THE ALABAMA LAWYER

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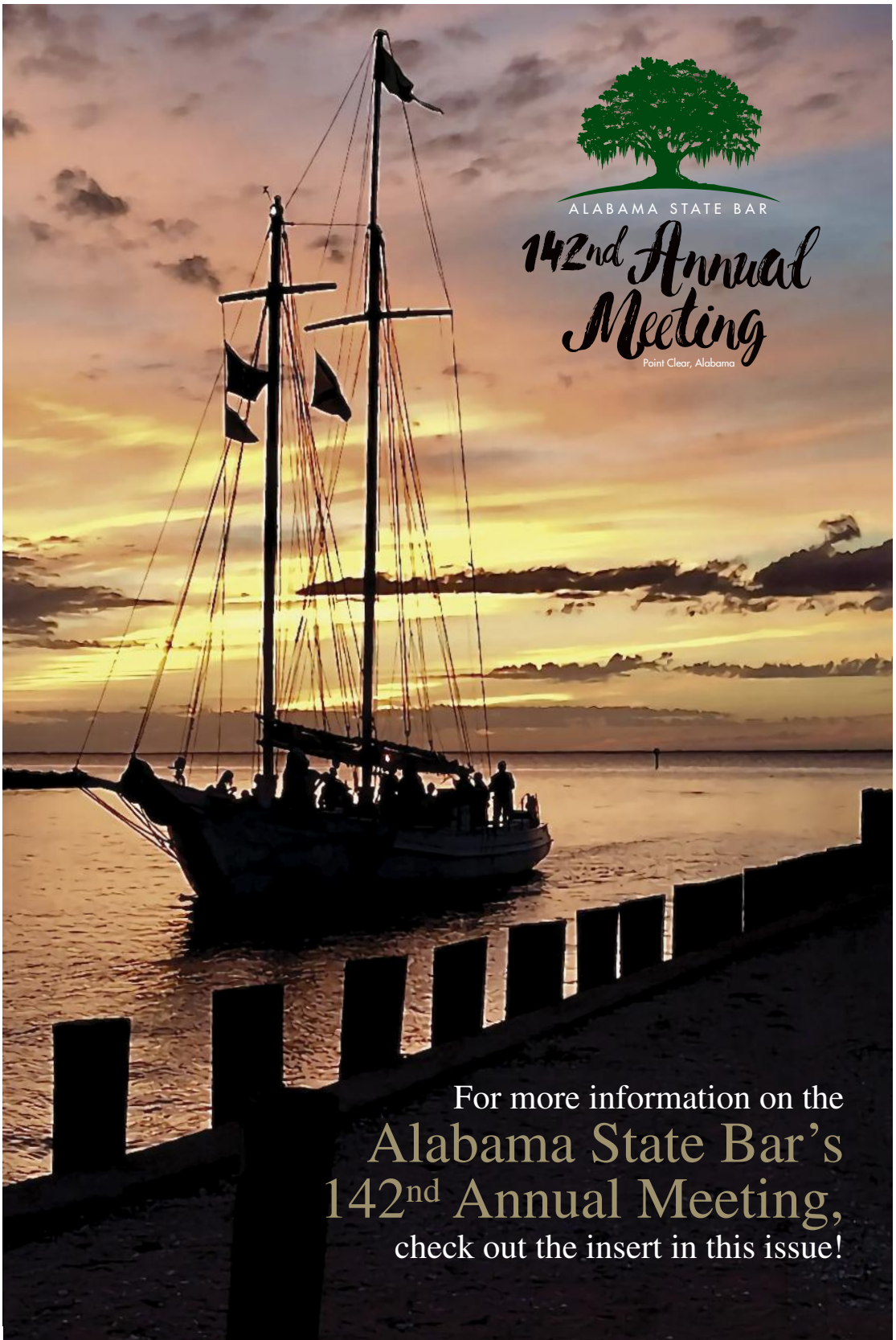

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142nd Annual Meeting

Point Clear, Alabama

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THE ALABAMA LAWYER

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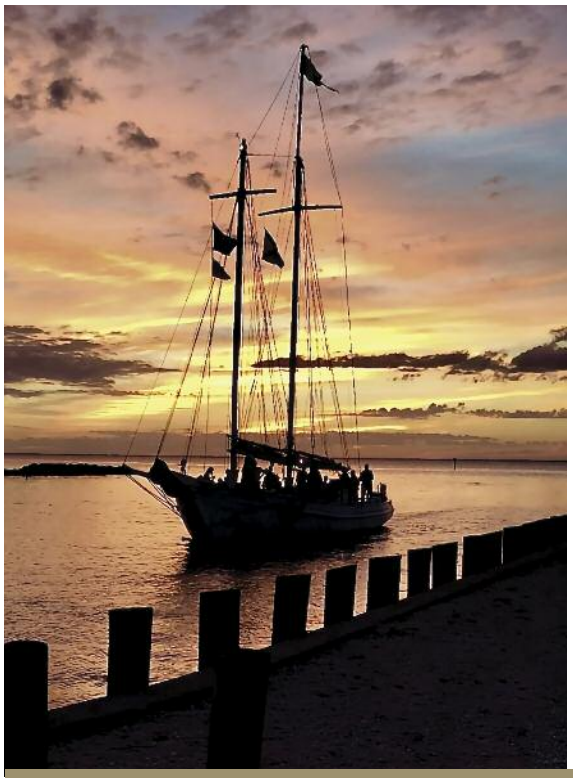

On The Cover

Sailboat at sunset on beautiful Mobile Bay near the site of this year's ASB 142nd Annual Meeting in Point Clear

–Photo courtesy of Louis Mapp

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Pro Bono and Legal Aid–Making a Difference

Every day, Alabama lawyers provide one-on-one pro bono legal counsel and representation to those in need. These are the same lawyers who give freely to coach their children's sports teams, serve with charitable organizations and are active with their churches. Much of the charitable and pro bono work done by Alabama lawyers is informal and unrecognized. It is clear that Alabama lawyers regularly give back to their communities.

It is my experience that most Alabama lawyers provide pro bono work in private and without any recognition. There are several avenues, though, for providing pro bono services through formal programs where participating lawyers can receive recognition for their work. Three local volunteer lawyer programs (VLPs)–Birmingham, Madison County and Montgomery County–provide services in their counties, and the South Alabama VLP provides services in Mobile, Baldwin, Clarke and Washington counties.

Through the leadership of program director Linda Lund, the Alabama State Bar Volunteer Lawyers Program covers the state's remaining 60 counties and also plays an important advocacy role. In 2018, more than 4,000 Alabama lawyers participated in these five programs, which provided assistance in 4,830 cases. All of these programs provide excellent legal pro bono service to those in need. In addition, there are organizations like the Alabama Law Foundation, the Alabama Civil Justice Foundation, Alabama Appleseed, YWCA

Central Alabama Family Law Center, the Hispanic Interest Coalition of Alabama and Alabama Access to Justice Commission which assist by supporting those who are in need of free legal services.

There is also a federally-funded organization, Legal Services Alabama (LSA), which serves low-income Alabamians by providing free civil legal aid and assistance through eight regional offices: Anniston/Gadsden, Birmingham, Dothan, Huntsville, Mobile, Montgomery, Selma and Tuscaloosa. LSA also gives grants to the local VLPs. However, the need for pro bono legal services in Alabama is far greater than LSA and the VLPs can provide on their own.

In addition to doing pro bono work, Alabama lawyers can help address the need for legal aid by supporting these organizations. All of them serve a vital leadership role in the effort to improve and expand the provision of legal services for low-income Alabamians.

The work done by Alabama lawyers, the local VLPs, the Alabama State Bar VLP, the Alabama Law Foundation, the Alabama Civil Justice Foundation, Alabama Appleseed, YWCA Central Alabama Family Law Center, the Hispanic Interest Coalition of Alabama and Alabama Access to Justice Commission is important and something in which we should all take pride. Each of us play a part in this–we also give through the interest earned on our trust accounts and through the contribution which is included as part of our annual state bar dues payments. Many of us contribute more, in the form of pro bono service to our clients and through our financial donations to organizations that provide free legal services.

The motto of the Alabama State Bar is "Lawyers Render Service." Thank you to Alabama lawyers for your pro bono efforts and for your service to your clients, your local bar and the Alabama State Bar.

Through the pro bono work provided by Alabama lawyers and our support of the many organizations that provide free help to our needy fellow citizens, we can know we are living that motto–we are rendering service.

We encourage all Alabama lawyers to do what you can to provide more pro bono services and to support these organizations. ▲

EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum
phillip.mccallum@alabar.org

Photo courtesy of Louis Mapp

A Grand Time in Point Clear– Annual Meeting 2019

Make plans to join us July 17-20 for three days of informative CLE programming, networking opportunities and family fun on Mobile Bay! While we enjoy all of our annual meeting locations, the Marriott Grand Hotel Golf Resort & Spa in Point Clear holds a special place in our hearts. Not only do we get to stay in Alabama, but we get to do so in one of its most beautiful locations. If you haven't visited the Grand Hotel since its renovation, you're in for a surprise. It was spectacular before, but its most recent upgrade is a balance of old world charm and modern finishes. The pool area has gotten a major upgrade and now features 11 cabanas, a splash pad, putting greens and lawn games. The Grand has also added a new farm-to-table restaurant, Southern Roots. I recommend the bone-in ribeye and the bread pudding with whiskey sauce!

There is so much to do in the neighboring town of Fairhope, home to President Sam Irby, but we will also have a wide variety of activities at the resort. In addition to enjoying the newly renovated resort, get ready to relax, reconnect and enjoy time with family and fellow lawyers.

On Wednesday night, join us for the Opening Night Reception and Family Dinner featuring music by Outside the Inside, including covers of the Beatles, pop, classic rock and everything in between. On Thursday night, stop by alumni receptions hosted by the University of Alabama School of Law, Birmingham School

of Law and Cumberland School of Law and before sharing dessert with Faulkner University Jones School of Law alumni and friends. On Friday afternoon, the internationally-awarded cheesemaker and CEO of Belle Chevre goat cheese creamery, Tasia Malakasis, will share an assortment of her cheeses. Moving on to Friday night, we will celebrate President Sam Irby and his incredible service as president before the annual Barrels and Planks Mixer, featuring beer from Fairhope Brewery. To finish off the annual meeting, on Saturday morning, we will welcome incoming President Christy Crow with a reception featuring music from a local talent, Sugarcane Jane.

As for CLE programming, we have some of the best speakers in the country on the agenda. We kick off things on Wednesday with well-known consultant and inspirational speaker Dr. Kevin Elko. Dr. Elko speaks on motivation, leadership, goal-setting and more and has worked with seven BCS National Championship football teams, NFL teams and major corporations. On Thursday, we will hear from one of our very own members, Bryan Stevenson. Bryan is the author of the award-winning and *New York Times* bestseller, *Just Mercy*. He has been recognized by *TIME* magazine as one of the world's most influential people and was named to *Fortune's* 2016 and 2017 World's Greatest Leaders list. We are tremendously grateful that Bryan has made time to share his experiences with his fellow Alabama lawyers. On Friday, we will welcome United States Senator Doug Jones who will discuss the historic prosecution of two of the four men responsible for the 1963 bombing of the 16th Street Baptist Church. Then, on Saturday, Alabama Supreme Court Chief Justice Tom Parker will share the state of the judiciary before our keynote speaker, former United States Attorney General Jeff Sessions, wraps up things at the Grand Convocation.

We hope to see you all at the 2019 Annual Meeting, July 17-20. **Registration is now open!**

Photo courtesy of Louis Mapp

THE FINCH INITIATIVE: Reconnecting Law Students to Rural Alabama

By Dean Mark E. Brandon, Circuit Judge Benjamin M. Bowden and Robert B. Thompson

Message from Dean Mark Brandon, Thomas E. McMillan Professor of Law, Hugh F. Culverhouse Jr. School of Law at the University of Alabama

When they think about careers, many law students think about Big Law in a Big City. That's understandable. The practice of law has changed in recent decades, and the material rewards of life in a large firm can be alluring.

For some students, however, the focus on Big Law can be shortsighted. Despite structural changes in the practice of law, there remain fine opportunities in small towns across the state. For the right student, those opportunities can make for a stimulating and fulfilling professional life.

To remind students that it is possible to flourish in small-town practice, and to call their attention to some of the "hidden gems" of rural Alabama, I invested discretionary resources in what we're calling "the Finch Initiative"–so named with the permission of Harper Lee's estate. The Finch Initiative is a program that gives a rising 2L or 3L student an opportunity to spend part of the summer as an intern in the legal community of rural Alabama.

The inspiration for the initiative grew from a conversation with

Judge Ben Bowden of Covington County. So, when we commenced the program in the summer of 2017, it was only fitting that we began in Andalusia, the county seat of Covington County. With Judge Bowden's expert guidance–and the good will of lawyers and public officials in Covington County–the first summer was a great success. It was so successful that we decided to continue there, with Robby Thompson as our second Finch Fellow.

We committed to continue the program in 2019. Resources permitting, we hope to expand the Finch Initiative to other parts of the state as well.

Message from Judge Ben Bowden, 22nd Judicial Circuit, Finch Initiative Mentor

In 1997, I left active duty with the United States Air Force. I was fortunate to be offered a position with the Albritton firm in Andalusia, which I gladly accepted. I had no idea at that time what a blessing it would be.

A few years later, when the newness had worn off and making a living practicing law was more of a job than an adventure, I came across an article lauding the virtues of the "county seat" law practice. The article was very inspiring and lifted my morale such that I still recall the pride I felt in being one of the lawyers it was describing.

It is my hope that the Finch Initiative will acquaint young lawyers with the notion that the practice of law in towns like Andalusia is both noble and rewarding. The contributions such a lawyer makes to his community are up close and personal, as the clients, opposing counsel, jurors and judiciary will be encountered nearly every day in some ordinary walk of life. As Justice Robert H. Jackson stated, the county seat lawyer "was not always popular in [the] community, but was respected. Unpopular minorities and individuals often found in him their only mediator and advocate…He lived well, worked hard, and died poor."

Reflections from 2018 Finch Fellow Robby Thompson, third-year law student, Hugh F. Culverhouse Jr. School Of Law at the University Of Alabama

Excitement, anxiety and southern Alabama heat seeped into my car as I made the drive down to Andalusia this past July. I was unsure of what my seven-week Finch Initiative fellowship would entail, but as I have discovered, my instinctual, anxiety-ridden reaction to "new" is often a precursor to personal growth and fulfillment.

Once I crossed into the Andalusia city limits, I veered off the main highway and pleasantly noted the number of charming homes and historical buildings for such a small town. I was eventually funneled into the downtown square with a city block-sized greenspace at its center. The century-old Beaux-Arts style courthouse sits on the north end of the square, and a movie theater, sandwich shop, congressional office, general store and other small businesses make up the remainder of the square's perimeter. As I parked in front of the courthouse, I was reminded that Mayberry and Maycomb still exist, just outside the margins of most people's mental map.

I was not sure what to expect of myself through the Finch Initiative. In a way, my second-year summer

mimicked the second year of the Initiative–both trying to refine a mission and identity out of a rough outline of limited experience and unbound expectation for the future.

In a phone conversation prior to the fellowship start date, Judge Bowden told me that his goal was to get me to the point where I could sit in on one of his hearings and be able to write an order. I knew that was a lofty goal and would take a great deal of observation and substantive knowledge of the issues on my part, as well as a well-functioning working relationship with Judge Bowden. Along the way, I found that the latter easily and naturally formed because we both benefited from discussion and debriefing after hearings. Judge Bowden would often ask what I thought about the credibility of a witness's testimony, the policy reasons behind a statute or the potential exceptions to the hearsay rule which went unexplored. I felt a bit like a Little Leaguer taking batting practice off of Greg Maddux, but I think my perspective added value to our discussions.

Throughout the summer, Judge Bowden assigned several projects to me spanning a range of purposes and legal issues. Some projects were community-oriented. For example, I initiated the application process and created an action plan to place a historical marker at the courthouse to honor its historical and architectural value to the community.

Other projects involved communicating legal information for community consumption. I designed a flowchart tracking the language of the Protection From Abuse statute. My flowchart was distributed to local law enforcement officers to help them properly identify eligible applicants for protection orders. I also designed an informational handout to distribute to abuse victims that prepares them for the process of obtaining a protection order.

Other projects focused on courthouse administration and functions. I combed through dozens of pages of data and teased out information and patterns regarding filings and dispositions in civil and domestic relations cases so Judge Bowden could more efficiently effectuate his duties. I also updated and reformatted a script used to qualify and empanel grand juries in the county.

I was tasked to research numerous legal issues, arising out of arguments made in motions, briefs or proceedings. Judge Bowden and I have even talked about writing a comparative paper of *To Kill a Mockingbird* and *Strangers on a Bridge*, specifically, focusing on the duties of Atticus Finch and James Donovan to their clients and to society at large after being thrust into the unenviable position of representing socially unrepresentable clients.

When Dean Brandon asked me to do more than show up for work and to treat my time in Andalusia as an ambassadorship on behalf of myself and the law school, I immediately connected his vision of the Finch Initiative to that of the Fulbright Program. I relied heavily on the recent experience of my wife, Mollie, having just completed a Fulbright Teaching Assistant grant in the Czech Republic, to understand the challenges and rewards of representing yourself as an image of something bigger than you are in a community in which you are a stranger. I decided to say "yes" to all invitations that came my way, including to lunches and dinners, community events and even a parade. That mindset led to numerous fruitful professional relationships and many lasting friendships.

Overall, I found the Finch Initiative to be exactly what I hoped. It

placed me in a small-town legal environment, extended my professional network, enhanced my legal writing skills and generated work product to add to my portfolio. I was pleased to find that Alabama Law School alumni were eager to meet and talk with me, and Judge Bowden facilitated those connections.

I left Covington County feeling connected to its people and places in a way that I have felt in only a handful of other places. I am privileged and thankful for my weeks working for Judge Bowden through the Finch Initiative. He shepherded me through a crucial time in my early legal career, and I am sure that I will continue to benefit from his mentorship for many years. I am thankful that a program like the Finch Initiative exists, and I am eager to see it continue to grow over the years.

Second- and third-year law students at the University of Alabama may apply for a Finch Initiative fellowship through the Career Services Office. ▲

Dean Mark E. Brandon

Dean Mark Brandon is the dean and Thomas E. McMillan Professor of Law, Hugh F. Culverhouse Jr. School of Law at the University of Alabama.

Judge Benjamin M. Bowden

Judge Ben Bowden is circuit judge for the 22nd Judicial Circuit. He is a graduate of the University of Alabama School of Law.

Robert B. Thompson

Robby Thompson is a third-year law student at the University of Alabama School of Law. He was the 2018 Finch Fellow.


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UNITED STATES MAGISTRATE JUDGES: Southern District Of Alabama

By Michael E. Upchurch

Cassady

Milling

The Southern District of Alabama has five magistrate judges:

Judge William Cassady; Judge Bert Milling, Jr.; Judge Sonja Bivins; Judge Katherine Nelson; and Judge Bradley Murray. Judge Cassady and Judge Milling are on recall status, and Judge Bivins, Judge Nelson and Judge Murray are the active status full-time magistrate judges.

Beginning in the 1980s, the Article III judges in the Southern District recognized the value of magistrate judges and gave them significant amounts of meaningful responsibility.

In criminal cases, magistrate judges try all misdemeanors, and they manage the criminal dockets in other cases. The magistrate judge is involved from indictment on, including all detention and preliminary hearings and pre-trial conferences. At the pretrial conference, the defense lawyer is expected to inform as to court whether the accused will be entering a plea or going forward with trial. Magistrate judges strike felony juries, if the parties consent, and handle prisoner habeas corpus cases if they are referred from the district judges. The district judges handle motions to suppress.

In civil cases, the magistrate judges are included on the same case assignment wheel as the Article III judges. Once assigned to a

case, if the parties consent, the magistrate judge handles the case from beginning to end.

The magistrate judges routinely handle jury selection in civil and criminal cases, even if they are not assigned to preside over the trial. An extensive juror questionnaire is used in criminal and civil cases. The magistrate judges will occasionally (in complex or high profile cases) approve the use of a separate or supplemental questionnaire. They tend to control voir dire more tightly in criminal cases than in civil cases. In most civil cases, the lawyers are allowed to ask preapproved questions and follow-up questions.

The magistrate judges preside over almost all Social Security cases and handle most civil prisoner litigation on referral from the district judges. Magistrate judges issue recommendations on motions to remand, motions to dismiss and motions for summary judgment to those district judges who refer those motions to them. Injunctive matters usually go to the district judge, but can be referred to a magistrate judge for report and recommendation at the discretion of the district judge.

The Southern District has never had a chief magistrate judge. All the magistrate judges are of equal status and share administrative responsibilities. Southern District magistrate judges are not paired with one or two specific Article III judges.

The Southern District Article III judges treat the magistrate judges as colleagues and independent judicial officers. In the Southern District, unlike many jurisdictions, the Article III judges include the magistrate judges in the interviews of candidates for magistrate judge vacancies and seek the input of the magistrate judges before the Article III judges make their selection.

Judge Sonja Bivins

Judge Bivins attended public schools in Mobile, graduated from Spring Hill College in Mobile in 1985 and received her law degree from the University of Alabama School of Law in 1988. Immediately after law school, Judge Bivins returned home to Mobile and clerked for the late Senior District Judge Virgil Pittman for almost two years.

Bivins

After clerking for Judge Pittman, Judge Bivins worked at an Atlanta firm for 13 years, primarily practicing labor and employment law. One of her partners left the firm to become a magistrate judge. In what Judge Bivins views as divine intervention, a few weeks later, her roommate from law school called with news of a magistrate judge opening in Mobile. At that time, Judge Bivins's parents were growing older and returning home to Mobile to help care for them influenced her decision to apply. Judge Bivins moved back to Mobile to become a magistrate judge in the Southern District in 2004.

Judge Bivins is an active member of the Vernon Crawford Bar in Mobile and the Mobile Bar Association Women's Section, serves as a "Big" for Big Brothers Big Sisters of South Alabama and is a mentor for a fifth grader at a local Mobile school.

Judge Bivins serves on the Federal Judicial Center Education Advisory Committee for Magistrate Judges where she is one of only six magistrate judges selected nationally for this honor. She and her colleagues on the committee help plan and deliver training sessions for new magistrate judges twice a year in the first phase of their orientation, and again later, in Washington, D.C., for the second phase of new magistrate judge education. They also develop and deliver two national workshops for existing magistrate judges.

Judge Bivins says that what might surprise others is that magistrate judges in the Southern District have a heavy workload. She says that the intensity of the work is comparable to that in private practice, although the magistrate judges have flexibility over their schedules not enjoyed by private sector lawyers.

Judge Bivins's practice with regard to oral argument depends on the type of case. She always allows oral argument on Social Security cases. In other civil cases, motions are typically decided based on the briefs unless there are issues which require clarification.

Judge Bivins enjoys being an integral part of a legal system in which disputes are resolved in a civilized manner. She particularly enjoys settlement conferences because they allow litigants to have some input into how their disputes are resolved. Judge Bivins has found that even if the prospects for a resolution look hopeless at first, if she is able to keep the parties talking they are usually able to reach an agreement, either during the settlement conference or shortly thereafter.

Judge Bivins has found that her settlement skills are also useful in resolving discovery disputes, where she

prefers to give the lawyers the chance to control the outcome by compromise.

She sometimes receives telephone calls from lawyers embroiled in a deposition dispute. Her practice is to have her staff gather the specifics of the dispute, and then have the attorneys call back at a designated time, usually within an hour.

Judge Bivins has two law clerks: one position is a career judicial law clerk and the other fills a position that lasts one to two years. The clerks perform legal research and prepare written drafts, primarily on civil matters.

Judge Katherine Nelson

Judge Nelson also grew up in Mobile. She received a B.A. from Auburn University in political science and a master's degree in public administration from the University of South Alabama. She then worked as a bailiff for Presiding Judge Braxton Kittrell in Mobile County Circuit Court.

Nelson

Judge Nelson returned to the University of South Alabama and obtained a degree in secondary education, and then taught at St. Paul's Episcopal School in Mobile from 1987 to 1993.

She enrolled at the University of Alabama School of Law in 1993, and after graduation went to work for Johnstone Adams in Mobile, where she practiced employment law and insurance defense until 2003.

Judge Nelson was a law clerk for then-Magistrate Judge Kristi DuBose (who is now chief judge for the Southern District) from 2003 to 2009. When a magistrate judge position in the Southern District became available, Judge Nelson applied.

Today magistrate judges try civil cases by consent with regularity. Judge Nelson fondly remembers fondly over her first jury trial, and still finds participating in trials especially satisfying. Serving as a trial

judge gives the magistrate judge an understanding of the practical impact of discovery rulings on the trial of the case. For the parties and their counsel, having the same magistrate judge who handled discovery and jury selection try their case also can be appealing, since during discovery the magistrate judge gains an understanding of the facts and issues.

Judge Nelson also enjoys settlement conferences in her civil cases. While she does not know her exact record of success, she says that the majority of cases in which she has held settlement conferences have resolved.

Judge Nelson is open to allowing oral argument. She allows oral argument in all Social Security cases, and she often conducts oral argument on motions to compel and, when needed, during discovery motions in complex matters. Judge Nelson's purpose in scheduling oral argument is to ask the parties' lawyers specific questions on those issues that she has not fully decided and to receive straightforward answers.

Judge Nelson cautions all lawyers to diligently observe court deadlines and requirements. She expects those who come before her to be on time.

What Judge Nelson enjoys most about her job are the people with whom she works. She considers everyone at the federal courthouse family and the work done there a team effort.

Judge Nelson wants lawyers to know that when the dates or time intervals they request in their Rule 16(b) submissions are not accepted by the Court, there is a reason. District judges usually have four civil jury months a year, the magistrate judge is the duty judge every third month and the scheduling deadlines have to fit everything into the trial docket of the district judge handling the case. She suggests that lawyers in civil cases allow time in their proposed scheduling orders between the summary judgment motion and the trial dates, to give the district judge time to review, consider and rule on the motion.

Judge Nelson participated in the last Mobile/Baldwin County Bar Association Battle of the Bay, usually participates in the annual Mobile/Baldwin County Bench & Bar conference and attends the monthly Mobile Bar Association lunches as often as she can.

Judge Bradley Murray

Judge Murray is the Southern District's newest magistrate judge, having been on the job for less than two years.

Murray

He grew up in Mobile, where his father is a bail bondsman, and graduated from college at the University of Virginia in 1990. From 1990 to 1992, he taught 9th grade English and world history and coached freshman basketball at UMS-Wright in Mobile. He graduated from the University of Alabama School of Law in 1995, and went to work at Helmsing Lyons Sims & Leach in Mobile in civil litigation and criminal defense, later formed a small law firm and then went into solo practice.

Judge Murray, like Judge Nelson and Judge Bivins, did not have becoming a judge on his professional to-do list. In fact, the first time Judge Murray considered pursuing a judicial position was March 2017 when he saw a notice seeking applications for a magistrate judge vacancy in the Southern District. Judge Murray thought that he would be a good fit for the position and, 22 years into his career, decided to apply.

Upon taking the bench, Judge Murray was immediately impressed with the commitment of every judge, clerk and support person in the Southern District to getting the job done in the right way. The collegiality and sense of unity among the judges and everyone else at the courthouse is what has pleased Judge Murray the most about his new position. Judge Murray describes the working relationship with the Article III judges as excellent.

Like the other magistrate judges, Judge Murray has two clerks. The clerks do the research, draft opinions, discuss key issues with him, summarize cases and legal authority and have a central role in handling the workload.

Judge Murray is enthusiastic about mediation and considers it one of the most important parts of his job. His scheduling order requires the parties to submit an alternative dispute resolution plan. Settlement conferences, however, must be by agreement. Judge Murray holds a settlement conference in one case or another approximately every other month and the settlement conferences produce a resolution in three out of four cases.

Judge Murray's advice to lawyers practicing in the Southern District with regard to motions and briefs is to quickly get to the point. He warns that discovery schedules and other deadlines are strictly applied in

the Southern District. Deadline extensions should be sought by filing a motion before the deadline.

With motions to compel, Judge Murray requires that lawyers hold a conference with him, usually by telephone, before filing the motion.

What has surprised him most is the volume of prisoner litigation cases and the challenges in managing them.

Judge Murray says that magistrate judges are chosen through a merit procedure involving an extensive written application, a thorough evaluation of the applicants by a committee established by the chief judge and in-depth interviews. The committee then selects five finalists for the district judges to interview, and the district judges have the option of not accepting any of the five. The Southern District judges stay completely out of the Merit Selection Committee's activities, so the committee's judgment on applicants and its selection of the five finalists is independent.

Judge Murray thinks it is particularly beneficial to have lay people as well as lawyers on the Merit Selection Committee. He explains that a magistrate judge might be the only judge many parties involved in federal litigation ever see, and that input from citizens is valuable.

Judge Murray has been on the federal bench for about two years, but he has not felt isolated by virtue of moving out of the community of private practice lawyers and donning a robe. ▲

Michael E. Upchurch

Michael Upchurch graduated in 1983 from the Law School at the University of Virginia and practices with the Mobile firm of Frazer Greene.

Representing Parents in Dependency Cases Involving The Alabama Department of Human Resources

A PRACTICAL APPROACH

By Eric B. Funderburk and Jo Anna Parker Funderburk

The general idea behind this article is a discussion about representing the parent in a case where the Department of Human Resources has removed a child from their home. The topic could be approached any number of ways, but we decided that the best use of this article would be to focus on how to best shepherd your client through the process in order to put them in a position to get their child back, rather than focusing on a particular line of cases or a particular legal issue.[1] In other words, our approach is a practical one.

With that said, this article is written from the perspective of an attorney who has been retained or appointed to represent a parent at the time the child was removed–basically, you're in the case from the outset.

Know Your Local Department of Human Resources

The first piece of advice is to know your local DHR. This is not a "know your enemy" declaration. It is quite the opposite: DHR isn't the enemy–unless and until it becomes necessary to try your case (more about that below).

If your client's child has been removed through a safety plan done without court involvement, then obviously DHR can–and if you handle your case carefully, will–determine that your client's issues have been resolved and the child should be returned back home.

Even when a case has been filed, there are many jurisdictions with crowded dockets and a backlog of cases, all of which promotes the parties finding an amenable resolution to the case so that everything gets resolved without having to go to an adjudicatory hearing.

Accordingly, our suggestion of a peaceful coexistence with DHR ranks ahead of "know your judge" because in many instances, DHR will have an opportunity to return the child before the judge will.

When the department is the adverse party, rule number one for our clients is "make the DHR worker your best friend, do everything you're asked to do and do it with a smile of your face." Ok, so maybe that's three rules, but you get the idea.

Your client is in this situation because DHR saw something in your client's environment or their home that caused DHR concern for your client's child. Obviously, the most expeditious way to resolve the case is to alleviate DHR's concerns.

This is a time in the case where you need to be willing to suppress your adversarial instincts. Whether you are attending the ISP with your client, or you are negotiating with the DHR attorney about the steps that your client will have to complete to get their child back, this stage of the proceedings has little to do with whether your client actually did anything wrong and everything to do with how quickly they can reach the goals that DHR has set for them.

It's important to consider psychological evaluations, substance abuse assessments and any of the various required treatments, or, for that matter, any issue that needs to be resolved through some form of an expert opinion or treatment. You need to know what services are available in your community.

In an effort to address the problems that lead to its involvement, DHR will often refer your client to the providers that DHR uses and help get those services scheduled, but in many cases, that is going to result in a delay. The DHR worker in charge of your case probably has a long list of cases and a short list of resources to allocate to those cases. This isn't willful or intentional on the part of DHR; this is the reality of a budget that demands stretching resources to get a dollar's worth out of a dime (but that's another topic for another day). Consequently, if your client is going to depend on DHR to schedule evaluations and find treatment options, it is just going to take longer to achieve DHR's goals to allow the child to return home.

Consequently, if your client is going to depend on DHR to schedule evaluations and find treatment options, it is just going to take longer to achieve DHR's goals to allow the child to return home.

Sometimes, depending on DHR is inevitable because your client is also short on resources and can't afford to pay for a private evaluation. Look for alternatives in your community. There may be a faith-based program or a grant-funded program that can help provide some of these services at little to no cost to your client. Have your client approach DHR and see what they think about these alternatives. Not only can that speed up things, but it shows that your client is actively working to get their child back.

The bottom line is that your client is going to have goals to reach, and if they are successful in reaching those goals, they will get their child returned. Take the time to learn the landscape and know the pitfalls and the path to success so you can direct your client to the most expedient path to achieving those goals.

It is also helpful to know the local DHR attorney. Most lawyers who represent DHR are tough but fair competitors, and while they strongly advocate for their client, they also recognize and appreciate when a parent is making strong efforts to comply. Every jurisdiction is different, though, and some jurisdictions have several lawyers representing DHR, so it is important to know the lawyer in your case.

Know Your Judge

Former Speaker of the United States House of Representatives Tip O'Neill is credited with coining the phrase "all politics is local." If we may be so bold as to borrow that notion, we suggest that the foundation of a successful juvenile court practice is to understand that all juvenile law is local.

To be clear, we are not suggesting that juvenile court judges ignore the law or make it up as they go along. The most important truth about a juvenile trial is that "matters of dependency are within the sound discretion of the trial court and a trial court's ruling on a dependency action in which evidence is presented ore tenus will not be reversed absent a showing that the ruling was plainly and palpably wrong." *J.S.M. v. P.J.*, 902

So.2d 89, 95 (Ala.Civ.App. 2004). In other words, *what* the judge determines the facts to be is usually what the appellate courts will find the facts to be.

If the foundation of your strategy to defend your client is to convince a judge that his or her notion of what constitutes dependency is just wrong, then you are likely not positioning your client for success.

Those of you who are veterans of the juvenile court circuit already understand this sentiment: juvenile courts are judge-centric. Consequently, an act that may result in a finding of dependency in one jurisdiction may not in another. That means that the second step toward successfully representing a parent in a dependency action is to know what your judge finds important.

As we address below, there is a time and place to fight and try your case, but this section, in conjunction with the notion of working with DHR instead of against them, is based on the idea of trying to put your client in a position to be successful and have their child returned without the need for a trial. Accordingly, if your client has achieved the goals that you know your judge believes are dispositive, then your client is in the strongest position to have DHR agree that the child be returned.

Every dependency case is in its own way unique and the behaviors that led DHR to get involved are never as simple as one thing, i.e. drug use alone. For the sake of this article, though, let's look at the example of a client who is alleged to have a drug or alcohol addiction, and that is why their child was removed. Routinely, we have clients in this position who want to deny and fight the notion that they have a problem. They believe that they are perfectly capable of caring for their child and they don't need help. That is certainly their right, but we believe that we will be doing our client a disservice if we can't answer one simple question: "What does my judge need to hear or see to believe them?" In other words, you have to confront them with the idea that their position may not be realistic.

We all understand that DHR has the burden to prove dependency. One of the authors of this article served as a juvenile court judge for 10 years, and it is fair to say that for almost all (if not all) judges, the scales of justice were always going to tip toward erring on the side of keeping a child safe.

With respect to whether your client's drug use is an impediment, a judge in one jurisdiction may be satisfied if the parent has a certain number of consecutive, negative drug screens, whereas a judge in another jurisdiction may want to see a successfully completed treatment program along with a favorable opinion from a professional counselor. Know your judge and advise your client what their path to success looks like.

Rule 2.1, Alabama Rules of Professional Conduct, provides that "in representing a client, a lawyer shall exercise independent professional judgment and tender candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political factors, that may be relevant to the client's situation." The Comments to Rule 2.1 specifically sets forth that "the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations . . . [f]amily matters can involve problems within the professional competence of psychiatry, clinical psychology, or social work."

So, while our advice to this point may make you feel like more of a life coach than a lawyer, you are fulfilling your professional duty. Know DHR's tendencies, know your juvenile judge's tendencies, advise your client accordingly and hope that they follow your advice.

Be the Advocate

The Preamble to the Alabama Rules of Professional Conduct provides that a lawyer should act as an advisor, as we have discussed above, but this notion is followed with the call to advocacy: "As advocates, a lawyer zealously asserts the client's position under the rules of the adversary system."[2]

In whatever area you practice, there is probably a group of attorneys you deal with on a regular basis, many of whom are probably people you consider friends. There is nothing extraordinary or unusual about working with another attorney amenably to try and resolve a case, and then having to go to battle against them in court when those negotiations fail. Juvenile court is no different.

We've suggested that you maintain a friendly relationship with DHR, but that relationship ends at the courtroom door. Once the case is called, at whatever stage, you must make the transition from advisor to advocate.

Once on the record, everyone has their own way of going about advocating for their client and presenting their case. What we hope to do below is offer some risks to be aware of and avoid.

Remember, the rules of evidence and procedure apply in juvenile court, unless otherwise set forth or are amended by statute or the Rules of Juvenile Procedure.[3]

You can work with DHR, you can put your client in a great position to succeed, you can prosecute your defense of your client artfully and fully, but as we all know, at the end of the day, the decision is in the hands of the judge. And the judge's determination of dependency is given great deference on appeal.[4] So, representing the parent also includes making a record for appellate review, while keeping high appellate standards in mind.

Another critical determination for the practitioner to try to make is whether the hearing taking place will lead to a final appealable order.

Just as in other courts of record, in order for the Alabama Court of Civil Appeals to consider an issue, it must have been properly and timely raised before the trial court.[5] However, proceedings in juvenile court can pose some unusual challenges to preserving an issue. In juvenile court, "unlike other civil cases, dependency and termination-of-parental-rights proceedings may involve multiple 'final' appealable orders before the juvenile case is closed." *Ex parte T.C.*, 96 So.3d 123, 130 (Ala. 2012).[6]

For example, "a formal determination by a juvenile court of a child's dependency coupled with an award of custody incident to that determination will give rise to an appealable final judgment even if the custody award is denominated as a 'temporary' award and further review of the case is envisioned." *J.J. v. J.H.W.*, 27 So.3d 519 (Ala. Civ. App. 2008).[7]

The juvenile court is free to consider hearsay evidence during at least two stages.

At the shelter care hearing, the juvenile court can consider "[a]ll relevant and material evidence helpful in determining the need for shelter care, even though not admissible in subsequent hearings."[8]

At the dispositional hearing, the juvenile court can consider "all relevant and material evidence helpful in determining the best interest of the child, including verbal and written reports, may be received by the juvenile court even though not otherwise admissible in an adjudicatory hearing."[9]

The first hearing in a case where the child has been removed by DHR is generally going to be the hearing required by Ala. Code §12-1-141. The court must conduct a hearing within 72 hours and at that hearing the court can

"either dissolve, continue or modify the [ex parte] order." *Id.*

This is another stage where knowing your judge is of the utmost importance. Some judges work toward finding dependency at the shelter care hearing, while others treat it like a first hearing with more evidence to be heard later. Know what your judge's inclinations are.

We believe that the best practice is to treat this hearing as if it is adjudicatory in nature and preserve your issues. If the judge rules against your client and leaves the child with DHR, pay close attention to the wording of the order. Know that you could be dealing with what an appellate court may consider a final order that must be appealed within 14 days.[10]

With regard to what an order generated from the 72-hour hearing can address and whether it can be considered a final order, there is an important due process issue to keep in mind. A parent has the right to "notice, a hearing according to that notice, and a judgment entered in accordance with such notice and hearing." *C.O. v. Jefferson County Dep't of Human Res.*, 206 So.3d 621 (Ala. Civ. App. 2016). So, the nature of the notice could limit the finality of the trial court's order and may be an important issue to raise.

One issue of evidence that we have always considered paramount in juvenile court proceedings is hearsay. As a matter of course in many jurisdictions and pursuant to Ala. Code §12-15-313 (1975)(a), DHR is going to provide the juvenile court judge with a report "with recommendations concerning the child, his or her family, his or her environment, and other matters relevant to the need for treatment or disposition of the case."

Some judges work toward a finding of dependency at the shelter care hearing, while others treat it like a first hearing with more evidence to be heard later. Know what your judge's inclinations are.

Once again, this takes us back to knowing both your judge and your DHR. Know how your judge handles these reports and what your local DHR generally puts in them. In some jurisdictions these reports may be provided to the court prior to the adjudicatory hearing, while in others they may be offered into evidence.

We are not suggesting that there is any impropriety with regard to these reports. The importance here is about how and if these reports become a matter of record in your case and the necessity for preserving your objection to them. To that end, we recommend considering how the Alabama Court of Civil Appeals dealt with this issue in *Y.M. v. Jefferson County Dep't of Human Res.*, 890 So.2d 103 (Ala. Civ. App. 2003) and *K.W. v. J.G.*, 856 So.2d 859 (Ala. Civ. App. 2003).

In *Y.M.,* "DHR requested, over the mother's objection, that the juvenile court 'take judicial knowledge of the ... complete contents of each court file.' The court file contained four court reports submitted by DHR caseworkers, as well as psychological evaluations by mental health professionals, and reports from family-violence shelter personnel. The court reports contained summaries of conversations between DHR caseworkers and the following individuals: the mother's husband, who is the children's legal father; the children's foster mother; family-violence shelter personnel; hospital social workers; the director of a YWCA parenting class the mother had attended; the mother's employers; and the mother's landlords. None of those individuals testified at trial. The trial court agreed to take judicial notice of the contents of the files." *Id.* at 106.

The court in *Y.M.* concluded that because the subject hearing was an adjudicatory proceeding rather than a dispositional proceeding, hearsay was not permitted. Accordingly, the trial court's order was reversed and the matter was remanded.

In *K.W.,* "much of the factual history of this case [was] derived from a series of reports (hereinafter 'court reports' or 'DHR court reports') prepared by the Department of Human Resources ('DHR') and submitted to the trial court; those court reports were admitted into evidence during the termination hearing, which took place on March 28 and 29, 2002. Much of the witnesses' testimony at the termination hearing was based on those court reports. The court reports were admitted into evidence without any objection, and the parties referenced various facts in the court reports in support of their positions." *Id.* at 861.

The mother in *K.W.*, relying on *Y.M.*, maintained that the trial court erred in admitting the reports because they contained hearsay. The appellate court granted no relief on this issue because the mother had failed to raise the issue of hearsay with the trial court.

Both *Y.M.* and *K.W.* are in many ways typical of how a dependency matter involving DHR evolves over time. *Y.M.* and *K.W.* happened to be at the stage of a termination hearing, but the same issue will present itself in a hearing concerning the adjudication of dependency.

Your case starts out with a shelter care or 72-hour hearing under Ala. Code §12-1-141 and, at that hearing, a DHR report is presented to the trial court containing the information that DHR has at that time. If DHR prevails, the shelter care order will generally allow DHR to keep temporary custody of the child. However, the court will usually schedule a more final hearing, called an adjudicatory hearing. In other words, you get another bite at the apple.

In the interim, the DHR worker is accumulating more information: mental health records, treatment records, medical records, law enforcement records and statements from other people who may know your client or have knowledge of your client's situation. Many times, all of this new information is going to find its way into another DHR report that, at some point, either before or during the adjudicatory hearing, is going to be presented to the juvenile judge; each time the case gets continued, more information finds its way into the report.

Once the case is finally called to trial, the report is often filled with hearsay; in our opinion, the best practice is to object to the report being admitted into evidence or made a part of the record in any way.

The bottom line is that every hearing conducted in juvenile court could result in an order that may be considered final in nature, and while we may want to maintain an amenable relationship with DHR, our primary responsibility is to our client. Accordingly, in representing parents in dependency matters, we must remain diligent in protecting the record and preserving appropriate issues for appeal.

You will probably rarely, if ever, change your judge's mind about what does and what does not constitute dependency, but you can ensure that only evidence that is "competent, material, and relevant in nature"[11] is admitted and considered by the court. ▲

Endnotes

1. The authors assume a basic familiarity with the terms and conduct under the Alabama Juvenile Justice Act, Ala. Code §§ 12-15-101 to-509, which governs the juvenile court proceedings covered in this article.
2. Alabama Rules of Professional Conduct, Preamble.
3. Ala. R. Juv. P. 1(A) and Ala. R. Evid. 1101.
4. *J.S.M. v. P.J.*, 902 So.2d 89, 95 (Ala. Civ. App. 2004) (holding that matters of dependency are within the sound discretion of the trial court, and a trial court's ruling on a dependency action in which evidence is presented ore tenus will not be reversed absent a showing that the ruling was plainly and palpably wrong).
5. *D.M. v. Walker County Dep't. of Human Res.*, 919 So.2d 1197 (Ala. Civ. App. 2005).
6. *See C.L. v. D.H.*, 916 So.2d 622 (Ala. Civ. App. 2005) (holding that order awarding maternal grandmother primary physical custody of a child in a dependency case was a final appealable order as opposed to a pendente lite order).
7. Citing *Potter v. State Dep't of Human Res.*, 511 So.2d 190, 192 (Ala. Civ. App. 1986) (holding that "the pivotal question in the determination of whether timely notice of appeal was filed concerns whether the juvenile court's March 17, 1986 (sic) order constituted a final order for purposes of appeal.)
8. Ala. Code § 12-15-308 (d).
9. *Id.* §12-15-311 (b).
10. Rule 28 (c), Ala. R. Juv. P.; Rule 4 (a) (1), Ala. R. App. P.
11. Ala. Code § 12-15-311.

Eric B. Funderburk

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Roman A. Shaul
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Dual Professions–Attorney And Real Estate Broker

QUESTION:

I have an interest in a real estate sales company located in the same suite of offices as my law practice. I am a licensed real estate broker. Assuming that an ethically proper referral with full disclosure took place from the law practice to the real estate company, can the law firm close the sales contract developed by the real estate company?"

ANSWER:

If your law client requests that you close the sales contract developed by your real estate company, you may ethically do so.

DISCUSSION:

It is well established that an attorney may engage in a separate profession so long as that profession is not used as a cloak for solicitation. An attorney may ethically refer clients to a separate business operated by the attorney so long as full disclosure is made to the client of the attorney's interest in the business. The converse is not true, however. An attorney's non-legal business cannot refer customers to the attorney for legal services, as the business is not prohibited from direct solicitation of customers. In other words, an attorney cannot solicit customers for his law practice through his separate business. Thus, if you had not previously represented a customer of your real estate company, you could not accept a referral from the company to close the sales contract for the company's customer. However, where you originally represented the customer as his attorney and referred the customer to your real estate company with full disclosure of your interest in this company, you may handle the real estate closing on your client's behalf. Your pre-existing attorney-client relationship with the customer removes the dangers of solicitation. [RO-1987-161] ▲

An Overview of Juvenile Court Proceedings Involving the Department of Human Resources

By Assistant Attorneys General Karen C. Phillips and Elizabeth L. Hendrix

Introduction

The purpose of the Alabama Juvenile Justice Act of 2008[1] (the Act), which became effective January 1, 2009, is "to facilitate the care, protection, and discipline of children who come under the jurisdiction of the juvenile court."[2] One of the goals of the Act is preserving and strengthening the family of the child whenever possible, or removing the child from the custody of the parents when it is judicially determined to be in the child's best interest or for the safety and protection of the public.[3]

This overview of juvenile court proceedings involving the Department of Human Resources ("DHR") (and the flow chart on pages 201-203) will help to understand the Act and the court proceedings under it.

Dependency

Jurisdiction

The juvenile court has exclusive original jurisdiction in cases where a child is alleged to be dependent, but it has no jurisdiction over mere custody disputes between parents.[4]

However, when a divorce court determines custody, and the child is thereafter alleged to be dependent, the "[divorce] court does not retain exclusive jurisdiction over a child whose custody is addressed in a divorce judgment when a separate action in initiated in a juvenile court alleging that the child is dependent." *Ex parte J.C.*, 165 So. 3d 623 (Ala. Civ. App. 2014); see *K.A.B. v. J.D.B.*, [No. 2170039, December 14, 2018] — So. 3d — (Ala. Civ. App. 2018).

The Act defines a "child" as someone under the age of 18.[5] The juvenile court must adjudicate a child as dependent before the child's 18th birthday, or the court lacks jurisdiction to do so. *A.C. v. E.C.N.*, 89 So. 3d 777 (Ala. Civ. App. 2012).

Once the juvenile court obtains jurisdiction over a child, it retains jurisdiction until the child becomes 21, or until it explicitly terminates jurisdiction.[6]

Pick-Up Orders

If an initial complaint of abuse or neglect report alleges that a child is in danger of imminent or threatened harm, DHR will investigate the claim and, if the report is substantiated, DHR can file a verified complaint asking for a pick-up order to remove the child.[7] The affidavit should state the specific reasons why it is necessary to take the child into custody for the child's safety.[8]

After the affidavit has been received, the intake officer will present the allegations (usually orally) to the juvenile court for a decision as to whether a pick-up order should be issued. If the juvenile court approves, the order will be issued, either by endorsement on the summons or by separate order, usually with the judge's signature stamped on it.[9]

Shelter Care Hearings

When a child alleged to be dependent has been removed from the

custody of the parent, legal guardian or legal custodian, a hearing must be held within 72 hours from the time of removal, including Saturdays, Sundays and holidays, to determine whether continued shelter care is required.[10] Written or verbal notice of the 72-hour hearing shall be given to the parent, legal guardian or legal custodian if they can be located.[11]

At the hearing, the juvenile court is required to advise the parent, legal guardian or legal custodian of the right to counsel and to appoint counsel if they are indigent.[12]

The court must appoint a guardian ad litem for the child.[13] The guardian ad litem is to meet with the child prior to juvenile court hearings and explain to the child what is going on, conduct a thorough and independent investigation, advocate for appropriate services for the child and family, attend all juvenile court hearings and file any necessary pleadings supporting the best interests of the child.[14]

All relevant and material evidence helpful in determining the need for shelter care may be admitted at the shelter-care hearing, even though not admissible in subsequent hearings.[15] If the child is not released at the conclusion of the shelter-care hearing, the juvenile court may order the parent, legal guardian or legal custodian to provide a list of names, addresses and telephone numbers of known paternal and maternal relatives to the juvenile court.[16] DHR will then make efforts to contact the relatives and investigate their willingness and ability to serve as a placement resource for the child.

Adjudicatory Hearing Standard

An adjudicatory hearing is a hearing at which evidence is presented for a juvenile court to determine if a child is dependent[17] as that term is defined at § 12-15-102(8).

The standard of proof required of evidence presented in an adjudicatory hearing is the "clear and convincing" standard, a higher standard than that required in a 72-hour shelter-care hearing. According to *L.M. v. D.D.F.,* 840 So. 2d 171, 179 (Ala. Civ. App. 2002) and § 6-11-20(b)(4), clear and convincing evidence is "[e]vidence that, when weighed against evidence in opposition, will produce in the mind of the trier of fact a firm conviction as to each essential element of the claim and a high probability as to the correctness of the conclusion. Proof by clear and convincing evidence requires a level of proof greater than a preponderance of the evidence or the substantial weight of the evidence, but less than beyond a reasonable doubt."

If there is no stipulation of dependency by the parties, the juvenile court must take testimony before finding the child to be dependent. Failure by the juvenile court to take testimony or to admit documentary evidence at the adjudicatory hearing before making a finding of dependency deprives the parent(s) of due process. *R.R. v. Chilton County Dep't of Human Res.*, [No. 2170334, September 21, 2018] — So. 3d — (Ala. Civ. App. 2018).

Disposition After the Adjudication of Dependency

If the juvenile court finds from clear and convincing evidence, competent, material and relevant in nature, that a child is dependent, the juvenile court may proceed immediately, in the absence of an objection or at a postponed hearing, to make proper disposition of the case.[18] In a dispositional hearing, all relevant and material evidence, including verbal and written reports, may be received by the juvenile court–even it that evidence would not be admissible in the adjudicatory hearing.[19]

If a child is found to be dependent, the juvenile court may make any of the following orders of disposition: (1) permit the child to remain with the parent, legal guardian or legal custodian, subject to conditions and limitations as the juvenile court may prescribe; (2) place the child under protective supervision of DHR; (3) transfer legal custody of the child to DHR or to another agency licensed by DHR authorized to receive and provide care for the child; (4) transfer legal custody to a relative or other individual found to be qualified to receive and care for the child; or (5) make any other order as the juvenile court deems to be in the best interests of the child.[20]

When parental rights are terminated, the juvenile court shall award permanent custody of the child to DHR or other licensed child-placing agency and shall grant the authority to place the child for adoption.[21]

Permanency Review Hearings

If the child is placed in foster care, the juvenile court must review the case no less frequently than once every six months to see if foster care should be continued, to ascertain the safety of the child, to review the parents' compliance with the steps outlined in the individualized service plan ("ISP"), to determine the parents' progress in eliminating the cause which necessitated the child's removal from the home and placement in foster care and to determine the projected date when the child

will have a safe, permanent home.[22] That review may be an administrative review based only on a written report submitted by DHR.[23]

The juvenile court must conduct a permanency hearing within 12 months of the date the child is placed in out-of-home care, and not less frequently than every 12 months thereafter while the child is in foster care.[24] A child's case may have concurrent permanency plans–usually a main plan and a secondary plan–and DHR is allowed to work simultaneously toward both permanency goals. The child's health and safety shall be the court's paramount concern.

The juvenile court must make specific findings within specific intervals: In its first order sanctioning removal, the court has to find "whether continuation of the child in the home would be contrary to the welfare of the child," and this can be in the pick-up order.[25] Within 60 days of removal, the court must determine whether reasonable efforts to prevent removal were made, or whether those reasonable efforts were not required.[26] Within 12 months of removal, and every 12 months thereafter, the court must determine whether DHR is making reasonable efforts to finalize its existing permanency plan.[27]

Under certain circumstances, DHR is not required to make reasonable efforts. Reasonable efforts shall not be required to be made by DHR if the parental rights of the parent of a sibling of a child have been involuntarily terminated, or when a parent has done things such as subjecting a child to an aggravated circumstance.[28] *J.L. v. State Dep't of Human Res.*, 961 So. 2d 839 (Ala. Civ. App. 2007). An aggravated circumstance may include rape, sodomy, incest, aggravated stalking, abandonment, torture, chronic abuse or sexual abuse; allowing a child to use alcohol or illegal drugs; substance abuse by a parent; noncompliance by a parent with the steps of an ISP for more than six months; leaving the child with someone who is unwilling or incapable of providing care; suffering from an emotional or mental condition which has no treatment available to improve or strengthen the condition to allow the child to return home safely; or incarceration of a parent which deprives the child of a safe, stable and permanent parent-child relationship.[29]

When a court determines that reasonable efforts do not have to be made, the court is required to conduct a permanency hearing within 30 days.[30]

Termination of Parental Rights

Who May File a Petition/ Timeframe for Filing A Petition

DHR, a licensed child-placing agency, a parent or any interested person may file a petition to terminate parental rights of a parent of a child.[31] DHR is required to file a petition to terminate parental rights, or if a petition has been filed by another party, shall seek to be joined as a party to the petition when: (a) the child has been in foster care in DHR's custody for 12 of the most recent 22 months; (b) the child has been abandoned; (c) the parent has committed murder of another child of that parent; (d) the parent has committed manslaughter of another child of that parent; (e) the parent has aided, abetted, attempted, conspired or solicited to commit murder or manslaughter of another child of that parent; or (f) the parent committed a felony assault that resulted in serious bodily injury to the child or the other parent of the child.[32] There are exceptions to the mandatory filing at 12 months, such as occasions when the child is cared for by a relative, DHR has documented a compelling reason that filing a petition would not be in the child's best interests or DHR has not provided services necessary for the safe return of the child to the home, if reasonable efforts are required to be made with respect to the child.[33] The Alabama Court of Civil Appeals and the Alabama Legislature have agreed that 12 months is a reasonable time for a parent to make progress toward reunification. *J.S. v. Etowah County Dep't of Human Res.,* 72 So. 3d 1212 (Ala. Civ. App. 2011). However, when a compelling reason exists which indicates that termination of parental rights is not in the child's best interest after 12 months, DHR is not required to file such a petition.[34]

If DHR determines that reunification of the child and parent is not in the child's best interest, and that termination of parental rights is in the child's best interest, it will file a petition to terminate parental rights.

Evidence Required Under the Termination of Parental Rights Statute

At a termination of parental rights hearing, the court must consider the grounds for termination referenced in § 12-15-319. The grounds must be proven with clear and convincing evidence, competent, relevant and material in nature. That evidence must establish:

1. That the parents are unable or unwilling to discharge their parental responsibilities to and for the child; or
2. That the parents are in a condition or course of conduct such that they are unable to care properly for the child; and

3. That this condition or course of conduct is unlikely to change in the foreseeable future.[35]

Mandatory Considerations

In determining whether the parents are unable or unwilling to discharge their responsibilities to and for the child, juvenile court must consider several factors. They are:

1. That the parents have abandoned the child, provided that in such cases, proof shall not be required of reasonable efforts to prevent removal or reunite the child with the parents.
2. Emotional illness, mental illness or mental deficiency of the parent, or excessive use of alcohol or controlled substances, of such duration or nature as to render the parent unable to care for the needs of the child.
3. That the parent has tortured, abused, cruelly beaten or otherwise maltreated the child, or attempted to torture, abuse, cruelly beat or otherwise maltreated the child, or the child is in clear and present danger of being thus tortured, abused, cruelly beaten or otherwise maltreated as evidenced by such treatment of a sibling.
4. Conviction of and imprisonment for a felony.
5. Commission by the parents of any of the following:
   a. Murder or manslaughter of another child of the parent.
   b. Aiding, abetting, attempting, conspiring or soliciting to commit murder or manslaughter of another child of the parent.
   c. A felony assault or abuse which results in serious bodily injury to the surviving child or another child of that parent. The term "serious bodily injury" means bodily injury which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty.
6. Unexplained serious physical injury to the child under such circumstances as would indicate that such injuries resulted from the intentional conduct or willful neglect of the parent.
7. That reasonable efforts by DHR or licensed public or private child care agencies leading toward the rehabilitation of the parents have failed.
8. That parental rights to a sibling of the child have been terminated.
9. Failure by the parents to provide for the material needs of the child or to pay a reasonable portion of his support, where the parent is able to do so.
10. Failure by the parents to maintain regular visits with the child in accordance with a plan devised by DHR, or any public or licensed private child care agency, and agreed to by the parent.
11. Failure by the parents to maintain consistent contact or communication with the child.
12. Lack of effort by the parent to adjust his circumstances to meet the needs of the child in accordance with agreements reached, including agreements reached with county DHR or licensed child-placing agencies, in an administrative review or a judicial review.

Rebuttable Presumption

In any case where the parents have abandoned a child and their abandonment continues for a period of four months next preceding the filing of the petition, such facts shall constitute a rebuttable presumption that the parents are unable or unwilling to act as parents.[36] This section does not prevent the filing of a petition prior to the end of the four-month period.[37]

In addition to finding that grounds for termination of parental rights are proven, the juvenile court must find the child is dependent and must determine if all viable alternatives to termination of parental rights have been considered and rejected, and that termination of parental rights is in the best interest of the child. *Ex parte Beasley*, 564 So. 2d 950 (Ala. 1990).

Though DHR is required to make reasonable efforts toward the rehabilitation of the parents, the law requires only *reasonable* efforts, not *maximal* efforts. *M.A.J. v. S.F.*, 994 So. 2d 280, 291 (Ala. Civ. App. 2008). A parent's failure to avail themselves of the services provided to them should be considered when evaluating whether rehabilitation of the parents should continue or is failing. *A.M.F. v. Tuscaloosa Cty. Dep't of Human Res.*, 75 So. 3d 1206, 1212 (Ala. Civ. App. 2011). The appellate court held in *Montgomery Cty. Dep't of Human Res. v. A.S.N.*, 206 So. 3d 661 (Ala. Civ. App. 2016), that the juvenile court erred by seeking "to impose on DHR a Herculean duty to do absolutely everything for a parent facing termination of his or her parental rights while imposing no duty on that same parent to make efforts to change the conduct, condition, or circumstance that gave rise to his or her child's dependency."

A determination of whether a viable alternative to termination of parental rights exists is a question of fact to be decided by the juvenile court. *J.B. v. Cleburne County Dep't of Human Res.*, 991 So. 2d 273 (Ala. Civ. App. 2008). The Alabama Court of Civil Appeals held in *C.C. v. L.J.*, 176 So. 3d 208 (Ala. Civ. App. 2013) that because an unwed father abandoned his child, he lost any due-process rights that would have required the juvenile court to consider other viable alternatives to terminating his parental rights.

Disposition After the Termination of Parental Rights

Section 12-15-320(a) was amended by Act 2013-157 and now requires the juvenile court to complete a termination of parental rights trial within 90 days after service of process has been perfected. It then requires that the juvenile court issue its order within 30 days of the date that the trial is completed. Rule 25(D), Ala.R.Juv.P. also requires that "a juvenile court shall make its finding [in a termination of parental rights case] by written order within 30 days of completion of the trial."

In the event that the juvenile court terminates parental rights, § 12-15-320(b) reflects that it may do the following:

(1) Transfer or continue permanent legal custody of the child to DHR or a public/private licensed child-placing agency, thereby giving the department or agency authority to make permanent plans for the child, including the authority to place the child for adoption and consent to adoption; or

(2) Transfer or continue permanent legal custody of the child to the petitioner who, after study by DHR, is found to be able to properly receive and care for the child.

In the event parental rights are terminated, the juvenile court shall award permanent custody to DHR or other licensed child-placing agency and shall grant the authority to place the child for adoption.[38] If the juvenile court fails to place permanent custody in DHR, the appellate court will dismiss any appeal from that judgment as having been taken from a non-final judgment. *S.H. v. Macon County Dep't of Human Res.*, 195 So. 3d 311 (Ala. Civ. App. 2015).

After parental rights are terminated, the juvenile court is still required to conduct permanency hearings at least annually in order to review what efforts have been made to achieve permanency for the child.[39] The juvenile court's authority is limited, and the juvenile court is without authority to change DHR's permanency plan for the child. "Nothing in § 12-15-321, however, bestows upon a juvenile court the power to determine the permanency plan for the child [after parental rights have been terminated]." *Ex parte Limestone Cty. Dep't of Human Res.*, 255 So. 3d 210, 216 (Ala. Civ. App. 2017). ▲

Endnotes

1. Ala. Code §§ 12-15-101 to -509.
2. *Id.* § 12-15-101(a).
3. *Id.* § 12-15-101(b)(2).
4. *Id.* § 12-15-114(a).
5. *Id.* §§ 12-15-102(3).
6. *Id.* § 12-15-117(a).
7. *Id.* § 12-15-126.
8. Rule 12(A), Ala. R. Juv. P.
9. Ala. Code §§ 12-15-125, 12-15-126.
10. *Id.* § 12-15-308 (a).
11. *Id.* § 12-15-308 (b).
12. *Id.* §§ 12-15-305, 308 (c).
13. *Id.* § 12-15-308 (c).
14. *Id.* § 12-15-304 (b).
15. *Id.* § 12-15-308 (d).
16. *Id.* § 12-15-308 (f).
17. *Id.* §§ 12-15-310 (a).
18. *Id.* §§ 12-15-311 (a).
19. *Id.* § 12-15-311 (b).
20. *Id.* § 12-15-314.
21. *Id.* § 12-15-320.
22. 42 U.S.C. § 675(5)(B).
23. 42 U.S.C. § 675(5)(B).
24. Ala. Code § 12-15-315; 42 U.S.C. § 675(5)(C).
25. *Id.* § 12-15-312 (a) (1).
26. *Id.* § 12-15-312 (a) (2).
27. *Id.* § 12-15-312 (a) (3).
28. *Id.* § 12-15-312 (c).
29. *Id.* § 12-15-312 (c) (1).
30. *Id.* § 12-15-312.
31. *Id.* § 12-15-317 (1).
32. *Id.* § 12-15-317.
33. *Id.* § 12-15-317 (2).
34. *Id.* § 12-15-317 (2) b.
35. *Id.* § 12-15-319(a).
36. *Id.* § 12-15-319(b).
37. *Id.* § 12-15-319(b).
38. *Id.* § 12-15-320.
39. *Id.* § 12-15-321.

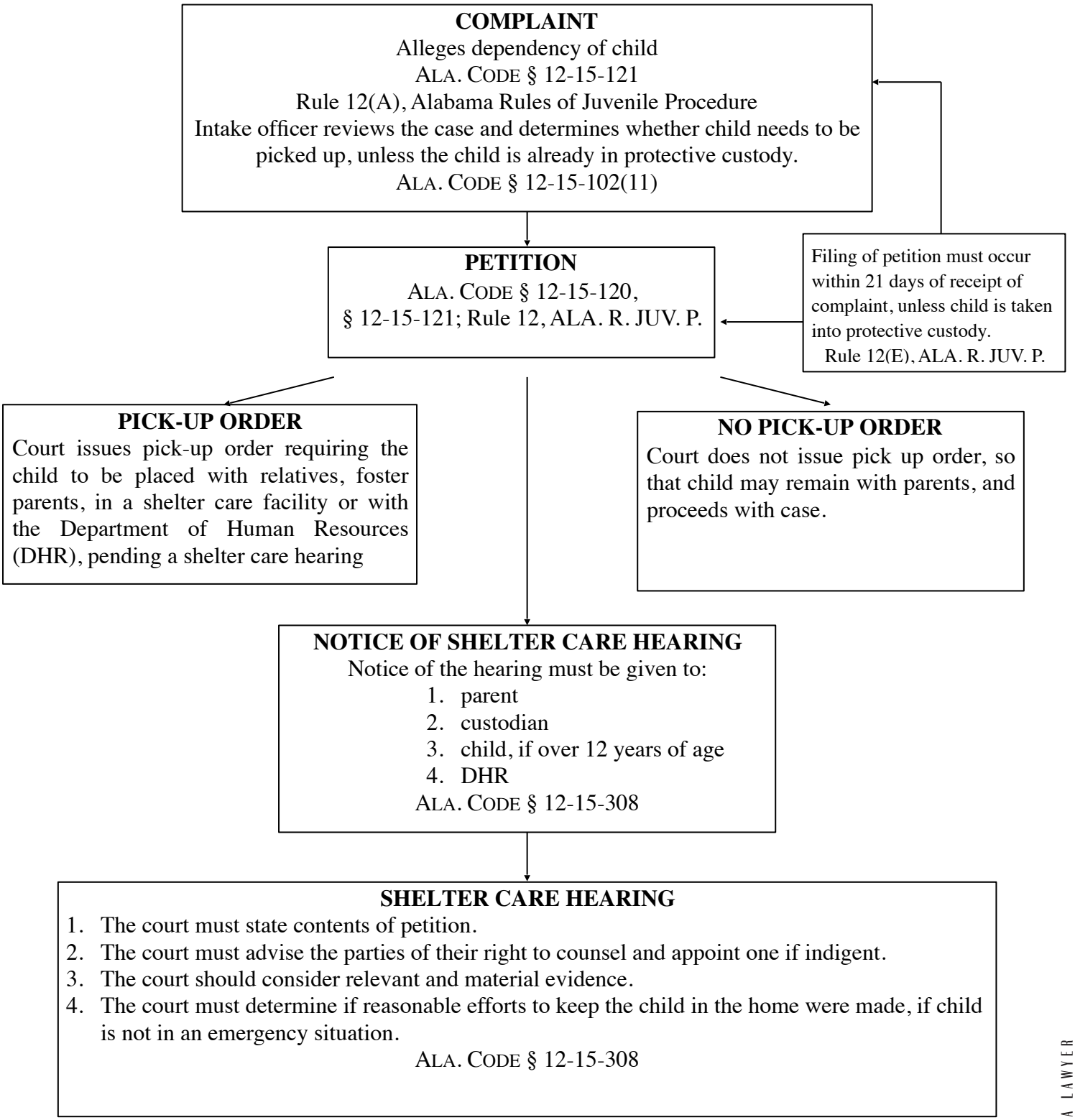
Karen C. Phillips

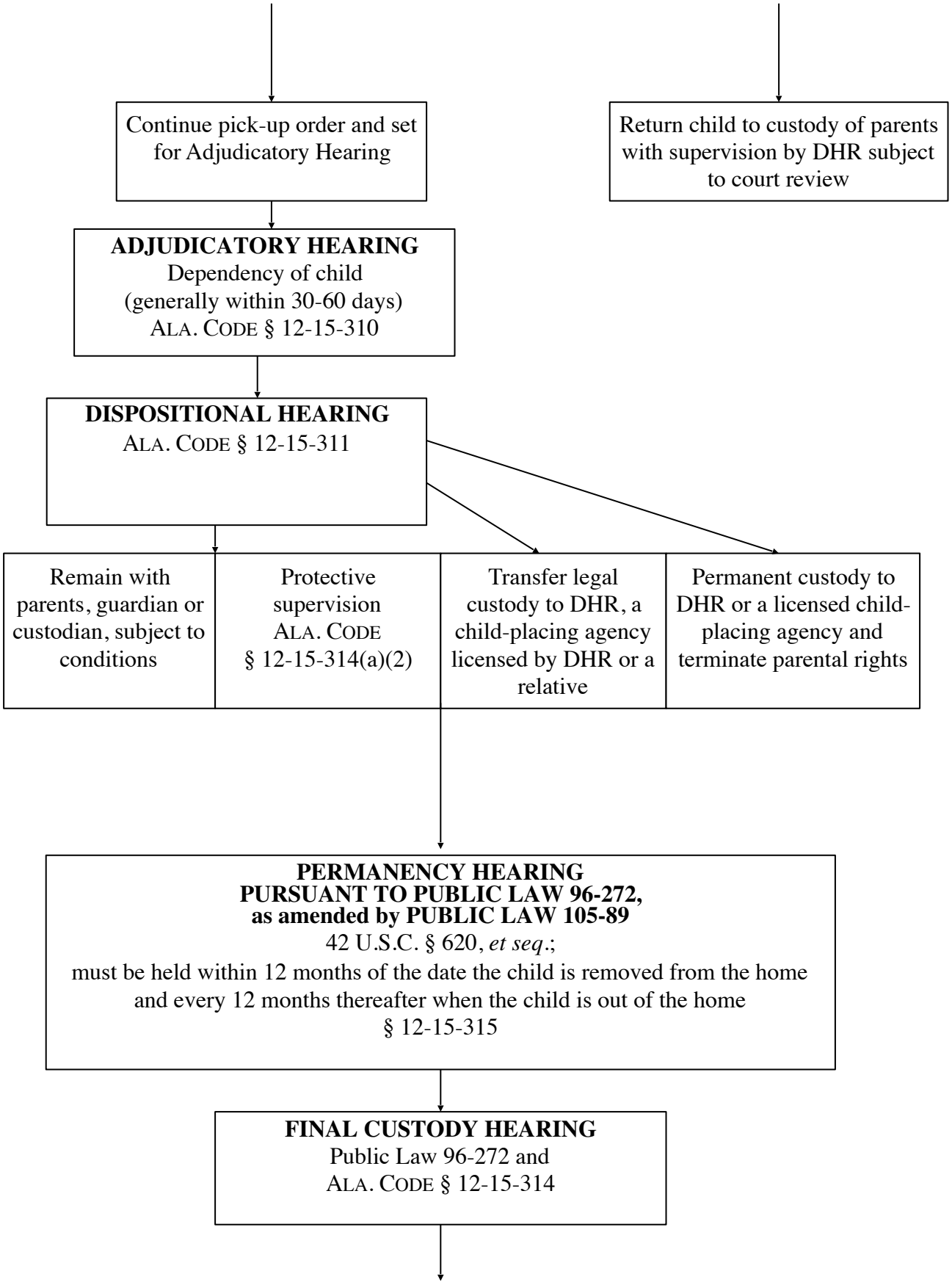
Karen Phillips is an assistant attorney general at the Alabama Department of Human Resources. She represents DHR in appeals and child welfare trials throughout the state.

Elizabeth L. Hendrix

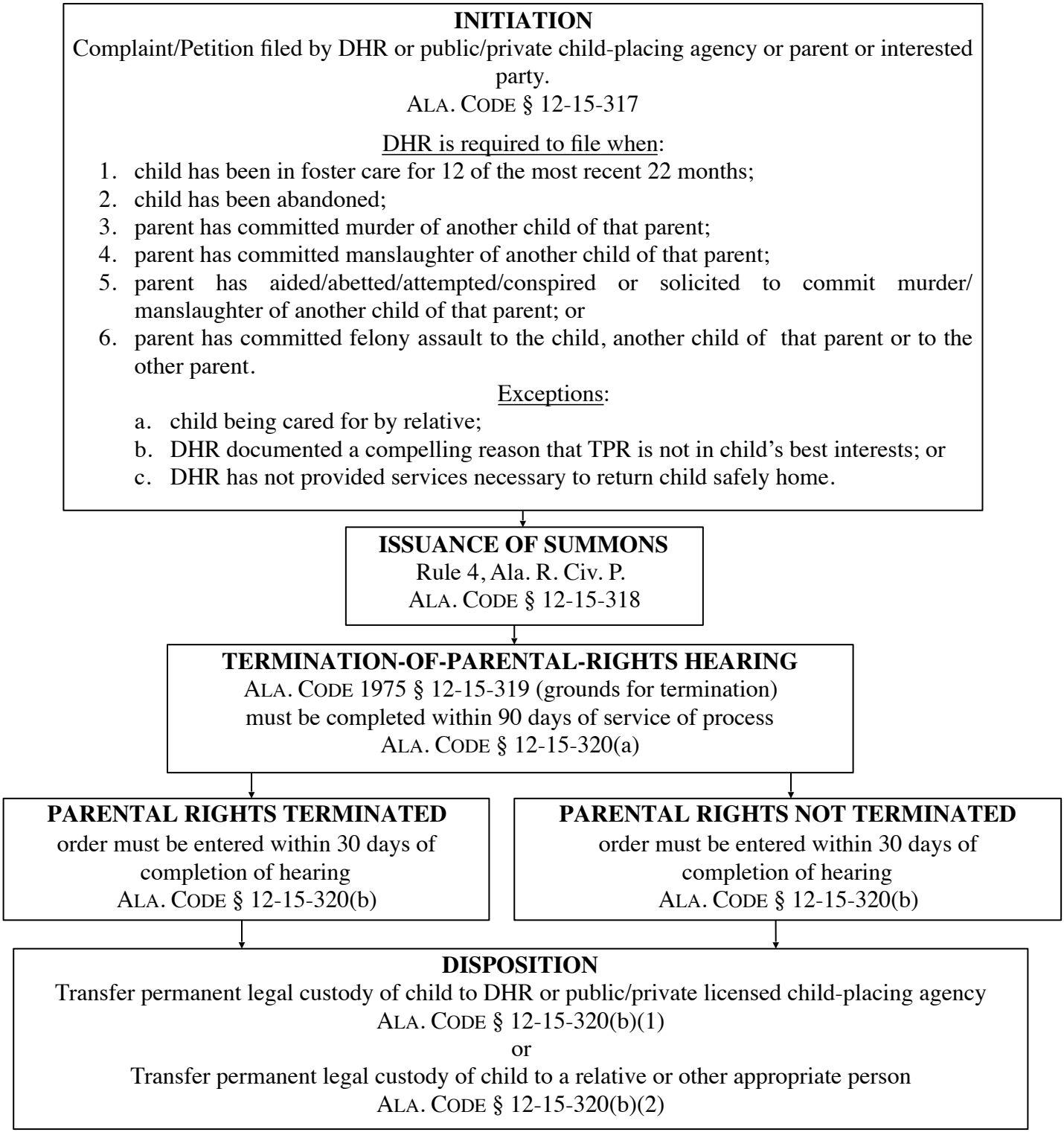
Elizabeth Hendrix has been an assistant attorney general at the Alabama Department of Human Resources State Legal Office since 2004. Ms. Hendrix represents the Department of Human Resources in appellate, trial court and administrative actions throughout the state.

PROCESS FOR DEPENDENCY CASES




Continue pick-up order and set for Adjudicatory Hearing
Return child to custody of parents with supervision by DHR subject to court review
ADJUDICATORY HEARING
Dependency of child
(generally within 30-60 days)
ALA. CODE § 12-15-310
DISPOSITIONAL HEARING
ALA. CODE § 12-15-311
Remain with parents, guardian or custodian, subject to conditions
Protective supervision
ALA. CODE
§ 12-15-314(a)(2)
Transfer legal custody to DHR, a child-placing agency licensed by DHR or a relative
Permanent custody to DHR or a licensed child-placing agency and terminate parental rights
PERMANENCY HEARING
PURSUANT TO PUBLIC LAW 96-272,
as amended by PUBLIC LAW 105-89
42 U.S.C. § 620, et seq.;
must be held within 12 months of the date the child is removed from the home and every 12 months thereafter when the child is out of the home
§ 12-15-315
FINAL CUSTODY HEARING
Public Law 96-272 and
ALA. CODE § 12-15-314

PROCESS FOR TERMINATION OF PARENTAL RIGHTS CASES



Local Bar Award of Achievement

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

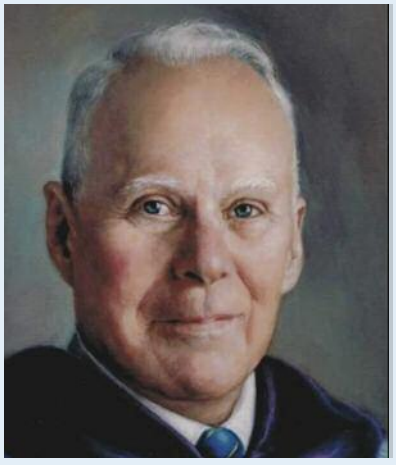
Local bar associations compete for these awards based on their size–large, medium or small.

The following criteria are used to judge the applications:

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

To be considered for this award, local bar associations must complete and submit an application by June 1. Applications may be downloaded from *www.alabar.org* or obtained by contacting Ashley Penhale at (334) 269-1515 or *ashley.penhale@alabar.org*. ▲

Remembering Justice Sam Beatty



Huntsville attorney Pat Graves is writing a tribute to the late Alabama Supreme Court Justice Sam Beatty and is seeking stories to honor him. Please email your remembrances to *pgraves@bradley.com* or call (256) 517-5143.

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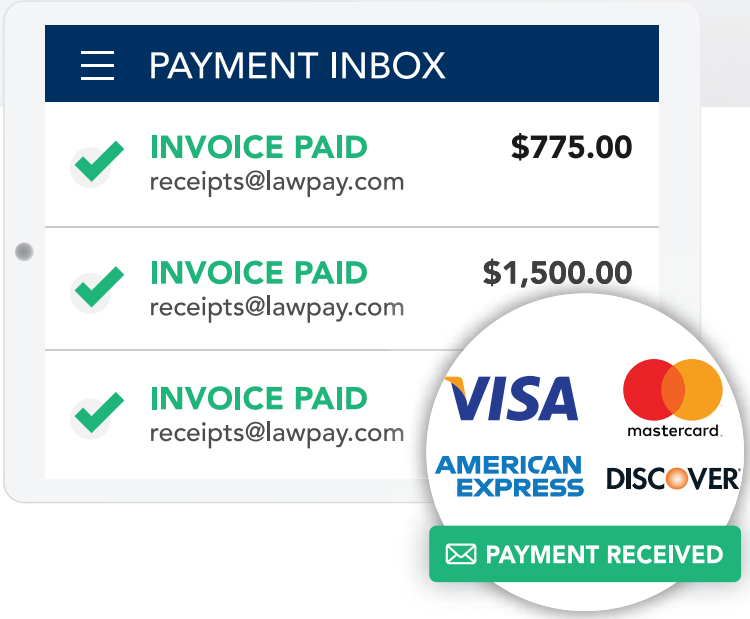

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DISCIPLINARY NOTICES

Notices

- **Michael Ray Jeffries**, whose whereabouts are unknown, must answer the Disciplinary Board of the Alabama State Bar's order to show cause within 28 days of the date of this publication, or thereafter, the reciprocal discipline therein shall be deemed appropriate and identical discipline shall be imposed against him in Rule 25(a), Pet. No. 2018-1123 by the Disciplinary Board of the Alabama State Bar.
- **John Walter Sharbrough, III**, who practiced in Mobile and whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of May 31, 2019 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 2018-289, before the Disciplinary Board of the Alabama State Bar. [ASB No. 2018-289]

Disbarments

- Birmingham attorney **Thedric Brackett, Jr.** is currently disbarred from the practice of law in Alabama. He has received another disbarment, effective March 10, 2023, to run consecutively to his current disbarment from the practice of law. The supreme court entered its order based on the report and order of the Disciplinary Board of the Alabama State Bar, disbarring Brackett after he was found guilty of violating Rules 1.2(d) [Scope of Representation], 3.4 [Fairness to Opposing Parties and Counsel], 4.1 [Truthfulness in Statements to Others], 8.1(b) [Bar Admission and Disciplinary Matters] and 8.4(a), (c), (d) and (g) [Misconduct], Ala. R. Prof. C. In 2016, Brackett was retained by a client to sue an individual regarding possession or title of a vehicle. Brackett provided copies of pleadings to the credit union that held the loan on the vehicle. Subsequently, when the individual attempted to pay off and obtain title to the vehicle, the payment was not accepted due to the purported lawsuit. The individual insisted she had never been served with a lawsuit. Corporate counsel for the credit union researched the AlaCourt filing system and discovered the case number on the purported pleadings was for another lawsuit. The

Jefferson County Clerk confirmed that the case number provided by Brackett was fictitious or incorrect. No such lawsuit was filed and the pleadings provided to the credit union were fraudulent. Additionally, Brackett failed to respond to multiple requests from the Office of General Counsel of the Alabama State Bar for a written response to the client's complaint. [ASB No. 2016-760]

- Mobile attorney **Malcolm Bailey Conway** is currently disbarred from the practice of law in Alabama. He has received another disbarment, effective August 9, 2023, to run consecutively to his current disbarment from the practice of law. The supreme court entered its order based on the report and order of the Disciplinary Board of the Alabama State Bar, disbarring Conway after he was found guilty of violating Rules 1.16(d) [Declining or Terminating Representation], 8.1(b) [Bar Admission and Disciplinary Matters] and 8.4 (g) [Misconduct], Ala. R. Prof. C. In August 2016, a client retained Conway for a child support matter. At the conclusion of the case, the client requested his file and the return of tax documents that were previously provided to Conway. Despite numerous phone calls and emails by the client requesting the file and the tax documents, Conway failed to return the file or the tax documents to the client. Conway failed to respond to the client's bar complaint despite requests to do so by the Office of General Counsel of the Alabama State Bar. [ASB No. 2016-1558]
- Birmingham attorney **Richard Charles Frier** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective January 9, 2019. The supreme court entered its order based upon the January 9, 2019 order of Panel III of the Disciplinary Board of the Alabama State Bar. Frier was found guilty of violating Rules 1.16(a) [Declining or Terminating Representation], 3.4(a) [Fairness to Opposing Parties and Counsel], 8.1(b) [Bar Admission and Disciplinary Matters] and 8.4(d) and (g) [Misconduct], Ala. R. Prof. C. Frier was found guilty of violating the terms and conditions of a prior disciplinary order by engaging in the private practice of law. [ASB No. 2015-319]
- Bessemer attorney **Richard Larry McClendon** is currently disbarred from the practice of law in Alabama. He has received another disbarment, effective June 24, 2021, to run consecutively to his current disbarment from the practice of law. The supreme court entered its order based on the report and order of the Disciplinary Board of the Alabama State Bar, disbarring McClendon after he was found guilty of violating Rules 1.3 [Diligence], 1.4 [Communication],

(Continued from page 207)

1.15(a) [Safekeeping Property], 1.16(d) [Declining or Terminating Representation], 8.1(b) [Bar Admission and Disciplinary Matters] and 8.4 (g) [Misconduct], Ala. R. Prof. C. In 2015 and 2016, McClendon was hired by several clients for representation and was paid to handle their matters. Thereafter, McClendon failed to take any other action on the client's behalf and the clients were unable to contact McClendon or obtain a refund of the fees paid. McClendon also did not inform the clients of his disbarment from the practice of law, effective June 23, 2016. Additionally, McClendon failed to respond to multiple requests from the Office of General Counsel of the Alabama State Bar for a written response to the client's complaints. [ASB Nos. 2016-1021, 2016-1025, 2016-1089, 2016-1351 and 2016-1406]

- Mobile attorney **Sonya Alexandrial Ogletree-Bailey** is currently disbarred from the practice of law in Alabama. She has received another disbarment, effective November 17, 2022, to run consecutively to her current disbarment from the practice of law. The supreme court entered its order based on the report and order of the Disciplinary Board of the Alabama State Bar, disbarring Ogletree-Bailey after she was found guilty of violating Rules 1.3 [Diligence], 1.4 [Communication], 1.15(a) [Safekeeping Property], 1.16(d) [Declining or Terminating Representation], 8.1(b) [Bar Admission and Disciplinary Matters] and 8.4 (d) and (g) [Misconduct], Ala. R. Prof. C. In July 2015, Ogletree-Bailey was hired by a client to represent her in a divorce. According to the contract signed by the client, she was to be charged a rate of $250 per hour. The client provided a note that appears to be written by Ogletree-Bailey in which Ogletree-Bailey quotes a fee of $750 and a $208 filing fee. The note stated that the client must pay $300 to $400 of the attorney's fee prior to filing. The client maintained she paid Ogletree-Bailey a total of $958 to file the petition for divorce. Ogletree-Bailey failed to place the funds in trust, failed to file the divorce petition, failed to return the client's calls and failed to refund any portion of the attorney's fees or filing fee. Additionally, Ogletree-Bailey failed to respond to multiple requests from the Office of General Counsel of the Alabama State Bar for a written response to the client's complaint. [ASB No. 2017-81]

Suspensions

- Sulligent attorney **Daniel Heath Boman** was suspended from the practice of law in Alabama for two years, of which he is to serve 90 days, with credit for the time he served a previous interim suspension (June 22–October 30, 2018). Boman will be placed on a conditional probationary period for two years. The suspension was based upon the Disciplinary Commission's acceptance of Boman's conditional guilty plea, wherein he pled guilty to violating Rules 1.4 [Communication], 1.5(f) [Fees], 1.7 [Conflict of Interest: General Rule], 1.8(a) [Conflict of Interest: Prohibited Transactions], 1.15(a), (b), (e), (f) and (k) [Safekeeping Property], 7.3(a) [Direct Contact with Prospective Clients] and 8.4 (g) [Misconduct], Ala. R. Prof. C. [ASB Nos. 2017-22 and 2017-1420]
- Athens attorney **Morris Hammack Bramlett, II** was summarily suspended pursuant to Rule 20a, Ala. R. Disc. P., from the practice of law in Alabama by the Supreme Court of Alabama, effective January 11, 2019. The supreme court entered its order based upon the Disciplinary Commission's order that Bramlett be summarily suspended for failing to respond to formal requests for information concerning a disciplinary matter. [Rule 20(a), Pet. No. 2019-101]
- Birmingham attorney **Shayana Boyd Davis** was suspended from the practice of law for two years in Alabama by the Supreme Court of Alabama, effective January 18, 2019. The supreme court entered its order based upon the Disciplinary Board's order, wherein Davis was found guilty of violating Rules 1.15(a), (e) and (n) [Safekeeping Property], and 8.4(g) [Misconduct], Ala. R. Prof. C. Davis was suspended for mishandling client funds. She deposited earned fees into trust and used funds from one client to make payment on behalf of another client. In addition, Davis overdrew her trust account on multiple occasions. Davis also failed to maintain all trust account records, as required by Rule 1.15, Ala. R. Prof. C. [ASB No. 2017-178]
- Millbrook attorney **Darren William Kies** was suspended from the practice of law in Alabama for 180 days by the Supreme Court of Alabama, effective February 4, 2019, of which Kies was ordered to serve the 90 days. The remaining 90 days were ordered held in abeyance pending Kies's successful completion of a two-year probationary period. The supreme court entered its notation based upon the Disciplinary Commission of the Alabama State Bar's order reflecting Kies's guilty plea in one disciplinary matter to violations of Rules 1.3 [Diligence], 1.4 [Communication], and 8.4(a) and 8.4(g) [Misconduct], Ala. R. Prof. C. [ASB No. 2018-134]
- Wetumpka attorney **Connie J. Morrow** was suspended from the practice of law in Alabama for 90 days by the

Supreme Court of Alabama, effective December 4, 2018, of which Morrow was ordered to serve the 45 days. The remaining 45 days were ordered held in abeyance pending Morrow's successful completion of a two-year probationary period. The supreme court entered its notation based upon the Disciplinary Commission of the Alabama State Bar's order reflecting Morrow's guilty plea in four disciplinary matters to violations of Rules 1.1 [Competence], 1.3 [Diligence], 1.4 [Communication], 1.7 [Conflict of Interest: General Rule], 1.9 [Conflict of Interest: Former Client], 3.3(a)(1)–(3) [Candor toward Tribunal], 8.1(a) [Bar Admissions and Disciplinary Matters], 8.4(a), 8.4(b), 8.4(c), 8.4(d) and 8.4(g) [Misconduct], Ala. R. Prof. C. [ASB Nos. 2015-957, 2015-1241 and No. 2017-227; CSP No. 2018-1175]

- Washington, D.C. attorney **Leslie Arnold Thompson**, who is also licensed in Alabama, was ordered by the Disciplinary Board of the Alabama State Bar to receive reciprocal discipline of a 91-day suspension from the practice of law in Alabama, effective October 18, 2018. Thompson was found guilty of violating Rule 8.4(d) [Misconduct], District of Columbia Rules of Professional Conduct and District of Columbia Rule XI § 2(b)(3). [Rule 25(a), Pet. No. 2018-1205]

Public Reprimands

- Tuscaloosa attorney **Herbert Ervin Browder** received a public reprimand without general publication on January 18, 2019 for violating Rules 1.5, 1.7(a), 1.7(b), 1.8(a), 1.14(a), 3.4(a), 8.4(a), 8.4(d) and 8.4(g), Alabama Rules of Professional Conduct. Browder was hired by an elderly couple to assist them with an ongoing dispute with the wife's daughter. The couple expressed they wished to update their estate planning to disinherit the daughter. The wife also wished to file a petition to set aside the guardianship previously established to protect her and revoke the power of attorney her daughter held. Browder failed to execute a fee contract with the clients showing they agreed to his hourly rate or they were reasonably informed of said rate. Both clients executed various estate planning documents and a deed for their home, held jointly with right of survivorship, into the husband's name only and granted a life estate only to the wife, even though the wife was still deemed incapacitated and her daughter was still her power of attorney. Thereafter, the wife also executed a

(Continued from page 209)

new last will and testament. A revocation of the wife's power of attorney was filed in the Probate Court of Tuscaloosa County, Alabama. However, the probate court previously held the wife was not able to revoke her power of attorney due to her incapacitation. Thereafter, Browder filed a motion for emergency petition for removal of guardianship proceedings into circuit court. The petition for removal was granted and an order of limited guardianship was issued. The circuit court's order did restrict the daughter's contact with the wife, found the wife had the ability to manage her monies and bank accounts and transact other business and ordered the wife should pay fees and costs in such amount and under such terms as Browder and the husband should agree. A month later, the husband executed a new last will and testament. That same day, he also executed an open-ended second mortgage on the marital home in Browder's favor for legal fees. Browder prepared both wills and the mortgage. On the day of the execution of the documents, the client slipped into a coma and never regained consciousness. The wife was still living in the home and did not sign the mortgage. The terms of the second mortgage provided no payment was required until the clients were either unable to live in the home or upon the husband's death. The husband died one week after the execution of the will and mortgage. Thereafter, Browder filed a claim in the amount of $46,544.07 against the husband's estate. Browder represented not only the husband's estate, but also the husband's niece in the will contest which questioned the validity of the wife's last will and testament. With Browder's conduct in this matter, he violated the Alabama Rules of Professional Conduct and engaged in conduct that adversely reflects on his fitness to practice law. Browder is also required pay any costs taxed against him pursuant to Rule 33, Alabama Rules of Professional Conduct, including but not limited to a $1,000 administrative fee. [ASB No. 2016-1540]

- On August 15, 2018, the Disciplinary Commission determined Birmingham attorney **Frederic Lamar Washington, I** should receive a public reprimand with general publication for violating Rules 1.1, 1.3, 1.4, 1.16(a)(1), 3.3(a), 5.5(a)(1), 8.4(a), 8.4(c), 8.4(d) and 8.4(g), Alabama Rules of Professional Conduct. While Washington was employed with the Legal Aid Society of Birmingham, the federal district court for the Northern District of Alabama issued an order and made multiple findings of fact regarding his representation of a client and detailed reservations about Washington's credibility. He failed to fully advise his client regarding a plea agreement and the possibility to receive a lesser sentence, he was unfamiliar with the consecutive mandatory sentencing requirements and he had no prior experience with a multiple count indictment. Furthermore, Washington informed the Court he would talk to his client about the possibility of settlement, but failed to do so. As a result, the Court granted the client's motion to vacate, set aside or correct his sentence based upon Washington's ineffective assistance of counsel and the government was ordered to re-offer the plea agreement to the client. Additionally, Washington engaged in the private practice of law with a special license. With Washington's conduct in this matter, he violated the Alabama Rules of Professional Conduct and engaged in conduct that adversely reflects on his fitness to practice law. Washington is also required pay any costs taxed against him pursuant to Rule 33, Alabama Rules of Professional Conduct, including but not limited to a $1,000 administrative fee. [ASB No. 2017-1152] ▲

MEMORIALS

Anderson, Michael Alan
Chattanooga
Admitted: 1985
Died: January 22, 2019

Andrews, Barry William
Mobile
Admitted: 2007
Died: February 15, 2018

Benton, Daniel Alexander
Fairhope
Admitted: 1970
Died: December 8, 2018

Clarke, Arthur Pierce
Mobile
Admitted: 1973
Died: January 9, 2019

Cooper, Belton Youngblood, Jr.
Birmingham
Admitted: 1983
Died: January 15, 2019

Holt, Thaddeus Goode, Jr.
Point Clear
Admitted: 1956
Died: December 29, 2018

Hughes, Melvin Richard
Birmingham
Admitted: 1980
Died: December 19, 2018

Lankford, Alexander Fillmore, III
Mobile
Admitted: 1952
Died: July 28, 2018

Merchant, Alice Dialtha
Birmingham
Admitted: 1956
Died: January 25, 2019

Nathan, Donna Bowling
Birmingham
Admitted: 1989
Died: February 2, 2019

Paul, William Joseph
Geneva
Admitted: 1981
Died: June 6, 2018

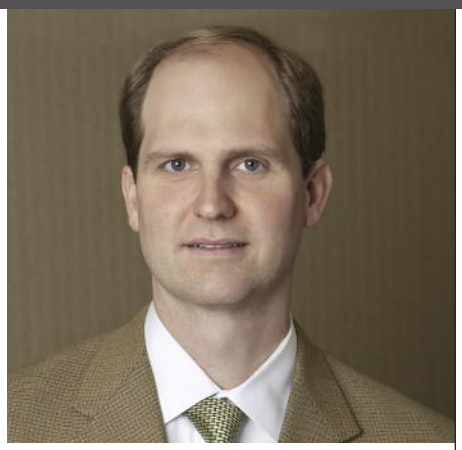
Reaves, Randolph Pierce
Montgomery
Admitted: 1974
Died: September 30, 2018

Roberts, James Vernard, Jr.
Spanish Fort
Admitted: 1984
Died: January 10, 2019

Robinson, Jackie David
Enterprise
Admitted: 1987
Died: November 30, 2018

Tyler, William Daniel, Sr.
Fairhope
Admitted: 1985
Died: September 18, 2018

Ward, Richard Murray, III
Birmingham
Admitted: 1952
Died: January 16, 2019



Wilson F. Green

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

Marc A. Starrett

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

RECENT CIVIL DECISIONS

From the Alabama Supreme Court

Contracts; Banking

***SE Property Holdings, LLC, f/k/a Vision Bank v. Bank of Franklin*, No. 1171167 (Ala. Feb. 15, 2019)**

In a factually complex dispute concerning a bank participation agreement, (1) trial court's summary judgment granting specific performance of the repurchase obligation was in the form of an injunction, as to which there was an immediate appeal, and (2) as used in the context of the agreement negotiated between sophisticated parties with counsel, the term "proceeding" encompassed and anticipated any judicial or quasi-judicial proceeding to wind up the affairs of Vision, not a voluntary merger, meaning that BoF had no right under the agreement to compel SE to repurchase BoF's interest.

Agency; Expert Testimony

***Hinkle Metals & Supply Company, Inc. v. Feltman*, No. 1170512 (Ala. Feb. 15, 2019)**

Where an employee combines personal activities with the employer's business, the question whether the employee is acting within the line and scope of his employment in connection with MVA is a factual question for the jury. Also at issue in this appeal was an evidentiary question, concerning the admission of expert testimony regarding Butterfield's cell phone usage in order to pinpoint the calls. Draper (the expert) opined that, based upon the timing of those three calls and the cell towers used to connect those calls, one could conclude that Butterfield's phone was moving "from northeast Birmingham down to [the intersection of I-20/I-59 with I-65] and then south down [I-]65" during that time. The trial court did not exceed its discretion in admitting the testimony using "historical cell-site analysis" (as it is called).

Rule 54(b)

***Wright v. Harris*, No. 1171031 (Ala. Feb. 15, 2019)**

Appeal dismissed; Rule 54(b) certification was improper from grant of summary judgment for nurses in AMLA action against nurses and nursing home. The summary judgment was based on lack of causation, and nursing home's argument for summary judgment, which remained pending, interposed the same issue.

Retaliatory Discharge; Damages

***Merchants FoodService v. Rice*, No. 1170282 (Ala. March 1, 2019)**

The court affirmed a judgment on jury verdict for plaintiff for roughly $314,000 in compensatory damages and $944,000 in punitive damages in a retaliatory discharge action involving a foodservice vendor driver. Among other holdings–(1) The controlling law on future wages is inherently fact-specific. Annual income is one measure, and earnings per hour is another method, depending upon the circumstances. Expert testimony may not be required in calculating future wages in all cases; (2) There was sufficient direct evidence from plaintiff of the nature, extent and duration of the mental anguish to support a mental anguish award; (3) As to punitive damages, the trial court did not abuse its discretion in permitting evidence of a similar firing occurring after the plaintiff's firing–though defendant had moved in limine regarding that evidence, it did not object at trial on the same basis (which is required to preserve the issue for appeal); and (4) amount of punitive damages (analyzed under the *State Farm v. Campbell* guideposts) was not excessive–there was sufficient evidence of reprehensibility because the plaintiff was financially vulnerable, and the conduct was intentional, and the 3:1 ratio was entirely proper.

Venue; Waiver

***Ex parte Seriana*, No. 1180104 (Ala. March 1, 2019)**

Defendant waived its right to contest venue because it did not assert improper venue as a defense in its answer, filed more than a year after an amended complaint, and did not seek a transfer of venue until an additional year after the filing of its answer. Under Rule 12(h), defense of improper venue is waived if not asserted in an initial responsive pleading or as a defense in an answer as provided in the rule.

Default Judgments

***Ex parte Bhones*, No. 1171171 (Ala. March 1, 2019)**

Trial court lacked discretion to consider setting aside default judgment because defendant failed to offer evidence and argument supporting all three *Kirtland* factors.

State Immunity

***Ex parte Wilson*, No. 1170982 (Ala. March 1, 2019)**

Section 14 state immunity bars claims against officials of state university for money damages brought against them in their official capacities.

Forum Selection Clauses

***Ex parte International Paper Co.*, No. 1180144 (Ala. March 1, 2019)**

Outbound forum selection clause was enforceable because (1) the clause was not the product of overweening bargaining power; (2) enforcement of the clause was not seriously inconvenient under the five-factor test of *Nawas Int'l Travel Serv., Inc.*, 68 So. 3d 823, 827 (Ala. 2011); (3) requirement that witnesses would have to travel to Tennessee did not work serious inconvenience; (4) although the requirement to litigate identical issues and conduct identical issues in separate fora may sometimes result in the required "serious inconvenience" to avoid clause enforcement, in this case that was not present because the breaches of contract were entirely separate and the third-party claims were not properly brought under Rule 14 for that reason; and (5) employees of IP were entitled to enforce IP's clause.

Open Meetings Act

***Swindle v. Remington*, No. 1161044 (Ala. March 8, 2019)**

AEA filed an action against PEEHIP board members, claiming a violation of the Open Meetings Act, Ala. Code § 36-25A-1 to -11, resulting from a day-long session in which the PEEHIP board considered and approved increases in public-employee health insurance premiums. The board contended that the session consisted of two components: an unnoticed and non-public morning session, which the board contended

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was an "educational session" or "training session," and the noticed and public afternoon session, which was the actual "meeting." The trial court and the supreme court (exercising de novo review) held that the entire day was a meeting subject to the Act because the morning session was devoted to considering the planned increases in premiums and in obtaining information on that point. Although some of the injunctive relief ordered by the trial court was rendered moot by subsequent rate adjustments of the board, other injunctive relief remained ripe. The closed morning session was neither a "training program" as set forth in § 36-25A-2(6)b.1 nor a "gathering of state officials" for the purpose of "obtaining information" as set forth in § 36-25A-2(6)b.2. And, the invalidation provision of § 36-25A-9(f) does not apply, because the violation occurred during the full-day meeting.

Charter Schools

***LEAD Education Foundation v. AEA*, No. 1170706 (Ala. March 8, 2019)**

In a dispute over the grant of approval for charter school operator to open and operate a school, the court held: (1) 60-day deadline for operator (following approval of application) to execute contract to operate school was subject to equitable tolling, which applied here because operator was diligently pursuing the contract (by offering to enter into a contingency agreement with the commission, which the commission declined, and by moving for, and obtaining, a stay from the circuit court) and because of circumstances beyond the operator's control (AEA's filing of this action to block the operator from operating and contracting); (2) under Ala. Code § 16-6F-6(c)(9), the vote of a majority of the quorum present as opposed to a majority of the entire commission is sufficient to approve a public charter-school application; and (3) authorizing agency's interpretation of Ala. Code § 16-6F-6(c)(4), requiring that "[t]he local school system shall appoint a member to the rotating position through board action specifically to consider that application[,]" was entitled to deference.

State Immunity and State-Agent Immunity

***Ex parte Wilcox Co. Bd. of Educ.*, No. 1170705 (Ala. March 8, 2019)**

In action brought by student for alleged physical assault by teacher, the court held: (1) board was absolutely immune under Ala. Const. Art. I, Sec. 14; (2) board members sued in their official capacities were entitled to Section 14 immunity on money-damage claims; (3) requests for declaratory and injunctive relief against board members on official-capacity claims were proxies for money-damage claims, thus barred by Section 14; (4) board members were entitled to state-agent immunity on individual-capacity claims because there was no allegation they acted willfully, maliciously, fraudulently, in bad faith or beyond their authority; (5) although board members were generally entitled to Eleventh Amendment immunity on section 1983 claims asserted against them in their official capacities, neither the board nor the board members are entitled to Eleventh Amendment immunity in this case, which concerns an employment-related decision, i.e., whether the board should have removed the teacher before he allegedly assaulted the child–when making such decisions, the board and the board members in their official capacities are not an "arm of the state" under the Eleventh Amendment per *Ex parte Madison Cty. Bd. of Educ.*, 1 So. 3d 980, 987 (Ala. 2008); (6) board members were entitled to qualified immunity for individual-capacity claims under section 1983, because there were no allegations of a violation of "clearly established" constitutional right; and (7) circuit court had jurisdiction over original complaint because it stated potential claims against individual board members and board–the complaint on its face was not so lacking as not to invoke the subject matter jurisdiction of the court.

Arbitration

***Alliance Investment Company, LLC v. Omni Construction Company, Inc.*, No. 1170504 (Ala. March 15, 2019)**

After the circuit court compelled arbitration under an arbitration agreement governed by AAA Construction Industry Arbitration rules, a dispute arose among the parties as to venue of the arbitration. The circuit court considered and ruled on a motion. The supreme court reversed, holding that under Rule 9 of the CIA Rules, "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement." That power included the authority to determine proper venue, since this was, in effect, a dispute concerning what type of dispute existed under the parties' agreement.

Will Contests and Estates; Removal

***Jones v. Brewster*, No. 1170450 (Ala. March 15, 2019)**

Circuit court never acquired jurisdiction over a will contest commenced in the probate court before admission of the will to probate under Ala. Code § 43-8-198, because the probate court never entered an order of transfer. This case contains a very helpful compendium of law on the confusing area of removals of proceedings from probate to circuit court.

Arbitration; Arbitrability Questions

***Carroll v. Castellanos*, No. 1170197 (Ala. March 22, 2019)**

Because AAA rules were invoked in arbitration agreement, the arbitrator had jurisdiction to determine the scope of the agreement and whether the claims against the co-employees fell within its scope, and so trial court erred by denying arbitration motions as to claims asserted against co-employees.

Defamation

***Bell v. Smith*, No. 1171108 (Ala. March 22, 2019)**

Opinion column written on al.com by D.C. lobbyist regarding state school board member was reasonably capable of being interpreted only as opinion, which is not actionable as a defamatory statement.

Undue Influence; Inter Vivos Transfers

***Mitchell v. Brooks*, No. 1170490 (Ala. March 22, 2019)**

Applying the *ore tenus* rule, sufficient evidence supported trial court's conclusion that inter vivos deed (transferring property from wife to husband) was not the product of undue influence. Husband and wife were in confidential relationship and husband was dominant party (due to the cancer diagnosis and its effects suffered by mother), but husband overcame the resulting presumption that the inter vivos gift was the product of undue influence, because there was evidence that wife's intent for husband to have property came from her own volition and not solely from husband.

From the Court of Civil Appeals

JML

***Fazzingo v. Orange*, No. 2171008 (Ala. Civ. App. Feb. 8, 2019)**

Trial court improperly granted JML to defendants in MVA case based on lack of "credible" evidence of causation. Expert's opinion (treating physician) provided substantial evidence of causation; it was admitted without objection and was based on assumptions and "facts" for which the record contained substantial evidence.

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Actions against Decedents

***Kelton v. Caldwell*, No. 2170660 (Ala. Civ. App. Feb. 15, 2019)**

Action brought against defendant who was deceased at the time action was commenced was a nullity and could not be amended to confer subject-matter jurisdiction on the trial court.

Workers' Compensation; Sufficiency of Evidence

***Georgia Pacific Consumer Products LP v. Gamble*, No. 2170750 (Ala. Civ. App. Feb. 15, 2019)**

Record contained substantial evidence supporting the trial court's determination that worker reached MMI on date on which he was under a PTD. The evidence was in conflict, but the CCA's function was not to re-weigh the evidence.

Adverse Possession; Sufficiency of Evidence

***Littleton v. Wells*, No. 2170948 (Ala. Civ. App. Feb. 22, 2019)**

Undisputed evidence demonstrated that adverse possessor's possession had been open, hostile and exclusive for decades. A party seeking to establish ownership by adverse possession can "tack" his period of possession onto that of a prior adverse claimant in order to establish a continuous stream of adverse possession for the required time span.

Architects

***Stoneridge Homes, Inc. v. Alabama State Bd. for Registration of Architects*, No. 2171113 (Ala. Civ. App. March 1, 2019)**

For purposes of § 34-2-32(b), Ala. Code 1975, a "single family residence building," as described in § 34-2-32(b), is, by necessity, a detached single-family residence, as stated in the board's regulation.

Post-Judgment Proceedings

***Rowland v. Tucker*, No. 2170928 (Ala. Civ. App. March 8, 2019)**

Failure of non-party movant to file a complaint under Rule 8 and the failure to tender a filing fee for that complaint were jurisdictional defects which prevented the trial court from exercising any jurisdiction over a motion to enforce a prior settlement agreement.

Unlawful Detainer; Service

***Mays v. Trinity Property Consultants, LLC*, No. 2170867 (Ala. Civ. App. Jan. 11, 2019, on reh'g March 8, 2019)**

Process server's affidavit was not sufficiently specific as to when the process server was attempting service (it was on a weekday, but no time was specified). One attempt to serve during a weekday and business hours would not be sufficient, but a repeated attempt before working hours followed by "nail and mail" notice was sufficient.

Finality; Boundary Line Disputes

***Donald v. Kimberley*, No. 2170991 (Ala. Civ. App. Jan. 11, 2019, on reh'g March 8, 2019)**

Trial court's order setting a boundary line, but "severing" issues of damages raised in complaint and counterclaim and reserving those for later proceeding, but without using Rule 21 to set up separate cases, was not a final judgment.

Driver License Suspensions

***ALEA v. Ellis*, No. 2180087 (Ala. Civ. App. March 22, 2019)**

Ala. Code § 32-5A-307 contains the procedure by which a licensee whose license is suspended may seek an administrative hearing, after which judicial review in the circuit court may be obtained. Under *ALEA v. Carter*, [Ms. 2160820, April 27, 2018] ___ So. 3d ___ (Ala. Civ. App. 2018), there are two procedures–an administrative review (from which there is no judicial review) and an administrative hearing (for which there is judicial review). In this case, the record did not make clear what procedure was used before the circuit court's jurisdiction was invoked, so jurisdiction was lacking.

From the United States Supreme Court

Taxation

***Dawson v. Steager*, No. 17-419 (U.S. Feb. 20, 2019)**

West Virginia's taxing federal retirees for retirement benefits, but not taxing benefits of state or local governmental retirees, the intergovernmental tax immunity doctrine, codified at 4 U.S.C. §111

Federal Judges

***Yovino v. Rizo*, No. 18-272 (U.S. Feb. 25, 2019)**

A federal judge who dies before a decision is issued cannot participate in that decision. The upshot: "federal judges are appointed for life, not for eternity."

Class Actions

***Neutraceutical Corp. v. Lambert*, No. 17-1094 (U.S. Feb. 26, 2019)**

The 14-day petition for appeal time in Fed. R. Civ. P. 23(f) is not subject to equitable tolling.

Copyright

***Fourth Estate Public Benefit Corp. v. Wall-Street.com, Inc.*, No. 17-571 (U.S. March 4, 2019)**

Copyright claimant may commence an infringement suit, only after the Copyright Office registers a copyright. Upon registration of the copyright, however, a copyright owner can recover for infringement that occurred both before and after registration.

Railroad Employees; Tax

***BNSF Railway, Inc. v. Loos*, No. 17-1042 (U.S. March 4, 2019)**

Railroad's FELA payment to an employee for working time lost due to an on-the-job injury is taxable "compensation" under the Railroad Retirement Tax Act.

Copyright

***Rimini Street, Inc. v. Oracle USA, Inc.*, No. 17-1625 (U.S. March 4, 2019)**

"Full costs" in §505 of the Copyright Act, 17 U.S.C. § 505, means only the costs specified in the general costs statute 28 U.S.C. §§1821 and 1920.

Class Actions; *Cy Pres* Relief; *Spokeo* Standing

***Frank v. Gaos*, No. 17-961 (U.S. March 20, 2019)**

In a long-awaited case concerning the appropriateness of awarding "cy pres" relief in small-claim consumer class, the Court vacated approval of a class-action settlement providing for *cy pres* recovery and remanded for the district court to consider whether the plaintiffs have standing to sue (that is, have a sufficiently concrete and personalized injury in fact) under *Spokeo, Inc. v. Robins*, 578 U. S. ___ (2016).

FDCPA

***Obduskey v. McCarthy & Holthus LLP*, No. 17-1307 (U.S. March 20, 2019)**

A business (in this case, a law firm) engaged in no more than non-judicial foreclosure proceedings is not a "debt collector" under the FDCPA, except for the limited purpose of §1692f(6).

Asbestos; Maritime Law

***Air & Liquid Systems Corp. v. DeVries*, No. 17-1104 (U.S. March 19, 2019)**

In the maritime tort context, a product manufacturer has a duty to warn when its product requires incorporation of a part, the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses and the manufacturer has no reason to believe that the product's users will realize that danger.

From the Eleventh Circuit Court of Appeals

Qualified Immunity

***Paez v. Mulvey*, No. 16-16863 (11th Cir. Feb. 8, 2019)**

Officers within public corruption unit who provided probable cause affidavits to support arrests of other officers on public corruption charges were entitled to qualified immunity on claims that the affidavits omitted exonerating information, even though the charges were later dismissed. Even if the omitted information had been included in the affidavits, there would still have been probable cause to believe the officers had engaged in a scheme to defraud.

RICO

***Al-Rayes v. Willingham*, No. 18-11059 (11th Cir. Feb. 5, 2019)**

Creditors filed a RICO action, claiming that a husband and wife worked together to commit multiple acts of mail and wire fraud over several years for the purpose of hiding the husband's assets–acts which, in the creditors' telling, established an association-in-fact RICO enterprise. The creditors sued the wife. Held: genuine factual dispute existed about whether this couple formed an association-in-fact enterprise separate and apart from their marital relationship.

Grand Jury Records; Disclosure

***Pitch v. United States*, No. 17-15016 (11th Cir. Feb. 11, 2019)**

Author and historian was entitled to obtain unsealing of grand jury records from a 1946 lynching case in Georgia, known as the "Moore's Ford Lynching," on grounds of exceptional historical significance. Exceptions to grand jury secrecy within Fed. R. Crim. P. 6(e) are not exclusive under *In re Petition to Inspect & Copy Grand Jury Materials (Hastings)*, 735 F.2d 1261 (11th Cir. 1984).

Land Use

***Hillcrest Property, LLC v. Pasco County*, No. 17-14789 (11th Cir. Feb. 13, 2019)**

No substantive-due-process claim arises when a governmental entity allegedly unlawfully applies a land-use ordinance under *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc). Land-use decision is classic executive, rather than legislative, action which does not implicate a fundamental right.

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First Amendment Retaliation

***King v. Polk County Bd. of Commissioners*, No. 18-10631 (11th Cir. March 1, 2019)**

Physician responsible for determining whether firefighter applicants were medically qualified did not engage in speech protected by the First Amendment in speaking out about objected-to qualification determination situations, because she spoke as an employee and not as a private citizen.

Antitrust; Twombly Pleading Standards *(En Banc)*

***Quality Auto. Painting of Roselle, Inc. v. State Farm Indemnity Co.*, No. 15-14160 (11th Cir. March 4, 2019) (*en banc*)**

Body shops brought antitrust class actions against insurers, contending that the insurers colluded to lower repair prices by improperly pressuring the shops to lower prices and by threatening to boycott those who do not comply. The body shops claim a per se price-fixing conspiracy and a per se conspiracy to boycott. The *en banc* majority concluded that the pleaded conduct–uniformity of price, uniformity of tactics and actions taken contrary to the insurers' economic interest–were not enough under *Twombly* pleading standards to take the complaint beyond simply parallel conduct, which is not actionable under antitrust law. Similarly, the group boycott allegations were also insufficient: "The boycott allegations in this case are even weaker than the allegations of price-fixing. Neither the 'steering' allegations nor the 'boycott' section of the complaint allege even in conclusory fashion that there was an agreement to do so."

Immigration; Equal Protection

***Estrada v. Becker*, No. 17-12668 (11th Cir. March 6, 2019)**

Reviewed under the rational basis test, the Court upheld a policy of the Georgia Board of Regents requiring Georgia's three most selective colleges and universities to verify the "lawful presence" of all the students they admit.

Excessive Force; Handcuffing

***Sebastian v. Ortiz*, No. 17-14751 (11th Cir. March 14, 2019)**

Officer is not entitled to qualified immunity when he intentionally applies unnecessarily tight handcuffs to an arrestee who is neither resisting arrest nor attempting to flee, thereby causing serious and permanent injuries, because "that gratuitous use of force when a criminal suspect is not resisting arrest constitutes excessive force."

First Amendment; Common-Law Right of Access

***ADOC v. Advance Local Media, LLC*, No. 18-12402 (11th Cir. March 18, 2019)**

Materials submitted by litigants–whether or not they are formally filed with the district court–that are integral to the 'judicial resolution of the merits in any action taken by that court are subject to the common law right of access and the necessary balancing of interests that the right entails. The district court properly balanced the interests of the public's right of access to the materials sought in this case (Alabama's capital punishment procedure protocols) against the state's interests relating to security concerns.

Admiralty

***Orion Marine Construction, Inc. v. Carroll*, No. 17-11961 (11th Cir. March 20, 2019)**

Construing the Shipowner's Limitation of Liability Act, 46 U.S.C. §§ 30501 et seq: (1) § 30511(a)'s six-month filing deadline does not erect a jurisdictional barrier to suit; (2) "written notice of a claim" under § 30511(a) requires written (not oral) notice that reveals a "reasonable possibility" that his claim will exceed the value of the vessel(s) at issue; (3) shipowner incurs no duty to investigate known or potential claims immediately upon receipt of a claimant's notice, but rather a duty to investigate arises only if the notice reveals the required "reasonable possibility;" and (4) in this case, Orion did not receive the statutorily required written notice–revealing a reasonable possibility of claims that would exceed the value of its barges–more than six months before it filed its limitation action, and so suit was timely.

Employment *(En Banc)*

***Lewis v. City of Union City*, No. 15-11362 (11th Cir. March 21, 2019) (*en banc*)**

This case addresses the "similarly situated" component of the *McDonnell Douglas* framework for analyzing employment discrimination claims. There are two holdings: (1) "a meaningful comparator analysis must be conducted at the prima facie stage of *McDonnell Douglas*'s burden-shifting framework, and should not be "move[d]" to the pretext stage[;]" and (2) a plaintiff asserting an intentional-discrimination claim under McDonnell Douglas must demonstrate that she and her proffered comparators were "similarly situated in all material respects." This standard does not require "doppelganger-like

sameness" and so differences in job titles and minor differences in job functions will not disqualify the comparator. Ordinarily, for instance, a similarly situated comparator (1) will have engaged in the same basic conduct (or misconduct) as the plaintiff, (2) will have been subject to the same employment policy, guideline or rule as the plaintiff, (3) will ordinarily (although not invariably) have been under the jurisdiction of the same supervisor as the plaintiff, and (4) will share the plaintiff's employment or disciplinary history.

RECENT CRIMINAL DECISIONS

From the Federal Courts

Capital Punishment; Intellectual Disability

***Moore v. Texas*, No. 18-443 (U.S. Feb. 19, 2019)**

Texas courts erred a second time in rejecting defendant's claim he was intellectually disabled for purposes of Eight Amendment protection from execution. It relied too heavily on the defendant's pro se court filings without determining whether he wrote them himself, as well as the adaptive improvements he had made while in prison. The Texas courts also relied on their own caselaw that had been abrogated by the Court.

Incorporation Doctrine; Excessive Fines

***Timbs v. Indiana*, No. 17-1091 (U.S. Feb. 20, 2019)**

Eighth Amendment's Excessive Fines clause applies to the states via the incorporation doctrine, and thus applies to civil forfeiture proceedings arising from criminal offenses in state court.

Capital Punishment

***Madison v. Alabama*, No. 17-7505 (U.S. Feb. 27, 2019)**

Under *Ford v. Wainwright*, 477 U.S. 399, the Eighth Amendment prohibits executing a prisoner who has "lost his sanity" after sentencing. Under *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Court set out the appropriate competency standard: A state may not execute a prisoner whose "mental state is so distorted by a mental illness" that he lacks a "rational understanding" of "the State's rationale for [his] execution." Issue: whether the *Ford* and *Panetti* standards categorically prohibit the execution of a defendant who cannot remember his crime. Held: the Eighth Amendment may permit executing a prisoner even if he cannot remember committing his crime. *Panetti* asks only about a person's comprehension of the state's reasons for resorting to punishment, not his memory of the crime itself. One may exist without the other. Such memory loss, however, still may factor into the analysis *Panetti* demands. If that loss combines and interacts with other mental shortfalls to deprive a person of the capacity to comprehend why the state is exacting death as a punishment, then the *Panetti* standard will be satisfied.

Ineffective Assistance

***Garza v. Idaho*, No. 17-1026 (U.S. Feb. 27, 2019)**

Defense counsel rendered ineffective assistance of counsel by not filing a notice of appeal despite the defendant's requests. Though the defendant waived his right to appeal in a plea agreement, filing a notice of appeal would not have necessarily breached the plea agreement. The defendant could possibly raise claims beyond the appeal waiver's scope, and the decision to appeal belonged to him.

From the Court of Criminal Appeals

Capital Punishment; Sentencing Findings

***Lindsay v. State*, CR-15-1061 (Ala. Crim. App. Mar. 8, 2019)**

Trial court failed to make written findings of fact regarding each of the aggravating and mitigating circumstances set forth in Ala. Code §§ 13A-5-49 and 13A-5-51, and its order misstated the standard for weighing these factors under Ala. Code § 13A-5-46.

Community Corrections Revocation

***Lindsay v. State*, CR-15-1061 (Ala. Crim. App. Mar. 8, 2019)**

Revocation hearing did not provide the defendant with adequate due process and that its written order relied in part on exhibits that were not introduced into evidence.

Probation Revocation

***Emerson v. State*, CR-17-1108 (Ala. Crim. App. Mar. 8, 2019)**

Trial court did not list the evidence upon which it based its probation revocation. Though an appellate court may examine the record to determine the basis for revocation under *McCoo v. State*, 921 So. 2d 450, 462 (Ala. 2005), the record was unclear, thus necessitating remand.

Rule 32; Construction of Pleadings

***S.R.A. v. State*, CR-18-0004 (Ala. Crim. App. Mar. 8, 2019)**

Construing a "petition for a writ of habeas corpus" as an Ala. R. Crim. P. 32 petition due to the relief it sought, the court found no error in the summary dismissal of the petition. The sentencing provisions of Ala. Code § 13A-5-6 (c) were not in effect at the time of the defendant's rape offense and thus were inapplicable to his conviction. ▲

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For more information,
visit www.lsa.alabama.gov.

Senator Arthur Orr
Chair, Alabama Bicentennial Commission

Alabama's Bicentennial

On December 14, 2019, Alabama will celebrate the 200th anniversary of its becoming the 22nd state. The celebration of this significant milestone in history has been cause for much reflection, looking forward and a bit of celebration. The commemoration, like our process to statehood which began with formation as a territory on March 3, 1817, has been a three-year process. These three years of sharing the stories of our great state cause us to celebrate what is good and learn from our mistakes in a way that charts a path for an even better future for our state.

Just before the start of this year's regular session, the legislature spent a weekend in Huntsville, where it kicked off the final stretch of this commemoration. Huntsville is where it all started at Constitution Hall and it was there that Alabama's first constitution was drafted and signed. That event was commemorated through the re-enactment of the roll call of those who signed that document by our current legislators who offered their signatures at that historic place.

While in Huntsville, legislators were also able to visit places on the frontier of the next 100 years of our state, including

the Marshall Space Flight Center. Seeing a full Saturn V rocket on the 50th anniversary of the Apollo 11 mission to the moon and the new Space Launch System, which will return us to the moon again, reminds us of Alabama's leading role in our nation's space exploration.

Also available were opportunities to learn more about our path to statehood and our constitutions, as well as the unveiling of the United States Postal Service Alabama Bicentennial Stamp featuring a beautiful sunset in Cheaha State Park, captured by photographer Joe Miller.

The commitment to the bicentennial by people around the state has been tremendous. Numerous local and county committees have ensured that every county in the state participates in the bicentennial. More than 200 schools have undertaken projects, and hundreds of teachers and schools have benefited from new resources and professional development opportunities. Teachers, students and their communities will enjoy the fruits of these projects for many years to come.

The Alabama Department of Archives and History has played a vital role in this commemoration. One highlight for the legal community is the restoration of Alabama's constitutions. In a year-long project, the department sought to conserve the state's six constitutions and the 1861 ordinance of secession, which declared Alabama's separation from the Union on the eve of the Civil War. These documents, some of the most important in state history, were sent for preservation to the Northeast Document Conservation Center located in Andover, Massachusetts. In the coming months, these documents will be displayed together in a series of viewings around the state.

Additional bicentennial legacies will also continue to have an impact, including the restoration of Constitution Hall Park in Huntsville, the site of the writing of the first state constitution. The Capitol Bicentennial Park, an installation of 16 relief sculptures telling the story of Alabama, will be placed on the capitol grounds to inform visitors for generations to come. *The Future Emerges from the Past: Celebrating 200 Years of Alabama-African American History and Culture* book will share stories of people, places and events that have indelibly marked our history, but are often too little known. These are just a few of the projects and initiatives defining the bicentennial.

There are far too many events and activities in the coming months to mention in this column. We hope that you will monitor them and take advantage of the many opportunities to learn from our heritage and to grow for the future of our great state. Numerous resources and a calendar of events can be found at *www.Alabama200.org*. ▲

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

Among Firms

The Adkins Firm announces the opening of a fourth office in Franklin, Tennessee.

Argent Trust Company announces that **Morgan Henry Gearhart** joined the company as vice president and trust officer in the Birmingham office.

Burr & Forman announces that **William M. Lawrence** joined as counsel to the firm's Birmingham office.

Fish Nelson & Holden LLC announces that **Louis Steven Bode, V** joined as an associate.

Hand Arendall Harrison Sale LLC announces that **Christopher S. Williams** is now a member of the firm.

Harris, Caddell & Shanks PC of Decatur announces that **Scott A. Slate** and **Patrick E. Sebesta, II** joined the firm.

Littler announces that **Janell M. Ahnert** joined as a shareholder in the Birmingham office.

Maynard Cooper & Gale announces that **Christian Pereyda** joined the firm as of counsel, **Paul A. Thatcher** joined as an attorney and **Colin T. Dean** joined as an associate.

Morris Haynes announces that former **Circuit Judge Tom F. Young, Jr.** joined the firm.

Porterfield, Harper, Mills, Motlow & Ireland PA announces that **M. Jeremy Dotson** is a shareholder in the firm.

Rushton, Stakely, Johnston & Garrett PA announces that **Amanda C. Hines** and **Philip A. Sellers, II** are shareholders in the firm.

Sheffield & Lentine PC announces that **Christopher Daniel** is a partner.

Silver, Voit & Thompson, Attorneys at Law, PC announces that **Ashley Robinson** joined the firm as an associate.

Siniard, Timberlake & League PC announces that **William L. Messervy** and **Bart Siniard** joined the firm as partners.

Sirote & Permutt PC of Birmingham announces that **J.S. Christie** joined the firm.

Slaten Law PC announces that **Daniel L. Slaten** is a partner and **H. Raymond Evans, IV** is an associate with the firm.

Smith, Spires, Peddy, Hamilton & Coleman PC announces that **Rosemary S. Moore** is a partner in the firm.

Tanner & Guin LLC announces that **Patrick O. Gray** joined the firm.

Weinberg Wheeler Hudgins Gunn & Dial announces that **Stephen A. Walsh** joined as a partner in the Birmingham office.

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