



*THE TECHNOLOGY ISSUE*

▲  
**Getting It Done on  
A Low-Tech Budget**  
Page 252

▲  
**Digital Smoking  
Guns Are All  
Around Us**  
Page 255

▲  
**Dangers of Your  
Client's Social  
Media—How to  
Prevent Your  
Client from  
Ruining Their Case**  
Page 262

▲  
**Operation  
CryptoSweep—The  
Alabama Securities  
Commission Is  
Setting the Bar in  
Cryptocurrency  
Crackdown**  
Page 266

▲  
**What's in a Name  
(Besides Centuries  
Of Confusion)?  
The Alabama  
Uniform Voidable  
Transactions Act**  
Page 270

▲  
**5G Mobile  
Technology—FCC  
Preemption and  
Geopolitics**  
Page 276

# Is your practice more demanding than ever?



**The best malpractice insurance takes no time to find. AIM makes it easy.**

**Dedicated to insuring practicing attorneys.**



**Attorneys Insurance Mutual  
of the South®**

**200 Inverness Parkway  
Birmingham, Alabama 35242**

**Telephone 205-980-0009  
Toll Free 800-526-1246  
Fax 205-980-9009**

**[www.AttysInsMut.com](http://www.AttysInsMut.com)**

**“Insuring and Serving Practicing Attorneys Since 1989”**

Copyright 2013 by Attorneys Insurance Mutual of the South®

Scan for Application





WHERE VOICE BECOMES VISIBLE.®



**ALABAMA**  
COURT REPORTING, INC  
STATE & NATIONWIDE COVERAGE

*Offices in*  
Birmingham  
Huntsville  
Montgomery  
Mobile  
Florence  
Gadsden

877.  
478.3376

Nationwide Scheduling  
Realtime  
Court Reporters  
Videographers  
Videoconferencing  
Trial Technicians  
Daily Copy

Bringing the experience you need for your next big case.

[WWW.ALABAMAREPORTING.COM](http://WWW.ALABAMAREPORTING.COM)



# LAWPAY IS FIVE STAR!



In our firm, it's actually fun to do our billings and get paid. I send our bills out first thing in the morning and more than half are paid by lunchtime. **LawPay makes my day!**

– Cheryl Ischy, Legal Administrator  
Austin, Texas



Trusted by more than **35,000 firms** and  
Rated '**5-Star**' on Trustpilot

PAYMENT INBOX	
✓ INVOICE PAID receipts@lawpay.com	\$775.00
✓ INVOICE PAID receipts@lawpay.com	\$1,500.00
✓ INVOICE PAID receipts@lawpay.com	

# LAWPAY<sup>®</sup>

AN AFFINIPAY SOLUTION

## THE #1 PAYMENT SOLUTION FOR LAW FIRMS

Getting paid should be the easiest part of your job, and with LawPay, it is! However you run your firm, LawPay's flexible, easy-to-use system can work for you. Designed specifically for the legal industry, your earned/unearned fees are properly separated and your IOLTA is always protected against third-party debiting. Give your firm, and your clients, the benefit of easy online payments with LawPay.

**877-591-1627** or visit [lawpay.com/alabar](http://lawpay.com/alabar)

LawPay is proud to be a vetted and approved Member Benefit of the Alabama State Bar.



Special offer for bar members.  
**Call for details**

FEATURE ARTICLES

**Alabama Lawyers Hall of Fame**  
238

**Leadership Forum at Age 15:  
A Year to Reflect, Renew and Reenergize**

*By Leadership Forum Alumni*

242

**Mobile Bar Association Celebrates Its 150<sup>th</sup> Anniversary**

*By David A. Bagwell*

247

**Legal Services Alabama: Celebrating 15 Years of Providing  
Statewide Legal Aid in Alabama (2004-2019)**

*By Guy E. Lescault*

250

**THE ALABAMA LAWYER: TECHNOLOGY ISSUE**

**Getting It Done on a  
Low-Tech Budget**

*By Lloyd W. Gathings*

252

**Digital Smoking Guns  
Are All around Us**

(A Tale of the Internet of Things,  
Privacy and Ethical Duties)

*By J. Paul Zimmerman and  
Michael A. Vercher*

255

**Dangers of Your Client's  
Social Media—How to Prevent  
Your Client from Ruining  
Their Case**

*By Bernard D. Nomberg*

262

**Operation CryptoSweep—  
The Alabama Securities  
Commission Is Setting the Bar in  
Cryptocurrency Crackdown**

*By Albert W. Copeland*

266

**What's in a Name (Besides  
Centuries of Confusion)?  
The Alabama Uniform Voidable  
Transactions Act**

*By N. Christian Glenos and  
Cathleen C. Moore*

270

**5G Mobile Technology—FCC  
Preemption and Geopolitics**

*By William M. Lawrence and  
Matthew W. Barnes*

276

**President's Page**  
232

**Executive Director's Report**  
234

**Editor's Corner**  
236

**Important Notices**  
288

**Disciplinary Notices**  
290

**Memorials**  
292

**The Appellate Corner**  
294

**Legislative Wrap-Up**  
302

**About Members,  
Among Firms**  
306

W. Gregory Ward, Lanett.....Chair and Editor  
*wgward@mindspring.com*  
Wilson F. Green, Tuscaloosa .....Co-Chair and Associate Editor,  
*wgreen@fleenorgreen.com*  
Jonathan C. Hill (Rudy), Montgomery .....Vice Chair and  
Associate Editor, *rhill@bradley.com*  
Linda G. Flippo, Birmingham.....Vice Chair and  
Associate Editor, *lflippo@whitearnolddowd.com*

 [facebook.com/AlabamaStateBar](https://facebook.com/AlabamaStateBar)

 @AlabamaStateBar

 @AlabamaStateBar

 [youtube.com/TheAlabamaStateBar](https://youtube.com/TheAlabamaStateBar)

 [flickr.com/AlabamaStateBar](https://flickr.com/AlabamaStateBar)

# ADVERTISERS

Alabama Court Reporting, Inc.....227

Alabama Family Trust.....237

Alabama Legal & Investigative Services, Inc. ....291

Attorneys Insurance Mutual Of the South.....226

Bama By Distance .....233

Cain & Associates Engineers.....249

Davis Direct.....303

J. Forrester DeBuys, III .....258

The Finklea Group .....251

Freedom Court Reporting .....307

GilsbarPRO.....246

Insurance Specialists, Inc. ....308

LawPay .....228

National Academy of Distinguished Neutrals .....231

The Neutral Solution .....245

Professional Software Corporation.....248



**BOARD OF EDITORS:** J. Pratt Austin-Trucks, Wetumpka • Marc J. Ayers, Birmingham • G. Glasco Baxter, Tuscaloosa • Joseph K. Beach, Atlanta • Jennifer M. Bedsole, Birmingham • D. Edgar Black, Muscle Shoals • Henry L. Cassady, Jr. (Max), Evergreen • W. Lloyd Copeland, Mobile • Joi T. Christoff, Montgomery • Ashley H. DeGaris, Birmingham • Aaron L. Dettling, Hoover • Christie Lyman Dowling, Birmingham • Jesse P. Evans, III, Birmingham • Kira Y. Fonteneau, Birmingham • Leigh K. Forstman, Birmingham • Lloyd W. Gathings, II, Birmingham • Hon. William R. Gordon, Montgomery • Steven P. Gregory, Birmingham • Amy M. Hampton, Alexander City • Sarah S. Johnston, Montgomery • Margaret H. Loveman, Birmingham • Mignon A. Lunsford, Mobile • Jennifer Brooke Marshall, The Woodlands, TX • J. Bradley Medaris, Montgomery • Allen P. Mendenhall, Montgomery • Rachel L. Miller, Montgomery • Anil A. Mujumdar, Birmingham • Blake L. Oliver, Opelika • Rebecca D. Parks, Mobile • William F. Patty, Montgomery • Sherrie L. Phillips, Montgomery • Katherine T. Powell, Birmingham • Julie H. Ralph, Baton Rouge • Preston Y. Register, Dothan • Tracy L. Richards, Mobile • Christopher E. Sanders, Montgomery • J. Beren Segarra (Ben), Mobile • Joel P. Smith, Jr., Eufaula • Marc A. Starrett, Montgomery • Mary H. Thompson, Mountain Brook • M. Chad Tindol, Tuscaloosa • Jason B. Tompkins, Birmingham • Henry J. Walker, Jr., Birmingham • Stephen A. Walsh, Birmingham • David G. Wirtes, Jr., Mobile • Barr D. Younker, Jr., Montgomery

## ALABAMA STATE BAR STAFF 415 Dexter Avenue Montgomery, AL 36104 (334) 269-1515 • (800) 354-6154 [www.alabar.org](http://www.alabar.org)

### ADMINISTRATION

Executive Director .....Phillip McCallum  
Director of Personnel & Operations.....Diane Locke  
Administrative Assistant .....Katherine Church  
Communications Coordinator.....Alex Edwards

### ADMISSIONS & ATTORNEY LICENSING

Director of Admissions & Attorney Licensing ..Justin Aday  
Administrative Assistant.....Cathy Sue McCurry  
Administrative Assistant.....Sonia Douglas  
Administrative Assistant .....Angie Fuqua  
Administrative Assistant.....Morgan Lott

### CENTER FOR PROFESSIONAL RESPONSIBILITY

General Counsel.....Roman Shaull  
Paralegal to General Counsel.....Robin Ennis  
Assistant General Counsel .....Jeremy McIntire  
Paralegal/Investigator.....Carol Mott  
Assistant General Counsel.....Mark Moody  
Paralegal/Investigator.....Stacey Moseley  
Disciplinary Commission Clerk .....Kim Ellis  
Disciplinary Clerk .....Bonnie Mainor  
CSF Coordinator .....Laurie Blazer  
Receptionist.....Julie Lee

### ETHICS DIVISION

Assistant General Counsel .....Tripp Vickers  
Director of Practice Management  
Assistance Program .....Eric Anderson

### DIGITAL COMMUNICATIONS

Director of Information Technology .....Dolan Trout  
Information Systems Manager.....Hunter Harris  
Director of Publications .....Margaret Murphy

### PROGRAMS

Director of Programs .....Ashley Penhale  
Administrative Assistant .....Robyn Bernier  
Administrative Assistant .....Vickie Stewart

### FINANCIAL/TRAVEL

Director of Finance.....Merinda Hall  
Financial Assistant .....Kristi Neal

### LAWYER ASSISTANCE PROGRAM

(334) 269-1515 • (334) 834-7576  
Director of Lawyer Assistance Program .....Robert Thornhill  
Case Manager .....Shannon Knight  
Administrative Assistant.....Joycelyn Hill

### LAWYER REFERRAL SERVICE

LRS Representative.....John Dunn

### PRINT SHOP/BUILDING

Print Shop Manager/  
Building Superintendent.....Roderick Palmer

### RECEPTIONIST

.....Stephanie Oglesby

### VOLUNTEER LAWYERS PROGRAM

Director of Volunteer Lawyers Program .....Linda Lund  
ABAP Coordinator .....Hilaire Armstrong  
Intake Clerk.....Debbie Harper  
Intake Clerk.....Doris McDaniel

### OFFICERS AND EXECUTIVE COUNSEL

Sam W. Irby, Fairhope .....President  
Christina D. Crow, Union Springs.....President-Elect  
Augusta S. Dowd, Birmingham .....Past President  
Tazewell T. Shepard, Huntsville .....Vice President  
Phillip W. McCallum, Montgomery .....Secretary  
Frederick G. Helmsing, Jr., Mobile.....Ex Officio Member  
Jana Russell Garner, Selma.....Executive Council  
T. Thomas Perry, Jr., Demopolis .....Executive Council  
Rachel L. Miller, Montgomery.....Young Lawyers' Section President

### BOARD OF BAR COMMISSIONERS

1st Circuit, Halron W. Turner, Chatom • 2nd Circuit, J. Levi Nichols, Luverne • 3rd Circuit, Courtney R. Potthoff, Eufaula • 4th Circuit, Jana Russell Garner, Selma • 5th Circuit, Larry W. Morris, Alex City • 6th Circuit, Place No. 1, Terri Olive Tompkins, Tuscaloosa; Place No. 2, Scott Bradley Holmes, Tuscaloosa • 7th Circuit, William H. Broome, Anniston • 8th Circuit, Emily L. Baggett, Decatur • 9th Circuit, Dana Grimes, Ft. Payne • 10th Circuit, Place No. 1, James M. Terrell, Birmingham; Place No. 2, John A. Smyth, Birmingham; Place No. 3, Barry A. Ragsdale, Birmingham; Place No. 4, Robert G. Methvin, Jr., Birmingham; Place No. 5, LaBella S. Alvis, Birmingham; Place No. 6, Michael D. Ermert, Birmingham; Place No. 7, Allison O. Skinner, Birmingham; Place No. 8, Brannon J. Buck, Birmingham; Place No. 9, Erik Stephen Heninger, Birmingham • Bessemer Cutoff, Kenneth Moore, Bessemer • 11th Circuit, Ralph E. Holt, Florence • 12th Circuit, Carmen F. Howell, Enterprise • 13th Circuit, Place No. 1, Charles Zackery Moore, Mobile; Place No. 2, Frederick G. Helmsing, Jr., Mobile; Place No. 3, William R. Lancaster, Mobile; Place No. 4, Bryan E. Comer, Mobile; Place No. 5, James Rebarchak, Mobile • 14th Circuit, Charles C. Tatum, Jr., Jasper • 15th Circuit, Place No. 1, George R. Parker, Montgomery; Place No. 2, Patrick L.W. Sefton, Montgomery; Place No. 3, J. Flynn Mzingo, Montgomery; Place No. 4, C. Gibson Vance, Montgomery; Place No. 5, Jeffery C. Duffey, Montgomery; Place No. 6, David Martin, Montgomery • 16th Circuit, Bradley W. Cornett, Gadsden • 17th Circuit, T. Thomas Perry, Jr., Demopolis • 18th Circuit, Place No. 1, William Randall May, Birmingham; Place No. 2, Mark S. Boardman, Chelsea; Place No. 3, Anne Malatia Glass, Birmingham • 19th Circuit, Robert L. Bowers, Jr., Clanton • 20th Circuit, R. Cliff Mendheim, Dothan • 21st Circuit, J. Kirkman Garrett, Brewton • 22nd Circuit, Manish H. Patel, Andalusia • 23rd Circuit, Place No. 1, Tazewell T. Shepard, Huntsville; Place No. 2, John A. Brinkley, Jr., Huntsville; Place No. 3, Rebekah Keith McKinney, Huntsville; Place No. 4, M. Clay Martin, Huntsville • 24th Circuit, Amanda Walters Porter, Fayette • 25th Circuit, B. Scott Shipman, Haleyville • 26th Circuit, F. Patrick Loftin, Phenix City • 27th Circuit, Clint L. Maze, Arab • 28th Circuit, Place No. 1, James Lynn Perry, Daphne; Place No. 2, J. Langford Floyd, Fairhope • 29th Circuit, Sally Clark Bowers, Sylacauga • 30th Circuit, Erskine R. Funderburg, Jr., Pell City • 31st Circuit, H. Thomas Heflin, Jr., Tusculumbia • 32nd Circuit, Roy W. Williams, Jr., Cullman • 33rd Circuit, Robert H. Brogden, Ozark • 34th Circuit, Jeffrey L. Bowling, Russellville • 35th Circuit, Clinton H. Hyde, Evergreen • 36th Circuit, Christy Williams Graham, Moulton • 37th Circuit, Andrew D. Stanley, Opelika • 38th Circuit, Deborah L. Dunsmore, Scottsboro • 39th Circuit, Donald B. Mansell, Athens • 40th Circuit, Gregory M. Varner, Ashland • 41st Circuit, Brett Ashley King, Locust Fork

### AT-LARGE BOARD MEMBERS

Diandra S. Debrosse, Birmingham • Raymond L. Bell, Jr., Mobile • Latisha R. Davis, Chattanooga • Charles Price, II, Birmingham • Karen Laneaux, Montgomery • Kira Y. Fonteneau, Birmingham • Jeanne Dowdle Rasco, Huntsville • John Thomas Stamps, III, Bessemer

*The Alabama Lawyer* (USPS 743-090) is published six times a year by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Periodicals postage paid at Montgomery, Alabama and additional mailing offices.

POSTMASTER: Send address changes to *The Alabama Lawyer*, P.O. Box 4156, Montgomery, AL 36103-4156.

*The Alabama Lawyer* is the official publication of the Alabama State Bar. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Advertising rates will be furnished upon request. Advertising copy is carefully reviewed and must receive approval from the Office of General Counsel, but publication herein does not necessarily imply endorsement of any product or service offered. *The Alabama Lawyer* reserves the right to reject any advertisement. Copyright 2019. The Alabama State Bar. All rights reserved.



# THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS ALABAMA CHAPTER

[WWW.ALMEDIATORS.ORG](http://WWW.ALMEDIATORS.ORG)

Check preferred available dates or schedule appointments directly with the state's top mediators & arbitrators. For free.



Phil Adams  
OPELIKA



Beverly Baker  
BIRMINGHAM



Danny Banks  
HUNTSVILLE



William Coleman  
MONTGOMERY



Martha Reeves Cook  
BIRMINGHAM



Reggie Copeland  
MOBILE



Sam Crosby  
DAPHNE



Charles Denaburg  
BIRMINGHAM



Charles Fleming  
MOBILE



Stevan Goozee  
BIRMINGHAM



Arthur Hanes  
BIRMINGHAM



Bernard Harwood  
TUSCALOOSA



Braxton Kittrell  
MOBILE



Debra Leo  
BIRMINGHAM



Rodney Max  
BIRMINGHAM



Boyd Miller  
MOBILE



Larry Moore  
FLORENCE



William Ratliff  
BIRMINGHAM



Ben Rice  
HUNTSVILLE



Jim Rives  
MONTGOMERY



Allen Schreiber  
BIRMINGHAM



Kenneth Simon  
BIRMINGHAM



Spin Spires  
BIRMINGHAM



Harold Stephens  
HUNTSVILLE



Glynn Tubb  
DECATUR



Michael Upchurch  
MOBILE



Marty VAN TASSEL  
BIRMINGHAM



Michael WALLS  
BIRMINGHAM



Brad Wash  
BIRMINGHAM

The National Academy of Distinguished Neutrals is an invitation-only association of over 900 top-rated premier mediators & arbitrators throughout the US, and proud Neutral Database Partner to the national defense (DRI) & plaintiff (AAJ) bar associations. For more info, see [www.nadn.org/about](http://www.nadn.org/about)



## P R E S I D E N T ' S   P A G E

**Sam Irby**  
samirby@irbyandheard.com  
(251) 929-2225



*Enjoying the Mobile Bar Association's 150th Anniversary celebration are MBA Executive Director Ann Sirmon, U.S. District Court Clerk Chuck Diard, ASB President Sam Irby, U.S. District Court Judge Jeff Beaverstock, Sontrease Williams-Maynard, MBA President Mark Newell, Father Dan Goode, former U.S. Attorney General Jeff Sessions, and U.S. Circuit Judge William Pryor. (Photo by Chad Riley Photography, Mobile)*



**THE  
ALABAMA  
STATE  
BAR  
NEEDS  
YOU!**



## A Year of Listening and Learning

It has been my honor to serve as the 143<sup>rd</sup> president of the Alabama State Bar representing our 18,000+ members. I was fortunate to have the opportunity to travel throughout Alabama meeting and getting to know many fine Alabama lawyers. My favorite part of the job has been meeting all of you, the lawyers of Alabama. I have made many new friends and these friendships are very special to me.

As I noted in my May column, there are countless exceptional, talented and professional Alabama lawyers giving service to their clients, the community, our profession and the state bar. In addition, most of them regularly provide pro bono service to clients who are in need. There are few professions where you can make a difference in the lives of everyday people, truly living up to the

Alabama State Bar motto, "Lawyers Render Service."

We are very fortunate to belong to a strong and respected bar, but we can always make it better. I encourage you to get involved. The Alabama State Bar needs you and the door is always open for you to get involved. Join a committee or task force. Consider running for bar commissioner or president. You will get more out of your involvement than you could ever imagine. And, your involvement will make our bar a better bar.

My main goal has been to improve the way the state bar communicates with, and provides service to, its members. This is best done by interacting with individual members and hearing what you say about how the state bar can remain relevant to you in your professional lives.



Along with other state bar leaders and staff members, we have traveled to numerous towns and cities throughout Alabama giving "State of the Bar" presentations. I have spoken to many groups—marking the opening of the Alabama Supreme Court, welcoming newly-licensed lawyers, celebrating the Mobile Bar Association's 150<sup>th</sup> anniversary, visiting with many local bar associations and more. We also went out into the local communities and met with lawyers and judges in their offices, seeking their perspective about the state bar. Everyone was very gracious and receptive to our visits. It is important for the state bar to listen to the concerns of our members.

## Many Thanks

This has been the greatest professional experience of my life, and I have many people to thank.

Thank you to all of the state bar members who have served on committees and task forces. There are numerous committees and task forces doing the work of your state bar, work which cannot happen without all of the many individuals who are willing to give of their time and take on leadership roles.

Thank you to the members of the Executive Council: Vice President Taze Shepard (Huntsville), Jana Russell Garner (Selma), Judge Monet Gaines (Montgomery), Tom Perry (Demopolis), Fred Helmsing (Mobile), Rachel Miller (Montgomery), past President Augusta Dowd (Birmingham) and President-Elect Christy Crow (Union Springs). They have devoted many hours to the state bar and are true leaders.

Thank you to our very special bar staff who are always available to assist state bar leaders and members. We have the best bar staff in the country. Thank you to General Counsel Roman Shaul, and everyone in his office. They have provided the state bar with sound guidance and legal advice. Thanks also to Executive Director Phillip McCallum and to Director of Personnel and Operations Diane Locke for their invaluable support. Everyone on the state bar staff has been very courteous and supportive throughout my presidency. I have really enjoyed working with and getting to know each of them.

Most of all, though, I thank the members of the Alabama State Bar who so willingly listened to what I had to say.

Thank you for giving me the opportunity to serve.

Congratulations to incoming President Christy Crow and to President-Elect Bob Methvin. We are very lucky to have them as the leaders of the Alabama State Bar. I wish them the best.

Thanks to Mobile lawyer Mary Margaret Bailey of Frazer Greene for her assistance in preparing this article. ▲



*Crow*



*Methvin*

## Outstanding results for you *and* your clients



## Earn your LL.M. in Business Transactions or Taxation online

The University of Alabama's School of Law's online LL.M. programs deliver live lectures by leading scholars and practitioners from across the country to wherever you are. Start earning your degree now and experience the powerful, interactive connection of live online instruction.



[AlabamaLLM.ua.edu/al](http://AlabamaLLM.ua.edu/al)



## EXECUTIVE DIRECTOR'S REPORT

*Phillip W. McCallum*  
phillip.mccallum@alabar.org



*Katherine Church, Diane Locke, Margaret Murphy and Bonnie Mainor have a combined total of almost 130 years of service, all having worked for the three most recent executive directors.*

## The Best Bar Staff in America

Too often we take people's great work for granted and simply forget to say anything. I naturally expect the Alabama State Bar staff, or should I say our "bar family," to do an excellent job, but they never cease to amaze me with their dedication and commitment to our organization. The pride they take in their work is inspiring and their positive attitude is infectious. Our staff of 38 serves more than 18,000 lawyers!

Many of our key staff members were integral to Keith Norman's incredible 23-year stewardship to the bar and some even go back the tenure of Reggie Hamner. These remarkable individuals are now, and have been, the backbone of

our state bar and I frequently find myself relying upon their wisdom.

Since I arrived two years ago as the newly-named executive director, we have lost more than 100 years of institutional knowledge through retirement in several key positions. Yet we continue to learn, adapt and thrive. Our future success is vitally dependent upon the continuity brought by our long-term staff. Not only do they continue to do their jobs and more, it has been awesome to watch as they have embraced, trained and mentored some of the new faces who have come on board to ensure their philosophy of service to the legal profession will continue without abatement.



*This year marks the fifth annual “AJ’s Fish Fry” at the state bar. Past President Anthony “AJ” and Cassandra Joseph (front row, center) prepare fried catfish and all the trimmings for the staff and guests. It’s always a fun time!*



*ASB executive directors, past and present: Judge John Scott, Keith Norman, Reggie Hammer and Phillip McCallum (Photo by Dolan Trout)*



*Newly-named Assistant Executive Director Justin Aday with wife Alexis, daughter Taylor and son Ellis at the Alabama National Fair*

Our bar family always finds a way to get it done, and done well. Thank you!

I am pleased to announce that Justin Aday has agreed to serve as assistant executive director in addition to his current responsibilities. Justin has served as the director of admissions for the state bar since 2014 and has done an excellent job in ensuring and maintaining the integrity of the admission and licensing process.

It remains an honor and privilege to work with so many wonderful people—the best bar staff in the nation! ▲



*Showing that they have a fun side, some of the staff of the Office of General Counsel dressed as characters from “The Wizard of Oz” for last year’s Halloween Party.*



## EDITOR'S CORNER

**W. Gregory Ward**  
wgward@mindspring.com



*Anyone who isn't embarrassed of  
who they were last year  
probably isn't learning enough.*

—Alain de Botton

Greg Hawley, our former editor, used to tell me that the goal of *The Alabama Lawyer* is for lawyers to teach lawyers. Succinct, simple, clear—I like it. All of us lawyers want to be smarter and better informed, and we try to make that happen with every *Alabama Lawyer* that comes down the pike. And if we are lucky, we will be entertained while we are being enlightened.

This edition's theme is technology, and two of our board members, Lloyd Gathings and Kira Fonteneau, were in charge of finding authors and gathering articles. They did a terrific job.

Lloyd Gathings starts us off with a practical, hands-on perspective on how a small law practice—even a solo practitioner—can compete with the technology

of the big firms, and how they can do that on a budget.

Ever thought about digital smoking guns? Mike Vercher and Paul Zimmerman of Christian & Small have, and they scare us (me, anyway) by telling us a fictional story (that could really happen) to demonstrate just how open all of us are being tracked by the technology that surrounds us—both voluntarily and also some of which we might not even be aware. Do you have any idea how many different devices record things about you every day? I'm not sure I actually wanted to know. Could someone send this to Stephen King?

Bernard Nomberg of Birmingham warns us that our clients can destroy their own cases by their unwise use of

social media. And he tells us what do to about it.

Albert Copeland of Christian & Small writes about Operation Cryptosweep and explains to us how the Alabama Securities Commission takes care of us.

Chris Glenos and Cathy Moore of Bradley, Arant ask "What's In a Name," and then explain Alabama's new (and often misunderstood) Uniform Voidable Transactions Act. They tie together Justinian, St. Augustine, the King of Kent, Queen Elizabeth—and the Alabama Legislature. Not everyone could pull that off.

Do you think the Internet is fast now? Bill Lawrence and Matt Barnes of Burr & Forman tell us all about the move to 5G, which, they explain, can make the Internet up to 100 times faster than what we have now—and what Alabama and its municipalities can do to help move along this improvement. They also demonstrate the international struggle to see which country dominates 5G, and they let us

know just how much rides on the outcome of that battle. This is an article that everyone who represents any city or county should read, as should every member of our legislature. Feel free to send it around.

One of the things we enjoy the most is keeping everyone up on what is going on around the state. This month we have three articles that celebrate birthdays. David Bagwell's writing and Ann Sirmon's photographs combine to tell the story of the 150<sup>th</sup> anniversary of the Mobile Bar Association. Not only did David and Ann do good work, but they are two of the most delightful people I've had the opportunity with whom to work. The state bar's Leadership Forum turns 15 this year, as does Legal Services Alabama, and you can read all about them, too.

Take a look at the article about the newest admittees to the Alabama Lawyers Hall of Fame. All of them are impressive, and two of them impacted me directly.

Robert A. Huffaker was my first editor at *The Alabama Lawyer*. No one knew better how to bring along a young writer. His intellect was eclipsed by his humility, and he was always a pleasure to work with. We did ourselves proud inducting him. I'm fortunate to have known and worked with him.

George Peach Taylor taught me criminal law when I was in law school. When I began practicing law, young lawyers had no choice but to take criminal appointments, and I owe much of the meager help I was able to give to having sat under his tutelage. His son, David, was in my law school class and I always thought a lot of him. Alabama can be rightly proud of Professor Taylor.

So, enjoy the articles. Email me at [wguard@mindspring.com](mailto:wguard@mindspring.com) if you have questions, or comments, or want to write. We are always looking for our next group of excellent writers. ▲

## Help Your Clients With Special Needs Trusts Administered by . . .



*Do you encounter these scenarios  
in your practice?*

- Elderly client about to move into a nursing home
- Disabled minor about to receive child support
- Disabled client who needs a conservatorship
- Disabled client about to receive:
  - Alimony payments
  - An inheritance
  - A legal settlement or judgment

*Alabama*  
**Family Trust**  
ADMINISTERING SPECIAL NEEDS TRUSTS

Use Alabama Family Trust to help your clients qualify for or keep their current government benefits. We have been serving Alabamians for 20+ years since being created by the Alabama Legislature, and we currently manage \$27M+ in our non-profit pooled trust.

**Need help?** See our special web page just for attorneys where you can learn more about Special Needs Trusts and download complete trust documents.

[www.alabamafamilytrust.com](http://www.alabamafamilytrust.com)

**205-313-3915**

2820 Columbiana Road, Suite 301 Vestavia, AL 35216 [sbrubaker@alabamafamilytrust.com](mailto:sbrubaker@alabamafamilytrust.com)

# ALABAMA LAWYERS Hall of Fame

*Photos by Fouts Commercial Photography*



*As always, a large crowd attended the Alabama Lawyers Hall of Fame ceremony held at the Heflin-Torbert Judicial Building.*

## May is traditionally the month when new members are inducted into the Alabama Lawyers Hall of Fame

which is located at our state judicial building. The idea for a hall of fame first appeared in 2000, when Montgomery attorney Terry Brown wrote Alabama State Bar President Sam Rumore with a proposal that the former supreme court building, adjacent to the Alabama State Bar building and vacant at that time, should be turned into a museum memorializing the many great lawyers in the history of this state.

The implementation of the idea of an Alabama Lawyers Hall of Fame originated during the term of state bar President

Fred Gray. He appointed a task force to study the concept, set up guidelines and then provide a recommendation to the Board of Bar Commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004.

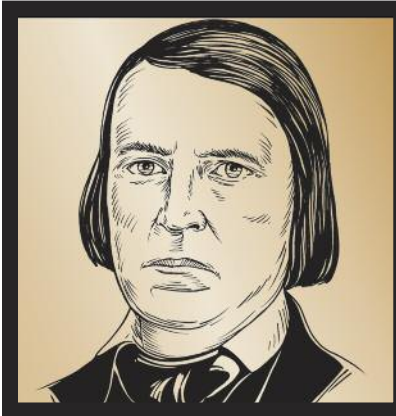
A 12-member selection committee, consisting of the immediate past president of the Alabama State Bar, a member appointed by the chief justice, one member appointed by each of the three presiding federal district court judges of Alabama, four members appointed by the Board of Bar Commissioners, the director of the Alabama Department of Archives and History, the chair of the Alabama Bench and Bar Historical Society and the Executive Secretary of the Alabama State Bar, meets annually to consider the nominees and to make selections for induction.



Accepting the plaque for the Clemens family is Sam King (center), with Archives and History Director Steve Murray and ASB President Irby. King is Jeremiah Clemens's great-great-grandson.



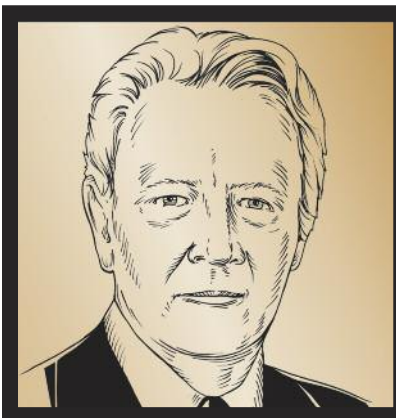
Carl Elliott, III accepts the plaque for the Elliott family from ASB President Irby and Hall of Fame Selection Committee member Wendy Brooks Crew.



## JEREMIAH CLEMENS

1814 - 1865

Born in Huntsville, Alabama, then part of the Mississippi Territory; lawyer, politician, military leader, author; educated at LaGrange College, the University of Alabama, and Transylvania University; began law practice before his 20th birthday; elected to Alabama Legislature in 1839 and 1841; served in the U.S. Army in the Mexican War and attained the rank of Colonel; served in the U.S. Senate, 1849-1853; received acclaim for writing several novels and was cousin of Samuel Clemens (Mark Twain); spoke out against secession but eventually voted for Alabama to secede; ultimately supported the end of the Civil War and restoration of the Union; died of pneumonia at the age of 50 in 1865 and is buried in Huntsville.



## CARL ATWOOD ELLIOTT, SR.

1913 - 1999

Born in Franklin County, Alabama; attended the University of Alabama and served as Student Body President; earned law degree in 1936; practiced law in Russellville and Jasper from 1936 until his election to Congress in 1948 and served eight terms until 1964; served two years in the Army during World War II; co-authored the Library Services and Construction Act (1956) which provided 7.5 million dollars over five years for building, staffing, and stocking rural libraries and the National Defense Education Act (1958) which provided a billion federal dollars for education that included student loans and graduate fellowships; named the first recipient of the Profile in Courage Award in 1990 given by the John F. Kennedy Library Foundation.

Inductees to the Alabama Lawyers Hall of Fame must have had a distinguished career in the law. This could be demonstrated through many different forms of achievement, leadership, service, mentorship, political courage or professional success. Each inductee must have been deceased at least two years at the time of their selection. Also, for each year, at least one of the inductees must

have been deceased a minimum of 100 years in order to give due recognition to historic figures, as well as the more recent lawyers of the state.

The selection committee actively solicits suggestions from members of the bar and the general public for the nomination of inductees. Nominations are needed of historic figures as well as present-day lawyers for consideration.

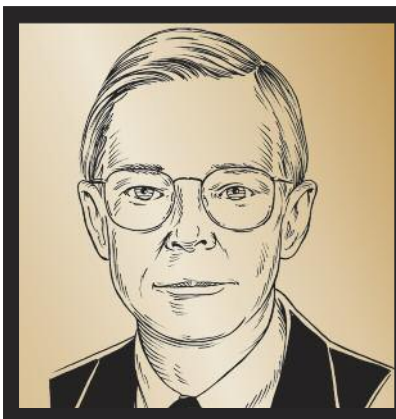
Great lawyers cannot be chosen if they have not been nominated. Nominations can be made throughout the year by downloading the nomination form at [www.alabar.org](http://www.alabar.org) and submitting the requested information. Plaques commemorating the inductees are located in the lower rotunda of the judicial building and profiles of all inductees are found on the state bar's website. ▲



*The Robert Huffaker family—Accepting the plaque were Kitty Huffaker (second from left) and Austin Huffaker (second from right, back row).*



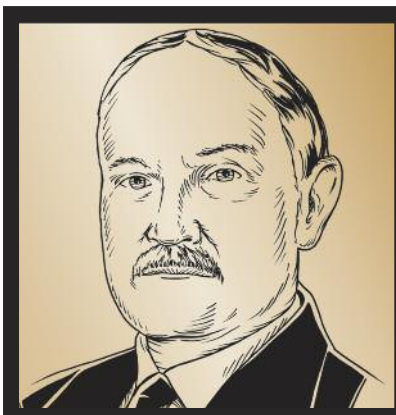
*Hall of Fame Selection Committee Chair Sam Rumore and President Sam Irby with James Baggett, Birmingham Public Library archivist, who accepted the plaque for the Sims family.*



## ROBERT A. HUFFAKER

1944 - 2010

Born in Gentry, Arkansas and attended the University of Alabama receiving his B.S. degree in 1966 and his J.D. in 1968 from the University of Alabama School of Law being ranked first in his law school class; served as Editor-In-Chief of the *Alabama Law Review*; a member of the Order of the Coif; after serving in the U.S. Army, became law clerk to Alabama Supreme Court Justice James M. Bloodworth; entered the private practice of law in 1971 and remained with his firm until his death; participated in many Alabama State Bar activities which included Section Chairman, Bar Commissioner, and numerous committees; served as Editor of *The Alabama Lawyer* magazine for more than 27 years.



## HENRY UPSON SIMS

1873 - 1961

Scholar, author, teacher and writer; born in Columbus, Mississippi and attended the University of Virginia where he received a B.A. degree in 1894; attended Harvard University and received his LL.B. degree in 1897; received an honorary LL.D. degree conferred by the University of Alabama in 1926; President of the Birmingham Bar Association (1915); President of the Alabama State Bar (1917-1918); President of the American Bar Association (1929-1930); only person to hold all three offices; executive committee of the American Law Institute (1910-17); practiced law in Birmingham until his retirement; Chairman of Jefferson County Community Chest and Red Cross; Birmingham Public Library benefactor and community servant.





The George Peach Taylor family—Jarry Taylor accepted the plaque on behalf of the family.



# GEORGE PEACH TAYLOR

1925 - 2008

Dedicated lawyer, professor, and public servant; born in Birmingham and graduated from the University of Alabama School of Law; clerked for Alabama Supreme Court Justice Ed Livingston; practiced law in Birmingham with an interest in civil rights and his community; acted as a mediator between Dr. Martin Luther King, Jr. and downtown Birmingham businesses in the 1960s; instrumental in the admission of the first African-American into the Birmingham Bar Association; served with the Peace Corps (1965-1970) in Africa and South America; Chief Counsel of Lawyers' Committee for Civil Rights Under Law (1970-73); Professor and Associate Dean, University of Alabama School of Law (1973-1989); Public Defender for Tuscaloosa County (1989-1993).

## ALABAMA LAWYERS HALL OF FAME PAST INDUCTEES

### 2017

Bibb Allen (1921-2007)  
Mahala Ashley Dickerson (1912-2007)  
John Cooper Godbold (1920-2009)  
Alto Velo Lee, III (1915-1987)  
Charles Tait (1768-1835)

### 2016

William B. Bankhead (1874-1940)  
Lister Hill (1894-1984)  
John Thomas King (1923-2007)  
J. Russell McElroy (1901-1994)  
George Washington Stone (1811-1894)

### 2015

Abe Berkowitz (1907-1985)  
Reuben Chapman (1799-1882)  
Martin Leigh Harrison (1907-1997)  
Holland McTyeire Smith (1882-1967)  
Frank Edward Spain (1891-1986)

### 2014

Walter Lawrence Bragg (1835-1891)  
George Washington Lovejoy (1859-1933)  
Albert Leon Patterson (1894-1954)  
Sam C. Pointer, Jr. (1934-2008)  
Henry Bascom Steagall (1873-1943)

### 2013

Marion Augustus Baldwin (1813-1865)  
T. Massey Bedsole (1917-2011)

William Dowdell Denson (1913-1998)  
Maud McLure Kelly (1887-1973)  
Seybourn Harris Lynne (1907-2000)

### 2012

John A. Caddell (1910-2006)  
William Logan Martin, Jr. (1883-1959)  
Edwin Cary Page, Jr. (1906-1999)  
William James Samford (1844-1901)  
David J. Vann (1928-2000)

### 2011

Roderick Beddow, Sr. (1889-1978)  
John McKinley (1780-1852)  
Nina Miglionico (1913-2009)  
Charles Morgan, Jr. (1930-2009)  
William D. Scruggs, Jr. (1943-2001)

### 2010

Edgar Thomas Albritton (1857-1925)  
Henry Hitchcock (1792-1839)  
James E. Horton (1878-1973)  
Lawrence Drew Redden (1922-2007)  
Harry Seale (1895-1989)

### 2009

Francis Hutcheson Hare, Sr. (1904-1983)  
James G. Birney (1792-1857)  
Michael A. Figures (1947-1996)  
Clement C. Clay (1789-1866)  
Samuel W. Pipes, III (1916-1982)

### 2008

John B. Scott (1906-1978)  
Vernon Z. Crawford (1919-1985)  
Edward M. Friend, Jr. (1912-1995)  
Elisha Wolsey Peck (1799-1888)

### 2007

John Archibald Campbell (1811-1889)  
Howell T. Heflin (1921-2005)  
Thomas Goode Jones (1844-1914)  
Patrick W. Richardson (1925-2004)

### 2006

William Rufus King (1776-1853)  
Thomas Minott Peters (1810-1888)  
John J. Sparkman (1899-1985)  
Robert S. Vance (1931-1989)

### 2005

Oscar W. Adams (1925-1997)  
William Douglas Arant (1897-1987)  
Hugo L. Black (1886-1971)  
Harry Toulmin (1766-1823)

### 2004

Albert John Farrah (1863-1944)  
Frank M. Johnson, Jr. (1918-1999)  
Annie Lola Price (1903-1972)  
Arthur Davis Shores (1904-1996)



*Leadership Forum Session 1*

# LEADERSHIP FORUM AT AGE 15: A Year to Reflect, Renew and Reenergize

*By Leadership Forum Alumni*

Since its inception in 2005, the Alabama State Bar Leadership Forum (“LF”)

has graduated nearly 400 lawyer servant-leaders and sent them back into law firms, businesses, non-profits and governmental entities across the state to carry out the mission of the LF. Thanks to the insight and vision of Assistant Executive Director Ed Patterson, the state bar’s Board of Bar Commissioners created the forum “to produce committed and involved lawyers willing to take significant leadership roles in local and state bars, and serve as role models in matters of ethics and professionalism.” Leadership Forum

graduates are equipped not only to influence the bar, but to shape the future of the state. They are models of ethical and professional behavior both within and outside the legal community.

Over the last 14 years, the program has produced two bar presidents (and a president-elect), more than 25 Bar Commissioners, 10 presidents of the Young Lawyers’ Section, more than 20 judges and countless local bar leaders. Recognizing the need for servant-minded bar and community leadership training, under Patterson’s leadership and with the consistent support of the BBC, the LF has become a nationally-recognized, cutting-edge

leadership program. The forum sets the standard for other state bars and legal organizations to follow. In 2013, the American Bar Association awarded the LF the E. Smythe Gambrell Professionalism Award, the nation's leading award honoring the best professionalism programs and practices of law schools, bar associations, professional commissions and other law-related organizations.

This year's retirement of Patterson and the addition of Ashley Penhale as the bar's new director of programs gave the Leadership Forum the opportunity to celebrate its 15<sup>th</sup> anniversary by taking a strategic one-year pause in its typical annual class structure. With

the support of bar staff and leadership, the LF Section has taken 2019 to focus on LF alumni by engaging them in reflecting on what has worked well in the past and what improvements they could recommend, as well as joining with other bar leaders to plan for the future of the forum.

To accomplish this goal, under the leadership of LF alumni including ASB President-Elect Christy Crow, Bar Commissioner George Parker, former LF Alumni Section Executive Council member Kitty Brown and LF Alumni Section President Janine Smith, three Leadership Forum Alumni summits were held in Montgomery and Birmingham in

February and April. While each summit was specifically designed for a targeted group of LF classes, all alums were invited to attend any and all summits. Each summit enjoyed a high rate of participation and engagement from LF alumni, giving true testament to the impact that this program has had on so many over the past 15 years.

Each summit kicked off with a Thursday night social for forum alumni to reconnect and network. In Birmingham, those events were held at Top Golf and The Woolworth, and in Montgomery participants enjoyed a Montgomery Biscuits baseball game. The following morning, the summit was



*Leadership Forum Session 2*



*Leadership Forum Session 3*

split into two sessions. The initial session featured alumni speakers who shared their life experiences in the form of brief “Ed Talks,” named in honor of Patterson and his lasting impact on the program.

Summit speakers included Ed Sledge, Judge Bess Creswell, Jenna Bedsole, Judge Pamela Higgins, AAJ President-Elect Josh Hayes, Pooja Chawla, Bar Commissioner Emily Baggett, Bar Commissioner Brett King, Judge Craig Cargile, state bar General Counsel Roman Shaul, Judge Jim Hughey, Bar Commissioner Audrey Strawbridge, Judge Gray Borden, Holly Sawyer, Bar Commissioner John Brinkley, Jaffe Pickett, Judge Emily Marks, Wilson Green, Heather Fann, Ashley Peinhardt, Judge John England, Judge Adrian Johnson, George Newton, Starr Drum, Bar Commissioner and former ASB Vice President Diandra Debrosse and Rip Andrews. The LF Alumni Section thanks this outstanding group

of lawyers and judges for taking the time to share their stories.

Following the “Ed Talks,” alumni were separated into focus groups for discussions led by LF alumni facilitators Othni Lathram, Nathan Dickson and Adam Plant. Judge Shera Grant, Janine Smith and Adam Israel served as reporters for these sessions. The focus sessions resulted in multiple ideas that will be implemented in the near future, including creating an active LISTSERV for alumni, organizing regular regional socials and increasing involvement by alumni in future bar CLE programs. In addition, the “Ed Talks” were filmed and will be included in future LF promotional and marketing materials.

Special thanks to LF alumni Cassandra Adams, Brandy Robertson, Andrew Nix, Chris Waller and Ashley Peinhardt, and state bar Director of Programs Ashley Penhale, Administrative Assistant to the Director of Programs Robin



*LF Alumni Soo Seok Yang and Cassandra Adams*

Bernier and Communications Coordinator Alex Edwards for their hard work in planning and executing the sessions.

The future of the LF is bright. The 2019 summits resulted in an invigorated group of LF alumni, which in turn will result in an invigorated program going forward. All bar members are encouraged to make plans to nominate qualified



candidates to be a part of LF Class 15. Applications will be available on the bar's website in the fall of 2019 for the 2020 Class. Those

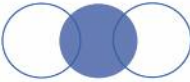
lawyers whose last year of eligibility fell within 2019 are invited to apply for the 2020 class. More information about the LF summits

and excerpts from the "Ed Talks" will be presented at the state bar's Annual Meeting on Thursday at 2:00 p.m. ▲

**Now there is **ONE PLACE** to find a mediator for all your needs!**

Finding the *right mediator* doesn't have to be a *shot in the dark*. The Neutral Solution is a unique community of Alabama-based mediators, arbitrators and private judges, who provide *affordable mediation solutions* in a diverse range of specialty areas.

Visit our website today to browse our *Neutral Directory*, or give us a call at 205.202.6608.

  
**THE NEUTRAL SOLUTION™**  
A mediation and arbitration community

[TheNeutralSolution.com](http://TheNeutralSolution.com)

**MEDIATION • ARBITRATION • PRIVATE JUDGING**



Fastest smartest malpractice insurance. Period.

800.906.9654  
GilsbarPRO.com



Photo by Chad Riley Photography, Mobile

# MOBILE BAR ASSOCIATION Celebrates Its 150<sup>th</sup> Anniversary

By David A. Bagwell

Lawyers have associated ever since there have been lawyers,

but official bar associations are not so old. Mobile's is pretty old—32 lawyers incorporated the Mobile Bar Association 150 years ago on April 12, 1869.

The Mobile Bar Association, led by current president Mark Newell with Armbrecht Jackson, celebrated its birthday on March 28 with a ceremony in the new federal courthouse in Mobile. Sun-trease Williams-Maynard led the Pledge of Allegiance and John T. Crowder, with Cunningham Bounds, sang the National Anthem. Alabama State Bar President Sam Irby congratulated the group on its milestone.

The main address was given by Judge William H. Pryor, Jr., a Mobile native, former Alabama Attorney General and now United States

Circuit Judge on the Court of Appeals for the Eleventh Circuit. The subject of Judge Pryor's address was the only U.S. Constitutional doctrine which originated in Mobile, "the Original Footing Doctrine," first espoused in the 1840s by Mobile lawyer John Archibald Campbell. The earlier U.S. Court-house in Mobile was named after Justice Campbell in 1980.

Following the ceremony, the 300 or so celebrants marched in an ersatz Mardi Gras "second line" procession up the street to the Battle House Hotel, where the Paul W. Brock Inn of Court and the Mobile Bar Association together hosted a reception, and a few lawyers—some from 1869, some not—were toasted by some of today's lawyers. Presiding were President Newell and Mary Margaret Bailey, with Frazer Green, president of the Inn.

Who were some of those founders?



Photo by Chad Riley Photography, Mobile

The incorporators included these, among others:



*Erik Overbey Collection, The Doy Leale McCall Rare Book and Manuscript Library, University of South Alabama*

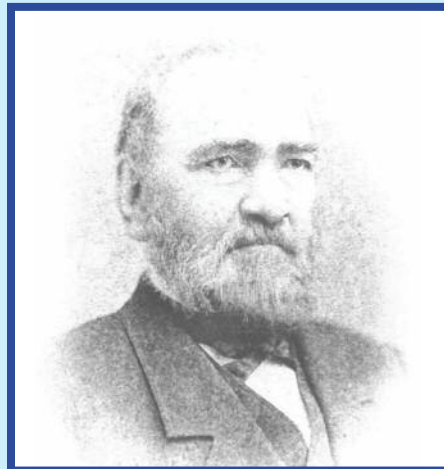
### Daniel Perrin Bestor

Mr. Bestor was born in Greensboro, Alabama in 1840 to Daniel

Bestor, a prominent Baptist minister who was a trustee of the University of Alabama. He graduated from the University of Mississippi at age 18 with a bachelor of arts degree, and moved immediately to Mobile and read law with a lawyer.

When the Civil War came in 1861, he volunteered for the 37<sup>th</sup> Mississippi Infantry, spending the war in the Virginia theater, and after the cessation of hostilities he came back to Mobile and read law some more, and was admitted to the bar in 1867.

He was a Democrat and a Baptist. He was president of Mobile's Strikers Mystic Society—now America's oldest extant Mystic Society—for nine years (from 1883 to 1891), years during which one scholar of the period wrote that to be in the top level of Mobile society, "you have to live on Government Street, attend Christ Church and go to the Strikers' Ball." Bestor checked all those boxes other than his being a Baptist.



*Photo courtesy of Palmer Hamilton*

### Peter Hamilton

Born in 1817 in Harrisburg, Pennsylvania, at age 15 he entered Princeton University, graduating high in his class in 1835.

Almost immediately his family moved to Mobile, and Peter read law with the famous Mobile lawyer Daniel Chandler, later partner of the even more famous John A. Campbell, who was destined for a U.S. Supreme Court seat in 1853, the only Mobilian ever to be so honored.

Mr. Hamilton was "called to the bar" in 1838, but was shy and modest and hardly made a living for several years.

His younger brother, Thomas A. Hamilton, started practice in 1843 with an established lawyer, and five years later, Peter joined the firm. The two Hamilton brothers continued the practice under the name "Hamiltons" after the English fashion of firm nomenclature.

Peter tended to the Chancery and appellate side of the practice, while a written family history says his brother Thomas, "because of his alertness and peculiar fitness for it, mainly attended to the trial practice before juries."

In 1847, Peter, as a Whig, was nominated and later confirmed for what we would call "U.S. Attorney" under President Zachary Taylor and, in that role, condemned the East End of Dauphin Island to become Fort Gaines at the mouth of Mobile Bay.

Much of Peter's practice was spent with the Mobile & Ohio Railroad. He was practically its manager by the end of the Civil War, and was long its counsel afterward.

He was elected for one term in the Alabama Senate in 1872. The state ended Reconstruction on financial life support from overzealous railroad construction and other problems, the depth of which is still debated by historians. Furthermore, there at the end of Reconstruction in Alabama—at the so-called "Bourbon

## CHILD SUPPORT CALCULATION SOFTWARE

For Alabama

### Alabama Support Master™

Uses Current Guidelines  
Prepares and prints forms  
CS-41, CS-42, CS-43, and CS-47

Includes Interest and Arrearage  
Calculator

Since 1989  
Professional Software  
Corporation

POB 716 Mount Vernon, IN 47620  
812-781-1422

marc.edwin.hawley@gmail.com  
www.SupportMasterSoftware.com

**FREE DEMO**



restoration”—there were competing legislatures sitting: the Republican Reconstruction legislature meeting in the federal court, and the Bourbon Restoration Democrat legislature meeting in the capitol. Peter Hamilton was already known as “the unquestioned leader of the legislature” and no bill in his term ever passed over his objection, and none he supported failed to pass. He was called on to draft a bill to bring Alabama out of the financial chaos. He sat down at ten o’clock at night, and by eight o’clock the next night, during which period he continuously hand-wrote without a note or a book, introduced a bill to reorganize the debt. It suited both the creditors and the debtors, and it passed without its having one word changed.



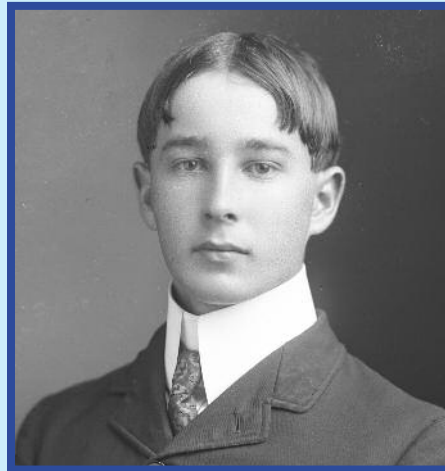
Photo courtesy of Palmer Hamilton

### Thomas A. Hamilton

Thomas A. Hamilton, younger brother of Peter, was born in 1820 in Harrisburg, Pennsylvania and in 1835 moved with his family to Mobile, and by 1842 had become a lawyer.

Mr. Hamilton was the last of the old school in dress. He was the last in Mobile to wear a silk top

hat daily in winter, and wore white or brown linen suits in summer. He mostly tried jury cases and was said to have been very good at it. He had a wide variety of cases, but one went to the U.S. Supreme Court three times.



Erik Overbey Collection, *The Doy Leale McCall Rare Book and Manuscript Library, University of South Alabama*

### Huriosco Austill

Huriosco Austill was named for a Native American, but nobody knows exactly who he was; the name has garnered Austill a slot on the website “The Strangest Names in American Political History.” Austill was the son of Jeremiah Austill, one of three heroes [also Col. Sam Dale and the slave named Caesar] in “The Canoe Fight” on November 13, 1813, the famous battle on the Alabama River in the Creek War in Alabama, the first battle which the settlers won against the Creek Red Stick Creeks after the settlers’ humiliating defeat at Burnt Corn Creek.

Mr. Austill graduated in 1861 from the University of Alabama, which was then a military school,

just in time to enlist in the First Alabama Artillery for the Civil War. He rose to captain and, injured in battle, was captured with the fall of Fort Morgan in August 1864. He was a prisoner until the end of the war, and released in a weakened state.

He came back to Mobile and grew stronger, studied law and was admitted to the bar in 1868, practicing and serving as a judge here until he died in 1912 at age 71. ▲

### David A. Bagwell



David A. Bagwell retired as a solo practitioner in Fairhope after more than four decades as a lawyer or a judge. He and his wife live on Mobile Bay.

## CONSTRUCTION & ENGINEERING EXPERTS

Forensic engineering and investigative inspection work for Commercial buildings, Residential, & Industrial facilities.

- Construction delay damages
- Construction defects
- Structural issues
- Foundations, settlement
- Sinkhole Evaluations
- Stucco & EIFS
- Toxic Sheetrock & Drywall
- Electrical issues
- Plumbing & Piping Problems
- Air Conditioning Systems
- Fire & Explosion Assessments
- Roofing problems
- Flooding & Retention Ponds
- Engineering Standard of Care issues
- Radio & Television Towers

CONTACT: HAL K. CAIN, PRINCIPAL ENGINEER  
 CAIN AND ASSOCIATES ENGINEERS & CONSTRUCTORS, INC.  
 HALKCAIN@AOL.COM • WWW.HKCAIN.COM  
 251.473.7781 • 251.689.8975



LEGAL SERVICES ALABAMA:  
**Celebrating 15 Years of  
Providing Statewide  
Legal Aid in Alabama**  
(2004-2019)

*By Guy E. Lescault*

**This year, Legal Services Alabama (LSA) celebrates the 15 years**

since three historic legal aid providers—Legal Services Corporation of Alabama, Legal Services of Metro Birmingham and Legal Services of North Central Alabama—merged to form a statewide law firm known as Legal Services Alabama. Included in the celebration is the recognition that the Alabama State Bar’s Board of Bar Commissioners approves the appointment of the LSA attorney board members.

The continued support of LSA is a reflection of not only 15 years of high-quality civil legal services provided to those in need in all 67 Alabama counties, but also of the LSA staff and board members who have served for more than four decades. These individuals epitomize selfless dedication to service and a commitment to equal justice for all.

LSA is now the 12<sup>th</sup> largest law firm in the state, with offices in Anniston, Birmingham, Dothan, Huntsville, Mobile, Montgomery, Selma, and Tuscaloosa, and it has a statewide call center.

It assists in four core service areas: domestic violence, consumer protection, housing/foreclosure prevention and public benefits. It also serves its clients in the areas of education, low-income taxpayer clinics, community re-entry, disaster relief and assistance to vulnerable populations such as the elderly and veterans. In 2018, LSA completed more than 11,000 cases, many of which were resolved out of court, thus easing the burden on Alabama's court system.

With a grant from the Alabama Civil Justice Foundation, LSA has launched the *Rural Economic*

*Improvement Project* to identify ways for it to help meet the legal needs in those areas of the state with the highest poverty populations and the greatest lack of resources.

The LSA staff and board plans to increase the numbers of clients it can serve. It is also working to expand its partnership with the Alabama State Bar Volunteer Lawyers Program to increase the number of rural legal clinics and to develop continuing legal education webinars to train volunteer attorneys.

Working together with partners like the Alabama State Bar, LSA looks forward to the next 15 years. ▲

## Guy E. Lescault

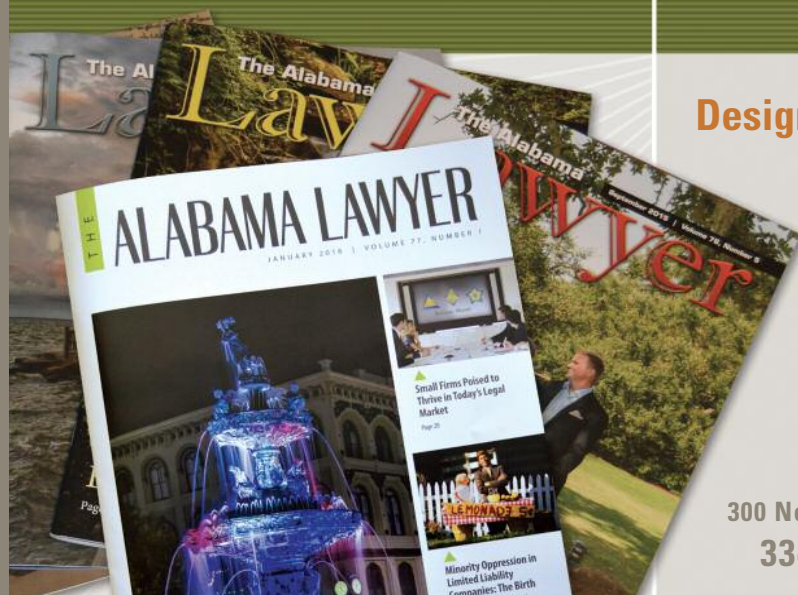


Guy Lescault was appointed LSA interim executive director in January 2018, having more than 35 years of experience in the legal services community. He graduated from Union College and Albany Law School.

Proud graphic designer of  
**The Alabama Lawyer**  
magazine for over 29 years.



THE FINKLEA GROUP  
INC  
*Creative solutions for your marketing strategies*



## Design and Marketing Services

- |                        |                         |
|------------------------|-------------------------|
| Logos                  | Trade Show Exhibits     |
| Websites               | Publication Design      |
| Brochures              | Media Kits              |
| Product Catalogs       | Billboards              |
| Print Ads              | P.O.P. Displays         |
| Product Packaging      | Professional Portfolios |
| Sales Support Material |                         |

300 North Dean Road, Suite 5-193 • Auburn, AL 36830  
334.799.7843 • [gavin@taplink.com](mailto:gavin@taplink.com)



# Getting It Done on a Low-Tech Budget

By Lloyd W. Gathings

For most of the lawyers reading this article, setting up your office with the technology

available to the larger firms in Alabama's larger cities is little more than a pipe dream. Not only do many of them have the newest and best technology, they also have a full-time IT person to keep it running as seamlessly as possible. They are beginning to use artificial intelligence programs on a greater scale, particularly with regard to huge quantities of electronically stored information (ESI). Some of the larger national firms have case

management and document management programs designed specifically for their practice.

So, how can the solo practitioner or small law firm compete with that amount of technology that is simply beyond their grasp?

It is a goal far more reachable than most solo practitioners and small firms realize.

First, let's look at the software programs you must have, no matter how low cost you are trying to be. Office 365 Business Premium is a must. Yes, you can buy a cheaper version of Office, but that would be pound poor and penny foolish. The Office 365 Business Premium package will cost \$12.50 per month for

each user and requires an annual commitment. Thus, it will cost \$25/month total for you and your secretary/legal assistant/paralegal or \$300 on your annual commitment. For that you get Outlook, Word, Excel, PowerPoint, Cloud file storage, Exchange, OneDrive, Sharepoint and Teams. If you can afford to open a law office, then the \$25/month should not be a problem. The trick is to learn how to use all the capabilities of Microsoft Office in ways that enhance your practice.

Let's assume your practice involves civil litigation of some type, such as personal injury, contract cases, domestic relations or business torts. The first task is setting up your electronic file and using an indexing method that makes sense for your practice. First, set up a Current Clients folder. This folder will have a subfile or folder for each of your current clients. Within each client's folder for most civil litigation matters will be the following folders: Client Information, Client Documents, Correspondence, Pleadings, Discovery, Research, Medical Records and Bills, Notes, Settlement, Trial, and Case Expenses.

The Client Information folder contains basic information obtained for the most part from the initial client interview, such as the complete name of the client, mailing address, email address, telephone numbers, Social Security number and their preferred method of contact. Complete contact information should also be entered for an alternate contact in the event you have trouble contacting your client. All of the information in this folder must be kept current while the case or matter is active.

The Client Documents folder will contain any documents the client has provided to you. The documents must be labeled individually or in groups, and they must be labeled in a concise, descriptive manner. Labeling them individually is generally best.

The Correspondence file contains all written communications with anyone that are relevant to the case. This may be letters to and from an associating attorney, the client, other lawyers in the case, medical providers, governmental agencies, experts, evidence preservation letters or the like.

The key is to label each entry appropriately. The date

the letter is sent or is received should be the first item in naming the document. For example, "2019-05-19." That date should be followed by "to \_\_\_\_\_" or "from \_\_\_\_\_" with a short description such as "initial settlement demand." Unless the correspondence has evidentiary value for trial, the hard copy need not be retained. Of course, to accomplish this on correspondence received, you will need a scanner. These can be purchased in combination with a printer and a copier for very reasonable prices, at least until your practice gets

large enough to require a machine that will produce high-speed printing, copying and scanning for large volumes of documents.

The Pleadings folder will not require scanning because of the electronic filing systems in the state and federal courts. When a pleading is completed, the final draft should be saved in this folder, again using a uniform system for naming the pleading similar to the one discussed above for the Correspondence file, beginning with the date and followed by a descriptive name: "2019-05-19 First Complaint," "2019-06-30 Answer of Defendant \_\_\_\_\_," "2019-11-15 MSJ of Defendant \_\_\_\_\_," etc. Abbreviations can be used, but they must be used uniformly, such as using

"MSJ" for motion for summary judgment.

There is no need to make a paper copy of the pleadings, unless you need one to take to a hearing. In that case only the needed pleading should be printed and should be discarded afterwards. By printing only select pleadings and documents, the expense of maintaining and storing hard files can be avoided, including expensive staff time. Any pleading in the case will be at your fingertips whether you are in or out of the office.

The Discovery folder is where all discovery in the file is stored. They should be labeled the same way you label documents kept in your pleading folder. For example, "2019-12-18 First Interrogs-RP to Defendant \_\_\_\_\_," for first interrogatories and requests for production sent to that defendant on December 18, 2019. Any discovery received, including documents, should be kept in this folder. If documents are produced in paper format, a scanned copy is kept in this file folder.

The first task is setting up your electronic file and using an indexing method that makes sense for your practice.

Our office produces almost all documents on a disk or thumb drive, which makes it easy to store them in the Discovery folder. Also, most documents produced to you will be in electronic format, so this system will again save expenses by avoiding the traditional paper file.

It is important that everyone has a clear understanding into what folder certain things go. For example, under our system, a motion to compel goes into the Discovery folder even though it could be kept in the Pleadings folder.

The Research file contains all legal research done in the case.

The Notes file contains lawyer notes made while evaluating or performing tasks on the case.

The Settlement folder contains all offers and demands, along with any significant comments made by the parties while negotiating a settlement. If a settlement is reached, then all settlement documents are filed in this folder.

The Trial folder contains your trial notebook—from motions in limine to voir dire to closing argument. This folder should be developed throughout the life of the case. It makes final trial preparation far, far easier.

Your emails and calendar can be kept on Outlook. Your mediation, hearing and trial exhibits can be done in PowerPoint. Detailed data lists can be drawn up using Excel. The share and team functions of Office 365 Business Premium allow you to make assignments to staff and coordinate your work with your team.

When your case is completed, since almost the entire file is electronic, all you have to do is move the entire file to a Closed File folder and maintain it for six years to meet the Alabama State Bar’s requirements. The hard file that will have to be stored will be very small.

At this point, you have probably 90 percent of the functions you would get through a case management program that would cost you up to \$300 per user per month, but you are only paying \$12.50 per user per month. In addition, even if you had a case management program, you would still have to get these other programs.

The management programs have reminder date, due date and other similar functions which can easily be managed through Office Outlook. Some of these programs link with your accounting software, while some have the accounting software built into their program. You can get Quickbooks Online for \$10 to \$17 per month, and it will perform all accounting functions necessary for your office.

Some of the case management software has legal forms built in, while others do not. You can purchase the forms you may need much cheaper than you can get them through a case management program, and you can draw up your own. These should be stored in a Forms file in your shared files.

So, at this point, you have essentially accomplished what a case management program would, and you have saved the \$600 per month. And yet you have the ability to compete against firms with much larger budgets and far more technology.

Finally, there is one more software program you need: Adobe Acrobat Pro DC (\$14.99 per month). One license should suffice and should probably be for the lawyer to use. You really cannot live without this program since most documents, including ones you need to edit, are produced to you in PDF format. This program allows you to fill in PDF forms and to edit PDF documents. Both of these features were not in earlier Adobe Acrobat programs.

The utility of Acrobat Pro DC goes well beyond these two functions, however, if you really get into the program. By setting the correct “preferences” you can highlight text in a deposition or other document and have that text printed into a document summary or a shorter document containing the excerpts that are the most useful to you. This is a great tool when preparing a motion for or opposition to summary judgment. It is even more useful as a trial preparation tool.

Also of great benefit is the feature that allows you to send, track and receive electronic and digital signatures. This can be helpful for signatures of clients who cannot easily come into the office to sign a document.

There are those who would argue that case management software has advanced features, features that were not discussed in this article. After using some case management programs and studying many others, though, we prefer using this simpler system. And while using this simpler, more cost-effective system, we have had no technology problems as we litigate with bigger firms in complex cases. ▲

---

### Lloyd W. Gathings



Lloyd Gathings practices in the area of complex civil litigation, representing plaintiffs in mass environmental cases, products liability and on-the-job injuries. He has spoken frequently on issues regarding electronically stored information and avidly stays abreast of software available to lawyers to enhance their practices.



# Digital Smoking Guns Are All around Us

(A Tale of the Internet of Things, Privacy and Ethical Duties)

**By J. Paul Zimmerman and Michael A. Vercher**

**Two attorneys are called to related, but very different, hastily-scheduled meetings on a Saturday morning.**

One is the general counsel of All Knowing Oz, Inc., summoned to the company's boardroom, and the other is a solo practitioner who is called to a screened-in porch at the home of a lifelong friend.

All Knowing Oz's general counsel, who ran into the company's VP of human resources in the elevator on the way up, arrives with

the VP to find the board already assembled and various computer devices about the room, indicating that the meeting commenced much earlier that morning.

Through its various divisions, All Knowing Oz produces surveillance systems for various applications, including consumer, defense contracting, commercial and industrial access control, and various dependent care environments, such as nursing homes, neonatal

*Note: The companies and characters in this tale are fictitious and are not based on any real entities or people, except for Brian Krebs, who is real.*

hospital units and psychiatric care facilities. The solo practitioner, who practices white collar criminal defense, arrives to find her friend obviously distressed.

The two lawyers hear very different tales.

All Knowing Oz's board was notified of a complaint of sexual harassment late Friday. The complaint is against Julia Winniford, vice president of marketing, and is being lodged by one of her direct reports, Winston Medders, who manages All Knowing Oz's branding of its baby monitoring and dependent care products. Winston alleges that Julia made advances on him, and when he rejected her, she threatened to eliminate his annual bonuses with bad performance reviews and altered productivity reports to force him into a nonconsensual sexual encounter after a client meeting. Faced with such pressure, he gave in.

Meanwhile, on Julia's screened-in porch, she explains to her old classmate and sorority sister that she's been suspended with pay while the company investigates the claim, and that if she discloses the complaint to anyone besides counsel, which the company recommended she consult, she will be terminated immediately with no severance. When she was notified of the suspension earlier that morning, she was told that the complaint was "delivered with credible evidence of its allegations." Julia explains that All Knowing Oz's defense contracting division recently capitalized on a scandal involving a competitor hit with allegations of bribery in overseas contracts, allowing All Knowing Oz to gain market share and obtain two substantial—and fiercely competitive—contracts. As a result, Julia is convinced that

...the term IoT refers to the application of Internet connectivity to devices such as household appliances, access control systems, surveillance systems, garage door openers and anything else that can now be accessed or controlled via the Internet.

"all they need is an excuse." She then explains that she and Winston had been involved romantically for months, that the relationship was pursued outside of work and that she recently ended the relationship. The breakup, she says, obviously caused Winston to retaliate with this fabricated complaint.

Both lawyers listen to their client's version of events, and both are asked, "What do we do and how quiet can we keep it?" After hearing the stories, both lawyers recognize that their clients have been surrounded by what have come to be known as IoT devices ("Internet of Things"), and that information contained on the IoT devices is going to be vital.

## What Are IoT Devices?

The Federal Trade Commission has defined IoT as "the ability of

everyday objects to connect to the internet and to send and receive data."<sup>1</sup> Computer devices, even small ones such as smartphones, tablets and laptops, are generally not considered IoT devices as they traditionally exchange data via the Internet. Instead, the term IoT refers to the application of Internet connectivity to devices such as household appliances, access control systems, surveillance systems, garage door openers and anything else that can now be accessed or controlled via the Internet.

It is estimated that as of 2018 there were 10 billion IoT devices on the market in consumer, commercial, healthcare and industrial applications.<sup>2</sup> Furthermore, by the year 2025, that number will probably swell to 64 billion.<sup>3</sup> This evidence must be considered in evaluating a case, investigating a case, conducting discovery and preparing for trial.

When connected to the Internet, an IoT device can send and receive information using the same or similar technology as more traditionally connected devices. Now that these devices are designed to transmit and receive data via the Internet, they are being designed to gather and use that information. Such information may be solely to monitor the performance of the device itself, such as for troubleshooting and cost-effective preventive maintenance. However, the information gathered and used by the device may be in the course of interacting with the device's environment and users. Vacuum cleaners can be self-guiding, smart TVs monitor viewing patterns, surveillance devices and HVAC systems can be monitored and controlled remotely. "Smart speakers," such as Amazon Echo



and Google Home, and FitBit and similar fitness devices, are not alone in collecting and transmitting data.

With Internet connectivity comes the risk of unwanted access to the device. Most of these devices connect to a local wireless network, whether in a home or a commercial space. From the network, the device can then communicate with any other Internet-connected device. This is usually a device that

the IoT device is intended to connect with, such as the owner’s smart phone, a company server or another IoT device owned by the same person or company.

However, this intended connectivity can allow for a device to be hacked, much like a computer, and even taken over and controlled remotely by a bad actor. While many are aware of risks regarding personal information stored on the

device (e.g., account information or identifying information of some kind) or obtained via the device (e.g., video or audio capture), the ability to surreptitiously control a device is less appreciated. In summary, the security threats to IoT devices are: “(1) unauthorized access and misuse of personal information; (2) facilitating attacks on other systems; and (3) creating risks to personal safety.”<sup>4</sup>

## Hire a PRIVATE JUDGE

to hear any case assigned a CV or DR case number by the Alabama Administrative Office of Courts

**Qualified, Former or Retired Alabama Judges Registered With the Alabama Center for Dispute Resolution**

**FAST • EASY APPEALABLE**

AL Acts No. 2012-266 and 2018-384

For more information, search “Find a Private Judge” at [www.alabamaADR.org](http://www.alabamaADR.org)

<p><b>Hon. Robert E. Austin</b> <i>baustin@bobaustinlaw.com</i> (205) 274-8255</p> <p><b>Hon. S. Phillip Bahakel</b> <i>Phillip@bahakellaw.net</i> (205) 987-8787</p> <p><b>Hon. John B. Bush</b> <i>jbush@courtneymann.net</i> (334) 567-2545</p> <p><b>Hon. Rosemary D. Chambers</b> <i>rosemarychambers@gmail.com</i> (251) 402-6256</p> <p><b>Hon. Suzanne S. Childers</b> <i>judgesuzanne@gmail.com</i> (205) 908-9018</p> <p><b>Hon. R.A. “Sonny” Ferguson, Jr.</b> <i>raferguson@csattorneys.com</i> (205) 250-6631</p> <p><b>Hon. Melissa “Jill” Ganus</b> <i>jill@jillganuslaw.com</i> (205) 424-0993</p> <p><b>Hon. Arthur J. Hanes, Jr.</b> <i>ahanes@uww-adr.com</i> (205) 933-9033</p>	<p><b>Hon. Sharon H. Hester</b> <i>sharon@hesterjames.com</i> (256) 332-7440</p> <p><b>Hon. J. Brian Huff</b> <i>judgebrianhuff@gmail.com</i> (205) 930-9800</p> <p><b>Hon. David A. Kimberley</b> <i>david@alalawyers.net</i> (256) 543-0400</p> <p><b>Hon. Braxton L. Kittrell, Jr.</b> <i>bkittrell@kittrellandmiddlebrooks.com</i> (251) 432-0102</p> <p><b>Hon. Richard D. Lane</b> <i>rdlane4031@gmail.com</i> (334) 740-5824</p> <p><b>Hon. Christopher M. McIntyre</b> <i>cmcintyrelaw@gmail.com</i> (256) 644-5136</p> <p><b>Hon. Julie A. Palmer</b> <i>judgejuliepalmer@gmail.com</i> (205) 616-2275</p> <p><b>Hon. James Gary Pate</b> <i>j.gary.pate@googlemail.com</i> (205) 999-3092</p>	<p><b>Hon. Eugene W. Reese</b> <i>genereese2000@yahoo.com</i> (334) 799-7631</p> <p><b>Hon. James H. Reid, Jr.</b> <i>bevjam@bellsouth.net</i> (251) 709-0227</p> <p><b>Hon. James H. Sandlin</b> <i>judge@jimmysandlin.com</i> (256) 319-2798</p> <p><b>Hon. Martha L. Sherrod</b> <i>sherjudg@aol.com</i> (256) 655-2016</p> <p><b>Hon. Ron Storey</b> <i>ron@wiregrasselderlaw.com</i> (334) 699-2323</p> <p><b>Hon. Edward B. Vines</b> <i>evinesattorney@yahoo.com</i> (205) 354-7179</p> <p><b>Hon. J. Scott Vowell</b> <i>jsv@scottvowell.com</i> (205) 214-7320</p> <p><b>Hon. Tom F. Young, Jr.</b> <i>tyoung@mhhlaw.net</i> (256) 329-2000</p>
---	---	--

The bad actor may take over the device to use it for another purpose, such as to mount a distributed denial of service attack (“DDoS”), where a large number of such devices are accessed and the devices are redirected to another system, such as a website.<sup>5</sup> The website receiving such requests from the large number of IoT devices is overwhelmed and crashes. One of the largest DDoS attacks ever mounted (at the time) was on the website of Brian Krebs, a widely read commentator on computer and Internet security. Krebs’s website crashed when it received repeated information requests from—wait for it—24,000 surveillance cameras and similar devices. Incidentally, that

episode ultimately cost the owners of those devices an estimated \$324,000, although most of the device owners probably had no idea at the time that their devices had been taken over.<sup>6</sup> The network of enslaved IoT devices was probably rented for the attack for a few hundred dollars.<sup>7</sup>

Sometimes the functionality of the IoT device is taken over and used for the hacker’s amusement. In recent years, video-capable baby monitors have been widely taken over, and video feeds were viewable live on the Internet. Even more creepy, some hackers used the speakers on the baby monitors to talk to whomever was near the monitor. Misuse of IoT devices is sometimes limited only by the decisions of the hacker. As such, the potential dangers posed by Internet-accessible medical devices, such as implanted defibrillators and pain pumps, self-driving cars and other devices capable of hurting people, is obvious.

One of the major components of IoT device security is the password needed for accessing and controlling the device. Often, this password is initially set by the manufacturer as something that is easy to remember, such as “admin.” Many buyers do not change IoT device passwords and other basic security settings, allowing easier remote access to and control over the device. Other security flaws in the hosting network can make such devices vulnerable. Once these flaws are discovered by hackers, word of them will spread quickly and flaws can be exploited before they are discovered and patched.

Given the sheer number of IoT devices in use, security flaws and improper deployments are inevitable.

## Ethical Considerations Regarding IoT Devices And Evidence

While IoT devices are relatively new, the ethical rules that apply to such devices in the practice of law are not. The application of ethical rules to the impact of technology, including IoT devices, on the practice of law has become a frequent topic. Unfortunately, most of the discussions are reactive rather than prescient. Lawyers must become more active in analyzing how emerging and increasingly mainstream technologies affect the practice of law. The disparity between the rate at which new technologies emerge (and evolve) versus the bar’s ability to keep pace of their impact on the practice of law will probably only increase.

Fortunately, the long-standing and tested ethical rules governing our profession are generally very capable of helping chart the constantly changing waters, whether with regard to the lawyer’s own office environment or to circumstances involving IoT in a particular matter.

First, Alabama Rule of Professional Conduct 1.6 generally prohibits lawyers from revealing confidential client information without the client’s consent. The comments to Rule 1.6 make clear that the disclosure of information due to the representing lawyer’s mishandling of technology could violate rule 1.6. “The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” The comments further state that “the



J. FORRESTER DEBUYS, III  
(de-bweez) CLU®, ChFC®, AEP®

FINANCIAL IDEAS,  
INSTITUTIONS & INSTRUMENTS  
THAT STAND THE TEST OF TIME.

- Life/Disability\* Insurance
- Annuities\*\*
- Long Term Care Insurance
- Retirement Income Planning
- Estate Planning
- Deferred Compensation
- Key Person Coverage
- Group Life & Disability
- Business Succession Planning

\*Products available through one or more carriers not affiliated with New York Life, dependent on carrier authorization and product availability in your state or locally.  
\*\*Issued by New York Life Insurance and Annuity Corporation

Registered Representative offering securities through NYLIFE Securities LLC,  
Member NINRA/SIPC a licensed insurance agency Financial Advisor  
offering investment advisory services through Eagle Strategies LLC,  
A Registered Investment Advisor Agent, New York Life Insurance Company

2311 HIGHLAND AVENUE SOUTH, SUITE 100  
BIRMINGHAM, AL 35205  
205-918-1515

WWW.FORRESTDEBUYS.COM

lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation...*or to make other arrangements minimizing the risk of disclosure*” (emphasis added). This comment is not limited to such traditional problems as speaking too freely over drinks. Rather, it infers the need for reasonable data security. A data breach could implicate Rule 1.6.

The lawyer’s handling of IoT devices within the lawyer’s own office system is an ethical concern. Lawyers must take reasonable steps to address the potential vulnerabilities of IoT devices connected to their own networks. This obligation includes being cognizant of ways in which IoT devices and their use are subject to various statutes and regulations and could lead to violations of them. While lawyers generally hire, either as employees or contractors, the appropriate technical staff to address office network security, the ethical responsibility for client information still generally rests with the lawyers. *See Rule 5.3.*

Obviously, the lawyer’s representation of a client in a matter is also guided by Rule 1.1, which requires competency in preparation reasonably necessary for the representation. While Rule 1.1 and its comments do not specifically address the role of technology, the rule does define “competence” to include the “legal knowledge” and “preparation” reasonably necessary for the representation. Among the basic skills required of a lawyer is the ability to evaluate evidence, which is specifically noted in the comment to Rule 1.1. Obviously, to the degree that any

## Factors to be considered in determining whether and how to collect and review IoT data include privacy concerns, security issues, strategic considerations and proportionality factors.

technology involved in a case is or could be a source of relevant and material evidence, Rule 1.1 requires basic competence in the attorney’s ability to analyze the impact of that evidence on the case. If a lawyer does not know what evidence arising from technology may be available in a matter, whether that evidence is harmful or helpful to the lawyer’s client, then the lawyer cannot be said to be competent in analyzing the impact that evidence has on the case.

While the comments and ethics opinions in Alabama have not adopted the ABA’s 2012 amendment to comment 8 to Model Rule 1.1, lawyers licensed in Alabama should nonetheless take the comment to heart. Comment 8 states, “to maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law

and its practice, including the benefits and risks associated with relevant technology...” The ABA clearly envisions a lawyer’s duty of competence as including not just the role of technology in the matter at hand, but also with the lawyer’s administration of the business of law. Lawyers in Alabama should take heed to Comment 8 when addressing security generally, as well as in handling particular matters.

The duty of competence would include a rudimentary ability to: (a) identify the possible role of IoT devices in a matter the lawyer is handling, (b) be able to obtain or defuse relevant evidence from IOT devices and (c) be able to admit (or make appropriate arguments to exclude) IoT data.

Lawyers clearly have a legal and ethical obligation not to break the law when investigating a client’s case. For example, the Computer Fraud and Abuse Act (18 U.S.C. § 1030 (2012)) could be civilly and criminally implicated through unauthorized access to a computer device or use of another person’s login credentials without permission. Similarly, lawyers must be mindful of Rule 8.4(a), which prohibits a lawyer from directing another person to engage in illegal conduct, which may include any conduct that violates the law with regard to privacy. The laws applicable to various devices and data residing on those devices are numerous, and can vary based upon geographic jurisdiction, the industry involved and type of data. Federal privacy laws vary from the obvious, such as HIPAA and the FCRA, to the more obscure, such as the Driver’s Privacy Protection Act (regarding access to state DMV records for political use).

Factors to be considered in determining whether and how to collect and review IoT data include privacy concerns, security issues, strategic considerations and proportionality factors. For example, when investigating Winston's complaint against Julia, are stated company privacy policies at issue? Are the privacy interests of third parties involved? What are the company policies with regard to privacy in company email, computer devices, Internet communications and other company-owned assets, and do the employees have a reasonable expectation or diminished expectation of privacy in their use? *See, e.g., Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996); *Falmouth Firefighters Union Local 1497 v. Town of Falmouth*, No. 09-517 (Mass. Sup. Ct. Feb. 2, 2011); *Matter of Cunningham v. N.Y. State Dep't of Labor*, 933 N.Y.S.2d 432 (3d Dep't 2011); *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010) (suggesting that employers who track employees' location may face liability for invasion of privacy). Not only must the appropriate degree of analysis merited by the case be determined, but also strategic decisions as to the effect of the results of such investigations. After all, once the cat is out of the bag, it may turn out to be damaging. Obviously, not every case merits the turning over of every IoT stone, but the assessment of the digital landscape must be undertaken.

## Back to the Investigations of Winston's Claim

Both All Knowing Oz's lawyer and Julia's lawyer have intense

Obviously, not every case merits the turning over of every IoT stone, but the assessment of the digital landscape must be undertaken.

investigations before them. Both of them must determine in the course of those investigations what IoT devices may impact the matter from their clients' respective points of view.

The degree to which IoT devices may have gathered relevant information is mind-boggling. All Knowing Oz's office building is probably monitored by security cameras that transmit video data to a server. Access to Omniscient's building, and even various sections inside the building, is probably controlled and monitored by some sort of devices that record who enters and when, such as keypads, badge readers, RFID readers and other devices. Depending on All Knowing Oz's security system, access could also be controlled and monitored through biometric devices, such as fingerprint and retina scanners. Both Julia and Winston probably have company-issued smart phones, in addition to their personal cell phones. Further, other company-issued devices such as tablets and laptops, would be a wealth of both

user-created data and operating system data. Not only could these devices be treasure troves of relevant data—they could contain evidence of phone calls, text messages, pictures, etc.—but they may also include GPS positioning data. This only scratches the surface—yet to be considered are devices such as vehicle GPS, hotel security and access systems, and so on.

The IoT devices that could be part of the investigation are nearly endless: a refrigerator in an office breakroom, HVAC controls, GPS systems in Julia and Winston's cars, smart speakers and so on. Similarly, Julia's lawyer notices during the conversation that she is wearing a Fitbit. At about the same time she notices this, both she and All Knowing Oz's GC make a note to determine whether Winston wears a Fitbit or an Apple watch.

Both lawyers remember conversations in the past about All Knowing Oz instituting a wellness program through which employees and the company could save money on health insurance premiums by using Fitbits paid for by the company. Interestingly, Winston and Julia's Fitbits both show elevated heart rates at the same time on the same two to three days of the week at lunchtime and on occasions when both of them were out of town on business in the same location. While one explanation is that they went running together, which would be plausible due to the fact that both of them are avid runners, further investigation by both lawyers indicates that Julia has tracking shoes that record activity. During times that their Fitbits showed increased

heart rates, her shoes report that they were stationary. At those same times, Winston’s company-issued phone indicates that it was connected by Bluetooth to a device called “Julia’s speaker.” Winston’s company-issued laptop contains indications that it was used to create a playlist on a music streaming service called “Julia’s favorites,” consisting of various R&B songs. Inferences abound.

## Takeaways for the Lawyers (but Not for Julia and Winston)

Under Rule 1.1, lawyers must either have a basic understanding of the implications of IoT devices in their law practice and the matters they handle, or must engage persons to assist them to do so. Under Rule 1.6, lawyers must maintain reasonable security on all systems and devices that can allow access to client data. This includes office policies, password management programs, firewall systems, adequate protective software such as antivirus tools and employee education regarding common security risks, such as phishing attacks and wire transfer fraud. Additionally, factory default passwords and settings must be evaluated. Privacy policies should be formulated and clearly stated. Data breach response plans should be formulated, and adequate cyber liability insurance coverage secured. Encryption of client data, both at rest and in transit, is becoming increasingly routine. Consider conforming to a set of established privacy and security standards because of the level of attention and detail re-

quired for multiple aspects of office network security. Data lifecycle policies should be instituted. After all, data cannot be compromised if it is no longer maintained.

Be able to competently advise your client regarding data privacy as to employees, customers, third parties and other data subjects, or associate (or refer the client to) an attorney who can do so. Similarly, either obtain competence in addressing IoT data or associate counsel who has.

The world in which we practice is changing at an increasingly dizzying rate. Thus far, these changes have not excused lawyers from their duty to be prepared for how those changes affect their clients, and how changes affect the confidentiality of client information. All Knowing Oz and Julia’s lawyers, like the rest of us, must be able to assess what evidence is available and how to address or use it. ▲

### Endnotes

1. [www.ftc.gov/news-events/blogs/business-blog/2015/01/internet-things-ftc-staff-report-new-publication-businesses](http://www.ftc.gov/news-events/blogs/business-blog/2015/01/internet-things-ftc-staff-report-new-publication-businesses).
2. [www.businessinsider.com/internet-of-things-report](http://www.businessinsider.com/internet-of-things-report) (last visited April 10, 2019).
3. *Ibid.*
4. *See note 1, above.*
5. [www.us-cert.gov/ncas/tips/ST04-015](http://www.us-cert.gov/ncas/tips/ST04-015) (last visited April 12, 2019).
6. [krebsonsecurity.com/tag/ddos](http://krebsonsecurity.com/tag/ddos) (last visited April 10, 2019).
7. *Ibid.*



### J. Paul Zimmerman



Paul Zimmerman is a partner with Christian & Small LLP and serves on the firm’s technology committee. He is a graduate of the University of Alabama and of the University of Al-

abama School of Law. He is a member of the Sedona Conference Working Group 1 (Electronic Document Retention and Production) and Working Group 11 (Data Security and Privacy Liability). Paul is a frequent speaker on cyber liability, data protection and breach response.

### Michael A. Vercher



Mike Vercher is a partner with Christian & Small LLP and serves as chair of its insurance practice group. He graduated with honors from the University of Alabama, and from the University of

Alabama School of Law. His practice includes defending in complex mass tort, workplace exposure, construction, transportation, product liability, premises liability, breach of contract and fraud litigation. He is a frequent speaker at seminars, most recently presenting on the use in litigation of personal data collected by cutting-edge technology.



# Dangers of Your Client's Social Media

How to Prevent Your Client from Ruining Their Case

*By Bernard D. Nomberg*

**No matter what type of law you practice  
and no matter which side you are on,**

social media has the potential to affect your client's case. Your failure as an attorney to properly counsel your client on social media use may cause irreparable harm to your client's case. If you are not advising your clients on social media, you need to get on board now. If you are ignoring social media, your client could destroy their case.

**Help Our Clients Protect  
Themselves From  
Themselves!**

One of our duties to clients is to educate them on how to protect themselves from themselves when participating in pending litigation. Clients can derail their own case through their erratic use of social media. You must counsel your clients on social media do's and don'ts so that your clients do not cause irreparable harm to their case.



## What Is Social Media?

Social media refers to the means of interactions among people in which they create, share and exchange information and ideas in virtual communities and networks. Social media has become the norm of our culture and how we interact with each other on a daily basis.<sup>1</sup> We post our favorite moments from our life on Instagram, Facebook, Twitter, Google+, YouTube, Snapchat, etc., for all the world to see. As of the third quarter of 2018, Facebook had 2.27 billion monthly active users. Active users are considered those who have logged in to Facebook during the last 30 days. Many businesses have not implemented social media policies, thus resulting in many employees incorrectly using social media.

## Anyone and *Everyone* Is an Investigator through Social Media

Prior to the social media explosion, we warned clients about surveillance and the private investigator who had been hired by the defense counsel to sit and watch their daily activities. Social media appears to have a much larger effect on a client's claim than surveillance due to the number of people using social media and the free and easy accessibility of it. Social media evidence has been found to be a deciding factor in several of our workers' compensation and personal injury cases. Clients need to be cautious of what they are posting on social media, regardless of the privacy settings on their accounts.

Additionally, evidence from an Echo, Alexa and Fitbit has proved to be admissible in court, and lawyers have found ways to use it against certain clients in court. Data found on fitness trackers has been used to undermine suspects' alibis. Keep in mind, Alexa is always listening, and the recordings that are stored on Amazon servers are discoverable evidence. The recordings from an Alexa have been used to help investigate a murder case, yielding clues to the killer. (*State of New Hampshire v. Timothy Verrill* Case #: 219-2017-CR-0072 Strafford County, (NH) Superior Court). Depending on the way this evidence is used, these devices can be a sword or a shield to your clients' testimony.<sup>2,3</sup>

## So What Do You Do about It?

Not only do we have a duty to inform our clients about how social media can be used against them in court, but clients also need to be aware that all of their social media websites are considered to be evidence and that they have a duty to preserve this information. Failure to preserve and take reasonable steps to avoid the destruction of any posts can result in sanctions. Clients need to be aware that sanctions and discipline can arise for deleting specific posts, even if the client thinks there is nothing discoverable from that post. In order to prevent any destruction of evidence through social media, clients need to be fully counseled and fully informed of the social media implications in their case, at the very beginning of litigation.

Counseling clients about social media dangers should start in the initial interview. Clients need to be aware that any and all social media precautions they take should continue during the entirety of the case. Clients should be advised to refrain from posting statements about their claim or physical condition

**Clients should be advised to refrain from posting statements about their claim or physical condition along with posting photographs of doing things not within their physician-ordered restrictions.**

along with posting photographs of doing things not within their physician-ordered restrictions.

Without question, material on social networking sites is discoverable evidence in any civil case. Many clients will assume their privacy settings will protect them and their posts from being discoverable. However, the Stored Communications Act does not apply to social media, and there is no expectation of privacy in voluntarily posted social media content.<sup>4</sup>

## Recommendations for Your Clients

Once you advise your clients of the implications their social media posts can have on their case, you must continue to monitor their social media postings. There are several precautions to take when using social media:<sup>5</sup>

1. Archive the content of current accounts. This will help prevent the destruction of potential evidence and create a bigger issue. Do this immediately to prevent any destruction of evidence.
2. Deactivate or discontinue using social media accounts. If you are the plaintiff in a personal injury case, consider deactivating your Facebook or other social media accounts. If you do not want to deactivate your account, you should archive the content and then remove any information relating to your injury or activities to avoid future posts.
3. Adjust privacy settings to the highest levels. This means making sure that only actual friends can see the information rather than friends of friends or the general public.
4. Beware of "friends." If social media use continues, it is important to edit "friend lists" so that only certain friends can see photo albums and



status updates. Remove any “friends” you do not know well, or at all, and accept only friend requests from people you know and trust.

5. Become invisible. You can remove yourself from Facebook search results by selecting “only friends” under the “search visibility” option under profile settings. You can also remove your Facebook page from Google by unchecking the box for “Public Search Listing” in your Internet privacy settings. Make comparable changes to privacy settings in all other social media accounts.
6. Take down photos. After archiving current content, remove and un-tag all photos of yourself which are not simple headshots.
7. Be cautious. Assume that anything you write or post on social media will be seen by defense lawyers, judges and juries. Think about how things might be perceived when viewed out of context.
8. Preserve all computers, tablets or cell phones. If you lose or destroy an electronic communications device, opposing counsel could try and make it look like a deliberate destruction of evidence. Ultimately, the judge could instruct a jury that it may assume the contents of the discarded or destroyed device would have been unfavorable to you.
9. Don’t send messages, including emails, text messages or “private” social media messages, about your claim, health or activities to anyone except your lawyers. Careless emails and electronic messages can destroy a case.
10. Don’t post on websites or web group chats. You don’t own the information you post online. Such information is highly searchable. You should not enter any information on dating or insurance websites, post on message boards, participate in or comment on social media “private” groups or blogs or use chat rooms.

## Use Social Media to Your Advantage

Social media can be used to your client’s advantage. You can learn lots about corporate defendants through

their websites. Companies love to post about where all they do business. Also, if you are taking a corporate defendant’s deposition, perform a Google search on him. Review his bio on LinkedIn. You can find out about the defendant company’s culture through the company’s website and press releases. Ask the corporate representative if firing the injured worker for having a workers’ compensation claim is consistent with the company’s corporate culture.

In order to zealously represent your client, you must include counseling the client on the subject of social media. As the attorney, you must explain to your client that anything posted on social media is like sending an invitation to the insurance company and the defendant welcoming them into their home and life. Do not allow your clients to do this. As the attorney, you must discuss with your client social media and its implications on their case. Clients must understand that something they consider to be harmless and not relevant to the case can be used against them by the opposition. ▲

### Endnotes

1. <https://www.merriam-webster.com/dictionary/social%20media>.
2. <https://techcrunch.com/2018/11/14/amazon-echo-recordings-judge-murder-case/>.
3. <https://www.cnet.com/news/alexa-fitbit-apple-watch-pacemaker-can-testify-against-you-in-court/>.
4. The Stored Communications Act (SCA, codified at 18 U.S.C. Chapter 121 §§ 2701–2712).
5. <http://www.atlantainjurylawblog.com/trucking-accidents/social-media-instructions-for-clients.html>. Thanks to Ken Shigley. Posted June 8, 2016.

### Bernard D. Nomberg



Bernard Nomberg has practiced civil litigation in Birmingham since 1995. He received his undergraduate degree from Vanderbilt University in 1990, where he played football on a full athletic scholarship. He then graduated from Jones School of Law in 1994. Bernard’s practice concentrates on workers’ compensation, Social Security and personal injury claims.



# Operation CryptoSweep— The Alabama Securities Commission Is Setting the Bar in Cryptocurrency Crackdown

*By Albert W. Copeland*

**Around 50 percent of the Alabama Securities Commission’s (ASC) reported administrative actions**

in 2018-2019 targeted suspicious cryptocurrency offerings.<sup>1</sup> In the words of ASC Director Joseph Borg, this recent flurry of enforcement actions is “just the tip of the iceberg.”<sup>2</sup> Why is Alabama placing such an emphasis on regulating cryptocurrencies? And why now?

In April 2018, the North American Securities Administrators Association (NASAA), under the leadership

of its then-president, Alabama’s own Joseph Borg, organized a task force to conduct international, coordinated investigations into Initial Coin Offerings<sup>3</sup> (ICO) and other investment products related to cryptocurrencies in an initiative known as “Operation Cryptosweep.” This initiative revealed a disturbing and unfortunate trend: illegal and fraudulent schemes involving the sale of cryptocurrencies are a growing threat to Main Street investors across the country. As reported in the NASAA’s 2018 Enforcement Report, state regulators are finding evidence of pervasive fraud, including issues such as “concealing

important information from investors, including the significant risks associated with investing in the cryptocurrency market, the true identity of the promoters and managers of investment programs, the actual location of issuers' business operations, and the premises for promises of lucrative profits and returns."<sup>4</sup>

To date, NASAA's crypto-crackdown has resulted in more than 200 inquiries, 50 of which related to ICOs or cryptocurrencies.<sup>5</sup> Considering Alabama's membership in NASAA and Borg's leadership in the ASC and NASAA, it is no surprise that the state's enforcement is also aggressive. In fact, the ASC originally conceived the idea for NASAA, making the state not only a leader in the United States for consumer protection for ICO fraud, but across the world as well. What exactly do these cease-and-desist orders allege?

### *In the Matter of JINBI Limited, Andre Rafnsson And Joseph Crawly*

To illustrate, consider the commission's order in September 2018: *In the Matter of JINBI Limited, Andre Rafnsson and Joseph Crawly*.<sup>6</sup> Like most cease-and-desist orders filed by the ASC against cryptocurrency companies, this matter targets the company's unregistered sale of securities through its ICO offering.

The order begins by providing general information and a brief statement of the facts about JINBI Limited, its co-founders and the company's ICO token sale. The

abbreviated versions of the facts alleged are:

- The London, UK-based company, JINBI Limited, through its co-founders Rafnsson and Crawley, operates an online entity that purports to "merge traditional gold investments with blockchain technology offering token holders a share in the profitability from the production of gold."<sup>7</sup> To operate this entity, JINBI sought to raise \$88 million through a 28-day ICO offering in which it capped its token offering to 12.5 million tokens.
- In August 2018, ASC discovered JINBI's advertisement that invited Alabama residents to invest in its ICO on Montgomery's WSFA 12 News' website. The advertisement claimed that "JINBI allows individuals to trade gold in a peer-to-peer system to share the profitability of gold production" using JINBI tokens that could be obtained through an investment on its token site.<sup>8</sup>
- According to the company's website and its whitepaper, JINBI token holders will benefit directly and share in the profitability from the production of gold through JINBI's liquidity events following production milestones whereby each coin holder will receive a biannual dividend payable in physical gold or JINBI tokens.<sup>9</sup>

Upon notification of JINBI's advertisements, the ASC conducted an inquiry and found the company's ICO efforts in Alabama to be unlawful under Ala. Code §§ 8-6-4 and 8-6-17(a)(2).<sup>10</sup> In reaching its





The commission found that JINBI's cryptocurrency plan requires "investors to invest money into the common investment plan in order to pool their investments with other investors."

conclusion, the commission first found that JINBI's Initial Coin Offering qualifies as a "security."<sup>11</sup> Ala. Code § 8-6-2(10) defines a "security," in relevant part, to be "participation in any profit-sharing agreement ... [or] investment contract."<sup>12</sup> The commission found that JINBI's cryptocurrency plan requires "investors to invest money into the common investment plan in order to pool their investments with other investors. Investors share and expect a profit and receive biannual dividends based on investments' profitability ... [t]herefore, Respondents' ICO development plans constitute investment contracts and profit-sharing agreements and are 'securities' as defined by the Act."<sup>13</sup>

Moreover, JINBI and its co-founders qualify as an "issuer" under Alabama securities law. Ala. Code § 8-6-2(5) defines "issuer" as "[e]very person who proposes to issue, has issued, or shall hereafter issue any security. Any person who acts for a compensation or a consideration as a promoter for or on behalf of a corporation, trust, unincorporated association, or partnership of any kind to be formed shall be deemed to be an issuer."<sup>14</sup> By issuing its token sale (*i.e.* investment contract and/or profit-sharing agreement), JINBI, Rafnsson and Crawley are "issuers" and are subject to the Act's provisions.<sup>15</sup>

Next, the commission found that JINBI's ICO sale to Alabama residents through WSFA 12 News' website was in violation of Ala. Code § 8-6-4, which provides that "[i]t is unlawful for any person to offer or sell any security in this state unless: (1) it is registered under this article; (2) the security is exempt from registration under Section 8-6-10; or (3) the transaction is exempt

under Section 8-6-11."<sup>16</sup> After conducting a registration file review and corporation search, the commission found that JINBI's investment contract and/or profit-sharing agreement "were neither registered nor subject to a perfected exception from registration in Alabama at the time of solicitation or sale and were offered in violation of the Act."<sup>17</sup>

Finally, the respondents' failure to disclose that its JINBI tokens were "securities" in its advertisement violated Ala. Code § 8-6-17(a)(2).<sup>18</sup> That statute provides, in relevant part, that it is unlawful "for any person, in connection with the offer, sale, or purchase of any security, directly or indirectly ... to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading."<sup>19</sup>

## Takeaways

### 1. Enforcement Strategy

The ASC successfully employs a two-tiered approach to protect Alabama investors from fraudulent cryptocurrency offerings: enforcement and education. Between its inquiries and official cease-and-desist orders like *In the Matter of JINBI Limited*, director Borg and his staff are putting the world on notice that Alabama law and regulations may apply to crypto-related investments, as evidenced through its 21 ICO inquiries<sup>20</sup> and 14 cease-and-desist orders since Operation Cryptosweep's announcement in May 2018.<sup>21</sup> Concurrently, the ASC is helping educate Alabamians through its fraud prevention outreach programs, in which its leaders speak to professional and civic groups in seminars

about these risky investments. As this emerging market continues to develop, we can expect the ASC to continue this strategy.

### 2. Opportunity

This is an exciting time to be a lawyer in this space—both on the defense and the plaintiff’s side. Entrepreneurs and their companies are in need of practical legal counsel in business organization, securities regulation and contract formation to help elevate their startups to the next level.<sup>22</sup> Meanwhile, defrauded consumers need help with recourse for their lost investments in this multi-billion dollar market.

### 3. Service

Our motto, “Lawyers Render Service,” has never been as prevalent as it is now for our role as lawyers in the crypto-space. Together, we can help the ASC in its goal of protecting our fellow Alabamians not only through representation, but helping our families, friends and communities through participating in education and fraud prevention outreach on these consumer protection issues. ▲

### Endnotes

1. Administrative Actions—2018-2019, Alabama Securities Commission, <http://asc.alabama.gov/2018.aspx> (last visited April 10, 2019).
2. Alabama Securities Commission Participates in Coordinated International Crypto Crackdown, Alabama Securities Commission, News Releases (May 21, 2018), <http://asc.alabama.gov/News/2018%20News/5-21-18%20Cryptosweep%20NASAA%20-%20ASC.pdf>.
3. What to Know About ICOs, Alabama Securities Commission, Investor Alerts (May 2018), [http://www.asc.state.al.us/investor\\_alerts.aspx](http://www.asc.state.al.us/investor_alerts.aspx) (defining ICO as “a method used by an individual, group of individuals, or organization to raise capital for a planned project. Most ICOs involve projects that are at the ‘idea’ stage and in many instances may lack a prototype or ‘real world’ implementation of the idea. To finance the idea or project through an ICO, promoters create a new virtual ‘coin’ or

‘token,’ which is then sold online to participants in the ICO in exchange for fiat currency”).

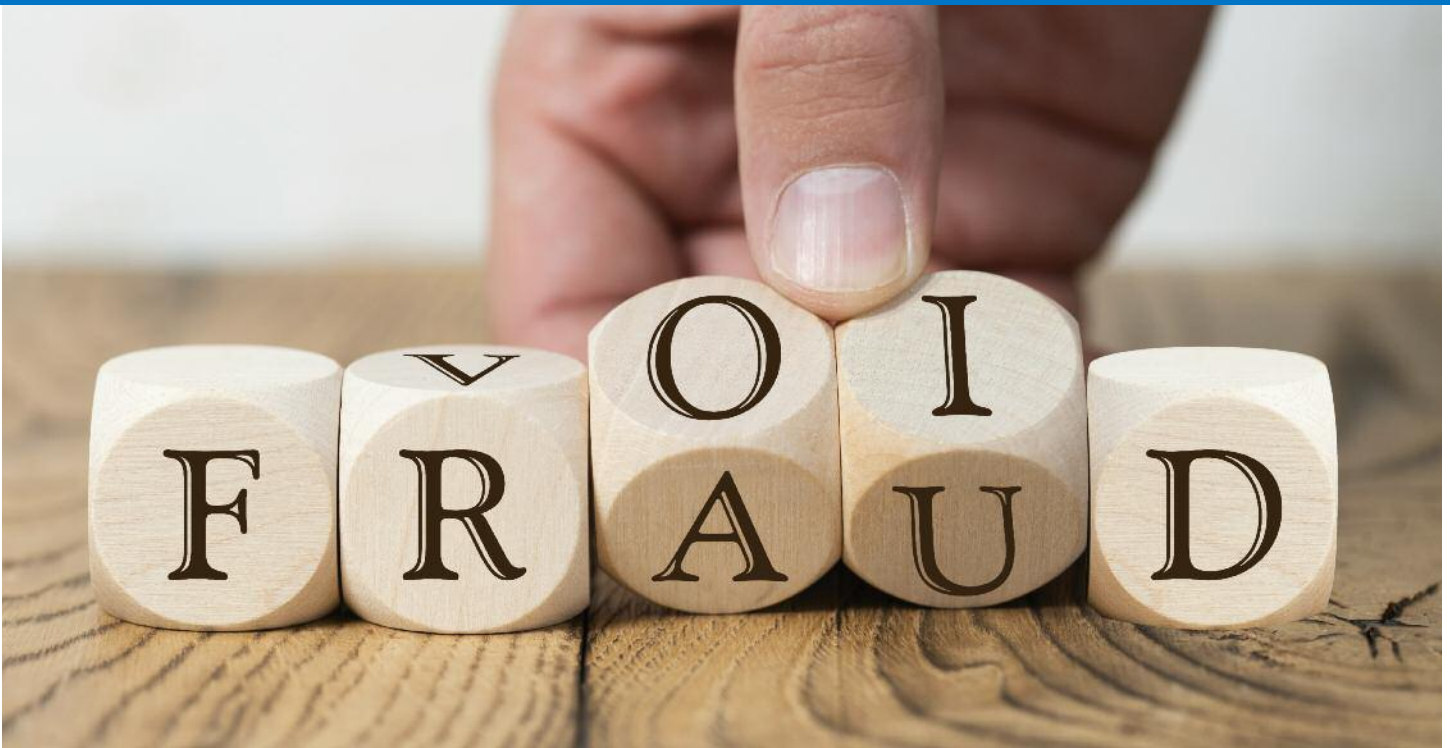
4. NASAA 2018 Enforcement Report at 5, <http://www.nasaa.org/wp-content/uploads/2018/10/2018-Enforcement-Report-Based-on-2017-Data-FINAL.pdf>.
5. <http://www.nasaa.org/regulatory-activity/enforcement-legal-activity/operation-cryptosweep/>.
6. In the Matter of: JINBI Ltd., Andre Rafnsson and Joseph Crawley, 2018 WL 5098924, at \*1.
7. *Id.* at \*1-2.
8. *Id.*
9. *Id.*
10. *Id.* at 3.
11. *Id.*
12. Ala. Code § 8-6-2(10).
13. In the Matter of: JINBI Limited, Andre Rafnsson and Joseph Crawley, Respondents, 2018 WL 5098924, at \*3.
14. Ala. Code § 8-6-2(5).
15. In the Matter of: JINBI Limited, Andre Rafnsson and Joseph Crawley, Respondents, 2018 WL 5098924, at \*3.
16. Ala. Code § 8-6-4.
17. In the Matter of: JINBI Limited, Andre Rafnsson and Joseph Crawley, Respondents, 2018 WL 5098924, at \*3.
18. *Id.*
19. Ala. Code § 8-6-17(a)(2).
20. Alabama Securities Commission Updates Coordinated Crypto Crackdown, Alabama Securities Commission, News Releases (August 28, 2018), [http://www.asc.state.al.us/news\\_detail.aspx?ID=12943](http://www.asc.state.al.us/news_detail.aspx?ID=12943).
21. See generally Administrative Actions—2018-2019, Alabama Securities Commission, <http://asc.alabama.gov/2018.aspx> (last visited April 10, 2019).
22. See, e.g. Alabama Securities Commission Updates Coordinated Crypto Crackdown, Alabama Securities Commission (August 28, 2018), [http://www.asc.state.al.us/news\\_detail.aspx?ID=12943](http://www.asc.state.al.us/news_detail.aspx?ID=12943) (stating that “[s]ponsors of these products should seek the advice of knowledgeable legal counsel to ensure they do not run afoul of the law.”)

### Albert W. Copeland



Albert W. Copeland is an associate with Christian & Small LLP in Birmingham. He is a graduate of the University of Alabama School of Law. Albert publishes and presents on regulatory, cybersecurity and litigation trends involving cryptocurrencies and blockchain technology, and is the organizer of a Birmingham-based civic group dedicated to educational programming about blockchain's utility and application.

Meanwhile, defrauded consumers need help with recourse for their lost investments in this multi-billion dollar market.



# What's in a Name (Besides Centuries of Confusion)?

THE ALABAMA UNIFORM VOIDABLE TRANSACTIONS ACT

*By N. Christian Glenos and Cathleen C. Moore*

On January 1, 2019, Alabama became the 17<sup>th</sup> state to enact the Uniform Voidable Transactions Act (“UVTA”).

The Alabama Uniform Voidable Transactions Act (“AUVTA”)<sup>1</sup> replaces the Alabama Uniform Fraudulent Transfer Act (“AUFTA”),<sup>2</sup> and applies to transfers and transactions occurring after January 1, 2019.<sup>3</sup> The AUVTA is not a wholesale revision of the AUFTA. Its changes are narrow, targeted and intended to clarify points of confusion and harmonize the law with

other statutes. In addition to the name change, the AUVTA (i) adds a choice of law provision, (ii) defines and allocates the burdens of proof, (iii) refines the definition of “insolvency,” (iv) refines defenses and (v) expands the prior law to apply to series organizations. These changes will be described in more detail below.

Although the AUVTA’s changes are relatively minor, the name change itself—the replacement of “fraudulent” with “voidable”—represents a major course correction intended by the drafters to clear up centuries-old confusion about the

very nature of a fraudulent transfer, likely rooted in an incorrect translation of the Latin phrase “*in fraudem creditorum*” in the mid-1500s. To understand where we are, it helps to know where we’ve been, so a brief review of the history of fraudulent (or voidable) transfer law is in order.

## A Brief History of Fraudulent Transfer Law

While American law is primarily based on English law, a deeper study of the origins of the American—and English—legal tradition sometimes reveals a more complex story. This is certainly true of the origins of American fraudulent transfer law. As it turns out, as long as there has been property, there have been defaulting debtors. In



Emperor Justinian I

recognition of this reality, the ancient Romans had a well-developed body of fraudulent transfer law, embodied in the Institutes of Justinian in *Corpus Juris Civilis*, the Roman Civil Code. The Institutes of Justinian, compiled by order of Byzantine Emperor Justinian I, stated the general principles of Roman fraudulent transfer law:

Again, if anyone has transferred his property to another in fraud of creditors, upon judgment to that effect by the chief provincial magistrate, the creditors of the transferor may seize his property, avoid the transfer, and recover the thing transferred; that is, they may claim that the things have not been transferred at all and accordingly are still within the legal possession of the debtor.<sup>4</sup>

This core statement of fraudulent transfer law remains remarkably unchanged from when it was first published in 533 A.D.

Roman law, as published in the Justinian writings, was likely carried over to England during the missions of St. Augustine during the late fifth century A.D.<sup>5</sup> By 600 A.D., the King of Kent, a convert of St.

Augustine, was known to have modeled the laws of his kingdom “according to the Roman mode.”<sup>6</sup> Roman law continued to influence the development of the English common law during the centuries that followed,<sup>7</sup> but the English common law courts did not always acknowledge their use and application of Roman law:

And this habit and practice gradually increased proportionally with the rise and increase of English prejudice against whatever bore the name “Roman.” Originally this prejudice began in a well-founded English abhorrence of the absolutism of the Roman public law. But the repudiation of this tended to involve the rejection of the Roman private law—at least openly. English suspicion, prejudice, and jealousy of “foreign laws” finally aroused much hostility to Roman law . . . This hostility was especially aimed at the encroaching pretensions of the Canon Law—that ecclesiastical offshoot of Roman law; soon, unfortunately, it also became aimed at the Roman in addition to the Canon law. Both became suspiciously regarded . . . as mere instruments to enslave the English people to popes and emperors: hence the efforts to curtail the authoritative influence in England of the Roman laws. To such a state of ingratitude did insularity and religious prejudice finally reduce most English jurists until modern times, when at last the debt owed by our law to Roman law began to be paid.<sup>8</sup>

By the 1500s, during the reign of Queen Elizabeth I, the lack of written statutory law in England became increasingly unworkable as England’s stature as a mercantile power grew. As the English developed their own statutory code, they borrowed heavily from the Roman Civil Code.



Queen Elizabeth I

However, due to continuing hostility to foreign laws generally, and Roman law more particularly, the English wanted to maintain plausible deniability that they were copying the Romans<sup>9</sup> so they sometimes

changed the legal terms, and important meaning got lost in the translation.

English fraudulent transfer law incorporated the Roman concept embodied in the Latin phrase “*in fraudem creditorum*,” or “in fraud of creditors.” As explained by one historian, however, “*fraudem*” in Latin meant something entirely different than it would come to be understood by the English:

The point is that the term *fraus*, in Latin, does not really mean “fraud” at all in the sense of “deceit”—at any rate, not deliberate fraud. The word for that is *dolus*. The word *fraus* means “prejudice” or “disadvantage” . . . Unfortunately the word came to be applied both in legal as in non-legal writers [sic] to the quality of the act that caused the prejudice, as well as to the damage itself and so became almost—but not quite—interchangeable with *dolus*. An ambiguity was thus foisted upon the phrase *in fraudem creditorum*, which has compelled us to distinguish between “actual” fraud and “constructive” fraud, and forced other indirects upon us which have obscured the purpose and function of this form of relief.<sup>10</sup>

*In fraudem creditorum*, properly translated, means something roughly equivalent to “to the disadvantage of creditors.” As interpreted by the English, however, it came to mean something more akin to “in deceit of creditors,” suggesting an element of intentional fraud or misrepresentation. So when the English Fraudulent Conveyances Act of 1571 (Statute of 13 Elizabeth C. 5) was carried across the Atlantic to the American colonies, its misleading focus on “deceit” instead of “disadvantage” came too.

## Statutory Precursors to the AUVTA

The principles of fraudulent transfer law as embodied in the Statute of 13 Elizabeth continued as part of the American common law for several hundred years. Then in 1918, the Uniform Law Commission published the Uniform Fraudulent Conveyance Act of 1918 (“UFCA”), which was enacted in 25 states. Subsequently, in 1984, the Uniform Law Commission published the Uniform Fraudulent Transfer Act (“UFTA”), which was enacted in 43 states, as well as the District of Columbia and the U.S. Virgin Islands. Alabama adopted the UFTA, with some modifications, in 1989.

The impetus for the UFTA in 1984 was to conform state laws more closely to the fraudulent transfers provision in the new Bankruptcy Code, enacted in 1978. This major, newly-enacted federal statute retained the “fraud” terminology in federal fraudulent transfer law.<sup>11</sup> The Drafting Committee of the Uniform Law Commission was charged with harmonizing the UFTA with the Bankruptcy Code, so another generation would pass before there would be a renewed opportunity to fix the problems caused by the regrettable mistranslation of *in fraudem creditorum* centuries earlier.

## Fraud by Any Other Name . . . Would Really Help Clear up Things Here

With the concept of deceit or intentional misrepresentation unwittingly baked into the name “fraudulent transfer” from the beginning, courts regularly misapplied the laws in a variety of contexts. One common error was in the interpretation of pleading standards. Some courts required plaintiffs to specifically plead “fraudulent intent” when alleging a fraudulent transfer because the Federal Rules of Civil Procedure, as well as many state rules of civil procedure, including Alabama’s, require that parties alleging fraud state with particularity the circumstances constituting fraud.<sup>12</sup> Even though fraudulent transfers are unrelated to “fraud” as intentional misrepresentation, and fraud is not an element of a claim under the UFTA, courts would dismiss otherwise valid fraudulent transfer claims for failure to meet the heightened pleading standard for “fraud.”

Moreover, under several theories of recovery of fraudulent transfers, there is no intent element at all, much less a required showing of “fraudulent” intent by the transferor. The continued use of the word “fraud” in connection with these transactions was needlessly confusing and misleading. For example, under the AUFTA, creditors may avoid transfers made without adequate consideration under one of the following conditions: (1) the debtor was left by the transfer with unreasonably small assets for a transaction or business in which the debtor was engaged or about to engage; (2) the debtor intended to incur, or believed or reasonably should have believed that the debtor would incur, more debts than the debtor



would be able to pay they become due; or (3) the debtor was insolvent at the time or as a result of the transfer or obligation. As noted by the Drafting Committee of the Uniform Law Commission when considering changes to the UFTA, these theories of recovery under the UFTA “have nothing whatever to do with fraud (or with intent of any sort) . . . [yet] came to be widely known by the oxymoronic shorthand ‘constructive fraud.’”<sup>13</sup>

Likewise, even under the theory of recovery relating to a transfer of property made by a debtor with “actual intent to hinder, delay, or defraud” a creditor of the debtor, the “fraud” tag can distort results. This section applies even if the debtor intends to merely “hinder” or “delay” a creditor, even absent intent to “defraud,” but, as noted by the drafters of the UVTA, this provision “came to be widely known by the shorthand tag ‘actual fraud’ . . . [and that] shorthand is misleading, because that provision does not in fact require proof of fraudulent intent.”<sup>14</sup>

The revisions set forth in the UVTA make more sense against this historical background. When the Drafting Committee of the Uniform Law Commission met to consider changes to the UFTA, the name change was a major priority. The drafters explained:

[T]he retitling is not motivated by the substantive revisions to the 2014 amendments, which are relatively minor. Rather the word “Fraudulent” in the original title, though sanctioned by historical usage, was a misleading description of the Act as it was originally written. Fraud is not, and never has been a necessary element of a claim for relief under the Act. The misleading intimation to the contrary in the original title of the Act led to confusion in the courts.<sup>15</sup>

While news of the name change was met with grumblings by some change-averse practitioners, the Uniform Law Commission unanimously adopted the UVTA without dissent on July 16, 2014. Alabama adopted the UVTA during the 2018 legislative session, and the AUVTA applies to all transactions occurring on or after January 1, 2019.

## The AUVTA and Its Revisions to the AUFTA

As under the AUFTA, four general types of transactions are voidable under the AUVTA:

- Transfers made with actual intent to hinder, delay or defraud creditors;<sup>16</sup>
- Transfers made by an insolvent debtor without receiving reasonably equivalent value in exchange for the transfer;<sup>17</sup>
- Transfers made by an insolvent debtor to an insider of the debtor that has reasonable cause to believe that the debtor is insolvent;<sup>18</sup> and
- Transfers made by a debtor, without receiving reasonably equivalent value in exchange for the transfer, when the debtor is either undercapitalized or about to incur debts beyond his ability to pay as they become due.<sup>19</sup>

The major revisions introduced by the AUVTA include the following:

### Choice of Terms

As discussed at length above, the word “voidable” replaced “fraudulent” to reduce confusion about the meaning of the UVTA and to discourage the application by courts and parties of an erroneous intent element. In addition, the word “transaction” replaced “transfer” because the UVTA drafters determined that “transfer” was under-inclusive and failed to cover the incurrence of obligations by the debtor, which are also covered by the UVTA.<sup>20</sup>

### Choice of Law

The AUVTA adds a new section 11, which establishes a choice of law rule providing that the local law of the jurisdiction in which the debtor is “located” at the time of the transfer shall govern claims for relief. It provides that an individual debtor is located at the individual’s principal residence, a debtor that is an organization and has only one place of business is located at its place of business, and a debtor that is an organization and has more than one place of business is located at its chief executive office.<sup>21</sup> This new rule intends to provide a simple and predictable choice of law rule. Section 11, with its focus on the location of the debtor, is analogous to the choice of law rule set forth in section 9-301 of the Uniform Commercial Code. The UVTA drafters noted that the analogy to the law of secured transactions is apt, “because the substantive rules of this Act are a species of priority rule, in that they determine the circumstances in which a debtor’s creditors, rather than a debtor’s transferee, have superior rights in property transferred by the

debtor.”<sup>22</sup> Moreover, the focus on the debtor’s location “when the transfer is made” is intended to reduce the incentives for a debtor to make a voidable transfer in one jurisdiction and then evade the consequences by moving to a jurisdiction with more favorable laws.

### Burden of Proof

The AUVTA also adds several provisions defining and allocating the burden of proof. Specifically, new sections 5(c), 6(c) and 9(h) clarify that the burden of proof for claims and defenses under the AUVTA is a simple “preponderance of the evidence” standard. Because of the use of the word “fraud” in earlier iterations of the law, courts sometimes applied a heightened “clear and convincing evidence” standard in evaluating claims and defenses. The UVTA categorically rejected the application of a heightened standard, even for claims seeking to avoid transfers made with the intent to hinder, delay or defraud creditors.<sup>23</sup>

In addition, the AUVTA removes uncertainty regarding the allocation of the burden of proof. Under sections 5(c) and 6(c), the creditor making claims for relief under sections 5 and 6 bears the burden of proof. Section 9(g) of the AUVTA sets forth clear rules allocating the burden of proving defenses under Section 9. The party asserting defenses to voidable transfer claims set forth in Section 9 of the AUVTA bears the burden of proving the defenses.<sup>24</sup> The creditor has the burden of proving the value of the transferred asset when seeking a money judgment.<sup>25</sup> The transferee has the burden of proving any good faith defense.<sup>26</sup> A party seeking adjustment of a money judgment bears the burden of proving the adjustment.<sup>27</sup>

### Insolvency

The definition of “insolvent” continues to be important in the AUVTA, because many bases for relief turn on whether the debtor is insolvent. The AUVTA clarifies the definition of insolvency to provide that a debtor is insolvent “if the sum of a debtor’s debts at a fair valuation is greater than the sum of the debtor’s assets at a fair valuation.”<sup>28</sup> While the comments have always provided that “fair valuation” applies to both the debtor’s debts and assets, the statutory text itself has now been revised to make this more apparent. In addition, the AUFTA had contained a special definition of insolvency applicable to partnerships that gave a partnership full credit for the net worth of each of its general partners. The AUVTA has deleted that

definition. As a result, the general definition of “insolvency” applicable to other debtors applies to partnerships as well.<sup>29</sup>

Both the AUFTA and the AUVTA establish a rebuttable presumption that a debtor that is generally not paying his debts as they come due is insolvent.<sup>30</sup> Once the presumption of insolvency is triggered by a showing that the debtor is not paying his debts as they come due, the AUVTA shifts the burden of proof to the defendant (i.e., the transferee) to prove solvency.<sup>31</sup>

### Defenses

The AUFTA made it a complete defense to so-called “actual fraud” (transfers made with actual intent to delay, hinder or defraud creditors) if the transferee takes in good faith and for reasonably equivalent value. The AUVTA adds an additional requirement that the reasonably equivalent value must be given to the debtor.<sup>32</sup>

In addition, the AUVTA creates a defense for subsequent transferees (i.e., transferees other than the first transferee) that take in good faith and for value. The defense, derived from section 550 of the Bankruptcy Code, also protects any later transferee from such a protected transferee, even if the later transferee did not take for value.<sup>33</sup>

Finally, the AUVTA retains the language in the AUFTA providing that transfers resulting from enforcement of a security interest under Article 9 are not avoidable, but carves out from this defense “acceptance of collateral in full or partial satisfaction of the obligation it secures,”<sup>34</sup> also known as a strict foreclosure. While Article 9 contains protections for a debtor’s other creditors in the case of a foreclosure sale (e.g., the requirement of commercial reasonableness), there is no requirement of commercial reasonableness for a strict foreclosure, which requires only the debtor’s consent. So if the debtor facing a strict foreclosure does not withhold his consent to protect his equity, there is little protection for the debtor’s other creditors. The revision to the AUVTA attempts to provide a measure of protection to other creditors in these scenarios.

### Series Organizations

The AUVTA adds a new section providing that a “series organization” and each “series of the organization” is to be treated as a separate person for purposes of the Act, even if it is not treated as a person for

other purposes.<sup>35</sup> This addition recognizes the increasing prevalence of series organizations in complex transactions. A series of a series organization may not be a legal entity, even though it has its own assets and liabilities. If a series is not a legal entity, then a creditor could not challenge a transfer of property from one series to another under fraudulent transfer law, which only applies to a “person” (i.e., a legal entity). The AUVTA seeks to close this loophole by adding a new section providing that a “series” that has its own assets and debts is to be treated as a person for purposes of the AUVTA, regardless of how it is treated for other purposes. Committee work at the Uniform Law Commission is currently underway to add series provisions to all uniform acts applicable to unincorporated business organizations.

## Alabama Exclusions from the UVTA

Alabama adopted the UVTA in large measure, with a couple of notable exceptions. First, it retained the existing statute of limitations.<sup>36</sup> Second, as with the AUFTA, the AUVTA omitted language from the UVTA referring to “obligations,” opting instead to leave the question of whether an obligation is void as a voidable conveyance to existing common law.<sup>37</sup>

## Conclusion

The revisions embodied in the AUVTA help to bring the law in line with the original intent of its ancient founders by removing the “fraud” language that created centuries of misdirection, while also making the adjustments necessary to account for the realities of modern business transactions. ▲

### Endnotes

1. Ala. Code §8-9B-1 to 12. As of the date of this article, the UVTA has been adopted by 20 states and introduced in four others.
2. *Id.* § 8.9A.1.
3. The AUFTA remains in force with respect to transfers that occurred before January 1, 2019.
4. Max Radin, *Fraudulent Conveyances at Roman Law*, 18 Va. L. Rev. 109 (1931), citing Institutes of Justinian, 4, 6, 6.
5. Charles P. Sherman, *The Romanization of English Law*, 4 Yale L.J. 318 (1914).
6. *Id.* at 319.
7. *Id.* at 323.
8. *Id.* at 328.
9. See Jenks, *A Short History of English Law* 20 (2d ed. Rev. 1922) (“But the point to be remembered is, that the influence of Roman Law became in England secret, and, as it were, illicit.”).

10. Radin, *Fraudulent Conveyances at Roman Law*, 18 Va. L. Rev. 111.
11. 11 U.S.C. § 548 (2012).
12. See Fed. R. Civ. P. 9(b); Ala. R. Civ. P. 9(b).
13. See UVTA, 11 U.S.C. § 15, Official Comment (2014).
14. *Id.*
15. *Id.*
16. Ala. Code § 8-9B-5(a)(1).
17. *Id.* § 8.9B.6(a).
18. *Id.* § 8.9B.6(b).
19. *Id.* § 8.9B.5(a)(2).
20. However, as discussed below, the AUVTA does not cover obligations. See AUVTA comment §8-9B-4.
21. Ala. Code § 8-9B-11(a).
22. UVTA, §10, Official Comment, ¶1.
23. UVTA, §4, Official Comment, ¶10.
24. Ala. Code § 8-9B-9(g)(1).
25. *Id.* § 8-9B-(g)(2).
26. *Id.* § 8-9B-9(g)(3).
27. *Id.* § 8-9B-9(g)(4).
28. *Id.* § 8-9B-3(a).
29. *Id.* § 8-9B-3.
30. *Id.* § 8-9A-2(b); *Id.* § 8-9B-3(b).
31. *Id.* § 8-9B-3(b).
32. *Id.* § 8-9B-9(a).
33. *Id.* § 8-9B-9(b)(1)(ii).
34. *Id.* § 8-9B-9(e)(2).
35. *Id.* § 8-9B-12.
36. *Id.* § 8-9B-10.
37. *Id.* § 8-9B-2, Comment 1.

---

### N. Christian Glenos



Chris Glenos is a partner at Bradley Arant and chairs its bankruptcy, restructuring and distressed investing practice group. He served as a member of the Alabama Law Institute’s Committee on the Uniform Voidable Transactions Act.

---

### Cathleen C. Moore



Cathy Moore is counsel in the bankruptcy, restructuring and distressed investing practice group at Bradley Arant. She represents debtors, creditors, purchasers of distressed assets and other clients in Chapter 11 bankruptcy cases, out-of-court restructurings and complex commercial litigation matters in state, federal and bankruptcy courts.



# 5G Mobile Technology— FCC Preemption and Geopolitics

*By William M. Lawrence and Matthew W. Barnes*

## Mobile Broadband Technology's Journey Toward 5G Technology

Mobile broadband—the wireless industry's marketing term for technology that allows devices to connect to the Internet wirelessly using cellular networks—is moving toward the technology's fifth generation, also known as 5G.

During mobile broadband's less than 40 years of history, its technology has evolved from the 1980's era of 1G analog telecommunications, to the 1990's era of 2G digital phone calls and SMS<sup>1</sup>

text messages, to the early 2000's era of 3G high-speed Internet and multi-media applications, to our current era of 4G and 4G LTE<sup>2</sup> technology's improved download/upload speeds, reduced latency (*i.e.*, lag time) and crystal clear voice calls.

## Overview of 5G's Significance and Characteristics

Unlike previous generations of mobile broadband technology that featured one main evolutionary development each, 5G will feature

multiple new evolutionary developments and radically change how consumers use the Internet.

5G will have three revolutionary characteristics. First, data transfer speeds will be up to 100 times more rapid than 4G, allowing consumers to transmit and download content astonishingly faster than ever imagined. Second, 5G will dramatically reduce latency, which will allow consumers to stream content without delays and glitches. Third, 5G will materially increase device connectivity and capacity abilities, allowing consumers to communicate simultaneously with greater numbers of users and devices.

## 5G and the “Internet of Things”

The Internet of Things (the IoT) is a network of Internet-connected, data-sharing machines, appliances and other devices which, despite its infancy, has given consumers products like smart watches, autonomous cars and Internet-based home security systems. 5G’s increased data capacity and speed, combined with its reduced latency, will fuel the so-called IoT.

Just as anabolic steroids stimulate muscle growth, 5G will stimulate the IoT’s growth, maturation and evolution. Among other ways in which 5G will support next-generation IoT services, the following are widely-predicted results:

- The automotive industry could use 5G and the IoT to produce connected automobiles featuring augmented and virtual reality technologies, which could lead to direct communication between vehicles, vehicle to pedestrian and vehicle to

infrastructure, in order to foster automobile convenience and safety, including route planning and real-time updates.

- Industrial manufacturers could use 5G and the IoT to develop highly secure private IoT networks, by integrating security into network architecture.
- The healthcare field could use 5G and the IoT to perform tele-surgeries and allow specialists to remotely monitor patients and surgeries using real-time networks.
- Gaming manufacturers, retail businesses and other primarily consumer-based businesses could use AR and VR to revolutionize customer experiences.

## 5G and Smart Cities

5G and the IoT will together fuel the evolution of “smart cities”—municipalities that use data collection, information supply and enhanced communication technologies to manage assets and resources, improve government services, foster economic growth and enhance livability. Early examples of smart city technologies include automated traffic management systems to reduce traffic and allow for more efficient movement, multi-modal transportation and smart traffic lights, and digital utility monitoring.

Smart cities are predicted to spur economic growth for their citizens, but they could also reduce government expenditures. For example, research suggests that smart city solutions for managing vehicle traffic and electrical grids could produce \$160 billion in benefits and savings by reducing energy use, traffic congestion and fuel costs.<sup>3</sup>

## The United States and China Are in a Race for 5G Dominance

### To the Victor Go the Spoils—The Economic Motives for Global 5G Leadership

The United States is currently the world’s mobile broadband leader, a position to which it ascended with 4G technology’s emergence. Riding on 4G technology’s back, U.S.-based companies like Facebook, Apple, Amazon, Netflix, Google, Venmo, Uber and Lyft have changed how society functions and communicates, led the U.S. economy and generally transformed consumers’ day-to-day lives.

As the global mobile broadband leader, the U.S. has received significant economic rewards. 4G innovations created almost \$100 billion of the GDP’s annual increase by 2016, increased wireless-related jobs by 84 percent from 2011 to 2014 and increased American companies’ revenue approximately \$125 billion (including more than \$40 billion in additional revenue due to app stores and app developers).<sup>4</sup> Experts predict that 5G technology will stimulate the U.S. economy to heights dwarfing the gains created by all prior mobile broadband technologies combined, including, by one forecast, three million new jobs, \$275 billion in private investment from wireless operators and \$500 billion in economic growth.<sup>5</sup>

The United States does not want to lose its global mobile broadband leadership and suffer the negative effects that Japan and several European countries suffered by losing 3G and 4G wireless leadership.

## To the Victor Go the Spoils— Geopolitical Motives for Global 5G Leadership

China wants to become the world's first choice for 5G technologies and supplant the U.S. as the global mobile broadband leader. Aside from losing out on the significant economic development that global 5G leadership is expected to bring, the U.S. government has a more base emotional reason for not wanting to cede global 5G leadership without a significant fight—fear.

Underlying the U.S. fears are the following concerns: (i) China could expose security and privacy risks in the U.S. government, in U.S.-based companies and pertaining to U.S. citizens; (ii) the potential for China to install malicious software and backdoor spying technologies in imported devices to track and discover vital U.S. interests; and (iii) China could remotely sabotage Internet-connected devices and cripple the U.S.'s communications and economic systems in the process.

In short, the U.S. understands that China, by controlling the IoT through 5G, will gain significant and destabilizing political, economic and military strength.

### It's a Marathon, Not a Sprint

In early 2018, most experts opined that China was leading the race to global 5G dominance, with South Korea in second place and the U.S. trailing in third place.

The U.S.'s early race positioning suffered due to the lack of 5G deployments, the federal government's failure to auction necessary spectrum and outdated infrastructure rules at the federal, state and local government levels.<sup>6</sup>

In April 2019, the Cellular Telecommunications Industry Association, a trade association that represents the U.S. wireless communications industry, released a new report that found the U.S. and China are now tied for first place in 5G readiness.<sup>8</sup>

China's early race positioning benefitted due to multiple factors:

- First, jobs creation incentivized China. The China Academy of Information and Communications Technology (CAICT), a government-run research institute, estimates that 5G will create more than eight million jobs in China by 2030.<sup>7</sup>
- Second, privately-owned Chinese companies want to evolve and be known as innovative forces, rather than continuing their well-earned reputation for being manufacturers of copycat products.
- Third, Chinese carriers view themselves as governmental partners, who follow government direction and implement government policy objectives, which propelled Chinese carriers to far more quickly invest

in 5G networks than U.S.-based carriers.

- Fourth, the Chinese government has helped propel Chinese carrier investments in 5G networks by giving the carriers necessary spectrum, unlike their U.S. counterparts who must purchase their spectrum from the federal government.

Notwithstanding the United States' sluggish start in the race for global 5G leadership, it is finding its mid-race form. In April 2019, the Cellular Telecommunications Industry Association, a trade association that represents the U.S. wireless communications industry, released a new report that found the U.S. and China are now tied for first place in 5G readiness.<sup>8</sup>

The report attributes the U.S.'s rise in the rankings to the wireless industry's investment as a whole and to the work of U.S. policymakers to speed the process of updating networks. According to the report, the U.S. currently has the most worldwide commercial 5G deployments, spurred by AT&T's 5G launch in more than a dozen markets and Verizon's 5G launch in several municipalities. The report predicts 5G will be available in 92 U.S. municipalities before 2020.

## 5G Will Introduce the World to Small Cell Facilities

To deliver to consumers the staggering, multi-gigabit speeds that 5G promises, carriers will use extremely high frequency millimeter waves that they have not used previously for consumer devices. Although the technological advantages

of millimeter waves is critical to 5G delivery, the high-frequency waves do not travel as far generally as the lower frequency waves used to deliver 4G technology and suffer attenuation due to, among other things: (i) atmospheric gases, which absorb the waves; (ii) line-of-sight path blockages, including building walls and some foliage; and (iii) rain and other precipitation forms.

To combat signal attenuation so that millimeter waves can carry 5G's promise of enormous data quantities at multi-gigabit speeds, carrier networks must have numerous, densely-located connections to small, low-power, short-range, self-contained cell site nodes, also known as "small cell facilities" or "small cells," which are the building blocks of 5G networks. Consequently, carriers are turning their attention away from deploying cell towers and other high-power macrocell sites and toward deploying small cells.

A small cell consists generally of a single antenna and supporting transmission equipment. The "small" in small cells refers not to their size but, rather, to their smaller power and coverage radiuses than macrocell sites; however, small cells are indeed smaller in size, more discrete and more aesthetically pleasing than cell towers. Typical small cell enclosures do not exceed six cubic feet in volume, and most associated wireless equipment does not exceed 28 cubic feet in cumulative volume.

Small cells have the benefit of not requiring expensive land swaths like cell towers and other macrocell sites. Carriers deploy small cells on a variety of structures, including poles, street lights, traffic lights, utility poles<sup>9</sup> and street signs,

among other structures. Due to the quantity of existing installable structures and fiber optic cable installations, public rights-of-way are the generally preferred small cell deployment locations.<sup>10</sup>

Approximately 200,000 operational small cells are installed across the U.S., which are primarily used to assist with 4G delivery in highly populated and congregational areas.<sup>11</sup> However, according to one expert, 5G will require more than 800,000 installed and operational small cells in the next six to seven years.<sup>12</sup>

## 5G Infrastructure Deployment—The Impact of State and Municipal Laws on Global Geopolitical Stability

Local land-use and zoning laws are not subjects one typically thinks about having global significance. However, municipalities that have burdensome or no small cell siting processes will significantly impact whether U.S.-based carriers and infrastructure providers will be able to deploy small cell networks quickly, efficiently and cost-effectively, which, in turn, will play a meaningful role in whether the U.S. can maintain global mobile broadband leadership and geopolitical stability.

### Why Municipalities Play Important Roles in Helping The U.S. Maintain Global 5G Leadership

Carriers and infrastructure providers need access to the public

rights-of-way for optimal 5G small cell deployments. Right-of-way access is crucial, because they are sources of abundant (i) fiber optic cables (5G fiber optic backhaul is necessary to flawlessly stream bandwidth-intensive applications), (ii) power sources and (iii) structures or space for structures to which small cells can be attached (*e.g.*, utility poles, street light poles and other structures).

Carriers and infrastructure providers have three main structure options in the rights-of-way: installing their own poles and structures and attaching small cells to them; attaching small cells to city-owned poles and structures (whether existing or to-be-constructed); and contracting with public utilities to attach to the utility's poles and structures.<sup>13</sup>

Each of the preceding options carries different costs and risks, but no one of the options is a deployment panacea, so carriers and infrastructure providers use a combination or all three options to maximize small cell deployments.

### Municipalities Are Incentivized to Help the U.S. Maintain Global 5G Leadership

Municipalities have incentives to help the U.S. win the 5G race. For example, municipalities that have burdensome or non-existent small cell siting processes will prevent themselves from becoming "smart cities" and reaping the associated economic rewards. The carrot for municipalities is directly in front of them—carriers in the U.S. are willing and ready to invest \$275 billion to deploy 5G networks, which could create three million new jobs and add \$500 billion to the economy.<sup>14</sup>

Cities that desire to reap these economic benefits and associated savings should have simple objectives for facilitating small cell deployments in their jurisdictions: streamlining permitting processes, adopting reasonable fee structures, modernizing siting rules to ensure fair and reasonable access to utility poles and city owned structures, and reducing regulatory hurdles to small cell deployments.

### Municipalities Can Be Unintentional Stumbling Blocks to the U.S.'s Global 5G Leadership

Municipalities impede small cell deployments, often unintentionally, in five primary ways:

- First, most municipalities have not enacted small cell regulations, which results in a lack of administrative preparedness and extraordinarily lengthy review periods to facilitate small cell deployments.
- Second, many municipalities have cumbersome and unnecessary multi-level, discretionary review and approval processes, such as neighborhood associations, planning commissions, zoning commissions and city councils.
- Third, many municipalities rely mistakenly upon inapplicable laws passed originally to govern macrocell towers and other high-powered macrocell sites, which, among other impediments, require lengthy review periods and expensive permitting fees that are stifling to small cell deployments.<sup>15</sup>
- Fourth, municipalities that have passed small cell regulations (i) often did so before 5G

## More significantly, municipalities that adopt reasonable and up-to-date small cell regulations help the U.S. to maintain its continued global mobile broadband superiority.

technology and small cell deployment strategies were well understood; (ii) deferred heavily to outside consultants, whose own immediate financial interests outweighed the city's long-term interests; or (iii) copied or relied excessively upon flawed regulations promulgated by other municipalities.

- Fifth, despite rights-of-way being crucial for deployment success, carriers and infrastructure providers face multi-prong challenges to right-of-way deployments, including: (i) widely varying municipal ordinances; (ii) laboriously slow and inconsistent municipal permit processing; (iii) prohibitive, unreasonable and widely varying municipal fee structures among different jurisdictions; (iv) burdensome, costly and inconsistent municipal information collection and assessment requirements, which are often unrelated to right-of-way access; and (v) remediation and maintenance responsibilities that carriers

and infrastructure providers argue may be appropriate for macrocell sites but impose unreasonable burdens in the small cell deployment context.

As a result of these stumbling blocks, carriers and infrastructure providers suffer the consequences, which are no small cells being deployed or fewer small cells actually being deployed than a carrier's buildout plans contemplate (resulting in poor or less than optimal 5G coverage).

### Reasonable, Updated and Streamlined Municipal Regulations Benefit the Municipalities and Their Citizens

By adopting reasonable, streamlined and up-to-date small cell deployment regulations, municipalities benefit their citizens by: (i) providing greater IoT access; (ii) earning fee and rental revenues (including application fees, construction permit fees, right-of-way access fees and rentals for installations on city-owned structures); (iii) protecting their jurisdictions by controlling noise and visual and design aesthetics, and enforcing zoning restrictions; (iv) managing and assuring public safety and accessibility; and (v) controlling the permitting of what is deployed within their jurisdictions. More significantly, municipalities that adopt reasonable and up-to-date small cell regulations help the U.S. to maintain its continued global mobile broadband superiority. That superiority is not merely so that we, as citizens, can feel good about the U.S.'s maintaining a world leading position, but so that we can reap the economic benefits of being the "go-to" technology source.



## The FCC'S Efforts to Help the U.S. Beat China in the Race to Global 5G Leadership<sup>16</sup>

### Background—The FCC's Implementation Authority Under the Communications Act of 1934 and Telecommunications Act of 1996

The Communications Act of 1934<sup>17</sup> (the “Communications Act”) combined and organized federal regulation of telephone, telegraph and radio communications and, significantly, created the Federal Communications Commission (“FCC”). The Telecommunications Act of 1996 (the “Telecommunications Act”) was the first major overhaul of telecommunications law after the Communications Act’s enactment and became the first major legislation addressing mobile broadband technology. Section 704(a) of the Telecommunications Act added Section 332(c)(7) to the Communications Act, which provides for limited preemption of state and local zoning authority over the siting of personal wireless service facilities.

Section 332(c)(7) of the Communications Act limits what municipalities can do regarding the siting of personal wireless service facilities, including small cells. Specifically, it prohibits municipalities from (i) unreasonably discriminating among providers of functionally equivalent services, (ii) prohibiting or taking action that has the effect of prohibiting the provision of personal wireless services and (iii) regulating wireless facilities on the basis of environmental effects of radio

frequency emissions if facilities comply with FCC RF emissions regulations.

Section 332(c)(7) of the Communications Act requires municipalities to take certain affirmative actions regarding the siting of personal wireless service facilities, including small cells. Specifically, it requires municipalities to (i) act on any request for authorization to place, construct or modify personal wireless service facilities within a reasonable period of time, (ii) publish siting application decisions in writing and (iii) support denials of siting applications with substantial evidence.

The U.S. Supreme Court has confirmed that the FCC has authority to implement Section 332(c)(7) of the Communications Act. As noted, Section 332(c)(7)(B)(ii) of the Communications Act requires municipalities to act upon siting applications for wireless facilities

“within a reasonable period of time after the request is duly filed.” Relying upon its broad authority to implement the Communications Act, see 47 U.S.C. § 201(b), the FCC issued a declaratory ruling concluding that the phrase “reasonable period of time” is presumptively (but rebuttably) 90 days to process an application to place a new antenna on an existing tower and 150 days to process all other applications. The cities of Arlington and San Antonio, Texas sought review of the FCC’s ruling in the Fifth Circuit. They argued that the FCC lacked authority to interpret Section 332(c)(7)(B)’s limitations.

The Fifth Circuit, relying upon Circuit precedent holding that *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), applies to an agency’s interpretation of its own statutory jurisdiction, applied

*Chevron* to the municipalities’ question. Finding the statute ambiguous, the Fifth Circuit upheld as a permissible construction of the statute the FCC’s view that § 201(b)’s broad grant of regulatory authority empowered it to administer § 332(c)(7)(B). The Supreme Court agreed with the Fifth Circuit that courts must apply the *Chevron* framework to an agency’s interpretation of a statutory ambiguity that concerns the scope of the agency’s statutory authority (*i.e.*, its jurisdiction). Accordingly, under the Supreme Court’s decision in *City of Arlington, Texas v. Federal Communications Commission*, the FCC has the authority to implement provisions of Section 332(c)(7).<sup>18</sup>

### An Overview of the FCC's Three Most Significant Actions to Help the U.S. Win Its Race with China for Global 5G Leadership

The FCC has taken three major actions to help the U.S. outpace China in their 5G global superiority race.

First, in March 2018, the FCC exempted small cells from certain review requirements under certain circumstances, including the historic preservation rule under the National Historic Preservation Act (“NHPA”) and the environmental review under the National Environmental Policy Act (“NEPA”), by concluding that small cell deployments are neither “undertakings” affecting historic properties under NHPA nor “major Federal actions” having environmental impacts under NEPA.<sup>19</sup> By establishing these exemptions, the FCC gifted carriers and infrastructure providers with significant time and cost savings relating to their small cell deployments.

Second, in September 2018, the FCC adopted the Facilitate America's Superiority in Technology Plan ("FAST Plan"), which makes more spectrum available to the commercial marketplace for 5G services,<sup>20</sup> promotes updated infrastructure to encourage private sector investment in 5G networks<sup>21</sup> and modernizes federal regulation to promote 5G backhaul and digital opportunity for all Americans.<sup>22</sup>

Finally, in perhaps its most significant action, the FCC adopted its Declaratory Ruling and Third Report and Order, WT Docket No. 17-79 and WC Docket No. 17-84<sup>23</sup> (the "Small Cell Order"). The Small Cell Order promotes 5G infrastructure buildout generally by "eliminating regulatory impediments that unnecessarily add delays and costs to bringing advanced wireless service to the public" and, specifically, by regulating the fees municipalities can charge carriers and infrastructure providers to deploy small cells and establishing timeframes within which municipalities must act upon carriers' and infrastructure providers' small cell deployment applications (commonly referred to in the wireless industry as "shot clocks").

### **The Small Cell Order Illustrates the FCC's Use of Limited Federal Preemptive Authority over Municipalities Under the Communications Act to Control Issues Having National and Global Significance**

Despite its limited scope, the Small Cell Order is a profound example of the federal government, through the FCC, flexing its federal muscle over local land-use and zoning regulations to achieve

## **The Declaratory Ruling establishes an "objectively reasonable" standard for fees that municipalities may lawfully charge carriers and infrastructure providers under the Communications Act to access public rights-of-way and attach to government owned properties in the rights-of-way.**

a national policy objective. The Small Cell Order is divided into two parts—a declaratory ruling and an order. Both the declaratory ruling portion and the order portion preempt local regulation in limited but significant ways.

### **■ *The Small Cell Order's Declaratory Ruling Limits Municipalities to Charging Only Objectively Reasonable Fees and Establishes a Presumptively Lawful Fee Schedule to Guide Municipalities in Complying with The Communications Act***

In the Declaratory Ruling portion of the Small Cell Order, the FCC issued guidance regarding how fee and non-fee requirements of municipalities over small cell

siting applications can constitute effective prohibitions of service, which Section 332(c)(7) of the Communications Act prohibits.

Generally, the Small Cell Order: (i) concludes that Section 332(c)(7) limits municipalities to charging fees that are no greater than a reasonable approximation of objectively reasonable costs for processing applications and for managing deployments in the rights-of-way; (ii) removes uncertainty by identifying specific fee levels for small cell deployments that presumably comply with the "objectively reasonable" standard; and (iii) guides municipalities regarding when certain non-fee requirements allowed generally under the Communications Act—such as aesthetic and undergrounding requirements—may constitute effective prohibitions of service in violation of Section 332(c)(7).

The Declaratory Ruling establishes an "objectively reasonable" standard for fees that municipalities may lawfully charge carriers and infrastructure providers under the Communications Act to access public rights-of-way and attach to government owned properties in the rights-of-way. Fees must be a reasonable approximation of the municipality's costs, include only objectively reasonable costs and be no higher than the fees charged to similarly-situated competitors in similar situations.<sup>24</sup> To aid municipalities in setting fees for small cell applications, the FCC established a presumptively lawful fee schedule, which establishes (i) \$500 for non-recurring fees, including a single up-front application that includes up to five small cells, with an additional \$100 for each small cell beyond five, or

\$1,000 for non-recurring fees for a new pole (*i.e.*, not a collocation) intended to support one or more small cells, and (ii) \$270 per small cell per year for all recurring fees, including any possible right-of-way access fee or fee for attachment to municipally-owned structures in the right-of-way.<sup>25</sup>

■ ***The FCC Clarifies When Municipal Land-Use and Zoning Requirements Violate the Communications Act of 1934***

Acknowledging that municipal land-use and zoning requirements could effectively prohibit small cell deployments, the Small Cell Order clarified that local requirements constitute effective prohibitions if they materially limit or inhibit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.<sup>26</sup> To assist municipalities, the Small Cell Order provides guidance regarding four local zoning considerations that small cell applications can be expected to address—local aesthetic requirements, local spacing requirements, local undergrounding requirements and local in-kind requirements.

The Small Cell Order permits local aesthetic requirements if they are reasonable, no more burdensome than those applied to other types of infrastructure deployments and are objective and published in advance.<sup>27</sup> Aesthetic requirements that are “technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments” are permissible, but, if the aesthetic requirements are more burdensome

than those applied to “similar infrastructure deployments,” they are impermissible because the “discriminatory application evidences the requirements are not, in fact, reasonable and directed at remedying the impact of the wireless infrastructure deployment.”<sup>28</sup> In order for aesthetic requirements to be “reasonable and reasonably directed to avoiding” aesthetic harms, they “must be objective—*i.e.*, they must incorporate clearly-defined and ascertainable standards, applied in a principled manner—and must be published in advance.”<sup>29</sup>

The Small Cell Order (i) confirms that local spacing requirements for small cells (*i.e.*, mandates that small cells be installed a specific number of feet or other minimum distance away from other facilities, ostensibly to avoid excessive overhead clutter visible from public areas) will be evaluated under the same standards as local aesthetic requirements, and (ii) explains that some spacing requirements “may violate Section 253(a) [of the Communications Act]” (such as a city promulgating new minimum spacing requirements that, in effect, prevent a deployer from replacing its preexisting facilities or collocating new equipment on a structure already in use), while “others may be reasonable aesthetic requirements.”<sup>30</sup>

The Small Cell Order clarified that local undergrounding requirements (*i.e.*, requirements that equipment be installed underground) may be permissible under state law generally but, like local aesthetic requirements, must specifically comply with Section 253 of the Communications Act.

The Small Cell Order noted two undergrounding requirement examples that constitute effective prohibitions under Section 253: (i) a requirement that all wireless facilities be deployed underground would amount to an effective prohibition given the propagation characteristics of wireless signals, and (ii) a requirement that materially inhibits wireless service, even if it does not go so far as requiring that all wireless facilities be deployed underground.<sup>31</sup>

Finally, the Small Cell Order confirmed that local in-kind requirements are impermissible if they do not meaningfully advance any recognized public interest objective (that is, an explicit or implicit *quid pro quo* in which a municipality makes clear that it will approve proposed deployments only upon condition that the provider supply an in-kind service or benefit to the municipality, such as installing a communications network dedicated to the municipality’s exclusive use.)<sup>32</sup> Per the FCC, “[s]uch requirements impose costs, but rarely, if ever, yield benefits directly related to the deployment. Additionally, where such restrictions are not cost-based, they inherently have ‘the effect of prohibiting’ service, and thus are preempted by Section 253(a) of the Communications Act.”<sup>33</sup>

■ ***The Order Portion of the Small Cell Order Establishes Shot Clocks to Speed Locality Reviews of Small Cell Applications***

The Small Cell Order establishes timeframes or “shot clocks” within which timeframes municipalities must act upon small cell applications. The FCC tailored the shot

clocks to speed municipal approvals of small cell applications by balancing municipal authority over small cell application reviews with Section 332(C)(7)'s requirement that municipalities exercise that authority "within a reasonable period of time."<sup>34</sup> For collocations on preexisting structures,<sup>35</sup> municipalities must rule on small cell applications within 60 days and, for new sites, municipalities must rule on small cell applications within 90 days.<sup>36</sup>

The FCC clarified that the shot clocks apply to batch filings for small cell clusters within the bodies of geographic polygons (*i.e.*, multiple separate applications filed at the same time, each for one or more sites or a single application covering multiple sites).<sup>37</sup> When carriers and infrastructure providers file applications to deploy small cell facilities in batches, "the shot clock that applies to the batch is the same one that would apply had the applicant submitted individual applications."<sup>38</sup> When deployers file a single batch application that includes "both collocated and new construction of small cells, the longer 90-day shot clock will apply, to ensure that the siting authority has adequate time to review the new construction sites."<sup>39</sup> In "extraordinary cases" in which the siting authority needs "flexibility to account for exceptional circumstances," a local authority "can rebut the presumption of reasonableness of the shot clock period where a batch application causes legitimate overload on the siting authority's resources."<sup>40</sup>

The Small Cell Order provides that a municipality's inaction prior to the applicable shot clock's

expiration will constitute a "failure to act" under Section 332(c)(7)(B) (v) of the Communications Act, and, additionally, a "failure to act" will constitute a "presumptive prohibition" of the provision of personal wireless services, which will violate Section 332(c)(7)(B)(i)(II) of the Communications Act.<sup>41</sup> If a "failure to act" applies, the Small Cell Order "expects the state or local government to issue all necessary permits without further delay."<sup>42</sup>

In cases where the local authority does not issue permits prior to the expiration of the presumptively reasonable shot clocks, the Small Cell Order does not deem the application granted, but, instead, provides that "the applicant would have a straightforward case for obtaining expedited relief in court."<sup>43</sup> Once an applicant files a court action, the local authority "will have an opportunity to rebut the presumption of effective prohibition by demonstrating that the failure to act was reasonable under the circumstances and, therefore, did not materially limit or inhibit the applicant from introducing new services or improving existing services."<sup>44</sup>

The Small Cell Order establishes that a "shot clock begins to run when an application is first submitted, not when the application is deemed complete."<sup>45</sup> Following an applicant's submission, the municipality will have 10 days from the submission date to determine whether the application is incomplete and that applicant must submit supplemental information.<sup>46</sup> Once an applicant submits any supplemental information the municipality may request, the shot clock resets, which effectively

gives the municipality an additional 60 days to review an application.<sup>47</sup> For subsequent incompleteness determinations, "the shot clock would toll if the siting authority provides written notice within 10 days that the supplemental submission did not provide the information identified in the original notice delineating missing information."<sup>48</sup>

To keep small cell deployment on track by ensuring that the entire approval process necessary for deployment is completed within the shot clock time periods, the Small Cell Order clarifies that the shot clocks will apply to "all authorizations a municipality may require, and to all aspects of and steps in the siting process, including license or franchise agreements to access [rights-of-way], building permits, public notices and meetings, lease negotiations, electric permits, road closure permits, aesthetic approvals, and other authorizations needed for deployment."<sup>49</sup>

### ■ *Legal and Congressional Challenges to the FCC's Small Cell Order*

More than 20 municipalities, including Los Angeles, Las Vegas and Seattle, have sued the FCC to overturn the Small Cell Order and stay its implementation pending judicial review. The municipalities contend that aspects of the Small Cell Order conflict with the Communications Act, are arbitrary and capricious under the Administrative Procedure Act and violate the municipalities' Fifth Amendment and Tenth Amendment rights. The suits were consolidated in the United States Court of Appeals for the Tenth Circuit. Following the consolidation, numerous

municipalities moved the Tenth Circuit to transfer the cases to the Ninth Circuit, which they view as a more favorable venue based upon at least one of its prior interpretations of the Telecommunications Act.

In January 2019, the Tenth Circuit concluded that the municipalities did not demonstrate that they would suffer irreparable harm and declined to stay the Small Cell Order pending judicial review. The Tenth Circuit's ruling was significant, because it meant that most of the Small Cell Order (including the shot clocks) became effective January 14, 2019. However, in a small victory for the municipalities, the Tenth Circuit granted their requests to transfer their appeal to the Ninth Circuit.

On January 14, 2018, Congresswoman Anna Eshoo of California introduced a bill (H.R. 530), entitled the Accelerating Wireless Broadband Development by Empowering Local Communities Act of 2019, which is legislation meant to dismantle the Small Cell Order. "Having served in local government for a decade on the San Mateo County Board of Supervisors, I understand and respect the important role that state and local governments play in protecting the welfare of their residents," said Rep. Eshoo. "5G is essential for our country's communications network and economy, but it must be deployed responsibly and equitably. The FCC let industry write these regulations without sufficient input from local leaders. This has led to regulations that restrict municipalities from requiring carriers to meet the needs of communities in which they want to operate."<sup>50</sup>

## Conclusion

5G technology leadership has significant economic rewards and, perhaps more importantly, global geopolitical ramifications beyond whether one's refrigerator can send a text reminder to purchase a gallon of milk on one's commute home. The federal government recognizes that the U.S. must maintain its global mobile broadband leadership to ensure that the economic, political and military benefits inherent in 5G dominance flow to the U.S. rather than China or some other geopolitical competitor. The FCC has taken steps to help the U.S. win the race, but the FCC is counting on municipalities for backing support. If municipalities do not play their own important role, the FCC's actions will have minimal significance, and the U.S.'s mobile broadband leadership, together with the geopolitical status quo, will abruptly end. ▲

## Endnotes

1. "SMS" stands for "short message service." SMS is a text messaging service component of most mobile device systems, which uses standardized communication protocols to enable mobile devices to exchange short text messages. SMS text messaging is popular among direct marketers.
2. 4G LTE means "fourth-generation long-term evolution."
3. [https://www.accenture.com/t20170222T202102\\_w\\_us-en/\\_acnmedia/PDF-43/Accenture-5G-Municipalities-Become-Smart-Cities.pdf](https://www.accenture.com/t20170222T202102_w_us-en/_acnmedia/PDF-43/Accenture-5G-Municipalities-Become-Smart-Cities.pdf).
4. How America's 4G Leadership Propelled the U.S. Economy. [https://api.ctia.org/wp-content/uploads/2018/04/Recon-Analytics\\_How-Americas-4G-Leadership-Propelled-US-Economy\\_2018.pdf](https://api.ctia.org/wp-content/uploads/2018/04/Recon-Analytics_How-Americas-4G-Leadership-Propelled-US-Economy_2018.pdf).
5. <https://newsroom.accenture.com/news/new-research-from-accenture-strategy-highlights-economic-and-societal-impact-of-investing-in-5g-infrastructure.htm>.
6. <http://fortune.com/2018/08/07/5g-china-verizon-sprint-t-mobile/>.
7. <http://techblog.comsoc.org/2019/03/23/china-mobile-reports-2018-net-profit-of-17-58-billion-5g-accomplishments-and-2019-plans/>.

8. <https://www.ctia.org/news/u-s-tied-with-china-in-global-5g-race-new-report-finds>.
9. "A utility shall provide . . . a telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1). "A utility providing electric service may deny a . . . telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes." 47 U.S.C. § 224(f)(2). See also 47 C.F.R. § 1.1403(a).
10. See *infra*. Section 5.B.(iii) of this article.
11. Remarks of FCC Chair Ajit Pai—White House 5G Summit—Washington, D.C.—September 28, 2018—<https://docs.fcc.gov/public/attachments/DOC-354323A1.pdf>.
12. *Id.*
13. To facilitate wireless deployments, the FCC has clarified that pole attachment laws cover wireless attachments. Federal Communications Commission, "Report and Order and Order on Reconsideration," April 7, 2011. [https://apps.fcc.gov/edocs\\_public/attachmatch/FCC-11-50A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/FCC-11-50A1.pdf).
14. See download available at <https://www.ctia.org/news/race-to-5g-report>.
15. Although one small cell installation is substantially less expensive to install than one macro cell installation, the small cell installation density 5G requires due to wave attenuation makes small cell deployments costly in the aggregate. For context, one geographic polygon of small cells could include anywhere from 10 to 100 or more small cells within its body. Moreover, carriers and infrastructure providers incur numerous up-front costs for each deployed small cell, including fiber installations and associated fees, equipment costs, site acquisition costs, legal costs and, historically, environmental and historic property review costs. Once a carrier or infrastructure provider has incurred these up-front costs, it must further incur application, permitting and rental/license fee expenses—not to mention post-installation and on-going maintenance, modification and upgrade costs. Accordingly, excessive and unreasonable application and permitting fees and rentals/license fees discourage small cell deployments generally and, despite their need, can make them financially unfeasible in some markets.
16. Three primary federal laws impact small cell deployments: the Communications Act, the Telecommunications Act and a provision of the Middle-Class Tax Relief and Job Creation Act of 2012 ("Spectrum Act"). The Spectrum Act was generally intended to advance wireless broadband service for public safety and commercial purposes, including the creation of a broadband communications network known as FirstNet for first responders, as recommended by the 9/11 Commission. Section 6409(a) of the Spectrum Act provides, in pertinent part, that notwithstanding Section 332(c)(7) of the Communications Act, a municipality "may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base

station that does not substantially change the physical dimensions of such tower or base station.”

17. 47 U.S.C. § 151 *et seq.*
18. *City of Arlington v. FCC*, 133 S. Ct. 1863 (2013). The case featured an interesting split opinion: Justice Scalia wrote the majority opinion, in which Justices Thomas, Ginsburg, Sotomayor and Kagan joined; Justice Bryer filed an opinion concurring in part and concurring in the ruling; and Chief Justice Roberts, joined by Justices Kennedy and Alito, dissented.
19. The specific conditions for exclusion from NHPA and NEPA review for small cells are as follows: (i) the facilities are mounted on structures 50 feet or less in height, including their antennas, or the facilities are mounted on structures no more than 10 percent taller than other adjacent structures, or the facilities do not extend beyond the height of existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater; (ii) each antenna associated with the deployment, excluding the associated equipment, is no more than three cubic feet in volume; (iii) all other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume; (iv) the facilities do not require certain specified antenna structure registrations; (v) the facilities are not located on Tribal lands; and (vi) the facilities do not result in human exposure to specified levels of radio frequency radiation.
20. The FCC has conducted an incentive auction, in which it sold spectrum that TV broadcasters once used to wireless companies to expand consumer bandwidth and coverage, launched America’s first two 5G spectrum auctions in November 2018 (and announced plans to auction three more bands in 2019), is exploring how to repurpose mid-band spectrum for new wireless applications from rural broadband coverage to Wi-Fi’s next generation and is working with other federal agencies to free up spectrum the federal government currently holds. Remarks of FCC Chair Ajit Pai—White House 5G Summit—Washington, DC—September 28, 2018—<https://docs.fcc.gov/public/attachments/DOC-354323A1.pdf>.
21. The FAST Plan recognizes that a substantial physical infrastructure is necessary for optimal 5G delivery and performance. FCC Chair Pai has estimated that the United States will need 800,000 new small cell sites by 2025—barely 200,000 exist today. Accordingly, the FCC is encouraging private sector investment in 5G networks by: adopting new rules reducing federal regulatory impediments to small cell infrastructure deployments that 5G needs and helping to expand 5G’s reach for faster, more reliable wireless service, and reforming rules designed decades ago for macrocell sites to accommodate small cells, which ban “short-sighted municipal roadblocks that have the effect of prohibiting deployment of 5G” and gives states and municipalities reasonable deadlines to approve or disapprove small cell applications. Remarks of FCC Chair Ajit Pai—White House 5G Summit—Washington, DC—September 28,

2018—<https://docs.fcc.gov/public/attachments/DOC-354323A1.pdf>.

22. Under the FAST Plan, the FCC is modernizing outdated regulations to meet 5G infrastructure requirements and promote 5G backhaul and digital opportunities using a five-step process: (i) “encourag[ing] investment and innovation while protecting Internet openness and freedom” through its adoption of the Restoring Internet Freedom Order, which sets “a consistent national policy for Internet providers”; (ii) updating its rules governing the attachment of new network equipment to utility poles in order to reduce cost and speed processes; (iii) revising its rules so companies may more easily invest in next-generation networks and services; (iv) incentivizing investment in modern fiber networks by updating rules for high-speed, dedicated services by lifting rate regulation where appropriate; and (v) proposing to prevent taxpayer dollars from being used to purchase equipment or services from companies posing national security threats to the integrity of American communications networks or the communications supply chain.
23. Action by the Commission September 26, 2018 by Declaratory Ruling and Report and Order (FCC 18-133)—WT Docket No. 17-79 and WC Docket No. 17-84. Chair Pai, Commissioners O’Rielly and Carr approving. Commissioner Rosenworcel approving in part and dissenting in part. Chairman Pai, Commissioners O’Rielly, Carr and Rosenworcel issuing separate statements.
24. *Id.* at Section III.B.50.
25. *Id.* at Section III.B.79. Although the Small Cell Order expressly excludes access or attachments to government-owned properties outside the rights-of-way, it requires that application or review fees for small cells outside the rights-of-way be cost-based.
26. *Id.* at Section III.C.82.
27. *Id.* at Section III.B.86.
28. *Id.* at Section III.C.87.
29. *Id.* at Section III.C.88.
30. *Id.* at Section III.C.91.
31. *Id.* at Section III.C.90.
32. *Id.* at Section III.C.91 at n.252.
33. *Id.*
34. *Id.* at Section IV.103.
35. For shot clock purposes, the Small Cell Order clarifies that “attachment of facilities to existing structures constitutes collocation, regardless of whether the structure or the location had previously been zoned for wireless facilities.”
36. *Id.* at Section IV.A.105.
37. *Id.* at Section III.B.113.
38. *Id.* at Section III.A.2.114.
39. *Id.*
40. *Id.*
41. *Id.* at Section III.B.117.
42. *Id.* at Section III.B.118.
43. *Id.*

44. *Id.* at Section III.B.119.
45. *Id.* at Section IV.C.4.141.
46. *Id.* at Section IV.C.4.143.
47. *Id.*
48. *Id.*
49. *Id.* at Section IV.C.1.132.
50. <https://eshoo.house.gov/news-stories/press-releases/eshoo-introduces-legislation-to-restore-local-control-in-deployment-of-5g/>.

**William M. Lawrence**



Bill Lawrence practices in the Birmingham office of Burr & Forman LLP, where he focuses on corporate transactional law for a wide range of commercial businesses, and on wireless communications law for wireless carriers, cell tower owners and other wireless industry service providers. He graduated from Auburn University and the Cumberland School of Law of Samford University. From 1996-97, he served as law clerk to the Honorable Robert B. Propst, United States District Judge for the Northern District of Alabama.

**Matthew W. Barnes**



Matt Barnes practices in the Raleigh office of Burr & Forman LLP, where he focuses on mergers and acquisitions, business planning, general business and corporate matters, and representing infrastructure and other service providers in the wireless industry. He graduated from the University of Alabama at Birmingham and the Cumberland School of Law of Samford University.



**JOIN THE CONVERSATION  
ON SOCIAL MEDIA**

-  [facebook.com/AlabamaStateBar](https://facebook.com/AlabamaStateBar)
-  [@AlabamaStateBar](https://twitter.com/AlabamaStateBar)
-  [@AlabamaStateBar](https://instagram.com/AlabamaStateBar)
-  [youtube.com/TheAlabamaStateBar](https://youtube.com/TheAlabamaStateBar)
-  [flickr.com/AlabamaStateBar](https://flickr.com/AlabamaStateBar)



## IMPORTANT NOTICES

- ▲ **Harold Albritton Pro Bono Leadership Award**
- ▲ **Public Notice for Reappointment Of Incumbent Magistrate Judge**
- ▲ **Notice of and Opportunity for Comment on Amendments to The Rules of the United States Court of Appeals for the Eleventh Circuit**



# Harold Albritton Pro Bono Leadership Award

The Harold Albritton Pro Bono Leadership Award seeks to identify and honor individual lawyers who through their leadership and commitment have enhanced the human dignity of others by improving pro bono legal services to our state's poor and disadvantaged. The award will be presented in October, which has been officially designated Pro Bono Month.

To nominate an individual for this award, submit no more than two single-spaced pages that provide specific, concrete examples of the nominee's performance of as many of the following criteria as apply:

1. Demonstrated dedication to the development and delivery of legal services to persons of limited means or low-income communities through a pro bono program;
2. Contributed significant work toward developing innovative approaches to delivery of volunteer legal services;
3. Participated in an activity that resulted in satisfying previously unmet needs or in extending services to underserved segments of the population; *or*
4. Successfully achieved legislation or rule changes that contributed substantially to legal services to persons of limited means or low-income communities.

To the extent appropriate, include in the award criteria narrative a description of any bar activities applicable to the above criteria.

To be considered for the award, nominations must be submitted by **August 1**. For more information about the nomination process, contact Linda Lund at (334) 269-1515 or [linda.lund@alabar.org](mailto:linda.lund@alabar.org).



United States District Court for the  
Southern District of Alabama  
Mobile, Alabama

## Public Notice for Reappointment of Incumbent Magistrate Judge

The current term of office of United States Magistrate Judge Sonja F. Bivins, United States District Court, Southern District of Alabama, is due to expire on February 1, 2020. The United States District Court is required by law to establish a panel of citizens to consider the reappointment of the Magistrate Judge to a new eight-year term.

The duties of the position are demanding and wide-ranging and include the following:

1. Preside over preliminary proceedings in criminal cases;
2. Trial and disposition of some misdemeanor cases;
3. Preside over pretrial matters and evidentiary proceedings in civil cases, on delegation from the Judges of the District Court;
4. Trial and disposition of civil cases with consent of the litigants; and
5. Jury selection in most civil and criminal cases.

Comments from members of the bar and the public are invited as to whether the incumbent Magistrate Judge should be recommended by the panel for reappointment by the Court. Comments should be marked "Confidential" and directed to:

Charles R. Diard, Jr., clerk  
U.S. District Court  
Southern District of Alabama  
155 St. Joseph St.  
Mobile, AL 36602

**Comments must be received by close of business  
September 1, 2019.**

## Notice of and Opportunity for Comment on Amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit

Pursuant to 28 U.S.C. § 2071(b), notice and opportunity for comment is hereby given of proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit. The public comment period is from August 6 to September 6, 2019.

A copy of the proposed amendments may be obtained on and after August 6, 2019 from the court's website at <http://www.ca11.uscourts.gov/rules/proposed-revisions>. A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., NW, Atlanta, Georgia 30303 [phone: 404-335-6100].

Comments on the proposed amendments may be submitted in writing to the Clerk at the above address, or electronically at <http://www.ca11.uscourts.gov/rules/proposed-revisions>, by 5:00 p.m. Eastern Time on September 6, 2019. ▲



**NOTICE**

## DISCIPLINARY NOTICES

- ▲ Notice
- ▲ Surrender of License
- ▲ Disbarment
- ▲ Suspensions

### Notice

- **Douglas Howard Cooner**, whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of the date of this publication, or thereafter, the allegations contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 2013-181, 2013-2141, 2014-280, 2014-281, 2014-366, 2014-367, 2014-1219, 2014-1304, 2014-1589, 2014-1670, 2015-207, 2015-606, 2015-673, 2015-1222, 2015-1410, 2015-1593, 2015-1594, 2015-1745, 2016-1504, 2017-182, 2017-187, 2017-194, 2017-195, 2017-196, 2017-207, 2017-917 and 2017-1091 by the Disciplinary Board of the Alabama State Bar.

### Surrender of License

- On March 12, 2019, the Supreme Court of Alabama issued an order accepting the voluntary surrender of **Thomas Glenn Mancuso's** license to practice law in Alabama, with an effective date of February 22, 2019. [ASB No. 2019-301]

### Disbarment

- Montgomery attorney **Christopher Bernard Pitts** was disbarred from the practice of law in Alabama, effective February 22, 2019, by order of the Supreme Court of Alabama. Pitts's disbarment was based upon his guilty plea entered in the United States District Court for the Middle District of Alabama to one count of wire fraud affecting a financial institution and the corresponding sentence entered November 19, 2018 ordering Pitts to serve 37 months in the custody of the United States Bureau of Prisons. [Rule 22(a), Pet. No. 2016-1373]

# Suspensions

- Thibodaux, Louisiana attorney **David Winston Ardoin**, who is also licensed in Alabama, was ordered by the Disciplinary Board of the Alabama State Bar to receive reciprocal discipline of a one-year suspension from the practice of law in Alabama, effective February 28, 2019. The suspension was fully deferred pending completion of a two-year probationary period. Ardoin was found guilty of violating Rules 8.4(a) and (b) [Misconduct] of the Louisiana Rules of Professional Conduct based on his arrest for DUI. [Rule 25(a), Pet. No. 2019-232]
- Florida attorney **Christopher Tracy Fulmer** received reciprocal discipline in the form of a five-year suspension on February 14, 2019. On October 4, 2018, the Florida State Bar ordered a five-year disciplinary revocation be imposed against Fulmer for misappropriating funds totaling \$75,000 while employed by two title insurance companies. Fulmer is also required to pay any costs taxed against him pursuant to Rule 33, Alabama Rules of Disciplinary Procedure, including but not limited to a \$1,000 administrative fee. [Rule 25A, Pet. No. 2018-1221] ▲



**ALABAMA**  
LEGAL &  
**INVESTIGATIVE**  
SERVICES, INC.


**SERVICES**

- Statewide Process Serving >
- Skip Tracing >
- Tag Registration Searches >
- Vehicle Lien Searches >
- Private Investigative Services >

**JIM HENDERSON** **CLAY HENDERSON**


**(334) 478-4147 • www.alis-inc.com**

You take care of your clients... **but** who takes care of **YOU?**



For information on the Alabama Lawyer Assistance Program's **Free and Confidential** services, call **(334) 224-6920**.

**ALABAMA LAWYER ASSISTANCE PROGRAM**





## MEMORIALS

- ▲ Jerry W. Hauser
- ▲ E. Paul Jones
- ▲ William Edward Shinn, Jr.

### Jerry W. Hauser

Jerry W. Hauser of Auburn was released from the surly bonds of this earth on January 20, 2019 at the age of 75. He was born on October 28, 1943 in Ardmore, Oklahoma to Wayne and Sibyl Hauser.

Jerry proudly served his country as an officer in the United States Air Force and served tours of duty in Vietnam, Korea and Japan. Following his military experience, he worked in various fields before he fulfilled his lifelong dream of becoming an attorney. He practiced law in east Alabama for 20 years and was a proud graduate of the University of Oklahoma and the Jones School of Law at Faulkner University.

He is survived by his wife of almost 40 years, Dr. Margaret Fitch-Hauser, and his sisters, Carolyn Green (Troyce) of Ardmore, OK and Marilyn Bean (Mike) of Mannsville, OK. He also leaves behind his niece, Mindy Hightower (Ronnie), and nephews Stacy Green (Tami) and Scott Green. Additionally, three great-nieces, two great-nephews, his cousin, Dewayne Narmore (Wanda) of Ft. Worth, and other treasured family members and friends survive him. He was predeceased by his parents.

The family extends a special thank-you to Joey Smith and the other staff members with Alacare Hospice for their loving and compassionate care in the final days of Jerry's battle with cancer.

At his request, there will be no public memorial service. The family will hold a private service in Oklahoma at a later date. Those who wish to honor him may do so by making a donation in his memory to The Mother's Love Fund at Holt International Children's Services, 250 Country Club Road, Eugene, OR 97401.

Any checks should be made out to Holt International with The Mother's Love Fund in the memo line.

### E. Paul Jones

Mr. E. Paul Jones, a distinguished lawyer and the District Attorney for the 5<sup>th</sup> Judicial Circuit, passed away on Sunday, November 11, 2018 at M.D. Anderson Cancer Center in Houston at the age of 75.

Mr. Jones, known by many as E. Paul or Paul, was born August 27, 1943 in Langdale, Alabama to Luther Jennings Jones and Birdie Lee Reaves Jones. He was an active member of Alexander City Methodist Church.

Paul grew up in rural Alabama and worked his way through college and law school working at Russell Mills, as well as doing construction, fence installation and insurance investigation. He received his undergraduate degree from Auburn and his juris doctorate from Jones School of Law and immediately went to work for the district attorney in the



Jones

Fifth Judicial Circuit. He served as an assistant district attorney for several years before leaving to open a private practice. He was elected district attorney for the Fifth Judicial Circuit, which included Randolph, Chambers, Macon and Tallapoosa counties. He served in that position for two terms before retiring.

Paul was a passionate servant of the law. In private practice, Paul represented clients from all walks of life with equal zeal and compassion. As district attorney, he was devoted to protecting and seeking justice for all victims, and, in particular, children or the elderly.

Paul's love for life was demonstrated by his charming sense of humor, love and loyalty to family and friends, and by his extensive interests. He was an avid reader, a pilot and a boat captain, and had his own saw mill. He was frequently found in his barn making furniture for a loved one or singing a few favorite karaoke songs. Paul's wanderlust led him around the world and he was always planning his next trip. He especially enjoyed sailing in the Virgin Islands and exploring France. Attaining a lifelong goal, Mr. Jones recently wrote and published his first book, *To Kill a Preacher*. Paul dearly loved his family, especially his granddaughter, and he was looking forward to being a great-grandfather to Tucker.

He was preceded in death by his parents; his sister, Sharon Caldwell; and his half-sister, Nelda.

He is survived by his daughter, Denise J. Pomeroy of Birmingham; loving companion Cindy McAlpin of Alexander City; grandchild Callie N. Pomeroy of Auburn; stepchildren David Brett Newman, David Ellerbe and Nikki Thompson; step-grandchildren Kyle Pomeroy, Nicholas Newman, Gregory Newman, Ashton Ellerbe, Zach Tolbert, Elisabeth Ellerbe, McKenzie Ellerbe and Hayden Ellerbe; brother Lonnie Jones; sister Kathy East; two half-siblings, Martha and Melba; and godchild Nina Mikulski. He was also survived by numerous nieces and nephews.

—Tallapoosa County Probate Judge Kim Taylor

## William Edward Shinn, Jr.

William Edward Shinn, Jr. of Decatur passed away on Friday, April 26, after a lifetime of accomplishments. He was born January 8, 1939 in Raleigh, North Carolina and attended Needham Broughton High School, where he was president of the student body. Bill attended Davidson College, where he played varsity basketball and was president of Phi Delta Theta fraternity. At North Carolina School of Law at Chapel Hill, he served on the editorial board of the *North Carolina Law Review* and was a member of Order of the Coif. After gradua-



Shinn

tion, Bill served in the Judge Advocate General Corps of the United States Army for three years.

In 1967, Bill moved to Decatur, Alabama to practice with Harris, Harris, Shinn & Harris, which later became Harris, Cad-dell & Shanks.

Bill was a distinguished member of the Morgan County Bar until his retirement at the end of 2017, including his service as the county attorney and as the attorney for the Decatur Board of Education. He was a graduate of Leadership Alabama and an active member of First United Methodist Church, where he sang in the choir.

Bill is survived by his wife, Noel; his four daughters, Margaret Evans and husband Jeff, Elizabeth Heinisch and husband Don, Noel Lovelace and husband Barney, and Catherine Polk and husband Ben; four grandchildren; his brother, Robert W. Shinn, of Charlotte; and his sister, Elizabeth Shinn Gate-wood, of Winston-Salem.

Bill will be missed by his family and his many friends and colleagues. The family has asked that any gift in his memory be made to the Decatur Morgan Hospital Foundation, to the Delano Park Conservancy or to a charitable organization of your choice. ▲

### Anderson, Larry Kent

Mountain Brook  
Admitted: 1975  
Died: April 4, 2019

### Burnett, Nelson

Mobile  
Admitted: 1965  
Died: December 22, 2018

### Christian, Thomas William

Birmingham  
Admitted: 1965  
Died: February 25, 2019

### Dudley, Clarence Raymond, Jr.

Birmingham  
Admitted: 1961  
Died: February 4, 2019

### Esdale, Robert Graham, Sr.

Birmingham  
Admitted: 1954  
Died: April 16, 2019

### Jenkins, Angela Bishop

Center Point  
Admitted: 1993  
Died: April 2, 2019

### Lewis, Joseph Brady

Montgomery  
Admitted: 1992  
Died: February 19, 2019

### Noble, Andrew Jackson, Jr.

Birmingham  
Admitted: 1947  
Died: March 20, 2018

### Princiotta, Morris Joseph, Jr.

Birmingham  
Admitted: 1979  
Died: April 20, 2019

### Randolph, John Nevitt

Leeds  
Admitted: 1968  
Died: March 31, 2019

### Till, Arthur Grey, Jr.

Birmingham  
Admitted: 1973  
Died: February 2, 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

### Future Advance Mortgages; Priority

#### ***GHB Construction and Development Company, Inc. v. West Alabama Bank and Trust, No. 1170484 (Ala. Sept. 21, 2018, on reh'g March 29, 2019)***

Issue: whether a materialman's lien has priority over a mortgage with a "future advance" clause securing a construction line of credit, where no funds are initially advanced on the line. Held: Mortgage with future advance clause is "created" when executed and recorded, whether or not funds are advanced, and therefore a mortgage so "created" has priority over a subsequent materialman's lien created under § 35-11-211(a), Ala. Code 1975, despite the "shall have priority over all other liens, mortgages, or incumbrances created subsequent to the commencement of work on the building or improvement."

### Discovery; Privilege; Advice of Counsel

#### ***Ex parte Alfa Insurance Corporation, No. 1170804 (Ala. April 5, 2019)***

Because Alfa had not interposed advice of counsel as a defense to former agents' bad-faith claim and had not injected advice of counsel in the case in any form, communications between Alfa and its counsel regarding coverage for former agents under E&O policies at issue were privileged and not discoverable. Although the communications between attorney and client are privileged, materials provided to the attorney which are otherwise discoverable are not privileged simply because they are provided to the attorney.

### Finality

#### ***Ex parte Eustace, No. 1171103 (Ala. April 5, 2019)***

Trial court's order finding for plaintiff on trespass and conversion and determining that damages were awardable, but not fixing the damages was non-final and thus not appealable.

### Alabama Constitutional Law

#### ***Clay County Commission v. Clay County Animal Shelter, Inc., No. 1170795 (Ala. April 5, 2019)***

Local act appropriating 18 percent of tobacco tax to an animal shelter, which was a "charitable or educational institution not under the absolute control of the state" within the meaning of Ala. Const. § 73, was unconstitutional because that section would require that it receive "a vote of two-thirds of all the members elected to each house." Provision could be severed from the remainder of the act, even though no severance provision is in the act itself, because the remainder of the act was not rendered meaningless by severing that portion.

## Administrative Law

### ***Ex parte GASP, No. 1171082 (Ala. April 5, 2019)***

The Jefferson County Board of Health was exempt from application of the Alabama Administrative Procedure Act, § 41-22-1 et seq., Ala. Code 1975 (“the AAPA”), because the board is a “local governmental unit” rather than a “state agency” for purposes of the AAPA. Accordingly, it was unnecessary for the board to comply with the notice and hearing requirements of the AAPA when it adopted new rules for Jefferson County’s Air Program.

## Summary Judgment

### ***Shoals Extrusion, LLC v. Beal, No. 1170673 (Ala. April 19, 2019)***

Trial court improperly granted summary judgment to plaintiff employee in action against former employer for refusal to pay contractual severance benefits. Evidence was in dispute as to whether employee breached the terms of the employment agreement, thus excusing employer’s performance.

## Land Use; Rails to Trails; Preemption

### ***Monroe County Commission v. A.A. Nettles Sr. Props. Ltd., No. 1170738 (Ala. April 26, 2019)***

In a dispute between property owner and county commission over property purportedly conveyed to commission by railroad under the “Rails to Trails” program, the decision turned on Alabama law, under which “an easement given for a specific purpose terminates as soon as the purpose ceases to exist, is abandoned, or is rendered impossible of accomplishment.” *Tatum v. Green*, 535 So. 2d 87, 88 (Ala. 1988). Thus, railroad’s right of way terminated, if not earlier, on a certain public filing, and thus the railroad’s subsequent conveyance by quitclaim deed to the county commission under the Rails to Trails program was a nullity.

## Dram Shop; “Visibly Intoxicated” Standard; Circumstantial Evidence

### ***Wiggins v. Mobile Greyhound Park LLP, No. 1170874 (Ala. May 3, 2019)***

Under Alabama law, alcohol sale to a visibly intoxicated person is “contrary to the provisions of law” and triggers application of the Dram Shop Act. The court concluded in this case that the “totality of the circumstances” test applied and that circumstantial evidence for driver’s actions after the accident and after service could be considered in determining whether a direct sale to a minor or visibly intoxicated person triggers application of the Act.

## Malicious Prosecution; Probable Cause

### ***Naman v. Chiropractic Life Center, Inc., No. 1170934 (Ala. May 3, 2019)***

Circuit court properly granted summary judgment to CLC on malicious prosecution action by Naman, based on CLC’s underlying unsuccessful collection action against Naman for unpaid bills. CLC had probable cause to commence collection action.

## Default Judgment Procedure

### ***Putnam County Memorial Hospital v. TruBridge, LLC, No. 1171062 (Ala. May 10, 2019)***

Because the default judgment defendant met the pleading and evidentiary threshold showing of each of the three *Kirtland* factors, the circuit court was required to consider the *Kirtland* factors and present a written analysis of those factors in ruling on the motion.

## Negligence; Premises Liability

### ***Armstrong v. Hill, No. 1170650 (Ala. May 10, 2019)***

In a dog-bite case, landlord of tenant dog owner had no liability in negligence, because the duty regarding owners of dogs generally rests upon the dog owner, not a landlord. Plaintiff offered no evidence that landlord cared for or had responsibility for the dogs.

## Forum Selection Clauses

### ***Castleberry v. Angie’s List, Inc., No. 1180241 (Ala. May 17, 2019)***

Circuit court properly enforced outbound forum selection clause (providing exclusive jurisdiction in Indiana courts) in contract between Angie’s List and retail customer, who had sued claiming that the company misrepresented the credentials of a bathroom remodeler. Trial court did not exceed its discretion in determining that plaintiffs had failed to demonstrate that the chosen forum was “seriously inconvenient”—plaintiffs had made no showing of their relative business acumen, and plaintiffs did not adequately demonstrate how simultaneous maintenance of their action in Alabama against the contractor and against Angie’s List in Indiana would create “intertwining” problems or result in potentially inconsistent adjudications.

## Arbitration

### ***Greenway Health, LLC and Greenway EHS, Inc. v. Southeast Alabama Rural Health Associates, No. 1171046 (Ala. May 17, 2019)***

Parties had two agreements: a license agreement (with arbitration clause) and a later BAA (with no arbitration clause and with a merger clause). The issue is arbitrability. The supreme court held: (1) due to the nature of the agreements at issue and the rights asserted, the claims raised issues concerning obligations under the BAA, and so trial court properly denied arbitration as to those claims; and (2) because third party claimed a right to arbitration under the “intertwining” doctrine and contracting party’s claims were not subject to arbitration, neither were those against the third party.

(Continued from page 295)

## Insurance (CGL); Construction

### ***Nationwide Mutual Fire Insurance Company v. The David Group, Inc.*, No. 1170588 (Ala. May 24, 2019)**

General contractor (GC) brought contract and bad faith action against its CGL carrier for failing to defend and indemnify GC in arbitration proceeding brought by buyer of new home. Homeowner alleged that house had structural and other defective workmanship issues, but the underlying complaint did not allege that those defects caused damage to the home beyond the defects themselves. Held: GC was not entitled to defense and indemnity because the underlying complaint did not allege damages beyond the construction defects themselves, which were not covered as "occurrences" under the CGL form policy.

## Stay of Civil Proceedings

### ***Ex parte McDaniel*, No. 1180199 (Ala. May 24, 2019)**

General "target" letter sent to a defendant was insufficient to establish that potential criminal investigation of that defendant was "parallel" to the civil proceeding, and thus plaintiffs were entitled to mandamus relief directing circuit court to vacate stay of case pending resolution of criminal proceeding.

## Venue; Forum Non Conveniens

### ***Ex parte Tyson Chicken, Inc.*, No. 1170820 (Ala. Nov. 30, 2018, on rehearing May 24, 2019)**

On original submission, the court (5-4) granted mandamus relief and ordered an "interests of justice" transfer (under Ala. Code § 6-3-21.1) of an MVA action from Marshall County (where both plaintiff and individual driver defendant resided, as well as where Tyson had presence, though not its primary business location) to Cullman County (county where accident occurred and where plaintiff's injuries were treated). On rehearing, the court (5-3) denied the petition for mandamus in a per curiam opinion. The court reasoned that although the connections to Cullman County were "strong," the connections to Marshall County could not be characterized as "weak"—in fact, they were significant. The court noted that "our forum non conveniens analysis under the interest-of-justice prong, however, has never involved a simple balancing test weighing each county's connection to an action." (internal quote omitted). NB: Justice Sellers's dissent contains a helpful compendium of forum non conveniens cases with noted contacts to the chosen forum and the putative transferee forum.

## Amendments to Pleadings

### ***Ghee v. US Able Mut. Ins. Co.*, No. 1170249 (Ala. May 24, 2019)**

Trial court abused its discretion in denying amendment to complaint designed to avoid a defensive preemption defense (under ERISA). (Note: this is a plurality opinion.)

# From the Court of Civil Appeals

## Workers' Compensation

### ***Ex parte Trusswalk, Inc.*, No. 2180266 (Ala. Civ. App. March 29, 2019)**

Trial court abused its discretion in ordering employer to authorize treatment of employee by pain management specialist without evidence before it that specialized treatment was medically necessary under Ala. Code § 25-5-77(a).

## UIM

### ***Beeman v. ACCC Insurance Company*, No. 2171114 (Ala. Civ. App. April 12, 2019)**

Although Alabama law requires that each "named insured" reject UIM coverage under a policy, in this case Beeman (the driver of a car owned and insured by Reese, his mother) was not a "named insured," even though he was listed in the policy as a driver of the car. Reese had specifically rejected UIM coverage, and thus Beeman could not claim UIM benefits under the policy.

## District Court De Novo Appeals; Counterclaims

### ***Durham v. Cohen*, No. 2170994 (Ala. Civ. App. April 12, 2019)**

Because defendant's counterclaims were transactionally related, but were beyond the jurisdictional limits of the district court, it was not improper for defendant to assert those counterclaims for the first time in a de novo appeal, due to the operation of Ala. R. Civ. P. 13(j).

## Workers' Compensation

### ***Tuscaloosa County v. Beville*, No. 2171022 (Ala. Civ. App. April 19, 2019)**

The court affirmed the trial court's assignment of a 60 percent permanent impairment to injured jailer's left wrist. Even though treating physician assigned a 4 percent impairment rating, FCE evidence, construed most favorably to plaintiff, would support a finding that plaintiff could lift only 10 pounds frequently due to continued pain in left wrist.



## Summary Judgment Procedure

**Reese v. Bolling, No. 2180265 (Ala. Civ. App. May 10, 2019)**

Motion to dismiss had to be treated as summary judgment motion because defendants attached evidentiary materials and the trial court's order noted it relied on the evidentiary materials.

## Trial Procedure (Non-Jury)

**The Crest Homeowners Association, Inc. v. Onsite Wastewater Maintenance, LLC, No. 2171146 (Ala. Civ. App. May 17, 2019)**

In a case tried non-jury without a court reporter, the appellate court is required to presume conclusively that the testimony at trial was sufficient to support the trial court's findings.

# From the United States Supreme Court

## Securities

**Lorenzo v. SEC, No. 17-1077 (U.S. March 27, 2019)**

Dissemination of false or misleading statements with intent to defraud can fall within the scope of Rules 10b-5(a)

and (c), as well as the relevant statutory provisions, even if the disseminator did not "make" the statements.

## Social Security; Expert Testimony

**Biestek v. Berryhill, No. 17-1184 (U.S. April 1, 2019)**

Vocational expert's refusal to provide private market survey data during Social Security disability benefits hearing does not categorically preclude the testimony from counting as "substantial evidence" in federal court under 42 U. S. C. §405(g).

## Arbitration; Class Actions

**Lamps Plus, Inc. v. Varela, No. 17-988 (U.S. April 24, 2019)**

Under the Federal Arbitration Act, an ambiguous agreement cannot provide the necessary contractual basis for concluding that the parties agreed to submit to class arbitration.

## TVA; Sovereign Immunity

**Thacker v. TVA, No. 17-1201 (U.S. April 29, 2019)**

Under the Federal Tort Claims Act (FTCA), there is an exception for claims based on a federal employee's performance of a "discretionary function." 28 U.S.C. §2680(a). Held: Congress's waiver of TVA's sovereign immunity in TVA's sue-and-be-sued clause (in the TVA Act, 16 U. S. C. §831c(b)) is not subject to a discretionary function exception, of the kind in the FTCA.

# Need more clients?

## Join the ASB Lawyer Referral Service



### WHY JOIN?

- Expand your client base
- Benefit from our marketing efforts
- Improve your bottom line

### OVERVIEW OF THE PROGRAM

- Referrals in all 67 counties
- Annual fee of \$100
- Maximum percentage fee of \$250 on fees between \$1,000 and \$5,000
- Professional liability insurance required for participation

### Sign me Up!

Download the application  
at [www.alabar.org](http://www.alabar.org) or  
email [LRS@alabar.org](mailto:LRS@alabar.org).

(Continued from page 297)

## Federalism

**Franchise Tax Bd. v. Hyatt (Hyatt III), No. 17-1299 (U.S. May 13, 2019)**

Overruling *Nevada v. Hall*, 440 U. S. 410 (1979), the Constitution does not permit a private party to sue a state without its consent in the courts of a different state.

## False Claims Act

**Cochise Consultancy, Inc. v. U.S. ex rel. Hunt, No. 18-315 (U.S. May 13, 2019)**

Under 31 U. S. C. §3731(b), an FCA claim must be brought within the later of two limitations periods: (1) within six years after the statutory violation occurred, or (2) within three years after the United States official charged with the responsibility to act knew or should have known the relevant facts, but not more than 10 years after the violation. Issue: whether these periods are altered for cases in which the United States chooses not to intervene. Held: (1) the periods apply regardless of whether the government intervenes, and (2) the private relator is not deemed the government official for purposes of the second limitations period.

## Antitrust

**Apple, Inc. v. Pepper, No. 17-204 (U.S. May 13, 2019)**

Under *Illinois Brick* doctrine principles, the iPhone owners were direct purchasers if iPhone apps through the App store may sue Apple for alleged monopolization based on Apple's contract terms with App developers.

## FDA Preemption

**Merck Sharp & Dohme Corp. v. Albrecht, No. 17-290 (U.S. May 20, 2019)**

Under *Wyeth v. Levine*, 555 U.S. 555, state law failure-to-warn claim is pre-empted where there is "clear evidence" that the FDA would not have approved a change to the label. Held: (1) "Clear evidence" is evidence that shows the court that the drug manufacturer fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve a change to the drug's label to include that warning; and (2) the question of agency disapproval is primarily one of law for a judge to decide.

## Bankruptcy

**Mission Product Holdings, Inc. v. Tempnology, LLC, No. 17-1657 (U.S. May 20, 2019)**

Debtor's rejection of an executory contract under Section 365 of the Bankruptcy Code has the same effect as a breach of that contract outside bankruptcy. Such an act cannot rescind rights that the contract previously granted.

# From the Eleventh Circuit Court of Appeals

## FCRA

**Marchisio v. Carrington Mortgage Services, LLC, No. 17-10584 (11<sup>th</sup> Cir. March 25, 2019)**

Among other holdings, creditor's FCRA violation was willful because its investigation was unreasonable and its reporting of erroneous information under the circumstances was reckless. District court erred in denying plaintiff's request for emotional distress damages; plaintiffs' testimony created a fact issue concerning the aggravation of mental anguish suffered from prior litigation. The Court also reversed the district court's grant of partial summary judgment to defendant on punitive damages, holding that district court's insistence on intentional or purposeful conduct did not comport with controlling willfulness standard.

## Retired Officers

**Burban v. City of Neptune Beach, No. 18-11347 (11<sup>th</sup> Cir. April 5, 2019)**

Law Enforcement Officers Safety Act ("LEOSA"), 18 U.S.C. §§ 926C(a) and (b), under which "a qualified retired law enforcement officer . . . who is carrying the identification required by [the Act]" may "carry a concealed firearm," notwithstanding most state or local restrictions, does not give rise to a federal right enforceable under 42 U.S.C. § 1983.

## Experts

**Guevara v. NCL (Bahamas), Ltd, No. 17-14889 (11<sup>th</sup> Cir. April 1, 2019)**

District court acted within its discretion in striking supplemental expert reports, where first supplement listed a host of industry standards on lighting not included in the expert's initial or rebuttal reports and not produced ahead of his

deposition, and the second supplement was not produced until after the close of discovery and the *Daubert* deadline, but the district court erred in granting summary judgment to cruise line on a claim that the line failed to warn patrons adequately of a step-down.

## Qualified Immunity

### ***Taylor v. Hughes, No. 17-14772 (11<sup>th</sup> Cir. April 3, 2019)***

In a deliberate indifference case against jail officials, held: (a) there was a genuine issue of material fact precluding summary judgment on qualified immunity, because (i) testimony that jailee was crying out in pain, moaning and begging for medical help gave rise to an inference of “serious medical need,” and (ii) there was substantial evidence of deliberate indifference since these cries were in the presence of guards—the “guard does not need to know a detainee’s specific medical condition to be deliberately indifferent to his or her serious medical need”; (b) Alabama state-agent immunity and Ala. Code § 14-6-1 do not immunize the guards from liability under state law if they violated Taylor’s constitutional rights.

## FDCPA

### ***Holzman v. Malcolm S. Gerald & Assocs., Inc., No. 16-16511 (11<sup>th</sup> Cir. April 5, 2019)***

FDCPA claim premised upon the collector’s “offer to ‘resolve’ a time-barred debt, combined with a deadline to accept the reduced-payment offer and a warning that the offer might not be renewed if payment is not timely made,” stated a claim for relief under section 1692e. The Court noted that collector could still seek to collect, but might include language in the collection letter as follows (the collector had in fact included this language in more recent collection letters): “The law limits how long you can be sued on a debt. Because of the age of your debt, LVNV Funding LLC will not sue you for it, and LVNV Funding LLC will not report it to any credit reporting agency.” The Court rejected a per se unconscionability claim under section 1692f.

## Black Lung; Statutory Construction

### ***Oak Grove Resources, LLC v. OWCP, No. 17-14468 (11<sup>th</sup> Cir. April 11, 2019)***

The Black Lung Benefits Act provides that deceased miner’s survivors can claim benefits under the Act’s so-called “automatic entitlement” provision, 30 U.S.C. § 932(l), which states that “[i]n no case shall the eligible survivors of a miner who was determined to be eligible to receive benefits . . . at the time of his or her death be required to file a new claim for benefits, or refile or otherwise re-validate the claim of such miner.” Held: the phrase “at the time of his or her death” modifies the adjective “eligible,” such that survivors’ entitlement to benefits depends on whether the miner was eligible before his or her death, not whether, by that time, the pertinent decision-maker had formally determined the miner to be so.

## Excessive Force; Deliberate Indifference

### ***Sears v. Roberts, No. 15-15080 (11<sup>th</sup> Cir. April 24, 2019)***

Sears, a Florida inmate, brought § 1983 excessive force and deliberate indifference claims, based on allegations that three correctional officers physically assaulted him and that one of them sprayed a chemical agent on him for 16 minutes after he was handcuffed and compliant, and that three supervisory officers watched the attack without doing anything to intervene. The district court granted summary judgment. The Eleventh Circuit reversed, holding that the district court had disregarded improperly Sears’s version of the facts, as sworn to in a verified complaint and other evidence. Moreover, the fact that the prisoner may have been found to have violated prison rules in attacking a guard did not negate excessive force.

## Labor

### ***Security Walls, Inc. v. NLRB, No. 17-13154 (11<sup>th</sup> Cir. April 23, 2019)***

NLRB did not abuse its discretion in refusing to allow employer to reopen an administrative record in action brought by board, and on which board prevailed. A party may move to reopen an administrative record due to “extraordinary circumstances,” which were not present. 29 C.F.R. § 102.48(d)(1).

## Trademark; Trial by Jury

### ***Hard Candy, LLC v. Anastasia Beverly Hills, Inc., No. 18-10877 (11<sup>th</sup> Cir. April 23, 2019)***

Remedies of an accounting and disgorgement of profits for trademark infringement are equitable; a plaintiff seeking the defendant’s profits in lieu of actual damages is not entitled to a jury trial.

## Fair Housing Act

### ***City of Miami v. Wells Fargo Co., No. 14-14544 (11<sup>th</sup> Cir. May 3, 2019)***

Miami alleged a substantial injury to its tax base resulting from alleged reverse redlining in violation of the FHA. The injury to the city’s tax base is uniquely felt in the city treasury, and there is no risk that duplicative injuries could be pled by another plaintiff or that the apportionment of damages amongst different groups of plaintiffs would be a problem. However, city’s pleadings did not sufficiently allege “some direct relation” between the bank’s conduct and a claimed increase in expenditures on municipal services.

## Ponzi Schemes; Receiverships; Due Process

### ***SEC v. Torchia, No. 17-13650 (11<sup>th</sup> Cir. April 30, 2019)***

District court’s summary proceedings for defrauded investors in failed Ponzi scheme did not allow them to present their claims and defenses or meaningfully challenge the receiver’s decisions through proceedings allowing for some discovery, thus denying them due process.

(Continued from page 299)

### Rule 59; FLSA

**Jenkins v. S. David Anton, P.A., No. 17-13073 (11<sup>th</sup> Cir. April 29, 2019)**

(1) FLSA plaintiff's new trial motion based on "newly discovered" evidence was properly denied because the evidence was not discovered after trial, but was actually known before trial. (2) Under the Fair Labor Standards Act, overtime is calculated on a workweek basis. See 29 U.S.C. § 207(a)(1); 29 C.F.R. § 778.103. "An employee's workweek is a fixed and regularly recurring period of . . . seven consecutive 24-hour periods" that "need not coincide with the calendar week but may begin on any day and at any hour of the day." 29 C.F.R. § 778.105. In this case, the district court did not clearly err in finding that the workweek began on Monday, since the only evidence on the issue came from the employee who so testified. (3) Although working meals can be compensable under the FLSA, district court did not clearly err in finding that the meals of a litigation paralegal during an arbitration proceeding were not compensable, given the lack of evidence that there were any restrictions on employee's personal freedom.

### Standing

**Flat Creek Transp. LLC v. FMCSA, No. 17-14670 (11<sup>th</sup> Cir. May 9, 2019)**

Carrier lacked standing to pursue claim against regulator for purportedly being unfairly targeted for compliance reviews. Claimed injury was designation as a "high risk" carrier, subject to an increased likelihood of compliance reviews; the Court found that was neither "concrete" nor "imminent," but rather "conjectural" and "hypothetical."

### Tax

**Meruelo v. CIR, No. 18-11909 (11<sup>th</sup> Cir. May 6, 2019)**

Monetary transfers between various business entities partly owned by the taxpayer and an S corporation that were later reclassified as loans from the taxpayer to the S corporation did not establish a "bona fide indebtedness" that "runs directly" to the taxpayer. Treas. Reg. § 1.1366-2(a)(2)(i); see also 26 U.S.C. § 1366.

### Qualified Immunity

**Piazza v. Hunter, No. 18-10487 (11<sup>th</sup> Cir. May 9, 2019)**

Jailer of pre-trial detainee was entitled to qualified immunity with respect to the first tasing of detainee, after which the detainee lay incapacitated on the floor and lost continence. Jailer

was not entitled to qualified immunity for actions in tasing detainee a second time minutes later, which eventually led to detainee's suffering cardiac arrest and death in the Jefferson County jail. Supervisors were entitled to qualified immunity for lack of showing that supervisor's policy or custom resulted in "deliberate indifference" or that the failure to have a policy led to the constitutional infringement.

### Preliminary Injunction; Tax

**USA v. Askins & Miller Orthopaedics, P.A., No. 18-11434 (11<sup>th</sup> Cir. May 23, 2019)**

IRS was entitled to preliminary injunction against taxpayer—"a serial employment-tax delinquent—to ensure that it gets its due as taxes continue to pile up."

## RECENT CRIMINAL DECISIONS

# From the Federal Courts

### Capital Punishment

**Bucklew v. Precythe, No. 17-8151 (U.S. April 1, 2019)**

*Baze v. Rees*, 553 U. S. 35, and *Glossip v. Gross*, 576 U.S. \_\_\_\_ govern all Eighth Amendment challenges alleging that a method of execution inflicts unconstitutionally cruel pain. In this case, the inmate petitioner's as-applied challenge to Missouri's single-drug execution protocol, and specifically that it would cause him severe pain because of his particular medical condition, fails to satisfy the *Baze-Glossip* test.

# From the Alabama Supreme Court

### Capital Punishment; Intellectual Disability

**Ex parte Carroll, No. 1170575 (Ala. Apr. 5, 2019)**

Because capital murder defendant failed to show he suffered from substantial deficits in adaptive functioning, the

trial court did not abuse its discretion in finding that he had no significant intellectual disability that would prohibit the imposition of the death penalty.

### **Probation Revocation; Notice**

***Ex parte Wayne*, No. 1171213 (Ala. Apr. 26, 2019)**

Defendant's probation revocation was reversed because she was not provided written notice that absconding was being alleged as a violation of the terms of probation.

### **Rule 29; Correction of Clerical Error**

***Ex parte Jones*, No. 1170546 (Ala. Apr. 26, 2019)**

Trial court did not err in granting Rule 29 relief to correct a clerical error in the entry of its previous order that had reinstated the defendant's petition for post-conviction relief.

## From the Court of Criminal Appeals

### **Split Sentence**

***Collier v. State*, CR-17-0799 (Ala. Crim. App. Apr. 26, 2019)**

Amended Split Sentence Act, Ala. Code §15-18-8, expressly limits the trial court's authority to split a sentence to felony cases only.

### **Reckless Endangerment; Attempting to Elude**

***Hopson v. State*, CR-17-1155 (Ala. Crim. App. Apr. 12, 2019)**

The court affirmed the defendant's convictions of assault, leaving the scene of an accident, attempting to elude and reckless endangerment arising from a high-speed chase and resulting collision. However, it vacated the defendant's reckless driving conviction on the ground that it was a lesser included offense of reckless endangerment under the circumstances of this case. It also vacated one of the defendant's two attempting to elude convictions, finding as a matter of first impression that Ala. Code § 13A-10-52 provides one unit of prosecution for all persons injured during a single offense of attempting to elude.

### **Capital Punishment; Judicial Override**

***White v. State*, CR-16-0741 (Ala. Crim. App. Apr. 12, 2019)**

The court denied post-conviction relief under Ala. R. Crim. P. 32, finding that statutory amendments removing the judicial

override procedure from capital murder cases and permitting the jury to make the final sentencing determination were not retroactive.

### **Mistrial; Medical Emergency**

***Jarmon v. State*, CR-17-0360 (Ala. Crim. App. Apr. 12, 2019)**

Trial court erred in denying newly-appointed substitute defense counsel's motion for a mistrial after the defendant's original counsel collapsed during closing arguments and was taken from the courtroom by paramedics.

### **Contempt; Recusal**

***Dearman v. State*, CR-18-0049 (Ala. Crim. App. Apr. 12, 2019)**

Attorney representing his client during a probation revocation hearing was entitled to hearing before being held in direct contempt for not following the trial court's direct order regarding his objection. Attorney was not entitled to the judge's recusal from the contempt proceeding, however, because his conduct did not involve gross disrespect or a personal attack on the judge's character.

### **Sixth Amendment**

***Connell v. City of Daphne*, CR-17-0943 (Ala. Crim. App. Apr. 12, 2019)**

Defendant was denied Sixth Amendment right to counsel in both municipal court and in his appeal to circuit court for a trial *de novo*.

### **Juvenile *Miller* Resentencing; *Brady***

***Thrasher v. State*, CR-17-0393 (Ala. Crim. App. Apr. 12, 2019)**

In affirming the resentencing of a juvenile capital murder offender to life imprisonment without parole pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012), the court denied relief on his *Brady* claim regarding payments made to a witness by his victims' families. State learned of the payments several months after trial and thus could not have suppressed this evidence before trial.

### **Presumptive Sentencing Guidelines**

***Laakkonen v. State*, CR-17-1146 (Ala. Crim. App. Apr. 12, 2019)**

The court remanded to allow defendant an opportunity to withdraw guilty plea. He was not informed of the correct sentencing range under the presumptive sentencing standards, and his sentence of 24 months' confinement did not comply with those standards. ▲



## LEGISLATIVE WRAP - UP

***Othni J. Lathram***  
***Director, Legislative Services Agency***  
*olathram@lsa.state.al.us*

*For more information,  
visit [www.lsa.alabama.gov](http://www.lsa.alabama.gov).*

***Buddy Rushing***  
***Staff Attorney, Alabama Law Institute***

# 2019 Wrap-Up Part 1

As of the writing of this column, the Alabama Legislature has completed 24 of its possible 30 session days; however, by the time you are reading this column, the 2019 Legislative Session will be well behind us. This means the first regular session of the quadrennium will be complete. It has been a session that has been fast and furious. As is typical, this first year saw the legislature take on many major issues and tackle legislation dealing with many of them. This current group has proven themselves willing to debate difficult and complicated issues. Like last year, this wrap-up will be split into two installments with Law Institute Legislation being addressed in this edition and all other legislation covered in the next.

Under the leadership of the legislative members of our executive committee—Senators Cam Ward (ALI president), Arthur Orr and Rodger Smitherman and Representatives Chris England (ALI vice president), Mike Jones and Bill Poole—and the guidance of Clay Hornsby, the Law Institute had another remarkable session. While their hard work saw passage of these important improvements to Alabama law, it is only possible thanks to the hundreds of attorneys who volunteer their time to work on our drafting committees. These lawyers work hard to make sure that each proposal that is advanced by the Law Institute is well developed, balanced, fair and serves to improve the state of our law.

### **Judicial Article Study Committee**

In 1973, Alabama approved a complete overhaul of Article VI of the state Constitution, the Judicial Article. A ground-up redesign of the state's judiciary, the article established the Unified Judicial System. Since that time, several issues requiring attention have arisen in the judicial system. This year, the legislature passed a package of bills to address those issues that were the result of a tremendous amount of work by the Law Institute's Article VI Revision Committee.<sup>1</sup>

## Judicial Administration and Discipline: Act 2019-187

**Senator Arthur Orr**

**Representative Prince Chestnut**

This proposed Constitutional amendment to be voted in 2020 will make a number of changes throughout Article VI:



Orr

Chestnut

### A. *Minor Changes*

**Section 143**—A provision of this section requiring district courts to physically hold court in municipalities of 1,000 people or more which lack municipal courts will be deleted as archaic.

**Section 160**—This section applies Amendment 280 to constables, while also excepting them from the meaningful requirements of that amendment will be deleted as archaic.

**Section 161**—This section continued existing courts at the time of the 1973 Judicial Article's passage and will be deleted as archaic since that article has long been in effect.

**Section 162**—This section designates "circuit solicitors" as "district attorneys." As the term "district attorney" has

now supplanted "circuit solicitor" in Alabama, this section will be deleted as archaic.

**Section 153**—This section includes a list of counties which may implement judicial nominating commissions superseding the provisions of Section 153 by local law or constitutional amendment. In practice, such commissions have been adopted by local constitutional amendment in several of these counties and by two counties not listed. The amendment would replace this over- and under-inclusive list with general language noting that any county or circuit may alter the standard vacancy procedures by local constitutional amendment.

### B. *Administrative Director of Courts*

**Section 149**—The alteration to this section is part of a proposal by the committee to create an independent nominating commission for Administrative Director of Courts. The constitutional amendment portion of the proposal would move the power to appoint the director from the chief justice to the supreme court as a whole. Further details relating to the proposed appointment process and nominating commission are specified in the companion bill listed below.

**Printing**  
WE'VE  
**Mailing**  
GOT YOU  
**Fulfillment**  
COVERED  
**On Target. On Time.**



1241 Newell Parkway | Montgomery, AL 36110 | [davisdirect.com](http://davisdirect.com)

(Continued from page 303)

### C. Judicial Discipline and Removal

The original 1901 Constitution allowed for the removal of judges from office only through legislative impeachment (for the supreme court) or by the supreme court (for other judges). These provisions continued in force until a 1972 amendment created the Judicial Commission, an independent body for the investigation and adjudication of judicial complaints. Only one year later, the 1973 Judicial Article established the existing process for judicial removal by bringing the process within the judicial branch and dividing the Judicial Commission's duties between two new bodies: The Judicial Inquiry Commission (JIC), which investigates and prosecutes complaints, and the Court of the Judiciary (COJ), which adjudicates these cases.

In the years since, two constitutional amendments have confused and divided this straightforward system. In the mid-90s, Section 158 was amended and re-applied the old Section 173 legislative impeachment process to supreme court justices and court of appeals judges with a number of exceptions, notably that JIC and COJ proceedings would preclude legislative impeachment. In 2016, the amendment of Sections 173 and 174 of Article VII restored the previously repealed language that applied those sections to judges. This change re-submits trial court judges to impeachment by the supreme court and creates confusion as to whether all the additional procedures of Section 158 would apply in the event that a supreme court justice is impeached.

Together, the post-1973 changes have replaced a simple, independent removal process with a complex, multi-layered one. The JIC/COJ process remains in effect, but separate impeachment provisions now also apply to all judges with varying rules and provisions for supreme court, court of appeals and trial court judges across Sections 158, 173 and 174 of the Constitution. The committee proposes to address this confused system by restoring judicial removal procedures largely to those originally established under the 1973 Judicial Article, with JIC/COJ as the sole avenue for judicial removal.

**Section 158**—This section would be repealed entirely in order to remove the impeachment process for supreme court justices and judges on the courts of appeals and restore the JIC/COJ complaint process as the sole avenue for judicial removal.

**Sections 173 and 174 of Article VII**—These sections would be amended in order to remove judges from the impeachment article and restore the JIC/COJ complaint process as the sole avenue for judicial removal.

The committee also recommends three updates to the existing JIC/COJ provisions:

**Section 156**—The membership of JIC would be expanded to include a probate judge and a municipal judge, appointed by their respective professional associations. This would establish new representation for two previously unrepresented groups subject to JIC's investigatory processes. Additionally, members of the commission would be limited to a maximum of two consecutive terms, to encourage rotation of members.

**Sections 156 and 157**—existing language originally assigned the lieutenant governor the power to appoint a district judge and three non-lawyers to JIC and one non-lawyer to COJ. However, this language also caused that appointment power to shift to the governor in 2005. As a housekeeping matter, this old language would be removed, with appointment of all non-lawyer members explicitly assigned to the governor and the appointment of a district judge to JIC assigned to their professional association, as is the case with other judicial appointments to JIC and COJ. Also, standard language has been added to encourage that these bodies be composed to reflect the state's demographic diversity.

**Section 159**—This section would be amended to provide additional due process to judges who are charged with misconduct by JIC. Under the current law, judges are automatically suspended from office if they are charged with a felony or if JIC files a complaint against them with COJ. The proposed amendment would leave an automatic suspension in place for judges who are charged with felonies, but JIC complaints would not necessarily trigger an automatic suspension. Less serious complaints may be filed without triggering a suspension from office. Should JIC seek a suspension, however, it would be required to allege by a two-thirds vote that the judge is unable to perform the duties of the office or poses a substantial threat to the public and obtain the approval of COJ's chief judge. Additionally, judges suspended based on such a complaint could pursue review of their suspension pursuant to COJ rules of procedure.



## Administrative Director of Courts Nominating Commission: SB198

**Senator Arthur Orr**  
**Representative Prince Chestnut**

This bill is a companion to the proposal to amend Section 149 of the Constitution. While that amendment assigns the power to appoint the administrative director of courts to the supreme court as a whole, this bill would subject that appointment to a nominating commission process. Whenever a vacancy occurs in that office, a nominating committee would be formed, consisting of:

- An active or retired circuit judge;
- An active or retired district judge;
- An active or retired probate judge;
- An active or retired municipal judge;
- A circuit clerk; and
- A state bar commissioner

Each of the judges and the clerk would be appointed by their respective professional associations, while the bar commissioner would be appointed by the bar. The commission would nominate three candidates for the position of administrative director of courts by majority vote. The supreme court would then, by majority vote, exercise its power under the proposed Section 149 by appointing one of the candidates to the position, or request that the commission nominate three additional candidates.

The goal of this new procedure is to provide greater stability to an office that has featured 11 separate tenures over the last 30 years and six over the past 15 years. Accordingly, the administrative director of courts would serve a 10-year term, subject to removal by a majority vote of the supreme court. The term could be automatically renewed once by a majority vote of the supreme court.

## Permanent Place Names for Appellate Courts: SB279

**Senator Rodger Smitherman**  
**Representative Matt Fridy**

Currently, the individual seats on the Alabama Supreme Court and the courts of appeals lack permanent designations. In each election, contested seats are numbered on the ballot sequentially starting at "Place 1," so that seats held by different judges are given the same numbers in different election cycles. This situation leads to difficulties in referring to specific seats, particularly in the election filing process, which requires that candidates specify which seat they are seeking. This bill would remedy the situation by giving each seat a permanent numerical designation to minimize confusion.



Orr

Chestnut



Smitherman

Fridy

## Business Corporation Act: HB250

**Senator Sam Givhan**  
**Representative Bill Poole**

Alabama's business corporation law has long been based on the American Bar Association's Model Business Corporation Act. After more than two decades without any significant changes to the Model Act, the ABA's committee recently conducted a full revision. Since then, the Law Institute's Business Entities Standing Committee has reviewed this newly revised Act to develop a plan for revising Alabama's own business corporation law. The result is the proposed Alabama Business Corporation Law of 2019.



Givhan

Poole

## Collateral Consequences: SB163

**Senator Cam Ward**  
**Representative Chris England**

A felony conviction imposes a status that not only makes felons vulnerable to future sanction, but also affects their economic opportunities. Record numbers of individuals with a felony record are exiting prisons and returning to communities across Alabama. These individuals must confront a wide range of collateral consequences stemming from their convictions, including ineligibility for federal welfare benefits, public housing, student loans and employment opportunities, as well as various forms of civic exclusion, such as ineligibility for jury service and disenfranchisement which has resulted in a wide range of social, economic and political privileges being unattainable.

The Law Institute's Collateral Consequences Committee developed a bill that would allow those convicted of crimes facing collateral consequences automatically barring them from employment in a given field to seek judicial relief. Inspired by similar Uniform Law Commission work in the field, this bill focuses on creating an individualized assessment, so that blanket bans do not act to prohibit consideration of applications for licensure or employment-related permissions when public safety is not seriously implicated. Individuals who face such restrictions could apply to the circuit court, where a petition and hearing process would allow them to present their situation to the judge. Upon considering the collateral consequences in question and the individual's record and history, the court could act to relieve the petitioner from certain collateral consequences, allowing them to pursue employment without being banned by an otherwise mandatory collateral consequence. ▲



Ward

England

## Endnote

1. The May 2017 edition of this column focused on the work of this very important committee.



## ABOUT MEMBERS, AMONG FIRMS

Please email announcements to  
[margaret.murphy@alabar.org](mailto:margaret.murphy@alabar.org).

### About Members

**Kevin Hays** announces the opening of **Hays Law Firm LLC** at 112 N. Hoyle Ave., Bay Minette 36507.

**J. Todd Miner** announces the opening of **Law Office of J. Todd Miner LLC** at 2323 2<sup>nd</sup> Ave. N., Birmingham 35203. Phone (205) 259-7000.

**Holly Sawyer** announces the opening of **The Law Office of Holly L. Sawyer LLC** at 294 W. Main St., Ste. 103, Dothan.

### Among Firms

**Ambrecht Jackson LLP** of Mobile announces that **Duane A. Graham** is now the managing partner.

**Hannah C. Thompson** and **Brandon C. Prince** announce the opening of **BHM Law Group** at 1330 21<sup>st</sup> Way S., Ste. 100, Birmingham 35205. Thompson and Prince are partners in the firm.

**Ball, Ball, Matthews & Novak PA** announces that **Hope Curtis Hicks** joined as a partner in the Montgomery office.

**Mark C. Wolfe, J. Knox Boteler** and **Matthew B. Richardson** announce the

formation of **Boteler Richardson Wolfe** at 3290 Dauphin St., Ste. 505, Mobile 36606. Phone (251) 433-7766.

**Bradley Arant Boult Cummings LLP** announces that **Jonathan D. Wohlwend** rejoined the firm in the Birmingham office.

**Cusimano, Roberts & Mills** of Gadsden announces that former **Circuit Court Judge David Kimberley** joined the firm.

**Dominick, Feld, Hyde PC** announces that **Melissa H. Yan** joined as an associate.

**Durward & Durward PC** announces that **Nancy Khalaf Bird** joined as an associate.

**Hill Hill Carter** announces that **Matthew Parten** joined as an associate in the Montgomery office.

**Huie Fernambucq & Stewart LLP** of Birmingham announces that **Kimberly Jones** joined as an associate.

**Samford & Denson LLP** announces that **Riley Murphy** joined as an associate.

**Webster, Henry, Bradwell, Cohan, Speagle & DeShazo PC** announces that **Dan Cowell** joined as an associate in the Montgomery office. ▲

# Video Streaming

Connect to the witness across the country  
or the globe!



**FREEDOM**

FREEDOMREPORTING.COM

*Feel the Freedom Difference*

Visit Us Online At:

[www.freedomreporting.com](http://www.freedomreporting.com)

1-877-373-3660 toll free



## A disability can happen to any one of us.

While disabilities may be unexpected, they don't have to be financially devastating.

Disability insurance can help you protect your personal finances when you can't work due to a covered disability.

As a member of the Alabama State Bar, you qualify for **competitive rates** on disability insurance.

Depending on your age, you may apply for disability insurance using a short-form application. **Just answer a few medical questions.** If we find no further medical information is needed upon review of your application, then you're done. It's as easy as that.<sup>1</sup>

Don't miss out on this important benefit offer.

**Apply now at**

**<https://startprotectingyourfuture.com/isi/isi>**

**or call 1-888-474-1959.**



**MetLife**

<sup>1</sup> If answers to medical questions are unfavorable, then full underwriting may be required and coverage is subject to approval of insurer. Coverage may not be available in all states. Please contact your plan administrator for more information.

Like most insurance policies, insurance policies offered by MetLife and its affiliates contain certain exclusions, exceptions, reductions, limitations, waiting periods and terms for keeping them in force. Please contact your plan administrator for costs and complete details.

Insurance coverage is issued by Metropolitan Life Insurance Company, New York, NY 10166.