

THE ALABAMA LAWYER

MAY 2018 | VOLUME 79, NUMBER 3



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Alabama State Bar 141st Annual Meeting

ALABAMA STATE BAR
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WEDNESDAY

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

ALABAMA STATE BAR
HILTON SANDESTIN BEACH

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
HILTON SANDESTIN BEACH

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
HILTON SANDESTIN BEACH

SATURDAY

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





On The Cover

Hilton Sandestin Beach Golf Resort & Spa is the site of the ASB 141st Annual Meeting.

—Photo by Noelle Buchannon, creative director at The Finklea Group, Inc. Noelle is 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 more than 27 years.

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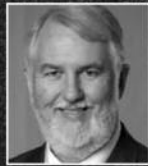
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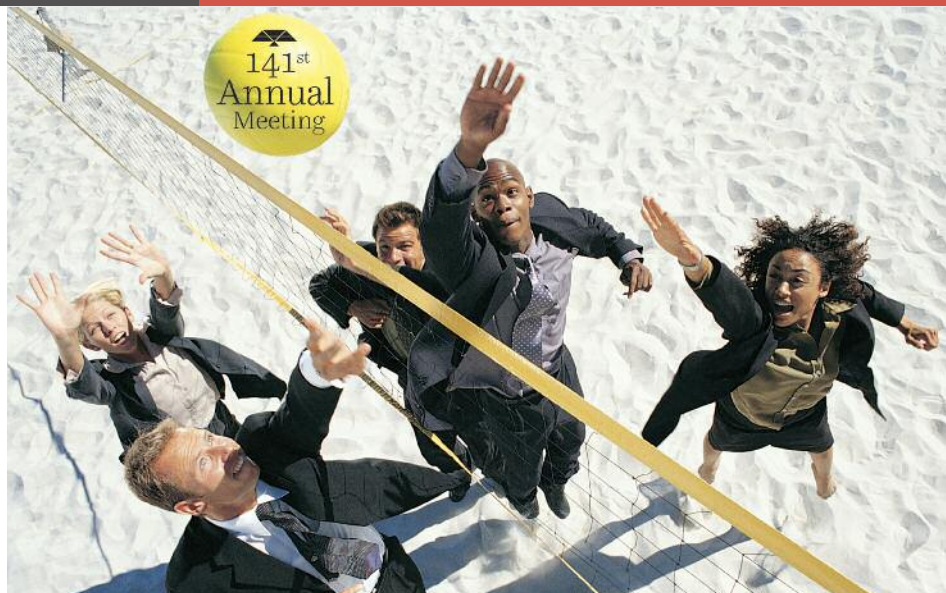
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P R E S I D E N T ' S P A G E

Augusta S. Dowd
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(205) 323-1888



What's up with the Annual Meeting This Year?

We find ourselves in May and my presidency, despite my best efforts to retain the magic of this year for longer than my approved tenure, is drawing to a close. The next time I write to you, I will be sporting a "Past President" ribbon on my bar name tag. The adage about time flying when you are having fun certainly applies to my year as your state bar president. I remain eternally grateful for the privilege and opportunity.

Your bar staff, supported by lawyers across the state, is currently focused on the programming and logistics surrounding our upcoming annual meeting. This year's meeting will be June 27-30 at the Hilton Sandestin Beach Golf Resort & Spa. The earlier timing of this year's annual meeting means that my

presidency will end several weeks ahead of its one-year mark—a quirk of calendaring that I've been assured is nothing personal. I will leave office knowing that our bar is in great hands with incoming President Sam Irby at the helm.

So, what's up with the annual meeting? Our goals for this year's meeting are for our members to "Get Away. Get Informed. Get Ahead." and we've been developing an agenda that delivers all of those! In response to feedback received about past annual meetings—what has worked, and what you would like to see done differently in the future—we have endeavored to provide a wider variety of CLE programming, as well as multiple networking and fellowship opportunities, family events and

occasions to recognize and celebrate all that our bar and its lawyers are doing so well. The aim is that the annual meeting will enable you to “Get Away” from the office for a few days, “Get Informed” by earning an entire year’s worth of CLE credit (and then some!) and “Get Ahead” by networking with our members, as well as reengaging with friends and loved ones and, hopefully, enjoying a bit of rest and recreation in a beautiful place.

I am excited to share some of the program and activity highlights with you. Joe Borg, director of the Alabama Securities Commission, will start off the Thursday morning plenary session with a fascinating discussion about how lawyers with the best of intentions can be duped by others into running afoul of Alabama’s securities laws. He will be sharing with us information about actual cases involving lawyers handled by his office. The bar’s Business Section is sponsoring Joe for an additional Friday breakout seminar on crypto-currency (Bitcoin, blockchain and other terms that may be unfamiliar to many of us but are of cutting-edge importance) entitled “Tales from the Crypt”—the title alone should attract a crowd!

Also on Thursday, Pat Juneau, who serves as the court-appointed administrator of the multi-billion dollar BP oil spill settlement, is going to speak to us in a breakout session entitled “Oil & Water: The Inside Story of the BP Oil Claims Process.” We will learn about the good, the bad and, I am sure, the very ugly (but no doubt very interesting). Pat is a great speaker and is extremely entertaining, and I know his talk will be well worth attending.

Friday’s opening plenary session is not to be missed: world-renowned geopolitical strategist and global affairs expert Peter Zeihan will speak on “The End of the World . . . And Other Opportunities.” I invite you to watch some of Peter’s speeches that are available online; he is absolutely fascinating. In very different and evidence-based ways, he will stimulate your thinking about our country and its place in the world. Special thanks to the Business Section for bringing Peter to our annual meeting.

In addition to this headline-grabbing array of speakers, we have a very full program of CLE opportunities for all types of practitioners, practice areas and interests. We will have CLE programs sponsored by many different sections, committees,

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(Continued from page 161)

task forces and other friends of our bar, including the Dispute Resolution Section, the Alabama Lawyer Assistance Program, the Practice Management Assistance Program, the Member Relations Task Force, the Service Member and Veterans Support Task Force, the Alabama Law Foundation, the Diversity Committee, the Women's Section, the In-House and Government Lawyers Section, Alabama WINGS, the Alabama Defense Lawyers Association and the Alabama Law Institute. We have a wide spectrum of programs planned—from lawyer marketing to healthcare, labor law to criminal law and many more.

By way of a few highlights: we expect to be introducing the new general counsel to everyone through a CLE breakout session on Thursday followed by a reception, which will be a great opportunity for all of you to meet and spend time with our new general counsel. Taze Shepard will be leading the Access to Justice Summit reports on the listening sessions that were held all over the state in February and March

and the Task Force on the Updates to Alabama Workers' Compensation Law will also provide its report. The Diversity Committee, Women's Section and Alabama Lawyers Association have joined forces to present an extremely timely 90-minute CLE session, "Let's Listen: A Real Conversation about Historical Monuments and Living through Change." We are deeply appreciative to our lawyers who are providing programming content for our annual meeting—thank you for helping to embody our bar motto that in Alabama, "Lawyers Render Service."

For those of you who will be enjoying the annual meeting with your families, we have a number of events scheduled to make this a special time. Wednesday night will kick off our time together with the Opening Reception and Family Night Dinner followed by a sand-crabbing expedition for the young and young at heart. We have arranged for sand castle instructors to help us enhance our castle-building skills on Thursday afternoon, and on Thursday evening, Insurance Specialists, Inc. Alabama will once again graciously provide a party and dinner for our younger guests so their parents can attend law school receptions. You'll have to check out the insert in this issue to find out this year's party theme and ISI's grand prize, but for now, let me just say, "May the Force Be with You."

In addition to solid educational sessions and family fun, the annual meeting will also provide multiple opportunities to catch up with old friends and make new ones. We are looking forward to new traditions, such as a great poolside party planned for Thursday afternoon, as well as continued traditions like the Bench and Bar and the Maud McLure Kelly luncheons and Women's Section Silent Auction. For our sports fans, the first-ever Tony McLain Memorial Golf Tournament, as well as a family tennis tournament, are set for Friday afternoon, and the annual Freedom Legal Run-Around 5K Run and 1-Mile Fun Run/Walk will take place before the Grand Convocation on Saturday morning. I hope you all will plan to attend what is shaping up to be a great party on Friday night, my last night as your bar president, as well as the Grand Convocation on Saturday morning, where we will hear the State of the Judiciary from our chief justice, recognize a number of our outstanding state bar members and install our 143rd president, Sam Irby.

As the annual meeting planning continues, I know we will have even more programs and activities to appeal to you, your practice and your family. More details will be coming your way via email or at www.alabar.org. Please make plans to join us and have a great time with your family and friends—I look forward to seeing you there! ▲

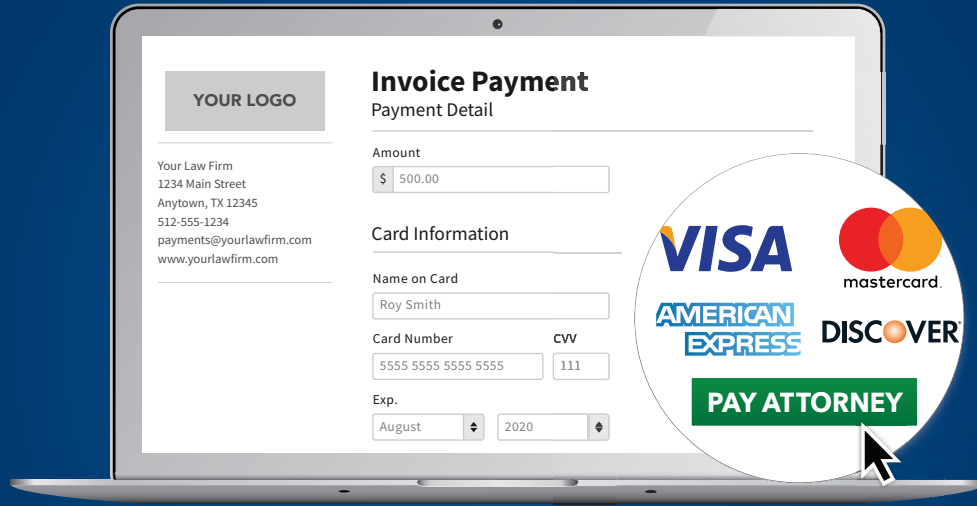
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EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum
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Back to the Beach: Relax, Learn and Connect

It's that time again! Annual meeting planning is in full swing at the bar and we are thrilled to be back at the Hilton Sandestin Beach Golf Resort & Spa this summer. Make plans to join us June 27–30 for three days of excellent CLE programming, networking opportunities and family fun. We always have productive and family-oriented annual meetings, but this year we are emphasizing relaxation and the time members get to spend with family and fellow lawyers.

One of the best parts of being at the Hilton Sandestin is the proximity to the beach. New activities for this year include sandcastle-building for the kids, a twilight crab chase by the ocean and a pool party with entertainment for the adults. There are some old favorites returning to the itinerary, but with an extra twist or two. At the Barrels and Planks party we hope to feature Alabama distilleries and breweries, to add a little hometown flair. We also have

planned the Tony McLain Memorial Golf Tournament. It's the perfect occasion to honor our friend while working on your handicap, too. If sand and sun don't appeal to you, the hotel has a world-class spa and the outlet malls are down the road. With shopping, golf and the beach, there is truly something for everyone at this year's annual meeting!

As for CLE programming, we have a full slate of informative and interesting speakers that cover a wide range of subjects. We'll kick it off with a Lawyer University program that focuses on the marketing information that lawyers need now, no matter the firm size or practice area. Throughout the week, sessions highlighting everything from Alabama dispute resolution to workers' compensation will be available. There will also be sessions featuring relevant digital topics like the ethical implications of using interconnected devices in litigation, as well as the ins and outs of

cryptocurrency. Additionally, the new general counsel will be introduced and those in attendance will have the opportunity to meet him or her during the course of the meeting.

We know that lawyers work hard, are often busy and sometimes are unable to attend the annual meeting. We are looking at options to make certain programs available online, including live-streaming on Facebook, so that those at home or at the office are able to be a part of the action. Our state bar is about providing opportunities to grow and learn within the profession. We hope you are able to attend this year's annual meeting at the Hilton Sandestin, bring your family and network with other members. Please visit <https://www.alabar.org/about-the-bar/annual-meeting> for more information about registration and a detailed itinerary. See you there! ▲



Pictured above with Mobile Bar Association Executive Director Barbara Rhodes (center) are, left to right, Bar Commissioners Bill Lancaster and Jim Rebarchak, ASB Executive Director Phillip McCallum, ASB President Augusta Dowd and Bar Commissioners Zack Moore and Bryan Comer. Rhodes has served as the executive director since 1981, and she and longtime Associate Director Tammy Anderson are the true “faces” of the MBA. According to MBA member Michael Upchurch, “Barbara has groomed, guided, educated, encouraged, tolerated and saved Mobile Bar presidents and officers from disaster and been the secret of their success for almost four decades. She knows more things about more Mobile lawyers than any other person alive.” Because of her dedication to the members of the Mobile Bar Association and the legal profession, Rhodes was chosen the third recipient of the “Executive Director’s MVP Award” and was recognized at the March Board of Bar Commissioners’ meeting held in Mobile.

–Photo by Alex Rice

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▲ Local Bar Award of Achievement

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.



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HOUSE BILL 317

Deep Breaths...

HB317 Doesn't Actually Gut the Ethics Act

By Edward A. Hosp

The outrage sparked by House Bill 317, the self-titled “Alabama Jobs Enhancement Act,” has been somewhat perplexing. For numerous weeks now, several Alabama media outlets, as well as some public officials and a prosecutor appointed as special prosecutor for the case against former Speaker Mike Hubbard, have warned that the bill would “gut” the Ethics Act, and lead to members of the legislature being hired by powerful interests as “economic developers.” Additionally, we have been told that the bill would allow economic developers to spend unlimited amounts of money on public officials in an effort to obtain favorable deals for their employers—

all without disclosure of those expenditures to the public.

The uproar is confusing because the plain language of the bill simply would not allow any of that.¹ In fact, the only thing it seems that the bill would do with respect to the Ethics Act is clarify that economic developers who do not seek action through any legislation do not have to register with the Alabama Ethics Commission. This clarification was deemed essential by the community of economic developers because the projects on which they work are routinely required to be kept confidential during the selection process. Additionally, it is important to understand that this (non-registration, that is) has been the standard practice both before and after the 2010 changes to the Alabama Ethics Act.

A. How Did We Get Here?

For decades, lobbyists in Alabama have been required to register with the Alabama Ethics Commission and disclose the entities that they represented before legislative bodies. Prior to 2011, registration was required *only* for efforts to influence legislation or regulations at the state or local level, though. Specifically, *Alabama Code* Section 36-25-1(20) defined (and still defines) lobbying as:

The practice of promoting, opposing, or in any manner influencing or attempting to influence *the introduction, defeat, or enactment of legislation* before *an* legislative body; opposing or in any manner influencing the executive approval, veto, or amendment of legislation; or the practice of promoting, opposing, or in any manner influencing or attempting to influence the enactment, promulgation, modification, or deletion of regulations before any regulatory body. The term does not include providing public testimony before a legislative body or regulatory body or any committee thereof.

Id. (emphasis added). Typically, those involved in economic development are not involved, at least in the early, confidential stages of a project, in efforts aimed at passing or altering legislation or regulations. As such, until 2011, economic developers did not register as lobbyists with the commission, and no one believed that they needed to.

In 2010, the legislature added a new provision to the *Code*, which provided an additional definition of lobbying. Section 36-25-1.1, which became effective in 2011, now provides that:

Lobbying includes promoting or attempting to influence the awarding of a grant or contract with any department or agency of the executive, legislative, or judicial branch of state government.

No member of the Legislature, for a fee, reward, or other compensation, in addition to that received in his or her official capacity, shall represent any person, firm, corporation, or other business entity before an executive department or agency.

Although this new provision arguably encompasses some of what an economic developer does in the course of his or her early efforts on behalf of a project, generally speaking it was not read to include those individuals. Thus, economic developers continued to operate in Alabama without registering as lobbyists. There is a legitimate debate as to whether that was an appropriate interpretation based on the 2010 change in the law, but it cannot be debated that—in fact—the economic development community did not consider themselves to be lobbyists under the Ethics Act, and therefore did not register.

Then, at the Alabama Ethics Commission’s August 16, 2017 meeting, just over seven months before

HB317 was passed, attorneys from the attorney general’s office spoke to this issue and pointed out to the commission that economic developers could very well be lobbyists under plain language of Alabama’s law and could face criminal charges under that law if they failed to register. Those in the economic development community expressed concerns that, given the confidential nature of most projects, particularly in the early stages, applying a registration and disclosure requirement to those representing companies looking to expand or relocate would result in fewer companies seeking to engage Alabama in discussions regarding potential projects. In response to these arguments, the commission

stated that the issue should be addressed and if necessary clarified by the Alabama Legislature. This “problem,” therefore, has only existed for approximately eight months. House Bill 317 was the administration’s and the legislature’s response to the invitation from the commission to clarify the law.

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B. How Does HB317 Affect the Ethics Act?

The purportedly offensive portion of HB317 is fairly short, covering just one page of the bill. Under that provision:

a person acting as an economic development professional is not a lobbyist, *unless and until he or she seeks incentives through legislative action*, or is

seeking funds over which a legislator or legislative delegation has discretionary control, that are above and beyond, or in addition to, the then current statutory or constitutional authorization.

HB317, Section 3(a) (emphasis added). In other words, an “economic development professional” would not be considered a lobbyist unless he or she seeks to influence legislation or funds over which legislators have some control. In many respects this simply confirms the longstanding definition of a lobbyist as one who seeks to influence legislation, though it does not address the changes made in 2010 related to activities surrounding contracts or grants.

The bill also defines who an economic development professional actually is. According to the bill:

an economic development professional is a person employed to advance specific, good faith economic development or trade promotion projects or related objectives for his or her employer, a professional services entity, or a chamber of commerce or similar nonprofit economic development organization in the State of Alabama.

HB317, Section 3(b). More important, though, the bill also provides who cannot under any circumstances be considered an economic development professional, and would not be exempt from the requirement that they register with the Alabama Ethics Commission. Under the bill:

(c) For the purposes of this section, *the term economic development professional does not include public officials, public employees, legislators, nor any former legislator within two years of the end of the term for which he or she was elected.*

(d) This section shall not apply to any person that is otherwise required to register as a lobbyist.

HB317, Section 3 (emphasis added). Under the bill, therefore, a public official, including a legislator, hired ostensibly as an “economic developer” would not be exempt from registering as a lobbyist. Additionally, a legislator could not be exempt from registration as a lobbyist, even if hired as an “economic developer” for two full years *after* the term for which they were elected. Finally, anyone who is otherwise a lobbyist would also be prohibited from using HB317 to allow them to avoid registering on behalf of an “economic development” client. In other words, if a person currently required to register as a lobbyist is hired by an entity to assist them with an economic development project, that

person would be required to register and report that engagement, because the registration exemption provided by the legislation does not apply to them.

C. Does HB317 Allow Companies to Hire Legislators under the Guise of “Economic Development?”

The short answer to this question is “no.” The slightly longer answer is “no—for multiple reasons set forth in a number of different places in both the bill itself and in existing, unchanged provisions of the Ethics Act.” And here is the even longer answer:

First, as noted above, HB317 specifically provides that public officials, public employees and legislators cannot be considered “economic development professionals” and therefore can never be exempt from the registration requirements of the Alabama Ethics Act. If a company hired a legislator to work as an “economic developer,” HB317 simply would not apply and would have no impact.

Moreover, HB317 simply provides that an economic development professional is not considered a lobbyist. That clarification does not have any effect on other provisions of the Ethics Act, all of which would continue to apply because they apply to more than just lobbyists. For example, as noted above, Section 36-25-1.1 of the Ethics Act specifically provides that “[n]o member of the Legislature, for a fee, reward, or other compensation, in addition to that received in his or her official capacity, shall *represent* any person, firm, corporation, or other business entity before an executive department or agency.” That provision, which uses the very broad term “represent” as opposed to the term “lobbyist,” remains unchanged by HB317.

Further, elected public officials, including legislators, are prohibited elsewhere in the Ethics Act from *representing* (not just “lobbying”) anyone before any branch of state or local government. Section 36-25-23(a) states that:

No public official elected to a term of office shall serve for a fee as a lobbyist *or otherwise represent a client*, including his or her employer, before any legislative body or any branch of state or local government, including the executive and judicial

branches of government, and including the Legislature of Alabama or any board, agency, commission, or department thereof, during the term or remainder of the term for which the official was elected.

Id. (emphasis added). Again, note that Section 23(a), just like Section 1.1, uses the broader term “representation” rather than “lobbying.” Because of the phrasing of these two provisions, merely exempting economic development professionals from registering as lobbyists would not allow an entity to hire an elected official as an economic development professional because that official is still prohibited from “*represent[ing] a client, . . . before any legislative body or any branch of state or local government, including the executive and judicial branches of government, and including the Legislature of Alabama or any board, agency, commission, or department thereof . . .*”

D. Will HB317 Allow Economic Developments To Lavish Public Officials With Gifts, Travel and Meals in an Effort to Influence Their Actions—All without Disclosing Anything?

The ability of an economic development professional to spend money on a public official or public employee, even under HB317, is essentially the same as that of a lobbyist. Reasonable people can certainly

Thus, despite the general prohibition imposed on lobbyists, even a lobbyist is *permitted* to provide food, beverages and travel to a public official as long as it is part of an economic development function (and as long as it is not with the intent to corruptly influence the official’s action).

argue that what lobbyists (and others) are permitted to do today in the way of meals and hospitality is too much—but HB317 doesn’t loosen those rules for an economic development professional.

First, it is important to remember that any expenditure on a public official or public employee designed to corruptly influence their actions is a violation of the Ethics Act whether the person is a lobbyist, an economic developer or a plain old citizen. Section 36-25-7(a) provides that:

No person shall offer or give to a public official or public employee or a member of the household of a public employee or a member of the household of the public official and none of the aforementioned shall solicit or receive anything for the purpose of corruptly influencing official action, regardless of whether or not the thing solicited or received is a thing of value.

Id. (emphasis added). This provision will continue to apply to everyone, whether they are a lobbyist or an economic developer.

It is true that a provision of the Ethics Act specifically prohibits a lobbyist from providing a “thing of value” to a public official. That provision, found in 36-25-5.1, would not apply to economic developers under HB317. However, as a practical matter, this prohibition likely would not apply to economic developers even if they were considered lobbyists because of the current exceptions to the definition of “thing of value.” Specifically, when travel, lodging, meals and hospitality is provided in connection with an “economic development function,” it is already considered outside the definition of a “thing of value.” According to the Ethics Act, an economic development function is defined as “[a]ny function reasonably and directly related to the advancement of a specific, good-faith economic development or trade promotion project or objective.” Thus, despite the

general prohibition imposed on lobbyists, even a lobbyist is *permitted* to provide food, beverages and travel to a public official as long as it is part of an economic development function (and as long as it is not with the intent to corruptly influence the official's action). Nearly every occasion at which an economic development professional would have a reason to purchase a meal for or provide hospitality to a public official would qualify as an economic development function—since in order to be considered an economic developer under HB317 you must be “advanc[ing] specific, good faith economic development or trade promotion projects.” Thus, under HB317, economic developers would be in the same position as lobbyists when making an expenditure in connection with an economic development function.

Finally, nearly identical disclosure requirements apply to a lobbyists and people spending money on a public official while acting as an economic developer. Under the Ethics Act, a lobbyist is required to report any expenditure on a public official, public employee or member of their household if the expenditure exceeds \$250 in a 24-hour period. Again, a reasonable argument can be made that this disclosure requirement is too permissive. However, it is the law and has been the law for decades. As noted above, a nearly identical provision of the law would also apply to individuals who fall under the definition of an economic developer. Section 36-25-19(b) of the Ethics Act provides that:

Any person not otherwise deemed a lobbyist pursuant to this chapter who negotiates or attempts to negotiate a contract, sells or attempts to sell goods or services, *engages or attempts to engage in a financial transaction with a public official or public employee in their official capacity* and who within a calendar day [as opposed to a 24-hour period] expends in excess of two hundred fifty dollars (\$250) on such public employee, public official, and his or her respective household shall file a detailed quarterly report of the expenditure with the commission.

Id. (emphasis added). Economic development professionals seeking to negotiate incentive packages in Alabama clearly would be “engag[ing] or attempt[ing] to engage in a financial transaction with a public official or public employee in their official capacity.” Thus, this reporting requirement would apply to that person if he or she spent funds on a public official. As a result, the reporting requirement that would be imposed upon them is nearly identical to the disclosure requirement that applies to lobbyists.

Conclusion

Given all that has occurred in Alabama politics in the past, it is certainly understandable that there is a level of distrust among the people when there is a proposed change to the Ethics Act, but House Bill 317 simply isn't the bogeyman that many seem to believe it is. To sum up, take a deep breath and understand the following:

- Under HB317, public officials, specifically including legislators, cannot be considered economic development professionals exempt from registration requirements or from the Ethics Act in any other manner.
- Under HB317, elected officials, including legislators, continue to be prohibited from representing anyone, including an employer or a client before any branch or agency of state or local governments, even if their work was categorized as “economic development.”
- Under HB317, any expenditure made on a public official or public employee made by anyone—including a person exempted from the definition of “lobbyist”—to corruptly influence that person's actions continues to be illegal.
- Under HB317, all legal expenditures in excess of \$250 on a public official in a single calendar day must be reported to the Alabama Ethics Commission, a nearly identical requirement to the disclosure requirement imposed on lobbyists. ▲

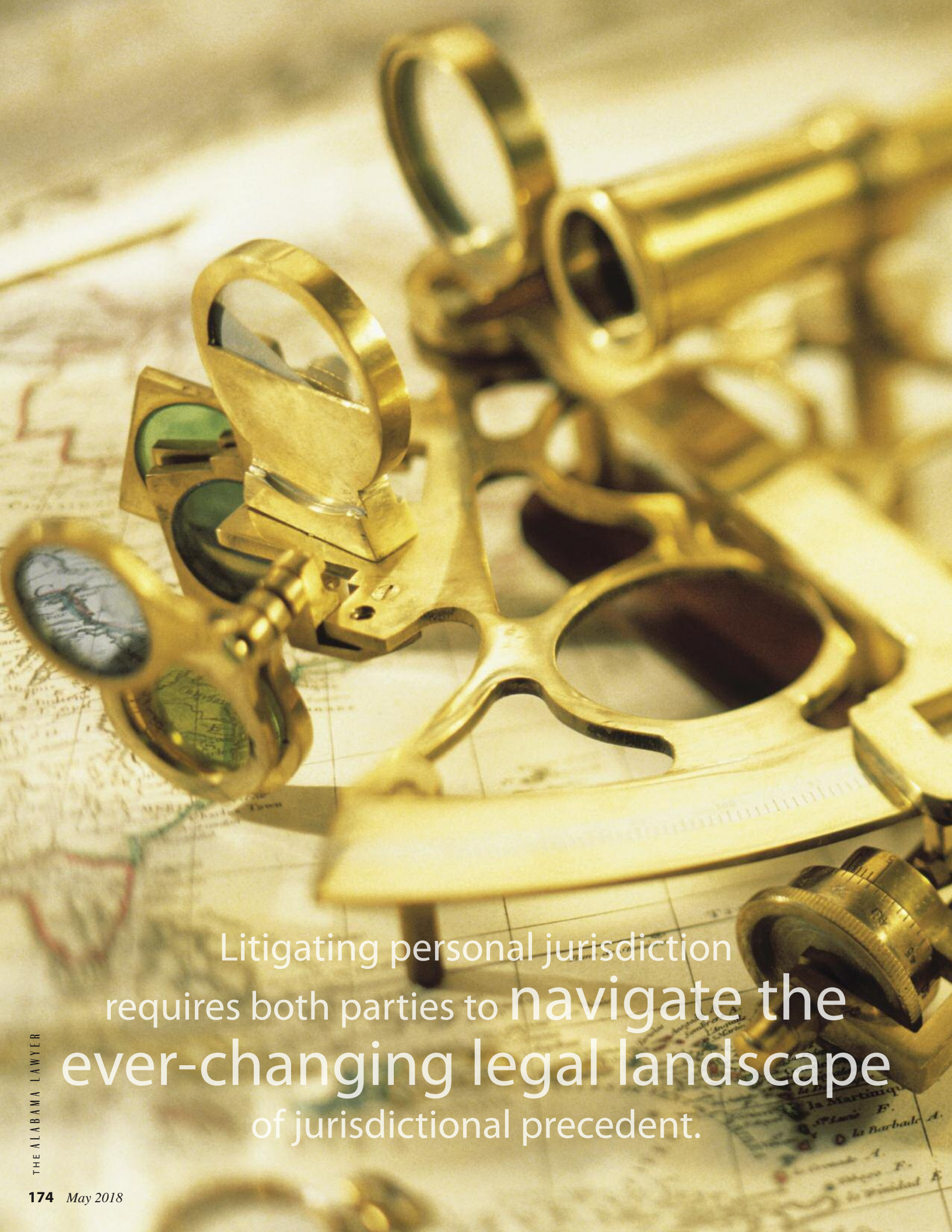
Endnotes

1. Important disclosures—the author is a registered lobbyist which means that the bill—which exempts lobbyists from being considered “economic development professionals”—does not apply to the author. That said, the author represents several entities with an interest in HB317. The author was not asked by any of those clients to assist in its passage and did not participate on behalf of any clients in the drafting or lobbying of the legislation.
2. In practice, very few people seem to be aware that promoting, opposing or in any manner influencing or attempting to influence the introduction, defeat or enactment of *ordinances* or matters before either city councils or county commissions constitutes lobbying which requires registration with the Alabama Ethics Commission.

Edward A. Hosp



Ted Hosp is the chair of Maynard Cooper's state governmental and regulatory affairs practice group, and is a founder and the immediate past chair of the Alabama State Bar Section on Ethics, Elections & Government Relations Law. He also serves as the chair of the Alabama Access to Justice Commission, and is a member and past chair of the ASB Pro Bono Committee.



Litigating personal jurisdiction
requires both parties to **navigate the**
ever-changing legal landscape
of jurisdictional precedent.

Obtaining Personal Jurisdiction:

A Deceptively Complex Stage of Litigation

By Stephanie S. Monplaisir

While liability and damages are certainly the bread and butter of litigation,

personal jurisdiction is emerging as one of the most complex areas of personal-injury and product-liability practice. Just as with liability and damages, a plaintiff must properly plead and prove that his chosen forum has personal jurisdiction over the defendant. A plaintiff must carefully craft his complaint with proper jurisdictional allegations and obtain jurisdictional discovery to prove those allegations. The defendant must timely file an answer or a motion to dismiss asserting the defense. Failure to properly preserve a defense of personal jurisdiction can result in waiver. Litigating personal jurisdiction requires both parties to navigate the ever-changing legal landscape of jurisdictional precedent.

Personal jurisdiction is the court's authority to enter a judgment against a defendant and is based on the Due Process Clause of the U.S. Constitution. As with any due process analysis, the cornerstone of personal jurisdiction precedent has always been fairness. The central question with personal jurisdiction is whether the defendant has such a connection with the forum that he should reasonably anticipate being haled into court there. Determining whether the defendant has this type of connection with the forum is not as easy as it sounds. Courts must determine: 1) whether the defendant has sufficient minimum contacts with the forum state; and 2) whether exercising jurisdiction would offend traditional notions of fair play and substantial justice.¹

The extent of contacts required to fall within the parameters of "minimum" depends on whether a court is trying to assert general or

specific jurisdiction. General jurisdiction requires that the defendant have “continuous and systematic contacts” with the forum state so the court can exercise jurisdiction over the defendant for any claim, even if the claim is not related to the defendant’s contacts with the state. Specific jurisdiction requires contacts with the forum that are purposeful and related to the cause of action so that the defendant could reasonably anticipate litigation in the forum.² Once the court analyzes the defendant’s contacts, the court must then determine whether exercising jurisdiction would be fair by looking to several factors, such as: 1) the burden on the defendant; 2) the forum state’s interest in litigating the claim in that forum; 3) the plaintiff’s interest in convenient and effective relief; 4) the judicial system’s interest in efficient resolution of controversies; and 5) the forum state’s interest in furthering its fundamental social policies.³

For almost 40 years, the U.S. Supreme Court has emphasized that personal jurisdiction is a fact-intensive inquiry.

Like any standard that requires a determination of “reasonableness,” the “minimum contacts” test of *International Shoe* is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite “affiliating circumstances” are present. *We recognize that this determination is one in which few answers will be written “in black and white. The greys are dominant and even among them the shades are innumerable.”*

Kulko v. Superior Court of California In & For City & Cty. of San Francisco, 436 U.S. 84, 92 (1978)(emphasis added). Over the course of that same 40 years, however, courts have attempted to obliterate the grey areas by creating bright-line rules. While helpful in other areas of the law, bright-line rules for personal jurisdiction ignore the fundamental concepts of fairness, reasonableness and predictability. A surge of jurisdictional bright-line rules occurred in the wake of decisions issued by the U.S. Supreme Court from 2011-2014. This article explores the recent developments in personal-jurisdiction precedent and how these developments affect the Alabama practitioner.

The U.S. Supreme Court Ushers in a New Era of Jurisdictional Battles

The predominate issue for courts from 1980-2011 was whether a defendant’s contacts with a forum were “purposeful.” For manufacturers, courts developed what is known as the “stream of commerce test,” which subjects an out-of-state manufacturer to jurisdiction in a forum where its product causes injury if that manufacturer *expects* its product to be sold there.⁴ This test comes from *World-Wide Volkswagen Corp. v. Woodson*,⁵ where the U.S. Supreme Court noted that a

manufacturer is subject to jurisdiction in a forum where its product causes injury if the manufacturer directly *or indirectly* sought to serve the forum. A manufacturer seeks to serve a forum’s market when its products are regularly sold in the forum.

Hence, if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve directly or indirectly, the market for its product in other states, it is not unreasonable to subject it to suit in one of those states if its allegedly defective merchandise has there been the source of injury to its owner or to others.⁶

As long as there is a regular course of sales in the forum where the injury occurs, specific jurisdiction would be proper under *World-Wide Volkswagen*.⁷

After *World-Wide Volkswagen*, courts developed different tests to determine whether a manufacturer “expected” its product to be distributed to the forum. *Asahi Metal Indus. Co. v. Superior Court of California, Solano Cty.*⁸ considered, but did not definitively answer, whether the stream-of-commerce test requires a manufacturer to have more than “mere awareness” that its products will be distributed and sold in the forum to have minimum contacts with the forum.⁹ Justice O’Connor’s plurality opinion reasoned that “[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.”¹⁰

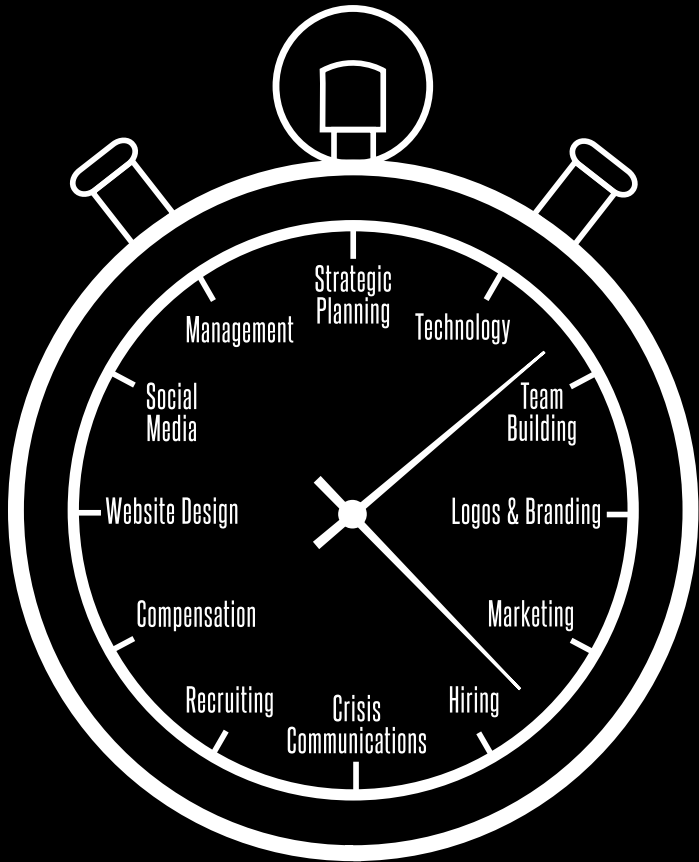
Instead, the defendant must engage in some additional conduct that indicates an intent or purpose to serve the market in that state, which could include: 1) designing the product for the market in the forum state; 2) advertising in the forum state; 3) establishing channels for providing regular advice to customers in the forum state; or 4) marketing the product through a distributor who has agreed to serve as the sales agent in the forum state.¹¹

Justice Brennan’s concurrence rejected the plurality’s “additional conduct” requirement for a stream-of-commerce test.¹² Justice Brennan reasoned that when a manufacturer’s products arrive in the forum state through the “regu-

lar and anticipated flow of products,” and the manufacturer “is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.”¹³ The manufacturer benefits economically from this regular and anticipated flow of products into the forum regardless of whether the manufacturer directly conducts business there.¹⁴ The Alabama Supreme Court adopted the “pure stream of commerce” test from *World-Wide Volkswagen* and Justice Brennan’s *Asahi* concurrence in *Ex parte DBI, Inc.*, 23 So.3d 635 (Ala. 2009).


From 1987-2011, personal jurisdiction remained a relatively uninteresting part of the law primarily

reserved for law-school hypotheticals. Then, with its simultaneously released stream-of-commerce opinions in *J. McIntyre Mach., Ltd. v. Nicastro*¹⁵ and *Goodyear Dunlop Tires Operations, S.A. v. Brown*,¹⁶ the U.S. Supreme Court launched an avalanche of jurisdictional challenges from defendant manufacturers. The *J. McIntyre* plurality found that a defendant must “target the forum” with its distribution of goods. According to the plurality, prediction that the goods might reach the forum state is not sufficient for jurisdiction.¹⁷ Justice Breyer’s concurrence, however, found the plurality’s “targeting” standard “unwise” in light of modern-day globalization of the world economy.¹⁸ Instead,



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he wrote, a manufacturer's delivery of its goods into the stream of commerce with the expectation that they will be purchased in the forum is purposeful activity in the forum.¹⁹ Upon the release of *J. McIntyre*, defendants argued that a stream-of-commerce test could no longer be utilized for specific jurisdiction unless the plaintiff presented evidence that the defendant manufactured its product for the particular state and directed it specifically into the state.

In *Goodyear*, the U.S. Supreme Court held that the stream-of-commerce test cannot establish general jurisdiction, *i.e.*, jurisdiction based on claims unrelated to the defendant's contacts. In addition, the U.S. Supreme Court greatly restricted the forums where a defendant could be subject to general jurisdiction. Before *Goodyear*, the test for general jurisdiction was whether the defendant had "continuous and systematic" contacts with the forum. Instead, *Goodyear* held that general jurisdiction exists where the defendant is "essentially at home." For a corporation, those places are where the corporation is incorporated and where it keeps its principal place of business.

Goodyear did clarify that the stream-of-commerce test *should* subject a manufacturer to specific jurisdiction when "a nonresident defendant, acting *outside* the forum, places in the stream of commerce a product that ultimately *causes harm inside* the forum."²⁰ The Court noted that specific jurisdiction is appropriate when there is "an 'affiliatio[n] between the forum and the underlying controversy,' principally, activity *or an occurrence that takes place in the forum State and is therefore subject to*

the State's regulation."²¹ One of the occurrences that subjects a defendant to specific jurisdiction is the "*the episode-in-suit,*" or the accident that causes injury.²² In light of *Goodyear*, manufacturers argued that general jurisdiction is reserved only for the manufacturer's place of incorporation or principal place of business, and have urged courts to restrict the use of specific jurisdiction no matter how many of the manufacturer's products are distributed or sold in the forum.

In 2014, the U.S. Supreme Court released two additional decisions on personal jurisdiction. The first was *Daimler AG v. Bauman*.²³ While *Daimler* primarily involved general jurisdiction, the Court emphasized that "specific jurisdiction has become the centerpiece of modern jurisdiction theory" that allows courts "to hear claims against out-of-state defendants *when the episode-in-suit occurred in the forum or* the defendant purposefully availed itself of the forum."²⁴ *Daimler* also clarified that general jurisdiction could exist in forums other than the manufacturer's place of incorporation or principal place of business.²⁵

The second decision released in 2014 was *Walden v. Fiore*,²⁶ a unanimous U.S. Supreme Court opinion, which emphasized that specific jurisdiction depends on "the relationship among the defendant, the forum, and the litigation."²⁷ The Court reasoned that specific jurisdiction is proper when "the defendant's suit-related conduct [creates] a substantial connection with the forum State."²⁸ In regard to the relationship necessary to create specific jurisdiction, the Court noted two principles that should be considered:

1. The relationship must arise out of contacts that the "defendant *himself*" creates with the forum state.
2. The "minimum contacts" analysis looks to the defendant's contacts with the forum state itself, not the defendant's contacts with persons who reside there.²⁹

The Court approved jurisdiction over foreign manufacturers by noting that jurisdiction is proper over defendants "who have purposefully 'reach[ed] out beyond' their State and into another by, for example, entering a contractual relationship that 'envisioned continuing and wide-reaching contacts' in the forum State."³⁰ Further, the Court noted that "although physical presence in the forum is not a prerequisite to jurisdiction, . . . physical entry into the State—either by the defendant in person *or through an agent, goods, mail, or some other means*—is certainly a relevant contact."³¹

Using *Walden*, manufacturers argued specific jurisdiction requires "suit-related activity" initiated by the defendant that "creates" or "causes" plaintiff's claim to take place in the forum. Manufacturers argued that "the event" necessary for specific jurisdiction in a product-liability case is the sale of the product. In other words, even if the plaintiff's use of the defendant's product in the forum caused the plaintiff's injury there, and even if the defendant regularly profited from the distribution of the same type of product in the forum, defendants argued specific jurisdiction could not exist if the product was purchased elsewhere.

The Alabama Supreme Court Weighs in on Recent Personal-Jurisdiction Opinions

A. *Ex parte Edgetech*

In 2014, the Alabama Supreme Court reviewed the recent U.S. Supreme Court precedent restricting personal jurisdiction, in *Ex parte Edgetech I.G., Inc.*³² Edgetech was an Ohio foam-spacer manufacturer that manufactured and sold its products to Thompson, a Michigan manufacturer, which then incorporated the foam spacers into its finished insulated glass windows³³ Thompson then distributed the insulated glass windows to Wynne Enterprises, an Alabama window manufacturer, which incorporated the insulated windows into its finished complete windows.³⁴ Wynne Enterprises subsequently sold the finished complete windows to Tiffin, an Alabama RV manufacturer, to be incorporated into its RVs.³⁵ Tiffin sued Edgetech, the Ohio manufacturer, for breach of contract, breach of implied warranty and breach of express warranty in Alabama.³⁶ Edgetech moved for dismissal based on lack of specific jurisdiction under the plurality opinion in *J. McIntyre*.

The Alabama Supreme Court refused to follow the “targeting” language of the *J. McIntyre* plurality.

Instead, the Alabama Supreme Court affirmed the stream-of-commerce test announced in *Ex parte DBI*.³⁷ In finding that Edgetech was not subject to specific jurisdiction under the stream-of-commerce theory, the court reasoned:

[T]here is no evidence before this Court indicating that *Edgetech*'s actions created substantial contacts between Edgetech and Alabama. Rather, it appears that Tiffin seeks to hale Edgetech into an Alabama court based on Thompson's unilateral activity of selling to Wynne Enterprises insulated-glass units that include the Super Spacer product. However, Tiffin has not established that, in selling its Super Spacer product to Thompson, Edgetech should have *foreseen* that a certain percentage of its Super Spacer products would be used in insulated-glass units that would be distributed and sold in Alabama.³⁸

In dicta, the Alabama Supreme Court discussed the *Goodyear* case but refused to adopt a strict rule limiting general jurisdiction to a corporation's place of incorporation or principal place of business.³⁹ Instead, the court performed a factual analysis of Edgetech's contacts with Alabama to determine whether general jurisdiction was proper, focusing on the number of Alabama customers, the number of Alabama sales vs. overall sales, whether the sales were initiated by Edgetech or an independent sales agent, whether the independent sales agents were employed by Edgetech and whether the independent sales agents sold only Edgetech products.⁴⁰

In *Edgetech*, the Alabama Supreme Court affirmed three things: 1) *DBI* sets the standard for specific jurisdiction in a product-liability case; 2) it is the manufacturer's expectation that the product will be sold in the forum where the injury occurs that subjects the manufacturer to specific jurisdiction; and 3) jurisdiction, whether specific or general, still requires a factual analysis even in light of recent U.S. Supreme Court cases.

B. *Hinrichs v. GM Canada*

Florian Hinrichs was a career soldier in the German military. He was selected by his superiors to attend flight training with the U.S. military at Fort Rucker in Alabama. Mr. Hinrichs moved to Alabama in



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December 2006 to begin his training and befriended a U.S. soldier named Daniel Vinson. In June 2007, Mr. Hinrichs suffered a spinal-cord injury in a car accident that occurred in Geneva County, Alabama. The accident occurred in Daniel Vinson's 2004 GMC Sierra pickup. Vinson bought the pickup in Pennsylvania and brought it to Alabama upon being stationed at Fort Rucker.

In 2009, Mr. Hinrichs sued General Motors of Canada, a wholly owned subsidiary of General Motors which manufactured the subject GMC pickup.⁴¹ In 2012, GM Canada moved to dismiss the action for lack of personal jurisdiction, arguing that it had no direct contacts with Alabama and that the action did not arise out of or relate to its indirect contacts, so there was no specific jurisdiction. In addition, GM Canada argued that it did not have continuous and systematic contacts with Alabama so as to justify exercising general jurisdiction.

Jurisdictional discovery showed that GM Canada manufactures vehicles for its parent company, GM, pursuant to a distribution agreement in which GM agreed to distribute those vehicles throughout the United States market. This agreement included the 2004 GMC Sierra pickup that injured Mr. Hinrichs. The stated purpose of this distribution agreement is "to [appeal] to customers and dealers, [meet] competition from other motor vehicle producers, and [comply] with regulatory rules" in the United States. GM Canada knows that its vehicles will be distributed to Alabama pursuant to the distribution agreement. In fact, Alabama contained 120 GM dealerships that

received vehicles pursuant to this agreement at the time Mr. Hinrichs filed his lawsuit against GM Canada.

GM Canada manufactured the subject Sierra pickup in 2003. Over the next six years, it manufactured almost four million vehicles specifically for sale in the United States. The vehicle that injured Mr. Hinrichs was included in this number. During this time frame, GM Canada derived between 80 to 90 percent of its profit from the United States market, which included 120 GM dealerships in Alabama.

GM Canada's corporate representative, Geoffrey Bailey, admitted that GM Canada knows its vehicles will be distributed and sold in Alabama. GM Canada ensures as much by manufacturing its vehicles to comply with the Federal Motor Vehicle Safety Standards. GM Canada did not restrict any of these four million vehicles from being distributed, sold or used in Alabama. GM Canada is insured for product-liability claims that occur in Alabama, which included Mr. Hinrichs's claim.

Based on these facts, the trial court found that GM Canada's contacts with Alabama were purposeful such that GM Canada could reasonably anticipate litigating a claim here. The trial court specifically found:

GMC Canada's contacts, manufacturing motor vehicles sold to GM to be distributed for retail sale by dealerships within the United States, including Alabama, is an act by which it purposefully avails itself of the privilege of conducting activities within Alabama thus invoking the

benefits and protections of Alabama's laws. GMC Canada profits from this contact. This contact is its business. This being true, GMC Canada's contacts with Alabama, through the sale and indirect distribution of its product in Alabama, is such that GMC Canada should reasonably anticipate being haled into court here.

Nonetheless, the trial court declined to exercise specific jurisdiction over GM Canada for one reason—because the specific vehicle that injured Mr. Hinrichs in Alabama was not purchased by an Alabama citizen from an Alabama dealership. The trial court reasoned that Mr. Hinrichs's product-liability claim could only be related to GM Canada's contacts with Pennsylvania, since that was the place where the specific vehicle was purchased. In addition, the trial court declined to exercise general jurisdiction over GM Canada, reasoning that GM Canada was not "at home" in Alabama since it was not incorporated in Alabama and did not have its principal place of business here. The trial court did not consider the fair-play and substantial-justice factors.

On appeal, GM Canada did not dispute that its contacts with Alabama were purposeful or that it reasonably anticipated litigating a product-liability claim in Alabama. Instead, for specific-jurisdiction purposes, the parties and the Alabama Supreme Court primarily focused on whether Mr. Hinrichs's product-liability claim was related to GM Canada's contacts with Alabama. While *Hinrichs*

was on appeal, “relatedness” was the “least developed prong” of specific jurisdiction.⁴² The U.S. Supreme Court had never defined the meaning of “arises out of or relates to.”⁴³ The U.S. Supreme Court had merely held that specific jurisdiction depends on a relationship among “the defendant, the forum, and the litigation” in which the defendant’s contacts create a “substantial connection” with the forum.⁴⁴ The absence of U.S. Supreme Court clarification had led to conflicting tests among courts in distinguishing controversies that “arise out of” and controversies that “relate to.” Some courts applied a proximate-cause standard, requiring the defendant’s contacts with the forum to directly cause the plaintiff’s claim inside the forum.⁴⁵ Other courts applied a more-lenient relatedness standard, evaluating relatedness in light of all the facts, reasonableness and fairness.⁴⁶ The Alabama Supreme Court had interpreted relatedness to require “a clear, firm nexus between the acts of the defendant and the consequences complained of in order to establish the necessary contacts.”⁴⁷ As long as the consequences were foreseeable, the Alabama Supreme Court would uphold specific jurisdiction.⁴⁸

Hinrichs advocated a “foreseeable consequence” standard for relatedness.⁴⁹ Hinrichs argued that basing “relatedness” on the sale of vehicles places an unreasonably restrictive interpretation on the phrase “arises out of or relates to.”⁵⁰ Hinrichs argued that the majority of federal circuit courts of appeals applied “a more flexible standard . . . to satisfy the requirements of due process,

i.e., fairness.”⁵¹ Hinrichs cited multiple cases where the manufacturer was subject to specific jurisdiction in a forum where its product caused injury even when the manufacturer’s product was sold outside the forum.⁵² Hinrichs argued that specific jurisdiction is not based on the location of the sale but on whether the manufacturer intended and expected for the product to be distributed, sold and used in the forum where the injury occurs.⁵³ To hold otherwise, Hinrichs maintained, would grant absolute immunity to manufacturers over claims occurring in forums where the manufacturer derives significant profit solely because the product crosses the state line from where it was sold.⁵⁴ Because GM Canada derives 80-90 percent of its profit from the United States market, including 120 GM dealerships in Alabama, Hinrichs argued that his injury in Alabama from a GM Canada product intended for any of the 50 states should satisfy the relatedness requirement.⁵⁵ Hinrichs argued that an injury caused by a GM Canada vehicle in Alabama surely should be sufficient for specific jurisdiction when the defendant undisputedly has purposeful contacts with the forum such as to reasonably anticipate the very type of claim brought by Hinrichs.

GM Canada, on the other hand, advocated a proximate-cause standard for relatedness under which the claim must proximately result from contacts the defendant himself creates with the forum.⁵⁶ GM Canada argued that “two key undisputed facts preclude the exercise of specific jurisdiction in this case: (1) the Sierra was sold in Pennsylvania, not in Alabama, and

(2) the Sierra did not enter Alabama by any distribution channel used by GM or GM Canada, but entered through the unilateral, fortuitous actions of Vinson.”⁵⁷ According to GM Canada, “the exercise of specific jurisdiction cannot be based on the location of the underlying accident or on GM’s distribution of other vehicles in Alabama that were manufactured by GM Canada.”⁵⁸

Four out of eight justices⁵⁹ of the Alabama Supreme Court agreed that Mr. Hinrichs’s claim did not arise out of or relate to GM Canada’s contacts with Alabama since the owner purchased the vehicle in Pennsylvania. In coming to this conclusion, the Alabama Supreme Court relied on *Walden v.*

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Fiore, 134 S. Ct. 1115 (2014), which stated that “the defendant’s *suit-related* conduct *must* create a substantial connection with the forum State.”⁶⁰ The majority noted that it had “found no caselaw that upholds specific jurisdiction where the stream of commerce for the product does not end in the forum state.”⁶¹ The court found “no ‘suit-related conduct’ that creates a substantial connection between GM Canada and Alabama if the vehicle was not sold in Alabama, even though Hinrichs was injured in Alabama.”⁶² The court stated that in absence of “supporting precedent from the United States Supreme Court,” it was reluctant to create “dispute-blind specific jurisdiction.”⁶³

In addition, a majority of the Alabama Supreme Court held that GM Canada’s contacts with Alabama were not so continuous and systematic that GM Canada is “essentially at home” in Alabama.⁶⁴ The plurality reasoned that GM Canada is incorporated in Canada.⁶⁵ Its principal place of business is in Canada.⁶⁶ It manufactures, assembles and sells its product in Canada.⁶⁷ None of these facts, according to the plurality, rendered GM Canada “essentially at home” in Alabama under *Goodyear* and *Daimler*.⁶⁸ Even though Justices Murdock and Wise concurred in the result on the issue of general jurisdiction, they emphasized that these facts do not

preclude a finding of general jurisdiction where a corporation has ‘some ... level of intensity of contact’ that is ‘comparable’ to incorporating or having a principal place of business in the forum.”⁶⁹ The Alabama Supreme Court did not consider 1) whether GM Canada purposefully availed itself of the privilege of conducting business in Alabama, 2) whether GM Canada reasonably anticipated litigating a product-liability claim in Alabama or 3) whether the fair-play and substantial-justice factors weighed in favor of exercising jurisdiction.⁷⁰

Justice Bolin concurred in part, on general jurisdiction, and in the result on specific jurisdiction.⁷¹ He

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stated that he wrote separately to note the lack of clarity on the stream-of-commerce test from the U.S. Supreme Court.⁷² Further, Justice Bolin's concurrence disagreed with creating special jurisdictional rules for product-liability cases and cited an article disagreeing with drawing a jurisdictional line at the place of sale.⁷³

Hinrichs produced three dissenting opinions. Justice Parker's dissent focused on GM Canada's three-year delay in asserting the personal-jurisdiction defense. Justice Parker explained that a defendant can waive the personal-jurisdiction defense in one of two ways: 1) the defendant fails to assert the defense in its answer or in a Rule 12 motion or 2) the defendant recites the defense in an answer but substantially participates in the litigation without actively pursuing its personal-jurisdiction defense.⁷⁴ In finding that GM Canada waived its personal-jurisdiction defense, Justice Parker reasoned:

General Motors of Canada, Ltd. asserted the defense of lack of personal jurisdiction in its answer filed on August 12, 2009. It was not until July 10, 2012, almost three years later, that General Motors of Canada further pursued this defense by filing a motion for a hearing on the issue of personal jurisdiction. I believe that this failure to litigate the defense of lack of personal jurisdiction for nearly three years constitutes a waiver of the defense.⁷⁵

Justices Murdock and Wise concurred on general jurisdiction, but dissented from the main opinion on specific jurisdiction.⁷⁶ The dissent

explained that the main opinion's application of *Walden* to a product-liability case failed to discuss "what actually constitutes 'suit-related conduct' in a products-liability action involving, as it inherently does, issues of markets and 'streams of commerce.'"⁷⁷ Instead, "the nature of the plaintiff's claims in a given case must be carefully compared to the nature of the conduct by which the defendant has some relationship with the forum."⁷⁸ The dissent reasoned that for product-liability claims, the "suit-related conduct" in the state where an injury occurs "is in fact the design or manufacturing of such automobiles and the placement of them into the stream of commerce for that United States market."⁷⁹ This "is the reason GM Canada has a connection to any state, regardless of where [GM] happens to place any one particular vehicle."⁸⁰ Finally, the dissent criticized the main opinion for failing to consider the principles of reasonableness, fair play and substantial justice.⁸¹

C. *Ex parte The Maintenance Group, Inc.*

On November 22, 2017, the Alabama Supreme Court issued its first major personal-jurisdiction opinion since *Hinrichs v. GM Canada*. In *Ex parte The Maintenance Group, Inc.*, the court considered whether the plaintiff had properly pled civil-conspiracy contacts with Alabama to establish specific jurisdiction. The parties involved in the case were all located outside of Alabama as follows:

- MARC Transport ("MARC")—Delaware LLC/Georgia principal place of business

- Pelican Bay Equipment ("Pelican Bay")—Nevada LLC/Florida principal place of business
- The Aviation Department, LLC ("TAD")—Delaware LLC/Georgia principal place of business
- The Maintenance Group, Inc. ("Maintenance")—Georgia corporation/Georgia principal place of business.⁸²

MARC purchased an aircraft from Pelican Bay. TAD assisted in the purchase and agreed to provide MARC with maintenance, pilot services, flight scheduling and storage of the aircraft once it was purchased. TAD located the aircraft in Florida. The purchase agreement allowed MARC to conduct a pre-purchase inspection of the aircraft. The parties agreed that Maintenance would perform the inspection at its facility in Georgia. Maintenance conducted the inspection and found discrepancies totaling \$170,000. Pelican Bay agreed to correct the discrepancies.⁸³

The purchase of the aircraft took place in Delaware. Pelican Bay flew the aircraft from Florida to Delaware for delivery. The aircraft was then flown to Georgia where MARC is located. After the purchase, the aircraft was flown back and forth between Huntsville and Atlanta several times. The flights in and out of Huntsville were the only contacts the plane had with Alabama.⁸⁴

MARC sued all parties in the Madison County Circuit Court, alleging that Pelican Bay had not corrected the discrepancies identified by Maintenance. The claims were breach of contract, negligence,

fraud and civil conspiracy. Maintenance moved to dismiss for lack of personal jurisdiction. The trial court denied the motion to dismiss, and Maintenance filed a petition for writ of mandamus with the Alabama Supreme Court.⁸⁵

In directing the trial court to dismiss Maintenance for lack of personal jurisdiction, the Alabama Supreme Court noted that “ordinary” specific jurisdiction was not at stake in this case.⁸⁶ Instead, *Maintenance Group* involved “conspiracy” jurisdiction, which requires the plaintiff to plead with particularity the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy.⁸⁷ The court held that the alleged co-conspirators’ actions of arranging flights to and from Huntsville and Atlanta were insufficient to establish conspiracy contacts with Alabama.⁸⁸ In addition, the court noted that the flights could not establish relatedness because the alleged misrepresentations “occurred before the closing on the purchase of the aircraft, concerned conduct outside Alabama, and involved entities that were not residents of Alabama.”⁸⁹ Finally, the court reasoned, “The post-purchase flights into Alabama have, at best, a tenuous connection to the material allegations of tortious conduct. Accordingly, those contacts lack the ‘suit-related nexus’ to Alabama required for specific jurisdiction to attach.”⁹⁰

Justice Main wrote the opinion, with Chief Justice Stuart and Justices Bolin, Parker, Wise and Sellers concurring. Justices Murdock and Bryan concurred in the result but did not write separately as to their reasoning. Justice Shaw dissented with no opinion.

The U.S. Supreme Court Clarifies “Relatedness” For Specific Jurisdiction

In its 2016-2017 Term, the U.S. Supreme Court granted two petitions for certiorari review on personal jurisdiction that seemed to clarify questions created by its 2011-2014 precedent. The first personal-jurisdiction case was *BNSF Ry. Co. v. Terrell*,⁹¹ which reviewed the Montana Supreme Court’s holding that BNSF Railroad was subject to general jurisdiction in Montana for its employees’ on-the-job injuries that occurred in other states. The employees did not reside in Montana and were not injured in Montana.⁹² Despite these facts, the Montana Supreme Court found that the employees could bring their suits in Montana under the Federal Employers’ Liability Act (FELA) § 56, which allows railroad employees to bring suits where the defendant railroad is doing business.⁹³ The U.S. Supreme Court held that “§ 56 does not address personal jurisdiction over railroads,” but instead addresses venue and subject-matter jurisdiction.⁹⁴

Alternatively, Montana’s Supreme Court relied on Montana’s long-arm statute, which granted jurisdiction over “persons found within ... Montana.”⁹⁵ “BNSF fit that bill, the court stated, because it has over 2,000 miles of railroad track and employs more than 2,000

workers in Montana.”⁹⁶ The U.S. Supreme Court rejected this reasoning, as it had previously explained that general jurisdiction over a corporation is appropriate only where the corporation is “at home.”⁹⁷

While *BNSF* primarily focused on general jurisdiction, the Court also emphasized that specific jurisdiction could not be invoked “[b]ecause neither Nelson nor Tyrrell alleges any injury from work in or related to Montana.”⁹⁸ In addition, the Court noted specific jurisdiction requires that the plaintiff’s claims have a relationship to something that occurs in the state, or had its principal impact in the state.⁹⁹ If the employees had been injured in Montana, or if they could have linked their injuries back to work they performed in Montana, specific jurisdiction likely would have existed based on the railroad’s business there.¹⁰⁰


Bristol-Myers Squibb, the second case reviewed by the U.S. Supreme Court last term, involved a product-liability action filed in California by 86 California residents and 592 residents of 33 other states.¹⁰¹ The action was brought against Bristol Myers Squibb (BMS), a large pharmaceutical company, which manufactured Plavix.¹⁰² BMS is incorporated in Delaware, headquartered in New York and maintains substantial operations in New York and New Jersey.¹⁰³ BMS has five research facilities in California employing approximately 160 people.¹⁰⁴ BMS also has 120 sales representatives in California.¹⁰⁵ From 2006-2012, BMS sold almost 187 million Plavix pills to California distributors and wholesalers.¹⁰⁶ During this time, BMS derived more than \$918 million from the California

market.¹⁰⁷ The resident and non-resident plaintiffs all claimed that they were injured by Plavix. However, the nonresidents did not use Plavix in California, were not injured in California and were not treated in California. Their Plavix prescriptions were not prescribed or filled in California. BMS moved to dismiss the nonresidents' claims, arguing that their claims were not "related" to BMS's contacts with California.

The California Supreme Court found that the nonresident plaintiffs' claims arose out of or related to BMS's contacts with California even though their injuries did not occur there.¹⁰⁸ The court reasoned that "both the resident and nonresident plaintiffs' claims are based on the same allegedly defective product and the assuredly misleading marketing and promotion of that product, which allegedly caused injuries in and outside the state."¹⁰⁹ BMS sold Plavix to residents and nonresidents "as part of a common nationwide course of distribution."¹¹⁰

In granting BMS's petition for writ of certiorari, the U.S. Supreme Court sought to resolve the same long-standing circuit conflict noted in *Hinrichs*: what types of connections are required to meet the "arises out of or relates to" requirement for specific jurisdiction. In reversing the California Supreme Court's finding of specific jurisdiction over injuries that occurred outside of California, the U.S. Supreme Court refused to adopt a strict proximate-cause standard for relatedness. In fact, the word "proximate" is not mentioned once in the *Bristol-Myers Squibb* opinion. Instead, *Bristol-Myers Squibb* held that plaintiffs

must show a mere "*affiliation* between the forum and the underlying controversy."¹¹¹ The Court noted that this affiliation is met when "[an] activity *or an occurrence* . . . takes place in the forum State and is therefore subject to the State's regulation."¹¹² The Court discussed the "occurrences" that could have subjected BMS to specific jurisdiction in California over the nonresidents' product-liability claims. If BMS had developed Plavix, created a marketing strategy for Plavix, manufactured, labeled or packaged Plavix, or worked on the regulatory approval for Plavix in California, the relatedness prong would have been met.¹¹³ If BMS had contracted with a distributor in California that acted together with BMS in committing acts related to the plaintiffs' claims, the relatedness prong would have been met.¹¹⁴ Finally,



In reversing the California Supreme Court's finding of specific jurisdiction over injuries that occurred outside of California, the U.S. Supreme Court refused to adopt a strict proximate-cause standard for relatedness.

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the relatedness prong for specific jurisdiction would have been met if the non-resident plaintiffs had obtained Plavix, ingested Plavix, been injured by Plavix or received treatment for their injuries due to Plavix in California.¹¹⁵

Justice Sotomayor's dissent further explained that the majority did not adopt a strict actual-causation standard.¹¹⁶ She noted that such a standard "might call into question whether even a plaintiff *injured* in a State by an item identical to those sold by a defendant in that State could avail himself of that State's courts to redress his injuries."¹¹⁷ However, Justice Sotomayor reassured us that under *World-Wide Volkswagen*, jurisdiction would exist in this situation.

In addition to the two cases reviewed, the U.S. Supreme Court denied two petitions for certiorari on personal jurisdiction during the latest term that left two opposing standards for relatedness standing. The first denial left standing the Alabama Supreme Court's plurality opinion in *Hinrichs v. GM Canada* that the injury occurring in the forum *is not* the link for specific jurisdiction between a defendant's contacts and a plaintiff's claim. The second denial left standing the Texas Supreme Court's opinion in *TV Azteca v. Ruiz*, 490 S.W.3d 29 (Tex. 2016), which held that the injury occurring in the forum *is* the link between a defendant's contacts and a plaintiff's claim.

TV Azteca involved a defamation claim filed by a Texas resident against two Mexican television-broadcasting companies. The Mexican companies broadcast news stories about the Texas resident in Texas. Discovery showed

that these Mexican companies had created maps of its Texas viewers and advertised its Texas viewership. The Mexican companies argued, among other things, that the plaintiff's defamation claim did not arise out of or relate to its map of viewership or its advertising activities. The Texas Supreme Court refused to require the plaintiff to show that her harm was proximately caused by one specific contact with Texas. Instead, the Texas Supreme Court considered 1) what the claim is principally concerned with, 2) whether the contacts will be the focus of the trial and consume most if not all of the litigation's attention and 3) whether the contacts are related to the operative facts of the claim.¹¹⁸

The Texas Supreme Court held that the "operative facts" of the suit occurred in Texas because the tort and harm occurred in Texas. In that case, the actionable conduct was defamatory broadcasts.¹¹⁹ "Although the broadcasts originated in Mexico, they were received and viewed—and allegedly caused harm—in Texas."¹²⁰ The place where the broadcasts originated would not be the focus of the litigation. The place where the broadcasts caused harm would be the focus at trial in determining whether the plaintiff established a claim for defamation.

Considerations For Alabama Practitioners

Upon close review of personal-jurisdiction precedent, clearly there is a lot more to litigating personal jurisdiction than meets the

eye. The recent personal-jurisdiction cases leave the Alabama practitioner in the position of having to figure out a great deal about the defendant's contacts with Alabama before filing his complaint, or in the defendant's case, an answer.

A. Burden of Proving Personal Jurisdiction

"The plaintiff has the burden of proving that the trial court has personal jurisdiction over the defendant."¹²¹ Every jurisdictional analysis starts with the plaintiff's complaint. "[A] court must consider as true the allegations of the plaintiff's complaint not controverted by the defendant's affidavits . . . and 'where the plaintiff's complaint and the defendant's affidavits conflict, the . . . court must construe all reasonable inferences in favor of the plaintiff.'"¹²² When the defendant files a motion to dismiss and submits prima facie evidence that jurisdiction is lacking, however, the plaintiff must controvert the defendant's evidence with his own affidavits or other competent evidence.¹²³ Pleading and proving jurisdiction is no easy feat, and in most cases, jurisdictional discovery will be required.

The plaintiff has a qualified right to conduct jurisdictional discovery.¹²⁴ While a plaintiff does not have an automatic right to jurisdictional discovery, if the plaintiff can "at least *allege* facts that would support a *colorable* claim of jurisdiction," then the court should permit jurisdictional discovery.¹²⁵ The standard for jurisdictional discovery is "quite low."¹²⁶ As long as the plaintiff's request is not "clearly frivolous," the plaintiff's request for jurisdictional discovery

should be granted.¹²⁷ Courts in Alabama have consistently granted requests for jurisdictional discovery so long as the “plaintiff presents factual allegations that suggest ‘with reasonable particularity’ the *possible existence* of the requisite contacts between [the party] and the forum state.”¹²⁸

Despite the low standard for obtaining jurisdictional discovery, the Alabama Supreme Court, in 2015, issued a writ of mandamus directing a trial court to dismiss a defendant for lack of personal jurisdiction even though plaintiff had requested, but had not received, jurisdictional discovery. In *Ex parte Gudel AG*, 183 So. 3d 147 (Ala. 2015), the plaintiff was injured at an automotive-parts-manufacturing plant in Crenshaw County when the cable of an overhead, roll-up door broke causing the door to come down on his leg, which resulted in a crushing injury and ultimately, an amputation. The roll-up door was the entrance to a stamping-press unit.¹²⁹ The plaintiff sued the manufacturing plant where he worked to recover worker’s compensation.¹³⁰ He also sued Hyundai WIA and Güdel AG, a Swiss corporation that, according to the plaintiff’s allegations, designed and manufactured the stamping-press unit.¹³¹ Güdel AG moved to dismiss for lack of personal jurisdiction and submitted an affidavit in which it denied manufacturing the stamping-press unit.

Instead, Güdel asserted that it merely “supplied to Hyundai ... a component system of the machine,” namely “a [‘Transfer Automation System,’ to serve as the] control system for the conveyor system running

through the press,” which was wholly designed and manufactured in Switzerland before being sold to Hyundai, a Korean entity. Güdel’s motion was further supported by affidavit testimony and authority aimed at establishing the limited extent of Güdel’s contacts with Alabama, including, but not limited to, testimony indicating that it had not conducted any systematic and/or continuous business activities in Alabama; that it was not licensed to do business in Alabama; and that it had no registered agent for service of process in Alabama.¹³²

While Güdel admitted that it shipped the conveyor system to the Alabama manufacturing plant and sent a representative to the Alabama plant “to assist in installation of the system and to train employees with regard to its operation,” Güdel denied any involvement with the overhead door that caused the plaintiff’s injury.¹³³

In response to Güdel’s motion to dismiss, the plaintiff asserted that Güdel’s direct shipment of its product to Alabama and subsequent training of Alabama employees were sufficient for jurisdiction, but in the alternative, requested jurisdictional discovery.¹³⁴ The Alabama Supreme Court held that while the complaint alleged a colorable basis for jurisdiction, the defendant’s evidence produced with its motion to dismiss rebutted those allegations.¹³⁵ This shifted the burden to the plaintiff to present evidence that the defendant’s conveyor system, its installation or the defendant’s training had an effect on the overhead door to cause

the plaintiff’s injuries.¹³⁶ Since the plaintiff produced no evidence of this, the Alabama Supreme Court directed the trial court to dismiss the plaintiff’s claims against Güdel without allowing jurisdictional discovery.¹³⁷ The Alabama Supreme Court did note that the plaintiff never explained why he had failed to undertake certain informal efforts to obtain pertinent information that appeared to be feasible.

The plaintiff must carefully draft the complaint to allege a colorable basis for jurisdiction over the defendant since proving personal jurisdiction is the plaintiff’s burden. Once the defendant challenges jurisdiction, the plaintiff must conduct discovery so he can rebut the defendant’s evidence produced in support of the motion to dismiss. Finally, after discovery is complete, the plaintiff should amend the complaint to assert jurisdictional allegations that are supported by the evidence.

B. Waiver of the Personal Jurisdiction Defense

The defense of lack of personal jurisdiction is waivable. This means the defendant must put the defense in its answer or move to dismiss asserting the defense within thirty days of being served with the complaint. *See* Ala. Civ. P. 12. Failure to include the personal-jurisdiction defense in an answer constitutes waiver of the defense. Further, even if the defense is included in the answer, it may be waived for failure to seasonably pursue the defense.¹³⁸

In determining whether a defendant has seasonably pursued its personal-jurisdiction defense, courts primarily examine two factors: 1) the length of time that

elapses between the defendant's first appearance and the pursuit of the defense, and 2) the nature of the defendant's participation in the litigation.¹³⁹ The dissent in *Ex parte Alaska Bush Adventures, LLC*, 168 So.3d 1195, 1207-08 (Ala.2014), cited to several federal cases that discuss the length of time that must elapse before a defendant's jurisdictional defense is waived. Courts deemed the defense waived if not pursued for periods of time ranging from nine months to four years.¹⁴⁰ Courts deemed the defense preserved if pursued within two months to seven months.¹⁴¹ In addition, if the defendant's submissions, appearances, and filings in the trial court gave the plaintiff "a reasonable expectation that [Defendant] will defend the suit on the merits," the defendant has waived the defense of personal jurisdiction.¹⁴² Waiver is also found if the defendant's actions "cause the court to go to some effort that would be wasted if personal jurisdiction is later found lacking."¹⁴³ ▲

Endnotes

1. *Ex parte Alamo Title Co.*, 128 So.3d 700, 710 (Ala.2013).
2. *Id.*
3. *Ex parte DBI, Inc.*, 23 So.3d 635,654 (Ala.2009).
4. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-298 (1980); *Ex parte DBI*, 23 So.3d 635, 654-55 (Ala.2009).
5. 444 U.S. 286 (1980).
6. *World-Wide Volkswagen*, 444 U.S. at 297-98.
7. *Id.*
8. 480 U.S. 102 (1987).
9. *Asahi*, 480 U.S. at 105.
10. *Id.* at 112.
11. *Id.*
12. *Id.* at 116.
13. *Id.* at 117.
14. *Id.*
15. 564 U.S. 873 (2011).
16. 564 U.S. 915 (2011).
17. *J. McIntyre Mach., Ltd.*, 564 U.S. at 882.
18. *Id.* at 887.
19. *Id.* at 889.
20. *Id.* at 926 (italicized emphasis in original) (bold emphasis added).
21. *Id.* at 919 (emphasis added).
22. *McIntyre Mach., Ltd.*, 564 U.S. at 919 (emphasis added).
23. *Daimler AG*, 134 S. Ct. 746 (2014).
24. *Id.* at 755 (emphasis added).
25. *Id.* at 760.
26. 134 S. Ct. 1115 (2014).
27. *Walden*, 134 S. Ct. at 1126.
28. *Id.* at 1121.
29. *Id.* at 1122 (emphasis in original).
30. *Id.* at 1122.
31. *Id.* at 1122 (emphasis added).
32. 159 So.3d 629 (Ala.2014).
33. *Id.* at 634-635.
34. *Id.* at 630.
35. *Id.*
36. *Id.* at 631.
37. *Ex parte DBI, Inc.*, 23 So.3d at 654-55 (holding that although DBI, a Korean seatbelt manufacturer, had no physical or direct presence in Alabama, it was subject to specific jurisdiction here because it contracted with Kia to provide its seatbelts for Kia cars, knowing that these seatbelts would be incorporated into cars sold in the U.S., including Alabama).
38. *Ex Parte Edgetech I.G., Inc.*, 159 So.3d at 648-649 (emphasis added).
39. *Id.* at 639 (noting that Tiffin did not specifically argue that "Edgetech had continuous and systematic contacts that would subject it to the general jurisdiction of the trial court. Rather, Tiffin appears to focus solely on its argument that the trial court had specific jurisdiction over Edgetech.>").
40. *Id.* at 639-40 (emphasis added).
41. Mr. Hinrichs initially sued General Motors in 2008. However, in 2009, General Motors declared bankruptcy and was dismissed from the case.
42. See *Ticketmaster-N.Y., Inc. v. Alioto*, 26 F.3d 201, 206 (1st Cir.1994). The other prongs for specific jurisdiction are: 1) whether defendant purposefully availed itself of the privilege of conducting business in the forum so as to reasonably anticipate litigating a claim there, and 2) whether jurisdiction would comport with notions of fair play and substantial justice. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-299 (1980).

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43. See, e.g., *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 589 (1991) (declining to reach the issue despite having certified it for review); *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 415 n. 10 (1984) (declining to reach the issue).
44. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).
45. See *Peckham v. Continental Casualty Ins. Co.*, 895 F.2d 830, 836 (1st Cir.1990); *Sybaritic, Inc. v. Interport Int'l, Inc.*, 957 F.2d 522, 525 (8th Cir. 1992); *Kuenzle v. HTM Sport-Und Freizeitgerate AG*, 102 F.3d 453, 457 (10th Cir.1996).
46. See *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir.1998); *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 323 (3d Cir. 2007); *Lanier v. Am. Bd. of Endodontics*, 843 F.2d 901, 909 (6th Cir.1988); *Deluxe Ice Cream Co. v. R.C.H. Tool Corp.*, 726 F.2d 1209, 1216 (7th Cir.1984); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 385-86 (9th Cir.1990), *rev'd sub nom. Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991); *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210, 1223-24 (11th Cir.2009); *SEC v. Carrillo*, 115 F.3d at 1540 (11th Cir.1997).
47. *Duke v. Young*, 496 So.2d 37, 39 (Ala.1986).
48. *Id.*
49. *Hinrichs v. Gen. Motors of Canada, Ltd.*, 222 So.3d 1114, 1125-26 (Ala.2016), *cert. denied*, 137 S. Ct. 2291 (2017).
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Hinrichs*, 222 So. 3d at 1125-26.
56. *Id.* at 1127.
57. *Id.*
58. *Id.*
59. Justice Shaw recused himself. Chief Justice Moore appointed retired justice Champ Lyons as special justice to resolve a tie vote (4-4) among the justices. Shortly before the *Hinrichs* opinion was released, Chief Justice Moore was suspended from the court. Chief Justice Moore's vote and opinion were not included in the final decision released.
60. *Hinrichs*, 222 So.3d at 1138(emphasis in *Hinrichs*).
61. *Id.* at 1141.
62. *Id.*
63. *Id.*
64. *Id.* at 1125.
65. *Id.*
66. *Hinrichs*, 222 So.3d at 1125.
67. *Id.*
68. *Id.*
69. *Id.* at 1147.
70. *Id.* at 1141.
71. *Id.* at 1142.
72. *Hinrichs*, 222 So.3d at 1142-1145.
73. *Id.* at 1145 (citing Stanley Cox, *Personal Jurisdiction for Alleged Intentional or Negligent Effects Matched to Forum Regulatory Interest*, 19 Lewis & Clark L.Rev. 725, 742 (2015))(noting "line drawing that shuts off jurisdiction always at the point of sale . . . smacks of formalism").
74. *Id.* at 1146.
75. *Id.*
76. *Id.* at 1147.
77. *Hinrichs*, 222 So.3d at 1152.
78. *Id.* at 1153.
79. *Id.*
80. *Id.*
81. *Id.* at 1152.
82. *Maint. Grp., Inc.*, No. 1160914, 2017 WL 5623326, at *1 (Ala. Nov. 22, 2017).
83. *Id.*
84. *Id.*
85. *Id.* at *1-6.
86. *Id.* at *8.
87. *Id.* at *8-9.
88. *Maint. Grp., Inc.*, No. 1160914, 2017 WL 5623326, at *9-10.
89. *Id.* at *10-11.
90. *Id.* at *10.
91. *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1553-1555 (2017).
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* (citing Mont. Rule Civ. Proc. 4(b)(1) (2015)).
96. *Id.*
97. *BNSF Ry. Co.*, 137 S. Ct. at 1553-1555.
98. *Id.* at 1558.
99. *Id.* at 1559, FN 4.
100. *Id.* at 1559.
101. *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S. Ct. 1773, 1778 (2017).
102. *Id.* at 1777.
103. *Id.* at 1777-1778.
104. *Id.* at 1778.
105. *Id.* at 1778.
106. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1778.
107. *Id.* at 1778.
108. *Id.* at 887-888.
109. *Bristol-Myers Squibb Co.*, 377 P.3d at 888.
110. *Id.*
111. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780(emphasis added).
112. *Id.* (emphasis added).
113. *Id.* at 1778.
114. *Id.* at 1783.
115. *Id.* at 1778, 1781.
116. *Id.* at 1788, FN 3.
117. *Id.* (emphasis in original).
118. *TV Azteca*, 490 S.W.3d at 52-53.
119. *Id.* at 53.
120. *Id.* at 54.
121. *Ex parte Gudel AG*, 183 So.3d 147, 155 (Ala.2015); *Ex parte Merches*, 151 So.3d 1075, 1078 (Ala.2014).
122. *Ex parte Bufkin*, 936 So.2d 1042, 1045 (Ala.2006)
123. *Id.*
124. See *Ex parte Troncalli Chrysler Plymouth Dodge, Inc.*, 876 So.2d 459, 467-68 (Ala.2003).
125. *Id.* at 468 (emphasis added).
126. *Ex parte Bufkin*, 936 So.2d 1042, 1047 (Ala.2006).
127. See *Ex parte Gregory*, 947 So.2d 385, 391 (Ala.2006).
128. *Id.* (quotations omitted) (emphasis added).
129. *Ex parte Gudel AG*, 183 So.3d at 150.
130. *Id.*
131. *Id.*
132. *Id.* at 151.
133. *Id.*
134. *Ex parte Gudel AG*, 183 So.3d at 151.
135. *Id.* at 155-157.
136. *Id.*
137. *Id.*
138. *Ex parte Alaska Bush Adventures, LLC*, 168 So.3d 1195, 1208, FN 4 (Ala.2014).
139. *Id.* at 1206 (Murdock, J., dissenting).
140. *Hamilton v. Atlas Turner, Inc.*, 197 F.3d 58, 61 (2d Cir. 1999)(4 Years); *Cont'l Bank, N.A. v. Meyer*, 10 F.3d 1293, 1297 (7th Cir.1993)(2.5 Years); *Hunger U.S. Special Hydraulics Cylinders Corp. v. Hardie-Tynes Mfg. Co.*, 203 F.3d 835 (10th Cir.2000)(3 Years); *Plunkett v. Valhalla Inv. Servs., Inc.*, 409 F. Supp.2d 39, 42 (D.Mass.2006)(13 Months); *Schwartz v. M/V Gulf Supplier*, 116 F.Supp.2d 831, 835 (S.D.Tex.2000)(9 Months).
141. *Brokerwood Int'l (U.S.), Inc. v. Cuisine Crotone, Inc.*, 104 F. App'x 376, 379 (5th Cir. 2004)(7 months); *Sunlight Saunas, Inc. v. Sundance Sauna, Inc.*, 427 F.Supp.2d 1011, 1015 (D.Kan.2006)(2 months).
142. *Ex parte Alaska Bush Adventures, LLC*, 168 So.3d *Id.* at 1203 (Lyons, S.J., concurring).
143. *Id.*

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The Continuing Reformation of Alabama's Municipal Courts

By Judge T. Brad Bishop and Laura E. Yetter

“There can be no equal justice where the kind of trial a man gets depends on the amount of money he has.”¹ These are the words of Alabama’s own Justice Hugo Black, interpreting the Due Process and Equal Protection clauses of the Fourteenth Amendment to require “procedures in criminal trials which allow no invidious discrimination between persons and different groups of persons.”² Stated another way, the Fourteenth Amendment requires that defendants in criminal proceedings be afforded the same basic procedural protections regardless of their financial status.³ In *Bearden v. Georgia*, for example, the United States Supreme Court held that before a defendant’s probation was revoked for non-payment of a court-ordered fine, the court must inquire into that defendant’s ability to pay.⁴

The Court reasoned that incarcerating an individual for his inability to pay would amount to “punishing a person for his poverty” in a manner “contrary to the fundamental fairness required by the Fourteenth Amendment.”⁵

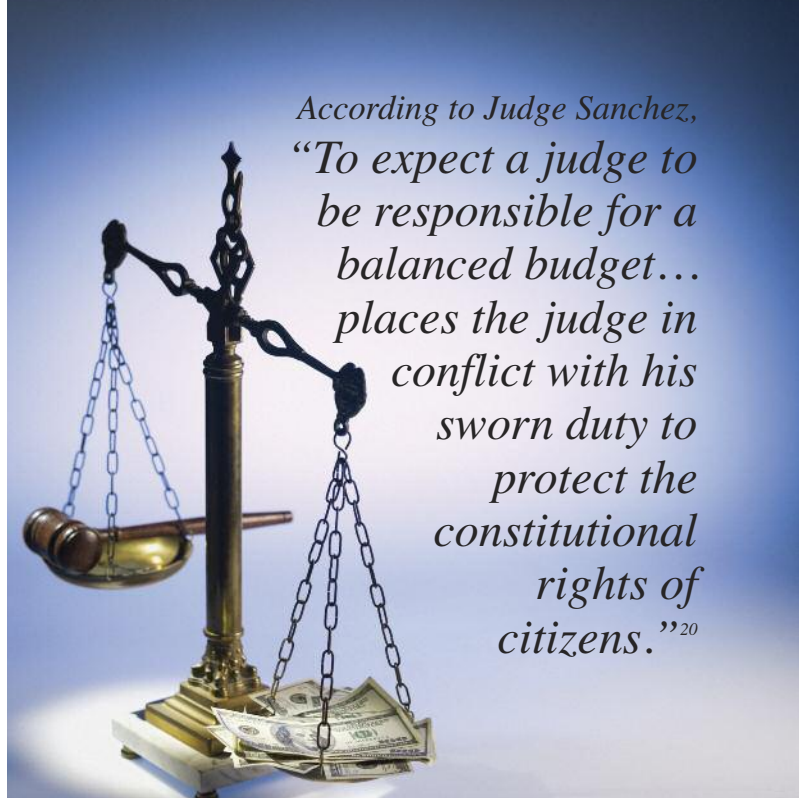
In spite of these important judicial pronouncements, various municipalities across Alabama have been incarcerating poor defendants for failing to pay court-ordered fines and fees. Many place the blame on the legislature for its drastic cuts to the state’s judicial budget.⁶ By sharply decreasing General Fund contributions to the judicial system and steadily increasing court costs, the legislature places the financial burden to fund judicial operations on the courts themselves.⁷ Furthermore, although the average citizen believes city courts retain costs assessed against defendants to

finance court operations, generally only a small part of the total amount is retained. For example, in Birmingham's municipal court, a driver's license violation will cost a defendant \$220, with only \$72.50 going toward the *actual* court costs, and \$147.50 going toward a "State Fee."⁸ A study assessing the effects of increased court costs, conducted by the Public Affairs Research Council of Alabama (PARCA), concluded the state's judiciary "has become a collection agency . . . for itself [and] other branches of government," with the majority of money collected from criminal defendants, over 80 percent of whom are believed to qualify as indigent.⁹ The study further cautioned, "In criminal proceedings, the costs assessed against offenders have risen to a level that can be counterproductive to the ends of justice."¹⁰

Alabama's constitutional requirement that the legislature appropriate "adequate and reasonable funds" to the state's judicial system does not extend to the state's municipal courts.¹¹ Instead, the *Alabama Code* puts the responsibility of funding municipal courts on the cities in which they maintain jurisdiction.¹² The *Code* unambiguously holds municipalities responsible for providing "appropriate facilities" and "necessary supportive personnel" for their respective municipal courts.¹³ Despite this statutory mandate, some municipalities still expect their courts to largely fund themselves through fines and fees collected from municipal court offenders.¹⁴

In 2016, for example, the Southern Poverty Law Center (SPLC) intervened in response to an initiative by the City of Monroeville, proposing the city's municipal court become "self-sufficient" and "make up any funding shortfall by more aggressively targeting those who fail to pay."¹⁵ Thus, the proposal advanced the idea that the court should fund its own operations through court-ordered fines and fees.¹⁶ Responding to the decline in court-generated revenue, one city councilman speculated that, "[perhaps] police officers were not issuing enough tickets."¹⁷ Subsequently, the Monroeville Chief of Police was replaced and a new directive issued requiring police officers to issue at least two tickets per shift.¹⁸ Judge Sanchez, the municipal court judge, was also replaced after objecting to the proposition that the municipal court should be required to fund itself.¹⁹ According to Judge Sanchez, "To expect a judge to be responsible for a balanced budget . . . places the judge in conflict with his sworn duty to protect the constitutional rights of citizens."²⁰

In a letter to the City of Monroeville, SPLC warned that the city would violate state and federal law if it required its municipal court to fund its own operations.²¹



According to Judge Sanchez, "To expect a judge to be responsible for a balanced budget . . . places the judge in conflict with his sworn duty to protect the constitutional rights of citizens."²⁰

SPLC argued that a self-funded court would violate "bedrock principles of constitutional law and judicial ethics," as a judge may feel compelled to find defendants guilty and impose maximum costs in an attempt to secure his court's economic survival.²² Perhaps in an attempt to avoid litigation, SPLC requested that Monroeville pass a resolution in order to "restore confidence in the impartiality of the judiciary and to demonstrate that the city is not improperly using its justice system to raise revenue."²³ The City of Monroeville complied with the request, adopting a resolution declaring the city: (1) would fund its municipal court in accordance with state law; (2) would neither require its municipal court to pay for its own expenses nor consider financial consequences to the city when making judicial determinations; and (3) would consider public safety, not quotas or numbers, when directing police to issue tickets.²⁴

When a city comes to rely on court-generated revenue as an essential source of income, the pressure on a municipal court to collect from offenders can take precedence over its obligation to administer justice in an ethical and lawful manner. Such a dynamic not only jeopardizes the rights of defendants, but also the very existence of the municipal court on which the city's budget relies. Such was the case in the City of Harpersville, when in 2013, the city experienced serious budgetary shortfalls as the result of its municipal court's being shut down in the aftermath of a lawsuit against it.²⁵

A small town with a population of about 1,700 residents, Harpersville opted to maintain its own police

and fire departments rather than contract with neighboring agencies.²⁶ In order to finance these departments, Harpersville depended on the revenue generated by its municipal court.²⁷ Because the municipality's budget increasingly depended on court-ordered fines and fees, the city needed an efficient, low-cost way to collect amounts owed by offenders.²⁸ To this end, it contracted with Judicial Correction Services (JCS), a for-profit, private probation company used in more than 100 Alabama courts.²⁹ JCS guaranteed that its supervision of probationers was "completely offender-funded" with no expense to taxpayers, and that "[c]ourt collections have increased in every community that has made the transition to JCS."³⁰

Private probation companies like JCS that operate on an "offender-funded" basis require probationers to pay the entire costs of probation services rendered.³¹ In order to turn a profit, a private probation company will charge probationers additional fees, such as an initial "start-up fee" and a monthly "supervision fee."³² The payment of these additional fees becomes a condition of the offender's probation, and failure to pay results in a probation violation.³³ When offenders are put on probation simply because they are unable to pay the balance of court costs and fines due at sentencing, this is referred to as "pay-only" probation.³⁴

To illustrate, an offender who could only pay \$100 of the \$350 in court costs and fines assessed against him at sentencing would be placed on pay-only probation. When his next payment was due, if the offender were only able to put \$50 toward his balance, \$35-\$40 of this payment would be withheld as a supervision fee, with only \$10-\$15 going toward his outstanding balance. Thus, the poorer an offender is, the longer they are placed on probation and the more they are required to pay.³⁵

In 2012, four Harpersville defendants placed on a pay-only probation scheme initiated a lawsuit in circuit court against the Town of Harpersville challenging the validity of the municipal court's probationary practices.³⁶ The resulting decision, issued by Circuit Court Judge Hub Harrington, found that the Harpersville Municipal Court had committed numerous violations of the United States Constitution, the *Alabama Rules of Criminal Procedure* and state law.³⁷ Admonishing the court's practices, Judge Harrington referred to the municipal court as a modern-day "debtor's prison" and a "judicially sanctioned extortion racket."³⁸ Among the abuses perpetrated by the Harpersville Municipal Court and JCS, the most egregious included: (1) automatically placing defendants on probation with JCS simply because they were unable to

pay the entire amount assessed against them at trial; (2) the failure of the municipal court judge to ever make an adjudication, issue a valid sentencing order or hold a hearing regarding a defendant's probation; (3) unlawfully delegating powers to the probation company (e.g., allowing JCS to set court dockets and issue arrest warrants for defendants who failed to appear and/or failed to make payments); (4) incarcerating defendants who failed to make payments without first holding a hearing concerning the defendants ability to pay as required by the *Alabama Rules of Criminal Procedure*;³⁹ (5) extending probationary sentences beyond the two-year limit;⁴⁰ and (6) charging defendants "unconscionable fines and fees"⁴¹ that could potentially compound to "thousands upon thousands of dollars."⁴²

Judge Harrington's order placed strict limitations on the Harpersville Municipal Court, requiring the municipal court to secure his permission before it could incarcerate any individual placed on probation.⁴³ Suspecting that other individuals may have been wrongfully incarcerated, the circuit court demanded a list of every individual being held by the city, along with copies of their respective incarceration orders.⁴⁴ As a result, less than a month later, the Harpersville City Council voted to dissolve its municipal court.⁴⁵

Shortly after the Harpersville case, a separate lawsuit was initiated in federal court against the City of Childersburg, another JCS client. The lawsuit alleged the city's municipal court and JCS had violated the constitutional rights of offenders brought before the court.⁴⁶ The Childersburg lawsuit was remarkably similar to the Harpersville case in several respects. The plaintiffs initiating the lawsuit were all placed on probation with JCS because of their inability to pay the total amount due at trial.⁴⁷ Subject to the same offender-funded probationary scheme utilized in Harpersville, probationers were charged various fees in order to compensate JCS for its services.⁴⁸ After failing to pay, the plaintiffs in the Childersburg lawsuit alleged they were incarcerated without any inquiry into their ability to pay.⁴⁹ The other claims set forth by the plaintiffs alleged unconstitutional acts that mirrored Harpersville Municipal Court practices, such as unlawfully delegating judicial powers to JCS and extending periods of probation past the two-year limit.⁵⁰ The most notable similarity between the two lawsuits: the presiding judge of the Childersburg Municipal Court was the *same* judge of the formerly dissolved Harpersville Municipal Court.⁵¹

The municipal court judge testified that he only worked "a couple hours a month" for the Childersburg court and was unaware of the contract between

the municipality and JCS.⁵² As the Childersburg lawsuit progressed, the issue was raised as to whether the city could be potentially found liable for the unconstitutional acts of JCS and its municipal court.⁵³ Although the city's mayor signed the contract on behalf of the Childersburg Municipal Court, a federal judge found that it is the municipal court judge, not the municipality, who bears responsibility for ensuring that the services provided by a probation company are legally sanctioned.⁵⁴

This assessment comports with an advisory opinion issued three years earlier by Alabama's Judicial Inquiry Commission which asserted, "Although a judge may be employed in a part-time capacity, he or she has a legal obligation to assure that all court officials be in compliance with their duties to the court and to constitutional and statutory law and procedural legal and ethical rules."⁵⁵ The Judicial Inquiry Commission (JIC) is one facet of Alabama's two-part judicial conduct system and promulgates advisory opinions regarding judicial ethics.⁵⁶ When the JIC released the 2014 advisory opinion regarding part-time judges, it reportedly did so in response to an informal request from the Childersburg (and former Harpersville) Municipal Court judge.⁵⁷ The advisory opinion noted that a municipal court judge should be especially aware of the following concerns: court records;⁵⁸ probation;⁵⁹ counsel, incarceration and pre-trial diversion;⁶⁰ private probation;⁶¹ and judicial engagement.⁶² The JIC warned that if a judge and his or her court consistently violate established judicial ethics or display a pattern of engaging in unlawful practices, "the judge cannot serve and there can be no court."⁶³

As of now, the Childersburg lawsuit is still ongoing. In one of his most recent orders, U.S. District Judge David Proctor hinted to potential cracks in the judicial immunity doctrine by permitting the plaintiffs to proceed to trial on a 42 U.S.C § 1983 conspiracy claim against the Childersburg Municipal Court judge and JCS.⁶⁴ It is worth noting that successful § 1983 claims present plaintiffs with a wide range of remedies, including various damages, attorney fees and injunctive relief.⁶⁵ While punitive damages are unavailable against municipalities under a § 1983 claim, they can be secured against a public official, sued in a personal capacity, where his or her conduct demonstrates "reckless or callous indifference to the federally protected rights of others."⁶⁶

Additionally, the state reserves the right to initiate proceedings against a judge when necessary. Apart from promulgating advisory opinions, the JIC is tasked with receiving, investigating and initiating complaints against judges accused of ethics violations



The Montgomery Municipal Court utilized a "fine or days" policy, in which defendants convicted of traffic violations or other misdemeanor offenses were incarcerated if they were unable to pay debts owed to the court.⁷³

or incompetence.⁶⁷ Upon investigation, if the JIC decides to proceed with a complaint alleging judicial wrongdoing, it will file charges against that judge in the Court of the Judiciary.⁶⁸ The Court of the Judiciary acts as the second prong in the state's judicial conduct system, hearing complaints initiated by the JIC.⁶⁹ The court is authorized to impose various disciplinary measures such as removing a judge from office, suspending a judge with or without pay, censuring a judge or instituting any other sanction afforded by law.⁷⁰

In 2016, the JIC filed seven different charges against a Montgomery Municipal Court judge asserting numerous violations of *Alabama's Canons of Judicial Ethics*.⁷¹ These seven charges were divided into three inclusive categories: (1) the wrongful incarceration of offenders, (2) "grossly deficient" recordkeeping and (3) the delegation of judicial functions to JCS.⁷²

The Montgomery Municipal Court utilized a "fine or days" policy, in which defendants convicted of traffic violations or other misdemeanor offenses were incarcerated if they were unable to pay debts owed to the court.⁷³ Pursuant to this policy, the court regularly jailed indigent offenders without providing adequate counsel or conducting any meaningful inquiry into their ability to pay.⁷⁴ In a federal class action lawsuit, Equal Justice Under Law (EJUL), a national civil rights organization represented 16 indigent individuals who were jailed by the Montgomery Municipal Court for failure to pay costs assessed against them.⁷⁵

Additionally, the SPLC initiated two separate federal lawsuits against the Montgomery Municipal Court, representing similarly situated defendants.⁷⁶ Subsequently, the three actions were consolidated and a settlement agreement was reached in 2014.⁷⁷ The settlement agreement included procedural rules that the Montgomery Municipal Court *must* follow concerning indigent defendants and nonpayment, including prohibiting the incarceration of defendants unable to pay costs assessed against them, providing unrepresented defendants a public defender to represent them at compliance and indigency hearings, giving defendants a choice between paying \$25 per month toward the amount owed or performing community service and developing a standardized method calculated through the federal poverty level chart, when determining indigence.⁷⁸

The JIC referenced the three federal actions in its complaint against the Montgomery Municipal Court judge, comparing the ethical charges contained therein to the issues raised in the SPLC and EJUL suits.⁷⁹ Alleging wrongful incarceration, the JIC asserted the municipal judge “routinely jailed traffic offenders and misdemeanants” for failure to pay costs assessed against them: (1) without conducting any meaningful inquiry into an offender’s indigent status, the reasons why an offender was unable to pay, any bona-fide efforts the offender might be making in an attempt to pay or considering any alternatives to incarceration for failure to pay; (2) without providing an offender with an adequate opportunity to explain his or her inability to pay, the reasons behind it and any bona-fide efforts they were making in order to try to do so;⁸⁰ (3) without conducting a hearing, as required by Rule 26.11⁸¹ of the *Alabama Rules of Criminal Procedure*, to inquire into the offender’s ability to pay before incarcerating them for non-payment; (4) while applying a “fundamentally erroneous” indigency standard (e.g. no source of income whatsoever); and (5) while considering assets of an offender’s family or friends.⁸²

The JIC complaint also claimed the Montgomery Municipal Court judge had violated judicial ethics rules by allowing his municipal court to engage in “grossly deficient recordkeeping.”⁸³ Upon review of municipal court records, the JIC found some court records lacked any indication of which judge entered orders or what type of actions were even actually occurring (e.g. compliance reviews, revocation hearings, etc.).⁸⁴

The final charge brought against the Montgomery judge concerned the judge’s delegation of his judicial authority to a private probation company and to court staff.⁸⁵ The Montgomery Municipal Court, like many

other municipal courts in the state, contracted with JCS for its probationary services.⁸⁶ The complaint contended that pursuant to this contractual agreement, “the non-judicial, debt-collector JCS purported to act with judicial authority when collecting court-ordered financial assessments owed to the City of Montgomery.”⁸⁷ The Montgomery Municipal Court judge allowed JCS to choose which offenders were eligible for supervision and even allowed JCS to set the terms and conditions of probation.⁸⁸ The judge would sign JCS-generated “Order[s] of Probation” forms allowing JCS to set the length of probation, the number of appointments a probationer must attend and the monthly payment amount.⁸⁹ If a probationer was unable to make his or her monthly payment in full, JCS was permitted to determine what amount of the payment would be credited toward court-ordered assessments and what amount would be withheld for JCS fees.⁹⁰ Unconstrained by judicial interference, JCS notified defendants of probation violations and unilaterally “set, modified, and/or canceled”⁹¹ probationary hearings in Montgomery’s municipal court.⁹²

Approximately two months after the complaint was filed, the Court of the Judiciary released its final judgment, adjudicating the Montgomery Municipal Court judge guilty on all seven ethics charges.⁹³ For his numerous violations of Alabama’s *Canons of Judicial Ethics*, the Court of the Judiciary suspended the judge without pay for 11 months and ordered he bear the costs of the proceedings, amounting to \$4,312.⁹⁴

Despite being driven out of Harpersville and Montgomery, JCS still served approximately 100 municipal courts in the state by early 2015.⁹⁵ In the same year, however, city courts across the state began terminating their contracts with JCS in the aftermath of a lawsuit filed by SPLC against JCS and the City of Clanton.⁹⁶ Consequently, JCS announced it would cease all operations in the state.⁹⁷

SPLC initiated the lawsuit on behalf of three Clanton residents, all subjected to JCS supervision by the Clanton Municipal Court.⁹⁸ The lawsuit accused JCS of violating federal racketeering laws by extorting money from impoverished individuals under threat of incarceration.⁹⁹ Although this was the first time a lawsuit was brought against a municipal court in Alabama under the Racketeer Influenced and Corrupt Organizations (RICO) Act, the practices of the Clanton court triggering the suit resembled those of previous municipal courts sued. For example: the Clanton Municipal Court employed one part-time judge who improperly delegated judicial authority regarding probationary procedures to the JCS, individuals were placed on

pay-only probation with JCS and subsequently subjected to JCS's supplemental fees, JCS employed coercive tactics in an attempt to collect on amounts owed, impoverished individuals were incarcerated for failing to pay costs and fines and no indigency hearings were ever conducted.¹⁰⁰ Ultimately, SPLC and the City of Clanton entered into a settlement agreement that required the City of Clanton to cancel its contract with JCS.¹⁰¹ Individuals previously supervised by JCS are now required to report directly to the Clanton court to pay outstanding court balances.¹⁰²

After the settlement agreement was filed, SPLC sent out letters to municipalities still contracting with JCS, advising them the contracts were illegal and that the practices of JCS could amount to extortion.¹⁰³ Four months after the letters were sent, 72 municipalities had canceled their JCS contracts, and JCS announced its decision to close its Alabama offices.¹⁰⁴

Despite city courts effectively ousting JCS from the state, other private probation companies continued to operate in various municipalities. In the City of Gardendale, for example, a private probation company, Professional Probation Services (PPS), had been providing its services to the Gardendale Municipal Court since 1998.¹⁰⁵ PPS provides offender-funded probationary services to city courts at no cost to the municipality. The for-profit corporation generates revenue solely by charging its probationers various supplemental fees.¹⁰⁶ In November 2017, however, Gardendale terminated its longstanding contract with PPS, after the SPLC, on behalf of two Gardendale probationers, filed a lawsuit against the city, its municipal judge and PPS.¹⁰⁷ The suit accused the defendants of: (1) violating the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution, (2) violating Section 22 of the state's constitution, (3) violating state public policy by charging probationary fees in municipal court and (4) abuse of process.¹⁰⁸ SPLC also filed a separate complaint against the Gardendale Municipal Court Judge with the JIC, alleging judicial ethics violations and requesting that sanctions be imposed.¹⁰⁹

As a result of the various lawsuits initiated against municipalities, the number of city courts contracting with private probation services has dropped to less than 10, placing courts that continue to use private probation at risk for future legal action.¹¹⁰ However, when evaluating a municipal court's susceptibility to lawsuits, its probationary practices are not its only concern. Bail practices of a court could also face constitutional scrutiny, especially in regard to its treatment of indigent arrestees. EJUL, for example, filed a



Most cities now provide payment plans for fines and costs that cannot be paid at the time of sentencing with no additional assessment of administrative fees.

lawsuit against the City of Clanton for its municipal court's use of a bail schedule that functioned to keep indigents charged with misdemeanor crimes in jail while those with financial means were released.¹¹¹ In response to the suit, the municipal court amended its bail practices, now releasing anyone arrested for a misdemeanor charge on an unsecured appearance bond so long as the arrestee carries no outstanding warrants for previously failing to appear, poses no danger to himself or others and if release is not precluded by statute (i.e. DUI or domestic charges).¹¹² Those unable to qualify for immediate release are provided "a hearing within 48 hours of arrest to make an *individualized* determination as to whether the person may be released, and if so, under what conditions."¹¹³ At the hearing, the court considers the arrestee's ability to pay when setting an amount appropriate to the purposes of bail, or whether any viable alternatives to bail exist.¹¹⁴ In reviewing the municipal court's revised policies, federal Judge Myron H. Thompson found these new practices met constitutional due process requirements.¹¹⁵

In addition to the municipalities listed in this article, other cities within the state have been sued because of their court practices, including: Albertville, Alexander City, Birmingham, Columbiana, Dothan, Gadsden and Irondale. As a result of the lawsuits, the following reforms have been implemented in most of Alabama's municipal courts:

1. The abuses created by the use of "for-profit" private probation companies have been virtually eliminated.

2. Most cities now follow the bail reform recommendations approved by federal Judge Myron H. Thompson in the City of Clanton Bail Case.
3. Most cities no longer jail indigents (or non-indigents) for failure to pay minor traffic citations at the time of sentencing.
4. Most cities now provide payment plans for fines and costs that cannot be paid at the time of sentencing with no additional assessment of administrative fees.
5. Most cities now provide indigency hearings, as required by the *Alabama Rules of Criminal Procedure*, and do not incarcerate defendants for nonpayment of fines and costs.
6. Most cities now inform defendants potentially facing jail time of their right to counsel, and provide indigent defendants with a public defender, unless the right to counsel is waived.¹¹⁶ ▲

Endnotes

1. Griffin v. Illinois, 351 U.S. 12, 19 (1956).
2. *Id.* at 17.
3. See Griffin, 351 U.S. at 17; Henry Rose, *The Poor as a Suspect Class under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407, 420 (2010); see U.S. CONST. amend XIV, § 1.
4. 461 U.S. 660 (1983).
5. *Id.* at 671-73.
6. Claire Greenberg et al., *The Growing and Broad Nature of Legal Financial Obligations: Evidence from Alabama Court Records*, 38 CONN. L. REV. 1079, 1101 (“In lieu of legislative appropriations—which fell off from about \$68 million to less than \$3 million in a period of six years—the UJS handled the budget pressure by turning to other revenue sources, including creating additional [legal financial obligations].”); Sarah Stillman, *Get out of Jail, Inc.*, THE NEW YORKER, June 23, 2013 (quoting Alabama Judge Stephen Wallace, “The legislature cut budgets so drastically that the judiciary have to be debt collectors”).
7. See Greenberg, *supra* note 6; PUBLIC AFFAIRS RESEARCH COUNCIL OF ALABAMA, PARCA COURT COST STUDY 2-3 (2014).
8. *Municipal Court Fee Chart*, City of Birmingham, Municipal Court, Alabama (2013) (on file with author).
9. PARCA COURT COST STUDY at 3, *supra* note 7.
10. *Id.*
11. ALA. CONST. art. VI, § 149.
12. ALA. CODE § 12-14-2(a) (1975).
13. *Id.*; see also Op. Atty. Gen. No. 90-00185, 1990 WL 10709685 (Mar. 30, 1990).
14. HUMAN RIGHTS WATCH, PROFITING FROM PROBATION: AMERICA’S “OFFENDER-FUNDED” PROBATION INDUSTRY (Feb. 5, 2014).
15. Letter from Micah West, staff attorney, Southern Poverty Law Center, to Monroeville mayor, Monroeville mayor-elect and City of Monroeville City Council (Nov. 3, 2016) (on file with author).
16. *Id.*
17. *Id.*
18. Letter from Micah West, staff attorney, Southern Poverty Law Center, to Nicholas S. Hare, city attorney, City of Monroeville (Nov. 21, 2016) (on file with author).
19. *Id.*
20. *Id.*
21. See letter from Micah West to Monroeville mayor, *supra* note 15.
22. *Id.*
23. See letter from Micah West to Nicholas S. Hare, *supra* note 18.
24. CITY OF MONROEVILLE, ALA., RES. 16-12-005 (adopted Dec. 6, 2016).
25. Martin J. Reed, *Harpersville Mayor: Loss of Court Revenue Causing Budget Shortfall*, ALABAMA LOCAL NEWS (May 17, 2013).
26. *Id.*
27. See PROFITING FROM PROBATION, *supra* note 14.
28. See *id.*; see Martin J. Reed, *supra* 25.
29. See PROFITING FROM PROBATION, *supra* note 14.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. See PROFITING FROM PROBATION, *supra* note 14.
35. *Id.*
36. Burdette v. Town of Harpersville, No. CV 2010-900183, 2012 WL 2995326 (Ala. Cir. Ct. Shelby Cnty. July 11, 2012); see press release, Johanna Burkett, Baker Donelson’s Kevin Garrison Helps Shut down Alabama Debtor’s Prison (July 13, 2012) (naming Kevin R. Garrison and co-counsel William Dawson and Jim Pino as the attorneys who provided pro bono services to the four individuals in their lawsuit against the municipality).
37. *Id.* at *1.
38. *Id.*
39. ALA. R. CRIM. P. 26.11(g) & (i).
40. See ALA. CODE § 12-14-13(a) (1975) (placing a two-year maximum on municipal court probationary sentences).
41. *Town of Harpersville*, 2012 WL 2995326, at *2 (detailing additional fees assessed against defendants by JCS, such as an initial \$10 “set-up fee” and a monthly \$35-45 “probation fee”).
42. *Id.* at *1-2.
43. *Id.* at 3; see press release, Johanna Burkett, *supra* note 36.
44. *Town of Harpersville*, 2012 WL 2995326, at *3; see press release, Johanna Burkett, *supra* note 36.
45. Kent Faulk, *Harpersville Court Records Seized by Shelby County Sheriff’s Office and Alabama Attorney General*, ALABAMA LOCAL NEWS (Aug. 10, 2012).
46. See Ray v. Judicial Correction Services, No. 2:12-CV-02819-RDP, 2013 WL 5428360 (N.D. Ala. Sep. 26, 2013) (denying defendant’s motion to dismiss in part); see also Kent Faulk, *Update: Lawsuit Claims Childersburg and Probation Company Judicial Correction Services, Inc. Violated City Court Defendants’ Rights*, ALABAMA LOCAL NEWS (Aug. 29, 2012) (stating lawsuit initiated in August 2012).
47. Ray v. Judicial Correction Services, No. 2:12-cv-02819-RDP, 2017 WL 4012933, at *1 (N.D. Ala. Sep. 12, 2017). Three of the four plaintiffs were not convicted of an offense before initial placement on probation with JCS. *Id.* at *21.

48. *Id.* at *2, *6 (probationers subject to JCS supervision charged \$10 “set-up fee” and monthly \$35-45 “probation fee”); *see supra* note 41 (detailing Harpersville fees).
49. *Judicial Correction Services*, 2017 WL 4012933, at *3. The JCS office manager “could not recall whether she had ever supervised any probationer who had been declared indigent” by the Childersburg Municipal Court. *Id.* at *7. The municipal court judge explained that he had directed JCS to declare indigency if a probationer could not pay, and expected the probation company to work with indigent offenders. *Id.* at *8.
50. *Id.* at *2-3.
51. *See* Tim Lockette, *Judicial Commission: Part-Time Judges Responsible for Defendant’s Rights*, THE ANNISTON STAR (Mar. 11, 2014) (stating it was the same municipal court judge who was in charge of Harpersville and Childersburg).
52. *Ray v. Judicial Services*, No. 2:12-cv-02819-RDP, 2017 WL 660842, at *3 (N.D. Ala. Feb. 17, 2017) (stating judge also testified “he did not understand who was authorized” to enter into a binding contract between the municipal court and JCS.)
53. *Id.* at *1, *12 (plaintiffs argue the city should also be found liable for violating their constitutional rights since the city required the municipal court to use JCS probationary services).
54. *Id.* at *15. “[T]he probation customs and policies implemented by the City’s Municipal Court judge, the Municipal Court Magistrate, and JCS are not attributable to a City policymaker.” *Id.* “Under well-settled Alabama law, Judge Ward was responsible for supervising the Municipal Court, its magistrates, and its probation supervision provider.” *Id.* at *20.
55. Ala. Jud. Inquiry Comm’n Adv. Op. No. 14-926 (Mar. 4, 2014).
56. ALA. CONST. Art. VI, § 156; ALA. JUD. INQUIRY COMM’N R. P. 18 (as amended 2009).
57. *See* Lockette, *supra* note 51 (stating JIC spokeswoman acknowledged Judge Ward sought an opinion from the JIC).
58. Ala. Jud. Inquiry Comm’n Adv. Op., *supra* note 55. Declaring, among other things, that: court orders should be signed by the judge in a timely manner, a judge should never sign blank court orders and allow staff to fill them in and that all court records should be maintained. *Id.*
59. *Id.* “[P]robation be used only when a suspended sentence is imposed following a conviction or an offense; that probation be imposed only after a properly executed order of conviction has been entered; . . . periods of probation be neither imposed nor extended beyond the time authorized by law; that petitions for revocation of probation be processed in accordance with due process requirements, including proper notice to the defendant; and written findings of the grounds for revocation of probation be recorded.” *Id.*
60. *Id.* Declaring, among other things, that a judge must conduct an inquiry into a defendant’s ability to pay before incarcerating any defendant for non-payment, incarcerated people must be given credit toward the amount owed for time served and defendants who cannot pay as a result of their indigency should not be incarcerated. *Id.*
61. Ala. Jud. Inquiry Comm’n Adv. Op., *supra* note 55. “[P]rivate probation or other services used by the court be reviewed on a consistent basis to ensure there is no usurpation of the authority of the court, and to prevent such agencies from creating the perception that they have the authority to make the final determination of conditions of probation or to incarcerate defendants for noncompliance with court orders.” *Id.*
62. *Id.* A judge must commit sufficient time to ensure that his or her court and its personnel are protecting the due process rights of individuals brought before the court. *Id.*
63. Ala. Jud. Inquiry Comm’n Adv. Op., *supra* note 55.
64. *Judicial Correction Services*, 2017 WL 4012933, at *36. “To establish such a conspiracy, a plaintiff must show that (1) the parties ‘reached an understanding’ to deny a plaintiff his or her federal rights, and (2) the actions committed by the parties pursuant to the conspiracy actually impinged upon a plaintiff’s federal rights.” *Id.* (citing *Grider v. City of Auburn*, Ala. 618 F.3d 1240, 1260 (11th Cir. 2010)). Moreover, a plaintiff may prove a § 1983 conspiracy claim through circumstantial evidence. *Id.* (citations omitted).
65. William H. ReMine, *Civil Suits for Civil Rights: A Primer on § 1983*, 26-NOV. COLO. LAW 5, 11 (Nov. 1997).
66. *Id.* (citing to *Smith v. Wade*, 461 U.S. 30, 51 (1983)).
67. ALA. CONST. Art. VI, § 156; *see generally* Mallory L. Schnider, *Silence in the Courts: Alabama Judicial Inquiry Commission Rules of Procedure Silence Potential Ethical Violation Complaints Against Judges*, 42 CUMB. L. REV. 377 (2011) (discussing the establishment of the JIC, disclosure requirements when ethical complaints are submitted to the JIC and the effect of the 2010 amendments to JIC rules).
68. ALA. CONST. Art. VI, §§ 156-57.
69. ALA. CONST. Art. VI, § 157.
70. *Id.*
71. Complaint, *In re Hayes*, No. 49 (Ala. Ct. of the Judiciary filed Nov. 2016).
72. *Id.* at 28-33.
73. First Amended Class Action Complaint at 28, *Mitchell v. The City of Montgomery*, No. 2:12-cv-186-MEF (M.D. Ala. filed May, 23, 2014); *see* amended complaint, *Cleveland v. City of Montgomery*, No. 2:13-cv-732-MEF-TFM (M.D. Ala. filed Nov. 12, 2013); *see* amended complaint, *Watts v. City of Montgomery*, No. 2:13-cv-733-MEF-CSC (M.D. Ala. filed Nov. 12, 2013).
74. Amended complaint at 2, *Cleveland*, No. 2:13-cv-732-MEF-TFM; amended complaint at 2, *Watts*, No. 2:13-cv-733-MEF-CSC; first amended class action complaint at 2, *Mitchell*, No. 2:12-cv-186-MEF.
75. First amended class action complaint at 3-4, *Mitchell*, No. 2:12-cv-186-MEF.
76. Amended complaint, *Cleveland*, No. 2:13-cv-732-MEF-TFM (Cleveland was ordered to serve 31 days for traffic violations because she was unable to immediately pay \$1,554 in court costs and fines); amended complaint, *Watts*, No. 2:13-cv-733-MEF-CSC (Watts was ordered to serve 54 days because he was unable to immediately pay \$1,800 in court costs and fines).
77. Agreement to settle injunctive and declaratory relief claims, *Mitchell v. City of Montgomery*, No. 2:14-cv-186 (M.D. Ala. filed Nov. 17, 2014); complaint at 40, *In re Hayes*, No. 49 (Ala. Ct. of the Judiciary filed Nov. 2016).
78. Judicial procedures of the Municipal Court of the City of Montgomery for indigent defendants and nonpayment, *Mitchell v. City of Montgomery*, No. 2:14-cv-186 (M.D. Ala. filed Nov. 17, 2014).
79. Complaint at 36, *In re Hayes*, No. 49.
80. *See* first amended class action complaint at 17, *Mitchell*, No. 2:12-cv-186-MEF (“When Mr. Maull was brought before the City court, the judge asked him why he had not paid his old tickets. . . . As Mr. Maull was trying to explain his situation to the judge, the judge cut him off and would not let him speak.”).
81. ALA. R. CRIM. P. 26(i) (further providing that an indigent may not be incarcerated for his or her inability to pay a fine or court cost).
82. *See* complaint at 28-29, 81-82, 85-86, *In re Hayes*, No. 49; *see also* first amended class action complaint at 29, *Mitchell*, No. 2:12-cv-186-MEF (“If family members are present, the City’s practice is to

call them up to the bench and to ask them to pay as much of their family member's debts as they can on the threat that the person who allegedly owes the money will be jailed if the family members do not pay.”).

83. Complaint at 30-31, 86-89, *In re Hayes*, No. 49.
84. *Id.* at 30.
85. *Id.* at 43, 82-85.
86. *Id.* at 7-8. The EJUL settlement agreement effectively terminated the Montgomery-JCS contract, requiring the municipal court “[t]o agree not to hire, contract with, or otherwise use any private probation company . . . for a period of not less than three years following the execution of this agreement.” Agreement to settle injunctive and declaratory relief claims, *Mitchell v. City of Montgomery*, No. 2:14-cv-186 (M.D. Ala. filed Nov. 17, 2014).
87. Complaint at 33, *In re Hayes*, No. 49.
88. *Id.* at 31, 83.
89. *Id.* at 31-32, 82-83.
90. *Id.* at 83.
91. Complaint at 84, *In re Hayes*, No. 49. JCS was permitted to issue “show-cause” orders and initiate revocation hearings within Montgomery’s municipal court. *Id.* at 31-32, 83.
92. *Id.* at 31-33, 83-84.
93. Final judgment at 8, *In re Hayes*, No. 49 (Ala. Ct. of the Judiciary filed Jan. 2017).
94. *Id.*
95. See *SPLC: Private Probation Company’s Decision to Leave Alabama Is Welcome News for Indigent*, SPLC (Oct. 19, 2015) (SPLC sent letters to approximately 100 cities with JCS contracts).
96. *Id.*
97. Kent Faulk, *Private Probation Company Once Called ‘Judicially Sanctioned Extortion Racket’ Leaving Alabama*, ALABAMA LOCAL NEWS (Oct. 19, 2015); *Clanton Residents Settle Lawsuit with Private Probation Company*, SPLC (Dec. 13, 2016).
98. Complaint, *Reynolds v. Judicial Correction Services Inc.*, No. 2:15-cv-00161-MHT-CSC (M.D. Ala. filed March 3, 2015).
99. *Id.*; see Faulk, *supra* note 97.
100. Complaint, *Reynolds*, No. 2:15-cv-00161-MHT-CSC.
101. Settlement Agreement, *Reynolds v. Judicial Correction Services*, No. 2:15-cv-00161-MHT-CSC (M.D. Ala. filed June 16, 2015).
102. *Id.* at 2.
103. *SPLC Settles Private Probation Suit with Alabama Town*, SPLC (June 16, 2015); see e.g., letter from Sam Brooke, deputy legal director, SPLC, to Alberto C. “Butch” Zaragoza, Jr., mayor of Vestavia Hills (June. 17, 2017) (one of approximately 100 letters sent out to municipalities warning them about their JCS contracts).
104. See SPLC, *supra* note 95.
105. Complaint at 7, *Harpersville v. Professional Probation Services*, Case No: 2:17-cv-01791-UJB-AKK (N.D. Ala. filed Oct. 23, 2017).
106. *Id.*; see also Amy Yurkanin, *Private Probation Losing Ground in Alabama, But Holdouts Remain*, ALABAMA LOCAL NEWS (Nov. 9, 2017) (PPS’s *modus operandi* not only mirrors JCS’s, but, in fact, the owners of PPS acquired JCS sometime in 2017).
107. Yurkanin, *supra* note 106; Complaint, *Harper*, Case No: 2:17-cv-01791-UJB-AKK.
108. See Complaint at 45-48, *Harper*, Case No: 2:17-cv-01791-UJB-AKK. The lawsuit charged the defendants with violating: (1) the Due Process Clause of the Fourteenth Amendment because PPS

had a financial conflict of interest in supervising probationers, (2) Section 22 of the state’s constitution because “[a] municipal contract must be publicly bid if the contract grants ‘exclusive franchise,’” (3) ALA. CODE §§ 11-45-9(a); 12-19-153(a) which provides that municipal courts are limited to imposing only fines and court costs that are expressly provided by law and (4) abuse of the process for misusing probation in order to “extort money.”

109. Complaint before Ala. Jud. Inquiry Comm’n Against J. Kenneth Gomany (Oct. 24, 2017).
110. Yurkanin, *supra* note 106.
111. *Jones v. City of Clanton*, 2015 WL 5387219 (M.D. Ala. Sept. 14, 2015).
112. *Id.* at *1.
113. *Id.* at *2.
114. *Id.*
115. *Id.* at *3.
116. See also Chris Friedman, Greg Cook, and Will Hill Tankersley, *Judging Locally: A Right Worth Protecting*, ALABAMA MUNICIPAL JOURNAL, Sept.-Oct. 2017 at 19-20 (discussing additional municipal court reforms).

Judge T. Brad Bishop

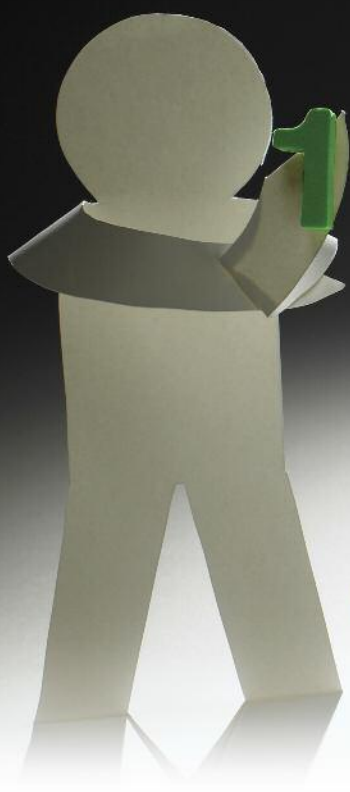


Judge Brad Bishop, a professor at the Cumberland School of Law of Samford University is also the municipal judge for the City of Hoover. He is the chair of the Alabama Supreme Court Advisory Commission on Municipal Courts and is the author of numerous books and journal articles on municipal court practice and procedures.

Laura E. Yetter



Laura Yetter is a native of Louisville, Kentucky and a third-year student at the Cumberland School of Law. While at Cumberland, she has cultivated a particular interest in court-cost reform and other issues facing indigent defendants in Alabama.



Ten Things You Should Know about the Alabama Uniform Trust Code

By R. Mark Kirkpatrick

1 The Alabama Uniform Trust Code (UTC) contains both default and mandatory rules.

The UTC, *Ala. Code* §19-3B-101 et seq. (1975) contains default rules that apply when the trust instrument is silent. It also has 13 mandatory rules that will apply to all trusts regardless. See *Ala. Code* §19-3B-105.

2 The UTC does not authorize investment in stock of a private corporation.

There is a constitutional prohibition against investment in stock of a private corporation absent a specific authorization in the trust. Thus, you cannot rely on the UTC for such authorization. See *Ala. Code* §19-3-B-902(e).

3 Spendthrift provisions do not protect against a domestic relations order for support and maintenance.

A spendthrift provision is one that restrains the beneficiary's ability to voluntarily and involuntarily transfer his or her interest in the trust. If present, this

protects the beneficiary's interest from creditors. The only requirement is to indicate an intent that it be a spendthrift trust. See *Ala. Code* §19-3B-502. The most notable exception to spendthrift protection is the one for domestic relations orders on behalf of the beneficiary's child or former spouse for support and maintenance. *Ala. Code* §19-3B-503.

4 Absent a waiver in the trust instrument, a trustee has a duty to inform all qualified beneficiaries of certain matters.

A qualified beneficiary is any beneficiary currently eligible to receive a distribution from the trust, any successive income beneficiary and presumptive remainder beneficiaries. Absent a waiver in the trust instrument, the trustee of any trust (created after January 1, 2007) has a duty to inform all qualified beneficiaries of the existence of the trust, the name of the settlor or creator, the right to request the trust instrument, the right to receive the trustee's most recent accounting and the right to receive the trustee's most recent report. *Ala. Code* §19-3B-813.

5

A trustee has a non-waivable duty to respond promptly to a qualified beneficiary's request for trustee's reports and other information reasonably related to the administration of a trust. *Ala. Code §19-3B-105.*

While the creator of the trust may waive the duty to inform discussed above, he or she may not waive the duty to promptly respond to a request for information about the trust. Thus, the creator may waive the duty to inform if he or she doesn't want one or more of the qualified beneficiaries to know about the trust's existence, but the trustee must respond to requests for information about it even from a beneficiary who the trustee had no obligation to inform of the trust's existence. For instance, the creator may want to waive the duty to inform remainder beneficiaries of the existence of the trust. Waiving this duty to inform would have implications on the limitations period for bringing a claim against the trustee (see discussion below).

6

The statute of limitations for bringing a claim is generally two years.

The statute of limitations for bringing an action against a trustee is two years from adequate disclosure of the breach in a report sent to the beneficiary (or his representative), or, if not applicable, two years from the first to occur of (1) the removal, resignation or death of the trustee; (2) the termination of the beneficiary's interest in the trust; or (3) the termination of the trust. *Ala. Code §19-3B-1005.*

7

The UTC allows for out-of-court settlement agreements to address many matters previously available only through a court.

Ala. Code §19-3B-111 allows for out-of-court settlement agreements regarding interpretation of the trust, granting a particular power to a trustee, direction to a trustee to refrain from a particular act, trustee accountings, appointment or resignation of a trustee, compensation of a trustee, change of a trustee's principal place of administration, trustee liability for a particular action and partial or final settlements. These are called non-judicial settlement agreements. Non-judicial settlement agreements are only valid to the extent they do not violate a material purpose of

the trust and only if the matter approved could be properly approved by a court.

8

The UTC adopts the concept of virtual representation.

Article 3 of the UTC deals with the concept of virtual representation and specifies circumstances where a third party may represent and bind a beneficiary in dealing with a trust. The most notable is that a parent or other direct ancestor may represent a minor or unborn issue, assuming there is no court-appointed guardian or conservator, as long as no conflict of interest exists. Previously, a guardian ad litem would have been required to represent these interests.

9

Court action is not necessarily required to terminate or modify a trust.

A trust may be terminated (or modified) with the consent of all beneficiaries in a non-judicial settlement agreement or by a court, if, in the case of termination, "continuance of the trust is not necessary to achieve any material purpose of the trust," or, in the case of modification, the "modification is not inconsistent with the material purpose of the trust." *Ala. Code §19-3B-111(c)* and *§19-3B-411(6)*.

10

Probate courts in Jefferson, Mobile and Shelby counties have jurisdiction to hear proceedings involving a trust.

Generally, the circuit courts have exclusive jurisdiction over proceedings brought by a trustee or beneficiary concerning administration of a trust. However, the probate courts in Jefferson, Mobile and Shelby counties have concurrent jurisdiction. *Ala. Code §19-3B-203.* ▲

R. Mark Kirkpatrick



Mark Kirkpatrick is a board-certified Estate Planning Specialist, with an L.L.M in tax law from NYU. His practice primarily focuses on the areas of trust and estate litigation, estate planning and business acquisitions and sales with the Mobile firm of Coale, Dukes, Kirkpatrick & Crowley PC.



NOTICE

DISCIPLINARY NOTICES

- ▲ Notice
- ▲ Reinstatement
- ▲ Surrender of License
- ▲ Disbarments
- ▲ Suspensions
- ▲ Public Reprimands

Notice

- **Sonya Alexandrial Ogletree-Bailey**, who practiced law in Mobile and whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 31, 2018 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against her in ASB No. 2017-81, before the Disciplinary Board of the Alabama State Bar. [ASB No. 2017-81]

Reinstatement

- Anniston attorney **Richard Joel Laird, Jr.** was reinstated to the active practice of law in Alabama on January 22, 2018, per the Supreme Court of Alabama. Laird petitioned to be transferred to disability inactive status and the petition was granted, effective October 25, 2016. On November 13, 2017, Laird petitioned for reinstatement to the active practice of law in Alabama and was subsequently reinstated by order of the Supreme Court of Alabama, effective January 22, 2018. [Rule 28, Pet. No. 2017-1311]

Surrender of License

- On November 9, 2017, the Supreme Court of Alabama adopted the order of the Alabama State Bar Disciplinary Commission, accepting the surrender of license of Birmingham attorney **Gary L. Weaver** from the practice of law in Alabama, effective October 11, 2017. On October 11, 2017, Weaver submitted his surrender of license to practice law in Alabama. The surrender of license was the result of Weaver's guilty plea to one count of wire fraud which was entered on May 31, 2017. [ASB No. 2017-658]

Disbarments

- Mobile attorney **Sidney Moxey Harrell, Jr.** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective February 22, 2018. The supreme court entered its order based on the report and order of the Disciplinary Board of the Alabama State Bar, disbaring Harrell after he was found guilty of violating Rules 1.3, 1.4, 1.7(b), 1.15(a), (b), (e) and (f), 4.19(a), and 8.4(a), (c), (d) and (g), *Ala. R. Prof. C.* Harrell represented a client in criminal proceedings. Harrell negotiated and reached a

plea agreement with the U.S. Attorney's Office, wherein the client agreed to transfer \$20,000 in cash to Harrell, which was to be maintained by Harrell until it was surrendered to the government as part of a forfeiture agreement upon which the plea agreement was conditioned. Harrell did not deposit the cash into his trust account, but rather put the cash in a gun safe in his law office, where the cash went missing. Harrell never informed his client, failed to report the money as missing and lied to the U.S. Assistant Attorney handling the client's prosecution regarding the matter. Harrell also failed to properly maintain his IOLTA trust account, as required by Rule 1.15, *Ala. R. Prof. C.* [ASB No. 2016-1527]

- Birmingham attorney **Kelli Jo Hogue-Mauro** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective November 30, 2017. The supreme court entered its order based on the order of the Disciplinary Commission of the Alabama State Bar, disbarring Hogue-Mauro after she pled guilty to felony theft concerning programs receiving federal funds in violation of Title 18, *United States Code*, Section 666, before the United States District Court of the Northern District of Alabama, Southern Division. Hogue-Mauro's felony conviction related to her theft of funds while serving as the director of the Birmingham Bar Association's Volunteer Lawyers Program. [Rule 22(a), Pet. No. 2017-1085; ASB No. 2017-450]
- Birmingham attorney **Richard F. Horsley** was disbarred from the practice of law in Alabama, effective December

20, 2017, by order of the Alabama Supreme Court subject to the terms and conditions of the December 20, 2017 order entered by the Disciplinary Board of the Alabama State Bar based on Horsley's consent to disbarment submitted December 18, 2017, wherein Horsley consented to disbarment based upon misappropriation of client funds. [Rule 23A, Pet. No. 2017-1348]

- Mobile attorney **Sonya Alexandrial Ogletree-Bailey** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective November 16, 2017. The supreme court entered its order based upon the November 2, 2017 order of Panel I of the Disciplinary Board of the Alabama State Bar. Ogletree was found guilty of violating Rules 1.3, 1.4, 1.15(a), (e) and (n), 1.16(d), 3.4(c), 8.1(b), and 8.4(d) and (g), *Ala. R. Prof. C.* In addition, Ogletree-Bailey failed to comply with a prior order of the Disciplinary Board of the Alabama State Bar. [ASB Nos. 2016-688, 2016-914, 2016-1034 and 2016-1195]
- Birmingham attorney **Jonathan Kenton Vickers** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective November 16, 2017. The supreme court entered its order based on the November 2, 2017 order of Panel I of the Disciplinary Board of the Alabama State Bar. Vickers was found guilty of violating Rules 1.4(a) and (b), 1.5(b), 1.15(a), 1.16(d), 3.4(c), and 8.4(c) and (g), *Ala. R. Prof. C.* Vickers was retained in January 2016 to represent a client on robbery charges. After February 1,



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(Continued from page 203)

2016, Vickers did not communicate with the client until approximately two weeks prior to the status docket set on April 25, 2016. Beyond filing a notice of appearance, appearing at arraignment and receiving discovery, Vickers took no substantive action on behalf of the client, failed to return any portion of the fee to the client and misled the client as to the reason for his inability to continue to represent him in the criminal case as Vickers was suspended from the practice of law for five years, effective April 4, 2016. [ASB No. 2016-925]

Suspensions

- Greenville attorney **Heather Leigh Friday Boone** was summarily suspended pursuant to Rule 20a, *Ala. R. Disc. P.*, from the practice of law in Alabama by the Supreme Court of Alabama, effective January 2, 2018. The supreme court entered its order based upon the Disciplinary Commission's order that Boone be summarily suspended for failing to respond to formal requests concerning a disciplinary matter. [Rule 20(a), Pet. No. 2017-1427]
- Andalusia attorney **Willie Clyde Harr, III** was summarily suspended pursuant to Rule 20a, *Ala. R. Disc. P.*, from the practice of law in Alabama by the Disciplinary Commission of the Alabama State Bar, effective January 11, 2018, for failing to respond to formal requests for a written response concerning a disciplinary matter. Harr subsequently submitted a written response and petitioned for dissolution of the summary suspension. The Disciplinary Commission granted the petition and ordered that the summary suspension be dissolved on January 24, 2018. [Rule 20(a), Pet. No. 2017-1314]
- Birmingham attorney **Rachel Harris Pinson** was suspended from the practice of law in Alabama for 90 days by order of the Supreme Court of Alabama, effective January 1, 2018 through March 31, 2018. The suspension was based upon the Disciplinary Commission's acceptance of Pinson's conditional guilty plea, wherein she admitted to violating Rules 8.4(c) and (g), *Ala. R. Prof. C.* Pinson was a former associate at a firm where she improperly took fees owed to the firm by placing the client fees in her own trust account, without the knowledge or consent of the firm, in anticipation of establishing a solo practice. [ASB No. 2014-1738]
- Montgomery attorney **Amardo Wesley Pitters** was suspended from the practice of law in Alabama for one year and 90 days by the Disciplinary Commission of the Alabama State Bar. Pitters will serve the 90-day suspension beginning December 12, 2017, while the one-year suspension will be held in abeyance at which time Pitters will be placed on probation, with conditions, for the two-year period. On January 3, 2018, the Supreme Court of Alabama entered a notation of Pitters's suspension. The supreme court entered its notation based upon the Disciplinary Commission's acceptance of Pitters's conditional guilty plea, wherein Pitters pleaded guilty to violating Rules 1.4(a), 1.4(b), 8.4(a) and 8.4(g), *Ala. R. Prof. C.* Pitters admitted he failed to comply with reasonable requests for information from his clients and failed to explain the matter to the extent reasonably necessary to permit the clients to make an informed decision regarding his representation. [ASB No. 2014-1769]
- Mobile attorney **Steven Lamar Terry** was summarily suspended from the practice of law in Alabama pursuant to Rules 8(c) and 20(a), *Ala. R. Disc. P.*, by order of the Disciplinary Commission of the Alabama State Bar, effective January 11, 2018. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing Terry's refusal to respond to a request for information concerning a disciplinary matter. After receiving a copy of the suspension order, Terry submitted his response on January 23, 2018 and filed a petition to dissolve the summary suspension. Thereafter, on January 29, 2018, the Disciplinary Commission entered an order dissolving the summary suspension. [Rule 20(a), Pet. No. 2018-59]

Public Reprimands

- Montgomery attorney **Lee Argel Cook, Jr.** received a public reprimand with general publication on December 8, 2017 for violating Rules 1.3 [Diligence] and 1.4 [Communication], *Ala. R. Prof. C.* Cook was hired to represent a client in an automobile injury case and failed to communicate with the client and keep the client reasonably informed of the trial date, which caused the client to miss the trial. Cook also failed to appear in court on the day of trial, causing the client's case to be dismissed. With this conduct, Cook violated Rules 1.3 and 1.4, *Ala. R. Prof. C.*, by failing to provide competent representation, neglecting a legal matter entrusted to him and failing to keep the client reasonably informed about the status of the matter. Cook is also required to pay any and all costs taxed against him pursuant to Rule 33, *Ala. R. Disc. P.*, including but not limited to a \$750 administrative fee. [ASB No. 2017-284]

- Tuscaloosa attorney **Donnis Cowart** received a public reprimand with general publication on January 26, 2018 for violating Rules 1.3 [Diligence], 1.4(a) [Communication] and 3.2 [Expediting Litigation], *Ala. R. Prof. C.* Cowart was hired to represent a client in a faulty product case. Initially, his clerk researched the issues of the case. Numerous phone calls from the client to Cowart went unanswered. Thus, Cowart failed to properly communicate with the client. Thereafter, Cowart held the case in his office for approximately a year and a half with little, if any, work performed. After the year and a half, Cowart referred the matter to another attorney. With this conduct, Cowart violated Rules 1.3, 1.4 and 3.2, *Ala. R. Prof. C.*, by neglecting a legal matter entrusted to him, failing to keep his client reasonably informed about the status of their matter and failing to make reasonable efforts to expedite litigation consistent with the interests of the client. Cowart is also required to pay any costs taxed against him pursuant to Rule 33, *Ala. R. Disc. P.*, including but not limited to a \$750 administrative fee. [ASB No. 2016-378]
- Montgomery attorney **Alfred Dudlow Norris, III** was issued a public reprimand with general publication on January 26,

2018 for violating Rules 1.3, 1.4, 1.5(b), 1.15(a), (b) and (e), 1.16(d) and 8.4(g), *Ala. R. Prof. C.* In March 2013, a client hired Norris to represent her in a dispute with an automobile dealership. The client paid Norris a \$175 consultation fee and he agreed to write a letter to the automobile dealership on her behalf, but Norris never did so. At a later date, the client agreed to have Norris draft a will for her for \$3,000. Norris never completed the will, nor provided the client with a copy. Additionally, Norris failed to place any of the fee into trust and failed to maintain a copy of the client's file for six years from the termination of representation. [ASB No. 2017-574]

- Scottsboro attorney **Frank Brian Rice** was issued a public reprimand with general publication on December 8, 2017 for violating Rules 1.3, 1.4(a) and (b), and 1.15 (a) and (e), *Ala. R. Prof. C.* In March 2016, a client paid Rice a flat fee of \$650 to represent her in an uncontested divorce. Rice failed to place the flat fee into trust and failed to maintain trust records. Due to health issues, Rice failed to adequately communicate with the client and failed to prepare the necessary paperwork in a timely manner. Additionally, Rice failed to make a refund to the client until after the client filed a bar complaint. [ASB No. 2016-1147] ▲



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MEMORIALS

▲ William T. Galloway, Jr.

William T. Galloway, Jr.

Former Lanier Ford shareholder Bill Galloway died on January 20, 2018 at age 85. Born on August 30, 1932 and raised in Huntsville, Mr. Galloway joined the Ford, Caldwell, Ford & Payne firm in 1959 after his graduation from Vanderbilt University Law School. When the Lanier and Ford firms merged in 1988, he became a shareholder in Lanier Ford Shaver & Payne PC. He retired from practice on June 27, 1997 after 37 years of active law practice.

After graduating from Columbia Military Academy, he received his B.A. from Vanderbilt University in 1954. While at Vanderbilt, he was a member of the Reserve Officer Training Corps (ROTC) and spent two years on active duty in Japan and Korea as a second lieutenant in the U.S. Army's Intelligence Corps. He then returned to Vanderbilt, receiving his J.D. in 1959.

Mr. Galloway served as treasurer of the Huntsville Symphony Orchestra and was a long-time active member of the Huntsville Rotary Club. He was also past president of the Huntsville United Way.

Mr. Galloway's practice was primarily in real estate, with his primary client being First Federal Savings and Loan Association, which eventually became First American Federal Savings and Loan Association. (First American Federal merged with Colonial Bank in 1993.)

Mr. Galloway was famous for his dry wit, colorful expressions and stories. He once shared about how an old farmer had asked him for advice about a situation. Mr. Galloway advised him and then requested that he pay a \$5 consultation fee. Mr. Galloway said the old farmer paused for a bit and then replied, "If I decide to follow your advice, I'll pay you."

He loved to repeat a story about his father, who lived to a ripe old age. When he was into his 90s, his father received a cold call from a young stock broker who tried to interest him in some long-term investments. He always chuckled in retelling his father's response, "Young man, at my age, I don't even buy green bananas." And, if you asked how Mr. Galloway how his father was doing, he would reply, "Well, he's still buying green bananas."

Because he was a real estate attorney, he referred to himself as a "dirt mover" and called a mortgage a "no-pay-no-stay."

Mr. Galloway was a long-time member of the Central Presbyterian Church of Huntsville, where he served as a deacon and elder. ▲

Bolen, Randall Harry
Chelsea
Admitted: 1987
Died: November 14, 2017

Bradford, Robert Larry
Vestavia
Admitted: 1978
Died: January 29, 2018

Cook, Camille Wright
Tuscaloosa
Admitted: 1948
Died: February 20, 2018

Gamble, Michael Joseph
Dothan
Admitted: 1987
Died: April 18, 2017

Hill, Shawn M.
Alexandria
Admitted: 1989
Died: January 13, 2017

Ingram, Douglas Wayne
Birmingham
Admitted: 1990
Died: January 21, 2018

Ingram, James Carl, Jr.
Lanett
Admitted: 1993
Died: August 23, 2017

Kirby, Robert Edward, Jr.
Alabaster
Admitted: 1988
Died: February 4, 2018

Mackey, Maurice Cecil, Jr.
East Lansing, Michigan
Admitted: 1958
Died: February 8, 2018

McLean, Robert Joe
Birmingham
Admitted: 1978
Died: January 14, 2018

Payton, Charles Richard
Verbena
Admitted: 1980
Died: December 17, 2017

Phillips, Joseph Hunter, III
Leeds
Admitted: 1982
Died: February 10, 2018

Stoddard, Belle Howe
Huntington, Pennsylvania
Admitted: 1978
Died: January 30, 2018

Wallis, Walter Lanier
Tallahassee, FL
Admitted: 1976
Died: December 13, 2017

Wilson, James Matthew
Hoover
Admitted: 2011
Died: February 27, 2018



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LEGISLATIVE WRAP-UP

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Legislative Update, Part 1

This article is being written as the 2018 Legislative Session is winding down; by the time you are reading this article, the legislature will have adjourned sine die for yet another year and likely closed out this quadrennium. This year the legislative update will be split into two editions, with an update on the Law Institute bills that were in this month's issue and all other bills in the July magazine.

The Law Institute had another great legislative session, passing four significant pieces of legislation to advance our directive to improve the laws of Alabama. We owe this success first and foremost to the hundreds of attorneys who volunteer their time to work on our drafting committees. These lawyers work hard to make sure that each and every proposal that is advanced by the Law Institute is well developed, balanced and fair to all affected persons. Second, our success would not be possible without

the support and push from the legislative members of our executive committee, Senators Cam Ward (ALI president), Arthur Orr and Rodger Smitherman and Representatives Chris England (ALI vice president), Mike Jones and Bill Poole. These legislators use their tremendous influence and credibility to help advance the Law Institute's legislative initiatives every year. Finally, special thanks are owed to Clay Hornsby, who provides great stewardship over all that is necessary to shepherd these bills through the legislative process.

Alabama Partnership Law: HB72 (Act 2018-125)

Representative Bill Poole and Senator Arthur Orr

This Act is the latest installment of the Alabama Law Institute Standing Committee on Business Entities. That committee is working hard to systematically improve the business formation and

governance laws of our state. This year's installment updates Alabama's partnership law in a manner that provides for greater alignment with the Alabama Limited Partnership Law and the Alabama Limited Liability Company Law.

The proposed Act focuses on the contractual nature of the partnership. There are few mandatory provisions in the proposed Act; most features of a partnership can be modified by the parties to suit their needs. The proposed Act includes default provisions that apply if the partners do not modify those default provisions in the partnership agreement. Despite the emphasis on allowing the parties to make their own contract, the proposed Act provides that certain obligations, such as the implied contractual covenant of good faith and fair dealing, cannot be modified.

A new feature allows a partnership to conduct not for profit activities. Under existing law, partnerships are, by definition, only "for-profit" entities. The main difference is that formation of a "for-profit" partnership requires little formality and can be accomplished with or without an intention to do

so. However, in order to form a not-for-profit partnership, the partners must intend to do so, and must file a statement of not-for-profit partnership with the secretary of state.

Normally a filing is not required to form a partnership. Rather, a partnership is the least formal of Alabama's entities, and thus the partners and third parties must look to the partnership agreement to determine many aspects of a partnership. However, the proposed Act does permit or, under certain circumstances, require notice filings normally referred to in the law as "statements," such as (i) a statement of partnership, (ii) a statement of not for profit partnership, (iii) a statement of limited liability partnership, (iv) a statement of authority, (v) a statement of dissolution, (vi) a statement of conversion, (vii) a statement of merger and (viii) a certificate of reinstatement. These statements are designed to notify the state and third parties that the partnership exists and how to contact it. The details about the conduct of the partnership will generally be contained in the partnership agreement.

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(Continued from page 211)

Uniform Voidable Transactions Act: SB152 (Act 2018-163)

Representative Matt Fridy and Senator Rodger Smitherman

This act amends the Alabama Fraudulent Transfers Act adopted in 1989 and last amended in 1999. The title of the act is now the “Uniform Voidable Transactions Act” (UVTA). The original title was changed to avoid a perception that was misleading because fraud has never been a necessary element of a claim under the act.

The UVTA amendments also include a few new provisions. For example, the UVTA adds a choice-of-law rule for claims governed by the act. The proper jurisdiction is defined as the location where the debtor was located when the transfer occurred. The UVTA also includes uniform rules allocating the burden of proof and defining the standard of proof with respect to claims and defenses under the act. The established burden is preponderance of the evidence.

The amendments to the UVTA also delete the special definition of “insolvency” for partnerships. As originally written the act set forth a special definition of “insolvency” applicable to partnerships, which adds to the sum of the partnership’s assets the net worth of each of its general partners. The amendments delete that special definition, and thus, make a partnership subject to the general definition.

Condominium Act: SB337

Representative Chris England and Senator Rodger Smitherman

Alabama’s Condominium Act was passed in 1990 and is located in Chapter 8A of Title 35 of the *Code of Alabama*. In the time that has passed, several issues have been raised needing clarification. Throughout the act, revisions have been made to provide for consistent language to address practical matters raised by those on the committee.

Some of the more critical amendments are: Section 35-8A-102(c) was amended to clarify when an offering statement is required for the sale of units in condominiums located outside of Alabama sold to Alabama residents. The amendment to § 35-8A-103(4) recognizes that easements and other interests in real property can be a common element. The act now recognizes that some property subject to development rights cannot be separately assessed and taxed. Section 35-8A-107(c) was amended to require that any portion of an award attributable

to condemnation of limited common elements be divided among the owners in accordance with the value of the interest in a particular limited common element assigned to the units rather than requiring the amounts to be equally divided among the unit owners. The requirement of maintenance of a condominium book by the judge of probate in each Alabama county was removed. Section 35-8A-201(c) was amended to clarify that a declaration or an amendment to the declaration is not effective until there is substantial completion of the structural and mechanical systems in the buildings located on the property being submitted to the condominium form of ownership. The amendment to § 35-8A-210(c) also removes the requirement that the engineer or architect certify that the structural and mechanical systems of all buildings were “completed in accordance with the plans.” Section 35-8A-(209)(g) was amended to allow a licensed surveyor to provide the required certification. This change expands the prior law which provided that only a licensed engineer or architect could certify to a plat.

Trust Decanting Act: HB163

Representative Paul Beckman and Senator Greg Albritton

The Trust Decanting Act is a latest recommendation of the ALI Standing Committee on Probate and Trusts to modernize and improve the Alabama trust laws.

The act represents one of several recent innovations in trust law that seek to make trusts more flexible so that the settlor’s material purposes can best be carried out under current circumstances. The decanting statute provides flexibility by statutorily expanding discretion already granted to the trustee to permit the trustee to modify the trust either directly or by distributing its assets to another trust.

While some trusts expressly grant the trustee or another person a power to modify or decant the trust, a statutory provision can better describe the power granted, impose limits on the power to protect the beneficiaries and the settlor’s intent, protect against inadvertent tax consequences, provide procedural rules for exercising the power and provide for appropriate remedies.

The Alabama Uniform Trust Code currently permits modifications to trusts and many practitioners believe that decanting is permitted within the scope of permitted modifications; however, adoption of this act removes any doubt about the ability to decant and the procedures to be followed. ▲



BAR BRIEFS

- **David L. Selby, II**, a partner in the Bailey & Glasser LLP Birmingham office, was recently appointed to a leadership position in the Atrium Medical Corporation C-Qur Hernia Mesh MDL. In addition, Selby has been appointed to the Plaintiffs' Steering Committee in the Smith & Nephew Hip Implant MDL which is pending in the United States District Court of Maryland.
- **Stephen Gidiere**, a partner in the Birmingham office of Balch & Bingham and co-chair of the environmental and natural resources practice, was elected a Fellow of the American College of Environmental Lawyers (ACOEL), at the organization's annual meeting last fall in Charleston. Gidiere has nearly 20 years of experience litigating environmental and natural resources cases against the federal government and non-governmental organizations in federal district courts, U.S. Courts of Appeals and the U.S. Supreme Court.
- Beasley Allen announces that **David Dearing**, a principal attorney in the firm's mass torts section, has been selected as a member of the International Society of Barristers, and that **Kendall Dunson** was inducted into the American Board of Trial Advocates at the Alabama Chapter's annual meeting in November. Dunson serves on the state bar's Diversity Committee and the Client Security Fund Committee. He also served on the Alabama Curriculum Committee for the Board of Examiners.
- **Faulkner Law's** trial advocacy program recently moved up in the rankings of the nation's best programs by the *US News and World Report* for 2019. Faulkner Law's advocacy program moved up two positions from last year's rankings and is now tied with Stanford Law School. The program is ranked 15th among the nation's 204 ABA-Approved law schools.
- Hare, Wynn, Newell & Newton LLP announces that **Justice Ralph D. Cook** recently received the Lifetime Achievement Award last Friday from the Birmingham Bar Association.
- Lightfoot, Franklin & White LLC partner **Brooke Garner Malcom** has been named to the 2018 Board of Directors for the Birmingham Bar Volunteer Lawyers Program.
- White Arnold & Dowd PC of Birmingham announces that **J. Mark White** was elected president of the International Academy of Trial Lawyers at the organization's annual meeting in March in Austin.



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

Personal Jurisdiction

Ex parte International Creative Management Partners, LLC, No. 1161059 (Ala. Feb. 2, 2018)

Talent agency's negotiation of performance agreement under which musical act was performed, at which event plaintiff was injured, was too tenuous a connection to Alabama forum to warrant exercise of personal jurisdiction.

Forum Selection; Unconscionability

Ex parte United Propane Gas, Inc., No. 1160891 (Ala. Feb. 2, 2018)

Inability to bring class action on a small claim, standing alone, does not render unconscionable an outbound forum-selection clause mandating disposition in a forum prohibiting class actions (due to the outbound forum state's procedural peculiarities).

Mandamus

Ex parte Sanderson, No. 1160824 (Ala. Feb. 9, 2018)

Trial court's denial of motion to dismiss, based upon claim that release agreement executed in conjunction with corporate merger and share exchange operated as a defense to shareholder claims against directors, was a merits determination on affirmative defense, for which appeal rather than mandamus was appropriate.

Equitable Estoppel

EvaBank v. Traditions Bank, No. 1160495 (Ala. Feb. 9, 2018)

Traditions could not reasonably rely on payoff statement provided by EvaBank when it had notice of discrepancies between the payoff statement and closing documents, which would have revealed that payoff statement was not for the loan secured by the EvaBank mortgages in issue. Traditions could not use equitable estoppel to claim priority interest in property.

Arbitration

STV One Nineteen Senior Living, LLC v. Boyd, No. 1160727 (Ala. Feb. 16, 2018)

Claim against nursing home operator by resident, arising from resident-on-resident incident and alleging negligent supervision by the operator, was a claim "relating to" admission agreement and thus fell within arbitration agreement's scope.

Wills

Spencer v. Spencer, No. (Ala. Feb. 16, 2018)

When a will remains in the possession of the testator and is not found at death, the legal presumption is that the testator revoked the will. Probate court, considering the totality of evidence, concluded that the legal presumption had been overcome, and that testator never revoked the will. The supreme court affirmed, applying the *ore*

tenuis rule and concluding that the testimony concerning the testator's fastidious retention of records was sufficient to rebut the presumption.

Municipal Liability

Ex parte City of Muscle Shoals, No. 1160396 (Ala. Feb. 23, 2018)

(1) A denial of summary judgment to city for lack of immunity under *Ala. Code* § 11-47-190 is reviewable by mandamus; (2) under section 11-47-190, the city can be liable in only one of two circumstances: (a) under respondeat superior for the wrongful action of an employee, or (b) for the maintenance of an unsafe condition about which the governing body had knowledge or which had been allowed to persist for such an unreasonable length of time that knowledge is inferred—and there was no substantial evidence to support either exception.

Negligence; Duty and Causation

DeKalb-Cherokee Counties Gas District v. Raughton, No. 1160838 (Ala. Feb. 23, 2018)

Dump truck's performance of a "clutch release" maneuver to dislodge stuck truck contents did not violate any safety standard and thus was not itself negligent, and that there was no substantial evidence that there was some defect in the side wall of the truck (which failed, causing plaintiff's injury) which was discoverable through any allegedly non-performed inspection. Thus, no act of negligence proximately caused the injuries.

Forum Non Conveniens

Ex parte Hrobowski, No. 1170014 (Ala. Feb. 23, 2018)

Granting mandamus relief and ordering a transfer of an MVA case to the county of the accident, the court unanimously stated: "the fact that a defendant resides in a particular forum does not, for purposes of the interest-of-justice prong of § 6-3-21.1, outweigh the forum where the tortious conduct occurred."

Discovery

Ex parte Industrial Warehouse Services, Inc., No. 1170013 (Ala. March 2, 2018)

In an MVA case, plaintiffs sought discovery from defendant (employer of vehicle operator) of its operations and safety manuals (the "manuals") and its bills of lading for customers. The supreme court (in a deeply fractured decision) held that defendant had demonstrated adequately that the bills of lading were trade secrets, which might be discoverable, but which were entitled to protection to preserve trade secret status. However, the manuals were not trade secrets, especially since they were largely based on FMCSR regulations.

Amendments to Pleadings; Intentional Interference

Fitzpatrick v. Hoehn, No. 1160348 (Ala. March 2, 2018)

(1) the circuit court did not abuse its discretion in denying leave to amend to file fourth and fifth amended complaints well after the pleading deadline imposed under a Rule 16 scheduling order; even though there is a liberal standard for finding "good cause" for such post-deadline amendments, "undue delay in filing an amendment, when it could have been filed earlier based on the information available or discoverable, is in itself ground for denying an amendment[.]" (2) in an intentional interference case, the plaintiff bears the burden of proving that the defendant is a "stranger" to the business relationship, which was not met in this case because the defendant was a party to the operative contract and relationship; and (3) pretermittting whether Alabama law would recognize tortious interference with an inheritance, in this case the evidence would not support such a claim because there was no evidence that a will was in fact destroyed, as was alleged.

Arbitration

Hillwood Office Center Owners' Association, Inc., et al. v. Blevins, No. 1160725 (Ala. March 2, 2018)

Whether a defendant not a party to the agreement containing the arbitration agreement was bound to arbitrate was an issue for the court, not the arbitrator, because the agreement did not delegate to the arbitrator the power to decide issues of non-signatory arbitrability. Issues of compliance with conditions precedent to arbitration, however, were issues of procedural arbitrability for the arbitrator. A party waives any right to object to the validity of an arbitration provision calling for the arbitration of certain claims once that party agrees to arbitrate those claims.

Condemnation Appeals

Ex parte Alabama Power Co., No. 1161161 (Ala. March 2, 2018)

Although an aggrieved party resisting an eminent-domain taking cannot appeal the preliminary order granting a complaint for condemnation (the party must wait until the order of condemnation is entered pursuant to *Ala. Code* § 18-1A-282 and setting compensation before any appeal can be filed), in this case, the appeal referenced by date the preliminary order of condemnation, but was filed after the order setting compensation, thus evincing an intent to appeal from the final order.

Medical Liability

Hamilton v. Scott, No. 1150377 (Ala. March 9, 2018)

The standard of *Parker v. Collins*, 605 So. 2d 824 (Ala. 1992),

(Continued from page 215)

under which “the issue of causation in a malpractice case may properly be submitted to the jury where there is evidence that prompt diagnosis and treatment would have placed the patient in a better position than she was in as a result of inferior medical care[.]” applies to wrongful-death cases.

Justiciability

***Walker County Commission v. Kelly*, No. 1160862 (Ala. March 9, 2018)**

Action by commission against Civil Service Board to require compliance with Open Meetings Act was not justiciable because there was no actual controversy between the parties concerning sufficiently specific conduct.

Rule 41 Dismissal for Want of Prosecution

***Curry v. Miller*, No. 1170176 (Ala. March 16, 2018)**

Plaintiff’s failure to prosecute case was “willful” warranting dismissal with prejudice, where plaintiff fired his lawyer and chose to proceed *pro se*, then failed to notify court of its intention to proceed in despite an order requiring notice.

Arbitration

***Bridgestone Americas Tire Operations, LLC v. Adams*, No. 1160877 (Ala. March 16, 2018)**

Ambiguity in scope of arbitration agreement was resolved in favor of arbitration. In light of the presumption against waiver, defendant’s filing answer and counterclaim, and responding to discovery approximately three months before it filed a motion to compel arbitration did not establish waiver.

Derivative Actions

***Nichols v. HealthSouth Corporation*, No. 1151071 (Ala. March 23, 2018)**

(1) Claims in the eighth amended complaint related back to the original filing, because the amendment “is not raising a different matter or something entirely distinct from the HealthSouth fraud alleged in the original complaint[, but rather] it refined how that fraud was perpetrated[.]” and (2) under *Citigroup Inc. v. AHW Investment Partnership*, 140 A.3d 1125 (Del. 2016), decided after the circuit court’s dismissal, the claims of employee shareholders were direct and not derivative claims, and thus no shareholder demand was required.

Class Actions

***Baldwin Mutual Insurance Company v. McCain*, No. 160093 (Ala. March 23, 2018)**

Class representative’s claims were subject to a unique *res judicata* defense, rendering her claim atypical and thus destroying Rule 23(a)(3) typicality. The merits of the *res judicata* defense could be evaluated on appeal because it was sufficiently certification-related and not purely a merits issue.

Abatement

***Ex parte Nautilus Insurance Company*, No. 1170170 (Ala. March 30, 2018)**

Insurer’s prior-filed federal court action abated subsequent claims by insured against insurer in state-court action (which were compulsory counterclaims in the federal action), because there was no jurisdictional impairment in the federal action. However, insurance broker was not entitled to Rule 19 dismissal based on failure to join insurer in state action, because (a) mandamus was not necessarily available to review a Rule 19 ruling, but (b) insurer had been a party to the state-court action, and thus there was no basis for a Rule 19 dismissal until insurer was actually dismissed from the case.

Arbitration; Unconscionability

***SCI Alabama Funeral Services, LLC v. Hinton*, No. 1161107 (Ala. March 30, 2018)**

Sheer breadth of an arbitration provision, standing alone, is not evidence of “grossly favorable” contract terms as to establish “substantive unconscionability.”

Outbound Forum Selection

***Ex parte Terex USA, LLC*, No. 1161113 (Ala. March 30, 2018)**

Alabama Heavy Equipment Dealer Act, § 8-21B-1 et seq., *Ala. Code* 1975 (“the AHEDA”), expresses a strong public policy allowing suits in Alabama regardless of a contractual choice of venue, and thus enforcement of outbound forum selection clause in such a contract would violate Alabama public policy.

Wills and Estates

***McGimsey v. Gray*, No. 1161016 (Ala. March 30, 2018)**

Will contestants claiming undue influence offered substantial evidence of a confidential relationship and beneficiary dominance (in that influencer lived with testator and accompanied him to medical appointments for several years), and undue activity (in assisting testator to revise an existing will, helping schedule meeting for execution of new will, and presence in the home during meetings with testator’s counsel).

From the Court of Civil Appeals

Standing; Exhaustion of Administrative Remedies

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

Plaintiffs had standing to challenge ADEM's discriminatory approval of odor-emanating facilities in proximity to African-American neighborhoods because they alleged a sufficiently concrete injury (the inability to bring valid challenges to approval of odor-emanating sites) which was fairly traceable to the defendant's conduct (the use of the procedures to process environmental justice complaints), which were redressable. Because the plaintiffs sought interpretation of administrative rules not requiring administrative findings of fact or the exercise of discretion, plaintiffs were not required to exhaust administrative remedies.

Preservation of Error

Ballard v. Lee A. McWilliams Construction, Inc., No. 2160469 (Ala. Civ. App. Feb. 2, 2018)

In nonjury case in which the trial court makes no specific findings of fact, a party must move for a new trial or otherwise properly raise before the trial court the question relating to the sufficiency or weight of the evidence in order to preserve that question for appellate review.

MVA; Agency

Brown v. K & M Tree Services, Inc., No. 2160903 (Ala. Civ. App. Feb. 9, 2018)

When a vehicle is owned by a corporate defendant and being operated by an employee, there is an "administrative presumption" that the employee is operating the vehicle in the line and scope of his employment. In this case, the trial court granted JML to the corporate entity. Held: there was substantial evidence of agency, making the JML erroneous, based on plaintiff's testimony that employee stated he was on his way to "get his boss."

Workers' Compensation; Discovery

Ex parte Alabama Gas Corp., No. 2170285 (Ala. Civ. App. Feb. 23, 2018)

Employer was not entitled to mandamus relief from HIPAA order, which employer challenged as impeding employer's right to discovery in worker's comp action. Employer failed

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(Continued from page 217)

to demonstrate that it had been prohibited from obtaining any specific document or item of information, and thus mandamus relief was inappropriate.

Willfulness and Wantonness

Brewer v. Atkinson, No. 2161073 (Ala. Civ. App. March 9, 2018)

Plaintiff, who was injured in MVA involving cow which wandered onto public road while residing on defendant's property, brought action under *Ala. Code* § 3-5-1 for knowingly or willfully putting or placing the cow on a public roadway. Among other holdings, there is a significant discussion regarding the distinction between willful and wanton behavior. "[W]antonness is the conscious failure of one charged with the duty to exercise due care and diligence, to prevent an injury after discovery of peril. Or, under circumstances where one is charged with the knowledge of such peril, and conscious that injury will likely, probably or inevitably result from his actions, or his failure to act, he does not take the proper precautions to prevent injury." On the other hand, "[t]o constitute 'willful or intentional injury,' there must be knowledge of danger accompanied with a design or purpose to inflict injury, whether the act be one of omission or commission. To constitute 'wantonness' the design may be absent if the act is done with knowledge of its probable consequence and with a reckless disregard of those consequences." The court held that even evidence of wantonness would not rise to the level of willful or knowing behavior, as the statute requires.

Fraudulent Transfer Act

Holmsbeck v. US Ameribank, No. 1160960 (Ala. Civ. App. March 16, 2018)

Substantial evidence supported the circuit court's determination that a divorce settlement agreement had been crafted to transfer the husband's interest in the marital assets to the wife with an actual intent to hinder, delay, or defraud the bank in its collection of notes owed by husband's entity and personally guaranteed by husband, based upon the circuit court's consideration of the factors provided by § 8-9A-4(b). Specifically, the trial court properly considered to whom the transfer was made, the amount of assets transferred and the financial condition of the debtor before and after the transfer.

Appeals

Alabama Medicaid Agency v. Brooks, No. 2170286 (Ala. Civ. App. March 16, 2018)

Unlike an appeal from circuit to appellate court, an appeal *de*

novo from probate to circuit court could properly be perfected through the electronic filing of a complaint, an original proceeding which indicated clearly that the subject matter was an appeal from probate court.

Tax Sale Redemption

Henderson v. Seamon, No. 2160807 (Ala. Civ. App. March 23, 2018)

Under *Ala. Code* § 40-10-122, probate court has exclusive jurisdiction over the redemption process; circuit court was without jurisdiction to decide the redemption terms.

Workers' Compensation; Venue

Ex parte Mercedes-Benz U.S. International, Inc., No. 2170209 (Ala. Civ. App. March 23, 2018)

Worker (residing in Jefferson County) injured on the job at MBUSI (in Tuscaloosa County) and treated for injuries by physicians in Jefferson County brought comp action in Jefferson County. MBUSI moved to transfer to Tuscaloosa County under *Ala. Code* § 6-3-7 and *forum non conveniens*; the trial court denied the motion, and MBUSI sought mandamus relief. The CCA denied the petition, reasoning (1) under *Ex parte Scott Bridge Co.*, 834 So. 2d 79 (Ala. 2002), MBUSI's contracting with suppliers located in Jefferson County was sufficient to be "doing business by agent" in Jefferson County, making venue proper; and (2) interests of justice did not compel a transfer under *forum non conveniens*, because Jefferson County did not have a "weak" connection to the case, given both plaintiff's residence and the use of treating physicians there.

"Unlicensed Driver" Exclusion

Safeway Insurance Company of Alabama, Inc. v. Thomas, No. 2170088 (Ala. Civ. App. March 30, 2018)

Coverage exclusion for unlicensed driver applied to UM benefits was not void against public policy and did not violate the UM statute.

Landlord Tenant

Autery v. Pope, No. 2160797 (Ala. Civ. App. March 30, 2018)

Although tenant may recover the reasonable value of the improvements upon the property of the landlord only if the tenant had been induced to make the improvements by fraud, duress, undue influence or mistake, no such evidence existed where plaintiff voluntarily made improvements and failed to prove at trial how those improvements increased the value of the property (rather than being actual cost figures).

From the United States Supreme Court

Supplemental Jurisdiction; Tolling of Statute of Limitations

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, and dismisses all related state claims under 28 U.S.C. §1367(c)(3), section 1367(d) provides that the “period of limitations for” refiling 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: the word “tolled” in section 1367(d) means suspended, i.e., the statute of limitations stops running while the federal action is pending, and begins running again once the federal action is dismissed.

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, but at the very least had “arguable” probable cause which would trigger qualified immunity.

Collective Bargaining

CNH Industrial NV v. Reese, No. 17-515 (U.S. Feb. 20, 2018)

In *M&G Polymers USA, LLC v. Tackett*, 574 U. S. ____ (2015), the Court held that collective-bargaining agreements according to “ordinary principles of contract law.” Before *Tackett*, the Sixth Circuit had applied a series of so-called “*Yard-Man* inferences,” under which courts presumed, in a variety of circumstances, that collective-bargaining agreements vested retiree benefits for life. In this case, the Sixth Circuit held that the same *Yard-Man* inferences it once used to presume lifetime vesting could now be used to render a collective bargaining agreement ambiguous as a matter of law, thus allowing courts to consult extrinsic evidence about lifetime vesting. The Supreme Court reversed, holding that the inference drawn by the Sixth Circuit could not be reconciled with the “ordinary principles of contract law” rule of *Tackett*.

Prisoner Section 1983 Cases; Attorneys’ Fees

Murphy v. Smith, No. 16-1067 (U.S. Feb. 21, 2018)

When a prisoner wins a section 1983 case and is awarded fees under section 1988, 42 U. S. C. §1997e(d)(2) requires that “a portion of the [prisoner’s] judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney’s fees awarded against the defendant.” In this case, the district court ordered Murphy to pay 10 percent of his judgment toward the fee award, leaving defendants responsible for the remainder. The Seventh Circuit reversed, holding that §1997e(d)(2) required the district court to exhaust 25 percent of the prisoner’s judgment before demanding payment from the defendants. The Supreme Court affirmed, holding that in cases governed by §1997e(d), district courts must apply as much of the judgment as necessary, up to 25 percent, to satisfy an award of attorney’s fees.

Securities

Digital Realty Trust v. Somers, No. 16-1276 (U.S. Feb. 21, 2018)

The anti-retaliation provision in the Dodd-Frank Act does not extend to an individual who has not reported a violation of the securities laws to the SEC.

Immigration

Jennings v. Rodriguez, No. 15-1204 (U.S. Feb. 28, 2018)

8 U.S.C. §§1225(b), 1226(a), and 1226(c) do not give detained aliens the right to periodic bond hearings during the course of their detention.

Separation of Powers

Patchak v. Zieke, No. 16-498 (U.S. Feb. 28, 2018)

Jurisdiction-stripping statute, in which Congress passes a law depriving federal courts of jurisdiction over a pending lawsuit, is a change in the law which can be applied retroactively without violating separation of powers principles.

Bankruptcy

Merit Mgmt. Gp. LP v. FTI Consulting, Inc., No. 16-784 (U.S. Feb. 28, 2018)

The Bankruptcy Code allows trustees to set aside and recover certain transfers for the benefit of the bankruptcy estate, including certain fraudulent transfers “of an interest of the debtor in property.” 11 U. S. C. §548(a). There are limits on the exercise of these avoiding powers, including the securities safe harbor, which provides that “the trustee may not avoid a transfer that is a . . . settlement payment . . . made by or to (or for the benefit of) a . . . financial institution . . . or that is a transfer made by or to (or for the benefit of) a . . . financial institution . . . in connection with a securities contract.” §546(e). The Court held in this case that the only relevant transfer for purposes of the §546(e) safe harbor is the transfer that the trustee seeks to avoid.

(Continued from page 219)

Bankruptcy; Mixed Questions of Law and Fact

US Bank, NA v. The Village at Lakeridge LLC, No. 15-1509 (U.S. March 5, 2018)

The heart of this appeal is the appropriate standard of review applied to a Bankruptcy Court's determination that a transaction occurred at arms' length. The question was mixed of law and fact; the Ninth Circuit reviewed the transaction's status under "clear error" review rather than *de novo*. The Supreme Court affirmed unanimously, holding that "the standard of review for a mixed question depends on whether answering it entails primarily legal or factual work."

In this case, the nature of the specific question (whether the parties were acting more or less as strangers in a transaction) required the evaluation of witnesses, etc. and thus was more factual than legal, and therefore was properly reviewed only for clear error.

Securities

Cyan v. Beaver County Employees Retirement Fund, No. 15-1439 (U.S. March 20, 2018)

SLUSA did not strip state courts of their longstanding jurisdiction to adjudicate class actions brought under the 1933 Act.

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Consolidation; Appeals

Hall v. Hall, No. 16-1150 (U.S. March 27, 2018)

When one of several cases consolidated under Rule 42(a) is finally decided, that decision confers upon the losing party the immediate right to appeal, regardless of whether any of the other consolidated cases remain pending.

From the Eleventh Circuit Court of Appeals

First Amendment

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

Intersection of University Boulevard and Hackberry Lane is a limited public forum within UA's campus; test for determining limited vs. traditional public fora is whether UA intended to open this area up for non-student use, not the physical characteristics of the locale.

False Claims Act

Marsteller v. Tilton, No. 16-11997 (11th Cir. Jan. 29, 2018)

The Court vacated the district court's dismissal of an implied certification claim under the False Claims Act and remanded for the district court to reconsider its decision based on *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016).

Medical Devices; Preemption

Godelia v. Zoll Services, LLC, No. 17-10736 (11th Cir. Feb. 8, 2018)

Express and implied preemption for medical device claims under the Medical Device Amendments leave a "narrow gap" through which plaintiffs making medical device claims must proceed. To make it through, a plaintiff has to sue for conduct that violates a federal requirement (avoiding express preemption), but cannot sue only because the conduct violated that federal requirement (avoiding implied preemption). Claims in this case were largely not preempted.

Rooker-Feldman

Target Media Partners, Inc. v. Specialty Marketing Corp., No. 16-10141 (11th Cir. Feb. 5, 2018)

The Court reversed the district court's dismissal of defamation-based claims, regarding litigant's post-state-court litigation statements concerning litigation adversary. Claims were not barred by *Rooker-Feldman* because they were not seeking to undermine a prior state-court judgment, but rather did not accrue until after the statements were made following judgment.

Collateral Source Rule

ML Healthcare Services, Inc. v. Publix Super Markets, Inc., No. 15-13851 (11th Cir. Feb. 7, 2018)

Though the case concerns Georgia collateral source law, it discusses at length the Eleventh Circuit's handling of Alabama collateral source issues under Alabama's former common-law regime and in a footnote marks Alabama's statutory overruling of the common-law regime.

Desegregation

Stout v. Jefferson County Bd. of Educ., No. 17-12338 (11th Cir. Feb. 14, 2018)

Proposed "splinter" school district (Gardendale) sought relief from county school system desegregation order to form and operate school system. The district court, after trial, found that discriminatory intent was a motivating factor in the formation of the splinter system, and that allowing splinter system to form would substantially interfere with incumbent system's ability to achieve unitary status. Nevertheless, the district court allowed the proposed splinter district to operate two schools for limited time. The Eleventh Circuit reversed, holding that under established Circuit law, finding of discriminatory intent and frustration of achieving unitary status required that splinter district be denied any right to separate.

Arbitration

Dasher v. PNC Bank, No. 15-13871 (11th Cir. Feb. 13, 2018)

Three years into pending litigation in which arbitration was being contested by Dasher, RBC unilaterally sent all account holders, including Dasher, a proposed additional term to its account agreements which added arbitration under a "negative option" provision in the account agreement. Dasher did not respond, but the communication of the arbitration agreement by RBC was sent directly to Dasher, even though RBC knew Dasher had counsel. The district court denied arbitration. The Eleventh Circuit affirmed.

Employment

Bowen v. Manheim Remarketing, Inc., No. 16-17237 (11th Cir. Feb. 21, 2018)

Bowen sued Manheim under the Equal Pay Act and Title VII, alleging that Manheim discriminated against her by paying her less than her male predecessor. The district court granted summary judgment to Manheim. The Eleventh Circuit reversed, reasoning that a jury could find that prior salary and prior experience alone did not explain Manheim's disparate approach to Bowen's salary over time, especially once Bowen established herself as an effective arbitration manager.

Attorneys' Fees; Lanham Act

Labinick v. Institute for Neurological Recovery, Inc., No. 16-16210 (11th Cir. March 8, 2018)

(Continued from page 221)

The “exceptional case” standard for awarding attorney’s fees in Patent Act cases, as articulated by the Supreme Court’s recent decision in *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014), also applies to *Lanham Act* cases.

Qualified Immunity

***Shaw v. City of Selma*, No. 17-11694 (11th Cir. March 7, 2018)**

Officer using deadly force was entitled to qualified immunity on all claims; reasonable officer could have believed that decedent posed a serious threat when he was close to and advancing on officer, had a hatchet in his hand and had ignored more than two dozen orders to drop the weapon.

Allen Charges

***Burkhart v. R.J. Reynolds Tobacco Co.*, No. 14-14708 (11th Cir. March 7, 2018)**

District court’s providing a “watered down” *Allen* charge to the jury after an initial indication of deadlock, followed later by the giving of the 11th Circuit pattern *Allen* charge, was not an abuse of discretion and did not amount to improper jury coercion.

Qualified Immunity

***Gates v. Khokhar*, No. 16-15118 (11th Cir. March 13, 2018)**

Officers were entitled to qualified immunity for alleged arrest without probable cause, where plaintiff was arrested for violating Georgia’s mask statute, O.C.G.A. § 16-11-38, for donning and refusing to remove a mask during a protest in downtown Atlanta; officers had probable cause, much more than “arguable” probable cause needed for immunity.

Employment

***EEOC v. Exel, Inc.*, No. 14-11007 (11th Cir. March 16, 2018)**

Punitive damages can be assessed against the employer on a Title VII claim where “either that the discriminating employee was high[] up the corporate hierarchy, or that higher management countenanced or approved [his] behavior[,]” *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1323 (11th Cir. 1999). *Dudley* remains Circuit law despite its apparent conflict with the multi-factor analysis adopted by the Supreme Court in *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526, 535 (1999). Judge Tjoflat wrote a lengthy dissent. (Ed.: this case seems destined for *en banc* review).

Carmack Amendment

***Essex Ins. Co. v. Barrett Moving & Storage, Inc.*, No. 16-11526 (11th Cir. March 21, 2018)**

Question of first impression in this circuit: what is the proper test for distinguishing “brokers” from “carriers” under the *Carmack* Amendment (the latter is liable)? Held: a accepts legal responsibility to transport the shipment.

Dismissal; Opportunity to Amend

***Woldeab v. Dekalb County Bd. of Educ.*, (11th Cir. March 23, 2018)**

District court abused its discretion in dismissing complaint with prejudice without opportunity to amend; it should have advised plaintiff, proceeding *pro se*, of his complaint’s deficiency and given him the opportunity to amend to name the proper defendant before the court dismissed with prejudice.

Crime-Fraud Exception to Privilege

***Drummond Co. v. Conrad & Scherer, LLP*, Nos. 16-11090 (11th Cir. March 23, 2018)**

Crime-fraud exception defeats work product protection when a lawyer and law firm are found to have engaged in a crime or fraud, even if there is no crime or fraud finding as to the client or clients the lawyer(s) or the firm represented.

ERISA

***Metropolitan Life & Annuity Co. v. Akpele*, No. 16-15677 (11th Cir. March 29, 2018)**

Party who is not a named beneficiary of an ERISA plan may not sue the plan for any plan benefits.

Informed Consent

***Looney v. Moore*, No. 15-13979 (11th Cir. March 30, 2018)**

Under Alabama law, plaintiff who claims that he did not give informed consent to medical treatment provided as part of a clinical study must show that he was injured as a result of that treatment.

Bankruptcy

***Caldwell v. Kaufman, Englett & Lynd, PLLC*, No. 17-10810 (11th Cir. March 30, 2018)**

Attorney violates 11 U.S.C. § 526(a)(4) if he instructs a client to pay his bankruptcy-related legal fees using a credit card.

RECENT CRIMINAL DECISIONS

From the United States Supreme Court

Effect of Plea

Class v. US, No. 16-424 (U.S. Feb. 21, 2018)

Defendant's guilty plea, by itself, does not bar challenge to constitutionality of the statute of conviction on direct appeal.

From the Alabama Supreme Court

Pre-Indictment Discovery

Ex parte State, No. 1161087 (Ala. Feb. 2, 2018)

District court, having conducted a preliminary hearing before the issuance of an indictment, possessed no authority to order the state to provide discovery to the defendant.

From the Court of Criminal Appeals

Miranda

Creque v. State, CR-13-0780 (Ala. Crim. App. Feb. 9, 2018)

Police officer's interview of defendant in a hospital room did not constitute a custodial interrogation, and thus statements without *Miranda* rights were admissible. Second statement, given to another officer at the hospital after being given *Miranda* warnings, was also admissible. Though defendant had consumed drugs and alcohol before he went to the hospital, he could understand and voluntarily waive his *Miranda* rights.

Rule 32; Amendments

Riley v. State, CR-16-0207 (Ala. Crim. App. Feb. 9, 2018)

Trial court acted within its discretion in refusing to allow amendment to Rule 32 petition after an evidentiary hearing on the petition, for the amendment would have caused both undue delay in the proceedings and undue prejudice to the state.

Rule 32

Shapley v. State, CR-16-1225 (Ala. Crim. App. Feb. 9, 2018)

Defendant's motion to correct clerical error sought sentence review; case remanded to permit defendant to raise claim via Rule 32.

Competency

Weeks v. State, CR-16-0881 (Ala. Crim. App. Feb. 9, 2018)

Defendant's express waiver of a competency evaluation, without more, is insufficient to waive his right to that evaluation, where the trial court has information demonstrating that his competency to stand trial is in question.

Child Testimony; Disproportionality

L.Y. v. State, CR-15-0151 (Ala. Crim. App. Feb. 9, 2018)

Defendant's Confrontation Clause rights were not violated because he was not allowed to be physically present in the courtroom during his seven-year-old victim's testimony; defense counsel cross-examined victim while defendant watched a live video feed from another room and could communicate with defense counsel during testimony. There was no unconstitutional disproportionality in defendant's mandatory life without parole under *Ala. Code* § 13A-5-6(d); legislature could properly determine that offenders who commit sex crimes against very young children "are deserving of one of the harshest punishments meted out by the State." ▲

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OPINIONS OF THE GENERAL COUNSEL

J. Douglas McElvy
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Required Notice to Client when Attorney Leaves Law Firm

QUESTION:

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

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

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

“All contracts with regard to clients, including those which were ‘brought’ into the firm by Mr. Lawyer and in the one instance where the client was not ‘brought’ by Mr. Lawyer, were between client and Doe, Jones & Smith. All of the client files are on a contingency fee contract with Doe, Jones & Smith.

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

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

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

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

ANSWER:

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

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

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

DISCUSSION:

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

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

Finally, absent this same intentional interference, fraud, etc., the former lawyer may continue contact with the client unless the client objects. If the client objects to such contact, the former lawyer’s failure to accede to the desires of the former client would be considered as vexatious and/or harassing and, therefore, unethical. The former lawyer, however, could obviously contact the former client for certain, justifiable reasons, e.g., payment for services rendered. [RO-1991-06] ▲



ABOUT MEMBERS, AMONG FIRMS

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

About Members

Kristine Jones announces the opening of **The KJ Law Firm LLC** at 445 Dexter Avenue, Ste. 4050, Montgomery 36104. Phone (334) 557-7188.

Among Firms

Badham & Buck LLC announces that **Lance L. Goodson** joined as an associate.

Bradley Arant Boult Cummings LLP announces that **William S. Cox, III** joined as a partner and **Seth I. Muse** joined as an associate, both in the Birmingham office.

Bridgewater Resolutions Group of Atlanta announces that **Keith Lichtman** joined the firm.

Burns, Brashier & Johnson LLC announces that **Kathryn Elyse Thompkins** joined as an associate.

Capell & Howard PC announces the opening of an office in Baldwin County.

Cory Watson Attorneys announces that **Joel Caldwell, Nicholas Gutierrez** and **Brett Thompson** joined as associates.

Liz Young and **Jeff Dummier** announce the opening of **Dummier Young LLC** with offices in Gardendale and Birmingham.

The Five Points Law Group of Birmingham announces that **Angelica Agee Prince** and **LaTonia Williams** joined as associates.

Fried Rogers Goldberg LLC announces that **R. Sean McEvoy** is now a partner.

Gaines, Gault, Hendrix PC announces that **T. Dillon Hobbs** joined as an associate in the Birmingham office.

Hall Booth Smith announces that **Andrew C. Knowlton** is now a partner.

Maynard Cooper & Gale announces that **Michael W. Rich** joined the Huntsville office.

Partridge, Smith PC of Mobile announces that **David T. Trice** joined as an associate.

Starnes Davis Florie announces that **Brittney B. Claud** joined the firm.

Joseph E. Stott and **Freddie N. Harrington, Jr.** announce the opening of **Stott & Harrington PC** in Birmingham.

Uniti Group Inc. announces that **Kelly A. McGriff** is now vice president and deputy general counsel in the Mobile office.

Whitaker, Mudd, Luke & Wells LLC of Birmingham announces that **Bentley H. Patrick** joined as a member. ▲

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