



2019-20 ASB PRESIDENT  
**Christy Crow and Family**



**Drafting Powers of Attorney for  
Elder Planning—Going Beyond  
The Form**

Page 328



**A Legal Primer on Medicaid—  
*Not Medicare***

Page 334



**While You Were Aging**

Page 338



**Special Needs Trusts:  
What You Need to Know to  
Help Your Clients and Avoid  
Client Complaints**

Page 343



# 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



# 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**





## On The Cover

Alabama State Bar President Christy Crow with her husband, Van Wadsworth, and their children—son Drew Wadsworth, daughters Jordan Wadsworth and Mary Margaret Hale, and son-in-law Brandon Hale, in front of the Bullock County Courthouse. The courthouse is the only Second Empire-style courthouse in Alabama. It was built in 1871 and patterned after the Eisenhower Executive Office Building in Washington, D.C. In the background are the offices of Jinks, Crow & Dickson PC, where President Crow has practiced since being admitted to the Alabama State Bar in 1997.

—Photo courtesy of Fouts Commercial Photography, Montgomery, [photofouts@aol.com](mailto:photofouts@aol.com)

## FEATURE ARTICLES

### CELEBRATE PRO BONO MONTH:

#### Pro Bono Month 2019

By Emily L. Baggett  
320

#### Attorneys Now Eligible for CLE Credit for Pro Bono Work

By Matthew J. Ward  
322

#### Lawyers Render Service: 2019 Legal Food Frenzy Makes a Difference

By Jeanne Dowdle Rasco  
324

## ELDER LAW ARTICLES:

#### Drafting Powers of Attorney for Elder Planning—Going Beyond the Form

By George D. Gaskin III  
328

#### A Legal Primer on Medicaid—Not Medicare

By Laura C. Givens and Norma M. Wells  
334

#### While You Were Aging

By Judy B. Shepura  
338

#### Special Needs Trusts: What You Need to Know to Help Your Clients and Avoid Client Complaints

By Melanie Bradford Holliman  
343

#### 2019 Annual Meeting Award Recipients and Photo Highlights

350

#### Playing Your Cards at Interpreting Federal Government Contracts

By Jerome S. Gabig, Richard J.R. Raleigh and Christopher L. Lockwood  
364

#### Authorizing the Electronic Filing of the Notice of Appeal

By Hon. Sarah H. Stewart and Ed R. Haden  
375

#### Alabama State Bar Spring 2019 Admittees

379

## COLUMNS

#### President's Page

316

#### Executive Director's Report

318

#### Editor's Corner

326

#### Opinions of the General Counsel

372

#### Important Notices

378

#### Disciplinary Notices

382

#### Memorials

390

#### The Appellate Corner

394

#### Legislative Wrap-Up

402

#### About Members, Among Firms

410

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



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



@AlabamaStateBar



@AlabamaStateBar



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



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



# ADVERTISERS

Alabama Court Reporting, Inc.....311

Alabama Legal & Investigative Services, Inc. ....385

Attorneys Insurance Mutual Of the South.....310

Cain & Associates Engineers.....341

Cumberland School of Law .....323

Davis Direct.....403

J. Forrester DeBuys, III .....339

The Finklea Group .....373

Freedom Court Reporting .....411

GilsbarPRO.....349

Insurance Specialists, Inc. ....412

LawPay .....312

National Academy of Distinguished Neutrals .....315

Professional Software Corporation.....377



**BOARD OF EDITORS:** Marc J. Ayers, Birmingham • Robert C. Crocker, Cullman • Aaron L. Dettling, Birmingham • Jesse P. Evans, III, Birmingham • Linda G. Flippo, Birmingham • Kira Y. Fonteneau, Birmingham • Lloyd W. Gathings, II, Birmingham • Gregory H. Hawley, Birmingham • Sarah S. Johnston, Montgomery • Jacob J. Key, Lanett • Margaret H. Loveman, Birmingham • Allen P. Mendenhall, Montgomery • Keith S. Miller, Montgomery • Anil A. Mujumdar, Birmingham • Sherrie L. Phillips, Montgomery • Christopher E. Sanders, Prattville • Allison O. Skinner, Birmingham • Marc A. Starrett, Montgomery • David G. Wirtes, Jr., Mobile • Bar 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

Phillip McCallum.....Executive Director  
Justin Aday .....Assistant Executive Director  
Diane Locke.....Director of Personnel & Operations  
Melissa Warnke.....Director of Communications  
Hunter Harris.....Information Systems Manager  
Katherine Church.....Administrative Assistant  
Margaret Murphy.....Director of Publications

### ADMISSIONS & ATTORNEY LICENSING

Justin Aday .....Assistant Executive Director  
Sonia Douglas.....Administrative Assistant  
Angie Fuqua.....Administrative Assistant  
Morgan Lott.....Administrative Assistant  
Cathy Sue McCurry.....Administrative Assistant

### CENTER FOR PROFESSIONAL RESPONSIBILITY

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

### ETHICS DIVISION

Tripp Vickers.....Assistant General Counsel

### PROGRAMS

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

### ACCOUNTING/TRAVEL

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

### LAWYER ASSISTANCE PROGRAM

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

### LAWYER REFERRAL SERVICE

John Dunn.....LRS Representative

### PRINT SHOP/BUILDING

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

### RECEPTIONIST

Stephanie Oglesby.....Receptionist

### VOLUNTEER LAWYERS PROGRAM

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

### BOARD OF BAR COMMISSIONERS

1<sup>st</sup> Circuit, Halron W. Turner, Chatom • 2<sup>nd</sup> Circuit, J. Levi Nichols, Luverne • 3<sup>rd</sup> Circuit, Elizabeth C. Smithart, Union Springs • 4<sup>th</sup> Circuit, Jana R. Garner, Selma • 5<sup>th</sup> Circuit, Larry W. Morris, Alex City • 6<sup>th</sup> Circuit, Place No. 1, Terri O. Tompkins, Tuscaloosa • Place No. 2, Scott B. Holmes, Tuscaloosa • 7<sup>th</sup> Circuit, William H. Broome, Jr., Anniston • 8<sup>th</sup> Circuit, Emily L. Baggett, Decatur • 9<sup>th</sup> Circuit, Dana J. Grimes, Ft. Payne • 10<sup>th</sup> 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, Vacant, 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 S. Heninger, Birmingham • Bessemer Cut-off, Kenneth Moore, Bessemer • 11<sup>th</sup> Circuit, Ralph E. Holt, Florence • 12<sup>th</sup> Circuit, Carmen F. Howell, Enterprise • 13<sup>th</sup> Circuit, Place No. 1, C. 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 • 14<sup>th</sup> Circuit, Charles C. Tatum, Jr., Jasper • 15<sup>th</sup> Circuit, Place No. 1, George R. Parker, Montgomery • Place No. 2, Pat Sefton, Montgomery • Place No. 3, Joel D. Connally, Montgomery • Place No. 4, C. Gibson Vance, Montgomery • Place No. 5, Jeffrey C. Duffey, Montgomery • Place No. 6, David Martin, Montgomery • 16<sup>th</sup> Circuit, Bradley W. Cornett, Gadsden • 17<sup>th</sup> Circuit, T. Thomas Perry, Jr., Demopolis • 18<sup>th</sup> Circuit, Place No. 1, W. Randall May, Birmingham • Place No. 2, Mark S. Boardman, Chelsea • Place No. 3, Anne Malatia Glass, Birmingham • 19<sup>th</sup> Circuit, Robert L. Bowers, Jr., Clanton • 20<sup>th</sup> Circuit, R. Cliff Mendheim, Dothan • 21<sup>st</sup> Circuit, J. Kirkman Garrett, Brewton • 22<sup>nd</sup> Circuit, Manish H. Patel, Andalusia • 23<sup>rd</sup> Circuit, Place No. 1, Tazewell T. Shepard, III, Huntsville • Place No. 2, John A. Brinkley, Jr., Huntsville • Place No. 3, Rebekah K. McKinney, Huntsville • Place No. 4, M. Clay Martin, Huntsville • 24<sup>th</sup> Circuit, Amanda W. Porter, Fayette • 25<sup>th</sup> Circuit, Chrissy L. Riddle, Haleyville • 26<sup>th</sup> Circuit, F. Patrick Loftin, Phenix City • 27<sup>th</sup> Circuit, Clint L. Maze, Arab • 28<sup>th</sup> Circuit, Place No. 1, J. Lynn Perry, Gulf Shores • Place No. 2, J. Langford Floyd, Fairhope • 29<sup>th</sup> Circuit, Sarah Clark Bowers, Sylacauga • 30<sup>th</sup> Circuit, Erskine R. Funderburg, Jr., Pell City • 31<sup>st</sup> Circuit, H. Thomas Heflin, Jr., Tusculumbia • 32<sup>nd</sup> Circuit, Jason P. Knight, Cullman • 33<sup>rd</sup> Circuit, Robert H. Brogden, Ozark • 34<sup>th</sup> Circuit, Jeffrey L. Bowling, Russellville • 35<sup>th</sup> Circuit, Clinton H. Hyde, Evergreen • 36<sup>th</sup> Circuit, Christy W. Graham, Moulton • 37<sup>th</sup> Circuit, Andrew D. Stanley, Opelika • 38<sup>th</sup> Circuit, Deborah L. Dunsmore, Scottsboro • 39<sup>th</sup> Circuit, Donald B. Mansell, Athens • 40<sup>th</sup> Circuit, Gregory M. Varner, Ashland • 41<sup>st</sup> Circuit, Brett A. King, Locust Fork

### AT-LARGE BOARD MEMBERS

Diandra S. Debrosse, Birmingham • Raymond L. Bell, Jr., Mobile • Latisha R. Davis, Chattanooga • Judge Charles Price, II, Birmingham • Karen Laneaux, Montgomery • Kira Y. Fonteneau, Birmingham • Jeanne Dowdle Rasco, Huntsville • Richard M. Kemmer, Jr., Centreville • John T. 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

*Christina D. Crow*  
ccrow@jinkslaw.com



*Union Springs is known as the Bird Dog Field Trial Capital of the World, with the field trials bringing visitors to Bullock County from October to March each year. The life-size bronze statue of an English Pointer was sculpted by Robert Wehle and unveiled in February 1996 to pay homage to this popular sport.*

*—Photo courtesy of Fouts Commercial Photography, Montgomery, photofouts@aol.com*

## Better Together

Thirty years ago, I drove from Prattville (my hometown) to Union Springs for the first time. My sister was the hospital administrator in Union Springs and had offered me a summer job after I graduated from high school. I started down Highway 110 and around Pike Road, I stopped and asked for directions because I knew I must be lost, as nothing could be that far away from Montgomery.

As you can see from the photo on the cover, Union Springs soon became home to me. I learned about the community, including what a field trial and a bird dog were and why both were important enough that we'd build a statue in the middle of town to honor bird dogs and their handlers. When I moved here after finishing law school in 1997, I

started exploring other small towns and learning their stories as well. There's Enterprise and its tribute to the boll weevil, LaFayette's tribute to Joe Louis and, of course, Dothan's peanut on every corner. To ensure we have geographical diversity in leadership, I have appointed to my executive council:

- Rebekah McKinney with Watson McKinney from Huntsville;
- Diandra Debrosse with Grant & Eisenhofer from Birmingham;
- George Parker with Bradley Arant from Montgomery;
- Cliff Mendheim with Prim & Mendheim from Dothan;
- Glenda Freeman with Legal Aid Society and president of the Alabama

Lawyers Association from Birmingham as an ex officio member; and

- Robert Shreve with Burr & Forman and president of the Young Lawyers' Section from Mobile as an ex officio member.

I love these hometown stories. Just as towns have stories, so do lawyers. Often, though, we get so busy in representing our clients that we forget to slow down and recognize or develop our own stories. It is hard to be a good lawyer if you don't know yourself.

Acknowledging this and in an effort to help lawyers, the Alabama State Bar's focus this year will be:

## Helping Lawyers

Health and wellness are a struggle in every lawyer's life. We tend to put the needs of our clients in front of our own and our mental and physical health suffer as a result. Gibson Vance is chairing a task force to develop a plan to help lawyers who have some significant, potentially life-changing event in their lives. Providing resources to our lawyers when they need it most is an essential service of our association.

Brannon Buck and our Wellness Committee are also developing a one-hour wellness CLE (that qualifies as your ethics hour for the year) that will be offered around the state. Emily Hornsby and Susan Han are co-chairing this committee.

Emily and Susan organized the Alabama Chapter of the Mindfulness in Law Society (MILS), which is a 501c3 charitable organization falling under the umbrella of the National MILS. MILS is the education and support hub for mindfulness in the legal profession, bringing together lawyers, law students, law professors, judges, secretaries, paralegals and other individuals associated with the legal profession across the nation to support mindfulness meditation, yoga and other contemplative practices, with the goal of alleviating suffering in the legal profession. The National Task Force on Lawyer Well-Being, whose members include the ABA Center for Professional Responsibility, the Conference of Chief Justices and the National Center for State Courts, recommends mindfulness meditation as a way for lawyers to reduce stress and promote well-being and balance in their lives. Joining the Alabama MILS connects you with a community of other like-minded people, as well as provides you with Mindful Mondays, which is a virtual meditation sit from 4:00 pm to 4:30 pm in every time zone every Monday, as well as a one-

hour free CLE with a new membership. For more information, visit <https://mindfulnessinlawsociety.com/>.

## Improving and Expanding Member Benefits

Jimbo Terrell and George Parker are evaluating our member benefits and determining how we can improve them. My goal is to introduce at least six new member benefits this year, including those that will promote a healthy lifestyle, such as life coaching and gym discounts; those that will encourage our members to get away, like hotel and travel discounts; and those that will help our members better represent their clients, like AI research tools. In addition, Davis Smith, Manesh Patel and Brian Murphy are evaluating opportunities for association insurance to meet member needs, including health insurance and cybersecurity insurance.

## Communicating More Effectively with Our Members

Sam Irby and Augusta Dowd, our immediate past presidents, along with our Executive Director Phillip McCallum, did an amazing job of getting on the road and visiting every circuit in our state during the past two years. In the last year, we have also launched our new website and rebranding and expanded the *Scoop*, our weekly email in which you can get all of the information from the Alabama State Bar in one place.

While I plan to continue those direct and personal outreach efforts, I know that I can't be everywhere and see everyone in person. To make sure our members know what is happening at the state bar, we are going to broadcast a Facebook Live video after every bar commissioner meeting to let you know what was discussed, what was voted on and what we accomplished. Members can ask questions that we will answer during the broadcast. We are also exploring a state bar podcast.

If you are on social media, please be sure to follow the ASB on Facebook (@alabamastatebar), Twitter (@AlabamaStateBar) and Instagram (alabamastatebar). You can also follow me on those platforms (Facebook @christina.d.crow; Twitter @crowchristy or @asb\_president; Instagram @christywadsworth).

The Alabama State Bar is dedicated to helping lawyers know their story and tell their story. We know that our members are better together and we can help each other be better people, better lawyers and better members of our communities. ▲





## EXECUTIVE DIRECTOR'S REPORT

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



*Anne Hornsby meets with a client at the Tuscaloosa legal assistance clinic.*

# Lawyers Render Service... It's What We Do!

Did you know that our Volunteer Lawyers Program is among the *best* in the country?

For 2018, Alabama attorneys provided 13,547 pro bono hours of legal assistance through our five volunteer lawyer programs. Based on numbers provided to the Legal Services Corporation, Alabama provides three times the national average of pro bono assistance. Alabama (18,000 members) closed 1,000 more cases than Florida (106,000 members) and three times as many cases as Georgia (39,000 members).

The resources that support the Alabama State Bar Volunteer Lawyers Program (VLP) come from a variety of sources. Our program receives monetary grants of support from the Alabama Law Foundation, the Alabama Civil Justice Foundation, Legal Services Alabama and the Alabama State Bar. However, our most important support comes from Alabama lawyers who volunteer their time and truly reflect our motto "Lawyers Render Service."

We are proud to have Linda Lund as the director of the Alabama State Bar

VLP. Linda is a state bar member and has directed our program for 20 years. She is assisted by intake specialists Deborah Harper and Doris McDaniel. This small, but effective staff coordinates pro bono assistance to 60 of Alabama's 67 counties. They run a statewide intake line for the public and answer more than 5,000 inquiries per year.

In addition to its intake responsibilities, the VLP conducts clinics across the state, coordinates the Will for Heroes project, oversees Alabama's pro bono month celebration and works with many state bar sections in providing pro bono services. The newest project of the VLP is a joint project with three other programs—the Madison County Volunteer Lawyers Program, the Montgomery County Volunteer Lawyers Program and the South Alabama Volunteer Lawyers Program. Together these programs applied and received a multi-year grant from

the Alabama Civil Justice Foundation. The grant enabled the establishment of a Chapter 7 Bankruptcy project, the Alabama Bankruptcy Assistance Project (ABAP). This joint grant provided enough funding to allow the programs to hire a project coordinator who, in conjunction with the volunteer lawyer programs and an outstanding advisory board, established this needed program. Hilaire Armstrong is a native of Birmingham and a graduate of Cumberland Law School. Before taking over as the ABAP coordinator, she served as a staff attorney for Legal Services Alabama in the Montgomery office, specializing in bankruptcy, consumer law, housing and public benefit law and regulations. ▲



*Armstrong*

## Stephen K. Griffith Memorial Fund

Honoring His Memory by Expanding Mental Health Services in Cullman County

Stephen K. Griffith, an Alabama State Bar member and long-time Cullman attorney, was killed in his home on July 17, 2017 by a man who had been deemed as mentally unstable.



*Griffith*

The Stephen K. Griffith Memorial Fund was established in June 2018 by his family to honor Steve's memory and to continue his legacy by helping address the mental health crisis in the Cullman community, especially among the indigent population.

In 2018, 1,027 people sought mental health treatment in Cullman Regional's Emergency Department. Nearly 30 percent of patients seeking treatment were unable to get care due to lack of insurance or an inability to pay for care.

Through this fund, the Griffith family hopes to make a positive impact by raising mental health awareness and filling the tremendous gap in mental health care services available in Cullman County.

The fund is administered through Garrison Gives Hope, Inc., a 501(c)(3) charitable organization. All donations are tax deductible. For more information about the

Stephen K. Griffith Memorial Fund, contact Meagan Tucker at (256) 255-5547.

To make a donation, mail your check to:  
The Stephen K. Griffith Memorial Fund  
P.O. Box 1544  
Cullman, AL 35056  
EIN 83-2471932





# Pro Bono Month 2019

*By Emily L. Baggett*

“None of us should drop the ball.”

This was the advice from a WWII Veteran and POW from Battle of the Bulge after his visit to Normandy for the 75<sup>th</sup> Anniversary of the D-Day Invasion this past June. Sgt. George F. Mills, 98 years old, was speaking about one of his treasured medals that he received during the trip back to Normandy. He keeps that medal in his pocket, a small football-shaped coin. He stated, “This football reminds me that none of us should drop the ball because it is what we do for our country to make sure it remains the best country and moves forward with growth and prosperity.”



As lawyers, “none of us should drop the ball” and remember that our motto is, “Lawyers Render Service.” This October, the Alabama State Bar will once again observe a month-long Pro Bono Celebration to recognize the impact that lawyers have in their communities, to recruit and train more pro bono volunteers, and to acknowledge the lawyers who have donated their time and talents to address so many needs of the citizens of the State of Alabama.

On September 19, 2018, the Alabama Supreme Court issued an order declaring “that October 2018 is designated as Pro Bono Month in Alabama to recognize the valuable contributions made by attorneys offering pro bono services



throughout the year and to encourage pro bono participation across the State.” The supreme court order also recognizes our rules of conduct which remind us that we bear a professional responsibility to provide legal services at a reduced or free rate for persons with limited means. Our legal skills make a difference for Alabama citizens that are in need. It is our responsibility to provide those services.

There are many ways for you to get involved this year. Local bar associations will feature events throughout the state that will include CLE programs and pro bono clinics each week. The state bar sections will also be encouraging their members to serve in a variety of activities. The five volunteer lawyer programs will continue service in

their communities, but are always in need of more volunteers.

Pro Bono Month is not just about celebrating lawyers, but about the future of our profession continuing this service. The law schools actively participate by hosting clinics, as well as having law students sign the Pro Bono Pledge. “As a law student, I understand that I am entering a profession that maintains a special responsibility to render service to others....I pledge that my future endeavors will include time each year to render service to my community through activities such as volunteering, mentoring, participating in legal clinics, mentoring, participating in legal clinics, serving on boards, working in public interest or public service and providing legal services regardless of a client’s ability to pay.”

This is a pledge that is signed by law students, but as a lawyer, are you participating in any of the activities listed above in your community? If so, you are to be commended for your service. If not, please consider finding an opportunity to serve. After all, “none of us should drop the ball.” ▲

### Emily L. Baggett



Emily Baggett is the City of Decatur prosecutor. She serves as a legal advisor to the Decatur Police Department and handles the appellate practice for the city on all criminal matters. Baggett is chair of the Alabama State Bar Pro Bono Task Force, a member of the Board of Bar Commissioners and a Class 10 graduate of the Leadership Forum.



# Attorneys Now Eligible for CLE Credit for Pro Bono Work

By Matthew J. Ward

In 2018 alone, Alabama attorneys completed 13,547 pro bono hours of legal assistance through the state's five volunteer lawyer programs, helping 4,830 needy Alabamians in cases across the state involving bankruptcies, domestic relations, estate-planning, garnishments and residential matters. That's nearly 565 days of volunteer work! Undeniably, several hundred additional pro bono hours were completed by Alabama attorneys, but because those hours went unreported to an approved pro bono provider, they were not included in these figures. In an effort to recognize and better record these selfless acts of dedication, the Alabama State Bar adopted Regulation 3.9 of Rule 3 of the Rules for Mandatory Continuing Legal Education—the “CLE 1-6-3 Program.”

Effective September 30, 2018, the “CLE 1-6-3 Program” allows attorneys to receive one hour of CLE credit for every six hours of pro bono work completed through an approved pro bono provider, for a maximum of three CLE credits in a 12-month period that runs from October 1 through September 30.

The “CLE 1-6-3 Program” only requires that your pro bono hours are certified through an approved pro bono provider. You can obtain pro bono hours by volunteering at legal assistance clinics and help desks, participating in “Lawyer for the Day” programs or providing direct pro bono representation to needy Alabamians. Any of the approved pro bono providers can refer you clients for assistance. And, if low-income clients come to you directly for assistance, you can contact any of the approved pro bono providers for screening and approval for them to be referred back to you. This means that even the pro bono hours worked in cases that you accepted on your own could still qualify for CLE credits.

To start earning CLE credits for your pro bono hours, contact one of the following approved pro bono providers in Alabama:

- Alabama State Bar Volunteer Lawyers Program (888) 857-8571

THE ALABAMA STATE BAR'S  
VOLUNTEER LAWYERS' PROGRAM PRESENTS

## CLE 1-6-3

1 CLE credit | 6 pro bono hours | 3 credit max

**1**  
you are eligible to receive  
1 hour of CLE credit

**6**  
for every 6 pro bono hours certified  
through Approved Pro Bono Providers

**3**  
for a maximum of  
3 hours of CLE credits per year

- Madison County Volunteer Lawyers Program (256) 539-2275
- Montgomery County Volunteer Lawyers Program (334) 265-0222
- South Alabama Volunteer Lawyers Program (251) 438-1102
- Volunteer Lawyers Birmingham (205) 250-5198 ▲

## Matthew J. Ward



Matthew Ward is an assistant attorney general for the Alabama Medicaid Agency. He serves as chair for the “CLE 1-6-3 Program” and as a voting member of the Pro Bono Awards sub-committee of the Alabama State Bar’s Pro Bono & Public Service Committee. In 2014, the committee awarded him the Pro Bono Award in the law student category for the nearly-500 hours he volunteered while attending Thomas Goode Jones School of Law.

A close-up photograph of a classical statue of Lady Justice, blindfolded and holding scales of justice. The background is a warm, out-of-focus autumn scene with orange and red leaves.

# Cumberland School of Law

## 2019 Fall CLE Programs

<b>Sept. 13</b>	Developments and Trends in Health Care Law 2019*
<b>Oct. 18</b>	Mandatory Professionalism*
<b>Oct. 25</b>	Bankruptcy Law Update*
<b>Oct. 31-Nov. 1</b>	Southeastern Business Law Institute 2019*
<b>Nov. 14</b>	Trends in Commercial Real Estate Law*
<b>Nov. 22</b>	Mandatory Professionalism
<b>Dec. 6</b>	Immigration Law*
<b>Dec. 12</b>	Employment Law Update*
<b>Dec. 18</b>	Legal User's Microsoft Word Academy featuring Barron Henley*
<b>Dec. 20</b>	CLE by the Bundle*

\*also available by live webcast

### Webcasts

Live webcasts count as live CLE credit in Alabama. You may receive your full credit hours (12) per year by live webcast.

### On-demand Courses

Cumberland CLE offers a wide range of online on-demand CLE courses that you can conveniently view anywhere, 24/7, in increments of time that are convenient for you. You may receive half (six) of your CLE credit hours per year online. Start earning 2019 credit today.

**Alabama Law Office Practice Deskbook by Robert McCurley, 2018 Edition, Second Printing (2019) is available.**

Organized into 43 chapters with numerous forms, the updated hardcover edition includes the latest laws through the 2019 regular session of the Alabama legislature and a new chapter on immigration.

\$139 plus \$10 for shipping and handling

To order your copy, go to **cumberland.inreachce.com** and locate the item under "Books" to place your order.





# LAWYERS RENDER SERVICE: 2019 Legal Food Frenzy Makes a Difference

*By Jeanne Dowdle Rasco*

The Alabama State Bar, Attorney General Steve Marshall and the Alabama Food Bank Association recently announced the winners of this year's Alabama Legal Food Frenzy. The overall winner of this year's joint effort and the Attorney General's cup is Lewis & Feldman LLC of Birmingham. "I congratulate the winning law firms

of the Legal Food Frenzy and everyone who helped to make a difference in the lives of many Alabama children struggling with hunger," said Attorney General Steve Marshall. "It has been exciting to watch the spirited competition among our state's law firms to raise the most contributions to benefit Alabama food banks for

summer meal programs. The real winners are Alabama's children and I applaud all those who worked hard to make the 2019 Legal Food Frenzy a success." In its fourth year, more Alabama lawyers participated than ever before, and more than 140,000 pounds of food were collected to help end child hunger.



*Montgomery Area Food Bank CEO Rich Deem thanks and recognizes those who made this year's food drive such a success.*

# This year's category winners are:

## Most pounds for a sole proprietor

MF Walker Law Group LLC (Birmingham)

## Most pounds per employee for a sole proprietor

MF Walker Law Group LLC (Birmingham) and Longino Public Finance LLC (Birmingham)

## Most pounds and most pounds per employee for large firm

Hill Hill Carter (Montgomery)

## Most pounds and most pounds per employee for a small firm

Lewis & Feldman LLC (Birmingham)

## Most pounds and most pounds per employee for medium firm

Morris Haynes Attorneys at Law (Birmingham and Alexander City)



## Most pounds and most pounds per employee for a legal organization

Alabama State Bar



Almost 400,000 Alabama children rely on free and reduced breakfast and lunch during the school year. Yet, less than 40 percent of those children have dependable access to meals during the summer. The food collected during the Legal Food Frenzy helps Alabama's eight regional food banks and their 1,500 partner agencies and pantries stock up for the summer to help fill the summertime hunger gap. Explaining how the Legal Food Frenzy personifies the Alabama legal community, Sam

Irby, Alabama State Bar 2018-2019 president, said, "Alabama lawyers serve their clients and communities each day. The Legal Food Frenzy is the embodiment of our motto 'Lawyers Render Service' and it is my hope that we, as a community, continue to improve the lives of others through our time and commitment to service."

Since the project's start in 2016, the equivalent of more than 612,000 pounds of food have been donated by Alabama lawyers. ▲

### Jeanne Dowdle Rasco



Jeanne Dowdle Rasco is with the City Attorney's Office in Huntsville and serves as co-chair of the Alabama State Bar Legal Food Frenzy Task Force.





## EDITOR'S CORNER

W. Gregory Ward  
wgward@mindspring.com

“We’ve put more effort into helping folks reach old age than into helping them enjoy it.”

—Frank Howard Clark



If you missed the state bar’s annual meeting in July, you missed a treat. The stately Grand Hotel in Point Clear welcomed us with a grandmother’s open arms, lead us along her playful pathways like a favorite aunt, and then fed us with mom’s home cooking. The ocean breeze that swept through her brick walkways kept us cool, while the swaying of the azaleas and the live oaks drew our attention to the dolphins gently breaking the surface of Mobile Bay where, if you listen closely, you could almost hear Admiral Farragut curse the torpedoes and order the ship to go full speed ahead. Ashley Penhale, our director of programs, deserves much credit.

Our annual peaceful changing of the guard took place with the end of President Sam Irby’s year (could we have had a better president?), and the beginning of the fresh promise of President Christy Crow’s term. Sam, we all owe you much for your year of outstanding service. He was a delight to work with and a friend to the bar. Christy hit the ground running with her ideas, and we are working closely with her to put out an issue devoted to one of her focal points—mental wellness for lawyers. Stay tuned.

The annual meeting had some interesting timing. The early copies of the lat-

est edition of *The Alabama Lawyer* arrived as Chris Glenos and Cathy Moore presented a CLE based on their article on the Alabama Uniform Voidable Transactions Act. As Chris and Cathy wrapped up, one of the attendees stopped me with, “I’ve got a hearing on this very thing next week. Can I have one of those copies so I can get ready?” He got it, too.

Sports psychologist Dr. Kevin Elko—he of the multiple BCS national football championship and championship NFL teams—gave us quite a talk about how to keep our minds in the game. Good stuff.

Alabama Supreme Court Justice Jay Mitchell brought the Christian Legal Society to tears as he told his son’s journey with cancer, beginning with the diagnosis, through the treatment, and, ultimately—and he gives God great credit—to being cancer-free.

What a great meeting. But lest we develop a crick in our neck from looking behind us, let’s press ahead.

This edition’s theme is elder law, and Sarah Johnston recruited some excellent articles. When I say excellent, I mean it—I incorporated several things from several articles into my practice even as I edited them. This edition is chocked full of interesting and helpful articles.

Sarah, a job well done.

Most lawyers draft powers of attorneys from time to time. George Gaskin takes a deep dive into the topic with “Drafting Powers of Attorney for Elder Planning—Going Beyond the Form” (starts on page 328). I dare you to read this without discovering some way to improve POA drafting for your older clients.

Whether it is in your law practice or your personal life, everyone knows someone who has to navigate the shoals of Medicaid. In “A Legal Primer on Medicaid—Not Medicare,” Laura Givens and Norma Wells give us a helpful look at what to do when someone needs nursing home care they can’t afford it (page 334).

In “While You Were Aging,” Judy Shepura explains how to be a legal lighthouse for the elderly by shining her light on just how much help the Alabama Code already provides. She reminds us of the Protecting Alabama Elder’s Act, the Elder Abuse Order and Enforcement Act, the Protection of Vulnerable Adults from Financial Exploitation Act, the Natural Death Act, the Assisted Suicide Ban Act, and the Alabama Uniform Power of

Attorney Act. Come on, be honest—you didn’t know that most of these acts even existed. Judy helps us all catch up (page 338).

Melanie Bradford Holliman sails us through “Special Needs Trusts: What You Need to Know to Help Your Clients and Avoid Client Complaints” (page 343). I hear lawyers and judges, especially probate judges, talk about special needs trusts all the time. Melanie takes us on a trip from problem to solution, and solution is an island we all want to spend time on.

While this issue is subject-specific, what fun is there in being too strict about it? Jerry Gabig, Rich Raleigh (our former bar president), and Chris Lockwood dealt us all a great article about “Playing Your Cards at Interpreting Federal Government Contracts.” They took a dry topic and turned it into an interesting article (page 364).

Want to be up to date? Alabama Supreme Court Justice Sarah Stewart and appellate whiz Ed Haden explain all about the new rule regarding filing notices of appeal electronically (page

375). This is going to be helpful to a lot of us. Thanks for the heads-up, you two.

And, don’t forget that October is Pro Bono Month in Alabama. Emily Baggett tells us all about it (page 320), and Matthew Ward (doesn’t he have a nice last name?) tells us how to get MCLE credit for helping others (page 322). And, as part of the Pro Bono Celebration, as well as coinciding with this issue’s theme, students from Alabama’s three accredited law schools will be fanning out across the state making presentations at senior centers about scams that target the elderly. With materials developed by the Federal Trade Commission, they will share how to identify imposter scams, charity fraud, health care scams and identity theft.

I hope you enjoy this edition as much as we enjoyed putting it together for you.

And just wait until you see what we have for you in November.

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

## 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)

**Hon. Robert E. Austin**  
[baustin@bobaustinlaw.com](mailto:baustin@bobaustinlaw.com)  
(205) 274-8255

**Hon. S. Phillip Bahakel**  
[Phillip@bahakellaw.net](mailto:Phillip@bahakellaw.net)  
(205) 987-8787

**Hon. John B. Bush**  
[jbush@courtneymann.net](mailto:jbush@courtneymann.net)  
(334) 567-2545

**Hon. Rosemary D. Chambers**  
[rosemarychambers@gmail.com](mailto:rosemarychambers@gmail.com)  
(251) 402-6256

**Hon. Suzanne S. Childers**  
[judgesuzanne@gmail.com](mailto:judgesuzanne@gmail.com)  
(205) 908-9018

**Hon. R.A. “Sonny” Ferguson, Jr.**  
[raferguson@csattorneys.com](mailto:raferguson@csattorneys.com)  
(205) 250-6631

**Hon. Melissa “Jill” Ganus**  
[jill@jillganuslaw.com](mailto:jill@jillganuslaw.com)  
(205) 424-0993

**Hon. Arthur J. Hanes, Jr.**  
[ahanes@uww-adr.com](mailto:ahanes@uww-adr.com)  
(205) 933-9033

**Hon. Sharon H. Hester**  
[sharon@hesterjames.com](mailto:sharon@hesterjames.com)  
(256) 332-7440

**Hon. J. Brian Huff**  
[judgebrianhuff@gmail.com](mailto:judgebrianhuff@gmail.com)  
(205) 930-9800

**Hon. David A. Kimberley**  
[david@alalawyers.net](mailto:david@alalawyers.net)  
(256) 543-0400

**Hon. Braxton L. Kittrell, Jr.**  
[bkittrell@kittrellandmiddlebrooks.com](mailto:bkittrell@kittrellandmiddlebrooks.com)  
(251) 432-0102

**Hon. Richard D. Lane**  
[rdlane4031@gmail.com](mailto:rdlane4031@gmail.com)  
(334) 740-5824

**Hon. Christopher M. McIntyre**  
[cmcintyrelaw@gmail.com](mailto:cmcintyrelaw@gmail.com)  
(256) 644-5136

**Hon. Julie A. Palmer**  
[judgejuliepalmer@gmail.com](mailto:judgejuliepalmer@gmail.com)  
(205) 616-2275

**Hon. James Gary Pate**  
[j.gary.pate@googlemail.com](mailto:j.gary.pate@googlemail.com)  
(205) 999-3092

**Hon. Eugene W. Reese**  
[genereese2000@yahoo.com](mailto:genereese2000@yahoo.com)  
(334) 799-7631

**Hon. James H. Reid, Jr.**  
[bevjam@bellsouth.net](mailto:bevjam@bellsouth.net)  
(251) 709-0227

**Hon. James H. Sandlin**  
[judge@jimmysandlin.com](mailto:judge@jimmysandlin.com)  
(256) 319-2798

**Hon. Martha L. Sherrod**  
[sherjudg@aol.com](mailto:sherjudg@aol.com)  
(256) 655-2016

**Hon. Ron Storey**  
[ron@wiregrasselderlaw.com](mailto:ron@wiregrasselderlaw.com)  
(334) 699-2323

**Hon. Edward B. Vines**  
[evinesattorney@yahoo.com](mailto:evinesattorney@yahoo.com)  
(205) 354-7179

**Hon. J. Scott Vowell**  
[jsv@scottvowell.com](mailto:jsv@scottvowell.com)  
(205) 214-7320

**Hon. Tom F. Young, Jr.**  
[tyoung@mhhllaw.net](mailto:tyoung@mhhllaw.net)  
(256) 329-2000





# Drafting Powers of Attorney for Elder Planning— Going Beyond the Form

*By George D. Gaskin III*

## Introduction

Most people—lawyers and laypersons alike—have heard of a power of attorney. It is one of those basic legal documents that many of us will have to use at some point, whether we are taking care of a loved one or whether a loved one is taking care of us. It is also a document that is often misunderstood. Perhaps because a power of attorney form exists in the Alabama Code, many attorneys simply view the power of attorney as a form document to be printed from the computer and signed by the client without any tailoring to a client’s specific needs.<sup>1</sup>

However, the power of attorney is arguably the most important weapon in the elder lawyer’s arsenal. While the basic form grants an agent (the individual who is empowered to act on behalf of the “principal”) a variety of default powers, the Code gives the principal a great deal of leeway to include additional powers, sometimes called “hot powers,” that must be specifically indicated in the power of attorney. “Hot powers” expand the agent’s ability to carry out planning techniques for the elderly client; however, they also create additional risk for abuse.<sup>2</sup> For the general practitioner, knowing when to include and when to omit these additional powers can greatly benefit an elderly client.

The purpose of this article is to equip you with advanced knowledge about the additional powers you might consider including in your power of attorney documents.

## Background

Don't let the humble power of attorney fool you—behind its unassuming nature lies a powerful legal tool. For example, a power of attorney can help avoid the need for a guardianship or conservatorship. Even when such a protective proceeding is still necessary, the principal may nominate his or her guardian or conservator in a power of attorney, and the court will appoint the individual named “[e]xcept for good cause shown or disqualification.”<sup>3</sup> A robust power of attorney can allow an agent to take certain actions to qualify the principal for Medicaid or VA benefits in a crisis planning situation. Simply put, the power of attorney “is an inexpensive, flexible planning tool and is easier to implement in comparison to the other options which afford similar powers over the principal's property—conservatorships and trusts.”<sup>4</sup>

On January 1, 2012, the Alabama Uniform Power of Attorney Act became effective. Under this Act, unless expressly provided otherwise, all powers of attorney are durable, meaning they remain in effect after the principal has become incapacitated.<sup>5</sup> By default, they are also “sprung,” meaning they are effective immediately upon execution by the principal instead of becoming effective upon the occurrence of a triggering event.<sup>6</sup>

The code provides a form power of attorney.<sup>7</sup> The form allows the principal to grant his or her agent

“general authority” to act with respect to a list of matters simply by signing the principal's name on one line.

This grant of general authority includes the power to manage the following areas on behalf of the principal: real property; tangible personal property; stocks and bonds; commodities and options;

---

**Don't let the humble power of attorney fool you—behind its unassuming nature lies a powerful legal tool.**

---

banks and other financial institutions; operation of an entity or business; insurance and annuities; estates, trusts and other beneficial interests; claims and litigation; personal and family maintenance, benefits from governmental programs or civil or military service; and retirement plans, taxes and gifts.<sup>8</sup>

The next section of the form allows the principal to grant “specific authority” to the agent to perform certain additional actions—the so-called “hot powers.” Unlike the grant of general authority above,

the powers in this section may not be exercised by the agent unless the principal specifically grants authority to do so. These hot powers include the authority to create, amend, revoke or terminate an inter vivos trust; make a gift which exceeds the monetary limitations of § 26-1A-217; create or change rights of survivorship; create or change a beneficiary designation; authorize another person to exercise the authority granted under the power of attorney; waive the principal's right to be a beneficiary of a joint and survivor annuity; and exercise fiduciary powers that the principal has authority to delegate.<sup>9</sup>

While there is nothing inherently wrong with using the form provided in the Code, doing so has the potential to limit authority that the agent may need to carry out “elder planning” actions for an incapacitated principal. Without specific guidance from an attorney, a person completing the form power of attorney may lack context to make an informed decision as to whether granting “hot powers” to the agent is advisable for his or her specific circumstances. In our practice, we find that these additional powers frequently go undelivered to the agent.

## Elder Planning Powers

There are several elder planning provisions that you should consider discussing with your client when preparing a durable power of attorney. These include (1) options for the document to be “springing,” (2) the power to make gifts in excess of the federal gift tax exclusion, (3) the power to create and fund an irrevocable trust, (4) the power to apply for government



benefits, (5) the power to obtain a reverse mortgage and (6) specific wishes about care.

### (A) “Springing” Options

As mentioned above, by default, powers of attorney in Alabama are “sprung” (meaning the agent can act immediately upon execution of the document by the principal).<sup>10</sup> However, clients have the option of making the document “springing” (only effective upon incapacity of the principal).<sup>11</sup> Seniors may be wary of signing a sprung power of attorney, as the agent may take actions that are inconsistent with the principal’s wishes while the principal can still act for himself or herself. They may feel more comfortable knowing their agent can act only if they are incapacitated.

Incapacity is by no means a bright line. Rather, many factors go into this determination, and reasonable people can disagree about whether a person is incapacitated. There are different options for triggering a springing power of attorney. The principal may decide to require a doctor (or two) to attest to the principal’s incapacity before the agent can use the power of attorney. Or, the client may want his or her trusted attorney, family member or friend(s) to be the arbiter of incapacity. The client may choose to deem certain powers “springing powers,” requiring incapacity before the agent can exercise those particular powers.

A standard springing provision could read as follows:

**Springing Power.** This power of attorney shall become effective on my disability or incapacity. Disability or incapacity shall be deemed to exist when

Seniors may be wary of signing a sprung power of attorney, as the agent may take actions that are inconsistent with the principal’s wishes while the principal can still act for himself or herself.

my incapacity has been declared by a court of competent jurisdiction or when a conservator or guardian for me has been appointed and is based upon my incapacity, **or** upon the attachment to this document of a certificate or letter executed by a licensed physician, declaring that I am incapable of caring for myself and that I am physically or mentally incapable of managing my financial affairs.

Although a springing power of attorney may provide protection from premature intervention by an agent, this choice must be weighed against the realistic use of this kind

of document. Often, an agent will need to use a power of attorney quickly in the event of an emergency. In an emergency, it can be cumbersome or even impossible to obtain a written determination of incapacity from the principal’s physician. Unless there are particular factors that make signing a sprung document especially risky, we generally recommend the sprung option to clients.

### (B) Power to Make Gifts in Excess of the Federal Gift Tax Exclusion

The second elder planning provision to consider including is the power to gift assets in excess of the amount of the federal gift tax exclusion. Gifting assets can be an integral part of planning for nursing home care. For example, assume that an elderly mother with dementia is moving into a long-term care facility. Her assets will not fully provide for her care, yet she is over the acceptable resource limit to qualify for Medicaid. Her daughter, who is her agent under her durable power of attorney, has a physical disability. Under Alabama Administrative Code Rule 560-X-25.09(6)(b)(1) (iii), an applicant may transfer assets to a child “who is blind or permanently and totally disabled,” and such transfer will not be penalized for Medicaid eligibility purposes. In this hypothetical, it may be to the applicant’s advantage for her disabled daughter, as agent, to transfer to herself the mother’s assets to qualify the mother for Medicaid and preserve the mother’s assets for her disabled child.

Suppose that the mother had executed the power of attorney form contained in Ala. Code § 26-1A-

301, signing the line indicating that she wished to grant “general authority” to her daughter as agent. Under this grant of general authority, the agent would have the gifting power described in § 26-1A-217. Paragraph (b)(1) of § 26-1A-217 limits the agent’s gifting power to amounts “per donee not to exceed the annual dollar limits of the federal gift tax exclusion” under the Internal Revenue Code.<sup>12</sup> In our example, then, the daughter as agent could only transfer to herself a maximum of \$15,000 (the present federal gift tax exclusion limit) of the mother’s assets.

Moving forward with our example, assume that the mother had a daughter who had lived with the mother in the mother’s home for at least two years before the mother entered the nursing home and provided care to her mother during this time. Medicaid allows an applicant to transfer her home, without penalty, to a child who has lived in the applicant’s home for at least two years immediately before the applicant entered a nursing home, and who provided care to the applicant which permitted the applicant to remain in the home rather than requiring nursing home care.<sup>13</sup> If the mother had a form power of attorney taken from the Code, the gift limit in the default gifting power would prevent the daughter from transferring the mother’s home to herself, as the home’s value would likely exceed \$15,000. In this scenario, the home would become subject to a Medicaid lien, rather than being able to pass outright to the daughter. The form power of attorney contains an option to grant specific authority to make gifts in amounts that exceed the federal

gift tax exclusion and, had the mother initialed this option, our conundrum would not exist.

There is, admittedly, good reason why the form requires the principal to affirmatively grant these additional specific powers, including the power to make gifts larger than the federal gift tax exclusion amount. Giving the agent any of these additional powers opens the door to greater risk of abuse by the agent. Of course, the agent is bound by a fiduciary duty of loyalty to the principal to act in the principal’s best interest.<sup>14</sup> In weighing the risks versus benefits to a particular principal, however, the benefit of broader and more effective elder care planning options should be evaluated alongside the risks of the agent stealing the principal’s assets. In evaluating an agent’s ability to responsibly administer broad powers, the principal should consider the relationship of the agent and principal, the agent’s past behavior, the principal’s health and financial situation and the agent’s health and financial situation. Further, the principal may choose to appoint joint agents, which may provide increased protection.<sup>15</sup>

A sample gifting provision, which does not include a limit, is as follows:

**Power to Make Gifts.** My

Agent is authorized to make gifts or other transfers without consideration either outright or in trust (including the forgiveness of indebtedness and the completion of any charitable pledges I may have made) to such person or organization as my Agent shall select; to consent to the splitting of gifts under Section 2513 of the Internal Revenue

Code; to pay any gift tax that may arise by reason of such gift.

**(C) Power to Create and Fund An Irrevocable Trust**

A third important elder planning provision to include in the power of attorney is the power to create and fund an irrevocable trust. Many times, a person who has moved into a long-term care facility will need to establish a trust for planning purposes. Two common trusts that arise in connection with Medicaid eligibility are the Alabama Family Trust (“AFT”) and qualifying income trust (“QIT”).

A person with a disability can establish a first-party special needs trust with the AFT, transfer his or her assets into the trust and immediately qualify for Medicaid. As a first-party special needs trust, any remaining trust assets with the AFT at the grantor’s death would be used to pay Medicaid back for its expenditures toward the grantor’s care. A QIT is used when a Medicaid applicant’s monthly income exceeds the income limit for Medicaid eligibility. Both the QIT and the special needs trust with the AFT are irrevocable trusts.

The standard grant of general authority with respect to “estates, trusts, and other beneficial interests” allows the agent to take various actions regarding existing trusts.<sup>16</sup> It does not, however, allow the agent to *create* trusts. On the form power of attorney, the principal may grant his or her agent the specific authority to “create, amend, revoke, or terminate an inter vivos trust, by trust or applicable law.”<sup>17</sup> Presumably this includes the power to create both revocable and irrevocable inter vivos trusts.<sup>18</sup>



The following is a more comprehensive trust provision:

**Power Regarding Trusts for the Principal.** My Agent is authorized to create, amend, revoke or terminate any inter vivos trust on my behalf. This power shall specifically include the power to create both revocable and irrevocable trusts, including the power to enter into a “pooled income” trust agreement (such as the Alabama Family Trust) on my behalf. Any such action must be consistent with the overall structure of my estate plan.

With this language, there is no ambiguity regarding the agent’s powers to establish an account with the AFT or a QIT for the principal. Further, there is some protection in the provision that any such actions must be consistent with the client’s estate plan, which is not present in the form power of attorney found in the code.

#### **(D) Power to Apply for Government Benefits**

Section 26-1A-214(b)(3) explains that a grant of general authority “with respect to benefits from governmental programs or civil or military service” authorizes the agent to “enroll in, apply for, select, reject, change, amend, or discontinue, on the principal’s behalf, a benefit or program.” While this authorization should cover Medicaid, VA, and Social Security applications by an agent on behalf of the principal, a more comprehensive benefit provision would be as follows:

**Governmental Entitlement Powers.** My Agent is authorized to deal with any and all state or federal agencies (including, but

not limited to, Medicaid, Medicare, Veterans Affairs and Social Security) from whom I receive or am entitled to receive governmental benefits of any description or amount in order to: (i) prepare and file all documents required by such agencies; (ii) apply for any benefits to which I may be entitled; (iii) modify the amounts or terms of such entitlements; (iv) assert my rights against any curtailment or termination of benefits; or (v) appeal or compromise any contested claim.

This language expands the form power by explicitly naming several agencies and programs that are most commonly used by seniors. It also grants the agent broader authority with respect to actions that may be required over and above simply applying for benefits (such as appealing a denial).

#### **(E) Power to Obtain a Reverse Mortgage**

Section 26-1A-204(a)(3) allows an agent under a “power of attorney granting general authority with respect to real property” to “pledge or mortgage an interest in real property or right incident to real property as security to borrow money.” This language may or may not include the power to obtain a reverse mortgage. To reduce ambiguity, it would be better to specifically include reverse mortgage powers in the power of attorney. Reverse mortgages are certainly not right for everyone (or most people); however, they are useful from time to time for elderly people.

The following is an example of a provision addressing reverse mortgages:

#### **Reverse Mortgage Powers.**

My Agent is authorized to negotiate, obtain and close a reverse mortgage for me and in my name to be secured by any residential real estate I own; to execute and deliver all documents in connection with such reverse mortgage; to execute an end term plan for the ultimate disposition of my said residence; and to take any other action(s) necessary for the purpose, in order to satisfy the terms and conditions of the reverse mortgage loan.

#### **(F) Specific Wishes About Care**

In addition to granting the agent powers, a power of attorney can address concerns specific to the client about his or her care as the client ages. For example, the client may want to include a provision such as “I want to remain in my home for as long as possible, and I direct my agent to take all steps needed to ensure this outcome.” The client may have other specific concerns, such as wanting to continue a hobby for as long as possible following a diagnosis of Alzheimer’s or dementia. Not only will these specific wishes inform the agent about how to best care for the principal, but should a guardianship and/or conservatorship become necessary, this guidance will also be available to the guardian or conservator and can carry weight in decisions about the ward’s care. For example, where a conservator is weighing the costs of around-the-clock, in-home sitters versus saving thousands each month by moving the ward into a nursing home, the conservator could select the more expensive option knowing that the ward’s wishes of remaining in the home were being honored.

## Consequences of Omitting Powers

The omission of “hot powers” in a power of attorney increases the potential that court permission will be required to accomplish elder planning goals. In our practice, the most common omission we encounter is the power to create and fund irrevocable trusts. Often, when we are engaged to assist a client with qualifying for Medicaid at the “crisis” stage (when the applicant is already incapacitated and in the hospital or nursing home), the client will need to use the AFT or a QIT in order to quickly qualify. If the client does not have a power of attorney, or has a power of attorney that does not include the power to create and fund irrevocable trusts, he or she will be unable to establish an AFT trust or a QIT. In these situations, a family member must file a petition for single transaction conservatorship in the probate court. Authorized by § 26-2A-137, a single transaction conservatorship allows the court, without appointing a conservator, to “authorize, direct, or ratify” any transaction, contract or trust pertaining to the protected person’s property “if the court determines that the transaction is in the best interest of the protected person.”<sup>19</sup>

While it is beneficial to have the option of a single transaction conservatorship as a backup for elder planning in the event the necessary power is omitted from the client’s power of attorney, there are many drawbacks of having to proceed via this route. Additional court costs and attorneys’ fees must be paid, and there may be added stress on a ward having to attend a hearing. There can be complications with the notice requirement if family members in

the state are estranged or difficult to locate. Often, the most frustrating aspect of using a single transaction conservatorship is simply the delay it imposes on the Medicaid application process. If the court does not schedule a hearing for several weeks or months, it is likely the client will be required to pay additional out-of-pocket costs to the nursing home, as Medicaid eligibility will be delayed.

**For many aging clients, it is the most important legal document they will execute in their lifetimes.**

## Conclusion

The power of attorney, simple as it seems, is a truly powerful legal document. For many aging clients, it is the most important legal document they will execute in their lifetimes. Understanding how certain powers are used to accomplish elder planning will equip the general practitioner to advise clients more comprehensively. While there are certainly risks to including broad powers in a power of attorney (as there are risks with giving an agent any powers at all), those powers may provide a trusted agent with the ability to take all of the actions necessary to care for the principal in the most efficient way. ▲

## Endnotes

1. See Ala. Code § 26-1A-301; Alabama State Bar, Volunteer Lawyers Program, *Powers of Attorney*, <https://alabamaatj.org/wp-content/uploads/2014/01/Power-of-Attorney.pdf> (last visited May 17, 2019).
2. Michele M. Hughes, *Remedying Financial Abuse by Agents Under a Power of Attorney for Finances*, 2 MARQUETTE ELDER’S ADVISOR 39 (2001).
3. Ala. Code §26-1A-108.
4. Alabama State Bar, *supra* note ii.
5. *Id.* at § 26-1A-104.
6. *Id.* at § 26-1A-109.
7. See *Id.* at § 26-1A-301.
8. See *Id.* at § 26-1A-204 to -217, 301.
9. See *Id.* at § 26-1A-301.
10. *Id.* at § 26-1A-109.
11. *Id.*
12. See *Id.* at § 26-1A-201(d). Of note, those states that adopted the Uniform Power of Attorney Act took different approaches with regard to gifts, and Alabama limited the gift amount unless expressly stated otherwise in the document. See Angela M. Vallario, *The Uniform Power of Attorney Act: Not a One-Size-Fits-All Solution*, 43 U. BALT. L. REV. 85, 104-105 (2014).
13. See Ala. Admin. Code r. 560-X-25.09(6)(a)(4).
14. Hughes, *supra* note iii at 40; see also Ala. Code § 26-1A-217(c) (stating that gifts may be made “only as the agent determines is consistent with the principal’s objectives”).
15. Another way to mitigate this risk could be to draft the power of attorney to include a “special agent” provision. Essentially, the document would require a second agent to approve any actions whereby the primary agent intended to use the gifting provisions to transfer the principal’s assets to the agent. This type of provision is basically appointing a co-agent in a very limited circumstance.
16. See Ala. Code § 26-1A-211.
17. *Id.* at § 26-1A-301.
18. However, in our practice, the AFT has not always accepted this language as sufficient authority for the agent to establish an AFT trust. Rather, the AFT has insisted at times that the power of attorney explicitly include the power to create *irrevocable* trusts.
19. *Id.* at § 26-2A-137.

## George D. Gaskin III



George Gaskin practices with Carney Dye LLC in Birmingham, where he focuses on elder law, estate planning and probate matters. His passion for the elderly began while working as a speech-language pathologist in skilled nursing facilities. Gaskin is a graduate of Vanderbilt University and Vanderbilt University Law School.





# A Legal Primer on Medicaid—*Not Medicare*

By Laura C. Givens and Norma M. Wells

Medicaid and Medicare—two terms that, although similar, are not interchangeable. While both are federally-mandated programs, Medicare will not pay for long-term nursing home care.

*Scenario:* Your client, Cliff, recently had a stroke. You handled basic estate planning for him several years ago. Cliff's daughter, Darla, is his appointed agent under a durable power of attorney. According to Darla, Cliff is still hospitalized from the complications caused by the stroke. She believes he will need long-term nursing home care, which will cost approximately \$7,000 per month. Cliff is a man of modest means. Darla asks if Medicare can help pay the nursing home costs. How do you respond?

If you practice elder law, your response will be, "Darla, what you're looking for is Medicaid, *not* Medicare." Medicare may cover Cliff's

rehab time—up to 100 days so long as certain requirements are met—but Medicare does not pay for long-term care. To address Darla's concerns, you need more information about Cliff. Specifically, you will need information about Cliff's monthly income and his assets.

## Qualifying for Institutional (Nursing Home) Medicaid in Alabama

The Alabama Medicaid Agency is responsible for administering Medicaid funds in Alabama.<sup>1</sup> Cliff must meet the following criteria to qualify for Institutional Medicaid in Alabama:

- Be living in Alabama with intent to remain<sup>2</sup>
- Be a U.S. citizen or be in this country legally<sup>3</sup>
- Meet certain medical criteria<sup>4</sup>

- Have a gross income below the annual limit (in 2019, the limit is \$2,313)<sup>5</sup>
- If single, have countable resources (assets) at or below \$2,000<sup>6</sup>
- If married, the countable resource limit depends on the couple's resources<sup>7</sup>

*Continued Scenario:* Cliff's monthly income consists of Social Security and a pension totaling \$2,500 per month. He is married to Wilma. They own their home jointly with rights of survivorship. Wilma plans to remain in their home. Cliff has \$50,000 in countable assets. Darla confirms that Cliff is not a veteran and that he does not have long-term care insurance. If Cliff is to reside long-term in a nursing home, he will need Medicaid to help with the cost of skilled care.

### Income Limits:

- In 2019, the limit is \$2,313
- Excess income can be fixed by setting up a Qualified Income Trust ("QIT")
  - > Also known as a "Miller Trust"
  - > Must be set up by someone with authority
  - > This is a restricted checking account subject to a lien by the Alabama Medicaid Agency
  - > Generally, monthly income goes in and then goes out to pay the "liability amount"<sup>8</sup>
    - "Liability amount" is calculated by deducting from gross income the cost of health insurance and a personal needs allowance (\$30)
    - The remaining balance is owed to the nursing home each month
    - Problems occur when the liability amount is not paid to the nursing home, creating excess income issues and nursing home eviction
  - > Must direct at least one of the sources of income into QIT account to reduce income below the limit
- **Minimum Monthly Maintenance Needs Allowance (MMMNA)**<sup>9</sup>—the spouse who does not live in a nursing home (the "Community Spouse") can keep an amount sufficient to raise the Community Spouse's income to the MMMNA.
- The MMMNA as of July 2018 is \$2,113.75 (this limit changes each July)

- > *For example:* If Wilma's gross monthly income is \$463.75, she is entitled to \$1,650 from Cliff's monthly income ( $\$2,113.75 - \$463.75 = \$1,650$ )
- > Thus, Cliff's liability amount to the nursing home would decrease by the amount Wilma can keep under the MMMNA

### Resource Limits for an Individual:<sup>10</sup>

- Countable resources must be less than \$2,000
- Amount on the first of the month exceeding \$2,000 causes ineligibility for the entire month
- Can use cleared checks dated in prior month to rebut excess resource issue
- Pay the nursing home and other expenses before the end of the month
- If married and spouse in the nursing home, each is treated as an individual claimant

### Resource Limits for the Community Spouse:

- During the initial application process, Medicaid considers the couple's assets, regardless of prenuptial agreement or which spouse is legal owner
- Determine the Community Spouse Resource Allowance ("CSRA")<sup>11</sup>
- In 2019, minimum CSRA is \$25,284; maximum CSRA is \$126,420
- Maximum CSRA is reached if a couple's total combined countable assets are \$252,840 or greater on the "Snapshot date"
  - > "Snapshot date" is the date Cliff entered the medical facility for a continuous period of institutional care<sup>12</sup>
  - > The snapshot date can be years before a Medicaid application is filed
  - > For example, Cliff's Snapshot date would be the date he was admitted to the hospital and subsequently transferred to the nursing home
- Certain assets are "excluded" or not counted when determining a couple's CSRA
- The Community Spouse may
  - > Own a home
  - > Own other non-countable assets; and
  - > Own countable assets up to the CSRA



- CSRA is calculated by adding all countable resources, which were owned on the Snapshot Date by the applicant or the spouse individually or jointly
- CSRA is one-half of all countable resources owned on the Snapshot Date
- Minimum CSRA is \$25,284 and maximum is \$126,420 (in 2019)
- Thus, if Cliff and Wilma’s total countable resources on the Snapshot date is \$25,284 or less, they meet the resource requirement and all countable resources may be protected as Wilma’s spousal share
- However, if Cliff and Wilma’s countable resources on the Snapshot date total \$148,420, Wilma can set aside \$2,000 of Cliff’s resource allowance and must “spenddown” the remaining countable resources by \$73,210 before Cliff can qualify for Medicaid (\$148,420 less \$2000 = \$146,420 / 2 = \$73,210); Wilma may retain the remaining \$73,210 in countable resources as her spousal share
- The “spenddown” is achieved by purchasing goods and services for the benefit of the Institutionalized Spouse<sup>13</sup>
- Nursing homes often advise the couple to private pay until the CSRA is reached. This can be quite unfortunate for all (including the nursing home)
- Experienced nursing home administrators refer couples to an experienced elder law attorney
- Elder law attorneys who handle “crisis planning” could advise the couple to:
  - > Set up a pooled trust such as the Alabama Family Trust—in addition to having funds for a private room or other needs, funds are available in the event Medicaid refuses to pay
  - > Purchase a Medicaid compliant annuity
  - > Purchase approved burial items
  - > Improve the home
  - > Purchase a new car
  - > As well as assist the couple in applying for benefits
- To reduce Wilma’s resources below the CSRA, Wilma could purchase a new car (trading in her existing car); get the much-needed new roof on their home; buy pre-need burial contracts and place the remaining funds for the benefit of Cliff in an Alabama family trust
- **Non-countable assets:** Assets which are not counted by Medicaid in the calculation of resources include:
  - > Household goods and personal effects<sup>14</sup>
  - > One automobile<sup>15</sup>
  - > Home so long as Community Spouse lives there<sup>16</sup>
    - Other options to protect the home is to
      - ~ Transfer to child under age 21
      - ~ Transfer to a blind or disabled child
      - ~ Transfer to a sibling co-owner who has resided there for one year
      - ~ Transfer to a caretaker child who 1) for two years resided in the home and 2) provided care that kept the Medicaid applicant out of the nursing home
  - > In our scenario, Cliff and Wilma could have additional resources in burial items and burial funds including:<sup>17</sup>
    - Five burial items, regardless of value:
      - ~ Casket
      - ~ Vault
      - ~ Plot
      - ~ Marker
      - ~ Opening and closing the grave
    - Funds totaling \$5,000 each set aside for burial
      - ~ The funds can be set aside in a designated burial account
      - ~ May be those “other items” on a pre-need that are not included in the above five burial items
      - ~ Life and burial insurance
        - ^ If the combined face value (a/k/a death value) of all life and burial insurance policies are over \$5,000, the *cash value* counts toward the limit
        - ^ If the combined face value of all life and burial insurance policies is less than or equal to \$5,000, the *face value* counts toward the limits
    - ~ Amounts exceeding the \$5,000 count in the resource limit
    - ~ Life insurance policies should be carefully reviewed prior to application to ensure no excess resource issue

## Look-back Period and Transfer Penalty

- As of February 8, 2006, the Medicaid applicant is required to disclose any transfer of property made in the last five years (the “look-back period”)<sup>18</sup>
- Transfer of an asset for less than fair market value during the look-back period for the purposes of qualifying for Medicaid will be subject to a transfer penalty<sup>19</sup>
- Certain transfers are exempt from penalty<sup>20</sup>
  - > Transfers to the Community Spouse
  - > Transfer of the home to child who is under 21, blind or disabled for use as his home
  - > Transfer to a trust for disabled child
  - > Transfer for purpose other than qualifying for Medicaid
- The transfer penalty is calculated by adding together the value of all assets transferred without compensation during the look-back period (not including exempt transfers)
- The sum is then divided by a divisor which represents the average monthly cost for nursing home care in Alabama, as determined annually by the Alabama Medicaid Agency
- In 2019, the divisor used to calculate the transfer penalty is \$6,200
- The quotient will be the number of months that the transferor must pay for nursing home care without Medicaid, starting with the month that the transferor would have been receiving Medicaid but for the transfers or starting with the month of the transfer, whichever is later
  - > If Cliff or Wilma transferred a resource for less than fair market value during the look-back period, Medicaid will presume the transfer was made with the intent to qualify for Medicaid and impose a penalty

## Fair Hearings

If you disagree with Medicaid’s findings, you must request a fair hearing within 60 days. This request must be *received by Medicaid no later than the 60<sup>th</sup> day*. Carefully review Ala. Admin. Code Rule 560-X-3-.01 et seq.

## Conclusion

The most important take away from this primer—associate yourself with an experienced elder law attorney before providing assistance to Darla, Cliff and Wilma. ▲

## Endnotes

1. Medicaid funding is primarily federally sourced and is governed by 42 U.S.C. §§ 1396 to 1396w-5 and 42 CFR §§ 430 to 430.104. The states are allowed some discretion in operating their state Medicaid programs. Alabama Medicaid Agency’s administrative regulations are found starting at Ala. Admin. Code r. 560-X-25.01.
2. Ala. Admin. Code r. 560-X-25.05(e).
3. *Id.* at 560-X-25.05(d).
4. *Id.* at 560-X-25.11(1).
5. *Id.* at 560-X-25.10.
6. *Id.* at 560-X-25.06.
7. *Id.* at 560-X-25.16.
8. *Id.* at 560-X-25.10(3) and (4).
9. *Id.* at 560-X-25.16.
10. *Id.* at 560-X-25.06.
11. *Id.* at 560-X-25.16.
12. *Id.* at 560-X-25-.16.
13. *Id.* at 560-X-25-.16.
14. *Id.* at 560-X-25-.06(2)(c).
15. *Id.* at 560-X-25-.06(2)(a).
16. *Id.* at 560-X-25-.06(2)(e).
17. *Id.* at 560-X-25-.06(2)(d).
18. *Id.* at 560-X-25-.09.
19. 42 U.S.C. § 1396p(c); Ala. Admin. Code r. 560-X-25-.09.
20. 42 U.S.C. § 1396p(c)(2); Ala. Admin. Code r. 560-X-25-.09(6).

## Laura C. Givens



Laura Givens is a graduate of Jacksonville State University and Cumberland School of Law, Samford University, cum laude. In law school, Givens received various awards, including the Scholar of Merit Award in Professional Responsibility, and was the managing editor of the *Cumberland Law Review* during the 2001–2002 school term. She is a member of the Alabama State Bar’s Elder Law and Real Property, Probate & Trust Law sections.

## Norma M. Wells



Norma Wells graduated from Cumberland School of Law in 2004. After graduation, she was hired by an estate planning and probate practice in Huntsville and then opened her own general practice in Albertville in 2005.





# While You Were Aging

*By Judy B. Shepura*

## Introduction

As Alabama's older population increases, so do instances of neglect and exploitation. In 2010, there were more than 650,000 Alabama citizens aged 65 or older. This population is projected to exceed 970,000 by 2025 and 1,100,000 in 2040.<sup>1</sup> Sooner or later, as we age, we will need to rely on others. For many vulnerable individuals this reliance turns sour, if not life threatening, when trusted individuals take advantage of the situation. Federal and state lawmakers have scrambled to address the problem with new statutes. Some of the new laws are part of the criminal code; others are part of the civil code and touch on health decisions, spousal relationships, personal care and financial management.

Until recently, legal protection for

Alabama's adults outside of the criminal code has taken the form of remedies under the Adult Protective Services Act and certain proceedings in probate court—primarily guardianships, conservatorships and commitment hearings. The Adult Protective Services Act, which has been part of the Alabama Code since 1976, is principally an act to provide protective services and to order protective placements to prevent abuse, neglect and exploitation of adults.<sup>2</sup> The Act outlines the responsibilities of Alabama's Department of Human Resources ("DHR") to investigate complaints and reports regarding adults who are in need of care or protection. If the situation warrants it, DHR may petition the court for placement of individuals, provide counseling and assist in coordinating a plan of care in other instances. Under this Act,

certain individuals are classified as "mandatory reporters"—those who are required to disclose what they believe may be abuse—to DHR. Mandatory reporters are physicians and others who practice in the healing arts and caregivers. DHR's form for reporting abuse is found at [www.dhr.state.al.us/services/Adult\\_Protective\\_Services/Adult\\_Protective\\_Services.aspx](http://www.dhr.state.al.us/services/Adult_Protective_Services/Adult_Protective_Services.aspx).

This article will highlight Alabama-specific laws that have taken effect in roughly the last 10 years and have to do only with adults. Guardianship and conservatorship proceedings are addressed in another article in this issue and will not be included here. Some provisions such as the new power of attorney law, while not designed specifically for vulnerable adults, still provide incidental benefits and are worth noting.

## Alabama Uniform Durable Power of Attorney Act (2012)

The Alabama Uniform Durable Power of Attorney Act took effect in 2012.<sup>3</sup> It expanded state law breadth on this topic from about five pages in the Alabama Code to more than 60 pages. Under certain circumstances with the “old” law, an agent could essentially rewrite one’s estate plan. The new law requires that at least some potentially abusive powers be expressly granted by the principal. Those include the power to create, amend, revoke or terminate an inter vivos trust; create or change rights of survivorship; create or change beneficiary designations; and waive the principal’s right as beneficiary of a joint and survivor annuity.<sup>4</sup> Under the new law, an agent may be required to give an accounting upon request by the principal or a fiduciary on the principal’s behalf, by government authorities or by a court. After the principal’s death, his or her personal representative or a successor in interest of the principal’s estate may demand an accounting.<sup>5</sup> An even broader group of individuals may take the agent to court to construe the document and review the agent’s conduct.<sup>6</sup>

One proviso: the new law applies only to powers of attorney signed in 2012 or later.<sup>7</sup> For your clients to benefit from protections under the new law, they should update their powers of attorney.

## For Seniors in Particular Protecting Alabama’s Elders Act (2013)

A year after the Uniform Durable Power of Attorney Act took effect, the Protecting

Alabama’s Elders Act became law.<sup>8</sup> This Act was first cited at Ala. Code Section 38-9E-1, but was then moved to the criminal code, where it has remained at 13A-6-190 through 13A-6-201. This law protects vulnerable adults age 60 or older.<sup>9</sup> Intended primarily to punish any wrongdoer, the law imposes felony and misdemeanor penalties for lack of care as well as physical, emotional and financial abuse. It defines terms such as *caregiver*, *emotional abuse*, *financial exploitation*, *intimidation*, *neglect* and *undue influence*.<sup>10</sup> It describes elder abuse and neglect in the first, second and third degrees and gives similar treatment to financial abuse. Severity of punishment hinges upon whether the abuse is intentional or reckless, the degree of harm and, in the case of financial abuse, the amount involved.


As of August 2018, there were 34 reports filed for abuse and neglect in the first degree under this new law, 140 in the second degree and 50 in the third degree.<sup>11</sup> In terms of financial abuse, there were 509 reports for first degree (in excess of \$2,500), 192 reports for second degree (\$500 to \$2,500) and 47 reports for third degree (less than \$500).<sup>12</sup>

## Elder Abuse Protection Order and Enforcement Act (2017)<sup>13</sup>

Enforcement is built into a broader law that took effect only two years ago. An offshoot of protection-from-abuse proceedings common to domestic law, the Elder Abuse Protection Order and Enforcement Act is a do-it-yourself approach allowing an individual 60 years old and older to seek

relief directly from civil court (primarily district court or circuit court) for physical, emotional and financial abuse. This might appeal to one who does not seek criminal redress and is reluctant to go to DHR for fear of protective placement. It can be quicker than an emergency proceeding for guardianship/conservatorship and does not require a finding of incapacity—and the concurrent loss of rights. It also saves the filing fee required for emergency proceedings in probate court.

Definitions for criminal activities like arson, assault, stalking, kidnapping, etc., match those found in Alabama’s criminal code.<sup>14</sup>



**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**



The cost for a proceeding under this Act is low and the procedures are user-friendly. Along with the person needing help, any of the following may file a petition: guardian, conservator, agent under power of attorney, health care proxy and interested person with authority to petition for protective services, such as DHR.<sup>15</sup> The forms are standardized and available online through the Alabama Administrative Office of Courts, found at [www.alacourt.gov/](http://www.alacourt.gov/). The basic petition (Form C-90) is a four-page fill-in-the-blank form, found under “E-Forms” at [www.alacourt.gov/](http://www.alacourt.gov/). There is no filing fee assessed against the petitioner or plaintiff.<sup>16</sup> The forms are also kept at the circuit clerk’s office for walk-in petitioners.

Venue is liberal. A petition may be filed where the plaintiff resides, where the defendant resides, where the plaintiff is staying temporarily to avoid abuse and where the abuse occurred.<sup>17</sup> Ex parte relief is available. The court will answer a request for temporary or ex parte relief within three days of filing.<sup>18</sup>

As ex parte relief the court may, among other things, remove the defendant from the plaintiff’s residence, prohibit the defendant from contacting the plaintiff, enjoin the defendant from transferring the plaintiff’s property, order possession of personal effects essential to the plaintiff (for example, an automobile) and direct law enforcement to accompany the plaintiff as necessary to appropriate such property, order the defendant to provide an accounting related to the plaintiff’s financial affairs, and order the defendant to stay away from the plaintiff’s residence and place of employment.<sup>19</sup> Such relief may also be made permanent.<sup>20</sup> Furthermore,

an order issued in response to a petition in one county is valid in all counties of the state.<sup>21</sup>

Just as importantly, the act enables law enforcement officers to step in without a warrant and arrest individuals for violating elder abuse protection orders. The presentation of a valid order constitutes probable cause, but the officer may also consider other information, absent such an order.<sup>22</sup>

A more detailed discussion of this particular law appeared in the January 2018 issue of *The Alabama Lawyer*. As of August 2018, 190 cases had been reported under this new statute.<sup>23</sup>

### Protection of Vulnerable Adults from Financial Exploitation Act (2016)<sup>24</sup>

The Protection of Vulnerable Adults from Financial Exploitation Act is aimed at the financial services industry. It is designed to curb financial exploitation among those at least 65 years old as well as younger adults who need protection.<sup>25</sup> This is a reporting statute; no enforcement mechanisms are built in. Interestingly, it does not apply to banks (but a subsequent federal law known as the Senior Safe Act does apply to banks and credit unions).<sup>26</sup> While many financial institutions have implemented and were already following their own internal safety measures, this act requires an investment advisor to file a report with the Alabama Securities Commission and the Department of Human Resources if the advisor reasonably believes exploitation has occurred, has been attempted or is being attempted.<sup>27</sup> Records made available to law enforcement or adult protective service agencies for this purpose are

not considered public records as defined under state public records law.<sup>28</sup> Acting in good faith immunizes the advisor from administrative or civil liability that might otherwise apply.<sup>29</sup> The advisor may disclose such concerns to the vulnerable adult’s trusted third parties, but is not required to do so. Trusted third parties might include trustees, guardians and agents under a power of attorney.<sup>30</sup>

Exploitation as defined in this act takes many forms. It includes the unauthorized taking of property, obtaining control over another’s property and converting another’s property in such a way as to deprive the owner of its benefit.<sup>31</sup> If an investment advisor has reason to believe a requested distribution is suspect, the advisor may delay the disbursement, within certain limits, in order to conduct a more thorough internal investigation.<sup>32</sup>

As the result of this law, financial and investment advisors have been added to the list of “mandatory reporters.” Diane Dunning, assistant attorney general in Alabama’s Department of Human Resources, has witnessed practical value from the new law in other ways as well. “Once the money is gone, it’s gone. This new law allows brokerage firms the opportunity to take more time and ask questions before making requested distributions. This makes it possible to avoid disbursements that should not have been made.”

A copy of the joint reporting form for the Alabama Securities Commission and Department of Human Resources may be found at [www.dhr.state.al.us/services/Adult\\_Protective\\_Services/Adult\\_Protective\\_Services.aspx](http://www.dhr.state.al.us/services/Adult_Protective_Services/Adult_Protective_Services.aspx).

## Laws Related to Marriage

Suppose you have a 61-year-old client with declining capacity, recently divorced. If she did not remove her former spouse as fiduciary and beneficiary after the divorce, she may still be protected because of a law which took effect in 2015.<sup>33</sup> Under Ala. Code Section 30-4-17, divorce revokes any revocable disposition to a former spouse, any revocable power of appointment given to a former spouse and any revocable appointments of the former spouse to roles of responsibility like personal representative, trustee, agent, guardian and conservator.<sup>34</sup> In addition, property formerly characterized as joint with right of survivorship between spouses is severed and converted into equal tenancies in common.<sup>35</sup> This statute does not apply to irrevocable documents. It does not apply to life insurance identifying the former spouse as beneficiary if the former spouse is listed as owner or continues to pay premiums on the policy post-divorce.<sup>36</sup> Importantly, this statute does not preempt federal laws requiring a former spouse to remain as named beneficiary absent actual removal of the former spouse as beneficiary.<sup>37</sup>

A recent case has been decided based on this new statute: Loyd Sutphin lived in north Alabama and worked in Chattanooga.<sup>38</sup> He acquired a life insurance policy while at work and named his daughter as beneficiary.<sup>39</sup> After he married, he changed the beneficiary form to name both his wife (Blalock) and his daughter. Sutphin and Blalock divorced, but the divorce docu-

ments did not mention the life insurance policy nor did Sutphin remove Blalock's name as beneficiary before he died, still an Alabama resident.<sup>40</sup> The daughter and Blalock then sparred in Alabama circuit court over payment of the proceeds. After considering the conflicts of law issues and the fact that Tennessee had no counterpart to Ala. Code Section 30-4-17, the Alabama court determined that application of Tennessee law in this instance would violate Alabama's public policy.<sup>41</sup> Alabama's revocation-upon-divorce statute applied to revoke Sutphin's designation of Blalock as a beneficiary of his life insurance policy.

In a separate provision under the new power of attorney law discussed previously in this article, divorce removes a former spouse appointed as agent if the power of attorney was signed Jan. 1, 2012 or later.<sup>42</sup>

Yet another protection has to do with common law marriages. Now a vulnerable adult cannot be taken advantage of by one's common law "spouse" if the "marriage" was not already in place by the end of 2016.<sup>43</sup> Alabama does not recognize common law marriages that were not established before January 1, 2017.

## Laws Related to Healthcare

The Natural Death Act has long provided a mechanism through its advance directive to allow individuals to set out their choices for medical care ahead of the time when they can no longer communicate such decisions.<sup>44</sup> In 2016, Alabama added the ability of a person

to specify he/she does not want to be resuscitated in the event of heart failure.<sup>45</sup> This directive, referred to as a "DNAR" (do not attempt resuscitation), is a separate form that requires the signatures of both the patient's physician and patient or the patient's proxy. A copy of the form is found at <http://www.alabamapublichealth.gov/about/az-index.html#D>.

A DNAR is to be used alongside of, not instead of, an advance directive. An advance directive gives instructions for a broad range of medical conditions whereas the DNAR addresses only cardiac failure. An advance directive does not require a physician's signature and may or may not be in the patient's file; a DNAR is part of the medical record.<sup>46</sup> It is often relied upon by

### 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



emergency responders who are called to homes for medical emergencies. For those in poor condition or facing a short life expectancy, this law may provide welcome relief. Now someone in fragile health can say “no” to CPR and avoid the risk of a fractured breastbone and broken ribs;<sup>47</sup> an individual with respiratory problems can opt out of the extreme discomfort and inability to speak that accompany mechanical ventilation.<sup>48</sup> If an individual cannot sign the document himself, his health care proxy may do so provided the proxy has been given authority to make decisions related to providing, withdrawing or with withdrawal of life-sustaining treatment. The proxy may be someone designated under the patient’s existing advance directive or designated as agent under the patient’s power of attorney, provided the power of attorney substantially complies with the Natural Death Act and proper formalities of execution are followed.<sup>49</sup>

Another development prohibits assisted suicide.<sup>50</sup> The Assisted Suicide Ban Act took effect in 2017 and distinguishes between medication to alleviate pain and medicine that assists in causing death. By way of explanation in its legislative findings, the statute points to the state’s “interest in protecting vulnerable groups, including the impoverished, the elderly, and disabled persons from abuse, neglect, and mistakes. “A ban on assisted suicide reflects and reinforces our belief that the lives of those in vulnerable groups are no less valued than the lives of the young and healthy.”<sup>51</sup> The law recognizes a patient’s refusal of life sustaining treatment resulting in natural death, versus the patient

receiving lethal medication that causes death. Those found guilty of deliberately violating the law are liable for damages, loss of license and subject to a Class C felony.<sup>52</sup>

## Conclusion

Efforts are underway to address the special vulnerabilities of our aging population in the medical, personal care and financial arenas. It will take time, but as law enforcement, social services agencies, medical professionals and financial and legal services industries communicate with one another and work together more effectively, it is possible that these new laws and others which will follow will cast a wider blanket of protection. Much of the success will depend upon collaboration. ▲

## Endnotes

1. U.S. Census Bureau and Center for Business and Economic Research, the University of Alabama, April 2018, *Alabama County Population Aged 65 and Over 2000-2010 and Projection 2020-2040*.
2. Ala. Code § 38-9-1 to -11.
3. *Id.* at § 26-1A-101 to -404.
4. *Id.* at § 26-1A-201(a).
5. *Id.* at § 26-1A-114(h).
6. *Id.* at § 26-1A-116.
7. *Id.* at § 26-1A-403.
8. *Id.* at § 13A-6-190 to -201.
9. *Id.* at § 13A-6-191(3).
10. *Id.* at § 13A-6-191.
11. “Criminal and Civil Elder Action/Adult in Need of Protective Services Statistics” as of August 7, 2018, compiled from data on the State Judicial Information System of the Alabama Administrative Office of Courts.
12. *Id.*
13. Ala. Code § 38-9F-1 to -12.
14. *Id.* at § 38-9F-3.
15. *Id.* at § 38-9F-6.
16. *Id.* at § 38-9F-6(e).
17. *Id.* at § 38-9F-4.
18. *Id.* at § 38-9F-7(b).
19. *Id.* at § 38-9F-8.

20. *Id.*
21. *Id.* at § 38-9F-5(c).
22. *Id.* at § 38-9F-11.
23. “Criminal and Civil Elder Action/Adult in Need of Protective Services Statistics” as of August 7, 2018, compiled from data on the State Judicial Information System of the Alabama Administrative Office of Courts.
24. Ala. Code § 8-6-170 to -179.
25. *Id.* at § 8-6-171(10).
26. AARP, *New Law Targets Elder Financial Abuse* (May 24, 2018) <https://www.aarp.org/politics-society/government-elections/info-2018/congress-passes-safe-act.html>.
27. Ala. Code § 8-6-172.
28. *Id.* at § 8-6-178.
29. *Id.* at § 8-6-173.
30. *Id.* at § 8-6-174.
31. *Id.* at § 8-6-171(5).
32. *Id.* at § 8-6-176.
33. *Id.* at § 30-4-17.
34. *Id.* at § 30-4-17(b).
35. *Id.*
36. *Id.* at § 30-4-17(h).
37. *Id.* at § 30-4-17 (g)(3). See also *Eglehoff v. Eglehoff*, 532 U.S. 141 (2001) (under ERISA plans, name on the document is controlling).
38. *Blalock v. Sutphin*, \_\_\_ So. 3d \_\_\_ (Ala. 2018) WL 5306884.
39. *Id.* at 4.
40. *Id.*
41. *Id.*
42. Ala. Code § 26-1A-404(c)(3).
43. *Id.* at § 30-1-20.
44. Ala. Code § 22-8A-1 to -17.
45. *Id.* at § 22-8A-3(7).
46. *Id.* at § 22-8A-4.1.
47. KATHRYN BUTLER, *BETWEEN LIFE AND DEATH*, 54, Crossway Books (2019).
48. *Id.* at 74-76.
49. Ala. Code § 26-1A-404.
50. Ala. Code § 22-8B-1 to -7.
51. *Id.* at § 22-8B-2(2).
52. *Id.* at § 22-8B-5 and -4.

## Judy B. Shepura



Judy Shepura holds an undergraduate degree from the University of Georgia, a law degree from Samford University’s Cumberland School of Law and an LLM in elder law from Stetson University.

# SPECIAL NEEDS TRUSTS: What You Need to Know to Help Your Clients *and* Avoid Client Complaints

By *Melanie Bradford Holliman*



## No lawyer wants to receive a letter from the Disciplinary Commission of the Alabama State Bar

or a summons and complaint for negligence after settling a case or even winning a verdict. Unfortunately, bad outcomes are possible when lawyers stray into unfamiliar areas of law or fail to keep up with changes in the law. This is especially true when dealing with special needs trusts, also known as “supplemental needs trusts,” and clients’ disability benefits.

Normally, receiving property through an unexpected inheritance or the settlement of a lawsuit is a positive result for clients. However, if your client receives means-tested government benefits for basic support and health care, an unexpected, unplanned receipt of

assets can cause disqualification from receiving those means-tested benefits, resulting in severe disruption to the provision of his or her basic needs. A special needs trust is a planning tool that will manage assets for the benefit of a person with disabilities who receives means-tested benefits without disrupting his or her current support and health care.

Most lawyers do not need to know how to draft and administer special needs trusts. However, it is important that all lawyers understand what a special needs trust accomplishes and recognize when it is time to associate a lawyer who is well-versed in special needs planning. This article is designed to provide the foundation necessary to discern when special needs planning may apply to your practice.



## What Are the Key Means-Tested Government Benefits Your Client May Receive?

Means-tested benefits are federal and state provisions that are available to people whose income and assets are below a certain level. For people with disabilities in Alabama, Supplemental Security Income (“SSI”) and Alabama Medicaid are the primary means-tested government benefits programs.

SSI is designed for people with disabilities who have financial need but have not worked enough credit hours to qualify for Social Security Disability (“SSDI”) benefits.<sup>1</sup> Examples of SSI recipients include children who have had disabilities from birth and have never worked and adults with disabilities who have lost support from family (many times, after a parent’s death) and are now unable to support themselves. SSI is means-tested and requires that a person must have countable income under \$771 and assets under \$2,000 (\$3,000 for a couple) to be eligible to receive benefits. If a person qualifies for SSI, the person will receive a monthly benefit of up to \$771 for an individual (\$1,157 for a couple) to assist with the costs of food and shelter.<sup>2</sup>

Alabama Medicaid provides health care for individuals who have minimal income and assets. A person with disabilities may obtain health care through Medicaid by first qualifying for SSI or by qualifying for the institutionalized long-term care/nursing home program. In both instances, there are strict income and asset requirements to be eligible. A person who qualifies for SSI is automatically eligible for Medicaid.<sup>3</sup> To receive long-term care nursing home benefits from Alabama Medicaid, a person must meet the following general, medical, and financial criteria:

- the person must be a U.S. citizen or a qualified alien;
- the person must live in Alabama and intend to stay in Alabama;
- the person must meet medical standards;
- the person’s gross income must be at or below \$2,313 in 2019; and
- the person’s countable resources must be at or below \$2,000.<sup>4</sup>

Maintaining qualification for Medicaid is especially

important for clients whose special needs require ongoing and expensive treatments and medications to maintain their health.

## What Are Special Needs Trusts?

A special needs trust is a creation of federal law. Specifically, federal law allows special needs trusts to hold assets transferred by a person with disabilities (who will be the trust beneficiary) or by third parties so that (1) the transfer of the assets does not cause the person to lose means-tested government benefits, and (2) the use of the assets for the benefit of the person does not cause him or her to lose means-tested government benefits.<sup>5</sup> State law compliments federal law by setting out general laws governing trusts.<sup>6</sup> In some cases, state law sets out specific statutes regarding special needs trusts.<sup>7</sup>

The primary laws applicable to special needs trusts in Alabama are: 42 U.S.C. § 1396p(d)(4)(A) (exempting special needs trusts for a beneficiary under age 65 from counting as a resource in means-testing); 42 U.S.C. § 1396p(d)(4)(C) (exempting pooled special needs trusts managed by a non-profit from counting as a resource in means-testing); 20 C.F.R. § 416.1100–416.1182 (setting income limits for Supplemental Security Income qualification); 20 C.F.R. § 416.1201–416.1266 (setting resource limits for Supplemental Security Income qualification); and Ala. Code § 19-3B-101 to -1305 (the Alabama Uniform Trust Code). Additionally, the Social Security Program Operations Manual System (the “POMS”), while not law, should be followed closely because Social Security uses the operational details in this manual to evaluate special needs trusts and to determine whether they comply with the law.<sup>8</sup>

## The Variations and Mechanics of Special Needs Trusts: First-Party Special Needs Trusts and Third-Party Special Needs Trusts

Understanding that a client may benefit from special needs planning is the first step. Special needs trusts are not “one size fits all.” There are several factors that determine the type of special needs trust that

should be created, such as the circumstances regarding the source of the beneficiary's money (i.e., whether the assets legally belong to the beneficiary or to a third party), whether the trust is revocable or irrevocable and the age of the individual with disabilities. A first-party special needs trust is created using assets belonging to the beneficiary, which would include proceeds from a lawsuit, gifts and inheritances. A third-party special needs trust is created using assets belonging to someone other than the beneficiary, such as a parent or grandparent. The administration of these trusts is the same; however, first-party special needs trusts must reimburse Medicaid at the death of the beneficiary while the proceeds of a third-party trust may be paid out to anyone the trustor wishes.

### A. First-Party Special Needs Trusts

There are three types of first-party, self-settled special needs trusts: (1) 42 U.S.C. § 1396p(d)(4)(A) allows a trust to be created for a person with disabilities under the age of 65; (2) 42 U.S.C. § 1396p(d)(4)(C) allows a pooled trust to be created for a person with disabilities; and (3) 42 U.S.C. § 1396p(d)(4)(B) allows a qualified income trust to be created to hold excess income. In all instances, a first-party special needs trust is created using the assets of the person with disabilities.

#### 1. Trusts for Persons under 65

For persons with disabilities under the age of 65, a first party special needs trust may be established pursuant to 42 U.S.C. § 1396p(d)(4)(A):

“A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1382c(a)(3) of this title) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this subchapter.”<sup>9</sup>

The requirements for a trust established under 42 U.S.C. § 1396p(d)(4)(A) are:

**i. Under 65**—The individual with disabilities must be under the age of 65. This form of special needs trust is not available for anyone 65 years of age or older.

**ii. Settlor**—The trust must be settled by a parent, grandparent, legal guardian, the person who will be the beneficiary, or by an appropriate court. A court must approve a petition and issue an order establishing the trust prior to creation of the trust.<sup>10</sup>

**iii. Medicaid Payback**—The trust must contain a provision that requires any trust principal remaining at the beneficiary's death to be used to reimburse Medicaid for benefits paid over the beneficiary's lifetime. Any remaining trust assets may be distributed to other remainder beneficiaries.

The POMS clarifies this requirement further by stating:

“To qualify for the special needs trust exception, the trust must contain specific language that provides that upon the death of the individual, the State(s) will receive all amounts remaining in trust, up to an amount equal to the total amount of medical assistance paid on behalf of the individual under the State Medicaid plan(s). The State(s) must be listed as the first payee and have priority over payment of other debts and administrative expenses except as listed in SI 01120.203E. The trust must provide payback for any State(s) that may have provided medical assistance under the State Medicaid plan(s) and not be limited to any particular period of time, i.e., payback cannot be limited to the period after establishment of the trust.”<sup>11</sup>

**iv. Sole Benefit**—While the statute does not specifically require that trust assets be used for the sole benefit of the beneficiary with disabilities, the POMS interpretation of the statute creates this requirement.<sup>12</sup> The POMS, as updated in 2018, clarify that “sole benefit” means that the beneficiary with disabilities is the “primary beneficiary.” For example, if a television is purchased for a child with disabilities, it is permissible for other family members to watch the television as long as the child is the primary beneficiary of the television. Conversely, a car for the child with disabilities cannot be used by a



parent as the primary transportation for the family and to travel to work.<sup>13</sup>

**v. Irrevocable Trust**—Likewise, while the statute does not require that the trust be irrevocable, POMS SI 01120.200D and POMS SI 01120.201D essentially provide that the trust must be irrevocable. The reasoning behind this interpretation is that if the trust is revocable, the payback provision can be negated which automatically disqualifies the trust under 42 U.S.C. § 1396p(d)(4)(A). Additionally, if the trust can be revoked by the beneficiary, the assets in trust will be deemed as being available to him or her. The assets in trust would then be considered in determining the beneficiary's eligibility for benefits.

**vi. Trustee**—The beneficiary with disabilities may never be the trustee. The purpose of this prohibition is to avoid giving the beneficiary control over trust assets. A corporate trustee, family member or friend may be the trustee. However, the better practice is to use a professional trustee who is familiar with the requirements for distributions. Family members and friends may not charge as much as a professional trustee, but they may unintentionally administer the trust in a manner that will cause the beneficiary to lose benefits (such as by giving money to the beneficiary to purchase a new computer instead of directly purchasing the computer).

**vii. Trustee Discretion**—A special needs trust is designed to supplement the beneficiary's needs for items that are not covered by government programs. As a result, the trust may not serve as the source of funds for health, maintenance, education and support. Including this type of common distribution standard in the trust document will cause the funds to be considered an asset of the beneficiary and cause him or her to lose eligibility for means-tested government benefits.

## 2. Pooled Special Needs Trust

Persons with disabilities of any age, including 65 years of age and over in some states (including

Alabama) may create a first-party special needs trust using a non-profit pooled trust company. These trust companies are able to accept smaller trusts that private corporate trustees often refuse and may charge less to manage the trust.<sup>14</sup> The pooled trust companies also usually enjoy pre-approved status with Medicaid and Social Security so that anyone using these companies and their respective trust forms can be assured that the trust will be accepted as a valid special needs trust. A pooled trust may hold first-party and third-party trusts.

Pooled trusts are addressed in 42 U.S.C. § 1396p(d)(4)(C):

“(C) A trust containing the assets of an individual who is disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)] that meets the following conditions:

- (i) The trust is established and managed by a non-profit association.
- (ii) A separate account is maintained for each beneficiary of the trust, but, for purposes of investment and management of funds, the trust pools these accounts.
- (iii) Accounts in the trust are established solely for the benefit of individuals who are disabled (as defined in section 1614(a)(3)) [42 USCS § 1382c(a)(3)] by the parent, grandparent, or legal guardian of such individuals, by such individuals, or by a court.
- (iv) To the extent that amounts remaining in the beneficiary's account upon the death of the beneficiary are not retained by the trust, the trust pays to the State from such remaining amounts in the account an amount equal to the total amount of medical assistance paid on behalf of the beneficiary under the State plan under this *title*.”

In Alabama, the legislature created the Alabama Family Trust to help serve the needs of people who have disabilities. Using Alabama Family Trust is an easy, low-cost way to establish a special needs trust for a client and ensure

administration compliance with SSI and Medicaid.<sup>15</sup> All Alabama Family Trust forms have been approved by Social Security and by Medicaid so there is no uncertainty about whether the language in the trust documents is satisfactory.

### 3. QIT Trust

A qualified income trust is created under 42 U.S.C. §1396p(d)(4)(B) when the person's income exceeds the maximum monthly income limit of \$2,250. This type of trust is used most often for a beneficiary needing long-term care in a skilled nursing home facility when his or her income exceeds the limits allowed by Medicaid, but is insufficient to provide for his or her care.

### B. Third-Party Special Needs Trust

A third-party special needs trust is funded with assets from third parties (such as parents, grandparents, siblings, other family and friends) for the benefit of the person with disabilities. A third-party special needs trust may be created through a revocable living trust, a testamentary special needs trust or a stand-alone special needs trust. The third-party trust may be administered by a private trustee (other than the beneficiary) or by a pooled trust company. The trust may be revocable or irrevocable.

From the client's perspective, the key difference between a third-party special needs trust and a first-party special needs trust is that the third-party grantor has the right to name the remainder beneficiaries for any proceeds remaining in trust at the death of the beneficiary with disabilities. There is no Medicaid pay-back requirement in a third-party trust. For example, if the parents of the beneficiary establish a third-party special needs trust, the parents can designate their other children to be the remainder beneficiaries. This is not possible with a first-party trust which requires Medicaid reimbursement at the death of the beneficiary who has received Medicaid.

## What's at Stake for Lawyers?

The demands in any practice area can be so consuming that it is easy to overlook the problems that clients with special needs may face once a matter is concluded. While Alabama has not yet had cases addressing a failure to advise regarding special needs

planning, other courts have addressed this issue, and the following cases are instructive:

### A. Personal Injury Law

In *Grillo v. Petiete et al.*, a child was injured at birth and required ongoing medical treatments and care.<sup>16</sup> In the resulting personal injury action, the plaintiffs, at the advice of their attorney, refused a structured settlement and the case was settled for a lump-sum payment of \$2.5 million. Within a short period of time, the family spent the funds and had no money to pay for the substantial medical and caregiving costs for the child. The family sued their attorney and others arguing that the attorney failed to consult competent experts concerning a structured settlement and failed to preserve SSI and Medicaid eligibility by using a special needs trust. The case against the combined defendants settled for \$4.1 million.

*Grillo* is often cited by financial advisors and insurance agents as the reason to use a structured settlement. However, that conclusion is only partially correct as the structured settlement alone would not have protected the child's eligibility to receive means-tested government benefits once the payments were released. The facts of this case show that an attorney's failure to consider special needs planning for a client with known special needs can be subject to question.

### B. Probate Law: Conservators and Personal Injury Law

In *Dept. of Social Services v. Saunders*, the conservator for the plaintiff settled a personal injury case.<sup>17</sup> The conservator properly asked the court to place the settlement proceeds in a first-party special needs trust so that the plaintiff would remain eligible for means-tested government benefits. The State of Connecticut objected. The state wanted to force the conservator to spend all of the ward's proceeds on care before the ward could receive Medicaid benefits. The Supreme Court of Connecticut disagreed with the state and held that creating a special needs trust for the ward was in the ward's best interests, "it may be fairly stated that by failing to follow [the appropriate course of action], the Probate Court and [the Conservator] potentially could have been deemed to be in dereliction of their duties to [the ward]."<sup>18</sup>



### C. Estate Planning Law

*Board of Overseers of the Bar v. Brown*<sup>19</sup> demonstrates the danger of preparing an estate plan without considering beneficiaries with special needs. In this case, the Supreme Court of Maine reviewed numerous ethics complaints against attorney Ralph Brown which resulted in his suspension from the practice of law for six months. Among the long list of ethical violations was a failure to include a testamentary special needs trust in a last will and testament that Brown had prepared for a client. His failure to include the testamentary special needs trust caused his client's sister, a beneficiary of the will, to lose her Medicaid benefits. The sister was forced to spend down the inheritance and reapply for her Medicaid benefits to continue her care.

### D. Family Law

Family law attorneys need to consider special needs planning when a client with disabilities will receive a divorce settlement and alimony payments. Likewise, if there are children with disabilities, a special needs trust should be considered for child support payments.

### E. Additional Probate Issues

It is important to know that assets held by a conservator are considered to be assets that are available to the beneficiary and can cause the beneficiary to be ineligible for means-tested government benefits. While a conservatorship may be a good choice to make sure that the assets are handled properly, it may not be the best choice for a ward if it causes the ward to lose eligibility for benefits or to be ineligible to obtain benefits. Instead, the better choice may be to have the funds placed into a special needs trust that the conservator manages or manages in coordination with a professional trustee.

## Final Thoughts

A basic understanding of special needs planning is essential to guide clients in deciding whether a special needs trust is advisable to protect means-tested government benefits.<sup>20</sup> However, it is not necessary to learn the intricacies of special needs trust law to avoid bad outcomes. Instead, attorneys need to be able to identify the situations where special needs planning may be useful and ask an attorney who is well-versed in that area of law to review the matter. ▲

### Endnotes

- SSDI is not means-tested. It is a payment to individuals who have worked a certain number of credit hours and paid into the Social Security System, but can no longer work due to disability.
- These numbers are effective for 2019 and are adjusted on an annual basis.
- See Ala. Admin. Code r. 560-X-25-.01 to 560-X-25-.17.
- Ala. Admin. Code r. 560-X-25-.05 to 560-X-25-.06.
- 42 U.S.C. § 1396p(d)(4)(A), 42 U.S.C. § 1396p(d)(4)(C).
- See, e.g., Ala. Code §§ 19-3B-101 to -1305, §§ 19-3D-1 to -29.
- See, e.g., *Id.* at § 19-3B-1101.
- The POMS are kept up to date at <https://secure.ssa.gov/poms.nsf/home!readform>.
- 42 U.S.C. § 1396p(d)(4)(A).
- POMS SI 01120.203B.8.
- Id.* at 01120.203B.10.
- Id.* at 01120.201F.1.
- "The key to evaluating this provision is that, when the trust makes a payment to a third party for goods or services, the goods or services must be for the primary benefit of the trust beneficiary. You should not read this so strictly as to prevent any collateral benefit to anyone else. For example, if the trust buys a house for the beneficiary to live in, that does not mean that no one else can live there, or if the trust purchases a television, that no one else can watch it. On the other hand, it would violate the sole benefit rule if the trust purchased a car for the beneficiary's grandson to take her to her doctor's appointments twice a month, but he was also driving it to work every day." POMS SI 01120.201F.3.a.
- It is common to find private trust companies that will only accept trust balances of \$500,000 and higher.
- The fee to establish a trust with Alabama Family Trust is \$1,500.
- Grillo v. Petiete et al.*, 96-145090-92 (96<sup>th</sup> Dist. Ct. Tarrant Cty., Texas).
- Dept. of Social Services v. Saunders*, 724 A.2d 1093, 1105 (Conn.1999).
- Id.*
- Board of Overseers of the Bar v. Brown*, (Me., No. BAR-01-6, Oct. 25, 2002).
- "Not every case involving a disabled person requires a supplemental needs trust. Every case, however, requires consideration of a supplemental needs trust. The settlement may be large enough whereby the plaintiff's medical needs can be provided for without utilizing the Medicaid program, and without the restrictions the local Medicaid district may impose upon the use of the funds in the supplemental needs trust. It is also possible that private health insurance, to which every resident of New York State is entitled without pre-existing conditions, will be sufficient for the plaintiff's medical needs. There is also the consideration of the pay-back provision in the supplemental needs trust. Medicaid districts disagree as to the extent of the pay-back provision. In a Medicaid district that requires a pay-back for all Medicaid provided during lifetime, the pay-back can be draconian, especially in the instance of an individual who had significant Medicaid benefits prior to the establishment of the supplemental needs trust, which amounts were neither causally related to the injury nor otherwise needed to be paid as a Medicaid lien from the lawsuit proceeds." Jay J. Sangerman, *Supplemental Needs Trusts: A Malpractice Trap for the Unwary Plaintiff Attorney* (2004) available at [http://www.sangerman.com/html/supplemental\\_needs\\_trusts\\_\\_a\\_t.html](http://www.sangerman.com/html/supplemental_needs_trusts__a_t.html).

### Melanie Bradford Holliman



Melanie Holliman earned her degree from Cumberland School of Law, Samford University, cum laude, and is a partner with Bradford & Holliman LLC in Birmingham and Scottsboro. She focuses her practice on elder law and estate planning with a special emphasis on asset protection and special needs trusts. Holliman is admitted to practice before the U.S. Tax Court and is an accredited attorney with the Veterans Administration.



Fastest smartest malpractice insurance. Period.

800.906.9654  
GilsbarPRO.com



# Award RECIPIENTS

## JUDICIAL AWARD OF MERIT

*This award is presented to a judge who is not retired, whether state or federal court, trial or appellate, and is determined to have contributed significantly to the administration of justice in Alabama.*

### Judge Elisabeth A. French

Judge French attended the University of Montevallo on an athletic scholarship and graduated in 1993. She earned her juris doctorate from Samford University's Cumberland School of Law in 1997.

Judge French entered private practice and represented clients in the areas of education law and general civil litigation. In November 2010, she was elected to the Jefferson County Circuit Court to preside over civil cases and was re-elected in 2016. She is a graduate of the National Judicial College.

Judge French is a member of the Birmingham Bar Association, the Magic City Bar Association, the Alabama Lawyers Association (ALA) and the Alabama State Bar, serving in all offices of the ALA. Judge French is a member of the Court of the Judiciary and the Alabama Association of Circuit Judges. She is a member of the Alabama Supreme Court's Alternative Dispute Resolution Committee and the Technology Commission. She hosts and volunteers for multiple legal clinics throughout Jefferson County, as well as hosting mock trials for elementary, middle and high school students of Jefferson County.

Judge French is a member of the UAB Minority Health Advisory Board and a graduate of Leadership Birmingham. She served on the Children's Dance Foundation Board and volunteered for the Birmingham City Schools after-school program.

Judge French, her husband, attorney G. Courtney French, and their three children are active members of Living Stones Church.



French

## WILLIAM D. "BILL" SCRUGGS, JR. AWARD

*This award was created in 2002 in honor of the late Bill Scruggs, former state bar president, to recognize outstanding and dedicated service to the Alabama State Bar.*

### J. Mark White

Mark White, a graduate of Auburn University and Samford University's Cumberland School of Law, is a founding partner of the Birmingham firm of White Arnold & Dowd PC. He has served as trial counsel in matters across the spectrum of civil and criminal practice, including white-collar crime, environmental, mass tort, personal injury, antitrust and securities litigation. Mark has been lead counsel in a number of high-profile trials, both civil and criminal. For eight years, he served on Alabama's Judicial Inquiry Commission and is a frequent speaker on campaign oversight committees and judicial ethics. Mark has served as president of the Birmingham Bar Association, the Alabama State Bar and the International Academy of Trial Lawyers.



Mark White and President Irby

## J. ANTHONY "TONY" MCLAIN PROFESSIONALISM AWARD

*This award is given to recognize members for distinguished service in the advancement of professionalism.*



Percy Badham, Douglas McElvy and President Irby

### Walker Percy Badham III

Percy Badham, a native of Birmingham, graduated from Davidson College and the University of Alabama School of Law. After law school, Percy was hired as an associate with Cabaniss, Johnston. In 1983, he joined the newly-formed firm of Maynard, Cooper & Gale, practicing there for 24 years. In 2008, Percy and Brannon Buck formed Badham & Buck LLC.

Percy was named one of the TOP 10 Super Lawyers in Alabama from 2012-2015 and one of the Top 50 Super Lawyers in Alabama from 2010-2017. He also has an "AV"

Peer Review Rating, the highest possible rating given by Martindale Hubbard.

He is president of the Alabama School of Law Foundation and is a Fellow of the Birmingham Bar Foundation and the Alabama Law Foundation.

Percy has served as a council member for the Tort Trial and Insurance Practice Section of the ABA and as director of the TIPS Trial Academy. He served as president and secretary of the state bar's Young Lawyers' Section. Percy is a member of the International Association of Defense Counsel.

He is a member of Leadership Birmingham, the Downtown Kiwanis Club and the Monday Morning Quarterback Club. Percy is married to Patti Poundstone from Montgomery, and they have three children, Walker, Phillip and Lindsey Badham Mills, and four grandchildren. He and his family attend Canterbury Methodist Church.

### J. Douglas McElvy

Douglas McElvy graduated from the University of Alabama School of Commerce and Business Administration and the University of Alabama School of Law. He is a certified mediator, accredited by the American Academy of Attorney Mediators.

Douglas served on the Board of Bar Commissioners from 1991 to 2003, as well as four terms on the Executive Council. He was elected vice president of the state bar in 2002 and president in 2004-2005. In March 2017, Douglas was asked to serve as the acting general counsel of the state bar, which he held until July 2018.

He served as chair of the Chief Justice's Commission on Professionalism, having been presented with the Chief Justice's Award of Professionalism in 2010, and as president of the Christian Legal Society of Alabama. He also served as a trustee of the Alabama Law Foundation. Douglas was selected for *Best Lawyers in America* in 2005 and named to *Alabama Super Lawyers* in 2009. He is a Master of the Bench in the Hugh Maddox Inn of Court.

Douglas is president of the Kiwanis Club of Montgomery, a board member of YMCA Camp Chandler and a member of the Baptist Health Care Foundation Executive Committee.

He practiced in Tuscaloosa for 25 years with McElvy & Ford PC before he and his family relocated to Montgomery in 2003. His practice consists of handling civil litigation in both state and federal courts. Douglas and his wife, Eleanor, have five children and 11 grandchildren.

## COMMISSIONERS' AWARD

*This award was created in 1998 by the Board of Bar Commissioners to recognize individuals who have had a long-standing commitment to the improvement of the administration of justice in Alabama.*

### Jeanne Dowdle Rasco

Jeanne Rasco is a 1989 graduate of the University of Alabama School of Law, where she was Student Bar Association president and recipient of the Dean Thomas Christopher award. She earned a B.S. degree from Auburn University and an M.A. degree from the University of Alabama.

Jeanne began her legal career in Talladega at Gaines, Gaines & Rasco PC and then opened her own practice in 2001.

While in Talladega, she served on the state bar Volunteer Lawyers Program and was named to the first Pro Bono Celebration Task Force in 2009. She later served as the task force chair and then as chair of the Pro Bono and Public Service Committee.

In 2014, Jeanne joined the Huntsville City Attorney's office where she works daily with the police department, in addition to serving as a certified instructor for the Alabama Peace Officers Standards and Training Commission.

Jeanne is an at-large member of the Board of Bar Commissioners, serving her third consecutive term. She is chair of Alabama's Legal Food Frenzy, and serves on the state bar's Character & Fitness Committee, President's Task Force, Leadership Forum Selection Committee, Personnel Committee and Strategic Planning Task Force, among others.

Jeanne is a member of the Huntsville/Madison County Bar Association Executive Committee and a past president of the Talladega County Bar Association. She is a fellow of the Alabama Law Foundation and the American Bar Association, and past recipient of the Albert L. Vreeland Pro Bono Award and the Alabama State Bar President's Award.

## JEANNE MARIE LESLIE SERVICE AWARD

*This award recognizes exemplary service to lawyers in need in the areas of substance abuse and mental health and is presented by the Alabama Lawyer Assistance Program Committee.*

### Mack B. Binion

Mack Binion graduated from Spring Hill College in 1969 and from the University of Alabama School of Law



Jeanne Rasco and President Irby



Robert Thornhill, Mack Binion and President Irby





in 1972. After active duty as a 1<sup>st</sup> Lt., Air Defense Artillery (USAR), and as general counsel to the Medical Association for the State of Alabama, Mack returned to his native Mobile. For 45 years, he has maintained a civil litigation practice, serving 30 years with Briskman & Binion PC, which he and Donald Briskman founded in 1988 and where they continue to practice.

Mack is a member of the American Bar Association, the Alabama State Bar, the Mobile Bar Association, the Alabama Defense Lawyers Association and the International Association of Defense Counsel, and is a Lifetime Fellow of the Alabama Law Foundation.

Mack has served on the Mobile Bar Association's Executive and Civil Practice committees, as well as chair of its Lawyers Assistance Committee. He was a member of the state bar's Lawyer Assistance Program Committee and Lawyer Assistance Foundation Board. Mack is an active supporter and fundraiser for the Drug Education Council of Mobile.

With several Mobile and Baldwin County attorneys, Mack helped organize Lawyers In Recovery, a non-affiliated group of attorneys who has been meeting semi-monthly for 15 years in a 12 Step Program format.

Mack and his wife, Judy, have two children and four grandchildren.

## LOCAL BAR AWARDS OF ACHIEVEMENT

*This award recognizes local bar associations for their outstanding contributions to their communities judged by the quality and extent of programs, level of participation of the bar and overall impact of the programs on its citizens.*



Accepting for local bars are Charles Godwin (Escambia County Bar Association), Scott Holmes (Tuscaloosa County Bar Association) and Jennifer Buettner (Birmingham Bar Association).

**Birmingham Bar Association:** Charles T. Fry, Jr., president

**Escambia County Bar Association:** Wade L. Hartley, president

**Tuscaloosa County Bar Association:** Mary T. Roberts, president

## RETIRING COMMISSIONERS' AWARDS

**William H. Broome**, 7<sup>th</sup> Judicial Circuit

**Monet McCorvey Gaines**, At-Large, Place 8

**J. Flynn Mozingo**, 15<sup>th</sup> Judicial Circuit, Place 3

**Courtney R. Potthoff**, 3<sup>rd</sup> Judicial Circuit

**B. Scott Shipman**, 25<sup>th</sup> Judicial Circuit

**Roy W. Williams, Jr.**, 32<sup>nd</sup> Judicial Circuit

## VOLUNTEER LAWYERS PROGRAM

# Pro Bono Awards

## ALBERT VREELAND PRO BONO AWARD

*The Albert Vreeland Pro Bono Award is presented to an individual who demonstrates outstanding pro bono efforts through the active donation of time to the civil representation of those who cannot otherwise afford legal counsel and by encouraging greater legal representation in, and acceptance of, pro bono cases.*

### Tazewell T. Shepard, III

Taze Shepard, with Sparkman, Shepard & Morris PC in Huntsville, has provided countless hours of pro bono service in his local community and through statewide initiatives. He became president of the Madison County Volunteer Lawyers Program in 2017, and during his term, the number of cases closed annually increased by 45 percent. Taze continues to take pro bono cases, providing assistance to clients who desperately need help.

He serves as chair of the state bar's Solo & Small Firm Section and served on the Pro Bono Celebration Task Force for the last three years. As chair of the SSF Section, Taze arranged for free section membership for all VLP directors and active pro bono volunteers in Alabama. He coordinated a seven-city Probate Practice CLE series to provide low-cost CLE for pro bono volunteers and section members, and was the organizer and moderator for the statewide Civil Legal Aid Listening Sessions and Summit. He also organized a summit for the various volunteer lawyers programs and the Bankruptcy Court judges and officials, leading a discussion on how the programs could work together to serve low-income citizens.





Front row, left to right, are George Parker, bar commissioner; Tiffany Graves (law firm award); Lauren James (law student award); and VLP Director Linda Lund. Back row, left to right, are Lindsey Boney (law firm award), Dylan Black (law firm award), Taze Shepard (AI Vreeland award), President Irby and Allen Howell, chair, Pro Bono Committee.

Taze serves on the Board of Bar Commissioners, as the chair of the Pro Bono Innovation Task Force and the Government Relations Task Force and as a member of the Lawyer Incubator Task Force, Member Benefits Committee and Diversity in the Profession Committee.

## LAW FIRM AWARD

### Bradley Arant Boulton Cummings LLP

Bradley's Alabama attorneys contributed more than 12,000 hours in pro bono legal services in 2018, assisting approximately 175 clients with general civil law matters, as well as with death penalty post-conviction and criminal pro bono appeals.

Their efforts include starting a corporate pro bono partnership with the legal department of Encompass Health to create a new legal help desk serving the Woodlawn neighborhood in Birmingham. The help desk is held at Hayes Middle School once a month and is staffed by Bradley and Encompass Health attorneys. Bradley attorneys also staff a veteran's help desk two months a year, providing legal advice and, in some cases, extended representation to local veterans. Last spring, Bradley's Birmingham office began partnering with the YWCA of Birmingham to provide pro bono legal assistance to low-income individuals seeking to file protection-from-abuse petitions. Through this initiative, Bradley attorneys contributed 187 hours to pro bono clients.

Bradley attorneys also provided more than 5,000 pro bono hours last year representing Clemente Javier Aguirre-Jarquín, who spent 14 years in prison after being wrongfully convicted of murder. The firm began its representation in 2013, and after full briefing and oral arguments, the Florida Supreme Court unanimously reversed and vacated Mr. Aguirre's convictions and ordered a new trial. In November 2018, the state dropped all charges.

## LAW STUDENT AWARD

### Lauren A. James

Lauren James, a student at Faulkner University Jones School of Law in Montgomery, has participated in numerous

public service and pro bono activities during her three years at Jones, reporting more than 340 service hours. Lauren volunteered with both the Alabama State Bar Volunteer Lawyers Program and the Montgomery Volunteer Lawyers Program. She provided assistance at the bi-monthly legal assistance clinics and the divorce clinic sponsored by the Montgomery VLP, as well as for the Selma Legal Assistance Clinic and the Disaster Legal Assistance Hotline for the Alabama State Bar VLP.

Lauren was a law-student member of the Pro Bono Celebration Task Force assisting in the development and implementation of law student-centered Pro Bono Month events. She is an active member of the Jones Public Interest Law Foundation, assisting with its many activities, including its annual Bid for Justice Auction to raise money for public-interest summer stipends.

## MEDIATOR AWARD

### Robin L. Burrell

Robin Burrell, of Najjar Denaburg PC in Birmingham, has been the organizer for and a mediator at the Tenth Judicial Circuit's Domestic Relations Mediation/Settlement docket for 10 years. Once a month, three judges set cases for settlement, resulting in approximately 40 cases on each mediation/settlement docket. Robin volunteers for at least four of these dockets each year and organizes and recruits other attorneys for the remaining ones. She assigns someone as the mediator in charge of the docket, disseminates the schedule, sends the docket to volunteers to check for conflicts and provides reminders so the attorneys can find replacements for last-minute cancellations. Judge Patricia Stephens, who nominated Robin, states, "The mediation docket has helped tremendously in settling cases, especially those cases having self-represented litigants who cannot afford representation. She has given tirelessly of her time and resources and is deserving of this recognition."



Burrell

W O M E N ' S S E C T I O N

# Awards

## MAUD MCLURE KELLY AWARD

*(Presented at the Women's Section Luncheon on Friday)*

Maud McLure Kelly was the first woman to be admitted to the practice of law in Alabama. In 1907, Kelly's performance on the entrance exam at the University of Alabama Law Department merited her admission as a senior, the second woman ever to have been admitted to the school.

### Merceria L. Ludgood

Merceria Ludgood earned undergraduate and graduate degrees from the University of Alabama and her law degree from the Antioch School of Law. In 1981, she entered private practice with Figures, Irby & Ludgood.

After serving as a board member for 10 years, Merceria was selected to lead the Legal Services Corporation of Alabama, predecessor to Legal Services Alabama, and later the staff of Legal Services Corporation in Washington, DC. Upon returning to Mobile, she joined the legal staff of the Mobile County Commission.

She has served on the Board of Bar Commissioners, the Alabama Commission on the Status of Women and Girls in the Criminal Justice System and as an alternate member of the Court of the Judiciary. She is a Fellow of the Alabama Law Foundation and a founding board member of the Alabama Appleseed Center for Law and Justice.

Merceria was selected for Leadership Mobile, Leadership Alabama and the W.K. Kellogg Foundation National Leadership Fellowship. She received Mobile United's A.F. Delchamps Award for "creating community by forging unity from diversity."

Merceria was elected to the full-time Mobile County Commission in 2007 and reelected three times without opposition. She was one of 25 elected women selected to participate in the 2017 Governing Magazine's Women's Leadership program.

Merceria's volunteer work includes United Way of Southwest Alabama and with Big Brother Big Sister as Big for her Little, Breanna. She is married to Carlos Williams, federal defender for the Southern District of Alabama.



Ludgood

## SUSAN B. LIVINGSTON AWARD

*(Presented at the Women's Section Luncheon on Friday)*

The recipient of this award must demonstrate a continual commitment to those around her as a mentor, a sustained level of leadership throughout her career and a commitment to her community in which she practices, such as, but not limited to, bar-related activities, community service and/or activities which benefit women in the legal field.

### Allison O. Skinner

Allison Skinner is a graduate of the University of Alabama and the University of Alabama School of Law. She clerked for the Hon. Sharon G. Yates on the Alabama Court of Civil Appeals before joining the Birmingham office of a regional firm. Allison then opened her own firm, offering ADR services. She now is senior vice president-senior corporate counsel at Cadence Bank, NA in Birmingham.



Skinner

Allison is co-chair of the multi-year task force for the Centennial Celebration of Women's Suffrage, engaging multiple private and public organizations to collaborate with the state bar's efforts. She is vice chair of the Alabama Department of Archives & History Women's Suffrage Centennial Celebration and the Vulcan Museum Suffrage Exhibit Steering Committee, as well as past chair of the state bar's Women's Section, having launched the section's first "Legislative Day" to promote women in public service.

She is in her second term as a bar commissioner for the 10<sup>th</sup> Judicial Circuit. Allison served as chair of the state bar's Dispute Resolution Section and was actively involved with the Alabama Center for Dispute Resolution as a roster member and trainer. She is a member of the Alabama Supreme Court Civil Rules Committee and served on the U.S. District Court for the Northern District ADR Rules Committee. She is a contributing editor to *The Alabama Lawyer* and past editor of the *Addendum* e-newsletter.

She is a Fellow of the American Bar Foundation, Alabama Law Foundation, Birmingham Bar Foundation, Academy of Court Appointed Masters and founding Fellow of the America College of e-Neutrals.

Allison is an active member of the Birmingham Bar Association and has served on many BBA committees. She is a member-at-large of the BBA's Women Lawyers Section and is a three-time recipient of its Distinguished Service Award. *Birmingham* magazine named her a "Top Attorney" in mediation. She has even authored a children's book.

She is on the Fundraising Committee for the local chapter of the Muscular Dystrophy Association. Allison participated in Leadership Birmingham and served on the



board of the Junior League of Birmingham for four years, graduating from its Leadership Institute. The Girl Scouts of Northern Alabama recognized her as a Woman of Distinction in its "One Smart Cookie" program.

Allison is married to David C. Skinner, also an attorney, and the couple has two children, ages 17 and 15.

## JUSTICE JANIE L. SHORES SCHOLARSHIP

To encourage the next generation of women lawyers, the Women's Section of the Alabama State Bar established the Justice Janie L. Shores Scholarship Fund. Named in honor of the first woman to sit on the Supreme Court of Alabama, the scholarship is awarded to an outstanding woman who is an Alabama resident attending law school in Alabama.

### Jennifer Townsend

Jennifer Townsend is a rising second-year law student at Cumberland School of Law. She is the daughter of Tyrone and Reorita Townsend and is a Birmingham native. She received her Master of Social Work from the University of Alabama and her Bachelor of Social Work



President-elect Christy Crow, Jennifer Townsend and Women's Section Chair Elizabeth Smithart

from the University of Alabama at Birmingham. Before attending law school, Jennifer was a social worker with the Jefferson County Office of the Public Defender and volunteers with Project Homeless Connect. Jennifer is clerking with the firm of Wiggins, Childs, Pantazis, Fisher & Goldfarb this summer and plans to pursue a career in labor and employment law.



## PRESIDENT'S AWARD

President Irby is recognizing the following members for best exemplifying the Alabama State Bar motto, "Lawyers Render Service."

**LaBella Alvis**  
**Mark Boardman**  
**Robert Bowers**  
**John Brinkley**  
**Bill Broome**

**Allan Chason**  
**Michael Ermert**  
**Kira Fonteneau**  
**Hon. Monet Gaines**  
**Jana Russell Garner**

**Charles Godwin**  
**Greg Hawley**  
**Tom Heflin**  
**Fred Helmsing**  
**Stephanie Hunter**  
**Bill Lancaster**  
**Karen Laneaux**  
**Madeline Lewis**  
**Randy May**  
**Rachel Miller**

**Levi Nichols**  
**Manish Patel**  
**Tom Perry**  
**Jeanne Rasco**  
**Taze Shepard**  
**Allison Skinner**  
**Andrew Stanley**  
**John Stamps**  
**Charles Tatum**  
**Terri Tompkins**





# 50-Year MEMBERS



Orrin Kaley Ames, III  
James Knox Argo  
David Lee Barnett  
Albert Colin Barrett  
George Milton Beason, Jr.  
John R. Behr, Jr.  
David Brown Blankenship  
Thomas Hall Boggs, Jr.  
John R. Boname  
Samuel H. Bradshaw, III  
Clifford Lanier Branch  
Joseph Barris Brogden  
Galen Scott Brown  
George Philip Bryson  
John George Cady  
Maria Bouchelle Campbell  
Grifton Edward Carden  
Tommy Chisholm  
Jack Michael Conaway  
Thomas Eugene Davis  
Charles Cook Dawson  
William Monroe Dawson, Jr.  
Ross Martin Diamond, III  
Russell Jackson Drake  
Wesley Wade Drinkard  
Edward Dwight Fay, Jr.  
Charles Eddie Floyd, Jr.  
James Morton Gaines  
Fournier Joseph Gale, III  
Ellis Palmer Golden, Jr.  
Walter Earle Gomel  
William Roger Gordon  
George McInvale Grant, Jr.

Thomas Guy Greaves, III  
Arthur Hoyt Groover  
John Owen Haley  
Donald Boucvalt Hankins  
John Barto Harper  
James Addison Harris, Jr.  
Ralph Nicolson Hobbs  
James Allen Holliman  
Calvin Marvin Howard  
Richard Oscar Hughes, Jr.  
Horace S. Hunt  
James Theodore Jackson, Jr.  
Leslie Gainer Johnson  
Merritte Scott Johnson  
Robert Galloway Johnson  
Marshall Alston Keith, Jr.  
Phillip Andrew Laird  
Susan Stivers Leach  
Winston Vaughan Legge, Jr.  
James William Lewis  
Roy Edgar Long  
William Breckenridge Long  
Michael Stephen Lottman  
Harris Edward McFerrin  
Donald Joseph McKinnon  
George D.H. McMillan, Jr.  
Robert Tweedy McWhorter, Jr.  
Edward Paul Meyerson  
Roy Wesley Miller  
Wendell Richmond Morgan  
Robert Edward Morrow  
Jack Thomas Noe  
Howard Crumpton Oliver

Paul Dennard Owens, Jr.  
Francis Anthony Poggi, Jr.  
Robert Leslie Potts  
Joseph Victor Price, Jr.  
Jack Moody Purser, Jr.  
James Edward Roberts  
Jasper Beroujon Roberts  
Louis Cooper Rutland  
Dieter Jurgen Schrader  
Edward Neal Scruggs, Jr.  
James Robert Seale  
William Amos Short, Jr.  
Robert Herschel Smith  
Mary McAnlis Smithburg  
Daniel Merrill Spitler, Jr.  
Charles Gaither Spradling, Jr.  
Donald Archibald Stewart  
William Edward Swatek  
James Joseph Thompson, Jr.  
John William Thompson, II  
Charles Henderson Tingle  
William Hendon Tucker  
Harvey Lee Wachsman  
Dennis Larry Waites  
John Stephens Walker  
David Hall Ward  
Jesse George Whitfield, Jr.  
Thomas Moore Wilkinson  
Roger Courtland Williams  
Wayne Lavon Williams  
Horace Guice Williams  
James Jerry Wood  
Frank Mobley Young, III

# THANK YOU TO OUR SPONSORS & EXHIBITORS

## SPONSORS:

### PLATINUM:

Attorneys Insurance Mutual of the South, Inc.  
Baker Realtime Worldwide Court Reporting & Video  
Freedom Reporting, a Veritext Company  
Insurance Specialists, Inc., Alabama

### GOLD:

Bradley Arant Boulton & Cummings, LLP  
Cite Court Reporting and Litigation Support  
LawPay  
Litigation Section  
Women's Section

### SILVER:

AlaCourt  
Business Law Section  
Construction Industry Section  
Diversity in the Profession Committee  
GEICO  
Government Contracts Section  
Leadership Forum Alumni Section  
Solo & Small Firm Section  
Taxation Law Section

### BRONZE:

2B Solutions, Inc.  
Alabama Court Reporting, Inc.  
Alabama Defense Lawyers Association (ADLA)  
Balch & Bingham, LLP  
Beasley Allen Crow Methvin Portis & Miles, P.C.  
Bedford, Rogers, Bowling & McReynolds, P.C.  
Business Torts & Antitrust Law Section  
Cartography Consulting, LLC  
Clio  
Cory Watson

Criminal Justice Section  
Disabilities Law Section  
Elder Law Section  
GilsbarPRO  
Hare, Wynn, Newell & Newton, LLP  
Health Law Section  
Holt, Mussleman, Morgan & Alvis  
In-House Counsel & Government Lawyers Section  
Jinks, Crow & Dickson, P.C.  
Jones Walker, LLP  
LexisNexis  
Maynard Cooper & Gale, P.C.  
Methvin, Terrell, Yancey, Stephens & Miller, P.C.  
MLQ Attorney Services/AlaServe Attorney Services  
Morris Haynes  
Nolan Byers, P.C.  
Real Property, Probate & Trust Section  
Redden Mills Clark & Shaw, LLP  
Regions Financial Corporation  
Regions Institutional Trust Services  
Rimkus Consulting Group, Inc.  
Senior Lawyers Section  
University of Alabama School of Law  
Wellbeing Coaching Consultants, LLC  
Workers' Compensation Section  
Young Lawyer's Section

### FRIEND OF THE BAR:

ABA Retirement Funds Program  
Administrative Law Section  
Alabama Center for Dispute Resolution, Inc.  
Allison and David Skinner  
Alyce M. Spruell  
Appellate Practice Section  
Bankruptcy & Commercial Law Section  
Cain and Associates Engineers & Constructors, Inc.  
Casemaker  
College Counts 529 Fund  
Comprehensive Investigative Group

Elections, Ethics & Government Lawyers Section  
Family Law Section  
Faulkner University Thomas Goode Jones School of Law  
Federal Court Practice Section  
International Law Section  
Law Offices of Jana Russell Garner  
Legal Imaging, LLC  
LocalLawyers.com, LLC  
Oil, Gas & Mineral Law Section  
Pine Grove Behavioral Health & Addiction Services  
Rushton, Stakely, Johnston & Garrett, P.A.  
Stone Crosby, P.C.  
Strategic Tax & Accounting, LLC  
The Law Office of Carmen F. Howell  
The Stamps Law Group, LLC  
William T. Coplin, Jr., LLC

### MEETING PATRONS:

Elizabeth C. Smithart, Attorney at Law  
Evans & Evans Lawyers, LLC  
Jeff Bowling  
Mark Boardman  
Prim & Mendheim, LLC  
Tommy James Law

### WIFI SPONSOR:

Mississippi Valley Title/Old Republic Title

### T-SHIRT SPONSOR:

Commonwealth Land Title Insurance Company

### KOOZIE SPONSOR:

Baker Realtime Worldwide Court Reporting & Video

### BAG SPONSOR:

Freedom Reporting, a Veritext Company

## EXHIBITORS:

2B Solutions, Inc.  
Alabama Association for Justice  
Alabama Center for Dispute Resolution, Inc.  
Alabama Civil Justice Foundation  
Alabama Court Reporting, Inc.  
Alabama Med Screen  
Alabama National Guard  
Alabama State Bar Volunteer Lawyer Program  
AlaCourt  
Atlanta Custom Tailors  
Attorneys Insurance Mutual of the South, Inc.  
Auburn University Pre-Law Program  
Baker Realtime Worldwide Court Reporting & Video  
Bayshore Retreat  
C&S Legal Tech Consulting Group, LLC  
Cain & Associates Engineers & Constructors, Inc.  
Cartography Consulting, LLC  
Casemaker  
Clio  
CollegeCounts 529 Fund  
Comprehensive Investigative Group  
Freedom Reporting, a Veritext Company  
GilsbarPRO  
Great Southern Land  
Huntsville Madison County Bar Association  
Insurance Specialists, Inc., Alabama  
LawPay  
Legal Imaging, LLC  
Legal Services Alabama  
LexisNexis  
LocalLawyers.Com, LLC  
MLQ Attorney Services  
Pearce & Associates Auction Company  
PEG, Inc.  
Pine Grove Behavioral Health & Addiction Services  
Rimkus Consulting Group, Inc.  
Smith.ai Virtual Receptionists & Live Website Chat  
Strategic Tax and Accounting LLC  
The Menninger Clinic  
Thomson Reuters  
TrackBill, LLC



## 2019 ANNUAL MEETING AWARDS RECIPIENTS & PHOTO HIGHLIGHTS

Thanks to Tripp Raleigh, Ashley Penhale, Robyn Bernier and Justin Aday for their photographic contributions!



Judge Jeff Kelley, Justice Bernard Harwood, Judge Carole Medley and Judge John England, Jr. prepare to share what judges wish that attorneys knew.



Taze Shepard thanks Dr. Kevin Elko for the "Three R's."



River Region band Outside the Inside entertained the poolside group during the Opening Night Reception.



Annalisa helps keep the traffic flowing the right way around the buffet tables at Wednesday evening's reception.



Mamie and Billy Bedsole found just the right spot to enjoy a breeze and the music by OTI.

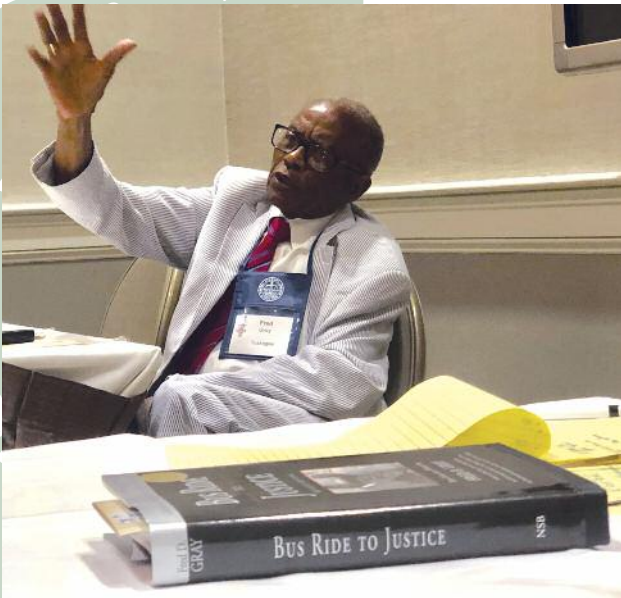


Isla Penhale, the ASB's unofficial social media star



You never know what super hero you'll run into at the Grand! (Big thank-you to Graham Martin and Ellie Pool!)





Past President Fred Gray shares memories of helping create social change during the Civil Rights Movement.



Margaret Loveman stops for a quick visit with Judy Butler, founder of Bayshore Retreat.



This was Jim Sasser's third visit with Tony Hoffman and the alacourt.com table.



The Slants, including Simon Tam (right), use music to tell the story of taking on the U.S. Supreme Court, and winning.



Chief Justice Tom Parker and President Sam Irby thank April Mullins, Grand Hotel senior sales manager, for all her help with this year's meeting.



Starr Drum livens up the serious topic of online privacy and the constantly changing laws relating to it.



Long-time attendees Mary Jane Oakley and her brother, Michael Oakley, visit with a friend at their "final" final annual meeting.





ALAP Director Robert Thornhill explains ways for lawyers to take better care of themselves.



You just never know who you might run into at the Past Presidents' Breakfast. Front row, left to right, are Justice Sonny Hornsby, Ben Harris, John Owens, Augusta Dowd, Fred Gray, Spud Seale and Boots Gale. On the back row are Phillip McCallum, Sam Crosby, Lee Copeland, Anthony Joseph, Rich Raleigh, Bill Clark, Sam Rumore, Larry Morris, Mark White, Cole Portis and Alva Caine.



Clemente Aguirre-Jarquín and attorneys Lindsey Boney and Dylan Black share the story of his wrongful conviction, incarceration and 10 years on death row.



Creating one-of-a-kind pieces at the Driftwood Art Project



Monika Glennon tells her story as the victim of an Internet smear campaign.



Another large group turned out for the Friends of Tony McLain Golf Tournament. Dropping by for a quick visit was Leah McLain.



Be sure to ask Gerald Paulk about the signatures on the bill of his cap!





Participants enjoyed samples from Belle Chevre goat cheese creamery—a great mid-afternoon break!



Baker Realtime Worldwide Court Reporting & Video, sponsor of the Roman Street band at the Closing Night Reception



Everette and Donna Price, longtime supporters of the Women's Section Silent Auction



As his term winds down, President Irby convinces wife Ginger to get on the dance floor and enjoy the music by Roman Street.

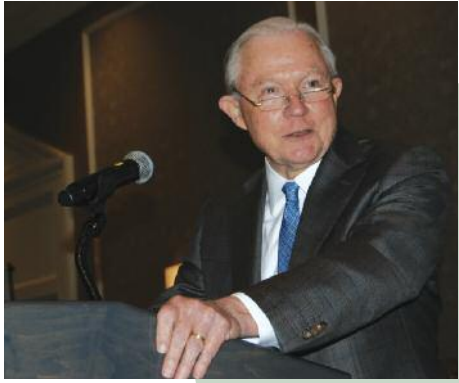


ISI Alabama sponsored several children's events at the annual meeting, including during the President's Closing Night Family Reception.



Bill Broome and friends enjoy the Brews, Barrels and Planks Mixer.





Former U.S. Attorney General Jeff Sessions, Grand Convocation keynote speaker



Past, present and future—Immediate past President Sam Irby, President Christy Crow and President-elect Bob Methvin



Kari Roberson is recognized and thanked for keeping President Irby on track during his term.



Wonder if Executive Director Phillip McCallum knows his gift from President Irby is upside down?



Susan Han (center), winner of the Grand Prize Giveaway, sponsored by ISI Alabama



President Christy Crow visits with family and friends while enjoying Sugarcane Jane.







## MAKE PLANS TO TRI THE GULF OCTOBER 19, 2019



In late 2015, the leadership of the Mobile Bar Association was trying to come up with a project to fund charitable endeavors through the Mobile Bar Foundation. The Mobile community already had an abundance of golf tournaments, silent auctions and cocktail party fundraisers. At a table at Moe's Original Bar B Q restaurant, the concept was spawned for the foundation's sponsoring a triathlon. In true lawyer fashion, a feasibility study was conducted, and it suggested that the community could support the event. In January 2016, the Tri The Gulf triathlon was created, and the first one was held later that year in October.

This year's Tri The Gulf Triathlon will be Saturday, October 19, on Dauphin Island. It will consist of a 600-yard open water swim in Pelican Bay, a protected inlet of the Gulf of Mexico, followed by a 16.7-mile bike ride on Dauphin Island, with a round trip across the Dauphin Island Bridge, followed by a 3.1-mile run on the island.

A great party with food by Greer's Food Stores and Wintzell's Oyster House will follow at the iconic and historically recognized Isle Dauphine Club facility on Dauphin Island. New this year are the Aqua-Bike and the Bike-Run courses for those who only want to participate in two of the three sports.

Registration deadline is October 14. The 2018 TTG registration closed due to capacity approximately 10 days before the event, so if you're interested in participating this year, don't wait until the last minute to register!

For more information, go to [www.trithegulf.com](http://www.trithegulf.com) or [www.facebook.com/trithegulf](https://www.facebook.com/trithegulf). All Alabama lawyers are invited and encouraged to participate in the triathlon. If triathlons aren't your cup of tea, please help us spread the word about the TTG to your family, friends and social media contacts.



FEDERAL  
GOVERNMENT  
CONTRACTS

THE ALABAMA LAWYER





# Playing Your Cards at Interpreting Federal Government Contracts

*By Jerome S. Gabig, Richard J.R. Raleigh and Christopher L. Lockwood*

## Introduction

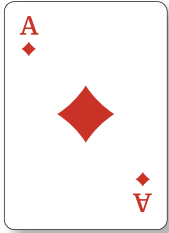
Redstone Arsenal accounts for 9.8 percent of Alabama's gross domestic product.<sup>1</sup> The importance of government contracts to Alabama's economy is even greater when one also considers Anniston Army Depot, Montgomery's Maxwell Air Force Base and Mobile's Austal shipbuilding complex. In the last 12 months alone, the federal government has awarded more than \$11 billion in contracts to business concerns throughout the state.<sup>2</sup> Inevitably, with such a high volume of government contracts also comes contractual disputes, and in a world where contract amounts can often exceed seven digits, a dispute over even a relatively small percentage of those funds can be significant.

Just as in the commercial sector, one of the most common types of contract disputes arises when the vendor and the customer have conflicting interpretations of the contract.<sup>3</sup> Federal contracts are interpreted according to federal common law, consisting of a body of decisions issued by the U.S. Court of Appeals for the Federal Circuit, U.S. Court of Federal Claims and the several agency "boards" of contract appeals (primarily, the Armed Services Board of Contract Appeals and the Civilian Agency Board of Contract Appeals).<sup>4</sup>

Resolution of government contract disputes is frustrated when the respective parties do not understand the rules of interpretation by which a court or agency board will resolve the dispute. The confusion

is analogous to playing a game of cards without understanding which cards outrank others in the deck. For example, if a dispute arises from a poorly drafted government solicitation, it may be tempting for a contractor to jump straight to the well-known rule that ambiguities are construed against the drafter. However, as discussed below, this is actually among the weakest rules of contract interpretation.

By analogy to a deck of cards, this article provides a simplified approach to help demystify the often-confusing federal common law rules of contract interpretation.



## Ace—Mutual Intent a.k.a. “the Cardinal Rule”

The cardinal rule of contract interpretation is to carry out the mutual intent of the parties.<sup>5</sup> Just as the ace is the highest card in the deck, the “cardinal rule” is the highest rule of contract interpretation. Accordingly, a court confronted with a contract dispute will first try to ascertain whether the written understanding is clearly stated and was plainly understood by the parties.<sup>6</sup> Occasionally, the rule is stated as giving effect to the “spirit and purpose” of the agreement.<sup>7</sup> Under this objective line of inquiry, the unexpressed subjective intent of either party has no bearing on how the contract should be interpreted.<sup>8</sup> Once satisfied as to mutual intent, a court can invoke the “principal apparent purpose” doctrine to overcome any apparent gaps or omissions in the contract language.<sup>9</sup>



## King—Patent Ambiguity and the Duty to Inquire

Frequently, the cardinal rule cannot be readily applied because the intent of the parties is unclear (or, possibly, they never had the same intent). Before proceeding to the secondary rules discussed below, a court must first determine, as a matter of law, whether the agreement is ambiguous and, if so, whether the ambiguity is latent or patent.<sup>10</sup> “A patent ambiguity is one that is obvious, gross, glaring, so that the contractor had a duty to inquire about it at the start.”<sup>11</sup> A latent ambiguity exists when the ambiguity is “neither glaring nor substantial nor patently obvious.”<sup>12</sup>

The distinction is crucial. If the ambiguity is latent, then the court may proceed to interpret the contract using the remainder of the rules below. The court may also allow the parties to introduce extrinsic evidence to help resolve the ambiguity.<sup>13</sup> If, however, the ambiguity is patent, it gives rise to a duty to inquire.<sup>14</sup>

The duty to inquire is a powerful rule in government contracting. Specifically, if a government solicitation contains a patent ambiguity, it triggers a duty to inquire on the part of the bidder to clarify the government’s interpretation.<sup>15</sup> If the bidder fails to inquire about a patent ambiguity, the bidder’s unilateral interpretation will fail.

Under proper circumstances, the patent ambiguity rule can overcome any of the other interpretation rules discussed below. Only if the court decides that the ambiguity was not patent will it reach the question of whether a contractor’s interpretation is reasonable.<sup>16</sup>

Unlike many of the other rules of contract interpretation, the patent ambiguity rule does not attempt to ascertain the most probable intent of the parties. Instead, this rule prevents contractors from taking advantage of the government, ensures that all bidders bid on the same specifications and attempts to resolve ambiguities before a contract is awarded, thereby avoiding costly after-the-fact litigation.<sup>17</sup>



## Queen—The Whole Instrument Rule

Assuming that a contractor’s interpretation is not foreclosed by a failure to inquire, the next highest rule of interpretation is the whole instrument rule.<sup>18</sup> Under the whole instrument rule, an interpretation that gives a reasonable meaning to all parts of an instrument will be preferred to one that leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous.<sup>19</sup> Additionally, a court will avoid construing any contractual provision as being in conflict with another, unless no other reasonable interpretation is possible.<sup>20</sup> Thus, if a provision can be interpreted in two ways—one that is consistent with other contractual clauses and one that conflicts—the whole instrument rule dictates that the consistent reading is preferred. A harmonious reading of the whole instrument prohibits a twisted or strained analysis that would take terms out of their context.

As we descend into the remainder of the deck, it is worth noting that each of the following rules is



progressively less concerned with ascertaining the actual intent of the parties and is more reliant on providing a mechanical substitute to determine the most probable intent. The more mechanical the rule, the less it is preferred, as it is less likely to reflect the true intent of the parties and therefore less likely to give effect to the cardinal rule.



## Jack—The Express Language Rule

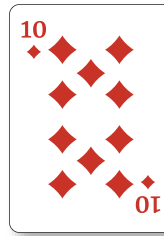
After avoiding a twisted interpretation under the whole instrument rule, the express language rule dictates that if the language of a contract is subject to only one reasonable interpretation, then that interpretation should prevail.<sup>21</sup> Like the whole instrument rule, and often used in conjunction with it, the express language rule is a central tool of contract interpretation. If, after examining the intrinsic features of the instrument, the court finds that its terms are clear and unambiguous, the court will give those terms their plain and ordinary meaning and will not resort to extrinsic evidence as an aid to interpretation.<sup>22</sup>

The express language rule behooves parties to read their agreements before signing them. The rule recognizes that, absent highly unusual circumstances, the parties should be able to rely on the chosen language of their contract. For example, the parties are fully entitled to use express language to deviate from a prior course of dealings or custom in trade.<sup>23</sup> Thus, a prior course of dealings will not override definitions that are provided in the express language of a contract.<sup>24</sup>

Professor Ralph Nash, the preeminent scholar on federal government contracts, attributes to a pundit, EK Gubin, the adage, “When all else fails, read the contract.”<sup>25</sup> Professor Nash went on to explain: “In 1960, that was good advice. In 2011, that’s bad advice. You better read the contract before you sign it.”<sup>26</sup> Courts do not permit a party to avoid contractual obligations by claiming ignorance of the express terms to which they agreed.<sup>27</sup> Failing to read a document before signing it does not enable one to ignore the obligations imposed by that document.<sup>28</sup> Consequently, a contractor who submits a bid without reading all the specifications does so at its own peril.<sup>29</sup>

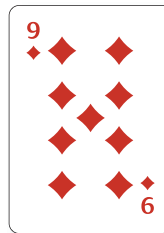
Fortunately, the government is also precluded from pleading ignorance as a basis for avoiding its contractual obligations. In *Alkai Consultants, LLC, ASBCA* No. 56792, 10-2 B.C.A. (CCH) ¶ 34493 (June 24,

2010), the Armed Services Board of Contract Appeals overturned a termination for default where the contracting officer misunderstood the delivery date and “thought the completion date had passed.”<sup>30</sup>



## Ten—Conduct of The Parties

If the express language fails to resolve a disagreement, the next step is to consider the parties’ conduct under the contract prior to the dispute. How the parties acted under an agreement before the advent of controversy is often more revealing than the dry language of the written agreement by itself.<sup>31</sup> The rationale behind this rule is that the interpretation the parties place upon a contract during their performance demonstrates their intent.<sup>32</sup> Once the interpretation of the contract becomes controversial, however, a party is apt to manipulate its behavior to buttress its own litigating position. As such, behavior after a controversy arises is not a trustworthy indicator of intent.<sup>33</sup>

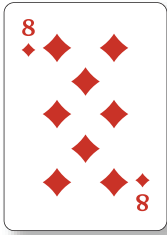


## Nine—Knowledge of The Other Party’s Interpretation

A party who willingly and without protest enters into a contract with knowledge of the other party’s interpretation is bound by such interpretation.<sup>34</sup> In the context of government contracts, this rule dates back to a 1970 Court of Claims decision in *Perry & Wallis v. United States*.<sup>35</sup> In that case, the court found that the contractor was aware of the agency’s interpretation of a disputed contractual provision due to its involvement as a subcontractor in a similar claim against the same agency involving the same contractual language. Having agreed to the language with knowledge of the agency’s interpretation, and without making any inquiry to the contrary, the court held that the contractor was bound by the agency’s prior interpretation.

Likewise, the government can be bound by failing to object to the known interpretation of a contractor.<sup>36</sup> In a 2006 case involving a tax settlement agreement, the Court of Federal Claims found that the plaintiff had clearly communicated its interpretation to the IRS during the negotiation of the agreement. Applying *Perry*

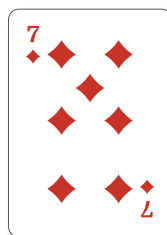
& Wallis, the court held that this rule of contract interpretation “may apply equally to the government.”<sup>37</sup>



## Eight–Prior Course of Dealings

A course of dealing is defined as “a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a basis of understanding for interpreting their express and other conduct.”<sup>38</sup> A course of dealing involves more than just a single transaction or event.<sup>39</sup> One or two prior deviations from a contract are not enough.<sup>40</sup> A court will look to whether the prior conduct is of sufficient similarity and repetitiveness to constitute an understanding.<sup>41</sup> If a sufficient course of dealing is found, the rule precludes the government from suddenly changing a long-standing interpretation of contract language to the detriment or prejudice of a contractor who has acted in reliance on that historic definition or contractual practice.<sup>42</sup>

This rule does not focus on the parties’ conduct during the contract at issue. Rather, the focus is on the parties’ interpretation of past similar contracts. Under this rule, the parties’ actions under past contracts are taken as strong evidence of their intent when entering into subsequent transactions with each other. Unless the parties agreed to deviate from their prior course of dealings, it may be presumed that they intended to continue dealing in the same manner.

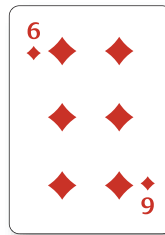


## Seven–Trade Usage

The Federal Circuit’s decision in *Metric Constructors, Inc. v. NASA* contains a detailed discussion of trade usage as a tool of contract interpretation.<sup>43</sup> Before arriving at a legal reading of a contract provision, a court must consider the context and intentions of the parties.<sup>44</sup> According to the Federal Circuit, evidence of trade practice and custom is part of the initial assessment of contract meaning.<sup>45</sup> It illuminates the contemporaneous circumstances of the time of contracting, giving life to the intentions of the parties.<sup>46</sup> It helps pinpoint the bargain the parties struck and the reasonableness of their subsequent interpretations of that bargain.<sup>47</sup> Thus, where trade usage or custom attaches a special meaning to certain words or

terms, a party may be permitted to introduce evidence of that special meaning to enable the court to interpret the contract language in accordance with the intention of the parties.<sup>48</sup>

However, evidence of trade usage does not override an otherwise unambiguous contract provision.<sup>49</sup> A contracting party cannot invoke trade practice and custom to create an ambiguity where a contract was not reasonably susceptible of differing interpretations at the time of contracting.<sup>50</sup> Trade practice evidence is not an avenue for a party to avoid its contractual obligations by later invoking a conflicting trade practice.<sup>51</sup> Instead, a court will accept evidence of trade practice only when a party shows that it relied reasonably on a competing interpretation of the words when it entered into the contract.<sup>52</sup>



## Six–Specific Over General

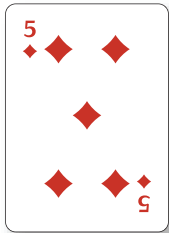
After trade usage, we begin to reach the bottom of the deck, where the rules are significantly more mechanical in their operation. These rules often carry Latin names such as *generalia specialibus non derogant* (“the general does not detract from the specific”). However, if your best argument is in Latin, realize that you may be holding weak cards.

Where specific and general terms in a contract are in conflict, those which relate to a particular matter control over the more general language.<sup>53</sup> This rule is based on the rationale that people commonly use general language without a clear consciousness of its full scope and without awareness that exception should be made.<sup>54</sup> When two provisions clearly contradict so that both cannot be given full effect, it is presumed that the more specific provision is likely to reflect the parties’ intent.<sup>55</sup> Treating the specific language as an exception to the general terms, so that both are given some effect, is viewed as being in accordance with the whole instrument rule.<sup>56</sup>

In *Goldwasser v. United States*, the plaintiff received a Navy contract to print and deliver a weekly newspaper called *The Shipworker*.<sup>57</sup> The contract contained two conflicting provisions regarding the minimum number of copies the Navy was required to order. One provision generally stated that the Navy would order indefinite quantities of not less than \$100 per period. Another more specific provision stated that the Navy would order a minimum of 10,000



copies per issue and contained requirements regarding additional copies and print/color specifications. The court found that the indefinite quantities provision was boilerplate language resulting from the Navy's selection of an incorrect contract form. The court rejected that general language and instead applied the specific minimum quantities set forth in the second, more specific, provision.



## Five—Other Miscellaneous Maxims

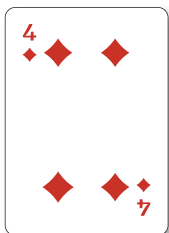
Miscellaneous maxims are a hodgepodge of mechanical rules that jurists sometimes use to infer the most probable intent of the parties. The rule of specific over general, discussed above, is one such maxim. Other examples include:

*Noscitur a sociis* (“it is known by its associates”)—a word used by the parties in one sense is to be interpreted as employed in the same sense throughout the writing, in absence of countervailing reasons.<sup>58</sup>

*Ejusdem generis* (“of the same kind or class”)—when a list of specific matters is followed by more general words relating to the same subject matter, the general words are interpreted as meaning things of the same kind as the list of specific matters to which the parties refer.<sup>59</sup>

*Expressio Unius est Exclusio Alterius* (“the expression of one thing is the exclusion of another”). According to the ASBCA, “It is rightly applied as an aid in contract interpretation, where one or more objects in a class are specifically named and another object of that class is not named.”<sup>60</sup>

At their core, these various maxims are little more than extensions of the whole instrument rule. When other aspects of an instrument may help inform the meaning of a specific term, these maxims may serve as helpful references for accomplishing that task.



## Four—Order of Precedence Clauses

An order of precedence clause is an agreement between the parties on how inconsistencies in the contract should be resolved. FAR § 52.215-8 provides an order of precedence clause:

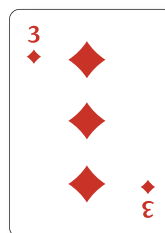
Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:

- (a) The Schedule (excluding the specifications)
- (b) Representations and other instructions
- (c) Contract clauses
- (d) Other documents, exhibits, and attachments
- (e) The specifications.

For construction contracts, it is not uncommon for an order of precedence clause to state: “In case of differences between drawings and specifications, the specifications shall govern.” Thus, if a specification requires the construction of only six dog kennels but the drawings show eight kennels, the contractor is only required to construct the six kennels set forth in the specifications.<sup>61</sup>

Since an order of precedence clause is the result of an express agreement of the parties, one might be tempted to consider it a very strong card in the deck. In practice, however, one must first apply the foregoing rules. Clearly, an order of precedence clause will not overcome the cardinal rule of contract construction.<sup>62</sup> Nor will it circumvent the whole instrument rule.<sup>63</sup> Moreover, if an erroneous specification creates a patent ambiguity, it may give rise to a duty to inquire.<sup>64</sup>

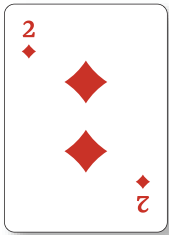
Finally, by its very nature, an order of precedence clause presupposes that there has been an error (almost always by the government) resulting in a conflict between, for example, the drawings and the specifications. Because these clauses merely seek to protect the government from its own mistakes, they are strictly construed, even if the result works against the government's needs. Therefore, order of precedence clauses are relegated to a lowly status among contract interpretation rules.



## Three—Punctuation

Reliance on punctuation has long been recognized as a poor method of contract interpretation. In 1965, the

United States Court of Claims aptly stated: “Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the Court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent, on judicially inspecting the whole, the punctuation will not be suffered to change it.”<sup>65</sup>



## Two–Interpretation Against the Drafter

As mentioned in the introduction, many are familiar with the rule that ambiguities in a contract may be interpreted against the drafting party. However, this rule is widely recognized as a “rule of last resort,” which is only used after all other cards have been played.<sup>66</sup> Frequently, the rule is called by its Latin name—*contra proferentem* (“against the one bringing forth”). This mechanical rule places the consequences for lack of clarity upon the party responsible for the poor draftsmanship. The rule is premised upon favoring the party that is least culpable for the existence of the dispute. The rule does not apply to clauses that have their basis in statutes or regulations which have the force and effect of law.<sup>67</sup>

There seems to be a common misperception that *contra proferentem* is a powerful rule of contract interpretation. This misconception is likely due to the fact that the rule is very mechanical and easy to understand and apply. However, since the rule is essentially punitive (usually against the government), and therefore least likely to ascertain the most probable intent of the parties, it is viewed as the lowest of all the rules and is only applied only after all other modes of interpretation have failed.

## Conclusion

Many contract disputes remain unresolved because the parties do not understand the applicable rules of interpretation. As discussed above, the overarching goal is to ascertain the mutual intent of the parties. Since attempting to divine intent can be a nebulous task, courts have developed a system of increasing mechanical rules to aide in determining the most probable intent of the parties. As discussed in this article, one way to conceptualize these rules is by analogy to the hierarchy within a deck of cards.

Keep in mind, while rules are often helpful, contract interpretation tends to be more art than science. If mutual intent is clear, no mechanical rule will overcome it. And, only if a court is unable to ascertain the most probable intent will it resort to a punitive result, such as *contra proferentem*.

We hope that this article will be a helpful reference in your next federal contract interpretation dispute. ▲

## Endnotes

1. <https://www.al.com/business/2018/11/redstone-arsenal-leader-sees-50000-working-on-base-in-2025.html>.
2. <https://www.usaspending.gov/#/state/01>.
3. “The most frequently litigated issue in government contracting is probably the correct interpretation of contract language.” *Interpretation Disputes: Finding An Ambiguity*, 4 *Nash & Cibinic Report* ¶ 25 (April 1990).
4. See *United States v. Greer*, \_\_\_ F. Supp. 3d \_\_\_, 2019 WL 282035 (2019), Jan. 22, 2019 (“[O]bligations to and rights of the United States under its contracts are governed exclusively by federal law.” *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504, 108 S. Ct. 2510, 101 L. Ed. 2d 442 (1988). “Courts must therefore apply the federal common law of contracts to the interpretation of contracts with the federal government.” *Red Lake Band of Chippewa Indians v. U.S. DOI*, 624 F. Supp. 2d 1, 12 (D.D.C. 2009).”).
5. *Hegeman-Harris & Co. v. United States*, 440 F.2d 1009, 1014 (1971). See also 11 *Williston on Contracts* § 32:2 (4th ed.); *Nicholson v. United States*, 29 Fed. Cl. 180, 194 (1993); *Tri-Star Elecs. Int’l, Inc. v. Preci-Dip Durtal SA*, 619 F.3d 1364, 1367 (Fed. Cir. 2010); and *M.A. Mortenson Co.*, ASBCA No. 53062, 01-2 BCA (CCH) ¶ 31573 (Aug. 17, 2001).
6. *King v. Dep’t of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir. 1997).
7. *Navcom Def. Elecs., Inc.*, ASBCA No. 50767, 01-2 B.C.A. (CCH) ¶ 31546 (July 25, 2001) (“Provisions of a contract must be so construed as to effectuate its spirit and purpose.”).
8. *Cooper Realty Co. v. United States*, 36 Fed. Cl. 284, 289 (1996) (“When construing a contract, the court seeks to ascertain the objective intent of the parties, thus “mental reservations are legally irrelevant.”); *Singer-Gen. Precision, Inc. v. United States*, 427 F.2d 1187, 1193 (Ct. Cl. 1970) (“the unexpressed, subjective, unilateral intent of one party is insufficient to bind the other.”).
9. 11 *Williston on Contracts* § 32:9 (4th ed.). *E.g., Sea-Land Serv. v. United States*, 553 F.2d 651, 656 (1977).
10. *K-Con, Inc. v. Sec’y of Army*, 908 F.3d 719, 722 (Fed. Cir. 2018).
11. *States Roofing Corp. v. Winter*, 587 F.3d 1364, 1372 (Fed. Cir. 2009).
12. *K-Con, Inc.*, 908 F.3d at 722.
13. *E.g. BPLW Architects & Engineers, Inc. v. United States*, 106 Fed. Cl. 521 (2012).
14. *Cnty. Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1579 (Fed. Cir. 1993).
15. *K-Con, Inc.*, 908 F.3d at 722.
16. *Newsom v. United States*, 676 F.2d 647, 650 (Ct. Cl. 1982).
17. *Newsom*, 676 F.2d at 649.
18. See *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965). The whole instrument rule is often discussed in relation to cardinal rule. *M&G Polymers USA, L.L.C. v. Tackett*, 135 S. Ct. 926, 937 (2015) (“Under the ‘cardinal principle’ of contract interpretation, the intention of the parties, to be gathered from the whole instrument, must prevail.”) (Ginsburg, J., concurring); and *AMP, Inc. v. United States*, 389 F.2d 448, 454 (1968) (“But it is also a cardinal rule that the parties’ intent must be gathered from the instrument as a whole.”).
19. *Hol-Gar Mfg. Corp.*, 351 F.2d at 979. See also *City of New York v. United States*, 113 F. Supp. 645, 647 (Ct. Cl. 1953) (“To resolve this apparent ambiguity we look to the intention of the parties which is to be gathered not from a reading of paragraph 5(a) alone, but from the whole instrument in the light of the circumstances existing at the time of its negotiation.”).
20. *Id.* See also *Appeal of M.A. Mortenson Co.*, VABCA No. 2435, 88-3 B.C.A. (CCH) ¶ 20895 (June 14, 1988).
21. *C. Sanchez & Son, Inc. v. United States*, 6 F.3d 1539, 1543 (Fed. Cir. 1993) (“A contract is read in accordance with its express terms and the plain meaning thereof.”); *Blackstone Consulting Inc. v. United States*, 65 Fed. Cl. 463, 469 (2005) (“[T]he court must endeavor to effectuate the parties’ intention using the plain language of the agreement itself.”) *aff’d*, 170 F. App’x 128 (Fed. Cir. 2006); *Hills Materials Co. v. Rice*, 982 F.2d 514, 516 (Fed. Cir. 1992) (“Wherever possible, words of a contract should be given their ordinary and common meaning.”).
22. *Coast Fed. Bank, FSB v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003).
23. *MPE Bus. Forms, Inc.*, GPOBCA No. 10-95 (Aug. 16, 1996); *Sixth & E Assocs., L.L.C.*, 09-2 B.C.A. (CCH) ¶ 34179 (June 22, 2009); *Houck Ltd.*, 09-1 B.C.A. (CCH) ¶ 34134 (May 5, 2009).
24. *MPE Bus. Forms, Inc.*, GPOBCA No. 10-95 (Aug. 16, 1996) (“In this case, however, the Appellant’s ‘trade usage’ argument must fail because the contract itself defines the critical term.”).
25. 213 *Military Law Review* (Fall 2012) at 197.
26. *Id.* at 198.



27. *Upton v. Tribilcock*, 91 U.S. 45 (1875); *Nichols v. United States*, 29 Fed. Cl. 180 (1993).
28. *Alaska Am. Lumber Co. v. United States*, 25 Cl. Ct. 518, 529 (1992).
29. *Dale Ingram, Inc. v. United States*, 475 F.2d 1177, 1184 (Ct. Cl. 1973); *Sauer Mech., Inc.*, NASA BCA No. 884-9, 86-2 B.C.A. (CCH) ¶ 18884 (Mar. 6, 1986); *Z.A.N. Co.*, ASBCA No. 25488, 86-1 B.C.A. (CCH) ¶ 18612 (Nov. 29, 1985) *Turnkey Enters., Inc. v. United States*, No. 304-76, 1979 WL 16470, at \*6 (Ct. Cl. Jan. 31, 1979), *aff'd*, 597 F.2d 750 (Ct. Cl. 1979); *P & K Contracting, Inc. v. United States*, 108 Fed. Cl. 380, 396 (2012), *aff'd*, 534 F. App'x 1000 (Fed. Cir. 2013).
30. *ALKAI Consultants, LLC*, 09-1 BCA ¶ 24058, ASBCA No. 55581.
31. *Omni Corp. v. United States*, 41 Fed. Cl. 585, 591 (1998); *Macke Co. v. United States*, 467 F.2d 1323, 1325 (1972).
32. *Boye v. United States*, No. 07-195 C, 2008 WL 11408605, at \*1 (Fed. Cl. Nov. 18, 2008); *Floyd v. Ring Const. Corp.*, 165 F.2d 125, 129 (8th Cir. 1948) (“[W]here ambiguity exists in a contract the construction the parties in their dealings and by their conduct have placed upon the terms will furnish the court with persuasive evidence of their meaning.”); *Edward R. Marden Corp. v. United States*, 803 F.2d 701, 705 (Fed. Cir. 1986) (“It is the general law of contracts that in construing ambiguous and indefinite contracts, the courts will look to the construction the parties have given to the instrument by their conduct before a controversy arises.”).
33. *Fincke v. United States*, 675 F.2d 289, 295 (1982) (“Their actions and conduct before the inception of a controversy is of much greater weight than what they said or did after a dispute arose.”); *Liles Constr. Co. v. United States*, 455 F.2d 527, 538–39 (1972) (“It is only actions and interpretations before the controversy arises, conduct during performance, that are highly relevant in determining what the parties intended.”); and *Dynamics Corp. of Am. v. United States*, 389 F.2d 424, 430 (1968).
34. *Perry & Wallis, Inc. v. United States*, 427 F.2d 722, 725 (1970); *Blue Cross & Blue Shield United of WI & Subsidiaries v. United States*, 71 Fed. Cl. 641, 649 (2006); *HPI/GSA 3C, LLC v. Perry*, 364 F.3d 1327 (Fed. Cir. 2004); *Appeal of PCA Health Plans of Texas, Inc.*, ASBCA No. 48711, 98-2 B.C.A. (CCH) ¶ 29900 (June 24, 1998).
35. *Perry & Wallis, Inc. v. United States*, 427 F.2d 722, 725 (Ct. Cl. 1970).
36. *Blue Cross & Blue Shield United of WI & Subsidiaries v. United States*, 71 Fed. Cl. 641, 646 (2006) (“This rule may apply equally to the government; i.e., that the meaning BCW assigns to paragraph (3)(e) could prevail if, at the time the agreement was made, the government knew or should have known how BCW understood the provision and did nothing further.”).
37. *Id.*
38. *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 688 (1994) (citing Restatement (Second) of Contracts § 223 (1981)) at 157-58 (1981).
39. *IAP World Servs., Inc.*, 12-2 B.C.A. (CCH) ¶ 35119 (Aug. 13, 2012); and *Cape Romain Contractors, Inc.*, ASBCA No. 50557, 00-1 B.C.A. (CCH) ¶ 30697 (Dec. 15, 1999) citing *Doyle Shirt Mfg. Corp. v. United States*, 462 F.2d 1150, 1153 (Ct. Cl. 1972). *See also Appeal of Tech. Sys., Inc.*, ASBCA No. 59577, 17-1 B.C.A. (CCH) ¶ 36631 (Jan. 12, 2017) (auditor’s failure to challenge a cost in one audit did not constitute a course of conduct precluding the government from disallowing the costs in subsequent audits.).
40. *Custom Printing Co.*, GPOBCA No. 28-94 (Mar. 12, 1997).
41. *Romala Corp. v. United States*, 20 Cl. Ct. 435, 446 (1990), *aff’d*, 927 F.2d 1219 (Fed. Cir. 1991).
42. *Custom Printing Co.*, GPOBCA No. 28-94 (Mar. 12, 1997).
43. *Metric Constructors, Inc. v. NASA*, 169 F.3d 747, 752 (Fed. Cir. 1999).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Western States Const. Co. v. United States*, 26 Cl. Ct. 818, 823 (1992) (citing 17A Am Jur. 2d *Effect of usage, custom, or course of dealing* § 364 (1991)).
49. *Id.*
50. *Metric Constructors, Inc.*, 169 F.3d at 752.
51. *Id.*
52. *Id.*
53. *Hills Materials Co. v. Rice*, 982 F.2d 514, 517 (Fed. Cir. 1992) citing *Hol-Gar Mfg.*, 351 F.2d at 980.
54. Restatement (Second) of Contracts § 203, comment e. (1981).
55. *Abraham v. Rockwell Int’l Corp.*, 326 F.3d 1242, 1254 (Fed. Cir. 2003) quoting *Farnsworth on Contracts* § 7.11 (2d ed. 2000).
56. Restatement (Second) of Contracts § 203, comment e. (1981).
57. *Goldwasser v. United States*, 325 F.2d 722 (Ct. Cl. 1963).
58. 11 Williston on Contracts § 32:6 (4th ed.). *See also Shell Oil Co. v. United States*, 751 F.3d 1282, 1305 (Fed. Cir. 2014) (Reyna, J., dissenting).
59. 11 Williston on Contracts § 32:10 (4th ed.); *Bighorn Lumber Co. v. United States*, 49 Fed. Cl. 768, 771 (2001).
60. *ITT Defense Communications Div.*, ASBCA No. 44791, 98-1 BCA ¶ 29,590 citing 3 *Corbin on Contracts* § 552 (1960); *See also Smelser v. United States*, 53 Fed. Cl. 530 (2002) and *Beard v. United States*, 125 Fed. Cl. 148 (2016).
61. *Appeal of Sommers Bldg. Co., Inc.*, ASBCA No. 32232, 86-3 B.C.A. (CCH) ¶ 19223 (July 28, 1986). *See also Hensel Phelps Const. Co. v. United States*, 886 F.2d 1296, 1298 (Fed. Cir. 1989); *Franchi Const. Co. v. United States*, 609 F.2d 984, 990 (Ct. Cl. 1979).
62. *Apollo Sheet Metal, Inc. v. United States*, 44 Fed. Cl. 210, 214 (1999); and *Appeal of John C. Grimberg Co., Inc.*, PSBCA No. 1085, 83-2 B.C.A. (CCH) ¶ 16836 (June 21, 1983).
63. *Sperry Corp. v. United States*, 845 F.2d 965 (Fed. Cir. 1988).
64. *W. Bay Builders, Inc. v. United States*, 85 Fed. Cl. 1, 29 (2008).
65. *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 976 (Ct. Cl. 1965). *See also Marathon Oil Co. v. Kleppe*, 556 F.2d 982, 985 (10th Cir. 1977) (internal quotations omitted).
66. *Gardiner, Kamy & Assocs., P.C. v. Jackson*, 467 F.3d 1348 (Fed. Cir. 2006); *Dick Pacific/GHEMM, JV ex rel. W.A. Bottling Co. v. United States*, 87 Fed. Cl. 113, 126 (2009).
67. *Honeywell Inc. v. United States*, 661 F.2d 182, 186 (Ct. Cl. 1981).

---

### Jerome S. Gabig, Jr.



Jerry Gabig is of counsel in the Huntsville office of Wilmer & Lee. He is chair of the Alabama State Bar’s Government Contracts Section.

---

### Richard J.R. Raleigh, Jr.



Rich Raleigh is a shareholder in the Huntsville office of Wilmer & Lee. He is a past president of the Alabama State Bar and co-chair of the firm’s government contracts practice group.

---

### Christopher L. Lockwood



Chris Lockwood is a shareholder in the Huntsville office of Wilmer & Lee and is a member of the firm’s government contracts practice group.



## OPINIONS OF THE GENERAL COUNSEL

**Roman A. Shaul**  
*roman.shaul@alabar.org*

# Lawyer's Indemnification of Defendants for Unpaid Liens

### QUESTION:

May a plaintiff's or claimant's lawyer, on behalf of his client, personally indemnify an opposing party, their insurer or their lawyer for any unpaid liens or medical expenses? May a lawyer request or require another lawyer to personally indemnify the lawyer's client against any unpaid liens or medical expenses as a condition of settlement?

### ANSWER:

Pursuant to Rules 1.7 and 1.8(e), Alabama Rules of Professional Conduct, a plaintiff's or claimant's lawyer, on behalf of his client, may not agree to personally indemnify the opposing party for any unpaid liens or medical expenses due to be paid from the settlement proceeds or underlying cause of action unless the liens or expenses are known and certain in amount at the time of the proposed settlement. Likewise, a lawyer representing the defendant or the defendant's insurer may not request or require the opposing lawyer to personally indemnify defendant(s) for unpaid liens or medical expenses as a condition of settlement unless such liens and expenses are known and certain in amount at the time of the proposed settlement.

If the amount of the lien or expense is known at the time of settlement, the plaintiff's attorney may agree on behalf of the client to use the settlement funds

to satisfy such liens or expenses, and, thereby, relieve the defendant or his insurer of any further liability. However, a settlement agreement may not contain language requiring an attorney to indemnify an opposing party, their insurer or their lawyer for unknown liens or expenses or where the amount of such liens or expenses is unknown at the time of settlement. Such a request would violate Rule 8.4(a), Ala. R. Prof. C., which prohibits an attorney from "induc(ing) another" to violate the Rules of Professional Conduct.

### DISCUSSION:

The Disciplinary Commission has been asked to issue a formal opinion regarding the growing trend of defense counsel requiring, as a condition to settlement, that plaintiff's counsel personally indemnify the defendant, his insurer and counsel against any unpaid liens, medical bills or third-party claims against the plaintiff arising from the litigation. In examining the issue, the Disciplinary Commission notes that 13 bars have issued formal opinions expressly prohibiting plaintiff's counsel from entering into such indemnification agreements.<sup>1</sup> In finding that such indemnification agreements are prohibited, these bars found that such agreements may create an impermissible conflict of interest and/or constitute improper financial assistance to the client.



For instance, the New York City Bar Association determined that such indemnity agreements by a client's lawyer to "guarantee a client's obligations to third party insurers . . . amounts to 'guaranteeing financial assistance to the client.'" Rule 1.8(e), Ala. R. Prof. C., provides as follows:

**RULE 1.8 CONFLICT OF INTEREST:  
PROHIBITED TRANSACTIONS**

\* \* \*

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client;

(3) a lawyer may advance or guarantee emergency financial assistance to the client, the repayment of which may not be contingent on the outcome of the matter, provided that no promise or assurance of fi-

ancial assistance was made to the client by the lawyer, or on the lawyer's behalf, prior to the employment of the lawyer; and

(4) in an action in which an attorney's fee is expressed and payable, in whole or in part, as a percentage of the recovery in the action, a lawyer may pay, for his own account, court costs and expenses of litigation. The fee paid to the attorney from the proceeds of the action may include an amount equal to such costs and expenses incurred.

Under Rule 1.8(e), a lawyer may not provide any financial assistance to a client except in limited circumstances as set out in the rule. An indemnification agreement in which the lawyer agrees to be personally liable for any outstanding liens or medical expenses incurred by the client would not fall under any of the exceptions to the rule and would, therefore, constitute impermissible financial assistance to the client.

Other bars have focused on the fact that indemnification agreements create an impermissible conflict between the financial interests of the lawyer and those of the client. Rule 1.7(b), Ala. R. Prof C., provides as follows:

*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**

(Continued from page 373)

RULE 1.7 CONFLICT OF INTEREST: GENERAL RULE

\*\*\*

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

As noted by the Arizona Bar in Ethics Op. 03-05 “[t]he mere request that an attorney agree to indemnify Releasees against lien claims creates a potential conflict of interest between the claimant and the claimant’s attorney.” Such a conflict involves the lawyer’s own financial interests in seeking to avoid such exposure and liability for the client’s debts and the client’s own desire to settle the matter on favorable financial terms.

While the Disciplinary Commission agrees that a plaintiff’s or claimant’s lawyer may not generally indemnify an opposing party, their insurer or their lawyer for any unpaid liens or medical expenses, a lawyer may agree, on behalf of the client, to use settlement funds to satisfy liens and expenses that are known and certain at the time of settlement. In order to do so, the amount of the lien or expense must be known at the time of the settlement. The liens or expenses to be satisfied under the terms of the settlement must be included in the settlement agreement. Further, the client must agree, in writing, that the settlement funds will be used to satisfy those liens or expenses. Such would be akin to the lawyer’s issuing a letter of protection to the opposing party, their insurer or their lawyer that the settlement funds will be used to satisfy a particular lien or expense. Once an agreement has been entered into amongst the parties, the plaintiff’s or claimant’s lawyer would have an ethical obligation to ensure the payments are made.

Just as a plaintiff’s or claimant’s lawyer may not agree to sign a general indemnification agreement on behalf of a client, a lawyer representing a defendant may not require the plaintiff’s lawyer to personally and generally indemnify the defendant against any unpaid liens or medical expenses

as a condition of settlement. Requiring general indemnification as a condition of settlement is analogous to when a lawyer is required to agree to refrain from representing other persons against the defendant in exchange for settling a claim on behalf of a client. Rule 5.6(b), Ala. R. Prof C., expressly prohibits any lawyer from offering or making any agreement that would place a restriction on a lawyer’s right to practice as part of a settlement between private parties. Just as a lawyer cannot participate in making or requiring any agreement that would limit a lawyer’s right to practice, a lawyer cannot agree to or require another lawyer to personally enter into a general indemnification agreement on behalf of a client.

Further, Rule 8.4(a), Ala. R. Prof C., provides, in part, as follows:

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another . . .

As discussed previously, a plaintiff’s or claimant’s lawyer, on behalf of the client, may not agree to personally and generally indemnify the opposing party and his lawyer against all unpaid liens and medical expenses without violating Rules 1.7(b) and 1.8(e), Ala. R. Prof C. Rule 8.4(a) provides that is an ethical violation for any lawyer to “induce another” to “violate the Rules of Professional Conduct.” As such, a lawyer cannot require or ask opposing counsel to agree to generally indemnify as a condition of settlement since that would constitute inducing and assisting another to violate the Rules of Professional Conduct. [RO 2011-01] ▲

Endnote

1. See Arizona Opinion 03-05, Indiana Opinion No. 1. of 2005, Illinois Adv. Op. 06-10, Kansas Op. 01-05, Missouri Formal Op. 125, New York City Bar Op. 2010-03, North Carolina Ethics Op. RPC 228, South Carolina Ethics Adv. Op. 08-07, Tennessee Formal Op. 2010-F-154, Vermont Ethics Op. 96-05, Wisconsin Formal Op. E-87-11 and Washington State Bar Op. 1736.

[Note: Formal Opinion RO-2011-01 was revised on July 12, 2017 by the Disciplinary Commission of the Alabama State Bar. The revision is in reference to a point requiring clarification in the last paragraph on the first page. In the second sentence of the paragraph, the original opinion read, “However a settlement agreement may not contain language indemnifying an opposing party, their insurer or their lawyer...” This revised opinion will now read, “However a settlement agreement may not contain language requiring an attorney to indemnify an opposing party, their insurer or their lawyer...”]





# Authorizing the Electronic Filing of the Notice of Appeal

*By Hon. Sarah H. Stewart and Ed R. Haden*

Attorneys involved in the daily grind of the practice of law often find themselves not only working on behalf of their firms and their clients, but also working at the direction of the courts. Courts impose deadlines, request proposed orders, set cases for trial, etc., and expect the attorneys to perform diligently and in a timely fashion. It is not uncommon for practicing attorneys to feel like they are constantly under the microscope. Rarely, however, is the lens focused in the other direction to examine whether the courts are being receptive to the needs of the lawyers who appear before them. Stated another way, is the court system providing attorneys with

what attorneys need in order to zealously represent their clients?

Shortly after the new Alabama Supreme Court convened in January 2019, it began looking at ways to improve the court system. One area that was immediately identified by Justice Mike Bolin was the manner in which the notice of appeal is filed in order to invoke the jurisdiction of the appellate court. As discussed in detail below, despite the Alabama court system's progressiveness when it comes to embracing technology, users of AlaFile, the trial court's electronic-filing system, have not been allowed to file the notice of appeal electronically. Some attorneys who have inadvertently or perhaps purposefully submitted a

notice of appeal as a miscellaneous or other filing using AlaFile found their cases procedurally trapped because some appellate courts determined that subject-matter jurisdiction did not attach. The supreme court recognized this problem needed attention. The court tasked newly-invested Justice Jay Mitchell with leading a working group of supreme court staff to develop a plan to authorize and implement electronic filing of the notice of appeal. Through Justice Mitchell's leadership, in very short order, the working group submitted a plan to the court for approval. Now, that solution is on the cusp of becoming law in Alabama. A thorough description of the problem and the solution is explained below.

### The Problem

When it comes to electronic filing, the Alabama court system has

been at the forefront nationwide. In July 2005, the Alabama Supreme Court entered the first order authorizing an electronic-filing pilot project in Alabama's circuit courts and district courts. That is before the advent of Twitter, before Apple released the iPhone and before Facebook (which was then still formally known as "The Facebook") expanded beyond schools and universities. Although electronic filing became permanent in Alabama's trial courts shortly thereafter, electronic filing of the notice of appeal was not permitted. So a lawyer in Mobile whose client told him to file a notice of appeal in Huntsville the morning it was due, would have to drive to Huntsville to manually file the notice of appeal. This was less than efficient.

Further, pursuant to Rule 3, Rule 12 and Rule 35A of the Alabama Rules of Appellate Procedure, a

party filing the notice of appeal in the trial court was also required to submit payment of the appellate-court docket fee to the trial court clerk. Stated otherwise, the filing of the notice of appeal and the payment of the docket fee had to occur simultaneously.

The trial courts and the appellate courts have separate and distinct electronic-filing systems. Additionally, the trial courts and the appellate courts operate on different accounting systems. The trial court's accounting system does not permit it to process the payment of the appellate court docket fee nor then, in turn, disburse payment of the fee to the appropriate appellate court. Thus, the Rules required the trial court clerk to accept the notice of appeal only in paper format and then mail it, together with the check for the docket fee, to the appellate court clerk.





## The Solution

Justice Mitchell's working group proposed that the simplest and most efficient way to solve the problem would be to amend Rule 3, Rule 12 and Rule 35A of the Alabama Rules of Appellate Procedure to bifurcate the filing of the notice of appeal and the payment of the appellate court docket fee. This would allow the notice of appeal to be filed electronically and then the attorney or user filing the notice of appeal could send payment of the docket fee directly to the appropriate appellate court clerk. The working group drafted the proposed changes to these Rules and presented them to the supreme court for an initial review and discussion. Wanting feedback from attorneys who routinely practice in the appellate courts, the supreme court sought the input of the Standing Committee on the Alabama Rules of Appellate procedure. The committee offered helpful commentary and suggestions, and ultimately recommended that the supreme court adopt the proposed amendments to Rule 3, Rule 12 and Rule 35A.

On July 1, 2019, the Alabama Supreme Court entered an order adopting the proposed amendments. The Rules will have an effective date of October 1, 2019. Therefore, effective that date, attorneys and registered users of AlaFile will be authorized to file the notice of appeal to the appellate courts electronically using the AlaFile system. The amendments to the Rules will require the attorney or filing party who files the notice of appeal electronically to submit payment of the docket fee directly to the appropriate appellate court clerk, and the new Rules state that the appellate court clerk must receive the payment within seven days of the electronic filing of the notice of appeal.

Programming of the AlaFile system will be overseen by the Administrative Office of Courts. The AlaFile system will be programmed to include a dropdown menu for filing the notice of appeal, the docketing statement and any other documents that the attorney or user is required to submit with the notice of appeal. The interface for filing the notice of appeal will be similar to the way a user currently files a motion or other document electronically. Another advantage to the amended Rules and to the enhancement of AlaFile is that, once filed, the notice of appeal will be served electronically on opposing counsel or on the party who is registered for AlaFile. Furthermore, AlaFile will also transmit the notice of appeal directly to the appropriate appellate court clerk so that the appellate

court will receive immediate notification that the notice of appeal has been filed, which will help to expedite the appeal process. The new option will be available on AlaFile on October 1, 2019.

The entirety of the amendments to Rule 3, Rule 12 and Rule 35A can be found at <http://judicial.alabama.gov/Appellate/SupremeCourt>. Many thanks to Justice Mitchell for his leadership in seeing this matter through. ▲

---

### Justice Sarah Hicks Stewart



Justice Sarah Stewart was elected to the Alabama Supreme Court in November 2018. She received a bachelor's degree and a master's degree from the University of Arkansas, and

her J.D. from Vanderbilt University Law School, receiving an American Jurisprudence Book Award in Evidence and Torts II. In 2006, she was appointed a circuit judge in the 13<sup>th</sup> Judicial Circuit and re-elected three times. Justice Stewart served on the Standing Committee on the Alabama Rules of Evidence. She was elected in July 2018 the first female president of the Alabama Circuit Judges Association.

---

### Ed R. Haden



Ed Haden is chair of the Standing Committee on the Alabama Rules of Appellate Procedure and a partner at Balch & Bingham LLP in Birmingham. He is the author of *Alabama Appellate*

*Practice*. Haden received his B.S. and M.T.A. from the University of Alabama, and his J.D. from the Washington and Lee School of Law. He served as a law clerk for the Hon. E. Grady Jolly, United States Court of Appeals for the Fifth Circuit, and as a staff attorney for the Hon. Harold F. See on the Supreme Court of Alabama.

### 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](mailto:marc.edwin.hawley@gmail.com)

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

**FREE DEMO**



## IMPORTANT NOTICES

### ▲ Annual License Fees and Membership Dues

### ▲ Amendment of Alabama Rules of Appellate Procedure

# Annual License Fees and Membership Dues

Renewal notices for payment of annual license fees and special membership dues were emailed September 3. The fee for an Occupational license is \$325 and the dues for a Special Membership are \$162.50. Payments are due by October 1; payments made after October 31 will be subject to the statutory late fee. *As a reminder, you will not receive a paper invoice in the mail.*

Upon receipt of the renewal notice, online payments may be made at [www.alabar.org](http://www.alabar.org) or you can create and print a voucher to mail with your check. Log in to the website and select "Consolidated Fee Invoice" from your MyDashboard page to make an on-line payment or print a voucher. Instructions for the payment process and help with logging in are available online as needed.

# Amendment of Alabama Rules of Appellate Procedure

In an order dated July 1, 2019, the Alabama Supreme Court amended Rule 3(a), Rule 3(d), Rule 3(e), Rule 12(a), Rule 35A(a)(1), and Rule 35A(b), Alabama Rules of Appellate Procedure, and adopted Court Comments to those amendments. The amendment of these rules and the adoption of the Court Comments are effective October 1, 2019. The order amending these rules and adopting the Court Comments appears in an advance sheet of *Southern Reporter* dated on or about July 25, 2019. The amendments provide for the electronic filing of a notice of appeal in the trial court through the trial court's electronic-filing system, provide for the electronic filing of the docketing statement with the notice of appeal, and provide that the docket fee for the appeal is to be paid directly to the appellate court within seven days of the electronic filing of the notice of appeal. The text of these rules can be found at <http://judicial.alabama.gov/>, "Quick links—Rule changes."

Bilee Cauley  
Reporter of Decisions  
Alabama Appellate Courts







(Photograph by FOUTS COMMERCIAL PHOTOGRAPHY, Montgomery, photofouts@aol.com)

FEBRUARY 2019 BAR EXAM  
**STATISTICS**  
 OF INTEREST

Number sitting for exam.....	296
Number passing exam (includes MPRE deficient and AL course deficient) .....	105
Bar exam pass percentage.....	35.5 percent

**Bar Exam Passage by School**

University of Alabama School of Law .....	60.0 percent
Cumberland School of Law .....	62.9 percent
Faulkner University Jones School of Law.....	34.4 percent
Birmingham School of Law .....	22.5 percent
Miles College of Law .....	0.0 percent

**Certification Statistics\***

Admission by examination .....	110
Admission by transfer of UBE score.....	38
Admission without examination (reciprocity).....	18

*\*Statistics of those individuals certified to the Supreme Court of Alabama for admission to the Alabama State Bar for the period October 17, 2018 through May 14, 2019. To be certified for admission, a candidate must satisfy all admission requirements as prescribed by the Rules Governing Admission to the Alabama State Bar.*

**For detailed bar exam statistics, visit <https://admissions.alabar.org/exam-statistics>.**

# ALABAMA STATE BAR SPRING 2019 ADMITTEES

Arthur Oliver Acosta  
Michael Boland Admirand  
Rebecca Jessica Akselrod  
Jenny Michelle Albritton  
William Carey Alford  
Alina Arbuthnot  
Marcus Allen Augustine  
William Robert Avery  
Kendra Bristow Beauchamp  
Grace Josephine Bertelsen  
Tatiana Aloysia Bertsch  
William Joseph Bone  
Daniel Zachary Boswell  
Matthew Jack Bowness  
Bo Randle Brock  
Justin Kyle Brown  
Bethany Marie Bruce  
Andrew Bryant  
Michael Nolan Bush  
Jessica Estelle Calloway  
Kristen Leigh Campbell  
Rylee Elizabeth Candon  
Kristina Marie Capo  
Jacy Elizabeth Carpenter  
Alexandria Leigh Carter  
Carson Nicole Cash  
Sarah Elisabeth Clayton  
Valdelane Azevedo Clayton  
Addison Grant Clowers  
Kacey Nicole Cooper  
Jessica Joycann Cotton  
Robert Pepper Crutcher, Jr.  
Manley Lafayette Cummins, IV  
Brian Matthew Currier  
Jane Daily  
Sarah Rose Daley  
Jeremy Benedict Dalrymple  
Branka Damjanovic  
Sarah Conover Daves  
Alexander Van Hoose Davies, III  
Jarrett Joseph Dixon  
Melanie Thomas Dobbs  
Christopher Doerring  
Cynthia Lawler Dudley  
James Russell Dumas, IV  
Andrew Trey Duncan  
James Robert Ebert  
Jordan James Edwards  
Kaylie Dee Eichholt  
Jamesian Dillon Emmanuel  
Kyle Andrew England  
Aniya Escott  
Tricia Marie Fantinato  
Casey Elizabeth Faucon  
John Henry Fisher  
Mary Katherine Flanagan

Christian Lanier Flowers  
Laura Kathleen Forde  
James Decker Francisco  
Floyd Ivan Frank, II  
CaNisha LaTetrice Freeman  
Grant Warren Garber  
Rebecca Bond Garner  
Raymond Andrew Garrison, Jr.  
Aleah Adele Gathings  
Amanda Downs Gentle  
William Larry Gieske  
Candice Boatwright Gilliland  
Cherish Tiera Gilmore  
Laura Emily Glidewell  
James Victor Glover  
Dennis David Green, Jr.  
Kiel Buchanan Green  
Christopher Austin Harvey  
Nicole Trashea Herron  
Chelsea Walden Hester  
Marcus Brady Hill  
Nicholas Brice Hoisington  
Nathanael Robert Holloway  
Daphne Ann Hoyt  
Jessica Guthrie Hudson  
Thomas Erskine Ice  
Jonathan Wallace Irvin  
Billy Ray Jackson  
Emily Elizabeth Jackson  
Jacey Gabrielle Jefferson  
Sheri Kay Jones  
GeDa' Lea Jones Herbert  
Marianna Evans Kelley  
James Howard Kennedy, III  
Jarred Brandon Kinnett  
Jason Ryan Klinowski  
Jaime Ryan Knight  
Chester Lynn Lachowicz  
Taylor Marie Lawrence  
Orjanel Kianna Lewis  
Jessica Renae Lopez  
Chelsea Anne Lucas  
Tamora Lyons  
Ashley Nicole Mallory  
Tanya Hollaway McCaLpin  
Jonathan Charles McCardle  
Matthew Ryan McCormick  
Lisa Jane McCrary  
Samantha McDowall  
Tyler James McIntyre  
Kelsey Thomas Menendez  
Stephen Brent Mickelsen  
Adnan Fahmi Mirza  
William Ross Mitchell  
Lynita Michelle Mitchell-Blackwell  
Margaret Amelia Mitta

Dan Robert Miyagishi  
Thomas James Moody  
Julian Nekeisha Mowatt  
Nastassia Denise Myhand  
Jack R. Nolen, Jr.  
Babatunde P. Odubekun  
Sheryl Ann Olah  
Demetria Alisa Parker  
Logan Wood Pearce  
Kimberly Stephens Phillips  
James Kirby Pickle  
Brittney Lychelle Pinon  
Andrew Nowell Porter  
Ericka Dionne Powell  
Nancy Lauren Presley  
Jamillah Tiya Pritchett  
Karina Joal Rahall  
James Robert Renner  
Caroline Cockrell Ritchey  
Krista Brooke Roach  
Jana Miller Roberts  
Jennifer Lewis Roberts  
Tanitha Christy Roberts  
Roxanna Manoochehri Robertson  
Gregory Dewayne Robinson  
Tulia Laticia Robinson-Larkin  
Nicholas Alexander Rolader  
Adam Lynn Royal  
Michael Paul Russ  
Ryen Connifer Schimmerman  
Lauren Michele Schroeder  
Awanna Shavon Scott  
Jennifer Jean Scruggs Jones  
Ayrn Sedore  
Creighton McCall Segars  
Rachel Leanne Sheffield  
Evan Davis Shoemaker  
Jeffrey Anderson Showalter  
Jeremy Daniel Skelton  
Hugh Andrew Smith  
Lauren Margaret Snyder  
Charles David South, III  
Jason Michael Sullivan  
Eddie James Talley  
Connor Harrison Theune  
Samuel Brett Thigpen  
Douglas Lee Tinkham  
Robert Smith Vance, III  
Brennan Shipley Ward  
Kendra Danielle Ward  
Kayla DeAnn Washington  
Joshua Andrew Weldon  
Morgan Antonia Wilson  
Caleb Collins Wolanek  
Mary Reynolds Wyatt



# LAWYERS IN THE FAMILY



**Jana Miller Roberts** (2019) and  
Hon. **Peggy Miller Lacher** (1995)  
*Admittee and mother*



**Mary Reynolds Wyatt** (2019) and  
Hon. **Sibley Grady Reynolds** (1982)  
*Admittee and father*



**Addison Grant Clowers** (2019)  
and **William Bruce Barr, Jr.** (1992)  
*Admittee and uncle*



**Alexandria Leigh Carter** (2019)  
and **Maxwell Douglas Carter** (1998)  
*Admittee and father*



**Tulia Larkin** (2019) and  
**Tom L. Larkin** (1976)  
*Admittee and father-in-law*



**Amanda Downs Gentle** (2018)  
and **Mickey Joe Gentle** (1998)  
*Admittee and husband*



**Caroline Cockrell Ritchey** (2019), **G. Scotch Ritchey, Jr.** (2017), **Ginger Dickerson Cockrell** (1986), **Bobby Hill Cockrell, Jr.** (1986), **Gregory Scotch Ritchey** (1988) and **Onnie Davis Dickerson, III** (1982)  
*Admittee, husband, mother, father, father-in-law and uncle*



**Nicole Herron** (2019) and  
**Cellie Miller** (1979)  
*Admittee and stepfather*



NOTICE

## DISCIPLINARY NOTICES

- ▲ Reinstatements
- ▲ Transfer to Inactive Status
- ▲ Disbarments
- ▲ Suspensions

### Reinstatements

- Birmingham attorney **Joel Robert Good** was reinstated to the practice of law in Alabama by order of the Supreme Court of Alabama, effective March 21, 2019. Good petitioned for reinstatement to the practice of law in Alabama on November 9, 2018 and was subsequently reinstated by order of the Supreme Court of Alabama. [Rule 28, Pet. No. 2018-1287]
- On May 8, 2019, the Alabama Supreme Court entered an order reinstating former Foley attorney **Matthew Alan Seymore** to the practice of law in Alabama based upon the decision of Panel III of the Disciplinary Board of the Alabama State Bar. On April 21, 2016, the Alabama Supreme Court entered an order suspending Seymore's license to practice law due to his failure to complete the Mandatory Continuing Legal Education Requirements. [Rule 28, Pet. No. 2017-03]

### Transfer to Inactive Status

- Dothan attorney **Thomas Kirven Brantley, Jr.** was transferred to inactive status, effective May 15, 2019, by order of the Supreme Court of Alabama. The Alabama Supreme Court entered its order based upon the May 15, 2019 order of Panel II of the Disciplinary Board of the Alabama State Bar in response to a petition filed on Brantley's behalf and submitted to the Office of General Counsel requesting he be transferred to inactive status.

### Disbarments

- Opelika attorney **Ben Elton Bruner** was disbarred from the practice of law in Alabama, effective June 21, 2019. The Alabama Supreme Court entered its order based upon the report and order entered May 8, 2019 by Panel III of the Disciplinary Board of the Alabama State Bar, disbaring Bruner in ASB No. 2014-1336 for violating Rules 1.3, 1.16(b), 8.4(a) and 8.4(g), Alabama Rules of Professional Conduct, and in ASB No. 2016-459 for violating Rules 1.3, 1.4, 1.16(a), 8.1(b), 8.4(a) and 8.4(g), Alabama Rules of Professional Conduct. In ASB No. 2014-1336, a client retained Bruner to represent him in an immigration matter, for which the client paid Bruner \$5,000 in cash. Thereafter, the client experienced difficulty communicating with Bruner and spoke with Bruner once after he engaged Bruner to represent him, at which time Bruner informed the client he was not working on the case and would refund



his retainer and return his file. Bruner failed or refused to refund the client's retainer and return his file. In ASB No. 2016-459, a client hired Bruner to represent her regarding immigration issues with the U.S. Citizenship and Immigration Services ("USCIS"). The client and her husband filed an I-751 petition to remove conditions of marriage in 1999, but were not scheduled for an interview until May 2003. Between filing the application and the interview, the client divorced her husband and remarried. The client's new husband accompanied her to the interview. The USCIS subsequently denied her application. In May 2003, the client hired Bruner to represent her in a new petition and adjustment of her status due to her new marriage. Over the next few years, the client and Bruner appeared at various court hearings. On two occasions, at Bruner's request, the client went to Bruner's office for a telephonic hearing and waited all day but her case was not called. The client later learned that the USCIS placed her in removal proceedings as a result of her failure to personally appear for her hearing in Atlanta. Bruner moved the USCIS to reopen the matter, which the agency granted, but the agency's order specified that the client never waived presence at the prior hearings. Bruner accompanied her to court several more times over the next few years. In early 2008, the client updated her address with USCIS. The client later discovered the agency set a court date shortly

thereafter, but she never received a notice, and Bruner failed to inform her of the court date. As a result, the client failed to appear for her hearing, and the USCIS entered an order of removal against her. Beginning in early 2013, the client thereafter experienced difficulty reaching Bruner. The client received an interview notice in 2015, 12 years after her initial application, and attended without counsel because she was unable to contact Bruner. It was not until the 2015 USCIS interview that the client learned of the pending order for removal against her; because she was unable to reach Bruner, she was forced to hire another attorney to handle her matter. In the above-referenced matters, Bruner failed to answer the charges filed against him by the bar. [ASB Nos. 2014-1336 and 2016-459]

- Huntsville attorney **Annary Aytch Cheatham** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective April 1, 2019. The Alabama Supreme Court entered its order based on the Disciplinary Board's order wherein Cheatham was found guilty of violating Rules 1.1 [Competence], 1.4 [Communication], 1.8(a) [Conflict of Interest: Prohibited Transactions], and 8.4(c) and (g) [Misconduct], Ala. R. Prof. C. In 2009, after a son satisfied a mortgage, the son's father agreed to have the title to the home transferred to the son. Cheatham was retained to have a title transferred from the father's name into the son's name. Cheatham informed them they first

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**

(Continued from page 383)

needed to execute a quit claim deed transferring the home from the father to one of Cheatham's businesses, Cheatham Group, LLC. Cheatham informed the son that she would then execute a statutory warranty deed from her business to him. In July 2009, Cheatham had the father execute a quit claim deed in which the home was deeded from the father to Cheatham Group, LLC. That same day, Cheatham had the son sign a fraudulent settlement statement indicating that the son had paid the Cheatham Group, LLC \$80,000 to purchase the property. Cheatham subsequently failed to deed the home from her business to the son. In January 2011, a federal tax lien was placed on the son's property for approximately \$22,000. At the time, the property was still recorded in the name of the Cheatham Group, LLC. The federal tax lien was issued against the Cheatham Group, LLC for unpaid payroll and employment taxes. Only after the tax lien had been filed on the property did Cheatham file a statutory warranty deed transferring the property from the Cheatham Group, LLC to the son. In 2012, the son began attempting to sell the property and only then learned a federal tax lien had been filed against the property. The son contacted Cheatham in an effort to get her to resolve the tax lien so he could sell the property. Cheatham repeatedly assured him that she was working to resolve the lien with the IRS and through her bankruptcy proceeding. However, Cheatham's Chapter 7 bankruptcy petition was dismissed in May 2013 for her failure to appear. Cheatham texted the son and informed him she was awaiting a court order and would be moving forward with resolving the debt with the IRS. Cheatham did not inform him that her bankruptcy petition had been dismissed. Cheatham offered to sign a repayment agreement if the son chose to sell the property and use the sale proceeds to satisfy the tax lien on her behalf. Relying on Cheatham's promise to repay him, the son used the sale proceeds from his home to satisfy Cheatham's federal tax lien in the amount of \$22,131.79. Cheatham subsequently agreed to repay him \$1,000 a month beginning in August 2013. However, Cheatham failed to do so. Cheatham agreed to repay him a lump sum payment amount of \$15,000 by December 15, 2013. Cheatham failed to make the payment and, thereafter, quit communicating with him. [ASB No. 2018-280]

- Birmingham attorney **Benjamin Howard Cooper** was disbarred from the practice of law in Alabama, effective June 21, 2019. The Alabama Supreme Court entered its order based upon the report and order entered May 8, 2019 by Panel III of the Disciplinary Board of the Alabama State Bar, disbarring Cooper in ASB No. ASB 2015-1600 for violating Rules 1.4, 1.15(a), 8.1(b), 8.4(a) and 8.4(g), Alabama Rules of

Professional Conduct; in ASB No. 2015-1626 for violating Rules 1.3, 1.4, 1.16(b), 8.1(b), 8.4(a) and 8.4(g), Alabama Rules of Professional Conduct; in ASB No. 2015-1656 for violating Rules 1.3, 1.4, 1.16(b), 8.1(b), 8.4(a) and 8.4(g), Alabama Rules of Professional Conduct; in ASB No. 2015-1671 for violating Rules 1.3, 1.4, 1.16(b), 8.1(b), 8.4(a) and (g), Alabama Rules of Professional Conduct; in ASB No. 2015-1693 for violating Rules 1.3, 1.4, 1.16(b), 8.1(b), 8.4(a) and 8.4(g), Alabama Rules of Professional Conduct; in ASB No. 2016-129 for violating Rules 1.3, 1.4, 1.16(b), 8.1(b), and 8.4(a) and (g), Alabama Rules of Professional Conduct; in ASB No. 2017-530 for violating Rules 1.3, 1.4, 1.16(b), 8.1(b), and 8.4(a) and (g), Alabama Rules of Professional Conduct; and in ASB No. 2017-1186 for violating Rules 1.3, 1.4, 1.16(b), 8.1(b), and 8.4(a) and (g), Alabama Rules of Professional Conduct. In ASB No. 2015-1600, on November 9, 2015 and November 13, 2015, the Office of the General Counsel received notification of overdrafts of Cooper's trust account from Compass Bank. In ASB No. 2015-1626, in October 2011, a client retained Cooper to represent her in a case against the Postmaster General, for which she paid Cooper a \$500 fee. Cooper appeared to diligently represent the client until May 2015. From May 2015 to October 2015, the client was unable to reach Cooper at the telephone number and email Cooper provided to her. On November 13, 2015, Cooper requested to withdraw as counsel, which the trial court granted. Cooper abandoned the client's case and failed to communicate with her after May 2015. Mail sent to Cooper's address regarding the overdraft notices was returned and marked not deliverable as addressed. In ASB No. 2015-1656, in 2014, a client hired Cooper to represent him in an employment matter and paid Cooper an \$876 fee. On July 9, 2014, Cooper sent the client an email advising he filed the civil complaint in federal court and indicated he would be in and out of his office during the month of July. Cooper instructed the client not to discuss the matter with anyone. After the July 9, 2014 email, the client experienced difficulty contacting Cooper. Cooper failed to file the suit in federal court. In ASB No. 2015-1671, in November 2012, a client retained Cooper to represent him in an employment matter, for which the client paid Cooper a \$2,000 retainer. Cooper provided the client with a fraudulent copy of a civil complaint, with a filed stamp date of July 3, 2012, in the United States District Court for the Middle District of Alabama, Northern Division (2:12-cv-02381-SLB). Although Cooper was the attorney of record in this case, the parties were not the parties involved in the client's matter. Cooper never filed a case on the client's behalf. Cooper abandoned the client's case and



failed to communicate with him after October 2015. In ASB No. 2015-1693, in December 2014, Cooper was hired to represent a client in a case against the United States Department of Defense involving failure to provide reasonable accommodations to her under the Americans with Disabilities Act. The case addressed two formal complaints and numerous retaliatory punishments. Cooper failed to timely file the client's complaint within 90 days after the agency's final decision. The late filing caused the agency to drop one of her formal complaints and the corresponding retaliatory actions. On November 3, 2015, Cooper failed to appear at court hearings and failed to reply to the agency's orders. Cooper abandoned the client's case and stopped communicating with the client on November 3, 2015. In ASB No. 2016-129, on May 29, 2014, the client executed an agreement to employ Cooper as his attorney and paid him a \$1,500 retainer. Since that date, Cooper failed or refused to respond to the client's communications sent by email, USPS mail or telephone. Cooper abandoned the client's case and has not communicated with him since May 24, 2014, the date the client signed the agreement to retain Cooper. In ASB No. 2017-530, in 2014, a client retained Cooper to represent her in a sexual-harassment case against her employer, for which she paid Cooper a \$2,500 fee. Cooper met with the client's employer and hired a private investigator. After a year or two of representing the client, Cooper began negotiating with the client's employer, but failed to reach a settlement. For over a year, the client made multiple attempts to contact Cooper, but was unsuccessful. On September 18, 2015, Cooper filed a lawsuit in the client's matter in the United States District Court, Northern District of Alabama (Eastern Division), but the district court dismissed the matter for lack of prosecution. In ASB No. 2017-1186, on May 4, 2011, a client originally retained another attorney to represent him in a wrongful-termination and discrimination case against his employer, for which he paid the attorney a \$500 retainer. On September 6, 2012, the attorney notified the client that he partnered with Cooper and that Cooper would handle the case. On October 23, 2013, Cooper sent a letter to the client informing him of the status of his case. Cooper contacted the client again, requesting that he send the \$500 fee listed in the representation agreement and informing the client that he would close his file if he did not pay the fee within 10 days. A copy of a check from the referring attorney's office evidenced that the referring attorney transferred the retainer to Cooper. Cooper allowed the statute of limitations in the client's case to expire and did not file his lawsuit. In the above-referenced matters, Cooper failed to answer the charges filed against him by the bar. [ASB Nos. 2015-1600, 2015-1626, 2015-1656, 2015-1671, 2015-1693, 2016-129 and 2017-530]

- Birmingham attorney **Shayana Boyd Davis** was disbarred from the practice of law in Alabama, effective January 19, 2021. The Alabama Supreme Court entered its order based

on the Disciplinary Board's order, wherein Davis was found guilty of violating Rules 1.2 [Scope of Representation], 1.3 [Diligence], 1.4 [Communication], 1.8(a) [Conflict of Interest: Prohibited Transactions], 3.3 [Candor Toward the Tribunal], and 8.4(c), (d) and (g) [Misconduct], Ala. R. Prof. C. Davis was hired to represent a client on divorce and bankruptcy proceedings. However, Davis failed to file the petition for uncontested divorce and never disclosed such to the client. Additionally, Davis failed to file a bankruptcy petition on behalf of the client or any other legal pleading in reference to the foreclosure and sale of the client's home. As a result, the client lost her home and some of her personal belongings when those belongings were moved out of her home by the sheriff's office. [ASB No. 2017-645]

- Jasper attorney **Garfield Woodrow Ivey, Jr.** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective June 26, 2019. The Alabama Supreme Court entered its order based on the order of the Disciplinary Commission of the Alabama State Bar, disbaring Ivey after he was convicted for first-degree theft of property in the Walker County Circuit Court on February 20, 2019. [Rule 22, Pet. No. 2019-714]

**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**

(Continued from page 385)

- Birmingham attorney **John Price McClusky** was ordered disbarred from the practice of law in Alabama, effective at the end of his current disbarment, April 16, 2020. The Alabama Supreme Court entered its order based upon the report and order entered May 8, 2019 by Panel III of the Disciplinary Board of the Alabama State Bar, disbaring McClusky in ASB No. 2015-982 for violating Rules 1.3, 1.4, 1.16(a), 5.5(a), 8.1(b), 8.4(a), 8.4(d) and 8.4(g), Alabama Rules of Professional Conduct; in ASB No. 2015-1636 for violating Rules 1.3, 1.4, 1.16(a), 5.5(a), 8.1(b), 8.4(a), 8.4(d) and 8.4(g), Alabama Rules of Professional Conduct; and in ASB No. 2017-866 for violating Rules 1.4, 1.16(a), 1.16(d), 4.1, 5.5(a)(2), 8.1(b), 8.4(a), 8.4(b), 8.4(c), 8.4(d), 8.4(e) and 8.4(g), Alabama Rules of Professional Conduct. In ASB No. 2015-982, McClusky failed or refused to appear in court with his client. As a result, the court issued a show cause order for failure to perfect service. The case eventually was dismissed. In a separate client matter, McClusky failed or refused to appear in court on his client's behalf. As a result of McClusky's failure to appear, the court issued an order suspending the client's driver's license and a warrant for the client's arrest for his failure to appear. During the course of the case, McClusky was interimly/summarily suspended from the practice of law. McClusky consented to disbarment shortly thereafter. McClusky failed to notify his client or the court of his disbarment. Thereafter, McClusky filed a motion to withdraw the warrant and set aside the suspended driver's license. In ASB No. 2015-1636, McClusky was hired to represent a client in a criminal matter. McClusky entered a notice of appearance in the case. Over the next year, the client repeatedly requested McClusky to file for a bond reduction and discovery, which McClusky failed to do. During the course of the case, McClusky was interimly/summarily suspended from the practice of law. As a result, McClusky failed or refused to appear in court with his client and failed to notify his client or the court of his disbarment. In ASB No. 2017-866, McClusky contacted another attorney and requested the attorney to consider handling a criminal matter for a client. Instead of advising the attorney he was disbarred, McClusky told the attorney he was retired. McClusky informed the attorney his client paid him \$3,500 and advised he would forward the retainer to him. The attorney informed McClusky he would not enter a notice of appearance until he received the funds. The attorney met with the client the next day and appeared at his arraignment. The client provided the attorney a copy of a fee agreement with a handwritten notation for receipt of the \$3,500 paid to McClusky. The agreement was dated June 6, 2016, over a year after McClusky was disbarred. Thereafter, the attorney attempted to contact McClusky to inform him he still had not received the retainer. The attorney also contacted the client, and informed him that McClusky failed to forward the retainer to him. The attorney also requested the client to contact McClusky and request that he forward the \$3,500 retainer. The client contacted the attorney and informed him he was unable to reach McClusky. In the above-referenced matters, McClusky failed to answer the charges filed against him by the bar. [ASB No. 2015-982, 2015-1636 and 2017-866]
- Florence attorney **Mollie Hunter McCutchen** was ordered disbarred from the practice of law in Alabama, effective at the end of her current disbarment, October 24, 2023. The Alabama Supreme Court entered its order based upon the report and order entered May 8, 2019 by Panel III of the Disciplinary Board of the Alabama State Bar, disbaring McCutchen in ASB No. 2012-1276 for violating Rules 1.15(d), 8.1(b), 8.4(a), 8.4(c) and 8.4(g), Alabama Rules of Professional Conduct, and in ASB No. 2013-2046 for violating Rules 1.3, 1.4, 1.15(d), 8.1(b), 8.4(a) and 8.4(g), Alabama Rules of Professional Conduct. In ASB No. 2012-1276, on or about June 15, July 3 and July 10, 2012, the Office of General Counsel received notices of insufficient funds for McCutchen's trust account. McCutchen responded, stating the first overdraft occurred when she wrote a check to herself for fees she previously earned and that she miscalculated her trust-account balance. McCutchen averred that the other insufficient funds notices occurred when she paid her overdue Verizon account and mistakenly provided the representative her trust-account number. The bar made several attempts to contact McCutchen regarding the overdrafts. When McCutchen finally responded, she explained the delay was due to an injury she incurred and that she had difficulty getting to her office. McCutchen stated she had returned to work full time and apologized for the overdraft. However, the bar received another complaint, after which McCutchen failed or refused to respond. On February 20, 2014, McCutchen was summarily suspended from the practice of law in Alabama. In ASB No. 2013-2046, a couple retained McCutchen to represent them regarding an insurance claim after a fire destroyed their home and its contents. Between May 2012 and December 2012, McCutchen worked with the insurance companies and ServPro regarding the restoration. On December 5, 2012, the clients met with McCutchen and signed over to her an insurance check in the amount of \$19,961.27, which was designated to pay ServPro. McCutchen informed the clients that she would hold the money in her trust account because she did not



want to pay ServPro at that time. McCutchen allowed the time to lapse for filing a claim with the insurance company regarding the contents of the home. McCutchen then appeared to avoid contact with the clients. They were able to contact McCutchen on only one occasion by physically catching her leaving her office. In March 2013, the clients learned that ServPro filed suit against them for nonpayment of services. The clients attempted to contact McCutchen to get her to sign a release from representing them. McCutchen's receptionist informed the clients that McCutchen did not sign the release. McCutchen also failed or refused to respond to the clients' new attorney. On February 20, 2014, McCutchen was summarily suspended from the practice of law for failure to respond to the allegations of the clients' complaint. On May 12, 2014, the bar received a letter from the Honorable Michael T. Jones, circuit judge in Lauderdale County, which contained an affidavit from McCutchen. In her affidavit, McCutchen admitted she was addicted to prescription pain medicine, was evicted from her office and had no money. On December 12, 2016, McCutchen pleaded guilty to first-degree theft of property. On February 22, 2017, the trial court ordered McCutchen to pay restitution in the amount of \$17,621.27 to the Client Security Fund of the Alabama State Bar. On March 1, 2017, the trial court ordered McCutchen to be released and "get in compliance with all drug court requirements." In the above-referenced matters, McCutchen failed to answer the charges filed against her by the bar. [ASB Nos. 2012-1276 and 2013-2046]

curred earlier in the year of 2015. In November 2015, the client accepted a \$3,000 settlement offer and executed a confidential release and settlement agreement and sent the signed agreement and release to Harris-Daniels' office. Thereafter, the client had difficulty contacting Harris-Daniels's office. Harris-Daniels believed she had sent the signed agreement and release to the opposing counsel in December 2015 and also believed she had requested opposing counsel to send the settlement funds directly to the client. The client sent Harris-Daniels several text messages in 2016, seeking an update on the matter and the status of her settlement funds. In response, Harris-Daniels informed the client she was waiting on opposing counsel to check on the status of the settlement. However, Harris-Daniels failed to take any action on behalf of the client to check on the status of the settlement. In September 2017, Harris-Daniels learned from the client that she never received any of the settlement funds. Harris-Daniels later learned opposing counsel did not receive the signed agreement and release. [ASB No. 2018-1156]

- Tuskegee attorney **Linda W.H. Henderson** was summarily suspended from the practice of law in Alabama pursuant to Rules 8(c) and 20(a), Ala. R. Disc. P., by order of the Disciplinary Commission of the Alabama State Bar, effective April 17, 2019. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing Henderson's refusal to respond to a request for information concerning a disciplinary matter. [Rule 20(a), Pet. No. 2019-793]
- Clanton attorney **David Brian Karn** was suspended from the practice of law in Alabama for one year by the Alabama Supreme Court, effective May 15, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission of the Alabama State Bar's order reflecting Karn's guilty plea to violations of Rules 1.1, 1.3, 1.5, 1.15, 8.4(a) and 8.4(g), Ala. R. Prof. C. Karn was appointed *administrator ad colligendum* in a conservatorship matter after it was removed to the Chilton County Circuit Court and a will contest was filed. Over a period of two years, Karn prepared and filed inventories for the estate with the court. As a result, an order was entered against the previous administrator in the amount of \$352,205. The previous administrator filed a motion to alter, amend or vacate the court's order, citing numerous deficiencies in Karn's inventories. Thereafter, the previous administrator filed a notice of appeal in the conservatorship and will contest matters. The Alabama Supreme Court declared the Chilton County Circuit Court was without jurisdiction in the conservatorship matter and remanded the matter back to probate court. The circuit court vacated all orders entered in the conservatorship matter and transferred it back to probate court. The circuit judge vacated the order appointing him, but Karn admitted he continued to act as *administrator ad colligendum*. The Chilton County Probate

## Suspensions

- The Alabama Supreme Court entered an order suspending Fort Payne attorney **Sherry Ann Weldon Dobbins** from the practice of law in Alabama for 90 days, effective March 8, 2019, of which Dobbins was ordered to serve the first 45 days. The remaining 45 days were ordered held in abeyance pending Dobbins's successful completion of a two-year probationary period. The Alabama Supreme Court entered its notation based upon the Disciplinary Commission of the Alabama State Bar's order reflecting Dobbins's guilty plea in a disciplinary matter to violations of Rules 1.1 [Competence], 1.3 [Diligence], 1.4 [Communication], and 8.4(a) and 8.4(g) [Misconduct], Ala. R. Prof. C. [ASB No. 2018-688]
- Birmingham attorney **Felicia Deanna Harris-Daniels** was suspended from the practice of law in Alabama for a period of 90 days by order of the Supreme Court of Alabama, effective June 24, 2019 through September 22, 2019. Harris-Daniels admitted to violating Rules 1.3 [Diligence], 1.4 [Communication] and 1.16(d) [Declining and Terminating Representation], Ala. R. Prof. C. Harris-Daniels was retained to represent a client on a personal injury claim that oc-

(Continued from page 387)

Court ordered Karn to turn over the estate's property and provide a full accounting within 30 days. The previous administrator filed a motion to show cause after Karn failed to comply with the court's order. A hearing was set and then continued to allow Karn an additional week to comply with the court's prior order. Again, Karn failed to comply with the court's order. Karn filed an accounting which failed to list the beginning balance of the estate, contained calculation errors and was not supported by documentation. The accounting disclosed Karn paid himself \$44,588 from the estate's assets, which was not authorized by the court. Pursuant to the court's order, he re-paid this amount. [ASB No. 2016-426]

- Tuscaloosa attorney **Anne Dishuck LaCoste** was suspended from the practice of law in Alabama for one year, to serve 90 days by order of the Supreme Court of Alabama, effective June 1, 2019 through August 30, 2019. The remainder of the one-year suspension shall be held in abeyance and LaCoste will be placed on a two-year probationary period. The suspension was based upon LaCoste's conditional guilty plea, wherein she admitted to violating Rules 1.15 [Safekeeping Property] and 5.3 [Responsibilities Regarding Nonlawyer Assistants], Ala. R. Prof. C. In September 2018, the Office of General Counsel received insufficient funds notices regarding LaCoste's trust account. After being notified by the bar of the overdrafts, LaCoste began an investigation into the matter. As a result, LaCoste learned that an employee responsible for maintaining the trust account and other bookkeeping matters had been mishandling client funds. Beginning in 2013, the employee, without LaCoste's knowledge or consent, began withholding payment of collected funds to the firm's clients. Instead, some of those funds were improperly used by the employee to pay firm bills, including payroll. The employee would then use subsequently collected funds from other clients to fund payments to those clients whose funds had been improperly used to pay firm bills and payrolls. Over time, the misuse of client funds by the employee created a substantial shortage in LaCoste's trust account that led to the account being overdrawn. After learning of the employee's misconduct, LaCoste replaced all missing funds and made sure all clients received any outstanding monies owed to them. [ASB No. 2018-1047]
- Fairhope attorney **Robert Maurice Lichenstein, Jr.** was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective March 18, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Lichenstein be suspended for failing to comply with the 2017 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2018-502]
- Birmingham attorney **Scott Lee Loftis** was suspended from the practice of law in Alabama for 90 days by order of the Supreme Court of Alabama, effective June 24, 2019 through September 22, 2019. Loftis admitted to violating Rules 1.15 [Safekeeping Property] and 8.4(g) [Misconduct], Ala. R. Prof. C. Loftis was previously employed by Stephen Klimjack, a bankruptcy attorney with offices in Mobile, Montgomery and Birmingham. Loftis was the local attorney for Klimjack's firm in Birmingham and was responsible for handling client and firm funds. In October 2018, Klimjack instructed Loftis to deposit client funds into the firm's trust account. The deposit was comprised of 71 individuals and totaled \$4,220. Prior to making the deposit, Loftis discovered the deposit was short by approximately \$2,347. Rather than informing Klimjack of the shortage, Loftis included a personal check in the deposit for the amount of \$2,347. The personal check was subsequently returned for insufficient funds. Loftis subsequently made a personal deposit of \$500 into the trust account. Loftis failed to properly safeguard and account for the client funds. [ASB No. 2018-1318]
- Elba attorney **Mart Wayne Marler** is currently suspended from the practice of law in Alabama. Marler has received a 26-month suspension, effective July 1, 2020, to run consecutively to his current suspension from the practice of law. The Alabama Supreme Court entered its order based on the report and order of the Disciplinary Board of the Alabama State Bar, suspending Marler after he was found guilty of violating Rules 5.5(a)(1) [Unauthorized Practice of Law] and 8.4 (d) and (g) [Misconduct], Ala. R. Prof. C. After Marler was suspended from the practice of law in Alabama, which became effective January 1, 2017, Marler formed the Marty Marler Land and Title Company, LLC, where he engaged in preparing legal documents for the title company and its customers. Marler subsequently admitted he engaged in the unauthorized practice of law during his suspension by preparing property deeds for various clients of his title company. [ASB No. 2018-406]
- Madison attorney **Eric Rodney Peak** was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective March 18, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Peak be suspended for failing to comply with the 2017 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2018-507]



- Scottsboro attorney **Frank Brian Rice** was summarily suspended pursuant to Rule 20a, Ala. R. Disc. P., from the practice of law in Alabama by the Supreme Court of Alabama, effective April 15, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Rice be summarily suspended for failing to respond to formal requests for information concerning a disciplinary matter. [Rule 20(a), Pet. No. 2019-470]
- Fort Payne attorney **Charles McCracken Scott** was suspended from the practice of law for 91 days in Alabama by the Supreme Court of Alabama, effective May 10, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's acceptance of Scott's conditional guilty plea, wherein Scott pled guilty to violating Rules 1.4 [Communication], 1.5 [Fees], 1.7(b) [Conflict of Interest: General Rule], 1.16(a) [Declining or Terminating Representation], and 8.4(d) and (g) [Misconduct], Ala. R. Prof. C. Scott undertook to represent three individuals in probate court regarding a last will and testament. Scott failed to communicate the basis or rate of his fee in the matter and failed to obtain a written fee agreement authorizing him to assume the representation on a contingency fee basis. In August 2014, Scott filed a claim against the estate for attorney's fees, claiming \$12,000 to \$18,000 in legal fees, and reserved the right to claim additional fees for services performed after the date of the claim. In addition, Scott requested a lien secured by real property of the estate owned by the deceased at the time of her death. Scott failed to inform the executor of the estate of his intention to file a claim against the estate in the amount of \$12,000 to \$18,000. By seeking a lien on the real property of the estate, Scott became adverse to the estate and his clients. Scott's claim to an excessive attorney's fee unnecessarily delayed the closing of the estate and caused unnecessary expense to the estate. [ASB No. 2015-915]
- Mobile attorney **John Walter Sharbrough, III** was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective April 29, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Sharbrough be suspended for failing to comply with the 2017 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2018-510]
- Gadsden attorney **Clark Vann Stewart** was summarily suspended from the practice of law in Alabama pursuant to Rules 8(e) and 20(a), Ala. R. Disc. P., by order of the Disciplinary Commission of the Alabama State Bar, effective May 6, 2019. The Disciplinary Commission's order was based on a petition filed by the Office of General Counsel evidencing Stewart's refusal to respond to a request for information concerning a disciplinary matter. [Rule 20(a), Pet. No. 2019-523]
- Hayneville attorney **Logan Ryan Taylor** was suspended from the practice of law for 91 days in Alabama by the Supreme Court of Alabama, effective May 10, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's acceptance of Taylor's conditional guilty plea, wherein Taylor pled guilty to violating Rules 1.4 [Communication] and 8.1(b) [Bar Admission and Disciplinary Matters], Ala. R. Prof. C. Taylor was hired in February 2016 to represent an individual in a criminal matter. In December 2016, the client entered a blind plea and was sentenced to prison. The sentence was to be reviewed within six months. However, in June 2017, the client and her family made several attempts to contact Taylor without success. The client, unable to contact Taylor, retained other counsel. The client subsequently filed a bar complaint. Thereafter, Taylor failed to respond to formal requests for information concerning a disciplinary matter and was summarily suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective June 18, 2018. [Rule 20(a), Pet. No. 2018-694; ASB No. 2018-218]
- Birmingham attorney **Roderick Walls** was suspended from the practice of law in Alabama for 91 days, with the suspension to be held in abeyance. Walls will be placed on probation for two years. The suspension was based upon the Disciplinary Commission's acceptance of Walls's conditional guilty plea, wherein Walls pled guilty to violating Rules 1.8(e) [Conflict of Interest: Prohibited Transactions], 1.15 [Safekeeping Property] and 8.4(g) [Misconduct], Ala. R. Prof. C. The Office of General Counsel of the Alabama State Bar received an insufficient funds notice regarding Walls's IOLTA account, where Walls had overdrawn his trust account by approximately \$4,000. The shortage was the result of his failure to properly memorialize the source of fees when withdrawn from trust. [ASB No. 2018-1087]
- Bessemer attorney **Lonnie Anthony Washington, Sr.** was suspended from the practice of law for three years in Alabama by the Supreme Court of Alabama, effective April 1, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's acceptance of Washington's conditional guilty plea, wherein Washington pled guilty to violating Rules 1.15 and 8.4(c), (d) and (g), Ala. R. Prof. C. Washington voluntarily admitted that he had previously misappropriated client funds from his trust account. [ASB No. 2018-1097]
- Grenada, Mississippi attorney **Robbie Elizabeth Willis**, who is also licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective March 18, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Willis be suspended for failing to comply with the 2017 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2018-518] ▲



## MEMORIALS

- ▲ Cartledge Weeden Blackwell, Jr.
- ▲ Thomas W. Christian
- ▲ Richard Cobb Lacey

# Cartledge Weeden Blackwell, Jr.



*Blackwell*

Cartledge Weeden Blackwell, Jr. passed away June 7, 2019 after a lengthy illness. He was my father. I have been tasked with the impossible, as there is no way for me to convey in words that he was the finest man and lawyer there ever was. Here is my attempt.

“Cart” or “Carty,” as he was known to his family, a host of friends and our community, was the son of Cartledge W. Blackwell, Jr. and Ruth Adler Blackwell. He was descended from prominent Blackbelt families, and his great-grandfather, F.M. Blackwell, served as sheriff of Dallas County in the early 1900s. Cart attended public schools in Selma, obtained a bachelor of arts from the University of Alabama in 1969 and a juris doctorate from the University of Alabama School of Law in 1972. He briefly served in the United States Army after graduation from law school and passing the bar exam.

Cart married Sara Crum Cook in 1975, of which union two children were born: Virginia L. Blackwell and Cartledge W. Blackwell, III. He entered legal practice in the fall of 1972, practicing with his uncle, T.G. Gayle, as Gayle & Blackwell until 1977. Thereafter, he was a sole practitioner until he went into practice with his cousin, Julian Parke Keith, from 1984 to 2000 as Blackwell & Keith. He then was a sole practitioner again until he was joined by his daughter, Virginia L. Blackwell, in 2003, with whom he practiced until his death. In 2019, they merged with the Honorable A. Ted Bozeman and Randall K. Bozeman to form Bozeman & Blackwell LLC.

Cart was admitted to practice in Alabama, the United States District Court for the Southern District of Alabama, the Eleventh Circuit Court of Appeals and the United States Supreme Court. He argued numerous cases during his practice before the Eleventh Circuit (and, before its creation, the former Fifth Circuit), and had cases before the United States Supreme Court.

Cart served as county attorney for Dallas County from 1973 to 1988, and was elected to the Board of Directors of the National Association of County Civil Attorneys. He faithfully represented numerous government officials and entities throughout his practice, including the Dallas County Probate Judge, Sheriff, Tax Assessor, Tax Collector and Communications District. Cart faithfully represented an extensive clientele throughout Dallas County and surrounding counties and Alabama. He truly cared for his clients, and treated the prince the same as the pauper. He took into account a client’s ability to pay, despite the countless hours he had expended on a matter. He always took his time to carefully and thoroughly explain a matter for a client.

Cart served as Assistant District Attorney for the Fourth Judicial Circuit of Alabama prosecuting child support cases from 1992 to 2013, including Dallas, Wilcox and Perry



counties, and was awarded the Alabama Child Support Association Gordon F. Bailey Attorney of the Year for 2009-2010.

Cart was a member of the Alabama State Bar; the Dallas County Bar Association, (serving as past president, CLE Chair and Memorial Committee Chair); the Dallas County Abstract Company, Inc. (past president, vice president and secretary-treasurer); the Dallas County Law Library Board (past president and chair); the Dallas County Communications District Board (secretary); and the Cahaba Foundation Board. He received the Dallas County Legal Secretaries Association Boss of the Year award in 1984.

Cart was a devout Christian and lifelong member of St. Paul's Episcopal Church in Selma, having served numerous terms on the vestry and as senior warden.

Cart exemplified the utmost strength of charter and integrity, both personally and professionally, and, throughout his life, set an example for those of us who survived him to follow. He was a true Southern gentleman, and held the respect and admiration of all with whom he came into contact, especially fellow attorneys and judges. He always went out of his way to help a younger lawyer who had come into practice or a new lawyer in town.

Cart conducted extensive research on family history and genealogy, of that of his own family and of others, and was a great source of knowledge respecting the history of Dallas County and surrounding counties. He knew more about most people's families than they did, and loved to tell them about it. Stated another way, he loved to talk, especially when accompanied by a good story and a good bourbon.

Cart was of good humor, patient, gracious and kind to all he came into contact with, even when they had tested his patience. I can personally attest to his patience, as I tried that on numerous occasions. I was basically his shadow, and he never grew weary of teaching me and answering my endless questions.

Cart was loyal to his faith, his family, his profession and his clients, and his death represents a great loss to our bench and bar and community. His friendship and counsel will be greatly missed, by none more than me.

In closing, Daddy was one of those rare attorneys whose integrity and character truly matched that of Atticus Finch. He certainly was my Atticus.

—Virginia L. Blackwell, Bozeman & Blackwell LLC, Selma

## Thomas W. Christian

*Sharon Stuart delivered a eulogy at the memorial service for Mr. Christian, who died February 25, 2019, and an excerpt of her remarks can be found here.*



Christian

In 1994, when I had been at our firm a little over a year, my mentor, boss and dear friend, Ed Elliott, walked into my office and told me he was leaving the firm to take a job as in-house counsel. I was devastated. As with all things, God was in control, and He knew—although I did not—that through Ed's departure, He would bestow upon me one of the greatest blessings of my life—the blessing of having Tom Christian as a mentor, law partner, dear friend and, as many have heard me say over the years, sort of a second dad.

Tom quickly became one of the best friends I've ever had. He was the perfect mentor. He was full of encouragement and his advice was always constructive and kind. He had very high expectations and he made quick judgments about a person's ability and their character. If he liked, you, he liked you. Period. Once you won his trust, he had your back. He gave me lots of rope, but was always there, just in case. From day one, even when I was a young associate, he introduced me as his "partner." I was never his equal, but he always made me feel that I was. And I was not unique. Many others would tell you the exact same thing.

At the same time, Tom, or "Mr. C" as we called him, was also the perfect gentleman. He always made me walk on the inside of the sidewalk, away from the street. He always opened the door for me. He refused to let me buy lunch, ever.

Over 25 years, we worked together constantly. We spent a lot of time together—some of it was fun, some of it was fun in a sick sort of way and some of it was downright painful. And I wouldn't trade a minute of it.

For years, our offices were at opposite ends of the hall. If he needed me, he'd walk out in the hall and yell my name. It always made me laugh. I spent countless hours in his office, on conference calls, talking about cases, talking about life, trying to help him use his computer. We traveled all over North America. We always seemed to get lost. He nicknamed us "The Get Lost Twins." When he was stressed, he'd always say we could just quit and open a bait shop.

I learned a lot about Tom over all those years. Some things you may or may not know—he hated meetings. He loved pigs. He collected pigs. I never knew why. He loved Cincinnati Chili. He loved his cat, Morris. He once sent me a picture of Morris peering into the new birdbath, and asked, "Do you think any birds will use my fancy new birdbath?" In the old days, Tom often had insomnia, and he'd wake up in the middle of the night and listen to the radio host Art Bell. The next morning, he would regale me with whatever he heard on Art Bell's show the night before. It usually involved some alien sighting or Martian abduction. Tom almost always bought a double shot espresso on his way to work. He loved Cajun country music. Bobby Bare was his favorite. He told me once that, "I have decided to have one of my grandchildren make me a CD of my favorite songs. The first two are: 'If the phone don't ring, you will know it's me' and 'If a woman answers, hang up.'"

He had some superstitions—he would not kill a spider or mess with its web.

In Matthew Chapter 5, Jesus tells Christians that we are to be the salt of the earth and the light of the world. As Colossians

*(Continued from page 391)*

4:6 tells us, "Let your conversation be always full of grace, seasoned with salt, so that you may know how to answer everyone." And we aren't to hide our light under a bushel or a bowl, but put it on a stand and let it shine before others. Tom was salt, and he was light.

Tom loved to laugh. He seasoned every conversation with humor, often dry humor. A lot of people sent him jokes by email. If you ever sent him a joke, chances are he sent it to me.

Tom seasoned his relationships with salt. He loved his family. He constantly talked about how proud he was of his kids and grandkids: when Ed made managing partner; George's career success; his grandchildren's basketball and golf successes; laughed about how he'd need to run by Piggly Wiggly to get some fried chicken for dinner, because Dorothy always ate salad; he sent me jokes from Dorothy and George; he talked about how strict Delia was with her kids; and he looked forward to their family trips to the beach.

He seasoned his friendships. His friends knew he loved them. When Alec Newton died, Tom sent me an email: "Alec Newton died on Christmas day. He had been very sick for a long time. I will miss him. He was a good friend. I remember asking Alec for a favor. He did not say 'what is it,' he said 'you got it.'" Tom was salt.

He was also light. Edith Wharton said, "There are two ways of spreading light: to be the candle or the mirror that reflects it." Tom was at many times the candle—he was a shining star as a trial lawyer—as fine as there has been. He founded a successful law firm. He received virtually every legal accolade he could receive. He shone brightly in the legal community, but I always got the feeling Tom was happiest when he was the mirror, reflecting light. He didn't need to be the center of attention. He loved to empower those of us around him to succeed and then watch us do it. He made sure to let others know he was thinking about them.

There were three ways Tom reflected light that really stick out.

Loyalty—Tom was loyal to a fault. Loyal to his family, his friends, his law firm and his law partners and his clients. Did not tolerate disloyalty. And not just disloyalty to him. If someone was disloyal to one of his friends, that was even worse. His loyalty to his clients was above reproach. He made them all feel like they were the only client he had. All that loyalty made the rest of us want to reciprocate. From time to time someone would call me and ask if I wanted to change firms. I wasn't interested anyway, but my answer was always the same—I would never do that to Tom.

Gifts—They say everyone has a love language. There's no doubt in my mind that Tom's love language was giving gifts.

Sometimes it took the form of material gifts. He loved to buy gifts for his family, and he put a lot of thought into them. He would often ask for my help, or Debbie Smith's help, to pick out a gift for his children or their spouses. We went on many shopping trips to Remon's, and if we had to travel on business near the holidays, he almost always wanted to go shopping to buy presents for his family. We went to malls all over America. He searched high and low for the perfect gift for clients who were retiring, or lawyer friends from around the country who received some honor. He loved to give gifts celebrating Crimson Tide football. Once, he learned that a lawyer friend in New York had a high school son who was a huge Alabama fan. He figured out a way to get them tickets to the Iron Bowl, asked me to take them and presented the son with some very nice memorabilia. That young man won't soon forget Tom.

Tom would often send me an email that said, "I have you a present." It might be an article or a book or a can of Goldstar Chili. One time after he had retired, he emailed me and asked me to look at a website for some aviator sunglasses he wanted to buy Delia for Christmas and tell him which ones I liked. I had a sneaking suspicion that they were for me. So, I picked the ones I thought would look good on me. Sure enough, a week later, I got to my office to find them in my chair. When he retired, he offered me his furniture and I took some of it. He sent me an email that said, "You can move the table and two chairs to your office. This table was purchased by Jack Bingham. Jack gave it to Harold Bowron and Harold gave it to me. That little table has seen lots of law."

The gifts Tom gave often were more special than material gifts. He constantly gave the gifts of time, thoughtfulness, listening and help. He was never too busy to ask me how I was doing. He wanted to know what my husband and kids were up to. If someone in my family had an illness, he would search for just the right doctor and make personal calls on our behalf. He never passed up a chance to write a recommendation letter. If he saw a way to help one of his partners advance in their career, he would do everything in his power to make it happen. If someone at the firm seemed unhappy, he wanted to know why and what could be done about it.

He was constantly thinking of ways to help those he cared about. He visited his sick friends and wrote them notes of encouragement. When Richard Ogle was very ill, Tom wrote him and said this, "Richard: I have been thinking about you. You are a good friend. Some years ago I was representing a nurse from Cullman. On the way to the courthouse, she could tell that I was nervous about the case. She told me not to worry because she saw a hawk in a tree that morning and that was very good luck. I am going to find a hawk for you. Tom"



Third, Tom was generous and unselfish. Unlike many senior partners in law firms, he shared his success. He understood the importance of succession planning, and he worked hard to transition his clients to those of us who came behind. He also shared his financial success. He could have made so much more money. Instead, he always pushed those dollars down to younger lawyers. He provided a ladder up to the lawyers around him.

Tom could see beyond his years. Whether he knew it or not, his loyalty, gift-giving spirit and generosity was not lost on us. Those traits established a culture—a legacy—that will live long after he's departed us.

Tom loved to quote Will Rogers. One of his favorites was "never miss a chance to keep your mouth shut." I wouldn't want to disappoint him, so I will take that advice and end with this:

Last night I received an email from a client and good friend of Tom's. She said, "Among the many fine lawyers I had the good fortune to work with during my career, there were none better than Tom. It was a true privilege to work with this remarkably talented, genuinely kind, immensely successful, hard-working and honorable man. Tom's graciousness for so many members of our legal team is something we will never forget. The generosity he extended to me personally touched me deeply and I will forever be grateful for the brief but precious occasions when I shared his company. The world is truly a lesser place without him."

Salt and light.

—Sharon D. Stuart, Christian & Small LLC, Birmingham

## Richard Cobb Lacey

*"If you can fill the unforgiving minute with sixty seconds' worth of distance run, yours is the earth and everything that's in it."*

—Rudyard Kipling

Richard Cobb Lacey encountered his unforgiving minute on June 14, 2019 when his distance run met an untimely end at age 90. My cousin led life like a cavalry charge, enlisting at 16 to fight in WWII, engaging in combat again in the Korean War and earning an engineering degree at the University of Alabama in between his service to the country he loved. An outstanding lawyer, he was worthy of a Nobel Prize for showing his children, grandchildren, great grandchildren, nieces, nephews and cousins what it meant to be family, to live life fully and how to be a good person. He was the best friend, mentor and relative someone could have.

After completing law school and being admitted to the bar in 1958, he moved his family to Fairhope where he practiced as a country lawyer for 60 years. He represented the



Lacey

City of Bayou La Batre for 29 years, incorporated the City of Daphne and formed water and sewer boards in Baldwin and Mobile counties. Dick resolved problems by "principles," legal, for sure, but moral, always. He did not specialize, nor did he pick and choose clients. Rarely did he decline service for inability to pay, and once undertaking an endeavor, he was convinced (rightly or wrongly) he was on the side of the angels. His representation was a crusade. During the 50s and 60s, Dick often took eggs, turnip greens or a side of beef for his services. No one left his office, city hall, the courthouse or presence without being befriended and encouraged.

Dick left an indelible legacy and enjoyed life until the end. He was a pilot, yachtsman, hunter and world traveler. He had irresistible charm, with or without intention. Even in his last years, when he was living in an assisted living facility, he wanted to serve others by providing legal advice to other residents. Again, he was most of all an excellent family man and friend who taught the values of grace, love, independence, forgiveness and amnesia in personal relationships. The best memorials to my cousin are those persons, like me, who had the chance to know him, to love him and to learn from him. We will miss Dick.

—Wayne Morse, Waldrep, Stewart & Kendrick LLC, Birmingham ▲

**George William Andrews, III**  
Birmingham  
Admitted: 1971  
Died: April 4, 2019

**Jack Berry Porterfield, Jr.**  
Birmingham  
Admitted: 1949  
Died: June 5, 2019

**Earl Charles Bloom, Jr.**  
Birmingham  
Admitted: 1950  
Died: May 12, 2019

**John Franklin Proctor**  
Birmingham  
Admitted: 1957  
Died: May 22, 2019

**James Bernard Brannon, Jr.**  
Auburn  
Admitted: 1978  
Died: June 1, 2019

**William Walton Sellers**  
Ramer  
Admitted: 1995  
Died: June 3, 2019

**William Huger Hardie, Jr.**  
Mobile  
Admitted: 1966  
Died: May 20, 2019

**Charles Edwin Shaver**  
Huntsville  
Admitted: 1967  
Died: May 6, 2019

**Francis Hutcheson Hare, Jr.**  
Birmingham  
Admitted: 1959  
Died: May 31, 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

### Agency

#### **Donaldson v. Country Mutual Insurance Company, No. 1171045 (Ala. June 14, 2019)**

Insurer had no right to control manner or means of independent agent's work and time in day-to-day activities to establish respondeat superior liability. Although Johnston's vehicle had "Country Financial" signs on it and although Johnston was engaged in a mixture of personal and business affairs while driving, agent was traveling back to his office from personal business, not engaged solely in business matters.

### Zoning; Governmental Agencies

#### **Meriwether v. Pike Road Volunteer Fire Protection Authority, No. 1180330 (Ala. June 14, 2019)**

Fire Authority is not a "governing body" or a "political subdivision" that, if engaged in governmental functions, is exempt from zoning ordinances.

### Attorney's Lien; Interest

#### **Pope, McGlamry, Kilpatrick, Morrison & Norwood, P.C. v. DuBois, No. 1171178 (Ala. June 14, 2019)**

Money held by the court regarding an attorney's lien is not a "money judgment" subject to the collection of post-judgment interest, and thus no post-judgment interest is due under Ala. Code § 8-8-10.

### Arbitration; Class Actions; Review of "Clause Construction"

#### **Alabama Psychiatric Services, P.C. v. Lazenby, No. 1170856 (Ala. June 21, 2019)**

Judicial review of an arbitral order construing a clause to determine whether class-action mechanism was available in arbitration was properly limited to whether the arbitrator even arguably construed the contract.

### Rule 54(B)

#### **Cox v. Parrish, No. 1170391 (Ala. June 21, 2019)**

Pendency of declaratory judgment count which was intertwined with claims subject to Rule 54(b) final order rendered the Rule 54(b) certification improper.

### Mortgages

#### **Deutsche Bank National Trust Co. v. Allison, No. 1160926 (Ala. June 28, 2019)**

Ala. Code § 35-4-50 provides that "[c]onveyances of property, required by law to be recorded, must be recorded in the office of the judge of probate." Tracing the provenance of this statute back to the Code of 1852, the court found an ambiguity created when, in an 1860s Code revision, the first comma was inserted. The intent of the Code



section, the court concluded, was not to require the recordation of all mortgages, but is intended to govern those recordings otherwise required by law. There is no general obligation to record mortgage assignments under Alabama law.

### Personal Jurisdiction; Preliminary Injunction

#### **Facebook, Inc. v. K.G.S., No. 1170244 (Ala. June 28, 2019)**

(1) Facebook was not subject to general personal jurisdiction because it could not be considered “at home” in Alabama; (2) Facebook lacked transaction-specific contacts directed to Alabama to subject it to specific jurisdiction, under the standard of *Walden v. Fiore*, 571 U.S. 277, 291 (2014), under which “the defendant, not the plaintiff or third parties, must create contacts with the forum State.” Failure to take down Facebook post was not directed to Alabama as a forum. Plaintiff also failed to establish reasonable likelihood of success on the merits of an invasion of privacy claim, which was premised upon the disclosure of information protected by the Alabama Adoption Code—the information at issue had already been made public by the *Huffington Post* at the time plaintiff sought preliminary injunctive relief.

### Open Records Act

#### **Health Care Authority for Baptist Health (an affiliate of UAB Health Systems) v. Central Alabama Radiation Oncology, LLC, No. 1171030 (Ala. June 28, 2019)**

(1) Authority is subject to the Open Records Act; (2) records were subject to disclosure and did not fall within exceptions to Ala. Code § 36-12-40, under which “recorded information received by a public officer in confidence, sensitive personnel records, pending criminal investigations, and records the disclosure of which would be detrimental to the best interest of the public” are not subject to disclosure; (3) by allowing the records to be subject to an in camera inspection by counsel for CARO, the Authority surrendered any claim of confidential or unduly sensitive material not otherwise subject to disclosure.

### Collateral Estoppel

#### **Austill v. Prescott, No. 1170709 (Ala. July 12, 2019)**

Prior quiet title action was a judgment on the merits and therefore operated as res judicata as to the right to redeem in the second action.

### Declaratory Judgments

#### **Ex parte Valley National Bank, No. 1180055 (Ala. July 12, 2019)**

Claims for declaratory judgment regarding non-liability under the Alabama Uniform Fraudulent Transfer Act and for non-liability for civil conspiracy are inappropriate actions for declaratory judgment under *Ex parte Valloze*, 142 So. 3d 504 (Ala. 2013). However, claims for declaratory judgment regarding veil piercing and for constructive trust were appropriate for DJ action. This is a 4-1-3 decision with one justice not participating.

### Employment Contracts

#### **Arnold v. Hyundai Motor Manufacturing Alabama, LLC, No. 1170974 (Ala. July 12, 2019)**

Under employment contract, employee was required to reimburse employer for moving expenses because he “voluntarily terminate[d]” his employment before two years. Alleged intolerable and hostile work environment, and purported “handshake agreement” that employer would not pursue him if he would not file an EEOC charge, did not negate the contractual obligation, because the resignation was voluntary whether or not he had good reason to do so, and that any handshake agreement was not supported by a writing to satisfy the statute of frauds, since the matter represented a debt exceeding \$25,000.

## From the Court of Civil Appeals

### Adverse Possession; Contiguous Ownership

#### **Kennedy v. Conner, No. 2180063 (Ala. Civ. App. June 5, 2019)**

Under Ala. Code § 6-5-200, “[a] boundary line dispute is subject to a unique set of requirements that is a hybrid of the elements of statutory adverse possession and adverse possession by prescription.”

#### **Bearden v. Ellison, 560 So. 2d 1042, 1044 (Ala. 1990)**

“If a coterminous landowner holds actual possession of a disputed strip under a claim of right openly and exclusively for a continuous period of ten years, believing that he is holding to the true line, he thereby acquires title up to that line, even though the belief as to the correct location originated in a mistake, and it is immaterial what he might or might not have claimed had he known he was mistaken.” *Sylvest v. Stowers*, 276 Ala. 695, 697, 166 So. 2d 423, 426 (1964).

### Attorneys’ Fees; Liens

#### **Rose v. Penn & Seaborn, LLC, No. 2180184 (Ala. Civ. App. June 5, 2019)**

Attorney’s lien based on 45 percent contingent fee contract was enforceable because fee was reasonable, supported by testimony that attorneys’ fees would have been more than the 45 percent contractual rate if billed hourly.

### Discovery; Workers’ Compensation

#### **Ex parte Farley, No. 2180513 (Ala. Civ. App. June 21, 2019)**

Trial court did not exceed its discretion, in action concerning non-scheduled injury, in ordering discovery of employee’s Social Security disability records, Social Security earnings records, Alabama Department of Internal Revenue records and Alabama Department of Labor records regarding workers’ compensation and unemployment benefits.

(Continued from page 395)

## Contractor Licensure

### **Construction Services Group, LLC v. MS Electric, LLC, No. 2171099 (Ala. Civ. App. June 28, 2019)**

Where trial court concluded that subcontract was subject to contractor licensure statutes, §§ 34-8-1(c) and 34-8-7(c), Ala. Code 1975, and that subcontractor was not licensed, contract was illegal as a matter of law, and thus subcontractor could not recover damages under any non-contract theory (unjust enrichment).

## Garnishment; Exemptions from Judgment

### **Smith v. Renter's Realty, No. 2180304 (Ala. Civ. App. July 12, 2019)**

The sole issue in this garnishment action is the constitutionality of Ala. Code § 6-10-6.1, which purports to exclude wages from assets subject to exemption in garnishment. The judgment debtor served the Attorney General under Ala. Code § 6-6-227, but the Attorney General did not have sufficient time to appear and defend the statute. The court remanded to the trial court for a return in 90 days, in order to give the AG an opportunity to address the constitutional issue.

# From the United States Supreme Court

## Abortion Rights

### **Box v. Planned Parenthood of Indiana, No. 18-483 (U.S. May 28, 2019)**

Reversing the Seventh Circuit, the Court in a per curiam opinion sustained an Indiana law altering the manner in which abortion providers may dispose of fetal remains. The Court cautioned that the case did not involve any argument "that Indiana's law creates an undue burden on a woman's right to obtain an abortion." *Cf. Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 874 (1992) (plurality opinion).

## Social Security

### **Smith v. Berryhill, No. 17-1606 (U.S. May 29, 2019)**

Social Security Act permits judicial review of "any final decision . . . after a hearing" by the Social Security Administration (SSA). 42 U.S.C. § 405(g). Claimants for supplemental security income disability benefits under Title XVI of the Act must generally proceed through a four-step administrative process in order to obtain federal-court review: (1) seek an initial determination of eligibility, (2) seek reconsideration of

that determination, (3) request a hearing before an administrative law judge (ALJ) and (4) seek review of the ALJ's decision by the SSA's Appeals Council. See 20 CFR §416.1400. A request for Appeals Council review generally must be made within 60 days of receiving the ALJ's ruling, §416.1468; if the claimant misses the deadline and cannot show good cause for doing so, the Appeals Council dismisses the request, §416.1471. In this case, petitioner filed an untimely appeal to the Appeals Council; the federal district court dismissed an appeal for lack of jurisdiction, which the Sixth Circuit affirmed. The Supreme Court unanimously reversed the Appeals Council's dismissal on timeliness grounds after a claimant has had an ALJ hearing on the merits qualifies as a "final decision . . . made after a hearing" for purposes of allowing judicial review under §405(g).

## Class Actions; Removal

### **Home Depot USA, Inc. v. Jackson, No. 17-1471 (U.S. May 29, 2019)**

Citibank, N.A. filed a debt-collection action in state court, alleging that respondent Jackson was liable for charges incurred on a Home Depot credit card. Jackson responded by filing third-party class-action claims against petitioner Home Depot U.S.A., Inc. and Carolina Water Systems, Inc., alleging that they had engaged in unlawful referral sales and deceptive and unfair trade practices under state law. Home Depot attempted to remove the case. Held (5-4): Neither the general removal statute (28 U.S.C. § 1441(a)) nor the removal provision of CAFA (28 U.S.C. § 1453(b)) permits removal by a third-party counterclaim defendant.

## Qualified Immunity

### **Nieves v. Bartlett, No. 17-1174 (U.S. May 29, 2019)**

In a section 1983 retaliatory arrest claim based on an alleged violation of the arrestee's First Amendment speech rights, the existence of probable cause to make the arrest defeats the claim as a matter of law.

## Title VII

### **Fort Bend County v. Davis, No. 18-525 (U.S. June 3, 2019)**

Title VII's requirement for exhausting administrative remedies is a waivable non-jurisdictional claim-processing rule.

## Bankruptcy; Statutory Construction

### **Taggart v. Lorenzen, No. 18-489 (U.S. June 3, 2019)**

For a creditor to be liable for civil contempt for violating the discharge injunction, there must be no "fair ground of doubt" as to whether the order barred the creditor's conduct, which is an objective test.



## Patent

### ***Return Mail, Inc. v. USPS, No. 17-1594 (U.S. June 10, 2019)***

The Government is not a “person” who can seek post-issuance of a patent in an administrative review before the Patent Trial and Appeal Board, 35 U.S.C. §6(c).

## Standing; Redistricting

### ***Virginia House of Delegates v. Bethune-Hill, No. 18-281 (U.S. June 17, 2019)***

The Virginia House lacks standing, either to represent the state’s interests or in its own right, in a challenge to the drawing of legislative districts. Under Virginia law, authority and responsibility for representing the state’s interests in civil litigation rest exclusively with the state’s Attorney General. The Supreme Court’s extant precedent has never recognized a discrete injury to each separate organ of government flowing from a judicial invalidation of a law.

## First Amendment

### ***Manhattan Community Access Corp. v. Halleck, No. 17-1702 (U.S. June 17, 2019)***

New York state law requires cable operators to set aside channels on their cable systems for public access. Held: the Manhattan Neighborhood Network, one such channel, is not a state actor subject to the First Amendment.

## TCPA; Administrative Law (FCC)

### ***PDR Network, LLC v. Carlton & Harris Chiropractic, Inc., No. 17-1705 (U.S. June 20, 2019)***

This case concerns the potentially binding effect of a 2006 FCC order interpreting “unsolicited advertisement” in junk-fax TCPA cases—the subject of much litigation. The Fourth Circuit had held in this case that the district court was required to apply the 2006 FCC order, under which the term “unsolicited advertisement” is to “include any offer of a free good or service,” and that the facts as alleged demonstrated that PDR’s fax was an unsolicited advertisement. The Supreme Court held that the extent to which the 2006 FCC order binds lower courts may depend on the resolution of two preliminary and rather arcane sets of questions not aired before the Court of Appeals, for which remand was necessary.

## First Amendment; Establishment Clause

### ***American Legion v. American Humanist Assn., No. 17-1717 (U.S. June 20, 2019)***

In a plurality, split-rationale decision of 87 pages, the Court held that the Bladensburg Cross, a 32-foot tall Latin Cross situated on public land in Prince George’s County, Maryland, constructed from 1918-25 and erected as a memorial to the WWI dead from that area, did not violate the Establishment Clause. Critical to the Court’s gathering of a

# 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 397)

majority position were two critical facts: (1) the Latin Cross became a symbol of the Great War (Justice Alito's lead opinion quotes from John McCrae's poem "In Flanders Fields" to get the point across); and (2) the historical aspect of the cross's placement and its longstanding maintenance without objection, until 2014 litigation. (There is a similar cross in Pensacola's Bayview Park, though it dates from 1941 and was reconstructed in 1969. The Eleventh Circuit held that cross unconstitutional in *Kondrat'yev v. City of Pensacola*, 903 F.3d 1169 (11<sup>th</sup> Cir. 2018). On June 28, 2019, the Supreme Court entered a "GVR" (granting cert., vacating and remanding) in light of the *American Legion* case.

### Section 1983; Accrual of Claim

#### **McDonough v. Smith, No. 18-485 (U.S. June 20, 2019)**

Statute of limitations on section 1983 fabricated-evidence claim began to run when claim accrued, which is when the criminal proceedings terminated in his favor, with an acquittal at the end of plaintiff's second trial. Accrual of a section 1983 claim is a question of federal law.

### Separation of Powers

#### **Gundy v. U.S., No. 17-6086 (U.S. June 20, 2019)**

Congress did not unconstitutionally delegate legislative power when it authorized the Attorney General to "specify the applicability" of SORNA's registration requirements to pre-Act offenders (plurality opinion).

### Takings

#### **Knick v. Township of Scott, No. 17-647 (U.S. June 21, 2019)**

Overruling *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U. S. 172 (1985), property owners must no longer seek just compensation under state law in state court before bringing a federal takings claim under §1983. A party whose property is taken without compensation may immediately bring a section 1983 action in federal court upon the taking, because the taking itself violates the Fifth Amendment.

### Taxation; Trusts

#### **N.C. Dept. of Revenue v. Kaestner 1992 Family Trust, No. 18-457 (U.S. June 21, 2019)**

State may not tax a trust simply because trust's beneficiaries live in the state, even if—as is the case here—those beneficiaries received no income from the trust in the relevant tax year, had no right to demand income from the trust in that year and could not count on ever receiving income from the trust.

### Census

#### **Department of Commerce v. New York, No. 18-966 (U.S. June 27, 2019)**

Secretary did not violate the Enumeration Clause or the Census Act in deciding to reinstate a citizenship question on the 2020 census questionnaire. The Secretary's decision to include the question as an enforcement tool under the Voting Rights Act was supported by the record evidence before him and was thus reasonable. However, the District Court was warranted in remanding the case back to the agency. Unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—which was the sole stated reason—"seems to have been contrived[,] given the evidence concerning the timing of the Administration's decision and other circumstances. Because the evidence does not match the Secretary's explanation for his decision, remand to the agency is appropriate.

### Redistricting; Partisan Gerrymandering

#### **Rucho v. Common Cause, No. 18-422 (U.S. June 27, 2019)**

Partisan gerrymandering claims present political questions beyond the reach of the federal courts.

### Administrative Law

#### **Kisor v. Wilkie, No. 18-15 (U.S. June 26, 2019)**

The Court reaffirmed two prior cases under which deference is given to an agency's reasonable reading of its own ambiguous regulations.

### Commerce Clause

#### **Tennessee Wine and Spirits Retailers Assn. v. Thomas, No. 18-96 (U.S. June 26, 2019)**

Tennessee's two-year durational-residency requirement applicable to retail liquor store license applicants violates the Commerce Clause and is not saved by the Twenty-first Amendment.

### FOIA

#### **Food Marketing Institute v. Argus Leader Media, No. 18-481 (U.S. June 24, 2019)**

(1) the association has standing to appeal due to the potential harm to its members from disclosure of the information; (2) where commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy, the information is "confidential" within FOIA Exemption 4's meaning (for trade secret type information).



## Trademark

### ***Iancu v. Brunetti*, No. 18-302 (U.S. June 24, 2019)**

Lanham Act's prohibition on registration of "immoral[] or scandalous" trademarks violates the First Amendment.

## Admiralty

### ***Dutra Group v. Batterton*, No. 18-266 (U.S. June 24, 2019)**

There is no recovery of punitive damages on an unseaworthiness claim.

# From the Eleventh Circuit Court of Appeals

## Ex Parte Young

### ***S&M Brands, Inc. v. State of Georgia*, No. 17-13261 (11<sup>th</sup> Cir. May 29, 2019)**

Georgia law requires that tobacco manufacturers who do business in Georgia, but are not parties to the multi-state Master Settlement Agreement (MSA), establish an escrow account and pay into it a set amount per cigarette sold annually. In 2016, the Georgia Assembly revised the escrow statute, after which the Georgia Attorney General modified the escrow agreement for NPMs. S&M sued to enjoin the implementation of the revised escrow agreement, contending that it violated the Contracts Clause and asserting other claims. The district court dismissed the case. The Eleventh Circuit affirmed, reasoning (1) as to the contracts claim, there was no reasonable expectation of contractual relationship, because if an industry is already heavily regulated, regulatory changes that abrogate industry players' contract rights are less likely to be considered substantial impairments; (2) NPMs were not similarly situated to manufacturers participating in the MSA for equal protection purposes; (3) sovereign immunity barred claim against state for violation of Georgia law; although under *Ex parte Young*, some suits requesting injunctive or declaratory relief against state officials are not considered suits against the state and thus are not barred by sovereign immunity, where (as in this case) the claim of entitlement to relief is based on a violation of state law, sovereign immunity applies.

## Qualified Immunity; Excessive Force

### ***Hinson v. Bias*, No. 16-14112 (11<sup>th</sup> Cir. June 14, 2019)**

Arrestee's claims against officers for excessive force in effecting arrest in a parking garage and subsequent deliberate indifference to post-arrest medical needs were not supported by substantial evidence. Video evidence from the arrests proved conclusive and demonstrated that officers' use of five fist blows to the back were reasonably designed to effect compliance from the arrestee.

## Foreclosure

### ***Landau v. Roundpoint Mortgage Servicing Corp.*, No. 17-11151 (11<sup>th</sup> Cir. June 11, 2019)**

Under 12 C.F.R. § 1024.41(g) of Regulation X, 12 C.F.R. § 1024.1, et seq., promulgated under RESPA, to reschedule a previously ordered foreclosure sale was not a prohibited motion for order of sale.

## ADA; Public Accommodation

### ***Silberman v. Miami-Dade Transit*, No. 17-15092 (11<sup>th</sup> Cir. June 17, 2019)**

Under ADA Title II, to show "deliberate indifference" to recover damages regarding public accommodation discrimination, plaintiff must plead and prove that a public official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the entity's behalf had actual knowledge of discrimination in the entity's programs and fail[ed] adequately to respond.

## Removal and Remand; Appellate Jurisdiction

### ***Overlook Gardens Apartments, LLC v. Orix USA, LP*, No. 17-14967 (11<sup>th</sup> Cir. June 25, 2019)**

Abrogating *Russell Corp. v. American Home Assurance Co.*, 264 F.3d 1040 (11<sup>th</sup> Cir. 2001), a district court's remand order premised upon forum selection clause enforcement is unreviewable by appeal or otherwise.

## IDEA

### ***L.J. v. School Board of Broward County*, No. 17-14824 (11<sup>th</sup> Cir. June 26, 2019)**

Although a material deviation from a student's IEP in its implementation would result in a violation of the statute, in this case, the implementation of the student's plan was not a material deviation from the IEP, and thus no statutory violation resulted.

## Bankruptcy; IRAs

### ***In re Yerian*, No. 18-10944 (11<sup>th</sup> Cir. June 26, 2019)**

Debtor forfeited the exemption from creditors for his IRA by engaging in prohibited self-dealing transactions.

## First Amendment; Public Meetings; Establishment Clause

### ***Williamson v. Brevard County*, No. 17-15769 (11<sup>th</sup> Cir. July 8, 2019)**

Practice of opening county commission meetings with prayer presented an Establishment Clause violation in this case. Commission members have plenary authority, on a rotating basis, to invite whomever they want to deliver invocations, with no consistent standards or expectation of inclusiveness. Commissioners exercised their discretion in a way that discriminates among religions based on their beliefs, favoring some but not all monotheistic and familiar religious sects over those faiths that fall outside the "mainstream."

(Continued from page 399)

### Red Light Camera Enforcement; Standing

**Worthy v. City of Phenix City, No. 17-14718 (11<sup>th</sup> Cir. July 18, 2019)**

Plaintiffs challenging legality of red light camera-enforcement systems lacked standing to seek injunctive relief because they could show no real and immediate threat of future injury. Although plaintiffs had standing to seek injunctive relief, plaintiffs did not state claims for violations of federal constitutional guarantees because enforcement scheme was civil in nature, not criminal, and thus protections did not attach.

### TCPA

**Gorss Motels, Inc. v. Safemark Systems, LP, No. 18-12511 (11<sup>th</sup> Cir. July 27, 2019)**

Hotel franchisees whose franchise agreements provided that franchisor's affiliates could offer assistance with purchasing items for their hotels and provided their fax numbers to receive assistance solicited junk faxes and thus did not have viable TCPA claims. Because the FCC abrogated the mandatory opt-out rule for such faxes while the case was on appeal, the failure to include an opt-out right in the fax did not constitute a violation of the TCPA.

### Class Actions; Attorneys' Fees

**In re The Home Depot, Inc. Consumer Data Security Breach Lit., No. 17-14741 (11<sup>th</sup> Cir. July 25, 2019)**

In settlement of a consumer data breach class action, litigants provided that class counsel's attorney's fees, in an amount to be set by the court, would be paid by defendant in addition to benefits paid or conveyed to class members. The district court awarded attorney's fees of \$15.3 million, using primarily the lodestar method (but employing a percentage-of-fund cross-check), and employing a multiplier of 1.3 to the hourly-based calculation for the risk associated with class counsel's prosecution of the case. The Eleventh Circuit vacated. The Court held: (1) the case is a contractual fee-shifting case, and the constructive common-fund doctrine does not apply; (2) the district court did not err in setting hourly-based fees in lodestar by simply determining the reasonably hourly rates and a reasonable number of hours; the *Johnson* factors can be used to enlighten that analysis, but district courts are not required to slog through the 12-factor analysis in setting reasonable rates and reasonable hours in lodestar; and (3) the district court abused its discretion in applying a multiplier to a fee-shifting case.

### Negligence (Maritime)

**K.T. v. Royal Caribbean Cruises, Ltd., No. 17-14237 (11<sup>th</sup> Cir. July 24, 2019)**

District court erred in dismissing complaint filed by passenger (then a minor) against cruise line on various negligence theories in failing to prevent adult male passengers from ordering and serving her drinks, which led eventually to her becoming intoxicated, after which passengers sexually assaulted her. Complaint adequately alleged that cruise line was on notice of common practices of serving underage passengers or having adult passengers ordering drinks for minors, rendering foreseeable to the cruise line the danger of sexual assault.

### Eleventh Amendment

**McAdams v. Jefferson County 911 Emergency Communications District, Inc., No. 18-13781 (11<sup>th</sup> Cir. July 24, 2019)**

JeffCo 911 ECD is not an arm of the State of Alabama, and thus was not entitled to Eleventh Amendment Immunity.

## RECENT CRIMINAL DECISIONS

# From the U.S. Supreme Court

### Batson

**Flowers v. Mississippi, No. 17-9572 (U.S. June 21, 2019)**

In a case with a tortured history (six trials, involving multiple *Batson*-based reversals), the Supreme Court held that the state's peremptory strike of black prospective juror Carolyn Wright was motivated in substantial part by discriminatory intent.

### Apprendi; Probation Revocation; Sentence Enhancement; Right to Jury Trial

**United States v. Haymond, No. 17-1672 (U.S. June 26, 2019)**

After a probation violation in which petitioner was found in possession of child pornography (by a judge without a jury, and by a preponderance of evidence), under 18 U. S. C. §3583(e)(3), the judge could have sentenced him to a prison term of between zero and two additional years. Because

possession of child pornography is an enumerated offense under §3583(k), the judge instead imposed that provision's five-year mandatory minimum. The Court held that section 3583(k) violated Haymond's right to jury trial.

## Double Jeopardy

### ***Gamble v. U.S., No. 17-646 (U.S. June 17, 2019)***

The Court declined to overrule the "dual sovereignty" doctrine, under which there is no double jeopardy violation of sequential prosecutions of like conduct under the law of two separate sovereigns (federal and state, typically).

## Felon in Possession

### ***Rehaif v. U.S., No. 17-9560 (U.S. June 21, 2019)***

In a felon-in-possession or alien-in-possession prosecution under 18 U.S.C. §922(g) and §924(a)(2), the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.

## Exigent Circumstances Test

### ***Mitchell v. Wisconsin, No. 18-6210 (U.S. June 27, 2019)***

The plurality concluded that when a driver is unconscious and cannot be given a breath test, the exigent-circumstances doctrine generally permits a blood test without a warrant, but not without potential exceptions. Justice Thomas (the fifth justice forming the majority) would apply a per se rule, under which the natural metabolization of alcohol in the blood stream "creates an exigency once police have probable cause to believe the driver is drunk," regardless of whether the driver is conscious.

## Vagueness; Criminal Law

### ***United States v. Davis, No. 18-431 (U.S. June 24, 2019)***

The residual clause of 18 U. S. C. §924(c), which authorizes heightened criminal penalties for using, carrying or possessing a firearm in connection with any federal "crime of violence or drug trafficking crime." §924(c)(1)(A), defines "crime[s] of violence" as any crimes "that by [their] nature, involv[e] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." §924(c)(3)(B). The Court held this provision unconstitutionally vague.

# From the Court of Criminal Appeals

## Habitual Offender

### ***Towns v. State, CR-17-1153 (Ala. Crim. App. May 24, 2019)***

Prior juvenile robbery convictions qualified for sentence enhancement under the Alabama Habitual Felony Act, Ala.

Code § 13A-5-9, and were not unconstitutional under *Miller v. Alabama*, 567 U.S. 460 (2012). While the court affirmed the defendant's convictions of robbery, kidnapping and fraudulent use of a credit card, a remand for resentencing was deemed necessary because the credit card offense constituted a Class D felony, rather than Class C felony, at the time of its commission.

## Habitual Offender

### ***Lanier v. State, CR-18-0474 (Ala. Crim. App. May 24, 2019)***

Defendant was not entitled to post-conviction relief on the ground that his sentence on a prior conviction used for enhancement under the Alabama Habitual Felony Act had been set aside. The prior conviction could still be utilized for habitual offender sentence enhancement, regardless that the court of criminal appeals had previously vacated its corresponding sentence.

## Mandatory Adult Prosecution

### ***State v. B.T.D., CR-17-1171 (Ala. Crim. App. May 24, 2019)***

The court reversed the dismissal of the juvenile defendant's assault indictment, rejecting the trial court's finding that Ala. Code § 12-15-204, which requires the prosecution of juveniles over the age of 16 as an adult for certain felony offenses, was unconstitutional. After reviewing case law from numerous other jurisdictions, the court found that § 12-15-204 did not violate the defendant's due process or equal protection rights, nor was the statute vague or overbroad.

## Search and Seizure

### ***Payton v. State, CR-17-0673 (Ala. Crim. App. May 24, 2019)***

Trial court did not err in denying defendant's motion to suppress the results of a warrantless search of his apartment. Search was proper under the emergency-aid exception to the warrant requirement; police had an objectively reasonable basis to believe defendant or others were in need of emergency assistance.

## Double Jeopardy; Domestic Violence

### ***Moore v. State, No. CR-17-0242 (Ala. Crim. App. May 24, 2019)***

Defendant's convictions of domestic violence-assault and domestic violence-menacing did not arise from same act or transaction and thus did not constitute a double jeopardy violation. However, the court reversed the domestic violence-menacing conviction on the ground that the trial court's oral charge erroneously omitted the element of the defendant's physical action for that offense. ▲





**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).



**Caleb Hindman**  
Attorney, Legislative Services Agency

## LEGISLATIVE WRAP-UP

# 2019 Wrap-Up, Part 2

The July edition of this column covered the Alabama Law Institute legislation that passed during the 2019 Legislative Session. This month serves as installment two and covers other noteworthy legislation. The first year of the quadrennium is always an active one and this year was no exception. There were 1,070 bills introduced during the 2019 Legislative Session, of which 383 bills were enacted and became law. In all, there were 540 acts, including bills and resolutions. Given this volume, this article cannot come near covering all acts of interest, but we do cover select general bills most likely to be encountered by practitioners around the state. Summaries of all of the general acts can be found at <http://lsa.state.al.us> under the Legal Division Publications.

## Business and Insurance

### Special Needs Trust (Act 2019-221, SB57)

#### Senator Cam Ward

This act authorizes a member of the Retirement Systems of Alabama to designate a portion of his or her retirement benefits to be paid to a special needs trust for the benefit of a dependent child. Effective: August 1, 2019



Ward

### Hospital Liens (Act 2019-273, HB11)

#### Representative Connie Rowe

This act (1) requires a hospital that provides medical treatment to an injured person to seek compensation solely from that person's health insurance provider, with the exception of approved copayments and deductibles, unless doing so would be contrary to a contract between the hospital and the persons' health care payor, or federal or state law or a contract exists between the hospital and the health care payor and there has been a failure to satisfy the claim; and (2) allows a hospital to perfect a hospital lien against any recovery the injured person may be awarded for injuries by way of settlement or judgment when the person's health care payor has failed to satisfy the person's claim, the person was not known to the hospital to be covered by a health care payor, the person was covered by a governmental payor or the person was not a subscriber to a primary care policy. If a hospital does not receive evidence of an injured person's health care payor until after the lien is perfected, it would be required to bill the health care payor for the treatment, but could retain its lien until the claim is satisfied. Effective: August 1, 2019



Rowe

## Withholding of Insurance Claims (Act 2019-460, HB139)

### Representative K.L. Brown

This act provides that if a claim under an insurance policy for damage to residential real property is paid to the insured and a lender, and the lender holds all or part of the proceeds from the insurance claim payment pending completion of all or part of the repairs to the property, the lender is required to notify the insured of each requirement with which the insured must comply for the lender to release the insurance proceeds and provides that interest at a rate of 10 percent per year begins to accrue on those insurance proceeds upon a lender's failure to properly release the proceeds or upon the lender's failure to explain the reason for its refusal and the requirements the lender must meet to have the proceeds released. Effective: September 1, 2019



Brown

within a municipality or a municipality's police jurisdiction except to deliver its merchandise is charged per business; (2) provides an exception for the requirement to purchase a delivery license for a taxpayer whose gross receipts within the municipality or the municipality's police jurisdiction do not exceed \$10,000 for the preceding license year when the taxpayer has no other physical presence within the municipality or the municipality's police jurisdiction except to deliver its merchandise; and (3) provides that a delivery license purchased under this section shall be calculated in arrears, based on the related gross receipts during the preceding license year. Effective: May 28, 2019

## Criminal Law and Procedure

### Domestic Violence (Act 2019-252, HB425)

#### Representative David Faulkner

This act (1) provides that the crime of burglary in the first degree is domestic violence when committed against anyone that other domestic violence crimes may be committed against; (2) adds stepparents and stepchildren to the class of victims for whom domestic violence actions may be pursued;



Faulkner

## Local Government

### Business Delivery License (Act 2019-283, HB329)

#### Representative Paul Lee

This act (1) clarifies that the business delivery license fee for businesses with no physical presence



Lee

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

**davis direct**  
On Target. On Time.

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

(Continued from page 403)

(3) specifically excludes non-romantic co-residents from the meaning of household member; (4) doubles the term of imprisonment imposed for a domestic violence crime in the first or second degree if the crime was committed in the presence of a child under the age of 14 years who is the victim's child or stepchild, the defendant's child or stepchild or a child residing in or visiting the household of the victim or defendant; (5) provides that a charge of domestic violence in the third degree is a Class C felony if the defendant has a previous conviction for domestic violence in the first degree, domestic violence in the second degree, domestic violence by strangulation or suffocation, or a domestic violence conviction or substantially similar conviction from another state or jurisdiction; (6) provides that a third conviction of a domestic violence protection order is a Class C felony; and (7) provides that a court appointed guardian ad litem may petition for relief on behalf of minor children and any person prevented by physical or mental incapacity from seeking a protection order from abuse. Effective: May 23, 2019

### Sentencing (Act 2019-344, HB559)

#### Representative Matt Simpson

This act provides that when imposing a sentence for a misdemeanor or a municipal ordinance violation, the court may order a portion of the sentence to be suspended and the defendant to be placed on probation not exceeding two years. Effective: May 31, 2019



Simpson

### Sexual Offenses (Act 2019-465, SB320)

#### Senator Vivian Davis Figures

This act (1) redefines deviate sexual intercourse as sodomy; (2) includes mental defectiveness, mental incapacitation and physical helplessness in a broad definition of incapacitation; (3) redefines sexual contact to include touching that occurs through clothing without regard to marital relationship; (4) expands the definition of forcible compulsion; (5) provides that certain sexual contact can be an offense under sexual misconduct; (6) includes additional offenses within the crime of sexual torture; and (7) creates a presumption that juveniles adjudicated delinquent of certain sex offenses are not subjected to the state sex offender registration requirements if the juvenile has been counseled on the dangers of the conduct for which he or she was adjudicated delinquent unless the sentencing court makes a determination that the juvenile sex offender is to be subjected to those sex offender registration requirements. Effective: September 1, 2019



Figures

### Voyeurism (Act 2019-481, SB26)

#### Senator Clyde Chambliss

This act creates the crime of voyeurism and provides criminal penalties for the commission of the crime. Effective: September 1, 2019



Chambliss

### Escape from Custody (Act 2019-485, SB92)

#### Senator Clyde Chambliss

This act provides that when a probationer or parolee escapes from the custody of the Department of Corrections or agency having custody of the person, and the person has a prior conviction for a Class A felony or a crime in which the victim was less than 12 years of age, or the person is serving a life sentence, the department or agency, as appropriate, is required to notify the governor, certain law enforcement agencies and certain electronic media outlets of the escape. Effective: September 1, 2019



Chambliss

### Alabama Forfeiture Information Reporting Act (Act 2019-505, SB191)

#### Senator Arthur Orr

This act (1) requires state, county and municipal law enforcement agencies to report all property seized in connection with a criminal event to the uniform crime reporting system operated by the Alabama Law Enforcement Agency on behalf of the Alabama Criminal Justice Information Center Commission (ACJICC); (2) requires the commission to establish rules for the reporting of the seized property; (3) requires revenue derived from seized property to be kept on its own line item within the budget of the agency receiving the revenue; (4) requires accounts containing revenue from seized assets to be audited as other public funds are audited; and (5) requires ACJICC to make an annual report regarding seized assets and resulting revenues to the speaker of the house, the president pro tempore of the senate and the governor. Sections 1 and 2 of the act, requiring the report of seizures, are effective June 10, 2019, and the remaining sections are effective October 1, 2019.



Orr

### Aggravated Theft by Deception (Act 2019-513, HB57)

#### Representative Chris Sells

This act (1) creates the crime of aggravated theft by deception, which occurs if: a person commits a theft of foreign or domestic funds, cash or cash equivalent by deception in an amount exceeding \$200,000, or



Sells



a person commits theft of public funds or revenue of any governmental or political subdivision by deception in an amount exceeding \$100,000; (2) creates the crimes of attempt, criminal solicitation or criminal conspiracy to commit aggravated theft by deception; (3) classifies these crimes as either a Class A or Class B felony; and (4) imposes additional sanctions in cases where a parolee or probationer has been convicted of any of these crimes. Effective: September 1, 2019

### Anti-Road Rage Act (Act 2019-515, HB212)

#### Representative Phillip Pettus

This act (1) provides that a vehicle may not travel in the left lane of an interstate highway for more than 1.5 consecutive miles unless the vehicle completely passes at least one other vehicle, unless doing so is necessary due to: traffic conditions; inclement weather, obstructions or hazards; compliance with a law, rule, ordinance or traffic control device; exiting a roadway to the left; paying a toll or user fee at a toll collection facility; operation of an authorized emergency vehicle in the course of duty; or operation of a vehicle in the course of highway maintenance or construction or through a construction zone; and (2) provides that law enforcement may issue only a warning citation for a violation for 60 days following the effective date of the act. Effective: September 1, 2019



Pettus

### Sex Abuse in the Second Degree (Act 2019-516, HB237)

#### Representative Matt Simpson

This act provides that sex abuse in the second degree, normally a Class A misdemeanor, is instead a Class C felony if there is at least a 15-year age difference between the victim and the defendant. Effective: September 1, 2019



Simpson

### Receiving Stolen Property in the Second Degree (Act 2019-521, HB375)

#### Representative Matt Simpson

This act provides that receiving a stolen firearm, rifle or shotgun, regardless of its value, constitutes the crime of receiving stolen property in the second degree. Effective: September 1, 2019.



Simpson

## Civil Law and Procedure

### Condemnation Actions (Act 2019-234, HB98)

#### Representative Corley Ellis

This act authorizes the state or a political subdivision of the state, in a condemnation action,



Ellis

to use a waiver valuation in lieu of an appraisal under certain conditions. Effective: May 22, 2019

### Asbestos Exposure Transparency Act (Act 2019-261, SB45)

#### Senator Dan Roberts

This act (1) requires a plaintiff in an asbestos action to file a sworn statement disclosing information regarding the plaintiff's exposure to asbestos or, alternatively, to file available asbestos trust claims and produce all trust claims materials before trial; (2) creates a rebuttable presumption that in an asbestos action, trust claim materials are relevant, authentic and admissible as evidence; and (3) provides that a defendant in an asbestos action may seek discovery from an asbestos trust. Effective: August 1, 2019



Roberts

### Tolling of Statute of Limitations (Act 2019-480, SB11)

#### Senator Linda Coleman-Madison

This act (1) provides that the statute of limitations for an action for an injury arising from a sex offense is six years; and (2) provides that if the person is below the age of 19 years or insane at the time of the injury, the statute of limitations is tolled until the termination of the disability. Effective: September 1, 2019



Madison

### Medicaid/Probate Proceedings (Act 2019-489, SB76)

#### Senator Arthur Orr

This act (1) requires the personal representative or person filing to initiate a proceeding under the Alabama Small Estates Act to give notice of his or her appointment, or the filing of a petition in accordance with the Alabama Small Estates Act, to the Alabama Medicaid Agency and provides requirements for the contents of the notice; (2) prohibits certain debts against the estate of the decedent from being paid until the notice has been filed in the probate court and 30 days have passed since the agency received the notice; (3) authorizes the agency to petition to open the probate estate of a Medicaid recipient by filing a petition to appoint a third party administrator and issue letters of administration; and (4) authorizes the agency to file a claim against the estate of the Medicaid recipient for the amount of any medical assistance payments made on behalf of the recipient, with exceptions. Effective: September 1, 2019



Orr

## Courts

### Appointment of Court Referees (Act 2019-163, HB43)

#### Representative Jim Hill

This act (1) authorizes the administrative director



Hill

(Continued from page 405)

of courts to allow the presiding circuit court judge in any judicial circuit to appoint one or more court referees to hear child support cases that are domestic relations cases brought under Title IV-D of the Social Security Act; (2) establishes a procedure by which child support cases may be heard by a court referee; (3) specifies the duties of a court referee; and (4) provides for the review of the court referee's findings by a circuit court judge. Effective: August 1, 2019

### Involuntary Commitments (Act 2019-398, SB246)

#### Senator Garlan Gudger

This act (1) provides that a probate court may issue a renewal of an involuntary commitment order for treatment for a mentally ill person if it finds, after a hearing, that the person is in need of further care; and (2) provides procedural requirements for petitioning for such a renewal. Effective: September 1, 2019



Gudger

### Circuit and District Court Jurisdiction (Act 2019-405, SB297)

#### Senator Sam Givhan

This act (1) increases the exclusive original jurisdiction of the circuit court from cases in which the amount in controversy exceeds \$10,000 to cases in which the amount in controversy exceeds \$20,000; (2) increases the original civil jurisdiction of the district court from cases in which the amount in controversy does not exceed \$10,000 to civil actions in which the matter in controversy does not exceed \$20,000; and (3) further provides for the filing fee for cases filed in the district court to reflect the increase in the authorized amount in controversy. Effective: September 1, 2019



Givhan

### Juvenile Court Jurisdiction; Minors' Right to Contract; (Act 2019-447, HB349)

#### Representative Terri Collins

This act (1) provides the juvenile court with jurisdiction over individuals who are under 19 years of age and before the court for any of the following: a child in need of supervision matter, commitment to the State Department of Mental Health or for a proceeding where it is alleged that the rights of the individual are improperly denied or infringed in proceedings resulting in suspension, expulsion or exclusion from a public school; and (2) authorizes unemancipated minors who are 18 years of age to enter into binding contracts. Effective: September 1, 2019



Collins

### Qualifications for Judgeship (Act 2019-539, HB529)

#### Representative David Faulkner

This act (1) increases the amount of time a person must have been licensed to practice law in order to qualify to be elected to or appointed to a circuit court judgeship from five years to seven years; (2) increases the amount of time a person must have been licensed to practice law in order to qualify to be elected to or appointed to a district court judgeship from three years to four years; and (3) provides that individuals who have been suspended or disbarred from the practice of law within the 10 preceding years may not be elected to or appointed to a circuit court judgeship or a district court judgeship. Effective: January 1, 2020



Faulkner

## Correctional Facilities

### Feeding of Prisoners (Act 2019-133, SB228)

#### Senator Arthur Orr

This act (1) increases the allowance paid by the state for the feeding of prisoners in the custody of the sheriff from a daily amount of \$1.75 per prisoner to \$2.25 per prisoner; (2) provides that under no circumstances may the sheriff be personally responsible for the cost of feeding prisoners in the event of any shortage of funds; (3) establishes a Prisoner Feeding Fund in each county sheriff's office and requires all payments made by the state to be deposited into each account; (4) requires each sheriff to maintain records of all payments received and all expenditures made from the Prisoner Feeding Fund and subjects the fund to a regular audit by the Department of Examiners and Public Accounts; (5) provides that at the end of each fiscal year, the sheriff may expend not more than 25 percent of the fund for the operation of the jail or for law enforcement purposes, and that the remaining balance must be carried over to the following fiscal year; and (6) commencing September 30, 2019, makes an appropriation of \$500,000 each year from the State General Fund to the Emergency Prisoner Feeding Fund, which may not exceed a total accumulated amount of \$1,000,000, to be used by counties in the case of an unforeseeable emergency cost overrun that fully depletes the Prisoner Feeding Fund in the county treasury. Effective: August 1, 2019



Orr

## Feminine Hygiene Products (Act 2019-306, HB308)

### Representative Rolanda Hollis

This act requires the Department of Corrections and county sheriffs to provide feminine hygiene products to female prisoners at the expense of the department or county, upon request by the prisoner. Effective: May 29, 2019



Hollis

## Board of Pardons and Paroles (Act 2019-393, HB380)

### Representative Connie Rowe

This act (1) authorizes the governor, with the advice and consent of the senate, to fill a vacant seat on the board of Pardons and Paroles; (2) provides for the membership of the board; (3) authorizes the governor to appoint a director of Pardons and Paroles and establish the director's responsibilities; (4) sets criteria to be used by the board to determine a prisoner's initial parole consideration date; (5) sets parameters to be used if the board deviates from the standards when setting a prisoner's initial parole consideration date; (6) requires approval by the deputy attorney general or assistant attorney general if the board deviates from the standards when setting a prisoner's initial parole consideration date; and (7) requires the board to work with the district attorney or Attorney General's Office to notify a victim, victim's representative or other interested party prior to the board taking action. Effective: September 1, 2019



Rowe

being available in any variety of flavors other than tobacco, mint or menthol; and (5) prohibits counties from issuing a license to a retailer of electronic nicotine delivery systems if the retailer is located within 1,000 feet of a school, child care center, church, public library, public playground, public park or a youth center. Effective: August 1, 2019

## Criminal Background Checks (Act 2019-303, SB277)

### Senator Rodger Smitherman

This act (1) requires criminal background checks for any adult working in a child care institution, group home, maternity center or transitional living facility; and (2) expands the list of violent crimes for which a conviction would make an individual unsuitable for employment, volunteer work, approval or licensure regarding a child care institution, group home, maternity center or transitional living facility. Effective: May 29, 2019



Smitherman

## Reporting of Gunshot Wounds (Act 2019-461, HB288)

### Representative Adline Clarke

This act requires a physician, nurse, and employees and agents of a hospital, mental health facility, clinic or nursing home who knowingly treat a person suffering from a gunshot wound or who receive a request for treatment for a gunshot wound to report the injury to a law enforcement officer. Effective: September 1, 2019



Clarke

# Health

## Stringer-Drummond Vaping Act (Act 2019-233, HB41)

### Representatives Shane Stringer and Barbara Drummond

This act (1) requires the Alabama Alcoholic Beverage Control Board to regulate the sale and advertisement of alternative nicotine delivery systems and alternative nicotine products; (2) prohibits the sale of an electronic nicotine delivery system or alternative nicotine product without the appropriate permit from the board; (3) prohibits the sale or transfer of alternative nicotine products to minors and increases the fine for unlawful sales of any tobacco product to a minor; (4) prohibits retailers and manufacturers of alternative nicotine products and electronic nicotine delivery systems from advertising those products near schools, as a tobacco cessation product, as a healthier alternative to smoking or, when displayed on an outdoor billboard, as



Stringer



Drummond

# Labor and Employment

## Clarke-Figures Equal Pay Act (Act 2019-519, HB225)

### Representative Adline Clarke and Senator Vivian Davis Figures

This act (1) prohibits an employer from paying an employee at a wage rate less than those paid to employees of another sex or race for equal work unless the pay differential is due to: a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any factor other than sex or race; and (2) prohibits an employer from refusing to interview, hire, promote or employ an applicant for employment, or to retaliate against such an applicant, because the applicant refuses to provide wage history. Effective: September 1, 2019



Clarke



Figures



(Continued from page 407)

## Education

### Free Speech On Campus (Act 2019-396, HB498)

#### Representative Matt Fridy

This act (1) requires state two-year and four-year colleges and universities to adopt and enforce policies that protect and uphold free speech rights for students, faculty and staff; (2) requires the boards of trustees of each public institution of higher education to submit to the governor and the legislature a report detailing the course of action implemented to ensure compliance with the act within 90 days after its effective date and any changes or updates to the chosen course of action within 30 days after the changes; and (3) requires the boards of trustees to publish annual reports detailing violations of the policies, describing how the violations were handled, describing difficulties and successes in maintaining institutional neutrality and including any other assessments, criticism, commendations or recommendations the boards see fit to include. Effective: July 1, 2020



Fridy

### Donation of Food (Act 2019-526, HB566)

#### Representative Wes Kitchens

This act provides that a public school district may allow its schools to donate surplus, non-expired food to a charitable organization for the purpose of redistributing the food to needy students participating in the federal school nutrition programs for consumption at the school or off school grounds. Effective: September 1, 2019



Kitchens

### School Resource Officers (Act 2019-532, HB209)

#### Representative Phillip Pettus

This act (1) authorizes local boards of education to employ retired federal, state and local law enforcement officers with at least 20 years of law enforcement experience as school resource officers or school security personnel; and (2) authorizes those officers to carry a firearm while on duty if the officer annually completes and passes the firearm requalification required of law enforcement officers by the Alabama Peace Officers' Standards and Training Commission and the officer is trained in the use of a non-lethal weapon and carries that weapon. Effective: September 1, 2019



Pettus

## Public Utilities

### Broadband Using Electric Easements Accessibility Act (Act 2019-326, HB400)

#### Representative Randall Shedd

This act (1) authorizes the placement, construction, installation, operation and use of broadband and other advanced communication capabilities and related facilities within electric easements by electric providers; (2) authorizes electric providers to engage in, and permits electric providers to authorize others to engage in, operating broadband systems or providing broadband services through advanced communications capabilities within electric easements; (3) authorizes electric providers to condemn easements and rights-of-way for advanced communications capabilities; (4) provides for the rates and the terms and conditions of access for certain pole attachments; and (5) provides for the allocation and accounting of certain costs associated with the provision of nonutility support services licenses, leases and membership agreements to place, construct, install, operate and use advanced communications within an electric easement. Effective: August 1, 2019



Shedd

### Grants Awarded to Spread Broadband Internet (Act 2019-327, SB90)

#### Senator Clay Scofield

This act (1) increases the minimum Internet speed that qualifies as minimum service threshold; (2) increases the monetary maximum for grants awarded for projects designed to spread broadband Internet to unserved areas; (3) requires the Alabama Department of Economic and Community Affairs, when awarding grants, to take into consideration the average pole attachment rates that a grant applicant charges to an unaffiliated entity; and (4) authorizes ADECA to give additional consideration to certain grant applicants, including applicants certified by the ADECA Office of Minority Business Enterprise or otherwise certified as a Disadvantaged Business Enterprise. Effective: May 30, 2019



Scofield

# Sports Regulation

## Fantasy Contests Act (Act 2019-343, HB361)

### Representative Kyle South

This act (1) provides for the operation of fantasy sports contests for cash prizes when winning outcomes are determined predominately by accumulated statistical results of performance of individual athletes in actual sporting events and winning outcomes are not based on the score, point spread or any performance of any single actual sports team or combination of teams or solely on any single performance of an individual athlete in any single sporting event; (2) requires fantasy contest operators to apply for registration with the Office of the Attorney General, pay registration fees and pay taxes equal to 10.5 percent of yearly gross revenues; (3) establishes procedures to prevent fraud, ensure fairness, enforce minimum age requirements, prohibit advertising targeted at minors, prohibit contests based on high school or youth sports, truthfully advertise prizes and awards for each contest, prohibit athletes from participating in fantasy contests determined in whole or in part upon their or their team's performance or in sports in which they participate, segregate fantasy contest player funds from operational funds, and provide for independent audits; and (4) allows the Office of the Attorney General to adopt rules to implement and enforce the act. Effective: May 31, 2019



South

## Student Athlete Agents (Act 2019-504, SB5)

### Senator Gerald Allen

This act provides that registered athlete agents may, prior to the signing of an agency contract by a student athlete, pay expenses of a student athlete, a family member of the student athlete and an individual authorized to receive such payment by the national association that certified the agent, if the expenses are: (1) for the benefit of an athlete who is a member of a class of athletes authorized to receive the benefit by the national association; (2) of a type authorized to be paid by a certified agent by the national association; (3) for a purpose authorized by the national association; and (4) allowed by the interscholastic association that determines eligibility for the athlete. Effective: June 10, 2019



Allen

# Domestic Relations

## Legal Rights of Blind Individuals (Act 2019-274, HB24)

### Representative Rolanda Hollis

This act provides that an individual's blindness may not serve as a basis for: (1) denial or



Hollis

restriction of visitation or custody in family or dependency cases when the visitation or custody is otherwise in the best interests of the child; (2) denial of participation in adoption when the adoption is otherwise in the best interests of the child; or (3) denial of appointment as a foster parent or legal guardian of a child when such foster care or legal guardianship is otherwise in the best interests of the child. Effective: August 1, 2019

## Marriage Licenses (Act 2019-340, SB69)

### Senator Greg Albritton

This act (1) abolishes the requirement of a marriage license for marriages performed in this state; (2) establishes requirements for a marriage document to be completed and signed by the parties to the marriage; (3) requires the payment of a recording fee to the judge of probate for each marriage recorded; and (4) establishes that there is no requirement for a marriage ceremony in order to legitimize a marriage. Effective: August 29, 2019



Albritton

# Elections

## Absentee Voting by Individuals with a Disability (Act 2019-359, HB174)

### Representative Victor Gaston

This act (1) allows a qualified voter who has a permanent disability preventing his or her attendance at the polls to vote by absentee ballot; and (2) requires the secretary of state to adopt rules implementing a process to place such a voter on the absentee voter list and provide that person with a ballot before each election. Effective: September 1, 2019



Gaston

## Absentee Voting Generally (Act 2019-507, SB301)

### Senator Rodger Smitherman

This act (1) requires an applicant for an absentee ballot to include photo identification with the application; (2) provides additional situations under which a registered voter may vote by absentee ballot or emergency absentee ballot; (3) deletes a requirement that an absentee election manager post a list of all absentee ballot applications received in a public place prior to an election; and (4) allows an absentee ballot to be post-marked no later than election day and received by mail no later than noon on the seventh day following an election. Effective: August 1, 2019 ▲



Smitherman



## ABOUT MEMBERS, AMONG FIRMS

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

### About Members

**Randall B. James PC** announces a change of address to 3500 Blue Lake Dr., Ste. 201, Birmingham 35243. Phone (205) 747-0710.

**Joel Weatherford** announces the opening of **Joel W. Weatherford LLC** at 200 Parkwest Cir., Ste. 3, Dothan 36303. Phone (334) 203-6325.

**Amelia Mitta** joined as an associate. The firm name is now **FarmerPrice LLP**.

**Fox Rothschild LLP** announces that **Bryan S. Kaplan** joined as a partner in the Atlanta office.

**Foxtrot Family Law** announces that **Gillian Kelley** joined the Huntsville office as an associate.

**Gordon, Dana & Gilmore LLC** announces that **Jonathan D. Gilbert** joined as an associate.

### Among Firms

**Baker Donelson** announces that **J. Trent Scofield** joined the Birmingham office.

**Barnett Bugg Lee & Carter** of Monroeville announces that **John B. Barnett, III** joined the firm.

**Copeland Franco** announces that **Benjamin W. Maxymuk, Wallace D. Mills** and **Richard K. Vann, Jr.** joined the firm.

**Cunningham Bounds LLC** announces that **Aaron N. Maples** joined as an associate.

**Farmer, Price, Hornsby & Weatherford LLP** of Dothan announces that

**Lightfoot, Franklin & White LLC** announces that **McKinley Dunn** and **Benjamin P. Harmon** joined the Birmingham office as associates.

**Mezrano Law Firm PC** announces that **Jacey Jefferson** joined the firm.

**Stone Crosby PC** announces that **Lauren M. Collinsworth** joined as an associate.

**Michael Tewalt, Ed Crackel** and **Camille Preston** announce the formation of **Tewalt, Crackel & Associates LLC** in Huntsville.

**Traditions Law Group** announces the opening of an office in Grant. ▲



# 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.