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- Registration and Welcome Refreshments
- Board of Bar Commissioners Meeting
- Opening Reception and Family Night Dinner

ALABAMA STATE BAR
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THURSDAY

- Reception honoring new Alabama State Bar General Counsel
- Bench and Bar Luncheon
- Celebrating the Diversity of the Profession CLE and Gathering

ALABAMA STATE BAR
Annual Meeting

FRIDAY

- Maud McLure Kelly Luncheon
- Tony McLain Memorial Golf Tournament
- Women's Section Silent Auction Fundraiser
- President's Closing-Night Family Dinner and Children's Party

ALABAMA STATE BAR
Annual Meeting

SATURDAY

- Grand Convocation and Grand Prize Drawing
- Installation of 143rd President of the Alabama State Bar
- Presidential Reception

Registration opened in mid-March.





On The Cover

This cute American green tree frog (*Hyla cinerea*) was caught napping inside a vibrant canna lily bloom in a south Alabama garden.

—Photo by Noelle Buchannon, creative director at The Finklea Group, Inc. Noelle functions as the graphic designer of the layout and graphics for *The Alabama Lawyer*. The Finklea Group, Inc. has been the design firm of *The Alabama Lawyer* for over 27 years.

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Toilet Paper Doesn't Grow in Bathrooms

Got your attention with that title, didn't I? I wish I could claim credit for what I think is one of the greatest lines of all time, but credit must go to **Diana Plosser**, a high school teacher for my three children. From the moment I heard this phrase I connected with its message, and it has stuck with me as the years have passed. The message, at least for me, is obvious—look around you and recognize and be thankful for all of those people who make your life's journey easier and richer without your even having to think about it. I think Ms. Plosser's message was probably an effort to get self-absorbed high school students to be grateful for what their parents were providing them, but its underlying truth speaks to all of us.

As I have journeyed down the path of being bar president this year, I have had my eyes opened to the number of quiet, unassuming "toilet paper-providers" we have in our midst. Daily, these loyal folks soldier on to advance the best interests of the bar and our profession without expecting or receiving any acknowledgment beyond a good day's work well done.

For example, within the physical space of the offices, the "voice" of our bar is **Stephanie Oglesby**, the bar's receptionist. She is the first encounter that most of the public has with the bar offices, and she works hard to make sure that she is at all times polite, responsive and professional, no matter the reason for the call. Stephanie does an excellent

job and we are fortunate to have her as a key ambassador to the membership and the general public.

Another quiet presence in the state bar offices is **Roderick Palmer**, graphic arts director. I have yet to find a task that Roderick will not pleasantly and professionally accomplish, without any fanfare or acclaim. You can always count on Roderick. As another bar employee commented, "He's our everything." He is a great go-to guy to get the job done.

And there is **Merinda Hall**, our director of finance, who quietly but competently handles the finances of our bar. She is an outstanding asset to our organization.

Of course, there is the inimitable **Diane Locke**, director of personnel and operations. She may be the strongest advocate in the entire state for our bar and our profession. Diane is the embodiment of institutional wisdom and professionalism; she lives by the "just do the right thing" motto and expects that everyone who works on behalf of the bar, whether an employee or a volunteer, do the same.

And I have to compliment Margaret Murphy here, since I am more than a few days past my January 1 deadline in getting this article to her for publication. I mean really, who is thinking about the March edition of *The Alabama Lawyer* on January 1? As the bar's director of publications, Margaret puts her heart and soul into that excellent publication, as well as the *Addendum*. Both are premier publications and present our bar to the outside world and other bar associations in the best possible light.

I realize I've had a front-row seat to bar programs and operations over the past several years, but still I wonder how many of you have had the opportunity to know the people I mentioned? Each of them is integral to the proper functioning of our bar offices and a great cheerleader for the important work that the bar does, and they are not alone. Indeed, our entire bar staff is outstanding and dedicated to advancing our profession and, fortunately, to helping the president along with whatever tasks fall on her shoulders. We are indeed blessed to have such a great group of individuals working for the betterment of our bar, our profession and the general public.

In addition to our professional staff, there are so many of you—our bar members—who work very hard to advance our profession, improve our communities and prepare the way for the next generation of lawyers and leaders. As I am writing to you, we have 31 sections, 19 committees and 20 task forces, all of which are populated with bar members and bar staff liaisons. We have lawyers serving on Alabama Supreme Court committees, commissions and task forces; on statewide and local committees, commissions and boards; and everything in between. Lawyers are critical pieces of the fabric of our society. What a huge responsibility we have! There are thousands of Alabama lawyers engaged in working

toward the betterment of our profession, the public and the communities in which we live and work. Let's look at a few things some of our lawyers are doing across the state and beyond.

How many of you are aware that our bar's very own **Leslie Barineau** is the president of the National Conference of Bar Foundations? Leslie is a solo practitioner in Birmingham, and yet she has taken the time and made the commitment to get involved with and ultimately lead this very important group. She champions its work of promoting and assisting the work of bar foundations across the country in law-related philanthropy, education and charitable giving, all with the goal of improving our profession, justice system and communities. Leslie is doing a great job and is a terrific ambassador for our state bar on the national level. In keeping with Ms. Plosser's principle, Leslie knows that toilet paper has to be put into place by someone's considered plan.

Taze Shepard, one of our Huntsville members, has spent enormous amounts of time and energy over the past year working with a planning committee—another group of unsung heroes—to put together the 2018 Civil Justice Summit, which is scheduled for the June Annual Meeting in Sandestin. The summit's goals are to achieve better public and private funding, delivery of services and more coordination among legal and non-legal providers for holistic solutions to the problems facing low-income clients. The summit is pulling together stakeholders from the Governor's office, the Alabama Supreme Court, the Supreme Court's Commission on Dispute Resolution, Legal Services Alabama, the Alabama Law Foundation, the various local volunteer lawyers programs and many others. The planning committee is in the process of scheduling six listening sessions around the state to hear from the "boots on the ground" people in our state about how our civil legal system and related assistance services do and do not work for low-income families in Alabama. Taze and his planning committee know that toilet paper doesn't just materialize in bathrooms.

In an effort to raise funds to support programs that improve the legal system and the administration of justice, and promote the betterment of the legal profession and local community, our members in Mobile have put together "**Tri the Gulf**," a sprint triathlon on Dauphin Island. This unique fundraiser sponsored by the Mobile Bar Foundation consists of a 600-yard Gulf swim, 16.7 mile island and bridge bike and 3.25 mile island run that will no doubt challenge participants and inspire those cheering them on to completion. Under the direction of **Judge Don Davis**, last year's race was a great success and the funds raised were donated to the Mobile Bar Foundation, which distributed \$66,000 in grants to nine local organizations in 2017. The Tri the Gulf event and all of its related logistics—including, I'm sure, providing

(Continued from page 89)

toilet paper—could not happen without the support of the Mobile Bar Foundation, its leadership and volunteers from the Mobile Bar Association and beyond. This team understands what Ms. Plosser was trying to convey to her students.

As I've traveled around the state speaking to local bar associations about the State of the Bar, I have met hundreds of unsung heroes (also known in my book as "toilet paper providers"). I recently had the opportunity to meet **David Hyde**, one of our members from Evergreen, when I spent a wonderful evening with David and other members of the Conecuh and Monroe County Bar associations. I was extremely impressed with David. I asked his son, **Clint**, a bar commissioner, to share some thoughts about his father, with whom Clint has practiced since he passed the bar in 1998. Here are a few of Clint's words about his father, who has lived out our bar's motto that "Lawyers Render Service." Clint wrote to me:

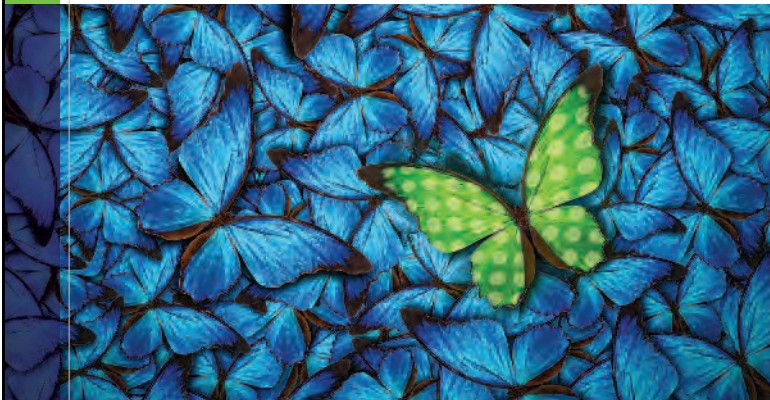
"My dad is what I would call old school lawyer. He lived and practiced law by the adages 'a lawyer's time and advice are his stock-in-trade' and 'a lawyer's reputation is his advertising.' My dad believes in the judicial system and has impeccable integrity and I can only hope to have

half of his ethics and reputation. It is my goal to be him in many ways (but don't tell him this)... My dad has the respect of our Bar. He never hesitates to provide assistance and advice to other lawyers. One of the proudest things he has done was serve as a Bar commissioner. He has the utmost respect for our profession and is proud to be a lawyer In a nutshell, my dad is the lawyer that every small town lawyer should desire to be. Ethical, honest, dedicated to the law and his clients."

Thank you for your words, Clint. It seems both Clint and his father have embraced and lived the core meaning behind Ms. Plosser's words.

As you enjoy the benefits of our fine bar and your bar membership, I encourage you to remember Ms. Plosser and her words of wisdom. Toilet paper still doesn't grow in bathrooms. There's real work that goes into the efficient and productive operations of our bar, the advancement of our profession and the protection of the public we serve. Reflect on those who make your days and years smoother and more efficient. Acknowledge and appreciate their efforts, and look for the ways that you too can be a "toilet paper provider" in your own life. ▲

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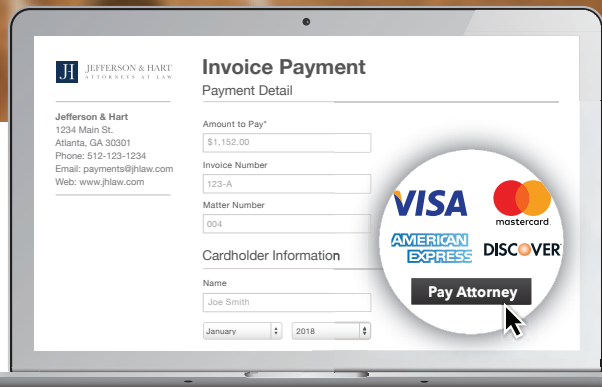
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Christina D. Crow

Get to Know Your President-Elect

*Pursuant to the Alabama State Bar's Rules Governing the Election of President-elect, the following biographical sketch is provided of **Christina D. Crow**. Crow was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 2018-2019 term and will assume the presidency in 2019.*

Born the youngest of three girls to Roy and Carolyn Crow in Fresno, California, Christy's father's Alabama roots drew them back home to Hamilton when Christy was a small child. Christy spent the majority of her formative years in Prattville, where she graduated from high school in 1990.

A chance encounter with hospital attorneys Lynn Jinks and Burt Smithart during a summer job at Bullock County Hospital changed the course of Christy's life: Lynn and now Judge Smithart hired Christy to work for their Union Springs law firm. Christy worked her way through Auburn University at Jinks & Smithart, and fell in love with small-town law practice.

After graduating in 1994 with a bachelor's of science in accounting from Auburn, Christy put her orange and blue shakers into storage for a few years while she attended the University of Alabama School of Law. While at Alabama, she served on the *Journal of Legal Profession*, was named to the Bench & Bar Legal Honor Society and won the West

Publishing Co. Corpus Juris Secundum Award; rumors of her winning numerous pinball championships at Jackie's Lounge during this time remain unsubstantiated. Christy also worked as a law clerk at Pearson & Smithart in Tuscaloosa from 1994-1997.

Christy returned to Union Springs in 1997 to practice with Jinks, Smithart, Jackson & Daniel. After the departure of Burt Smithart and Terry Daniel to join the bench, the firm eventually became Jinks, Crow & Dickson, after Nathan Dickson became a partner.

With more than 20 years' experience in civil litigation, Christy has represented individuals and families throughout Alabama and Georgia in claims involving personal injuries, wrongful death, product liability, class actions, agricultural law, warranty violations, MDLs and a variety of other claims. Christy has also defended many local Bullock County companies in litigation and, as with most small-town lawyers, she has ended up doing a little bit of everything in her practice.

Christy attended her first Alabama State Bar meeting in 2001 to see the investiture of Fred Gray, who practiced in neighboring Macon County. Inspired by Mr. Gray's motto that "Lawyers Render Service," Christy became more active in the Young Lawyers' Section of the bar, eventually becoming the second female president of the YLS in 2005-2006. During her presidency, the YLS expanded its Minority Pre-Law Conference to a second location in Birmingham to reach more high school students who were interested in a future in the legal profession. Under Christy's leadership, the YLS's signature FEMA Disaster Relief Program helped hundreds of people in response to Hurricane Katrina, one of the largest natural disasters ever to affect our state.

Following her service and leadership in the YLS, Christy became involved in the Women's Section of the Bar. She served as the section's treasurer from 2009 to the present and has held various other positions, including CLE chair and scholarship chair.

Seeking an opportunity to represent her local legal community on a state level, Christy became the bar commissioner from the Third Judicial Circuit in 2007. She has also worked on a variety of bar task forces and committees. Christy served on the Executive Committee of both Tom Methvin (2009-2010 president) and Lee Copeland (2016-2016 president). She also was vice president of the state bar during Phillip McCallum's presidency (2012-2013). Christy served on a bar Disciplinary

Panel (2009-2011), on the Disciplinary Commission (2011-2015) and as chair of the Disciplinary Commission (2015-2016).

Christy chaired the bar's Pro Bono Celebration Task Force in 2016. She is a Fellow of the Alabama Law Foundation, where she serves on the board, and a Fellow of the American Bar Foundation. Christy is a member of the American Board of Trial Advocates, the American Bar Association and the Alabama Association for Justice. She is a graduate of Class 3 of the Alabama State Bar Leadership Forum and the 2009 Class of Leadership Alabama.

Christy and her husband, Van Wadsworth, continue to live in Union Springs, where they attend the First United Methodist Church. She and Van have been married since 1997 and have three children, Mary Margaret (29), Jordan (15) and Drew (12). With their family, in 2008, they started Dream Field Farms, a pumpkin patch in between Union Springs and Montgomery. In 2013, Van founded High Ridge Spirits, Alabama's first legal distillery since Prohibition.

Through the years, Christy has coached basketball and baseball in Union Springs, served on the board of the local recreation department, taught Sunday school and served on the Chunnenugee Fair committee. She is co-chair of the Bullock County Relay for Life and is also on the Board for the Girl Scouts of Southern Alabama and the Board of Trustees for the Alabama-West Florida Conference of the United Methodist Church. ▲

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EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum
phillip.mccallum@alabar.org



STATE OF THE BAR: New Admissions Rules Are Working to Create Efficiencies

In the last few years, the Board of Bar Commissioners and the Supreme Court of Alabama have approved recommended amendments to the *Rules Governing Admission to the Alabama State Bar* ("Rules") that have allowed us to streamline our processes and become a more efficient operation. These amendments have also made the Rules easier to understand and more consistent with generally accepted practices, without compromising the integrity of our admissions process.

At its meeting in October 2017, the Board of Bar Commissioners was presented with a set of proposed amendments to the Rules that would further streamline and modernize the admissions process. These proposed amendments were unanimously approved by the Board of Bar Commissioners at its January 2018 meeting and have been submitted to the Supreme Court of Alabama for review. Below is a brief description of the proposed amendments.

1. Removal of resident/non-resident distinction: The resident/

non-resident applicant distinction was once important when application fees differed among residents and non-residents and when the Alabama State Bar collected fees that were passed through to the National Conference of Bar Examiners (NCBE). Removal of this distinction has little impact, as application fees are currently uniform among all applicants. The greatest impact is that fewer applicants will go through NCBE for a separate character and fitness investigation. This will save applicants time and money in the application process.


2. Clarification of pre-legal education requirements for graduates of non-ABA approved law schools: The current language is vague and confusing, especially for graduates of non-ABA approved law schools and graduates with foreign undergraduate degrees.

The recommended change clarifies the pre-legal education requirement and will give more clear guidance to Admissions staff and potential applicants who fall under the relevant rule.

3. **Addition of explicit language as to burden on applicants of providing documents and responding to requests of Committee on Character & Fitness:** Simply put, this language makes it clear that failure to provide documents or otherwise respond to a request of the Character & Fitness Committee is grounds for denial of an application by the committee.
4. **Amendments affecting applicants for admission by transfer of Uniform Bar Exam (UBE) score:** Three proposed amendments affect applicants for admission by transfer of UBE score: (1) clarification that applicants for admission by transfer of UBE score must satisfy the same requirements under the Rules as applicants for admission by examination in Alabama; (2) changing the pre-exam time in which a UBE score transfer applicant may earn a valid Multistate Professional Responsibility Exam (MPRE) score from 12 months to 25 months, which is consistent with the MPRE validity timeframe for exam applicants; and (3) increasing the application fee for UBE score transfer applicants from \$575 to \$875.

5. **Amendment allowing flexibility for Character & Fitness hearings to be held after release of bar exam results:** Currently, exam applicants are allowed to sit for the bar exam if they have satisfied the educational requirements *and* have character and fitness approval. This proposed amendment provides that character and fitness approval may come after a passed bar exam, which is currently in practice for satisfying the MPRE and AL Online Course requirements. This would give us the flexibility to hold Character & Fitness hearings after administration of the bar exam and release of bar exam results. Holding hearings only for those who are eligible for admission (i.e., those who passed the bar exam) will significantly reduce the number of Character & Fitness hearings and resources expended on same.

This set of proposed amendments to the *Rules Governing Admission to the Alabama State Bar* is just one example of how we are working to create efficiencies at the Alabama State Bar. I hope to soon report that these amendments have been approved by the Supreme Court of Alabama and implemented by the Alabama State Bar. I also look forward to sharing more examples of how we are working to better serve our members, prospective members and the public. ▲



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IMPORTANT NOTICES

▲ Local Bar Award of Achievement

▲ J. Anthony “Tony” McLain Professionalism Award

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

▲ Notice of Election and Electronic Balloting

Local Bar Award of Achievement

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

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

The following criteria are used to judge the applications:

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

To be considered for this award, local bar associations must complete and submit an application by June 1. Applications may be downloaded from www.alabar.org or obtained by contacting Mary Frances Garner at (334) 269-1515 or maryfrances.garner@alabar.org.

J. Anthony “Tony” McLain Professionalism Award

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

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

The purpose of the J. Anthony “Tony” McLain Professionalism Award is to honor the leadership of Tony McLain and to encourage the emulation of his deep devotion to

professionalism and service to the Alabama State Bar by recognizing outstanding, long-term and distinguished service in the advancement of professionalism by living members of the Alabama State Bar.

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

William D. "Bill" Scruggs, Jr. Service To the Bar Award

The Board of Bar Commissioners of the Alabama State Bar will receive nominations for the William D. "Bill" Scruggs, Jr. Service to the Bar Award through April 15.

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

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

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

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

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(Continued from page 97)

Notice of Election And Electronic Balloting

Notice is given here pursuant to the *Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners* that the election of these officers will be held beginning Monday, May 21, 2018 and ending Friday, May 25, 2018.

On the third Monday in May (May 21, 2018), members will be notified by email with instructions for accessing an electronic ballot. Members who wish to vote by paper ballot should notify the secretary in writing on or before the first Friday in May (May 4, 2018) requesting a paper ballot. A single written request will be sufficient for all elections, including run-offs and contested president-elect races, during this election cycle. All ballots (paper and electronic) must be voted and received by the Alabama State Bar by 5:00 p.m. on the Friday (May 25, 2018) immediately following the opening of the election.

Nomination and Election of Board of Bar Commissioners

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

- 2nd Judicial Circuit
- 4th Judicial Circuit
- 6th Judicial Circuit, Place 2
- 9th Judicial Circuit
- 10th Judicial Circuit, Place 1
- 10th Judicial Circuit, Place 2
- 10th Judicial Circuit, Place 5
- 10th Judicial Circuit, Place 8
- 10th Judicial Circuit, Place 9
- 12th Judicial Circuit
- 13th Judicial Circuit, Place 2
- 15th Judicial Circuit, Place 2
- 15th Judicial Circuit, Place 6
- 16th Judicial Circuit
- 18th Judicial Circuit, Place 2

- 20th Judicial Circuit
- 23rd Judicial Circuit, Place 2
- 23rd Judicial Circuit, Place 4
- 24th Judicial Circuit
- 27th Judicial Circuit
- 29th Judicial Circuit
- 38th Judicial Circuit
- 39th Judicial Circuit

Additional commissioners will be elected for each 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits will be determined by a census on March 1, 2018 and vacancies certified by the secretary no later than March 15, 2018. All terms will be for three years.

A candidate for commissioner may be nominated by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Nomination forms and/or declarations of candidacy must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 27, 2018).

Election of At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 1, 4 and 7. Petitions for these positions, which are elected by the Board of Bar Commissioners, are due by April 2, 2018.

Submission of Nominations

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

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

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

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

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



A L A B A M A S T A T E B A R

Long-Range Strategic Planning Task Force Report

By Adam P. Plant

In a 2005 PBS interview,

Kurt Vonnegut said America should have “a Secretary of the Future”—someone who informs our decisions of today with their consequences on a farther horizon. Former Bar President Cole Portis convened the Long-Range Strategic Planning Task Force to take that longer view of the legal profession in Alabama, and our work continued under the administration of bar President Augusta Dowd. We will continue to take the longer view of the bar through the duration of this plan, which will direct us until 2022.

In August 2017, the task force released its first report. That report built on the 1994 Strategic Plan, 2001 task force reports, the reports of bar’s standing committees and task forces, the 2004 draft report, input from former bar presidents, the long-range plans of other state bars, the 2005 Long-Range Plan and the trends facing the future of the profession. From those sources and our own original research, the 22-member task

force looked toward a rapidly-changing future to establish goals and spot issues as the profession serves its members and the public.

We have addressed the compulsory issues at the forefront for every competent state bar: discipline, licensing, operations, member benefits and continuing legal education. We also have addressed issues critical to the future of the profession, including diversity, communication, technology and the law, service to local bars, service to the public, attorney wellness and the administration of justice.

As the task force continues its work in 2018, we will build on our 2017 report and work closely with task forces in other substantive areas. We will release annual or bi-annual updates to our written work product, and we will continue to turn our eyes to more distant horizons. ▲

—Adam P. Plant, Birmingham, vice-chair, Long-Range Strategic Planning Task Force

Read the plan at <https://www.alabar.org/assets/uploads/2017/08/Long-Range-Task-Force-Plan-FINAL-to-BBC.pdf>



STARTING A NEW LAW FIRM –
It's More than Hanging a Shingle

By R. Cooper Shattuck

You're thinking about it.

Or maybe you have done it. Regardless of the circumstances or basis for the decision, most lawyers at one time or another think about starting their own firm, but “hanging a shingle” isn’t what it used to be. Though it may be easier today to practice on your own than it was 10 years ago, there are a lot of decisions to be made before launching your new venture. No matter how many years you have or haven’t practiced law, establishing a new firm or solo practice is challenging. Like most things in life, challenges can be more easily overcome with a little forethought and planning. This article provides an outline of issues you should address in your planning process. Please recognize that each of these topics could be an article by itself. I have simply attempted to hit the highlights for each.

1. Develop a strategic plan.

Developing a strategic plan for your firm or practice is imperative. Your strategic plan will (and should) inform every decision you make. Most importantly, it will guide you through the difficult and challenging days. It is hoped that you have the basis of it floating around in your head, but you should formulate your thoughts into a written version. The time invested in developing a strategic plan now will save you time and money in the long run.

Here are the steps to developing your strategic plan:

a. Establish a mission statement.

What is the purpose of your firm? What do you want to do? Making money should not be part of your mission statement. Effectively following your mission statement should generate revenue and a profit, but that is not your mission. If making money is your sole focus, you won't—at least not for long. The following is an example of a simple law firm mission statement: "To render efficient and reasonably-priced legal services to people with whom I enjoy working."

As you create your plan, you can explore each adjective, further define the types of legal services you will provide and specify the people for whom you will provide them.

b. Define your core values.

What are your core values? Why do they matter to you? When it comes to hiring staff and other lawyers, articulating (at least for yourself) those core values will be of great benefit. While it isn't necessary to communicate these values to potential hires, you should look for them in new team members. If your teammates do not value, understand or respect your core values, trouble is around the bend. For example, do you value pro bono work? If you do, but your teammates don't feel the same way, dealing with those clients may drive them nuts.

c. Conduct a SWOT analysis.

To think strategically and plan accordingly, conducting a SWOT analysis is beneficial. A SWOT analysis involves assessing your strengths, weaknesses, opportunities and threats.

i. Strengths

What are you good at? What do you enjoy doing? Chances are you are good at what you enjoy and vice versa. There are a variety of assessments which can help you determine your strengths.¹ Your strengths are not what types of legal work you do, but how you do them. Thinking more broadly than just what type of work you currently do will illustrate opportunities.

ii. Weaknesses

Why identify them? So that you can find some way to make up for them or avoid them. For example, you may need to hire team members with strengths which complement yours. Or, perhaps you should consider developing strategic alliances or partnerships with other firms, attorneys, consultants or advisors who can help make up for these weaknesses.

iii. Opportunities

What opportunities exist for you? What opportunities could become a niche for you? These could be opportunities for everyone, but if everyone is pursuing them, are they really opportunities? Unique opportunities are more fruitful. Focus on those that are consistent with your strengths, mission statement and core values.

iv. Threats

Who else is pursuing the same opportunities? What else threatens your success? It doesn't have to be a competitor. It could be a change in the economy or some segment of it. Or, it could be some factor or condition involving you individually.

Once you have identified your strengths, weaknesses, opportunities and threats, the remainder of your strategic plan should more easily fall into place.

d. Set your goals.

You should set measurable, quantifiable goals for your practice. They could be measured in countless ways such as clients, cases or dollars. You should set goals for different time periods,

Your strategic plan should identify the tasks necessary to accomplish your goals.

e.g. six months, one year, three years, five years. Interim goals should lead to ultimate goals. Your overall goals should be in your strategic plan.

e. Identify tasks.

Your strategic plan should identify the tasks necessary to accomplish your goals. In other words, if you follow through on your tasks, your goals should be more easily accomplished. Tasks are action items or to-do lists entries with verbs. For example, schedule five speaking engagements this year; conduct 10 more prospective client conferences this month; schedule five networking lunches per month. Each goal should have its own tasks which—if done successfully—should result in accomplishing that goal.

f. Draft the plan.

Now that you have established your mission statement, defined your core values, outlined a SWOT analysis, set your goals and identified tasks to reach them, put all of it in a document. When you are faced with a decision, refer to your strategic plan. Does this further my goals? Does this help me accomplish a task? Your tasks should work their way into your to-do lists. You have to-do lists, right? A topic for another day...

2. Determine your entity type.

Once you have given serious thought to what you want to accomplish and how you are going to accomplish it, then you need to determine the entity through which you are going to do so.

a. Entities generally

So, why create an entity? You covered this in law school, didn't you? Well, the advice that you would give a client applies to you and your practice too.

b. Limited liability

Most legal entities offer some measure of protection from liability generally, though they

won't necessarily protect your individual assets from professional malpractice claims.² That is why you need insurance (discussed below). They can protect your personal assets from other liability, however, and they may help protect firm assets from personal liability.

c. Tax treatment

One of the biggest differences between entity types is how they are taxed. Generally, the income and expenses of the business either flow through to you as the owner of the entity or the entity is taxed separately. There are advantages and disadvantages to each. What's the key here? Form a strategic alliance. Enlist the expertise of an accountant to help you make an informed decision.

d. Maintenance

Whatever entity you choose, there is a certain amount of maintenance involved—things that must be done (usually on a recurring basis) to ensure that the entity's existence is continued and recognized. Some entities are easier to maintain than others. Some must have documented meetings of their shareholders or owners. Most have reporting requirements to state and other governmental entities. Again, your accountant can help you with this.

e. Entity types

I am not going to try to repeat what you supposedly learned about organizations in law school or in preparing to take the bar exam, but here are a few quick reminders for your consideration. Remember, these are just the highlights.

i. Corporations

A corporation is a creature of state law.³ Corporations provide limited liability for their owners (shareholders),⁴ but from a tax standpoint, they are generally one of the following two types: "C" corporations and "S" corporations.⁵ C corporations are "typical" corporations. C corporations pay taxes on their income, and their shareholders pay income taxes on any dividends.⁶ S corporations

have a limited number of shareholders and are taxed differently.⁷ S corporations are generally “flow-through” entities whose income and losses flow through to their shareholders’ tax returns.⁸ Corporations are generally more high-maintenance than the other entities, requiring such things as annual meetings of shareholders, election of officers and meeting minutes.⁹

ii. Professional corporations

Professional corporations are creatures of state law, as well.¹⁰ They can be a “C” or an “S” corporation for tax purposes. However, state law limits those who can be shareholders.¹¹ Lawyers are one of the recognized shareholders.¹² There are a few more restrictions as to how these organizations are established and maintained because of their special shareholders.¹³

iii. Limited liability entities

In addition to corporations, there are other entities which can be created under state law to provide limited liability to their owners, such as limited liability companies (LLCs).¹⁴ These entities are generally treated as flow-through tax entities, but don’t have to be.¹⁵ Their annual maintenance is a little less burdensome than that of a corporation. An LLC can have many members or just one member.¹⁶

iv. Partnerships

This is the basic form of business when there is more than one owner. No formalities are required, but if you are going to be in business with someone, a written agreement obviously makes sense.¹⁷ Partners are generally jointly and severally liable for partnership debts and obligations.¹⁸ There is no limit of liability, unless the partnership is a registered limited liability partnership.¹⁹ Income for these entities is not taxed separately from the partners’ income.²⁰ They are flow-through entities.²¹

v. Sole proprietorship

This is the most basic form of business. In fact, it isn’t really a form. If you don’t structure something else and you operate a busi-

ness by yourself, you are considered a sole proprietor.²² There is no separate tax treatment.²³ There is no liability protection.²⁴ It is just you—and all your assets.

vi. Combinations

Of course, you can have combinations of these different entities. Corporations can be members of LLCs and partnerships.²⁵ LLCs can be partners and shareholders of corporations.²⁶ It gets complicated fast. This is why it is imperative to enlist the assistance of a professional.

f. Name reservations/restrictions

Most of the entities which provide limited liability will have their own identity, which includes a name. You must make sure no one has previously reserved the right to use the name that you want, and then you must reserve the right to use that name. This can be done on the secretary of state’s website.²⁷ The name of the firm cannot be misleading.²⁸ For example, you cannot be “John Doe & Associates” if it is just you.²⁹ If you are forming a partnership or sole proprietorship, you generally do not have to reserve your operating name, but you want to make sure someone else isn’t doing business under the same name you’ve chosen. If a name is unused and you want some added protection for your business name, you can apply for a service mark like a trademark.³⁰

g. Disclaimer

There are *many* matters to consider when selecting an entity. Unless you have been regularly engaged in establishing professional practices, you need professional assistance. Even if you have, lawyers are their own worst clients.

3. Choose a location.

With new technologies and changes in the way legal services are delivered, the need for a traditional legal office has changed, as well. The needs of your new firm will depend in large part on your practice type and how you practice. Do not make the mistake of assuming you need a traditional office in a traditional location, even if that is how you have practiced for 20

years. Evaluate how you currently use your office. What do you really need, and what is unnecessary? Though technology could allow you to be more mobile, if you aren't likely to take advantage of these technologies, then don't fool yourself, but times have changed. People spend less time in their traditional offices. Technology makes that possible.

Law firms are notorious for being slow and difficult to adapt to new technologies. Once investments are made in certain assets, such as servers or outdated software, it is difficult for firms to abandon them. They keep feeding the monster. That may be one of the reasons you are starting your own practice! If so, remember you are starting fresh with a clean slate. Answering a few key questions will help your analysis.

a. What are you going to do there?

If you are going to be doing real estate loan closings, perhaps you need space to conduct them. Or do you? Could you do those at the lender's office or realtor's office? Do you frequently take depositions? How often do you really need a conference room? How large does it need to be? Are there other options? Do you need space to meet with clients? Or, would your business clients rather you come to their office? Can you meet with your clients in your office or do you need a separate room? Do you need work space in addition to your office?

b. Who is going to be there?

Who is likely to spend time at your office? Clients? Staff? Other lawyers (associates, partners, contract lawyers)? How many? How often? These are all factors you need to consider. And remember, it is generally easier—and less expensive—to expand or find more space than to contract when you have too much.

4. Utilize technology.³¹

Advances in technology have revolutionized the practice of law making solo and small firms more practical than ever. With more people (including courts) relying on digital communications, the days of expensive on-site document generation, reproduction and storage are gone. With improvements in security, digital storage no longer must be on-site. Severing these tethers to overhead allows you to use your space

more efficiently and to reduce the size of your physical footprint and support.

a. Practice management

Practice management software helps manage matters or files. These programs are essentially attractive templates for a robust database of information. They allow easy access to critical practice management data such as client names, contact information, other parties and other lawyers. Even the most rudimentary practice management software does so much more, though. Most also store or provide a link to case-specific documents (even emails), maintain case-specific calendars and tasks lists and provide a link or features for billing and accounting functions. There is a host of excellent practice management solutions with many tailored to specific practice types. Review all your options and make sure to secure something that fits your practice, your skills and your needs. Your practice management software should work seamlessly with your document management software and, if separate, your billing and accounting software. A link to your calendar and any separate tasks or to-do lists will help, as well. If you are going to be using your cell phone or tablet extensively in your practice, then your practice management system should be easily used on that device.

b. Bookkeeping

There are two primary accounting functions you will need—billing and operations. These can be done in one program, or you can use separate programs. Basically, your billing is your revenue generation. Your practice management system will most likely give you a mechanism to generate bills and manage your accounts receivable; however, you will also have expenses. Some expenses will be billable to clients, matters or files, and some will not. There are robust programs to handle such matters within your practice management system or separately. Who is going to monitor all of this? They should be involved in this decision-making process.

c. Document management

How will you manage your documents? First, let's assume we are talking about digital documents.

If you haven't made the switch to digital documents, now is the time. They are here to stay, like it or not. If you don't adapt now, doing business with clients, other firms and courts will be harder in the future.

The first thing to determine is *how* your digital documents will be stored. Yes, keeping them on your computer in "My Documents" is an option, just probably not the best—at least by itself. You should store the documents so they can be easily found and retrieved. If you and your staff are particular about directories and file folders, that is great. If you aren't, you will need some means of sorting them with a robust search. Deciding on a document management solution is a decision that many eagerly kick down the road because its necessity isn't immediately apparent. Before you know it, though, you will have thousands of documents. A system that works well with a few will quickly become unmanageable with thousands. Choose a system. Establish a protocol. Stick with it.

The other decision about documents can be made with the first decision or separately—*where* your digital documents will be stored. You can store them on your computer or network, but you must consider backups and security. Or, you can store them with a cloud-based provider. Storing them "in the cloud" is simply storing them on servers provided by a third party. The documents are transmitted seamlessly and automatically to those servers via the Internet. You should select a service that encrypts the documents before they are transmitted, that stores them encrypted and then allows you to retrieve them encrypted. You should ensure that ownership and access to your documents are exclusively yours. Good service

As with practice management solutions, if you are going to be using your phone or other devices in your practice, it will be helpful if your document management and storage solution work easily on those platforms.

providers have multiple layers of security, multiple backups and multiple server locations. Frankly, storing documents with the right cloud provider is more secure and safer than storing your documents on your own computer. Ask questions of the providers. Make sure that you choose a reputable and secure provider. Another advantage to cloud-based document storage is that they are accessible wherever there is a connection to the Internet, which is now practically everywhere.³² If you store documents on your computer or server, then adequate firewalls and backups must be installed and maintained to keep the documents secure and available. The ease with which you can connect to the Internet is also an asset to your storage device.

As with practice management solutions, if you are going to be using your phone or other devices in your practice, it will be helpful if your document management and storage solution work easily on those platforms.

d. Telephone

Do you need a traditional landline? Do you need a traditional telephone system? Check out what is available before jumping to conclusions. Voice-over-Internet systems are easy and inexpensive. You may not need a separate system at all. Practically everyone has a cell phone. You may be able to effectively use your cell phone as your sole office phone. For example, there are providers who will give you a telephone number (or they can use one you own), answer and screen calls, take messages and forward them. They can do this with in-person receptionists or automatically with an auto-attendant like a voicemail system. Some of these services can send actual transcripts of your voicemails. You can manage how you want certain calls to be handled.³³ The customization and possibilities are limitless.

You can cheaply and easily secure a domain and a website for your new firm—if someone else does not already own the domain.

If you begin relying on a cell phone for your new firm, you must respect its value. Regularly back up your data. Always install upgrades to your phone's operating system. Make sure the data on your phone is secure. Your phone should lock when not in use. If your phone is stolen, damaged or lost, its value will become clear very quickly. You must be able to promptly replace it with all your data and applications available for use so that you will be back in business as quickly as possible.

e. Data backups

If you are keeping any information on your computer, you should have a regular and effective backup of that data. Having an untested backup is like having no backup. It must work. What's more, having a great system that you never use is equally worthless. There are many options which can cheaply, effectively and even seamlessly back up your data. Backing up this data to a cloud-based location ensures greater safety.

f. Website

You can cheaply and easily secure a domain and a website for your new firm—if someone else does not already own the domain. There are many different providers who can secure that domain for you.³⁴ Most can also host your website and your emails. As lawyers, we love initials in our domains. However, people aren't generally typing in email addresses anymore so brevity is not the necessity it used to be.

Invest in a professional and high-quality website. Regardless of your practice type or where you live, your potential clients are on the Internet. And, they are making decisions about legal services based on what they see. Legal consumers are sophisticated Internet shoppers. If your website isn't top notch, they will know it.

Websites are selling opportunities. With the right search engine optimization, you can enhance a potential client's likelihood of visiting your website. Once there, you will need to convince them you are the right person for the job. If someone learns of you from another source (referral, reputation, etc.), they will likely visit your website before you ever know that they are considering you. They may choose to go elsewhere before you can speak with them.

g. Email

Having an email address that doesn't end in "@yahoo.com" or "@gmail.com" is not difficult or expensive, and you have the added benefit of appearing more reputable and established to clients and refer-

ral sources. For example, if you can secure "*thejoneslawgroup.com*" for your firm ("The Jones Law Group"), your email addresses can be established with that domain, e.g. *tim@thejoneslawgroup.com*.

There are many platforms through which you can send and receive email. You may be accustomed to Microsoft Outlook if you worked at a law firm or another organization. You can buy and install Microsoft Outlook, but there are other providers.³⁵ If you are working on a Mac, the existing Apple calendar function may be sufficient for you.

h. Internet

Right. If you don't think that you need access to the Internet, then you probably haven't read this far anyway. You will need to secure access to the Internet from some provider. Check speeds and costs. You may not have many options, but you may have more than you realize. Also, check on bundling discounts with your cellphone provider. You also need some means of accessing the Internet when you are not at the office. You can purchase hotspot devices which essentially allow you to connect to cellular data networks.

Or, you may be able to use your cell phone as a hotspot.

i. Apps

If you are using your smart phone in your practice, there are many applications you will find helpful. There are smart phone applications for your laptop or computer software for word-processing, spreadsheets, calendars, to-do lists, reminders, time and billing systems, PDF readers and more. There are also apps by which you can track your business mileage,³⁶ scan documents³⁷ and edit PDFs.³⁸ There are new apps introduced every day.

5. Build your team.

If you are leaving a law firm or practice and starting your own, as with the other contributors to overhead, one of your considerations is whether you need to maintain the level of staffing you had at the firm. What assistance do you need? Think of this in terms of skill sets, experience and abilities rather than individuals. Will you need this help full-time or part-time? You must also consider whether these services are best provided through an employee or an independent contractor. There will be many business and tax considerations here.

6. Develop a marketing plan.

It is not enough to simply do a good job and expect additional work to roll in the door. That may have been true years ago, but it isn't anymore. So, you need to market yourself and your new practice. Marketing does not necessarily mean advertising, but advertising is a method of marketing. Marketing is seeking to be at the right place at the right time when a decision is being made about retaining legal services. The right place is in someone's mind. You never know when the right time will occur. So, a strategic marketing plan to educate and inform potential clients of your availability and expertise will help you be in those right places, hopefully, at the right times.

You should do a marketing plan for your firm and for your practice areas. These are two different strategies and two different plans. There may be some overlap, but they must be thought of separately.

7. Acquire business licenses and file/pay taxes.

a. Business license

If your principal place of business is in a municipality, then you will likely need a business license.

b. Tax ID

If you create a business entity, you should obtain a tax ID number for that entity. You can do this online.³⁹

c. Federal income taxes

You may need to file a separate income tax return for the entity that you create for your firm. Don't wait until year end or even a looming April 15 deadline to discuss this with your accountant. The sooner you get him or her up-to-speed with what you are doing, the better off you will be. And, even more importantly, you may also need to be paying estimated taxes throughout the tax year. Talk to your accountant as soon as possible and definitely within the first quarter of your new venture. There are also state and federal withholdings that must be paid monthly for any salaries your entity pays or perhaps for self-employment taxes.⁴⁰

d. State employment taxes

If your entity is paying salaries, you must pay state employment taxes quarterly.⁴¹

8. Purchase insurance.

Even if you choose a limited liability entity, insurance is something you must consider. Protect your assets and yourself. Get to know some insurance agents so that you can buy the necessary products while also forming strategic alliances.

a. Professional liability

Professional liability insurance is not required, but it is not cost-prohibitive. Your commercial general insurance agent will have some choices for you, but there are other options.⁴²

b. Liability

You should consider general comprehensive liability insurance to protect your firm and yourself from liability for personal injury or property damage because of your activities. Many small business insurance packages include not only general comprehensive liability insurance, but also auto liability coverage and premises liability coverage. The premiums are generally reasonable for lawyers and small firms. You can usually get employment practices coverage as an add-on or rider. This coverage may not be necessary if you only have a few employees.

c. Workers' compensation

Workers' compensation insurance is required if you have five or more employees,⁴³ but it is a good idea even if you have fewer.

d. Health

You should consider the ever-changing health insurance landscape created by the Affordable Care Act.⁴⁴ You will likely want health insurance coverage. There are many options which are less expensive than any COBRA coverage to which you may be entitled after leaving your employment or law firm. Shop around. And, remember that you can join the Huntsville-Madison County Bar Association and purchase health insurance coverage for you and your employees through their group plan.⁴⁵

e. Disability

Unless you have some other source of income, you should consider purchasing disability insurance. These policies provide income if you become disabled. Policies are provided through a host of insurers including those with whom the Alabama State Bar has a special relationship.⁴⁶

9. Establish a banking relationship.

You should establish at least one banking relationship. You will need an operations account in which you can keep your firm funds separate from your own. This may not be as necessary if you are a sole proprietorship, but it is if you create any type of legal

entity for your firm. It is a good idea even if you are a sole proprietorship, so that you can easily track your progress. You must establish a trust account in which client funds are maintained separately from your own (an IOLTA account).⁴⁷

In closing, remember the following:

- 1. Be patient.** Remember that no great thing was created suddenly.⁴⁸ You must balance the need to abandon things that aren't productive with giving them time to be. Give yourself a reasonable amount of time to measure your success.
- 2. Be proactive.** Review your strategic plan as things develop. Review your marketing plan to ensure your progress, and revise it with new ideas.
- 3. Monitor your progress.** You will be encouraged with the progress that you see.
- 4. Stay fresh.** Don't be afraid to try something new or to change your direction to take advantage of new opportunities.
- 5. Maintain perspective.** Remember why you chose this path. Remember why you wanted to be a lawyer. Look for the positives. They are always there even when you hit dead ends or seemingly insurmountable obstacles. ▲

Endnotes

1. Rath, Tom. StrengthsFinder 2.0, <http://www.gallup.com/press/176429/strengthsfinder.aspx>.
2. Ala. Code § 6-5-572(2) (1975)(defining a "legal services provider" subject to malpractice liability as including "professional corporations, associations, and partnerships. . .and the members of such professional corporations, associations and partnerships and the persons, firms, or corporations either employed by or performing work or service for the benefit of such [entities]").
3. Ala. Code § 10a-2-2.03 (1975).
4. Ala. Code § 10a-2-6.22(b) (1975).
5. 26 U.S.C. § 1361-1368 (2012); *see also* 26 U.S.C. § 301 (2012).
6. 26 U.S.C. § 301 (2012).
7. 26 U.S.C. § 1361 (2012).
8. 26 U.S.C. § 1366 (2012).
9. Ala. Code §§ 10A-2-7.01 *et seq.* (1975).
10. Ala. Code §§ 10A-4-1.01 *et seq.* (1975).
11. Ala. Code § 10A-4-3.01 (1975).
12. Ala. Code § 10A-1-1.03 (77) (1975).
13. Ala. Code § 10A-4-2.01 (1975) ("... at least one shareholder of the professional corporation is duly licensed to provide each professional service..."); *see also* Ala. Code § 10A-4-2.04 (1975) ("... may render professional services in Alabama only through individuals permitted to render the services in Alabama..."); Ala. Code § 10A-4-3.01 (1975) ("... the licensing authority may, within its rule-making power, by rule further restrict, condition, or abridge the authority of domestic professional corporations to issue shares...").



14. Ala. Code §§ 10A-5A-1.01 *et seq.* (1975).
15. Via IRS form 8832, LLCs may elect to be classified as an association. "Corporation" is defined in part as "association." Thus, LLCs classified as an association are taxed as corporations. See 26 U.S.C. § 7701 (3) (2012); see also IRS Form 8832, <https://www.irs.gov/pub/irs-pdf/f8832.pdf>.
16. Ala. Code § 10A-5A-4.01 (1975).
17. Ala. Code § 10A-8-1.04 (1975).
18. Ala. Code § 10A-8-3.06(a) (1975).
19. *Id.*
20. 26 U.S.C. § 701 (2012).
21. 26 U.S.C. § 701 (2012).
22. INTERNAL REVENUE SERV., SOLE PROPRIETORSHIPS, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/sole-proprietorships> (last visited October 19, 2017) ("A sole proprietor is someone who owns an unincorporated business by himself or herself").
23. *Id.*
24. See Larry E. Ribstein, *The Loneliest Number: The Unincorporated Limited Liability Sole Proprietorship*, 1 J. OF ASSET PROTECTION 45, 46 (1996); HAROLD REUSCHLEIN & WILLIAM A GREGORY, HANDBOOK ON THE LAW OF AGENCY AND PARTNERSHIP 240 (2d ed. 1990).
25. A "person" member of an LLC can be non-individual organizations that include corporations. See Ala. Code § 10A-5A-4.01 (1975); see also Ala. Code § 10A-5A-6.02 (1975); Ala. Code § 10A-5A-1.02 (m) (1975).

26. A corporate member "person" can include an "individual, trust, estate, partnership, association, company or corporation." See 26 U.S.C. § 7701 (a)(1) (2012).
27. Alabama Secretary of State Name Reservation, https://www.alabamainteractive.org/sos/introduction_input.action.
28. Rule 7.1 Ala. R. Prof. Conduct.
29. ASB Formal Opinion 1993-11.
30. See Ala. Code § 8-12-1 (1975); see also 15 U.S.C. § 1051 (2012).
31. References to goods and services are simply by way of example and should not be considered endorsements of any particular product or provider, nor a representation that there aren't other providers out there.
32. Be careful! Free Internet access is not usually secure. <https://usa.kaspersky.com/resource-center/preemptive-safety/public-wifi-risks>.
33. Ruby Receptionist, <https://www.callruby.com/>.
34. "The Best Web Hosting Services of 2017," PCMagazine. <https://www.pcmag.com/article/2/0,2817,2424725,00.asp>.
35. "The 6 Best Business Email Hosting Services for Team Email, Contacts, and Calendars," Zapier. <https://zapier.com/blog/exchange-office-365-g-suite/>.
36. "Best Mileage Tracker App for Small Business," FitSmallBusiness.com. <https://fit-small-business.com/best-mileage-tracker-app/#>.
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39. "Apply for an Employer Identification Number (EIN) Online," Internal Revenue Service (IRS). <https://www.irs.gov/businesses/small-businesses-self-employed/apply-for-an-employer-identification-number-ein-online>.
40. <https://revenue.alabama.gov/individual-corporate/taxes-administered-by-individual-corporate-income-tax/withholding-tax/>; <https://www.irs.gov/businesses/small-businesses-self-employed/self-employed-individuals-tax-center>; and generally, <https://www.irs.gov/businesses/small-businesses-self-employed>.
51. See Alabama Department of Labor site for information, <https://www.labor.alabama.gov/employers.aspx>.
42. Attorneys Insurance Mutual of the South, Inc. <http://www.attysinsmut.com>.
43. Ala. Code § 25-5-50(a) (1975, as amended).
44. See, <https://www.irs.gov/affordable-care-act/employers/affordable-care-act-tax-provisions-for-small-employers>.
45. <http://www.huntsvillebar.org/Insurance-Plans>.
46. <https://www.alabar.org/membership/member-benefits/insurance/>.
47. Rule 1.15 Ala. R. Prof. Conduct.
48. Epictetus, <https://www.goodreads.com/quotes/782062-no-great-thing-is-created-suddenly-any-more-than-a>.

R. Cooper Shattuck



In January 2017, after more than 25 years practicing in law firms, government and as general counsel of one of the state's largest entities, Cooper Shattuck started his own firm, Cooper Shattuck, LLC. Shortly thereafter, he also started a consulting firm, Cartography Consulting, providing strategic marketing, communications and management consulting services primarily to lawyers.



Opioids and the Workers' Compensation Claim

By Bernard D. Nomberg

Recently, injuries covered by workers' compensation

have seen a rise in the prescriptions of strong painkillers for routine injuries. The effect: injured employees must be wary of the potential for addiction. Employers must be wary of employees who return to work, but who may still taking prescribed narcotics, or worse, taking under-the-counter opioids.

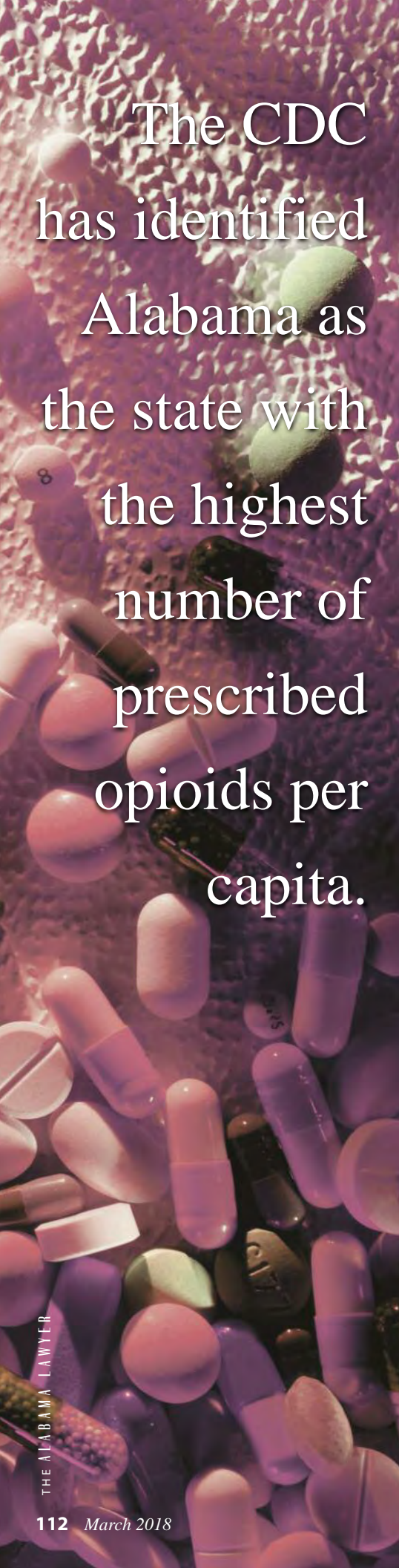
The Culprits

Oxycontin, Percocet, Lortab and Vicodin. Different name, same game. All are in a group of drugs known as opioids. Opioids are a type of narcotic painkiller that block pain signals from reaching the brain. The synthetic drugs get their name from the opium poppy and mimic the effects of natural opium—a euphoric “high.”

Why Opioids?

Presently, painkillers have been prescribed for injuries such as back pain; however, there is little evidence to support that painkillers have long-term benefits to the user.¹ While the prescriptions have potential side effects of drowsiness and lethargy, the narcotics can also become a source of addiction.

Painkillers can be an effective option to help with workplace injuries, but it is important to acknowledge which injuries are appropriately treated by opioids and which are better treated with other medications. Alternative treatment forms should be considered: acupuncture, chiropractic manipulation, yoga and marijuana are forms of alternative treatments for chronic pain. The Center for Disease Control (“CDC”) even issued guidelines which instruct doctors to prescribe opioids for chronic pain only where all other options have been exhausted. Yet, according to a 2016 National Safety Council survey, 99 percent of doctors prescribe them for longer than the CDC-recommended three-day period.



The CDC
has identified
Alabama as
the state with
the highest
number of
prescribed
opioids per
capita.

Opioid Epidemic

There a national opioid overdose epidemic. Drug overdose is the leading cause of accidental death in the U.S., with 52,404 lethal drug overdoses in 2015. Opioid addiction is driving this epidemic, with 20,101 overdose deaths related to prescription pain relievers and 12,990 overdose deaths related to heroin in 2015.² Just this May, the State of Ohio sued five drug companies for their role in fueling the opioid epidemic.³

Alabama has the highest rate of prescription opioids.⁴ The national average is 66.5 prescriptions per 100 people.⁵ Alabama's average: a staggering 121 prescriptions per 100 people. The CDC has identified Alabama as the state with the highest number of prescribed opioids per capita.

You can bet that states are now becoming aware of the problem and mindful of the high cost for employers. This means that many states have begun to issue pain treatment guidelines, including provisions on painkillers and their appropriateness. In addition, taxpayers are seeing a rise in their rates to offset painkiller costs for public employees.

Alabama specifically has taken note of the problem and the legislature is actively working to improve monitoring for the prescriptions. In addition, the state has made a life-saving anti-overdose drug widely available to emergency first-responders and the public in an attempt to combat drug overdose. The Alabama Board of Medical Examiners mandated doctors to check the prescription drug database before prescribing opioids to patients.

Effect on the Injured Employee

Regardless of whether an injured employee is suffering from addiction, the prescription of opioids can have an adverse effect. Opioid addiction begins with a legitimate prescription. Therefore, even those not susceptible to illicit drugs can become victims. The drugs do not discriminate, affecting men, women, wealthy, indigent, any race. As a result, employees put themselves and co-workers at risk.

An employee who is prescribed painkillers and returns to work faces inhibitions that can be extremely dangerous, depending on the context of the employment. Jobs involving work from heights, such as construction sites, and those that require driving, cannot be safely performed while on opioids. In addition, an employee who is prescribed opioids long-term may experience an increased sensitivity to pain, requiring a higher dose for the same level of pain. The drugs can also cause a myriad of side effects including constipation, nausea, vomiting, dry mouth, sleepiness, dizziness, confusion, depression, lower testosterone, itching and sweating.⁶ Addiction and the high prevalence of side effects can harm family relationships, threaten financial stability and even result in death.

What about the Employer?

A 2008 study from the California Workers' Compensation Institute concluded that workers who re-

ceived high doses of opioid painkillers were out of work three times as long as those with similar injuries who took lower doses.⁷ As a result, the cost of an injury is nine times higher when a strong narcotic, such as OxyContin, is used.⁸ More specifically, consider the cost of a typical workplace injury: \$13,000. In contrast, the cost of a workplace injury when the employee has been prescribed a narcotic painkiller is \$39,000. As the prevalence of strong painkillers rises, so does the recovery time of a workplace injury.

Fighting an Injury vs. Feeding An Addiction

There is a fine line between taking painkillers to cope with an injury and having an addiction. Doctors have recognized this issue for years, making it harder to obtain the drugs. Prescriptions are often only for a short period of time with monthly checkups required for a refill. Doctors have even begun to counsel and warn patients of the risks of addiction associated with the painkillers.

Attorney or Doctor?

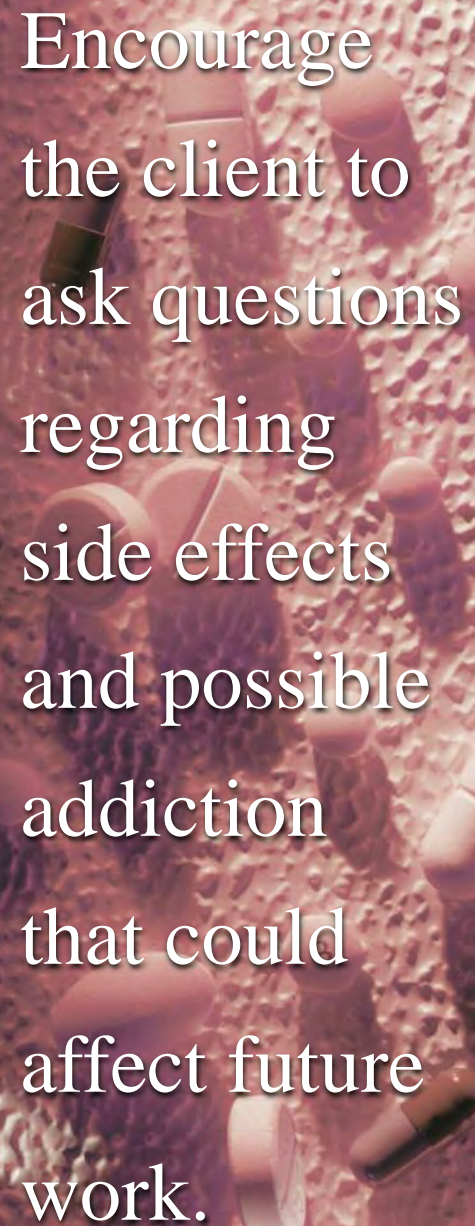
As a lawyer, advising clients on their sources of treatment may not

be appropriate. After all, an attorney is not qualified to give medical advice. While there are no specific ethical provisions addressing the issue, ethical problems are likely to arise. So, what can the attorney advise the client on the issue?

Most importantly, advise your client to become knowledgeable about the treatments that are being offered by their physician. Encourage the client to ask questions regarding side effects and possible addiction that could affect future work. Then the client can weigh the costs and benefits associated with the suggested treatment before committing. ▲

Endnotes

1. CDC Guideline for Prescribing Opioids for Chronic Pain, <https://www.cdc.gov/drugoverdose/prescribing/patients.html>.
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3. <http://www.npr.org/sections/thetwo-way/2017/05/31/530929307/ohio-sues-5-major-drug-companies-for-fueling-opioid-epidemic>.
4. Centers for Disease Control, “Prescription Opioids” <https://www.cdc.gov/drugoverdose/opioids/prescribed.html>.
5. According to the Centers for Disease Control, <https://www.cdc.gov/drugoverdose/maps/rx-rate-maps.html>.
6. CDC “Prescription Opioids” <https://www.cdc.gov/drugoverdose/opioids/prescribed.html>.
7. California Workers’ Compensation Institute, Pain Management and the Use of Opioids in the Treatment of Back Conditions in the California Workers’ Compensation System (Aug. 2, 2008).
8. 2010 analysis by Accident Fund Holdings.



Encourage the client to ask questions regarding side effects and possible addiction that could affect future work.

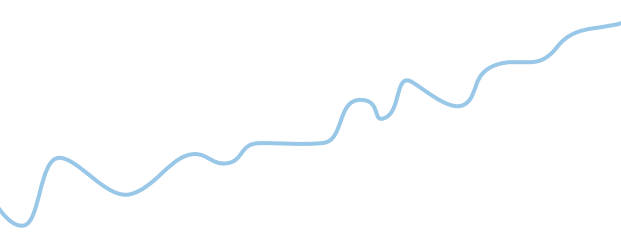
Bernard D. Nomberg



Bernard Nomberg has practiced workers’ compensation law in Alabama for more than 20 years. Bernard has earned an AV rating from Martindale-Hubbell’s peer-review rating.

Thank you for taking a few minutes to read my article, “Opioids and the Workers’ Compensation Claim.” This is a very important topic that regrettably is becoming more and more newsworthy. While we have your attention on this issue, please make sure to read Robert B. Thornhill’s most informative article on pages 124–127, “How to Address the Reality of Alcoholism, Addiction and Mental Health Disorders among Alabama Attorneys.” Many real world lessons are to be learned from both articles.





THE CELL TOWER GROUND LEASE: An Atypical Commercial Lease— What Attorneys Should Know

By William M. Lawrence

Introduction

Despite being only a decade old, smart phones drive the United States' increasingly fast-paced culture. Americans used approximately 262,000,000 smart phones during 2016.¹ Smart phones are vitally important to our daily lives: we wake up to their alarms; we communicate verbally and in writing with them through phone, text and social media applications; we use them to stay current with local and world news; we play games on them; we use them as GPS devices; and we watch live sporting events and cable programming on them. Smart phones are the quintessential all-in-one gadget.

Carriers, the companies to which consumers pay smart phone bills, provide smart phone-connectivity services using cellular networks. Cellular networks depend upon two crucial components: radio spectrum² and infrastructures. Radio spectrum is the radio frequency (RF) portion of the electromagnetic spectrum, which fuels cellular communications. Infrastructures are the network deployment areas, called “cells” or “cell sites,” which include towers, poles and other structures and facilities that support signal transmissions, increase network capacities and expand network coverages. An estimated 308,334 cell sites operated in the United States during 2016.³

Based upon whether carriers own portions of the radio spectrum purchased from the federal government and build and own their own infrastructures, the wireless industry

classifies them as mobile network operators (MNOs) or mobile virtual network operators (MVNOs). MNOs own radio spectrum and their own transmission infrastructures. The United States has five MNOs—Verizon Wireless, Sprint, AT&T Mobility, T-Mobile and U.S. Cellular. Unlike MNOs, MVNOs do not own radio spectrum or their own transmission infrastructures. Instead, MVNOs piggyback their networks on MNO networks by leasing or purchasing from them access to radio spectrum and infrastructure. MVNOs tend to market to specific geographic areas or population niches and offer contract-free or less expensive connectivity plans than MNOs. MVNOs include Cricket Wireless, Metro PCS, TracFone, Straight Talk and Total Wireless.

Each cell site involves at least one and usually multiple leases.⁴ Many attorneys negotiate cell site leases no differently than typical commercial leases, but cell site leases involve material and subtle differences from, and unique issues without corollary in, typical commercial leases. This article (i) provides wireless industry background and cellular technology deployment information to help attorneys understand cell sites generally and (i) addresses material negotiation components relating to one particular type cell site lease—cell tower ground leases.

Cell Site Types

Cell sites consist of four main types: cell towers, rooftops, small cells and distributed antenna systems (DAS). Known as “macro sites” or “macrocells,” cell towers and rooftop sites are carriers’ cellular network foundations because they canvas vast geographic areas and transmit signals great distances. Insatiable wireless demand and technology advances have spurred carriers deployments of small cell and DAS “micro sites” or “microcells,” which integrate smaller, less powerful technologies to densify network architectures and add network capacities and coverages.

A. Cell Towers

Due to their imposing size and omnipresent visibility along American highways, the most well-known

Many attorneys negotiate cell site leases no differently than typical commercial leases, but cell site leases involve material and subtle differences from, and unique issues without corollary in, typical commercial leases.

cell sites are cell towers. Cell towers are elevated, vertical structures built on land, on and around which carriers install high-powered antenna arrays and supporting transmission equipment. Cell towers provide carriers the widest coverage radius of all cell sites. Depending upon how many carriers have elected to “co-locate” on the tower,⁵ one cell tower can serve multiple carriers’ cell sites.

Some MNO carriers own and operate their own cell towers. In what some attorneys find to be a counter-intuitive business model, tower-owning carriers install their own antennas and transmission equipment on their towers, while simultaneously leasing tower “co-location” space to competitor carriers to generate revenue. For example, Verizon Wireless may own a tower and operate its own antennas and trans-

mission equipment on the tower, while also leasing tower “co-location” space to Sprint and T-Mobile.

Carriers do not require their own towers to run their networks. More often, carriers lease tower space from companies specializing in owning and operating tower portfolios to support carrier networks. Unlike carriers, which consumers know well due to their ubiquitous print and television ads, consumers are less familiar with tower portfolio companies, despite many being publicly traded or *Fortune 500* companies. The United States’ five major tower portfolio companies are: Crown Castle (NYSE: CCI), American Tower Corporation (NYSE: AMT), SBA Communications (NASDAQ: SBAC), United States Cellular Corporation (NYSE: USM) and privately-owned Vertical Bridge.⁶

B. Rooftop Sites

Rooftop cell sites provide the second widest coverage radius of cell sites. Rooftop sites consist of high-powered antenna arrays and supporting transmission equipment similar to what carriers install on cell towers, but which carriers install on building rooftops. The term “rooftop site” is a catchall and misnomer, because carriers install functionally equivalent antenna arrays and transmission equipment on and around water tanks, church steeples, bell towers and other pre-existing, tall structures.

C. Small Cell Sites

Small cell sites are single carrier-owned, low-powered, self-contained cell site nodes, which consist of single antennas and supporting transmission equipment. As their name implies, small cell nodes are smaller in size, power and coverage radius than cell tower sites and rooftop sites. Small cell nodes are often no larger than smoke detectors, fire alarms or paper reams and need limited installation space, which makes them discrete and aesthetically more pleasing than cell tower sites or rooftop sites.

Carriers deploy small cell nodes in smaller footprints to densify and increase overall network coverage and capacity, often in densely populated, congregational or topographically challenging areas that macro sites cannot serve alone or where zoning regulations make cell towers or rooftop sites impractical or impossible. Carriers deploy small cell nodes on right-of-way infrastructure (*e.g.*, utility poles⁷ and street signs), on mass transportation means that travel to remote locations (*e.g.*, cruise ships and commercial airliners) and in commercial settings (*e.g.*, hotel lobbies and office buildings).

D. DAS Sites

Similar to small cell sites, DAS sites are low-powered cell sites. Unlike self-contained small cell sites, DAS cabling interconnects multiple antenna nodes within defined geographical areas or buildings to hubs containing transmission equipment that all antenna nodes use collectively. Among other deployments, carriers deploy DAS sites for outdoor purposes (*e.g.*, the French Quarter in New Orleans) or inside large buildings, stadiums and arenas. DAS sites relieve pressure from cell tower and rooftop sites by removing DAS site coverage areas from the capacity outputs of cell tower and rooftop sites. Like small cell sites, carriers often use outdoor DAS sites in densely populated, congregational or topographically challenging areas that macro sites cannot serve alone or where zoning regulations make cell towers or rooftop sites impractical or impossible.

Cell Tower Types

Cell towers consist of three main types: self-supporting towers (a.k.a. lattice towers), guyed towers and monopole towers.

A. Self-Supporting Towers

Self-supporting towers are free-standing towers, which typically stand between 200-400 feet tall on

three or four legs. Latticework supports and braces each leg; hence their nickname “lattice towers.” Self-supporting towers require either single foundations supporting all tower legs or individual foundations supporting each leg. Carriers mount antenna arrays and other transmission equipment vertically on the tower exteriors and install supporting equipment on grounds beneath them.

B. Guyed Towers

Guyed towers are single mast towers, often standing 300 feet or more tall, which use cables or guy wires to stabilize their masts. The guy wires extend in different directions from the masts to ground based anchors. Guyed towers require separate foundations for their masts and each guy anchor. Carriers mount antenna arrays and other transmission equipment vertically on the masts and install supporting equipment on grounds beneath them.

C. Monopoles

Monopoles are single mast towers, which typically stand between 100-200 feet tall, but can be much shorter. Monopoles require one foundation at their bases. Carriers mount antennas and other transmission equipment vertically on their masts and may install small amounts of related equipment at or around their bases. Carriers often deploy monopoles stealthily, by disguising them on flag poles or in geographically characteristic ways, such as pine trees, palm trees or cactuses.

Cell Tower Leases

A cell tower site generally involves two different lease types—ground leases and multiple “co-location” leases.

Ground leases are between landowners as lessors and tower owners as tenants. Ground leases convey rights to land parcels upon which tower owners construct and operate cell towers. Ground lessors can be any person or entity who or which owns real property. Tower owners are either MNO carriers or tower portfolio companies.⁸

Co-location leases, which tend to be subleases⁹ to ground leases, are agreements between tower owners as lessors and carriers as lessees. Co-location leases convey rights to vertical spaces on towers and portions of the underlying grounds to which tower owners have ground lease rights.¹⁰

Cell Tower Ground Leases

A. Ground Space

Tower owners require ground spaces to accommodate their towers, their ground-based equipment (including shelters, cabinets, generators and fencing) and their co-locating carriers' equipment. Ground spaces generally range from 100 square feet or less for monopoles to as many as 10,000 square feet for self-supporting and guyed towers. Guyed towers present unique lease-related wrinkles because, in addition to requiring ground space similar in size to what self-supporting towers require, guyed towers require easement rights for their supporting guy lines.

B. Access and Utility Easements

Tower owners require unobstructed easements from public rights-of-way through ground lessors' properties to their leaseholds for access and utility purposes.

Access easements must be sufficiently wide for utility trucks to use them (ideally 30 feet wide). To ensure uninterrupted network service, tower owners and their co-locating carrier tenants must be able to use access easements 24 hours per day, seven days per week, generally without prior notice to, or consent of, ground lessors.

In order to install cable and fiber runs and provide power and phone services to cell tower sites, tower owners require utility easements, which convey to tower owners some combination of below-ground rights, surface rights and above ground rights. Utility easements may be identical in ground coverage and property description to tower owners' access easements, but, depending upon the locations of connection points to available utilities or existing cabling and fiber runs on and around properties, can entirely cover separate portions of ground lessors' properties.

Tower owners typically obtain and pay for surveys of ground lessors' entire property and the tower owners' leaseholds, access easements and utility easements. Surveys typically evidence these areas with separate property descriptions and sketches or depictions. A best practice is to incorporate surveys as exhibits to ground leases.

C. Permitted Use

As typical with other commercial leases, cell tower ground leases include permitted use provisions, which describe specifically how tower owners may use ground lessors' properties. Due to cellular technol-

ogy's rapid evolution, tower owners require broadly worded permitted use provisions allowing them, throughout their lease term durations, to install and use all known and useable technologies at lease inception, technologies known and contemplated for future use but not used or useable at lease inception and technologies not contemplated or known at lease inception. Some tower owners expect to obtain exclusive rights to ground lessors' properties for the permitted purposes.

Expect tower owners to insist upon provisions permitting them to broadly use sites as "communications systems or facilities and for all related purposes." Narrowly worded permitted use provisions, such as use for "telecommunications services," "radio communications" or "cellular communications," could subject tower owners to unintentional lease breaches if they were to implement technology advances at cell sites that their permitted use provisions may not expressly or interpretively allow.

Co-locating carriers require assurances that tower owners' ground leases grant carriers absolute and unrestricted rights to increase, decrease, maintain, replace, modify, amend, upgrade and expand their antennas and supporting transmission equipment within tower owners' leaseholds.

Tower owners require their access and utility easements to have broadly rights worded permitted use provisions. In addition to ingress and egress rights, tower owners expect to use their access easements to construct, inspect, repair, maintain, upgrade and enhance their towers and tower compounds. Tower owners must have rights to use their utility easements to connect tower compounds to available utilities and to install and run above and below ground cabling and fiber.

D. Rent

Unlike typical commercial leases, cell tower lease rates are not based upon price per square foot formulas. Rent amounts depend upon multiple factors, including the amount of ground space required at sites, sites' network coverage values to potential carriers, sites' zoning and permitting ease, sites' access ease and proximity to utilities, sites' construction ease and cost and lease possibilities at adjacent or neighboring properties.

Tower owners often expect to pay flat-rate rent amounts for their lease-term durations. However, if tower owners value certain sites highly, they may agree to rent escalations on annual or per-term bases.

Rent escalators are typically pre-determined percentages of the then-current rent amount. Due to the large ground lease volumes tower owners typically maintain, administrative ease is key to them, which militates against rent escalators based upon the Consumer Price Index or other fluctuating indices. Tower owners prefer to pay rent in monthly installments for operational flexibility and to avoid pre-paying rent for cell tower sites they may decide to terminate during periods in which they may have pre-paid rent.

A once-common practice involved tower owners paying “co-location” or “revenue sharing” fees to ground lessors upon entering into co-location leases with carriers. Co-location fee amounts were typically calculated as percentages of tower owners’ co-location lease rent amounts. As cell tower site volumes have increased, and each new tower site’s overall relative network value has decreased, the practice of tower owners paying co-location fees has decreased, too. Ground lessors should negotiate for co-location fees with caution, because tower owners typically explore multiple property options for potential cell tower sites and will likely pursue more aggressively locations that do not require co-location fees.

E. Term

Because tower owners may incur hundreds of thousands of dollars in upfront site acquisition, construction, permitting and related costs, they expect long-term leases in order to recoup their investment costs. Common lease terms are 25-30 years, with initial five- or 10-year terms and three to five additional, automatically renewing, five- or 10-year terms.¹¹ Automatically renewing terms are particularly important to tower owners, because they eliminate tower owners’ cumbersome administrative burdens of preparing and transmitting potentially hundreds or thousands of renewal letters annually. Although automatic term renewals cause ground lessors to surrender some control over leased premises, ground lessors acquire in exchange reliable, long-term rent stream security.

Ground lessors should negotiate for co-location fees with caution, because tower owners typically explore multiple property options for potential cell tower sites and will likely pursue more aggressively locations that do not require co-location fees.

F. Termination Rights

Tower owners expect broad, penalty-free and liability-free lease termination rights, both for cause and discretionary reasons. Unlike typical commercial real estate settings in which lessors must relet empty lease spaces to replenish their businesses’ lost revenues, cell tower ground lessors have no empty spaces to fill or lost business revenues when tower owners terminate cell tower leases, which justifies tower owners’ broad termination rights.

Tower owners expect for cause termination rights if they cannot obtain zoning or other governmental approvals necessary to construct or operate their towers or governmental approvals are withdrawn, cancelled, expire or lapse during lease terms. Tower owners expect discretionary and convenience-based termination rights if casualty events damage or destroy cell tower sites, or they determine that their sites are obsolete, unnecessary, no longer

technically compatible, suitable or economically feasible for their uses. Additionally, tower owners expect rights to terminate ground leases at any time prior to commencing site construction and on annual bases.

Conversely, to help ensure tower owners’ long-term site operabilities, they expect ground lessors to have limited termination rights. Accordingly, ground lessors should expect to obtain termination rights only if tower owners materially breach ground leases (*e.g.*, they fail to pay rent), subject to reasonable prior notice and cure rights.

G. Effective Date and Commencement Date

Most ground leases have separate effective and commencement dates. Effective dates are dates upon which ground leases are fully executed. Commencement dates mark the dates subsequent to effective dates upon which tower owners’ rent payment obligations commence.

The periods between effective dates and commencement dates allow tower owners to conclude due diligence and to avoid paying rent until they are ready to construct their towers. Their due diligence includes

obtaining surveys and title reports; conducting soil, engineering and environmental testing; and seeking governmental approvals. Ground lessors are expected to cooperate with tower owners in their due diligence performance, generally at tower owners' cost and expense.

Because commencement dates tend to be tied to tower construction, commencement dates are not necessarily determinable on effective dates. Commencement dates typically begin on the earlier of two different dates: commonly a date specific and the date site construction commences. For tower owners' administrative ease, commencement dates typically are the first days of months.

H. Electronic Interference

Despite being uncommon, signal interference, degradation and loss at cell tower sites are unavoidable. Tower owners' antenna arrays and transmission equipment emanate electronic signals, which can cause interference with ground lessors' and other co-locating carriers' equipment. Conversely, ground lessors' and co-locating carriers' equipment may emanate electronic signals that interfere with tower owners' and other co-locating carriers' equipment.

Tower owners generally do not accept liability for interference their equipment causes, unless the interference is material, but they will attempt to eliminate interference they cause. Tower owners expect ground lessors to give them written notice of interference and reasonable cure periods during which tower owners can attempt to eliminate interference, before ground lessors can terminate the lease or exercise other contractual remedies. In extreme interference cases, tower owners may be willing to power down their equipment or cause their co-locating carriers to power down their equipment for limited periods while they attempt to cure interference, as long as ground lessors cannot exercise any contractual remedies against them during the power down period.

Tower owners expect ground lessors to agree that neither ground lessors nor third parties with rights in or to ground lessors' properties will cause material interference with tower owners' equipment. Because tower owners may have no contractual privity with

Tower owners expect ground lessors to agree that neither ground lessors nor third parties with rights in or to ground lessors' properties will cause material interference with tower owners' equipment.

those third parties, many tower owners expect ground lessors to assign to them any enforcement rights ground lessors may have against those third parties. Additionally, tower owners expect ground lessors to cooperate with tower owners in their legal and non-legal efforts to stop interference or remove interference sources.

I. Insurance

Tower owners expect ground lessors to insure their ground lease interests for specified minimum amounts covering property damage, personal injury and death. Acceptable coverage amounts range from \$1,000,000 to \$2,000,000 per occurrence. Commercial general liability policies generally suffice. Ground lessors should expect to name tower owners as additional

insureds on their commercial general liability policies. In turn, tower owners will provide comparable third-party insurance coverage to ground lessors or self-insure against covered risks.

J. Indemnification

Tower owners expect mutual indemnification obligations from ground lessors. Indemnification obligations typically include claims for property damage, personal injury and death. Tower owners will indemnify ground lessors for covered liabilities, unless liabilities are due to ground lessors' or third parties' acts or omissions, negligence or intentional misconduct. Conversely, ground lessors will indemnify tower owners for covered liabilities, unless liabilities are due to tower owners' or third parties' acts or omissions, negligence or intentional misconduct.

Unlike typical commercial real estate leases, tower owners are reluctant to indemnify ground lessors for claims due to tower owners' use and occupancy of leased premises, because those risk allocations increase tower owners' risk exposures more than those allocations do for commercial tenants generally. For example, commercial tenants can secure their leased premises from third-party intrusions and damages, but because cell tower sites are unmanned, tower owners can only be expected to take reasonable security measures and precautions to prevent such intrusions

and damages. Even if tower owners agree to use and occupancy indemnities, they expect their obligations to be limited solely to their own actions and include carve-outs for ground lessors' and third-party acts and omissions, negligence and intentional misconduct.

Ground lessors often request environmental indemnities from tower owners. Because environmental indemnities expose tower owners to potentially greater risks than property damage, personal injury and death claims (*e.g.*, remediation liability), tower owners may agree to environmental indemnities, but they will insist upon narrowly tailored clauses, which limit their exposures to environmental damages they cause specifically, in most cases, due to federal law violations. Conversely, tower owners expect ground lessors to accept environmental indemnification liability for all environmental law violations relating to activities on their properties, including third-party activities, but excluding tower owners' activities.

K. Consent–Subordination and Non-Disturbance

If mortgages or deeds of trust encumber ground lessors' properties at lease inception, tower owners require ground lessors to obtain each secured lender's consent to their ground leases and help obtain subordination and non-disturbance agreements from each secured lender. Tower owners generally agree to subordinate their leasehold interests to secured lenders' interests in the leased premises, in exchange for secured lenders granting their ground lease interests absolute recognition in the future, regardless of foreclosures or related actions.

L. Rights of First Refusal

Tower owners typically require rights of first refusal clauses (“ROFR”) in ground leases. ROFRs prohibit ground lessors from assigning ground leases or selling or assigning certain interests in tower owners' leaseholds to third parties, unless tower owners have had opportunities to match third-party offers.

ROFRs have become increasingly important to tower owners, because companies specializing in cell tower lease or rent stream buyouts are increasingly soliciting ground lessors with enticing financial deals in order to step into ground lessors' shoes, position themselves to charge tower owners inflated rents and otherwise hold hostage tower owners at lease term renewal intervals.

ROFRs allow tower owners to control their site features and the ground lessors with whom or which they

conduct business. Additionally, exercising ROFRs allow tower owners to control and comply with potential administrative burdens with which buyout companies may be less equipped to comply, such as granting consents underground leases and dealing with governmental authorities.

M. Taxes

Tower owners typically pay personal property taxes assessed upon their equipment and other personal properties at cell tower sites. Ground lessors should expect to pay all real estate taxes assessed upon ground lessors' properties, including any increased real estate taxes due to cell towers on their properties.

N. Equipment Removal and Restoration

Tower owners generally agree to restore leased premises to their original conditions, reasonable wear and casualty damages excepted. Tower owners typically agree to complete restoration work within 90-120 days after ground lease expiration or ground lease termination effective dates. Restorations generally include removing buildings, structures, equipment, conduits, fixtures and all other personal properties from the site. Although tower owners will not remove tower foundations completely due to expense and time considerations, most tower owners will remove all visible foundation and footing signs and, in some cases, remove footings to a few feet below ground surfaces.

O. Lease Memoranda

Tower owners expect rights to record lease memoranda in local recording offices to give the public constructive notice of their ground lease rights. In addition to basic ground lease terms including the lease parties' identities, commencement dates and term lengths, as with ground leases, a best practice is to incorporate surveys as exhibits to memoranda.

Ground lessors are sometimes reluctant to grant rights to record memoranda, because they fear recorded memoranda will continue as title clouds on their properties after lease termination or expiration. Despite this reluctance being generally unfounded, tower owners may be willing in limited cases to execute instruments terminating their recorded memoranda, which they will allow ground lessors to hold in escrow pending ground lease termination or expiration. Alternatively, tower owners may be willing to grant ground lessors limited powers-of-attorney to prepare and sign termination statements for recording upon ground lease terminations or expirations.

P. Utilities

Tower owners typically pay for utility charges attributable to their property uses. Most tower owners are willing, if possible, to have their tower sites separately metered for utility consumption and to directly pay utilities.

Q. Assignment and Subletting

Tower owners generally require absolute and unrestricted rights to assign ground leases and sublet leased premises. Tower owners may cede some assignment rights, if their absolute and unrestricted rights include affiliated company assignment and assignments resulting from sales of all or substantially all of tower owners' assets in applicable FCC markets for sites, mergers, conversions and consolidations. Tower owners are generally amenable to all other assignments being subject to ground lessors' consents, which consents ground lessors may not unreasonably withhold, condition, delay or deny. Because tower owners' businesses depend, in part, upon revenue from co-locating carriers, tower owners should not expect to limit tower owners' subletting rights.

Conclusion

Understanding the industry basics and negotiation concepts this article addresses should enable practitioners to effectively negotiate cell tower ground leases timely and without unnecessary negotiations and client expense. ▲

Endnotes

1. Cellular Telecommunications Industry Association (CTIA) Wireless Industry Survey 2016—<https://www.ctia.org/docs/default-source/default-document-library/annual-year-end-2016-top-line-survey-results-final.pdf?sfvrsn=2>. CTIA is a Washington, D.C.-based trade association representing the wireless communications industry in the United States.
2. In the United States, the Federal Communications Commission, an independent regulatory agency, administers spectrum for non-federal uses, including business and personal use. <https://www.fcc.gov/engineering-technology/policy-and-rules-division/general/radio-spectrum-allocation>.
3. CTIA Wireless Industry Survey 2016—<https://www.ctia.org/docs/default-source/default-document-library/annual-year-end-2016-top-line-survey-results-final.pdf?sfvrsn=2>.
4. Cell sites often involve licenses rather than leases. Unlike leases, which convey to lessees property interests in leased premises and are typically transferable and irrevocable, licenses grant licensees rights to use properties for specific purposes, do not transfer interests in the properties, and are typically non-transferable and revocable at licensors' wills. "One of the principal tests in determining whether or not the contract is to be interpreted

Because tower owners' businesses depend, in part, upon revenue from co-locating carriers, tower owners should not expect to limit tower owners' subletting rights.

as a lease or a license is whether or not it gives possession of the premises against all the world, including the owner, in which case a lease is intended, or whether it merely confers a privilege to occupy under the owner, thereby indicating a license." *Mason v. Carroll*, 269 So. 2d 879, 880 (1972). For this article's purposes, the distinction between leases and licenses is largely unimportant.

5. See Section 4 of this article entitled "Cell Tower Leases" for further discussion about "co-location" leases.
6. During the past decade, some carriers have built up tower portfolios, which they have sold to tower portfolio companies to raise working capital. For example, both T-Mobile and Verizon Wireless have sold substantial tower assets to Crown Castle.
7. "A utility shall provide . . . a telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). "A utility providing electric service may deny a . . . telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2). See also 47 C.F.R. § 1.1403(a).
8. This article refers to carriers and tower portfolio companies in their capacities as ground lessees collectively as "tower owners."
9. See *supra* note 4.
10. Due to the large co-location lease volume one carrier may have with one tower portfolio company, carriers and tower portfolio companies tend to negotiate master lease agreements governing all their cell sites and enter into pro-forma schedules or supplements for each cell site.
11. Tower owners sometimes obtain perpetual easements instead of leases. Typical perpetual easements require tower owners to pay landowners one-time, lump sum payments, rather than recurring lease/rent payments in exchange for exclusive rights to use landowners' properties. Perpetual easements are generally irrevocable and grant the same or greater rights to tower owners as leases would. Easements may benefit landowners more than leases due to long-term capital gains tax advantage possibilities or tax deferral possibilities using 1031 like-kind exchanges.

William M. Lawrence



Bill Lawrence is a shareholder in the Birmingham office of Baker, Donelson, Bearman, Caldwell & Berkowitz PC, where his practice focuses on business transactional and telecommunications/wireless technology law. He represented his first telecommunications client 18 years ago and currently represents carriers, tower owners and other businesses engaged in deploying wireless communications infrastructure. He graduated from Auburn University and the Cumberland School of Law at Samford University. From 1996-97, he served as law clerk to the Honorable Robert B. Propst, United States District Judge for the Northern District of Alabama.

ALABAMA LAW FOUNDATION Announces New Fellows

The Selection Committee of the Fellows of the Alabama Law Foundation meets annually to select lawyers, from among those nominated by incumbent Fellows, to be invited to membership. Those selected have demonstrated outstanding dedication to their profession and their community.

This year's Fellows banquet was held in their honor on Saturday, January 27 at the Renaissance Hotel in Montgomery. During the event, those Fellows elevated to "Life Fellows" status were also recognized.

The Fellows program was established in 1995 to honor Alabama State Bar members for outstanding service and commitment. Since no more than 1 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 Anthony Joseph explains, "We are honored to welcome the 2018 Class of Fellows to the Alabama Law Foundation. This class reflects the best of the best. Throughout their careers, these men and women have distinguished themselves as lawyers, judges and servant leaders in the profession and community. We are proud to welcome them into the ranks of our Foundation."

The foundation depends upon Fellows to provide financial and personal support. Fellows' gifts help the foundation fund important projects and programs that benefit Alabama residents and the legal community alike, toward the goal of providing equal access to justice for all Alabama citizens. ▲

Below are the Fellows accepted into membership for 2017:

George W. Andrews, III, Birmingham, sole practitioner

Amy S. Creech, Huntsville, partner, Rhodes & Creech

David F. Daniell, Daphne, partner, Daniell, Upton & Perry

Kendall C. Dunson, Montgomery, partner, Beasley Allen Crow Methvin Portis & Miles

J. Langford Floyd, Fairhope, of counsel, Lloyd Gray Whitehead & Monroe

Jana Russell Garner, Selma, JRG Law Offices LLC

Johnny Hardwick, Montgomery, circuit judge, 15th Judicial Circuit

Jeffrey J. Hartley, Mobile, partner, Helmsing Leach Herlong Newman & Rouse

Bruce M. Lieberman, Montgomery, assistant attorney general, State of Alabama

Peter S. Mackey, Mobile, partner, Burns, Cunningham & Mackey

Emily Coody Marks, Montgomery, partner, Ball, Ball, Matthews & Novak

J. David Martin, Montgomery, partner, Copeland Franco Screws & Gill

M. Clay Martin, Huntsville, partner, Martin & Helms

Edward M. Patterson, Montgomery, assistant executive director, Alabama State Bar

Eugene W. Reese, Montgomery, Eugene W. Reese PC

Jeffrey C. Rickard, Birmingham, partner, Marsh, Rickard & Bryan

E. Tatum Turner, Chatom, partner, Turner Onderdonk Kimbrough Howell Huggins & Bradley

Leila H. Watson, Birmingham, partner, Cory Watson

Frank M. Wilson, Montgomery, partner, Copeland Franco Screws & Gill



How to Address the Reality of Alcoholism, Addiction and Mental Health Disorders Among Alabama Attorneys

By Robert B. Thornhill

Most of the attorneys I have known are hard-working,

self-motivated and ambitious, and certainly intent on bringing about the best possible outcome for clients. As a class, they expend tremendous effort to be disciplined, responsible and detail-oriented. These attributes have enabled them to endure the enormous challenges of undergraduate school, law school, studying for and passing the bar and facing the rigors of practicing law as a newly-licensed attorney. Most are able to navigate these

unique challenges and to find practical and healthy ways to cope with the stress of practicing law. However, recent studies have confirmed that there is also a significant proportion of lawyers who have not adjusted well to these multi-faceted challenges, and who have acquired very unhealthy coping skills and/or undiagnosed and untreated mental health disorders.

In a landmark study published in the *Journal of Addiction Medicine* in February 2016 entitled, “The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys,” researchers found “rates of hazardous, harmful, and potentially

I hope you will take care to read the very informative article in this issue by Bernard Nomberg, “Opioids and the Workers’ Compensation Claim,” on pages 111–113. The costs of undiagnosed and untreated addiction to the addict, families, loved ones, business, community, the health care system, corrections and our nation are incalculable. His article sheds light on one of these areas, workers’ compensation claims.

dependent drinking and high rates of depression and anxiety symptoms.” Review of this important study found that 15 bar associations participated, and almost 15,000 lawyers from 19 states (Alabama was one of the states that participated) completed surveys addressing alcohol use, drug use and symptoms of depression, anxiety, stress and other mental health concerns. Of these, approximately 11,300 completed a 10-question instrument known as the Alcohol Use Disorders Identification Test (AuDIT-10), which screens for levels of problematic alcohol use. Of these respondents, 21 to 36 percent revealed a score consistent with an alcohol use disorder. The study also revealed that 28 percent reported concerns with mild or high levels of depression, and 19 percent reported mild or high levels of anxiety. Overall, 23 percent reported mild or high levels of stress.¹

The purpose of this article is to define and discuss these issues, propose recommendations that can result in improved lives and careers and describe the various ways that the Alabama Lawyer Assistance Program (“ALAP”) can provide effective guidance and support.

Becoming a licensed attorney is an arduous and stress-filled challenge. Once the license is obtained, a new and often unexpectedly difficult process of discovering experientially how to function as an attorney begins. For those who have found healthy ways to deal with stress, a workable and fulfilling path to a successful legal career can emerge. However, for those who have resorted to over-consumption of alcohol or other drugs, or to excessive reliance on food, sex, gambling or other forms of behavioral addictions as a means of coping

with the stress of practicing law, the inevitably worsening negative consequences will become painfully evident over time. These negative consequences include formal complaints to the Office of General Counsel at the Alabama State Bar, alcohol- or drug-related arrests, other legal problems such as arrests for domestic violence or harassment, neglect of cases and responsibility to clients and colleagues, unethical use of trust fund monies and the onset of undiagnosed and untreated mental health maladies such as depression, anxiety disorder, substance use disorders and bipolar disorder. Without evaluation, accurate diagnosis and effective treatment of these issues, additional negative consequences such as loss of family, profession, health and eventually life itself are almost certain.

The Alabama Lawyer Assistance Program is designed to provide *confidential* assistance to law students, attorneys and judges who are struggling with one or more of these problems. There are good reasons for ensuring complete confidentiality. The February 2016 study shows that the primary reasons attorneys do not reach out for help are fear of others finding out and concern about privacy and confidentiality.²

It is important here to discuss some of the common, and I believe necessary, traits that most attorneys share. Among these are self-reliance, ambition, perfectionism and a learned adversarial approach. While these traits are certainly positive when utilized in a healthy and measured way, they are absolutely NOT conducive to recognizing or acknowledging that one may have a problem with a mental health issue or a substance use disorder. I believe this is a primary reason for the alarming statistics revealed in the

study, and for the reluctance most attorneys share in admitting that they might have a problem. These men and women need our help! They desperately need colleagues, family and friends who have the genuine courage to reach out and tell them what they need to hear.

Reaching out to someone who is obviously struggling with addiction is *not* easy. It requires a willingness to “risk their wrath” to tell them what they need to hear and not what they want to hear. People in the throes of active addiction have literally lost the ability to recognize that they may have a serious problem. The addicted mind automatically rationalizes and justifies the continued use of their drug of choice, and minimizes the risks and negative consequences. Addicts and alcoholics need to hear the truth from the people who know them and care about them. This is usually a very uncomfortable event for all involved, but it is a powerful and necessary first step in moving the addict toward a path of recovery.

ALAP can help with this process. We are happy to receive calls of concern regarding a colleague or family member. We will attempt to receive as much information as possible and we will provide specific recommendations. We will also help to arrange an informal intervention if the parties involved are willing. Should the caller wish to remain anonymous they may do so. Once we have received the information and we feel it is a cause for concern, we will reach out directly to the attorney in question.

The most common mental health concerns that we work with are alcohol or drug addiction, depression and anxiety. Other mental health issues that we see are attention deficit hyperactivity disorder (ADHD),

bipolar disorder and cognitive impairment. All of these conditions require evaluation and treatment. ALAP maintains a list of qualified and experienced health care providers, and we are happy to pass on the proper referrals when needed.

Once we have received documentation of the evaluation to include diagnoses and recommendations, we will meet again with our attorney-client and discuss our monitoring program. We will take time to explain the various provisions of our monitoring program to include random drug-screening; active participation in a 12-step program, such as Alcoholics Anonymous or Narcotics Anonymous; regular contact with an assigned “lawyer monitor,” usually one of the volunteer attorneys on our committee; documentation of ongoing counseling or therapy; participation in a “lawyers support group;” and monthly reports to our office. Studies have shown that this level of comprehensive monitoring provides for a much higher rate of success for professionals such as doctors, lawyers and airline pilots regarding improvement of symptoms and long-term sobriety.

I think it is important to provide a brief description of the most common mental health maladies that we encounter. The first remains substance use disorders.

The substance use disorders include alcohol use disorder (alcoholism), opiate use disorder (addiction to heroin or any opiate medication such as OxyContin, Hydrocodone, Oxycodone, etc.), cocaine use disorder, amphetamine use disorder and so on. These addictions meet the qualification of a chronic disease because they meet the following four criteria:

1. Primary: The substance use disorder is not secondary to

some other disorder, it is a primary disease.

2. Progressive: The disorder manifests in inevitably worsening negative consequences (physical, emotional, mental, spiritual).
3. Chronic: There is no “cure” for these disorders, but there can be effective recovery.
4. Fatal: Without immersion in a genuine program of recovery, the disorder is fatal.

The *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition* (DSM-5) provides the following clinical criteria necessary to diagnose a substance use disorder:

- A. Maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by two or more of the following in a 12-month period.
 1. Tolerance—takes more to achieve the same effect
 2. Withdrawal—this can be mental, emotional or physical. People in the latter stages of alcohol use disorder and benzodiazepine use disorder can actually die in the throes of withdrawal without medically-supervised detoxification.
 3. Substance often taken in larger amounts or over a longer period of time
 4. Persistent desire or effort to cut down or control use
 5. Great deal of time spent acquiring, using or getting over use (this is the tragic cycle of active addiction)
 6. Important social, occupational or other activities reduced or neglected

7. Continued use despite persistent physical or psychological problems³

Based on my experience, the best and most useful description of an alcohol use disorder can be found in the book *Alcoholics Anonymous*. This book, affectionately referred to by those in the AA fellowship as the “Big Book,” describes the disease of alcoholism as a two-fold illness:

1. A Mental Obsession—The alcoholic is literally obsessed with the idea of using and reusing the very substance that is killing him. This “obsession” to pick up that first drink, regardless of the inevitably worsening negative consequences, is a physiological phenomenon that is unique to alcoholics and to the other addictions. It never occurs to those who do not have a substance use disorder.
2. A Physical Allergy—once the alcoholic/addict inevitably succumbs to the mental obsession and picks up that first drink or drug, they are then driven by a “physical allergy” (a physiological craving) to have another and another. Again, this is a physiological phenomenon that only occurs with alcoholics and addicts. Social drinkers can easily stop after one or two drinks.⁴

It is important to note that the attorney who has developed an addiction will put forth great effort to conceal this fact from his colleagues and clients. Once the drinking and/or drug use begins to show up in the workplace it usually means that the addiction has been active for quite some time.

Attorneys who have developed a substance use disorder need a

comprehensive residential evaluation. This is usually followed by a recommendation for residential treatment. ALAP maintains a list of approved providers that offer excellent evaluation and treatment.

Upon successful completion of the recommended treatment, the attorney will typically sign a three-year voluntary monitoring contract with our office. As previously mentioned, studies involving professionals have shown that good evaluation and treatment followed by monitoring and accountability greatly increase the likelihood of sustained recovery!

The second most common malady that we work with is depression. The DSM-5 indicates that a diagnosis of major depressive disorder can be made if five or more of the following symptoms have been present for at least a two-week period and represent a change from previous functioning, and at least one of the symptoms is either depressed mood or loss of interest or pleasure.

- Depressed mood most of the day, nearly every day, as indicated by either subjective reporting or observations made by others
- Markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day
- Significant weight loss when not dieting, weight gain or decrease or increase in appetite nearly every day
- Insomnia or hypersomnia nearly every day
- Psychomotor agitation or retardation
- Fatigue or loss of energy nearly every day

- Feelings of worthlessness or excessive or inappropriate guilt nearly every day
- Diminished ability to think or concentrate, or indecisiveness, nearly every day
- Recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation without a specific plan or a suicide attempt or specific plan for committing suicide.⁵

These criteria represent a significant difference between the normal “low moods” that we all experience from time to time.

Again, people who have acquired depression usually do not possess the necessary insight to see the seriousness of their situation. Because of the very nature of the malady, they tend to blame themselves and see themselves as worthless and defective. They need a comprehensive psychological evaluation usually followed by a recommendation for ongoing counseling and psychiatric medication management.

Other common mental health issues that we work with are bipolar disorder, anxiety disorder and attention deficit hyperactivity disorder (ADHD). All of these maladies require evaluation followed by close adherence to clinical recommendations. Again, for all of these mental health issues, we provide a program of ongoing monitoring for accountability and support.

The process of intervening in someone’s life and guiding them to evaluation, treatment and effective recovery is rarely smooth and easy. Usually, it consists of multiple interactions and interventions, accompanied by inevitably worsening negative consequences. It is frequently difficult, challenging and

unpleasant. However, there is no doubt that when people are willing to get involved and have the courage to speak with these folks, risk their wrath and make them aware of their concern, the path to recovery has begun.

If you know of a colleague who is exhibiting some of these symptoms, or if you can recognize and relate to any of these sets of criteria yourself, we strongly urge you to contact the Alabama Lawyer Assistance Program. We will do our very best to provide support, referrals and an effective means of accountability. These maladies rarely “work themselves out on their own.” Without help they tend to grow progressively worse over time. It is important to remember that we all have problems and could benefit from counseling. It is truly a sign of mental health to acknowledge a problem and to reach out for help! ▲

Endnotes

1. “The Prevalence of Substance Use and Other Mental Health Concerns among American Attorneys,” Krill, Patrick R. JD,LLM; Johnson, Ryan MA; Albert, Linda MSSW; *Journal of Addiction Medicine*; February 2016; Volume 10—Issue 1—pp 46–52.
2. *Ibid*; p51.
3. *Diagnostic and Statistical Manual of Mental Disorder*, 5th Edition; American Psychiatric Association, 2013, pp 490-491.
4. Alcoholics Anonymous, Third Edition, Alcoholics Anonymous World Services, Inc., 1998, pp xxvi–xxvii.
5. *Diagnostic and Statistical Manual of Mental Disorders*; 5th Edition; American Psychiatric Association, 2013, pp 160-161.

Robert B. Thornhill



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- ▲ Public Reprimand

Notice

- **Malcolm Bailey Conway**, who practiced in Mobile and whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of March 31, 2018 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 2017-766, before the Disciplinary Board of the Alabama State Bar. [ASB No. 2017-766]

Transfers to Disability Inactive Status

- Birmingham attorney **James Edmund Odum, Jr.** was transferred to disability inactive status pursuant to Rule 27(b), *Alabama Rules of Disciplinary Procedure*, effective October 24, 2017, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the October 24, 2017 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to Odum's petition submitted to the Office of General Counsel requesting that he be transferred to disability inactive status. [Rule 27(b), Pet. No. 2017-1220]
- Cullman attorney **Virginia Ruth Smith** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective November 6, 2017. [Rule 27(c), Pet. No. 17-1265]
- Pleasant Grove attorney **Valeria Frye Walker** was transferred to disability inactive status pursuant to Rule 27(c), *Alabama Rules of Disciplinary Procedure*, effective October 19, 2017, by order of the Supreme Court of Alabama. The supreme court entered its order based upon the October 19, 2017 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to Walker's request submitted to the Office of General Counsel requesting that she be transferred to disability inactive status. [Rule 27(c), Pet. No. 2017-1208]

Suspensions

- Birmingham attorney **Theatric Brackett, Jr.** was summarily suspended from the practice of law in Alabama pursuant to Rule 8(e) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective November 14, 2017. The order of the Disciplinary Commission was based on the petition filed by the Office of General Counsel evidencing that Brackett failed to respond to requests for information from a disciplinary authority. [Rule 20(a), Pet. No. 17-1286]
- Tallassee attorney **Sara Anna Rutland Cook** was summarily suspended from the practice of law in Alabama pursuant to Rule 8(e) and 20(a), *Alabama Rules of Disciplinary Procedure*, by order of the Disciplinary Commission of the Alabama State Bar, effective May 22, 2017. The order of the Disciplinary Commission was based on the petition filed by the Office of General Counsel evidencing that Cook failed to respond to requests for information from a disciplinary authority. [Rule 20(a), Pet. No. 17-1286]

- Birmingham attorney **Felicia Deanna Harris-Daniels** was suspended from the practice of law for one year in Alabama by the Supreme Court of Alabama, effective November 30, 2017. The supreme court entered its order based upon the Disciplinary Commission's acceptance of Harris-Daniels's conditional guilty plea, wherein Harris-Daniels pled guilty to violating Rules 1.3, 1.15(a), (b), (e) and (n); 8.1(a); and 8.4(c) and (g), *Ala. R. Prof. C.* [ASB No. 2017-474]

Public Reprimand

- The Disciplinary Commission ordered that Gadsden attorney **Luther Dickie Abel** receive a public reprimand with general publication for violating Rules 1.3, 1.4, 1.6, 1.7(b), 5.3 and 8.4 (a) and (g), *Ala. R. Prof. C.* Abel agreed to file a divorce or annulment action on behalf of a client. He had previously represented the client, who was by then incarcerated, in a civil forfeiture matter. In that representation, he took possession of the client's property and turned it over to the client's wife. The client was concerned that his



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(Continued from page 129)

wife may dispose of his property if she discovered his intentions to file for divorce. Therefore, he asked Abel to keep the proposed divorce action confidential from his wife, and take steps necessary to secure his bank accounts and property. Abel did not file a divorce or annulment petition on behalf of the client, despite advising him he would do so. Nor did Abel respond to the client's attempts to contact him over the course of several months. The client's wife discovered the client's intention to file for a divorce or annulment, disposed of his property and then filed a pro se annulment petition. The wife's petition was

notarized by Abel's former employee, the mother of his child, with whom he is or has been romantically involved, and who is also a friend of his wife. He did not file an answer or communicate with the client regarding the wife's filing. The client filed a pro se answer where he indicated Abel was representing him and had already filed a divorce action on his behalf. Almost a year passed without any action in the matter, and it was dismissed by the court for want of prosecution. Abel then filed a notice of appearance on behalf of the client and a motion to reinstate the case, which was denied. [ASB No. 2016-1046] ▲



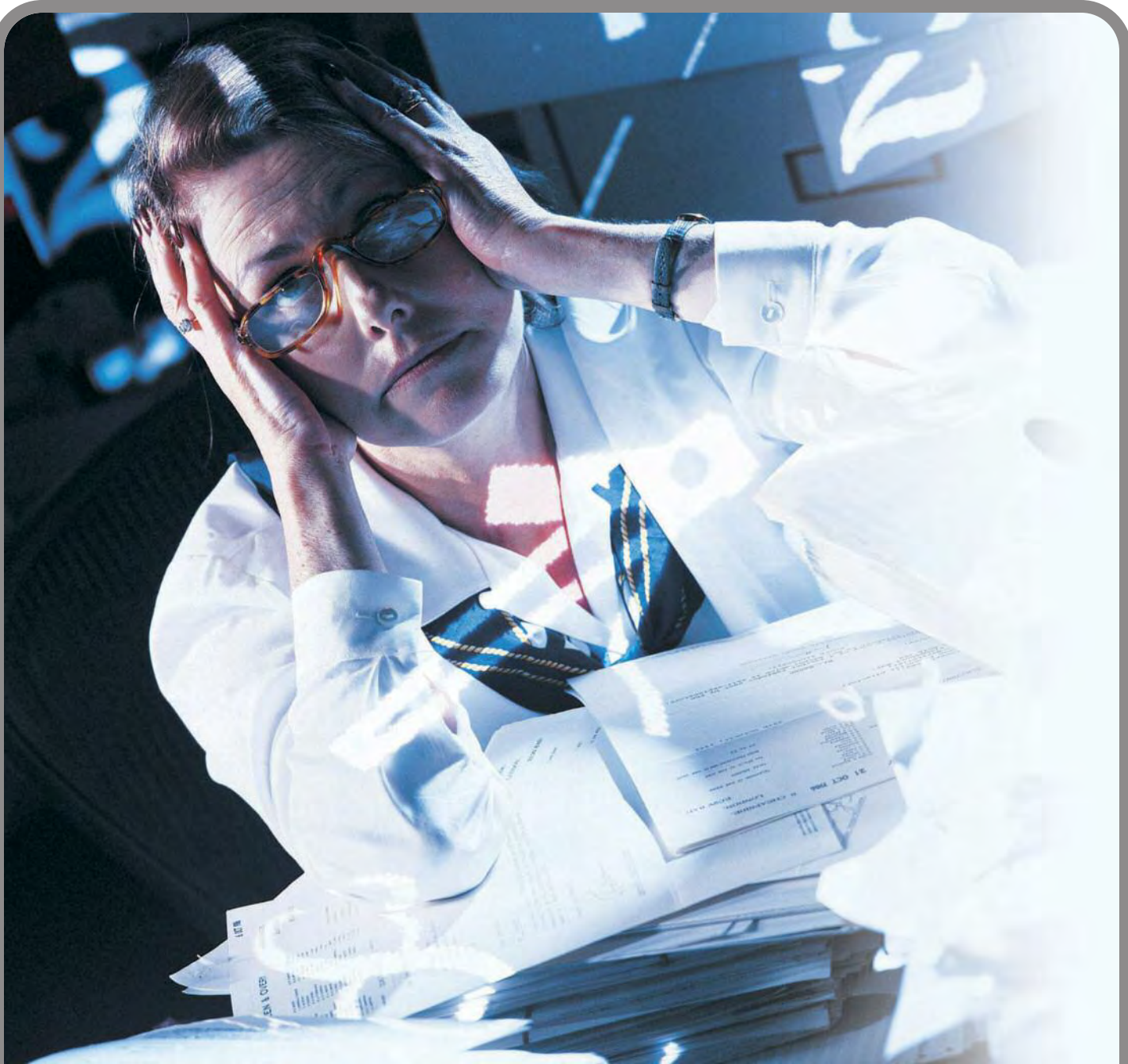
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▲ Julian Parke Keith

Julian Parke Keith

My cousin, Julian Parke Keith, died July 17, 2017 after a brief illness. Over the years, I have noticed that after the death of family and friends, we realize attributes we never really recognized before. Only after Parke's death did I realize how much of a mentor he was to me.

Parke was born March 24, 1946, the son of Chambliss Keith and Caroline Atkins Keith, and was a descendant of prominent Dallas County families. Parke was a third-generation attorney. He was educated in the Selma public schools, attended the University of the South at Sewanee and received his juris doctorate in 1972 from Cumberland Law School.

Parke was a longtime prosecutor for the City of Selma and later served as assistant district attorney for the Fourth Judicial Circuit. He served by appointment as Special Attorney General for the State of Alabama, handling condemnation work and also criminal appeals. Parke was a partner at his family firm, Keith & Keith, and as a partner at Blackwell & Keith for 16 years. During his 45 years of practice, Parke represented a large and varied clientele, handled a wide range of legal matters and faithfully provided excellent legal services to his clients. He possessed the ability to try a case in the district and circuit courts statewide. He was well respected by law enforcement throughout Alabama. He gave his clients sound legal advice.

Parke served for a number of years on the advisory board of AmSouth Bank and on many other boards of corporate entities. He was a lifelong member of St. Paul's Episcopal Church in Selma, where he served on the vestry. He was an avid and competitive golfer, and had a great interest in airplane history due to his father's service in World War II. He conducted extensive research and communication with various aeronautical organizations.

Parke was devoted to his family and was always supportive of his friends. He has left an admirable and honorable legacy to those of us who survived him.

Parke is survived by his wife, Brenda Cummings Keith; his son, Julian Parke Keith, Jr.; his daughter, Chambliss Keith Brister; and his grandchildren, Anna Claire Keith, Caroline Aileen Keith, Atkins Elizabeth Keith, James Parke Brister and Koen Keith Brister.

The passing from this life of Julian Parke Keith marks not only a great loss to the bar of this state and our courts, but also to his community.

—Cartledge W. Blackwell, Jr., Selma

Abbott, Garry Wayne
Bessemer
Admitted: 1984
Died: November 10, 2017

Crowell, Vicki Raines
Juliette, GA
Admitted: 1985
Died: May 5, 2017

Lammons, Aubrey Owen
Huntsville
Admitted: 1961
Died: June 12, 2017

Blan, Ollie Lionel, Jr.
Birmingham
Admitted: 1959
Died: November 23, 2017

Fagan, LaShan Williams
Ashford
Admitted: 2007
Died: July 26, 2017

Lang, Gregory Alan
Gadsden
Admitted: 2006
Died: May 11, 2017

Bolen, Randall Harry
Chelsea
Admitted: 1987
Died: November 19, 2017

Gathings, Jonathan Woodard
Birmingham
Admitted: 1985
Died: December 19, 2017

Naugle, Margaret Vance
Birmingham/West Point, MS
Admitted: 2003
October 22, 2017

Booth, Brad Jacob
Birmingham
Admitted: 2009
Died: November 29, 2017

Haislip, John Lister
Scottsboro
Admitted: 1958
Died: October 3, 2017

Pippen, Barbara Denise Dorriety
Dothan
Admitted: 1999
Died: March 23, 2017

Burton, Bradley Roger
Birmingham
Admitted: 2011
Died: December 12, 2017

Harris, Hugh Bennett, Jr.
Bessemer
Admitted: 1959
Died: November 8, 2017

Thompson, Ronald Paul
Albertville
Admitted: 1970
Died: February 19, 2017

Calhoun, John Childress
Trussville
Admitted: 1972
Died: November 25, 2017

Jackson, Jerry Wayne
Hayleyville
Admitted: 1969
Died: December 2, 2017

Yates, Joe Hugh
Florence
Admitted: 1974
Died: July 26, 2017

Copeland, Brian Gregory
Cullman
Admitted: 1983
Died: July 31, 2017

Keahey, Ronnie Eldred
Grove Hill
Admitted: 1970
Died: December 25, 2017



ABOUT MEMBERS, AMONG FIRMS

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

Among Firms

Balch & Bingham LLP announces that **Steve Feaga** joined as its first chief compliance officer. The firm also announces that **Tashwanda Pinchback Dixon** and **Righton Johnson Lewis** are now partners in the Atlanta office and **Thomas DeBray**, **Martha Legg Miller** and **Jesse Unkenholz** are now partners in the Birmingham office.

Bradley Arant Boult Cummings LLP announces that **Jared C. Batte**, **Angelique A. Ciliberti**, **Niya T. McCray**, **David W. Morton**, **Ryan R. Priddy**, **Candice L. Rucker**, **D. Butler Sparks** and **Lance W. Waters** joined as associates in the Birmingham office and **Austin Haggood** and **Angela M. Schaefer** joined as associates in the Huntsville office. The firm also announces that **James Blake Bailey**, **Lindsey C. Boney, IV**, **David W. Holt**, **Michael A. Thomason, Jr.** and **James W. Wright, Jr.** are now partners.

Christopher Burrell and **Terrell McCants** announce the formation of **Burrell & McCants LLC** in Birmingham.

Burr & Forman LLP announces that **Rachel Cash**, **Ben Coulter**, **Kasee Heisterhagen** and **Anna Scully** are now partners.

Cabaniss, Johnston, Gardner, Dumas & O'Neal LLP announces that **Diane Babb Maughan** was elected to serve as a managing partner on the firm's management committee.

Julia T. Cochrun and **W. Whitney Seals** announce the opening of **Cochrun & Seals LLC**.

Conchin Cloud & Cole LLC announces that **Aaron Ryan** is now a partner in the firm's Huntsville office and that **Craig N. Rosler** joined the firm in the San Francisco office.

Dillard & Associates LLC announces that **T. Geoffrey Dillard** joined the firm.

English Lucas Priest & Owsley LLP announces that **Nathan Vinson** is now a partner.

Forrester Law LLC announces that **Mary Elizabeth Lambert** joined as an associate.

Hand Arendall LLC and **Harrison Sale McCloy Attorneys at Law** announce the merger of the two firms and a name change to **Hand Arendall Harrison Sale LLC**.

Hill Hill Carter announces the opening of its Fairhope office at 23210 US Highway 98, Suite D-4, 36532. Phone (251) 270-7217.

Hollis, Wright, Clay & Vail announces that the **Hon. Allwin E. Horn, III, Allwin E. Horn, IV** and **Michael Eldridge** joined the firm.

Ignite Fueling Innovation announces that **Bobbi Weeks Wilson** is now vice president of corporate operations.

Lanier Ford Shaver & Payne PC announces that **Lauren Houseknecht** and **Lauren A. Smith** are now shareholders.

Lightfoot, Franklin & White LLC announces that **Melody Hurdle Eagan** is the managing partner and that **James W. Gibson** is a partner.

Maynard Cooper & Gale announces that **Matthew J. Cannova, Alexander B. Feinberg, Charles M. Hartman, Jennifer Justice McEwen** and **Will A. Smith** are now shareholders. The firm also announces that **J. Hobson Presley**

Jr., Kevin W. Beatty, John H. Burton Jr., Kathleen A. Collier, Kathryn J. Ottensmeyer and **David B. Ringelstein, II** joined the firm as shareholders.

McCallum, Methvin & Terrell PC announces a name change to **Methvin, Terrell, Yancey, Stephens & Miller PC**.

McGlinchey Stafford PLLC announces that **Christopher P. Couch** is now a member of the firm and that **Paul S. Leonard** joined as of counsel, both in the Birmingham office.

Moses & Moses PC announces that **William Randall May** joined the firm. ▲

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Resources to Understand The State's Budgets

This article is being written as the 2018 Legislative Session is approximately one-third of the way done; it is hoped that by the time you are reading this article, a productive and successful session will be nearing an end. Much of the focus and energy of each legislative session is on the development and passage of the annual appropriation bills.¹ The Legislative Service Agency has a number of publications available that help those interested understand this critical area of activity for the legislature.

Budget Resources

The passage of the appropriation bills, more commonly known as the “budgets,” is, of course, the only constitutional obligation of the legislature. The mandate that the state have a budget that is balanced is the cornerstone on which the legislature builds. The fiscal division has tremendous resources available that delve into great detail on what the state

spends, how much money the state collects and how much money we leave uncollected because of deductions, credits and rate differentials.

■ *The Budget Fact Book*

The Budget Fact Book is prepared annually by the Legislative Services Agency-Fiscal Division to be a quick-reference guide for members of the Alabama Legislature. The booklet contains general budgetary information, as well as other information about state government finances, in an easy-to-use format.

Below is a sampling of the information included in the book:

- Total appropriations from the Education Trust Fund and the State General Fund;
- Bonded indebtedness of the state;
- Proration History (Education Trust Fund and State General Fund);
- Estimated cost of a teacher unit;

- State employees' and teachers' salary increases history (percent increase);
- State employees' and teachers' salary increases estimated cost history (\$); and
- History of retirement system and health insurance contribution rate and costs

The *Budget Fact Book* also contains detailed information on the certain state agencies and boards as well as salary information for certain public officials.

■ **A Legislator's Guide to Alabama Taxes**

The 2018 *Legislator's Guide to Alabama Taxes* is the 25th edition of a publication that the Legislative Fiscal Office first completed in January 1979. The book is intended as a reference source for the most basic information about Alabama's taxes and revenues.

The book contains information about every tax collected for the benefit of the state, including:

- References to constitutional and statutory provisions related to the tax;
- Tax rate, base, exemptions and distribution;
- Five-year history of collections;
- Legislative history of the operative law establishing the tax;
- Local rates and related information (for selected taxes only); and
- Brief description of comparable tax in Florida, Georgia, Mississippi and Tennessee

The guide also contains tables and pie charts showing the State General Fund receipts by tax and the Education Trust Fund receipts by tax. The guide is a user-friendly source of a wealth of information about our state tax system, its legal authority and its collections.

■ **Report on Alabama Tax Expenditures**

This is the newest of the Fiscal Division Reports and is in its second year of publication. Tax expenditures are provisions of law that allow for special treatment of a source of income or certain types of expenses that results in a reduction in the tax liability for a taxpayer or group of taxpayers. In Alabama, these expenditures are established by statute and, in some cases, the Constitution. In most cases, the tax benefits realized by the taxpayer or group of taxpayers could be provided by direct appropriation; therefore, the provisions are referred to as "expenditures." Expenditures represent revenues that would have otherwise been generated if not for the preferential treatment.

Tax expenditures are intended to achieve a policy objective or encourage some activity. The value or cost of any tax

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expenditure can be thought of as the amount of money required to provide the same level of support through direct appropriation rather than preferential tax treatment. The benefits of tax expenditures are received by businesses and individual taxpayers and are present in all of Alabama's major taxes, including the individual income tax, corporate income tax and sales and use taxes.

Section 29-5A-46, *Code of Alabama* 1975, requires the Fiscal Division of the Legislative Services Agency to prepare and submit an annual report to the legislature which lists all state tax expenditures and the estimated costs associated with each.

The statute outlines the information required to be included in the report as follows:

- Each annual tax exemption and its constitutional and/or statutory citation;
- An estimate of the revenue loss to the state caused by each of the tax expenditures for the most recently completed fiscal year;
- Tax expenditures, organized by the funds into which the tax expenditures would be dedicated, but for the exemptions and rate differentials.

The report also provides summary charts laying out the following: (1) a recap of the amount of expenditures estimated by tax, including the total estimated revenue loss from the expenditures; (2) the funds affected by the tax expenditures and the revenue loss from the tax expenditures where estimates could be provided; (3) a chart comparing the taxes included in the report with the highest collections in FY2017 and the estimated tax expenditures for those taxes; and (4) a chart illustrating the five tax sources with the largest total tax expenditures.

These publications, as well as periodic reports to the legislature on the condition of Alabama's budgets, can be found on the publications page of the Fiscal Division at www.lsa.state.al.us. ▲

Endnote

1. The July 2014 edition of this column provides a good background to the legislative budgeting process in general.



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

Medical Liability

Coleman v. Anniston HMA, LLC, No. 1151212 (Ala. Dec. 1, 2017)

By a 5-4 margin, the court affirmed without opinion a summary judgment in favor of hospital on medical liability claim relating to actions of nurses in following physician's orders concerning overnight monitoring of patient. Plaintiff contended that nurses should have contacted physician overnight to advise of change in patient's condition. However, undisputed evidence (according to special concurrence by Justice Shaw) indicated that physician would have taken no different action, and therefore actions or inactions of nurses were not the proximate cause of any injury. Justice Bolin dissented with an extensive opinion, joined by Justices Murdock and Wise. Justice Parker dissented without opinion.

State-Agent Immunity

Ex parte McClintock, No. 1160782 (Ala. Dec. 1, 2017)

DHR employees were entitled to state-agent immunity for actions arising from death of child who had been placed in foster care, because plaintiffs failed to provide substantial evidence of DHR Policy violation which caused the alleged death.

Relation Back

Ex parte Profit Boost Marketing, Inc., No. 1160326 (Ala. Dec. 1, 2017)

Newly-added defendant had not been substituted for fictitious party under the pleadings for relation-back purposes, thus rendering claims against that defendant untimely.

New Trial

Mitchell's Contracting Service, LLC v. Gleason, No. 1160376 (Ala. Dec. 8, 2017) (plurality opinion)

Trial court abused its discretion by denying a motion for new trial, where defendant unsuccessfully sought continuance of trial based on belated disclosure of eyewitness whom non-movant called at trial.

Outrage; Rule 12 Standard

Wilson v. University of Alabama Health Services Foundation, P.C., No. 1160654 (Ala. Dec. 15, 2017)

Facts alleged in complaint properly stated outrage claim against doctors and hospital, based on averments that doctors uttered variety of statements that plaintiff's mother was "wasting the resources of the hospital" and should be returned home to die while on life support.

Equitable Mortgages

Newell v. Newell, No. 1160851 (Ala. Dec. 15, 2017)

Trial court erred in granting summary judgment concerning the existence of an "equitable mortgage." Statute of frauds is not applicable to a claim seeking a declaration of a trust in the nature of an equitable mortgage.

Will Contests; Procedure

McElroy v. McElroy, No. 1160394 (Ala. Dec. 15, 2017)

Because Jefferson Probate Court may exercise general equity jurisdiction, will contest filed in probate court after admission of will to probate could have properly been filed in probate court under *Ala. Code* § 43-8-199; however, removal of action from probate to circuit court was improper because *Ala. Code* § 12-11-41 requires removal order to be entered by the circuit court, not the probate court.

Discovery

Ex parte Tombigbee Healthcare Authority, No. 1160706 (Ala. Dec. 15, 2017)

In action by patients against hospital for liability stemming from radiological technologist's alleged sexual assaults of them, patients sought discovery from hospital of other incidents of alleged sexual assault by the technician. Trial court compelled discovery, and defendants sought mandamus relief. The supreme court denied mandamus relief; although the AMLA applied to the claims, hospital did not demonstrate that quality-assurance privilege of *Ala. Code* § 22-21-8 covered allegations of sexual acts wholly unrelated to medical treatment or that investigations related to allegations of sexual assault are undertaken to improve the quality of patient care.

Arbitration

Slamen v. Slamen, No. 1160758 (Ala. Dec. 22, 2017)

Motion to compel arbitration must be resolved before merit-based discovery is conducted; trial court exceeded its discretion

in ordering merits-based discovery while a motion to compel arbitration was pending.

Estates

Wehle v. Bradley, No. 1160214 (Ala. Dec. 22, 2017)

Under *Ala. Code* § 43-2-509, a personal representative who pays herself unauthorized compensation is liable to the estate for one of two alternative damage remedies: either interest on the amount of compensation paid or any profits derived from the compensation. The selection of the alternative method of calculation is the right of the aggrieved party. In this case, the court reversed the circuit court's switching of methods from the aggrieved party's selection (interest) to the profit method.

Forum Non Conveniens

Ex parte Elliott, No. 1160941 (Ala. Dec. 22, 2017)

In action against UIM carrier based on MVA accident, both county of accident and county of policy delivery had a significant connection to the dispute; thus, trial court exceeded its discretion in ordering "interests of justice" transfer from county of accident to county of policy delivery.



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(Continued from page 139)

Governmental Damage Caps

Wright v. Cleburne County Hospital Board, Inc., No. 1151317 (Ala. Dec. 29, 2017)

Claims against county hospital's nurses in their individual capacities were not subject to the \$100,000 damage cap of *Ala. Code* § 11-93-2.

State Agent Immunity

Ex parte Price, No. 1160956 (Ala. Jan. 12, 2018)

Warden and deputy DOC commissioner whose only involvement was in creating and maintaining policies were entitled to state-agent immunity in action based on inmate-on-inmate attack purportedly caused by defective locks and understaffing.

State Agent Immunity; Discovery

Austill v. Krolkowski, No. 1160820 (Ala. Jan. 12, 2018)

Because issues of state agent immunity should be addressed before general merits issues, trial court had discretion to determine that discovery in question was not relevant to the ultimate question of whether examiner was exercising professional judgment for immunity purposes.

Finality of Judgments

Bates v. Stewart, No. 1160800 (Ala. Jan. 12, 2018)

Order approving a final judicial accounting of administration of a trust contemplated further action by trustee, so order was not final.

Domestic Relations

Ex parte Wilson, No. 1160101 (Ala. Jan. 16, 2018)

In considering a modification to alimony award, trial court should take into account all changes in circumstances since last modification of alimony, including circumstances which trial court previously considered, but deemed insufficient as changed circumstances to warrant an intervening modification.

From the Alabama Court of Civil Appeals

Summary Judgment Procedure

Simmons v. Cook, No. 2160171 (Ala. Civ. App. Dec. 1, 2017)

Failure to move to strike affidavit supporting motion for default judgment constituted waiver of objections to contents of affidavit.

Students First Act

Lawson State Community College v. Mitchell, No. 2160821 (Ala. Civ. App. Dec. 1, 2017)

The court reversed a hearing officer's overturning of college's termination of an administrative assistant, because officer impermissibly substituted the officer's judgment for that of decision-maker.

Bonds; Remission

1 Quick Bail Bonds, LLC v. State, No. 2160959 (Ala. Civ. App. Dec. 1, 2017)

Under *Ala. Code* § 15-13-139, trial court has discretion to remit all or any portion of a final forfeiture judgment.

Finality of Judgments

Green v. Beard and Beard Attorneys, No. 2160590 (Ala. Civ. App. Dec. 8, 2017)

Trial court retained jurisdiction to enter Litigation Accountability Act award of fees because award was entered within 30 days after Plaintiff's voluntary dismissal of the action; trial court has jurisdiction to modify final order sua sponte within 30-day period.

Rule 60 Motions

Ex parte Keeler, No. 2170099 (Ala. Civ. App. Dec. 15, 2017)

Trial court lacked jurisdiction to adjudicate Rule 60(b) motion while appeal was pending, because appellate court leave to file motion is required under the rule while an appeal is pending.

Administrative Law

Ex parte Alabama Public Charter School Commission, No. 2170150 (Ala. Civ. App. Jan. 5, 2018)

Under § *Ala. Code* 41-22-20(d), circuit court acquires appellate jurisdiction over final state-agency decision only if appellant initially filed notice of appeal with the agency within 30 days of appellant's receipt of agency's final decision.

Fraud; Effect of Merger Clause

McCullough v. Allstate Property and Casualty Insurance Company, No. 2160497 (Ala. Civ. App. Oct. 27, 2017, on rehearing Jan. 12, 2018)

Presence of merger-integration clause in a contract does not bar a claim of fraudulent inducement of the instrument containing the clause. The court also held that the presence of the merger clause, combined with evidence of misrepresentation, created an issue of fact concerning reasonable reliance.

Fraudulent Inducement; Merger Clause

Jones v. The Village at Lake Martin, LLC, No. 2160650 (Ala. Civ. App. Jan. 12, 2018)

Although defendant was entitled to summary judgment on contract claim (where contract contained merger and integration clause), because Alabama law does not preclude fraudulent inducement claims relating to integrated contract, genuine issue of fact precluded summary judgment on fraudulent inducement claim, given testimony of buyers and (potentially) referential contract language not contradicting oral statements. (Ed. Note: Wilson wrote a 2010 *Alabama Lawyer* article about reasonable reliance, based upon which he believes there may be some significant inconsistency in the law on this point.)

Workers' Compensation

Regions Bank v. Allen, No. 2160949 (Ala. Civ. App. Jan. 12, 2018)

Trial court failed to make required findings under *Ala. Code* § 25-5-88, mandating reversal of award of comp benefits.

Tax Sale and Tax Deed Procedures

Rioprop Holdings, LLC v. Compass Bank, No. 2160673 (Ala. Civ. App. Jan. 12, 2018)

Under *Ala. Code* § 40-10-82, "[n]o action for the recovery of real estate sold for the payment of taxes shall lie unless the same is brought within three years from the date when the purchaser became entitled to demand a deed therefor . . ."

Materialmens' Liens

McGee v. Dillard, No. 2160581 (Ala. Civ. App. Jan. 12, 2018)

Action by general contractor for recovery of debt which did not mention a prior-filed materialmens' lien was not an action for enforcement of the lien, which is required for the lien to be perfected under *Ala. Code* § 35-11-220. Because no action for the enforcement of the lien was commenced within six months after the maturity of the debt the lien secured, the limitations period for the enforcement of the lien expired. *Ala. Code* § 35-11-221.

Standing

Keith v. LeFleur, No. 2160598 (Ala. Civ. App. Jan. 26, 2018)

African-American citizens had standing to challenge ADEM's adoption of certain procedures to process environmental justice complaints as being done without complying with notice and comment requirements, because they alleged a sufficiently concrete injury (the inability to bring valid challenges to approval of odor-emanating sites) fairly traceable to defendant's



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(Continued from page 141)

conduct, and because “there is some possibility that the requested relief will prompt” the director and ADEM to reconsider the manner in which such rules are enacted.

From the United States Supreme Court

Habeas; Juror Bias

Tharpe v. Sellers, No. 17-6075 (U.S. Jan. 8, 2018)

Juror affidavit attesting to juror’s racial prejudices compelled reopening of federal habeas corpus proceedings’ jurists of reason could debate whether inmate has shown by clear and convincing evidence that the state court’s factual determination was wrong.

Supplemental Jurisdiction; Tolling of Statute of Limitations for State Law Claims

Artis v. District of Columbia, No. 16-460 (U.S. Jan. 22, 2018)

When a district court dismisses all claims independently qualifying for the exercise of federal jurisdiction, it ordinarily also dismisses all related state claims. See §1367(c)(3). Section 1367(d) provides that the “period of limitations for” refile in state court a state claim so dismissed “shall be tolled while the claim is pending [in federal court] and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.” Held: “tolled” in section 1367(d) means suspended, i.e., the statute of limitations stops running while the federal action is pending.

Qualified Immunity

District of Columbia v. Wesby, No. 15-1485 (U.S. Jan. 22, 2018)

Officers who responded to a complaint about loud music and illegal activities in a vacant house, finding the house nearly barren and in disarray, smelling marijuana and observing beer bottles and cups of liquor on dirty floors, then finding a make-shift strip club in the living room and a naked woman and several men in an upstairs bedroom, had probable cause to arrest partygoers and were entitled to qualified immunity on false arrest claims. Even if officers lacked actual probable cause to arrest the partygoers, they

are entitled to qualified immunity because, given circumstances, they reasonably, but mistakenly concluded that probable cause was present.

From the Eleventh Circuit Court of Appeals

Bankruptcy

In re: Horne, No. 16-16789 (11th Cir. Dec. 5, 2017)

Bankruptcy Code authorizes payment of attorneys’ fees and costs incurred by debtors in successfully pursuing an action for damages resulting from the violation of the automatic stay and in defending the damages award on appeal.

Telemarketing Sales Rule (FTC Act)

FTC v. WV Universal Mgmt, LLC, No. 16-17727 (11th Cir. Dec. 15, 2017)

Independent of the “common enterprise” standards, party can be held jointly and severally liable with another party for violation of Telemarketing Sales Rule (TSR) for providing substantial assistance to the other party, to the extent of unjust gains.

Employment

Lewis v. City of Union City, No. 15-11362 (11th Cir. Dec. 15, 2017)

Lewis was terminated abruptly from her position after about 10 years of service, ostensibly because she was absent without leave—notwithstanding that she had only days earlier been placed on indefinite administrative leave. She sued for alleged unlawful disability and/or racial or gender discrimination. Held: genuine issues of material fact concerning the stated reason for the discharge precluded summary judgment.

Copyright

Roberts v. Gorday, No. 16-12284 (11th Cir. Dec. 15, 2017)

This is a copyright infringement action. The creators of a rap song “Hustlin’” (an encomium or paean to the craft of drug distribution, with the refrain “Every day I’m hustlin’”), brought it against the creators of Party Rock Album regarding its creation and Kia Motors’ use of the Party Rock Anthem

as the soundtrack for one of its now equally famous dancing-hamsters commercials (the alleged infringement is that Party Rock Album's "beat drop" is "every day I'm shufflin"). District court granted summary judgment based on alleged invalidity of copyright registrations and failure to demonstrate ownership, which district court had raised *sua sponte*. The Eleventh Circuit reversed, holding that lack of ownership or registration invalidity was an affirmative defense which could not properly be raised *sua sponte*, and that undisputed evidence demonstrated that any errors in registration were done in good faith and not with any intent to defraud, thus not impacting validity of registration.

Rooker-Feldman

May v. Morgan County, Georgia, No. 17-11030 (11th Cir. Dec. 21, 2017)

May sued the county, contending that she had a "grandfathered" right to engage in short-term rental use of certain real property, despite an intervening regulation which prohibited such use. In prior litigation, Georgia state courts determined that May was barred from contesting the enforceability of the regulation for failure to challenge it within 30 days of passage, as required by Georgia law, and that her action was barred for failing to exhaust her administrative remedies by not seeking a rezoning and conditional use permit from the county before filing suit. In this second suit, the district court dismissed the case based on issue preclusion and the *Rooker-Feldman* doctrine. The Eleventh Circuit affirmed dismissal of the entire case on *Rooker-Feldman* grounds, holding that the claims in the second case were inextricably intertwined with the issues raised in the prior case, such that a ruling in her favor in this case would effectively nullify the state court's judgment in the first case.

Qualified Immunity

Brand v. Casal, No. 16-10256 (11th Cir. Dec. 19, 2017)

Homeowners (parents of arrestee) sued two deputy sheriffs under section 1983 for excessive force and related claims arising from execution of arrest warrant on arrestee. The district court granted summary judgment based on qualified immunity (QI) on some claims, but not others, and further split its decision as to the two deputies. The Eleventh Circuit affirmed in part and reversed in part, holding: (1) both deputies were entitled to QI on unlawful entry claim, because entry into a residence is reasonable in executing an arrest warrant if the arresting officer has a reasonable belief [1] that the location to be searched is the suspect's dwelling, and [2] that the suspect is within the residence at the time of entry; here there were both; (2) district court properly denied summary judgment on excessive force claim based on tasing of homeowner, because in the Eleventh Circuit, use of taser on one not violent or aggressive and was not resisting arrest violates "clearly established law"; (3) deputy was entitled to qualified immunity on claim arising from protective sweep of residence, given prior violent encounter and potential presence of someone in rear

of home; and (4) qualified immunity was properly denied on bodily privacy claim, because forcing plaintiff to lie in floor for an hour with exposed breasts violated clearly established law.

Rule 25

Lizarazo v. Miami-Dade Corrections, No. 17-12280 (11th Cir. Dec. 29, 2017)

District courts have discretion to extend the 90-day deadline (running from the filing of a suggestion of death) within which a substitution of a deceased party must be made.

False Claims Act

King v. US, No. 15-12031 (11th Cir. Jan. 3, 2018)

Section 3705 of the False Claims Act (31 U.S.C. § 3705), under which plaintiff contended the U.S. was liable for secretly settling his FCA claim without paying him his statutory share, does not waive the U.S.'s sovereign immunity.

Shotgun Pleadings

Vibe Micro, Inc. v. Shabanets, No. 16-15276 (11th Cir. Jan. 3, 2018)

District court was within its discretion in dismissing, as being in violation of Rule 8, a "shotgun" pleading (in the form of a second amended complaint, ordered after the first complaint was

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also deemed non-compliant) of 70 pages with 160 pages of exhibits, containing numerous irrelevancies and inconsistencies.

Expert Evidence

Commodores Entertainment Corp. v. McClary, No. 16-15794 (11th Cir. Jan. 9, 2018)

District court did not abuse its discretion in excluding expert testimony from an attorney who proffered only legal conclusions.

Qualified Immunity; Monell Liability

Simmons v. Bradshaw, No. 16-10876 (11th Cir. Jan. 10, 2018)

Because it is not the jury’s role to determine entitlement to qualified immunity, which is a legal issue, jury instruction relating to excessive force claim was erroneous (thus requiring new trial) for failure to account for the possibility that there could be excessive force and Lin could nonetheless be entitled to qualified immunity.

Amendments to Pleadings

Cita Trust v. Fifth Third Bank, No. 16-15580 (11th Cir. Jan. 16, 2018)

Proper procedure for seeking leave to amend complaint as alternative to dismissal is for plaintiff to seek leave to amend. Where a request for leave to file an amended complaint simply

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is imbedded within an opposition memorandum, the issue has not been raised properly.

Defamation (Florida Law)

Turner v. Wells, No. 16-15692 (11th Cir. Jan. 18, 2018)

Former professional football coach for the Miami Dolphins is a public figure; his defamation claim failed for inadequate pleading that defendants acted with malice in publishing allegedly libelous report.

Idea; Standing

LMP v. Broward County School Bd., No. 16-16412 (11th Cir. Jan. 19, 2018)

Because their children's IEPs included ABA-based modeling, appellants, who were parents of disabled children, lacked standing to assert claim that school board maintained a policy of never including any ABA-based method or strategy in a child's IEP, in violation of the IDEA, 20 U.S.C. §§ 1400-1482.

First Amendment

Keister v. Bell, No. 17-11347 (11th Cir. Jan. 23, 2018)

Touchstone test for determining limited vs. traditional public fora is whether university intended to open area up for non-student use, and not the physical characteristics of the locale.

RECENT CRIMINAL DECISIONS

From the Court of Criminal Appeals

Brady; Capital Murder

State v. Martin, CR-15-0664 (Ala. Crim. App. Dec. 15, 2017)

Following its previous decision in *State v. Martin*, 195 So. 3d 1077 (Ala. Crim. App. 2014) (table) affirming the trial court's order that granted a new trial to a capital murder defendant due to *Brady* violations, the court affirmed trial court's subsequent dismissal of indictment, rejecting state's contention that trial court erred in granting the defendant a new trial and subsequently dismissing the charge due to the same *Brady* violations, and concluding that the trial court's decision was properly supported by evidence of the violations.

Ineffective Assistance

State v. Flowers, CR-14-1274 (Ala. Crim. App. Dec. 15, 2017)

Trial court properly found capital murder defendant's trial counsel rendered ineffective assistance during penalty phase of his trial, but it reversed its decision to resentence him and remanded for new penalty-phase trial.

Ineffective Assistance

Acklin v. State, CR-14-1011 (Ala. Crim. App. Dec. 15, 2017)

Trial court correctly denied capital murder defendant's ineffective assistance claims, because evidence showed that trial attorneys did not have a financial conflict of interest and that their decision to refrain from introducing evidence of the defendant's childhood abuse came at his express direction. It also did not err in excluding purported expert testimony from an attorney, not licensed to practice in Alabama, who "repeatedly demonstrated his ignorance of Alabama law[.]"

Ineffective Assistance; Sexual Abuse; Unanimity Instruction

State v. Kerley, CR-16-0740 (Ala. Crim. App. Dec. 15, 2017)

Trial court's Rule 32 relief on sexual abuse defendant's claim that trial counsel rendered ineffective assistance by not requesting a unanimity instruction was reversed. Though counsel was deficient by not either 1) moving for state to elect to prove specific instance of sexual abuse, or 2) requesting that jury be instructed that it could find guilt only if it unanimously agreed that defendant committed all the incidents described by the victim, defendant was not prejudiced by this deficient performance. It affirmed trial court's denial of relief on other ineffective assistance claims, noting that trial counsel was not called to testify at the evidentiary hearing and that his decision to not call certain witnesses could have been strategic in nature.

Youthful Offender; Preservation

Arnold v. State, CR-16-0789 (Ala. Crim. App. Dec. 15, 2017)

In affirming defendant's burglary and theft convictions, the court noted that, because he did not object to the trial court's failure to hold a hearing on his application for youthful offender status at or before trial, but instead objected in a motion for new trial, his objection was untimely and did not preserve any alleged error.

Hearsay; Certification of Medical Records

D.E.R. v. State, CR-15-1183 (Ala. Crim. App. Dec. 15, 2017)

Trial court abused its discretion when it admitted medical records of a child sexual abuse/sodomy victim without requiring that those statements satisfy a hearsay exception under *Ala. R. Evid.* 803(4); an affidavit accompanying the records did not comply with *Ala. Code* § 12-21-7 and thus did not serve to support their admission under that statute. The court reversed the defendant's sodomy conviction for that reason, but found the error harmless as it related to his sexual abuse conviction. ▲



OPINIONS OF THE GENERAL COUNSEL

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Direct Solicitation of Former And Present Clients

QUESTION #1:

Under what circumstances may an attorney conduct direct solicitation—via in-person contact or by telephone—for professional employment under Rule 7.3(a), *Alabama Rules of Professional Conduct*?

ANSWER:

Rule 7.3(a), *Ala. R. Prof. C.*, expressly authorizes an attorney to directly solicit any family member (related by blood or marriage), former client or current client.

DISCUSSION:

Rule 7.3(a) continues the traditional prohibition against direct solicitation of legal employment. That rule provides in pertinent part the following:

Rule 7.3 Direct Contact With Prospective Clients

- (a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no familial or current or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. A lawyer shall not permit employees or agents of

the lawyer to solicit on the lawyer's behalf. A lawyer shall not enter into an agreement for or charge or collect a fee for professional employment obtained in violation of this rule. The term "solicit" includes contact in person, by telephone, telegraph, or facsimile transmission, or by other communication directed to a specific recipient and includes contact by any written form of communication directed to a specific recipient and not meeting the requirements of subdivision (b)(2) of this rule.

Direct solicitation is disfavored, in part, because the contact between attorney and prospective client is in private and, therefore, not subject to public scrutiny. As such, the attorney can overreach and "can more readily mix misleading speech with factual statements."¹ The reason for prohibiting direct solicitation is also discussed in the Comment to Rule 7.3:

There is a potential for abuse inherent in direct solicitation by a lawyer in person or by telephone, telegraph, or facsimile transmission of prospective clients known to need legal services. Direct solicitation subjects the non-lawyer to the private importuning of a trained advocate, in a direct interpersonal encounter. A prospective client often feels overwhelmed by the situation giving rise to the need for legal services and may have

an impaired capacity for reason, judgment, and protective self-interest. Furthermore, the lawyer seeking to be retained is faced with a conflict stemming from the lawyer's own interest, which may color the advice and representation offered the vulnerable prospect.

The situation is therefore fraught with the possibility of undue influence, intimidation, and overreaching. This potential for abuse inherent in direct solicitation of prospective clients justifies some restrictions, particularly since the advertising permitted under Rule 7.2 offers an alternative means of communicating necessary information to those who may be in need of legal services.

Rule 7.3(a), *Ala. R. Prof. C.*, however, expressly exempts from the ban against solicitation those persons with whom the attorney has a familial relationship and/or a current or prior professional relationship.

It is presumed less likely that an attorney would engage in abusive or misleading practices against a person with whom he enjoys a familial relationship. While there is a recent trend to also exclude close personal friends from the prohibition against direct solicitation, the bar has yet to adopt such a provision.² Rather, the term "familial" literally denotes a family relationship, by either blood or marriage. It would be exceedingly

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difficult to enforce a rule that allowed direct solicitation of “close, personal friends.” What constitutes a “close, personal” relationship would be subject to debate and individual interpretation. As such, the commission believes that a “familial” relationship refers strictly to a family member by blood or marriage.

Current and former clients are also excluded from the prohibition against direct solicitation. Due to their previous or ongoing interaction with the attorney, current or former clients will have a sufficient basis upon which to judge whether to continue or reactivate a professional relationship with a particular attorney.

It should also be noted that in *In Re Primus*, 436 U.S. 412 (1978), the United States Supreme Court held that the solicitation of prospective clients by nonprofit organizations that engage in litigation as a form of political expression are entitled

to First Amendment protection and not subject to disciplinary action under the First Amendment for improper solicitation. In *Primus*, the prospective client was contacted after she had been sterilized as a condition to receiving Medicaid benefits. *Id.* The attorney offered to represent her, free of charge, under the auspices of the American Civil Liberties Union. *Id.* The ban against direct solicitation also may not apply when the attorney is not seeking and will not receive any type of financial benefit from the representation.

To the extent that RO-93-02 opined otherwise or conflicts with this opinion, it is hereby withdrawn. [RO-2006-01] ▲

Endnotes

1. Hazard & Hodes, *The Law of Lawyering*, § 57.3, 4. 3rd Edition (2005).
2. ABA, *Annotated Model Rules of Professional Conduct*, 547, Fifth Edition (2003).

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