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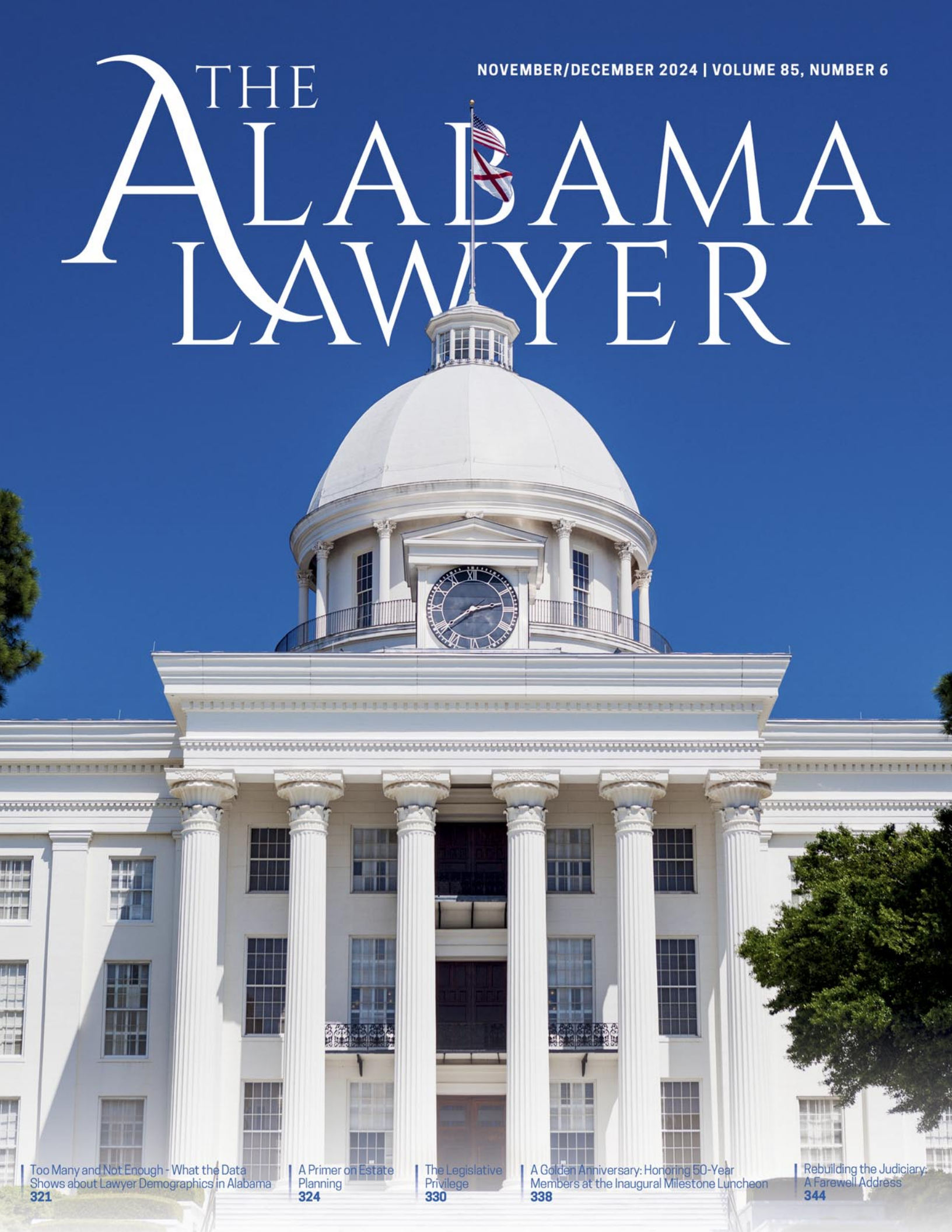
THE ALABAMA LAWYER



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On The Cover

The Alabama State Capitol on a sunny day in Montgomery

Credit: Getty Images by traveler1116

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Tom Perry
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Rooted in Community and Service: A Q&A with Alabama State Bar President Tom Perry

In this special feature, we step away from the traditional President's Page to present a Q&A with Tom Perry, the 149th president of the Alabama State Bar. Growing up on the family farm in rural Alabama, Tom learned the values of hard work, education, and community service—lessons that continue to guide him in both his personal and professional life. As president, his "Harvesting Hope" platform reflects his commitment to addressing the shortage of lawyers in rural communities while fostering unity within the legal community across the state, ensuring the profession remains strong for years to come.

Q: Can you tell us about your background and how it influenced your path?

A: I grew up in Demopolis on our family farm. My dad had always dreamed of becoming an engineer, but when his father became ill, he took a job at the local dress factory to support the family. He worked long hours, often starting before dawn, to make sure we had everything we needed. His sacrifice taught me the value of hard work, responsibility, and most importantly, the importance of education. My parents were always firm in their belief that education was the key to building a better future, and they made it a priority for my sister and me to pursue our degrees.

When I decided to go to law school, it wasn't just my own effort that got me there—it was the combined sacrifice and support of my parents. My mom, understanding the financial strain of law school, took a job herself to help cover the costs. I'll never forget how she would deposit her weekly paychecks into my bank account, making sure I could focus on my studies rather than worry about how to make ends meet. Their support and dedication fueled my determination to work hard and honor the sacrifices they made.

Q: You've mentioned the significance of family dinners in shaping your perspective and influencing your decision to become a lawyer. How did those discussions impact you?

A: Dinner time was when we engaged in lively discussions about current events. My parents encouraged us to share our opinions, and we learned how to disagree respectfully. This taught me the value of how to see things from two sides. My dad was the master – he would argue on one side, and then he'd jump to the other side and make you consider that too. I think this is what made me want to become a lawyer – learning how to put together arguments to help people. My son is a lawyer, too, and now we call each other on our way to court to talk through our cases. I can't tell you how much I enjoy that.

Q: As president of the Alabama State Bar, what is your focus this year?

A: My focus is on all lawyers in Alabama, whether in big cities or small towns. I want to ensure that we continue to serve our communities. Lawyers play vital roles, from coaching Little League to serving on local boards. However, the profession is changing, and it will have a profound impact on our future if we don't begin to address it now. Our lawyers are aging, moving out of state, or leaving the profession altogether. A significant challenge is the alarming statistic that 78 percent of practicing lawyers are concentrated in just seven counties, and the other 22 percent are spread out over the other 60 counties. It leaves many areas without sufficient legal representation. As many of these lawyers retire, we risk a growing gap in access to justice. That is where my platform "Harvesting Hope" was born.

Q: Can you elaborate on the "Harvesting Hope" initiative?

A: "Harvesting Hope" addresses access to justice, particularly in underserved rural areas. We're actively working on a way we can attract new lawyers to underserved areas and support them through mentorship and training programs. It's about ensuring they have the skills and the opportunities to thrive, have sustainable practices, and serve their communities effectively. My friend, Tom Heflin, and I have been gathering information and speaking to groups about this. I look forward to working with the Harvesting Hope Task Force in further developing our path to making this a reality.

Q: What is your vision for the future of the legal profession in Alabama?

A: My own experience of graduating law school, practicing first in a larger city, then returning home to West Alabama, showed me the fulfillment that comes from serving your community, and I believe others will find the same. It's been a true pleasure to have had the opportunity to serve our lawyers as ASB president. I've always been optimistic about the future, but now even more so. If we continue to come together and support one another, we can navigate the challenges ahead and ensure a bright future for all lawyers in Alabama. ▲

EXECUTIVE DIRECTOR'S REPORT

Terri Lovell
terri.lovell@alabar.org

A Shared Commitment to Service

Growing up in Lowndes County, I quickly learned the importance of community, hard work, and perseverance. My neighbors—farmers, teachers, small business owners, and leaders—invested in each other's success. When I chose to pursue a career in law, it felt like a natural extension of those values. Looking back on my 25 years as a trial judge in my home circuit, I now have the privilege as the Alabama State Bar's executive director to work with our larger community of fellow lawyers – lawyers who continue to shape my understanding of justice and service.

Throughout my life, I've seen the unique challenges facing rural areas. The courthouse, often miles from urban centers, serves as a crucial hub for resolving family, agricultural, property, and business issues. With a dwindling number of lawyers, access to legal services is increasingly limited, forcing attorneys to cover more areas of law—it's often overwhelming for many.

This shortage isn't just an inconvenience; it undermines access to justice. When legal representation is scarce, citizens may travel hours for basic services, and our most vulnerable populations suffer most. The decline isn't limited to lawyers—teachers, doctors, and social workers are also in short supply. Rural communities feel the strain, and we, as legal professionals, must lead in finding solutions.

Recently, our bar association celebrated a milestone by honoring our 50-year members—attorneys who have devoted their lives to the profession. It was humbling to be surrounded by such wisdom and a shared commitment to justice. These seasoned lawyers have witnessed the legal landscape evolve, yet their dedication to service remains unchanged.

I believe we can harness this commitment to address our rural lawyer shortage. Experienced attorneys are a vital resource in mentoring and inspiring the next generation. They understand what it means to be community pillars and the challenges that come with it.

As we look ahead, let's remember the lessons of the past. Like the values I learned in Hayneville, working together and investing in each other's success leads to victory. By seeking the help of our experienced attorneys, we can tackle the lawyer shortage in rural areas. It will require collaboration and a shared commitment to service, but the gathering of our 50-year members showed me that our legal community is more than capable! ▲

Farewell Margaret Murphy and Linda Lund!

Murphy

This fall, we celebrated the remarkable tenures of Margaret Murphy and Linda Lund.

During Margaret's 40-year career as Publications Director and Managing Editor of *The Alabama Lawyer*, she oversaw the evolution of this publication from a modest booklet into a well-regarded legal magazine, shaping its identity and elevating its look. In addition, her deep understanding of the state bar's history was invaluable through times of change. We wish her a fulfilling and joyful retirement!

Lund

Linda's 25 years of dedicated service as the ASB Volunteer Lawyers Program Director have left an enduring legacy. Her passion for expanding access to justice for low-income individuals and her tireless efforts to recruit and inspire volunteer lawyers have made a profound difference in countless lives. We are deeply grateful for her selfless commitment to serving the people of Alabama.

Congratulations to them both!

Wilson F. Green
wilson@wilsongreenlaw.com

Demographics and Destiny

Mark Twain (himself borrowing, so he thought, from Benjamin Disraeli) famously quipped in 1907 that there are "lies, damn lies, and statistics." The serialism in the remark suggests an aggravation of the untruths embodied in each element. If that's true, statistics are the worst of prevaricators.

I thought about Twain's remark in editing one of our feature articles this issue: Forrest Latta's piece on lawyer demographics. I must admit I was startled when I first read it – and to a person, that astonishment has been the reaction of each editorial board member. More personally, it's shocking to me that I've become one of those lawyers now on the downslope of the median of lawyer aging. When you're a kid, the slide is the thrill of the playground. Not so much in one's mid-50s, when one clings to the siderails just to keep from hurtling, or hurling.

But as to Forrest's piece, Twain's wrong: The statistics don't lie here. They are what they are. What they might represent, however, ***is*** a debatable and perhaps inscrutable proposition, inviting a plethora of possible theories and implications beyond the pages we have to print. But I share a few thoughts on it here.

The foundational question the piece raises, though by shadow only, is this: Is the number of practicing lawyers in Alabama sufficient now, and will those numbers be sufficient 10 or 20 years from now, to satisfy the then-existing demand for legal services among Alabamians? Just stating the issue as such sparks questions –

- Will delivery of conventional, mass-scale legal services be disrupted through technology – think LegalZoom meets AI?
- Will virtual technologies counteract the need for in-person lawyering?
- Will multi-jurisdictional practice expand to the point of shrinking demand for localized legal services?

The short answer: I haven't a clue.

I don't know if the number of lawyers in Alabama is adequate today to meet the existing demand for legal services. I do know, as we all do, that there are communities in Alabama which are underserved for satisfying legal needs (as is the case with medical needs). But how those current underservicing dynamics might change in the future, and whether technology and mass-scale services coming online can ameliorate those disparities? No one knows.

Like the markets, we all hate the unknown. Not knowing frustrates our desire to control the prevailing circumstances. It forces us to confront our almost universal lack of control over those circumstances. As W.H. Auden so poignantly put it, "[T]he Time Being is, in a sense, the most trying time of all."

Worse than not being able to control the circumstances, we often cannot even see the desired goal clearly. Indeed, we always see through a glass darkly.

This time of year especially, we do well to ponder the unknown and the unknowable. To think on the years, down the years, of our forbearers, and to remember with depthless gratitude the improbable chance of being placed in this time, of where we were born, of who we are, and for the illimitable possibilities of who we might yet be.

As the light slips away so early these days, perhaps you will consider with me the ironic truth: that while we sometimes wander in the darkness of not knowing, yet we can be and are well known, spiritual denizens of that place in which, again to invoke Auden, "everything became a You and nothing was an It." ▲

IMPORTANT NOTICES

Notice of Election and Electronic Balloting

Notice is given here pursuant to the Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners that the election of these officers will be held beginning Monday, May 19, 2025, and ending Friday, May 23, 2025.

On the third Monday in May (May 19, 2025), members will be notified by email with instructions for accessing an electronic ballot. Members who wish to vote by paper ballot should notify the secretary in writing on or before the first Friday in May (May 2, 2025) requesting a paper ballot. A single written request will be sufficient for all elections, including run-offs and contested president-elect races during this election cycle. All ballots (paper and electronic) must be voted and received by the Alabama State Bar by 5:00 p.m. on the Friday (May 23, 2025) immediately following the opening of the election.

Nomination and Election of President-Elect

Candidates for the office of president-elect shall be members in good standing of the Alabama State Bar as of February 1, 2025, and shall possess a current privilege license or special membership. Candidates must be nominated by petition of at least 25 Alabama State Bar members in good standing. Such petitions must be filed with the secretary of the Alabama State Bar no later than 5:00 p.m. on February 1, 2025.

Nomination and Election of Board of Bar Commissioners

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

1st Judicial Circuit
3rd Judicial Circuit
5th Judicial Circuit
6th Judicial Circuit, Place 1
7th Judicial Circuit
10th Judicial Circuit, Place 3
10th Judicial Circuit, Place 6
13th Judicial Circuit, Place 3
13th Judicial Circuit, Place 4
14th Judicial Circuit
15th Judicial Circuit, Place 1
15th Judicial Circuit, Place 3
15th Judicial Circuit, Place 4
23rd Judicial Circuit, Place 3
25th Judicial Circuit
26th Judicial Circuit
28th Judicial Circuit, Place 1
32nd Judicial Circuit
37th Judicial Circuit

Additional commissioners will be elected for every 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits will be determined by a census on March 1, 2025, and vacancies certified by the secretary no later than March 14, 2025. All terms will be for three years.

A candidate for commissioner may be nominated by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Nomination forms and/or declarations of candidacy must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 25, 2025).

Submission of Nominations

Nominating petitions or declarations of candidacy form, a high-resolution color photograph, and biographical and professional data of no more than one 8 ½ x 11 page and no smaller than 12-point type must be submitted by the appropriate deadline and addressed to Secretary, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101-0671.

Election of At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 2, 5, and 8. Petitions for these positions, which are elected by the Board of Bar Commissioners, are due by April 1, 2025. All terms will be for three years.

Submission of At-Large Nominations

The nominee's application outlining, among other things, the nominee's bar service and other related activities must be submitted by the appropriate deadline and addressed to Executive Council, Alabama State Bar, P.O. Box 671, Montgomery, AL 36101-0671. All submissions may also be sent by email to *elections@alabar.org*.

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

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

Self-Report Your Practice Areas in Our Member Directory

Members can now self-report practice areas on their member profiles. To select your practice areas: *(see graphic above)*

- Log in to your profile.
- Click on the pencil icon under "My Profile," and a new box will appear.
- At the bottom of that box, you can put a checkmark next to the boxes that apply.

The Alabama State Bar's new *Justice4AL.com* website, an initiative by Past President Brannon Buck, directs users to the ASB member directory, where they can search for attorneys by location and practice area. The website is designed for Alabama citizens who do not know a lawyer. It is a one-stop shop for obtaining legal assistance and accessing the court system. If your law office, organization, or company regularly receives calls from those looking for legal help in practice areas outside of your offerings, you can direct those callers to *Justice4AL.com*.

To request your own Justice4AL flyer, sign, or table-top easel or to learn more about Justice4AL.com, visit *www.alabar.org/justice4al* ▲

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Too Many and Not Enough –

What the Data Shows about Lawyer Demographics in Alabama

By Forrest Latta

Good business decisions require good information.

This is true not just for individuals but for law firms and bar associations, too. We must constantly evaluate our business model in light of an ever-changing environment. At the same time, as lawyers, we are answerable to the public for the privilege of having an exclusive license, and a condition of that exclusivity is the ability to meet the public's needs.

In that vein, let me share some data I recently stumbled upon while serving in leadership for the Mobile Bar Association. As you will see, the data suggests that the years ahead will likely be a time of great opportunity for today's young lawyers. They will be challenging, however, for small towns, rural counties, and certain practice areas.

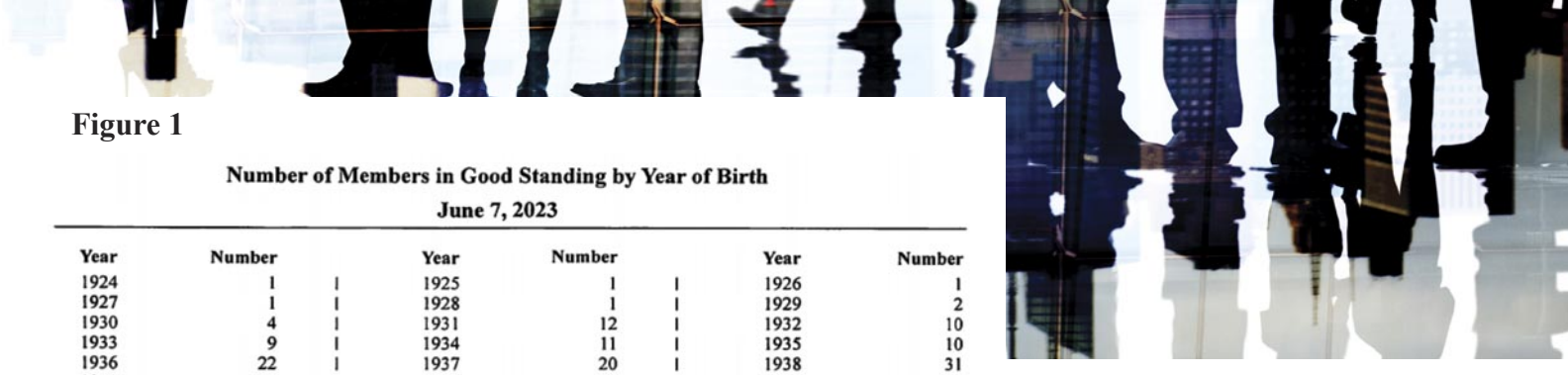
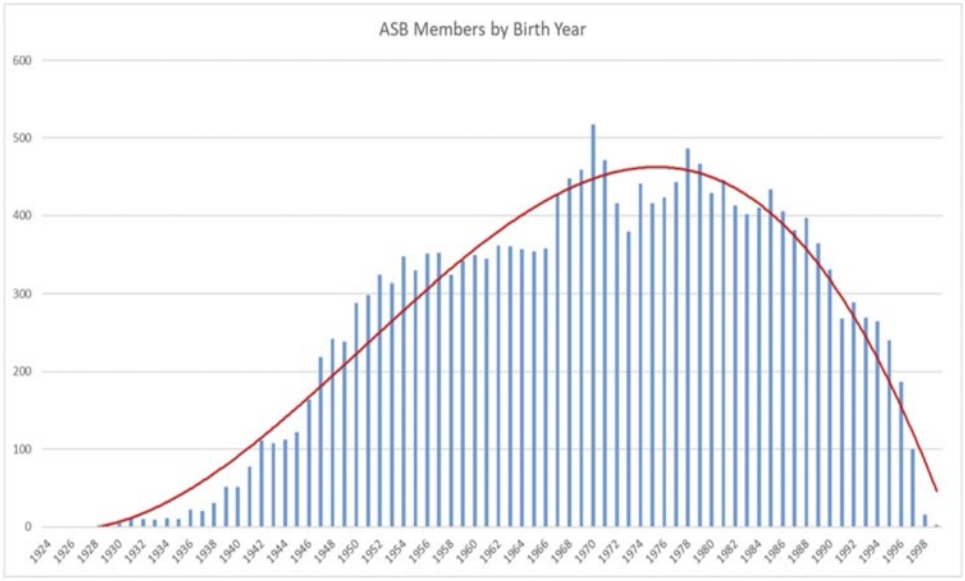


Figure 1

Number of Members in Good Standing by Year of Birth
June 7, 2023

Year	Number	Year	Number	Year	Number
1924	1	1925	1	1926	1
1927	1	1928	1	1929	2
1930	4	1931	12	1932	10
1933	9	1934	11	1935	10
1936	22	1937	20	1938	31
1939	51	1940	51	1941	78
1942	111	1943	108	1944	112
1945	122	1946	164	1947	219
1948	242	1949	238	1950	288
1951	298	1952	324	1953	313
1954	347	1955	329	1956	351
1957	352	1958	324	1959	342
1960	349	1961	344	1962	361
1963	360	1964	357	1965	354
1966	358	1967	426	1968	448
1969	459	1970	517	1971	471
1972	416	1973	379	1974	441
1975	416	1976	423	1977	443
1978	486	1979	467	1980	429
1981	446	1982	413	1983	402
1984	410	1985	434	1986	406
1987	381	1988	397	1989	364
1990	330	1991	268	1992	289
1993	269	1994	265	1995	240
1996	187	1997	100	1998	16
1999	2	2000	1	2003	1

Figure 2



1. Figure 1 lists *by birth year* the number of lawyers statewide. (Find your year!) It shows, for example, that there are 512 current ASB members who were born in the peak year of 1970.

The trend line of this data, as shown in Figure 2, clearly points to a major decline over the next 20 years. Unless something changes, within the next two decades our numbers will fall *by half*. This already is evident in Mobile where I practice. We have 100 members aged 66-70, as compared to only 44 in the 26-30 age group. Our average age is 55.

To get an even clearer picture of the future, we should consider several other data points that already are affecting the recruiting landscape:

2. Alabama's three ABA-approved law schools have shrunk their class size in recent decades to approximately 380 total. As of 2022, the entering class at Cumberland was approximately 150, Alabama 150, and Jones 80. (For comparison, my entering class at Cumberland had 275.)

3. Annual in-state tuition for UA Law School is $24,000 *per year*, Jones is $40,000, and Cumberland is $44,000. That does not count three years' living expenses. *It is common to see law graduates with over $250,000 in debt.*

This debt burden severely limits the jobs that recent law grads can accept, and where they can (and can't) afford to start working.

4. Even if Alabama could keep all 380 graduates, it would not offset the coming retirements. Data from the Alabama Commission on Higher Education suggests that 50 percent of each graduating class leaves Alabama. Many are likely to choose the higher pay of larger markets, which face their own recruiting pressures. Of the 260 candidates who passed Alabama's July 2023 bar exam, only 179 were Alabama residents. (Note: That number is less than half of the 512 current ASB members born in 1970.)

5. The number of law graduates from diverse backgrounds is extremely low. In the 2022 graduating class, only 25 students in Alabama's three ABA-approved law schools identified as African American, according to the Alabama Commission on Higher Education. Hispanic and Asian graduates were even fewer. Talented graduates

from historically under-represented groups are highly sought after in Alabama's legal market.

6. The bar exam pass rate declined nationally over the past decade, and Alabama had the nation's lowest pass rates. That was despite also having the *nation's lowest cut score* of 260 (i.e. minimum passing grade). Taken together, those two facts paint a bleak picture, but a closer look at the data suggests that perhaps there is less cause for concern: Alabama's pass rate jumps up to 72-percent, and into the Nation's Top 10, if we count only the graduates from ABA-approved law schools.

7. On the July 2023 bar exam, graduates of unaccredited schools had a pass rate of 8 percent (only 13 of 145). Alabama has a large number of examinees from unaccredited law schools, second only to California. No other state is close. Nationally, the racial gap in bar exam pass rates is around 24 points.

8. The Next-Gen Bar Exam is being pilot-tested for a 2027 roll-out in many states [and likely in Alabama by 2028]. The current memory-based test of black-letter law, now already reduced to a two-day exam, is going away. It is being replaced by a mixture of question types that emphasize issue recognition, problem-solving, and legal analysis. At least two states are experimenting with alternative licensing pathways, such as a diploma privilege and mandatory apprenticeship, or even licensing paralegals in some capacity.

9. The ABA House of Delegates has rejected calls to eliminate the LSAT as a requirement for law school admission. However, pressure remains strong to give law schools the ability to make the LSAT optional for at least part of each new class.

10. Artificial Intelligence programs such as Chat GPT already have passed the bar exam. A new wave of AI-assisted tools reportedly has the potential to turn certain practice areas into "click work" using human co-pilots who may not need a law license.

Some folks still say we have too many lawyers. Others, however, say it has become very difficult to recruit in certain geographic areas and practice specialties. One thing is certain: change is ahead. The coming decline in the census is undeniable, based on the data. And not just in Alabama. Georgia, for example, already has six counties with no lawyers.

This trend will be felt strongly. Lawyers are important not just to the functioning of our legal system, but to the social fabric of every community. With a declining census, how can Alabama lawyers adequately meet the public's need for legal services - especially in small towns and rural areas? Fortunately, we still have time to be proactive and prepare. ▲

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A PRIMER ON Estate Planning

By R. Mark Kirkpatrick

Level 1 – The Basics

Transferring Title at Death

Every client must understand the various ways title passes at death.

To begin, the *first* way title may pass is by survivorship (see Ala Code §5-24-12 with respect to bank accounts and Ala Code §35-4-7 with respect to real property). If an asset is owned as joint tenants with right of survivorship, it will pass at death to the surviving tenant or owner.

The *second* way title may pass is by designation pursuant to transfer on death ("TOD"), payable on death ("POD") or beneficiary designation form (see Ala Code §5-24-12 with respect to bank accounts and §8-6-140 et seq. with respect to securities). The owner of the bank or brokerage account can designate the person to take by TOD or POD. Likewise, the owner of an insurance policy or IRA account can designate the taker at death through the designation of beneficiary form.

The *third* way title may pass is by revocable trust. Revocable trusts are used as a Will substitute. Under this technique, the creator or grantor of the revocable trust transfers title to all assets during his lifetime to a trustee, usually himself as trustee of the trust, and designates the successor trustee. The successor trustee will be vested with title pursuant to the trust document upon the creator's death or disability. In lieu of fund-

ing the trust with liquid assets now, the creator may also fund the trust at death by TOD, POD, or beneficiary designation.

The *fourth* way title may pass is by Will. The Will transfers title to any assets not passing by one of these other methods but does require a probate proceeding.

The *fifth and final* way title may pass is under the state laws of intestate succession. This method applies to assets not passing in any other manner and dictates how such assets will be divided among family members.

After understanding exactly how title to assets may pass, the client then needs to decide how to transfer title (i.e., by Will, revocable trust, TOD, etc.), to whom, and in what proportions. The client will also need to decide who will be responsible for carrying out these instructions (i.e., executor or trustee), and if the client has minor children, a guardian will be necessary to take guardianship of the children.

Durable Power of Attorney for Financial Affairs ("DPAFA")

A person can designate an agent to act on his or her behalf with respect to financial matters in general and make it "durable," meaning the disability of such person (referred to as the "principal") will not affect the agent's authority to act on behalf of the principal. It can be currently effective, or "springing," meaning the agent's authority must first be triggered by a court order of disability or confirmation of disability by a doctor. The document must specifically authorize the making of gifts if the agent is to have that power. It will typically also designate that same person to act as conservator should the need arise to have the Court oversee the principal's affairs. However, this is generally not necessary if there is a DPAFA.

Durable Power of Attorney for Health Care ("DPAHC")/Living Will ("ADHC")

The DPAHC typically designates an agent to make healthcare decisions if the principal is unable to do so. Typically, a DPAHC/ADHC designates such person as guardian should a Court proceeding be instituted. The ADHC allows a person to designate a proxy to speak for the principal if he or she is unable to do so and allows the principal to make end-of-life choices, such as whether or not to be given life-sustaining treatment and/or tube feeding if the attending physician believes the condition is such that the giving of these treatments would only prolong the dying process. The principal also determines how broad to make the proxy's authority (i.e., just follow my directions, follow my directions but make decisions about things not covered, or make the final decision although it may be different than what I have selected).

Level 2 – Use of Trusts

Irrevocable Trusts

After understanding how title passes, the client needs to understand the potential use of irrevocable trusts. As mentioned above, the revocable trust is essentially a Will substitute. A Will (or revocable trust) can be readily changed by the creator, and as a result, assets passing via Will (or revocable trust) have no creditor protection. In contrast, an irrevocable trust created by a third party may be drawn to protect the assets contained therein from a beneficiary's creditors. Irrevocable trusts may be employed to achieve various goals, some tax-related and some for the protection of the beneficiary. Irrevocable trusts may be drawn as standalone instruments that are effective as of the date of signing, or they may be incorporated into a testamentary document such as a Will (referred to as a "testamentary trust"), or a revocable trust, which only becomes irrevocable upon the death of the creator of the revocable trust, and therefore, like the underlying document itself, can be changed until the death or disability of the creator. The discussion that follows deals with trusts that are incorporated into a testamentary document, becoming irrevocable at the death of the creator (as opposed to a separate currently effective standalone trust).

Minor Beneficiaries

Because minors lack the capacity to hold title to assets, trusts are often used to provide a vehicle to hold title, manage, and distribute income and/or principal at appropriate ages after the minor obtains adulthood. Alternatives to the use of a trust for smaller amounts include transfers to a custodian under the Alabama Uniform Transfers to Minors Act, a state law that essentially creates a trust-like account to be managed by a custodian and turned over to the beneficiary immediately upon reaching the age of 21 (see Ala. Code §35-5A-6 and 21), or a 529 plan. If one of these arrangements is not used and assets are left to a minor, then a conservatorship may need to be established to manage the assets until the minor reaches the age of majority. Conservatorships are established through the probate court and require the person seeking appointment to post a bond and render accountings in the court every three years.

Disabled Beneficiaries

A beneficiary may lack the capacity to handle financial or other affairs because of mental disability. To provide for such a beneficiary's needs, a trust may be established and can provide a useful tool for overseeing his affairs. An intended beneficiary may currently receive or may anticipate receiving future government benefits from needs-based programs such as SSI or Medicaid. In such cases, leaving assets directly to such a person could trigger a loss of benefits. If properly executed, a trust can hold such assets without jeopardizing the beneficiary's eligibility for such programs (referred to as a "special needs trust").

Spendthrift

A "spendthrift" is defined as a person who has spent his or her prosperity. A spendthrift trust is one designed to protect a beneficiary's inheritance from his creditors (see Ala. Code §19-3B-501 et seq.). While a spendthrift trust is generally protected from the claims of a beneficiary's creditors, there are exceptions. These exceptions include claims by the State of Alabama and the United States to the extent exempted by state or federal law, and judgments or orders to support a beneficiary's child or current or former spouse. (See Ala. Code §19-3B-503). Alabama law allows a claimant against whom a spendthrift provision cannot be enforced to obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary (such as mandatory distributions of income or principal, or discretionary distributions the trustee has otherwise decided to make), but does not authorize a claimant to compel a distribution from the trust.

Other Considerations

In addition to the type of trust to be employed and the purpose for creation, the client has several additional decisions regarding the trust. These decisions include how to design the trust (i.e. mandatory or discretionary distributions), the term of the trust (termination at a certain age, or lasting through one or more lives), and the designation of a trustee (individual or corporate). As to the designation of a trustee, there are additional issues that must be addressed. These include filling a vacancy of the trustee and whether to apply a different, perhaps lower, standard to the actions of family or friends (as opposed to a bank or trust company) serving in the role of trustee (such as applying a gross negligence standard to a family member as opposed to a regular negligence standard to mistakes made by such a trustee).

Level 3 – Income Taxes

Trust Tax Rate

A revocable trust is considered a grantor trust and it is ignored for income tax purposes until it becomes irrevocable at the death of the grantor. At that time, the irrevocable trust becomes a separate taxpayer. Irrevocable trusts are taxed at the highest marginal federal rate (37 percent in 2024 and 2025) on retained income in excess of $15,200 (in 2024), plus 3.8 percent on net investment income and with 5 percent for state income tax. In contrast, a single taxpayer is taxed at the highest marginal federal rate at taxable income in excess of $578,125 (and at 24 percent between $95,376 and $182,100). Anticipated tax rates for both the client and beneficiaries should be considered by the client in planning distributions under the trust.

Allocation of Receipts and Disbursements

It is important for the client and the planner to understand that funds considered income for state and federal income tax purposes may or may not be considered income for trust accounting purposes. The trustee of a trust has a duty to allocate receipts by and disbursements from the trust according to state law. The default rules are set out in the Alabama Principal and Income Act, but these default rules can be modified by the trust instrument. For example, absent modification in the trust instrument, required distributions from an IRA to a trust would generally be allocated 10 percent to income and 90 percent to the principal (see Ala Code §19-3A-409). Thus, assuming the application of the default rules, if the trustee was required by the trust instrument to distribute income, but did not have the discretion to distribute principal, a substantial IRA distribution to the trust would likely result in a higher overall income tax bill, assuming the beneficiary was in a lower tax bracket than the trust. A possible solution would be to define trust accounting income in the trust instrument as including any amounts payable to the trust from an IRA and requiring all income to be distributed to the beneficiary annually. Alternatively, the client could use a so-called "conduit trust," which passes through any IRA distribution to the beneficiary regardless of whether it is allocable to income or principal.

Grantor Trusts

The income trusts report is typically taxed at either the entity or beneficiary level. Which level is taxed depends on whether it is allocated to the principal amount or to the distributable income, and whether the amount

is distributed to the beneficiaries. Capital gain, for instance, would typically be allocated to principal, and interest and dividends to income. According to the U.S. tax code, estates and trusts are allowed to deduct the sum of the trust income required to be distributed and other amounts "properly paid or credited or required to be distributed" or the distributable net income, whichever is less, to beneficiaries to prevent double taxation on income. However, there are exceptions to this general rule, making trust income taxable in whole or part to individuals holding certain powers or interests. IRC §§ 671-677 & § 679 set out the powers and interests sufficient to cause a shift in income taxation from the trust to a grantor (defined as "any person to the extent such person either creates a trust or directly or indirectly makes a gratuitous transfer of property to a trust") and § 678 sets out the powers and interests sufficient to cause a shift in taxation to someone other than the grantor (such as a beneficiary).

Required Minimum Distributions (RMD)

The client and planner must also understand the RMD rules applicable to profit-sharing plans, IRAs, and other types of retirement plans, and how the interaction of these rules with the high tax rate applicable to retained trust income may affect the desired plan and its tax efficiencies. For simplicity, the term IRAs will be used to refer not only to IRAs but also to all other such plans. First, the client must name a "designated beneficiary" to receive the benefits. Otherwise, the entire benefit must be distributed within five years of death (the so-called "five-year rule"). An estate does not qualify as a designated beneficiary. An individual qualifies as a beneficiary and a trust may qualify as well by virtue of the "look through rules." Assuming there is a designated beneficiary, the rules are slightly different depending on whether the IRA owner dies before or after distributions have begun. An owner of an IRA must start taking withdrawals from a traditional IRA and retirement plan accounts at age 72 (age 73 if age 72 obtained after Dec. 31, 2022) (referred to as the required beginning date or "RBD").

If the IRA owner dies after his RBD, the beneficiary must take an annual RMD beginning in the first calendar year after the IRA owner's death. If the IRA owner dies before his or her RBD, this rule does not apply.

Generally, if an IRA owner has a designated beneficiary, the 10-year rule applies regardless of whether the IRA owner dies before or after the RBD. This rule requires the remaining account balance to be distributed by the 10th calendar year after the IRA owner's death (subject to the exception for an "eligible designated beneficiary"). Individuals that meet the definition of "eligible designated beneficiary" (and trusts for their benefit qualifying for look-through treatment) are allowed to take distributions over their life expectancy. An eligible designated beneficiary is a spouse or minor child of the deceased account holder, a disabled or chronically ill individual, and an individual who is not more than 10 years younger than the IRA owner. When a minor child of the account holder reaches the age of majority, that child will no longer be considered an eligible designated beneficiary and the remainder of that child's portion of the account holder's IRA must be distributed within 10 years of that date.

Clearly, the application of the 10-year rule coupled with high trust rates on retained income can have a big impact on planning. Therefore, it is critical to have a complete understanding of the applicable rules in order to create a tax-efficient plan.

Level 4

Gift and Estate Tax

At present, a unified gift and estate tax system is in place. Each donor can gift $18,000 (in 2024) per donee per year ("annual exclusion"), or $36,000 for a husband and wife, without incurring any gift tax. It is important to remember that a gift tax is a tax on lifetime transfers and the estate tax is a tax on transfers at death. In addition to the annual exclusion for lifetime gifts, an individual can transfer $10,000,000 indexed for inflation (or $13,610,000 in 2024) either during his lifetime or at death. This amount is scheduled to decrease in 2026 to $5,000,000 indexed (or approximately $7,000,000) ("estate and gift tax exclusion"). Lifetime transfers in excess of the annual exclusions reduce the exclusion available at death. Transfers in excess of the estate and gift tax exclusion are taxed at a 40 percent rate.

The donee of a lifetime gift takes the donor's basis in gifted property ("carryover basis"). In contrast, the basis of property transferred at death will be adjusted to fair market value ("step up" or "step down" in basis). However, this general rule does not apply to property defined as "income in respect of a decedent," such as IRAs and annuities, which significantly do not receive an adjustment in basis at death. Because the donee of a gift takes a carryover basis, a client should generally gift assets with a higher basis.

Notably, clients should consider taking the opportunity to make a large gift and take advantage of the higher exclusion amount currently in existence before the gift and estate tax exclusion drops in 2026. However, benefits will only accrue to the extent the amount of the gift exceeds the exclusion available at death. As an example, a $1 million gift has no effect, assuming a $7 million exclusion available at death, but a $13 million gift locks in most of the higher exclusion.

This article was meant to be a basic overview of the estate planning process, and to point out certain fundamental issues that must be considered by the planner. Because the use of irrevocable trusts is vital in all but the most basic plans, because trusts are taxed at such a high tax rate on very little retained income, and because so much of clients' wealth is now held in IRAs subject to compressed distribution rules implemented with the passage of the Secure Act in 2020, the planner needs a broad understanding of the tax law, trust law, and the Alabama Principal and Income Act to properly assist their clients in structuring the appropriate plan. ▲

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The Legislative Privilege

By Zachary A. Kervin

The legislative privilege is a necessary, but often misunderstood

and mischaracterized, foundation of our democratic republic. At its core, the privilege serves to ensure our legislators are free to pursue their public duties without distraction or fear. The legislative privilege ensures that legislators can carry out their duties without undue influence from the executive branch or concerns about being unfairly challenged in the judiciary. Without such protection, legislative independence would be lost along with our constitutional structure of separate, co-equal, and independent branches of government. As the Supreme Court has consistently held, the legislative privilege is indispensably necessary to "support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal."[1]

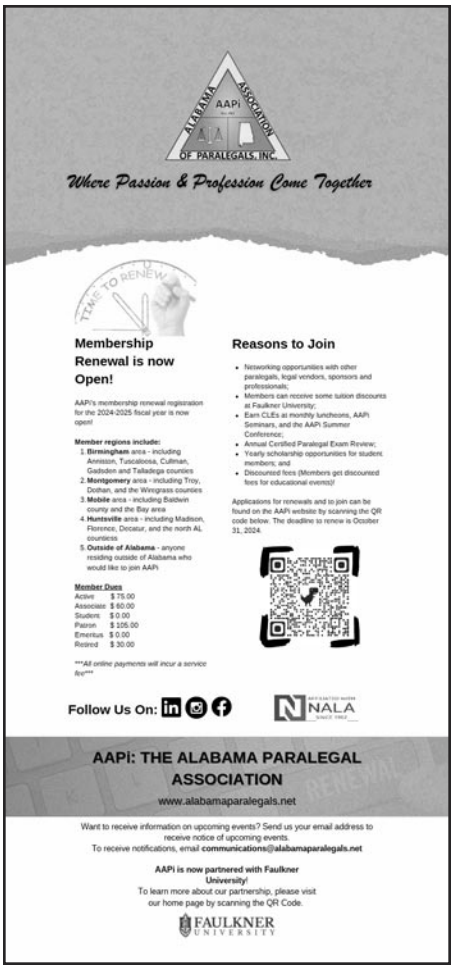
This article considers the federal legislative privilege unless otherwise stated, and the aspects of the privilege discussed herein apply to federal, state, and local legislators unless specified.

Background and Purpose

The need to protect legislators from the coercions of a separate branch of government is not a new concept and finds its origin in the British Parliament's historical struggles for power with the monarchy. Enacted in 1512, the Privilege of Parliament Act provides the first codified example of the legislative privilege by prohibiting the prosecution of any member of parliament for speech had during its proceedings.[2] This idea was later broadened and strengthened in the 1689 English Bill of Rights.[3] As with other concepts of English law, our nation's founders saw the advantage of an unafraid legislative body and adopted the concept of legislative immunity for our own government. This can be seen in Maryland's Declaration of Rights of 1776 and the U.S. Articles of Confederation both containing provisions providing legislators with immunity, and ultimately with the U.S. Constitution providing that no congressional member may be questioned in any other place for any speech or debate had in either house.[4]

An important initial distinction to be made when considering the legislative privilege is that legislative immunity and legislative privilege are separate but similar concepts. Article I, Section 6, Clause 1 of the U.S. Constitution, also known as the Speech or Debate Clause, provides that congressional members are immune from suit for speech or debate had in either house when given its plain meaning.[5] The legislative privilege, in turn, is an "outgrowth of the doctrine of legislative immunity."[6] While legislative immunity generally prevents a legislator from being personally tried for a legitimate legislative activity, the privilege protects information about these same activities when sought in an action for which the legislator is tried for non-legislative activities or as part of a suit in which the legislator is a nonparty. This distinction can be somewhat confusing as the early case law did not differentiate between these two ideas and the terms are often used interchangeably. Nonetheless, these parallel concepts of legislative privilege and legislative immunity work together to "reinforce[ ] representative democracy by fostering an environment where public servants can undertake their duties without the threat of personal liability or the distraction of incessant litigation."[7]

Legislative privilege and immunity do not protect all actions taken by a legislator. For an action and resulting information to be protected, the action must have been taken within the "sphere of legitimate legislative activity."[8] There has been considerable debate as to what actions fall within this sphere. The Supreme Court has consistently held that the Speech or Debate Clause's protections apply only to those actions that are an "integral part of the deliberative and communicative processes."[9] These "legitimate legislative activit[ies],"[10] or "things 'generally done in a session of the legislature by one of its members in relation to the business before it,'"[11] have included actions such as speaking or voting on the floor of either house; conducting committee business such as issuing subpoenas, making budgetary decisions, and revealing classified information during a hearing; caucus decisions; and any other "indispensable ingredient of lawmaking"[12] that, if allowed to be questioned, would impair a legislator's ability to engage in his or her duties.[13] Legislative errands however, which are those actions and resulting information that are not purely legislative, are not protected by the privilege. The Supreme Court has held actions such as appointing individuals to government agencies, speeches delivered outside of either house, the preparation of newsletters, or other similar conduct that is political in nature rather than legislative to be beyond the



privilege's protections.[14] Accordingly, the necessarily broad scope of the legislative privilege ensures that inquiries into a legislator's legitimate legislative acts that would hamper the legislative process do not occur.[15]

A second distinction is the federal legislative privilege provided to federal legislators, when compared to the federal privilege extended to state or local legislators, has a separate basis and differs in its scope of application. The legislative privilege enjoyed by Congress is granted by the Speech or Debate Clause. The legislative privilege that protects state and local legislators in federal question cases is provided by the federal common law.[16] And although the Speech or Debate Clause is often used to interpret these common law legislative protections, the immunity and privilege provided to state and local legislators has been a source of more ambiguity and subject to a higher level of refinement than that extended to members of Congress.

Members of Congress

The legislative immunity and privilege provided to congressional members by the Speech or Debate Clause is absolute. A federal legislator may not be tried personally for any action that falls within the sphere of legitimate legislative action. The privilege protecting information about such actions also never yields, no matter the claim. Accordingly, the analysis for when the privilege protects information regarding a congressional member's actions is fairly straightforward: Does the act fall within the sphere of legitimate legislative activities? If so, the member may not be personally tried for the act, nor may information regarding the act be forcibly revealed. However, this is not the case for the privilege that is extended to state and local legislators.

State and Local Legislators

The legislative immunity and privilege provided to state and local legislators has a much different scope in its application. The protections enjoyed by state and local legislators give way to federal interests in enforcing federal criminal statutes. State and local legislators may be personally tried as well as forced to testify and produce evidence regarding conduct that was within the scope of legitimate legislative activities in federal criminal cases. As the Supreme Court held in *United States v. Gillock*, the legislative privilege must yield "where important federal interests are at stake, as in the enforcement of federal criminal statutes."[17] However, this holding has caused some uncertainty as to the privilege in civil suits. The question has become what, if any, federal civil interests rise to the same level of importance as enforcing criminal statutes.

In *Tenney v. Brandhove*—the Supreme Court's seminal case on the provisioning of legislative immunity to state legislators—it was established that state legislators enjoy an absolute immunity from personal liability for civil claims based upon legitimate legislative acts.[18] No matter the act or the motivation for acting, including such important federal interests as preserving civil rights, "a state legislator's common-law absolute immunity from civil suit survive[s]"[19]

However, the privilege protecting state legislators from the compelled disclosure of information relating to legitimate legislative acts in civil suits does not enjoy such a solid foundation. The Supreme Court's holding in *Gillock* left open the possibility that other federal interests exist that might rise to the same level of importance as the enforcement of federal criminal statutes and thus require the piercing of the legislative privilege. Courts have wrestled with defining this boundary ever since. Several federal district courts have applied a balancing test to determine when this qualified privilege should yield. The factors have included: (1) whether the information sought is relevant; (2) whether the information sought is available from other sources; (3) whether the claim is sufficiently serious; (4) to what extent the government is involved in the litigation; and (5) whether directing the disclosure of the information sought would defeat the purpose of the privilege and have a chilling effect on the legislative process.[20] However, no federal appellate court has adopted such a balancing act, and at least five have directly rejected this approach.[21] Civil causes of action that have been held to not warrant the privilege to yield include claims alleging violations of 42 U.S.C. § 1983, the Voting Rights Act, the First Amendment, the Dormant Commerce Clause, and the Equal Protection Clause of the Fourteenth Amendment.[22] Accordingly, it is somewhat unclear what, if any, federal interests might warrant the in-

trusion into otherwise privileged legislative acts in civil cases. It appears that the federal legislative privilege afforded to state legislators in civil suits is all but absolute. Nonetheless, the possibility still exists that some federal civil interests rise to the level of importance required for the privilege to yield, at least until specifically addressed by the Supreme Court.

Actions of Staff

Several other aspects of the legislative privilege are worth noting. The first is that the protections provided by the privilege to legislators may be extended to members of their staff. In *Gravel v. United States*, the Supreme Court held that, in the light of the modern complexities of the legislative process as well as the ever-growing number of legislative tasks that must be accomplished, "the day-to-day work of such [legislative] aides is so critical to the Members' performance that they must be treated as the latter's alter egos ."[23] So long as an action taken by an aide would have been privileged had it been taken by the legislator himself, the aide's action is protected. If the action was within the sphere of legitimate legislative activity, "to the extent a legislator is immunized, his staffers are likewise 'cloaked.'"[24] However, the privilege is the legislator's to assert or waive, not the staffer's. The legislator may invoke or waive the privilege as he so chooses, even over the objection of a staffer whose action is in question. Further, a staffer's otherwise illicit actions taken as part of his legislative duties or even at the behest of a legislator are not protected. Finally, it is worth noting that a minor number of district courts have indicated that the legislative privilege's strength might diminish the further an action in question is removed from conversations shared among legislators or immediate staff, but no appellate court has yet taken such a view and it seems unlikely to gain traction.[25]

Third Parties

Secondly, the legislative privilege is provided to third parties under certain circumstances. The essential rationale of the legislative privilege is not to foster confidentiality, but rather to protect the legislative process as a whole. And because the privilege protects the legislative process and meeting with persons outside the legislature "is a part and parcel of the modern legislative procedures through which legislators receive information possibly bearing on the legislation they are to consider, " these communications are privileged to the extent they pertain to legitimate legislative acts.[26] Moreover, the political motivations underpinning these meetings or the fact that they are private does not diminish their legislative character and their resulting protection.[27] Accordingly, to the extent a legislator brings a third party into the legislative process, information relating to the purpose for which the third party was included is protected.[28] Further, a third party in this position may personally assert the legislative privilege so long as the information sought is within the legislative sphere and concerns

Accordingly, it is somewhat unclear what, if any, federal interests might warrant the intrusion into otherwise privileged legislative acts in civil cases. It appears that the federal legislative privilege afforded to state legislators in civil suits is all but absolute.

However, regardless of who enjoys its protection, the privilege's purpose remains the same: protecting the independence of those engaged in the legislative process, no matter the branch or level of government.

acts done at the direction of, instruction of, or for the legislator.[29] Courts have recognized the privilege protects conversations between a legislator and constituents, advocacy groups, partisans, political interest groups, attorneys, executive branch officers, and others outside the legislature so long as the conversations bear on the legislative process.[30]

Other Persons

The privilege may also be enjoyed by non-legislators in their own right under certain circumstances. So long as the information in question was produced through legitimate legislative action that was taken during the "proposal, formulation, and passage of legislation," it may be privileged regardless of whether the actor was a legislator.[31] Courts have generally agreed such an extension of the privilege stems from its underpinning purpose of protecting the legislative process as a whole. Governors, mayors, and other state and local officials have all enjoyed such protection as part of the legislative process.[32] All the aspects of the legislative immunity and privilege previously discussed apply in these situations, including the protections yielding under certain types of claims and the extension of the privilege to actions taken by staff and to third parties through the non-legislative official. Also, in acknowledging that it is the function of the official that determines whether he is entitled to the privilege, not his title, a minority of courts have developed a balancing test to determine when a non-legislator is entitled to the legislative privilege. The factors include: (1) whether the individual is a government official or an individual working on the official's behalf; (2) whether the act in question falls within the sphere of legitimate legislative activity; and (3) the act's proximity to the legislative arena.[33] However, regardless of who enjoys its protection, the privilege's purpose remains the same: protecting the independence of those engaged in the legislative process, no matter the branch or level of government.

Waiver

These previous considerations lead to a logical next question: Under what conditions may the protections provided by the legislative privilege be lost? The Supreme Court has explained that waiver of the Speech or Debate Clause's legislative immunity "can be found only after explicit and unequivocal renunciation of the protection."[34] But the circumstances under which the legislative *privilege* may be waived are less definitive. The privilege may certainly be waived through explicit direction or action. And, although never directly addressed by the Supreme Court, lower courts have generally reached a consensus that waiver of the legislative privilege may occur implicitly when information is publicly revealed.[35] Actions that have been held to implicitly waive the privilege include the sharing of internal deliberations with individuals outside of the legislative process, testifying as to privileged information, intervening in a suit relating to purportedly privileged information, and failing to respond to a request for whether the legislator wishes to

assert their privilege.[36] Accordingly, absent some explicit waiver or action reasonably calculated towards public revelation, the legislative privilege may be invoked for legitimate legislative acts.

Other Privileges

Two final points regarding the legislative privilege worth discussing are the differences between the legislative privilege and the attorney-client privilege as well as the differences among the various forms of state-provided legislative privilege and immunity.

The purpose of the attorney-client privilege is to prevent the disclosure of information that would tend to inhibit a socially desirable confidential relationship.[37] Put another way, the attorney-client privilege aims to keep information confidential in an effort to foster and preserve the attorney-client relationship. The legislative privilege differs in that it is not meant to promote confidentiality or secrecy, but rather to protect legislators from potential challenges or pressures from other branches of government in response to their legislative actions. This is exemplary of the legislative privilege's character as a use privilege and the fact that its animating concern is prohibiting the evidentiary use, not the disclosure, of information.[38] Further, the essential elements necessary to assert the attorney-client privilege are more numerous and rigorous than what is required to receive the legislative privilege. The requirements that a communication between a client and counselor, which was intended to be, and was in fact, kept confidential, and was for the purpose of receiving and providing legal advice are very different than the simple requirement that an act be taken within the sphere of legitimate legislative activity. While these two privileges share a mechanism by which they achieve their goals, their rationales and applications are very different.

States vary considerably in the provisioning of legislative immunity and privilege to their legislators. Almost all state constitutions contain some form of a speech or debate clause, and all states recognize legislative immunity and privilege. Some state speech or debate clauses mirror the federal Speech or Debate Clause.[39] Other states, however, have only a constitutional provision prohibiting the arrest of legislators going to and from a legislative session.[40] Nonetheless these states find legislative immunity and privilege through a variety of other sources. These sources include common law, statutory provisions specifically providing such protections, or other constitutional provisions providing for separate branches of government.[41] The various state courts have also interpreted these sources of legislative immunity and privilege to have differing scopes in their application. For example, the Constitution of the State of Hawaii contains a speech or debate clause somewhat similar to the federal clause that provides protections for statements or actions made in the exercise of "legislative functions."[42] However, the Supreme Court of Hawaii held that interviews conducted by legislators outside of either chamber in a public fashion are a legislative function and thus privileged.[43] Some states statutorily provide specific types of legislative information and conduct that are confidential and privileged. For example, Washington statutorily provides that bill drafting services provided by legislative staff are confidential.[44] Further, in addition to its constitutional speech or debate clause, Alabama explicitly references in statute the Supreme Court's holding in *Gravel* and adopts its implications as to the Legislature of Alabama and specifically its staff.[45] As can be seen, the determination for whether legislative action or information is privileged in a state law claim is very jurisdiction-specific. And although the scope of the legislative privilege and immunity varies by state, the importance of maintaining an independent legislature is nonetheless recognized by all states.

Conclusion

Although legislative immunity and legislative privilege have received somewhat of an undeserved reputation due to their perceived motives, they have performed their duty seamlessly throughout our country's history. Regardless of the mindset of various presidents, governors, mayors, and judges, the legislative privilege has ensured that legislators remain primarily accountable only to their constituents.

However, there is room for further refinement in reaching a balance between preventing hinderances to the legislative process and maintaining legislators' accountability. The circumstances under which legislative immunity and legislative privilege yield, when the privilege may be extended to staff and third parties, and when it is waived would all benefit from further direction by the courts or statutes. Nonetheless, so

long as an action and resulting information is within the sphere of legitimate legislative activity, it will be protected in most cases, thus ensuring an independent legislature and ultimately preserving our constitutional form of three separate but co-equal branches of government. ▲

Endnotes

1. *Tenney v. Brandhove*, 341 U.S. 367, 373-74 (1951) (quoting *Coffin v. Coffin*, 4 Mass. 1, 27 (1808)).
2. Craig M. Bradley, *The Speech or Debate Clause: Bastion of Congressional Independence or Haven for Corruption*, 57 N.C. L. Rev. 197, 200 (1979); *see also United States v. Johnson*, 383 U.S. 169, 182 n.13 (1966).
3. 1 W. & M. sess. 2, c. 2 (1689).
4. Md. Const. Decl. of Rights art. VIII (1776); Articles of Confederation of 1777, art. V, para. 5; U.S. Const. art. I, § 6, cl. 1.
5. U.S. Const. art. I, § 6, cl. 1.
6. *Page v. Va. State Board of Elections*, 15 F. Supp. 3d 657, 665 (E.D. Va. 2014) (citing *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011)).
7. *In re N.D. Legislative Assembly*, 70 F.4th 460, 463 (8th Cir. 2023) (citing *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998); *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011)).
8. *Tenney*, 341 U.S. at 376.
9. *Gravel v. United States*, 408 U.S. 606, 625 (1972).
10. *Tenney*, 341 U.S. at 376.
11. *Gravel*, 408 U.S. at 623-24.
12. *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 505 (1975).
13. *Kent v. Ohio House of Representatives Democratic Caucus*, 33 F.4th359, 365 (6th Cir. 2022).
14. *United States v. Brewster*, 408 U.S. 501, 512 (1972).
15. *In re Hubbard*, 803 F.3d 1298, 1310 (11th Cir. 2015).
16. *United States v. Gillock*, 445 U.S. 360, 372 n.10 (1980); *Hubbard*, 803 F.3d at 1307.
17. *Gillock*, 445 U.S. at 373.
18. 341 U.S. at 376-79.
19. *Gillock*, 445 U.S. at 372 (citing *Tenney*, 341 U.S. at 376).
20. *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 101 (S.D.N.Y. 2003); *Favors v. Cuomo*, 285 F.R.D. 187, 217 (E.D.N.Y. 2012); *Bethune-Hill v. Va. State Bd. of Elections*, 114 F. Supp. 3d 323, 337-39 (E.D. Va. 2015); *Am. Trucking Ass'ns. v. Alviti*, 496 F. Supp. 3d 699, 711-16 (D.R.I. 2020).
21. *Pernell v. Fla. Bd. of Governors of State Univ.*, 84 F.4th 1339, 1345 (11th Cir. 2023); *In re N.D. Legislative Assembly*, 70 F.4th at 465; *La Union Del Pueblo Entero v. Abbott*, 68 F.4th 228, 239-40 (5th Cir. 2023); *Am. Trucking Ass'ns, Inc. v. Alviti*, 14 F.4th 76, 88 (1st Cir. 2021); *Lee v. City of Los Angeles*, 908 F.3d 1175, 1188 (9th Cir. 2018).
22. *See Pernell*, 84 F.4th 1339(Equal Protection Clause); *Abbott*, 68 F.4th 228 (Voting Rights Act); *Alviti*, 14 F.4th 76 (Dormant Commerce Clause); *Lee*, 908 F.3d 1175 (Equal Protection Clause); *Hubbard*, 803 F.3d 1298 (First Amendment).
23. 408 U.S. at 616-17.
24. *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 298 (D. Md. 1992) (citing *Gravel*, 408 U.S. at 618).
25. *Bethune-Hill*, 114 F. Supp.3d at 337-39.
26. *Abbott*, 68 F.4th at 236 (quoting *Bruce v. Riddle*, 631 F.2d 272, 280 (4th Cir. 1980)).
27. *Almonte v. City of Long Beach*, 478 F.3d 100, 107 (2d Cir. 2007) (citing *Bruce*, 631 F.2d at 280; *Tenney*, 341 U.S. at 377).
28. *La Union del Pueblo Entero v. Abbott*, 93 F.4th 310, 322 (5th Cir. 2024).
29. *Id.*; *see also Milligan v. Allen*, No. 2:21-cv-01530-AMM, 2024 WL 3666369 (N.D. Ala. July 12, 2024) (order granting motions to quash subpoena seeking production of legislatively privileged information).
30. *See Abbott*, 93 F.4th at 322; *In re N.D. Legislative Assembly*, 70 F.4th at 464-65; *In re Mclean*, 2019 WL 2352453 at *6 (D. Vt. June 4, 2019).
31. *Hubbard*, 803 F.3d at 1308.
32. *Bogan v. Scott-Harris*, 523 U.S. 44, 55 (1998) (city mayor); *Stuart v. City of Scottsdale*, No. CV-17-01848-PHX-DJH, 2023 WL 5173781, at *4 (D. Ariz. May 12, 2023) (city councilmembers); *League of Women Voters of Fla., Inc. v. Lee*, 340 F.R.D. 446, 455 (N.D. Fla. 2021) (state governor).
33. *Pulte Home Corp. v. Montgomery Cnty., Md.*, No. GJH-14-3955, 2017 WL 2361167, at *8-*9 (D. Md. May 31, 2017); *Marylanders for Fair Representation*, 144 F.R.D. at 299-302.
34. *United States v. Helstoski*, 442 U.S. 477, 491 (1979).
35. *Abbott*, 68 F.4th at 236–37; *Favors*, 285 F.R.D. at 212.
36. *Alexander v. Holden*, 66 F.3d 62, 68 n.4 (4th Cir. 1995) (legislative privilege waived when commissioners "testified extensively as to their motives in depositions with their attorney present, without objection"); *Bethune-Hill*, 114 F. Supp.3d at 343-44 (legislative privilege waived when legislators did not respond to inquiry regarding assertion of privilege); *Trombetta v. Bd. of Educ., Proviso Twp. High School Dist. 209*, No. 02 C 5895, 2004 WL 868265, at *5 (N.D. Ill. Apr. 22, 2004) (legislative privilege waived when "Board members testified at their depositions about their reasons for acting, and they made no effort to seek a protective order barring inquiries about their reasons for acting as they did"). *See also Powell v. Ridge*, 247 F.3d 520, 531 (3rd Cir. 2001) (Roth, J., concurring) (legislators "waived any immunity from discovery by the decision to enter and remain in the case and to assert their rights as defendants").
37. *See, e.g., In re Grand Jury Proceedings*, 563 F.2d 577, 587 (3rd Cir. 1977) (Gibbons, J., concurring) (noting that assessing applicability of legislative privilege did not require court to "deal[ ] with matters of confidentiality such as are involved in the attorney-client[ ] . . . privilege[ ]").
38. *Id.* (Gibbons, J., concurring).
39. *See, e.g.*, Ala. Const. art. IV, § 56; Colo. Const. art. V, § 16.
40. *See, e.g.*, Cal. Const. art IV, § 14; Iowa Const. art III, § 11.
41. *See, e.g.*, Cal. Civ. Code § 47(b); N.C. Gen. Stat. Ann. § 120-9; *Fla. House of Representatives v. Expedia*, 85 So. 3d 517, 521-25 (Fla. 2012).
42. Haw. Const. art. 3, § 7.
43. *Abercrombie v. McClung*, 55 Haw. 595, 600-01 (Haw. 1974).
44. Wash. Rev. Code Ann. § 1.08.027.
45. Ala. Code § 29-6-7.1 (1975).

Zachary A. Kervin

Zachary A. Kervin is a legislative attorney with the Legislative Services Agency. He drafts legislation and advises upon matters relating to his primary areas of legislative privilege, environmental, firearms, animals, and boards and commissions. He is a graduate of Cumberland School of Law.

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** The Alabama State Bar will not know who is receiving counseling and will not have access to counseling or other personal data provided to BetterHelp.

A GOLDEN ANNIVERSARY: Honoring 50-Year Members at the Inaugural Milestone Luncheon

By Melissa Warnke

On September 19, 2024, the Alabama State Bar hosted its inaugural Milestone Luncheon, honoring 164 distinguished members who have dedicated 50 years of service to the legal profession. The 80 honorees who were able to attend in person enjoyed revisiting their Admission Ceremony photos from 1974, while reflecting on their shared journey and the lasting impact they've had on Alabama's legal landscape.

President Tom Perry opened the event with a heartfelt tribute. "It is both humbling and inspiring to be with you today," Perry remarked. "This is more than a celebration of years; it is a tribute to a lifetime of dedication, integrity, and an unwavering commitment to excellence in the legal profession."

Perry also transported the room back to 1974, a year that saw the end of the Vietnam War, the resignation of President Richard Nixon, and the introduction of the first personal computer. Gasoline was 53 cents per gallon, and a McDonald's hamburger cost just 35 cents.

As honorees and their guests reflected on the transformations that have reshaped the world and the practice of law, Perry reminded them that while the tools and context of legal work have evolved, the core values of the profession—commitment, integrity, and justice—remain unchanged.

Executive Director Terri Lovell spoke about the significance of the event, highlighting the need for such a celebration. "The excitement we feel today shows just how overdue this moment has been," Lovell said. "In the past, this recognition was part of our annual meeting, but we felt it was time to expand this celebration." She also expressed heartfelt gratitude to the event's sponsors—Balch & Bingham, Bradley Arant, Jinks Crow, Maynard Nexsen Capell Howard PC, and Grace Matthews and Debro, LLC—whose generous support made the luncheon possible.

"We're truly grateful to have you all here today," Lovell added. "This is a chance to reconnect with old friends and celebrate the journey you've shared, one that has left an enduring mark on Alabama's legal community."

The event's keynote speaker, The Honorable Keith Watkins of the Middle District of Alabama, captivated the audience with personal stories from his career and reflections on the sweeping changes he's witnessed in the legal profession over the past five decades. Drawing on the words of Justice Oliver Wendell Holmes Jr., he shared a powerful thought:

"The life of the law is not in the courthouse, it is in your house."

Judge Watkins reminded the audience that the law is not just a set of rules enforced in courtrooms, but a living, evolving force that shapes and reflects everyday life. "For lawyers who have spent 50 years in the profession, their work has extended far beyond the courtroom," Watkins explained. "It's touched families, communities, and the very fabric of society."

The Alabama State Bar looks forward to continuing this meaningful celebration next year, and hopefully for many years to come. The event not only honored the accomplishments of the past but also emphasized the ongoing importance of the legal profession in shaping Alabama's future.

To view photos from the Milestone Luncheon, visit

50-Year Members

James Roy Accardi
Thomas Reed Alexander
Margaret Searcy Alford
Joseph Hodge Alves, III
Hon. John E. Amari
Michael Duane Anderson
Anita Leslie Bagby
David Ashley Bagwell
Wilford Edward Bailey
Harry Edwin Barr
John Clarke Bell
Michael Christopher Berndt
Walter Lee Blocker, III
Jack Allen Blumenfeld
James Walter Bodiford, Jr.
Ronnie Michael Booker
James Garland Brazil
Stephen Edward Brown
Hon. Quentin Quarles Brown, Jr.
William Joseph Bryant
James Brice Callaway
John Harold Camp, Jr.
William Taylor Campbell, Jr.
Buford Clark Carpenter, Jr.
John Richard Carrigan
Cada M. Carter
Hon. Joel Ring Chandler
John Charles Clarke
James Richard Clifton
Donald Frederick Coats
Hon. James Ivan Cohn
John Sydney Cook, III
John Milton Coxwell, Jr.
Martha Stewart Crosland
John Edward Cunningham
William Mitchell Cunningham, Jr.
William Anthony Davis, III
Hon. John Carroll Dowling
Kermit McClendon Downs
Hon. George Karl Elbrecht
Thomas Eugene Ellis
Hon. John Henry England, Jr.
Joel Selig Erdberg
James Dansby Evans
Francis John Faraci
Hon. Ralph Alton Ferguson, Jr.
Hon. Jerry Leonard Fielding
William Snipes Fishburne, III
Michael Fraser Ford
Samuel Hugh Frazier
John Bonner Gamble, Jr.
Thomas Fearn Garth
Johnson Russell Gibson, III
Charles Richard Godwin
Kenneth John Gomany
Carl Leonard Gorday
Garland Kendall Grace, Jr.
John William Green, III
William Stanley Gregory
Stephen Van Hammond
Hon. Herschel Towles Hamner, Jr.
George Woodruff Harris
Edward Gordon Hawkins
Jerry Edwin Held
Miles Marcus Huffstutler
James Clarence Inzer, III
Lynn Wilson Jinks, III
Hon. Orson Lucius Johnson
Earl Verner Johnson
Nancy Skipper Jones
Hon. John Maxwell Karrh
Thomas Howard Keene
Richard Craig Kneisel
Larry Paul Knopf
Randolph Houston Lanier
Herbert James Lewis, III
Timothy Dean Littrell
George Gambrill Lynn
Frank Madonia
Frank DeCalve Marsh
Marion Dale Marsh
Guy Vernon Martin, Jr.
James LaFayette Martin
Mary Little Mattair
Hon. Gary Lex McAliley
Edmon Howard McKinley
Robert Turner Meadows, III
Von George Memory
Michael Hall Mobbs
Randall C. Morgan
Hon. Horace Hendrix Nation, III
John Twohey Natter
Hon. Michael Anthony Nix
Rodney Earl Nolen
Robert William O'Neill
Grant Allen Paris
Alton Blackwell Parker, Jr.
Richard Floyd Pate
Dow McMillan Perry, Jr.
Benton Howard Persons, Jr.
Marcus Bernard Polson
Hon. Jimmy Bryan Pool
James Wallace Porter, II
Hon. Charles Price
Edward Martin Price, Jr.
Marion Albert Quina, Jr.
William Larry Ray
Hon. Adolph Philip Reich, II
David Alfred Reid
Hon. James Harvey Reid, Jr.
Hon. Bert Wayne Rice
Maxey Jerome Roberts
Hon. James Jack Robinson
William Anthony Robinson
Robert Bryan Roden
Ernest Mabry Rogers
Perry Crawford Roquemore, Jr.
Thomas Sidney Rue
Samuel Anthony Rumore, Jr.
Daniel Geary Sayers
Albert Joseph Schibani
Hon. Jerry Kern Selman
Robert Ratliff Sexton
Richard David Shinbaum
Gordon Griffin Sikes, Jr.
Hon. George Campbell Simpson
Patrick Hanlon Sims
Hon. James Scott Sledge
Rodney Britton Slusher
Cary Franklin Smith
George Earl Smith
Marshall Ernest Smith, III
Thomas Michael Smith
Hon. Claude Kendall Snow
Michael Edward Sparkman
Henry Bascom Steagall, III
Charles Raymond Stephens
Hon. Charles Michael Stilson
Bert Pittman Taylor
Sarah Thompson
John Brent Thornley
William Lee Thuston
Alvis Earl Tidwell
John Alvin Tinney
James Donald Turner
James Steven Ward
Raymond Edward Ward
Raymond Larry Ward
Manning Gilbert Warren, III
Hon. Sheldon Lee Watkins
Joel Colley Watson
Winfred Nance Watson
David Harold Webster
John Mark White
John Richard Wible
Gary Palin Wilkinson
Hon. Bruce Edward Williams
Cary James Williams
Robert Alan Wills
Stephen Ralph Windom
Charles Ned Wright
John Francis Wymer, III
Lee Howard Zell

MILESTONE LUNCHEON PHOTO HIGHLIGHTS

MILESTONE LUNCHEON PHOTO HIGHLIGHTS

REBUILDING THE JUDICIARY:
A Farewell Address

By Chief Justice Tom Parker

With a mix of gratitude and nostalgia, I look forward to the future and back at 24 years of service in the beautiful Heflin-Torbert Judicial Building. I came in on the ground floor, literally: beginning in 2001, I served in several roles as Deputy Director of the Administrative Office of Courts, General Counsel, and the Director of the Judicial College (which provides training for all the elected officials and support staff within the judiciary). In 2005, I was elected to what has become 20 years on the Alabama Supreme Court, the last six years as Chief Justice. But my work at AOC gave me a breadth of understanding of the entire Court System and all its fine people, an understanding that equipped me for becoming the constitutionally designated Administrative Head of the Judicial Branch in 2019.

The early days in AOC were hardly "good ole days," because of the devastating effects of proration in FY 2003 that decimated the court system. We lost all courtroom Bailiffs and a large portion of our Court Specialists in the Circuit Clerk offices, who are the backbone of support for the trial judges. To compensate, I put together a series of Memoranda of Understanding with some of the larger counties to fund the positions of some of those Court Specialists. Sad to say, most of those MOUs were still in effect when I became Chief Justice in 2019, 17 years after I initially drafted them. We needed to rebuild.

Thus, at my Investiture in January 2019, I pledged that my top priority would be to put "flesh" back on the "bare bones" of our Judicial System. After all, the Alabama Constitution, Article VI, § 149, mandates that "[a]dequate and reasonable financing for the entire unified judicial system shall be provided." For too long, our Judicial System had begged and settled for what amounted to inadequate financing. I said at my investiture, "we must have essential personnel restored and the security of your courtrooms assured." But we would need the Legislature to partner with us.

To begin to facilitate that legislative cooperation, I asked the then-Speaker of the House to administer the oath of office to me, stating, "It is my intent that the interbranch swearing-in that Alabama just witnessed will be symbolic of a renewed mutually respectful and supportive relationship between the branches of this great State."

Looking back over these last 6 years of my Chief Justice term, we have accomplished much of this system-wide rebuilding and restoration. Some highlights:

- staffed and funded the Circuit Clerk's offices and ended MOUs with counties funding some positions
- obtained a long-needed pay adjustment for judges, helping us to retain experienced judges
- obtained a long-overdue pay increase for Circuit Clerks
- secured legislative authorization for 13 new judgeships (the first ones since 2007) to keep up with the growth of Alabama's population
- expanded trial court case management from the SJIC mainframe to a web-based system (UJIS)
- placed top priority on cyber security to protect our statewide IT system
- implemented Online Traffic Resolution (OTR) and got it up and running in all counties – allowing ticketed individuals to avoid a court appearance and to reduce the huge caseload of District Judges
- started the implementation of Online Dispute Resolution (ODR), first in the Small Claims Courts
- added a module for Municipal Courts to AlaCourt that will be available in 2025
- worked to develop an AlaCourt module for Probate Court
- implemented a new Case Management and E-Filing System for the Appellate Courts that is benefiting the Courts, attorneys, and the public
- obtained funding for updated pay scales for court employees

In sum, the key achievements during my administration have included restoring personnel lost during proration, creating essential new judgeships, and broadening the types of courts included in AlaCourt.

In the merger of the professional and the personal, I cherished the opportunity to work on access to justice with Taze Shepard, my friend since our Dartmouth College days, when he became President of the Alabama State Bar. That friendship served as the impetus for OTR and ODR, making it easier for those who cannot afford a lawyer to achieve resolution of pending charges or claims. The Bar's efforts to increase access to justice have been continued by each successive President, with the latest contribution being the Justice4AL.com website. There is still work to be done to increase access to justice, and I see a unanimity among the Justices on the Alabama Supreme Court to continue this focus.

We have also seen some changes on our Supreme Court. The Court has always been involved in statutory interpretation, of course, but recent years have seen a greater emphasis on textualism and upholding the "plain language" of statutes. After all, our Branch *applies* the law to pending cases, but it does not *make* the laws: "It is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison,* 5 U.S. 137, 177, 2 L. Ed. 60 (1803), but not what it ought to be.

Likewise, the Supreme Court has been employing more references to treatises and other "black letter law" compilations, either to show that Alabama jurisprudence is in the mainstream or to explain and contrast distinctions in Alabama law. Opinions from our Court, in addition to quoting from the old tried-and-true treatises like Sutherland's *Statutes and Statutory Construction (edited for many years by the late Norman Singer of the University of Alabama School of Law),* increasingly rely upon works like Scalia and Garner, *Reading Law: The Interpretation of Legal Texts* (2012).

Finally, the Justices have been influenced by books on State Constitutions written by Judge Jeffrey Sutton, Chief Judge of the Sixth Circuit U.S. Court of Appeals, such as *51 Imperfect Solutions: States and the Making of American Constitutional Law* (2018). Several of my fellow Justices and I have written separately in cases to emphasize that certain provisions of our State Constitution differ from those of the U.S. Constitution. We encourage attorneys and parties to make arguments in our Court grounded in Alabama's provisions, especially when these differences could lead to a different outcome.

Justice Parker, accompanied by his wife Dottie James Parker, being sworn into office at the U.S. Supreme Court by Justice Clarence Thomas, January 2005

The voters of Alabama have bestowed upon me the high honor of being able to rebuild, upgrade, and expand our Judicial System so that I will be handing it over to my successor in far better shape than I received it. Thank you for this privilege. I am confident that, as you have supported me, you will support the next Chief Justice in continuing the work of rebuilding our judicial system, including by restoring courtroom security in our ever-changing society and by continuing to update and expand access to the services provided by our Judicial System – to include Municipal and Probate Courts.

To my fellow judges around the State, thank you for the honor and privilege of working with you these many years and particularly for the cooperative effort we have made together branch-wide these past six years. From the creative solutions needed in the pandemic to the efforts to add critical staff and new judgeships, our success working together has been impactful and generationally beneficial, both for the bench and bar.

To my fellow Justices on the Supreme Court, past and present, working alongside you as an associate justice for 14 years was a great honor and blessing and prepared me well for the significant responsibilities of the Chief Justice position. I will cherish the relationships and professional collegiality we have built through the years, and I pray for the continued success of our Court's work and for its constant pursuit of the equal justice under the law due to all the citizens of Alabama.

My final charge to my fellow attorneys and judges: do not forget that since the founding of our great State of Alabama, our State Constitution, then as now, makes Justice the first priority for government. The Preamble to the Constitution still reads:

"We, the people of the State of Alabama, in order to establish justice… do ordain and establish the following Constitution and form of government for the State of Alabama."

As the words of the prophet Amos cried, echoed by Dr. Martin Luther King, Jr., "Let justice run down like waters, and righteousness like a mighty stream." Amos 5:24. ▲

Editor's note: Chief Justice Parker will be the first Alabama Chief Justice in 30 years to serve a full six-year term (since Sonny Hornsby left office in 1995).

Chief Justice Tom Parker is a cum laude graduate of Dartmouth College. He received his law degree from Vanderbilt Law School. He was the first foreign student at Brazil's leading law school, The University of São Paulo School of Law, as recipient of a Rotary International Fellowship. He served in the Alabama Attorney General's Office under Attorney Generals Session and Pryor, as Deputy Director of the Alabama Administrative Office of Courts, as an Associate Justice on the Alabama Supreme Court for 14 years and as Alabama Chief Justice for six years.

Please email announcements to *melissa.warnke@alabar.org.*

Pictured here, left to right, are Judge Brent Benson, ASB President Tom Perry, Caroline Strawbridge, Jack Livingston, Justice Brad Mendheim, Judge John Graham, and Judge Don Word.

Jack Livingston, Oldest Practicing Attorney in Alabama, Celebrates 98th Birthday

In August, Jack Livingston, the oldest, active practicing attorney in Alabama, celebrated his 98th birthday at the Jackson County Courthouse. Next February will mark his 75th year of practicing law.

Alabama State Bar President Tom Perry presented a proclamation celebrating his 75 years of service, and Presiding Circuit Judge John Graham presented a proclamation on behalf of Governor Ivey.

Jack was admitted in 1950 after graduating from the University of Alabama's School of Law and appointed as circuit judge for the Ninth Judicial Circuit in 1963 before leaving the bench to open his practice in Scottsboro, where he still works today. Livingston was one of the founding members of the Alabama Rules of Civil Procedure Committee

What are Bar Briefs?

Bar Briefs celebrates member achievements, accolades, and honors. We look forward to celebrating the accomplishments and good news of our members in this section!

From L to R in picture: Associate Tax Tribunal Judge Leslie Pitman, Bruce Ely, Chief Tax Tribunal Judge Jeff Patterson, Hank Hutchinson of Capell Howard PC, Former State Rep. and Birmingham Attorney Paul DeMarco (Primary Bill Sponsor), Retired Chief Judge Bill Thompson (the first Chief Judge of the Tribunal), Hon. Will Sellers, Associate Justice of the Supreme Court of Alabama, Hon. Christy Edwards, Judge on the Alabama Court of Civil Appeals (and first Associate Judge of the Tribunal), and Jimmy Long

Alabama Tax Tribunal Celebrates 10th Anniversary

This past summer, the ASB Tax Section met and commemorated the 10th anniversary of passage of the Alabama Taxpayer Bill of Rights, the "TBOR." The TBOR was the culmination of a decade-long effort led by was sponsored by (pre-) Justice Will Sellers, Bruce Ely, and Hank Hutchinson. The bill was carried in the Alabama House of Representatives by then-Rep. Paul Demarco, all of whom were eventually recognized for their efforts by receiving the President's Award.

Wilson Named Loretta Collins Argrett Fellow

Wilson

Carneil Wilson, an associate at Dentons Sirote, has been selected as a 2024-2027 Loretta Collins Argrett Fellow by the American Bar Association Section of Taxation. This prestigious fellowship recognizes individuals from historically underrepresented backgrounds and aims to foster diversity and inclusion within the tax profession. Wilson's selection underscores her commitment to the field and her potential to become a future leader in tax law. ▲

MEMORIALS

Charles Bruce Adams
Dothan
Died: July 23, 2024
Admitted: Sept. 26, 1986

Robert Edward Boone, Jr.
Birmingham
Died: July 15, 2024
Admitted: Sept. 8, 1965

Carol Anne Gibbs Braswell
Orange Beach
Died: June 21, 2024
Admitted: Sept. 29, 1995

Earl Ladon Dansby
Hope Hull
Died: Sept. 4, 2024
Admitted: May 1, 1985

Jesse Price Evans, III
Birmingham
Died: Oct. 2, 2024
Admitted: Sept. 28, 1979

Matthew Brian Ferry
Scottsboro
Died: Sept. 10, 2024
Admitted: Dec. 13, 2021

Jon Allen Green
Mobile
Died: Aug. 12, 2024
Admitted: Apr. 23, 1982

Harry L. Hopkins
Fairhope
Died: Sept. 24, 2024
Admitted: Sept. 24, 1973

Albert Oscar Howard, Jr.
Seale
Died: Aug. 19, 2024
Admitted: May 2, 1988

Ishmael Jaffree
Mobile
Died: July 30, 2024
Admitted: Apr. 18, 1977

Frank Steele Jones
Birmingham
Died: Sept. 18, 2024
Admitted: April 29, 1991

Thomas Ralston Long, IV
Uniontown
Died: May 9, 2024
Admitted: Apr. 28, 1995

William Breckenridge Long
Jasper
Died: Aug. 22, 2024
Admitted: Sept. 4, 1969

James Warren May
Magnolia Springs
Died: Sept. 5 2024
Admitted: March 29, 1965

Augustine Meaher, III
Mobile
Died: Sept. 8, 2024
Admitted: Aug. 27, 1963

John Stanley Morgan
Gadsden
Died: July 9, 2024
Admitted: Sept. 28, 1989

Sherry Denise Phillips
Athens
Died: Sept. 20, 2024
Admitted: Sept. 27, 2013

Morris Lloyd Roebuck
Mobile
Died: Oct. 9, 2024
Admitted: Sept. 24, 1973

Marshall Ernest Smith, III
Birmingham
Died: Aug. 22, 2024
Admitted: Nov. 15, 1974

Everette Tedford Taylor
Prattville
Died: Aug. 9, 2024
Admitted: Sept. 7, 1966

Lloyd Earl Taylor
Robertsdale
Died: Oct. 1, 2024
Admitted: Sept. 16, 1968

WE SHED *LIGHT* ON CONFUSING ISSUES

BOB COOPER
MEDIATOR

TIM DONAHUE
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Roman A. Shaul
roman.shaul@alabar.org

Is there a conflict because I have a family member at the opposing firm?

QUESTION:

I have a niche litigation practice in Alabama and there are only two attorneys in my firm. My wife is a transactional lawyer and is employed by a large firm here in Alabama. She does not handle any litigation matters. I also have a paralegal whose husband is a litigator for another firm. A question has arisen concerning a possible conflict of interest I may have in handling cases where my wife's firm is representing the opposing party or my paralegal's husband's firm is representing the opposing party.

My question is:

Is it a conflict for me to handle cases opposite my wife's firm and my paralegal's husband's firm?

ANSWER:

It does not constitute a conflict of interest for you to handle a case where your wife's firm or your paralegal's husband's firm is representing the opposing party, as long as neither spouse is involved in the case. For conflict purposes, we do not typically distinguish between lawyers in a firm and their paralegals or staff, but instead, treat them the same. Rule 1.8(i) of the *Alabama Rules of Professional Conduct* prohibits a lawyer related to another lawyer as a parent, child, sibling, or spouse from representing a client in a representation directly adverse to a person represented by the related lawyer. However, as the Comment to this rule indicates, the disqualification is personal and is not imputed to a member or employee of the firm with whom the lawyer is associated. If your paralegal's husband was the lawyer representing a party that was opposed to your client in a matter, that would present a conflict to both sides.

Specifically, Rule 1.8(i) states:

> A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

Although this rule does allow for the possibility that a client may waive a conflict if your paralegal's spouse represented the opposing party, it is the experience of the Office of General Counsel that litigation cases are rarely the types of matters where this provision should be invoked.

Lastly, although Rule 1.8(i) provides that a conflict may not exist *per se*, it does not mean that one may not actually exist. Rule 1.7(b), *Alabama Rules of Professional Conduct*, advises that, "[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or a third person, or by the lawyer's own interests…" Therefore, if you believe that your participation in a case may affect your wife's employment, compensation or standing in her firm, you may nevertheless have a conflict that would prevent you from accepting a case.

Furthermore, based on the concerns articulated in Rule 1.7(b), it is the opinion of the Office of General Counsel that even though you may not have a conflict, you should disclose to the client that your wife (or paralegal's husband) is employed by the firm representing the opposing party.

If you have any questions about this opinion or another matter, please feel free to contact us at the Alabama State Bar, or via email at *ethics@alabar.org* ▲

Sherrie Phillips
sherrie.phillips@chlaw.com

Sherrie L. Phillips practices in the areas of creditors' rights, bankruptcy, foreclosure, restructures/workouts and commercial litigation. Sherrie is admitted to practice in all courts in Alabama and is a member of the Alabama State Bar, Montgomery County Bar Association, and Birmingham Bar Association. She has serves two terms as chair of the Women's Section of the Alabama State Bar.

J. Pratt Austin-Trucks

A seventh-generation resident of Elmore County, J. Pratt Austin-Trucks practices with the Law Offices of Jacqueline E. Austin in Wetumpka. She is a 2002 graduate of The University of Alabama School of Law. Her practice mainly focuses on family law, and she routinely serves as a guardian *ad litem* in domestic relations cases. She is currently the bar commissioner for the 19th Judicial Circuit and a member of the Women's Section Board.

Celebrating 25 Years of Supporting Women in the Alabama State Bar

The Women's Section of the Alabama State Bar celebrated its 25th anniversary in 2024. To commemorate this important milestone, the section sponsored and enjoyed events throughout the year. As with every significant anniversary, it is vital to remember the roads traveled and plan for the road ahead.

The Beginning

In the early 1990s, a group of female attorneys throughout the state began discussing the need for a forum that would provide a platform for women attorneys in Alabama to network, support each other, provide relevant continuing education opportunities, and promote the success of their peers in Alabama. These women approached then-Alabama State Bar President Spud Seale and requested that a task force be formed to determine the viability of moving forward with a semi-permanent or permanent platform for women attorneys practicing in Alabama. Being forward-thinking, he agreed, and a Task Force on Women in the Profession was created to study how the state bar could better serve its female members.

By the mid-nineties, the task force had become a Standing Committee on Women in the Profession. The committee was tasked with identifying obstacles facing women attorneys in Alabama. To that end, a survey was conducted in 1996 of approximately 400 practicing female attorneys in Alabama to collect data and to determine what these women identified as obstacles or hindrances in their legal careers. In addition to completing this task, the committee provided mentoring opportunities for younger female attorneys, offered speaking opportunities for women attorneys, co-sponsored seminars with ABICLE for women lawyers, and presented networking opportunities for female attorneys.

Due to the hard work and research conducted by this group of women, as well as the success of the committee's programs, the state bar consented to the formation of the Women's Section in 1999. Celia Collins from Johnstone Adams in Mobile, the first chair of the Standing Committee on Women in the Profession, stated that the task force and the work of the committee "generated so much enthusiasm and interest from Alabama State Bar members that it evolved into a permanent section which is thriving 25 years later." The mission of the Women's Section is to provide "opportunities to network and communicate, to enhance women attorneys' level of bar participation, and to promote the advancement of women in the legal profession."[1]

Women's Section Board: Front Row (L-R): Pratt Austin-Trucks, Christy Crow, Jennifer Bates, Catherine Moncus. Back Row (L-R): Felicia Long, Caroline Strawbridge, Elizabeth Smithart, Karen Laneaux, Sherrie Phillips, Allison Skinner, Celia Collins, Mary Margaret Bailey

The Milestones

The Women's Section fully embraced this mission in an active manner by engaging female attorneys throughout the state of Alabama. In addition to numerous networking opportunities, CLEs, and informal meetings, the Women's Section developed multiple initiatives to acknowledge and support women lawyers in Alabama.

Maud McLure Kelly Award

In 2002, the Women's Section created the Maud McLure Kelly Award, named in honor of the first woman admitted to practice in Alabama. This award is presented annually to "a female attorney who has made a lasting impact on the legal profession and has been a pioneer and leader within the State."[2] The inaugural recipient of this award in 2002 was Justice Janie L. Shores.[3] The impressive list of recipients of this award includes Alice Lee (2003), Nina Miglionico (2004), Phyliss Nesbitt (2005), Mahala Dickerson (2006), Dean Camille Cook (2007), Jane Dishuck (2008), Louise Ingram Turner (2008), Frankie Fields Smith (2009), Sara Dominick Clark (2010), Carol Jean Smith (2011), Marjorie Fine Knowles (2012), Mary Lee Stapp (2013), Ernestine Sapp (2014), Judge Caryl Privett (2015), Judge Sharon Yates (2016), Martha Jane Patton (2017), Alyce Spruell (2018), Merceria Ludgood (2019), Augusta Dowd (2020), Jacqueline Austin (2021), Judge Carole Smitherman (2022), Celia Collins (2023) and Judge Inge Johnson (2024).[4]

To honor these deserving women, a Maud McLure Kelly Luncheon is held every year at the Alabama State Bar's Annual Meeting and is hosted by the Women's Section. The Maud McLure Kelly Luncheon has become an established event at the Annual Meeting and a much-anticipated gathering for many lawyers, their families, and friends.

Janie L. Shores Scholarship

In 2008, the Janie L. Shores Scholarship was established by the Women's Section. This scholarship is awarded annually to a deserving female student or students studying law in the state of Alabama. The Women's Section named this scholarship the Justice Janie L. Shores Scholarship to recognize and honor Justice Shores' achievements as a trailblazer for female attorneys in Alabama. Among other accolades and achievements, Justice Shores was the first full-time female law professor in Alabama (Cumberland School of Law) and was the first woman elected to serve on the Supreme Court of Alabama.

Mary Margaret Bailey of Frazer Greene Upchurch and Baker in Mobile was the chair of the Women's Section in 2008. She states that "establishing a scholarship program was my main goal as chair of the Women's Section…and it has been so fulfilling to see this program come to fruition. I've enjoyed participating in the scholarship selection committee each year as this gives me an opportunity to see firsthand how our section is impacting the lives of future women lawyers. I'm proud of what we've accomplished."

(Continued from page 353)

The Janie L Shores Scholarship is administered through the Alabama Law Foundation and is funded through donations, as well as the net proceeds from the Women's Section's annual silent auction. The silent auction is held in conjunction with the Alabama State Bar's annual meeting and occurs simultaneously with the president's reception on Friday evening during the conference. The silent auction, which is wholly operated by members of the Women's Section Board, has become a fixture at the annual meeting and is an integral part of funding the Janie L. Shores Scholarship.

Since the inception of the Janie L. Shores Scholarship Fund in 2008, the Women's Section has awarded more than $90,000 in scholarships to deserving female law students in Alabama. In its inaugural year of 2008, the amount awarded to the scholarship recipient was $2,000. This year, 2024, the Women's Section awarded a total of $8,000 in scholarships to two recipients. The recipients were recognized at the Maud McLure Kelly Luncheon at the Alabama State Bar annual meeting.

Susan Bevill Livingston Leadership Award

The Susan Bevill Livingston Leadership Award was established by the Women's Section in 2016. Susan Livingston was a partner at Balch & Bingham in Birmingham. She was an active participant in the bar, holding leadership roles in the Alabama Law School Foundation, the Alabama Law Institute, and the Birmingham Bar Association's Women's Section. She also served as the chair of her firm's diversity committee.[5] Ms. Livingston was also extremely involved in her community and worked diligently with organizations such as the YWCA of Central Alabama, the Girl Scouts of North-Central Alabama, and the Legal Aid Society of Birmingham.[6] Ms. Livingston exemplified what it means to be a servant leader.

When Ms. Livingston passed away unexpectedly, the Women's Section worked with attorneys at Balch & Bingham to establish the Susan Bevill Livingston Leadership Award. It is awarded annually to a female licensed to practice law in the State of Alabama. A recipient of the Livingston Leadership Award must have practiced law for a minimum of 10 cumulative years, be a member in good standing with the Alabama State Bar, demonstrate a sustained level of leadership throughout her career, and show a continual commitment to mentorship, as well as sustained dedication to service in the community in which she practices.[7] Judge Tammy Montgomery of Sumter County was the first recipient of this award in 2016. Award recipients include Maibeth Porter (2017), Kathy Miller (2018), Allison Skinner (2019), Christy Crow (2020), Lenora Pate (2021), Former Chief Justice Sue Bell Cobb (2022), Leslie R. Barineau (2023) and Kimberly Bessiere Martin (2024). Each recipient is honored with a reception hosted by the Women's Section in the city or area of the state in which she practices.

50-year members: (L-R) Sydney Smith of Alexander City, Carolyn Featheringill of Birmingham, Jacqueline Austin of Wetumpka (also 2021 Maud McLure Kelly Award recipient)

Celebration of the Past, Present, and Future

To commemorate its silver anniversary, the Women's Section planned several events throughout the year to celebrate this important milestone. A two-day schedule of events was held in Montgomery in January. Members sponsored a service project at Jones School of Law where a panel of female attorneys from across the state discussed the different career paths open to attorneys. On Jan. 17, the section hosted its annual Judicial Brunch honoring the female judges in Alabama. This year, the section not only honored female judges, but also invited those female attorneys who have practiced law for 50 years or more and are still members of the state bar. Currently, there are 19 female attorneys who have practiced law for 50 or more years. The Judicial and 50+ Year Member Brunch was held at the

Gala: (L-R) ASB President Tom Perry, former Bar Commissioner John Smyth, and ASB Past President Christy Crow

Gala: (L-R) Ginger Poynter, Justice Sarah Stewart, Celia Collins, Mary Margaret Bailey, Judge Brandy Hambright, former Chief Justice Sue Bell Cobb

Renaissance Hotel in Montgomery. Celia Collins read a brief biography of all nineteen female attorneys practicing for 50-plus years. Those present were recognized by the attendees and were also gifted a special brooch from the section. Thereafter, the attendees enjoyed a wonderful meal, as well as the opportunity to fellowship with old friends and meet new ones.

Later that evening, section members and guests enjoyed an anniversary gala at Central restaurant in downtown Montgomery. The evening was filled with fun, good food, conversation, and some serious dance moves by the attendees. Female attorneys were sporting various styles of footwear with their cocktail attire, from stilettos to sneakers with a little "bling." Alabama State Bar Executive Director Terri Lovell was a "bright light" at the event with her sneakers that featured flashing lights. Among the attendees were Alabama State Bar President Brannon Buck, incoming President Tom Perry, Past President Christy Crow, former Chief Justice Sue Bell Cobb, Justice Sarah Stewart, Justice Greg Cook, and Justice Will Sellers. The event was a huge success and allowed section members and their guests to enjoy a break to spend time with new and old friends!

In addition to the fun and fellowship, the section sponsored multiple seminars and CLEs at the end of 2023 and throughout 2024. These seminars included "Coffee and Court: A Panel Discussion Featuring Women Attorney Coffee Shop Owners" and "Financial Wellness for Attorneys: Growing Your Financial Assets and Protecting Them," which was co-sponsored with the Women's Section of the Montgomery County Bar Association and the Alabama Securities Commission. The Women's Section continues its commitment to the education of and networking opportunities for its members and the bar at large by hosting CLEs such as these.

At only 25 years, the Women's Section is still young and continues to grow as women increase their numbers in the profession. To date, the section is more than 750 members strong and continues to grow every year! As the section looks behind and ahead, its commitment to support, foster, mentor, and educate its members and future female attorneys remains strong and serves as the basis for all section activities. The section also remains committed to recognizing those women who have been pioneers and who have forged a path for female attorneys in Alabama over the last 126 years since Maud McLure Kelly joined the state bar in 1908.[8] ▲

Endnotes

1. *https://www.alabar.org/about/sections/womens/*
2. *https://www.alabar.org/about/awards-recognitions/*
3. Id.
4. Id.
5. "Law School Selects Susan Bevill Livingston as 2016 Profile In Service", *https://www.law.ua.edu/blog/news/9878,* October 20, 2016.
6. Id.
7. *https://www.alabar.org/about/awards-recognitions/*
8. *https://encyclopediaofalabama.org/article/maud-mclure- kelly/*

Marc A. Starrett

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

J. Thomas Richie

J. Thomas Richie is a partner at Bradley Arant Boult Cummings LLP, where he co-chairs the class action team. He litigates procedurally-complex and high-stakes matters in Alabama and across the country. Richie is a 2007 summa cum laude graduate of the Cumberland School of Law and former law clerk to the Hon. R. David Proctor of the United States District Court for the Northern District of Alabama.

Recent Civil Decisions – J. Thomas Richie

From the Supreme Court of Alabama

Mootness

***Ex parte Martin*, No. SC-2023-0902 (Ala. Aug. 23, 2024)**: The Supreme Court of Alabama dismissed a mandamus petition as moot. The petitioner sought mandamus relief of the trial court's denial of her motion to quash a writ of restitution or possession of a house in which the petitioner was living, but she did not move to stay the underlying litigation. The trial court later granted a motion to allow the house to be sold, and it was sold. With the house sold, the Court found it no longer could grant relief as to restitution or possession and that all other issues could be raised by appeal.

Services of Process

***Hoffman v. City of Birmingham Retirement & Relief Sys.*, No. SC-2023-0803 (Ala. Aug. 23, 2024)**: While the Alabama Supreme Court affirmed the trial court's determination that the plaintiff had failed to properly serve a copy of his petition for mandamus on the defendants—first by certified mail and then by Sheriff's Deputy as process server—the Court reversed the trial court's decision to dismiss the plaintiff's writ of mandamus with prejudice. It found that the trial court exceeded its discretion in dismissing with prejudice when the record evidence established that the plaintiff had diligently attempted to perfect service on the defendants.

Probate Jurisdiction

***Skidmore v. Skidmore*, No. SC-2024-0048 (Ala. Aug. 23, 2024)**: While the Supreme Court of Alabama determined that it had appellate jurisdiction over the case, it found that the probate court's judgment on appeal was void because it exceeded the probate court's statutory jurisdiction. The Court reasoned that, while probate courts can determine title to real property under Alabama Code § 12-13-1(b)(5), probate courts do not have statutory authority to decide disputes over real property. Instead of deciding the dispute, the Supreme Court of Alabama opined that the probate court, upon learning of adverse claims of title to the property, should have declined to exercise jurisdiction over a petition to sell the subject property. The Court reversed the circuit court's decision not to set aside the probate court's judgment denying the motion brought by the appellant under Rule 60(b)(4).

Civil Procedure

***A&W Contractors, LLC v. Colbert*, No. SC-2024-0037 (Ala. Sept. 13, 2024):** Homeowners sued a construction company that refused to honor a builder's warranty. The company appealed a judgment as a matter of law entered against it on the breach-of-contract claim and a jury awarding damages on the homeowner's fraudulent-misrepresentation and fraudulent-suppression claims. The Supreme Court of Alabama reversed the trial court's entry of judgment as a matter of law, finding that the trial court erroneously based its ruling on the defendant's failure to offer any witness testimony. Specifically, the Court found that although the homeowners presented prima facie evidence to support their breach-of-contract claim, the defendant elicited sufficient testimony on cross-examination to contradict that evidence and create a conflict warranting jury consideration, even without offering its own witness testimony. However, the Court affirmed the jury's allocation of damages on the fraudulent-misrepresentation and fraudulent-suppression claims finding that the defendant did not preserve its objections for appeal.

Default Judgment

***Mobile Investments, LLC, v. Corporate Pharmacy Servs., Inc.*, No. SC-2024-0115 (Ala. Sept. 13, 2024):** After the trial court entered a default judgment as a sanction under Rule 37(b)(2)(C) for the defendant's repeated failure to comply with multiple discovery requests and orders regarding a corporate representative's deposition, the defendants appealed. Although the current counsel for defendants argued that the former counsel did not inform them of the discovery requests and orders, the Supreme Court of Alabama made clear that any knowledge the former counsel had was imputed to the new counsel, regardless of whether the new counsel had actual knowledge or notice of the discovery orders. Further, the Court found the defendants' argument that their corporate representative was not aware of the consequences for failing to sit for a deposition to be unavailing. Thus, the Court found that the defendants' failure to comply with the trial court's discovery orders was willful and affirmed the trial court's decision to enter a default judgment under Rule 37(b)(2)(C).

Summary Judgment

***Powers v. Chadwell Homes, LLC*, No. SC-2024-0269 (Ala. Sept. 20, 2024):** The plaintiffs purchased a residence from the defendant in exchange for a promissory note and granted the defendant a mortgage on the property to secure payment of the promissory note. After the plaintiffs defaulted on their payment, the parties engaged in multiple lawsuits over the rightful owner of the land. In March 2023, the trial court granted summary judgment in favor of the defendant, declaring that the defendant had a right to the possession of the property, directing the plaintiffs to vacate the property, and authorizing the local sheriff's office to remove the plaintiffs from the property, if necessary. The Supreme Court of Alabama affirmed the trial court's entry of summary judgment, finding that the undisputed evidence showed that the defendant held legal title to the property and that the plaintiffs unlawfully withheld possession of the property. In addition, the Supreme Court of Alabama awarded sanctions in the amount of $7,070.54 to the defendant for having to defend a frivolous appeal.

***Radiance Capital Receivables Twelve, LLC v. Bondy's Ford, Inc.*, No. SC-2023-0683 (Ala. Aug. 23, 2024)**: The Supreme Court of Alabama reversed summary judgment relating to a garnishment, finding that disputes of material facts existed. The Court clarified that the "appropriate inquiry under the garnishment statutes" is whether a business owes money to the debtor, not whether the debtor was an employee of the business. The Court then determined that the summary judgment evidence showed questions of fact as to whether the debtor had misused the corporate form to hide payments received from the business to the debtor.

Appellate Jurisdiction

***Brewer v. Fairchild*, No. SC-2024-0302 (Ala. Sept. 20, 2024):** After entering summary judgment in an ejectment action, the trial court ordered the plaintiff to surrender possession of the property and certified the judgment as final under Rule 54(b), but reserved jurisdiction to award additional damages for any waste that may be discovered on the property. The Supreme Court of Alabama held that the trial court's reservation of jurisdiction to award additional damages rendered the order nonfinal and, as a result, dismissed the appeal. Further, because the plaintiff's attorney filed a frivolous appeal, made unsubstantiated representations in the appellate brief, and knowingly misrepresented multiple facts to the Court, the Court entered sanctions in an amount equal to double the costs of the appeal to be paid by the plaintiff's counsel.

***Universal Dev. Corp. v. Dellinger*, No. SC-2023-0645 (Ala. Sept. 20, 2024):** After a real estate development project ended in foreclosure, the property owner, the development group, and the licensed general contractor for the project each appealed the verdicts entered against them and in favor of the project's supervisor in three consolidated cases. The Supreme Court of Alabama dismissed the development group as a party to the appeal, making clear that although the cases were consolidated for the purposes of trial, none of the judgments that were appealed consisted of verdicts adverse to the development group. Similarly, the Court dismissed the property owner's appeals because (1) two of the judgments that he appealed did not consist of any rulings adverse to him and (2) the one judgment that did consist of an adverse ruling was untimely because it was filed more than forty-two days after the date of final judgment.

(Continued from page 357)

However, because the project supervisor's breach claim against the contractor was based on an underlying contract that was void (the project supervisor did not have a general contractor's license as required by law), the Court reversed the trial court's entry of judgment on that claim.

***Davis v. American Pride Properties, LLC*, No. SC-2023-0419 (Ala. Aug. 30, 2024):** The Supreme Court of Alabama dismissed an ejectment claim as improper under Rule 54(b). After entering judgment against the defendant on an ejection claim, the trial court retained jurisdiction over the plaintiff's demand for damages for the use and detention of the property at issue but certified its judgment as final under Rule 54(b). The defendant sought to set aside the trial court's judgment against him for ejectment. Because the demand for damages was still pending before the trial court, the Supreme Court held that the trial court's judgment on the ejectment claim was not a "final judgment" contemplated under Rule 54(b). Therefore, it lacked jurisdiction to hear the appeal.

***Myers v. Blevins*, No. SC-2023-0545 (Ala. Aug. 23, 2024)**: A defendant sought to set aside a $2,000,000 default judgment against him, but the Supreme Court of Alabama found that the defendant's appeal of the default was untimely because it was filed over five months after the judgment was entered. The defendant's Rule 60(b) was never ruled upon and remained pending, so the Court dismissed the appeal insofar as it related to that motion. It also found that the appeal of the motion sealing the underlying case was both untimely and moot, as the trial court had allowed the defendant access to the records already. The Court next denied the plaintiff's mandamus petition seeking to overturn the trial court's orders quashing the plaintiff's writs of execution. The trial court's orders being challenged lasted only during the pendency of the direct appeal. Given that the Court dismissed the direct appeal, the orders expired according to their own terms and there was no further relief requested by the plaintiff.

Preliminary Injunction

***Red Mountain Diagnostics, LLC, v. Black*, No. SC-2024-0128 (Ala. Sept. 20, 2024):** The plaintiffs and the defendants started a joint venture with an agreement to evenly divide any revenue after expenses. When the joint venture ended, the defendants obtained a preliminary injunction requiring the plaintiffs to deposit all funds derived from the joint venture with the circuit court clerk to ensure that they were not disposed of before the resolution of the case. The plaintiff appealed and, shortly thereafter, requested a stay of the injunction pending the outcome of the appeal. The Supreme Court of Alabama held that the trial court erred in entering the preliminary injunction because (1) the defendants could not establish that they would suffer imminent, irreparable harm without an injunction, and (2) in the event the defendants did suffer any harm, it could be remedied by a judgment awarding damages. Specifically, the Court focused on the fact that the defendants did not submit any evidence indicating the amount of funds generated by the joint venture, nor the amount of funds to which they claimed to be entitled. Therefore, the Court reversed the trial court's entry of the preliminary injunction and denied the request to stay as moot.

Subject-Matter Jurisdiction

***Ex parte Board of Trustees of The University of Alabama et al.*, No. SC-2024-0210 (Ala. Aug. 30, 2024):** Defendants petitioned the Supreme Court of Alabama for a writ of mandamus directing the trial court to dismiss the action for lack of subject-matter jurisdiction. Because the only named defendant in the original complaint was a state institution entitled to absolute immunity under Article I, § 14 of the Alabama Constitution, the Court found that the trial court lacked subject-matter jurisdiction over the matter. Further, although the original complaint also asserted claims against numerous fictitiously named defendants, because the original complaint did not invoke the jurisdiction of the trial court, it could not be amended to otherwise add or substitute additional-named defendants that may. Therefore, the Court granted the petition for a writ of mandamus and directed the trial court to dismiss the action.

Wrongful Death

***Leader v. Pablo*, No. SC-2022-0736 (Ala. Aug. 30, 2024):** Two defendants sought to set aside a $3,000,000 wrongful death verdict against them based on a violation of Alabama Code § 25-5-11(b). Because one defendant's judgment was formally discharged in bankruptcy before the appeals process was completed, the Supreme Court of Alabama dismissed the appeal as to him *ex mero motu*. In addition, the Court found that the plaintiff failed to establish the second element of his claim under § 25-5-11(b) because he did not present evidence demonstrating that the remaining defendant willfully and intentionally removed a safety device by

(1) failing to electronically interlock a security gate to a limit switch or (2) instructing employees to disregard available safety devices. Therefore, the Court reversed the trial court's judgment and remanded it for further proceedings.

Real Party in Interest

***Ex parte Baldwin Cty. Sewer Serv., LLC*, No. SC-2023-0723 (Ala. Sept. 6, 2024):** After the trial court entered an order denying summary judgment for the defendant on the issue of whether the plaintiffs were successors in interest to a party to a private contract, the defendant petitioned the Supreme Court of Alabama for a writ of mandamus. Although the defendant asserted that the real-party-in-interest issue implicated the trial court's subject-matter jurisdiction, the Supreme Court of Alabama made clear that the resolution of the real-party-in-interest question is a factual determination and is appropriate for resolution by the trial court in a final judgment. As a result, the Supreme Court of Alabama held that the denial of the defendant's summary judgment motion did not involve a question of the trial court's authority over the action, and therefore was not appropriate for mandamus review. Instead, it stated that the appropriate remedy for review was an appeal from the trial court's final judgment. It denied the petition for mandamus review.

Standard of Care

***Mottern v. Baptist Health Sys., Inc.*, No. SC-2024-0148 (Ala. Sept. 6, 2024);** The trial court dismissed the plaintiff's claim under the Alabama Extended Manufacturer's Liability Doctrine and his breach of implied warranty claim under the Uniform Commercial Code on the basis that neither was supported by substantial evidence of a breach of the applicable standard of care for medical providers and his negligence and wantonness claims on the basis that neither met the pleading standard. The plaintiff appealed, arguing that under the Alabama Medical Liability Act ("AMLA"), he is entitled to pursue alternate theories of liability in addition to traditional medical malpractice claims. In a plurality opinion, the Court made clear that, although a plaintiff can assert various theories of liability against medical care providers, each theory remains subject to the AMLA, including its standard-of-care provisions. In addition, the Court held that the trial court erred in dismissing the plaintiff's negligence and wantonness claims, specifically noting that the defendant agreed that the claims were erroneously dismissed. Therefore, the Court reversed the trial court's judgment and remanded the matter for further proceedings. Though seven justices voted to reverse, no opinion garnered more than three votes.

Personal Jurisdiction

***Sawyer v. Cooper Tire & Rubber Co.*, No. SC-2023-0603 (Ala. Sept. 6, 2024):** A plaintiff sued a tire manufacturer after her son was killed in a car accident stemming from a defective tire purchased in Alabama. The trial court held that it lacked personal jurisdiction over the suit because (1) the plaintiff failed to show that the tire manufacturer had sold, distributed, and marketed the defective tire model in Alabama three years prior to the underlying accident; and (2) the plaintiff and her son were not Alabama residents. The Supreme Court of Alabama reversed, relying on *Ford Motor Company v. Montana Eighth Judicial District Court*, 592 U.S. 351 (2021) to establish that even if there is no direct causal link between a plaintiff's claims and an out-of-state defendant's contacts with the forum state, personal jurisdiction exists so long as the plaintiff's injuries "arise out of or relate to" the defendant's forum contacts. The Court found that the tire manufacturer's unrefuted sale, distribution, and advertising in Alabama of the particular tire model at issue "related" to the plaintiff's claims, establishing personal jurisdiction. In addition, the Court held that the trial court's focus on the timing of the tire manufacturer's contacts with Alabama before the accident and the plaintiff's place of residency were not dispositive of jurisdiction.

From the Alabama Court of Civil Appeals

Statute of Limitations

***Ala. Home Builders Self Insurers Fund, Inc. v. Tumlin*, No. CL-2023-0901 (Ala. Civ. App. Sept. 20, 2024):** After her spouse died in a work-related accident in March 2019, the deceased's wife and the deceased's employer entered into a settlement agreement for worker's compensation benefits which was paid by the employer's insurer. When the deceased's wife later filed a wrongful death action against two other businesses, the insurer filed a motion to intervene for reimbursement but never joined the action. In September 2022, after the deceased's wife and two other parties in the wrongful death action entered into a settlement agreement, the insurer moved to re-open the case. The trial court denied the request, on the basis that the insurer was pursuing a subrogation claim time-barred by a two-year statute of limitations that began running on the date of the employee's death. On appeal, the Alabama Court of Appeals disagreed, stating that because the insurer only paid death benefits, but not future medical or vocational benefits, its claim was not one for subrogation, but instead for reimbursement under Alabama Code § 25-5-11(a). Further, because the statute of limitations for the insurer's claim of reimbursement did not begin running until September 2022 when the estate received the settlement proceeds stemming from the wrongful death action, the claim was not time-barred. Therefore, the Alabama Court of Appeals reversed and remanded the matter.

Workers' Compensation

***Zackery v. Huntley*, No. CL-2024-0127 (Ala. Civ. App. Sept. 20, 2024):** An employee sued a member of the limited liability company that employed her in district court, alleging

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that she was not adequately compensated for the hours that she had worked or for an injury she had sustained on the job. After the district court initially, and the circuit court on appeal, entered judgment in favor of the employee, the member appealed to the Alabama Court Civil of Appeals. Because any claims under the Workers' Compensation Act are required to be brought in circuit court regardless of the amount sought, the Alabama Court Civil of Appeals determined that the district court had lacked jurisdiction to adjudicate the employee's claim, and thus, that portion of the judgment was void. Further, because a limited liability company is a legal entity distinct from its members, the Court held that the member could not be held personally liable to the employee on her claims, and the trial courts had erred in entering a judgment against him. Therefore, the Court dismissed the appeal to the extent it arose from the Workers' Compensation Act and reversed the appeal to the extent it rested on the employee's claims for unpaid wages.

Post-Judgment Motions

***McLaurin v. Birmingham*, No. CL-2024-0041 (Ala. Civ. App. Sept. 6, 2024)**: Because it determined that a plaintiff's post-judgment motion had arguable merit, the Alabama Court of Civil Appeals held that the trial court erred by not holding a hearing on it and allowing the motion to be denied by operation of law. The case involved a police officer who was involved in a car collision. The officer existed his vehicle after the wreck but collapsed on the ground a distance away. The officer's vehicle began to roll towards the officer. The plaintiff, who was a driver not involved in the accident, observed the officer's car rolling towards the officer and intentionally collided with the officer's vehicle to stop the motion towards the officer. The plaintiff sued the city and the officer for negligence. The circuit court granted summary judgment for the city and officer, and the plaintiff filed a post-judgment motion challenging the trial court's conclusion that he was contributorily negligent, that the plaintiff's actions were a superseding cause of his injuries, that the defendants did not owe a duty, and the doctrine of sudden emergency did not apply. The Alabama Court of Civil Appeals found that factual disputes prevented the trial court from resolving those issues at summary judgment, giving arguable merit to the plaintiff's post-judgment motion and therefore making the failure to hold a hearing on the plaintiff's post-judgment motion not harmless error.

Summary Judgment

***Ray v. Ray*, No. CL-2023-0830 (Ala. Civ. App. Sept. 6, 2024)**: Because the trial court considered documents from another case––documents that were not referred to in the ex-wife's petition and were not central to it––in deciding to dismiss the case, the Court of Civil Appeals determined that the motion was properly deemed decided under Rule 56 instead of Rule 12 and the ex-wife should have been given a chance to respond as provided in Rule 56. It reversed the judgment and remanded.

Mandate Rule

***Ex parte Ala. Medical Cannabis Comm'n*, No. CL-2024-0532 (Ala. Civ. App. Sept. 12, 2024)**: The Alabama Court of Civil Appeals had previously found that the circuit court lacked jurisdiction in one action, referred to as the "master case," and directed the circuit court to dismiss. There were parallel consolidated cases pending in the same Court. After the appellate ruling, the circuit court indicated that certain orders from the master case would continue to remain effective in that case and in the consolidated case. On mandamus back to the court of civil appeals, the appellate court determined that the circuit court's attempt to keep orders in the master case effective violated the mandate rule from the prior appellate proceedings, but that the circuit court could enter orders in the consolidated case that were identical to the orders in the master case without violating the mandate rule. The issue of the enforceability of those orders was not decided.

Default Judgment

***Glenn v. Wetumpka*, No. CL-2024-0107 (Ala. Civ. App. Aug. 16, 2024)**: The Alabama Court of Civil Appeals held that a defendant using a Rule 60(b)(4) to set aside a default judgment of unlawful detainer against him entered in district court had 14 days to appeal the denial of that motion to the circuit court. It stated that the denial of a Rule 60(b) motion seeking relief from a final judgment is itself a final judgment that will independently support an appeal.

Workers' Compensation

***Victoryland v. Arnold*, No. CL-2024-0217 (Ala. Civ. App. Aug. 16, 2024)**: The Alabama Court of Civil Appeals affirmed an amended judgment that denied an employer's petition to be relieved of liability for future medical expenses for a work-related back injury sustained by an

employee. The court reviewed the medical and other evidence to determine that the trial court did not err in determining that a traffic accident occurring 12 years after the work-related injury was not an intervening or superseding cause under the successive compensable injury test. Even though the employee suffered a traumatic event that aggravated her work-related injury, the court found that the traumatic event acted upon the weakened condition of the employee's back to increase her pay and cause other symptoms. It also declined to apply judicial estoppel against the employee. The employee had sued third parties because of her traffic accident claiming that the accident had aggravated her lower back injury. After the accident, the employer continued to authorize treatment for the employee and received a portion of the employee's settlement in the third-party action to satisfy its subrogation interest in the third-party action.

Immunity

***Ex Parte Alabama Medical Cannabis Comm'n*, No. CL-2024-0463 (Ala. Civ. Appl. Aug. 23, 2024)**: The Commission sought a writ of mandamus seeking to direct the circuit court to dissolve a TRO and dismiss an action brought against the Commission and its members. The Alabama Court of Civil Appeals declined to order the TRO dissolved because the TRO had not been entered on the docket of the case in which the Commission sought mandamus review. The court then issued the writ directing the circuit court to dismiss the Commission from the action but denied the writ to the extent that the Commission sought to have the circuit court dismiss the members of the Commission—reasoning that the Commission is separate from its members and may assert only its own right to a dismissal.

Termination of Parental Rights

***D.M. v. Dale Cty. D.H.R.*, No. CL-2024-0301 (Ala. Civ. App. Sept. 20, 2024)**: Because the juvenile court did not determine that termination of parental rights would serve the best interests of the children by likely providing them permanency through adoption, the Alabama Court of Civil Appeals found that the termination of parental rights was improper and reversed. The court strictly requires that, before terminating the parental rights of the parents of children with special needs, courts must consider whether the children will likely achieve permanency through adoption.

Child Support

***Sampson v. Coachman*, No. CL-2023-0856 (Ala. Civ. App. Sept. 20, 2024)**: The Alabama Court of Civil Appeals reversed the award of child support because the award departed from the Rule 32 guidelines without a written finding that the application of the guidelines in the case would

(Continued from page 361)

be unjust or inequitable. It directed the parties to submit an income statement on Form CS-41 and required the trial court to calculate child support obligations using Form CS-42 before determining whether deviations from the amounts on that form were warranted.

From the Eleventh Circuit Court of Appeals

Title VII

***McCreight v. AuburnBank*, No. 22-12577 (11th Cir. Sept. 19, 2024)**: The court affirmed summary judgment on a "sex-plus" discrimination claim and age discrimination claims. It distinguished between a sex-plus claim and a mixed motive theory, noting that sex-plus is a type of claim and mixed motive is a method of proving causation. The Eleventh Circuit held that the plaintiff bringing a sex-plus claim did not rely on mixed motive causation and failed to meet her summary judgment burden. Next, it clarified that the "convincing mosaic" standard is not different than the normal evidentiary standard that applies at summary judgment generally. Under that standard, the court affirmed the finding that the plaintiffs lacked sufficient evidence of age discrimination to proceed past summary judgment.

First Amendment

***Jarrard v. Sheriff of Polk County*, No. 23-10332 (11th Cir. Sept. 16, 2024)**: The district court determined at summary judgment that two jail officials were entitled to qualified immunity on a volunteer minister's First Amendment retaliation claims. In so doing, the district court applied the *Pickering* standard that relates to employee speech regulations. The Eleventh Circuit reversed, holding that the district court should have applied a forum-based analysis instead because the minister's work in the jail did not fit the rationale underpinning *Pickering*. The Eleventh Circuit also determined that the jail's policies gave it "unbridled discretion" instead of meaningful substantive guidance or a timeline in which to respond, thereby violating the unbridled discretion doctrine. It then found that the jail officials were not entitled to qualified immunity on the summary judgment record in light of cases forbidding viewpoint discrimination and unbridled discretion.

Federal Railroad Safety Act

***Hitt v. CSX Trans., Inc.*, No. 23-11899 (11th Cir. Sept. 9, 2024)**: A railroad employee engaged in protective activity when he refused to work during a lightning storm and by refusing to operate at speeds he considered unsafe, and he suffered an adverse action when he was later terminated. Nevertheless, the Eleventh Circuit affirmed the district court's grant of summary judgment against him on his FRSA claim because it agreed with the district court that the plaintiff did not have sufficient evidence that his protected activities contributed to his termination. The plaintiff was fired at least four months after his protected activity, and that time period was too long to be satisfy the "temporal proximity" causation standard. In any event, the court held that the undisputed reason for the plaintiff's termination was his failing a safety test, not his engagement in protected activity.

Arbitration

***Steines v. Westgate Palace, L.L.C.*, No. 22-14211 (11th Cir. Sept. 5, 2024)**: The plaintiffs, one of whom was an active-duty soldier, brought a putative class action against a company that sells timeshare interests arising from the plaintiffs' purchase of such interests. The sales documents included an arbitration clause. The Eleventh Circuit agreed with the district on three issues. First, it held that the question of whether to apply the Military Lending Act (which contains an exception to the Federal Arbitration Act) is always a question for the district court, not an arbitrator to decide. Second, it held that the plain text of the Military Lending Act made any agreement to arbitrate unlawful, including an agreement to delegate that question to an arbitrator. Third, it determined that timeshares are more like transient lodgings than dwellings, so the timeshare transaction did not fall into the Military Lending Act's exception for residential mortgages. Because the Eleventh Circuit agreed with the district court that the FAA did not apply, it determined that the interlocutory appeal arising from the district court's decision did not properly invoke the Eleventh Circuit's jurisdiction, so it dismissed the appeal.

ERISA

***Pizzaro v. The Home Depot, Inc.*, No. 22-13643 (11th Cir. Aug. 8, 2024)**: The Eleventh Circuit held that plaintiffs bringing failure to investigate or failure to monitor claims under ERISA bear the burden of proving loss causation and ERISA

fiduciaries do not have the burden to prove that losses in their plans were caused by something other than their alleged failures to investigate and evaluate. Instead, plaintiffs must prove that a hypothetical prudent fiduciary with the information that a proper evaluation would have yielded would not have made the choices that led to the losses. This standard calls for objective prudence. The Eleventh Circuit found that the district court identified and applied the correct legal standard to the summary judgment record, so it affirmed summary judgment for the fiduciaries.

Recent Criminal Decisions – Marc Starrett

From the Supreme Court of Alabama

Split Sentence Act

***Ex parte Elston*, No. SC-2023-0427 (Ala. Sept. 20, 2024):** As a matter of first impression, the Supreme Court upheld the circuit court's imposition of consecutive split sentences for separate offenses under the Split Sentence Act, Ala. Code § 15-18-8. It noted that the Alabama Legislature has reenacted and amended the Act several times without having altered it to prohibit consecutive split sentences or otherwise indicated disapproval of this construction.

From the Alabama Court of Criminal Appeals

Ala. R. Crim. P. 32; Amendments; Expert Funding

***Newton v. State*, No. CR-2023-0953 (Ala. Crim. App. Sept. 27, 2024):** The circuit court did not err in denying the Ala. R. Crim. P. 32 petitioner's request to amend his petition a second time. He filed the original petition in 2012 and the first amended petition in 2023. Based on the length of time already elapsed and the fact that the circuit court had already considered the first amended petition, it was no abuse of discretion to refuse to consider a second amendment. The circuit court also did not abuse its discretion in refusing to provide funds for experts, for there is no obligation to provide investigative resources in postconviction proceedings.

Ineffective Assistance of Counsel

***Scheuing v. State*, No. CR-2022-0684 (Ala. Crim. App. Sept. 27, 2024):** The circuit court correctly dismissed the Ala. R. Crim. P. 32 petitioner's numerous ineffective assistance of counsel claims asserted pursuant to *Strickland v. Washington,* 466 U.S. 668 (1984). Among those claims, the Court of Criminal Appeals found no ineffectiveness in trial counsel's failure to challenge the State's peremptory strikes on the ground that they were discriminatory against women, where, on appeal, it had found no error in the State's use of its strikes. Trial counsel was also not ineffective during the capital murder trial's penalty phase by informing the jury regarding the nonviolent offenses for which the petitioner was on parole, because openness and candor may be a reasonable strategic choice.

Expert Testimony; *Brady*; Ineffective Assistance of Counsel

***Randolph v. State*, No. CR-2024-0091 (Ala. Crim. App. Aug. 30, 2024):** The circuit court did not err in admitting expert testimony from a Department of Human Resources investigator regarding signs of the victim's sexual abuse. It also correctly denied the defendant's claim that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing that an investigating officer had pending felony charges against him. The evidence was not material and would not have been admissible for impeachment. The circuit court also properly rejected the defendant's ineffective assistance of trial counsel claims based on a failure to call character witnesses, lack of preparation for trial, and failure to call the defendant to testify on his own behalf.

Drive-By Shooting Resolution; *Miranda*

***Watts v. State*, No. CR-2023-0820 (Ala. Crim. App. Sept. 27, 2024):** The Court of Criminal Appeals rejected the defendant's claim that he should not have been convicted of capital murder under Ala. Code § 13A-5-40(18). The Alabama Legislature passed a joint resolution fourteen years after § 13A-5-40(18)'s enactment stating that its intent was to prohibit gang-related "drive-by shootings" or murders in which the vehicle is an instrumentality in the offense. However, this resolution did not alter the statute's plain language that made the defendant's shooting of his victim inside an automobile a capital offense. The circuit court also did not err in considering the totality of the circumstances to determine that the defendant implicitly waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). When asked if he wanted to speak with detectives without an attorney, he ambiguously responded, "No or nah," but then stated that he had come to talk to them. There was also no indication that he did not understand his *Miranda* rights.

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Proof of Sexual Abuse Victim's Age; Discrepancy in Sentencing

***T.J.F. v. State*, No. CR-2023-0886 (Ala. Crim. App. Sept. 27, 2024):** The defendant, convicted of sexual abuse of a child under the age of twelve, unsuccessfully challenged the State's proof of the victim's age on appeal. The Court of Criminal Appeals acknowledged that no evidence unequivocally established the victim's age, but the jury could have concluded beyond a reasonable doubt that she was nearing but had not yet reached, twelve years of age. The case was remanded for a new sentencing hearing due to a discrepancy between the circuit court's pronouncement of its sentence and its written sentencing order.

Juvenile Capital Murder Resentencing

***Miller v. State*, No. CR-2022-1224 (Ala. Crim. App. Aug. 23, 2024):** The circuit court did not abuse its discretion in resentencing the juvenile capital murder defendant to imprisonment for life without parole under *Miller v. Alabama*, 567 U.S. 460 (2012). Further, it was not required to assign mitigating weight favoring life imprisonment while considering the fourteen sentencing factors provided by *Ex parte Henderson*, 144 So. 3d 1262 (Ala. 2013) for review of *Miller* resentencing motions.

Probation Revocation; Preservation

***Mulkey v. State*, No. CR-2022-1234 (Ala. Crim. App. Aug. 23, 2024):** The failure to conduct a probation revocation hearing when the probationer did not waive the hearing may be challenged on appeal regardless of whether the issue was raised in the circuit court. However, a circuit court's alleged failure to strictly comply with the Alabama Rules of Criminal Procedure in determining whether a valid waiver occurred is subject to the preservation rule.

Search and Seizure; Marijuana, Hemp

***Bain v. State*, No. CR-2024-0321 (Ala. Crim. App. Sept. 27, 2024):** Regardless of the legalization of hemp containing a similar odor, the odor of marijuana may serve as probable cause to support a warrantless search. The fact that the odor may also indicate the presence of a legal substance does not negate the probability that an illegal substance may be found.

Double Jeopardy

***R.E.F. v. State*, No. CR-2023-0399, 2024 WL 3909027 (Ala. Crim. App. Aug. 23, 2024):** The defendant's two sexual abuse convictions did not violate the Double Jeopardy Clause because the convictions were based on different acts of sexual abuse.

Expungement

***Ex parte C.M.*, No. CR-2023-0434 (Ala. Crim. App. Aug. 23, 2024):** The defendant's assault convictions were not subject to expungement under Ala. Code § 15-27-2. The statute permits those who have been "charged with," but not convicted of an offense, to have "records relating to the charge" expunged when it is proven that the defendant is a human trafficking victim. The convictions were also not eligible under the statute's provision allowing expungement of convictions for three specific offenses (promotion of prostitution, domestic violence, and production of obscene material) where the defendant is a human trafficking victim.

Double Jeopardy

***Amerson v. State*, No. CR-2023-0475(Ala. Crim. App. Aug. 23, 2024):** Arising from the same drunken, deadly collision with a motorcycle rider, the defendant's reckless murder and manslaughter convictions constituted double jeopardy, and his reckless murder and driving under the influence (DUI) convictions also constituted double jeopardy. The case was remanded for the circuit court to vacate the manslaughter and DUI convictions. The Court of Criminal Appeals also directed the circuit court to vacate its 180-day sentence on the defendant's failure to yield conviction, holding that, under Ala. Code § 32-5A-8, the offense was eligible to a sentence of imprisonment "for only 'not more than 10 days' to 'not more than three months.'"

New Trial; Denial by Operation of Law

***J.D.M. v. State*, No. CR-2023-0462 (Ala. Crim. App. Aug. 23, 2024):** The circuit court erred in permitting the defendant's motion for a new trial to be denied by operation of law under Ala. R. Crim. P. 24.4, because the defendant supported the motion with evidence that was not presented at trial and the State did not respond to the motion. Without an affirmative statement by the circuit court, its denial of the motion was not afforded a presumption of correctness. ▲

ABOUT MEMBERS, AMONG FIRMS

Please email announcements to *melissa.warnke@alabar.org.*

About Members, Among Firms *highlights ASB members on the move—whether you're taking on a new role within your current company, organization, or firm; being hired at a new firm or organization; or starting up your own practice.*

About Members

Jack B. Hood has retired after 33 years as an Assistant U.S. Attorney in the Civil Divisions of the U.S. Attorney Offices in the Middle District of Georgia and the Northern District of Alabama.

Among Firms

Alabama Law welcomes three new faculty members: **Tobie Smith, Cassandra Adams** and **Beth Crutchfield**.

Beasley Allen announces that **Burton Walker** has joined the firm in its Montgomery office**.**

Bradley Arant Boult Cummings announces the addition of **Former Assistant U.S. Attorney Jack Harrington to** Banking & Financial Services and Government Enforcement Teams.

Ellis, Head, Owens and Justice, PC announces the addition of attorney **Brian Kilgore** to the firm's Columbiana office.

Lanier Ford announces that **Richard "Vann" Buchanan, Jr.** has joined as an associate.

Lloyd, Gray, Whitehead & Monroe, PC's Birmingham office welcomes **Ben Smith, Erin Sullivan, Maggie Johnston Waldrop,** and **Tomi Adediji**.

Maynard Nexsen announces that Shareholder **William Bloom** will now have an office in both the Montgomery and Birmingham locations.

McBride Richardson, PC is pleased to announce that **Andrea Gullion** has joined the firm as a shareholder and the firm name has changed to **McBride Richardson & Gullion, PC**

McPhail Sanchez, LLC celebrated the firm's 30th anniversary**.**

Southern New Hampshire University announces the hire of **Roslyn Crews** as an associate general counsel for labor and employment. Crews is also admitted to practice in New Hampshire.

Smith, Spires, Peddy, Hamilton & Coleman, PC announces that **Madeline A. Marable** has joined the firm as an associate.

Starnes Davis Florie LLP announces the addition of associates **Kalen Early** and **Angel Sims** to its team

Stone Crosby, PC is pleased to announce that **Caroline E. Pope** recently joined the firm as an associate.

The Office of the District Attorney for the 15th Judicial Circuit is pleased to welcome **Natalie Harp** to the office as a deputy district attorney.

Thornton, Carpenter, O'Brien, Lawrence, Sims & Kulovitz announces the addition of **Rylee Caye Hiett.**

Traditions Law Group, LLC of Tuscaloosa announces that **Janie L. Mangieri** has joined the firm. ▲

DISCIPLINARY NOTICES

- Reinstatement
- Surrenders of License
- Disbarments
- Suspensions

Reinstatement:

- Elk Grove, CA, attorney **LeMarcus Malone** was reinstated to the practice of law in Alabama and to inclusion on the official rosters of attorneys in Alabama, effective July 17, 2024, by order of the Supreme Court of Alabama issued July 3, 2024. The Supreme Court's order was based upon the decision of the Disciplinary Board of the Alabama State Bar, issued May 8, 2024, granting Malone's Rule 28 Petition after hearing the same, with Malone being required to meet certain conditions as outlined in the Board's order. [Rule 28 Pet. No. 2023-1552]

Surrenders of License:

- On July 9, 2024, the Supreme Court of Alabama issued an order accepting the voluntary surrender of **John David Norris**' license to practice law in the state of Alabama, with an effective date of May 30, 2024. [ASB 2024-469 and 2024-650]
- On May 31, 2024, the Supreme Court of Alabama issued an order accepting the voluntary surrender of **Larry Joel Collins'** license to practice law in the State of Alabama, with an effective date of May 1, 2024. [ASB2024-336]

Disbarments:

- Montgomery attorney **Brian Daniel Mann** was disbarred from the practice of law in the state of Alabama by order of the Supreme Court of Alabama, effective July 3, 2024. The Supreme Court entered its order based on the Disciplinary Board's order accepting Mann's Consent to Disbarment, which was based upon formal charges alleging Mann mishandled and/or misappropriated client and third-party funds. [Rule 23(a), Pet. No. 2024-692, ASB No. 2022-859, ASB No. 2022-1056, Rule 27(c), Pet. No. 2023-192, CSP Nos. 2023-169, 2023-181, 2023-190, 2023-209, 2023-228, 2023-240, 2023-281, 2023-286, 2023-320, 2023-324, 2023-437, 2023-652, 2023-666, 2023-895, 2023-1202, 2023-1495, 2024-693 and 2024-809]

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- Louisiana attorney **Robert C. Jenkins, Jr.** was disbarred from the practice of law in the state of Alabama by order of the Supreme Court of Alabama, effective July 3, 2024. The Supreme Court entered its order based on the Disciplinary Board's order accepting Jenkins's Consent to Disbarment. While admitted *pro hac vice* to practice law in Alabama, Jenkins failed to inform the courts and the Alabama State Bar that he had been suspended from the practice of law in his home licensure state of Louisiana. [ASB No. 2023-294 and Rule 23, Pet. 2024-294]

Suspensions:

- Birmingham attorney, **Henry Lee Penick**, was suspended for a period of one-hundred eighty (180) days from the practice of law in the State of Alabama by the Supreme Court of Alabama, effective July 3, 2024. The Supreme Court entered its order based upon the Report and Order entered Nov. 17, 20232023, Panel I of the Disciplinary Board of the Alabama State Bar, suspending Penick and finding him guilty of violating Rules 1.1 [Competence], 1.3 [Diligence], 1.4 Communication], 8.1 [Bar Admission and Disciplinary Matters], and 8.4 [Misconduct], Ala. R. Prof. C. in ASB No. 2021-833. In this matter, Penick was hired by the adult child of a decedent to probate the decedent's last will and testament that had been prepared by Penick. The will was admitted to probate on February 20, 2018, with the adult child appointed as personal representative. On April 10, 2018, another heir petitioned to remove the matter to Circuit Court. After this removal, Penick failed to communicate with the personal representative and failed to complete the tasks he agreed to regarding closing the estate, forcing the personal representative to hire a different attorney to close the estate. Penick also failed to respond to the Local Grievance Committee investigating the complaint. In ASB No. 2021-991, Penick was found guilty of violating Rules 1.1 [Competence] and 1.3 [Diligence], Ala. R. Prof. C. In this matter, Penick filed a complaint against the City of Dothan and two of its police officers alleging civil rights violations, negligence, and malicious prosecution. After a Motion to Dismiss was filed by defendants on June 7, 2021, the Court entered an order for the plaintiff to show

cause by June 21, 2021. Penick's sister passed away on June 8, 2021, and Penick requested a one-week continuance to attend her funeral on June 21, 2021. Penick failed to contact opposing counsel after the Court ordered him to do so to determine whether the motion was opposed. When Penick did not file a response to the Motion to Dismiss within the extension requested, the Court granted an additional extension until July 21, 2021, then entered an order requiring Plaintiff to show cause by August 16, 2021. Penick did not respond to either, filing a response to the Motion to Dismiss on August 16, 2021. Penick said the lack of response was due to a severe automobile accident he was involved in and he was hospitalized from June 17, 2021 to July 15, 2021, which was inconsistent with the dates of the sister's funeral. The Court ordered Penick to provide proof of the accident and dates of the funeral, and to show cause why he should not be held in contempt of court for repeated misstatements to the Court and failure to follow Court orders. Penick failed to file anything in response. On September 23, 2021, the Court dismissed the case without prejudice. [ASB Nos. 2021-833 and 2021-991]

- Fairhope attorney **Asheton Wells Sawyer** was summarily suspended pursuant to Rule 20a, Ala. R. Disc. P., from the practice of law in the State of Alabama by the Supreme Court of Alabama, effective July 15, 2024. The Supreme Court entered its order based upon the Disciplinary Commission's order that Sawyer be summarily suspended for failing to respond to formal requests concerning a disciplinary matter. [Rule 20A, Pet. 2024-744] ▲

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g. Copies not Distributed (See Instructions to Publishers #4 (page #3))			346	346
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i. Percent Paid (15c. Divided by 15f. Times 100) ▶			100.00%	100.00%

* if you are claiming electronic copies, go to line 16 on page 3. If you are not claiming electronic copies, skip to line 17 on page 3.

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If present, check box →		x
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17. Publication of Statement of Ownership
x Publication required. Will be printed in the **11/30/2024** issue of this publication. ☐ Publication not required

18. Signature and Title of Editor, Publisher, Business Manager, or Owner	Title	Date
Melissa Warnke	Managing Editor	10/18/2024

I certify that all information furnished on this form is true and complete. I understand that anyone who furnishes false or misleading information on this form or who omits material or information requested on the form may be subject to criminal sanctions (including fines and imprisonment) and/or civil sanctions (including civil penalties)

PS Form **3526**, July 2014

[REWRITE]

James Bradford

Sonnet 181: Shall I Pursue This Case Another Day?

~

Shall I pursue this case another day?
When I said "yes," I was not temperate,
And now must I prepare for trial in May,
With April as discovery's cut-off date.
My injured client's dense, she never shines;
With passing time her recollection's dimmed.
As each offer from the other side declines,
I cannot settle with my fee untrimmed;
So, prospects for a resolution fade.
With expert costs advanced, the bank I ow'st
A couple of grand, or could it be a shade
Above? Lord, how my investment grow'st!
Oh that your visage never did I see,
Nor offered legal services to thee!

[ORIGINAL]

William Shakespeare

Sonnet #181: I Shall I Compare Thee To a Summer's Day?

~

Shall I compare thee to a summer's day?
Thou art more lovely and more temperate.
Rough winds do shake the darling buds of May,
And summer's lease hath all too short a date,
Sometime too hot the eye of heaven shines,
And often is his gold complexion dimmed;
And every fair from fair sometimes declines,
By chance, or nature's changing course, untrimmed;
But thy eternal summer shall not fade,
Nor lose possession of that fair thou ow'st,
Nor shall Death brag thou wand' rest in his shade,
When in eternal lines to time thou grow'st.
So long as men can breathe or eyes can see,
So long lives this, and this gives life to thee.

Famous Poems Rewritten For and About the Legal Profession

For our readers who may have missed the September/October issue, "Poetic Justice" features famous poems rewritten with a legal and lighthearted theme by Balch & Bingham attorney James Bradford. Copies of the book, with all 40-plus "rewritten" poems, are available for purchase ($11.99 per copy) from the publisher at *https://localbook nook.com/product/poetic-justice/*, with all profits going to the Alabama Lawyer Assistance Program (ALAP) Foundation.

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