

THE ALABAMA LAWYER

NOVEMBER 2019 | VOLUME 80, NUMBER 6



▲
Masking the Struggle
Page 428

▲
The Duty of Attorney Wellness
Page 435

▲
**Ten Steps to Creating an
"I Believe" Mindset**
Page 440

▲
Lawyer Well-Being
Page 445

THE WELLNESS ISSUE
How are YOU doing?



OUR AIM IS YOUR PEACE OF MIND

AIM, attorney-owned and operated, is dedicated to providing competitively-priced attorney malpractice insurance for attorneys in the states of Alabama and Tennessee.

After 30 years serving attorneys in Alabama and Tennessee, we're still growing. Grow with us!



**ATTORNEYS
INSURANCE
MUTUAL**
of the South®



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



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[®]

AN AFFINIPAY SOLUTION

THE #1 PAYMENT SOLUTION FOR LAW FIRMS

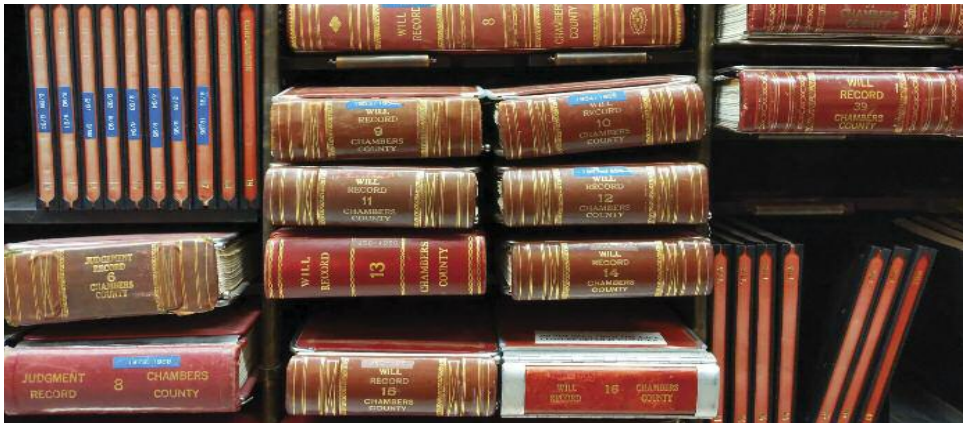
Getting paid should be the easiest part of your job, and with LawPay, it is! However you run your firm, LawPay's flexible, easy-to-use system can work for you. Designed specifically for the legal industry, your earned/unearned fees are properly separated and your IOLTA is always protected against third-party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

877-591-1627 or visit lawpay.com/alabar

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



Special offer for bar members.
Call for details



F E A T U R E A R T I C L E S

WELLNESS ARTICLES:

Masking the Struggle

By Dr. Rachel Fry

428

The Duty of Attorney Wellness

By R. Champ Crocker

435

Ten Steps to Creating an “I Believe” Mindset

By Dr. Kevin Elko

440

Lawyer Well-Being

By Robert B. Thornhill, MS, LPC

445

The New Mandatory Notice in Probate Estates Made Easy (With Forms!)

By Assistant Attorneys General Timothy A. Offord and Samuel M. White

450

The Alabama Legislature Takes Its Chance on Daily Fantasy Sports

By Zachary W. Anderson

456

BOOK REVIEW

Furious Hours: Murder, Fraud, and The Last Trial of Harper Lee

By Casey Cep. New York: Alfred A. Knopf, 2019. 314 pgs.

Reviewed by Allen P. Mendenhall

462

Alabama Law Foundation Welcomes New President and Board Members

471

President’s Page

420

Executive Director’s Report

422

Editor’s Corner

424

About Members, Among Firms

465

Important Notices

466

Opinions of the General Counsel

468

Disciplinary Notices

470

Memorials

472

Legislative Wrap-Up

474

The Appellate Corner

478

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

 facebook.com/AlabamaStateBar

 [@AlabamaStateBar](https://twitter.com/AlabamaStateBar)

 [@AlabamaStateBar](https://www.instagram.com/AlabamaStateBar)

 youtube.com/TheAlabamaStateBar

 flickr.com/AlabamaStateBar

ADVERTISERS

ABA Retirement Funds.....	421
Alabama Academy of Attorney Mediators	425
Alabama Court Reporting, Inc.....	415
Alabama Legal & Investigative Services, Inc.	483
Attorneys First Insurance	475
Attorneys Insurance Mutual Of the South.....	414
Cain & Associates Engineers.....	453
Cumberland School of Law.....	423
Davis Direct.....	485
J. Forrester DeBuys, III	431
Freedom Court Reporting	487
GilsbarPRO.....	477
Insurance Specialists, Inc.....	488
LawPay	416
Lexis Nexis Practice Guide.....	467
National Academy of Distinguished Neutrals	419
The Neutral Solution	427
Professional Software Corporation.....	452


THE FINKLEA GROUP
Creative solutions for your marketing strategies
 The Alabama Lawyer
 GRAPHIC DESIGN


davis direct
of The Alabama Lawyer
 The Alabama Lawyer
 PRINTING

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**

ADMINISTRATION

Phillip McCallum.....Executive Director
Justin Aday.....Assistant Executive Director
Diane Locke.....Executive Assistant
Melissa Warnke.....Director of Communications
Hunter Harris.....Information Systems Manager
Katherine Church.....Special Projects 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
Melissa Lawson.....Paralegal to General Counsel
Jeremy McIntire.....Deputy Chief 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

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

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



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



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

Christina D. Crow
ccrow@jinkslaw.com



Wellness

This is a one-of-a-kind issue for *The Alabama Lawyer*. While I am not an authority on the *Lawyer* and what has been published in the past, I understand this is the first issue that is focused on what some might consider a non-substantive law issue. I commend Greg Ward and everyone who contributed to this issue for taking the brave step forward into a hard conversation that has been stigmatized for way too long.

After I became the president-elect designate, I had many people ask what I wanted to accomplish during my year as president. I've always loved hearing the stories of lawyers and finding out what makes people tick. So I knew I wanted to tell the stories of lawyers and encourage the Alabama State Bar to tell the stories of its members. I wanted to do more than that, though. I wanted to create a path to make it easier for the lawyers in our state to thrive. A few weeks after I became president-elect, a lawyer in my small circuit who graduated from law

school with me committed suicide, and another lawyer from our circuit had a brother who committed suicide. This was not long after an investigator in our local district attorney's office (whose son is also an attorney) committed suicide. The sadness and despair in our community was palpable. These experiences so close to home solidified my desire to ease the path of my fellow lawyers.

I know and love people who are in recovery. I know and love people who suffer from depression. I know and love people who live unhealthy lives, are chronically over-stressed, drink too much, eat too much, and generally are not well. I would guess we all have known and loved people who have suffered similarly. I know I have suffered from those same things from time to time. The stress of practicing law, keeping a marriage together (and, hopefully, happy), raising a family, giving back to a community, and trying to develop clients affects everyone, including me, and can

be overwhelming at times. Sometimes I handle that stress in a healthy way, and sometimes I handle it in a less healthy way. While I am blessed that I do not suffer from chronic depression or addiction, I have struggled periodically during my career and have witnessed my friends and colleagues struggle as well.

Being aware generally of the statistics related to depression and anxiety for lawyers, I began my focus on wellness with reading the ABA Report on Lawyer Wellness. If you have not read it, I commend it to you (www.lawyerwellbeing.net). It offers statistics of where we are and practical recommendations for positive change that we can all make in our lives and the lives and culture of our firms. In light of this, I knew my presidency would be a success if I could reduce the stigma associated with seeking mental health treatment and increase awareness of wellness which would, I hope, make a difference in at least one person's life. This goal is coming to fruition now that Greg Ward and *The Alabama Lawyer* editorial board dedicated an issue of our state's legal magazine to these goals. In addition, Melissa Warnke and the Quality of Life, Health and Wellness Task Force, led by Susan Han, Emily Hornsby, and Brannon Buck, are sharing "Wellness Wednesday" tips on the bar's social media, and they have developed a Wellness CLE to be shared around the state.

The Alabama State Bar is concerned about the health and wellness of our members. The Board of Bar Commissioners recently approved a new member benefit through Wellbeing Coaches that offers member discounts on coaching to improve your health, wellness, behavior, career, finances, and life. There is often stigma attached to getting help. Wellbeing Coaches brings much-needed assistance to your home or office, avoiding any stigma or time constraints associated with seeking help. In addition, George Parker, Jimbo Terrell, Davis Smith, Manish Patel, and Brian Murphy are exploring other health and wellness-related member benefits, including insurance

benefits. Information about Wellbeing Coaches should be coming soon to www.alabar.org/members/benefits/. Of course, Robert Thornhill and the amazing volunteers at the Alabama Lawyer Assistance Program offer help and are always available for those in need.

As the holidays approach, there is often more stress and pressure related to everyday life. Remember a few important things: Don't give up. You matter. Get help if you need it. Find your peaceful place. Mine is my front porch,

which has amazing sunsets and is often filled with my favorite people on earth. Once you identify your peaceful place, go there on those stressful days, and remember that no matter what has happened in your life that day, tomorrow is another day that contains many mysteries of life, opportunities to learn new things, and promises of different experiences. The mysteries, opportunities, and experiences of life offer strength for today and hope for tomorrow. Be well. ▲

Do you know why thousands of law firms see their retirement plan in a different light?

Because they've chosen a different kind of 401(k) provider.

The **ABA Retirement Funds Program** ("the Program") is an employer-sponsored 401(k) plan uniquely designed for the legal community. For over 55 years, we have been committed to our mission of providing the tools necessary for all law professionals to achieve retirement security.

What makes us so different?

Oversight: Highest level of fiduciary oversight allowable through ERISA, saving your firm time and reducing your fiduciary risk.

Investments: Investment platform with options to allow for optimal choice and flexibility for your participants.

Service: Fully bundled service model, custom designed to meet the unique needs of the legal community.

The Program is structured to provide affordable pricing whether you are a Solo Practitioner or a large corporation.

The ABA Retirement Funds Program is available through the Alabama State Bar as a member benefit. Please read the Program Annual Disclosure Document (April 2019) carefully before investing. This Disclosure Document contains important information about the Program and investment options. For email inquiries, contact us at: joinus@abaretirement.com. Securities offered through Voya Financial Partners, LLC (member SIPC). Voya Financial Partners is a member of the Voya family of companies ("Voya"). Voya, the ABA Retirement Funds, and the Alabama State Bar are separate, unaffiliated entities, and not responsible for one another's products and services.

CN700696_0121-2019

Getting started is easy. Contact us today!

● ABA

● Retirement

● Funds

A different kind of retirement plan

800.826.8901

www.abaretirement.com

joinus@abaretirement.com



EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum
phillip.mccallum@alabar.org

Walk by Faith

For the past seven years, the Alabama State Bar has been blessed to work with Robert Thornhill, director of the Alabama Lawyer Assistance Program (ALAP). As many of you know, there's a certain piece of wisdom Robert frequently shares—to walk by faith. We've been fortunate to watch Robert live out those words of wisdom during his time here at the bar. Robert was dedicated to his mission, and spent most of his days traveling throughout the state to help lawyers, law students and judges struggling with addiction and mental health issues. We will certainly miss Robert when he retires on January 31, 2020.



Thornhill

As president-elect seven years ago, I was on the search committee to find a dedicated and committed individual to help continue the legacy of Jeanne Marie Leslie, former director of ALAP. This was not an easy task, but through careful consideration we decided Robert was the best candidate. Now that I am the executive director of the Alabama State Bar, I have had the privilege to meet with many lawyers around the state. It has been a common occurrence for a lawyer



A man of many talents

to walk up to me and express their gratitude for ALAP and for the difference Robert and the members of the ALAP committee have made in their life or for a struggling unidentified colleague.

Since Robert is a living testimony of the miracle of recovery through the program of Alcoholics Anonymous (AA), his humility might make it difficult for him to share some of his many achievements while director of ALAP. In addition to sharing the

mission of ALAP with bar members at various roadshows and CLEs throughout the state, Robert was honored to be part of a panel in 2018 that presented on the national study regarding alcohol use, depression, anxiety and stress among American attorneys that was published in the February 2016 edition of the *Journal of Addiction Medicine*. Robert was also on the task force appointed by former bar President Augusta Dowd, which made specific recommendations that were ultimately approved by the Alabama Supreme Court, which meant that lawyers who had been granted disability inactive status to be published as simply “inactive” and without the public stigma associated with it. It is important to note that Robert faced all of these challenges one day at a time, walking by faith and by making his recovery a top priority in his life.

Robert wasn't just the director of ALAP, he was also the state bar's

in-house entertainment at many staff gatherings and ASB annual meetings. There nothing like the sound of Robert's voice and acoustic guitar to set the tone for an enjoyable time with friends and colleagues.

To Robert's family, thank you for sharing him with us. We know how much Robert adores his wife, Cindy, and their sons, John and Robert Willis. Knowing he had his family's support meant a great deal to Robert as he faced many challenges as ALAP director. Like most people in AA, Robert's service work won't stop, as he and Cindy will continue to lead a support group for Adult Children of Alcoholics.

Robert, you have been a true blessing and friend to the bar staff and the state bar members. Just as you have demonstrated in your own life each day, we will remember to keep walking on faith as we continue to focus on lawyer wellness. ▲



Robert always takes his job seriously, but never himself!



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.

November and December CLE Programs

- Nov. 14** Trends in Commercial Real Estate Law*
- Nov. 22** Mandatory Professionalism
- Dec. 6** Immigration Law*
- Dec. 12** Employment Law Update*
- Dec. 18** Legal User's Microsoft Word Academy featuring Barron Henley*
- Dec. 20** 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.

samford.edu/go/cle
205-726-2391 or 1-800-888-7454
lawcle@samford.edu



Samford University
Cumberland School of Law



EDITOR'S CORNER

W. Gregory Ward
wgward@mindspring.com



Few issues of *The Alabama Lawyer* have created as much pre-publication buzz as this one, the wellness issue.

Our Alabama State Bar President Christy Crow was talking about lawyer wellness even before she took office. That set us thinking, and that set us listening. Not just noting what people said, but really *listening*. We heard lawyers talking about how tough their lives were—when you begin listening it is surprising how often this comes up—and just how many of them have lost fellow lawyers to suicide. Me, too.

We moved from listening to initiating conversations. The stories were amazing. At least twice I heard stories about how a

lawyer objected to a case being continued after some person involved in the trial died. I recalled an old story about a federal judge who, when a jury trial began, would not let out-of-town lawyers go home for the Thanksgiving holidays. We heard many stories about judges who, forgetful of where they came from and how powerful their voices are, become more abrasive than perhaps they realize. I heard a heart-breaking story about a lawyer in a juvenile case who argued that a child be sent home to a mother who was a long-term drug user, whose life was basically destroyed by her addiction, and who was high on methamphetamine during the court hearing.

With stories like those, no wonder we are stressed. No wonder wellness is a problem.

What happened to us? Where is our humanity? No wonder we are stressed. No wonder we are dissatisfied.

And all too often, all too many lawyers came to a very telling conclusion: I'd never want my son or daughter to do this for a living.

I love this profession. I love lawyers. That broke my heart.

We are taught to fight to win at all costs, and that the fight itself is our ethical duty. We call it zealous advocacy. There has to be a better way to say that. Shallow thinking on this reduces us to mere zealots, and do we really want to be counted among their number? We've shredded real ethics and common sense over our misunderstanding and misapplication of that term. We call it our duty; could it be our downfall?

How about this: how about we shift our internal focus from "Fight to win!" to "Fight to help!"? Subtle shift, that, yet profound. And how about while we are doing that we reclaim some of our humanity—from top to bottom, lawyers, judges, appellate courts, all of us? And how about we try something odd—how about we try being kind to one another? Didn't I once read something about doing unto others? What a great place to start.

Forty years ago, I spent some time as a counselor at a summer camp for disadvantaged inner-city children, and they had a sign: "Where there is a need, and the ability to meet that need, therein lies the call."

That stuck with me. *The Alabama Lawyer* is answering the call.

Here is our shot at beginning the conversation.

We, of course, are our own worst enemies. Dr. Rachel Fry, a Birmingham clinical psychologist who has lawyer wellness as an important part of her practice, in her article "Masking the Struggle" (page 428), shares a brilliant observation from a *New York Times* article: "Being a surgeon is stressful, for

instance—but not in the same way. It would be like having another surgeon across the table from you trying to undo your operation. In law, you are financially rewarded for being hostile." If you think that's good, just wait until you read the rest of her article. She has some solutions. She knows whereof she speaks because she's married to a lawyer, and a big

part of her practice involves counseling lawyers. Dr. Fry, so you have a Friday 3:00 appointment for me?

If we are talking about lawyers, maybe we should hear from a lawyer. Champ Crocker practices in Cullman, and he's a new addition to the editorial board of our magazine. He skillfully moves us between Daniel Webster, an



PROMOTE
The highest ethics, qualifications and training standards for attorney mediators

INCREASE
Expertise and effectiveness of attorney mediators

EMPOWER
Attorneys as professionals in dispute resolution



The Alabama Academy of Attorney Mediators is committed to dispute resolution through mediation. For a list of our qualified professionals visit our website:



ALABAMA ACADEMY OF ATTORNEY MEDIATORS

www.alabamaattorneymediators.com

(Continued from page 425)

ABA report, and a Virginia bar report, and he tells us that we should stop trying to all be Atticus Finch. Accepting that simple advice would free so many of us from our self-imposed (and societally-imposed) savior complexes and let us just be. He tells us what his personal journey to wellness was (is) like, and he invites us along (page 435).

Dr. Kevin Elko is the sports psychologist who has helped the University of Alabama football team during its recent title runs. He also helped Auburn University, many other universities, many championship professional football teams, and much of corporate America. His footprint is national. What he brings to the table, and what makes him so

sought after, is an uncanny ability to help people see things for what they really are. I met him when he spoke at our annual meeting in Point Clear, approached him about contributing to this edition (he might substitute *stalked* for *approached*), and he agreed. His piece to this puzzle is to show us "Ten Steps to Creating an 'I Believe' Mindset" (page 440). Don't dismiss him as a sloganeering sports person. Just reading his article made me feel better about myself. See if his very practical suggestions are useful to you.

Robert Thornhill is the director of the Alabama Lawyer Assistance Program, so we have to hear from him. He's resigned his position, moving on

to bigger and better things, but on his way out he slipped one last article under our doors (page 445). In it he cites a multitude of helpful sources, directs us to authors and studies, and he offers help. I know of several lawyers who will tell you that he and his office are why they are alive today. God-speed, Robert Thornhill. Thank you for this last help, and thank you for all you've done.

And we just couldn't help ourselves. We included some legal stuff.

Assistant Attorneys General Sam White and Bo Offord tell us about the new mandatory Medicaid notices for estates. Make a copy of this one and keep it handy (page 450).



Did you know that Alabama has a new fantasy sports bill? Zach Anderson gives us his take on this hot topic (page 456). Is fantasy sports a lottery? Is it gambling? I predict that this article will soon be cited in a brief. Zach, nice work.

Just for fun, we've included a book review by Allen Mendenhall, an editorial board member and associate dean at Faulkner University (page 462). He's from Monroeville, his grandfather was friends with Harper Lee (she gave us the Atticus Finch complex that so many of us suffer from) and Truman Capote (he shares in the guilt), and he was approached by a writer who had found some unpublished work by Harper Lee. Curious? How can a lawyer not be. Read on.

So, this is our take on lawyer wellness. It is an incomplete, imperfect start. But it is a start. There are lots of



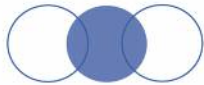
ways to handle the stresses of life and this profession, and we all have our own—me included. I look forward to continuing this chat as we meet and talk along the way. Ask me, and I'll tell you my way of handling things. I'd love to hear yours.

So, enjoy the articles. Email me at 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. ▲

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

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

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

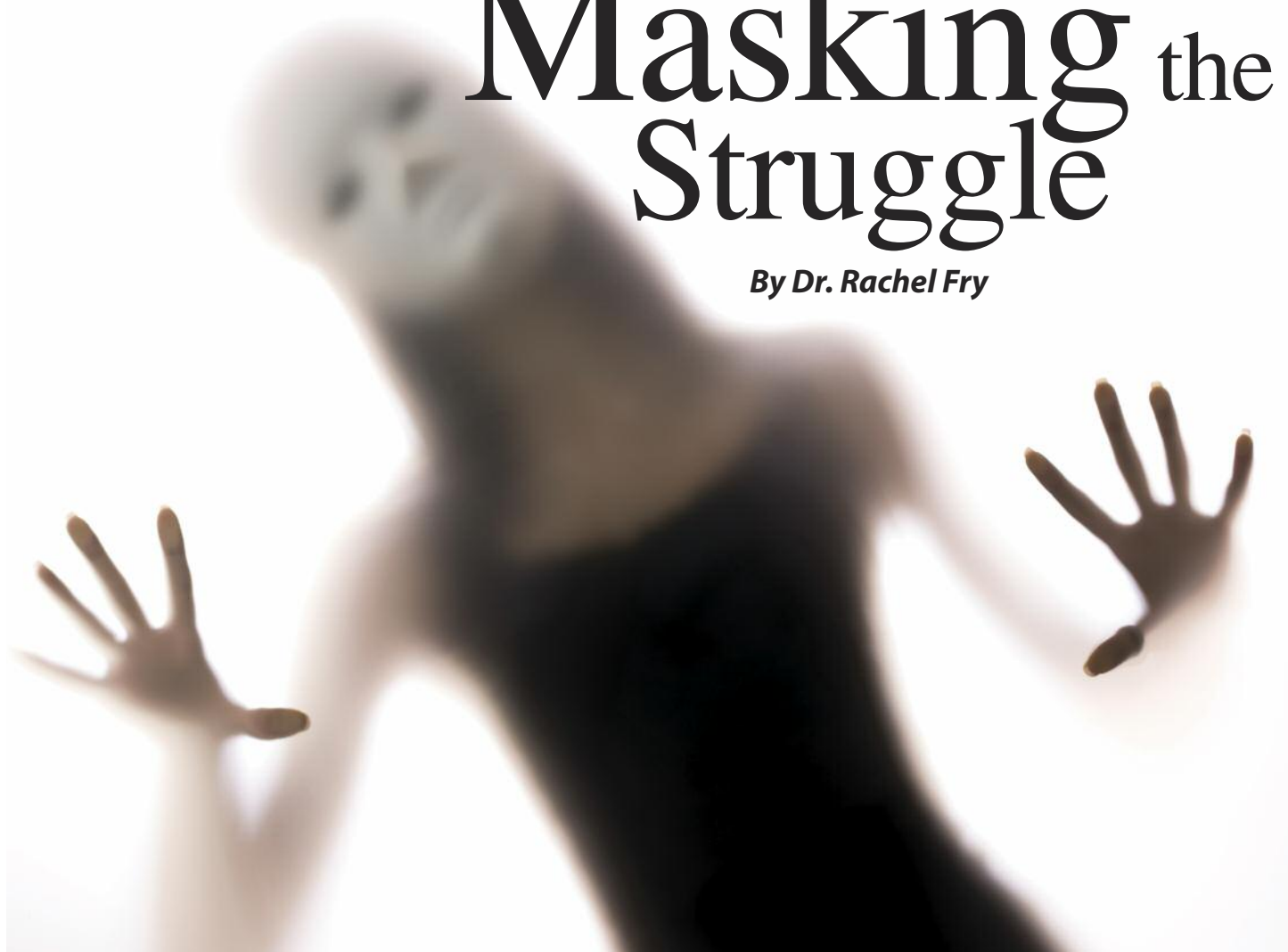

THE NEUTRAL SOLUTION™
A mediation and arbitration community

TheNeutralSolution.com

MEDIATION • ARBITRATION • PRIVATE JUDGING

Masking the Struggle

By Dr. Rachel Fry



Answer these four questions.

Do you enjoy your job most days? Would you seek out someone to talk to if you felt like you were struggling at work? Do you feel that you have the appropriate resources available to enable you to perform at your optimal level? Would you encourage your son or daughter to become an attorney? If, like many lawyers I see in my practice, you answered “no” to three out of the four questions listed above, please keep reading.

I’m Not Okay

“I’m so sorry to bother you on the weekend, but I’m not okay.” This was the first sentence of an email I received a few days ago from one of my clients. Since it was very unusual for this client to contact me outside of appointment times, I realized she was reaching out because she truly needed to, and her wording quickly got my attention. Although I had no idea what was going on, I knew that a phone call would clarify things. Did a medication need to be changed? Had something stressful

happened to her family? Was she having suicidal thoughts? Or did she need to just talk through what she was experiencing?

While I might know the truth about this client's struggles and successes, most would see only her successes. Others would likely perceive that her life was going very well. All of the right boxes would be checked. She'd be wearing the right clothes, working hard at her high-paying job, living in the right neighborhood, and moving quickly up the corporate ladder. She'd appear to be right on track with everything in her life and fit quite nicely into our cultural standard for success.

By this point, you might be trying to envision this person. If I told you that this was a superstar lawyer, a mentor, or a close colleague, would it get your attention? Because it very likely could be.

Perfection Masking Struggle

An outsider to the therapy world would be surprised by how many clients look perfect on the outside, but inside they are struggling. They have emotions and, yes, because they are human, they sometimes have trouble managing life's stresses. Generally, we are taught to put on masks, especially at work, and not to show emotion and vulnerability. However, such posturing can make it harder to empathize with others. As a result, when emotions start taking control or we have trouble managing them, we start to view ourselves as flawed or weak. Difficulty managing stress and emotions is usually a warning sign. Often, there is too

much going on and we are setting unrealistic expectations about what we can and are supposed to manage. Most of us are adept at putting on a good face, even performing spectacular shows. While this is certainly necessary on occasion, we can also get too good at it. When this happens, we can find ourselves in situations where we are almost living in the shadows of ourselves. If we live in an emotionless world for too long, the lights can start to dim, or flick on and off, often without warning. At these moments, it doesn't matter what you have on, where you work, or where you live—an expensive suit or a cool corner office can't provide an easy, quick fix.

Nothing Is Going On

In my practice, I have met many people who have not been "okay." Most people view therapy as an endpoint, as in, "I don't want to end up there!" Many feel that therapy signifies that they can't manage situations on their own, and therefore they are weak. When clients call for an initial appointment, it is usually after they have been thinking about it for a long time. Frequently, clients will call and say something along the lines of, "I have no idea why I'm feeling this way, there is nothing going on." I view this as a red flag. In a psychologist's mind, "Nothing is going on" often means there is way too much going on.

The disconnect or lack of awareness doesn't necessarily mean that clients don't want to acknowledge stress. Most highly successful, goal-oriented people can accomplish a lot before the cumulative effect of stress presents itself. So,

to them, there is "nothing new is going on." They have been able to operate at 150 percent for a long time. Only now, as they are pushed to their limits personally and professionally over time, their mind and body start to say, "Enough is enough, this system is not working anymore." Their fight or flight response system has timed out—physiological and mood changes are the only indicators that something is not "okay."

Challenges to Self-Awareness

"Okay" is a broad word, but at the same time it is so simple, direct, and clear. Lawyers are often checking in with clients and reassuring them that things will work out. "I'll get the deal done." "Don't worry, we will figure this out." "I've got it covered."

These are all statements that attorneys frequently say to their clients. It is also common for legal professionals to forget that they didn't cause the very problems they are trying to fix. Several years ago, I was talking with a lawyer at a conference and he shared something that struck me. He said, "I had to get to a place where I reminded myself that I was not in the operating room with the physician I was representing." The realization that he had viewed himself as both creator and fixer of the problem caused him to pause, and by changing his cognitive framework, a weight was lifted from his mind.

Lawyers are also expected to deal with discord and conflict on a recurring basis. In the *New York Times* article, "The Lawyer, The

Addict,” Wil Miller explained the combative nature of being a lawyer this way, “Being a surgeon is stressful, for instance—but not in the same way. It would be like having another surgeon across the table from you trying to undo your operation. In law, you are financially rewarded for being hostile.”

Lawyers also tend to be laser-focused on how many hours they bill—often more than 40 a week—or making sure they have on a perfectly dry-cleaned suit or dress, a fresh hairstyle, a new tie or scarf—all things that make them feel like they are put together. And, let’s be honest—these all impact how clients view their attorneys. Clients are looking for someone who exudes confidence and stability because they are in a jam and need someone who can help them. However, even lawyers who look the part and are quite good at playing it can also be struggling inside. And while they make great efforts to appear successful outwardly, lawyers rarely take the time to pause and ask themselves, “Am I operating at my best level, and if not, what is preventing me from doing so?”

Lawyers Who Aren’t “Okay”

I see their struggles in my practice. It might be a young associate who has been recruited into a firm with the illusion that his or her work would mirror the summer program experience. The fun atmosphere and social outings are quickly replaced by an office with little time to socialize and build connections. This can leave the associate feeling overwhelmed, isolated, and lonely. Or a young lawyer could be trying

However, even lawyers who look the part and are quite good at playing it can also be struggling inside.

to understand how hard he is supposed to work. Does working overtime and moving up the ladder also mean not getting any sleep and taking on every task—or are there other options? It could be a young partner who is obtaining new clients, but finds the work taken away by others. Or it could be a middle-aged partner who is going through family struggles and is beginning to lose clients. He has been able to manage and even outperform before, so why is it so difficult now? There is often an illusion that law school is the hardest part of becoming a lawyer. However, as anyone reading this article knows, that is not the case. Once a new attorney enters a firm, he is expected to do even more: wear many hats, be available at a moment’s notice, market to new clients, and maintain an active client load, all while not showing vulnerability. Attorneys are expected to have it all together, at least at the office.

My Encounter with Legal Wellness

My realization that legal wellness is imperative really began a few

years ago. While I already knew that the legal profession has many stresses (I am married to a lawyer), I had not given much thought regarding lawyer wellness. In 2015, a tragic incident occurred—a brilliant, adventurous, and caring attorney went through a struggle beyond her control and, ultimately, she died by suicide. This talented woman wasn’t just anyone—she was, as others have described her, “a bright light,” who always stood out in every realm of her life—personally, professionally, academically. The ripple effect that her death had on our local legal community was huge. No one could believe it. Everyone admired this young woman and many questioned how this could have happened to someone like her, seemingly without any warning.

What started as simple conversations after her death led to questions and comments. Some of those comments are still etched in my memory—“I would never know if I was depressed or burned out.” “We are expected to be different.” “I look down on others, even friends, in other professions because they are weak.” “We are supposed to be strong, we are lawyers.” As I started talking less and listening more, I couldn’t get many of the comments out of my head. I realized that there was a major lack of education regarding stress, depression, anxiety, and burnout for lawyers. I started asking, “Where would someone get help if he or she even realized help was needed?” I kept asking myself, “How is it that this huge group of highly educated, bright people hasn’t been given this information or at the very least, taught tools to deal with stress, since they are expected to deal with high-stress situations regularly?”

As I learned more, I realized that this young woman's story was not an anomaly. Talking with other lawyers, I found that most had at least one friend or acquaintance they knew who had committed suicide. A lawyer friend of mine who is only in her mid-30s has had four friends commit suicide since graduating from law school. My immediate thought after learning all of this was, "This is not acceptable; something needs to change." I also wondered, "What predisposes lawyers to these conditions and struggles?" and "Do these struggles start before law school, during law school, or after lawyers start their careers?" So, I started researching.

LAWYERS AND MENTAL HEALTH

Law School Effect

As I delved into the research, I discovered that before law school, lawyers have similar rates of anxiety (18.1 percent) and depression (8 percent) as compared to the general population. After starting law school, the rates slowly start to climb. According to The Dave Nee Foundation, within the first year of law school, nearly one in three students shows signs of depression. By the end of law school, around 40 percent of law students are depressed. In a 2016 report, *The National Law Journal* published a report in 2014 indicating that 37 percent of law students screened positive for anxiety while 14 percent reported symptoms consistent with severe anxiety. Additionally,


22 percent reported binge drinking during law school. Factors that likely play a role include constant competition, loss of autonomy, and isolation. Additionally, learning through the Socratic method, which some would describe as turning off one part of the brain and utilizing a new one, affects the neural pathways to increase reliance on law and rules, rather than mere logic. Also, receiving only one grade during the semester per course (which can then be curved), further exacerbates the loss of autonomy. Your grades become both a predictor and a determinant of your job opportunities.

Hazelden Betty Ford-American Bar Association Report

The first nationwide attempt to corroborate data within the legal profession was conducted by the Hazelden Betty Ford Foundation and the American Bar Association Commission on Lawyer Assistance Programs. This report, which was published in 2016, surveyed approximately 13,000 licensed attorneys practicing across 19 states. Published in the *Journal of Addiction Medicine*, the study reports that 21 percent of licensed, employed attorneys qualify as problem drinkers, 28 percent struggle with some level of depression, and 19 percent demonstrate symptoms of anxiety. The study also found that younger attorneys in the first 10 years of practice exhibit the highest incidence of mental health problems and binge drinking. Additionally, more than one in three practicing attorneys (across all ages) are problem drinkers.

Lawyers' Personalities And Stress

Lawyers tend to have certain personality characteristics that can play a role in how they manage stress. Dr. Larry Richard, a lawyer turned psychologist who is focused on better understanding and helping lawyers, has assessed thousands of attorneys. Through his early research, he found that compared to the general public, lawyers tend to score higher on skepticism (90 percent vs. 50 percent), urgency (71 percent vs. 50 percent), and autonomy (89 percent vs. 50 percent), but lower on sociability (50 percent vs. 12 percent) and resiliency (50 percent vs. 30 percent).



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

Skepticism can certainly make one a better lawyer, but if the brain is operating in this mode and it becomes difficult to turn it off, it can lead to dissatisfaction, depression, and anxiety.

Urgency is often needed in the legal environment—however, not at all times. Attorneys tend to have difficulty differentiating between urgent and non-urgent tasks, which can lead to being in a constant state of anxiety. Furthermore, it can become difficult to listen and to connect with clients and team members when operating in urgent mode.

Autonomy can create issues when one is not able to delegate or even work together with team members to increase productivity. One can feel depleted, isolated, and overwhelmed due to developing a high sense of autonomy.

While lawyers score lower on sociability, most are required not only to attain clients but also to interact well with them. This can create problems for attorneys who are introverted (approximately 60 percent), have few social skills, or who are focused on the facts rather than interactions. Resiliency is critical to getting feedback, growing, and becoming a better lawyer.

Mental Health Stigma

The two biggest reasons lawyers don't seek help are fear of someone finding out and confidentiality. Most attorneys do not feel safe seeking help. They often feel that they are under a microscope, and admitting that they are having a hard time is the last conversation they are likely to have with someone. While I see many different types of professionals in my

practice, the mental health stigma among lawyers is the most profound I've seen. This is real and needs to be addressed. The current stigma and lack of knowledge about resources available add more stress, further complicating getting help when it is needed. Law firms and other organizations are sensitive to this stigma as well. Sometimes there are concerns about the firm being seen as a place with "problems" as opposed to acknowledging broad concerns in the profession and taking a proactive stance.

Attorney Motivations And Mindsets

Lawyers are unique—highly educated, bright (and many are quick to remind you of that often), fun, deep thinking, and detail-oriented. Many of them chose to go into the profession because they wanted to help others in some way. Others decided to go to law school based on the promise of a stable, financially rewarding career. They are determined, dedicated, and driven, and throughout communities they constitute a large part of boards, charity organizations, and regularly assume other leadership roles. They are often pillars of our communities, but these prominent roles present challenges. Practicing law can be stressful, unpredictable, demanding, and of course over time the desire to help others can easily be replaced by the need to be productive and bill more hours. The promise of money can also be deceiving. Many lawyers get knee-deep in their practices and realize that money no longer motivates them, but they have

gotten used to their lifestyle and decide that it's easier to keep plugging along. Also, some of the skills needed to be a good lawyer, such as skeptical thinking and always looking for the loophole, can predispose one to depression. Being detail-oriented and focused on the task at hand can increase the tendency toward perfectionism, and make it difficult to cope when things don't go right.

Lack of Resiliency Coupled with High Expectations

Lawyers are so busy staying strong for their clients that when negative feedback or a bad outcome occurs, their thick-skinned facade can be pierced. Despite the appearance of wearing a shield of armor at all times, attorneys score low in resiliency. This can be seen with legal professionals who think they aren't good enough, that they are responsible for both the problem and its outcome. Without the skills to sort this out, this reasoning often leads to self-sabotaging behavior. The fact is that none of us welcome negative feedback, but we need it to grow.

Lawyers tend to operate in a "fixed" mindset. For example: "I messed up this case or didn't get the result I wanted, so I must not be a good lawyer" as opposed to "Experiencing bad outcomes can help me learn and become a better attorney." While it depends on who is offering up the assessment, lawyers tend to have a difficult time with this. Feedback is often viewed as criticizing and personal, and while in some cases it might

not lead to growth, the majority of the time it does.

Lawyers are often “okay,” or at least they are expected to be. It is a tall order for a profession that is filled with stress, unpredictability, and brutal competition for clients (both within and outside a firm). The lack of education regarding the acquisition of effective stress management tools, not being able to identify burnout, not knowing how and when to set appropriate boundaries, coupled with being expected to wear a superhero cape, can be difficult to say the least. In a profession where one is paid to be perfect, where any mistake can add up quickly and is certainly noted, stress can ensue. Attorneys are expected to have it together and if they don’t, clients will find another practitioner who does—at least that is the thought. In the current climate where competition is keen and lawyers are competing aggressively for clients, legal professionals must have it together, at least at work.

Who Seeks Help?

Many of the lawyers I see in my practice are superstars at their firms. These are people who by no means are weak, yet no one would ever think they were seeking out help to learn how to live a better, more sane life. Most of these lawyers have gotten so good at “working” that you will not see them struggle. I also see many lawyers I think could be star performers if they were provided appropriate mentoring and were better able to manage stress in their lives. These are not lawyers who want to quit working or give up, but without the appropriate resources available they sometimes feel that they don’t have a choice.

Firms and bar associations can play a critical role in making wellness a priority and decreasing the stigma associated with attending to mental and physical well-being.

There is a lot of potential to make things better, and law firms and other organizations should be motivated to promote and embrace change.

Future Directions

The research and data speak for themselves: it is past time to make attorney wellness a priority. Despite cultural changes regarding wellness and the ways other professions have adapted, the legal field is one that has remained the same, to the detriment of many lawyers. It is time for a shift in many ways: changing fee structure setup, altering incentives that align with generational shifts such as flexible work settings and more time off (as opposed to financial incentives), and providing opportunities for lawyers to obtain counseling while also practicing law.

Firms and bar associations can play a critical role in making wellness a priority and decreasing the stigma associated with attending to mental and physical well-being.

WHAT CAN BE DONE NOW?

Leadership Development

Lawyers need to learn leadership skills such as emotional intelligence and resiliency. Attorneys tend to score much lower than the general population in both of these measures, and both are highly correlated with productivity and becoming a more effective leader. Building emotional intelligence (EI) provides lawyers with the tools needed to identify and perceive emotions in others, become more empathetic, understand others, and be able to regulate their own emotions. Becoming more self-aware helps attorneys improve at getting and keeping clients. High EI skills need to be taught to leaders so they can set the appropriate tone for their team and communicate more effectively, which increases productivity and conflict resolution. Resiliency is also an essential skill for lawyers: it helps them bounce back from challenges, keep perspective, and view situations as growth experiences.

Stress Management

Lawyers need training related to stress management. Learning how to set boundaries, communicate

more effectively, separate urgent and non-urgent tasks, and develop new cognitive frameworks (replacing negative or skeptical thoughts with more neutral or positive statements) all play a role in helping a lawyer to be less stressed and, ultimately, more productive. Law firms and other organizations can encourage healthy coping mechanisms by decreasing alcohol-focused events. By promoting exercise and creative outlets such as art, music, or book clubs, attorneys will be exposed to other, better ways to manage stress.

Talent Management And Mentoring

More time should be spent evaluating a lawyer's strengths and weaknesses and ought to be devoted to mentoring during the first year. The old model of placing the same expectations on every lawyer—to get clients, write impressive briefs, provide billable hours—is not working well. Identifying and maximizing each lawyer's particular skill set assist both attorneys and firms in becoming more productive.

Mental Health Stigma

There needs to be a safe place where lawyers can seek help—whether it is a consultant to the firm, a friend, or therapist. Noticing when a colleague's behavior changes is important. Firms and other organizations might also want to consider hiring an outside wellness consultant who would serve as a safe, confidential resource when needed. Having other

There needs to be a better system in place, and having an in-house wellness consultant could be very beneficial.

assistance programs in place and a wellness consultant would serve to further de-stigmatize the seeking of help for mental well-being.

Access to Resources

While most firms and organizations provide employee assistance programs or a behavioral health line, most lawyers do not use these or understand how each of these resources could help them. Despite having these programs, many attorneys have shared with me that access to care has been the biggest barrier in seeking help. There needs to be a better system in place, and having an in-house wellness consultant could be very beneficial.

Starting Points

While I believe every lawyer would benefit from personal assessment and wellness training, this is not a practical step due to financial concerns and the current viewpoint many law firms hold that these activities don't add

value to the firm or organization. Advising new associates who are beginning their careers and need tools to survive and thrive would be an effective place to begin. Additionally, working with leadership teams could also create significant change within the firm and help other lawyers see the value of this type of training.

Law firms and other organizations have a unique opportunity to reduce the stigma of seeking counseling and to provide resources, tools, and support to create happier, more productive lawyers. Adding wellness programs does cost money, but I believe it is well worth the investment. We should be able to answer all of the questions at the beginning of this article with a resounding "Yes!" There is no reason why things can't improve for current and future lawyers. And, it is past time. Big shifts in a profession are daunting, but taking small steps to effect much-needed change would be a good beginning. ▲

Dr. Rachel Fry



Dr. Fry is a clinical psychologist in Birmingham, and legal wellness is a large part of her practice. Dr. Fry works with lawyers in her practice and also consults with law firms and bars on building legal wellness programs.



The Duty of Attorney Wellness

By R. Champ Crocker

A dominant issue affects attorneys, our courts, and the general public:

attorney wellness (and lack of it). American statesman and lawyer Daniel Webster said, “Most good lawyers live well, work hard, and die poor.”

What did Webster mean by “live well?” Was he talking about lawyers enjoying emotional health, physical health, and a purposeful life? I doubt it—he probably was referring to lawyers’ vulnerabilities to indulgence and over-exposure. Webster biographer Irving H. Bartlett noted that despite being

one of the country’s highest paid lawyers, he was often in debt and borrowing money from others. “Fewer American leaders have had a greater appetite for the good things in life.” Webster “bragged openly about his knowledge of good food and drink. Eventually, people said he drank too much, even in public—and sometimes they were right.” *Daniel Webster*, W.W. Norton & Co., 1978.

In 1954, Boston lawyer John Mullen wrote a letter to the editor of the *ABA Journal*, saying, “In a very literal sense, many lawyers ‘work themselves to death.’” And drawing on Webster’s quote, Mullen said, “The statement that ‘most good lawyers live well,

work hard and die poor' is as true today as when it was uttered by Daniel Webster 104 years ago." ("Views of Our Readers," *ABA Journal*, February 1954). In 2019, Webster's observation still rings true, dire as it is.

Lawyers face additional challenges than in Webster's day—the demands of complex discovery, educational debt, and technology addiction—which should make wellness more of a priority than ever before.

The ABA Report

The American Bar Association created the National Task Force on Lawyer Well-Being in August 2016. It began by defining it as:

"well-being as a continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections with others. Lawyer well-being is part of a lawyer's ethical duty of competence."

Think about that last sentence—lawyers have an ethical duty to be well. The task force endorsed amending the Rules of Professional Conduct to reflect this duty.

After a year of studying the issues, the task force released its findings. The task force released its final report, which says: "To be a good lawyer, one has to be a healthy lawyer. Sadly, our profession is falling short when it comes to well-being." Here is the link to the full 73-page report, and I encourage you to read it: <https://www.americanbar.org/content/dam/aba/images/abanews/ThePathToLawyerWellBeingReportRevFINAL.pdf>.

The task force's report is thorough and far-reaching. Much of the report focuses on substance abuse and psychological problems—lawyers are not immune. The good news is most state bars have resources to help lawyers struggling with substance abuse or psychological problems. The Alabama State Bar's Lawyer Assistance Program is a good example of a state bar using

"To be a good lawyer, one has to be a healthy lawyer."

lawyers to help other lawyers with these problems.

The Virginia Report

Following the lead of the landmark ABA report, in May 2019, the Virginia State Bar President's Special Committee on Lawyer Well-Being released "The Occupational Risks of the Practice of Law." Every lawyer should read this report:

https://www.vsb.org/docs/VSB_wellness_report.pdf.

One main purpose of the Virginia State Bar study was to try to find out why lawyers experience wellness problems at disproportionate rates when compared to the general public. The study identified several occupational risks for lawyers.

Physical Risks

You may be asking, "How is there a physical risk to practicing law?" The Virginia report found several. The first is the sedentary nature of practicing law. We spend most of our time sitting down. Studies show prolonged sitting causes health risks from storing calories to posture problems caused from being slumped over your keyboard. The report suggested lawyers understand these risks and try to be physically active during the day, whether it's walking to court or to lunch or setting reminders to stand up and stretch throughout the day. The report cited an ominous report from the Mayo Clinic, which determined those who sat for more than eight hours a day with no physical activity had a risk of dying similar to the risk posed by obesity and smoking. (Edward R. Laskowski, *What Are the Risks of Sitting Too Much?*, *MAYO CLINIC* (May 8, 2018)).

It makes sense to put reminders on your calendar or phone to get up and move around because if you're like me, if it isn't on the calendar, then it won't happen. Exercise is important, which I will talk about on a personal level later in the article.

Another physical risk is the long hours. We all face competing demands from the bench, the bar, and our

clients—and we owe a duty to all three. The result is we work long hours, which leads to exhaustion and burnout. The demands may never change, but the way lawyers manage these demands can change, by planning each day, limiting interruptions, and establishing reasonable expectations with our clients. The Virginia study also recommended lawyers take regular vacations. If you're like me, it's difficult if not impossible to be away from the office for more than a few days, but there are court holidays basically every month—three-day weekends can be a good way to recharge.

Sleep deprivation was identified as a physical risk. Sleep deprivation is proven to cause increased risk of illness and injury, not to mention lapses of judgment. Will Meyerhofer graduated from New York University School of Law and joined a prominent Manhattan firm. Soon after starting his career, the young lawyer gained 45 pounds, was sleep-deprived, and frequently ill. He said, “I was a nervous wreck. I was shattered ... Even though I got to the very top, I was treated like an idiot and I felt I didn't belong in the field. I was a mess. At the end of the day, I really only looked forward to seeing my dog.” (“How Lawyers Can Avoid Burnout and Debilitating Anxiety,” Leslie A. Gordon, *ABA Journal*, July 2015). Meyerhofer is an accomplished author and columnist who wrote about his struggles in his book, *Way Worse Than Being a Dentist—the Lawyer's Quest for Meaning* (2011). If you aren't getting enough sleep you are putting yourself at risk of committing malpractice. You need seven to nine hours of sleep every night. The Virginia report recommended establishing a bedtime and avoiding screen time for at least an hour beforehand. Cutting screen time is hard to do, especially after being in court all day and having dozens of emails to respond to, but it's necessary to put down the phone. I deleted certain social media accounts from my phone this year and have slept much better.

Other physical risks cited in the Virginia report include excessive time working indoors, which can disrupt biorhythms, and simple aging. While aging is not a litmus test of legal capacity, lawyers should know their own limits, have regular medical examinations, and have a succession plan to protect clients and colleagues.

Daniel Webster was one of the most successful lawyers of all time. He made (and spent) a fortune, and he argued more than 200 cases before the United States Supreme Court. Late in his life, as a United States Senator, Webster delivered the “Seventh of

March Speech” in support of the Compromise of 1850. In this famous speech, Webster said, “I am nearly broken down with labor and anxiety.” This comment—paired with his observation in the same year about lawyers “living well, working hard and dying poor”—was really a warning to our profession. No matter how successful you are, is it worth ending broken down?

Mental and Emotional Risks

The adversarial nature of our work was the first mental and emotional risk in the Virginia report. It concluded that they “promote feelings of anger, guilt, and fear that can lead to depression and chronic stress.” How do we keep the client's problem from becoming our problem? The report suggests being aware of “emotional contagion,” which is when people “catch” each other's feelings when working together, which can affect one's judgment and decision-making. Emotional contagion occurs in groups large and small. Some organizations have a positive culture, others not so much. This includes law firms.

Another occupational risk is the individual nature of the work. Legal work can be lonesome. Most of us have spent plenty of time at the office after hours or on weekends, alone, working for our clients. There is nothing wrong with that, but it's also important to be active in something other than your law practice—whether it's your local bar, volunteering in your community, or just having hobbies.

The Virginia report identified a host of other mental and emotional risks that go with this profession related to the pressures of deadlines, prolonged subjection to others' problems, practice management, and the business of law. Lawyers often face these risks every day, sometimes all at once.

The Atticus Finch Complex

To Kill a Mockingbird has inspired generations of lawyers and non-lawyers alike. Doesn't every young lawyer want to be like Atticus Finch? I did. North Carolina-based attorney Katie Guest Rose Pryal warns about the danger of the Atticus Finch Complex. In her 2016 essay, “American Lawyers Have an Atticus Finch Complex, and it's Killing the Profession,” Pryal wrote about the “unfortunate side effect” of being inspired by Finch:

In my experience, too many of these young Atticus wannabes took up the law because of a misplaced savior complex, not because they wanted to serve others, a drive lawyers are ostensibly taught to aspire to. The problem with a lawyer with a savior complex is that he is easily disenchanted. Many, if not most, poor clients involved in our legal system are “guilty” in the eyes of the law. Indeed, once you step into a courthouse, it is difficult to find a client as purely innocent as Tom Robinson.

Pryal further suggests that the legal system doesn’t need saviors: “It needs clear-eyed lawyers who recognize that all members of U.S. society have a right to a fair trial and a right to an attorney who is not overworked, underpaid, and abused by the system as well, as many public defenders can be.” Pryal points out the same problems in the civil justice system and suggests lawyers should “set aside the unrealistic expectations of being a savior and embrace the legal work that actually needs doing.”

The *Oxford Dictionary* defines “disenchantment” as “a feeling of disappointment about someone or something you previously respected or admired.” If you’ve ever been to a law school graduation, you don’t see a room full of disenchanted people. You see happy, ambitious people who are ready to take on the world. Yet, we all know lawyers who are disenchanted—maybe because they never had their Atticus Finch moment. The other possibility (I would suggest a likely one) is that lawyer disenchantment is rooted in a lack of wellness.

My Wellness Journey

Practicing law is stressful. So are other professions. For lawyers, the question that should claim our attention is, “How can you resolve someone else’s problems if you’re not taking care of yourself?” In the fall of 2014, I was constantly in court, in depositions, or meeting with my client. My practice was busy. My life was busy (I had one child and another on the way). I had slipped into having the mindset that any fitness activities or recreation made me “less” of a lawyer. My law practice had become *who I was*, not what I did for a living, which added stress. One morning I was in a hurry to court and the elevator was

busy, so I galloped up the courthouse staircase. Halfway up, I had to stop. I felt faint and lightheaded. I was out of breath. I was sweating. Uncomfortable, embarrassed, and slightly disheveled, I stopped and cooled off for a few minutes. I made it to court on time, but felt distracted by what happened on my way there. Days and weeks passed, and this memory eventually went to the back of my mind.

A few weeks later, during the holiday season, I woke up the day after Christmas and could not get out of bed. I had a sharp, intense pain in my lower back so severe that I could not stand up. So, I languished in bed for several hours until I could get on my feet. The back pain lingered. I knew something was wrong. I went to my doctor. Desperate for relief, I was hoping to get a quick fix so I could get back to my life. My doctor told me, “I can give you some relief, but if you want to fix your back you need to lose 40 pounds.” Forty pounds? I’m thinking, “How do I do that?” I didn’t have the will, and I sure didn’t have the time. That was always my excuse for not being physically active—I never had time.

Fortunately, my doctor is a local facilitator of a nationwide wellness program. So, I reluctantly went to the orientation for the program. After hearing the spiel, I said yes. I wasn’t yet thinking about changing my lifestyle; I just wanted relief from pain. I quickly learned wellness is not a diet. Diets don’t work. Improving my diet was part of the solution, but physical activity and mindfulness are major parts of overall wellness. The program changed my life. I lost 32 pounds in eight weeks, and 70 pounds for the year in 2015. I’ve kept off the weight and practiced self-control (some days are better than others). Running became a passion for me. I started running short distances, then 5Ks, and I’m now training for my eighth half-marathon.

Kentucky attorney Helen Bukulmez is the self-described “Hiking Lawyer.” She says physical movement, hiking, is essential to her overall wellness:

“Don’t get me wrong. My hiking trips don’t resolve any of the issues or the problems I bring to its peaks; but these hikes adjust my mental and emotional well-being to see the potential solutions or, alternatively, to see how small they are in comparison to my overall life.”

Knowing stress is inevitable to her career as a lawyer, Bukulmez says hiking helps her cope:

“I’ve had to deal with some serious work-related problems, be it an abusive client, an unfavorable decision, or a disrespectfully opposing counsel. At the end of a long, challenging hike, none of them survives the mental, physical and emotional adjustments that a hike is able to place on my existence.”

“Improving Mental Health through Movement,” Yvette Hourigan and Helen Bukulmez, Kentucky Bar Association *Bench & Bar Magazine*, March/April 2016.

You don’t have to run marathons or hike mountains to be well. We are all running our own race. Just put one foot in front of the other and move forward.

Had I only gotten physically healthier and lost weight my wellness journey would have been a failure. The most important race isn’t for a medal: it’s the race of life. I had gone to church all my life, but with time I had gotten complacent in my faith. The journey I started in 2015 wasn’t just physical; it was also about getting my spirit in better shape. Running is the perfect metaphor for life, so we should all examine what we are running toward. Is it money? Prestige? Power? Consider the Apostle Paul’s words:

“Do you not know that in a race all the runners run, but only one gets the prize? Run in such a way as to get the prize. Everyone who competes in the games goes into strict training. They do it to get a crown that will not last, but we do it to get a crown that will last forever.” I Cor. 9:24-25.

I am far from perfect and still a work in progress, but I firmly believe faith and service to others is essential to wellness.

You will enjoy practicing law more and do a better job if you are healthy. Here’s my wellness advice for lawyers:

- You *can’t* do your best job in helping someone else if you aren’t well yourself.

The work will always be hard, but achieving wellness is the best way to manage the demands of this profession.

- Find an outlet—running, walking, biking, something. Too many lawyers have no outlet which causes a burnout.
- After you find your outlet, go do it without your phone. There aren’t many emails or messages that can’t wait one hour.
- You have a choice: Make time now to achieve wellness or make *a lot more time later* for sickness.

- Your responsibilities go beyond you.

Think about your family, your partners, your staff, and your clients. They all are depending on you to be well.

- Wellness requires keeping your body, mind, and spirit in shape.
- Find accountability partners—a fitness group, an instructor, or a class.
- No results + excuses ≠ results.
- There are 24 hours in a day. You have the time.
- Do it now. If not now, when?

This article began with Daniel Webster’s quote about lawyers living well, working hard, and dying poor. I hope you will reflect on your own wellness, and the competing notions of living well and achieving wellness will become one for your benefit, for your clients, and for the people who are depending on you. The work will always be hard, but achieving wellness is the best way to manage the demands of this profession. Maybe the work won’t be as hard if you’re willing to fight as hard for your own wellness as you are for your clients. And if you do, no matter what you have in the bank, you won’t die poor. ▲

R. Champ Crocker



Champ Crocker is a member of the United States Supreme Court Bar, the Alabama State Bar, the Birmingham Bar Association, and the Cullman County Bar Association. He earned his J.D. from Samford University, Cumberland School of Law and his B.A. from Vanderbilt University.



Ten Steps to Creating an “I Believe” Mindset

By Dr. Kevin Elko

Introduction

The Pulaski Academy Football Team in Little Rock, Arkansas has had a lot of success, including a number of state championships. What really stands out about this team, though, is ... they do not punt. I don't mean figuratively, I mean literally: they don't even have a punter on the team. Think about the message that sends to everyone on the team: (1) We don't look back, (2) We are bold, and (3) We are always going to make it. And, as a result, they often do. That is radical faith and belief that they will get it done.

This article is about getting rid of your punter and developing a radical faith mindset.

Having faith—in yourself, in others, in your future, in both the past and present you—is the key to winning. Believing is not a feeling, but a choice. Most people are driven by feelings, therefore fear chooses them. You are not a born winner or a born loser—you are a born *chooser*. And greatness isn't for the chosen few but for the few who choose. *“Today my feelings don't get a vote. I will choose faith and strength.”* Believe in spite of the evidence and watch the evidence change.

The big question here is simple—*Do you have faith IN faith?* Do you think faith matters and that it makes a difference? Faith is missing everywhere you look these days. Faith has been replaced with doubt,

cynicism, and fear. It is this faith that mobilizes and overcomes; it is fear that immobilizes and destroys. I urge you to consider having faith in faith, choosing to believe that belief makes a difference. I believe you'll find that it does.

The question is not, "Are your thoughts and dreams too crazy?" The bigger question is, "Are they too sane?" Having faith in your crazy, outlandish dream might be just what the world needs right now.

Step 1: Thermometer Or Thermostat?

Most people are fear-based and let doubt run them, because just like a thermometer, they merely reflect their environment. If things are good, they are good, but as soon as things go downhill, their emotions follow.

Then there are the ones who set the temperature because their faith gives the room energy and hope. They do not sit and let life happen to them, but instead they cause life to happen. Their own lives are not a product of an accident, but a manifestation of their belief system.

At the heart of depression and anxiety is people constantly talking negatively and specifically about what they don't want. Instead, be the thermostat. Set the tone of the environment and talk about what you do want. Make a choice that you are going to decide the outcome. Purposely walk around and talk positively about the things you do want. Demonstrate responsibility by responding with ability.

The Bible says, "So is my word that goes out from my mouth—it will not return to me unfulfilled; but it will accomplish what I in-

end, and cause to succeed what I sent it to do." Walk around and speak like a thermostat, not a thermometer, because for those of us who have faith, the door handle is always on our side of the door.

Step 2: Neurons that Fire Together Wire Together

Your brain is wired to keep you safe and secure. However, the brain is an outdated organ—a Velcro for the bad—holding onto it and replaying it so you won't have to experience the pain or hurt again. It functions for survival, not for you to have a vision, take chances, or be happy.

It is more common to be fearful and doubtful than to be bold and faithful. In order to have faith, you must deliberately choose to rewire your brain to focus on faith. Our brains are neuroplastic, meaning that they form and mold easily. The brain rebuilds itself daily. We must be consciously aware of how we are thinking in order to rewire the design of our brain. Faith and boldness are choices, and when you deliberately practice them, the neurons that fire together wire together, creating a stronger inner connection.

W. Clement Stone was an executive in the insurance business who experienced huge success. He would start out each morning and have his team say out loud, 50 times, "Do it now. Do it now." Faith and boldness to act go hand-in-hand. By saying, "Do it now" 50 times they wired their brains to do it now, leading to one of the reasons for his team's great successes later on. We must have the

faith to wire our brains to do it now if we want to achieve our desired results down the road.

Those who are successful generally feel that they must finish everything that they start. It is an obsession in believing that no matter what happens, they will have faith that they will cross the finish line, so they continuously give effort and keep pushing forward no matter what. Attitude is not a gene. It is a muscle. Every day, visualize yourself being bold and having faith. Mold your brain by what you repeatedly tell it.

Step 3: Believing and Effort

Stanford psychologist Albert Bandura uncovered the self-efficacy theory: as we believe in our ability to complete a specific task, our effort to accomplish the task goes up. The logic behind this is that if we believe we can do something, our energy and focus increases, and, as a result, we complete the task. Our effort toward a task is a statement of how strong our faith is that the task can be done. The take-away is not to talk about your belief, but to demonstrate that you have the belief through effort.

We have all heard the stereotype that Japanese children are smarter than American children in mathematics. However, research does not necessarily show this to be the case. When an American child gets a math problem that is difficult to solve, they average working at it for 9.4 minutes before quitting. When a Japanese child gets the same problem, they average 13.2 minutes before quitting. The Japanese children are not

smarter per se, but they choose to believe that the problem can get done so they stick with it and therefore appear much smarter. Giving yourself the gift of believing will lift all skills.

Faith is about taking action first, without guarantees. Remember, act like who you want to be and that is who you will become.

Step 4: Faith in Yourself

We are not very good at being a good friend to ourselves. When our friends are challenged or hurting, we tend to talk to them in an entirely different way than we would ourselves. We are kind, understanding, and show faith in our friends, but when faced with similar things, we don't react the same way to ourselves. If you don't stand up for yourself, who will?

Don't be the cause of your own self-doubt—set your mind and keep it set. Stop overthinking and doubting your gifts. Be bold in believing that your gifts can make a difference in your world.

Faith is a choice, not a feeling. Choose to be a good friend to you, and have faith in yourself. Jimmy Carter was once asked about the first moment he believed he could be president. He responded that he never actually believed until after meeting a couple of presidents. He said he then told himself, *"If that guy can be the president, I think I can."* Why not you?

Step 5: Encourage Yourself

If you chop down a tree and it doesn't fall, do you quit? Or do you keep chopping until it falls?

You keep chopping, because you have faith that eventually it will fall. Be a good friend to you and continue to encourage yourself until you get the job done.

If you water bamboo for a year—two years—three years—four years—you'll see nothing. Then, around the fifth or sixth year, it grows above the soil six inches every day. Keep watering the bamboo, and even though you can't see the progress yet, the roots are growing underground, establishing a base.

Research finds that believing in yourself and your goals is important, but equally important is realizing ahead of time that the journey you face will be difficult. We may think that just because we have faith in ourselves and set a goal, the rest will be easy. When we hit adversity, however, it is typically unexpected and we quit. When someone goes into a task fully realizing it will be difficult, they tend to succeed much more often than those who are not prepared for the struggle.

When you have a goal worth achieving, expect that the journey will be incredibly difficult. This way, when the tough times and hard work begins, you won't be blindsided—you will be expecting those challenges. And when the challenges show up, encourage yourself to keep chopping and to keep demonstrating faith. Find a phrase that you can repeat over and over to rewire your brain for self-encouragement. Results happen over a long period of time. If you want to reach your goals, you have to keep working.

Step 6: A Higher Power

Meditate on faith and belief. Know that there are great things

ahead for you and great things you can do to make a difference.

There is something much higher than us, and that which is much higher would love to assist you in a big way—if you call upon it, meditate on it, and boldly speak to it. To really activate this power, be grateful for it. It is hard to have a good life without a meaningful life, and it is hard to have a meaningful life without meaningful work. The prayer below will help you find meaningful work and wire your brain to go make a difference.

*May God bless you with enough
Foolishness to believe that you can
Make a difference in the world
So you can do
What others claim cannot be done
To bring justice and kindness
To all our children
Amen*

Meditate daily to a higher power to get faith in your mission. This will help guide you toward leading a more significant, meaningful life. There is something larger than us that wants to use you to help make the world a better place. By reading this prayer daily, you can better connect with a higher power.

Step 7: Faith in Your Past

At some point in your life, you will face adversity. Something challenging or life-changing happens to all of us. How you view it and how you react to it are critical in shaping your future.

Typically, we react to adversity by taking one of two paths: redemption or contamination.

If we think things happened *to* us, we are more likely to get contaminated and bitter, not better. Our past refines us; it does not define us.

And if we are contaminated, we lose all faith and belief that good can happen in our life. We believe history will repeat itself and nothing good will come our way.

I believe nothing happens *to* us, but everything happens *for* us. Actively choosing that kind of mindset will redeem us and eliminate contamination. We have to believe there is a plan for our life and that whatever happens, even though it may not seem to be a good thing right now, we will eventually see how it was involved with the plan. We have to choose to believe that life is stacked in our favor, and if we believe that, eventually it will be.

Look back on your past with gratitude, not in a judgmental way. Self-pity will not serve you well; everything that has happened to you is for your strength. Take the lessons you've learned and the adversity you've overcome, and use them to become stronger and more focused on your goal. Remember, your past does not define you—it refines you.

Step 8: Faith in Your Future

The fact is you either live in vision or you live in circumstance. The problem happens when a challenging event occurs and we have no faith that it will soon pass. I say to myself daily that my latter days will be greater than my former days.

We often don't realize that our imagination runs 24 hours a day. We have to take control of it. It can do one of two things. It can either sink us to a new low we have never been, or it can raise us to a new high we have never experienced. If we do not take command of our imagination, it will most

certainly take command of us and take us to the darkest places.

Tina Turner and Oprah Winfrey ran a contest asking Oprah's listeners to write in and ask for whatever they wanted. One of the winner's letters had requested to have dinner with Tina and Oprah, so that's what they won. While at dinner, the winner was told that if she would have asked for a house, she would have gotten one. She became upset because she thought if she asked for something that big, it never would have been granted. Oprah told her to let that be her lesson—that if you ask small, you receive small, but if you ask big, you receive big. Have big faith in your future and ask big to receive big.

Believing is an exercise. The more we exercise it, the more it becomes strong and prevalent in our minds.

There is a phrase we use with the University of Alabama football team that was behind a 20-plus game-winning streak: "*So what? Now what?*" First of all, we have to say, "*So what?*" when a door is slammed shut. Stop staring at the closed door or you will never see the open window. We have to get our eyes on new possibilities that come from potential setbacks. Get onto using your positive imagination when adversity hits or a door has closed, rather than wallowing in self-pity.

I often speak to the University of Alabama football team, and I close with this story every time. Two boys were going to get into a fight after school one day, and I couldn't wait to see it. This fight was quick. One boy shoved the other one down a hill and that was that. So the gathered crowd all started to walk back into school,

but the seemingly defeated boy came up over the hill with a tree branch in his hand and said, "*Wait a minute, where is everyone going? This fight is not over.*" And then he said one of my favorite words—"Yet." The word yet is powerful because it shows you have faith going forward, and what is happening now is anything but final.

Take command of your imagination and say these self-talk phrases to yourself often—"So what? Now what?" and "Yet." Stay out of self-pity and negative judgment. Your imagination is powerful and can either lead you down a destructive path or up to a new, high peak.

Step 9: Faith in Others

Paul "Bear" Bryant, the famous head coach of the Alabama Crimson Tide, used to say, "*Call your momma, because I sure wish I could.*" I feel very much that way. My mother was a strong person who gave me a great gift—she believed in me. I would hear her say all the time, "*I never worry about Kevin because I have faith in him.*" I owe so much to her belief and faith and don't know where I would be without her.

Two young men joined the Marines together and told each other that they would be there for each other no matter what. During a battle, one of them was wounded and on the battlefield in the space between the two armies, in an area they called No Man's Land. The uninjured Marine asked his sergeant if he could go get his friend. The sergeant told him he couldn't stop him, but it wasn't worth it. The soldier went anyway. He picked up his friend and made it to the wall on his side of the front,

but was shot in the process. Sometime during the rescue attempt, his friend died. The sergeant said, “I told you it wasn’t worth it. He’s dead and now you’re shot!” The brave young man responded, “It was worth it because when I got to him he was still alive. And when I bent over to pick him up he said, ‘I knew you would come for me.’ It was more than worth it, sergeant.” Believing in others and being there for them is worth it.

Practice connecting with someone else daily. Practice letting them know you have faith in them. There is someone around you today who desperately needs to know that someone has faith in them and will be there for them. Remember, life is a game of boomerangs. What we give out comes back to us, and when we practice believing in others, the faith and belief you have invested in others will come back to you just when you need it most.

Step 10: Faith in Your Team

I watched a *Look Magazine* Netflix documentary about miracles. A man could not walk because there was a break in his spine. In the documentary the doctors showed X-rays and his spine was clearly disconnected. A group from his church came in to pray for him, asking God to grant him the ability to walk again. Sometime later, the doctor came in with a new X-ray and said, “*Look for yourself. Remember the break in his spinal cord? It isn’t there anymore!*” The patient once confined to a wheelchair is now running up the church steps!

What is behind these miracles? The first step involves a group of people coming together as one. Doug Pederson, head coach of the Philadelphia Eagles, told his team before winning the Super Bowl, “A person can make a difference, but a team can make a miracle.” I’m sure if you’ve looked at United States coins, you’ve noticed the phrase *e pluribus unum*. It means, “*Out of many, one.*” That is the first step of a miracle—a bunch of very diverse people coming together as one. The Bible says one can chase a thousand but two can chase ten thousand, which means when we can come into agreement, we can become so much stronger and our energy will be multiplied.

The second step is all of them meditating in one direction for someone, or something larger than themselves. I have found power in the phrase, “*I am not looking for blessings to come into my life, but I am looking to be a blessing in someone’s life.*”

The third element of a miracle is faith that the miracle will happen. We can because we believe we can. Together you will do something that no individual can do because the miracle mindset and the team mindset are exactly the same.

Daily meditate for the well-being of others in your family, workplace, or team. Choose to believe that the mission you are on can work and make a difference. An individual can make a difference, but a team can make a miracle.

Conclusion

Many of us want to become exceptional in our daily walk. To become exceptional we must think

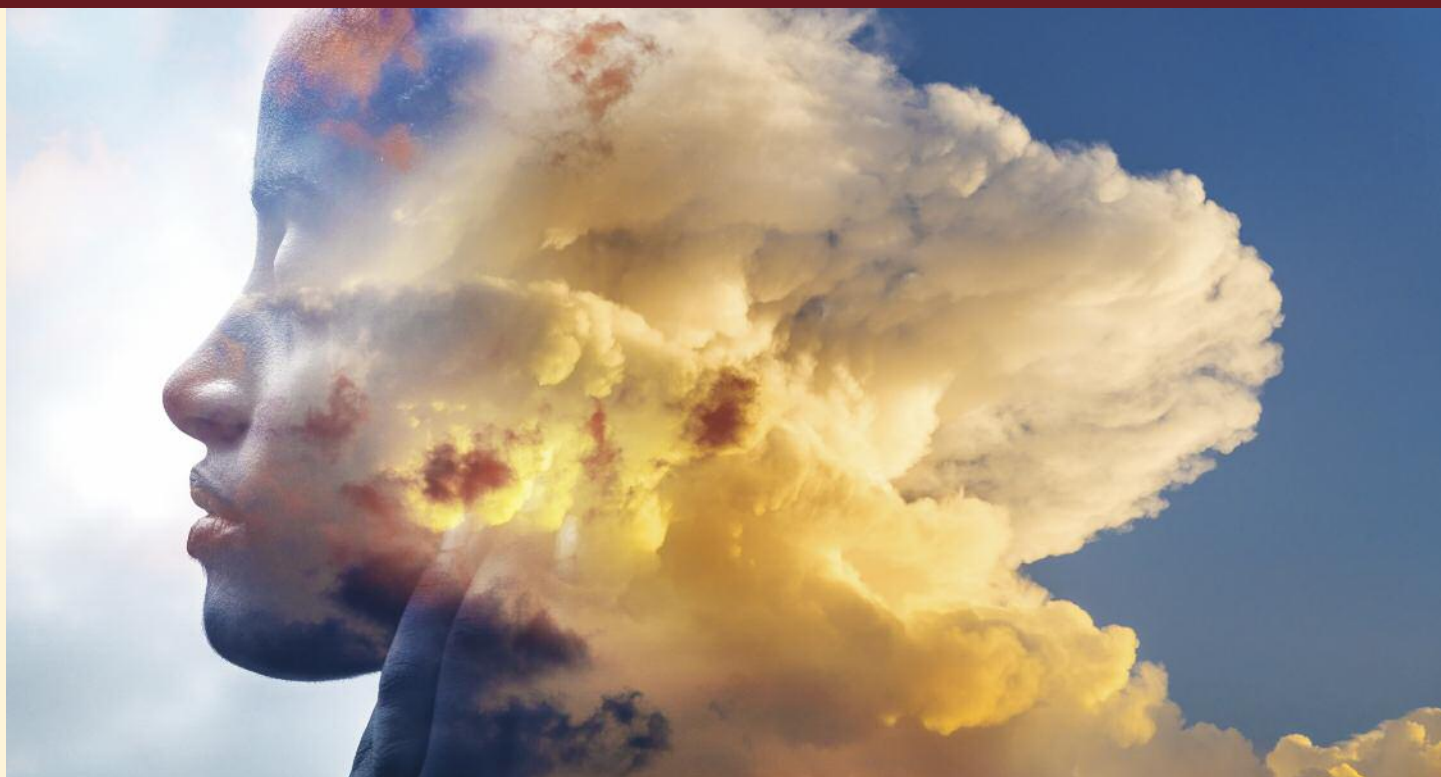
about the root word of exceptionalism—except. *To become exceptional we must make a statement about ourselves—everyone doubted except me, everyone lacked faith except me, everyone complained about their past except me.* And to become exceptional in our lives we must have faith—the kind of faith that can move mountains. Not only do we need to possess it, but we need to show it in our actions, exercise it in our thoughts, model it in our words. If we believe that we can get something done, we are more likely to keep going until we finish.

Lastly, I’m reminded of a song called “*Reason To Believe.*” That is the ultimate faith question—do you have a reason for believing? Aren’t your family and children reasons enough to believe? Isn’t the life you have, the opportunity of this day, enough? Isn’t being a blessing to someone and your responsibility to mankind enough? Sometimes what matters most is faith itself, trusting that you are meant to be part of a miracle. ▲

Dr. Kevin Elko



Dr. Elko is a performance consultant for the University of Alabama football team and the Philadelphia Eagles professional football team. He received his bachelor’s degree from the California University of Pennsylvania, and then two master’s degrees and a doctorate degree from West Virginia University. He has consulted with a multitude of college and professional football teams and numerous corporate clients, and published six books.



Lawyer Well-Being

By Robert B. Thornhill, MS, LPC

There has been a significant effort in recent years

to address the issue of lawyer wellness. There are many compelling reasons for this. It is well-known that the daily work of lawyers provides a multitude of situations that can trigger anxiety and stress. Lawyers typically devote a tremendous amount of effort and energy to provide meaningful guidance and representation to their clients, and often disregard their own needs in the process. This challenging and time-consuming work is frequently difficult and sometimes overwhelming. If the inherent stress of practicing law is not dealt with in healthy ways, it can lead to devastating consequences.

In the most comprehensive study to date, “The Prevalence of Substance Use and Other Mental Health Concerns among American Attorneys,” published in February 2016 in the *Journal of Addiction Medicine*, researchers found “rates of hazardous, harmful, and potentially dependent drinking and high rates of depression and anxiety symptoms.”¹ It is important to highlight the validity and reliability of this well-done study. Almost 15,000 lawyers from 19 states, including Alabama, completed an anonymous survey addressing alcohol use, drug use, and symptoms of depression, anxiety, stress, and other mental health concerns. Of these, approximately 11,300 completed a 10-question instrument, the Alcohol Use Identification Test (AUDIT-10), which

screens for problematic alcohol use. Of these respondents, 21 to 36 percent revealed a score consistent with an alcohol use disorder. The study also revealed that 28 percent reported concerns with mild or high levels of depression with males at a higher rate than females, and 19 percent reported mild or high levels of anxiety, with females at a higher rate than males. Overall, 23 percent indicated mild or high levels of stress.²

In the words of Patrick Krill, lead author of the study, “The law has always been a magnet for hard-working, self-reliant and competitive people who often prioritize success and accomplishment far above personal health or well-being. On top of that, stress, unhappiness and imbalance abound, while unhealthy coping skills such as excessive drinking are the cultural norm—malignant, learned behaviors passed down through the profession with the frequency of a dominant gene.” He adds, “If you value your reputation, hide any struggles you might have, or, better yet, pretend they don’t exist. These are the messages that many attorneys hear—both formally and informally—beginning on the first day of law school and continuing throughout their careers. It is a pure and indigenous dysfunction humming along through vast corridors of the profession, often unrestrained, and culturally enabled.”³

The findings of this study have resulted in a nationwide effort to directly address the issue of lawyer well-being. In a 2017 report from the National Task Force on Lawyer Well-Being, “The Path to Lawyer Well-Being: Practical Recommendations for Positive Change,” lawyer well-being is defined as: “A continuous process whereby lawyers seek to thrive in each of the following areas: emotional health, occupational pursuits, creative or intellectual endeavors, sense of spirituality or greater purpose in life, physical health, and social connections with others.” The authors go on to say that, “Lawyer well-being is part of a lawyer’s ethical duty of competence. It includes lawyers’ ability to make healthy, positive work/life choices to assure not only a quality of life within their families and communities, but also to help them make responsible decisions for their clients. It includes maintaining their long-term well-being. This definition highlights that complete health is not defined solely by the absence of illness; it includes a positive state of wellness.”⁴

It is important to remember that some stress is inevitable in all of life, and particularly in the legal field, and the experience of anxiety is quite common. Feeling brief periods of stress or anxiety is very normal for

all of us. Whether these events become debilitating or pathological often depends on how we view the situations or thoughts that are related to our experience of stress or anxiety, and the level of willingness we have to address these uncomfortable feelings and to utilize healthy coping skills.

A very useful article from the Cleveland Clinic in May 2018, “6 Signs Your Work-Life Balance Is Out of Whack,” provides an easy way to gauge our well-being at home and in the work place, and effective ways to make positive changes if needed. Here are the six signs as offered by psychologist Amy Sullivan, PsyD:

1. *You stop taking care of your body.* You’re staying up too late or having trouble falling asleep. You’re sitting all day and not exercising. You’re getting most of your food from vending machines, a drive-through window, or not eating at all. You have a nagging pain or health concern, but don’t feel you have time to go to the doctor.
2. *Your mental health is going downhill.* You’ve started noticing signs of anxiety or depression, or feeling angry or irritable. You may even experience dread, restlessness, hopelessness, panic attacks, mood swings, and maybe even thoughts of suicide.
3. *You just don’t care anymore.* Your work no longer feels meaningful. You don’t feel connected to your colleagues or clients. You’re just going through the motions.
4. *You feel incompetent.* No matter what you do, it feels like it is never enough. You’re always behind and the quality of your work may suffer. You worry constantly about your job performance. You fear (but in many ways fantasize about) being fired.
5. *There are no clear boundaries between work and home.* You’re working longer and longer hours. You can’t take time off without getting calls, texts, and emails from work. You feel like you have to be available around the clock.
6. *You’re lonely.* Although you may have people around you all the time and you’re constantly connected electronically, you no longer have the time or energy for meaningful interactions with family or friends. Your relationships begin to suffer.

Dr. Sullivan offers the following suggestions:

1. *Disconnect when you are at home.* Put down the phone! You don’t need to be available 24/7. Constantly checking and responding to texts and

emails raises stress levels, makes it difficult to connect with family members, and negatively affects your sleep.

2. *Be more efficient at work.* Focus on one task at a time, and keep working on it until it is complete. Don't try to multitask. Close your email and turn off your phone to minimize distractions. When we are more efficient at work we are then able to go home and spend time with our families.
3. *Prioritize self-care.* Make a decision to set aside time for exercise. Choose and plan for nutritious meals and quality time with friends and family. Make those things non-negotiable in your schedule.
4. *Get professional help.* If stress is impacting your emotional or mental health, don't hesitate to talk to a therapist.

Dr. Sullivan adds, "Although hard work is prized in our culture, and especially in the legal profession, you don't have to let your job take over your life. It's OK—and necessary—to take care of you first."⁵

There are many other practical methods of stress management that can be readily utilized. A very good way to start would be to identify the sources of stress in your life by keeping a stress journal, and then track how you are currently coping with it. This would enable you to identify those coping skills that have been effective and those that you need to eliminate or replace. Simple techniques such as goal-setting and time management can be very effective in combating procrastination and increasing productivity. Other immediate techniques that can be powerfully effective include deep breathing, progressive relaxation, and meditation. There are many self-help books and guides to learn how to incorporate these very useful methods of stress management.

Other approaches that can be very effective include cognitive therapy and mindfulness meditation. Both have been found to provide significant and positive improvement in mental and emotional health, as long as the simple techniques are practiced and utilized on a regular basis. Most mental health professionals are trained to explore thought systems and, in particular, to look for patterns of thinking that are distorted and nega-

tive. It is a well-established fact that our moods are determined, to a significant extent, by our thoughts rather than people or events, though most do not believe this! Cognitive therapy and/or mindfulness meditation can release us from the bondage of our own negative ruminations and help us begin to realize that our thoughts will always be distorted and negative when we are in a

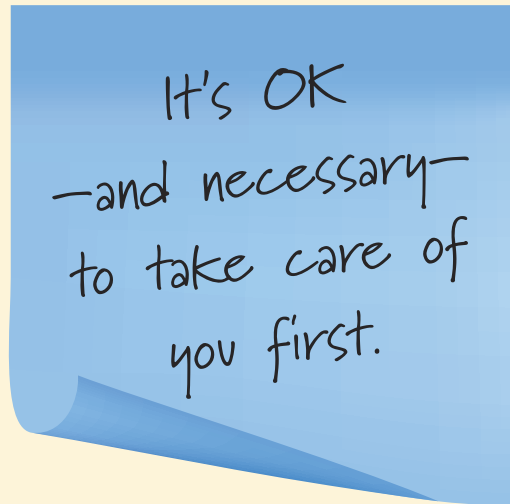
low mood. Mindfulness meditation can help us disengage from this negative pattern, and cognitive therapy can teach us simple and effective ways to recognize and challenge our negative and distorted thinking with objective reality. These therapies can be utilized as self-help or with the assistance of a trained therapist.

Some of the most powerful and effective ways to maintain or improve mental, emotional, and physical health have been widely known for a great many years.

These include regular exercise, eating a balanced and healthy diet, reducing caffeine and sugar, avoiding alcohol or drinking moderately, and getting adequate sleep. Of equal, or perhaps greater, importance is ensuring that we have set aside adequate time for fun and relaxation.

Regular exercise prolongs life and reduces the risk of disease such as hypertension, diabetes, cancer, and heart disease. It has also been shown to be very effective in reducing stress and improving our mood. Exercise has a powerful and positive impact on the brain's neurotransmitters such as serotonin, the endorphins, and dopamine—the brain chemicals that are directly involved with the physiological creation of our moods.

Eating a healthy diet is also essential for those of us who truly desire to be intentional about our well-being. Our pattern of eating, whether it is healthy or unhealthy, has a powerful and profound impact on our physical and emotional health. Learning to eat in moderation, instead of binging as a way of dealing temporarily with stress, can yield immediate and positive results. Almost all of us have experienced the misery of over-indulging when we feel stressed, or if it has simply become a habit. What almost always happens immediately afterward is that we not only feel "stuffed," we are also filled with remorse for having eaten far more than we should have, and for having eaten food that we know is unhealthy. For those who have developed a pattern of



overeating, this can lead to obesity and an increased risk of a multitude of health problems, including gastro-intestinal problems, diabetes, hypertension, and cancer. Stress-eating also leads, paradoxically and tragically, to a deepening of our negative moods and depression, and to low self-esteem. The way we choose to eat has a powerful effect on our physical health and our moods. A healthy diet, eaten in moderation, will dramatically improve our physical and emotional health and help to ensure a state of well-being.

It is essential to ensure that we get adequate sleep. While we sleep, the brain rests busy neurons, and forms and repairs neural pathways so that we're ready to face the world in the morning. The immune system produces infection-fighting antibodies and cells. Without adequate rest we will have difficulty with concentration and attention, and creativity and problem-solving skills will deteriorate. Long-term and short-term memory will suffer. Equally important, we will be far more prone to "moodiness" and more emotional and quick to anger. Sleep deprivation is a constant threat in the legal profession. Sadly, it often leads to lost productivity and negative outcomes for clients. Tragically, it has been strongly linked to an increased risk for anxiety and depression.

It is important to discuss the dangers of relying on alcohol or other mood-altering substances as a way of dealing with stress, anxiety, and depression. There is nothing wrong with having a drink or two after a hard day's work. However, if you have come to rely on alcohol (or some other legal or illegal mood-altering substance) as a way of coping with life, it is very likely you have crossed an unhealthy line. Once this dependence on alcohol is in place, it becomes our one and only coping skill and effectively blocks us from being able to acquire healthy ways of coping. This often leads to full-blown alcoholism and all the tragic problems that come with it: broken relationships, decreased productivity at work, formal complaints to the bar, loss of license, legal problems such as DUI or public intoxication, and so on. If this pattern has become operative in your life, or if you know someone who is struggling with alcoholism, it is imperative that you contact the Alabama Lawyer Assistance Program so that we can provide assistance.

Then, there is the matter of faith. For those who belong to a particular religion or denomination, or who espouse to a more "spiritual" way of life, practicing the tenets of your faith and reaching out to like-minded people can provide tremendous strength and guidance during a time of stress. Living a life based

on spiritual principles can bring about the genuine courage needed to face the inevitable challenges and difficulties that come our way.

In his brief but excellent article, "Up Your Gratitude," John Kralik describes a very specific and highly effective spiritual technique for expressing gratitude that transformed his life. He explains, "On New Year's Day 2008, I went for a hike, feeling at an all-time low. I was overweight. I owned a law practice, but it was losing money. Entangled in a divorce, I lived in a depressing apartment. The woman I'd been dating had recently ended our relationship. On my hike, I heard a voice. It said I shouldn't focus on what I wanted or had lost, but should be grateful for what I had. The idea of a year of 'thank-yous' popped into my head."

He realized that he had been blessed by many people in a multitude of ways, large and small. He began writing thank-you notes. He provided this specific thank-you note that he'd written to a Starbucks employee named Kimber: "Knowing that you had to work on Thanksgiving, of all days, I thought I'd express my gratitude that you have taken the time and made the effort to learn my name and greet me each day in a way that makes me feel like a person and not a number. It is a small thing, but on any given day, it can make all the difference. Thank you!" He describes how, on the following day, when he entered the Starbucks, the employee, nearly breaking down, told him that his note made her realize that what she does really counts. It was his 260th thank-you of 2008, the year he vowed to send one to a different person every day.

This simple but profound project has resulted in a complete transformation of his life. He states, "After I thanked colleagues for directing cases to me, they referred more. When I expressed gratitude to clients for paying promptly, they began doing so even more quickly."

He wrote a book in 2010, *A Simple Act of Gratitude*. Just days after its release, he received his first thank-you note from a reader. Within a few weeks, he had received a whole box of them from his publisher. His readers have demonstrated how the effects of gratitude continue to ripple out.

Of course, his circumstances have improved immeasurably since the decision he made on that hike. He is now in great shape (he has been intentional about exercise and diet), he has found a small but "lovely" house, and was appointed to his dream job, superior court judge. As of this article, he had written

his 860th note. He says, “I keep learning that gratitude is a path to the peace we all seek.”⁶

All of these suggestions for wellness can be remarkably effective. Each one of us, though, must become willing to self-search and identify those areas that we need to improve, and we must be willing to make an honest commitment to improve our lives. In order to truly experience significantly improved mental, emotional, and physical health, we must be deliberate and intentional about taking action. For those of us who do, we will reap the benefits in every area of our lives, including our marriages and families, friends and social connections, and our work.

For those attorneys who have relied on unhealthy coping skills, and who remain unwilling to improve their lives, the risks to their chosen profession run high. It is well-known that a significant proportion of attorneys with malpractice cases or formal complaints to the bar have ongoing problems with substance abuse and/or undiagnosed and untreated mental health issues, such as depression or anxiety. Some of the most commonly violated Rules of Professional Conduct are:

Rule 1.1: Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skills, thoroughness, and preparation reasonably necessary for the representation.

Rule 1.3: Diligence: A lawyer shall not willfully neglect a legal matter entrusted to him.

Rule 1.4: Communication: A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions.

Rule 1.5: Safekeeping Property: This is a very lengthy and comprehensive rule that carefully covers the obligation to properly handle and safeguard property and monies.

Attorneys who are abusing alcohol or drugs, or who are in need of evaluation and treatment for depression or anxiety, will inevitably run afoul of one or more of these rules. It is our hope that the emerging nationwide focus on the importance of wellness in the legal profession will cause all of us to be mindful, not only of our own needs, but also of those colleagues who

are clearly struggling and need our assistance.

The Alabama Lawyer Assistance Program can help. If you or a colleague are struggling with pathological stress or anxiety, or coping with it in ineffective or unhealthy ways, we urge you to contact us. Our program is completely confidential. We have a committee of dedicated attorneys who have courageously faced their own challenges and who stand ready to provide assistance and guidance.

It is important to once again mention the remarkable efforts of the National Task Force on Lawyer Well-Being. Their hard work and dedication have resulted in the publication of “The Path to Lawyer Well-Being: Practical Recommendations for Positive Change” and the “Well-Being Toolkit for Lawyers and Legal Employers.” These can easily be found on the ABA’s website. I highly encourage all of us to carefully read and then review this very important work. There is a wealth of information that can be utilized to bring about a positive revolution in health and wellness throughout the legal profession. This transformation can only begin with each one of us. ▲

Endnotes

1. “The Prevalence of Substance Use and Other Mental Health Concerns among American Attorneys,” Krill, Patrick R. JD. LL.M.; Johnson, Ryan MT; Albert, Linda MSSW; *Journal of Addiction Medicine*; February 2016; Volume 1-Issue 1-pp 46-52.
2. “Landmark Study: U.S. Lawyers Face Higher Rates of Problem Drinking and Mental Health Issues,” Joe Forward, *Wisconsin Lawyer*, February 2016.
3. “The Legal Profession’s Drinking Problem,” Patrick Krill, CNN Opinion, February 2016.
4. The National Task Force on Lawyer Well-Being, “The Path to Lawyer Well-Being: Practical Recommendations for Positive Change,” initiated by the ABA Commission on Lawyer Assistance Programs, the National Organization of Bar Counsel, and the Association of Professional Responsibility; August 14, 2017.
5. Cleveland Clinic, Health Essentials, May 23, 2018/ Mental Health, “6 Signs Your Work-Life Balance Is Out of Whack.”
6. “Up Your Gratitude,” by John Kralik; January 1, 2012; *Parade Daily*.

Robert B. Thornhill



Robert Thornhill, MS, LPC, is the director of the Alabama Lawyer Assistance Program of the Alabama State Bar. Contact him at (334) 517-2238, (334) 224-6920 or robert.thornhill@alabar.org.

Last Will and Testament

I, John Smithson, an adult residing at 123/456 North Town Road, Montgomery, Alabama, of sound mind, declare this to be my Last Will and Testament. I revoke

1111 0000 1111

IT TO GO ENVELOPE TO THE RIGHT
ADDRESS, FOLD AT DOTTED LINE

CERTIFIED MAIL



1111 0000 1111
1111 0000 1111

U.S. Postal Service
CERTIFIED MAIL® R
Domestic Mail Only

For delivery information, visit our website

OFFICIAL

Certified Mail Fee

Extra Services & Fees (check box, add fee as appropriate)

- Return Receipt (hardcopy) \$
- Return Receipt (electronic) \$
- Certified Mail Restricted Delivery \$
- Adult Signature Required \$
- Adult Signature Restricted Delivery \$

Postage

Postage and Fees

ment

ery, Alabama, being
all wills and codicils

RECEIPT

website at www.usps.com

AL USE

Appropriate

The New Mandatory Notice In Probate Estates Made Easy (With Forms!)

By Assistant Attorneys General Timothy A. Offord and Samuel M. White

Introduction

On June 10, 2019, Governor Ivey signed Act 2019-489, streamlining the estate recovery process while at the same time providing protections for the probate estate and the Alabama Medicaid Agency (Medicaid).¹ The Act ensures Medicaid will be aware of every recipient's probate estate opened in Alabama. It also benefits probate estates by shortening Medicaid's time to file a claim.

Medicaid is the single state agency responsible for administering the Title XIX Medicaid program under the Social Security Act.² The program is administered

under a federally approved state plan for medical assistance with the Centers for Medicare and Medicaid Services (CMS). Serving approximately 1,000,000 Alabama citizens through many different programs, Medicaid strives to be good stewards of taxpayer funds while covering vital medical services for its recipients. Medicaid staff, as well as other state and federal agencies, review applications to determine eligibility for the Medicaid program. After eligibility is awarded, Medicaid covers the health costs of its recipients within the coverage parameters of the recipient's specific Medicaid program.

Medicaid is required by federal law to seek recovery of medical assistance payments from the estates of certain Medicaid recipients after their death.³ The estate recovery obligation and estate recovery criteria are separate from Medicaid's federal law obligations to recover funds through other avenues such as real property liens,⁴ liable third parties,⁵ or trusts.⁶ To fulfill the federal law obligations regarding estate recovery, Medicaid must receive notice of recipient probate estates. Act 2019-489 guarantees this notice is received.

A New Notice Process for All Estates

As of September 1, 2019, Medicaid must receive notice of all post-death probate estates.⁷ The personal representative, or the person filing an action under the Alabama Small Estates Act, is responsible for sending the notice.⁸ The notice must include the full legal name of the deceased, their date of birth, and their date of death.⁹ Other information is also listed in the Act and should be included so Medicaid can verify any estate recovery exclusions.

The Act contains specific mailing instructions that must be followed to ensure notice is received by Medicaid. The notice must be mailed by United States Postal Service Certified Mail, return receipt requested, to the following address: Alabama Medicaid Agency, Attn: Estate Notice Office, P.O. Box 5624, Montgomery, AL 36103-5624.¹⁰ The "sender" block located on the return receipt should be addressed to the appropriate probate court.¹¹ Also, the case number must be written on the return receipt so the probate court can file it in the proper case file.¹² The person mailing the notice must file an affidavit of certified mailing in the probate court with a copy of the notice of probate attached to the filed affidavit.¹³

This method of service mirrors Rule 4(i)(2)(ii) of the Alabama

Rules of Civil Procedure. The process ensures that the court is aware of when the notice was mailed to Medicaid, when Medicaid received the notice, and when Medicaid's new shortened time to file a claim has passed.

A second method for providing notice is expected to be available in the years to come. The Act authorizes Medicaid to create an electronic system for the submission of probate notices.¹⁴ That system will provide a serialized certificate to be filed in the probate court, removing the necessity of a mailed notice in favor of a more streamlined electronic process.¹⁵ As of now, the written mailed notice is the only option and must be utilized for satisfaction of the Act requirements.

Medicaid's Response to Probate Notices

The Act, which went into effect September 1, 2019, shortens Medicaid's time to respond to a probate notice from six months to 30 days.¹⁶ However, the 30-day time period is actually less, because Medicaid must *deliver* the response to the probate court in 30 days, not *mail* the response within 30 days.¹⁷ Medicaid's response can come in one of three forms: a claim, a waiver of claim, or a statement that no amount is due.¹⁸ Assuming all notice requirements are met, if Medicaid's response is

CHILD SUPPORT CALCULATION SOFTWARE

For Alabama

Alabama Support Master™

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

Includes Interest and Arrearage
Calculator

Since 1989
Professional Software
Corporation

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

marc.edwin.hawley@gmail.com

www.SupportMasterSoftware.com

FREE DEMO

not delivered within the appropriate timeframe, any available claim is waived.¹⁹

The Act does not create a new cause of action for Medicaid. In fact, federal law explicitly states when Medicaid may file a claim.²⁰ Even then, several federal law exclusions may prevent Medicaid from recovering medical assistance payments.²¹ Further, the Act creates a state law exclusion preventing Medicaid from recovering payments made for Medicare cost-sharing or Medicare Savings Programs as described in 42 U.S.C. §1396a(a)(10)(e).²² If Medicaid is permitted to file a claim, an affidavit showing the amount Medicaid paid and the time period in which the payments were made must accompany the claim.²³

The filing of a claim pursuant to this Act does not change Medicaid's order of preference for a medical assistance claim under current probate law. The payments for medical assistance remain in the sixth class of debts.²⁴ However, pursuant to the Act, the filing fee for Medicaid's claim is now in the second class of debts, and it must be paid back without any additional claim filing by the agency.²⁵ It is important to note that a distribution from the estate, or payment of any debts in the sixth class, cannot be made until 30 days have passed since Medicaid received notice.²⁶ If the notice is properly mailed soon after the issuance of letters, or soon after the filing of a small estate petition, this limitation on distributions will not be a problem.²⁷

Uniformity in Probate Estate Petitions

Act 2019-489 creates a uniform process for Medicaid to petition any Alabama probate court to issue letters of administration to a third-party administrator.²⁸ Medicaid must provide extensive information, such as a list of the known assets, debts, and possible heirs.²⁹ Further, Medicaid must inform the court if any of the required information is not included in the petition.³⁰ Once Medicaid fulfills its duty, the court can appoint an administrator.³¹ The court cannot appoint a Medicaid employee as the administrator.³² Medicaid expects most courts will appoint the current general county administrator or a local attorney. After the petition is granted, Medicaid has no special status in the estate and the general laws of estate administration remain unchanged.³³

Processing Probate Estate Notices

Medicaid currently processes notices and may assert a claim if it is notified of a recipient estate. The Act ensures Medicaid will receive notice of every Medicaid recipient's probate estate by requiring that notice be provided to Medicaid of all post-death probate estates.³⁴ Because of the expanded notice requirement, Medicaid expects to

receive more notices in one month than it previously received in one year. Medicaid has established an improved method of notice processing due to this expected increase. It is important for a practicing lawyer to know how the Act will be implemented by Medicaid. Attorneys who practice probate law have seen this process in motion since September 1, 2019.

Medicaid has created and staffed the new Estate Notice Office to receive, analyze, and answer all notices. When the office receives a notice, it will immediately review the document to ensure that, at a minimum, all the required information is provided. If Medicaid

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

personnel find an error during the review, such as incomplete or illegible information, they will immediately contact the person providing the notice. Medicaid expects that minor errors can be handled in an expedient manner that does not delay Medicaid's response. If Medicaid's response is delayed because the notice was insufficient, the Estate Notice Office will inform the probate court that the submission did not meet the requirements of the Act.

Once it is determined that the notice is complete, a system match will be performed utilizing the information from the notice. If the information identifying the deceased matches the recipient information in Medicaid's system, a determination will be made as to whether Medicaid has provided any payments for medical assistance for which a claim can be made. If the results of the system match indicate that no payments for medical assistance were made or that the recipient and/or payments are exempt from recovery, Medicaid will file the necessary response with the probate court. In the event the system match indicates that payments for medical assistance were made and are eligible for an estate recovery claim, an affidavit will be generated and a claim will be processed for delivery to the appropriate probate court. Medicaid will mail all claims by certified mail so the Estate Notice Office can ensure the claims are delivered within 30 days. A courtesy copy will be provided to the appropriate representative in either case.

The Forms

Medicaid has created a website with sample forms to help make the process easier for everyone involved.³⁵

Final Note

Throughout both the estate claim process and the third-party administrator appointment process, Medicaid's goal is to quickly assert a claim or quickly remove itself from the estate so that the representative, probate court, and other interested parties can move forward with the estate proceedings with, or without, the Medicaid Agency. The implementation of this Act requires all parties to adapt to the new requirements, but the benefits to the state as well as the probate estates outweigh any growing pains inherently involved in change. If you have any questions about a notice that has been sent or Medicaid's response, please contact the Estate Notice Office at (334) 242-5000. ▲

Endnotes

1. Ala. Act 2019-489.
2. ALA. CODE § 22-6-150(6) (1975).
3. 42 U.S.C. § 1396p(b)(1)(B).
4. 42 U.S.C. § 1396p(b)(1)(A).
5. 42 U.S.C. § 1396a(a)(25)(A)-(C).
6. 42 U.S.C. § 1396p(d)(4).
7. Ala. Act 2019-489 § 1(a).
8. *Id.*
9. Ala. Act 2019-489 § 1(b).
10. Ala. Act 2019-489 § 1(c).
11. *Id.*
12. *Id.*
13. *Id.*
14. Ala. Act 2019-489 § 1(f).
15. *Id.*
16. ALA. CODE § 43-2-350(b) (1975); Ala. Act 2019-489 § 1(e).
17. Ala. Act 2019-489 § 1(e).
18. Ala. Act 2019-489 § 1(d).
19. Ala. Act 2019-489 § 1(e).
20. See 42 U.S.C. § 1396p(b)(1)(B).
21. 42 U.S.C. § 1396p(b)(2)(A).
22. Ala. Act 2019-489 § 3(a).
23. Ala. Act 2019-489 § 3(b).
24. See ALA. CODE § 43-2-371.
25. Ala. Act 2019-489 § 1(g).
26. Ala. Act 2019-489 § 1(h).
27. Cf. ALA. CODE § 43-2-640 (noting the personal representative can make a distribution six months after the date of the grant of letters testamentary or of administration). Cf. ALA. CODE § 43-2-692(b)(4) (noting that 30 days must have passed since notice of the filing of the petition under the Alabama Small Estates Act was published in the newspaper).
28. Ala. Act 2019-489 § 2.
29. Ala. Act 2019-489 § 2(b).
30. Ala. Act 2019-489 § 2(c).
31. Ala. Act 2019-489 § 2(d).
32. Ala. Act 2019-489 § 2(f).
33. See Act 2019-489 § 2 (containing provisions for Medicaid to file a petition, but no provisions for Medicaid to act after the court issues letters of administration to a third party).
34. Ala. Act 2019-489 § 1(a).
35. https://medicaid.alabama.gov/content/7.0_providers/7.1_third_party/7.1.1_estate_recovery.aspx.

Timothy A. Offord



Bo Offord is an assistant attorney general for the Alabama Medicaid Agency, where he has worked in the Office of General Counsel since 2010. He received his undergraduate degree from

the University of Alabama and his Juris Doctor from Faulkner University, Thomas Goode Jones School of Law.

Samuel M. White



Sam White is an assistant attorney general for the Alabama Medicaid Agency. He is admitted to practice in Alabama, the U.S. Supreme Court, the U.S. Eleventh Circuit and the U.S. Federal

District Court for the Middle District of Alabama. He is a graduate of Towson University and the Thomas Goode Jones School of Law.

An Exhibition 200 Years in the Making

WE THE
People

ALABAMA'S DEFINING DOCUMENTS

*A Bicentennial Exhibition
of Our State's Six Constitutions*



ALABAMA DEPARTMENT OF ARCHIVES & HISTORY

NOVEMBER 3 - DECEMBER 31, 2019

Celebrate Alabama's bicentennial with the documents that defined our state and shaped its history. All six of Alabama's constitutions will be on view together in a special exhibition presented by the Alabama Department of Archives and History.

We the People: Alabama's Defining Documents will explore Alabama's two-hundred-year conversation about citizenship. Whose voice matters? What do we value? These documents, written on fragile parchment, define what it meant, and what it should mean, to be an Alabamian.

WETHEPEOPLEALABAMA.ORG

#PATHTOSTATEHOOD

Alabama DEPARTMENT OF
ARCHIVES & HISTORY

624 WASHINGTON AVENUE • MONTGOMERY
ARCHIVES.ALABAMA.GOV





The Alabama Legislature Takes Its Chance on **DAILY FANTASY SPORTS**

By Zachary W. Anderson

On May 31, 2019, Governor Kay Ivey signed into law

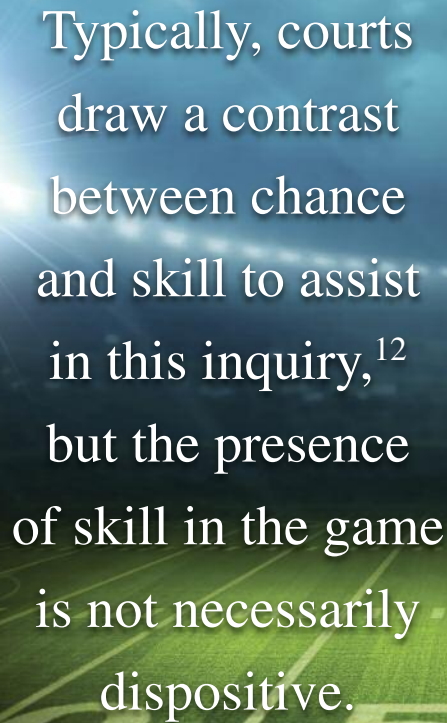
H.B. 361, a bill legalizing Daily Fantasy Sports (“DFS”) in Alabama.¹ Two highly popular DFS operators had previously suspended all operations in Alabama after then-Attorney General Luther Strange issued a press release claiming that DFS were illegal under Alabama law.² However, H.B. 361 legalizes DFS—for now, at least.

In traditional fantasy sports, participants select a lineup of real-life professional athletes to create a

fantasy team whose performance is measured throughout the real-life season of a sports league through statistical analyses of the fantasy team compiled by each participant.³ The fantasy teams of the participant(s) who accrue the most fantasy points win the game.⁴ DFS features a variation of this system in that each participant selects his or her fantasy team every day, and the winner(s) of the contests are similarly determined each day.⁵ Additionally, while traditional fantasy sports participants are largely comprised of self-selected groups of friends or colleagues, DFS are played online with up to thousands of participants per contest.⁶

Alabama's Constitution prohibits lotteries. Specifically, § 65 of the Alabama Constitution prohibits "lotteries or gift enterprises" and commands the legislature to "pass laws to prohibit the sale in this state of lottery or gift enterprise tickets, or tickets in any scheme in the nature of a lottery."⁷ The supreme court highlighted the immense strength of the public policy against lotteries in 1888 when it declared:

No state has more steadfastly emphasized its disapprobation of all these gambling devices of money-making by resort to schemes of chance than Alabama... [T]he voice of the legislature has been loud and earnest in its condemnation of these immoral practices, now deemed so enervating to the public morals.⁸



Typically, courts draw a contrast between chance and skill to assist in this inquiry,¹² but the presence of skill in the game is not necessarily dispositive.

game is a game of chance—the court in *Minges* looked to American jurisprudence and held that a game is a game of chance “if chance is the dominant or controlling factor.”¹⁵ “However,” the court continued, “the rule that chance must be the dominant factor is to be taken in the qualitative or causative sense, rather than the quantitative sense.”¹⁶

While *Minges* provided clarity by establishing that Alabama adhered to the American Rule, *Minges* also inserted a new, muddier analysis: whether chance is the dominant factor “in the qualitative or causative sense.”¹⁷ Applying this standard proved predictably difficult, as Alabama courts would struggle to decipher when games were

games of chance or games of skill, as discussed below.

CHANCE VS. SKILL IS BORN AND RAISED

After previously taking a case-by-case approach on the question of when a scheme constituted a “lottery” using a broad and ambiguous definition thereof,⁹ the supreme court announced in 1938 a new definition of a “lottery” in the following terms: “(1) A prize, (2) awarded by chance, (3) for consideration.”¹⁰ The key element of this definition is whether the prize is “awarded by chance.”¹¹ Typically, courts draw a contrast between chance and skill to assist in this inquiry,¹² but the presence of skill in the game is not necessarily dispositive. The supreme court announced in the 1948 *Minges v. City of Birmingham* case that a game need not be purely of chance to fall within this definition of a lottery.¹³ In other words, a game can be a game of chance—fulfilling the second element of the definition of a lottery—even when skill is involved. This rule, followed in Alabama and a majority of jurisdictions, is known as the American Rule, which stands in contrast to the English Rule, which holds that if skill plays any part in the game, then it is not a game of chance, and thus not a lottery.¹⁴

Attempting to provide more guidance on the second prong of the *Grimes* definition of a lottery—when a

THE ADDITION OF THE FREQUENT PRACTICE RULE

Three years after the *Minges* decision, the court of appeals took a different approach in *White v. State*. In this case, the court considered whether a pinball machine operated by participants using flippers was a game of chance.¹⁸ After extensively quoting Alabama cases and a Florida case on which the courts relied on the moral dangers of lotteries in the relevant legislative scheme in the chance-vs.-skill debate, the court of appeals appeared to introduce a new factor in the analysis: the amount of practice needed for the general public to acquire the skill needed to deem the game a game of skill. The court held:

Even so, the trend of the testimony of appellants['] own witnesses was that long practice on the machine was necessary to acquire the skill essential to overcome chance.

We do not think that the great mass of the patronizing public has either the time, or inclination, to develop whatever latent talent they may have in this field of endeavor. It would appear therefore that as to the public in general[,] this machine,

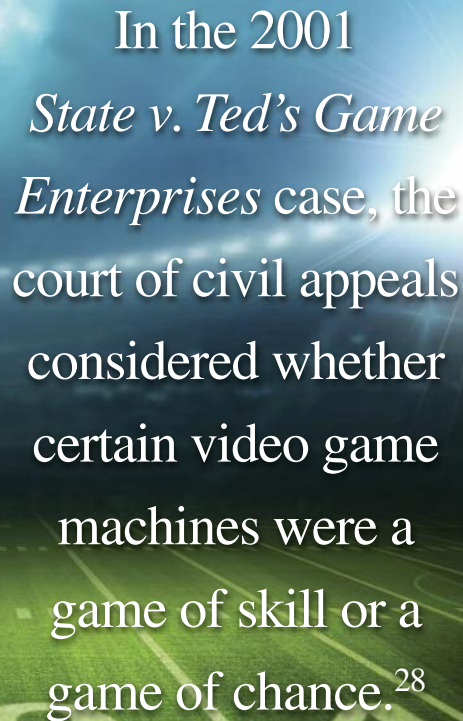
despite the addition of the flippers, is still a game of chance.¹⁹

Four years later, the court of appeals reinforced this rule and restated it in slightly different terms. In *Club 400 v. State*, the supreme court considered whether a baseball-themed pin-ball machine in which players hit the ball into relevant areas of the playing surface which corresponded to certain achievements (i.e., hitting the ball into certain pockets resulted in a single, home run, out, etc.) was a game of chance.²⁰ Citing the *White* decision, the court held that this game was a game of chance despite the skill needed to operate the machine because “[t]he evidence showed that for a player to acquire skill in the operation of the game requires frequent practice...”²¹

THE JUSTICES ADVISE THAT BETTING ON DOG RACING IS NOT A LOTTERY

The next significant decision in the skill-vs.-chance debate came in 1971, when the supreme court offered a new guidepost on this issue. In a 1971 *Opinion of the Justices*, the legislature requested the opinion of the justices of the supreme court regarding whether two bills that authorized pari-mutuel betting on dog racing would violate § 65 of the Constitution.²² Pari-mutuel betting is simply a form of betting in which participants who bet on the winning contestant share the total stakes while paying a small fee for the management of the betting system.²³ In determining whether betting on dog racing through such a system was a game of chance, a five-member majority of the court held:

[T]he winner of a dog race is not determined by chance. A significant degree of skill is involved in picking the winning dog, such factors as weight, paternity, trainer, position, past record, wet or dry track, etc. must all be considered by successful bettor[s].²⁴



In the 2001 *State v. Ted's Game Enterprises* case, the court of civil appeals considered whether certain video game machines were a game of skill or a game of chance.²⁸

To support this conclusion, the court first distinguished a lottery from gambling, noting that the former was constitutionally prohibited while the latter was not.²⁵ The court also discussed the system of pari-mutuel betting and, citing a Utah Supreme Court case, held that this system of betting did not transform betting on dog racing into a game of chance.²⁶ Interestingly, the court did not discuss the *Minges* inquiry regarding whether chance was the “dominant factor” in the “qualitative or causative sense.”²⁷ In fact, the court did not cite the *Minges* decision at all.

THE DEBATE IS REIGNITED WITH CHANCE GROWING AND SKILL DIMINISHING

In the 2001 *State v. Ted's Game Enterprises* case, the court of civil appeals considered whether certain video game machines were a game of skill or a game of chance.²⁸ After examining the history of Alabama case law on this topic as well as decisions from many other states—but without any mention of the 1971 *Opinion of the Justices* regarding betting on dog racing that arguably would have contravened the court’s decision in this case—the court announced the following rule:

As long as chance matters—as long as chance makes a meaningful difference in the outcome—the activity differs in kind, not just in degree, from a game of skill. The issue is whether the nature of the game is such that the role of chance in determining the outcome is thwarted by the skill involved, or whether chance meaningfully alters the outcome and thereby predominates over the skill.²⁹

The court continued its discussion on the skill-vs.-chance debate by discussing the word “skill.” In using its “common sense,”³⁰ the court noted that the word “skill” “speaks to the ability, through the application of human physical or mental capacity, to actually cause a desired outcome of a game when the game is

played.”³¹ The court went even further, however, announcing possibly the most inclusive definition of “chance” ever under Alabama law:

Further, the mere fact that the outcome of a game, either in a single play or over multiple plays, can be affected by an understanding of the laws of probability or an understanding of the rules of the game, or can be affected by other recognizable techniques or knowledge, does not change the fundamental nature of that game. Simply put, a player’s understanding of the rules or of the laws of probability relating to a game of chance does not change the fact that he is playing a game of chance. A player may be “skilled” at “playing the odds,” but he is still “playing the odds.”³²

Supreme Court Justice Johnstone, in his dissent in the appeal of the court of civil appeals’ *Ted’s Game Enterprises* decision, noted and disapproved of how broad this definition of chance was.³³ No subsequent cases have fleshed out exactly how broad the court of civil appeals made the definition of “skill” in *Ted’s Game Enterprises*. Of the five Alabama cases that cite the court of civil appeals’ *Ted’s Game Enterprises* decision, no majority opinion thereof applies the enlarged definition of skill that *Ted’s Game Enterprises* puts forth.³⁴

FACING THIS UNCERTAIN LEGAL LANDSCAPE

Assuming someone or some organization challenges H.B. 361 on constitutional grounds, be it the Alabama Attorney General or a well-funded public interest group, H.B. 361 must face this treacherous legal landscape. H.B. 361 contains an attempt to define DFS as a “game of skill,”³⁵ but this statement is useless in determining the law’s constitutionality, as the Alabama Supreme Court has made clear that “[i]t is for the courts to determine, on a case-by-case basis, whether skill or chance dominates in an activity and, therefore, whether the activity is in the nature of a lottery.”³⁶

Simply put, a player’s understanding of the rules or of the laws of probability relating to a game of chance does not change the fact that he is playing a game of chance.

Applying any state’s relevant case law to DFS is itself difficult.³⁷ This difficulty is compounded, though, by the fact that Alabama courts will have to somehow synthesize seemingly conflicting rules and guidance on the issue, reject previously-announced rules, announce new rules, or perform some combination of these options.

Questions abound from the case law. The strongest potential conflict appears to be between the supreme court’s 1971 *Opinion of the Justices* holding that pari-mutuel betting on dog racing was not unconstitutional and the court of civil appeals’ *Ted’s Game Enterprises* decision that was affirmed by the supreme court. Was the “significant degree of skill”³⁸ required in pari-mutuel dog rac-

ing—which made it a game of skill according to the court—the “dominant factor . . . in the qualitative or causative sense, rather than the quantitative sense?”³⁹ What degree of knowledge is required for a player to be playing a game of skill rather than, as the court in *Ted’s Game Enterprises* put it—“skilled at playing the odds”⁴⁰—which renders the game a game of chance? How is a player’s “understanding of the rules or of the laws of probability relating to a game of chance”⁴¹ different from a player exercising his or her “significant degree of skill”⁴² in determining, for example, how a certain athlete will play under certain conditions?

Other questions loom. For example, will the court deciding the constitutionality of H.B. 361 value or even invoke the “frequent practice rule” announced in *White* and reinforced by *Club 400*? Applying the frequent practice rule to DFS implicates several issues requiring a deep examination of the intricacies of DFS. For instance, does a player *need* frequent practice to command the level of skill “the operation of the game requires,”⁴³ as the court held was true in *White* with regard to playing pinball?⁴⁴ An often-cited article from McKinsey & Company examined DFS’s playing field and found that a relatively small amount of participants attain most of the winnings.⁴⁵ *The Wall Street Journal*⁴⁶ and *Business Insider*⁴⁷ have each published profiles of highly successful DFS players, examining the deep amount of data and analytics involved in selecting a successful lineup day after

day. Can just anyone from the “great mass of the patronizing public”⁴⁸ acquire these skills? Many of the ultra-successful DFS players profiled by *Business Insider* and *The Wall Street Journal* are former stock traders, poker players, and engineers, although *Business Insider* notes that not all of the big DFS winners have technical or mathematical backgrounds.⁴⁹ Furthermore, what is the level of skill the operation of the game requires under *White* as applied to DFS—to merely profit? If so, what level of profit is sufficient for this—\$1? Aside from this inquiry, another part of *White* poses a different question for DFS: will the reviewing court think that “the great mass of the patronizing public has either the time, or inclination, to develop whatever latent talent they may have in this field of endeavor”?⁵⁰

IT'S A BET IN THE END

The case law concerning when a game is a game of chance, and thus a constitutionally proscribed lottery, is replete with arguable inconsistencies, subjective analyses, competing priorities, and ever-changing political dynamics. One thing, however, is clear. With the murky legal landscape surrounding this issue, attempting to predict the result of a constitutional challenge to H.B. 361 is most certainly a game of chance. ▲

Endnotes

1. Legislative Acts, Act 2019-343, ALABAMA SECRETARY OF STATE; then follow “View Image,” <http://arc-sos.state.al.us/cgi/actdetail.mbr/detail?year=2019&act=343&page=bill> (last visited July 5, 2019).
2. Grass, Jonathan, *DraftKings, FanDuel Agree to Cease Fantasy Sports in Alabama*, AL.COM (Apr. 29, 2016), https://www.al.com/news/2016/04/draftkings_fanduel_agree_to_ce.html.
3. Stark, Harold, *What Is Daily Fantasy Sports and Why Is Everyone So Obsessed with It?*, FORBES (Dec. 9, 2017), <https://www.forbes.com/sites/haroldstark/2017/12/09/what-is-daily-fantasy-sports-and-why-is-everyone-so-obsessed-with-it/#11d59a7f1be3>.
4. *Id.*
5. *Id.*
6. *Id.*
7. ALA. CONST. Art. IV, § 65.
8. *Johnson v. State*, 3 So. 790, 791 (Ala. 1888).
9. See *State v. Ted's Game Enterprises*, 893 So.2d 355, 356 (Ala. Civ. App. 2002), *aff'd sub nom. Ex parte Ted's Game Enterprises*, 893 So.2d 376 (Ala. 2004) (discussing the early history of case law interpreting § 65).
10. *Grimes v. State*, 178 So. 73, 74 (Ala. 1938).
11. *Id.* at 74.
12. See *Opinion of the Justices*, 795 So.2d 630, 641 (Ala. 2001) (quoting 54 C.J.S. *Lotteries* § 5 (1925)).
13. *Minges v. City of Birmingham*, 36 So.2d 93, 96 (Ala. 1948) (quoting 34 Am. Jur. *Lotteries* § 6 (1941)).
14. See *Id.*
15. *Id.* (quoting 34 Am. Jur. *Lotteries* § 6 (1941)).
16. *Id.* (quoting 34 Am. Jur. *Lotteries* § 6 (1941)).
17. *Id.*
18. *White v. State*, 52 So.2d 550 (Ala. Ct. App. 1951).
19. *Id.* at 554.
20. *Club 400 v. State*, 78 So.2d 819 (Ala. Ct. App. 1955).
21. *Id.* at 820.
22. *Opinion of the Justices*, 251 So.2d 751, 752 (Ala. 1971).
23. *Id.* at 753 (quoting Webster's Third New International Dictionary (1967 Ed., p. 1642)).
24. *Id.* (citing *Opinion of the Justices*, 31 So.2d 753 (Ala. 1947)).
25. *Id.*
26. *Id.* (citing *Utah State Fair Ass'n v. Green*, 249 P. 1016 (Utah 1926)).
27. *Minges*, 36 So.2d at 96.
28. *State v. Ted's Game Enterprises*, 893 So.2d 355, 356 (Ala. Civ. App. 2002), *aff'd sub nom. Ex parte Ted's Game Enterprises*, 893 So.2d 376 (Ala. 2004).
29. *Id.* at 375.
30. *Id.*
31. *Id.*
32. *Id.* at 376.
33. See *Ex parte Ted's Game Enterprises*, 893 So.2d 376, 388 (Ala. 2004) (Johnstone, J., dissenting).
34. Justice Shaw cited the court of civil appeals' decision in *Ted's Game Enterprises* in a 2007 criminal gambling case, concurring with the majority therein that “Texas Hold'em” poker was a game of chance, based in part on the enlarged definition of chance announced in *Ted's Game Enterprises*. See *Garrett v. State*, 963 So. 2d 700, 701 (Ala. Crim. App. 2007) (Shaw, J., concurring).
35. Legislative Acts, *supra* note 1, at 2.
36. *Opinion of the Justices*, 795 So.2d 630, 641 (Ala. 2001).
37. For an analysis of multiple states' views on whether DFS is a game of skill or a game of chance, see Matthew H. Hambrick, *Is the Recent Trend of States Legalizing Daily Fantasy Sports in an Effort to Raise Revenue a “Safe Play” to Make Money or Simply a “Hail Mary?”*, 48 *Cumb. L. Rev.* 243, 271-74 (2018).
38. *Opinion of the Justices*, 251 So.2d at 753.
39. *Minges*, 36 So.2d at 96.
40. *Ted's Game Enterprises*, 893 So.2d at 375.
41. *Id.*
42. *Opinion of the Justices*, 251 So.2d at 753.
43. *Club 400*, 78 So.2d at 820.
44. *White*, 51 So.2d at 554.
45. Miller, Ed & Singer, Daniel, *For Daily Fantasy-Sports Operators, the Curse of Too Much Skill*, MCKINSEY & COMPANY (Sept. 2015), <https://www.mckinsey.com/industries/media-and-entertainment/our-insights/for-daily-fantasy-sports-operators-the-curse-of-too-much-skill>.
46. Reagan, Brad, *A Fantasy Sports Wizard's Winning Formula*, THE WALL STREET JOURNAL (June 4, 2014), <https://www.wsj.com/articles/a-fantasy-sports-wizards-winning-formula-wsj-money-june-2014-1401893587>.
47. Bales, Jonathan, *Here's What It Takes to Make a Living Playing Fantasy Sports*, BUSINESS INSIDER (Nov. 6, 2013), <https://www.businessinsider.com/how-pros-play-fantasy-sports-2013-11>.
48. *White*, 51 So.2d at 621.
49. Bales, *supra* note 48.
50. *White*, 51 So.2d at 554.

Zachary W. Anderson



Zach Anderson is an associate in the Huntsville office of Sirote & Permutt PC. He is a graduate of Mississippi State University and the University of Alabama School of Law.

Furious Hours: Murder, Fraud, and The Last Trial of Harper Lee

By Casey Cep

New York: Alfred A. Knopf, 2019. 314 pgs.

Reviewed by Allen P. Mendenhall

Imagine my surprise when, out of the blue, in the winter of 2016, I received a message through my website from a writer named Casey Cep. “I’m writing about your essay ‘Harper Lee and Words Left Behind,’” she said.¹ “It was a pleasure to read, and I’d love to talk with you about it. Any chance you have a direct email address or a telephone number at which I could reach you?”

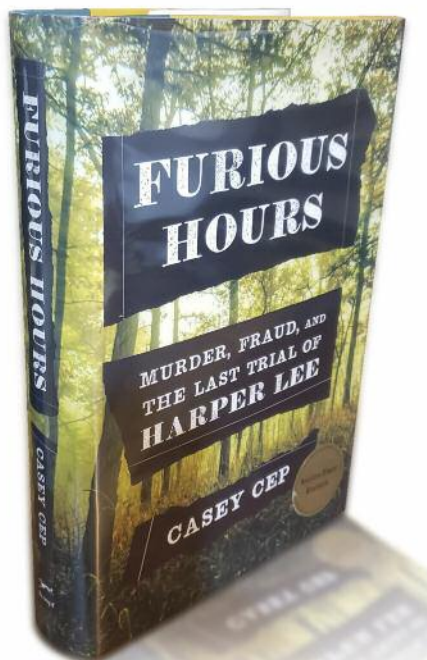
The essay she referred to described my grandfather’s childhood in Monroeville and his relationship with Harper Lee and Truman Capote.² I recognized Cep’s name from an article she had written a few months earlier.³ I told her I’d be glad to talk. She replied that she was in the area that very day—in Lanett, in fact. For whatever reason, though, we didn’t meet, but we did email back and forth.

How I regretted that missed opportunity as Cep’s fame spread across the globe earlier this year, after the publication of *Furious Hours*, which involves the true-crime thriller that Lee allegedly wrote (in whole or in part) but never published. The presumed offender in the story is the Reverend Willie Maxwell, an African-American preacher in Coosa County who, in the 1970s, purportedly murdered two of his wives, his nephew, his brother, a neighbor, and, lastly, his adopted daughter, Shirley Ann, and then collected death benefits on life insurance policies that he secured in which he was the beneficiary.

I lost that chance to meet Cep, but refused to miss *Furious Hours*. If Cep could render Maxwell with haunting sensitivity as Capote had deftly profiled Perry Smith, the convicted murderer from *In Cold Blood*, then I was, I knew, in for an exhilarating read.

Lee is just one of three key figures in *Furious Hours*, with the other two being a colorful attorney named Tom Radney and, of course, Maxwell. Divided into three parts—“The Reverend” (Maxwell), “The Lawyer” (Radney), and “The Writer” (Lee)—the narrative shifts between these titular subjects, but proceeds more or less chronologically. After all, Cep couldn’t explain Radney’s and Lee’s involvement with Maxwell without first explaining what brought Maxwell into their lives.

These apparent murders left a target on Maxwell’s back. Almost everyone in his community considered him a threat; reciprocally, he considered them to be threatening to him. In those days, the life insurance industry, though thousands of years old, was still immature in the United States. “By the time the Reverend Willie Maxwell began buying life insurance,” Cep explains, “the industry was wild the way the West had been: large, lawless, and lucrative for undertakers.”⁴ If you lived in Maxwell’s town, you couldn’t know for sure whether he had purchased a life insurance policy on *your* death. “[I]t was stunningly easy,” Cep submits, “to take out insurance on



other people without their knowledge, and somewhere along the line the Reverend Willie Maxwell started making a habit out of it.”⁵

While those close to Maxwell died, one by one, under mysterious circumstances, as he steadily accumulated wealth from life insurance payouts, people in Alex City grew uneasy. Everything about the situation was grotesque. Maxwell’s neighbor, Dorcas Anderson, for instance, was supposed to be a pivotal witness for the prosecution when Maxwell faced charges of murdering his first wife, Mary Lou, but Anderson changed her story at trial, baffling and angering “those law enforcement agents who had taken her original testimony.”⁶

What was Dorcas thinking? What was her motive? The answer soon became clear: “In November of 1971, barely fifteen months after Mary Lou’s body was found and only four months after he was acquitted of her murder, the Reverend Maxwell took another wife: his neighbor, and the state’s would-be star witness, Dorcas Anderson.”⁷ Not long after that, poor Dorcas was dead, too.

Rumors circulated that Maxwell practiced voodoo; no one could explain how, by all appearances, he got away with murder. But *was* it murder? “[O]f all the deaths associated with the Reverend Willie Maxwell, only two,” Cep points out, “had ever been declared homicides, and neither of those had resulted in convictions.”⁸

Maxwell finally got what was coming to him. An Army veteran named Robert Burns shot him three times in the head at Shirley Ann’s funeral. Burns regarded himself as the heroic vigilante, and wasn’t alone in that opinion. Many locals were relieved to be rid of Maxwell.

As if these twists weren’t curious enough, Radney—a liberal darling and sometime politician who had represented Maxwell in both civil and criminal matters connected to the murders—ended up defending Burns against the charge of murdering Maxwell. A representative of the New South with a national following, Radney was harassed and threatened because



Allen Mendenhall and Casey Cep meet and compare shoes.

of his politics. He was a media sensation, the object of hate and adoration, and he acquired the moniker Big Tom.

Big Tom needed to stay in the limelight after his political career took a turn for the worse. What should he do but apply his legal skills to Maxwell’s case, or cases. “All those years of representing Maxwell,” Cep writes, “hadn’t endeared Big Tom to anyone around Lake Martin, but it had helped him make his name as a lawyer who could handle any case.”⁹ Any case, including that of Burns. Big Tom wound up on the other side of Maxwell this time. Fearful that Maxwell had a living accomplice who could exact revenge, folks in Alex City and around Lake Martin were reticent about Burns’s trial, which was, by any measure, sensational. Then a jury found Burns not guilty by reason of insanity. “Like the dam on the Tallapoosa River,” Cep intones, “the gates had closed on the Maxwell case, and ever so slowly the waters began rising.”¹⁰

Cep never discovered whether Lee actually wrote a book about Maxwell. If Lee’s manuscript exists, its title is *The Reverend*. Until her literary estate is unsealed, we probably won’t discover whether she completed it, at what stage she abandoned it, or whether she undertook to compose it at all. In many respects, then, Cep wrote the book that Lee didn’t write, or might not have written.

Fans of Lee—or “Nelle,” as she was known to friends and family—will delight in the final section of *Furious Hours*. Readers of *this* journal—mostly lawyers—will take special interest in Amasa Coleman Lee, Nelle’s attorney father, and in Nelle’s legal education, to

say nothing of her research for Capote’s *In Cold Blood*. One gets the distinct impression that Cep was working on a biography of Lee when, over time and by slow degrees, the possibility of a different kind of book emerged.

Suspense and intrigue aren’t the only commendable qualities of *Furious Hours*. Cep is a master stylist, her prose rhythmic and resonant and refined. Her opening passages about the Tallapoosa River and the Coosa River—too long to quote here—testify to her talent as a craftswoman.

She presents, as well, extensive history about the South in general and Alabama in particular. George Wallace, Lurleen Wallace, Martin Luther King Jr., the Scottsboro boys, Booker T. Washington, Zora Neal Hurston, Mark Twain, Fred Gray, the victims of the Sixteenth Street Baptist Church bombing, Albert Brewer, Tammy Wynette, Jimmy Carter, Rosalynn Carter, F. Scott and Zelda Fitzgerald, Morris Dees—they’re all here, if only in passing. Other figures who appear are ancillary to Maxwell’s account, but significant to American history: John F. Kennedy, Ted Kennedy, Richard Nixon, Adlai Stevenson, Walter Kronkite, Dan Rather, Gregory Peck, and Lyndon Johnson, to name a few.

My story, I’m relieved to report, has a happy ending. Recently I was a panelist at the Mississippi Book Festival and noticed, on the program, that Cep was also a panelist. I sat in on her talk and marveled at the crowds that flocked to her as fans had flocked to Lee. Cep thanked me in her book, in light of our email correspondence and some leads I gave her, but the extent of “help” I provided did not merit the

(Continued from page 463)

acknowledgment. I wanted, now, to return thanks for her kind gesture.

Eventually the crowds dispersed. There we were, two people who knew each other, in a manner of speaking, but didn't *really* know each other. A weird feeling sets in when a disembodied personality you've grown accustomed to in writing suddenly materializes as a flesh-and-blood human with whom, suddenly, you can speak.

We initiated conversation by shaking hands and exchanging pleasantries; soon the ice was broken and we hit it off. Her intelligence was profound; she was kind and thoughtful. When it came time to leave, we hugged like old friends, making sure to snap a photo of the saddle oxford shoes we both happened to be wearing. Before parting, she told me she wished she could've

met my grandfather, who passed away in 2013. He would've enjoyed meeting her, too. What would Lee have thought of her, I wonder. We'll never know. ▲

7. *Id.* at 41.
8. *Id.* at 229.
9. *Id.* at 109.
10. *Id.* at 145.

Endnotes

1. Email correspondence with Casey Cep, January 27, 2016.
2. See Allen Mendenhall, *Harper Lee and Words Left Behind*, 37 *STORYSOUTH* (2014) [available at <http://www.storystouth.com/2014/03/harper-lee-and-words-left-behind.html>]; republished in ALLEN MENDENHALL, *OF BEES AND BOYS* 37 (2017). This essay mentioned, in passing, rumors I heard from my grandfather and others that Lee had drafted a manuscript about an Alabama salesman who murdered his wives to commit life insurance fraud. Cep was, at the time, researching this same bit of gossip.
3. Casey Cep, *Harper Lee's Abandoned True-Crime Novel*, *THE NEW YORKER* (March 17, 2015).
4. CASEY CEP, *FURIOUS HOURS* 35 (2019).
5. *Id.* at 36.
6. *Id.* at 39.

Allen P. Mendenhall



Allen Mendenhall is an associate dean at Faulkner University Thomas Goode Jones School of Law and executive director of the Blackstone & Burke Center for Law & Liberty. His

books include *Literature and Liberty* (2014), *Oliver Wendell Holmes Jr., Pragmatism, and the Jurisprudence of Agon* (2017), *Of Bees and Boys* (2017), *The Southern Philosopher* (2017), and *Writers on Writing* (2019).

JOIN THE CONVERSATION ON SOCIAL MEDIA
#alabamastatebar



ABOUT MEMBERS, AMONG FIRMS

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

About Members

Jerry Kilgo announces the opening of **The Kilgo Law Firm** at 105 1st Ave. NE, Ste. G, Cullman 35055. Phone (256) 841-0488.

Ashley Cranford Marshall announces the opening of **Cranford Marshall Legal LLC** at 210 E. Grubbs St, Ste. 3, Enterprise 36330. Phone (334) 417-0399.

Among Firms

Adams White & Oliver LLP of Opelika announces that **Luke Farmer** joined as an associate.

The **University of Alabama System** announces that **Christopher C. Schwan** joined as system counsel.

Baker Donelson announces that **J. Trent Scofield** joined the Birmingham office.

Barnett Bugg Lee & Carter LLC of Monroeville announces that **John B. Barnett, III** rejoined after retiring from Trustmark National Bank.

Burr & Forman of Birmingham announces that **Walker Beauchamp** joined as an associate.

Clark, May, Price, Lawley, Duncan & Paul LLC announces the opening of its offices at 3070 Green Valley Rd., Birmingham 35243.

Conchin, Cole & Jordan of Huntsville announces that **Megan L. Phillips** joined as an associate.

Ellis, Head, Owens & Justice of Columbiana announces that **Joshua D.**

Arnold is now a partner, and the firm name is **Ellis, Head, Owens, Justice & Arnold**.

Gathings Law of Birmingham announces that **Reynolds Pittman** joined as an associate.

Isom Stanko & Senter LLC of Anniston announces that **J. Timothy Mitchell** joined as a partner. **W. Drew Senter** is now the firm's managing partner.

Maynard Cooper & Gale of Birmingham announces that **Daniel M. Wilson** is now chief strategy officer for the firm.

Morrow & Nix of West Point celebrates its 100th anniversary this year, according to **Larry Nix**. Firm founder and Nix's grandfather, **W. Howell Morrow**, served as president of the Alabama State Bar from 1947 to 1948.

Ryan Law LLC of Tuscaloosa announces that **Claire H. Smelser** joined as an associate.

Sasser, Sefton & Brown PC of Montgomery announces that **Jae Reong Kim** joined as an associate.

Steele Law LLC of Monroeville announces the opening of a Mobile office.

Watkins & Eager announces that **Austin Smith Sistrunk** joined the Birmingham office.

Brian White, Brian Oakes, Amelia Griffith and **Haley Iverson** announce the formation of **White, Oakes, Griffith & Iverson LLC** in Decatur.

Wrary & Michel LLC of Birmingham announces that **Casey J. King** joined as a partner, and the firm name is now **Wrary Michel & King**. ▲



IMPORTANT NOTICES

- ▲ Alabama Lawyers Hall of Fame
- ▲ Judicial Award of Merit
- ▲ Local Bar Award of Achievement

Alabama Lawyers Hall of Fame

May is traditionally the month when new members are inducted into the Alabama Lawyers Hall of Fame, which is located at the state Judicial Building. The idea for a hall of fame first appeared in 2000 when Montgomery attorney Terry Brown wrote state bar President Sam Rumore with a proposal that the former supreme court building, adjacent to the state bar building and vacant at that time, should be turned into a museum memorializing the many great lawyers in the history of Alabama.

The implementation of the idea of an Alabama Lawyers Hall of Fame originated during the term of state bar President Fred Gray. He appointed a task force to study the concept, set up guidelines and then provide a recommendation to the Board of Bar Commissioners. The committee report was approved in 2003 and the first induction took place for the year 2004.

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

Inductees to the Alabama Lawyers Hall of Fame must have had a distinguished career in the law. This could be demonstrated through many different forms of achievement—leadership, service, mentorship, political courage or professional success. Each inductee must have been deceased at least two years at the time of their selection. Also, for each year, at least one of the inductees must have been deceased a minimum of 100 years to give due recognition to historic figures as well as the more recent lawyers of the state.

The selection committee actively solicits suggestions from members of the bar and the general public for the nomination of inductees. We need nominations of historic figures as well as present-day lawyers for consideration. Great lawyers cannot be chosen if they have not been nominated. Nominations can be made throughout the year by downloading the nomination form from the bar's website and submitting the requested information. Plaques commemorating the inductees are located in the lower rotunda of the Judicial Building and profiles of all inductees are found at www.alabar.org/about/alabama-lawyers-hall-of-fame.

Download an application form at <https://www.alabar.org/about/alabama-lawyers-hall-of-fame> and mail the completed form to:

Sam Rumore
Alabama Lawyers Hall of Fame
P.O. Box 671
Montgomery, AL 36101

The deadline for submission is March 1.

Judicial Award of Merit

The Alabama State Bar Board of Bar Commissioners will receive nominations for the state bar's Judicial Award of Merit through **March 15**. Nominations should be mailed to:

Phillip W. McCallum
Board of Bar Commissioners
P.O. Box 671
Montgomery, AL 36101-0671

The Judicial Award of Merit was established in 1987. The award is not necessarily an annual award. It must be presented to a judge who is not retired, whether state or federal court, trial or appellate, who is determined to have contributed significantly to the administration of justice in Alabama. The recipient is presented with a crystal gavel bearing the state bar seal and the year of presentation. The award will be presented during the Alabama State Bar's Annual Meeting.

Nominations are considered by a three-member committee appointed by the president of the state bar, which then

makes a recommendation to the board of bar commissioners with respect to a nominee or whether the award should be presented in any given year.

Nominations should include a detailed biographical profile of the nominee and a narrative outlining the significant contribution(s) the nominee has made to the administration of justice. Nominations may be supported with letters of endorsement.

Local Bar Award of Achievement

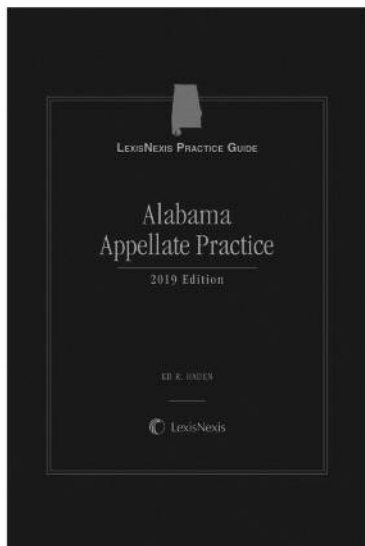
The Local Bar Award of Achievement recognizes local bars for their outstanding contributions to their communities. Awards will be presented during the Alabama State Bar's Annual Meeting.

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

The following criteria are used to judge the applications:

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

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



Your practice-oriented resource for handling every stage of the appeal process in Alabama Courts.

LexisNexis Practice Guide Alabama Appellate Practice, 2019 Edition—Fully Updated

Ed R. Haden, Appellate Practice Group, Balch & Bingham LLP

Provides critical information on when and how to file civil, criminal, and administrative appeals.

For more information or to order:

Call toll-free **800.223.1940 (Option 3)** or go to lexisnexis.com/alappellatepractice (Title available in ebook format)

LexisNexis, Lexis, Nexis and the Knowledge Burst logo are registered trademarks of RELX Inc. © 2019 LexisNexis. LP22493-00719





OPINIONS OF THE GENERAL COUNSEL

Roman A. Shaul
roman.shaul@alabar.org



Lawyer Wellness and Preventing Bar Complaints

Since this month's edition is devoted to lawyer wellness, I decided to take this opportunity to give you my views on the subject. In January 2014, I was getting ready for a three-week trial in Kansas City, Kansas, on a case I had worked on for well over two years. This case required that I leave my home in Montgomery almost every Sunday or Monday and not return home until Thursday, Friday or even Saturday, at times. After picking the jury in the case, we settled. Back in my hotel room, I reflected on what we accomplished and tried to make a note of all the people who helped make the case a success. I remember sitting there in silence and could literally hear myself breathing and gasping a little each time I inhaled. I stepped on the weight scale in my room; it showed I had gained more than 30

pounds in the last two years. As someone who had always taken pride in being healthy, I realized I had given up part of my identity. Realization #1: I lost my sense of self.

Because I had blocked out most of January for the trial in this case, I was able to go home early each night over the next few weeks and made it a point to build in time with my wife and two kids (now three kids—another product of being home). However, my kids began to look at me rather strangely and asked, "Why are you home?" I realized I had become a stranger in my own house. Realization #2: I lost my sense of family.

As those next few weeks in January played out, I took the opportunity to reestablish relationships with friends and extended family and renew my involvement in community and church activities.

However, I noticed that the groups and organizations with which I was once intimately familiar had changed. While I was gone, everyone went on without me. Time gave my friends and family new experiences, new memories and a new conversant language that excluded me because I had not been there. Realization #3: I lost my sense of community.

I realized that my losses were the results of my choices and from the way I had prioritized and marginalized the things in my life. I had a close-knit family, worked at a wonderful law firm and had amazing, supportive friends. There had been plenty of time to build in “me time” or “us time” during that two-plus year period; I just did not make it a priority. I needed to change that, and I did.

To regain my life, I committed to getting back into shape (I ran two marathons in 14 days at the end of that year), blocked out time for personal events and even managed to help coach Little League softball. Reprioritizing my life made me a better husband, dad, son, brother, friend and lawyer. Gone were the feelings of frustration and sadness because I did not feel I was giving my best to my family, clients, friends and law partners. Because it is my nature, I occasionally find myself slipping back into that “work is first” mode. However, I empowered my family and friends to intervene if they see that I need it.


As general counsel, I see people every day who appear to suffer from the same poor choices I once made. Those choices, left unchecked, can lead to complaints to my office. It is axiomatic that people make the worst choices when they are tired, angry, frustrated and/or impaired. The American Bar Association stated that “[l]awyer well-being is part of a lawyer’s ethical duty of competence. It includes lawyers’ ability ... to help them make responsible decisions for their clients.” *ABA National Task Force on Lawyer Well-Being (2017)*. The way I read this statement is, if a lawyer cannot take care of his or her own well-being, they may not be in the best position to help clients deal with their important life decisions.

The Office of General Counsel takes its duty seriously to protect the public and the profession. However, we are not without compassion. We believe every person has inherent worth and want individuals to get the help they need. We do not seek to use the disciplinary system in a way that unfairly or disproportionately punishes people. Our office routinely works with lawyers to try and get them help before dealing with the disciplinary issues. In all my years in this profession, I have come to believe that focusing on your own well-being is the biggest defense against bar complaints and the easiest way to become and maintain the best form of your own self. ▲

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





NOTICE

DISCIPLINARY NOTICES

▲ Reinstatement

▲ Disbarment

▲ Suspension

Reinstatement

- Tuscaloosa attorney **Andrew Jackson Smithart, III** was reinstated to the practice of law in Alabama by order of the Supreme Court of Alabama, effective June 19, 2019. Smithart petitioned for reinstatement to the practice of law in Alabama on April 2, 2019 and was subsequently reinstated by order of the Supreme Court of Alabama. [Rule 28, Pet. No. 2019-444]

Disbarment

- Montgomery attorney **Leon David Walker III** was disbarred from the practice of law in Alabama, effective June 26, 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 Walker in ASB No. 2011-636 for violating Rules 1.16(d), 8.4(a), and 8.4(g), Alabama Rules of Professional Conduct; in ASB No. 2012-595 for violating Rules 1.16(d) and 8.4(a) and (g), Alabama Rules of Professional Conduct; in ASB No. 2012-625 for violating Rules 1.16(d) and 8.4(a) and (g), Alabama Rules of Professional Conduct; in ASB No. 2012-836 for violating Rules 1.15(a), 1.15(b), 1.16(a)(1), 1.16(d), 8.1(b), and 8.4(a) and (g), Alabama Rules of Professional Conduct; in ASB No. 2012-1363 for violating Rules 1.16(a)(1), 1.16(d), 5.5(a)(1), 8.1(b), and 8.4(a), (b), (c), and (g), Alabama Rules of Professional Conduct; in ASB No. 2012-1760 for violating Rules 1.4, 1.15(a) and (b), 1.16(a)(1), 1.16(d), 8.1(b), and 8.4(a) and (g), Alabama Rules of Professional Conduct; in ASB No. 2012-1853 for violating Rules 1.3, 1.4, 1.16(a)(1), 1.16(d), 8.1(b), and 8.4(a) and (g), Alabama Rules of Professional Conduct; in ASB No. 2012-2090 for violating Rules 1.4, 1.16(a)(1), 1.16(d), 8.1(b), and 8.4(a) and (g), Alabama Rules of Professional Conduct; in ASB No. 2012-2241 for violating Rules 1.4, 1.16(a)(1), 1.16(d), 8.1(b), and 8.4(a) and (g), Alabama Rules of Professional Conduct; in ASB No. 2013-112 for violating Rules 1.4, 1.16(a)(1), 1.16(d), 8.1(b), and 8.4(a) and (g), Alabama Rules of Professional Conduct; in ASB No. 2013-710 for violating Rules 1.4, 1.15(a), 1.16(a)(1), 1.16(d), 8.1(b), and 8.4(a) and (g), Alabama Rules of Professional Conduct; and in ASB No. 2013-1935 for violating Rules 1.16(a)(1), 1.16(d), 5.5(a)(1), 8.1(b), and 8.4(a), (b), (c), and (g), Alabama Rules of Professional Conduct. [ASB Nos. 2011-636, 2012-595, 2012-836, 2012-1363, 2012-1760, 2012-1853, 2012-2090, 2012-2241, 2013-112, 2013-710, and 2013-1935]

Suspension

- Muscle Shoals attorney **Chase Russell Hutcheson** 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 June 19, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Hutcheson be summarily suspended for failing to respond to formal requests for information concerning a disciplinary matter. [Rule 20(a), Pet. No. 2019-809] ▲

ALABAMA LAW FOUNDATION Welcomes New President and Board Members

The Alabama Law Foundation announces that Mary Margaret Bailey is the board of trustees president for 2019-2020.

Bailey is a partner in the Mobile firm of Frazer Greene LLC. She served as chair of the state bar's Women's Section and as a member of the Board of Bar Commissioners, as well as president of the Mobile Bar Foundation. She is president of the Paul W. Brock Inn of Court in Mobile and a fellow of the Alabama Law Foundation and the American Bar Foundation.

The foundation also welcomed Vice President Richard J.R. Raleigh, Jr.; Treasurer Laura L. Crum; and Secretary Judge Jimmy Pool.



Bailey

New board members are Chris Carver, Karen Laneaux, Matthew C. McDonald, Robert G. Methvin, Jr., and James Rebarchak.

The Alabama Law Foundation is a charitable, tax-exempt organization affiliated with the Alabama State Bar whose mission is helping people in need through improving access to justice by providing opportunities, funding, resources, education, and awareness. Since its establishment in 1987,

the foundation has awarded \$20.9 million in grants. More information about the foundation is available at <https://www.alabamalawfoundation.org/>. ▲

IT'S TIME TO TECHSHOW

REGISTER WITH
DISCOUNT CODE **EP2016**
TO RECEIVE \$150 OFF STANDARD
REGISTRATION

www.techshow.com

 **TECHSHOW2020**

February 26 - 29, 2020
Chicago, IL

ALABAMA STATE BAR
members can get the BEST in legal
technology at ABA TECHSHOW

REGISTRATION OPENS OCTOBER 2019

Presented By:




MEMORIALS

▲ Donald Elmore Brutkiewicz

Donald Elmore Brutkiewicz

Mobile attorney Don Brutkiewicz, 89, passed away peacefully on July 25, 2019 after a brief illness. He was predeceased by his parents, Clement Rousseau and Lela Booth Brutkiewicz; his brother, Clement Booth Brutkiewicz; and his beloved wife of 60 years, Elizabeth Cook Brutkiewicz. He is survived by his five sons, 10 grandchildren and five great-grandchildren.

Don was born in Mobile on January 26, 1930. At age five, his family moved to Gulfport (where he enjoyed an idyllic childhood) and returned to Mobile his senior year, finishing at Murphy High School. He received both his undergraduate degree in history and his law degree from the University of Alabama. It was there that he met Elizabeth, a co-ed from Eufaula, at an Alabama-Auburn game, and he married her on May 29, 1952.

He served in the United States Air Force as a Judge Advocate General assigned to a post in Morocco. In 1956, he returned to Mobile to practice law and was appointed assistant district attorney by his uncle, Carl Booth. In 1970, he started his own criminal law practice and later was joined by his sons, Skip and John. In his 65 years of practice, he participated in more than 1,000 criminal jury trials and more than 3,000 cases, making him one of the most active attorneys in Mobile since the 1950s.



Brutkiewicz

He was a fixture at the courthouse, affectionately known as “Daddy Don” and “Downtown Don.” Don was quite a colorful and unorthodox character, renowned storyteller and story-maker. He was also eternally restless; in his prime, his Sunday ritual was to awaken at 4:00 a.m., read the newspaper and then history books and magazines, usher at early church, play singles tennis at Mirror Lake Racquet Club, followed by dove or quail hunting, be home in time for Gran-Gran’s Sunday dinner with often more than 20 family members, watch the evening news and go to bed by 7 p.m. Don was a lifelong member of Christ Church Cathedral and the Democratic Party. He loved his family and worked hard and sacrificed to provide them with the best possible education. He loved his hometown and encouraged all

his sons to return to Mobile; they did. In his latter years, he enjoyed huge family gatherings at local eateries.

Don’s motto was that an attorney’s sole purpose is to help people. He felt if you follow that simple policy, by word of mouth everything else would naturally grow, making you successful. He never declined a case, no matter how challenging or notorious.

Don was the subject of a profile in *Mobile Bay Magazine* (“The Amazing Life of Don Brutkiewicz,” <https://mobilebaymag.com/the-amazing-life-of-Don-Brutkiewicz>).

Alabama and the legal world were infinitely richer with Don Brutkiewicz in it. ▲

–D.E. “Skip” Brutkiewicz, Jr. and John C. Brutkiewicz, Mobile

Brandon, Marianne Battaglia

Birmingham
Admitted: 1986
Died: July 10, 2019

Hurley, Kathleen Marie

Norcross, GA
Admitted: 2002
Died: July 15, 2019

Meriwether, James Redd

Mobile
Admitted: 1952
Died: July 24, 2019

Bullock, Dennis Ray

Birmingham
Admitted: 1984
Died: August 11, 2019

Loomis, Jan Reese

Pinson
Admitted: 1990
Died: July 5, 2019

Olinger, Thomas, Jr.

Mobile
Admitted: 1977
Died: March 10, 2019

Burns, Matthew Wallace

Destin
Admitted: 1975
Died: May 27, 2019

Marr, Thomas Marshall, Sr.

Mobile
Admitted: 1957
Died: April 17, 2019

Powell, Abner Riley, III

Andalusia
Admitted: 1967
Died: August 21, 2019

Cvetetic, Elizabeth Teresa

Birmingham
Admitted: 1979
Died: July 7, 2019

McDowell, Jerry Arnold

Fairhope
Admitted: 1963
Died: August 7, 2019

Rochester, Terrell Buntyn

Florence
Admitted: 1997
Died: May 24, 2019



LEGISLATIVE WRAP-UP

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

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



The Education Trust Fund

Alabama is unique in so many ways. That is one of the great strengths of our beautiful state. We have tremendous positive diversity in our people, our landscape, our wildlife, and so many other things. That diversity and uniqueness make Alabama a great place to live, raise a family, and practice law. Guess what though—not only are we unique in how we live, we are also unique in how we approach our state budgets.

Forty-six states begin their fiscal year on July 1, while ours starts October 1. Forty-seven states have a single bill that appropriates education and general fund dollars, and we split them into two. Although it varies year to year, by most accounts, 48 states earmark less than 50 percent of their state revenues, and Alabama earmarks well north of eight percent. As you have probably figured out by now, this article is going to focus on our budget process in Alabama. To be more specific, this article is going to primarily focus on how we approach the education budget and appropriate funds for education.

Let's start with the basics: who, why, and how. Like most things in Alabama government, when you want to figure out the answers to these questions, you start by looking at our 1901 Constitution.

Section 72 of the Official Recompilation of the Constitution of Alabama of 1901 provides that no money shall be paid from the state treasury except upon appropriations made by law. Section 71.01 further provides that it is paramount duty of the legislature, at any regular session, to make basic appropriations. Read in conjunction, these provisions require the legislature to pass annual appropriation bills. This process is done under the leadership of two budget committees in each house chaired by Representative Bill Poole, Senator Arthur Orr, Representative Steve Clouse, and Senator Greg Albritton.

Why are there two appropriation bills? Well, the constitution also answers that question. Section 45 requires that each law "contain but one subject." There is an exception for the "general appropriation bill" in Section 71 that allows that bill to "embrace nothing but the ordinary expenses of the executive, legislative, and judicial departments of the state, for interest on the public debt, and for the public schools... All

other appropriations must be made by separate bills, each embracing but one subject."

The term "public schools" in Section 71 is determinative. The Alabama Supreme Court has held that term is inclusive of only grammar and high schools, and does not include colleges, universities, trade schools, and the like.¹ The court has also held that there is no violation of the single subject rule by including appropriations for public elementary and secondary schools, technical schools, junior colleges, and universities in the same bill.²

Alabama, like 48 other states, must have a balanced budget. Amendment 26, now appearing as Section 213 of the Recompilation of the Constitution of Alabama 1901, requires that no warrants shall be withdrawn on the state treasury unless sufficient revenues are available. In practice it is this provision that creates the proration process. When a governor is informed that tax revenues are not on track to keep pace with estimates used in passing the appropriation bill, he or she is required to declare proration. Proration is an across-the-board equal cut to all agencies for the remainder of a fiscal year to balance the budget.

Professional Liability Insurance 20% to 40% Lower Rates!

Insurance for Lawyers & Title Agents
If we can't SAVE you up to 40%,
WE WON'T WASTE YOUR TIME
Call (727) 799-4321 Today!

ATTORNEYS FIRST INSURANCE



www.attorneysfirst.com



sam@attorneysfirst.com

(Continued from page 475)

The declaration of proration is extremely disruptive as it often happens well into a fiscal year and after the agency has made its plans and personnel decisions. In the school setting proration is even harder as teachers' salaries and benefits cannot be cut. Proration has been declared on the education side seven times in the past 30 years: 1992 (3 percent), 2001 (6.2 percent), 2003 (4.4 percent, but made up through a \$180 million transfer from the Rainy Day Account), 2008 (6.5 percent, but made up through a transfer of \$439 million from the Proration Prevention Account), 2009 (18 percent, but reduced to 11 percent with a transfer of \$437 million from the Rainy Day Account), 2010 (9.5 percent), and 2011 (3 percent).

Following four straight years of proration in the education budget, the legislature passed the Education Trust Fund Rolling Reserve Act which became effective beginning the 2013 fiscal year. This act caps the annual appropriations from the Education Trust Fund based on the percentage of growth to recurring revenues over the past 15 years, dropping the lowest year. If the estimated revenue for the year is less than the statutory cap, the appropriation is limited to the average revenue projection of the Legislative Services Agency and the Executive Budget Office. The cap is then adjusted, up or down, for any appropriation to the Prepaid College Tuition program and for any legislation that affects recurring revenue.

This chart demonstrates how the cap was calculated for FY2020 which began October 1, 2019:

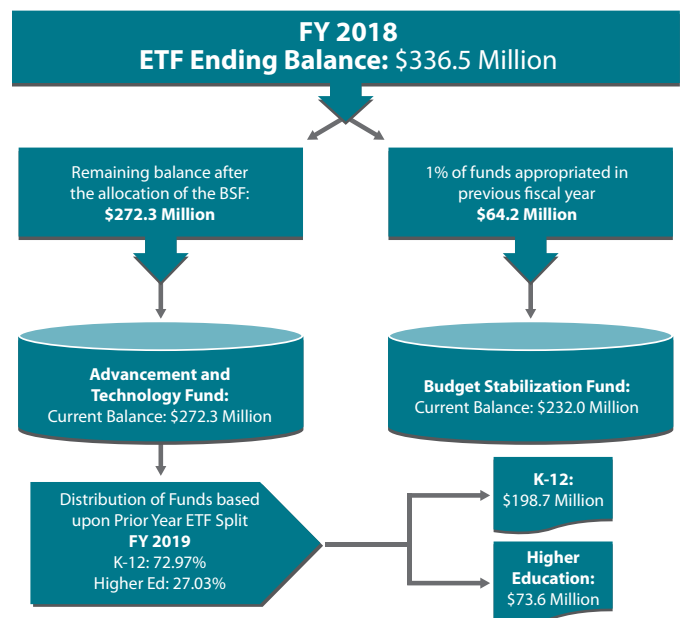
FY 2020 ETF APPROPRIATION CAP

FY 2018 Net Recurring Revenues	\$6,753,565,379
PLUS:	
Average growth for the 14 highest years out of the last 15 (4.70 percent)	\$317,417,573
New recurring revenue measures	-\$5,826,000
PACT appropriation for FY 2020	\$60,738,300
FY 2020 ETF Appropriations Cap	\$7,125,895,252
ETF Appropriations for FY 2019	\$6,650,298,627
Difference: FY 2020 vs. FY 2019	\$475,596,625

Now let's talk about what happens if actual revenue exceeds the amount appropriated. First, the excess up to 1 percent of the previous year's appropriation is set aside in the

Budget Stabilization Fund. That fund would be available in future years to offset any reduction caused by the declaration of proration. The Budget Stabilization Fund can also be used under certain limitations to lend funds to schools or school systems affected by natural disasters to bridge the gap to receiving insurance or emergency funding. Second, all remaining funds are deposited into the Advancement and Technology Fund. Each year, the legislature appropriates these funds in a supplemental appropriation bill for capitol, security, and technology projects in the education system. This process is demonstrated in the diagram below with actual numbers from FY2018.

ETF Rolling Reserve Act: How Excess Revenues are Allocated



While this process for the appropriation of funds from the Education Trust Fund is still relatively new, it has accomplished what was sought by providing stability. Since its inception, the state has avoided proration. ▲

Endnotes

1. See e.g., *Childree v. Hubbert*, 524 So.2d 336 (Ala. 1988).
2. Opinion of the Justices, 512 So.2d 72 (Ala. 1987).



Fastest smartest malpractice insurance. Period.

800.906.9654
GilsbarPRO.com



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

False Arrest

Heining v. Abernathy, No. 1180273 (Ala. August 16, 2019)

In action for false arrest, false imprisonment, and malicious prosecution, trial court properly granted summary judgment to defendants (the complainants to the arrest); police's conducting of independent investigation into the allegations resulted in the arrest, which in turn shielded the complaining party from liability.

Service of Process; Unlawful Detainer

Ex parte Trinity Property Consultants, LLC, No. 1180642 (Ala. August 30, 2019)

Under Ala. Code § 35-9A-461(c), "if after reasonable effort no person is found residing on the premises," proper service in an unlawful detainer action is effected by posting a copy of the notice on the door of the premises and mailing notice of the filing of the unlawful detainer action by enclosing, directing, stamping, and mailing by first class a copy of the notice to the defendant at the mailing address of the premises. . . ." Landlord's process server's affidavit stated he had "knocked on the door, [and that,] after [he] did not receive a response, [he] posted a copy of the Summons and Complaint on the door, then placed a stamped copy in the first class mail to the same address." The trial court held that the act of knocking on the door and receiving no response satisfied the statutory requirement of "reasonable effort" to obtain personal service, and thus service was proper pursuant to § 6-6-332(b) and § 35-9A-461(c). The CCA, in turn, reversed the denial of Rule 60(b)(4) relief, holding that the process server's affidavit was not sufficiently specific as to when the process server was attempting service (it was on a weekday, but no time was specified). The supreme court reversed CCA in a plurality opinion, stating that reasonable effort is not defined in the statute.

Recusal

Startley General Contractors, Inc. v. B'ham Water Works Board, No. 1180292 (Ala. Sept. 6, 2019)

Ala. Code § 12-24-3, which became law in 2014, creates a rebuttable presumption for judicial recusals in the event a litigant or counsel contributes certain percentages of a judicial candidate's campaign revenues in an "election cycle." Interpreting the material provisions of that statute for the first time, the court *per curiam* held that the "election cycle" encompasses the entire time period in which the judicial candidate is raising money up through the election, and is not confined to any reporting period for disclosure of campaign contributions (whether monthly or 90-day cycles).

Arbitration; Change of Terms; Arbitrability

Blanks v. TDS Telecommunications LLC, No. 1180311 (Ala. Sept. 6, 2019)

Customers had Internet service contracts with provider which (a) contained AAA Commercial Rules clause, and (b) stated that provider could change terms of service,

and that continued use of the service after receipt of change of terms constituted consent to those terms. After customers (through counsel) notified provider that arbitrations would be commenced to adjudicate claims, provider then issued change of terms eliminating arbitration from the customers' agreements. Issue: whether arbitration agreements were enforceable. Held: whether the updated terms of service validly "terminated" the arbitration clause as to the customers' claims is an issue of arbitrability that was delegated to an arbitrator.

Venue; Forum Non Conveniens

Ex parte KKE, LLC, No. 1180074 (Ala. Sept. 13, 2019)

While driving a truck for his employer, KKE (in Bibb County), Sanders (Bibb County resident) had accident in Chilton County, causing deaths of plaintiffs (residents of Montgomery County). Plaintiffs sued Sanders and KKE in Bibb County Circuit Court. KKE and Sanders moved to transfer to Chilton County, contending that it was substantially more convenient to litigate there because trooper who investigated the accident was from Montgomery County, and it would be more convenient for trooper to testify there. Plaintiffs opposed and submitted two affidavits from two non-party witnesses who lived in Montgomery County, who stated there was no significant difference to them between traveling to Bibb County or to Chilton County for testifying. Trial court denied transfer, and defendants sought mandamus relief. The supreme court denied the

writ, reasoning as follows: (1) as for a "convenience of parties and witnesses" transfer, defendants had not demonstrated that Chilton County was "significantly more convenient" for all parties, given testimony of non-party witnesses; (2) The operative test for an "interests of justice" transfer is that "the underlying action must have both a 'strong' connection to the county to which the transfer is sought and a 'weak' or 'little' connection to the county in which the case is pending...."

Ex parte Tyson Chicken, Inc., Ms. 1170820 (Ala. May 24, 2019)

Here, both Bibb and Chilton counties had strong connections. Under *Ex parte J & W Enterprises, LLC*, 150 So. 3d 190 (Ala. 2014), where a negligent hiring and retention claim is asserted, the employer's home county may provide the requisite strong connection as the location where employment decisions are made.

Venue; Forum Non Conveniens

Ex parte Reed, No. 1180564 (Ala. Sept. 13, 2019)

Watwood (Cullman resident) sued Reed (Jefferson resident) in the Jefferson County Circuit Court arising from MVA occurring in Marshall County. Marshall County officials responded to the accident; non-party witnesses were from Marshall and Blount counties. Reed moved for a forum non conveniens transfer to Marshall County, which the Jefferson

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

Hon. Robert E. Austin
baustin@bobaustinlaw.com
(205) 274-8255

Hon. S. Phillip Bahakel
Phillip@bahakellaw.net
(205) 987-8787

Hon. John B. Bush
jbush@courtneymann.net
(334) 567-2545

Hon. Rosemary D. Chambers
rosemarychambers@gmail.com
(251) 402-6256

Hon. Suzanne S. Childers
judgesuzanne@gmail.com
(205) 908-9018

Hon. R.A. "Sonny" Ferguson, Jr.
raferguson@csattorneys.com
(205) 250-6631

Hon. Melissa "Jill" Ganus
jill@jillganuslaw.com
(205) 424-0993

Hon. Arthur J. Hanes, Jr.
ahanes@uwww-adr.com
(205) 933-9033

Hon. Sharon H. Hester
sharon@hesterjames.com
(256) 332-7440

Hon. J. Brian Huff
judgebrianhuff@gmail.com
(205) 930-9800

Hon. David A. Kimberley
david@alalawyers.net
(256) 543-0400

Hon. Braxton L. Kittrell, Jr.
bkittrell@kittrellandmiddlebrooks.com
(251) 432-0102

Hon. Richard D. Lane
rdlane4031@gmail.com
(334) 740-5824

Hon. Christopher M. McIntyre
cmcintyrelaw@gmail.com
(256) 644-5136

Hon. Julie A. Palmer
judgejuliepalmer@gmail.com
(205) 616-2275

Hon. James Gary Pate
j.gary.pate@googlemail.com
(205) 999-3092

Hon. Eugene W. Reese
genereese2000@yahoo.com
(334) 799-7631

Hon. James H. Reid, Jr.
bevjam@bellsouth.net
(251) 709-0227

Hon. James H. Sandlin
judge@jimmysandlin.com
(256) 319-2798

Hon. Martha L. Sherrod
sherjudg@aol.com
(256) 655-2016

Hon. Ron Storey
ron@wiregrasselderlaw.com
(334) 699-2323

Hon. Edward B. Vines
evinesattorney@yahoo.com
(205) 354-7179

Hon. J. Scott Vowell
jsv@scottvowell.com
(205) 214-7320

Hon. Tom F. Young, Jr.
tyoung@mhhlaw.net
(256) 329-2000

(Continued from page 479)

County Circuit Court denied. Reed sought mandamus relief. The supreme court granted the writ, reasoning the underlying action's only connection to Jefferson County was the fact that the defendant individual resided there—a connection that, by itself, the court has repeatedly characterized as weak. See *Ex parte Benton*, 226 So. 3d 147, 151 (Ala. 2016).

Third-Party Spoliation

Imperial Aluminum-Scottsboro, LLC v. Taylor, No. 1171133 (Ala. Sept. 20, 2019)

Taylor, while employed by Imperial, injured his right index finger while using a paint sprayer manufactured by Graco and sold by Sherwin-Williams; the injury resulted in amputation. Three months after the injury, Taylor's counsel sent a letter to Imperial, requesting preservation of the sprayer. Taylor sued Graco and SW, shortly after which Imperial advised that the sprayer had been disposed of in December 2010, one month before counsel's letter. In a bench trial, the trial court found that the sprayer had initially been stored after the letter from counsel, but then discarded it. The trial court found Imperial liable for negligence and wantonness, awarding compensatory damages of \$250,000 and punitive damages of \$150,000. The supreme court affirmed in part, holding that the evidence was sufficient to support the finding of negligence in the failure to preserve, but reversed as to wantonness, holding that the evidence was not clear and convincing that the actual spoliation was willful, despite the subsequent letter from Imperial's counsel which falsely stated that the sprayer had been discarded before the letter. Because the wantonness count failed, the court vacated the punitive damage award. This is panel decision with a four-justice opinion.

Summary Judgment Procedure

Zieman v. Zieman Speegle, LLC, No. 1180196 (Ala. Sept. 20, 2019)

Under Rules 56 and 78, a party is entitled to a hearing on a motion for summary judgment. The party adequately notified the trial court of an intent to be heard by requesting oral argument in a pleading, though Rule 56 itself requires a hearing.

From the Court of Civil Appeals

Rule 60; Fraud upon the Court

Complete Cash Holdings, LLC v. Fryer, No. 2171147 (Ala. Civ. App. Aug. 2, 2019)

Under Ala. R. Civ. P. 60(b)(3), fraud on the court claims are subject to a four-month limitation (which was not met), but as to the merits, even if the underlying claim was legally frivolous, that does not equate to the commitment of fraud on the court.

Forfeiture

Martinez-Camacho v. State, No. 2180280 (Ala. Civ. App. Aug. 2, 2019)

State failed to present evidence necessary to support finding that \$52,560 seized in a traffic stop in which no drugs were found and no evidence of transactions was located was "furnished or intended to be furnished by any person in exchange for a controlled substance in violation of any law of this state." Ala. Code § 20-2-93(a)(4)

Standing vs. Merits

Ex parte Weeks, No. 2180658 (Ala. Civ. App. August 30, 2019)

Alleged failure of roofing contractor to be licensed under Ala. Code § 34-14A-3 was one of the merits of the claim (on materialmen's lien) and not issue of standing; traditional standing analysis is confined to "public law" cases and generally is not applicable in "private law" cases.

Workers' Compensation; Occupational Disease

Ex parte Warrior Met Coal, Inc., No. 2180740 (Ala. Civ. App. Sept. 6, 2019)

In action by employee for comp benefits for hearing loss associated with occupational conditions, employee's ability to continue working at his former position would not preclude him from demonstrating a permanent partial disability based on hearing loss. Employee was claiming unpaid medical expenses, which was a ripe claim for benefits, and thus PPD claim was also ripe.

From the United States Supreme Court

The Court's new term began in October. No decisions have been reported as of press time.

From the Eleventh Circuit Court of Appeals

Fair Housing Act; Section 8

Yarbrough v. Decatur Housing Auth., No. 17-11500 (11th Cir. Aug. 2, 2019) (*en banc*)

Under *Basco v. Machin*, 514 F.3d 1177, 1183-84 (11th Cir. 2008), a plaintiff may pursue a 42 U.S.C. § 1983 claim alleging wrongful termination of housing benefits under the Housing Act of 1937, 42 U.S.C. § 1437 et seq., where the housing authority failed to prove its case for termination by a preponderance of the evidence. The *en banc* court overruled *Basco*: there is no section 1983 right of action to a Section 8 termination decision made by a preponderance of the evidence.

Fair Housing; Standing

City of Miami Gardens v. Wells Fargo & Co., No. 18-13152 (11th Cir. July 30, 2019)

City failed to establish standing to sue lender for allegedly discriminatory lending practices. Potential that a loan issued by the lender might go into default was too speculative and

did not establish a real and immediate threat of injury. Further, the complaint conceded that “isolat[ing] the lost property value attributable to Wells Fargo foreclosures” would have required the use of a “statistical regression technique that focuses on effects on neighboring properties” “known as Hedonic regression,” which [would] involve the “study[] [of] thousands of housing transactions.” City’s failure to conduct that analysis destroyed causation component of standing.

Trial Procedure

Dear v. Q Club, Inc., No. 17-13127 (11th Cir. August 9, 2019)

In owners’ cross-appeal from a jury’s adverse determination regarding the interpretation of “shared costs” in a condo declaration, owners argued that the issue was purely one of law and should have never been submitted to the jury. Held: owners had failed to preserve that issue by failing to move for judgment as a matter of law or for partial findings under Rule 50(a).

Lanham Act; Contributory Infringement

Luxottica Group S.P.A. v. Airport Mini Mall, LLC, No. 18-10157 (11th Cir. August 7, 2019)

In action by infringees against landlord of infringer for contributory infringement, evidence was sufficient regarding widespread and repeated infringement to establish landlord had constructive notice of infringement by tenants, given prior raids to confiscate infringing material on premises, and given that

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 or
email LRS@alabar.org.

(Continued from page 481)

Luxottica's notice letters would have prompted a reasonable landlord to do at least a cursory visual inspection of the mall's 130 booths to determine which vendors displayed eyewear with Luxottica's marks and sold it at prices low enough—\$15 or \$20 a pair for glasses that typically retail at \$140 to \$220 a pair—to alert a reasonable person that it was counterfeit. “[W]illful blindness is one way to show that a defendant had constructive knowledge in cases of contributory trademark infringement.”

ADA

Lewis v. City of Union City, No. 15-11362 (11th Cir. August 15, 2019) (panel)

This is the remand to the panel from the *en banc* court's March 29, 2019 opinion clarifying the *McDonnell Douglas* framework for comparator evidence. To recap, the underlying case is a Title VII and ADA case concerning a firing of a long-term police detective while the detective was on administrative leave, following notice from her treating physician precluding her from receiving pepper spray and Taser training due to a prior heart attack. The original panel decision held the evidence presented by Lewis was sufficient to establish an ADA claim. With respect to her race and gender claims, it held that plaintiff presented (i) sufficient evidence to establish a genuine issue of fact under the *McDonnell Douglas* burden shifting framework and (ii) a convincing mosaic of circumstantial evidence that would allow a jury to infer intentional discrimination. The *en banc* court vacated, holding that the appropriate standard for proposed comparator evidence is whether they are “similarly situated in all material respects,” and under that standard, Lewis failed to make out a prima facie case under *McDonnell Douglas* because she and her proffered comparators were not so situated. It then remanded to this panel. In this latest opinion, the panel reaffirmed its holdings that there was sufficient evidence to support the ADA claim and a Title VII gender and race claim based on the “convincing mosaic” standard. Judge Tjoflat dissented (again).

Securities; Materially Misleading Statements

Univ. of Puerto Rico Ret. System v. Ocwen Mortgage Corp., No. 18-12250 (11th Cir. August 15, 2019)

The Court affirmed the district court's Rule 12(b)(6) dismissal of a securities class action brought by investor against issuer; statements by Ocwen's officers implied that the company would emerge from a regulatory mess, or statements regarding the likelihood of achieving regulatory compliance, were not material misrepresentations or omissions under §§ 10(b) and 20(a) of the Securities Exchange Act of 1934 and the SEC's Rule 10b-5—they were instead “puffery.” This is the

first reported case in the Circuit in which the Court has applied a puffery standard to a 10b-5 securities case.

Statutory Construction

USA v. Hi-Tech Pharmaceuticals, Inc., No. 17-13376 (11th Cir. August 30, 2019)

In construing statutory terms (regarding FDA confiscation of certain regulated “dietary supplements”), the Court relied on Merriam-Webster's definitions of the statutory terms, noting that “[b]oth the Supreme Court and the Eleventh Circuit have relied on Merriam-Webster's as an aid in construing statutes.”

Class Action Waivers; Public Policy

Davis v. Oasis Legal Finance Operating Company, LLC, No. 18-10526 (11th Cir. August 28, 2019)

After borrowers sued lender in putative class action based on contention that lending contracts were void as against Georgia's usury laws, lender moved to enforce a forum selection clause and to enforce class-action waiver provisions in contracts. Held: Georgia's Payday Lending Act and Industrial Loan Act articulate a clear public policy against enforcing forum selection clauses in payday loan agreements and in favor of preserving class actions as a remedy for those aggrieved by predatory lenders. The provisions of the lender's contracts were therefore void.

Statutory Construction; ECOA

Regions Bank v. Legal Outsource, P.A., No. 17-11736 (11th Cir. August 28, 2019)

The issue in this appeal has divided other circuits: whether a guarantor constitutes an “applicant” under the Equal Credit Opportunity Act. The Eleventh Circuit held a guarantor is not an applicant under the ECOA.

Contracts; Ambiguity; EFTA

Tims v. LGE Community Credit Union, No. 17-14968 (11th Cir. August 27, 2019)

Tims filed putative class action against her bank, contending that its account agreement allowed imposition of NSF/overdraft fees only when the “ledger” balance was insufficient, not when the “available” balance was insufficient. She alleged that LGE breached its agreement and violated Regulation E under the Electronic Funds Transfer Act by assessing overdraft fees when, based on her ledger balance, there was enough money in her account to cover the transaction in question, but based on her available balance—the money in her account after considering pending debits and deposits—there was not. The district court granted LGE's Rule 12(b)(6) motion, finding that the contract unambiguously allowed

the imposition of fees when the available balance was insufficient. The Eleventh Circuit reversed, holding that the agreement was ambiguous—it stated that “[a]n overdraft occurs when you do not have enough money in your account to cover a transaction, but we pay it anyway.” Contract was silent on the methodology used in determining whether there was “enough” money. Tims stated a claim under the EFTA and Regulation E, because “it is plausible that the notice does not describe the overdraft service in a “clear and readily understandable” way. 12 C.F.R. § 1005.4(a)(1). It is also plausible that Tims had no reasonable opportunity to affirmatively consent to LGE’s overdraft services. Id. § 1005.17(b)(1)(ii).”

Social Security

***Schink v. Commissioner*, No. 17-14992 (11th Cir. August 27, 2019)**

(1) ALJ failed to articulate good cause for discounting two treating physicians’ opinions; (2) substantial evidence did not support the finding that Schink’s bipolar disorder was non-severe, and (3) ALJ failed to consider Schink’s mental impairments when assessing his residual functional capacity.

Standing; Statutory Causes of Action; Spokeo Issues; TCPA

***Salcedo v. Hanna*, No. 17-14077 (11th Cir. Aug. 28, 2019)**

Receipt of one unsolicited text message in purported violation of the TCPA did not inflict a sufficient injury in fact to give rise to Article III standing. The Court specifically disagreed with *Van Patten v. Vertical Fitness Group, LLC*, 847 F.3d 1037, 1043 (9th Cir. 2017) (holding that the receipt of two unsolicited text messages constituted an injury in fact).

Class Actions

***AA Suncoast Chiropractic, P.A. v. Progressive American Ins. Co.*, No. 17-13003 (11th Cir. Sept. 12, 2019)**

Plaintiffs pursued certification of both an “injunction class” and a “damages class.” District court denied a damages class due to the predominance of individual issues, but certified an injunction class. On Rule 23(f) review, the Eleventh Circuit vacated, reasoning that claims for injunctive relief were really claims for damages, and in fact the relief being sought related to the processing of past claims, not the handling of future claims.

Employment (ADA)

***Lowe v. STME, LLC*, No. 18-11121 (11th Cir. Sept. 12, 2019)**

ADA protects persons who experience discrimination because of a current, past, or perceived disability—not because of a potential future disability that a healthy person may experience later (resulting from exposure to disease in employee’s anticipated travel).

Environmental Law

***Cahaba Riverkeeper v. EPA*, No. 17-11972 (11th Cir. Sept. 12, 2019)**

EPA has discretion not to commence withdrawal proceedings under 40 C.F.R. § 123.64(b) to withdraw a state’s CWA enforcement, even if it finds that a state’s National Pollutant Discharge Elimination System (“NPDES”) permit program has not always complied with the requirements of the CWA.

Trial Procedure; Evidence

***Ermini v. Scott*, No. 18-11220 (11th Cir. Sept. 10, 2019)**

(1) District court may inform jury about the legal effect of its finding so long as it does so accurately (which is an issue of federal procedural law, even in a case governed by state substantive law); (2) although impermissible “Golden Rule” arguments to the jury by counsel will normally result in reversal, the cases in which reversals have occurred are where such arguments are made concerning a potential award of damages, and under Eleventh Circuit law such arguments may be allowed in the context of determining the reasonableness of a litigant’s conduct when such is in issue; (3) although Eleventh Circuit precedent (which is of doubtful correctness—that’s the Court, not the writer) holds that Rule 404(b)’s rule of exclusion does not apply to testimony concerning non-parties, precedent in the Circuit applies functionally the same standard as Rule 404 to assess whether the relevance of such testimony is sufficiently powerful as against its prejudicial impact under Rule 403—in this case, although the testimony (elicited from the sheriff concerning



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 483)

the firings of two non-party deputies) was inadmissible under Rule 403, the error was harmless, because the cross-examination on the point was fairly short and generalized.

FCA

USA v. Aseracare, Inc., No. 16-13004 (11th Cir. Sept. 9, 2019)

Clinical judgment of terminal illness warranting hospice benefits under Medicare cannot be deemed false, for purposes of the False Claims Act, when there is only a reasonable disagreement between medical experts as to the accuracy of that conclusion, with no other evidence to prove the falsity of the assessment. However, the Government was entitled to rely on the entire record, not merely the trial record, to support its argument that the district court should not have reversed itself on the falsity question after verdict.

Arbitration; Arbitral Powers; Class Actions

Managed Care Advisory Group, LLC v. Cigna Healthcare, Inc., No. 17-13761 (11th Cir. Sept. 18, 2019)

Issue of first impression in the Circuit: whether an arbitrator has the authority under 9 U.S.C. § 7 to compel non-parties to produce documents or submit for deposition through subpoena issuance, in the same manner customarily used in the litigation process. Held—no: “9 U.S.C. § 7 does not permit pre-hearing depositions and discovery from non-parties.”

District court abused its discretion in deferring determinations regarding payments already made under a class action settlement to an arbitrator (where claimants and the defendant agreed to arbitrate matters regarding unpaid claims), because district court had retained jurisdiction “as to all matters relating to [] the interpretation, administration, and consummation of the [Settlement] Agreement.”

Fair Housing Act

Schaw v. Habitat for Humanity of Citrus County, Inc., No. 17-13960 (11th Cir. Sept. 18, 2019)

(1) Under a failure-to-accommodate claim brought under the Fair Housing Amendments Act, 42 U.S.C. § 3601et. seq., a court must first consider whether a plaintiff has shown that a requested accommodation is facially reasonable and then whether a defendant has demonstrated that the accommodation would result in an undue burden or fundamental alteration to its program or policy; (2) a plaintiff’s financial state in any particular case could be unrelated, correlated, or causally related to his disability and so, in some cases, an accommodation with a financial aspect, even one that appears to provide a preference, could be “necessary to afford [an] equal opportunity to use or enjoy a dwelling” within the

meaning of the Act; and (3) plaintiff failed to create a genuine issue of material fact as to whether Habitat’s minimum-income requirement disproportionately excludes SSDI recipients for his disparate impact FHA claim.

Title II ADA; Standing; Statutory Construction

USA v. State of Florida, No. 17-13595 (11th Cir. Sept. 17, 2019)

USA (the Attorney General) is a “person” under 42 U.S.C. § 12133 and thus has standing to seek relief under Title II of the ADA, in an action brought by the Justice Department against the State of Florida claiming that Florida was violating Title II by “unnecessarily institutionalizing hundreds of children with disabilities in nursing facilities.”

RECENT CRIMINAL DECISIONS

From the Eleventh Circuit Court of Appeals

Habeas; Intellectual Disability

Jenkins v. Comm’r, No. 17-12524 (11th Cir. Aug. 30, 2019)

District court correctly determined that the Court of Criminal Appeals’ rejection of the defendant’s intellectual disability claim was not contrary to, or an unreasonable application of, *Atkins v. Virginia*, 536 U.S. 304 (2002), which prohibits the execution of mentally retarded offenders. Because defendant did not diligently attempt to develop the factual basis for his *Atkins* claim in the state courts, he was not entitled to an evidentiary hearing on the claim in district court.

Habeas; Judicial Notice; Timeliness

Paez v. Secretary, Florida Department of Corrections, No. 16-15705 (11th Cir. July 31, 2019)

District court may properly take judicial notice of online state court docket entries under Fed. R. Evid. 201 in determining the timeliness of a petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. The court may not *sua sponte* dismiss a petition as untimely on its face, but must order the respondent to answer the petition if it states a legally sufficient claim for relief.

From the Court of Criminal Appeals

Fifth Amendment Privilege; Non-Party

Clevenger v. State, CR-18-0156 (Ala. Crim. App. Aug. 16, 2019)

Circuit court did not err in denying defendant's request to require witness to invoke Fifth Amendment privilege before the jury. Defendant, charged with possession of child pornography, claimed that his minor son placed pornographic videos on his computer; he sought to have the child invoke his Fifth Amendment privilege in the jury's presence during the defense case-in-chief. Citing Ala. R. Evid. 512(a), the court of criminal appeals held that a claim of privilege is not evidence and cannot provide a basis from which the jury can infer that someone other than the defendant committed the offense.

Rule 32; Sanctions

Dennis v. State, CR-17-0246 (Ala. Crim. App. Aug. 16, 2019)

Circuit court did not err in dismissing the defendant's eighth Rule 32 petition after it enjoined him from relitigating a denial-of-counsel claim. The circuit court has "inherent power" to limit defendants from abusing Ala. R. Crim. P. 32

by relitigating issues in successive petitions, noting that it may impose sanctions against abusive litigants and enforce those sanctions either by 1) directing the circuit clerk to return any subsequent petition filed in violation of the sanction or 2) summarily dismissing the subsequent petition under Ala. R. Crim. P. 32.7 (d).

Rule 32; Illegal Sentence Claims

Washington v. State, CR-17-1201 (Ala. Crim. App. Aug. 16, 2019)

Defendant was not entitled to post-conviction relief on claim that his split sentence was illegal. Though his sentence had been improperly split to permit him to serve one year rather than three years under Ala. Code § 15-18-8, his resulting probation was revoked due to his commission of a crime. The revocation of the defendant's probation rendered moot any illegality regarding the circuit court's imposition of the one-year split.

Revocation; Confrontation Clause

Pope v. State, CR-18-0253 (Ala. Crim. App. Aug. 16, 2019)

Circuit court did not err in revoking defendant's community corrections sentence based upon on both hearsay and non-hearsay evidence. Because revocation of his community corrections sentence was supported by non-hearsay evidence, defendant was not denied due process where the results of a drug test on his hair were admitted without an



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



1241 Newell Parkway | Montgomery, AL 36110 | davisdirect.com

(Continued from page 485)

opportunity for him to cross-examine the person who conducted the test.

Revocation of Probation

Walker v. State, CR-17-1123 (Ala. Crim. App. Aug. 16, 2019)

To refrain from committing a new criminal offense is an implied condition of every sentence of probation. It was unnecessary for the circuit court to find, before revoking the defendant's probation due to his commission of a new offense, that he had been expressly notified that he was required to refrain from violating the law as a condition of his probation.

Rule 32; Failure to Inform Defendant of Sentencing Range

J.F.C. v. State, CR-17-1120 (Ala. Crim. App. Aug. 16, 2019)

Defendant was entitled to post-conviction relief from his guilty plea convictions and resulting sentences because circuit court did not accurately inform him of the applicable maximum sentences and that he would be ineligible for parole on his sex offenses involving a child. ▲

UNITED STATES POSTAL SERVICE® (All Periodicals Publications Except Requester Publications)

Statement of Ownership, Management, and Circulation

1. Publication Title: The Alabama Lawyer

2. Publication Number: 0 0 0 2 - 4 2 8 7

3. Filing Date: 10/07/2019

4. Issue Frequency: Bi-Monthly: Jan., March, May, July, Sept., Nov.

5. Number of Issues Published Annually: Six

6. Annual Subscription Price: \$15: Members; \$30: Non-Members

7. Complete Mailing Address of Known Office of Publication (Not printer) (Street, city, county, state, and ZIP+4®): Alabama State Bar, 415 Dexter Avenue, Montgomery, Montgomery County, AL 36104-3742

8. Complete Mailing Address of Headquarters or General Business Office of Publisher (Not printer): Alabama State Bar, 415 Dexter Avenue, Montgomery, Montgomery County, AL 36104-3742

9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor (Do not leave blank):
 Publisher (Name and complete mailing address): Alabama State Bar, 415 Dexter Avenue, Montgomery, Montgomery County, AL 36104-3742
 Editor (Name and complete mailing address): W. Gregory Ward, 301 N. Lanier Ave., Ste. A, Lanette, AL 36863-2096
 Managing Editor (Name and complete mailing address): Margaret L. Murphy, 415 Dexter Avenue, Montgomery, Montgomery County, AL 36104-3742

10. Owner (Do not leave blank. If the publication is owned by a corporation, give the name and address of the corporation immediately followed by the names and addresses of all stockholders owning or holding 1 percent or more of the total amount of stock. If not owned by a corporation, give the names and addresses of the individual owners. If owned by a partnership or other unincorporated firm, give its name and address as well as those of each individual owner. If the publication is published by a nonprofit organization, give its name and address.)

Full Name	Complete Mailing Address
Alabama State Bar	415 Dexter Avenue, Montgomery, Montgomery County, AL 36104-3742

11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities. If none, check box None

Full Name	Complete Mailing Address
N/A	N/A

12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates) (Check one)
 The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes:
 Has Not Changed During Preceding 12 Months
 Has Changed During Preceding 12 Months (Publisher must submit explanation of change with this statement)

PS Form 3526, July 2014 (Page 1 of 4 (see instructions page 4)) PSN: 7530-01-000-9031 PRIVACY NOTICE: See our privacy policy on www.usps.com

13. Publication Title		14. Issue Date for Circulation Data Below	
The Alabama Lawyer		September 2019	
15. Extent and Nature of Circulation		Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Total Number of Copies (Net press run)		18,650	18,975
b. Paid Circulation (By Mail and Outside the Mail)	(1) Mailed Outside-County Paid Subscriptions Stated on PS Form 3541 (include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	18,513	18,722
	(2) Mailed In-County Paid Subscriptions Stated on PS Form 3541 (include paid distribution above nominal rate, advertiser's proof copies, and exchange copies)	-0-	-0-
	(3) Paid Distribution Outside the Mails Including Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Paid Distribution Outside USPS®	-0-	-0-
	(4) Paid Distribution by Other Classes of Mail Through the USPS (e.g., First-Class Mail®)	-0-	-0-
c. Total Paid Distribution (Sum of 15b (1), (2), (3), and (4))		18,513	18,722
d. Free or Nominal Rate Distribution (By Mail and Outside the Mail)	(1) Free or Nominal Rate Outside-County Copies Included on PS Form 3541	-0-	-0-
	(2) Free or Nominal Rate In-County Copies Included on PS Form 3541	-0-	-0-
	(3) Free or Nominal Rate Copies Mailed at Other Classes Through the USPS (e.g., First-Class Mail)	-0-	-0-
	(4) Free or Nominal Rate Distribution Outside the Mail (Carriers or other means)	92	143
e. Total Free or Nominal Rate Distribution (Sum of 15d (1), (2), (3) and (4))		92	143
f. Total Distribution (Sum of 15c and 15e)		18,605	18,865
g. Copies not Distributed (See Instructions to Publishers #4 (page #3))		45	110
h. Total (Sum of 15f and g)		18,650	18,975
i. Percent Paid (15c divided by 15f times 100)		99%	99%

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

PS Form 3526, July 2014 (Page 2 of 4)

UNITED STATES POSTAL SERVICE® (All Periodicals Publications Except Requester Publications)

Statement of Ownership, Management, and Circulation

16. Electronic Copy Circulation

	Average No. Copies Each Issue During Preceding 12 Months	No. Copies of Single Issue Published Nearest to Filing Date
a. Paid Electronic Copies	N/A	N/A
b. Total Paid Print Copies (Line 15c) + Paid Electronic Copies (Line 16a)	N/A	N/A
c. Total Print Distribution (Line 15f) + Paid Electronic Copies (Line 16a)	N/A	N/A
d. Percent Paid (Both Print & Electronic Copies) (16b divided by 16c x 100)	N/A	N/A

I certify that 50% of all my distributed copies (electronic and print) are paid above a nominal price.

17. Publication of Statement of Ownership
 If the publication is a general publication, publication of this statement is required. Will be printed in the November 2019 issue of this publication. Publication not required.

18. Signature and Title of Editor, Publisher, Business Manager, or Owner: Margaret L. Murphy, Managing Editor

Date: 10/07/2019

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

PS Form 3526, July 2014 (Page 3 of 4) PRIVACY NOTICE: See our privacy policy on www.usps.com

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

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.¹

Don't miss out on this important benefit offer.

Apply now at

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

or call 1-888-474-1959.



MetLife

¹ 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.