lives and be inspired by them. Let us be lawyers who prioritize our faith, who attend to the needs of our family, who work very hard for our clients and who volunteer to serve others in our communities. I truly believe if we committed ourselves to wasting fewer days, we would not only be happier, but we would impact our spheres of influence for good. ▲

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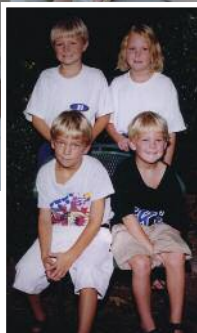
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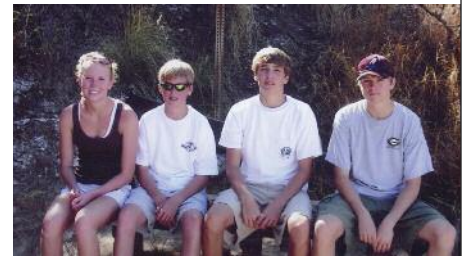
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So Long, Farewell and God Bless

This is the 136th "Executive Director's Report" that I have prepared. My intention when I first started writing these bi-monthly reports (except maybe this one) has been to open the door a bit wider on the Alabama State Bar and the legal profession. On those occasions when I have felt compelled to provide my unvarnished opinion, I attempted to be fair and as non-judgmental as I could be. I am certain that I overplayed my hand on occasion—perhaps many occasions. In any event, I hope that these writings have given Alabama lawyers, the readers, a better perspective and a clearer picture of our shared history as an organized bar, the operations of the association and national trends or activities about the legal profession.

My service as executive director these many years has not occurred in a vacuum. There have been many people both in the present and the past who have been critical to whatever success I have had during my tenure. First among those who have played a significant role in this association have been our two previous executive directors, **John B. Scott**, who served from 1950-1969, and **Reggie Hamner**, who served from 1969-1994. These two men are responsible for the facilities we have today and for developing the bar's operations as a full-fledged regulatory agency and member service organization. Without their leadership, this association would not be what it is today. Thanks to Judge Scott and Reggie, I had a head start as executive director and I feel



very humbled to have followed them and to have worked in the association that they helped forge. I look forward to passing this torch to **Phillip McCallum**. I know he will continue the legacy begun by Judge Scott and Reggie and that he will serve the bar well, becoming only its fourth executive director in the last 67 years.

Next, I have had the good fortune to work with an exemplary group of lawyers who have served on the bar's governing body, the Board of Bar Commissioners. In my 23 years as executive director and secretary of the board, I have worked with more than 200 lawyers who have served on the commission. These are lawyers who are among the most respected lawyers in our state and are elected to serve on the commission by their colleagues in their respective judicial circuits. These individuals willingly attend the commission meetings and are trusted by their peers to make decisions addressing the problems and issues confronting the legal profession in this state and adopting policies that keep the association operating smoothly. Our bar is lucky to have a

history of such a fine group of individuals who over the years have taken their responsibility seriously and have unselfishly given their time and energy to help maintain our profession's self-regulation. I consider each and every one of them a friend.

The 23 presidents with whom I have had the honor to serve with are truly a remarkable group of people. Not only are they among the finest and most noted practitioners in this state, each of them is and has been a leader who has placed the interest of the state bar before self. The thousands of hours they have invested in this association is incredible, to say the least, and virtually incalculable from a monetary standpoint. As president, each of them has brought his or her own ideas to the office and it has been a pleasure to work closely with each one as he or she led the bar and strived to improve the legal profession in Alabama. Our state bar presidents, including those who served before my arrival, are a very special group of friends and I thank them all for their support during my tenure as executive director.

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(Continued from page 183)



The next group I thank is the one I have had the pleasure to work with every day while I have served as executive director and that is the dedicated state bar staff. In my mind, the staff members here are the heart of the association. They work conscientiously and diligently to carry out the policies that the commissioners have adopted. As I have often pointed out to commissioners and officers alike, we are fortunate to have a very experienced staff. Over the years there has been very little turnover among the department members, although this is changing as our “Baby Boomers” are beginning to retire. I am confident, however, that Phillip, the officers and commission will continue to make this a favorable work environment so that the state bar will continue to attract dedicated people to work here. I express my deepest gratitude to the current staff and to those who have already retired for all that they have done these last 23 years. Each of them means a great deal to me and I can never express how much I appreciate their loyalty during the time we worked together. I will miss them all.

Finally, I thank my wife, **Teresa**, and our four wonderful children. This has always been a family-centered job since I came to the bar as director of programs in 1988, just two months after Teresa and I got married. Our children, **Byrne, Johnson, Miller** and **Harry**, spent much of their summers in their early years at state bar meetings in July and at the American Bar Association’s meetings that followed our annual meetings. Even when their pre-teen and teen years were dominated by all-star baseball games and the like, we still managed to attend many bar activities or events as a family. (Maybe this is why none of them elected to become lawyers!) My bar years have been an incredible journey. Teresa’s love and devotion and the fact that our children never begrudged my bar responsibilities when it required them to take part or me to be away from home helped make my bar career a personally fulfilling experience in spite of the usual challenges that accompany any job. To my family, thank you and I love you.

As I conclude this final report, I have had the wonderful opportunity to work with and know the state’s finest lawyers and to make wonderful friends with my bar executive colleagues across the country whom I have gotten to know through the National Association of Bar Executives and the

Southern Conference of Bar Presidents. I have been afforded the chance to support my family as well as to spend time with our children and be a part of their lives from infancy to adulthood. I have worked daily with a group of kind, caring people with whom I have shared some of life’s most wonderful moments—births of children and grandchildren, high school and college graduations, marriages—as well as the difficult times including sicknesses and the deaths of family members and co-workers. Through all of this, we, as members of the state bar staff, have all been given the privilege to do meaningful work helpful to the public and members of the legal profession.

In 1965, the rock group The Byrds scored a hit with the song, “Turn, Turn, Turn” written by Pete Seeger. The lyrics of that song are taken from the Book of Ecclesiastes. The first line of verse 3:1 and the first line of the song’s lyrics are virtually verbatim and read:

“To everything there is a season, and a time to every purpose under heaven”...

I have had the great privilege to work at the state bar for 29 years, but I am not planning on leaving here and doing nothing. Teresa and I look forward to the chance to undertake several projects that we have discussed, but have lacked the time to start and finish. Likewise, I plan to consider other opportunities that may present themselves. I will miss working with the state bar staff and the regular interaction with bar commissioners and officers, but I look forward to the new challenges that lie ahead and hope to remain as active as long as I am needed in state bar affairs.

So long, farewell and God bless. ▲



Education Debt Update

Education debt for first-time takers sitting for the February bar exam averaged \$86,382. Of those first-time takers, approximately 60 percent had education debt.

ALABAMA STATE BAR



ANNUAL MEETING

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17

GRAND HOTEL

POINT CLEAR

Thank you very much for planning so many family activities and making the meeting so kid-friendly. My whole family had a blast.

Overall, the conference was excellent, well organized, quality speakers and panels and plenty of networking opportunities.

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1994

ASB has 10,000 members

First full-time ASB communications director hired

1995

Addendum newsletter started;
Susan DePaola named editor



Alabama State Bar Bids Fond Farewell to Keith Norman

With this issue of *The Alabama Lawyer*, we celebrate an era that ends this month with the well-deserved retirement of Keith Norman as executive director of the Alabama State Bar,

a position with which his name has become synonymous during his 23 years leading this organization. We come to this celebration with enduring gratitude for this servant leader's willingness to devote his professional career to this calling, and with appreciation for his many valuable contributions to the bar and the legal profession. We congratulate Keith on his retirement, full of admiration for the personal characteristics and attributes that have allowed him to be so effective as our bar executive, and blessed with fond memories of the personal interactions so many of us have enjoyed with Keith and

the Norman family over the years—at the two dozen annual meetings he and his staff have organized and at countless other bar functions, committee meetings and day-to-day encounters.

Keith Byrne Norman is home-grown. Raised and schooled in Opelika, Keith left the state only long enough to graduate from Duke University, returning home for law school at the University of Alabama. After serving as staff attorney for Justice Hugh Maddox on the Alabama Supreme Court and spending several years in private practice, Keith came to the state bar in 1988 as assistant executive director, a new position specifically created for him at the prompting of then-Executive Director Reggie Hamner, who became Keith's mentor and friend for life.



1996

51 percent of July first-time bar examinees had educational debt, averaging \$35,000

ASB website launched

1997

Practice Management Assistance Program implemented

Largest class of new ASB admittees (633)

Selected to succeed Reggie when he retired in 1994, Keith has kept the organization on sound footing and built and maintained a talented and dedicated staff. During his two decades-plus leading the bar, he has overseen significant improvements to the bar building, modernization of the bar examination and admissions process, enhancement of the scope and quality of programs and services for members, incorporation and use of technology and many other advancements.

Along the way, Keith has worked successfully with literally thousands of individuals and groups—bar leaders and volunteers, the supreme court and other judges, legislators, bar staff, bar applicants, other-state colleagues, ABA representatives and many others—always representing the bar honorably and effectively as one of its chief public faces. Keith has built a reputation of excellence, recognized not only locally, but also among other bar executives and leaders nationally.

Keith's tenure has seen memorable and historic moments, including Alabama's first African-American and female bar presidents, as well as challenges associated with changes to the legal profession and the practice of law, and significant growth in the size and complexity of the state bar. Many of these are noted on the accompanying timeline. Through it all, Keith has been a steady hand at the wheel, always a faithful steward of the bar's resources and ever a protector of the institution's integrity. He has been nimble enough to embrace and adapt to change while still honoring important traditions and inviolate principles. Keith has led quietly, interested only in things being done well and honorably, eager to deflect



credit away from himself to others. Indeed, one has to marvel at Keith's ability to do his job so well while annually assimilating the personality and agenda of a new bar president and administration.

Keith's world has been much bigger, of course, than the Alabama State Bar. He and Teresa, his wife of some 29 years and herself an accomplished lawyer, raised four delightful children who continue to excel in their chosen pursuits. Family man, dedicated husband and father, faithful leader in his church, involved citizen and civic contributor, friend to many—these are among the things that define Keith Norman in his admirable life outside the state bar building.

We take the opportunity here to honor and thank Keith for all he has done these many years to keep the Alabama State Bar an organization of which all Al-

abama's lawyers, and the public generally, can be proud. On these pages are spread recollections and tributes of Keith from many individuals who have known him well, some in his role as bar executive, others in his personal and civic lives. Together they paint a lasting portrait of a lawyer who answered when called to serve his beloved profession in a special way, who served faithfully and without self-interest to protect and improve the state bar as an organization and the legal profession generally, and above all who has lived his personal life as an exemplary husband, father, friend and good citizen. Thank you, Keith Norman, on behalf of all the lawyers of Alabama. Congratulations and Godspeed. ▲

—David R. Boyd, Balch & Bingham LLP, Montgomery



1998

75th anniversary of ASB's becoming a mandatory bar
 Keith elected Fellow of American Bar Foundation
 First full-time Alabama Lawyer Assistance Program director hired

2000

Bar headquarters' third-floor buildout completed, including video-conferencing facilities
 Keith elected to Board of National Association of Bar Executives
 Fred Gray becomes ASB's first African-American president
 Bill Scruggs Service to the Bar Award created



KEITH NORMAN'S RETIREMENT: Reminiscences from Friends and Colleagues

The late Bill Hairston, Jr., a beloved lawyer and former bar president, often described a professional as “one who puts in more than they take out.” Keith Norman is such a person. I became aware of him while he was working at one of the state’s historic law firms known for service to the public and the profession. He had a serious sense of import for bar projects that he engaged in as a young lawyer.

I had advised the bar leadership of my intent to retire as secretary of the state bar in 1994. The Board of Commissioners authorized the creation of an assistant director position to enhance the transition to a new director. It was stipulated that this position would not be one of automatic succession. Keith was the five-star recruit I felt would be an ideal candidate to fill the position.

Keith was a proven volunteer with a range of experience that I felt could serve him and the bar well. While a law student, he worked in continuing education and law reform. He had clerked for a visionary Alabama Supreme Court Justice in Montgomery and had experience in the workings of the state government bureaucracy. Keith also had private practice experience and a network of legal friends, begun as a Key Club member in high school. Primarily, he loved the law and legal profession.

I unveiled my plans for Keith’s career change over a long lunch shortly before his marriage to Teresa. He expressed interest, but we agreed to talk after the wedding. Obviously, Keith accepted the offer and was my associate director until September 1994, when he succeeded me. The late Bill Scruggs had previously chaired a search committee that conducted



2001

Annual Meeting moves to Sandestin
Annual Meeting registration goes online

2003

First class of lawyers selected to ASB Lawyers' Hall of Fame
Online occupational license payment introduced
Alabama bar exam revised to include MEE/MPT and a state-specific component on pleading and practice

a national search. After interviewing a number of qualified candidates, the committee determined the best qualified candidate was already on board.

The profession has undergone many demanding changes in the 23 years Keith has served the bar as the executive director. Now, as then, I cannot think of a better person to lead our great state bar and the finest staff in the county. I am proud to claim Keith as part of my bar legacy.

—Reginald T. Hamner, *Alabama State Bar Executive Director, (1969-1994)*

Upon completion of his work with Justice Maddox, Keith joined the law firm of Balch & Bingham as an attorney in its Montgomery office. To say that he had a diverse practice is an understatement. As the newest lawyer in the office, and later because he was so willing to pitch in and was so reliable, he was asked to perform a variety of work—from litigating complex commercial cases to enforcing an easement, from litigating product liability cases (e.g., above-ground swimming pool ladder) to trying divorce cases, from working on supreme court briefs to defending a client in a commitment hearing. His diverse practice served him well when he transitioned to the state bar. There just was not much regarding the practice of law that he had not seen, and he used his broad experience to serve all members of the bar.

While he was working with us at Balch & Bingham, Keith was introduced to Teresa Miller, who later became his wife. Keith's and Teresa's first date was to the

South Alabama State Fair, probably because as a member of the Montgomery Kiwanis Club, which sponsored the fair, Keith was admitted free. Keith and Teresa hit it off, and they raised four wonderful and successful children.

—Pete Cobb and Joe McCorkle, *Balch & Bingham, Montgomery*

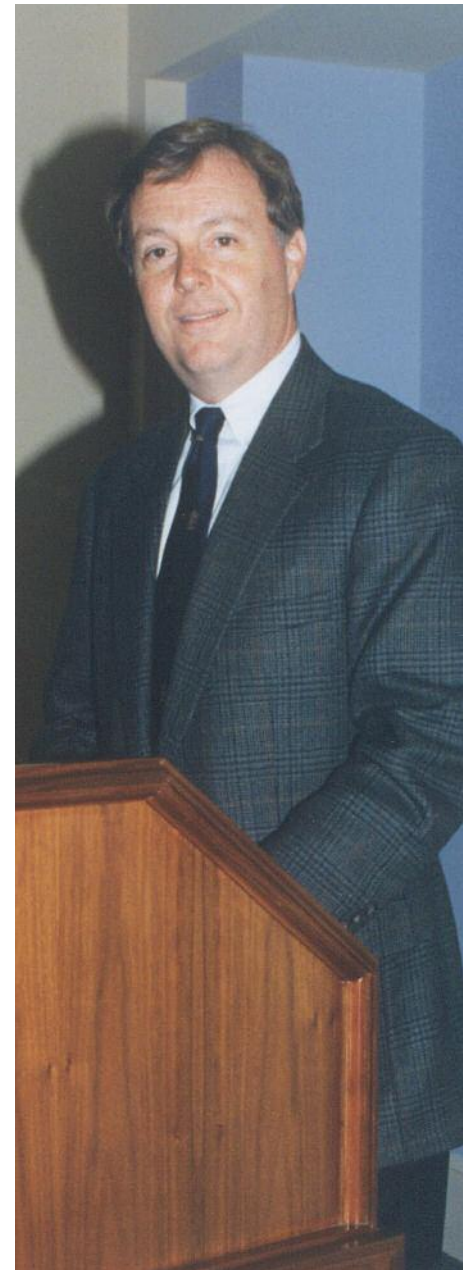
I've been proud to call Keith a friend since law school. He's been an outstanding executive director—always professional and always a friend to lawyers. He's ready to answer any question and provide direction regardless of the issue.

And, Keith's been a true "friend of the court." The Alabama Supreme Court has had a great relationship with the state bar throughout Keith's leadership. We've worked through rules changes, promoted professionalism and modified bar admission criteria and bar examination requirements. One of the greatest accomplishments during his service has been an emphasis on "lawyers helping lawyers." He leaves a great legacy.

—Alabama Supreme Court Chief Justice Lyn Stuart

Keith Norman and I grew up together in Opelika. We graduated from high school there in May 1974, and then we headed off to different colleges. We got together again when we both entered the University of Alabama Law School in 1978, and took the bar exam in 1981.

Even though I eventually settled into practice in Georgia, Keith and I have always stayed in touch, getting together





2004

ASB's 125th anniversary

Keith elected Fellow of Alabama Law Foundation

2005

Annual meeting moves to Grand Hotel

Casemaker legal research tool becomes member benefit



periodically with several of our Opelika High School friends and renewing our friendships.

Keith has always been a great advocate for any group or organization with which he was involved. We are all aware of the great job he has done as the executive director of the Alabama State Bar these many years, but in high school he was the biggest fan of and the local radio announcer for the Opelika High School basketball team.

I'm confident that Keith will not really retire. I'm sure that he will find another passion to advocate on behalf of and make a difference just as he has done for the Alabama State Bar and the legal profession these many past years.

Keith, please continue to stay in touch. My best to you and your family and I look forward to learning about your next endeavor.

—Steve Avera, Thomasville, Georgia

Keith Norman has been my friend and confidant since his law school days. Beginning as a Law Institute student law clerk, staying on with ALI a year after graduation as an as-

sistant, then throughout his tenure as lawyer and bar executive, Keith has given great advice to me and the Institute. Keith has made not only me but also Alabama and the state bar better. The success of the Alabama Law Institute is due to the bar's effectiveness assisting state government. This support is due in great part to the insight and personal assistance of Keith Norman, who helped identify outstanding lawyers to serve as counsel to legislative committees.

Fortunately for Alabama, when ALI needed a lawyer to run its Montgomery office, Keith's wife, Teresa, then with their four outstanding children in high school, consented to run the ALI Montgomery office as assistant director. The understanding was that when Keith, the bar or her family needed her, she would be available to them. That was a good deal.

Many of Keith's contributions and accomplishments remain unknown, as he has stayed in the background allowing others to take credit. Keith truly epitomizes the axiom, "It is amazing how much you can accomplish if you don't mind who gets the credit."

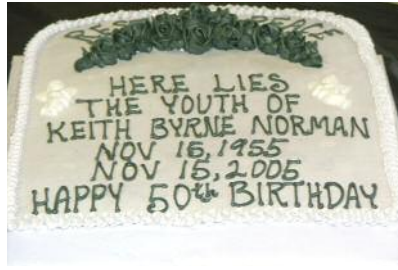
I know personally that Alabamians have no better friend and protector than Keith Norman. Keith has it all: scholar, practicing lawyer, bar executive, civic leader and family man. I appreciate and value his advice and look forward to his next adventure.

—Bob McCurley, Alabama Law Institute Director (1975-2011)

During my 12 years as a bar commissioner, Executive Council member, vice president or president of the bar, I often wondered what it must be like being Keith Norman. Every year, he gets a whole new crop of employers, some of them with aspirations and agendas which were not always consonant with the duties and role of a mandatory bar. I never saw him lose his composure or fail to protect his domain with patience, grace and dignity, making everyone feel as if they were right, even if they were missing the mark. Keith's vigilant eye, faithful leadership and diligent attention to every detail over these many years have kept the bar healthy and true to its mission to serve the public, the judicial system and the lawyers of Alabama. We asked much of Keith and I do not think anyone could have given more. Thank you, Keith.

Keith wisely assembled the best and most competent bar staff anywhere, and because of Keith and our staff, our bar is highly recognized as one of the best, if not the best, in the nation. Keith and Teresa have been great representatives of the Alabama State Bar. I pray that Keith's coming years will be many and, if possible, even more fruitful and rewarding.

—J. Douglas McElvy, Alabama State Bar President (2004-2005)

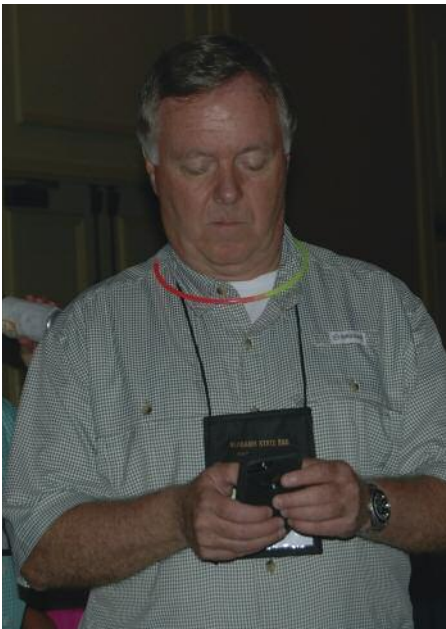


2007

Paper membership files digitized and future records stored electronically

2008

25th anniversary of *The Alabama Lawyer's* adopting magazine format, with Robert Huffaker as editor since 1983



One of the greatest joys of my life has been the joy of knowing Keith Norman and his wonderful family, from the very first day in 1988 that he was named the assistant executive director of the Alabama Bar through the many years of his service as executive director. As Keith's minister at First United Methodist Church of Montgomery for a quarter of a century, I observed several things about Keith's life that enabled him to be so successful.

Family: Those who know Keith well are much aware that he has always given a great priority to his family. As the husband of Teresa and father of three sons—Byrne, Miller and Harry, and a daughter, Johnson—Keith has been a role model in the building of a strong family. They have played together, prayed together and strongly affirmed each other. Keith has always been there for each member of his

family, whether it meant driving four hours to watch Johnson participate in an equestrian event, or driving six hours to watch Harry pitch for Furman University.

School: As a strong advocate of public schools, Keith became deeply involved in the LAMP Magnet School program in Montgomery, assisting in a variety of ways that enabled this fine institution to become one of the top high schools in the United States.

Church: During my 50 years as an ordained United Methodist minister, I have never known any family unit more devoted to worshipping together in church than the Norman family. Each Sunday when they were in town, Keith and Teresa, along with Byrne, Johnson, Miller and Harry, were seated together on the third pew from the front on the right-hand side of the sanctuary. Keith served on the Administrative Board, and as chair of the Staff-Parish Relations Committee and the Board of Directors of the local Samaritan Counseling Center that was begun by the church.

Civic Endeavors: Keith has completely immersed himself in the civic activities of our capital city, most especially as a leader in the Kiwanis Club of Montgomery.

All of us within the capital city have been blessed by this good man while he was serving as executive director of the Alabama Bar.

—Karl K. Stegall, senior minister, First United Methodist Church of Montgomery (1983-2007)

In a book entitled *Full Disclosure: Do You Really Want to be a Lawyer?*, there is a chapter that speaks to the



value of a judicial clerkship in starting a legal career. The book was compiled by Susan J. Bell in 1989 for the Young Lawyers' Division of the American Bar Association and Keith Norman is listed as one of the primary editors. At the end of that chapter, Keith wrote about his own experience as one of my staff attorneys, as follows: "Perhaps at no other time in my legal career will I possess the opportunity to have as direct an impact upon the jurisprudence of Alabama as I did while clerking for the Alabama Supreme Court."

I agree with Keith's observation relating to his service as a staff attorney. During my 31-year tenure as an associate justice on the Supreme Court of Alabama, I had a total of 56 staff attorneys and law clerks, and although I could make the same statement about many of my former staff attorneys and law clerks, I can truthfully state that Keith was like a



2009

From Power to Service: The Story of Lawyers in Alabama,
written by ASB member Pat Rumore

template of a true professional, and that all young lawyers could use his life as a pattern for their own as future leaders in their profession, and as leaders in their individual communities as productive citizens.

I wish him Godspeed, and thank him and several of the other staff attorneys and law clerks for always allowing me to win those handball and racquetball games at the downtown YMCA.

—Hugh Maddox, *Alabama Supreme Court Associate Justice (1969-2001)*

Keith Norman is a true conservative and southern gentleman in every sense of the word. When it comes to state bar finances, he squeaks at the expenditure of a box of paper clips.

Almost 18 years ago, I had the distinct pleasure of working with him as state bar president. To this day, he opines that, financially, “the bar is finally close to recovering from Larry’s exorbitant spending.”

During his tenure, he has skillfully guided the state bar during a time of tremendous growth and managed to keep the bar standards high and fiscally sound. By definition, he is a true gentleman and has left a living legacy. We can only wish him the very best in his future endeavors.

—Larry Morris, *Alabama State Bar President (2001-2002)*

Keith is unique—and thankfully so. It takes an extraordinary person to tend to the needs of thousands of lawyers—a good portion of whom, including me, are either unaware of their needs or try not to think about them. I was fortunate to serve as bar president

during Keith’s reign as executive director, and I have the fondest memories of our time together.

During my term, I thought of Keith as others may have thought of Madeleine Albright—sort of a diplomatic mother hen. He often made (what he called) “suggestions.” He suggested (told me) where to be, when to be there and what to say once I arrived. Keith wanted all bar presidents to feel good about themselves, though, so occasionally he asked my “advice” about bar issues. Fortunately, as a trained lawyer, Keith knew how to ask questions in a sufficiently leading manner to allow for a correct answer, *i.e.*, the one he preferred.

When I attended one of the (seemed like) 2,000 bar-related meetings held out of state, Keith was always there. And he took care of everything. He specialized in making, or causing to be made, all manner of reservations—transportation, hotels, restaurants—whatever. And, Keith was great at directions. He made sure I didn’t get lost—geographically or otherwise (some say he failed in the “otherwise” part). The only thing I recall Keith’s not doing for me was holding my hand when I crossed the street. I’m pretty sure he would have if asked.

Probably the best thing about Keith was the consistent example he set not only as a bar leader, but also as a husband and a father, and as a person. He had a great sense of what was right and what was fair. I remember with (less than) fondness the several times my wife Sandy threw Keith’s model conduct in my face, asking plaintively why I couldn’t be more like Keith. I guess the reason is that there’s only one Keith. He’s

2010

Alyce Manley Spruell becomes ASB’s first female president

Online voting introduced for bar commissioners and president-elect

been amazing at his job for a long time, and for his service we should all be grateful.

—Bobby Segall, *Alabama State Bar President (2005-2006)*

I was the second president of the Alabama State Bar to serve with Keith. My wife, Dot, and I became good friends with Keith and Teresa and their four delightful children. We have enjoyed watching them grow up. I remember Keith’s fondness for Duke basketball and the picture of Christian Laettner on his wall. I also remember his fondness for the *Wall Street Journal* on a daily basis. Keith was an effective leader of our state bar. He will be missed.

—John A. Owens, *Alabama State Bar President (1995-1996)*

I am honored to have been asked to offer a few observations concerning my good friend Keith Norman. Keith and I have had the privilege of administering the two finest bar associations in the country for the past quarter century, the Alabama State Bar in his case, the North Carolina State Bar in mine. While I have managed to survive in what can be a highly political role mainly by guile and good looks, Keith, having neither of those qualities, has instead relied upon intelligence, wisdom and strength of character. Ironically, now, after many years of becoming indispensable to the lawyers and the people of Alabama as your executive director, he is apparently walking away from the job with which he is synonymous. Perhaps his rumored retirement is just a cruel joke—a ploy to compel us all to publicly sing his praises as a prelude to



2011

Uniform Bar Exam (UBE) administered, making Alabama third UBE jurisdiction

2012

ASB headquarters building security enhanced

two or three more decades of exemplary service. I fear, however, that he really means to step away, and that no amount of praise, shame or personal recrimination is likely to change his mind.

Most great men are not reckoned so unless and until they have overcome some significant personal hardship or folly. In Keith's case, the former begat the latter, as he struggled early in his career to overcome an unfortunate choice that might have derailed a lesser man. I refer, of course, to his decision to matriculate at Duke University. There, in the New Jersey part of North Carolina, he became part of the shameful history of big tobacco and bad basketball, ultimately accepting as an article of faith the twin credos of its coach that, "It's not a foul unless they call it," and "They can't possibly call all the fouls." Thank goodness Keith somehow found his way back to the good people of Alabama before any lasting psychological damage was done.

Unlike many of you, I haven't had the privilege of seeing Keith carry out his responsibilities at work from day to day. I do have it on reliable authority that he has given a very good account of himself in Montgomery over the years, leading his staff ably throughout a period of tremendous ferment and change in the legal profession and society as a whole. Although



my insight on that score is a bit derivative, I can claim first-hand knowledge of his performance on the national stage. Over the years, I have encountered Keith most often at various meetings of the men and women who are similarly employed across the country—people who are lucky enough to do the sort of work that Keith and I have chosen for our careers. It is in those settings, where your peers know exactly the challenges you face and whether you are a player or a poseur, that Keith has attained tremendous stature and credibility. Never overbearing or less than a southern gentleman, Keith has quietly garnered genuine respect from the people who know the real deal when they see it. He is heeded, admired and very well liked.

Even more important, perhaps, is the fact that in such settings, Keith Norman has exemplified the professional Alabama lawyer. He has represented you all with grace and authenticity and warmth. In meetings, social occasions and random encounters on streets and in hotel lobbies from California to New York, Keith has consistently put

your best foot forward, impressing upon each individual he meets the inescapable conclusion that if your bar is led by such an outstanding person, it must be one hell of a fine organization.

It was a great day for Alabama's lawyers when they hired Keith Norman. It was an even better day for me

when I made his acquaintance. I congratulate him on a job well done.

—L. Thomas Lunsford, II, North Carolina State Bar Executive Director (UNC '75 and '78), Raleigh

Keith Norman has been a stalwart supporter of meaningful lawyer regulation in Alabama throughout the years. His interest in sensible bar admission processes has helped to shape the profession in Alabama and has been influential on a much broader basis. Keith brought a combination of stability and imagination—no easy feat—to looking at how bar admission might be improved while maintaining its essential features. Those improvements, now implemented, have placed Alabama among the leaders.

Over the many years I have known him, I have found Keith to be reasonable, prudent and unfailingly courteous. He has fulfilled the role of chief executive of the Alabama Bar in a manner that should be an exemplar for others. This includes the management skills necessary to run such an enterprise



2014

Tony McLain Professionalism Award created

2015

75th anniversary of *The Alabama Lawyer*, with Greg Hawley as editor since 2011



and the wisdom to work with an array of volunteers that encourages them to make the important contributions that they do.

I wish him every happiness as he moves into the next chapter of a life well-lived.

—Erica Moeser, *National Conference of Bar Examiners President, Madison, Wisconsin*

I never dreamed of being president of the Alabama State Bar. With the assistance and advice of Keith Norman, I became its 127th president. Prior to and during my administration, Keith and his support staff helped me to accomplish my three important goals: (1) the adoption of a mission statement during my presidential year, “Lawyers Render Service: to Clients, the Profession and to their Communities;” (2) creation of nine at-large positions on the Board of Bar Commissioners in order to increase diversity of gender, race and geography; and (3) the establishment of an “Alabama Lawyers Hall of Fame” similar to the “National Bar Association (NBA) Hall of Fame”

inaugurated during my NBA presidency.

Without Keith’s guidance, achieving these goals would have been most difficult. He was always kind. He used his deep reservoir of knowledge of the internal operations of the state bar and its history to point me in the right direction. Being the first lawyer of color to hold the office of president, I was privileged to work with him and an outstanding group of professionals nationwide.

Keith also assisted in modifying the customs of the state bar to facilitate a reception at the beginning of my presidency and allowed the presiding judge of my circuit, Hon. William I. Byrd, to administer the oath of office to me.

As executive director of the Alabama State Bar, Keith Norman has served every bar president admirably. I am confident he assisted them just as he did me. The bar will miss him. I wish him continued success in all his future endeavors. Have a wonderful retirement!

—Fred D. Gray, *Alabama State Bar President (2002-2003)*

When I think of Keith Norman, I think of service—service to our profession, to our bar and to our state.

A window into Keith’s dedication to our profession opened for me when he suggested, during my bar presidency, that I undertake a focus on the need for civics education in our schools and communities. He mentioned the efforts of Justice Sandra Day O’Connor and provided excellent suggestions for resource materials. He was concerned—as many of us are—about the lack of understanding of the role of the courts and the judiciary. I adopted his suggestion and have continued my efforts after my service as bar president. I know Keith has done so as well, not only as our bar executive but also through his work and leadership with Kiwanis and other community efforts.

The April 2011 tornadoes that ravaged Tuscaloosa and other communities in Alabama threw our bar leadership and members into a public service role that we could never have anticipated. I was so very thankful for Keith’s commitment to service, his compassion and his understanding of what was needed to help our bar members and their communities. Tony McLain and Keith Norman were on the phone with me the night after the tornadoes hit, coordinating what our bar could do and should do, lending resources and manpower, and putting into action our awesome VLP and Young Lawyers’ Section-established disaster assistance programs.

They say you can tell a man by how he treats others, even when someone isn’t looking. I saw Keith’s heart so many times in the days and weeks after the April 2011



2016

68 percent of July first-time examinees had educational debt, averaging \$119,600

2017

ASB membership reaches 18,000



tornadoes, and could not have been prouder of his leadership and appreciative for his support of our bar's efforts.

—Alyce Manley Spruell, *Alabama State Bar President (2010-2011)*

As noted elsewhere, Keith Norman has devoted most of his legal career to serving our state bar, for which he fully deserves the many accolades showered on him. In addition to serving the legal profession, Keith has distinguished himself by his service to the River Region through his membership in the Kiwanis Club of Montgomery, the third largest Kiwanis club in the world, for more than 33 years.

Since I became a Kiwanian in 1997, I have been amazed at how Keith found the time he has devoted to the club and its numerous charitable projects. Elected to the club's board of directors in 2006, Keith advanced through the officer ranks to become president in 2011-12. He also served on the Kiwanis Foundation Board from 2010-13, and has been a member of the Alabama National Fair Board since 2011, currently serving as its president. The fair is the club's annual fundraiser,

generating more than \$100,000 for local charities that serve children.

As if he hadn't done enough, when the Garrett Coliseum, site of the fair, was threatened with closing after operating at a loss for several years, Keith served on a small committee to represent the Kiwanis Club in negotiating a management contract between the fair and the Garrett Coliseum Redevelopment Corporation, under which the coliseum has operated profitably since. Whenever the Kiwanis Club needed volunteers for extra work, especially for a legal matter, Keith has always stepped up to the plate. When I paraphrase the adage "the true measure of a man is how he treats those who can do absolutely nothing for him," I think of Keith Norman.

—Ed Livingston, *immediate past president, Kiwanis Club of Montgomery, and Alabama State Bar member*

The staff of the Alabama State Bar assembled last month to prepare a tribute to Keith Norman on his impending retirement (not that we're keeping an official countdown clock, but 90 days remaining as we write this). There was extreme chaos at this meeting, as

everyone attempted to find nice things to say about Keith. One wise staff member reminded us to be careful, as the future could be much worse than the present (that's quite a tall order, Phillip McCallum).

Keeping that warning in mind, the staff decided on several areas in which Keith's absence will be noticeable:

1. Who will serve as the state bar courier in downtown Montgomery? Keith is known for his daily trips to the post office, bank, comptroller's office and other points of interest. His daily routes will be quieter and many clerks and tellers will miss his morning greeting. Let's just hope no one goes postal over it.
2. As Keith goes away, so does his dream of having an assistant who would be so kind as to bring him a morning cup of coffee. Maybe his future is bright in this regard—coffee and a kind assistant.
3. Dirty Santa has left the (state bar) building. Keith is especially fond of coordinating and setting the ground rules for Dirty Santa at the staff Christmas party. Over the years, this has evolved from the "exchange" of simple meaningful gifts to a fight for the most coveted bottle of wine or liquor (meaningful in its own regard).

All joking aside, the staff will miss Keith's leadership and we wish him the best as he embarks on the next chapter of his life. We appreciate the many years of service that he has dedicated to the Alabama State Bar, a place that is much more than just a workplace for so many of us. Best of luck, *Mr. Norman!*

—The staff of the Alabama State Bar



NOTE FROM THE EDITOR

Gregory H. Hawley
ghawley@joneshawley.com

Dear Keith:

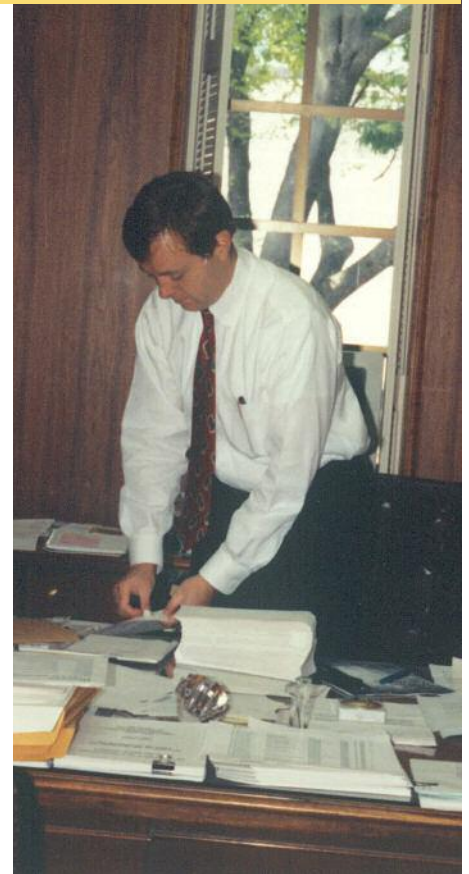
Thank you for your many years of dedicated service to the Alabama State Bar. I am but one of thousands of lawyers who are beneficiaries of your vision, strategy and hard work.

As a young lawyer, when you took over our association, I was proud that the bar's leadership had chosen a peer—a young lawyer with a track record of success and vision. Now that we are a little older, we can look back on your many successes and congratulate you for those, but we should also give a nod in the direction of those who placed their trust in you 23 years ago. Good call, ladies and gentlemen!

Over the years, I have enjoyed crossing paths with you. Like many, I have attended dozens of annual meetings and enjoyed the lectures, dinners, awards ceremonies, entertainment and cocktail hours that you and the Alabama State Bar staff put together.

I have also seen at ABA meetings the respect that you enjoy among the leadership of the ABA, as well as the respect you enjoy among other state and local bar executives at the meetings of the National Association of Bar Executives. You are widely respected among bar executives around the country.

During your tenure, our bar has grown, not only in numbers, but also in ways in which it serves members (the Alabama Lawyer Assistance Program)



and programs in which it helps us to better serve clients (the Practice Management Assistance Program and the Alabama Center for Dispute Resolution).

Your efforts truly epitomize our motto, "Lawyers Render Service." Your service to us allows us to embody that motto, too.

Thank you. ▲

The Editorial Board extends a special thanks to our collaborator, Dave Boyd, who spearheaded our effort to collect reminiscences from Keith's friends and colleagues.



**KEITH, CONGRATULATIONS ON YOUR
WELL-DESERVED RETIREMENT!**

FROM, THE FINKLEA GROUP AND DAVIS DIRECT

*Happy
and safe
travels on
your next
journey...*



MEMORIALS

▲ Thomas E. Drake

▲ Richard Ferrell Ogle

▲ Horace V. O'Neal, Jr.

Thomas E. Drake

Tom Drake was born on December 5, 1930 in a cabin-style home in Falkville, Alabama. His father died from a train accident when Tom was only six years old. Born and raised in Cullman County during the Great Depression, he attended public schools there and, ultimately, was able to secure a scholarship to the University of Tennessee at Chattanooga, where he both wrestled and played football for the Chattanooga Moccasins.



When he became eligible, he was drafted to play football for the Pittsburgh Steelers, but his short career with them ended when he was drafted by the U.S. Army. After his last season playing football at the University of Tennessee at Chattanooga, he was selected to play in both the Senior Bowl and the Blue and Gray game where he met and began a life-long friendship with Paul "Bear" Bryant. In 1952, he received the Templeton Trophy for being the best all-around athlete at the University of Tennessee at Chattanooga.

After being discharged from the United States Army, he went back to the University of Alabama to obtain a master's degree in health and physical education. It was at that time that he became the head wrestling coach and member of Coach Bryant's athletic staff at the University of Alabama, working alongside former Alabama football coach Gene Stallings. It was during this time that he also had an opportunity to get to know Governor George Wallace and became interested in politics.

Governor Wallace encouraged Tom to go to law school. It was at this stage in his life that he had to pick between a life of athletics or politics and law. So, in 1960 he entered law school at the University of Alabama. While still a student there, he successfully campaigned for a seat in the Alabama House of Representatives, defeating 11 opponents without a run-off. He would always chuckle and remark that during the campaign, he wore out three pairs of shoes and only spent \$600. In that elected position, he represented Cullman and parts of Morgan County for 32 years.

During that time, he was able to pave hundreds of roads and bring phone service to most of the rural areas in his district. While a member of the house of representatives, he was a floor leader for several governors and eventually was elected to consecutive terms as the Speaker of the House of Representatives, under then-Governor George Wallace.

While in law school, there were rules preventing students from being actively employed in order to better focus on studies. Coming from humble origins, Tom needed to earn income in order to provide for his family and pay tuition. As a result, he would sometimes wear a mask and be one of the “bad guys,” so that the law school would not discover that he was wrestling part-time.

Pivotal in his success in politics and law was the acclaim and notoriety he achieved as a professional wrestler. Sometimes known as “The Cullman Comet,” he wrestled professionally until 1978 and was eventually inducted into several wrestling halls of fame. He wrestled or partnered with many of the sport’s greatest wrestlers, including but not limited to, Tojo Yamamoto, Len Rossi, Lou Thesz, Bearcat Brown and Gorgeous George. In 2008, he was the recipient of the Senator Hugh Farley Award at the Professional Wrestling Hall of Fame and Museum. Before that he was inducted into the International Wrestlers Hall of Fame in Newton, Iowa.

Upon his graduation from law school, he practiced personal injury law and general civil law for more than 48 years in the north Alabama area. Many of his cousins and uncles were also attorneys, including former Morgan County Circuit Judge Newton B. Powell, Miles T. Powell, Sherman Powell, Sherman Powell, Jr., J.N. Powell and Joe Powell. Drake’s grandfather, Jasper Newton “Butler Powell,” was sought out for assistance for jury selection by both the prosecution and defense in the famous Scottsboro Boys trial.

No memorial to Tom Drake could be complete without mentioning his life-long partner, Christine McCoy Drake. Meeting her at the Globe Restaurant in Cullman, he immediately knew that he wanted her to be his wife. They were married for more than 55 years and were inseparable. Attorneys attending hearings or legal matters in Cullman would commonly visit with Tom and Chris while dining at the All Steak restaurant and enjoying light conversation and orange rolls. In addition to also being a sharp attorney in her own right, Chris was a stateswoman and former member of the Alabama Board of Education. They were side by side until the very end. Chris predeceased him on September 26, 2011 after a long battle with cancer.

Tom was invited to be a contestant on the 1970s game show, “What’s My Line?” As the name suggests, the purpose of the show was for the celebrities to ask indirect questions of a contestant in an attempt to guess their sideline occupation. After going back and forth with questions, the celebrity panel eventually guessed that, in addition to being an attorney, farmer and politician, he was a professional wrestler.

If these occupations weren’t enough, Tom was also a founding member and director of People’s Bank of Alabama,

a director of Attorneys Insurance Mutual of the South and the Cauliflower Alley Club.

Drake was a passionate lifelong “yellow dog” Democrat and served as a delegate at the Democratic National Convention in 1984. Despite his political allegiance, Tom was friend to Democrat and Republican alike.

Tom and Chris were tireless in their vocations and the raising of their family. Tom would sometimes comment that “you can rest when you are dead. Life is a time for living to the fullest.”

Tom Drake resided in Alabama for the entirety of his life after law school and was still going into his law office every day to speak with the friends and other attorneys who would come by to chat. He died on February 2, 2017 at the age of 86. His funeral was held at First Baptist Church of Vinemont, a church he attended regularly for 86 years.

Drake was predeceased by his wife, Chris, and had four children: Mary Drake Pate, Tommy Drake, Whit Drake and Christy Drake Lowe. Notably, Whit and Tommy are also attorneys as are their wives (Katie and Kimberly).

Tom Drake’s life was of a “Forrest Gump” nature. In one calendar year alone, he coached Joe Namath in football, met John F. Kennedy and wrestled Lou Thesz for the world heavy-weight title. Personal friends of Tom’s consisted of a veritable “Who’s Who” of athletes, politicians, statesmen and celebrities, including Hulk Hogan, Jesse Ventura, Walter Mondale, Geraldine Ferraro, Ted Kennedy, Howell Heflin, Gene Stallings, Tarzan White, Ray Perkins, etc. One of the few people from Alabama to have their own Wikipedia page, it can truly be said that Tom lived life to the fullest. His two main goals were “to be somebody” and “help everyone.” With wife Chris at his side, he succeeded, and then some.

—Whit Drake (son), Birmingham

Richard Ferrell Ogle

This remembrance originally appeared in the March 2017 issue of The Birmingham Bar Bulletin.

Richard Ogle departed this earth on October 27, 2016, after a long fight with pulmonary fibrosis. To call his fight courageous would be to trivialize it. His fight was more than that. Richard accepted no sympathy



(Continued from page 199)

and complained to no one. Through his long illness, Richard was far more concerned with those who worried about him than he was with his own health. “Inspirational” is often over-used, but not when referring to Richard Ogle.

Richard was born on March 11, 1942 in Birmingham. He attended Ramsay High School. Richard’s work ethic was forged early and was well known. His first job was at nine years old, shoveling coal into the furnace of an apartment building. He worked construction jobs while in high school while still managing to play on the school’s football and baseball teams. Richard was voted “Friendliest” by his senior class, a superlative that certainly fit him.

Richard later attended the University of Alabama, where he was a member of ODK, and then graduated from the University of Alabama School of Law. His legal career began in 1968, and he practiced law in Birmingham for almost 50 years.

On May 1, 2008, Richard moved his practice to and joined Christian & Small LLP. He had an immediate impact, not only in the firm’s profitability, but in its attitude. Richard was never afraid of a good fight and his attitude was infectious. He had no fear of any case, any client, any fact situation, any opposing counsel or any judge. His bravado was far from false. Richard was a warrior and a genuine advocate for his clients. Everyone knew it. Some lawyers feared him, some loved him, but all of them respected him. The manner and passion with which we practice law at Christian & Small was forever impacted by Richard Ogle.

Richard had a sharp mind and a quick tongue. I am fond of the story about Richard beginning a complicated jury trial before a former federal district judge in Birmingham known for exerting excessive control over the goings-on in his courtroom. Richard was told by the judge he would have only 10 minutes to do his opening statement to the jury. Richard protested loudly that he could not possibly present his opening statement in such a complicated case in only 10 minutes. He pleaded for more time, all to no avail. The trial began with Richard presenting his opening remarks to the jury.

Precisely at the 10-minute mark, and mid-sentence, Richard was interrupted by the judge and unceremoniously told to sit down, as his time was up. The case then proceeded, as others do, with examination of witnesses and the taking of evidence from both sides. At the conclusion of the evidence the judge called a side-bar conference with all of the lawyers. “Mr. Ogle” he said. “You are the plaintiff, how long do you need for closing argument?” “Well, first I’ll need time to finish my opening state-

ment,” Richard zinged back. Richard naturally got the full time for closing that he asked for.

Richard had much to offer his clients and partners and was doing so up until his very final months. He was working almost to his final breath, having been in the office only a few days before his last.

As recently as January 2016, Richard began an arbitration alongside two other Christian & Small partners. Richard was lead counsel and strategist. On the fourth day of the trial, Richard became too ill to continue, an exacerbation of the terminal illness, which led to his hospitalization. Nevertheless, Richard mandated that he be reported to daily and consulted on strategy throughout the remaining eight days of the trial. (It is fitting that Richard’s client fully prevailed in this case which was to become a two-week trial, and Richard’s final one).

Richard’s compulsion to always do the right thing was evident in his mentoring of many younger lawyers, including those in our firm. Many a Christian & Small lawyer has stood in Richard’s doorway seeking advice—me included—and his final case was no exception.

Richard’s desire to mentor young people was further evidenced by his work with his college fraternity, Pi Kappa Alpha, of which he was chapter president at the University of Alabama, and later served as its national president for two years. Richard established and endowed a scholarship for young men of the Gamma Alpha Chapter of PKA who exhibited character, leadership and excellence in academics. He was proud that through his work with PKA he impacted the lives of numerous young men.

Richard long ago ceased actually attending the football games of his beloved Alabama Crimson Tide. Instead, Richard had a habit of driving down to the PKA house in Tuscaloosa a few hours before each Alabama home game. He would see and greet friends, old and new, and then leave exactly one hour before kickoff to be home in front of his television precisely at kickoff. “There is no better seat,” he always told me. Every time he said it, I smiled.

Richard was active in bar-related matters and causes, having served as president of the Birmingham Bar Association in 1990 and of the Young Lawyers’ Section of the association as well. He further found time to serve on the boards of directors for the Alabama Supreme Court’s Advisory Committee on the *Alabama Rules of Evidence*, the American Judicature Society and the University of Alabama Law School Founda-

tion. Richard was recognized numerous times by the prestigious publication *Best Lawyers in America*.

Richard was interested in the betterment of our greater Birmingham community. He helped found the Birmingham Tip-Off Club and served as its first president. He was an attendee of Mountain Brook Community Church, and he served as a board member of the YMCA.

Richard was 74 years old when he left us, and he will be sorely missed—by his family, his numerous friends, his trusting clients and our law firm.

Richard is survived by his wife, Rhonda Ogle; his two daughters, Brook Ogle and Jessica Ogle Tate; and, of course, by everyone in his Christian & Small family.

—Daniel D. Sparks, partner, Christian & Small

Horace V. O’Neal, Jr.

Horace V. O’Neal, Jr. passed away on January 19, 2017 at the age of 64. Horace was a life-long resident of Jefferson and Shelby counties. He attended Woodlawn High School, the University of Montevallo, the University of Alabama at Birmingham and the Birmingham School of Law.

Horace was a practicing attorney in Birmingham for more than 30 years, a member of the Alabama State Bar, the Birmingham Bar Association and the Shelby County Bar Association. He was instrumental in the formation of the mentoring program for the Birmingham Bar Association.



Horace possessed a disposition and demeanor that made him an excellent attorney and many lawyers and judges called him for guidance on matters of domestic relations. Horace was a scholar in the law, a mechanic, an electrician, a carpenter, motorcycle enthusiast and a guitar player—truly a Renaissance man. There was really nothing Horace could not do. Those who knew him will remember him as a caring, compassionate man, devoted to those he worked with and a zealous advocate to those he represented. Horace will be missed by all who were fortunate enough to know him.

Cooper, Hon. Leo King, Jr.

Birmingham
Admitted: 1977
Died: January 6, 2017

Dixon, Jack Charles, Jr.

Montgomery
Admitted: 1948
Died: February 1, 2017

Graham, Robert William

Fultondale
Admitted: 1983
Died: January 7, 2017

Loftin, Samuel Eugene, Jr.

Phenix City
Admitted: 1976
Died: January 18, 2017

Madison, Donald Gordon

Montgomery
Admitted: 1984
Died: January 1, 2017

McNeil, Wanda Gayle Stubblefield

Nashville
Admitted: 1992
Died: May 26, 2016

Obradovic-Parry, Virginia Michelle

Birmingham
Admitted: 2000
Died: February 20, 2017

Odom, Lewis Guy, Jr.

Mobile
Admitted: 1949
Died: January 16, 2017

Rubin, Robert Barton

Birmingham
Admitted: 1965
Died: January 12, 2017

Smyth, Justice Dink, III

Tuscaloosa
Admitted: 1980
Died: February 10, 2017

Snodgrass, Hon. John David

Scottsboro
Admitted: 1962
Died: February 3, 2017

Stracener, Bueran Dale

Rainbow City
Admitted: 2001
Died: December 14, 2016

Wilder, John William

Birmingham
Admitted: 1961
Died: February 15, 2017



LEGISLATIVE WRAP-UP

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

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



Issues Facing Our Judiciary

Over the past few years, there has been an increasing focus on trying to address the issues that face our judiciary. As lawyers, we have a unique interest in helping to ensure that the judiciary runs as well as possible. The Alabama State Bar has done a very good job of educating both its membership and policy-makers of how the judicial branch operates and what its funding and structural needs are. That being said, the answers are not simple ones. As we all know, the condition of our budgets is such that significant increases in state funding are not likely. Similarly, we know that given how high, and varied, our court costs are that further increases in that area are not advisable. This means that we must look for more complex answers that focus on making better use of the resources we already have.

Judicial Reallocation

One of the more complicated issues facing our judiciary has been an unequal allocation of resources. The distribution of judgeships has not kept pace with the changes in demographics and population distribution in our state. Given the practical problems with creating new judgeships the creation of a way to move judgeships gained appeal. While this issue has been studied and bills introduced for several years, in 2017, consensus on a specific approach was reached.

Act 2017-42, sponsored by Senators Arthur Orr and Cam Ward and carried in the house by Representatives Jim Hill and Chris England, creates the Judicial Resources Allocation Commission. The commission is comprised of the chief justice, the governor's legal advisor, the attorney general, three circuit judges, three district judges and three lawyers. The composition ensures that both urban and rural judges serve. The commission is charged with annually ranking the circuits and districts to determine the need to increase or decrease the number of judges and rank each court accordingly and reporting the same to the governor and legislature.

In the event that a vacancy occurs, the commission can cause that judgeship to be moved prior to the vacancy being filled. A vacancy is defined as an open position caused by death, retirement, resignation or removal from office. The commission also has the power to move a judgment if the incumbent judge will be unable to run for reelection due to age. The factors to be considered in ranking the courts are to include: the Judicial Weighted Caseload Study, population, judicial duties in the circuit or district (this includes the existence of specialty courts) and uniformity in the calculation of caseloads.

The act also builds in protections to avoid the possibility of overcorrection. No judgeship can be moved if the result would be to move the circuit or district into the top 10 in need. Additionally, no more than one judgeship can be moved from any circuit or district in any two-year period.

Article VI Study Committee

In 1973, Article VI of the Alabama Constitution, relating to the judiciary, was revised in an effort led by then-Chief Justice Howell Heflin. That revision brought us our Unified Judicial System and was heralded as one of the most significant modernizations of a state judicial system in the country. That revision has served the state well for more than 40 years, but it may be time to take a look at modernizing it again.

Last year, we ratified changes to how retirement works for our judges. This year, there have been bills filed in the legislature to make significant changes to how our judiciary operates. These range from the size of juries, the appointment of the AOC director, to the operation of the Judicial Inquiry Commission and Court of the Judiciary. While all of these proposals can be debated on their own merits, it may make sense to take a comprehensive look at all of Article VI.

In the past five years, we have seen tremendous success in the realm of looking at complete article re-writes. The Constitutional Revision Commission created in 2011 brought forward proposals that resulted in the ratification of four complete article re-writes and two other significant proposals; however, review of Article VI was specifically excluded.

This spring, the Law Institute formed a committee to study and consider revisions to Article VI. This group is comprised

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of a cross-section of judges, lawyers and legislators: Acting Chief Justice Lyn Stuart, Senator Cam Ward, Representative Mike Jones, Senator Arthur Orr, Senator Rodger Smitherman, Representative Jim Hill, Representative Chris England, Judge Scott Donaldson, Judge Sarah Stewart, Judge David Kimberley, Judge Pam Higgins, Judge Bill Hightower, Judge Jim Fuhrmeister, Judge Ricky McKinney, Greg Butrus, Austin Huffaker, Bruce McKee and Steve Nicholas.

I would expect this commission to meet over the course of the next year or so and present any recommendations to the legislature for its consideration upon completion. ▲

Keith Norman

It seems hard to believe that we have reached the point of bidding farewell to the state bar's long-serving director, Keith Norman. Keith actually got his start with the Law Institute, serving as assistant director in 1981-1982 and he has been a tremendous supporter ever since. Under Keith's leadership, the bar has grown tremendously, both in size and scope of service. He has been a steady hand at the helm through times that have seen tremendous change in our profession. He has built the state bar into far more than a regulatory body and into a resource of which we should all be proud. On a personal note, Keith is a tremendous friend and resource and I am grateful to him for all of his help to me. We all wish him only the best in all his future endeavors. ▲





IMPORTANT NOTICES

- ▲ **Local Bar Award of Achievement**
- ▲ **Notice from the Clerk of the Supreme Court of Alabama**

Local Bar Award of Achievement

Cole Portis, Alabama State Bar president, and the ASB Local Bar Task Force want you to apply this year! This award recognizes local bars for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's 2017 Annual Meeting at the Grand Hotel Marriott Resort in Point Clear.

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

The following criteria are used to judge the applications:

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

To be considered for this award, local bar associations must complete and submit an application by Friday, June 2, 2017. Applications may be downloaded from www.alabar.org or obtained by contacting Mary Frances Garner at (334) 269-1515 or maryfrances.garner@alabar.org.

Notice from the Clerk of the Supreme Court of Alabama

Counsel practicing law in the state of Alabama should be particularly mindful of a recent amendment to the *Alabama Rules of Appellate Procedure*, effective January 1, 2017.

Rule 3(c) has been amended to require parties to an appeal to list with specificity all appellants and/or appellees in the notice of appeal, and appellants may no longer designate multiple, unnamed parties by the use of "et al." or "etc." In cases with multiple parties, the appellant or cross-appellant may attach a separate sheet of paper listing the parties and their designations with specificity if the parties are too numerous to fit into the spaces allotted for the same on the notice of appeal form. Notice of the amendment to this rule and its effective date appeared in the December *Addendum* and the January *Alabama Lawyer*.

Counsel are also advised to periodically check for the latest amendments to all *Rules of Court* (civil, criminal, appellate, etc.), which are listed on the Alabama Appellate Courts website (<http://judicial.alabama.gov/rules/Rules.cfm>). ▲



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205.638.6241 chris.theriot@childrenscl.org



THE ALABAMA LAWYER

ARTICLE SUBMISSION

REQUIREMENTS

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

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

All articles to be considered for publication must be submitted to the editor via email (ghawley@joneshawley.com) in Word format. A typical article is 13 to 18 letter-size pages in length, double-spaced and utilizing endnotes and not footnotes.

A brief biographical sketch and a recent color photograph (at least 300 dpi) of the author must be submitted with the article.

Beyond the Veterans' Benefit Known as "Aid and Attendance"

By R.F. "Ben" Stewart, II and Douglas I. Friedman

According to the Department of Veterans' Affairs,

more than 413,000 veterans live in Alabama. Of these, more than 317,000 are wartime veterans. In the November 2013, *Alabama Lawyer*, William C. Nolan wrote an article about the benefit known as "aid and attendance." The article described the tax-free benefit that assists qualifying wartime veterans and their surviving spouses with unreimbursed medical expenses, such as in-home care or assisted facility expenses. This article reviews developments in the area of "aid and attendance" and will highlight a handful of the many other VA benefits that may be available to veterans and their families.

Improved Pension-Aid and Attendance Update

The 2013 *Alabama Lawyer* article noted that federal legislation, pending at that time, sought to impose limitations on eligibility, including a look-back on all transfers made by a veteran or his/her spouse within the three-year period immediately preceding filing of a claim.

Although the look-back bill failed to pass Congress, the Department of Veterans' Affairs has decided to implement the rules through its rule-making authority. On January 23, 2015, the Department issued proposed regulations to 38 CFR 5.276. The period for public comments ended March 24, 2015. More than 900 comments were made and published on www.regulations.gov. About 50 percent of the comments opposed the new rule. Many groups, including the National Academy of Elder Law Attorneys, question whether the VA has the authority on its own to implement the look-back period without legislation.

Veterans' Disability Compensation Benefits

Overview

The Department of Veterans' Affairs provides disability benefits for veterans who suffer an injury or disease while serving in the military. The requirements are threefold: 1) an injury or event in the service; 2) a current medical condition; and 3) a medical nexus between the two. Note that VA disability compensation differs from the VA Improved Pension "Aid and Attendance" benefit which is needs-based and does not have to be related to a service-connected injury while in military service. While the three requirements are simply stated, the rules are often arcane and complex—as well as counter-intuitive.

www.alabar.org | THE ALABAMA LAWYER 215

The Alabama Law Foundation Announces New Fellows

At the start of every year, the Alabama Law Foundation selects Alabama State Bar members who have shown outstanding dedication to their profession and their community by inviting them to become Fellows. The annual Fellows banquet is held in their honor. During the event, those Fellows elevated to Life Fellows status are also recognized.

The Fellows program was established in 1995 to honor state bar members for service and commitment. Since no more than one percent of bar members are invited into fellowship, the selection committee chooses new members from an exceptional group of

lawyers. President of the Board of Trustees of the Alabama Law Foundation Joe Fawal explains, “The Fellows of the Alabama Law Foundation are selected from the ranks of the Alabama State Bar and represent our brightest and best. The fact that they are selected is in and of itself an honor, but the contribution that they make in defense of the poor in civil matters in Alabama is a much greater honor.” Fellows are given the opportunity as leaders in the legal community to provide financial and personal support for the Alabama Law Foundation, the charitable arm of the Alabama State Bar. ▲

Below are the Fellows accepted into membership for 2016:

Cassandra W. Adams, Hoover, director of Community Mediation Center for Samford University, Cumberland School of Law

John E. Burbach, Huntsville, partner, Sirote & Permutt

Michael G. Graffeo, Birmingham, circuit judge, 10th Judicial Circuit

Shelbonnie Coleman Hall, Mobile, City of Mobile Municipal Court Judge

R. Austin Huffaker, Jr., Montgomery, shareholder, Rushton Stakely Johnston & Garrett

George R. Irvine, III, Daphne, partner, Stone Granade & Crosby

Lynn W. Jinks, III, Union Springs, partner, Jinks, Crow & Dickinson

G. David Johnston, Dothan, partner, Johnston, Hinesley, Flowers, Clenney & Turner

William H. King, III, Birmingham, associate, the Southeastern Conference

Forrest S. Latta, Mobile, partner, Burr & Forman

Steven T. Marshall, Alabama Attorney General

Charles A. McCallum, III, Vestavia, partner, McCallum Hoaglund Cook & Irby

Apsilah O. Millsaps, Tuscaloosa, partner, Owens & Millsaps

Phillip D. Mitchell, II, Decatur, partner, Harris, Caddell & Shanks

James L. Noles, Jr., Birmingham, partner, Balch & Bingham

Jeanne Dowdle Rasco, Huntsville, assistant city attorney, City of Huntsville

Allison O. Skinner, Birmingham, SVP, senior corporate counsel, Cadence Bank

Elizabeth C. Smithart, Union Springs, sole practitioner

Will Hill Tankersley, Jr., Birmingham, partner, Balch & Bingham

Albert J. Trousdale, II, Florence, partner, Trousdale Ryan

C. Gibson Vance, Montgomery, partner, Beasley Allen Crow Methvin Portis & Miles

Lawrence B. Voit, Mobile, partner, Silver, Voit & Thompson

James N. Walter, Jr., Montgomery, shareholder, Capell & Howard



Collateral Legal Issues And the Military Client: A SHORT PRIMER

By Barr D. Younker, Jr.

Introduction

A defendant's right to "effective assistance of counsel" guaranteed under the Sixth Amendment to the U.S. Constitution has historically been interpreted by the U.S. Supreme Court to encompass only those matters directly related to a criminal prosecution at hand. However, with recent decisions, the U.S. Supreme Court has extended the "reach" of the right to include the competency of advice related to a limitless scope of matters "collateral" to the adjudication of guilt.

Alabama has a significant number of military members stationed within its borders. From time to time, these service men and women will have a need to engage the services of an Alabama attorney. As there are many areas where military collateral issues might arise out of the Alabama court process, it is imperative that Alabama attorneys have a working knowledge of military punishment and discharge processes in order that they may stay clear of ineffective assistance of counsel problems. This paper explains the relationship of those military processes and civilian legal processes.

Military Bases In Alabama

Several counties in Alabama are home to military installations and units. The Air Force has Maxwell-Gunter AFB in Montgomery and the Army has Anniston Army Depot in Calhoun, Redstone Arsenal in Madison and Fort Rucker in Dale. The total military population in the state numbers about 12,000 active duty members, with another 22,000 members in the Reserve and National Guard.¹ In addition, Ft. Benning, Georgia, which gained approximately 4,800 military members in the past few years,² borders Alabama, with many of its assigned members living in Lee, Russell and Barbour counties in Alabama. Also,

both Maxwell-Gunter AFB and Ft. Benning conduct education and training for thousands of transient students each year, which dramatically increases the numbers of military members in Alabama at certain times.

With so many military personnel living in the state, Alabama attorneys practicing near military installations can expect to see the occasional military client who needs help with a “criminal law matter.” While the issues that the Alabama attorney will see from these clients will be handled much the same as they would be for civilian clients, it is important to know that there are “collateral” issues and effects that may be in play for the military members involved in civilian criminal actions.

Why should the Alabama attorney be concerned with collateral military issues? The answer is simple. In 2010, the U.S. Supreme Court expanded the reach of ineffective assistance of counsel claims with a decision in *Padilla v. Kentucky*.³ In that case, a lawful permanent resident pled guilty to drug distribution charges in Kentucky. While counsel’s performance with regard to the adjudication of guilt phase of the case or with regard to advice to his client regarding the direct consequence of a guilty plea were not faulted, the Supreme Court found that counsel’s failure to properly inform the defendant of the “collateral” consequences of a conviction qualified as ineffective assistance of counsel. In particular, the Court found that counsel should have properly informed his client that a conviction carried with it a risk of deportation by the Immigration and Naturalization Service.

Obviously, *Padilla* did not involve a military member. However, it did involve someone who faced an adverse “collateral” action because of the legal path chosen in a civilian court. Will failure to advise a military client of the impact of a guilty plea or other legal position on that person’s military status be the next area to be encompassed under the realm of ineffective assistance of counsel? This article will examine a few of the more common collateral issues that may arise for the military client when he or she is involved in civilian legal matters.

Adverse Military Actions In General

A military member’s lowest-level commander is, by law and regulation, generally the focal point for all adverse actions taken against a service member. Military members will always have more than one commander, but it is the commander of that lowest level who nearly always starts an adverse action.⁴ That person is always a commissioned officer who generally holds the grade of captain, major or lieutenant colonel and who is, in nearly all cases, the “commander” of a formally-named military unit (e.g., B Company, 42nd Services Squadron).

It is fairly common knowledge that military members are governed by the Uniform Code of Military Justice (UCMJ).⁵ This is the criminal code for military members. Military members committing military-unique crimes (e.g. insubordination, absence

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without leave) or other crimes covered by the UCMJ can generally expect to be prosecuted under the UCMJ in a court-martial (trial) or under Article 15 of the UCMJ (the so-called “nonjudicial punishment”).⁶ A court-martial can result in a punitive discharge of the member from the military. There are two types of punitive discharges for enlisted members—a bad conduct discharge or the more serious dishonorable discharge. Officers are punitively discharged with what is called a dismissal. The available punishments for members found guilty by nonjudicial punishment do not include discharge from the military.

The range of enumerated crimes under the UCMJ is very broad,

Military members allegedly committing offenses off-post (those covered by the UCMJ and civilian criminal codes) can be prosecuted by either civilian authorities or the military.

ranging from malingering to murder. In addition, the UCMJ has two “catch-all” crimes that pick up any misconduct not covered by any of

the other enumerated crimes. One applies to an officer who commits conduct “unbecoming an officer” and the other is for enlisted members whose conduct is “prejudicial to good order and discipline.” The standard applied to finding a person guilty of an offense under the UCMJ is beyond a reasonable doubt.

Military members allegedly committing offenses off-post (those covered by the UCMJ and civilian criminal codes) can be prosecuted by either civilian authorities or the military.⁸ Conviction in a military court can lead to punishments that include fines, pay forfeitures, imprisonment, the aforementioned punitive discharge or even the death penalty. Potential sentences for a military member convicted in



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civilian court are, of course, the same as they would be for a civilian defendant in that court.

Military members can also be “fired” by the respective branch of service. That process is referred to as the administrative discharge. Administrative discharge of the service member can be for offenses committed under the UCMJ or for criminal offenses committed in the civilian community. The discharge can also be for such reasons as financial irresponsibility, failure to progress in training and many other causes. The reasons for the administrative discharge may be due to the fault of the member or may be for reasons beyond his or her control (e.g. reductions in the size of the military service, medical condition).⁹

There are due process considerations in the administrative discharge process. The strength of those considerations generally depends on the service member’s time in service at the time the proposed discharge is initiated and of the characterization of the discharge sought by the commander. A preponderance of the evidence standard is used when deciding if an administrative discharge is appropriate and when deciding on the characterization of that discharge.

Short of an administrative discharge, there are other adverse actions that a service member can face from his/her commander. In response to misconduct or substandard performance, a member can face, among other actions, the inclusion of derogatory remarks on a performance report, demotion in grade, postponement or cancellation of a promotion, denial of a reenlistment or a cancellation of transfer orders.

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The Common Areas Where Collateral Concerns May Arise

I. Disreputable Involvement With Civilian Authorities

Unfortunately, military members, on occasion, are accused of crimes or misdemeanors in civilian jurisdictions. Local law enforcement authorities, if they determine that the accused is a military member, will generally notify the nearest military installation of the arrest. At that point, the member’s commander will be

found and notified. Military authorities will then, generally, try to “maximize military jurisdiction” by convincing the local prosecutor to waive his/her jurisdictional authority. They will do so with the promise that the military will utilize the UCMJ to prosecute the member for the same or similar offense. However, a civilian prosecutor often will not agree to drop a prosecution if requested. This occurs in cases where local publicity surrounding the crime is high or where the victim or victim’s family disagrees with the military taking over the prosecution.¹⁰

It is important to understand that military members can be discharged for any “disreputable involvement with civilian authorities.”¹¹ That is, the underlying civilian offense can be used to discharge the member, even if the charges are dropped, an acquittal is obtained or pre-trial diversion is gained. Again, administrative discharge is a “firing,” not a conviction; the standard of proof is a preponderance of the evidence.

Attorneys representing someone in such civilian cases, where the defendant’s commander is aware or will reasonably become aware of the arrest of the client, may best be served by having the client advise the commander of the arrest as soon as possible (rather than waiting for the commander to be notified by law enforcement authorities) and asking the commander to give him or her the “benefit of the doubt” and withhold any adverse action until the case plays out in civilian court. When this is done, the military member may need to tell the commander that he has been “prohibited” by his civilian lawyer from giving details of the case. Generally,

a commander in this situation will withhold commencement of an adverse action, assuming the member has been released from custody and has missed no work.

The problem is more serious when the member is in jail for a period of time that causes him or her to miss assigned duties. When that happens, the commander will tend to initiate some adverse action against the member regardless of the pleas of the service member.

II. Civilian Conviction

As you would expect, any misdemeanor or felony conviction in a civilian court can result in an administrative discharge of a service member. If a felony is involved, a commander generally must initiate a discharge of the member or seek a waiver from a superior commander. Also, should a member receive a sentence from a civilian court that exceeds six months of confinement, a commander must generally start a discharge action against the member. There is not much the civilian practitioner can do in these situations. However, making sure the client knows of the possible adverse consequences to his or her military career is essential.

III. Financial Irresponsibility

A military client who is being pursued for having written bad checks in a civilian community can face administrative discharge, even if no civilian conviction arises out of the conduct. Writing bad checks can also qualify as military criminal conduct under some circumstances. Criminal conduct prohibited by the UCMJ may be evident if the individual procured or made payment by check with intent to defraud, “dishonorably”

failed to maintain sufficient funds to cover checks or made or delivered a check knowing that sufficient funds did not exist.¹²

Likewise, failure to pay one’s “just debts” can lead to discharge. For instance, a military member being evicted from his home for not paying rent could qualify as financial irresponsibility sufficient to lead to an adverse discharge action. Likewise, failure to make adequate payments on a credit card debt could get a member into trouble should his commander become aware of such conduct.


Today, a service person who pursues bankruptcy, as is his or her statutory right, will not face a discharge action because of the filing of the bankruptcy action. The services consider bankruptcy to be a responsible way of dealing with debt. However, be aware that the underlying financial irresponsibility may again be basis of a discharge action (in the case of bad checks, for instance).

IV. Failure to Support “Dependents”

A military member who fails to support his or her immediate family members may be subject to administrative discharge. As such, during the pendency of any divorce or other family law case, an attorney will want to make sure his military client is providing “adequate” support to his or her dependents. What constitutes adequate support, especially before a divorce has been finalized, can be hard to determine. Commanders will generally not dictate that a military member provide a certain amount of support during the pendency of a divorce (unless there is a *pendente lite* order), but it is important to understand at what

point a military commander will consider the level of support to be inadequate. Again, the member may best be served by informing his or her commander at an early stage of the existence of the family law case.

Military members receive some pay allowances that are based on marital status. If a member is married, he may be receiving some allowances at the so-called “with dependent rate” versus the lower, so-called “without dependent rate.” In the case where there is no court-ordered amount of support and it is found that the member is not providing at least the difference between the higher rate and the lower rate, the commander may cause the member’s allowances to be reduced to the lower rate (the “without dependent rate”).



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After a family law action is completed and there is a court order directing the military member to provide a certain level of support, a commander will nearly always default to the court-ordered amount in deciding if a member is supporting his or her dependents adequately.

V. Domestic Violence

When a military member is accused of domestic violence, special issues arise. First, a military member found to have committed a domestic violence offense in a civilian community can be administratively discharged from the service for the underlying offense, regardless of the outcome in the civilian community. Likewise, the 1996 Domestic Violence Amendment to the Gun Control Act (referred to as the Lautenberg Amendment)¹ applies even

to those in the military services. The Act makes it a federal offense for anyone convicted of a misdemeanor crime of domestic violence to ship, transport, possess or receive firearms or ammunition.

Obviously, not being able to carry a firearm can be an issue for a military member. While that fact alone will not result in initiation of an administrative discharge, the military member can suffer career effects. Not only must the service member immediately dispose of all firearms and ammunition, he or she also will become ineligible for firearms training, and if the person's career field requires the carry of weapons, the member may be forced to retrain to a new field. Having to retrain to a new career field, depending on when that occurs in a service person's career, can cause promotion

difficulties which could lead to an administrative discharge.

Convictions that are expunged or set aside, pardoned or those in which the military administers non-judicial punishment will not qualify as a "conviction" under the Act. Deferred prosecutions or similar alternate dispositions in civilian courts also do not qualify as a "conviction." However, it also does not matter if the charges are reduced or negotiated to a crime not entitled "domestic violence" if the factual basis is domestic violence. In those cases, the military commander will generally consider the Act to have been invoked and will take action, accordingly.

VI. Line of Duty Determinations

At times, a military client may have been involved in misconduct

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where he or she suffered a physical injury. Should the military become aware of the injury, it will likely initiate a Line of Duty (LOD) determination. An LOD is an administrative tool for determining a member's duty status at the time an injury, illness, disability or death occurs. On the basis of the LOD determination, the member may be exposed to liabilities.

An LOD where the finding is the injury was caused by the service member's own misconduct may affect, among other things, a service member's future retirement pay or veteran's benefits.

Conclusion

The above list of areas of concern is not exhaustive. However, it does represent those more commonly found areas where a civilian legal matter could impact a service member's military status. It is important for the civilian practitioner to be aware of these collateral issues. The practitioner may not be able to deflect any of the adverse actions, and the practitioner's efforts may not make a difference in the ultimate actions taken by the military service. However, failure to ensure the military member is aware of these collateral issues before proceeding on a particular legal path in a civilian forum could be the next area of concern of the U.S. Supreme Court regarding claims of ineffective assistance of counsel. ▲

Endnotes

1. U.S. Census Bureau Data; retrieved from <http://www.census.gov/compendia/statab/2012/tables/12s0509.pdf>.
2. Source: http://assets.bizjournals.com/cms_media/birmingham/pdf/brac.pdf.
3. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010).

However, failure to ensure the military member is aware of these collateral issues could be the next area of concern of the U.S. Supreme Court regarding claims of ineffective assistance of counsel.

4. A higher commander or civilian federal official is the decision authority for the discharge. The level within the service where the decision is made is determined by the grade of the person against whom the discharge action is initiated and the characterization of the discharge sought.
5. It applies to active-duty members, reserve members on active-duty orders or National Guard members in federal status. Found at 64 Stat. 109, 10 U.S.C. Chapter 47, it is the foundation of military law in the United States. It was established by the United States Congress in accordance with the authority given by the United States Constitution in Article I, Section 8.
6. The member must agree to proceedings under the UCMJ. The person's commander acts as judge and jury, but the limitations on punishment are lower than for a court-martial.
7. Personal jurisdiction over the military member pursuant to the UCMJ is based on military status, not on the location of the alleged offense.
8. The "characterization" of a discharge shows what the uniformed service sees as the quality of the member's performance during the current enlistment (if an enlisted member) or since the member's commissioning (if an officer). Characterization categories are honorable, general (under honorable conditions) and under other than honorable conditions (the poorest characterization of service). A person with an under-other-than-honorable-conditions-discharge characterization may be found ineligible for veterans and other benefits.
9. It is in the author's opinion that, generally, a military member who is prosecuted under the UCMJ for an offense committed in the civilian community will suffer a more severe punishment than that rendered by a civilian judge.

10. A false or unwarranted arrest generally will not rise to the level of a disreputable involvement with civilian authorities.
11. UCMJ arts. 123a, 134.
12. 18 U.S.C. § 922.

Barr D. Younker, Jr.



Barr Younker has been a professor in the Department of Justice and Public Safety at Auburn University at Montgomery since 2008. He is a retired Air Force Colonel

who has also been a licensed attorney for more than 25 years. He holds a B.S. degree from the U.S. Air Force Academy, an M.S. degree from Troy University, an M.S.S. degree from Air University and a J.D. degree from Oklahoma City University. As his teaching demands permit, he practices criminal and family law in Montgomery.

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How to Write So Judges Will Like You

By Aaron G. McLeod

I know what you're thinking.

Another article on legal writing? Yawn. But before you turn the page, stay your hand. This isn't about what the author thinks you should do. This article will explain what you are doing right—and wrong—according to the bench. This is about what judges think.

Your author interviewed over a dozen judges, state and federal, trial and appellate, to learn their thoughts on legal writing and hear the advice they would offer to the lawyers who write to them. It was a fascinating exercise, and the results were telling: there was overwhelming agreement on nearly



every issue. Space permits only a brief outline of those conversations, though, so we will begin by setting the frame with the single most important thing that judges said lawyers should do—and the worst mistake lawyers can make.

Contemplate the plight of your judicial reader. Life on the other side of the gavel is busy, filled with hearings and trials and conferences and 500 lawyers who all think their motion is an emergency that deserves immediate and undivided attention. The court wants to do the right thing, but only has so much time for any one case. So, when the day comes that the judge picks up your brief, what do you think he wants above all else to see?

More than half the judges said exactly
the same thing about your brief:
quickly get to the point.



Judges don't know your case. They probably don't remember its facts or issues since the last time it was before them, and if they do, they still won't know it as well as you. When they pick up your motion for summary judgment or response in opposition, they don't want to spend precious moments reading legalese, unconnected facts and page-long standards of review (as if they've forgotten the standard for granting summary judgment). What they want to know is what relief you are asking for and why they should grant it. Narrow the focus of your brief, the judges say. Lead with your best argument. Tell the court what you want and why you deserve it. Tell them on the first page.

Believe it or not, there are still lawyers among us who begin a motion with, "Comes now [Full Name of Party] (hereinafter "Short Name of Party"), by and through undersigned counsel of record and files this its Motion for Whatever, and in support whereof respectfully submits unto the Court the following"

If that's you, stop it. Don't do it anymore. You've just wasted the judge's time because that kind of beginning tells him practically none of what he needs to know. The title of your motion is already on the page, and he probably expects that your client hired you to write it. Why don't you use that critical first sentence to tell the court why you should get what you're asking for? Consider how much better that opening could be: "Defendant is not due summary judgment for two reasons: (1) there is contradictory testimony as to when plaintiff first noticed damages and (2) defendant waived the laches defense by not pleading it in the answer."

In one sentence you have now told the court exactly what this document is going to do and why you win. When the court starts reading the facts that follow, it will have some context and a sense of direction. That kind of opening—the kind that gets to the point—is more effective because it is more persuasive. Immediately the court knows where it is and where it is going in your brief. You've used your words wisely, and have therefore done something to endear you to the judicial heart. You've made your brief shorter.

If brevity is so beautiful, you might think that excessive length is the cardinal sin. It's not. The nearly-unanimous opinion of the judges was that the most egregious error they see is dishonesty. Fudging the truth about what the law is, or what the facts are, will ruin your chances faster than anything else. This should hardly need saying in our learned profession, but the judges said it anyway. Tell the truth! The judges understand there is room for advocacy in describing what a case says or doesn't say. That's your job. Don't twist the holding of a case to suit your needs, though. And don't even think about misrepresenting the facts in the record. Judges hate that. They will doubt everything else you write if they catch you fibbing. Winning is never important enough to break this rule. After all, it's your reputation—and maybe your client's case—on the line.

The runner-up for this position, though, is taking too long to say something. As one judge put it, make



their job “as easy as possible.” Don’t chase every rabbit. Focus your fire. Concede what you can. Pick the most important issues and let the rest go.

Lawyers have a hard time with this. We seem to grow more paranoid with age, more afraid that by leaving something out we will forego a winning argument or worse, fall prey on appeal to that dread beast “Waiver,” but it must be done. Selecting what matters and what doesn’t is the judgment lawyers are paid for. Aim to say more in less time on fewer pages than your adversary. Words are, after all, like currency. The more there are in circulation, the less each is worth.

How to achieve this goal of making every word bear its freight, every phrase tell your story? Being honest is easy enough (or should be); paring down your brief to its pure essentials without losing its flavor—that needs some explaining. The first point has already been made: don’t waste precious time and space with an opening paragraph of drivel that tells the judge nothing more than what was in the title. Launch your argument with force instead of muttering in legalese. If the judge has to turn the page to see why you are due relief, those critical first few seconds he spends reading your work are for nothing.

That principle of economy applies equally to the rest of the brief, and you can enforce it by using plain English. Use short words instead of long ones, simple construction of sentences instead of complex, active voice in your verbs in place of passive. Write for the ear. Let your writing speak as you would out loud instead of sounding like the voice of a 19th-century, second-rate orator.

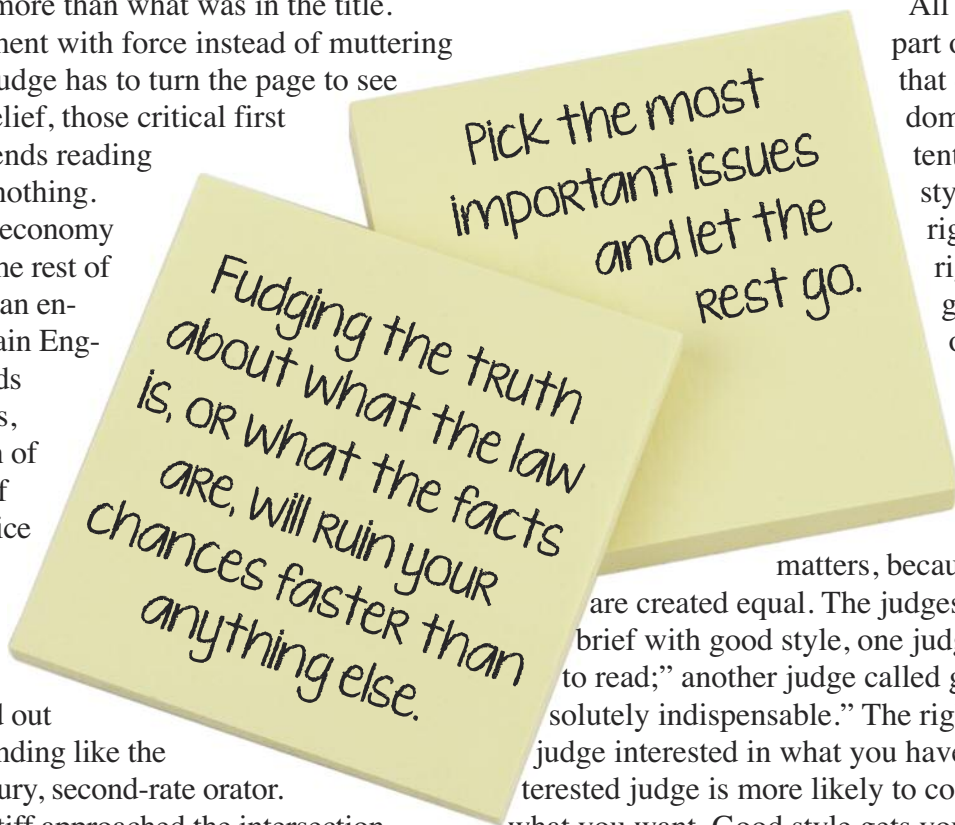
Rather than, “Plaintiff approached the intersection at an excessive rate of speed and as a result was unable to avoid collision with the vehicle being driven by Defendant,” try something like, “Plaintiff sped into the intersection and rammed Defendant’s car.” The second sounds more natural (and it’s more fun to read).

Eliminating needless facts from your brief is another way to keep the judge’s focus. Stop over-particularizing your statement of facts by larding it with irrelevant dates and names and filings. You can hardly tell a good story if you overwhelm the reader with the full dates of every event you recount. Do you really need to tell the judge that plaintiff arrived somewhere “on June 14, 2009” when the precise date of that event is meaningless to your argument? Do you really need to list the full names of every person who attended a party if their identities have no bearing on your motion? Filling the brief with superfluous detail slows the judge down, distracts him and leaves him wondering what he’s supposed to do with all this data. Cut your fact-telling down to what is essential to your argument and enough to tell the story of your case. A good cook doesn’t reach for every spice in the cupboard to flavor a dish; he uses what it needs and leaves the rest alone. You should do likewise.

All these points are part of a larger issue that demands but seldom receives close attention: style. What is style? Simple—the right words in the right places. Language, someone once said, is not a conveyor belt, trundling along a cargo of words. How you say what you say

matters, because not all words are created equal. The judges know this. A brief with good style, one judge said, “is a joy to read;” another judge called good style “absolutely indispensable.” The right style keeps the judge interested in what you have to say, and an interested judge is more likely to consider giving you what you want. Good style gets your brief “more attention” from the court and, as one judge candidly admitted, can help you win.

So what stylistic virtue ranks highest in legal writing, which is almost always persuasive writing? According to the judges, it’s clarity—clarity above all. As Strunk

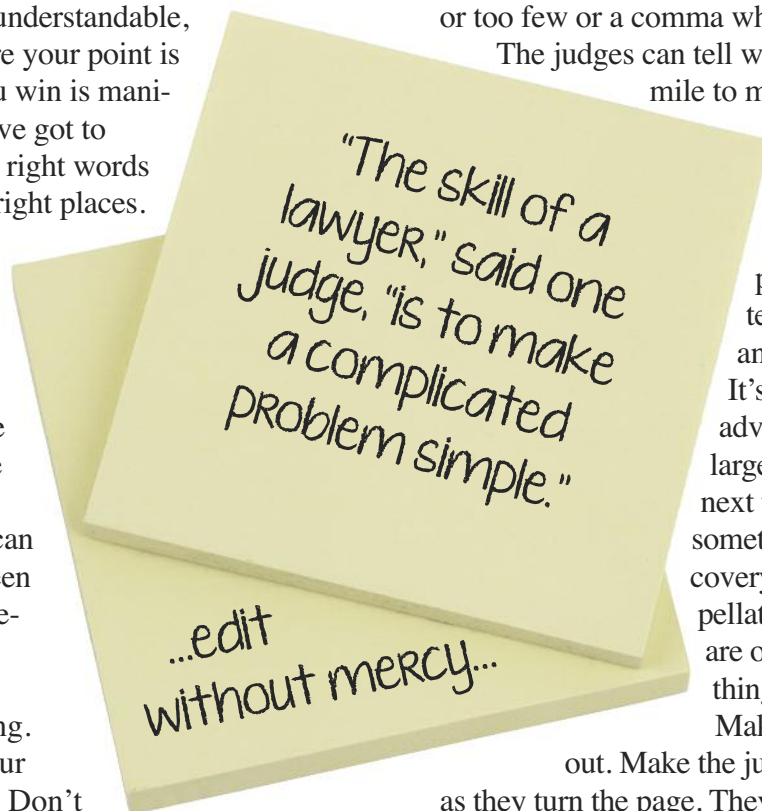




and White warned us, when you have said something, make sure you have said it. “The chances of your having said it are only fair.”¹ It is a humbling and highly educational experience to pick up something you’ve written recently and read the words that actually made it onto the page as against the way things sounded in your head. You may think you’ve communicated your point and connected all the dots in a way that makes your brief immediately understandable, but if you want to be sure your point is clear, that the reason you win is manifest on every page, you’ve got to spend time choosing the right words and putting them in the right places.

Concrete nouns, active and colorful verbs, short words, frequent paragraphing—these are your friends and will make you beloved of the overworked judge. Style counts. As one appellate judge put it, good style can be the “difference between getting tackled at the one-foot line and getting a touchdown.”

Oh, and one more thing. Once you’ve drafted your brief, stop. Don’t file it. Don’t email it to your secretary or boss or employee for them to read. You aren’t finished, because now you must revise. You may be good, but good writing becomes great writing only when you edit without mercy, when you switch roles (in Bryan Garner’s metaphor) from the carpenter framing arguments and building paragraphs to the dispassionate critic who strikes and prunes and trims and finds all the blunders. The judges appreciate the effort because they would rather you find the error than see it themselves. Sloppy editing, one judge said, makes her suspect sloppiness with the facts or the law, while another judge thought bad grammar and proofreading affected the credibility of the whole document. Several more judges identified bad proofreading as a pet peeve, and one federal judge called it “very distracting” and a more frequent problem than it should be.



You can score easy points by preventing these needless distractions. Edit that rough draft. Then edit it again. And again. And have someone else read it if possible, someone with no knowledge of the case. And when you’ve done that, break out the ultimate weapon in the editing arsenal—read your brief out loud (to yourself). Reading aloud will help you find the bumps in the prose, the places where there are too many words or too few or a comma where there should be a period.

The judges can tell when you’ve gone the extra mile to make it easy on them. And

they like it.

“The skill of a lawyer,” said one judge, “is to make a complicated problem simple.” Your writing is how you tell the court what you want and why you are due to get it.

It’s how you make your case and advocate for your client. It’s a large part of how you win. So the next time you sit down to write something to a judge, from a discovery motion to a bet-the-farm appellate brief, remember that you are only one among many other things on the court’s to-do list.

Make your work product stand out. Make the judges breathe a sigh of relief as they turn the page. They’ve already told you how. ▲

Endnote

1. William Strunk Jr. & E.B. White, *The Elements of Style* 79 (4th ed. 2000).

Aaron G. McLeod



Aaron McLeod graduated *summa cum laude* from the University of Alabama School of Law. He joined Adams & Reese in 2008 and focuses his practice on appellate litigation. McLeod is also experienced in defending professional-malpractice cases. In addition, he has chaired the Alabama State Bar’s Appellate-Practice Section and has served on the Steering Committee for the Eleventh Circuit Appellate Practice Institute.



DISCIPLINARY NOTICES

- ▲ **Transfers to Disability Inactive Status**
- ▲ **Surrender of License**
- ▲ **Disbarment**
- ▲ **Suspensions**
- ▲ **Public Reprimands**

Transfers to Disability Inactive Status

- Birmingham attorney **Gregg Lee Smith** was transferred to disability inactive status pursuant to Rule 27(c), *Ala. R. Disc. P.*, effective December 16, 2016, by order of the Disciplinary Board of the Alabama State Bar. [Rule 27(c), Pet. No. 2016-1520]
- Millbrook attorney **Guy Rodney Willis** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective January 17, 2017. [Rule 27(c), Pet. No. 17-49].

Surrender of License

- Charlotte, North Carolina attorney **Colin Rutherford Stockton** voluntarily surrendered his license to practice law in Alabama. The surrender was effective February 1, 2017.

Disbarment

- Montgomery attorney **J. Scott Hooper** was disbarred from the practice of law in Alabama, effective April 30, 2016, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the decision of the Disciplinary Board of the Alabama State Bar accepting Hooper's consent to disbarment, which was based upon his acknowledgement that there were pending investigations into his conduct as a lawyer concerning alleged violations of the *Alabama Rules of Professional Conduct* which, if proven, would likely result in serious discipline by the bar, to include disbarment. [Rule 23, Pet. No. 16-504]

Suspensions

- Birmingham attorney **Jason Michael Barnhart** was suspended from the practice of law in Alabama, effective December 26, 2016, for noncompliance with the 2015 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 16-692]
- Huntsville attorney **Vicki Ann Bell** was summarily suspended from the practice of law in Alabama pursuant to Rules 8(c) and 20(a), *Ala. R. Disc. P.*, by order of the Disciplinary Commission of the Alabama State Bar, effective January 5, 2017. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing Bell's refusal to respond to request for information concerning two disciplinary matters. After receiving a copy of the suspension order, Bell submitted her re-

sponses on January 6, 2017 and filed a petition to dissolve the summary suspension. Thereafter, on January 11, 2017, the Disciplinary Commission entered an order dissolving the summary suspension. [Rule 20(a), Pet. No. 2016-1571]

- Hanover, Massachusetts attorney **John Carmine Crescenzi** was suspended from the practice of law in Alabama, effective February 6, 2017, for noncompliance with the 2015 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 16-698]
- Mobile attorney **Woodrow Eugene Howard, III** was summarily suspended from the practice of law in Alabama pursuant to Rules 8(e) and 20(a), *Ala. R. Disc. P.*, by order of the Disciplinary Commission of the Alabama State Bar, effective January 25, 2017. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing Howard's refusal to respond to



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(Continued from page 221)

request for information concerning two disciplinary matters. [Rule 20(a), Pet. No. 2017-66]

- Mobile attorney **Sonya Alexandrial Ogletree-Bailey** was summarily suspended from the practice of law in Alabama by order of the Supreme Court of Alabama, effective December 15, 2016. The supreme court entered its order based upon the Disciplinary Commission's order that Ogletree-Bailey be summarily suspended for failing to respond to requests for information concerning disciplinary matters and for failing to comply with a prior order of the Disciplinary Board of the Alabama State Bar. [Rule 20(a), Pet. No. 2016-1529]
- Hoover attorney **Rachael Hall Taylor** was suspended from the practice of law in Alabama, effective December 26, 2016, for noncompliance with the 2015 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 16-725]

Public Reprimands

- Pelham attorney **Mickey Lamarr Johnson** received a public reprimand with general publication on January 20, 2017 for violating Rules 1.3, 1.4(a) and (b) and 1.16(d), *Ala. R. Prof. C.* Johnson was retained to defend a client in a matter where she was added as a defendant in a lawsuit. The client's husband had formed a construction company in the form of an LLC that listed the client as the owner of the company. The lawsuit pertained to Chinese drywall that was used by the client's husband during the construction of a home. Although Johnson received notifications of the pending matters, he failed to communicate with the client regarding pending court matters, erroneously believing the client had retained counsel through her insurer. Additionally, Johnson failed attend status conferences, of which he was notified, and failed to withdraw or terminate representation of the client. As a result, the court issued a default judgment against the client and collection efforts began, including garnishments against her bank accounts. [ASB No. 2016-346]
- Mobile attorney **Frank Leon Parker, Jr.** was issued a public reprimand with general publication on January 20, 2017, for violating Rules 1.1, 1.3, 1.4(a) and (b), 1.5(b) and

(c), 1.15(a) and (e) and 1.16(d), *Ala. R. Prof. C.* In or around October 2012, a murder was committed. After the conviction and imprisonment of the defendant, Parker agreed to represent the parents of the deceased individual in a wrongful death suit on the claim of intentional infliction of emotional distress against the parents. According to an unsigned employment contract, \$7,500 was the "upfront" fee for handling these matters, while a retainer of \$2,500 was to be placed in trust for expenses, and Parker was to receive a third of any recovery prior to trial and 40 percent if the case went to trial. In December 2013 and January 2014, the parents of the deceased paid Parker \$10,000. Parker mistakenly considered the entire \$10,000 earned upon receipt and failed to place any of the funds into trust. Parker failed to clearly and accurately communicate the basis of the fee to the parents of the deceased. Parker failed to provide them with an accounting of the \$10,000 fee or any refund upon termination of the representation. The wrongful death claim against the defendant was dismissed because Parker failed to open an estate for the deceased in order to bring suit in the name of the estate. The claim of intentional infliction of emotional distress claim was also dismissed on summary judgment. [ASB No. 2016-505]

- Montgomery attorney **Joe Morgan Reed** was issued a public reprimand with general publication on January 20, 2017 for violating Rules 5.3 and 7.3, *Ala. R. Prof. C.* On April 26, 2016, an individual was involved in an automobile accident. Reed's legal assistant contacted the individual by telephone that same day. The legal assistant informed the individual that she had heard she was in an accident and she needed to obtain legal representation. The legal assistant scheduled an appointment for the individual to come to Reed's office to meet with her regarding the accident and her injuries. The individual met with the legal assistant at Reed's office. The legal assistant revealed that she had obtained the individual's telephone number from a tow truck driver who responded to the accident. The legal assistant printed out an employment agreement for the individual to sign but did not review or explain the terms of the contract to the individual. The legal assistant then signed Reed's name on the employment contract. The individual did not sign the employment agreement. [ASB No. 2016-635]

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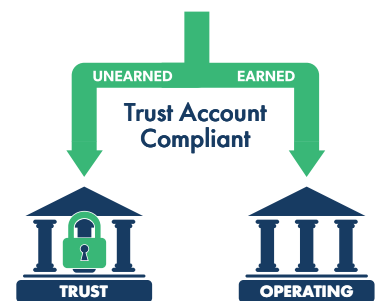
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Wilson F. Green

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



Marc A. Starrett

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

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Auto Guest Statute

Hurst v. Sneed, No. 1151067 (Ala. Feb. 3, 2017)

Trial court erred in granting summary judgment to defendant driver's estate, based on operation of auto guest statute (*Ala. Code* § 32-1-2) in tort action brought by rider. There was substantial evidence that rider's presence was not for exclusive benefit of the driver, and that driver and rider enjoyed a mutual and reciprocal relationship over many years of running errands together to save on gas and vehicle wear and tear, thus creating genuine issue of fact as to each of the three components of the application of auto guest principles under *Sullivan v. Davis*, 83 So. 2d 434, 436-37 (1955).

Medical Liability; Apparent Authority

Bain v. Northwest Alabama Colbert County Healthcare Authority, No. 1150764 (Ala. Feb. 10, 2017)

Heath (decedent) died on July 8 from aortic aneurysm which went undiagnosed at an emergency room visit to Helen Keller Hospital on June 18. At the ER visit, it was alleged that the ER nurses failed to take a family history on Heath, but the undisputed evidence was that Heath discussed the family history (including Heath's father's death from an aneurysm) with the attending ER physician (Dr. Wigfall, who was under contract with Weatherly, a medical staffing company under contract with HKH). Bain (PR and spouse) sued HKH, nurses and Dr. Wigfall. The trial court granted summary judgment to defendants. The supreme court affirmed. As to the claims against the nurses, the court held that theory of liability had a break in the chain of causation: because there was undisputed evidence that Dr. Wigfall received from Heath the information the nurses allegedly should have obtained from Heath, Bain failed to present substantial evidence demonstrating that the nurses' failure to obtain Heath's family history probably caused or contributed to Heath's death. As to the claims against HKH for the actions of Wigfall (under a theory of "apparent authority"), the court reasoned that (1) Alabama law does not recognize the notion "that a patient may presume that a doctor working in a hospital is an employee unless the patient is

told otherwise;" (2) Wigfall's wearing an HKH badge and giving orders to HKH employees went only to Bain's subjective belief of apparent authority, and was not an objective basis to conclude that HKH held out Wigfall as an agent. The court noted that Alabama's rule of apparent authority of doctors in hospitals is more restrictive than Mississippi law and *Restatement (Second) of Torts* § 429.

Rule 54(B) Certification Improper

***Equity Trust Co. v. Breland*, No. 1150302 (Ala. Feb. 17, 2017)**

A trial court exceeds its discretion in entering a Rule 54(b) certification where "[r]epeated appellate review of the same underlying facts would be a probability."

Mootness

***Hasting v. Roberts*, No. 1150813 (Ala. Feb. 17, 2017)**

Action by attorney against OIDS (Office of Indigent Defense Services) for injunctive relief relating to contract indigency work for attorney's local circuit for the 2015-16 fiscal year became moot once 2016-17 fiscal year began.

Medical Liability; Expert Testimony

***Collins v. Herring Chiropractic Center, LLC*, No. 1151173 (Ala. Feb. 17, 2017)**

Medical malpractice case stemming from chiropractic staff's use of un-thawed cold press, which caused frostbite on plaintiff's knee, fell within the class of cases where expert testimony was not required as to the applicable standard of care, because the conduct fell within those cases "where want of skill or lack of care is so apparent ... as to be understood by a layman, and requires only common knowledge and experience to understand it...." Moreover, expert testimony was not needed on issue of causation, because the procuring and application of the cold pack was within the exclusive control of the defendants, and no evidence was presented indicating that Collins contributed to her injuries.

State-Agent Immunity

***Ex parte Ingram & Wilkinson*, No. 1131228 (Ala. Feb. 24, 2017)**

Mother of special-needs student brought action against teacher (Ingram) and aide (Wilkinson) for injuries incurred when student was sexually assaulted by fellow special-needs student. Allegation was that assault occurred because (1) teacher deviated from policy requiring all teachers to accompany all students in transit without exceptions, and (2)



aide deviated from policy requiring teacher to accompany students to and from lunch in front of line and requiring aide to accompany in back of line. As to the teacher, substantial evidence supported conclusion that teacher deviated from policy of accompanying students in transit—a policy as to which there were “no exceptions”—and thus rendered teacher's conduct arguably beyond her authority. As to the aide, in this case the aide purportedly deviated from the policy because she faced exigent circumstances in being required to accompany a particular student to the restroom while in transit; the court concluded that the absence of a “no-exceptions” proviso within the policy, even while construing the facts in plaintiff's favor, demonstrated that aide was using her professional judgment in recognizing exigent circumstances, triggering immunity.

Class Actions; Dismissal; Retention of Jurisdiction

***Ex parte Caremark RX, Inc.*, No. 1151160 (Ala. Feb. 24, 2017)**

Jurisdiction retained by trial court over class-action settlement after final approval is limited to interpreting or enforcing that final judgment; the trial court could not extend its jurisdiction over a matter arising 16 years later relating to collateral litigation.

Legal Malpractice

***Bond v. McLaughlin*, No. 1151215 (Ala. Feb. 24, 2017)**

Bond sued McLaughlin for legal services liability in failing to properly bring will contest. McLaughlin conceded breach of standard of care, but claimed lack of causation based on absence of proof that, but for McLaughlin's negligence, she would have prevailed in the will contest. Held: Bond presented substantial evidence that probated will would have been deemed revoked and thus was not properly admitted as a lost will.

(Continued from page 225)

Workers' Comp Exclusivity

Ex parte Austal USA, LLC, No. 1151138 (Ala. March 3, 2017)

Workers' comp exclusivity under the Longshore & Harbor Workers' Compensation Act ("the LHWCA") recognizes an exception for intentional infliction of injury; complaint adequately alleged that employer intentionally placed saw into use knowing it would cause injury.

Arbitration; Assent

Bevel v. Marine Group, LLC, No. 1150941 (Ala. March 3, 2017)

Agreement contemplated assent to arbitration by initialing the applicable paragraphs; no initials appeared in the contract offered into evidence, and thus no evidence of assent to arbitration was present.

Qualified Immunity; Mixed-Motive First Amendment Case

Ex parte Andrew Hugine, No. 1130428 (Ala. March 17, 2017)

State university administrators were entitled to qualified immunity for decisions to terminate professors, which necessarily involved exercise of discretionary functions. Even if employee made out a prima facie case of First Amendment suppression under *Pickering* test, administrators had an independent and objectively lawful basis for the termination decision (budget shortfalls), and thus sole motive was not suppression of speech and therefore was not actionable. Administrators were also entitled to state-agent immunity on state-law claims under *Cranman*.

State Constitutional Law

Jefferson County v. Taxpayers and Citizens of Jefferson County, No. 1150326 (Ala. March 17, 2017)

In a bond validation proceeding in which the county sued its citizenry to validate a new taxing law, the trial court held that the local law authorizing the county's imposition of a one-cent sales tax in Jefferson County was void for the legislature's failure to comply with the "Budget Isolation Resolution" (BIR) amendment, ALA. CONST. ART. IV, SEC. 71.01(C). While the case was on appeal, the legislature proposed and the people ratified a constitutional amendment (Statewide Amendment 14 on the November, 2016 ballot) which retroactively cured laws which were passed without compliance with the BIR

Amendment. Held: passage of Amendment 14 retroactively cured the constitutional infirmity.

Arbitration; Unconscionability

Newell v. SCI Alabama Funeral Services, LLC, No. 1151078 (Ala. March 17, 2017)

The court rejected an unconscionability challenge to an arbitration agreement, noting there were no damage limitations or waivers.

Real Property

Simmons Group Ltd. v. O'Rear, No. 1150475 (Ala. March 24, 2017)

Under *Whitehead v. Hester*, 512 So. 2d 1297 (Ala. 1987), when all land records have been destroyed, the first conveyance recorded thereafter becomes the new beginning point of the chain of title.

Personal Injury; Minors

Thomas v. Heard, No. 1150118 (Ala. on reh'g. March 24, 2017)

Among other holdings: (1) *Ala. Code* § 6-5-390, under which "the party having legal custody of [the] minor child shall have the exclusive right to commence such action," applies only to separate action by a parent for personal injury of a child which deprives the parent of the child's services, not to claim brought for minor's own personal injuries; (2) tortfeasor's failure to stop at intersection, combined with evidence of tortfeasor's impairment from drinking (.05-.06) with taking of Seroquel, constituted substantial evidence of wanton conduct; (3) evidence regarding tortfeasor's level of toxicity combined with medical evidence of the effects of such toxicity was clear and convincing evidence of wantonness, sufficient to impose punitive damages.

Peace Officer Immunity

Ex parte City of Homewood, No. 1151310 (Ala. March 24, 2017)

Video evidence conclusively demonstrated that officers were actively engaged in high-speed pursuit and were exercising judgment, thus entitling them to immunity under *Ala. Code* § 6-5-338.

From the Court of Civil Appeals

Students First Act; Non-Tenured Termination Procedures

Dailey v. Monroe County Board of Education, No. 2150965 (Ala. Civ. App. Feb. 17, 2017)

Under *Ala. Code* § 16-24C-6(d), a board terminating a non-tenured employee “shall give written notice to the employee of the decision regarding the proposed termination within 10 calendar days after the vote of the board If the decision follows a hearing requested by the employee, the notice shall also inform the employee of the right to contest the decision by filing an appeal as provided in this chapter.” In this case, the board allegedly failed to provide written decision, though Dailey appealed (and the appeal was affirmed by a hearing officer). Held: hearing officer never acquired jurisdiction since board failed to provide written notice.

Appellate Standing

Manley v. Vaughn, No. 2150855 (Ala. Civ. App. Feb. 10, 2017)

Estate beneficiary who was not a party before the circuit court had no standing to take appeal in action in which PR was representing estate.

Forfeiture; Jurisdiction

Little v. Gaston, No. 2150889 (Ala. Civ. App. March 3, 2017)

In another fact pattern concerning the priority of state and federal forfeiture proceedings, the court held that the state court, as the court which issued the warrant under which the subject property was seized, had exclusive jurisdiction over the res.

UIM; Insurance Contract Construction

GEICO Indemnity Co. v. Bell, No. 2150745 (Ala. Civ. App. March 10, 2017)

Steiner and Bell jointly owned car insured by GEICO. While a passenger in the insured car while Steiner was driving, accident



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(Continued from page 227)

occurred resulting in Bell's death. Bell's estate sued Steiner and GEICO. After adverse judgment, GEICO appealed, arguing that Bell was not entitled to UIM coverage because the "household exclusion" excluded liability coverage for Bell. Bell's estate argued that she was entitled to UIM coverage because the car was an "uninsured auto" under the terms of the policy. The court rejected Bell's argument and found no coverage; policy definition of "insured auto" required that vehicle be both (1) named in the declarations and (2) be "covered by the bodily injury liability coverage of this policy." The court reasoned that though bodily injury coverage was unavailable to Bell, the car itself was covered by the liability provisions, and that an insurer's denial of "liability coverage to an individual because of an applicable liability exclusion or exclusionary definition ... does not trigger the availability of uninsured motorist coverage to that individual under the same policy." The court also reasoned that *Ala. Code* § 32-7-23 does not require that UIM coverage be extended to situations where an insured might be covered but is excluded. Judge Donaldson dissented, reasoning that the policy language in cases relied upon by the majority was distinguishable.

Taxation; Refund Procedures

Ex parte State Department of Revenue, No. 2150811 (Ala. Civ. App. reh'g March 17, 2017)

By virtue of class-action settlement between AT&T and its customers, AT&T became the customers' agents with express authority and therefore could jointly submit a refund petition under *Ala. Code* § 40-2A-7(c)(1). Further, "nothing in the language of § 40-2A-7(c)(1) prevents a taxpayer from including multiple consumers in a single refund petition." Finally, the court held that nothing in the Taxpayer Bill of Rights requires the consumer to sign a petition for refund.

Workers' Compensation

Brewton Area Young Men's Christian Association, Inc. v. Lanier, No. 2150944 (Ala. Civ. App. March 17, 2017)

Among other holdings, the evidence supported finding of employer notice under *Ala. Code* § 25-5-78; although there was no written notice, the employer had actual knowledge of the event and notified its workers' comp carrier, which conducted an investigation, and thus employer acted in a manner consistent with having received notice.

Real Property Redemption

Ward v. All South Rental Homes, Inc., No. 2150921 (Ala. Civ. App. March 24, 2017)

Three-year statutory period for redemption under *Ala. Code* § 40-10-82 begins to run when tax purchaser becomes entitled to deed, not when property is transferred to the state for failure to pay taxes.

From the United States Supreme Court

IDEA

Fry v. Napoleon Community Schools, No. 15-497 (U.S. Feb. 20, 2017)

IDEA's administrative procedures and the exhaustion requirement apply only to those claims based upon the failure to provide a free and appropriate public education ("FAPE"), and does not extend to claims under Section 504 of the Rehabilitation Act and related provisions (in this case, concerning school's failure to allow use of a service dog).

Patent

Life Technologies, Inc. v. Promega, No. 14-1538 (U.S. Feb. 20, 2017)

Section 271(f)(1) of the Patent Act prohibits the supply from the United States of "all or a substantial portion of the components of a patented invention" for combination abroad. Held: The supply of a single component of a multicomponent invention for manufacture abroad does not give rise to §271(f)(1) liability.

Voting Rights

Bethune-Hill v. Virginia State Bd. of Elections, No. 15-680 (U.S. March 1, 2017)

As to 11 legislative districts where race was deemed not to predominate, the district court's legal standard was incorrect,

because (1) in drawing legislative district lines, race can predominate either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, and (2) race may predominate even when a plan respects traditional principles. However, the district court's analysis of one unlawful district, requiring narrow tailoring, was consistent with supreme court precedent and was supported by the evidence.

Presidential Appointments

NLRB v. SW General, Inc., No. 15-1251 (U.S. March 21, 2017)

Subsection (b)(1) of the Federal Vacancies Reform Act of 1998 (FVRA) prevents a person who has been nominated to fill a vacant executive-branch office requiring Senate advice and consent from performing the duties of that office in an acting capacity.

Fourth Amendment

Manuel v. City of Joliet, No. 14-9496 (U.S. March 21, 2017)

Pretrial detention following the start of legal process (here, the judge's probable-cause determination purportedly

based on fabricated evidence) can give rise to a Fourth Amendment claim. Pretrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process.

IDEA

Endrew F. v. Douglas County School Dist., No. 15-827 (U.S. March 22, 2017)

School board may be required to pay private-school tuition for autistic child where IEP simply repeated standards from one year to another; to meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances, which is more than a *de minimis* requirement.

Bankruptcy

Czyzewski v. Jevic Holding Corp., No. 15-649 (U.S. March 22, 2017)

Bankruptcy courts may not approve structured dismissals providing distributions not following ordinary priority rules without consent of affected creditors.



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(Continued from page 229)

From the Eleventh Circuit Court of Appeals

Collateral Estoppel; Choice of Law

CSX Transp., Inc. v. General Mills, Inc., No. 15-12095 (11th Cir. Jan. 30, 2017)

Federal common law adopts the state rule of collateral estoppel to determine the preclusive effect of a judgment of a federal court that exercised diversity jurisdiction.

Bankruptcy

In re Appling, No. 16-11911 (11th Cir. Feb. 15, 2017)

Debtor cannot discharge any debt incurred by fraud, 11 U.S.C. § 523(a)(2)(A), but a debtor can discharge a debt incurred by a false statement respecting his “financial condition,” unless that statement is in writing, *id.* § 523(a)(2)(B). Held: oral statements about debtor’s tax refund did not trigger the exclusion.

Bankruptcy

In re Lunsford, No. 16-11578 (11th Cir. Feb. 15, 2017)

Debtor ordinarily may discharge debts in bankruptcy, 11 U.S.C. § 727, but not if the debt “is for the violation of . . . securities laws” and results from a court judgment, § 523(a)(19)(A)-(B). Held: (1) bankruptcy court found as fact that Lunsford violated the securities laws, and (2) independently, section 523(a)(19)(A) is not confined to instances where the debtor itself commits the violation.

Religious Expression

Smith v. Owens, No. 14-10981 (11th Cir. Feb. 17, 2017)

District court’s dismissal of prisoner challenge to prison policy concerning growing of an uncut beard required remand for consideration of *Holt v. Hobbs*, 135 S. Ct. 853 (2015), under which government must demonstrate that policy is the least restrictive means to achieving a compelling governmental interest.

First Amendment

Wollschaefer v. Governor, State of Florida, No. 12-14009 (11th Cir. Feb. 16, 2017) (en banc)

Florida’s Firearms Owners’ Privacy Act (FOPA) regulates speech based on content, restricting (and providing disciplinary sanctions for) speech by doctors and medical professionals regarding firearm ownership. Held: FOPA’s content-based restrictions—certain record-keeping, inquiry and anti-harassment provisions—violate the First Amendment. FOPA’s anti-discrimination provision—as construed to apply to certain conduct by doctors and medical professionals—is not unconstitutional. Unconstitutional provisions of FOPA can be severed from the rest of the Act. The *en banc* decision commanded two separate majority opinions.

Receivership

SEC v. Wells Fargo Bank, No. 16-10942 (11th Cir. Feb. 22, 2017)

Following the collapse of a Ponzi scheme, the district court appointed a receiver to administer the affairs, funds and property of parties who perpetrated that failed scheme. The district court also established a claims administration process by which those who had claims to property administered by the equity receivership could file proofs of claim. The issue in this appeal is whether, in such a circumstance, a district court may extinguish a non-party’s pre-existing rights to property under the administration of the equity receivership, if that non-party fails to comply with the court’s orders regarding filing of proofs of claim. Held: no.

CAFA; RICO

Blevins v. Aksut, No. 16-11585 (11th Cir. March 1, 2017)

CAFA’s local-controversy provision, 28 U.S.C. § 1332(d)(4), does not prohibit district courts from exercising federal-question jurisdiction under 28 U.S.C. § 1331. Plaintiffs adequately alleged a cognizable injury to their “business or property” (18 U.S.C. § 1964(c)) recoverable under RICO (in the form of unnecessary medical expenses allegedly incurred as a proximate result of the physician and practice group’s ordering unnecessary heart procedures).

Antitrust

Feldman v. American Dawn, Inc., No. 16-11663 (11th Cir. March 3, 2017)

Employee lacked antitrust standing to challenge a conspiracy directed at his employer, where the alleged conspiracy caused the employee's termination.

Sexual Orientation and Gender Stereotype Discrimination

Evans v. Georgia Regional Hospital, No. 15-15234 (11th Cir. March 10, 2017)

Although sexual orientation discrimination is not actionable under Title VII, discrimination based on the failure to conform to gender stereotypes is a type of "sex" discrimination actionable under Title VII. However, plaintiff did not provide enough factual matter to plausibly suggest that her decision to present herself in a masculine manner led to the alleged adverse employment actions. Therefore, while a dismissal of Evans's gender non-conformity claim would have been appropriate on this basis, these circumstances entitle Evans an opportunity to amend her complaint one time unless doing so would be futile.

RICO

Almanza v. United Airlines, Inc., No. 16-11048 (11th Cir. March 17, 2017)

The Court affirmed the district court's dismissal of a putative RICO class action brought on behalf of Mexican nationals against a group of airlines for alleged unlawful collection of a tourism tax purportedly required under Mexican law, even though defendants knew that, under Mexican law, plaintiffs were actually exempt from the tax. Defendants kept those improperly collected "taxes" for themselves instead of remitting them to Mexico (to which they were not owed) or back to plaintiffs (who technically could have utilized an obscure reimbursement procedure to get their money back, if only they knew about it). The Court held that plaintiffs failed to allege the existence of a RICO "enterprise."

First Amendment; Commercial Speech

Ocheese Creamery, LLC v. Putnam, No. 16-12049 (11th Cir. March 20, 2017)

Creamery had First Amendment right to use term "skim milk" to describe its no-additive, all-natural skim milk even though, inconsistent with industry and state law standards, skim milk is fortified with Vitamin A because in the skimming process, all Vitamin A is removed.

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Attorney Sanctions

***Purchasing Power, LLC v. Bluestem Brands, Inc.*, No. 16-11896 (11th Cir. March 20, 2017)**

Law firm's misapprehension of salient citizenship of the constituent members of its LLC client, which was based on information from the client, but which led to lack of jurisdiction in the district court, did not amount to the type of abuse of judicial process necessary to justify sanctions.

Products Liability; Jury Deliberations

***Christiansen v. Wright Medical Technology, Inc.*, No. 16-12162 (11th Cir. March 20, 2017)**

This was the first bellwether trial in a multidistrict litigation involving over 500 cases concerning the Wright Medical Conserve "metal-on-metal" hip replacement device. Wright Medical appealed from a judgment of \$2.1 million, contending that (1) the district court erred in ordering the jury to continue deliberations after the jury had already begun to deliver its verdict and (2) the district court erred in its instructions on Utah's products liability law with regard to the unavoidably unsafe product defense in Comment k of Section 402A of the Restatement (Second) of Torts. The Eleventh Circuit affirmed.

RECENT CRIMINAL DECISIONS

From the United States Supreme Court

Ineffective Assistance

***Buck v. Davis*, No. 15-8049 (U.S. Feb. 22, 2017)**

Defendant's trial counsel offered expert report that defendant's race predisposed him to violent conduct, and during penalty phase, primary issue was defendant's future dangerousness. The Supreme Court, reversing prior denials of habeas relief, held that ineffective assistance was demonstrated because no competent defense attorney would introduce such evidence.

Death Penalty; Lethal Injection

***Arthur v. Dunn*, No. 16-602 (U.S. Feb. 21, 2017)**

The Court denied certiorari review of the defendant's most recent challenge to Alabama's lethal injection method of execution.

Juror Impeachment; Sixth Amendment

***Pena-Rodriguez v. Colorado*, No. 15-606 (U.S. March 6, 2017)**

Where juror makes clear statement indicating reliance on racial stereotypes to convict defendant, Sixth Amendment requires no-impeachment rule (typically enshrined in rules of evidence, e.g. Rule 606(b), *Fed.* and *Ala. R. Evid.*) give way in order to permit trial court to consider evidence of juror's statement and any resulting denial of jury trial guarantee.

Federal Sentencing Guidelines

***Bickles v. U.S.*, No. 15-8544 (U.S. March 6, 2017)**

The Sentencing Guidelines are not void for vagueness, but guidelines are not immune from constitutional scrutiny under other due process challenges, the Ex Post Facto clause or the Eighth Amendment.

Judicial Recusal

***Rippo v. Baker*, No. 16-6316 (U.S. March 6, 2017)**

During criminal trial, defendant became aware that trial judge was being investigated for federal bribery charges in an investigation in which the prosecuting DA's office was participating. Defendant moved for recusal, which was denied and affirmed on appeal. In this post-conviction proceeding, holding that the Nevada Supreme Court applied the wrong legal standard. The Due Process Clause may demand recusal even when a judge has no actual bias, but where, objectively speaking, the probability of actual bias on the part of the judge or decision-maker is too high to be constitutionally tolerable.

From the Eleventh Circuit Court of Appeals

Sentencing Appeals

***McCarthan v. Director of Goodwill Industries-Suncoast*, No. 12-14989 (11th Cir. March 14, 2017) (en banc)**

By statute, a federal prisoner has one opportunity to move to vacate his sentence unless that remedy is “inadequate or ineffective to test the legality of his detention.” 28 U.S.C. § 2255(e). For almost 20 years, Circuit precedent maintained that a change in caselaw may trigger an additional round of collateral review. Overruling that precedent, the *en banc* Court held that a change in caselaw does not make a prior motion to vacate a prisoner’s sentence “inadequate or ineffective to test the legality of his detention,” 28 U.S.C. § 2255(e).

From the Court of Criminal Appeals

Ineffective Assistance

***State v. Gissendanner*, No. CR-09-0998 (Ala. Crim. App. Feb. 10, 2017)**

The court reversed a grant of post-conviction relief and ordered reinstatement of defendant’s capital murder convictions and death sentences, holding that defense counsel did not render ineffective assistance in his preparation of witnesses or presentation of evidence during the trial’s penalty phase.

Jury Instructions

***Henderson v. State*, No. CR-12-0043 (Ala. Crim. App. Feb. 10, 2017)**

Among other holdings in this capital murder/death penalty case, the court found no error in the substitution of the phrase “dangerous instrument” for “deadly weapon” in its oral charge regarding the defendant’s intent to kill, an amendment that the defendant himself had requested.

“Stand Your Ground” Immunity

***Martin v. State*, No. CR-15-1158 (Ala. Crim. App. Feb. 10, 2017)**

Trial court did not abuse discretion in denying as untimely defendant’s motion for a pretrial immunity hearing regarding “Stand Your Ground” defense. Though the defendant had filed several motions pretrial motions, including a motion specifically asserting the defense of self-defense three days before trial, he did not request a pretrial immunity hearing until 23 minutes before his trial was to begin.

Juries

***Young v. State*, No. CR-15-0020 (Ala. Crim. App. Feb. 10, 2017)**

Defendant was entitled to new trial where juror alternate was released from service upon the beginning of jury deliberations, but was then called back and permitted to deliberate with the jury two days later without a sufficient inquiry into whether she had encountered any contacts or influences regarding the case while released from service.

Expert Testimony

***Payne v. State*, No. CR-15-0225 (Ala. Crim. App. Feb. 10, 2017)**

In a murder trial stemming from the death of the defendant’s eight-month-old child, the trial court did not abuse its discretion in admitting opinion testimony from five expert witnesses regarding whether the child’s deadly injuries stemmed from a fall from her bed. ▲

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Among Firms

The **Law Office of Bailey & Poague LLC** in Wetumpka announces that **Brooke Poague Kelly** is relocating to Virginia. The firm will now be known as the **Law Firm of Clyde T. Bailey LLC**.

Bradley Arant Boulton Cummings LLP announces that **David Hill Bashford** joined as counsel and **Lee Birchall** joined as a partner, both in the Birmingham office.

Burgess Roberts LLC announces that **Robert Hornbuckle** joined as an associate.

Burr & Forman LLP announces that **J. Sims Rhyne III** joined the Birmingham office as an associate.

Carr Allison announces that **Margaret H. Manuel** and **Zachary R. Weaver** joined as associates, in the Birmingham and Mobile offices, respectively.

The **Dansby Law Firm** announces that **Catherine B. O'Quinn** joined as an associate.

Dominick Feld Hyde PC announces that **Anthony C. Willoughby** is a shareholder.

Dorroh & Associates PC announces a name change to **Dorroh & Mills PC** and that **Laura S. Chism** joined of counsel.

Friedman Dazzio Zulanas & Bowling announces that **Matt Conn** is a partner and **Jay Friedman** and **Ashley Crank** joined as associates.

Galloway, Wettermark, Everest & Rutens LLP announces that **J. Willis Garrett, III** is a partner.

Gilmore & Rowley, Attorneys as Law LLC announces that **Laura J. Crissey** and **T. Wade Wilson** are partners and the firm's name is now **Gilmore, Rowley, Crissey & Wilson, Attorneys at Law LLC**.

Hare, Wynn, Newell & Newton announces that **Karen Puccio** joined the Birmingham office as a staff attorney and **Randi McCoy** and **Virginia Applebaum** are now staff attorneys.

Haynes & Haynes PC of Birmingham announces that **Sonya C. Edwards** joined the firm.

S. Russ Copeland and **Robert J. Hedge** announce the opening of **Hedge Copeland PC** at 1206 Dauphin St., Mobile. Phone (251) 432-8844.

Lightfoot, Franklin & White LLC announces that **Brandon K. Essig** joined as a partner in the Birmingham office.

Maynard Cooper announces that **Gaines Brake** joined as of counsel and **Jon Mills** joined as an associate.

The **Merrell Law Firm** of Hoover announces that **Judge Julie A. Palmer**, former presiding judge for the Domestic Relations Courts of Jefferson County, Birmingham Division, is of counsel, as of February 1.

Stone, Granade & Crosby PC announces the retirement of partner **Fred K. Granade** and that the firm name is now **Stone Crosby PC**.

Whitaker, Mudd, Luke & Wells LLC of Birmingham announces that **Albert C. Boykin** and **Charles William Newman, III** joined the firm as associates. ▲



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OPINIONS OF THE GENERAL COUNSEL

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An attorney may pay an expert witness a reasonable and customary fee for preparing and providing expert testimony, but the expert's fee may not be contingent on the outcome of the proceeding.

QUESTION:

Under what circumstances may an attorney pay a witness who offers testimony at trial or by deposition for an attorney's client?

ANSWER:

Witnesses who offer testimony at trial fall generally into two categories, expert witnesses and lay or fact witnesses. An attorney may pay an expert witness a reasonable and customary fee for preparing and providing expert testimony, but the expert's fee may not be contingent on the outcome of the proceeding. An attorney may not pay a fact or lay witness anything of value in exchange for the testimony of the witness, but may reimburse the lay witness for actual expenses, including loss of time or income.

DISCUSSION:

The prohibitions against paying fact witnesses and against paying experts contingency fees are found in Rule 3.4(b) of the *Rules of Professional Conduct of the Alabama State Bar*, which provides that a lawyer shall not "offer an inducement to a witness that is prohibited by law." However, the Comment to this rule recognizes that the prohibition does not preclude payment of a fact witness's legitimate expenses as long as

such payment does not constitute an inducement to testify in a certain way. This Comment is consistent with DR 7-109 of the old *Model Code of Professional Responsibility* which specifically authorized a lawyer to pay “expenses reasonably incurred by a witness in attending or testifying” and “reasonable compensation to a witness for his loss of time in attending or testifying.” Furthermore, payment to a fact witness for his actual expenses and loss of time would constitute “expenses of litigation” within the meaning of Rule 1.8(e). Subparagraph (1) of that section authorizes an attorney to “advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.”

The situation may arise when an expert witness would also be in a position to provide factual testimony in addition to his paid expert testimony. Under these circumstances, the attorney would not be ethically precluded from paying the

witness, in his role as expert, his usual and customary fee. However, caution should be exercised that the attorney does not pay the expert more than his usual and customary fee or pay him for more time than he actually expended in preparing and providing his expert testimony, since any excess or unusual fee could be construed as payment for his testimony as a fact witness.

In summary, it is the opinion of the Disciplinary Commission of the Alabama State Bar that an attorney may pay a fact witness for actual expenses and actual loss of income or wages as long as such payment is not made as an inducement to the witness to testify in a certain way. An expert witness may be paid his reasonable, usual and customary fee for preparing and providing expert testimony, provided such fee is not contingent. This opinion is consistent with previous opinions of the Disciplinary Commission on similar or related issues in ROs 81-549, 82-699 and 88-42. [RO-97-02] ▲

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