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On The Cover

USA vintage postage stamp showing an image of a woman voting in the 1920s commemorating women's suffrage

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Lawyers Helping Lawyers

Every Alabama attorney understands their ethical duty to represent their clients. This obligation is the cornerstone of what we do as lawyers. As professionals, however, we have an obligation to our fellow members of the bar. The Alabama State Bar's wellness efforts continue and will blossom into a celebration of wellness in May with our Lawyer Wellness Month activities, thanks to the efforts of Susan Han, Emily Hornsby, and Brannon Buck. However, there are economic struggles that many members of our profession have that we cannot ignore.

Law school graduates finish school with an average student loan debt of \$145,500 according to the most recent data from the National Center for Education Statistics. While that total includes student loans that law students took out for their undergraduate degrees, the average law school loan payment for that amount of debt would be \$1,656 per month.

Under the leadership of President-elect Bob Methvin and Legislative Counsel Suzi Huffaker, the bar is in the process of implementing an economic impact study for the profession. While the new study will be more inclusive than one

the bar conducted in 2014, the older study had some interesting statistics.¹

In 2014, the largest single group of attorneys who responded (15.5 percent) indicated that they made between \$50,001 and \$75,000 in 2014. The next largest group (14 percent) stated that they made between \$75,001 and \$100,000. Less than half of respondents reported income of more than \$100,000 per year. The median salary range for all respondents was between \$75,001 and \$100,000. This is consistent with *salary.com's* current median salary for attorneys in Alabama of \$89,414 and its estimated range between \$77,662 and \$102,698. While these seem like healthy salaries, consider that 75 percent of the 2018 law school graduates had student loans, and that 17 percent of households nationwide making over \$100,000 said they would have trouble coming up with \$400 for unexpected bills. Higher earners are contending with mortgages, installment loans, and student loans. The fact that lawyers struggle with this economic reality is something we can no longer ignore in our profession.

Compassion for our fellow lawyers and our members is important, not just

for the obvious and compelling reasons of humanity. Encouraging compassion reduces the suffering of those affected by a crisis and enables them to recover from future setbacks more quickly and effectively. Positive change will occur for our members who witness and participate in acts of compassion. Our compassionate efforts contribute to our own resilience and increase attachment to our profession.

Knowing this, the Board of Bar Commissioners voted to implement a plan that will ensure that the bar has the ability to help lawyers in need and that our ability to help is something that continues through the years. **Lawyers Render Service, Inc.** is a 501(c)(3) that the Board of Bar Commissioners formed to focus on helping our fellow lawyers. This non-profit will provide a mechanism for the Alabama legal community to reach out in meaningful and compassionate ways to Alabama State Bar members who experience a death or some catastrophic event, illness, sickness, injury, or other personal crisis and reduce the financial burdens that cause additional stress to an already life-changing event.

Under the leadership of Gibson Vance, the Alabama State Bar designed a license plate, which has been approved by the commission.

It is hoped that you have been contacted by your bar commissioner and told how you can pre-order your license plate. This will ensure you are among the first to get a tag once they are in production. All proceeds from the tag sales will be contributed to Lawyers Render Service, Inc. for distribution to our members in need. It is a great way to show pride in your profession and help those among us who are in need.

We all know that we are “Better Together” and that we can do amazing things as lawyers when we work together. Helping our friends, co-workers, and fellow lawyers is the first step in making the world and our profession a better place. Together, we have a license to heal. ▲

Endnote

1. The full 2014 survey can be found at <https://www.alabar.org/assets/2019/02/Economic-Survey-of-Lawyers-in-Alabama-2014.pdf>.



President Christy Crow and Chief Justice Tom Parker recording the inaugural #MoreThanALawyer podcast at the Midyear Meeting

The welcoming remarks for the Alabama State Bar’s 2020 Midyear Meeting—the first in more than 30 years—were energetic and enthusiastic. Looking at the stage and around the room filled with lawyers and judges, I was excited to see a diverse mix of the bench and bar working toward a common goal.

“We depend on strong lawyers, and lawyers depend on a strong bench. Together, we are going to do good work for our state,” said Judge Teresa Pulliam, president of the Alabama Circuit Judges Association.

With that sentence, I believe Judge Pulliam best summarized the importance of the bar’s collaboration with the judges—we are *Better Together*.

Our two-day Midyear Meeting had many other highlights, including the re-launch of the Leadership Forum. After a one-year break, the program is back, under the leadership of Director of Programs Ashley Penhale. Members of Class 15 met during our time in Gulf Shores. They took part in day-long leadership and team-building exercises with plenty of fun and networking time mixed in, too. In addition, forum alumni offered their support to help plan the meeting as a way to pay it forward to this year’s group.

We also recorded our inaugural #MoreThanALawyer podcast and were thrilled that Chief Justice Tom Parker was our first guest. Chief Justice Parker is passionate about the Blackstone Commentaries and he shared that passion with us. We look forward to making the podcast available to those

who missed the meeting, and we have many more exciting guests planned as we grow the audience.

Our Bench & Bar Luncheon speaker was Chief Judge Stephen Dillard from the Georgia Court of Appeals who spoke on judges and lawyers using social-media platforms to involve and educate those they serve. He is widely known for his engaging use of social media and advocacy for more access to the judiciary and the judicial process.

The meeting concluded with a great panel discussing the importance of leadership and relationships within the legislature. Justice Sarah Stewart, Judges Lang Floyd and Phil Seay joined Paul DeMarco and Suzi Huffaker, the bar’s legislative counsel, along with lawyer-legislators Rep. Chris England and Sen. Will Barfoot.

To all who attended, supported, and sponsored our 2020 Midyear Meeting, especially our presenting sponsor, Attorneys Insurance Mutual of the South, we can’t thank you enough, and we are looking forward to planning next year’s Midyear Meeting! ▲



AIM Vice President Wilma Fields and board member Claire Black welcome attendees to the Midyear Meeting.

Get to Know Your Presidents-Elect

*Pursuant to the Alabama State Bar's Rules Governing the Election of President-elect, the following biographical sketches are provided of **George R. Parker** and **Tazewell T. Shepard, III**. Parker and Shepard were the qualifying candidates for the position of president-elect of the Alabama State Bar for the 2020-2021 term, and the winner will assume the presidency in 2021.*

George R. Parker

George Parker has been a resident of Alabama his entire life. He grew up in Montgomery and headed 50 miles east for college, where he earned a degree in marketing from Auburn University in 1994. After graduating, George moved to Tuscaloosa where he earned his JD from the University of Alabama School of Law in 1998. He then returned to Montgomery where he has practiced for 21 years, first at Ball, Ball, Matthews & Novak and then at Bradley's Montgomery office.

George began his service to the Alabama State Bar as a young lawyer. He was an active member of the Young Lawyers' Section, serving on the Executive Committee as treasurer, vice president, and president of the Young Lawyers' Section in 2007-2008. He also chaired the bar admissions ceremony for multiple years.

In 2007, George was selected as a member of the Alabama State Bar Leadership Forum, Class 3. He has remained active in the forum's alumni section and organized the Leadership Forum summits and "Ed Talks" that were held during 2019.

George has represented the 15th Judicial Circuit in Montgomery since 2013 as a bar commissioner and is serving on President Christy Crow's Executive



Parker

Council, on the state bar's Finance and Audit, Insurance Benefits, and Personnel committees and as co-chair of the Member Benefits Committee. He also served on President Augusta Dowd's Executive Council in 2017-2018.

George has served on many state bar committees and task forces, including the MCLE Committee, the Character & Fitness Committee, the Disciplinary Board, *The Alabama Lawyer*, as a hearing officer for disciplinary panels, and on the recent General Counsel Search Committee.

He is a Fellow of the Alabama Law Foundation and the American Bar

Foundation. He is AV Preeminent Rated by Martindale-Hubbell® and has been listed in *Alabama Super Lawyers*, *Mid-South Super Lawyers*, and *The Best Lawyers in America*®. He is a member of ADLA and IADC. George is a past member of Chief Justice Cobb's Commission on Professionalism. He chaired the American Bar Association TIPS Outreach to Young Lawyers Committee in 2014-2016.

While he focuses his practice on pharmaceutical and medical device, products liability, mass tort and class action litigation, George has also represented individuals and entities on a pro bono basis and was honored as a pro bono exemplar for the Alabama Access to Justice Commission in 2015. His law firm received the 2019 Alabama State Bar Pro Bono Award in the Law Firm category in 2019.

George and his wife Jessi are active members and Sunday school teachers at First United Methodist Church Montgomery. At the 2019 Annual Conference, George was installed as the associate chancellor for the Alabama-West Florida Conference of the United Methodist Church. George and Jessi will celebrate their 20th anniversary in August. They have three daughters, ages 16, 13, and 11. ▲

Tazewell T. Shepard, III

Taze Shepard's 40-year legal career reflects his belief that every Alabama lawyer can be a servant-leader in their community—dedicated to helping their fellow lawyers as well as their clients.

Taze started his career working alongside his grandfather, former Senator John Sparkman. Today, he's the senior partner in the three-lawyer firm of Sparkman, Shepard & Morris, P.C., in Huntsville, which includes Taze's partner and son, Ty Shepard. Taze has handled commercial litigation from copyright infringement to equipment lease disputes and serves as a federal trustee in bankruptcy, administering Chapter 7, Chapter 11, and Chapter 12 cases. Currently, Taze often serves as debtor's counsel in negotiated workouts and Chapter 11 reorganization cases for a variety of individual professionals and small companies who are facing large judgments or tax liens.

Taze's service to the Alabama State Bar is well-known throughout the state. He has served as Vice President of the Bar, received the 2019 Albert Vreeland Pro Bono Award for his efforts on behalf of legal aid organizations, and is in his sixth year as a member of the Board of Bar Commissioners. Taze has twice co-chaired the State Bar's Government Relations Liaison Committee and served as Chair of the Solo & Small Firm Section for two terms.

Through those leadership roles, Taze organized focus sessions that provided Alabama lawyers with the opportunity

to discuss pertinent issues like technology challenges, work stress, ethics, and how the State Bar can better meet the needs of its members. He grew the SSF Section into the Bar's largest and most active section by developing free and low-cost CLE events held around the state and online, including the 2019 Probate Practice CLE events attended by nearly 1,000 attorneys; an active ListServ® used to mentor and discuss legal issues; a growing library of legal forms and articles; a new Lawyer Wellness Program; and an upgraded, user-friendly website. Taze is currently organizing a series of 2020 Alabama District Court Practice CLE events in eight locations.

In addition to his commitment to the State Bar, Taze is serving his second term as Vice President of Legal Services Alabama, has served as President of the Madison County Volunteer Lawyers Program, and has served as President of the Huntsville/Madison County Bar.

Taze is a Fellow and member of the Board of Trustees of the Alabama Law Foundation, which makes IOTA grants to legal aid organizations. Because Taze is deeply dedicated to legal aid, he brought leaders together in a summit meeting to discuss improving court administration to assist low-income debtors in Alabama. Next, Taze organized a series of meetings of legal aid groups on the delivery of pro bono services to low-income Alabamans. The results were compiled in the Access to



Shepard

Justice Report he delivered at the State Bar's 2018 annual meeting and the 2019 Winter Conference of Alabama Circuit and District Judges.

As a father of five and grandfather of six, Taze takes an active interest in Alabama youth and education. This includes his work with Junior Achievement and Big Brothers/Big Sisters and his two terms as President of the Schools Foundation in Madison County. Taze is a former Vice-Chair of the Board of Trustees of Athens State University, was an elected member of the State Board of Education, served as Chair of the Governor's Commission on School Violence, and was Vice-Chair of the Board of the Alabama Space Exhibit Commission (Space Camp).

Taze and his wife, Pamela Lang Shepard, live in his family home in downtown Huntsville. In addition to his legal career, Taze and Pamela run a small business together. ▲



EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum
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Nurturing the Next Generation of Leaders

"It was about four years ago that my Leadership Forum classmate, Wyndall Ivey, passed away unexpectedly from a heart attack," said Circuit Judge Jim Hughey III.

"I write to his mother every year to let her know that I still remember him; I still value the things that we shared together; and I still value what he meant to me," continued Judge Hughey. "Not just because he was my dear friend, but because we grew up together as lawyers."

His message that day, as Judge Hughey spoke to a room of Alabama State Bar Leadership Forum alumni, was that "who you eat lunch with determines the future of our profession." He challenged those in the room to honor the memory of his late friend and get out of their comfort zone—break bread and build real friendships with someone who is different from you.



Ivey



Hughey

Judge Hughey's remarks were made this past April during a series of "Ed Talks" hosted at the state bar, named for longtime Programs Director Ed Patterson, who successfully led the Leadership Forum during its first 14 years. Upon Ed's retirement, the forum took a year off to focus on its alumni and the future of the program. During that time, three summits were held for alumni to reflect, reconnect, and re-energize.



Leadership Forum Class 15

While all of the “Ed Talks” given by forum alumni were impactful, I found Judge Hughey’s message to be particularly insightful, perfectly capturing the experience Leadership Forum provides its participants.

What program participants learn during their time in the Leadership Forum provides a strong foundation for the rest of their lives. Not only do those in the class grow as dynamic leaders, they cultivate deeper and more meaningful connections, making them better prepared to propel the profession forward.

From the program’s inception in 2005, it has produced more than 400 graduates equipped not only to influence the bar but to shape the future of this state. These leaders become models of ethical and professional behavior, both within and outside the legal community. In addition, the Leadership Forum has illuminated a pathway for other state bars and legal organizations to nurture servant-minded bar and community leaders.

Leadership Forum Class 15 kicked off its first session at the ASB Midyear Meeting in January. During the summits last year, forum alumni decided they wanted to give back to the bar by helping coordinate the first midyear meeting in 30 years, held January 22-23 at The Lodge at Gulf State Park. Having those alumni participate truly embodied the spirit of servant leadership in a significant way, and we appreciate their desire to give back.

The 30 participants in this year’s class will hear from various presenters about the development of leadership skills and strategies. That ethic advanced by the forum enhances professionalism as it calls for sharing power and helping others develop and perform to the best of their ability.

Today’s legal landscape is changing quickly, becoming more complex around every turn. As Judge Hughey did during “Ed Talks” last year, I challenge this year’s class to seek out those who think, look, and talk differently than you. Learn to see the profession from a perspective that’s not your own, and mix in a few difficult conversations with a classmate amongst the learning and skill-building.

As Judge Hughey so eloquently said in his conclusion, “We as lawyers are the blood that pumps through our democracy. We carry the nutrients, and we clean out the imperfections.”

I hope this year’s Leadership Forum participants enjoy their time in the program. We don’t take the purpose of the program lightly—the future of our bar, the state, and even our democracy depends on the guidance and connections of our next generation of leaders. ▲

Cordell Hull Speakers Forum
Featuring ABA President Judy Perry Martinez

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The 2020 Cordell Hull Speakers Forum will host Judy Perry Martinez, president of the American Bar Association (ABA), as the keynote speaker.

Martinez will discuss the ABA and its work to promote equal justice, diversity, and inclusion in the legal profession and justice system, and the rule of law.

Cumberland alumni, students, faculty, staff, and members of the Birmingham and Alabama legal communities are invited to attend.



Members of the 19th Amendment Centennial Celebration Task Force

Alabama State Bar Centennial Celebration of Women’s Suffrage

By Allison O. Skinner

August 26, 2020 will mark the 100-year anniversary of the passage of the 19th Amendment to the U.S. Constitution. The 19th Amendment reads:

The right of Citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.

Setting the Stage

The first Woman’s Rights Convention was held in July 1848 in Seneca Falls, New York. This convention marks the beginning of a 72-year campaign in our country to secure the passage of this

constitutional amendment. At the convention, a daughter of a lawyer, Elizabeth Cady Stanton, had the foresight that to improve the rights of women with respect to issues such as marriage, children, property, and wages, women needed the right to vote to engage the political process. Stanton introduced Resolution Nine to the “Declaration of Rights and Sentiments” at Seneca Falls, which read:

Resolved, That it is the duty of the women of this country to secure themselves their sacred right to the elective franchise.

While all the other resolutions unanimously passed, Resolution Nine barely passed.

Meanwhile, in Alabama...

In Alabama, Pierce Burton, a republican representative to the Alabama State House and delegate to the 1867 State Constitutional Convention, published an article entitled “Proposal for Women’s Suffrage” in the *Demopolis New Era*, claiming female suffrage would restore confidence and intelligence to the political process. Three years later, the *Livingston Journal* re-published Burton’s

article when Burton was a candidate for lieutenant governor to embarrass him. In 1892, the first woman’s club for voting rights formed in Decatur by Ellen Hildreth, followed by Calera, Gadsden, Tuskegee, Huntsville, Selma, and Birmingham. On August 8, 1901, an amendment to Alabama’s Constitutional Convention was adopted to allow women who pay taxes on \$500 of real estate to vote in all bond elections; however, the next day, the action was reversed. The suffrage movement barely survived in Alabama after this defeat.

In 1913, the Alabama Equal Suffrage Association held its inaugural state convention in Selma with seven chapters participating, culminating in a request for a suffrage bill. J.H. Green of Dallas County introduced the suffrage bill in the state house in 1915, but then withdrew his support. The bill failed by 12 votes shy of the required three-fifths majority. Because the state legislature met every four years, the Alabama suffragists would have to wait another four years or wait for the passage of a federal amendment.

Passage of the 19th Amendment and Beyond

The 66th U.S. Congress passed the 19th Amendment and sent it to the states for ratification on June 4, 1919. On September 22, 1919, Alabama rejected the



The Girl Scouts Centennial Patch, designed by the Girl Scouts of North Central Alabama

19th Amendment proposal as an infringement on the state’s authority from the federal government. Tennessee was the 36th state to ratify the 19th Amendment by a one-vote margin. The Alabama Legislature did not ratify the 19th Amendment until September 8, 1953.

Despite the passage of the 19th Amendment, the struggle for universal suffrage continued in our country leading to the passage of the 1965 Voting Rights Act. The Equal Rights Amendment passed the U.S.

Congress on March 22, 1972, which reads “Equality of rights under the law shall not be denied or abridged by the United States or by any state on account of sex.” The Equal Rights Amendment did not secure the requisite 38 states for ratification and remains in the headlines today.

Centennial Celebration

In 2017, the ASB Women’s Section voted to establish a task force to plan how the bar could recognize the centennial of the passage of the 19th Amendment. Alabama State Bar Presidents Augusta Dowd, Sam Irby, and Christy Crow elevated this task force to a multi-year task force at the state bar level, of which Tom Heflin and Allison Skinner serve as co-chairs. This task force launched a website at www.women-righttovote100.org. Please refer to the website for additional information and resources.

For two years, a steering committee has met almost monthly to outline plans for 2020, culminating at the ASB Annual Meeting and on the anniversary date of August 26, 2020. The goals of the ASB task force are education, celebration, and the future. The Alabama State Bar has partnered with numerous organizations. Our primary partner is the Alabama Department of Archives & History. Archives has established a

Women's Suffrage Centennial Commission with more than 50 representative organizations. ASB President Christy Crow is the co-chair of the Archives committee, and Allison Skinner and Tom Heflin serve on its executive committee. A list of events is located at alabamawomen100.org. The Alabama State Bar is pleased to have this significant public outreach.

The 19th Amendment Task Force activities include:

Education

Lawyers in the Classroom—Lawyers are returning to the classroom to promote civic education. The history of women's suffrage is the first topic lawyers will share with students. If you would like to participate, please contact Felicia Long.

A short film—Jenna Bedsole has developed a short educational film about the history of voting in Alabama that is available for public use.

Girl Scouts Centennial Patch—The Girl Scouts of North Central Alabama developed a Centennial Patch. Both the ASB Women's Section and the Birmingham Bar Association Women Lawyers' Section support this patch program and have funded the actual patch.

Speakers Bureau—Lawyers have been speaking at civic organizations and programs around the state about the history of suffrage. A list of speakers is found on the website.

University of Alabama School of Law Symposium—The University of Alabama School of Law is hosting a symposium on Friday, April 3, with a \$5,000 scholarship awarded to the author of the best essay on voting.

Law Day—"Your Vote—Your Voice—Our Democracy: The 19th Amendment at 100" is the theme for the 2020 Law Day. Leslie Barineau is a member of the American Bar Association's Task Force on the Centennial Celebration. American Bar Association President Judy P. Martinez will be celebrating Law Day with us in Alabama on April 27. Save the date for this special event for our bar.

Book Club Reading List—Sandra B. Reiss developed the only bibliography of suffrage related books, films, and music. Suffragists met in study clubs that later became book clubs. Offering a reading list to the public is our nod to the early study clubs. The bibliography is

located on the bar's suffrage website at www.women-righttovote100.org. The Alabama State Bar provided this bibliography to the American Bar Association for its use and dissemination. The task force is pleased that this resource has been featured in various ABA outlets.

Vulcan Museum—The Alabama State Bar and the Birmingham Bar Foundation are sponsors of the "Right or Privilege? Alabama Women and the Vote" exhibit that opened on January 17 at Vulcan Museum and will run through January 2, 2021. Girl Scouts can earn criteria for the Centennial Patch by visiting the museum. Judge Houston Brown (retired) and Allison Skinner served on the advisory board for the exhibit. Other events at the museum include:

- March 5: The Life of Pattie Ruffner Jacobs: a play
- April 23: Women, Whiskey and Taxes presented by Cumberland School of Law Assistant Professor Tracey Roberts
- May 12: Jenna Bedsole presents Women Suffrage Film and Panel Discussion

Celebration

"Day Of" events on August 26, 2020 are being planned. Check the website for updates.

Future

The task force has encouraged its partners to promote voter registration at its events. Additionally, women are under-represented in statutory presence throughout the state. The Alabama Archives is working on a project for its statutory hall. Additionally, the Pomeroy Foundation is supporting five markers throughout the state to recognize the contributions of Alabama women. The National Votes for Women Trail is an effort to identify and mark significant sites to women's suffrage to be included in a national database. In conjunction with our partners, we are working to identify these historic sites.

We encourage members of the bar to recognize the contributions of women to your respective organizations throughout the year, and let us know so we can post it on the website. ▲

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EDITOR'S CORNER

W. Gregory Ward
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Things are hopping here at *The Alabama Lawyer*.

I can't go anywhere without someone stopping me to tell me about an article they just read, about something they saw in our magazine that helped them in a hearing, or with an idea for an article they would like to see. I've even had people stop me to mention some of the recent covers.

It is great when that sort of thing happens.

I was at counsel table and about to begin a hearing the other day when a young lawyer walked over to tell me that he had just read Wilson Green and Marc Starrett's "Appellate Corner," and within their wonderful research he'd found a case he was about to use. He was so excited that he had just shared the case with another lawyer.

That was not a bad way to start my day.

We are working on an upcoming issue about military law. Word of that got to

our counterpart in a sister state north of here, and they are considering a similar edition.

I always put my email address on the end of my column and ask anyone with an idea to get in touch. They do. We are getting calls and emails—both directly to me and to the Montgomery office—with ideas and comments, suggestions and questions.

We recently received a question about an article that was published several months ago. We forwarded the email to the author, and he responded. A lawyer who was using an article then had even more firepower to add to her arsenal.

It's nice to know that you are reading. It's even nicer to know that the conversations begun in these pages keep going after you put down the magazine.

You may have noticed that this issue does not have a theme. After a series of themed issues, we decided to step back, take a deep breath, and relax just a little. I think you'll enjoy what turned up.

Allison Skinner begins a series of articles about the centennial celebration of women's suffrage. Her article about the 100th anniversary begins on page 118. It isn't by accident that this month's cover is a reproduction of the 1998 postage stamp celebrating the

19th Amendment. The U.S. Postal Service actually issued three stamps celebrating the passage of the 19th Amendment, more than it did for any other amendment. Not a bad thing to celebrate, is it?

In "Introduction to Alabama's Assisted Reproduction Law," AshLeigh Meyer Dunham establishes herself as Alabama's foremost legal expert in assisted reproduction technology (known by the acronym ART.) When I met AshLeigh about a year ago, I was impressed by her knowledge of a subject that I knew nothing about. She is on the forefront of a fast-developing area of the law, and I wouldn't let her leave until she promised me that she'd share that information with you. Here is her wonderful article (page 124). Enjoy.

Bert Nettles called me a while back to pitch his idea for an article about Magistrate Judge John E. Ott and his abilities as a mediator. I don't know if you know Bert, but he is such a gentleman on the telephone—an art form that is slipping past—that I heard myself tell him to send along the article. And I'm glad I did. I've never met Judge Ott, but after reading the feature I found myself wishing that I had a mediation just so he could handle it. Take a look (page 132). Bert, you silver-tongued lawyer, thanks for the call, and thanks for the article.

Larry King has been my friend for many years. We've been on the same side of cases, and we've been legal combatants when we've found ourselves sitting at opposing counsel tables. I consider him to be one of the best lawyers in Alabama. Larry has an impressive cache of publications, and we consider ourselves fortunate that we were able to get him to hold still long enough to be added to that list. If your practice includes any workers' compensation, take a look at "A Tort Defense in Crisis? The Defense That Is the Alabama Workers' Compensation Act" (page 136).

Speaking of Wilson Green and Marc Starrett, they enlighten us every month in "The Appellate Corner," pointing the way to recent appellate court decisions that you need to know about. I've met more than one Alabama lawyer who turns to them first—not the disciplinary actions—when the new edition comes out (page 158).

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.

And just wait till you see what we have for you in May. ▲





Introduction to Alabama's Assisted Reproduction Law

By Ashleigh Meyer Dunham

The Problem

Infertility affects one in eight couples within the United States.¹ It is diagnosed when a couple over the age of 30 unsuccessfully tries to conceive for a year. If the couple is under the age of 30, they are diagnosed after six months of unsuccessful conception attempts.² And the Center for Disease Control recently released a report showing that infertility rates have increased dramatically over the last few years.³ So infertility is a growing problem, and both the law and medicine have addressed the potential medical solutions to it.

The physicians who treat this condition are called reproductive endocrinologists. The technology they apply is called assisted reproductive technology (ART).

In this article, we will look at the complex legal issues surrounding ART with hopes to give the practitioner a point of beginning in learning this complex and fascinating field.

Alabama's Approach

As the committee comments to Article 7 of Title 26 point out, “[d]uring the last thirty years, medical science has developed a wide array of assisted reproductive technology, often referred to as ART, which have enabled childless individuals and couples to become parents.”

Alabama has addressed this in the Uniform Parentage Act (the UPA), Ala. Code §§ 26-17-101

through -905, and more specifically in Article 7 of that act, §§ 26-17-701 through -707 and § 26-17-901 through -905. This has also been addressed in the American Bar Association Model Act Governing Assisted Reproductive Technology (hereinafter referred to as “The Model Act”), and it offers guidance and provides a framework for ART attorneys.

Alabama varies from the national UPA in that it did not adopt the Model Act’s gestational agreement section (Article 8 of the UPA is reserved for possible later adoption). We will talk more about gestational agreements later (they are important), but for now know that Alabama hasn’t adopted any statutes about them. Since Alabama’s statutes are silent as to gestational carrier agreements (surrogacy agreements), lawyers are not statutorily governed and must seek guidance from the Model Act, the UPA, and sister jurisdictions. Although some lawyers fear the use of surrogates due to Alabama’s statute criminalizing payments in adoptions, the statute specifically makes an exception for surrogacy.⁴

There are several avenues for couples to consider if they are unable to conceive, and the legal ramifications vary greatly depending on the route they choose. The laws in this area are spread across probate law, juvenile law, family law, and contract law.

The facts of the case will dictate the path of law that the families will need to take. Those facts, combined with the decisions that families make, dictate what family law attorneys should be considering when determining how to guide their clients. And since the family is dealing with those several areas of the law simultaneously, they need solid legal advice.

Let’s think about how to think about all of this.

Overview of ART

Begin with why the couple is infertile in the first place. The cause of infertility suggests the solution, and the solutions suggest the area(s) of the law that have to be considered.

For example, if the issue is sperm quality or quantity, sperm donation may be an option. If the issue is egg quality or quantity, egg donation may be an option. If the couple is able to get pregnant but not to carry the baby to term, having another woman—called a surrogate—carry the child to term may be an option. If the couple is individually fertile, but they cannot create an embryo together, embryo adoption may be an option. Perhaps the client is a single person seeking to create a child without a spouse, and that creates substantial issues on its own.

It is important to know and understand where the clients are medically. Only then can you help them know their next legal steps.

There is an entire language surrounding this area, and the lawyer should learn it.

In contracts for receiving sperm, eggs, or an embryo, the couples are known as donor recipients. In surrogacy cases, the infertile couples are known as the intended parents.⁵ In these cases, the donation of sperm or eggs is referred to as the gametes.⁶ The couple may be using their own gametes and having a carrier (surrogate) carry their child to term, adopting an embryo and carrying that child themselves, adopting an embryo

and using a carrier, or using a mix of donated gametes (ovum or sperm) along with their own gametes to create an embryo that is implanted in a carrier.⁷

As you can see, things can get complicated. Legal help is crucial.

If parties have successfully navigated the path to obtain a donor, they will need to move forward with their next medical procedure.

If a client is contracting for sperm, they will typically move forward with an intrauterine insemination (IUI).⁸

However, if they are adopting an embryo or receiving eggs under an ovum contract, the couple’s next step is in vitro fertilization (IVF). The science behind this is complicated and can easily cause parentage issues. In *Kass v. Kass*, the New York Court of Appeals described the process:

Typically, the IVF procedure begins with hormonal stimulation of a woman’s ovaries to produce multiple eggs. The eggs are then removed by laparoscopy or ultrasound-directed needle aspiration and placed in a glass dish, where sperm are introduced. Once a sperm cell fertilizes the egg, this fusion—or pre-zygote—divides until it reaches the four- to eight-cell stage, after which several pre-zygotes are transferred to the woman’s uterus by a cervical catheter. If the procedure succeeds, an embryo will attach itself to the uterine wall, differentiate and develop into a fetus. As an alternative to immediate implantation, pre-zygotes may be cryopreserved indefinitely in liquid nitrogen for later use.⁹

Kass only provides a basic explanation of IVF. There are several other procedures that can be utilized to increase the probability that IVF will be successful.

Attorneys have to have a basic understanding of how all of this works so they can explain the process to the court (more about that in a minute). They then have to show the court how the process should be handled legally.

If this process is not handled properly, timing could cause an issue which would lead the case to have to be fixed via adoption, which is less than ideal when the child is already considered to be your clients' child. For example, if there is no pre-birth order in place, (these are discussed at length below) and a surrogate births a child she has been contracted to carry for a couple, she will be presumed to be the mother of the child by the hospital and placed on the birth certificate although she is not genetically related to that child.

Paternity Issues

In about half of the infertility cases, the infertility begins with an issue with the male partner.¹⁰ That is called male factor infertility. Couples may decide to use a sperm donor, or they may seek new scientific treatments.¹¹ Provided those treatments are successful, the parties may never need to use donor sperm. In fact, the stigma surrounding artificial insemination and other methods used to circumvent male factor infertility have essentially been eradicated. Intrauterine insemination (IUI) is now widely accepted.¹² Alabama

law statutorily addressed IUIs and parentage declaring that if a woman is married and undergoes intrauterine insemination, the woman's spouse is the legal parent of the child.¹³

Representation is more complicated when a person is a single parent or when there is an unmarried couple. Parties may decide to use donor sperm from either someone they know or from an anonymous donor.¹⁴ Anonymous sperm donors at sperm banks contain less of a risk simply because their identity is not disclosed to the recipient.¹⁵ The UPA and the Model Act all provide that if a donor provides sperm to someone other than his spouse, he is a donor and not a legal parent.¹⁶ Under current Alabama law, you cannot contract out parental responsibility for a child, regardless of the intentions, before a pregnancy occurs.¹⁷

In the absolute worst-case scenario, if a man offers to be a donor for an unmarried woman, because of the laws regarding paternity and child support, there is nothing stopping the donor from asserting parental rights despite his pre-conception intentions; likewise, there is nothing stopping a mother from seeking financial assistance for the child despite her pre-conception intentions.¹⁸ The law on child support and paternity is in place in order to protect the rights of the child, not the intentions of the parents. The laws are written in a way that protects a child's right to be financially supported and to have a relationship with his or her parents. Thus, it is extremely important for lawyers practicing in this field to draft agreements that explicitly detail the roles and intentions of everyone involved.

Maternity Issues

In the past, maternity was an open-and-shut case. If a woman gave birth to a child, that child was hers, both biologically and legally. With advances in medical technology, giving birth to a child is no longer the only determinative factor. Under the Alabama Code, our statutes still maintain that a woman giving birth is a determinative factor for maternity, but new provisions to the statute provide an avenue for women to prove maternity through an adjudication.¹⁹ And there may be times that a judicial adjudication of maternity is the only real option. For example, when a woman gives birth to a child using another couple's embryo and there is no clear pre-birth order (this article helps the attorney prevent that), then litigation may occur.

When representing parties in a surrogacy, lawyers need to be able to explain to a judge the surrogacy process to obtain a pre-birth order (more about them below), which is an order establishing the intended parents as the legal parents of the child and allowing them to be listed on the birth certificate.²⁰ Although there is no Alabama statute specifically authorizing pre-birth orders, they are used all across the nation. In them the intended parents and the surrogate (as well as her husband if she is married) file pleadings and attach to it documents to prove that the child is scientifically the child of the intended parents and that they are, in fact, the intended parents. At that time, provided everything goes smoothly, the intended parents receive an adjudication in the form

of a pre-birth order stating that they, not the surrogate (and her spouse if she is married), are the parents of the child being born. This is discussed in more detail below in the section concerning gestational surrogacy.

Couples may seek ovum donations to create an embryo with the man's sperm, or they may seek an embryo adoption (also called embryo donation) from another couple. Although ovum and embryo adoptions/donations are not usually indicative of maternal rights, they are an important factor in traditional surrogacy (discussed below). These are also used in gestational surrogacy agreements, but do not cause as many problems for the court system since the ovum/embryo is not the biological material of the actual surrogate.²¹

Couples often use ovum donation contracts when the couple either has low egg reserve or the quality of the ovum is not optimal for creating a viable embryo.²² The process for donating an embryo is more invasive than donating sperm.²³ The parties will need to consider contractually what medications and treatments the donor is willing to undergo in order to produce optimal results.²⁴ Further, they will discuss complications and side effects of the medication and the process.²⁵

During egg donation or ovum donation, the donor must undergo a series of medications and procedures before she can donate her genetic material. This also comes with a variety of legal and financial issues.²⁶

In practice, it is very important for couples who seek to adopt gametes or who intend to hire a gestational surrogate to protect themselves with contracts that cover a multitude of options concerning the medical obligations of

each party, the financial obligations of each party, and every possible scenario that could arise each step along the way.²⁷ Psychological evaluations can be used to ensure that everyone is doing this for the right reasons and lessening the risk for a courtroom battle during an already emotionally charged stressful time. Furthermore, these are often required by clinics or agencies in order to move forward with a surrogacy/donor contract.²⁸ This is more of an issue of contract law and is handled before the treatment begins.

Generally, if the donor signs a contract to donate her ovum to the couple and she is not the one who carries the baby, maternity is less likely to be disputed. Since the intended mother is giving birth to the baby, and there is a contract in place stating that the genetic material which resulted in an embryo is hers moving forward, the birth would create that maternity predisposition discussed above concerning pre-birth orders. Likewise, if she's married, the husband or spouse is the presumptive second parent. However, if the intended parents cannot carry the child, they then will begin the process of a gestational surrogacy contract. These scenarios are less likely to create confusion since the mother, or her contracted surrogate, is physically carrying the baby.

Traditional Surrogacy

Where maternity becomes an issue is when there is a traditional surrogate involved. As mentioned before, there are two types of surrogacy: traditional surrogacy and gestational surrogacy. In traditional

surrogacy, the surrogate is donating some of her own genetic material to the conception of the child.²⁹ This normally involves a contract where the surrogate agrees to relinquish the child at birth. Since the woman is genetically related to the child she is carrying, there is a huge legal risk.³⁰ In one case, *In re Baby*, the Tennessee Supreme Court illustrated the worst outcome for intended parents regarding traditional surrogacy.³¹

In *In re Baby*, the intended parents used the husband's sperm and contracted with a surrogate for her to be inseminated.³² She became pregnant, and the parties filed a consent order terminating the surrogate's rights to the child and allowing the intended parents to take the child.³³ After the birth of the child, the surrogate filed several motions in order to obtain access to the child. In this case, the Tennessee Supreme Court invalidated the agreement of the parties and allowed the surrogate visitation with the child finding that the termination of parental rights violated public policy.³⁴ Due to cases like these, traditional surrogacy is very rarely used these days.

Issues with Gestational Surrogacy

Gestational surrogacy is a more effective and less risky option for infertile couples. Gestational surrogacy is where the doctor uses the gametes of two parties (whether it be the gametes of the couple, donated gametes from other people, or a mixture of the two) and creates an embryo.³⁵ The doctor then uses in vitro fertilization to implant

the embryo in a surrogate who then carries the child to term.³⁶

In order to practice this area of law, or to fully represent clients who have contracted with a gestational surrogate, lawyers must understand the process and procedures for finding and utilizing a surrogate, the medical procedures and appointments involved before, and the medical procedures used to impregnate the surrogate along with the risks associated with each step.³⁷ Unfortunately, this is very difficult as the laws concerning surrogacy are not uniform.

The first step in a gestational surrogacy is for the couple to enter into a contract with the gestational surrogate. This is generally done through the use of a surrogacy agency. Gestational surrogacy agreements often span multiple jurisdictions.³⁸ The Alabama Code is silent regarding gestational surrogacy contracts except to state that money paid to a surrogate is not to be criminalized.³⁹ However, other statutes can be used. For example, attorneys are using the code surrounding maternity and paternity determination and adjudication to carve out the necessary mechanisms to protect the clients.⁴⁰

When drafting these agreements, it is important to be sensitive regarding the birth of the intended parents' child, and after years of fertility treatment, this process needs to go smoothly. Because of this, the surrogacy contract should provide a plan drafted by the attorney before the birth of the child. The attorney should include important provisions in the contract such as minute details most of the general public do not consider.

Those provisions may include medical decision-making authority during the birth, delivery atten-

dance, number of embryo transfers, governing laws, lifestyle restrictions of the surrogate during pregnancy, timing of the intended parents receiving their child, breastfeeding after the birth, access by the surrogate to the child following the birth, nursery access, health insurance, wrist-banding, social media, videography, and photography rules, to name a few.⁴¹ Since Alabama has no statutory law regarding surrogacy, the industry standard which has developed in this field involves the following process in gestational surrogacy representation: pre-birth orders.

Pre-birth orders are obtained when lawyers for the parties properly file pleadings in the juvenile court to disaffirm maternity and paternity of the surrogate and her spouse, if she is married.⁴² This includes obtaining medical affidavits from treating doctors explaining conception (stating very clearly the scientific process, the dates of the pregnancy tests, the procedure dates, suppression medications, DNA tests, etc.) in such a way that the judge can easily enter an order explaining the same process once again and, most importantly, ordering who should be placed on the birth certificate.⁴³ This order must be provided to the hospital for guidance.⁴⁴ It is important to draft pre-birth agreements and pleadings so that the intended parents will be listed on the child's birth certificate. It is imperative to attempt to resolve all matters with the hospital ahead of time so that the intended parents are treated as *the* parents during the birth and after.

Along with the pre-birth order, it is essential to provide a written birth plan to the hospital. The written birth plan should clearly explain what the parties agreed to

under the gestational surrogacy contract. And it should be provided to the hospital early enough to make sure that the hospital understands the process.

The gestational agreement should set out that the gestational surrogate will do everything necessary to establish legal parentage in the intended parents if the baby is born before the parties can obtain a pre-birth order. In order to do that, the documents must state that the gestational surrogate will cooperate in any necessary legal proceedings, execute any necessary pleadings/related documents, accept jurisdiction/venue as determined by the intended parents (or their legal representative), participate in genetic testing to confirm the parentage of the child, and appear at any hearings required by the judge in the jurisdiction in which the case is filed.⁴⁵

Divorce Issues

What happens when a couple with unused embryos divorces? The number of frozen embryos in the United States is growing as people turn to fertility specialists,⁴⁶ so this is simply going to happen.

There are divorce cases nationwide addressing the issue of what to do when the parties separate with embryos left at their fertility clinics. Generally, when they begin the process of fertility treatment, couples do not focus on what happens if they get divorced. They should.

Sometimes the clinics will have proper forms to address this matter ahead of time which can give guidance if that issue occurs in the

future. Other times, the clinics, like the couple, are more focused on the couple's decision concerning their leftover embryos such as destruction, donation to science, or donation to another couple. The issue of consent at medical offices has been in controversy for years from state to state.⁴⁷

The biggest problems tend to occur years later when the couple splits and they are left with a decision as to whether someone will be allowed to use those embryos. Typically, courts across the United States start their analysis with the paperwork at the clinic, but as pointed out above, this issue is handled differently across states and considering different fact patterns. Further, it has been shown in at least one study that 71 percent of couples change their mind after signing the form at the clinic, but before they finish their fertility treatment.⁴⁸ Along with looking at the paperwork at the clinic, the courts consider whether the spouse seeking use of the embryos would be able to have a child without the use of the created embryos, often balancing the best interest of the parties. These approaches across the nation are referred to as "the balancing approach" and the "contract approach" with at least one court calling the latter the "preferred" approach.⁴⁹

Once again, our sister state of Tennessee paved the way on this issue. In *Davis v. Davis*, the Tennessee Supreme Court decided that when there is no clear embryo disposition agreement, the decision should be based on the best interest of the parties.⁵⁰ Most importantly, the court explained, "[o]rordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving

parenthood by means other than the use of the pre-embryos in question. If no other reasonable alternatives exist, the argument in favor of using the pre-embryos to achieve pregnancy should be considered..."⁵¹

Following this case, several courts made decisions leaning toward the idea that parties should be protected from procreating against one's will. Even if the parties had come to an agreement preparation in which the embryos could be used, a court in Massachusetts held that a party should not be forced to procreate against his or her will.⁵² Similarly, a New Jersey court ruled that when the parties did not have an agreement in regard to the embryos, the wife had a fundamental right not to procreate against her will.⁵³ In New York, its court of appeals, using the reasoning in *Davis*, ruled that written contracts between the parties concerning the embryos should be enforced.⁵⁴

Courts that use the balancing approach analyze differently. They will look at the medical reasoning and subsequent health issues following the creation of embryos. In a string of cases involving cancer treatment eradicating the ability for the female partner to achieve a viable pregnancy, the courts have been very sensitive to the issue.

In one case, where the parties had signed a form at the clinic during the creation of the embryos, and then the parties later entered into an oral agreement as to using the embryos to have a child, the court held that the oral agreement was enforceable.⁵⁵

In another case in which the parties did not come to any type of agreement, but the wife's only possible option to procreate was the use of the embryos created

during the marriage, the court, after using the balancing test created in *Davis*, came to the conclusion that the wife's right to procreate outweighed the father's right not to procreate against his will.⁵⁶

Most recently, Arizona adopted the balancing approach in *Terrell v. Torres*, and remanded a case back to the trial court in which the female donor had less than a 1 percent chance of becoming a parent if she were not able to use the embryos. That court held that the trial court did not weigh the interests correctly.⁵⁷ In short, her inability to become a parent without those embryos, despite the ability to adopt other embryos or seek other methods that would unlikely work, should prevail over the male donor's right not to become a parent against his will.⁵⁸

Conclusion

Attorneys who decide to venture into this area of the law need to understand the different areas of the law that apply and the issues that can arise in each area if the case has not been handled properly from the very first step. The process of using ART to create a child, due to the evolving medical science and expertise, has been ever-changing and expanding in both the medical and legal fields.

Most importantly, on top of having to navigate several areas of the law, representing a client in this area requires knowledge of the science behind the process as well. Despite the quick changes in the medical field, the law is a slower-moving entity that simply cannot keep up with the science. Although the science may provide the ability for a couple to have a

child, because the law is moving so slowly on this matter, it is very difficult to navigate the proper channels to achieve the couple's end goal: their child.

Family law practitioners need to know to look for these legal issues. We should make sure to address these matters in our prenuptial agreements and post-nuptial agreements. We should ask our clients about these matters before they begin divorce proceedings.

As lawyers in this field, we simply cannot ignore the science when so many people are utilizing ART to create families. ▲

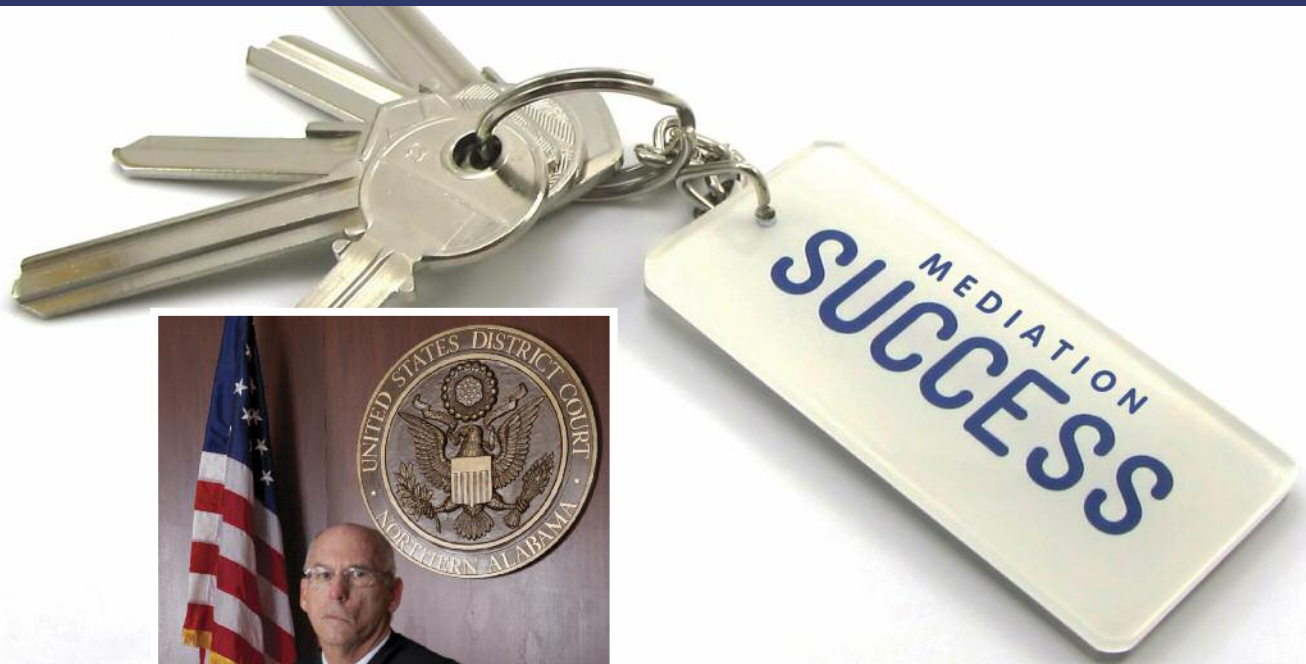
Endnotes

- Infertility 101, <https://resolve.org/infertility-101/what-is-infertility/fast-facts/> (last visited December 29, 2019).
- Alexander Quaas & Anuja Dakras, Diagnosis and Treatment of Unexplained Infertility, *Reviews in Obstetrics & Gynecology*, 2008 spring 1(2) 69-76 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2505167/>.
- Brady E. Hamilton et al., *Vital Statistics Rapid Relief Report No. 007*, (May 2019) <https://www.cdc.gov/nchs/data/vsrr/vsrr-007-508.pdf>.
- Ala. Code § 26-10A-34 (c) (2019).
- ABA Model Act on ART §102-12 (defining intended parents).
- Richard Vaughn & Stephanie Brinkley, *Developing a Successful Assisted Reproduction Technology Law Practice* 57-59 (2017).
- American Society for Reproductive Medicine, *Third-Party Reproduction: Sperm, Egg, and Embryo Donation and Surrogacy*, <https://www.reproductivefacts.org/news-and-publications/patient-fact-sheets-and-booklets/documents/fact-sheets-and-info-booklets/third-party-reproduction-sperm-egg-and-embryo-donation-and-surrogacy/> (last visited January 1, 2020).
- Resolve, *What Is IUI?* <https://resolve.org/what-are-my-options/treatment-options/what-is-iui/> (last visited December 28, 2019).
- Kass v. Kass*, 91 N.Y. 2d 554, 557 (Ct. App. N.Y. 1998) See also Maureen McBrien & Bruce Hale, *Assisted Reproductive Technology: A Lawyers Guide to Emerging Law and Science* at 87-112 (3d ed., 2018) (outlining the IVF procedure and explaining variations and advances in IVF, specifically the explanation of intracytoplasmic sperm injection ICSI).
- Infertility, <https://www.hopkinsmedicine.org/health/conditions-and-diseases/infertility> (last visited December 29, 2019).
- Quaas & Dukras *supra*, note ii.
- McBrien & Hale, *supra*, at 56-64.
- Ala. Code. § 26-17-702 (2019).
- McBrien & Hale *supra*, at 47-64.
- Id.* at 39.
- Id.* at 37.
- Ala. Code § 26-17-702 (2019) (specifying that a donor is not a father to a married woman's child).
- McBrien & Hale *supra*, 42-50.
- Ala. Code § 26-17-201(a) (2019) (outlining how maternity is determined).
- Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24, 210, 244 *Yale J.L. & Feminism* (2012). Available at <https://digitalcommons.law.yale.edu/yjlf/vol24/iss2/2>.
- McBrien & Hale, *supra*, at 138-139.
- Jayne Leonard, *How does the egg donation process work?*, *MEDICAL NEWS TODAY*, Mar. 29, 2019, <https://www.medicalnewstoday.com/articles/314750.php#what-to-expect>.
- Id.*
- Id.*
- Id.*
- Id.* See also Vaughn & Brinkley *supra*, at 57-59 (explaining how to draft donor contracts).
- Vaughn & Brinkley, *supra*, at 57-60.
- Id.* at 58.
- McBrien & Hale, *supra*, at 138. See also *Contract Law—Proper Procedure for the Termination of Parental Rights in Traditional Surrogacy Agreements—In re Baby*, 447 S.W.3d 807 (Tenn. 2014), 40 Am. J. Trial Advoc. 615.
- See Alabama Uniformed Parentage Act (2008) codified at §§ 26-17-101 to 26-17-905 Ala. Code § 26-17-801 Reserved. This reserved section describes the importance of replacing "Surrogate Mother" with "Gestational Mother" in contract language. See generally *Contract Law—Proper Procedure for the Termination of Parental Rights in Traditional Surrogacy Agreements—In re Baby*, 447 S.W.3d 807 (Tenn. 2014), 40 Am. J. Trial Advoc. 615. (citing Ala. Code § 26-17-801 which "reserve[s] Article 8 for future implementation of the Uniform Parentage Act's Gestational Carrier Agreement" as sufficient to describe Alabama as a "jurisdiction that expressly allows surrogacy practices but remains relent on aspects of pre-birth contracts").
- In re Baby*, 447 S.W.3d 807 (Tenn. 2014).
- Id.* at 812–813.
- Id.*
- Id.*
- McBrien & Hale, *supra*, at 139-140.
- Id.*
- Id.* at 140.
- Vaughn & Brinkley, *supra*, at 27.
- Ala. Code § 26-10A-34 (c) (2019).
- Ala. Code § 26-17-201 (2019) (outlining the process for determining maternity) (see also Ala. Code § 26-17-204 (2019) (outlining the process for determining paternity)).
- McBrien & Hale, *supra*, at 43-57.
- McBrien & Hale, *supra*, at 335-336.
- Note that since there are no laws governing surrogacy within Alabama, this process has been used by attorneys in order to provide the intended parents in our state the proper avenue to prove the parentage of their child. There are no specific laws explaining how to handle surrogacy cases, and the process is ever evolving considering judicial response, the Office of Vital Statistics, and individual attorney experiences.
- McBrien & Hale, *supra*, at 335-336.
- See Note xli.
- Tamar Lewin, *Industry Growth Leads to Leftover Embryos, Painful Choices*, *NEW YORK TIMES*, (Jun. 17 2015). <https://www.nytimes.com/2015/06/18/us/embryos-egg-donors-difficult-issues.html>.
- Davis v. Davis*, 842 S.W. 2d 588 (Tenn 1992). See also *Kass v. Kass*, 696 N.E.2d 174, 174 (Ct. App. N.Y. 1998), see also *Litowitz v. Litowitz*, 48 P.3d 261, 269 (Wash. 2002). *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1057 (Mass. 2000). (holding that these contracts were not binding when they did not indicate that they were binding and without a showing of intent by the parties).
- Christina L. Preville, *Collaborative Law in Pennsylvania and the Frozen Embryo Debate*, *J. ENVTL. PUB. HEALTH L.* 80, 90 (2013).
- Terrell v. Torres*, 438 P.3d 681, 687 (2019).
- Davis v. Davis*, 842 S.W. 2d 588 (Tenn. 1992).
- Id.* at 604.
- A.Z. v. B.Z.*, 725 N.E. 2d 1051 (Mass. 2000).
- J.B. v. M.B. and C.C.*, 783 A. 2d 707 (N.J. 2001).
- Kass*, 91 N.Y.2d at 174.
- Szafranski v. Duston*, 34 N.E. 2d 1132 (IL. Appl. 2015).
- Reber v. Reiss*, 42 A.2. 1131 (Pa. Super. Ct. 2012).
- Terrell*, 438 P. 3d at 692.
- Id.*

AshLeigh M. Dunham



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The Keys to the Mediation Success of Chief Magistrate Judge John E. Ott

By Bert S. Nettles

Imagine a 98 percent success record

on a mediator's 100+ mediations in his first two years on the job.¹

This impressive record belonged to Judge John E. Ott, who, at the time, was also attending to significant other tasks after being appointed in 1998 as a magistrate judge for the U.S. District Court for the Northern District of Alabama.² Back in 1998, the mediation process was a relatively new procedure designed to enable parties to obtain a mutually satisfactory, risk-free, quicker, and less expensive resolution of legal disputes. Mediations also reduced the number of jury trials.³

Judge Ott had previously served 15 years as a prosecutor and later as chief of the criminal division of the U.S. Attorney's office in the Northern District. Upon becoming a magistrate judge, he wanted to gain experience in civil litigation. So Judge Ott asked U.S. District Court judges to assign their civil cases to him for mediation.

Although Judge Ott estimates his mediation success rate after those first two remarkable years has slightly decreased for the approximately 700 additional mediations he has since handled, it has remained phenomenally high. The result has been a win-win for both litigants and judges.

Judge Ott's Self-Described Mediation Strategies

Judge Ott's mediations have ranged from the more than \$1,000,000,000 Jefferson County bond issue dispute mediated in New York City with over 100 lawyers in attendance, to a case involving only \$800. He has been mediating a prison case for the past three and a half years.

Judge Ott explains that each mediation is unique. He relies heavily upon the documents and position statements that he received before the mediation. He urges counsel to be candid in outlining the key facts and to discuss both the strong and weak points of their client's case. Prior to the mediation, Judge Ott often talks with his law clerks to analyze anticipated issues, and he sometimes consults with other magistrate judges.

At the beginning of the mediation, he explains the rules to the parties and the lawyers, including how offers are to be exchanged. He finds opening statements counter-productive, so he generally does not allow them. Lawyers are cautioned to avoid creating unrealistic expectations with their clients as to the facts and law. Judge Ott advises counsel to alert the mediator to potential impediments to settlement, both personal and otherwise. Apart from going to the restroom or ordering food, everyone must stay in their assigned rooms until the mediation ends.

Judge Ott tries to be a good listener, and he asks that of the lawyers, too. They should not tune out the other side, and no one should get hung up on little things. He attempts to determine what is important and to build credibility and trust from the outset. He tells the parties, "Talk with me. This is what I know about the facts. Fill in the blanks for me." Judge Ott stresses that patience is a necessity.

Although he is famous for having long mediations, he says that his average successful mediation lasts only three to four hours. He searches for the "sweet spot," the best means of moving the parties to resolution, and if he can find it early, the process usually ends quickly.

Though he strives to avoid any appearance of dictating, after he knows the facts and the parties reasonably well, he will generally make recommendations. Sometimes these will be strong recommendations. He often reminds the parties that his experience in trying 150 to 170 jury trials provides a solid foundation for his recommendations. For mediators in private practice, he advises, "You are paying me, so you need to consider my opinion. I have no reason to lie to you."

He carefully explains the time and expense of litigation, and the uncertainty of going forward, surviving pre-trial motions, followed by the tension of the trial itself, and finally a possible appeal. He warns of the personal stress throughout on the parties involved. He sometimes even takes the parties into his courtroom to explain how a trial will unfold.

He believes a mediator should project confidence with the negotiations, but strive to not be overbearing.

Judge Ott advises mediations are usually best held after each side has conducted enough discovery of their opponent's case (and their own). That can be early, late, in the midst of trial, or while the case is on appeal.

Judge Ott urges balance: "Don't bring 10 boxes of materials to the mediation, but likewise don't leave key documents at the office. Know what you might need. Also, be sure to bring the right people with the ultimate authority to settle."

At the conclusion of the mediation, it is important to obtain an enforceable agreement with all material terms signed by the parties and their lawyers.

When a mediation is successful, he enjoys seeing the satisfied expressions on the parties' faces when they realize that the case is over and they can move on with their lives. He believes that the best sign of a fair and good result is when neither party is completely happy with the outcome.

There are some cases that should settle, but do not. Judge Ott recalls when he told a plaintiff that he strongly believed the trial judge would grant a summary judgment against her, but the plaintiff unfortunately refused the last reasonable offer of the defendant and then lost the case on summary judgment.

He believes that the best sign of a fair and good result is when neither party is completely happy with the outcome.

An Early Predictor of Things to Come

Donald B. Sweeny, Jr., a recently retired Birmingham lawyer, recalls his first mediation with Judge Ott. It was a Title IX gender discrimination case pitting a girls' softball program against a public school football program. The issues in the case were varied and multiple, involving some 62 separate and distinct allegations of disparate treatment and discrimination. Given the bitterly entrenched respective positions of the parties, a successful mediation seemed unlikely.

At the threshold of that mediation, Judge Ott assured everyone that he wanted to help the parties settle. He told everyone that he had read all that they had submitted and studied the case law and the reported cases on the subject. He then told the lawyers, "You are here to respect and advance your clients' interests, but you have agreed to mediate as officers of the court, and I want you to be steadfast in your commitment to embrace this opportunity to reach a settlement no matter how long it takes or how intractable the differences appear to be."

Judge Ott listened to the parties, let them vent, and assured them he understood their contentions. He then eased the focus away from the acrimony between the parties and reframed the issues for productive discussion.

Sweeney said that over the 26 hours of negotiations Judge Ott let the parties know what their lives would be like if the case did not settle, outlining the costs and risks of litigation, the burdens and trauma of depositions and trial, and the disruption and disharmony for the teams, school, and community. Basically, he showed them the cost of bitter litigation.

By using stark contrast, he created the environment for the parties to embrace the eventual mediated settlement.

Other Mediation Experiences

Huntsville lawyer J.R. Brooks represented the Huntsville City Board of Education in a unitary school case that he successfully mediated before Judge Ott from 2014 to 2015. The mediation took six months and 25 to 30 meetings. All the multiple and complex issues involving 38 Huntsville schools, faculty and students,

assignments, transportation, faculties, discipline, and equal opportunities finally resulted in a recommended consent order approved without change by U.S. District Judge Madeline H. Haikala. Brooks describes that result as the most complete unitary consent order of all the many approved nationally—which he says was primarily the result of Judge Ott's superb handling.

Lane Woodke, an assistant U.S. Attorney and chief of the civil division for the Northern District of Alabama, describes Judge Ott in mediation as "tenacious, completely unrelenting in his pursuit of the middle. He won't accept 'no.'" Woodke adds that Judge Ott "has the ability to say where you are right and where you are wrong, and does it nicely with the parties as well as the lawyers. He studies the facts and knows them."

"Tenacious" is also the adjective used by Birmingham attorneys Dan Sparks, Rod Nelson, and Gerald Gillespy. Sparks says of his three mediations (all successful) before Judge Ott, the earliest Sparks left the mediation was 1:15 a.m. the following morning. Sparks's longest mediation lasted until 3:00 a.m. As long as there is a glimmer of hope, Judge Ott will insist that the mediation continue, explaining that such perseverance generally pays off.

Nelson mentioned a serious mediation that started on the Wednesday morning before Thanksgiving. At 5:30 p.m. Judge Ott stated that he thought there was some progress and he would have food delivered. Settlement was eventually reached at 11:45 that night, and all involved were able to enjoy their Thanksgiving.

Gillespy describes Judge Ott as professional and efficient, as well as willing to candidly assess and articulate strengths and weaknesses of the case to everyone. Gillespy says that Judge Ott is able to diplomatically tell a party or counsel if they are being unreasonable and then deftly move the parties toward resolution.

Conclusion

As Chicago lawyer Gary D. McCallister says, "Chief Magistrate Judge Ott exemplifies the type of judge trial lawyers in complex litigation hope to have mediate their cases as he is the first in line to roll up his sleeves, take on immensely challenging issues, and creatively weave the fabric necessary for accomplishing a settlement."

Senior U.S. District Judge Sharon L. Blackburn of the Northern District of Alabama says, "There are inadequate superlatives to describe Judge Ott as a per-

son, lawyer, judge, and mediator. He is quite simply the best of the best. I and my colleagues have asked him to mediate some of our most difficult cases, which he has diligently and tirelessly worked to resolve. Judge Ott is uniquely qualified to serve as a mediator given his extensive knowledge and experience, as well as his unflappable good nature. He has a very special gift for helping parties find and work toward a mutually beneficial resolution to their disputes. The numerous mediation agreements reached with his assistance have saved the parties the time and money of a trial, and these agreements have conserved the court's limited resources."

When Judge Ott retires in June 2020, the bench and bar will lose a pioneering mediation legend. However, by observing his successful mediation advice and strategies, his legacy will be preserved. ▲

Endnotes

1. The Alabama Center for Dispute Resolution notes a 76 percent settlement rate in 2018 for mediations conducted by Alabama registered mediators.
2. Judge Ott was named chief magistrate judge in 2012.
3. Court records show that the number of civil jury trials in the U.S. District Court for the Northern District of Alabama over the past 12 years have steadily decreased from a high of 36 in 2007 to only 14 in 2018.

Bert S. Nettles



Bert Nettles recently retired from a primarily litigation law practice in Birmingham, and now is affiliated with The Neutral Solution, where he focuses on providing mediation and arbitration services.



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A Tort Defense In Crisis?

The Defense That Is the Alabama Workers' Compensation Act

By Lawrence T. King

Overview

Sometimes it seems like workers' compensation law just trots along under the radar, never getting the news attention of a given week's \$120 million verdict or the latest ruling about some Washington scandal. But every once in a while, something happens and folks take notice.

On May 8, 2017, the earth beneath the feet of practitioners of personal injury and workers' compensation law shook a little bit. On that date, Jefferson County, Alabama Circuit Court Judge Pat Ballard found that the "[$\$220$ per week] cap [for permanent partial disability benefits] set forth in [Alabama Code] \S 25-5-68 is unconstitutional under the Equal Protection Clause of the Four-

teenth Amendment to the Constitution of the United States," that the same cap "is unconstitutional under Article 1, \S 13, of the Constitution of Alabama (1901)," that the cap on claimants' attorneys' fees set forth in \S 25-5-90(a) "fails to afford due process of the law" under the state and federal constitutions, and that the attorneys' fee cap "is unconstitutional under Alabama's constitutional guaranty of separation of powers" pursuant to Alabama Constitution (1901), \S 43.¹

Judge Ballard wrote: "Because the Court finds those statutes to be unconstitutional, the entire Workers' Compensation Act is declared unconstitutional because of the non-severability statute (Alabama Code \S 25-5-17) inserted into the Act by the Legislature in 1984."²

That court observed that if the Worker's Compensation Act were to be held unconstitutional, that "[e]mployers will face tort lawsuits upon the occurrence of industrial [accidents], subjecting them and co-workers of the injured victim[s] to lawsuits for compensatory and punitive damages available within the confines of the common law."³

Although that ruling was stayed and the case later settled before either the ruling was implemented or appellate review had, those familiar with litigation in this area of Alabama law fully expect further constitutional challenges to be forthcoming, in state court, federal court, or both.⁴ And it is in that regard that the first true essence of what the Workers' Compensation Act is comes most sharply into

focus: a defense to tort actions, given that the Act in most instances is the exclusive remedy against employers for workers injured in industrial accidents.⁵

The “Exclusivity Provisions” of the Alabama Workers’ Compensation Act

Immunity for employers from tort liability in the event of industrial accidents injuring or killing employees is codified in two places. In § 25-5-52:

Except as provided in this chapter, no employee of any employer subject to this chapter, nor the personal representative, surviving spouse, or next of kin of the employee shall have a right to any other method, form, or amount of compensation or damages for an injury or death occasioned by an accident or occupational disease proximately resulting from and while engaged in the actual performance of the duties of his or her employment and from a cause originating in such employment or determination thereof.

And in § 25-5-53:

The rights and remedies granted in this chapter to an employee shall exclude all other rights and remedies of the employee, his or her personal representative, parent, dependent, or next of kin, at common law, by statute, or otherwise on account of injury, loss of services, or death. Except as provided in this chapter, no employer shall be

held civilly liable for personal injury to or death of the employer’s employee, for purposes of this chapter, whose injury or death is due to an accident or occupational disease while engaged in the service or business of the employer, the cause of which accident or occupational disease originates in the employment.

Those few words, lodged into two statutes now so ingrained as an academic concept as to be obscure as actual citations to most practitioners most of the time, are all that stand between an injured worker being able to successfully sue his employer under common law theories of negligence or wantonness for injuries sustained in a work accident. To phrase it alternatively, those few words are the difference between an injured worker being relegated to receiving the benefits available under the Workers’ Compensation Act versus compensation for pain and suffering, mental anguish, lost wages, loss of ability to earn, and, perhaps, punitive damages.

The Fair Price That Must Constitutionally Be Paid for the Immunity Conveyed by the Exclusivity Provisions

At the common law, employers of workers injured in the course of their employment could—and often did—face negligence lawsuits for tort damages. There is no question that the legislature can abolish common law remedies if it wants to do so.⁶ But there are constitutional requirements to consider in deciding whether the abolition of

common law remedies can live harmoniously with the Alabama Constitution’s guarantee of a remedy.⁷

Under the common-law-rights approach to testing the constitutional validity of legislative enactments, common law rights can be legislatively abrogated either to ameliorate social evils, or where “exchange[d] for equivalent benefits or protection.”⁸ Given the evident paucity of social evil sought to be ameliorated by the Workers’ Compensation Act, the search for equivalent benefits to those offered by the common law must be undertaken. At least with the current co-employee law, for example, where no remedy exists against a co-employee for causing workplace injuries except for certain types of intentionally tortious conduct, there is equivalent mutuality of immunity among co-employees to sustain the limitations on co-employee lawsuits.⁹ But perhaps the same cannot be said for many other concepts presently embodied in Alabama’s Workers’ Compensation Act.

Judge Ballard, in his ruling holding the Act unconstitutional in the *Clower* litigation, wrote to the \$220 cap on permanent partial disability benefits fixed by the § 25-5-68.¹⁰ That cap became law for all permanently partially disabling injuries occurring after February 1, 1985 as the result of legislation passed in the Second Special Session of 1984-85.¹¹ Judge Ballard noted that the \$220 cap, when passed, exceeded the minimum wage and transcended the poverty level for a family of four; it no longer does either.¹² Coupled with the subsequent diminution of medical rights under the Act (such as rights to deny medical treatment via utilization review,¹³ or capping the time within which injured

workers may seek reimbursement for mileage expense connected with medical treatment¹⁴), one readily sees why even the casual observer has grave difficulty swallowing that the Act in its present form provides anything near what it did circa 1985, particularly when the \$220 cap annually erodes in value even further given annual increases in Alabamians' wage-earning capability.¹⁵

And yet the tort immunity continues seemingly iron-clad for employers for the injuries workers sustain in the course of their employment, despite the fact that the cost for obtaining the immunity, in real dollars paid to the permanently partially disabled worker, is lessening every year. To the extent that a workers' compensation act is referred to as a grand bargain of American society,¹⁶ and to the extent that one might rightfully expect the trade-off for an "injury done" in the lexicon of Section 13 of the Constitution (1901) of Alabama would be something equivalent or virtually so, serious re-examination of how we have permitted ourselves to be governed in this context might very well be sorely overdue.¹⁷

What Do Employers Face without the Immunity Conferred By the Exclusivity Provisions?

The short answer to that question is "probably a lot of trouble."

Once upon a time in Alabama the Workers' Compensation Act was truly elective, and employees and employers could simply opt out and play by the rules of common law. But even the late Justice Richard L.

"Red" Jones once observed, on the occasion of a majority of the Supreme Court of Alabama upholding the constitutionality of the statute granting immunity to an injured claimant's co-employees except in the cases of willful conduct now codified at §§ 25-5-11(c)(1) and (c)(2), that:

It is preposterous to suggest at this late date that constitutionality of either the original Workmen's Compensation Act or the subject amendment rests upon the right of the employee to elect not to be covered by the act. Notwithstanding the weight earlier given by the courts to this contractual doctrine in holding the workmen's compensation acts constitutional, over a half century of experience has shown that the "right to elect," at least from the employee's standpoint, was never more than an empty, impractical legal fiction. Indeed, I have found no reported Alabama cases in which an employee has successfully exercised the right to opt out of the act's coverage, and only one in which the employer (to its dismay) was held to have effectively elected not to be covered.¹⁸

In *Reed v. Brunson*, the Supreme Court of Alabama upheld the version of the co-employee law under which we practice still today. In rejecting a challenge to that statute under Section 13 of the Constitution of Alabama, that court found adequate quid pro quo to sustain the law. In co-employee litigation, claims brought under the common law, "with its attendant uncertainties of amount and time, can be relinquished in exchange for the

certainty of the remedy provided by the Workmen's Compensation Act for such personal injuries."¹⁹ That "this for that," coupled with the facts that some remedy remained (for intentional conduct) and that relinquishing the right to sue a co-worker for negligence or wantonness brought with it the corresponding right in claimants to remain immune from such suits brought by co-workers, provided the supreme court with all it needed to sustain the statute on that particular ground of constitutional attack.

But what if the entirety of the Act falls—because a single statute does not pass constitutional muster? To the stakeholders, that question is of critical importance—because the Act is comprised of dozens of statutes, and if a single word of a single statute fails constitutional validity, the entire Act

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crumbles.²⁰ If the Act falls, the defense of immunity—the exclusive remedy defense of workers’ compensation—falls away with it. And Alabama law has borne witness to what can befall an employer who no longer has the immunity defense available. In a case involving awful injuries to a logger injured at work, and involving an employer which had opted out of participating in the Workers’ Compensation Act then in effect, the law held to apply was this—and it is law far more favorable in practice to the worker than to the employer:

It is familiar law that where a servant or agent has been entrusted by the master with superintendence of work and other employees engaged in the work, it is negligence for such superintendent to create or allow such conditions of things

to exist in respect to such work and the men under him, as will render an accident probable through the means, even of an intervening agency, which due care on his part might have foreseen. *Sloss-Sheffield Steel & Iron Co. v. Green*, 159 Ala. 178, 49 So. 301; *Tennessee Coal, Iron & R. R. Co. v. George*, 161 Ala. 421, 49 So. 681; *Dresser’s Employment Liability*, page 290, § 63; *Crowley v. Cutting*, 165 Mass. 436, 43 N.E. 197; *Going, pro. ami, v. Alabama Steel & Wire Co.*, 141 Ala. 537, 37 So. 784.

So, also, it is the common law duty of the master to supply for the use of the servant, and keep “in proper condition tools, implements and appliances necessary and reasonably adequate” to carry on the master’s business, and that such duty is nondelegable, and tools, implements and appliances so furnished for general or permanent use are part of the plant, within the meaning of subdivision 1 of the Employer’s Liability Act Code 1940, Tit. 26, § 326, *Sloss-Sheffield Steel & Iron Co. v. Mobley, Adm’x*, 139 Ala. 425, 36 So. 181; *Gulf States Steel Co. v. Jones*, 203 Ala. 450, 83 So. 356, 23 A.L.R. 702; *Standard Cooperage Co. v. Dearman*, 204 Ala. 553, 86 So. 537; *Tennessee Coal, Iron & R. R. Co. v. Wiggins*, 198 Ala. 346, 73 So. 516; *Huyck v. McNerney*, 163 Ala. 244, 50 So. 926.

Belcher v. Chapman, 242 Ala. 653, 7 So. 2d 859, 863 (1942).

It takes little imagination to conjure the sorts of tort litigation that can and will result if employers are

left without the benefit of an immunity defense: “you didn’t give me the right tools,” or “my supervisor didn’t train me how to do that.” And that immunity defense will last only as long as it is part of a Workers’ Compensation Act that stands on sound constitutional footing.

What Is the Extent of Protection at this Moment of the Immunity Conferred By the “Exclusivity Provisions”?

For the most part, at the moment, employers²¹ of workers injured in workplace accidents enjoy immunity from tort claims for the injuries (and the consequences of those injuries) occurring in the course and scope of employment. However, problems for employers still can and do arise around the edges of that general proposition.

Before getting to the edges, examination of the center of the issue merits attention. Where, for example, a worker seeks to attribute tort liability to an employer for injuries occurring *in the workplace*, even on allegations that the employer merits liability for having intentionally caused injuries in violation of a duty to provide a safe workplace, for intentionally failing to supervise and train the injured worker’s co-employees, or for intentionally controlling the manner of work in an unsafe manner, the immunity provisions are held to firmly hold.²² Even alleging that injuries occurring in the workplace were due to the employer’s outrageous conduct usually are held to reach a similar fate.²³

But very recently, the Supreme

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Court of Alabama refused to extend the field of operation of the immunity conferred by the exclusivity provisions to a situation where the worker alleged that he had sustained physical “injuries occurring independently after the workplace accident.”²⁴ In *Ex parte Burkes Mechanical, Inc.*, Alessie McCoy was employed by Burkes Mechanical at a job site owned and operated by International Paper. McCoy was severely burned in a welding mishap which ignited the air around him. Following the accident which caused injury, McCoy alleged that Burkes was negligent and wanton by not notifying International Paper—which had an emergency medical response team—by failing to summon an ambulance, by permitting another of its employees to spray an improper substance on the burns, and by permitting an employee to drive him in a private vehicle to multiple facilities that were not equipped to treat McCoy’s injuries. The trial court denied Burkes’s motion to dismiss, which asserted the immunity of the exclusivity provisions, and the Supreme Court of Alabama refused to disturb that ruling. In so doing, the supreme court agreed with McCoy’s argument that his claims against his employer were “based on conduct and resulting injuries occurring independently after the workplace accident,” which caused “aggravated pain, suffering, and mental anguish.” The court concluded:

Whether McCoy’s claims relate to injuries that actually arose out of his employment or whether McCoy’s claims relate to activities that are “too tenuous to bring the later activities under the coverage” of the Act, *Lowman*, 547 So.

2d at 93, is a fact-intensive inquiry. Considering the allegations in McCoy’s complaint most strongly in McCoy’s favor, as we must, we conclude that the trial court could have determined that McCoy’s negligence and wantonness claims did not arise from “an accident proximately resulting from, and that occurred while the employee was engaged in, the actual performance of the duties of his or her employment.” *Ex parte Shelby Cty. Health Care Auth.*, 850 So. 2d 332, 338 (Ala. 2002).


The exclusivity provisions, however, are virtually impenetrable within their proper field of operation, so employer immunity stands strongly.

Despite those statutes, there are, of course, certain limited cases to which the Act’s exclusive-remedy provisions have been held not to apply. For example, if an employee is injured, but not as a result of an accident arising out of and in the course of his or her employment, the Act is without application. Thus, an employer’s “intentional tortious conduct, such as intentional fraud, ‘committed beyond the bounds of the employer’s proper role,’ is actionable notwithstanding the exclusivity provisions of the [Act].” *Hobbs v. Alabama Power Co.*, 775 So. 2d 783, 786 (Ala. 2000) (quoting *Lowman v. Piedmont Executive Shirt Mfg. Co.*, 547 So. 2d 90, 95 (Ala. 1989)). Similarly, if an employer’s wrongful conduct, rather than injuring an employee, injures an employee’s

unborn child, a personal-injury action brought by or on behalf of the child is not barred by the exclusivity provisions of the Act. *Namislo v. Akzo Chems., Inc.*, 620 So. 2d 573, 575 (Ala. 1993).

Beard v. Mobile Press Register, 908 So. 2d 932, 936 (Ala. Civ. App. 2004). And into the edges the law goes.

Mildred Lowman alleged that she was told a lie about workers’ compensation coverage by her employer while in a hospital bed following a work injury; the employer had no immunity for damages caused by its intentional fraud.²⁵ Rhonda Barr was deceived by the workers’ compensation claims adjusters who refused to disclose to her what needed to be done in order for the adjuster to comply with a referral from the au-



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thorized treating doctor to a pain management physician.²⁶ Robert McDonald faced years of hassle getting recommended treatment from authorized doctors scheduled by his workers' comp adjusters, all in the face of unpaid medical bills which clearly were the responsibility of the workers' compensation insurance company to pay, and all during repeated demands by the insurer that he settle his case closing out his entitlement to having future medical benefits paid; finding the whole ordeal outrageous, the Supreme Court of Alabama upheld a judgment based on a \$750,000 jury verdict.²⁷ In each case, the immunity of the exclusivity provisions was held inapplicable.

Lowman, Barr, and McDonald all involved matters that didn't cause an injury as the result of an accident occurring in the course of employment; rather, they all involved injury as the result of intentional conduct that didn't occur in the course of employment but as part of the claims-handling process that antedated the work injury. And that is where the line is drawn—immunity on one side, no immunity on the other.²⁸

Because of where that line is drawn, other intentional torts committed at work may not entitle employers to immunity, either. Firing a worker solely for seeking workers' compensation benefits is an express remedy created by the Act itself.²⁹ *Henry v. Georgia Pacific Corp.*, 730 So. 2d 119 (Ala. 1998), and *Cunningham v. Dabbs*, 703 So. 2d 979 (Ala.Civ.App.), *cert. denied*, 703 So. 2d 986 (Ala.1997), both are cases where the tort of outrage was bound for jury determination on allegations of sexual harassment. Even the conduct of nurse case managers, although perhaps not committed at the injured

worker's workplace, can subject them to liability,³⁰ and because the employer has the statutory obligation to fund medical treatment in compensable cases (even if ostensibly delegated to workers' compensation insurers),³¹ envisioning that the misconduct of nurse case managers can be attributable to employers or their insurers is probably not a stretch.

Where employers step across the line and act intentionally in ways that harm the worker after the occurrence of an injurious workplace accident, it is easily observed that immunity should not attach; the quid of having a remedy for harms that befall workers in the workplace should not extend the quo to conduct that didn't cause the injury but appertained to the handling of the claim or to matters not causative of the underlying injury. Nevertheless, the immunity conferred by the exclusivity provisions of the Alabama Workers' Compensation Act is an incredibly potent defense in the employer's arsenal.

Conclusion

Before it is anything else in the world, the Alabama Workers' Compensation Act is a defense, one that provides virtually unending tort immunity to employers for injuries befalling their workers as the result of workplace accidents. That barrier is the very reason that the tort alternative of benefits available to the injured worker exists. The exclusivity provisions of the Alabama Workers' Compensation Act, however, will not be held to extend to intentionally harmful conduct inflicted by employers or their insurers after the occurrence of the injurious workplace accident—despite the fact that the occasion for acting would not have

sprung to life in the absence of a workplace accident nor do they extend to negligence that causes injury after the occurrence of the workplace accident.

It is the fact that the exclusivity provisions that confer employers' immunity block a large number of otherwise viable tort claims that underscore the importance of a constitutionally vital scheme of workers' compensation laws, carefully calibrated as an adequate "quid pro quo" fair to both sides as a meaningful alternative to the parties' respective rights at common law. ▲

Endnotes

1. *Clower v. CVS Caremark Corp.*, Jefferson County, Alabama, Case No. 2013-904687 (order of May 8, 2017) (holding that the regulation of attorneys' fees was historically a power held exclusively by the judiciary, and that legislative intrusion broke the wall separating two coordinate branches of our government).
2. *Id.* at 2.
3. *Id.* at 27-28.
4. "Reform through recommendations of the [Alabama State Bar] Task Force is far preferable than facing an onslaught of *Clower v. CVS* decisions in courts across Alabama that ultimately will land in the appellate courts. The plaintiffs' bar has openly advised the Task Force and all levels of the workers' compensation system that '*Clower* was only the first case of many to come' if reform is not seen. . . ." J. Walston, "Update on the Proposed Reform to Alabama's Workers' Compensation Act," *Journal of the Alabama Defense Lawyers Association* 8, 10 (spring 2019).
5. *Ex parte Ultratec Special Effects, Inc.*, ___ So. 3d ___ ([Ms. 1180180, Ala., 11-8-19] Ala. 2019); §§ 25-5-52, -53; see also § 25-5-14 ("The intent of the Legislature is to provide complete immunity to employers. . .").
6. To ameliorate perceived social evils, for example, the legislature constitutionally put a stop to lawsuits based on alienation of affections, *Young v. Young*, 184 So. 2d 187, 236 So. 627 (1938). But an extraordinarily small amount of the Alabama Workers' Compensation Act concerns itself with ameliorating social evils.
7. Section 13 of the Constitution (1901) of Alabama provides in pertinent part that "every person, for any injury done him, . . . shall have a remedy. . ."
8. *Reed v. Brunson*, 527 So. 2d 102, 115 (Ala.1988)(citations omitted).
9. Liability of co-employees is governed by § 25-5-11(c), which permits a remedy to the injured worker if and only if the co-employee had a specific purpose of injuring the claimant, or intentionally removed a safety guard or safety device provided by the manufacturer of

a machine from the machine with knowledge that injury would likely result, or caused injury while intoxicated, or caused injury by violating a written safety rule under certain circumstances. The legislature positively identified a “social evil” attending co-employee litigation, contending that “actions filed on behalf of injured employees against employees . . . of the same employer seeking to recover damages in excess of amounts received or receivable from the employer under the workers’ compensation statutes of this state and predicated upon claimed negligent or wanton conduct . . . are contrary to the intent of the Legislature in adopting a comprehensive workers’ compensation scheme and are producing a debilitating and adverse effect upon effort to retain existing, and to attract new industry to this state.” § 25-5-14.

10. The Supreme Court of the United States, in its first decision passing on the constitutionality of a workers’ compensation system, left very open the right of the judiciary to be “troubled” at the disparity between the amount of compensation due on the one hand, and the rights given up on the other. “This, of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.” *N.Y. Cent. RR. Co. v. White*, 243 U.S. 188, 205-06 (1917).
11. See generally *Reed*, 527 So. 2d at 112. Steve Ford, longtime practitioner in Tuscaloosa, a partner of the author’s, and himself the author (along with the late Robert W. Lee) of a standard treatise on Alabama workers’ compensation law, holds that those negotiating the “\$220 cap” had every intention of “indexing” that cap, such that it rose and fell in relation to the state’s average weekly wage, but that the final draft didn’t incorporate that provision; once it passed, Mr. Ford relates, those who negotiated it decided to “fix it next year.” Unfortunately, everyone apparently got busy with other things and forgot, and there the ugly toad has sat for approaching four decades.
12. *Clower Order*, supra n. 2, at 8.
13. See generally Ala. Admin. Code, r. 480-5-5-.07.
14. Ala. Admin. Code, r. 480-5-5-.36(4).
15. Judge Ballard also held that the statute capping the fees of claimants’ lawyers at 15 percent, found at § 25-5-90, was also unconstitutional in violation of Alabama’s constitutional requirement of separation of power between the judicial and legislative branches.
16. The phrase “grand bargain” apparently did not enter the workers’ compensation lexicon until 2009. Credit Justice Bryan Morris of the Montana Supreme Court:

“The workers’ compensation system in Montana constitutes a grand bargain in which injured workers forego the possibility of larger award potentially available through the tort system (the quid) in exchange for a no fault system that provides more certainty of an award (the quo).”

Satterlee v. Lumbermen’s Mutual Casualty Co., 353 Mont. 265, 285, 220 P.3d 566, 579 (Mont. 2009).
17. Even the Alabama Council of Association Workers’ Compensation Self Insurers Funds has publicly stated that it

“is always willing to work with any group to make meaningful and fair improvements to Alabama’s workers’ compensation law.” R. Davis, “Statement of Opposition to Alabama State Bar Association’s Workers’ Compensation Legislation,” *Journal of the Alabama Defense Lawyers Association* 8, 10 (spring 2019).

18. *Reed v. Brunson*, 527 So. 2d 102, 121 n. 2 (Ala.1988) (Jones, J., concurring).
19. *Reed*, 527 So. 2d at 115.
20. Ironic as it may seem, the non-severability statute now codified as § 25-5-17 was a chip demanded and received by the “employer side” of the negotiations in the Second Special Session of 1984-85. The legislature had enacted a law that prohibited “co-employee lawsuits” altogether, and the Supreme Court of Alabama held that legislative unconstitutional in *Grantham v. Denke*, 359 So. 2d 785 (Ala.1978). In order to dissuade further constitutional challenges, when what is now the present “co-employee statute” passed in that Second Special Session that permitted “co-employee lawsuits”—but only for intentional conduct, the “employer side” negotiated into the law the non-severability statute which meant that any successful constitutional challenge of the new “co-employee statute” would result in every worker in Alabama losing the entirety of the Workers’ Compensation Act. Perhaps it wasn’t foreseen that the annually-eroding value that is the “\$220 cap” was not foreseen to be a potential problem for the “employer side,” given that now, the attraction of tort lawsuits in lieu of a benefit meager to a great many might make constitutional challenges by the “worker side” worthwhile. In any event, with the entirety of the Act on the line, the Supreme Court of Alabama in *Reed* upheld the constitutionality of the new “co-employee statute” under which we practice still today—but as Justice Jones pointed out, the “quid pro quo” was met by authorizing at least a remedy as against co-employees, plus lengthening the statute of limitations for workers’ comp cases, plus increasing benefits (to \$220 for permanent partial disability)! *Reed*, 527 So. 2d at 121 (Jones, J. concurring).
21. For a fascinating case involving unsuccessful efforts in a variety of ways by an employer’s “parent company” to claim the immunity of the exclusivity provisions when sued for negligence and wantonness by the administrators of the estates of two workers killed in an explosion, see *Ex parte Ultratec Special Effects, Inc.*, ___ So. 3d ___ (Ms. 1180180 & 1180183, Ala., 11-8-19] Ala. 2019) (plurality opinion by Bolin, J., joined by Parker, C.J.; Mendheim and Stewart, JJ., concurred in the result; Shaw, Brian, and Sellers, JJ., dissented; and Wise and Mitchell, JJ., recused).
22. *Ex parte Progress Services Rail Corp.*, 869 So. 2d 459 (Ala.2003).
23. *Ex parte Rock Wool Mfg. Co.*, 202 So. 3d 669 (Ala. 2016). Consider, too, *Hudson v. Renosol Seating, LLC*, 73 So. 3d 1267 (Ala. Civ. App. 2011) (discussing in detail the holding in *Ex parte Progress Rail Services*, and ruling that the exclusivity provisions cannot be overcome merely by alleging that the employer injured the worker “willfully” or “intentionally”).
24. *Ex parte Burkes Mechanical, Inc.*, ___ So. 3d ___ (Ms. 1180402, Ala., 12-6-19] Ala. 2019) (plurality opinion authored by Stewart, J., joined by Parker, C.J., and Bolin

and Wise, JJ.; Shaw, Brian, and Sellers, JJ., concurred in the result; Mendheim and Mitchell, JJ., concurred in another part of the holding, and dissented from the holding under discussion).

25. *Lowman v Piedmont Exec. Shirt Mfg. Co.*, 547 So. 2d 90 (Ala.1989).
26. *ITT Specialty Risk Servs., Inc. v. Barr*, 842 So. 2d 638 (Ala.2002).
27. *Continental Cas. Ins. Co. v. McDonald*, 567 So. 2d 1208 (Ala.1990). Consider, too, the holding of the Court of Civil Appeals of Alabama in *Swain v. AIG Claims, Inc.*, ___ So. 3d ___ (Ms. 2180336, Ala. Civ. App., 10-18-19] Ala. Civ. App. 2019), reversing the dismissal, pursuant to Rule 12(b)(6), A. R. Civ. P., of a claim against a workers’ compensation carrier based upon the torts of outrage, intentional fraud, and suppression; while lengthy and fact-specific, the appellate court’s ruling was squarely on the merits as opposed to procedural nicety.
28. See generally *King, Testing the Exclusivity Provision of the Alabama Workmen’s Compensation Act*, 11 Am. J. Trial Advoc. 121 (1987) (cited with approval, *Busby v. Truswal Sys., Inc.*, 551 So. 2d 322 (Ala.1989)(majority opinion), and *Lowman v. Piedmont Exec. Shirt Mfg.*, 547 So. 2d 90 (Ala.1989)(majority opinion)); *King, Re-Testing the Exclusivity Provision of the Alabama Workers’ Compensation Act: Where We Are Now*, 18 Am. J. Trial Advoc. 295 (1994) (cited with approval, *Morris v. Merritt Oil Co.*, 686 So. 2d 1139 (Ala.1996)(concurring opinion).
29. Ala. Code § 25-5-11.1. See generally *King, Fired in Retaliation for Claiming Workers’ Compensation Benefits in Alabama*, 24 Am. J. Trial Advoc. 539 (2001) (cited as authoritative, Alabama Pattern Jury Instruction 41.00 (3d ed. 2016)).
30. See, e.g., *Wilson v. IBP, Inc.*, 558 N.W. 2d 132 (Iowa 1996) (affirming \$15 million punitive damages rendered via jury verdict, holding nurse case managers owe fiduciary duty to clients); *International Rehab. Ass., Inc. v. Adams*, 613 So. 2d 1207 (Ala.1992) (\$155,000 total verdict affirmed; fraud and/or suppression of scope of services to be provided).
31. While employers may contract with insurance companies to administer claims and insure against losses, the law is quite clear that the obligation for payment of medical costs lies with the “employer.” Alabama Code § 25-5-77(a).

Lawrence T. King

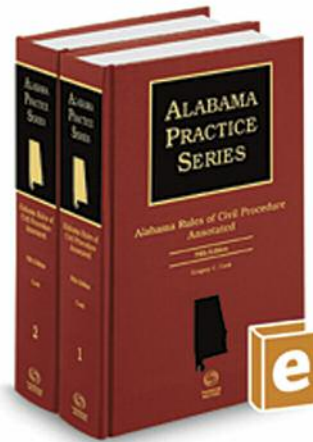


Larry King is a founding partner of King Simmons Ford & Spree PC, with offices in Birmingham, Tuscaloosa, and Daphne. He is a 1984 graduate of Florida State University and a 1988 graduate of Cumberland School of Law.



BOOK REVIEW

Gregory C. Cook



Alabama Rules of Civil Procedure Annotated, Fifth Edition (2018)

Gregory C. Cook, author

Thomson Reuters, publisher

**Reviewed by Wilson F. Green,
associate editor, The Alabama Lawyer**

Justice Champ Lyons was the original reporter on the Alabama Rules of Civil Procedure in the early 1970s. For several decades, his treatise *Alabama Rules of Civil Procedure Annotated* (some called it the *Rules Annotated*) was a mainstay in any litigator's library.

Lyons's *Rules Annotated* had those two essentials of a good legal treatise: timeliness and scholarship. Why is timeliness so essential? Every rule has its season. They change over time, as the ways of commerce and conflict are altered by the ways people transact their affairs. And so any legal treatise, but especially

one concerning procedural rules, must remain timely to remain relevant. And why scholarship? Well, it's almost self-answering. Any authoritative treatise derives its authority from the author's research, insight, and experience, not to mention clarity of prose.

Timeliness and scholarship synergize in Greg Cook's expansive and extensive rewrite of the *Rules Annotated*. Cook is a career litigator at Balch & Bingham LLP in Birmingham, an almost three-decade veteran in the world of complex litigation and class-action litigation. A Phi Beta Kappa graduate of Duke and a 1991

graduate of Harvard Law School, he is a member of the Alabama Supreme Court's Standing Committee on the Rules of Civil Procedure. (On a personal note, Greg is my friend of almost 30 years, a true thinker of truer character.)

In Cook's new *Rules Annotated*, timeliness and scholarship are in the klieg lights.

As for timeliness, the *Rules Annotated* was certainly in need of a revision. The *Rules Annotated's* last overhaul was in 2004, which was before the substantial changes to Rule 4 (concerning service of process), in the somewhat earlier years of arbitration enforcement, just a few years after the 1999 class-action statute became effective, before substantial development in Alabama venue law, and likely before anyone had ever conjured the term electronically stored information (ESI).

Cook's revision of the *Rules Annotated* brings the treatise in line with current practice and current case law. It also addresses procedural devices not specifically falling under a rule, but closely enough aligned to a rule and commonly encountered in practice to warrant specific content. Several examples:

- Cook's discussion of Rule 12 contains two brief, but brilliant sections on motions to compel arbitration (with annotations, naturally) and on abatement under Ala. Code § 6-5-440. The discussion on arbitration law in particular is a mini-hornbook.
- Cook has revamped the entire presentation of Rule 26, focusing on the differences between federal

rule and state rule and adding a full discussion of electronically-stored information, an explanation of protective orders and various types, and updates on work product and privilege issues. Cook's presentation of issues in expert discovery focuses on the differences between Alabama and federal practice.

- Cook has added an important section under Rule 56 (summary judgment procedure) to note the recent case law instructing how to preserve objections to inadmissible evidence offered at summary judgment. Such sections are sprinkled among the treatise and are particularly helpful to a lawyer encountering an unfamiliar issue.
- He has updated the material under Rule 37 (discussing sanctions in dealing with ESI discovery issues) and Rule 30 (issues in depositions).
- He has overhauled the discussions of Rules 53 (special masters), 54 (costs), and 55 (defaults). Regarding defaults, he provided a helpful analysis of the three *Kirtland* factors and how court cases interpret their application.

Cook's scholarship is always on display in this new *Rules Annotated*. He has ably updated an important section on enforcement of outbound forum selection clauses within Rule 82—a topic of increasing recurrence. He has also included helpful affirmative defense checklists under Rule 8—the product of an *Alabama Lawyer* article some years back which he credits (notably, he has

included multiple secondary citations to *The Alabama Lawyer* and law review pieces throughout the updated work).

But his best work is in Cook's wheelhouse: drawing on his specific experience, he completely revised the discussion of class actions. The new section accounts for the substantial development in Alabama case law over the last decade, and notes where applicable the burgeoning body of federal Rule 23 law from which our courts have commonly borrowed. Cook's Rule 23 discussion, which is entirely new, is quite literally a 30-page treatise-within-a-treatise, a must-reference for any practitioner of any experience dealing with a class-action issue.

For all of the new work in this new edition, Cook has maintained the helpful essential organization of the *Rules Annotated*. Each rule (in its current form) is presented in sequence, followed by various committee comments and an exposition of critical principles addressed by interpretive cases, and concluded with a topical index of case citations and summaries by topic. The new material, in other words, is presented within the framework of the desk-reference-type structure which has made all editions of this work so useful. Indexes and case tables are also included, especially for finding those procedural topics which do not fall neatly within an enumerated rule.

Cook's new *Rules Annotated* is at once the practitioner's tool and the judge's companion. What he has done with Justice Lyons's work is a great service to the bar and to the cause of legal scholarship in Alabama. ▲



IMPORTANT NOTICES

- ▲ Pro Bono Awards
- ▲ Notice of Election and Electronic Balloting
- ▲ Alabama Supreme Court Notice

Pro Bono Awards

The Alabama State Bar Pro Bono Awards recognize the outstanding pro bono efforts of attorneys, mediators, law firms, and law students around the state. The award criteria includes but is not limited to: the total number of pro bono hours or complexity of cases handled, impact of the pro bono work and benefit for the poor, particular expertise provided or the particular need satisfied, successful recruitment of other attorneys for pro bono representation, and proven commitment to delivery of quality legal services to the poor and to providing equal access to legal services.

Download a nomination form at <https://www.alabar.org/about/awards-recognitions/>, and submit to Linda Lund (linda.lund@alabar.org) by **April 1**. Awards are presented each year at the Alabama State Bar Annual Meeting.

Notice of Election and Electronic Balloting

Notice is given here pursuant to the Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners that

the election of these officers will be held beginning Monday, May 18, 2020 and ending Friday, May 22, 2020.

On the third Monday in May (May 18, 2020), members will be notified by email with instructions for accessing an electronic ballot. Members who wish to vote by paper ballot should notify the secretary in writing on or before the first Friday in May (May 1, 2020) requesting a paper ballot. A single written request will be sufficient for all elections, including run-offs and contested president-elect races during this election cycle. All ballots (paper and electronic) must be voted and received by the Alabama State Bar by 5:00 p.m. on the Friday (May 22, 2020) immediately following the opening of the election.

Nomination and Election of Board of Bar Commissioners

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

- 8th Judicial Circuit
- 10th Judicial Circuit, Place 4
- 10th Judicial Circuit, Place 7
- 10th Judicial Circuit, Bessemer
- 11th Judicial Circuit
- 13th Judicial Circuit, Place 1
- 13th Judicial Circuit, Place 5
- 15th Judicial Circuit, Place 5
- 17th Judicial Circuit
- 18th Judicial Circuit, Place 1
- 18th Judicial Circuit, Place 3
- 19th Judicial Circuit
- 21st Judicial Circuit
- 22nd Judicial Circuit
- 23rd Judicial Circuit, Place 1

- 28th Judicial Circuit, Place 2
- 30th Judicial Circuit
- 31st Judicial Circuit
- 33rd Judicial Circuit
- 34th Judicial Circuit
- 35th Judicial Circuit
- 36th Judicial Circuit
- 40th Judicial Circuit
- 41st Judicial Circuit

Additional commissioners will be elected for each 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits will be determined by a census on March 1, 2020 and vacancies certified by the secretary no later than March 15, 2020. All terms will be for three years.

A candidate for commissioner may be nominated by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Nomination forms and/or declarations of candidacy must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 24, 2020).

Election of At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 3, 6, and 9. Petitions for these positions, which are elected by the Board of Bar Commissioners, are due by April 1, 2020.

Submission of Nominations

Nomination forms, declaration of candidacy forms, and applications for at-large commissioner positions must be submitted by the appropriate deadline and addressed to:

Phillip W. McCallum
P.O. Box 671
Montgomery, AL 36101-0671

These forms may also be sent by email to elections@alabar.org or by fax to (334) 261-6310.

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

Election rules and petitions for all positions are available at www.alabar.org. ▲

Notice

Amendment of Alabama Rules of Appellate Procedure, Alabama Rules of Juvenile Procedure, and Alabama Civil Court Mediation Rules

In three separate orders, the Alabama Supreme Court has amended Rule 5(b)(2) and Rule 21(a)(1), Alabama Rules of Appellate Procedure; Rule 1(B), Rule 14, and Rule 28, Alabama Rules of Juvenile Procedure; and Rule 4, Alabama Civil Court Mediation Rules. The amendment of these rules is effective April 1, 2020. The orders amending Rule 5(b)(2) and Rule 21(a)(1), Alabama Rules of Appellate Procedure; Rule 1(B), Rule 14, and Rule 28, Alabama Rules of Juvenile Procedure; and Rule 4, Alabama Civil Court Mediation Rules, appear in an advance sheet of *Southern Reporter* dated on or about March 5, 2020.

Alabama Rules of Appellate Procedure: The amendment to Rule 5(b)(2) provides that the appendix to the petition for permission to appeal filed pursuant to Rule 5(a) shall contain a numbered cover sheet and a tab for each document in the appendix. The amendment to Rule 21(a)(1) adds the requirement that a petition filed pursuant to Rule 21 include a statement of the case and clarifies that an appendix to the petition shall include both a numbered cover sheet and a tab for each document in the appendix.

Alabama Rules of Juvenile Procedure: The amendment to Rule 1(B) removes any option for extending, by agreement of the parties, the period during which a postjudgment motion may remain pending before being deemed denied. The amendment to Rule 14 specifies that only counsel retained by a party in a juvenile-court case (including a guardian ad litem) has to file an initial pleading or notice of appearance or to appear personally at a juvenile-court hearing and to advise the court that he or she is representing the party to receive copies of notices, pleadings, motions, or other documents required by statute or rule to be given to the parties. The amendment also provides that neither retained nor appointed counsel (including a guardian ad litem) can withdraw from a case without the consent of the juvenile court. The amendment to Rule 28 adds a new subsection (C) to specify that counsel appointed to represent a party in a juvenile-court proceeding shall continue to represent that party in that proceeding, including the filing of a notice of appeal, if appeal is taken. Former subsection (C) and the remaining subsections were renumbered accordingly.

Alabama Civil Court Mediation Rules: The amendment to Rule 4 provides that a mediator appointed or designated by the court must be registered with the Alabama Center for Dispute Resolution, unless the court, for good cause, finds otherwise.

The text of these amendments can be found at: <http://judicial.alabama.gov/rules/index>, "Quick links—Rule changes."

Bilee Cauley
Reporter of Decisions
Alabama Appellate Courts



ABOUT MEMBERS, AMONG FIRMS

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

About Members

Ashley N. Bell announces the opening of **A. Bell Law Firm LLC** at 950 22nd St. N, Ste. 825, Birmingham 35203. Phone (251) 454-0079.

Among Firms

Adams & Reese announces that **Robert C. Campbell III** and **R. Nash Campbell** joined the Mobile office, of counsel and special counsel, respectively. The firm also announces that **Michael A. Berson, Adam V. Griffin,** and **Craig D. Lawrence, Jr.** are now partners.

Amari & Gray announces that former Jefferson County District Judge **Hon. John E. Amari** joined of counsel and is a registered mediator.

Ambrecht Jackson LLP of Mobile announces that **Philip H. Partridge, Bryan D. Smith,** and **David T. Trice** joined the firm.

Balch & Bingham announces that **Stephen W. Still** joined the firm as a partner, and that **Ryan Hodinka, Alan Lovett,** and **Dan Ruth** are now partners, all in the Birmingham office.

Barze Taylor Noles Lowther LLC of Birmingham announces that **William C. Hoffman, Jr.** joined as an associate.

Bond, Botes, Shinn & Donaldson PC of Opelika announces that **Jonathon**

Hull joined as an associate.

Bradley Arant Boulton Cummings LLP announces that **Cortlin Bond, Mary Nobles Hancock, Collin Keller, Kelsie M. Overton, Hunter Pearce, Corbin C. Potter, Connor J. Rose, Daniel C. Tankersley,** and **Andrew Tuggle** joined as associates. The firm also announces that **Anne Knox Averitt, Hillary Campbell, Anna Craft, Ann Phelps Hill, J. Riley Key, Jonathan R. Kolodziej, Ryan P. Robichaux,** and **J. Christopher Selman** are now partners.

Brett/Robinson Gulf Corporation of Gulf Shores announces that **Cheryl D. Eubanks** joined as in-house counsel and director of human resources.

Steve P. Brunson and **Rebecca A. Walker** announce the opening of **Brunson & Walker Attorneys PC** at 301 Broad St., Gadsden 35901. Phone (256) 546-9205.

Burr & Forman LLP announces that **Roger Varner, Jr.** joined as an associate in the Mobile office.

Cabaniss Johnston announces that **Winston R. Grow** joined as a partner in the Mobile office.

Cadence Bank N.A. of Birmingham announces that **Allison O. Skinner** is now deputy general counsel.

Cory Watson Attorneys announces that **Adam W. Pittman** and **J. Curt Tanner** are now principals, **Taylor A. Pruett** joined as an associate, and **Hirlye Lutz**

is now a shareholder, all in the Birmingham office.

DonovanFingar LLC of Birmingham announces that **Wade Cornelius** joined the firm.

Fish Nelson & Holden LLC of Birmingham announces that **H.H. Nation, IV** joined as an associate and **Charley Drummond** is now a partner.

Estes Closings LLC of Hoover announces that **Courtney Moseley** joined as an associate.

Haygood, Cleveland, Pierce, Thompson & Short LLP of Auburn announces that **Shelby Adams McNeill** joined as an associate.

Hill Hill Carter of Montgomery announces that **Reed Morgan Coleman** is now a shareholder in the Fairhope

office. The firm also announces that **Courtney Morman** joined of counsel in the Birmingham office.

Huie Fernambucq & Stewart LLP of Birmingham announces that **Karen Berhow** joined as counsel.

Lightfoot, Franklin & White LLC of Birmingham announces that **Brian P. Kappel, R. Ashby Pate, and Christopher C. Yearout** are now partners.

Maynard Cooper & Gale announces that **Zachary Mardis and Hayley N. Scheer** joined as associates in the Huntsville and Birmingham offices, respectively. The firm also announces that **Sarah S. Glover, James C. Lester, John A. Little, Jr., and Finis E. St. John V** are now shareholders in the Birmingham office.

Sirote & Permutt PC announces the opening of an office in Florence and that **Benjamin Little** and **Michael M. Shipper** will practice there as shareholder and of counsel, respectively.

Smith, Spires, Peddy, Hamilton & Coleman PC of Birmingham announces that **Peter M. Wolter** joined as an associate.

Stone Crosby PC of Daphne announces that **Laura M. Coker** is now a shareholder.

Webster, Henry, Bradwell, Cohan, Speagle & DeShazo PC announces that **Jeannie Bugg Walston, Phillip Piggott, Scott Dickens, and Andy Laird** joined as shareholders in the Birmingham office. ▲



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MEMORIALS

▲ Robert L. Williams, Jr.

Robert L. Williams, Jr.

Shelby County Public Defender Bob Williams passed away in the early morning hours of November 28, 2019 (Thanksgiving Day) at the age of 69, after a year-long battle with pancreatic cancer.

Bob spent nearly his entire career forming and developing the Shelby County Public Defender's Office. He shepherded the office from its humble beginnings to the office that it is today. His wife, Trudie Williams, recently described the office as Bob's home and the staff who worked there as his family. From 1991 to 2019, at the time of his death, he worked tirelessly for those less fortunate. Bob did not just assign cases. He rolled up his sleeves and worked with those persons assigned to the office. He treated the office as his calling and toiled to bring fairness to the system and to his clients.



Williams

He loved the Tennessee mountains and visited Cades Cove, Gatlinburg, and the surrounding areas as often as work let him. He was an outspoken fan of the Auburn Tigers. He loved the Shelby County people and spent his life in service to them, through his work, his church, his fellowship, and his example.

Bob cared deeply about his family, friends, and colleagues. He brought a quiet dignity to the table wherever he went. He gave his best in every situation. Throughout his full life he went to the aid of the neediest, the poorest, and often the most difficult to work for and with, and never walked away from them. He was an inspiration to those with whom he worked, and kept his head high until it was time to leave the legal world, and the world as a whole. Bob Williams was a husband, a father, a mentor, a spiritual person, and a friend. But most of all, he was a lawyer, an advocate for those who would otherwise have no advocate, and he was good at it. In the end, that is how he will be remembered. Alabama is poorer for his passing, but richer for his presence, hard work, and faith. ▲

—Gregory L. Case, Office of Public Defender, Columbiana

Davis, James Robert

Hoover
Admitted: 1973
Died: December 19, 2019

Ellmann, Stephen Jonathan

New York, NY
Admitted: 1978
Died: March 8, 2019

Falkenberry, John Croom

Birmingham
Admitted: 1970
Died: November 26, 2019

Forte, Booker Taliaferro, Jr.

Eutaw
Admitted: 1973
Died: November 29, 2019

Freeman, Arnold Charles

Tuscaloosa
Admitted: 1967
Died: December 26, 2018

Guemmer, Albert Martin

Tampa, FL
Admitted: 1967
Died: March 7, 2019

Hamilton, Herman Hardy, Jr.

Davidson, NC
Admitted: 1955
Died: April 30, 2019

Harden, Paul Morris

Monroeville
Admitted: 1976
Died: May 21, 2019

Hill, John Jephtha

Mobile
Admitted: 1951
Died: November 17, 2019

Igou, Alfred Richard

Fort Payne
Admitted: 1970
Died: November 24, 2018

Kuffner, Christopher Stephen

Huntsville
Admitted: 2006
Died: September 6, 2019

Lee, Norma

Hartselle
Admitted: 1995
Died: May 25, 2019

Little, Thomas Marvin

Birmingham
Admitted: 1993
Died: October 21, 2019

Montoya, Barbara McBrayer

Titus
Admitted: 1996
Died: February 21, 2019

Noojin, Bert Powell, Jr.

Fairhope
Admitted: 2012
Died: December 8, 2019

Oglesby, Jerry Brantley

Anniston
Admitted: 1967
Died: November 17, 2019

Prater, Alice Florence Higdon

Birmingham
Admitted: 1987
Died: November 15, 2019

Reynolds, Hon. Daniel James

Hoover
Admitted: 1968
Died: December 26, 2019

Samford, Frank Park, III

Tucker, GA
Admitted: 1969
Died: December 10, 2019

Savage, Kay Webb

Birmingham
Admitted: 1989
Died: January 23, 2019

Siegal, Fred Don

Birmingham
Admitted: 1967
Died: November 8, 2019

Starnes, John Wallace

Guntersville
Admitted: 1965
Died: September 18, 2018

Sullivan, William James, Jr.

Birmingham
Admitted: 1949
Died: December 14, 2019

Wear, David Campbell

Fort Payne
Admitted: 1976
Died: April 21, 2019



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

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



Clay Hornsby
Deputy Director, Alabama Law
Institute

LEGISLATIVE WRAP - UP

2020 ALI Legislative Agenda

On January 22, 2020, the Council of the Alabama Law Institute held its annual meeting and approved an impressive set of projects to be proposed in the current legislative session. These bills are the result of more than 1,000 hours of hard work by more than 100 lawyers who volunteer on these committees. We are grateful to them for their hard work and the efforts of the legislative members of our executive committee who help keep our efforts on track: Senator Cam Ward, president; Representative Chris England, vice president; Representative Mike Jones; Senator Arthur Orr; Representative Bill Poole; and Senator Rodger Smitherman.

Non-Disparagement Obligations

A committee chaired by Will Hill Tankersley, Jr. was formed to study the proliferation and law surrounding “non-disparagement obligations” which are being used with increased frequency in employment law. The committee did extensive research on how these are dealt with including a 50-state survey. Alabama law is silent on how to enforce or defend against these provisions, leaving businesses, individuals, and courts without any meaningful guidance on the issue.

The committee’s proposed act establishes the circumstances and scope of both enforcement and defense of an NDO provision, allows enforcement without further publicizing the alleged disparagement, and places the parties on notice that NDO clauses will not interfere

with the ability to communicate with law enforcement, regulators, or legal counsel. This proposed Act governs contractual rights only. Therefore, it does not expand or contract any existing common law tort causes of action.

Government Procurement

The protocols and practices that apply when the State of Alabama purchases goods and services have not been comprehensively reviewed in over 20 years. In the interim, particularly in today’s digital world, some of the laws and approaches in this area have become obsolete. This committee, chaired by John Montgomery, general counsel for the Department of Finance, was made up of more than 20 members representing a cross-section of the state’s legislative and executive agencies, universities, and county and local governments. The group studied Alabama’s current government procurement regime and compared it to the ABA Model Procurement Code.

With the Model Act as a best practices guide, the committee developed proposals to reorganize and modernize state purchasing policies and procedures. These will create a comprehensive baseline for more effective, efficient, flexible, and transparent public procurement for state agencies and universities, while still maintaining the current independence of the legislative and judicial branches, local governments, and public works projects. Notable features of the proposal include:

- Bringing together the state’s procurement law, currently scattered

across multiple code titles, into an updated and easier-to-locate format;

- Creating within the Department of Finance the position of a state chief procurement officer with regulatory creation authority and limited review of individual executive agency procurement officer's decisions;
- Extensively defining essential terms in governmental procurement procedure;
- Establishing limited due process procedures for review of contractor suspension or debarment;
- Addressing ethnic and gender fairness/access issues;
- Updating thresholds that would trigger the implementation of mandated competitive bid processes; and
- Updating the procedures for execution, submission, amendment, and review of competitive bid proposals.

Subdivisions

Charlie Beavers of the Standing Real Estate Committee chaired a review of the definition of what constitutes a "subdivision" under the state law enabling statutes for counties and municipalities. This committee drafted a definition that provides consistency while clarifying when certain types of land developments are subject to the jurisdiction of county and municipal planning commissions. Notable features of the proposal include:

- Excluding apartments, condominiums, and leases from subdivision application;
- Including drainage structures, public use areas, public streets/roads, and placement of public utilities within the definition and control of a development, thus allowing for local government body regulation of same within federal and state law;
- Authorizing local governing bodies to approve minor subdivisions, along with relocation of common boundaries, easements, and setbacks in them without the necessity of a public hearing;

- Defining what is a "minor" subdivision for regulatory purposes; and
- Removing and/or harmonizing some outmoded distinctions between municipal and county governing body regulatory authority.

Business Entities

The Standing Business Entities Committee continues to review and update Alabama's entity laws. This very active committee, chaired by Jim Wilson with Scott Ludwig acting as reporter, has done extensive work to Title 10A over the past few years. The committee continues its work by preparing proposed changes annually, or as needed, so that the entity laws of Alabama stay current with the rest of the country, provide Alabama businesses with the tools to quickly and efficiently conduct business in the state, and encourage Alabama businesses to use Alabama entities rather than be forced to utilize Delaware or another state's entity laws.

This year, the committee reviewed the Alabama Business and Non-Profit Entities Code (Title 10A). Among the proposed changes are those which:

- Allow business corporations to elect to become benefit corporations;
- Allow for electronic filing of all entity filings, thereby increasing the speed at which businesses may be formed and by which transactions may be accomplished;
- Update definition sections to include critical terms applicable to the allowance of electronic/digital transactions and transmissions of filings, notices, and data;
- Establish certain basic standards for all filing instruments to allow for easier electronic transmission;
- Provide a mechanism to allow the secretary of state to reject certain filing instruments which are not accompanied by full payment to assist in the electronic filing process;
- Clarify the requirements of certificates of existence for entities;
- Remove certain outdated definitions and matters to streamline the Code; and

- Clarify that volunteer partners, managers, members, governing persons, and other members of a governing authority are considered officers of a qualifying non-profit entity, thereby recognizing that there are non-profit partnerships, non-profit limited partnerships, and non-profit limited liability companies.

Trusts

The Trust Committee, chaired by Brian Williams, has finished its review of qualified trust distributions and updating trust planning.

Seventeen states now allow for some form of domestic asset protection trust. Such trusts allow additional flexibility in estate planning by allowing a self-settled trust for the settler's own benefit to protect assets from subsequent creditors. In an effort to help Alabama keep pace with other states, the Trust Committee reviewed and adapted a Michigan statute for Alabama to allow the creation of such trusts. Key provisions of the Alabama Qualified Dispositions in Trust Act include:

- Harmonization with the Voidable Transactions Act and limitation of trust creation in certain instances to prevent fraudulent use of trusts to shield assets from existing creditors;
- Insertion of a spendthrift provision to protect trust beneficiaries by limiting their ability to transfer their interests in qualifying trusts;
- Integration of the new provisions with existing trust law and definitions;
- Specification of procedures and rights concerning challenges to the trust by creditors of the beneficiary; and
- Delineation of the rights maintained by the trust beneficiary, including the right to remove and replace trustees.

We are exceedingly grateful to these great committees and all lawyers who work with the Alabama Law Institute for the improvement of our state and its laws. ▲



OPINIONS OF THE GENERAL COUNSEL

Roman A. Shaul
roman.shaul@alabar.org



A Non-Lawyer May Not Represent a Party in a Court-Ordered Arbitration Proceeding in Alabama

QUESTION:

May a non-lawyer represent a party in a court-ordered arbitration proceeding in Alabama?

ANSWER:

No, absent a federal or state statute allowing such, the representation of a party by a non-lawyer in a court-ordered arbitration proceeding in Alabama would constitute the unauthorized practice of law. Moreover, a lawyer has an obligation to bring the matter of the non-lawyer's representation of a party to the attention of the arbitrator and where appropriate, to the attention of the court.

DISCUSSION:

The Disciplinary Commission of the Alabama State Bar has been asked to opine on whether the representation of a party by a non-lawyer in a court-ordered arbitration would constitute the unauthorized practice of law by the non-lawyer and, if so, what duties would an attorney involved in the matter as an arbitrator or lawyer have to raise such issue in the arbitration or before the court. By way of background, Canon IV(C) of the Alabama Code of Ethics for Arbitrators and the American Arbitration Association Code of Ethics provides that "[t]he arbitrator should not deny any

party the opportunity to be represented by counsel or by any other person chosen by the party.” Some have interpreted this provision as allowing the representation of a party to an arbitration by a non-lawyer. However, the preamble to the Alabama Code of Ethics for Arbitrators also states that all provisions of the Code should be read in conjunction with applicable law. In addition, Rule 26 of the American Arbitration Association Commercial Arbitration Rules and Mediation Procedures states that a party may be represented by “any other representative of the party’s choosing, unless such choice is prohibited by law.”

As such, the question then becomes whether a non-lawyer may represent a party during an arbitration in Alabama or whether such representation would constitute the unauthorized practice of law. As a starting point, Rule 5.5, Ala. R. Prof. C., provides as follows:

Rule 5.5.

Unauthorized Practice of Law.

- (a) A lawyer shall not:
- (1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or
 - (2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
- (b) Subject to the requirements of Rule VII, Rules Governing Admission to the Alabama State Bar (Admission of Foreign Attorneys Pro Hac Vice), a lawyer admitted in another United States jurisdiction but not in the State of Alabama (and not disbarred or suspended from practice in that or any jurisdiction) does not engage in the unauthorized practice of law when the

lawyer represents a client on a temporary or incidental basis (as defined below) in the State of Alabama. Services for a client are within the provisions of this subsection if the services:

- (1) are performed on a temporary basis by a lawyer admitted and in good standing in another United States jurisdiction, including transactional, counseling, or other non-litigation services that arise out of or are reasonably related to the lawyer’s practice in a jurisdiction in which the lawyer is admitted to practice;
- (2) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding held or to be held in this or in another jurisdiction; or

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(Continued from page 155)

- (3) are performed by an attorney admitted as an authorized house counsel under Rule IX of the Rules Governing Admission to the Alabama State Bar and who is performing only those services defined in that rule.
- (c) A lawyer admitted to practice in another jurisdiction but not in the State of Alabama does not engage in the unauthorized practice of law in the State of Alabama when the lawyer renders services in the State of Alabama pursuant to other authority granted by federal law or under the law or a court rule of the State of Alabama.
- (d) Except as authorized by these Rules or other law, a lawyer who is not admitted to practice in the State of Alabama shall not (1) establish an office or other permanent presence in this jurisdiction for the practice of law, or (2) represent or hold out to the public that the lawyer is admitted to practice law in Alabama.
- (e) Practicing law other than in compliance with this rule or Rule VII or Rule VIII of the Rules Governing Admission to the Alabama State Bar, or other rule expressly permitting the practice of law, such as the Rule Governing Legal Internship by Law Students, shall constitute the unauthorized practice of law and shall subject the lawyer to all of the penalties, both civil and criminal, as provided by law.

Rule 5.5 does not state that representing a party in an arbitration is not the practice of law. Rather, Rule 5.5 is, in part, a multi-jurisdictional practice rule that expressly allows attorneys licensed in other states to represent parties in arbitrations taking place in

Alabama. In doing so, it does not expressly allow non-lawyers to represent parties in arbitration.

Obviously, if a state or federal statute or law specifically allows a non-lawyer to represent a party during an arbitration, such statute or law would control. However, the Disciplinary Commission is unaware of any Alabama Supreme Court opinion that addresses whether representation of a party during an arbitration proceeding would constitute the unauthorized practice of law. The Disciplinary Commission is also unaware of any law or statute that expressly permits or prohibits the representation of a party by a non-lawyer during an arbitration.

The Supreme Court of Alabama has previously stated that “the specific acts which constitute the unauthorized practice of law are and must be determined on a case-by-case basis.” *Coffee Cty. Abstract and Title Co. v. State, ex rel. Norwood*, 445 So. 2d 852, 856 (Ala. 1983). As a starting point, § 34-3-6, Ala. Code 1975, which defines the practice of law, provides, in pertinent part, as follows:

- (a) Only such persons as are regularly licensed have authority to practice law.
- (b) For the purposes of this chapter, the practice of law is defined as follows:

Whoever,

- (1) In a representative capacity appears as an advocate or draws papers, pleadings or documents, or performs any act in connection with proceedings pending or prospective before a court or a body, board, committee, commission or officer constituted by law or having authority to take evidence in or

settle or determine controversies in the exercise of the judicial power of the state or any subdivision thereof; or

- (2) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, advises or counsels another as to secular law, or draws or procures or assists in the drawing of a paper, document or instrument affecting or relating to secular rights; or
- (3) For a consideration, reward or pecuniary benefit, present or anticipated, direct or indirect, does any act in a representative capacity in behalf of another tending to obtain or secure for such other the prevention or the redress of a wrong or the enforcement or establishment of a right; or
- (4) As a vocation, enforces, secures, settles, adjusts or compromises defaulted, controverted or disputed accounts, claims or demands between persons with neither of whom he is in privity or in the relation of employer and employee in the ordinary sense; is practicing law.
- (c) Nothing in this section shall be construed to prohibit any person, firm or corporation from attending to and caring for his or its own business, claims or demands, nor from preparing abstracts of title, certifying, guaranteeing or insuring titles to property, real or personal, or an interest therein, or a lien or encumbrance thereon, but any such person, firm or corporation engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles to real or personal

property are prohibited from preparing or drawing or procuring or assisting in the drawing or preparation of deeds, conveyances, mortgages and any paper, document or instrument affecting or relating to secular rights, which acts are hereby defined to be an act of practicing law, unless such person, firm or corporation shall have a proprietary interest in such property; however, any such person, firm or corporation so engaged in preparing abstracts of title, certifying, guaranteeing or insuring titles shall be permitted to prepare or draw or procure or assist in the drawing or preparation of simple affidavits or statements of fact to be used by such person, firm or corporation in support of its title policies, to be retained in its files and not to be recorded.

In addition, the Supreme Court of Alabama has repeatedly held that the purpose of § 34-3-6 is to ensure that laymen do not serve others in a representative capacity in areas that require the skill and judgment of a licensed attorney. *Porter v. Alabama Ass'n of Credit Executives*, 338 So. 2d 812 (Ala.1976).

It is the opinion of the Disciplinary Commission that under section (b)(1) of the UPL statute a non-lawyer may not represent a party during an arbitration absent an express federal or state statute or law allow for such. A non-lawyer representative would be making an appearance in a representative capacity. Moreover, it is presumed that during the arbitration, the non-lawyer representative would be introducing exhibits, conducting examination of witnesses, including expert witnesses, objecting to exhibits and making legal arguments on behalf

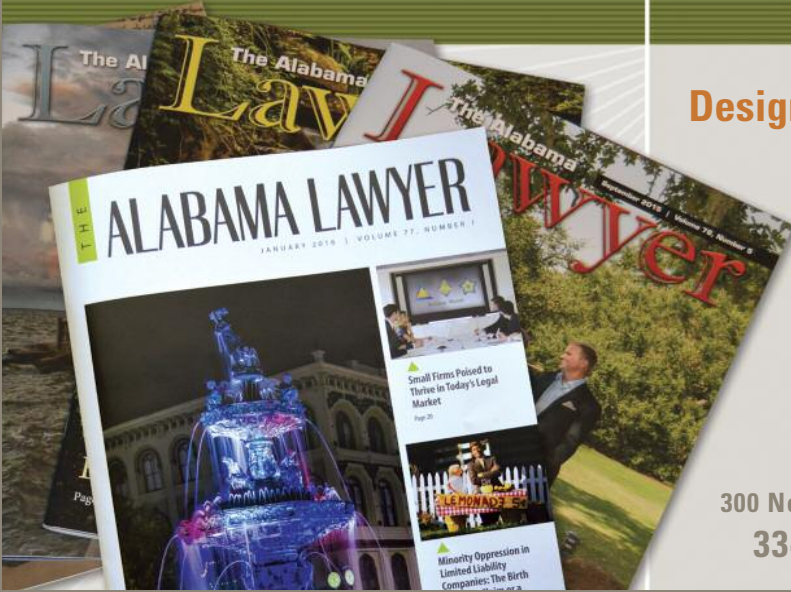
of the party and/or providing legal advice to the party. Such activities generally require the skill and judgment of a licensed attorney and under the UPL statute constitutes the practice of law.

In addition, Rule 5.5, Ala. R. Prof. C., prohibits a licensed Alabama lawyer from assisting "a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law." If a lawyer were to stay silent and allow a non-lawyer to represent a party in an arbitration, that lawyer would be aiding and abetting that non-lawyer in the unauthorized practice of law. As such, a lawyer has an obligation to bring the matter of the non-lawyer's representation of a party to the attention of the arbitrator and where appropriate, to the attention of the court and the Office of General Counsel. [RO 2014-01] ▲

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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

Inverse Condemnation

City of Daphne v. Fannon, No. 1180109 (Ala. Dec. 6, 2019)

City installed a 48-inch pipe in the right-of way near the Fannons' house. Shortly thereafter, Fannon installed a swale in the right-of-way. No problems were experienced for the next nine years. Then an unprecedented rain event occurred, causing erosion in the right-of-way which in turn caused trees growing in the city's right-of-way to fall onto the Fannons' house and damage the house. Fannons sued the city under Ala. Const. § 235 for inverse condemnation. Plaintiff's expert did not testify it was foreseeable or ascertainable at the time the pipe was installed that trees in the right-of-way would fall on the house and damage it nine years later. Held: under Ala. Const. § 235, an inverse condemnation plaintiff must demonstrate that the damage or devaluation of property was foreseeable at the time of the condemnor's actions. City was entitled to JML on the claim.

Workers' Compensation; Exclusivity

Ex parte Burke's Mechanical, Inc., No. 1180402 (Ala. Dec. 6, 2019)

Employee sued employer for failure to take emergency actions to treat burn injuries suffered in course of employment, which failure exacerbated employee's injuries. Employee asserted claims of negligence, wantonness, and outrage. Employer moved to dismiss based on exclusivity of the Act. The trial court denied the motion, and employer sought mandamus relief. The court denied the petition. In a plurality opinion by Justice Stewart, the articulated rationale was that the issue of whether the exacerbation of injuries was caused by independent conduct of the employer from that causing the initial injury is a fact-intensive inquiry unsuitable for a motion to dismiss, which saved the negligence and wantonness claims from dismissal and precluded any finding of a clear legal right to dismissal, and that employer did not demonstrate any the outrage claims were subject to dismissal for failure to argue a basis for their dismissal in their petition. The plurality consists of four justices, with three justices concurring in the result without opinion.

State Agent Immunity

Ex parte Blunt, No. 1180372 (Ala. Dec. 6, 2019)

While enrolled in a summer school instructional program, student allegedly was sent by teacher to pick up lunch off campus, during which excursion student was involved in motor vehicle accident, killing a driver and injuring two minor occupants. The personal representative (PR) of driver's estate and as next friend of minors sued teacher (Blunt) for negligence and wantonness, who claimed state-agent immunity. In re-

sponse, PR claimed that Blunt had violated detailed rules and regulations for the summer instructional program contained in the board's summer programs handbook, the resource guide, and the faculty handbook. The circuit court denied summary judgment, and teacher sought mandamus relief. The supreme court granted the writ in a *per curiam* opinion, holding that the teacher was entitled to state-agent immunity. There was no violation of the summer programs handbook because the handbook's setting out general hours of schooling for summer programs did not preclude the teacher's use of discretion, for which undisputed evidence existed, in the setting of hours for summer classes, where student work schedules had to be worked around, and where the particular class in issue was not to take an entire course but rather to address a student's specific deficiencies in a course taken during the nine-month academic year. There was no violation of the resource guide because the mandatory check-out rule for students leaving campus did not apply during the summer session, for which there was undisputed testimony. The document being called the faculty handbook was not the handbook in place during the summer 2010 session when the conduct occurred, and thus no violation of the purported faculty handbook could form the basis of a violation of detailed rules claim to evade *Cranman* immunity.

Compulsory Counterclaims; Mandamus

Ex parte Hayslip, No. 1180604 (Ala. Dec. 6, 2019)

In a tangled mess of litigation spanning over a decade, Hayslip interpleaded certain funds arising from Hayslip's purchase of assets from Harlan and named Pate and New Pate as defendants, because the latter entities might claim entitlement to funds based on a judgment in their favor against Harlan. Pate and New Pate did not counterclaim against Hayslip. In later litigation, Pate and New Pate sued Hayslip, claiming that Hayslip's acquisition of Harlan's interest was a fraudulent transfer. Hayslip moved to dismiss or for summary judgment for failure to assert the claim as a compulsory counterclaim in prior litigation (which is subject to mandamus proceedings); the trial court denied the motion. The supreme court granted mandamus relief, holding that the fraudulent transfer claim was a compulsory counterclaim to the prior interpleader action.

State Agent Immunity

Ex parte Tucker, No. 1180773 (Ala. Dec. 6, 2019)

City public works director was entitled to state-agent immunity in action brought by injured pedestrian arising from injury sustained in fall on municipal residential street. In-

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jured pedestrian offered no substantial evidence that work in a 2012 repaving project was not done to ALDOT standards as to the drop-off. Accident occurred over two years after the repaving, and although there was evidence that the drop-off was six inches at the time of the accident (outside the ALDOT standard), there was no evidence as to the drop-off at the time the repaving project was completed, and thus no substantial evidence that public works director violated clear standards.

Venue; Corporations

Ex parte Liberty National Life Ins. Co., No. 1180693 (Ala. Dec. 6, 2019)

Petition for mandamus granted, directing trial court to transfer action from Montgomery County to Elmore County. All acts or omissions of insurance agent and corporation occurred in Elmore County, which was also the county of plaintiff's residence, and thus venue in Montgomery County was not proper under Ala. Code § 6-3-7. Further, agent was resident of Butler County, and thus venue was improper as to individual defendant under Ala. Code § 6-3-2.

Declaratory Judgments

Ex parte Valley National Bank, No. 1180055 (Ala. July 12, 2019, rehearing Dec. 13, 2019)

On original submission, the court's plurality (a 4-1-3 decision) held that claims for declaratory judgment regarding non-liability for fraud and for non-liability for civil conspiracy are inappropriate actions for declaratory judgment under *Ex parte Valloze*, 142 So. 3d 504 (Ala. 2013), and thus petitioner (judgment creditor) had clear legal right to dismissal of those claims. However, claims for declaratory judgment regarding veil piercing and for constructive trust were appropriate for DJ action, and thus petitioner did not have clear legal right to dismissal of those claims. On rehearing, the essential holdings remained the same, but the division was 3-2-3. Parker dissented in the main, concluding that the issues were inappropriate for mandamus review and that he would deny the petition entirely. Mitchell dissented as to the veil piercing and constructive trust issues, noting that those issues were intertwined with the conspiracy and fraudulent transfer issues and that the parties would be left with "dueling proceedings." Justices Shaw and Mendheim would have granted the petition only with respect to the civil conspiracy claim. Justice Wise did not participate in this case.

Discovery; Employment Files

Ex parte Baggett, No. 1171028 (Ala. Dec. 20, 2019)

In a plurality decision (joined by four justices with concurrences in the result), the court in relevant part granted mandamus petitions quashing non-party subpoenas issued by Daphne Utilities ("DU"), a defendant in an excessive discharge action by ADEM, which DU had issued to the current employers of whistleblowers who were former employees of DU and who had instigated the current litigation. DU claimed that the whistleblowers' current personnel files from their employers could demonstrate bias or could demonstrate that the whistleblowers were in fact moonlighting while still employed by DU. The plurality decision reasoned that even accepting that proposition, discovery of personnel files would be disproportionate and that the discovery of personnel files is somewhat disfavored, especially if simply for establishing an employment timeline—and that was especially the case here, where the whistleblowers were offering to provide timelines themselves, thus making the information available through other means.

Pattern Jury Instructions

Nichols v. Tennessee Valley OB-GYN Clinic, P.C., No. 1180156 (Ala. Dec. 20, 2019)

The court affirmed 5-4 without opinion a judgment on jury verdict for defendant doctor in medical liability case involving the leaving of a surgical sponge and gauze in a mother following delivery. At issue in the appeal is the trial court's refusal to grant plaintiff's proposed jury charge regarding a foreign object in the body—which under *Breaux v. Thurston*, 888 So. 2d 1208 (Ala. 2003), and *Houserman v. Garrett*, 902 So. 2d 670 (Ala. 2004), causes the burden to shift to the doctor to prove that the conduct was within the standard of care. The trial court refused to give the charge, though it appears to have been accurate, because the trial court refused to give any charges which were not pattern jury instructions. The chief justice dissented, commenting extensively (and in Justice Bolin's review, "dismissively") that the APJI are not endorsed by the court as declarative of Alabama law. The Bolin concurrence and the dissents speak of the history of the APJI and its now independent operation from the court. Justice Mendheim's dissent set out the fact that the charge was an accurate statement of Alabama law, and that all jury charges must conform to the facts of the case and the patterns, while guides are simply guides.

Personal Jurisdiction; Pollutant Discharge

Ex parte Aladdin Mfg. Corp., No. 1170864 et al. (Ala. Dec. 20, 2019)

This is a set of eight mandamus petitions arising in two actions filed by the water authorities of Gadsden and Centre against Georgia carpet manufacturers. In both actions, the plaintiff water authorities alleged that the manufacturers discharged toxic pollutants into the interstate water supply which eventually led to contamination of the authorities' water sources downstream in Alabama. The trial court denied motions to dismiss for lack of personal jurisdiction, and defendants sought mandamus relief. The supreme court held the following: (1) "By presenting affidavits controverting the factual allegations in Centre Water's and Gadsden Water's complaints that would establish specific personal jurisdiction (i.e., evidence demonstrating that they did not and had never manufactured or used PFCs, and that they did not discharge wastewater with PFC in Dalton [Georgia]), Indian Summer, Kaleen, and Milliken made a prima facie showing that no specific personal jurisdiction existed as to them[,] and that showing was not rebutted by Centre Water or Gadsden Water, nor was there a sufficient showing that those parties needed discovery to develop facts regarding the motion—thus, those defendants were entitled to mandamus relief and an order of dismissal. (2) As to the remaining defendants, the allegations of the complaint, if taken as true, sufficiently demonstrated that the defendants purposefully directed conduct toward Alabama in the discharging of pollutants, which those defendants knew would or likely could reach plaintiffs' water sources in Alabama. The plurality opinion emphasized that the test for personal jurisdiction in these circumstances required more than foreseeability that consequences would result in Alabama, but the complaints alleged conduct which was sufficiently likely to have effects in Alabama that it could be deemed directed to Alabama—specifically, that defendants discharged pollutants with sufficient knowledge that they would enter the water supplying the Coosa River. This is a 3-1-3 decision with two recusals.

Preliminary Injunctions; Injunction Bonds

DeVos v. The Cunningham Group, LLC, No. 1180088 (Ala. Dec. 20, 2019)

Held: (1) trial court improperly granted preliminary injunction without considering the likelihood of success on the merits, which in turn turned on the issue of voidness of the contractual provisions (non-solicit provisions); and (2) after an extensive review of case law outside Alabama regarding the purpose and setting of injunction bonds, the \$25,000 bond set by the trial court was wholly inadequate to protect the enjoined doctors from a wrongful injunction.

Service by Publication

Cochran v. Engelland, No. 1180216 (Ala. Jan. 10, 2020)

Trial court properly set aside default judgment under Rule 60(b)(4) and quashed writ of execution in action in which de-

pendant was purportedly served by publication. Service by publication requires an affidavit from the plaintiff which avers "facts showing such avoidance," and Rule 4.3(c) reiterates that this affidavit "must aver specific facts of avoidance" (emphasis added) and cautions that "[t]he mere fact of failure of service is not sufficient evidence of avoidance." The affidavit in this case conclusorily stated that the defendant was avoiding service, but it alleged no specific facts regarding the circumstances of avoidance, and thus was insufficient.

Medical Liability; Experts

Youngblood v. Martin, No. 1171037 (Ala. Jan. 10, 2020)

At trial, doctor objected to plaintiff's expert's testimony for lack of proper foundation. Although counsel did not specifically refer to it in the objection, the testimonial hole was that the expert had not testified that he was board-certified in the specialty at issue at the time of his testimony, as required by Ala. Code § 6-5-548(c). The trial court allowed the testimony without plaintiff's filling the hole. After verdict and judgment for plaintiff, doctor appealed. The supreme court reversed, holding that expert's testimony was not properly admissible for failure to lay the proper foundation for the testimony. Plaintiff on appeal argued that doctor had not properly preserved the issue for lack of a sufficiently specific objection,



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but the court held that the objection was sufficiently specific to alert the trial court to the error. Doctor was not required “to direct his opponent’s mind to the correct law the way one would thrust a beagle’s nose on a rabbit tail.”

Jury Demands; Availability of Mandamus Review

Ex parte Lindsey, No. 1171172 (Ala. Jan. 10, 2020)

Because the trial court’s dismissal of two counts of an amended complaint was not reviewable by mandamus, the court would not consider whether plaintiff had a clear legal right to demand a jury with respect to the dismissed counts. However, plaintiff had a clear legal right to demand a jury in the amended complaint with respect to counts predicated on facts first alleged in the amended complaint; those facts were sufficiently dissimilar to the allegations in the original complaint as to which no jury had been demanded.

Forum Non Conveniens

Ex parte Burgess, No. 1180989 (Ala. Jan. 10, 2020)

Trial court was directed to vacate order transferring action from Jefferson County (county of residence of plaintiff and all defendants) to Shelby County (site of accident). Fact that accident occurred in Shelby County, standing alone, was insufficient to demonstrate that Jefferson County (the chosen forum) had a “weak” connection to the controversy under the “interests of justice” prong of *forum non conveniens*. Plaintiff made no showing that witnesses were not located in Shelby County or that treatment was not provided in Shelby County, which would be indicia of the nature of the connection between the case and Shelby County. The defendant seeking a *forum non conveniens* transfer must demonstrate that the chosen forum has a weak connection and that the proposed transferee court has a strong connection to the controversy. The court noted that “[b]efore a ruling is entered on a motion for change of venue, a trial judge should, at a minimum, allow the party opposing the motion to file a response and then consider whether a hearing would provide a more complete foundation for the exercise of its discretion regarding a change in venue.”

Legal Services Liability

Ex parte Edwards, No. 1180255 (Ala. Jan. 17, 2020)

(1) Order denying summary judgment based on a statute of limitations defense is reviewable by mandamus; and (2) claim for conversion and breach of contract arising out of client’s allegation that attorney improperly withheld ex-

penses from retainer under fee agreement was subsumed into the Alabama Legal Services Liability Act, and thus claims were barred by the Act’s two-year limitations period.

Wills

Taylor v. Hoehn, No. 1180375 (Ala. Jan. 17, 2020)

Proponent of lost will must demonstrate, among other elements, that the will was executed by the testator in the presence of two witnesses. Under ore tenus review, there was sufficient evidence before the trial court to negate that element and thus support the trial court’s refusal to admit lost will to probate.

From the Court of Civil Appeals

Commencement of Action; Statute of Limitations

Brooks v. Austal USA, LLC, No. 2180354 (Ala. Civ. App. Dec. 6, 2019)

Plaintiff commenced action within limitations period and provided service instructions to clerk, which turned out to be incorrect (incorrectly designating registered agent). Service was returned incomplete. Seven months later, plaintiff effected service. Defendant moved to dismiss based on the statute of limitations, claiming there was no bona fide intent to serve at the time the action was commenced and therefore the filing of the action did not toll the statute of limitations. The trial court granted the motion. The court of civil appeals reversed, holding that there did not appear to be any lack of a bona fide intention to serve based on the initial attempt to serve. Though Rule 4’s 120-day limitation might give the trial court the right to dismiss, for statute of limitations purposes, the action was commenced upon filing.

Will Contests

Rothwell v. Molitor, No. 2180845 (Ala. Civ. App. Dec. 13, 2019)

Will proponents failed to establish that will was self-proving under Ala. Code § 43-8-132, because there was an error in the attestation (on the self-proving affidavit, the name of one of the witnesses was listed as the testator in the notary attestation). Because the will was not self-proving, will was not properly admitted to probate under Ala. Code § 43-8-167,

because the witnesses did not offer testimony as to the soundness of mind of the testator, and no explanation was provided as to why the attesting witnesses were unavailable.

Tax Sales; Mesne Profits; Ejectment

Prescott v. Milne, No. 2180270 (Ala. Civ. App. Dec. 13, 2019)

Redemptionee (actually successor in interest to redemptionee) was entitled to recover mesne profits from redemptioner for possession of house for which tax deed had been issued to redemptionee, from time of redemptionee's receipt of tax deed through time of redemption. Because § 40-10-73 applies only to the holder of a tax-sale certificate who seeks possession of property sold for taxes and does not apply to the holder of a tax deed, redemptionee in possession of tax deed was not required to demand possession six months before filing ejectment action.

Rule 41 Involuntary Dismissal

Wilson v. Merriweather, No. 2180737 (Ala. Civ. App. Jan. 10, 2020)

Trial court abused its discretion in dismissing in its entirety a quiet title and ejectment action against 19 defendants (all of whom had potential claims regarding the property) for failure to perfect service on a newly added address of one of the 19 defendants within seven days after learning the address of the new defendant. Rule 41 is a drastic sanction, and the failure to perfect service within the short window demanded by the trial court after receipt of new information did not evince contumacious conduct.

Administrative Law

Ex parte Alabama Medicaid Agency, No. 2190092 (Ala. Civ. App. Jan. 10, 2020)

Under Ala. Code § 41-22-20(b), a party must file a notice of appeal with the administrative agency in order to obtain judicial review. The circuit court has no authority to extend that time. The filing of that notice is jurisdictional. Circuit court lacked jurisdiction in this case for failure to comply with the statute.

Exemptions; Wages

Renter's Realty v. Smith, No. 2181042 (Ala. Civ. App. Jan. 10, 2020)

A unanimous *per curiam* court held that Ala. Code § 6-10-6.1, under which wages and other compensation is not personal property subject to exemption from garnishment or execution for the collection of debt, is unconstitutional. The court reasoned that in *Kennedy v. Smith*, 99 Ala. 83, 88, 11 So. 665, 666 (1892), the supreme court had held that wages were "personal property" subject to exemption under the provision of the 1875 Constitution which became section 204 of the Alabama Constitution of 1901. The legislature may not amend the constitution.

Workers' Compensation; Panel of Four

Ex parte Kohler Company, Inc., No. 2190081 (Ala. Civ. App. Jan. 17, 2020)

Trial court did not abuse its discretion in compelling employer to refer employee to orthopaedic specialist for second opinion for compensable injuries, which had occurred after employee had been referred to a specialist selected from a panel of four, where the convening of and selection from original panel of four was necessitated by employer's refusal to refer employee to specialist as recommended by original treating physician.

From the United States Supreme Court

FDCPA; Statutory Construction

Rotkiske v. Klemm, No. 18-328 (U.S. Dec. 10, 2019)

The one-year statute of limitations for FDCPA claims under 15 U.S.C. § 1692k(d) is not generally subject to any "discovery" rule; the statute begins running from the date of the FDCPA violation and not the discovery of a violation.

From the Eleventh Circuit Court of Appeals

Standing

Lewis v. Governor of Alabama, No. 17-11009 (11th Cir. Dec. 13, 2019) (en banc)

The *en banc* court held that African-American minimum-wage workers lacked Article III standing to sue state officials regarding the constitutionality of Alabama's 2016 statute which proscribed local or municipal laws imposing a minimum wage—which in turn was a response to the Birmingham City Council's 2015 imposition of a \$10.10 minimum wage in the city.

RICO; Amendments to Complaints

Crawford's Auto Center, Inc. v. State Farm Mut. Auto. Ins. Co., No. 17-12583 (11th Cir. Dec. 20, 2019):

The court affirmed the district court's Rule 12 dismissal of RICO claims brought as putative class action by independent collision centers against insurers, based on insurers' use of their Direct Repair Programs (DRPs). Predicate acts of fraud

(Continued from page 163)

were not pleaded adequately, as there were only vague allusions to misrepresentations and no specifically identified misrepresentation. Predicate act of extortion under the Hobbs Act failed because plaintiffs “have not alleged Defendants wrongfully used actual or threatened force, violence, or fear to obtain their property.” Any further amendment attempt would be futile, and thus there was no abuse of discretion in denying amendment.

False Claims Act; Statutory Construction

Nesbitt v. Candler County, No. 18-14484 (11th Cir. Jan. 3, 2020)

To establish that adverse action was taken “because of” a protected False Claims Act reporting under the FCA anti-retaliation statute, 31 U.S.C. § 3730(h)(1), plaintiff must demonstrate “but for” causation—that the adverse action would not have been taken but for the reporting. The Court looked to the decisions in *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013), and *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). They involved interpretation of nearly identical language in two other job discrimination statutes—in *Gross*, the court interpreted “because of” under ADEA’s anti-retaliation statute to require but-for causation, and in *Nassar*, the court interpreted the word “because” in Title VII’s anti-retaliation statute the same way.

ADA; Eleventh Amendment

National Assn. of the Deaf v. State of Florida, No. 18-12786 (11th Cir. Jan. 3, 2020)

In suit challenging state agency’s failure to provide captioning for live and archived video of Florida legislative proceedings under ADA Title II, the court held: (1) that Congress validly abrogated defendants’ Eleventh Amendment immunity with respect to plaintiffs’ claims under Title II; (2) that the *Pennhurst* exception to *Ex parte Young* does not bar plaintiffs’ Title II claims for declaratory and injunctive relief against certain state officials; and (3) that it need not resolve whether sovereign immunity shielded the Florida House and Legislature from Plaintiffs’ Rehabilitation Act claim at the motion to dismiss stage.

Heck v. Humphrey

Henley v. Payne, No. 18-13101 (11th Cir. Dec. 30, 2019)

Henley was arrested for criminal trespass. Three weeks later he was released. Trespass charge was dropped when Henley pled guilty to unrelated charges. Held: *Heck v.*

Humphrey, 512 U.S. 477, 114 S. Ct. 2364 (1994), does not bar Henley’s § 1983 claim based on false arrest from the original trespass, because *Heck* is intended to foreclose collateral attacks on state-court judgments, and here the charge underlying the arrest was dismissed.

FCRA; Willfulness; Punitive Damages

Williams v. First Advantage LNS Screening Solutions, Inc., No. 17-11447 (11th Cir. Jan. 9, 2020)

Defendant in FCRA action (a criminal background report provider) had a procedure under which common-name report subjects required three identifier matches, but its actual practice was to proceed with only two identifiers. Although defendant had a system for correcting incorrect reports, its system offered no means to ensure that an investigative subject who has been mispaired with a particular criminal conviction or arrest of a person with a similar name will not be mismatched in future background checks with other convictions/arrests of this same person. After plaintiff’s information was mismatched in multiple reports impacting his employment, plaintiff sued under 15 U.S.C. § 1681e(b), which requires CRAs to follow “reasonable procedures to ensure maximum possible accuracy” in consumer reports. At trial, the jury awarded \$250,000 in damages (\$70,000 of which was lost wages, the remainder being reputational injury), found willfulness in the FCRA violation, and awarded \$3.3 million punitive damages. In a 77-page opinion largely devoted to the punitive damage analysis, the Eleventh Circuit affirmed as to the compensatory award and remitted the punitive damages to \$1 million. In a lengthy exposition of punitive damage law, the lead opinion by Judge Julie Carnes admitted that the assignment of punitive damages was an imprecise exercise. The separate opinions make clear that the punitive amount was set as a quotient verdict—Judge Martin would have left the punitive damages intact, and Judge O’Scannlain (from the Ninth Circuit) would have reduced the punitives to \$500,000.

PLRA

Sconiers v. FNL Lockhart, No. 16-16954 (11th Cir. Jan. 7, 2020)

The 2013 amendment to the Prison Litigation Reform Act (PLRA) and *Wilkins v. Gaddy*, 559 U.S. 34, 37 (2010), under which a correctional officer’s malicious and sadistic actions that both have no legitimate penological purpose and are unacceptable by contemporary standards of decency sub-

ject a prisoner to cruel and unusual punishment, abrogated *Boxer X v. Harris*, 437 F.3d 1107 (11th Cir. 2006), the court's prior precedent concerning sexual abuse allegations suffered by a prisoner in confinement.

RECENT CRIMINAL DECISIONS

From the Court of Criminal Appeals

Probation Revocation

***Lara v. State*, CR-18-0905 (Ala. Crim. App. Jan. 10, 2020)**

Trial court erred in revoking defendant's probation and ordering him to complete a prison substance abuse program for an undetermined length of time after he committed a technical probation violation. Because the defendant's theft conviction was neither a Class A violent felony nor a sex offense, the trial court could only impose a period of confinement of 45 days or less under Ala. Code § 15-22-54(e)(1).

Confrontation

***Capote v. State*, CR-17-0963 (Ala. Crim. App. Jan. 10, 2020)**

There was no violation of the confrontation clause in the admission of statements from non-testifying codefendants. Statements were attributed to a group, rather than to a specific person. Further, even if they were made by the codefendants, they did not fall within the confrontation clause because statements to associates about crimes in which the declarant participated are nontestimonial in nature.

Cellphone Records; Lay Testimony

***Watson v. State*, CR-18-0377 (Ala. Crim. App. Jan. 10, 2020)**

The court found no error in law enforcement officers' seizure of the defendants' cellphone record under *Carpenter v. United States*, 138 S. Ct. 2206 (2018). Though *Carpenter* requires the issuance of a search warrant for such records, they were seized here pursuant to court orders in compliance with the Stored Communications Act, 18 U.S.C. § 2701 et seq., and corresponding Alabama statutes nearly three years before the issuance of that decision. The officers' good-faith reliance on the court orders long before the issuance of *Carpenter* insulated the evidence from exclusion. Evidence regarding cellular towers and cellphone routing was admissible as lay testimony.

Stand Your Ground Immunity

***Dumas v. State*, CR-18-0449 (Ala. Crim. App. Jan. 10, 2020)**

Defendant's challenge to trial court's denial of immunity under Ala. Code § 13A-3-23(d) was moot because he did not challenge that decision through a petition for a writ of mandamus.

Probation Revocation

***Faircloth v. State*, CR-18-0837 (Ala. Crim. App. Jan. 10, 2020)**

In revoking probation, trial court may increase the split portion of a sentence under the Split Sentence Act, Ala. Code § 15-18-8, but it cannot increase that portion beyond the maximum term provided in the statute.

Probation

***Matthews v. State*, CR-18-0838 (Ala. Crim. App. Nov. 22, 2019)**

Because defendant was convicted and sentenced before the 2015 amendment of § 15-18-8(b), and the revocation of his probation was not a new sentencing event, the authority for his term of probation arose from the former version of § 15-18-8 in effect at the time of his conviction and sentence.

Ineffective Assistance

***Jones v. State*, CR-13-1552 (Ala. Crim. App. Nov. 22, 2019)**

Trial court did not err in rejecting the capital murder defendant's numerous ineffective assistance of counsel claims, including his contention that his trial attorneys were ineffective for not presenting blood-spatter expert testimony. The state's blood-spatter evidence at trial was consistent with the defendant's statement that he was present at the time of the murder, but did not participate in it, and he failed to plead sufficient facts to overcome the presumption that the decision to not retain a blood-spatter expert was sound trial strategy or to establish prejudice.

Rule 32; Enhancement

***Justo v. State*, CR-18-1058 (Ala. Crim. App. Nov. 22, 2019)**

The defendant sought relief from the life-without-parole sentences imposed on his rape and burglary convictions under the Alabama Habitual Felony Offender Act, Ala. Code § 13A-5-9, arguing his prior second-degree theft offense had been subsequently defined as a Class D felony and could not be used for sentence enhancement. The court affirmed the denial of the petition; reclassification from Class C to Class D was not retroactive. It also found no abuse of discretion in the trial court's imposition of a filing fee under Ala. R. Crim. P. 32.7 (e) after its dismissal of the petition.

Allocution

***Caver v. State*, CR-18-0969 (Ala. Crim. App. Jan. 10, 2020)**

Defendant is entitled to make a statement on his own behalf before sentencing as required by Ala. R. Crim. P. 26.9(b)(1). ▲



DISCIPLINARY NOTICES

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- ▲ Reinstatement
- ▲ Transfer to Inactive Status
- ▲ Disbarment
- ▲ Suspensions
- ▲ Public Reprimands

Notice

- **Chase Russell Hutcherson**, who practiced in Muscle Shoals and whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of March 31, 2020 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB No. 2019-375 before the Disciplinary Board of the Alabama State Bar. [ASB No. 2019-375]

Reinstatement

- On December 5, 2019, the Supreme Court of Alabama entered an order reinstating former Arley attorney **Sarah Anna Rutland Cook** to the practice of law in Alabama, with conditions, based upon the decision of Panel I of the Disciplinary Board of the Alabama State Bar. Cook had been suspended since May 22, 2017. [Rule 28, Pet. No. 2019-858]

Transfer to Inactive Status

- Birmingham attorney **Theodore Richard Pearson** was transferred to inactive status, effective October 21, 2019, by order of the Supreme Court of Alabama. The Alabama Supreme Court entered its order based upon the October 21, 2019 order of Panel II of the Disciplinary Board of the Alabama State Bar in response to Pearson's petition filed with the Office of General Counsel requesting he be transferred to inactive status. [Rule 27(c), Pet. No. 2019-1213]

Disbarment

- Mobile attorney **John Walter Sharbrough, III** was disbarred from the practice of law in Alabama, effective October 23, 2019. The Alabama Supreme Court entered its order based on the report and order of the Disciplinary Board of the Alabama State Bar, disbaring Sharbrough after he was found guilty of violating Rules 1.3 [Diligence] and 8.4(d) and (g) [Misconduct], Alabama Rules of Professional Conduct. On January 27, 2017, an appellant filed a notice of appeal from the Mobile Circuit Court in a case. Sharbrough represented the appellee in the appeal. The

case was subsequently selected for mediation screening by the Appellate Mediation Office on February 16, 2017. Sharbrough failed to return the mediation materials as directed. On March 20, 2017, the Appellate Mediation Office issued an order to Sharbrough requiring the forms to be completed and returned no later than March 2, 2017. Sharbrough failed to return the materials as directed. On March 20, 2017, the Appellate Mediation Office issued an order to Sharbrough requiring the forms to be submitted no later than March 27, 2017. Sharbrough subsequently failed to comply with the order. As a result, the Appellate Mediation Office reinstated the appeal to the active docket of the Alabama Supreme Court on March 28, 2017. Sharbrough subsequently failed to file an appellee's brief on behalf of his client. As such, the matter was submitted to the Supreme Court of Alabama on the appellant's brief. The Supreme Court of Alabama affirmed the trial court's judgment, without opinion, on September 15, 2017. On October 27, 2017, the Supreme Court of Alabama voted to impose a monetary sanction of \$500 against Sharbrough as a result of his failure to respond to and comply with the Appellate Mediation Office. Sharbrough failed to pay the sanction or respond to the order. As a result, on December 14, 2017, the Supreme Court of Alabama issued a show cause order to Sharbrough based on his failure to pay the sanction or otherwise respond to the court's order. The show cause order

warned that Sharbrough's failure to respond would result in the matter being reported to the Disciplinary Commission of the Alabama State Bar. Sharbrough failed to respond and the court reported the matter to the bar. Thereafter, the Office of General Counsel made repeated attempts to contact Sharbrough and obtain a written response to the court's complaint. Sharbrough failed to respond. As a result, Sharbrough was summarily suspended from the practice of law on July 23, 2018 for failing to respond to a disciplinary matter. [ASB No. 2018-289]

Suspensions

- Birmingham attorney **Stephen Judson Bailey** was summarily and interimly suspended pursuant to Rule 20(a), Ala. R. Disc. P., from the practice of law in Alabama by the Supreme Court of Alabama, effective September 16, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Bailey be summarily and interimly suspended for failing to respond to formal requests for information concerning a disciplinary matter and for engaging in conduct that is causing or likely to cause immediate and serious injury to a client. [Rule 20(a), Pet. No. 2019-1102]

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ALABAMA LAWYER ASSISTANCE PROGRAM

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- Los Angeles, California attorney **Sesie Kofi Bonsi**, who is also licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective August 28, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Bonsi be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-557]
- Meridian, Mississippi attorney **Joseph Anthony Denson**, who is also licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective August 28, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Denson be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-569]
- Dallas, Texas attorney **Michael Clark Dodd**, who is also licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective August 28, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Dodd be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-570]
- Homewood attorney **Christopher Ramsey Duck** was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective August 28, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Duck be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-573]
- Evans, Georgia attorney **Michael Eric Fowler**, who is also licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective August 28, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Fowler be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-576]
- Birmingham attorney **Nancy Lee Franklin** was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective August 28, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Franklin be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-577]
- Birmingham attorney **Robert William Hensley, Jr.** was summarily suspended pursuant to Rule 20(a), Ala. R. Disc. P., from the practice of law in Alabama by the Supreme Court of Alabama, effective October 21, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Hensley be summarily suspended for failing to make restitution as previously ordered by the Disciplinary Commission in a prior disciplinary matter. [Rule 20(a), Pet. No. 2019-716]
- Pinson attorney **Rebecca Mae Graf** was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective August 28, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Graf be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-580]
- Dothan attorney **James Garrett Jeffreys** was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective August 28, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Jeffreys be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-589]
- Birmingham attorney **Elliot Jacob Labovitz** was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective August 28, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Labovitz be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-595]
- **Alfred Dudlow Norris, III**, who formerly practiced law in Montgomery, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective August 28, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Norris be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-602]
- Johns Creek, Georgia attorney **Raymond Eric Powers, III**, who is also licensed in Alabama, was suspended from the

practice of law in Alabama by the Supreme Court of Alabama, effective August 28, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Powers be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-610]

- New Orleans, Louisiana attorney **Brent Louis Rosen**, who is also licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective August 28, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Rosen be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-615]
- Issaquah, Washington attorney **Brett Lee Wadsworth**, who is also licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective August 28, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Wadsworth be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-624]
- Columbus, Georgia attorney **Joseph Wiley, Jr.**, who is also licensed in Alabama, was suspended from the practice of

law in Alabama by the Supreme Court of Alabama, effective August 28, 2019. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Wiley be suspended for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-633]

Public Reprimands

- Mobile attorney **Darryl Tyrone Blackmon** was issued a public reprimand without general publication on November 1, 2019, as ordered by the Disciplinary Commission of the Alabama State Bar, for violating Rules 5.5 [Unauthorized Practice of Law] and 8.4(d) and (g) [Misconduct], Alabama Rules of Professional Conduct. On January 15, 2019, Blackmon was officially listed as inactive after failing to renew his occupational license. Prior to being listed as inactive, Blackmon received several notifications from September 1, 2018 to January 15, 2019, reminding him to renew his occupational license. On January 30, 2019, Judge Holmes Whiddon, presiding municipal judge for the City of Mobile, reported Blackmon had been engaging in the unauthorized practice of law. According to Judge Whiddon, on January 30, 2019, Blackmon approached him ex parte

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and asked him to continue a case to allow him and the prosecutor additional time to negotiate an agreement. Judge Whiddon agreed to do so and then subsequently engaged in small talk. After a few minutes of small talk, Blackmon asked Judge Whiddon to keep the conversation private and to not put anything on the record regarding the continuance because Blackmon had an ongoing issue with the bar. Blackmon then informed Judge Whiddon he had failed to renew his license timely and was not authorized to practice law. [ASB No. 2019-228]

- Phenix City attorney **Lindsay Brooke Erwin** received a public reprimand without general publication on November 1, 2019, as ordered by the Disciplinary Commission of the Alabama State Bar, for violating Rules 1.3 [Diligence], 1.4 [Communication], 8.1(a) [Bar Admission and Disciplinary Matters], and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct. In April 2018, Erwin was hired by a client to file an uncontested divorce for a flat fee of \$750. A week later, the client picked up the paperwork to be signed by him and his wife. The executed paperwork was returned at the end of April and the client provided Erwin with the \$236.13 filing fee. The check for the filing fee was negotiated by Erwin on May 16, 2018. The client heard nothing further from Erwin until August 2018. At that time, Erwin informed the client to provide a family member who could serve as a witness. After doing so, the client heard nothing further from Erwin and subsequently filed a bar complaint on December 10, 2018. The client and his mother repeatedly attempted to contact Erwin for a status update without success. In her response to the bar complaint, Erwin stated she filed the uncontested divorce upon receipt of the signed documents from the client. Erwin also stated that after filing the uncontested divorce, she requested the court on numerous occasions to finalize the divorce. However, the court later informed Erwin that she was also required to file a commission statement by a non-party since there were no children born from the marriage. Erwin stated that she immediately notified the client of the new requirement and a week later, the witness came to Erwin's office and signed the commission statement. Additionally, Erwin stated she filed the commission statement the same day and three days later, the court issued the final divorce decree. However, Erwin's response to the client's bar complaint was not truthful and contained material misrepresentations of fact. Contrary to Erwin's response to the client's complaint, she did not file the uncontested divorce until October 13, 2018, six months after receiving the signed paperwork from the client and his wife. The commission statement was signed by the witness on November 14, 2018. However,

Erwin did not file the commission statement the same day as she stated in her response to the bar, but rather three weeks later on December 3, 2018. The court issued the final divorce decree three days later. [ASB No. 2018-1377]

- McCalla attorney **Samuel Mark Hill** received a public reprimand without general publication on November 1, 2019 for violating Rules 5.5 [Unauthorized Practice of Law] and 8.4 (d) and (g) [Misconduct], Alabama Rules of Professional Conduct. On January 15, 2019, Hill was officially listed as inactive after failing to renew his occupational license. Prior to being listed as inactive, Hill received four emails reminding him to renew his license between September 1, 2018 and November 1, 2018. Hill then received three letters from the bar reminding him to renew his license from November 2018 to January 15, 2019, when Hill was notified that he was listed as inactive for failing to renew his occupational license. On January 31, 2019, the Office of General Counsel was notified that Hill was continuing to practice law despite not being licensed to do so. On January 31, 2019, Hill emailed the clerk of the Supreme Court of Alabama on behalf of his client. In Hill's email, he stated he was pursuing a petition for writ of certiorari before the United States Supreme Court and requested a certified copy of the record before the Alabama Supreme Court. On that same day, Hill filed a response to a motion in a circuit court matter. His response was subsequently struck by the court after the court determined Hill was not licensed to practice law. Hill also filed a pleading on behalf of a plaintiff in another circuit court matter on January 18, 2019. [ASB No. 2019-247]
- Irvington attorney **Paul Ricky Kornis** received a public reprimand with general publication on November 1, 2019 for violating Rule 3.5 [Impartiality and Decorum of the Tribunal], Alabama Rules of Professional Conduct. In 2017, Kornis was retained by Huntsville International Research Institute (HIRI) and its principals on federal claims involving an alleged fraudulent attempt by a third party to obtain insurance for HIRI, to steal money from HIRI, and to steal a government subcontract. During this time period, HIRI was represented by another attorney on related claims in state court. While not counsel of record for HIRI in the matter pending in state court, Kornis improperly communicated ex parte with the judge presiding over the state court matter. On or about April 9, 2018, Kornis emailed the state court judge a letter in which Kornis attempted to argue the merits of the matter involving HIRI and pending before the judge. In doing so, Kornis accused one of the parties and their attorney of various criminal acts. [ASB No. 2018-838] ▲

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