THE ALABAMA LAWYER

MAY 2020 | VOLUME 81, NUMBER 3

Alabama State Bar's 143rd Annual Meeting Has Been POSTPONED

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ALABAMA WORKERS' COMPENSATION ISSUE

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143rd ANNUAL MEETING

• POSTPONED •

Due to the global COVID-19 (Coronavirus) pandemic, we are postponing the Alabama State Bar 2020 Annual Meeting, originally scheduled for June 24-27 at the Hilton Sandestin.

As you can imagine, we did not come to the decision lightly, and we are all disappointed that we won't be able to be together in June for our 143rd Annual Meeting. Postponing the annual meeting is simply the right thing to do during this historic time. We need to do everything we can during this pandemic to protect the health, safety, and well-being of our members and attendees, and postponing the annual meeting is the only way we can accomplish this.

We hope to be able to reschedule the meeting for later in 2020. At this time, we don't have enough information to know when that will be safe or possible.

Read the full letter from President Christy Crow and Executive Director Phillip McCallum on page 183.

June 24-27, 2020

Hilton Sandestin Beach
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THE ALABAMA LAWYER

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On The Cover

A small brown and white Blenny fish peeks out of its home while a school of fish are swimming in the background. Shot underwater, on a wreck off the coast of Panama City Beach, Florida

FEATURE ARTICLES

ALABAMA WORKERS' COMPENSATION

COLUMNS

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Christina D. Crow
ccrow@jinkslaw.com

What Does It Mean to be More Than a Lawyer?

One of the things I knew from the day I became president-elect designate (that feels so long ago) was that I wanted to share the stories of lawyers. I was not born in the South. However, having moved here at a young age, I knew the importance of storytelling in the South. I also learned early in life that it is a lot easier to understand others if we know their story–their who; their why; their what. Maybe that's the reason I became a lawyer–to figure out other people. Whatever the reason, I knew I was tired of lawyer jokes and wanted more people to know how amazing lawyers are.

I also figured out early on that I was a better lawyer when I listened to my clients and didn't assume I knew that everyone who had been injured in an accident had the same story. Or, worse, that everyone who lost a loved one shared the same journey of grief. I came to understand that I learned a lot more from listening than talking. And I also realized that when I asked the right questions, whether of my clients or opposing side, I learned much more valuable information than if I assumed I knew the answers and talked more than I listened.

So, in preparing for my year as president, I thought about these lessons and

how I might apply them to our profession. Who am I? Who are we? Who is this person on the other side from me? Why am I showing up at this meeting? Why are others showing up? Why do so many lawyers serve their communities on boards and in groups? Why are so many lawyers concerned enough about this profession to volunteer for the bar? Why are so many lawyers concerned enough about this profession to even take the time to read this article?

I finally decided that, for me, the answer is connection. We are looking for a method to connect with others. For many of us, that is through the profession we call the practice of law and, for even more, it is the connection to our community. And because I love lawyers and know lawyers are doing amazing things, I wanted to share the stories of servant leaders who connect to their communities and their profession.

With this mission, and with the help of our amazing communications department, More Than A Lawyer was created. This is a collection of stories and interviews of lawyers across the state who love being a lawyer and know what a privilege it is to serve our communities as a lawyer. But each of these lawyers knows one more thing–that with great privilege comes great responsibility. And because of their acknowledgement that those in community need lawyers and that all lawyers need communities to feed their souls, I have interviewed lawyers this year that are More Than A Lawyer. These lawyers have:

- Had an annual fundraiser to raise funds and awareness of Cystic Fibrosis and to provide funds for immediate needs on the ground in response to a crisis (who, by the way, is also serving as president-elect of the Alabama State Bar and will be writing these articles soon);
- Served as a Jag Officer in the Army National Guard and been on active duty in the Reserves, serving in conflict zones around the world;
- Collected donations from all 50 states in support of the March of Dimes;
- Cooked and delivered 2,000 turkey dinners for Christmas meals in their community;
- Hiked 26 miles to raise money and awareness of the need to make wishes come true for ill children;
- Traveled to numerous countries to raise awareness of Rotary International and their mission to end polio and other diseases, as well as build an infrastructure in these communities; and
- Raised money and awareness of human trafficking in Alabama as an ongoing problem that can be solved if more people acknowledge the reality of human trafficking and "see something and say something."

In addition to the numerous people I've talked to during our Facebook Live programs, the Alabama State Bar has shared the stories of dozens of lawyers on our weekly #MoreThanALawyer posts on social media. Through these posts, we've gotten to know the stories of lawyers who:

- Served as the international director of Lions Club International;
- Coached the Dixie Softball Ponytails All-Star Team to the World Series (while on my Executive Council of the Alabama State Bar);
- Served as foster parents for over 20 children;
- Advocate for military spouses and was instrumental in the passage of the Military Spouse Rule for the Alabama State Bar this year;
- Served as the vice chair of the Boys & Girls Club of Etowah County; and
- Created a non-profit to support families before, during, and after the adoption process in an effort to build strong adoptive communities.

There are just a few of the amazing stories we have shared, and there are even more at *//www.alabar.org/more-than-a-lawyer-stories/*. If I'm ever feeling a little down, I can spend 10 minutes reading the stories of these amazing lawyers and fill my own spirit with hope and joy for the future. Each of these members of our profession displays their passion for their communities, whether it is a geographic community, a faith community, or a community of shared importance.

We have made a small drop in the bucket in telling the stories of lawyers, and that drop has created ripples across our state. People are beginning to understand that lawyers, generally, are pretty amazing. But our work is not done. It is hoped that we will all begin to realize that most lawyers work hard to represent their clients, that we have more in common than that which separates us, and that we all have a passion for service that is unparalleled.

I hope you have a story about an amazing lawyer that you will share with us. You can nominate a lawyer to be interviewed on our Facebook Live show or for a feature on our weekly spotlight by contacting Melissa Warnke at *melissa.warnke@alabar.org*.

More importantly, I hope that you know what makes you, personally, more than a lawyer. Because while we all share a passion for our profession, that cannot compare to the love and respect you should have for yourself and your profession that makes you proud to be a member of the Alabama State Bar and proud of yourself. Find your passion. Find what feeds your soul. Let that be your #MoreThanALawyer Story. ▲

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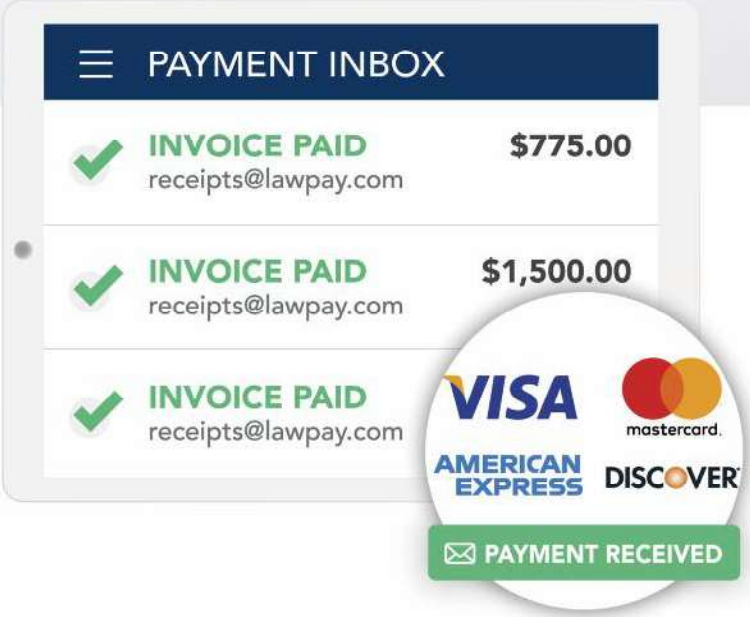

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Alabama State Bar's 2020 Annual Meeting Indefinitely Postponed

The Alabama State Bar has been closely monitoring the COVID-19 pandemic. The health and safety of all our members and attendees is a top priority.

Dear Alabama State Bar Members and Annual Meeting Sponsors:

Due to the global COVID-19 (Coronavirus) pandemic, the Alabama State Bar is postponing the 2020 Annual Meeting, originally scheduled for June 24-27 at the Hilton Sandestin.

As you can imagine, we did not come to the decision lightly, and we are all disappointed that we won't be able to be together in June for our 143rd Annual Meeting. Postponing the annual meeting is simply the right thing to do during this historic time. We need to do everything we can during this pandemic to protect the health, safety and well-being of our members and attendees, and postponing the annual meeting is the only way we can accomplish this.

We hope to be able to reschedule the meeting for later in 2020. At this time, we don't have enough information to know when that will be safe or possible.

If you had already made your hotel reservations and wish to cancel, you will need to cancel your own reservation by either calling the hotel at 888-519-1395, or cancel online or via the Hilton Honors app. If you have already registered for the annual meeting, you will receive a refund.

If you have further questions, please contact *annualmeeting@alabar.org*. More information will be posted on this page and on social media in the days and weeks ahead. As always, you can stay up to date with everything the Alabama State Bar is doing by following us on Facebook, Instagram and Twitter and also on the COVID-19 response page on our website.

Please stay safe, wash your hands and know that our thoughts and prayers are with you all during this difficult time.

Sincerely,

Christy Crow
President, Alabama State Bar

Phillip McCallum
Executive Director, Alabama State Bar

EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum
phillip.mccallum@alabar.org

A Decade of the Uniform Bar Exam in Alabama–Looking Back and Moving Forward

Alabama adopted the Uniform Bar Examination (UBE) in 2010 and, in July 2011, became the third jurisdiction in the country to administer it. The UBE is professionally developed by the National Conference of Bar Examiners (NCBE) and, among other features, provides for portability of bar exam scores among the UBE jurisdictions (now up to 36) and autonomy of each jurisdiction in grading and setting a minimum passing score. With nearly 185 years combined experience, the members of the Alabama Board of Bar Examiners, chaired by Dothan attorney Dan Johnson, are the experts on bar exam and bar admissions policies in Alabama.

Johnson

In 2017, the Board of Bar Examiners began a self-assessment to see how its duties and responsibilities were impacted by the evolution of the bar exam, particularly growth of the UBE. The Board of Bar Examiners concluded that there have been substantial changes in its duties and responsibilities over the past decade. In particular, the board realized that responsibilities associated with grading the bar exam are distinctly different from those associated with monitoring and shaping bar admissions policies, and that structural changes to the board were in order to best address those differences.

The Board of Bar Examiners Restructure Task Force was created in 2018 by then President Sam Irby. The task force, co-chaired by Dan Johnson and Bar Commissioner Tom Perry (17th Judicial Circuit), was charged with evaluating the structural changes recommended by the Board of Bar Examiners and exploring other opportunities for improvement of our admissions policies. After a year of active work, the task force recommended reducing the size of the Board of Bar Examiners from 15 members to seven. The task force also recommended that the Board of Bar Examiners implement enhanced grading procedures that will provide a higher level of fairness to examinees, without compromising public protection or the integrity of the bar exam.

The recommendations of the Board of Bar Examiners Restructure Task Force were unanimously approved by the Board of Bar Commissioners at its meeting in May 2019. The Supreme Court of Alabama, in an order dated February 21, 2020, unanimously approved amendments to the Rules Governing Admission to the Alabama State Bar that provide for a seven-member Board of Bar Examiners. The newly-constituted Board of Bar Examiners will be responsible for monitoring and enforcing bar admissions policies, recommending policy changes, and providing oversight of those committees responsible for grading the bar exam and delivering online curriculum on Alabama law. The changes to the rules go into effect on October 1, 2020 and will be used in practice starting with the February 2021 administration of the Alabama bar exam.

It's hard to believe that a decade has passed since Alabama adopted the UBE. As one of the first jurisdictions in the country to adopt it, we showed a commitment to being a trailblazer in the area of bar admissions. The restructuring of our Board of Bar Examiners and enhancement of our grading procedures are other examples of how the stakeholders in our bar are forward-thinking in the admissions arena. As a staff, we not only look forward to implementing these changes, but also to what the next decade will hold in terms of improvements to the bar exam and the bar admissions process. ▲

Alabama Board of Bar Examiners

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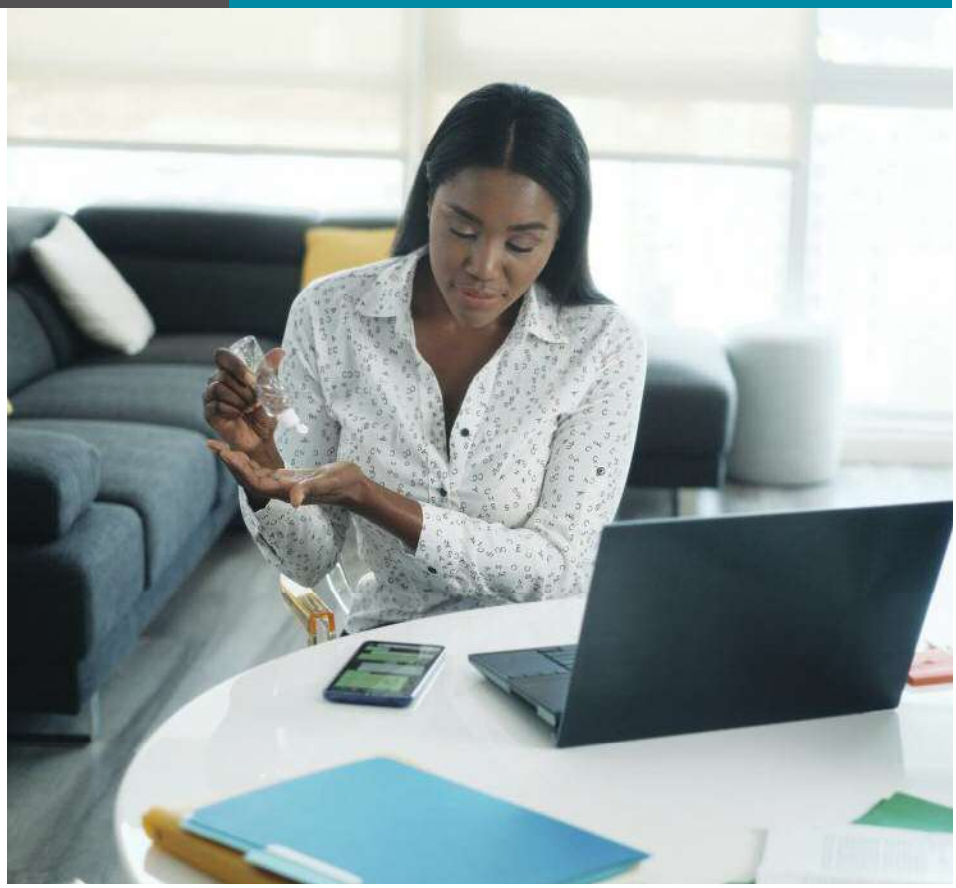


This is an historic edition. COVID-19 is working its way across our nation, taking many lives, shutting down an economy, and generally wreaking havoc. We are being tested as a people, and we are being tested as a profession.

You've likely heard that the state bar annual meeting has been postponed. I was slated to speak at Divorce on the Beach, and it suffered the same fate. Our bar commissioners' next meeting will be a virtual meeting. Our courthouses are largely shuttered. Did you ever think you'd live to see this?

We've gone from living our lives at 100 miles per hour to getting three weeks to the gallon.

I don't know the future. I can't even forecast what I'm having for supper. But if there is one thing I'm sure about, it is this: I'm proud of the members of the Alabama State Bar. The stories I'm hearing are absolutely wonderful. Y'all have contributed in so many ways, done so much, helped so many.

I just heard a story taken from Alfred Bester's 1953 science fiction classic, *The Demolished Man*. Bester wrote that in

the future there will be mind readers, and their skill will be so highly prized that they establish schools to teach it. Applicants to the school are warned that the process is arduous. While the applicants are filling out their forms, the actual mind readers are watching them and thinking, "If you can hear me, get out of the line, walk to the door that is marked 'No Admittance.' Go through it."

You do the hard things. You walk through doors marked "No Admittance," pushing barriers, and just trying to help. And I'm proud to be counted among your number.

We will get through this. We really are better together.

Now, to this issue:

Welcome to the workers' compensation edition! I've been excited about this one for a long time.

This one began when Larry King and I sat together at a docket call. I mentioned to him that I was thinking of dedicating an edition of *The Alabama Lawyer* to workers' compensation. He told me that I should talk to Mike Fish, who was also in the courtroom. I did. Mike is one of the smart guys in this field, and he wound up gathering all of the articles and giving them a once-over before they came to me. Boy, did he do a great job.

Julia Aquila is the chair of the state bar's workers' compensation section, and she wrote a welcoming message so warm that it almost made me want to do another workers' comp case. Almost. (page 194)

In addition to heading up the edition, Mike Fish also wrote our lead article, "Alabama Workers' Compensation and the Telecommuter" (page 196). Take a moment and read that title again. Could any article be more timely than an article about people who work from home? Mike's timing is so good that I made him promise to text me the next winning lottery numbers. Hey Mike, I'm still waiting. Mike takes a look at existing Alabama law, surveys other states when he finds issues we haven't addressed, and then he sums it up under a heading of WWAD–what would Alabama do. He's not only a great guy, but as scrivener he's first-rate.

Richard Browning leads us through "Handling a Workers' Compensation Case for the Employee–From Initial Interview to Trial" (page 204). If you are new, or if you are new to workers' compensation cases, this is a great starting place.

So, is workers' compensation boxed in, or does a savvy lawyer have to know other areas of the law? Carin Burford takes us by the hand and explains how the Americans with Disability Act, and the Family Medical Leave Act, poke their heads up in these cases (page 211). And Carin tells us what to do when they do. If you work in this field at all, this is a must-read article.

How many times have you lain awake in bed at night unable to sleep for wondering, *where did the Alabama workers' compensation law come from*? (Spoiler alert: think *Germany*.) Tracy Cary puts those questions, and oh so many more, to rest in "The Grand Bargain[1] Is 100! A Look Back at the Alabama Workers' Compensation Act and a Look Ahead" (page 219). Mining the history of legislation is harder than you might think, and Tracy does a good job of putting the concept on a train from Germany, moving it across the continent, and then booking it onto a transatlantic passage to the new world. This is a fun read and well worth your time.

Wilson Green and Marc Starrett continue Sisyphus-like to roll their stone up the hill of summarizing this month's appellate decisions. It is a never-ending job, and they have my thanks. Our readers turn to "The Appellate Corner" regularly. I'm sure they will this month, too (page 232).

So, enjoy the articles. Email me at *wgward@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 July. ▲

EDITOR'S COMMENTS: Great poets have a way of expressing what we are feeling, even when those feelings are so below the surface that we don't realize them. Though Longfellow wrote this poem more than 100 years ago, it remains fresh and as applicable to our Alabama lawyers in the midst of this COVID-19 pandemic as anything I've seen.

A Psalm of Life

By Henry Wadsworth Longfellow

What The Heart of The Young Man Said To The Psalmist.

Tell me not, in mournful numbers, "Life is but an empty dream!"
For the soul is dead that slumbers, And things are not what they seem.

Life is real! Life is earnest! And the grave is not its goal;
"Dust thou art, to dust returnest," Was not spoken of the soul.

Not enjoyment, and not sorrow, Is our destined end or way;
But to act, that each to-morrow Find us farther than to-day.

Art is long, and Time is fleeting, And our hearts, though stout and brave,
Still, like muffled drums, are beating Funeral marches to the grave.

In the world's broad field of battle, In the bivouac of Life,
Be not like dumb, driven cattle! Be a hero in the strife!

Trust no Future, howe'er pleasant! Let the dead Past bury its dead!
Act, –act in the living Present! Heart within, and God o'erhead!

Lives of great men all remind us We can make our lives sublime,
And, departing, leave behind us Footprints on the sands of time;

Footprints, that perhaps another, Sailing o'er life's solemn main,
A forlorn and shipwrecked brother, Seeing, shall take heart again.

Let us, then, be up and doing, With a heart for any fate;
Still achieving, still pursuing, Learn to labor and to wait.

May is Wellness Month

Join the Alabama State Bar and the Quality of Life, Health and Wellness Task Force by taking part in a Wellness Challenge.

The Alabama State Bar will be offering Wellness CLEs throughout the state during Wellness Month.
More information coming soon!

IMPORTANT NOTICES

Local Bar Award of Achievement

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

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

The following criteria are used to judge the applications:

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

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

Position Available

Assistant Reporter of Decisions, Alabama Appellate Courts

Starting date for position is expected to be September 1, 2020. Applicants must be members of the Alabama State Bar; an undergraduate or a graduate degree in English helpful but not required; experience in editing preferred. Requires knowledge of legal-citation formats and strict attention to detail. The assistant reporter is a full-time employee expected to work in the Heflin-Torbert Judicial Building in Montgomery and not remotely. Salary range for this position is $61,024 to $97,696, depending on experience and ability. Submit application letter with résumé by June 15, 2020 to

Sean Blum, Office of Reporter of Decisions, Alabama Appellate Courts, Heflin-Torbert Judicial Building, 300 Dexter Ave., Montgomery, Alabama 36104-3741.

Duties include editing and proofreading; reading the advance sheets of *Southern Reporter (3d)* to ensure that the headnotes accurately state the legal principles in the case and to ensure the accuracy of the reports of the opinions of the Alabama appellate courts; checking lists of decisions without opinions by the Alabama Supreme Court, the Court of Criminal Appeals, and the Court of Civil Appeals for publication in the *Alabama Reporter*; drafting and editing amendments to various rules of procedure adopted by the Alabama Supreme Court; preparing the documentation for, and assisting in, releasing the opinions of the Alabama appellate courts for publication in the official reports; and coordinating publication of the opinions of the appellate courts with the publisher of the official reports.

The assistant reporter serves at the pleasure of the Alabama Supreme Court and is not a merit-system employee. As a confidential court-system employee, the assistant reporter regularly deals with confidential and sensitive matters. ▲

Cindy Frances Myers

Myers

Cindy Myers passed away quietly in her own home on November 19, 2019, after a short battle with pancreatic cancer. She is survived by her parents, Sondra Pfeiffer of Birmingham and Dr. Gary Myers of Rochester, NY, and three nieces, Elizabeth Hyatt, Victoria Bridges, and Emma Bridges.

Cindy grew up in Boston, Rochester, and Birmingham. She graduated with a BS in psychology from the University of Alabama at Birmingham (UAB) and then obtained a master's degree in counseling from UAB and became a licensed professional counselor. She next completed a Juris Doctorate from the Birmingham School of Law and became a member of the Alabama State Bar. She loved learning and went on to become a certified case manager, a diplomate of the American Board of Quality Assurance and Utilization Review Physicians, and a certified trainer in mental health first aid. In 1990, she began working with the Jefferson-Blount-St. Clair Mental Health/Mental Retardation Authority.

In 1998, she joined Behavioral Health Systems, Inc. as director of quality assurance. She joined Cigna-HealthSpring in 2008 and advanced from a community-based care coordinator to a health services manager II, behavioral health. Cindy was most notably known at Cigna for building the Behavioral Health Case Management department. She helped start the team and handpicked all the BH case managers, established all the workflows and policies, and ensured her customers' needs were met to the best of her team's ability. Cindy was extremely loyal and never missed an opportunity to brag about her team. She was a leader in every sense of the word, and her dealings with her team went far beyond the typical manager-employee relationship. Shortly before her illness, she was the recipient of a Cigna CEO's Champions award.

Cindy was beloved by her family and colleagues. She was an inspiration to all and will be missed. The world is a better place for her example and time with us.

Abner Riley Powell III

Powell

After a valiant fight against lung cancer, Ab Powell III succumbed to the cancer and infection of this mortal world. Ab was born May 3, 1943 and passed away on August 21, 2019.

Ab was a 1961 graduate of Andalusia High School. He attended the University of Alabama on a golf scholarship. He graduated from the University of Alabama School of Law in 1967. He returned home to Andalusia and joined with his father, Abner ("Big Ab") Powell Jr., in the family practice that had been established in 1907 by his grandfather. The fourth generation, Abner Riley Powell IV, joined in 1993 and continues to anchor the firm today.

It was often said of Ab that he was just as comfortable conversing with a construction worker over a game of pool as he was arguing before the supreme court. He

fought for more than 50 years for those clients who could not stand for themselves. In almost every courtroom in Alabama that I travel, I am asked the same question, "Is Ab Powell your dad?" And then, "Let me tell you a story about Ab" (and almost all the stories involve Ab's antics in the courtroom).

Ab was appointed circuit judge in 1977 by Governor George Wallace and, at the time, was the youngest circuit judge in the country. He left the bench and returned to private practice with his father when the elder Powell began to have medical issues. At one point, Ab had more million-dollar verdicts than any other small firm in Alabama… and every single one of those million-dollar verdicts were cases that had been turned down by other lawyers. Throughout his career, Ab mentored many young lawyers, and today there are at least 10 young lawyers in the Covington County Bar Association who had their first jobs with Ab. He always felt a sincere obligation to improve his profession and was readily available to any other members of the bar to discuss legal issues and educate the next generation of attorneys. He was an Alabama State Bar Commissioner multiple times and was on the committee led by Dean Charles Gamble that wrote the Alabama Rules of Evidence.

Despite his professional accomplishments, Ab Powell will be most remembered for his kindness and friendship to all people. Countless stories have been told about Ab's kindness to others, usually privately, quietly, and without seeking praise from the public. (Just last week, I was told by an Alfa insurance agent that when he met Ab, he was purchasing homeowner's insurance for a single mother of three young children who could not afford to pay the premium.) He coached Little League football in Andalusia for almost 20 years without having a son or grandson playing, all in an effort to positively impact young men's lives. After attending Ab's funeral, Thomas Hughes, the youngest attorney in The Powell Law Firm PC, wrote:

> "Today, I had the great honor of being a part of the celebration of life of the legendary Ab Powell's life. Oftentimes, we use words to the point that they lose meaning and effect, but let me be clear, this man was indeed a legend! Today, dozens and dozens gathered to share stories of how Ab impacted their lives. The two words repeated over and over again were 'brilliance' and 'kindness.' Never have I seen a man loved by everyone from so many different walks of life. I am blessed to have had Riley as my mentor as I began a career in our noble profession. To hear the courtroom war stories today and learn so much about Ab as an attorney, it became abundantly clear why Riley is the great litigator he is. The one thing that I will always take with me from Ab Powell's life, and try to emulate in my own life, is the fact that he was kind to everyone–even when no one was watching. Thank you, Ab, for all the groundwork you laid for this firm. Thank you for my mentor and dear friend, Riley. Thank you for allowing me to be a part of such a long-standing and well-respected law firm. I'll do my best to make you proud. See you soon, Lawyer."

The Powell Law Firm's social media post about Ab's death reached over 18,000 people, was shared more than 200 times, and had hundreds of comments. Ab Powell's life and career touched so many people in all walks of life. His passing has created a void in courtrooms all over south Alabama. He will be greatly missed and never forgotten.

–A. Riley Powell IV, The Powell Law Firm PC

Alidor, Gary Paul, Sr.
Mobile
Admitted: 1968
Died: February 21, 2020

Bridges, Jennifer Gray
Huntsville
Admitted: 2005
Died: February 12, 2020

Coyle, James Timothy
Birmingham
Admitted: 1985
Died: February 25, 2020

Fleming, David Michael
Birmingham
Admitted: 2003
Died: December 8, 2019

Hartley, Paul Richard
Greenville
Admitted: 1971
Died: February 1, 2020

Hunt, Wendell Bryce
Little Rock, AR
Admitted: 1997
Died: September 28, 2019

Lewis, Wilbur Edward
Birmingham
Admitted: 1951
Died: January 1, 2020

Little, Joe Hollis, Jr.
Mobile
Admitted: 1968
Died: January 26, 2020

Lorant, Jerry Odyseaus
Birmingham
Admitted: 1950
Died: January 24, 2020

McGovern, Francis Edward, II
Ross, CA
Admitted: 1982
Died: February 14, 2020

McGowin, Donald Keiron
Trussville
Admitted: 1998
Died: February 3, 2020

Montiel, Hon. Mark Gonzalo, Sr.
Montgomery
Admitted: 1981
Died: January 2, 2020

Trimmier, Charles Stephen
Birmingham
Admitted: 1968
Died: January 2, 2020

Welcome to Work Comp

By Julia S. Aquila

Welcome to the workers' compensation edition of *The Alabama Lawyer*.

I hope that the articles in this issue will provide insight into an area of the law that many lawyers may not have had the opportunity to explore, while also providing great information to those of us who practice workers' compensation law every day.

It wasn't until I re-entered the practice of law in the fall of 2012 that I really studied this type of law. My prior legal experience included work as a defense attorney representing various businesses and city governments with a focus on employment and municipal law. I never imagined that I would be offered the opportunity to become a plaintiff's attorney representing injured workers throughout north Alabama. However, that is exactly what I have been doing for more than seven years, and I am a better lawyer for it.

I am honored to be the chair of the Alabama State Bar Workers' Compensation Section. This section is comprised of lawyers who are committed to raising the awareness and understanding of

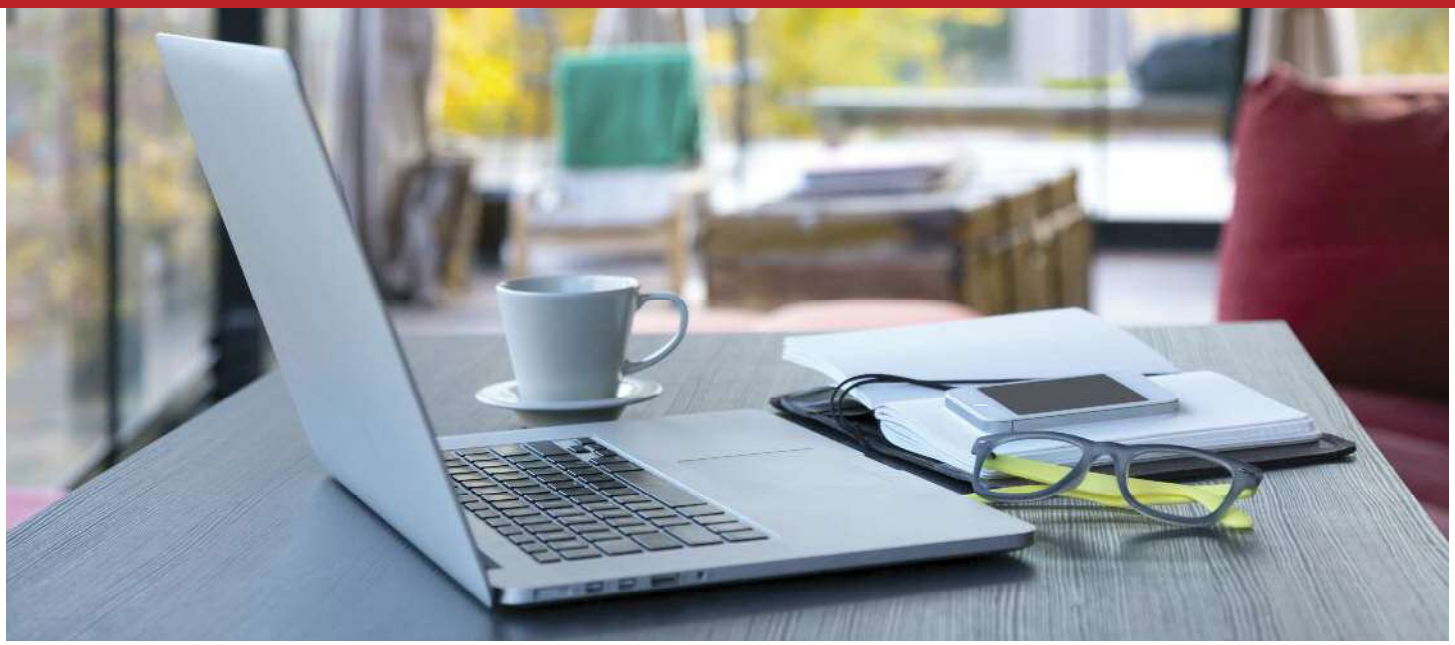
Alabama workers' compensation law and its impact throughout our communities. We meet annually to discuss recent case law and the ever-evolving issues that affect our practices and impact our clients. Throughout the year, whether we speak for the employers or the injured workers, we are part of a community that works together and learns from each other as we represent our clients to the best of our abilities.

Our section also helps bring awareness to the Kids' Chance scholarships that are administered by the Alabama Law Foundation. These scholarships help children of Alabama workers who were either permanently disabled or killed in an on-the-job accident go to college or learn a trade. As you can imagine, when a parent is hurt and unable to return to the work that he or she was doing, a family's standard of living is permanently affected. Donating to Kids' Chance is one way that we can all help make a difference in these families' lives. You can find out more about these scholarships at *https://www.alabamalawfoundation.org/scholarships/kids-chance/*.

Again, I hope that you enjoy learning a little more about workers' compensation law this month. As an attorney who practices this law every day, these last seven years have been eye-opening. Workers' compensation will never have its own *Law & Order* series, but it is certainly an important aspect of every community's health. If you have an interest in this area of the law, please consider becoming a part of our section. Building off our president's message, we are definitely better together. ▲

Julia S. Aquila

Julia Aquila practices with Siniard, Timberlake & League PC in Huntsville, where she focuses on workers' compensation law. She graduated from the University of Alabama School of Law, magna cum laude, and is chair of the Alabama State Bar Workers' Compensation Section.



ALABAMA WORKERS' COMPENSATION and the Telecommuter

By Michael I. Fish

The Arrival of Telecommuting

Telecommuting has become an important topic in the world of workers' compensation.

In the 100 years of Alabama workers' compensation, telecommuting is a relatively new phenomenon.[1] It involves making use of the Internet, email, and the telephone in order to work remotely from home.[2]

It was not considered a viable option by employers until the last 20 years due to the emergence and widespread availability of high-speed Internet in the home.

It is now a sought-after benefit. Employees like the reduced time spent traveling to and from work, as well as the cost savings associated with gas, wardrobe, and meals.[3] Employers benefit from reduced overhead costs and happier employees.[4] The environment benefits from the reduced emissions associated with motorized transportation.[5]

The percentage of remote workers as compared to the rest of the workforce has grown steadily and significantly in the last 15 years.[6] In that period of time, the number of remote workers increased by 173 percent.[7] In 2015, the number of telecommuters in the United States was at 3.9 million.[8] Just two years later, it was at 4.7 million.[9]

Causation

Since January 1, 1920, Alabama employees have been able to recover workers' compensation benefits for job-related injuries.[10] In order for an injury to be considered compensable, the employee must be able to establish that the accident occurred in the course of and arose out of the employment.

To prove that the accident occurred in the course of the employment, the employee must show that he was "engaged in or about the premises where their services are being performed or where their service requires their presence as a part of service at the time of the accident and during the hours of service as workers."[11]

For determining whether the accident arose out of the employment, states can be divided into two main categories, "increased risk" and "positional risk." Alabama is an "increased risk" state which means that the claimant must be able to prove that his employment "exposed [the employee] to a danger or risk materially in excess of that to which people are normally exposed in their everyday lives."[12] Causation is typically easier to prove in "positional risk" states because it *does not require proof beyond the fact of the accident itself* that the accident arose out of the employee's employment.[13]

Risk

While at work, employees are potentially exposed to three types of risk: (1) risks that are peculiar to the employment, (2) risks that are peculiar to the person, and (3) neutral risks.[14] Risks peculiar to the employment include hazards caused by materials, equipment, or work processes that the employer provides or requires to be used.[15] Such risks are universally accepted as compensable.[16] Risks peculiar to the employee such as idiopathic conditions are universally considered not to be compensable.[17] As explained below, neutral risks tend to be the primary source of controversy and litigation.[18]

An example of a neutral risk is tripping over a curb on the employer's property. The curb has nothing to do with the employment per se. However, the employee is exposed to the risk because he is at work. This category of risk is often covered in Alabama because the mechanism of the accident can be explained.[19] So what happens when an employee is working from home and is injured as the result of an accident caused by a neutral risk? The Alabama Workers' Compensation Act does not specifically address telecommuting. In addition, there are not currently any Alabama appellate opinions concerning telecommuters.

Sweet Home Accident Alabama

Although no Alabama appellate court has released an opinion regarding telecommuter work accidents, the issue of work accidents occurring at home has certainly been addressed. Prior to 1982, it was nearly impossible to recover workers' compensation benefits when injured at home.

In 1927, the Alabama Supreme Court affirmed the judgment of the trial court that an employee who sustained a head injury when kicked in the head by a donkey while feeding it at home despite the fact that the donkey was used for work purposes.[20] Since the employee was at home and not on the employer's premises at the time of the accident, he was not considered to be in the course of his employment.[21]

In 1954, the Alabama Supreme Court reversed the trial court's decision to award death benefits to the widow of a truck driver who was killed when a gas tank exploded in his kitchen.[22] The driver had removed the tank from his work truck and was attempting to repair it at the time of the explosion.[23] Despite the obvious work purpose of repairing the tank, the court held that he was not in the course of his employment since he was at home at the time of the accident.[24]

In the above two cases, the court used a very black-and-white approach to injuries occurring at home. Namely, if you were at home, then the accident could not have occurred in the course of the employment.

In 1982, the Alabama Supreme Court began applying a new test. Rather than simply looking at the geographic location of the employee, the court focused more on the benefit being conveyed to the employer by the employee's activities at the time of the accident.

In *Ex parte Pritchett*, the employee truck driver was injured when he fell off his truck.[25] Although this did not happen at home, it was not during work hours and occurred on the premises of a truck repair company.[26] The trial judge and the Alabama Court of Appeals applied the strict black-and-white geographic location test and determined that since he was not at work during work hours it did not occur in the course of his employment.[27] The Alabama Supreme Court reversed the court of appeals and held that having the truck repaired was in furtherance of the employer's interests and, therefore, in the course of his employment.[28] Presumably the same test would be used if the accident occurred at home.

The *Pritchett* opinion was released about 20 years before telecommuting became widely identified as an emerging issue.[29] While the "furtherance of employer's interests" test would certainly apply to telecommuters who are injured as the result of a risk that is peculiar to the employment, it does not apply to neutral risks.

In order to get an idea of how Alabama courts will ultimately handle telecommuters and injuries arising out of exposure to neutral risks, it is necessary to look at appellate opinions from other "increased risk" states.

In order to get an idea of how Alabama courts will ultimately handle telecommuters and injuries arising out of exposure to neutral risks, it is necessary to look at appellate opinions from other "increased risk" states.

Utah[30]

The first modern handling of the telecommuter issue was in a 2000 Utah opinion. In the case of *Ae Clevite, Inc. v. Labor Comm'n*, the Utah Court of Appeals considered the appeal of an employer whose employee worked from home. He was a district sales manager and often received United States Postal Service deliveries from his employer. On the day of the accident, his driveway was icy and he saw his letter carrier approaching. When he went out to spread salt on the driveway to ensure the safe delivery of his mail, he fell and was rendered a quadriplegic.

The employer denied the claim because it never requested, directed, encouraged, or reasonably expected the employee to salt his driveway. Further, the employee was not in an employer-controlled area (i.e. the home office) when the injury occurred. The Utah Labor Commission agreed with the employer.

On appeal to the Utah Court of Appeals, the employee asserted that he was attempting to remove a hurdle that could have prevented the delivery of an expected business package. The Utah Court of Appeals agreed with the employee and reversed the Labor Commission. The rational was that the act of salting the driveway was motivated, at least in part, by a purpose to benefit the employer and was, therefore, considered reasonably incidental to the employment.

WWAD?[31]

So What Would Alabama Do? The act of making the driveway safer, in and of itself, would probably not be enough to satisfy the test set forth in *Pritchett*. However, if it was established that the employee was a telecommuter, then it is likely that an Alabama judge would issue an opinion similar to that of the Utah Court of Appeals. With no rules in place to prohibit such conduct during work hours, it would be a stretch for any court to consider salting the driveway to be a deviation from employment when you consider the timing and stated purpose.

Tennessee[32]

Seven years after the Utah decision, another "increased risk" state court addressed telecommuters and workers' compensation. This time, the Tennessee Supreme Court held that the injuries sustained by a telecommuter who was assaulted by a neighbor while taking a lunch break were not compensable.

In *Wait v. Travelers Indemnity Co. of Illinois*, the employee was an executive for the American Cancer Society. She was a telecommuter who had an employer-approved home office (i.e. converted spare bedroom), employer provided-office equipment, supplies, and a dedicated phone line, and held in-person meetings in her home office.

On the day of the assault, the employee was in her kitchen making lunch. When her neighbor knocked on the door, she let him in. The neighbor then, without provocation, brutally assaulted the employee.

The employer denied the claim. When the employee filed a lawsuit[33] for workers' compensation benefits, the employer was granted summary judgment by the Chancery court. Although the employee appealed to the Special Workers' Compensation Appeals Panel, the Tennessee Supreme Court accepted review before the case could be heard or considered by the panel.

The Tennessee Supreme Court first addressed whether the employee was in the course of her employment at the time of the attack. Since she was in the kitchen preparing lunch when she heard a knock at the door, the court determined that this activity was covered by the personal comfort doctrine which generally considers injuries that occur during personal breaks on employer's premises to be in the course of employment.

Next, the court considered whether the incident arose out of her employment. Since there was nothing about the attack that had anything to do with the employee's job or related duties, the court determined that the attack constituted a neutral risk. Per Tennessee law at the time, neutral risks were not compensable because there was no causal nexus with the employment.

WWAD?

Alabama courts would agree with the result, but for a different reason.

As opposed to Tennessee in 2007, neutral risks are sometimes covered in Alabama. However, attacks that occur for personal reasons fall under the category of risk that is peculiar to the person. As stated above, such risks are universally not compensable.

Oregon[34]

Four years later, another "increased risk" state tackled the telecommuter issue. In 2011, the Oregon Court of Appeals released an opinion wherein it reversed the Administrative Law Judge ("ALJ") and the Oregon Court of Appeals and found the employee's claim to be compensable.

In *Sandberg v. J.C. Penney Co., Inc.*, the evidence revealed that the employee essentially worked out of her car. She was required to keep fabric samples on hand and kept excess samples in her home garage. In order to secure samples for the following day, the employee walked out of the back door of her house and headed to her garage. In the course of her short trip, she felt the earth move under her feet. Only it wasn't earth. It was fur. Immediately realizing that it was one of her dogs, she shifted her weight and lost her balance. This caused her to fall and break her arm. The employer denied the claim.

The ALJ denied the claim because the risk of tripping over your own pet is distinctly personal in nature. The Oregon Workers' Compensation Board affirmed the ALJ's decision. The Oregon Court of Appeals was of a different opinion. In looking at the "in the course of" part of the causation test, the court relied on a nationally recognized and often cited treatise, *Larson's Workers' Compensation Law*:

> "[O]nce it is established that the home premises are also the work premises, it follows that the hazards of the home premises encountered in connection with the performance of the work are also hazards of the employment.
>
> "That the employee is a telecommuter or other home-based worker should not, in and of itself, make any difference. Was the risk of injury a risk of *this* employment? So long as the employment subjects the employee to the actual risk of injury, the argument follows that the injury should be compensable."

Arthur Larson and Lex K. Larson, 1 *Larson's Workers' Compensation Law* § 16.10 [4], 16-37 (2009) (emphasis in original; omitted).

The court noted that, while at home performing work activities, her home became her employer's premises. Therefore, the "in the course of" part of the two-part test was satisfied. Once that was established, then it was the court's opinion that the hazards of the home became work place hazards. Thus, her injury resulted from risk presented by her work environment and, therefore, arose out of her employment.

WWAD?

An Alabama judge could probably just rely on the *Pritchett* test and find that it was in the course of her employment since getting the samples ready for the next day was furthering her employer's interests.

How an Alabama judge decided the "arising out of" part of the test would come down to whether an accident involving a pet while at home would be considered a risk that is peculiar to the employee or a risk that is neutral. The Oregon court determined that it was a neutral risk that was encountered while in the course of her employment and, as such, compensable. Absent evidence of any rules or guidelines regarding pets in the home work area, if an Alabama judge determined it to be a neutral risk, then it is possible that the accident could be found to have arisen out of the employment. However, if it determined that the risk was personal to the employee because it was her cat, then her only legal recourse would be to sue the cat.[35]

New Jersey[36]

In 2014, New Jersey considered the first telecommuter occupational disease claim. Unfortunately, it was also a death claim.

In *Renner v. AT&T*, the decedent had a telecommuting agreement

with her employer. She worked three days at home and two days at the office per week. Her employer said that she was supposed to work from 9:00 to 5:00 each day. Her husband testified that his wife worked all hours of the day and night. On the night before her death, the decedent worked past midnight. The next morning, she was found still alive and lying in her home office area. She said that she couldn't breathe and she needed help. She later died from a pulmonary thromboembolism. Her husband pursued an occupational disease claim. In his corner was a doctor who was of the opinion that the sedentary nature of her work was the precipitant in her getting a pulmonary embolism. The trial judge agreed and awarded benefits. The New Jersey Supreme Court reversed the trial court. In doing so, the court pointed out that her job did not require her to remain seated, she had control over her body position and movement, and she was free to take breaks, stand, and stretch.

WWAD?

To prevail on an occupational disease by exposure claim in Alabama, it is necessary to establish that the disease is peculiar to the employee's occupation and that it is due to hazards in excess of those ordinarily incident to employment in general. It certainly cannot be said that the onset of a pulmonary thromboembolism is peculiar to office-type work, especially when you consider that the employee was free to take breaks and exercise as needed throughout the day. Therefore, Alabama courts would not likely find such a claim to be compensable.

To prevail on an occupational disease by exposure claim in Alabama, it is necessary to establish that the disease is peculiar to the employee's occupation and that it is due to hazards in excess of those ordinarily incident to employment in general.

Florida[37]

In 2019, the Florida District Court of Appeal released a controversial telecommuter opinion regarding the compensability of neutral risk.

In *Sedgwick CMS and The Hartford/Sedgwick CMS v. Tammitha Valcourt-Williams*, it was undisputed that the employer approved the work-from-home arrangement. One day, the employee tripped over her own dog while reaching for a coffee cup in her kitchen. The fall resulted in in knee, hip, and shoulder injuries. The employer denied the claim.

The employee convinced the ALJ to award her benefits. In doing so, the ALJ relied on the fact that the work-from-home arrangement meant that the employer "imported the work environment into the claimant's home and the claimant's home into the work environment." In other words, neutral risks are covered.

However, the Florida District Court of Appeal reversed and issued an opinion that the question is not whether a claimant's "home environment" becomes her "work environment." Rather, the question is whether the employment–wherever it is–necessarily exposes a claimant to conditions which substantially contribute to the risk of the injury.

In the dissenting opinions, it was pointed out that the majority opinion was overturning decades of precedent regarding the compensability of neutral risk. The thought being that if neutral risks were not going to be covered at home while in the course of the employment, then the argument could certainly be made that neutral risks would no longer be covered while at work on the employer premises.

WWAD?

Like the Oregon case, the employee's furry little friend was the cause of the accident. Since the employee was engaged in a personal break during work hours, an Alabama court would apply the personal comfort doctrine and find that the accident occurred in the course of the employment. Like

Florida in the decades leading up to this case, Alabama sometimes covers neutral risks that are presented while in the course of employment. Like the Oregon case, the issue of compensability would probably come down to whether or not the risk posed by a household pet was considered neutral or personal to the employee.

Maryland[38]

In 2019, the Court of Special Appeals of Maryland considered the issues of whether the employee was a telecommuter and whether the accident was causally related to his employment.

In *Schwan Food Co. v. Ryan Frederick,* the employee was a customer service representative. On the morning of the accident, he was getting ready to leave the house to see clients. He was also planning to drop off his son at daycare while on the way. Before he could safely get into his car, the employee slipped on black ice that thinly and transparently coated his driveway. As a result, he injured his right leg. The employer denied the claim.

The Workers' Compensation Commission denied benefits because it determined that the employee was injured on his way to drop off his son, which was a personal errand. The employee appealed the decision to the Circuit Court of Baltimore County. Although the matter was tried before a jury on appeal, the circuit court judge granted the employee's motion for judgment as a matter of law. In doing so, the court concluded that the claim arose out of and in the course of his employment because he worked from his home office prior to leaving the house that morning.

Since the Alabama circuit court judge is the decider of both law and fact, it unlikely that a motion for judgment as matter of law would ever be granted following a trial.

The court of special appeals vacated and remanded the judgment. In support of its decision, the court noted that there existed questions of fact that needed to be decided by a jury. For instance, it could not be decided as a matter of law that the employee had an established home work-site. Rather, it would be necessary for a jury to weigh the evidence and determine (1) the quantity and regularity of work performed at home, (2) the continuing presence of work equipment at home, and (3) the special circumstances of the particular employment that made it necessary and not merely personally convenient to work at home. If the jury decided that the employee was a telecommuter, then it needed to decide whether the employee had commenced his work day and was fulfilling his work duties, or something incident thereto, at the time of his accident.

WWAD?

Because the original court of jurisdiction for disputed Maryland workers' compensation matters is administrative, the first level of appeal is to the circuit court with the availability of a jury trial. Since Alabama's original court of jurisdiction for disputed workers' compensation claims is the circuit court, the first level of appeal is the Alabama Court of Civil Appeals. A jury is never going to decide these issues in Alabama.[39]

Since the Alabama circuit court judge is the decider of both law and fact, it unlikely that a motion for judgment as matter of law would ever be granted following a trial. Rather, a circuit court judge would be more inclined to simply issue a final order that contains a statement of the law and facts along with conclusions.[40] If the employee was able to convince an Alabama judge that he was a telecommuter and that his work day had commenced prior to slipping on the driveway, the fact that he planned to drop his son off on the way to see the client would probably not have been considered an intervening event for purposes of determining causation since that aspect of the trip had not commenced.[41]

Telecommuting Agreements

While it is impossible to completely eliminate the risk of accidents in the home, it is possible to manage it by implementing thorough "work from home" policies that emphasize that working from home is a privilege and not a right.[42]

Such a policy should address eligibility, establish defined work hours, identify a specific work area within the employee's home, include a list of office equipment, outline safety practices such as eliminating tripping and lifting hazards, and outline the accident reporting procedures.[43] A detailed policy may help reduce the likelihood of a work-related injury occurring at home.

In the event that an accident does occur, the telecommuter agreement will become an important evidentiary exhibit for the judge to consider when determining the existence of a telecommuting arrangement and causation.

Conclusion

As technology continues to improve, we can expect the number of Alabama telecommuters to increase along with the number of telecommuter workers' compensation claims. If we are to learn anything from the above survey, it is that the telecommuting arrangement needs to be committed to writing.

It is important for the employee to know when and under what circumstances she will be covered by the employer's policy of workers' compensation insurance. It is equally important for the employer to ensure that rules and guidelines are in place to help prevent home accidents from occurring and to help define what will and will not be covered as a compensable claim. ▲

Endnotes

1. David Torrey, *Telecommuter Injuries and Compensability Under Workers' Compensation Act* (2013) available at *http://www.davetorrey.info/attachments/amcomp.lasvegas.telecommuters.torrey.pdf*.
2. Tammy Allen, Timothy Golden, and Kristen Shockley, *How Effective is Telecommuting? Assessing the Status of Our Scientific Findings*, available at *https://www.psychologicalscience.org/publications/telecommuting.html*.
3. Dawn Swink, *Telecommuter Law: A New Frontier in Legal Liability*, 38 Am. Bus. L. J. 857, 861 (2001).
4. Dawn Swink, *Telecommuter Law: A New Frontier in Legal Liability*, 38 Am. Bus. L. J. 857, 862.
5. *Id.*
6. Daniel Kline, *Just How Big Has Telecommuting Become?* (2019), available at *https://www.fool.com/careers/2019/08/12/just-how-big-has-telecommuting-become.aspx*.
7. *Id.*
8. *Id.*
9. *Id.*
10. Terry A. Moore, *Alabama Workers' Compensation* § 1:7 (2nd ed. 2013).
11. § 25-5-1(8), Ala. Code (1975).
12. *Ex parte Trinity Indus., Inc.*, 680 So. 2d 262, 267 (Ala. 1996).
13. *Ex parte Byrom*, 895 So. 2d 942, 947 (Ala. 2004).
14. *Sedgwick CMS v. Valcourt-Williams*, 271 So. 3d 1133, 1141 (Fla. 1st DCA 2019) (Bilbrey, J. dissenting).
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. On the flip side, unexplained falls are not compensable in Alabama. *See Ex parte Patton*, 77 So. 3d 591 (Ala. 2011).
20. *Praytherv. Deepwater Coal & Iron Co.*, 216 Ala. 579, 114 So. 2d 194 (Ala. 1927).
21. *Praytherv. Deepwater Coal & Iron Co.*, 216 Ala. 579, 580, 114 So. 2d 194, 195.
22. *Deaton Truck Line v. Acker*, 261 Ala. 468, 74 So. 2d 717 (Ala. 1954).
23. *Deaton Truck Line v. Acker*, 261 Ala. 468, 472, 74 So. 2d 717, 721.
24. *Deaton Truck Line v. Acker*, 261 Ala. 468, 473, 74 So. 2d 717, 722.
25. *Ex parte Pritchett*, 424 So. 2d 623 (Ala. 1982).
26. *Ex parte Pritchett*, 424 So. 2d 623, 624.
27. *Ex parte Pritchett*, 424 So. 2d 623.
28. *Ex parte Pritchett*, 424 So. 2d 623, 625.
29. David Torrey, *Telecommuter Injuries and Compensability Under Workers' Compensation Act* (2013).
30. *Ae Clevite, Inc. v. Labor Comm'n*, 996 P. 2d 1072 (Utah Ct. App. 2000).
31. What Would Alabama Do?
32. *Wait v. Travelers Indemnity Co. of Illinois*, 240 S.W. 3d 220 (Tenn. 2007).
33. At the time, Tennessee still handled disputed workers' compensation claims through the regular civil court system. Now, only Alabama handles disputed claims in such a manner.
34. *Sandberg v. J.C. Penney Co., Inc.*, 260 P. 2d 495 (Oregon Ct. App. 2011).
35. Editor's note: We believe that Alabama disfavors lawsuits against cats–the depositions alone would be daunting.
36. *Renner v. AT&T*, 218 N.J. 435 (2014).
37. *Sedgwick CMS and The Hartford/Sedgwick CMS v. Tammitha Valcourt-Williams*, 271 So. 3d 1133 (Fla 1st DCA 2019).
38. *Schwan Food Co. v. Ryan Frederick*, 241 Md.App. 628 (2019).
39. That is not to say that a jury trial is never available for Alabama workers' compensation matters. Ala. Code § 25-5-81(a)(2) provides that a jury is available when requested by either party to make special findings of fact related to the willful misconduct affirmative defenses that are set forth in Ala. Code § 25-5-51.
40. Ala. Code § 25-5-88 provides that a final workers' compensation order "shall contain a statement of the law and facts and conclusions as determined by said judge."
41. "Alabama law provides that not any deviation places an accident out of the course of the employment; rather, a substantial deviation occurs when the employee abandons the employment in pursuit of a purely personal objective. Thus, an employee will not be entitled to compensation when the accident occurs while the employee has left the employment route to run a completely personal errand that does not benefit the employer." Terry A. Moore, *Alabama Workers' Compensation* § 11:44 (2nd ed. 2013)(footnotes omitted).
42. Dawn Swink, *Telecommuter Law: A New Frontier in Legal Liability*, 38 Am. Bus. L. J. 857, 871.
43. David Torrey, *Telecommuter Injuries and Compensability Under Workers' Compensation Act* (2013).

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Handling a Workers' Compensation Case for The Employee from Initial Interview to Trial

By Richard E. Browning

Initial Interview

Explain the Process

Most clients have never been involved with the workers' compensation process prior to the injury which brings them to your office. They are frequently experiencing a combination of any or all of the following: confusion about how the entire process works; anger at the employer about how they are being treated; uncertainty about the future and the ability to support their family; feelings of helplessness and lack of control over being in this situation to begin with; and fear over whether they will ever be the same person when this is all over.

I find it valuable to my client and to my relationship with my client to use our initial interview to explain the entire workers' compensation process from beginning to end. This appears to provide a great degree of relief to the client.

Equally important, the client needs to be educated about the limitations of the Workers' Compensation Act.

Explain the Limits of the Act

An important part of the initial discussion includes educating the client about the limits of the Workers' Compensation Act. It helps to explain to them that this is a statutory remedy which will not provide the same relief that would be available if the identical injury

had occurred in an automobile accident or some other general liability setting. Their expectations should be aligned with reality from the outset. There is nothing worse than at the end of a case trying to explain to a client why she should accept $20,000 when she has expectations of receiving $500,000.

Tell Them What to Expect Once the Case Begins

I inform the client that once we file the suit, they are now in a "waiting game," that there is not a lot that can be done to finish the case until his doctor places him at maximum medical improvement–a term you should also explain to him.

During that interim period, I believe the lawyer's role becomes that of a crisis manager. I receive calls from clients that their check has not arrived on time, that the amount of their check has changed, that their medical treatment is not being authorized, that they need another treating physician, and any number of other, similar problems. Also involve the process of waiting for the client to get to maximum medical improvement.

How and When to Deal with Their Lawyer

The client should understand that there is no need for his attorney to call him every week just to check in. Rather, I instruct them to let me know immediately when a problem arises so I can deal with it immediately. I also tell them that I am relying on them to let me know when they are getting close to maximum medical improvement, when they are released to return to work, and those sorts of things.

Explain Best and Worst Case Scenarios

The attorney has to help the client begin the case with a realistic assessment of the range of potential outcomes. Since the workers' compensation scheme is a limited statutory remedy, the attorney can discuss what range of compensation the client's case could have. They should understand that it is impossible to really assess what their case should bring until things such as permanent impairment and work restrictions are known.

Even though this does not give the client an exact approximation of how much money he might get, it helps give him appreciation of the limitations of the act itself, and it lets the client know that the limitations of the act are something over which none of us have any control.

Settlement v. Trial

I estimate that 80-85 percent of workers' compensation claims are settled without having to go to trial. Most clients prefer settling for a number of reasons.

First, there is a tremendous sense of relief in having the matter behind them. It allows them to move on with their lives.

Second, even if they get less than they really want, a settlement allows them to keep a measure of self-determination as opposed to putting everything in the hands of a judge.

Third, a settlement can include a lump-sum payment. The trial court could not award a lump-sum payment, but if the parties can, agree to it in a settlement. And many clients want a lump sum because it allows them to pay bills, pay off a house, or do other things which they see as making a significant difference in their life.

By explaining all this to the client at the outset, the groundwork is then laid when it comes time to discuss settlement.

Preliminary Information Gathering

Determine Their Average Weekly Wage

It is crucial to determine your client's correct average weekly wage. It determines the amount of weekly benefits the client will receive while she is off work recovering from the injury, as well as the ultimate determination of compensation due at the conclusion of the case.

My experience is that the average weekly wage is incorrectly calculated in 60-70 percent of the cases. Sometimes the employer simply reports an hourly rate of pay to the insurance carrier who then multiplies it by 40 to assign an average weekly wage. Other times, fringe benefits such as health and life insurance are omitted.

In my initial meeting with the client, I ask them to bring me as many check stubs as possible for the 52-week period before the date of their injury. I put those pay stubs in chronological order, list them all out for the 52-week period, including the time period covered by the check and the amount, and I add them up and divide by 52 to get the correct average weekly wage.

When I compare this to what amount the insurance company is paying my client, and with those check stubs in hand, the insurance company is hard-pressed to disagree and will almost always adjust the average weekly wage accordingly–and they will generally make back payments.

Your Letter of Representation

When you are hired, you should immediately send the insurance adjustor a letter of representation. I ask the client to bring this to our very first meeting. The client can usually get this from letters sent to them, from check stubs for benefits, or from other claim-related paperwork that they have. The sooner the adjustor is informed of your involvement in the case, the better for all concerned.

Medical Records or Reports

The amount of medical information possessed by the client when they first come to see you varies widely. I have had clients who bring entire accordion files with records neatly marked and categorized by every doctor who has seen them. I have had clients who could not even remember the names of their doctor. Nevertheless, it is always beneficial to ask for this information.

The records help me to determine whether the claim has significant merit. For example, medical records that reveal a multi-level spinal fusion with instrumentation suggest one kind of case. Medical records that show the doctors can't find any evidence of the client's problems, which they find to be exaggerated and subjective, especially when that is coupled with many missed appointments, suggests a different kind of case.

Sometimes a client who will be extremely difficult to deal with has that same personality in dealing with everyone else. And sometimes the comments in the medical records will provide significant insight into a potential "problem client" whom you will wish you had never agreed to represent six months down the road.

And sometimes the comments in the medical records will provide significant insight into a potential "problem client" whom you will wish you had never agreed to represent six months down the road.

Gather Whatever Records Your Client Has

I simply gather whatever medical records the client already has in her possession.

In my letter of representation to the insurance carrier, I always request copies of whatever medical records are already available. They usually either forward them to me or they write to tell me their fees for copying them. In most cases, this is both quicker and less expensive than obtaining them directly from the doctors.

Don't Waste Money with Multiple Records Requests

I try to avoid asking for medical records until my client is at maximum medical improvement. With rare exception, I do not need to know what the doctor is saying until the client has been placed at maximum medical improvement, and there is no need to pay for the same records twice.

My goal is to obtain one complete set of records per doctor and that the records include the opinion that the client is at maximum medical improvement, any permanent impairment rating, and any work restrictions which the doctor assigns. I can then determine whether a vocational evaluation (or something else) is needed to bring the case to a conclusion.

Paper Discovery

Interrogatories

When I file a complaint, I attach interrogatories, requests for production of documents, and requests for admissions. The interrogatories obligate the employer to disclose their trial experts and the expected contents of their testimony. I ask for information regarding average weekly wage and also fringe benefits. I ask for information meant to discover any affirmative

defenses which may be pleaded, such as pre-existing condition, lack of notice, or others.

Request for Production

This is how I get the employee's personnel file which can reveal a wealth of information regarding wages, medical records, attendance, and any disciplinary action, all of which can be helpful in evaluating and prosecuting the case. As with interrogatories, I attempt to discover information regarding the use of any potential experts at trial so that I can know in advance what their testimony will be.

Request for Admissions

This request is to identify those issues which are going to be in dispute and to determine those on which we can agree. There is no sense in either side wasting time and effort in the litigation process on issues that are not really in dispute.

Depositions

Treating Physicians

I can only think of a couple of cases that were submitted to the court using only medical records and testimony from the employee. Almost always, I depose the one or two treating physicians who have had the most involvement in the client's care for these injuries.

I believe the depositions can provide great benefit to the case by allowing the doctor to elaborate on his opinions much more than he would do by only dictating his medical summaries. Likewise, if there are certain areas that I want to focus upon, I can explore those areas better by deposition. I ask the doctor during a deposition his opinion about the degree of disability, the degree to which pain plays a part in the patient's ability to function and whether the patient is capable of performing a given job which I know the employer

is going to claim is available. Those avenues simply cannot be sufficiently explored without asking those questions in person.

However, I make a deliberate effort to keep the doctor's deposition extremely short. The judges who try these cases are familiar with them and do not need a lot of the "jury hype." In most cases, I have found that a doctor's deposition will run 20 to 30 pages in length. I believe that if you start going too much beyond that the judge will lose interest in what is being said, and you will lose the impact you are trying to accomplish by taking the deposition in the first place.

I believe that being short, direct, and to the point will get you a whole lot farther than a long, drawn-out examination.

Vocational Experts

Why Use One at All?

The use of a vocational expert is probably one of the most hotly disputed topics in the area of workers' compensation. I have had numerous conversations with judges, and some of them believe that vocational experts are absolutely of no benefit to the court, others almost expect to hear from them, and some judges are in between.

Often when I am asked by a trial judge why I am using one, my answer is that it is as much, if not more, for an appeal than for the trial court. I would certainly hope that my evidence, even without the vocational expert, would be sufficient to persuade the judge to rule in my favor.

On appeal the burden belongs to the non-prevailing party. A vocational expert's testimony provides one more piece of evidence that I can point to in my appellate brief as justification for upholding the trial court on appeal. I believe that benefit alone is worth it.

On rare occasions, the doctor's opinion is that the patient's condition is serious enough that the patient cannot return to gainful employment. When that happens, I have been successful at trial without the use of a vocational expert.

I believe that most trial judges understand how rare such a strong medical opinion is and that they value it higher than the opinion of a hired vocational expert.

Typically, the client's treating physician's opinion is limited to an opinion regarding the client's degree of permanent impairment and/or physical restrictions. It then becomes the role of the vocational expert to take those physical limitations and match them with the person's qualifications to see whether they are capable of returning to gainful employment.

Live Testimony or Written Reports?

When they use a vocational expert, both sides usually present them through live trial testimony. However, I am not certain that this is truly needed in many cases.

As I stated above, trial courts are familiar with this area of law and do not need to be educated on the role a vocational expert serves. The trial court simply needs to know the bottom line: whether this person can work and to what degree the injury has caused an impact on his ability to earn.

Unfortunately, I think there is a reluctance to offer the vocational expert's testimony through their report for fear that the other side will have their expert testify live at trial. One good way to handle this is for the parties to agree to the admission of a report of both experts as evidence.

However, for whatever reason, both sides end up using their experts live at trial more often than not.

Defense Vocational Experts

Typically, I do not depose the defendant's vocational expert. Before trial, I am going to know who the expert is, and usually I have seen them in trial numerous times. I already know what their demeanor is, what their typical approach to cross-examination is, and how they will react to my questions.

When this happens, I normally don't depose their expert; I generally get a copy of their report and cross-examine them from it.

The flip side of that coin is that when I know an expert, the expert knows me. When the expert already knows me, I believe there is some advantage to be gained by *not* deposing them so they will not know in advance what my approach is going to be on cross-examination in this case.

Trial

Client Preparation

It is essential to have the client come in prior to trial to prepare them for it. I always make a copy of the

plaintiff's deposition and have it for them to take home and review. I make it clear that I do not want them to try to memorize it, but to simply re-read it to re-familiarize themselves with its contents since a year or more may have elapsed between their deposition and the trial.

I have the client come in just one or two days before the trial so that the discussions we have will still be fresh in their mind.

I try to put the client at ease by telling them about the trial process from start to finish. I tell them when I will call them as a witness, I go over the questions I will ask, and I tell them what questions to expect on cross-examination. I do not go through a question-and-answer script.

One of my main objectives is to try to put them at ease as much as possible to reduce their stress before and during the trial.

Stipulations

Trial courts greatly appreciate the parties stipulating to as much as possible before the trial begins. I have made it my practice to confer with opposing counsel prior to trial to discuss those areas upon which we can stipulate.

When the parties agree on stipulations, I prepare a pleading to present to the court at the beginning of trial.

Though it changes with every case, the parties can typically agree that both the plaintiff and the defendant were covered under the Workers' Compensation Act, that the plaintiff sustained an on-the-job injury, that there was proper notice to the employer after the injury, the average weekly wage, the number of weeks' benefits that have already been paid, and the date on which the doctor placed the employee at maximum medical improvement.

At the conclusion of the trial, the trial court's job is made significantly easier when the parties stipulate to things that are not in dispute in the first place.

Though you have to call as many witnesses as are necessary to prove the case, I prefer to call as few as possible–often only my client and the vocational expert.

Pre-Marked Exhibits and Exhibit List

Just like the list of stipulations, this is a time-saving measure which the courts greatly appreciate. I determine which exhibits I plan to offer into evidence. I then pre-mark them with exhibit stickers and prepare an exhibit list, identifying each exhibit. When we arrive for trial, I simply hand the court reporter the folder with all the exhibits and the list identifying them.

Order and Number of Witnesses

The order in which witnesses testify varies depending on the issues in dispute. I believe the court wants to hear from my client as soon as possible, and their testimony helps put the testimony of the remaining witnesses into proper perspective.

If the only real issue being disputed is extent of the plaintiff's disability, I call the vocational expert immediately following the plaintiff.

Following the expert's testimony, I offer the medical records and depositions.

If there are other issues involving an affirmative defense which must be litigated, then those witnesses are generally called next.

Remember that the trial court hears these cases all the time, and it does not need to be overwhelmed with a parade of unnecessary live witnesses. Though you have to call as many witnesses as are necessary to prove the case, I prefer to call as few as possible–often only my client and the vocational expert. On other occasions, when necessary, I will call co-workers of the plaintiff or other witnesses who may have testimony to offer which is relevant to the issues at hand. I cannot recall a case I have tried which had more than four to five witnesses from the plaintiff's side. Even with that, other than the plaintiff and the vocational expert, I believe that most of these fact witnesses can, and should, be on and off the witness stand in approximately 10 to 15 minutes.

Submission of Medical Records

Medical records can become extremely cumbersome when the plaintiff has received extensive medical treatment. A full copy of those records includes things the trial court has no need of and which do not help your case. Records which may be relevant to the medical community may not help your case.

I go through medical records and pull the documents which I believe will be helpful to the court. Surgical records can be in excess of 200 pages. I can often reduce this to five to 10 pages that may have any bearing on my case. Those will typically consist of the history and physical, operative reports; diagnostic studies (such as MRIs, CT scans, etc.); and the discharge summary.

This allows me to make a targeted argument to the trial court, and by telling him which pages matter, I am certain that the judge will look at them.

I have seen a defense attorney introduce into evidence a banker's box of medical records. How likely is it that a busy trial judge will go through all of that with more than a cursory glance?

Records which may be relevant to the medical community may not help your case.

I go through medical records and pull the documents which I believe will be helpful to the court.

Medical Depositions

I typically pick out the one or two most important treating physicians and depose them. When I offer their depositions at trial, I generally identify the pages which I believe are most relevant, make a separate copy of those pages with important parts highlighted, and present those to the court. This saves the court a lot of time, and courts seem to appreciate the effort.

Post-Trial Briefs

I always ask the court for an opportunity to submit a brief after the trial. Many attorneys bring a brief to the trial and submit it immediately at the close of evidence. No trial goes exactly as expected, and submitting a brief after the trial allows me to tailor my brief to what happened.

I have found that most judges appreciate this and welcome the brief. And since the court generally has to read medical records and depositions, the post-trial brief does not cause a delay.

I always try to get it to the court within a matter of days after the trial. And I always include a full and highlighted copy of all of the cases that I am relying on. ▲

Richard E. Browning

Richard Browning practices in Mobile with the Browning Law Firm. He graduated magna cum laude from Spring Hill College in 1977 and from the University of Alabama School of Law in 1980. Following law school, he served for four years in the United States Navy JAG Corps. His practice consists almost exclusively of representing injured workers in workers' compensation claims.

How the ADA and FMLA Interact with Alabama's Workers' Compensation Act

By J. Carin Burford

When handling an Alabama workers' compensation case, lawyers are often faced with a myriad of issues beyond the "comp" claim itself. Because clients rely on their attorney to provide sound advice about their claim, it is essential that counsel recognize the legal issues beyond those invoked under the Alabama Workers' Compensation Act. This article outlines some of the issues that can come up under the Americans with Disabilities Act ("ADA") and the Family Medical Leave Act ("FMLA").

Americans with Disabilities Act– An Overview

The ADA prohibits discrimination on the basis of disability in employment, state and local government, public accommodations, commercial facilities, transportation, and telecommunications. It applies to applicants and employees of federal employers and private employers with at least 15 employees.[1]

It defines "disability" as a physical or mental impairment that substantially limits a "major life

Under the ADA, whether the employer should provide light duty will often turn on whether the requested accommodation would result in an undue hardship or a direct threat.

activity," having a record of such an impairment, or being regarded as having such an impairment.[2] Major life activities involve such tasks as walking, standing, lifting, bending, speaking, working, and performing manual tasks.[3] Major life activities also include the operation of a major bodily function.[4]

Given the expansive language of the ADA, most Alabama workers' compensation injuries fit under the definition of disability.

Under Title I of the ADA, an employer may not discriminate against an individual based on the individual's disability in hiring, promotion, training, pay, discipline, termination, and other privileges of employment.[5] It requires that employers make reasonable accommodation of any known physical and mental limitations of an otherwise qualified individual with disability, unless the accommodation would result in an undue hardship or a direct threat to the health and safety of the individual or others.[6] An individual is considered a "qualified individual" if they can perform the essential functions of the job at issue.[7]

Reasonable accommodation and/or direct threat analysis frequently arise in the context of workers' compensation injuries where an employee has been assigned light duty and/or work restrictions commensurate with their physical functioning. Under the ADA, whether the employer should provide light duty will often turn on whether the requested accommodation would result in an undue hardship or a direct threat.

In order to timely assert an ADA charge of discrimination in Alabama, the charging party must file their charge of employment discrimination on the basis of disability with the Equal Employment Opportunity Commission ("EEOC") within 180 days from the date of the alleged violation.[8]

Family Medical Leave Act—An Overview

The FMLA provides eligible employees of covered employers to take leave for specified family and medical reasons.[9] It applies to both public and private employers with at least 50 employees.[10] Employees who have worked for their employer for at least 12 months, have worked at least 1,250 hours during the 12 months prior to the beginning of a requested leave, and who work at a location where the employer has at least 50 employees within 75 miles meet the FMLA's eligibility requirements.[11] It allows eligible employees to take up to 12 weeks of leave in a 12-month period due to the employee's serious health condition, among other reasons.[12]

Under the FMLA, a serious health condition is defined as "an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider."[13] Any incapacity or medical treatment that requires in-patient care qualifies as a serious health condition.[14]

Continuing treatment includes a period of incapacity of more than three consecutive calendar days that also involves treatment two or more times by a health care provider, or at least a single visit to

a health care provider that results in a continuing treatment regimen.[15] A regimen of treatment involves a course of prescription medication or therapy requiring special equipment to resolve the health condition.[16] The first treatment must take place within seven days of the first day of incapacity.[17]

Any subsequent treatment or period of incapacity that relates to the same condition will also qualify if the treatment or incapacity involves two or more treatments by a health care provider.[18] Such continuing treatment must occur within 30 days unless extenuating circumstances exist.[19]

Once an employee has established eligibility for FMLA leave and a qualifying event, the employee is protected from any employer action that discourages or interferes with their right to take FMLA leave.[20] An eligible employee with a covered condition may take up to 12 weeks of leave during any 12-month period.[21] When medically necessary, it allows an employee to take intermittent leave, taken in separate blocks of time, or to work a reduced leave schedule, which decreases the employee's work schedule for a limited period of time.[22] An employee may take intermittent leave to attend medical appointments for treatment or may take a reduced leave while recovering from a serious health condition.[23]

FMLA leave is generally unpaid.[24] However, in the scope of many workers' compensation claims, the employee many be entitled to temporary total disability ("TTD") benefits while out on FMLA leave. Upon return from FMLA leave, the employee is entitled to return to the same or an equivalent position that they held at the beginning of the leave (including equivalent benefits, pay, and working conditions).[25]

In order to be timely asserted, an FMLA suit must be brought within two years of the alleged violation (or three years in the case of a willful violation).[26]

Workers' Compensation Situations Where the ADA and FMLA May Overlap: Light Duty

The Alabama Workers' Compensation Act does not require employers to "create a job specifically designed for an injured employee and [it] does not require an employer to provide the employee with special accommodations to allow the employee to perform a job."[27] That being said, light duty work assignments in the workers' compensation arena are often utilized to get an employee back to work as soon as the employee is physically capable to perform such work. That determination is made by the authorized treating physician.

When utilized properly, light duty can enable the employee to get back to work more quickly and earn more than the employee would while on TTD (which is usually limited to 66 2/3 percent of the employee's average weekly wage).

Studies have shown that getting an employee back to work sooner can lower the cost of the overall claim to their employer.

Light duty may be used to respond to the worker's medical restrictions. Light duty positions usually involve decreased physical demands and may be used only until the employee is released to return to work full duty.

A light duty job may have the employee performing the same job as before but with lessened physical requirements, or it may have the employee assigned to an entirely different job that may exist only for the duration of the temporary disability. Whatever the assignment, the position should have some job-related necessity and provide a benefit to the employer.[28]

In the ADA context, light duty issues may arise if the worker's condition prevents the employee from performing certain functions

of the job. As such, the employee may request a light-duty position as a form of reasonable accommodation under the ADA.

Sometimes employers have decided not to provide light duty; rather, they chose to pay a claimant TTD benefits when the employee is on restricted duty. While there is nothing preventing the employer from doing so under the Alabama Workers' Compensation Act, in certain contexts, it could run afoul of the ADA.

Since one of the purposes of the ADA is to provide disabled individuals with the opportunity to work where a reasonable accommodation could enable that employee to perform the essential functions of the job, a blanket policy or approach that would automatically put a workers' compensation claimant on TTD without examining whether a restriction is marginal to the employee's overall job function could result in an adverse finding under the ADA for failure to accommodate reasonably.

The bottom line is that an employee's restrictions should be examined not only in the context of their workers' compensation claim, but also in the context of whether the company can reasonably accommodate their restrictions.

Neither the ADA nor workers' compensation mandates that an employer create light-duty positions by job restructuring.[29] But, if an employer already has a vacant light-duty position for which an injured worker is qualified, the EEOC and the federal courts have taken the position that reassignment of the injured worker to the vacant position constitutes a reasonable accommodation.

Note, though, if the position was created as a light-duty job, reassignment to that position need only be for a temporary period. There also is no requirement that an employer convert a temporary light-duty position into a permanent assignment.

When an employer places an injured worker in a light-duty position, the claimant is "otherwise qualified" for that position for the term of that position under the ADA. Thus, a worker's qualifications must be gauged in relation to the position the employee occupies, not in relation to the job the employee held prior to their injury. An employer also may be required to provide additional reasonable accommodation to enable an injured worker in a light-duty position to perform the essential functions of that position.

To illustrate this latter point, the EEOC has provided the following example:

> Suppose a telephone line repair worker broke both legs and fractured her knee joints in a fall. The treating physician states that the worker will not be able to walk, even with crutches, for at least nine months. She therefore has a "disability" under the ADA. Currently using a wheelchair, and unable to do her previous job, she is placed in a "light duty" position to process paperwork associated with line repairs. However, the office to which she is assigned is not wheelchair accessible. It would be a reasonable accommodation to place the employee in an office that is accessible. Or, the office could be made accessible by widening the office door, if this would not be an undue hardship. The employer also might have to modify the employee's work schedule so that she could attend weekly physical therapy sessions.[30]

In the FMLA context, the issue of light duty may arise when an employee sustains a work-related injury that is also a serious health condition under the FMLA, and is released by the health care provider (*i.e.* the authorized treating physician) to return to light-duty work.

If, at the time of release, the claimant has a serious health condition and has not used all of their FMLA entitlement, the worker can decline the employer's offer of a light duty job and be placed or continue on FMLA leave until the 12-week entitlement is exhausted. However, if the claimant declines light duty (which is within the worker's restrictions), such action may prevent the employee's claim for TTD benefits during the period of refusal.[31]

There is one other significant overlap between light duty for workers' compensation claimants and the FMLA. When an employee *voluntarily* accepts light-duty work, their time spent doing that work may not be counted against their FMLA leave entitlement.[32]

Under this same scenario, if at the time the employee is released to light duty the employee has a disability under the ADA, the employee can decline the light-duty position if a reasonable accommodation would permit the employee to return to their regular job.

Duration of Leave

In determining when leave applies to a workers' compensation claimant's circumstances, it can get very complicated when the ADA, FMLA, and state-covered leaves are also involved.

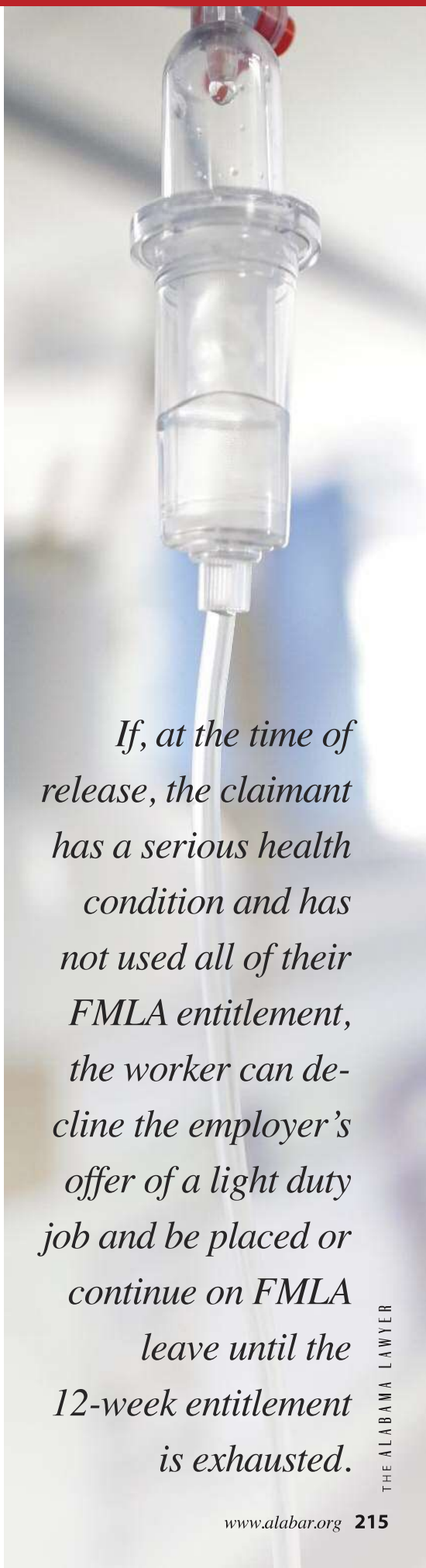
When dealing with a straightforward workers' compensation claim, the issue of leave can be relatively simple–has the authorized treating physician taken the claimant off work?

The situation becomes more complicated when the employee is unable to return to work after a period of months or, in some cases, years.

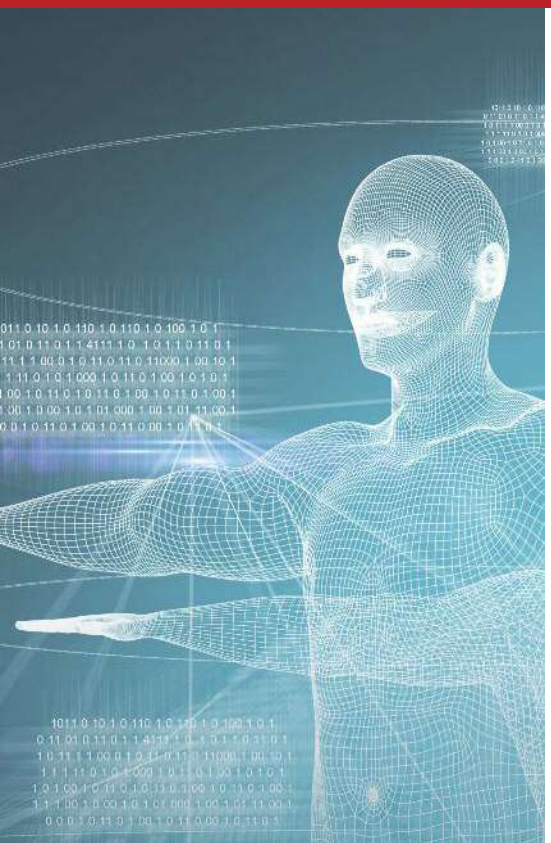
As in most states, the Alabama Workers' Compensation Act does not require an employer to hold the employee's job open indefinitely following a work-related injury. Some employers have extended medical leave policies which address these situations regardless of whether the employee's condition is work-related. Alabama law has found that terminations under such policies are not retaliatory under the Act.[33] However, "maximum leave policies" have come under increased scrutiny by the EEOC,[34] and counsel should examine whether a brief extension of leave would serve as a reasonable accommodation under the ADA.

Where a workers' compensation claimant is on leave due to an injury that also qualifies as a serious health condition under the FMLA, either the employee or employer may choose to have the employee's FMLA 12-week entitlement run concurrently with the employee's workers' compensation absence. If leave is run concurrently, the employee will enjoy the right to reinstatement to their position at the expiration of his leave (assuming he can physically return to his job at that time with or without a reasonable accommodation).

Under the ADA, permitting an employee to use accrued paid leave, or providing additional unpaid leave for necessary treatment, is reasonable accommodation. Thus, providing a disabled employee who qualifies for FMLA leave with 12 weeks of FMLA leave would be a form of reasonable accommodation under the



If, at the time of release, the claimant has a serious health condition and has not used all of their FMLA entitlement, the worker can decline the employer's offer of a light duty job and be placed or continue on FMLA leave until the 12-week entitlement is exhausted.



When a workers' compensation claimant is also covered under the FMLA, the employer may seek another evaluation which is somewhat akin to an FCE–a "fitness for duty" certification.[35]

ADA that would not be an undue hardship.

However, in some circumstances which can vary widely and are very fact-specific, an employee who exhausts his FMLA leave entitlement may be entitled to *additional* unpaid leave as a form of reasonable accommodation. However, as leave becomes more expansive and extensive, courts may consider such leave as an undue hardship on an employer.

Fitness for Duty Certification

When considering whether an injured worker may return to work and what his physical restrictions are, employers should rely on the authorized treating physician's assessment. When the claimant is nearing maximum medical improvement, the workers' compensation doctor often schedules the patient for a functional capacities evaluation ("FCE") to determine the extent of the claimant's capabilities and limitations.

When a workers' compensation claimant is also covered under the FMLA, the employer may seek another evaluation which is somewhat akin to an FCE–a "fitness for duty" certification.[35]

The "fitness for duty" evaluation is typically less comprehensive than an FCE. Still, such an examination can be required of an employee returning from FMLA leave for their own serious health condition. The health care provider who performs the examination must state that the employee is healthy enough to resume work. The evaluation report does not have to be completed by the workers' compensation authorized treating physician. Rather, it can be completed by the employee's own personal private physician or by a physician chosen by the employer.

An employer may require that the "fitness for duty" certification specifically address the employee's ability to perform the essential functions of the employee's job. Also, where the employer has reasonable job safety concerns, it may require the "fitness for duty" examination and a certification before the employee may return to work (even in the intermittent leave context). When performed, the certification should be job-related and consistent with business necessity.

Under the ADA, a company may also require a medical examination of an employee who seeks to return from a leave of absence if the employer has a reasonable belief that the employee's present ability will pose a direct threat to their own or another employee's health and safety,[36] and that determination must be based on an individualized assessment of the employee's present ability to safely perform the essential functions of his job.[37] It must also be based on a reasonable medical judgment, relying on the most current medical knowledge or the best available objective evidence. It should consider: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm.[38]

When examining a possible direct threat assessment, counsel should partner with appropriate

medical professionals who should be provided with information regarding the employee's job duties, the environment, and logistics necessary for them to make an informed determination about whether the employee may be a direct threat to themselves or others in the workplace.

Medical Examinations

Under Ala. Code § 25-5-77 the employer has the right to require the employee to submit to an examination by a doctor of the employer's choosing to determine the nature, extent, and probable duration of the employee's injury. Under the ADA, a medical examination is permissible where it is job-related and consistent with business necessity. Where an employer exercises its right to obtain a second or third opinion under the FMLA after an employee supplies certification of a serious health condition, the medical examination must not be overly broad, but be confined to the certified serious health condition.

Reinstatement Rights

Unless a workers' compensation claimant is also out on FMLA, there is usually no guarantee under Alabama law that the claimant will be entitled to return to their same or an equivalent job on their return. While Alabama's retaliatory discharge statute, Ala. Code § 25-5-11.1, prevents the employer from terminating an employee solely because the employee initiated or filed a workers' compensation claim, nothing in the Act requires an employer to reinstate an employee back to the same job they had prior to their injury.

However, where an absence occasioned by a work-related injury is also covered by the FMLA, the employee is entitled to be returned to the same position held when the leave began, or to an equivalent position with equivalent pay, benefits, and other terms and conditions of employment. Under the ADA, if the reason the employee is unable to perform the essential functions of the position is attributable to an ADA-covered disability, the employer will have a duty to reasonably accommodate the employee, and such an accommodation may include a transfer to another position, if such position is available, the employee is qualified for it, and they can perform the essential functions of that job with or without a reasonable accommodation.

Health Insurance Continuation

A question that often comes up in workers' compensation discovery involves what benefits remain in place. One reason this question may be asked is for the calculation of the employee's average weekly wage.[39]

In Alabama, there is no duty to continue fringe benefits while an employee is on workers' compensation leave. The ADA similarly does not require maintenance of health insurance unless other employees receive health insurance during leave under the same circumstances.

But, if the workers' compensation claimant also has a serious health condition under the FMLA, and their FMLA leave is approved and so designated, the employer is required to maintain the employee's group health plan coverage during the leave just like it would have been if the employee had been continuously employed during the leave period.

In such a circumstance, the employee may be required to pay their normal employee contribution toward their insurance premiums (as would have been customarily deducted from their paycheck when they were working). The employee's failure to pay that portion of the premium may be a basis to discontinue coverage.

Confidentiality of Medical Information

In the workers' compensation context, counsel cannot manage a case without getting a firm grasp of the relevant medical records. The employer's human resources, safety, benefits, and employee health departments should maintain employee medical records in a separate file from other personnel documents. Under the ADA, documents relating to an employee's medical condition or history must be collected and maintained on separate forms and in separate medical files and treated as a confidential record, except under the following situations:

- Supervisors and managers may be informed regarding the employee's work restrictions and necessary accommodations through workers' compensation and the interactive dialogue process under the ADA;
- First aid, safety, and medical personnel may be informed (when appropriate) if the employee's physical or medical condition might require medical treatment; and
- Government officials investigating compliance with the ADA (or other pertinent law) shall be provided relevant information upon request.

Because the ADA's confidentiality requirement applies to all medical information and not just that relative to an ADA-covered disability, it applies to medical information received by an employer in administering a workers' compensation claim or to those seeking FMLA leave.

Conclusion

In summary, when a workers' compensation claim arises, counsel should assess issues that extend beyond the Alabama Workers' Compensation Act. ▲

Endnotes

1. Equal Opportunity for Individuals with Disabilities, 42 U.S.C. § 12111(5) (2008).
2. 42 U.S.C. § 12102(1).
3. 42 U.S.C. § 12102(2)(A).
4. 42 U.S.C. § 12102(2)(B).
5. 42 U.S.C. § 12112(a).
6. 42 U.S.C. § 12111(3),(9-10).
7. 42 U.S.C. § 12111(8).
8. The Family and Medical Leave Act of 1993, 29 C.F.R. § 1626.7(a) (2020).
9. 29 C.F.R. § 825.112.
10. 29 C.F.R. § 825.104(a).
11. 29 C.F.R. § 825.110(a).
12. The FMLA also provides leave for reasons unrelated to an employee's own serious health condition, such as for the care of a family member, birth or placement of a child, or qualifying exigency arising from a family member's covered active duty. *See* 29 C.F.R. § 825.112(a). Those reasons are beyond the scope of this article.
13. 29 U.S.C. § 2611(11).
14. 29 C.F.R. § 825.114.
15. 29 C.F.R. § 825.115(a).
16. 29 C.F.R. § 825.113(c).
17. 29 C.F.R. § 825.115(a)(3).
18. 29 C.F.R. § 825.115(a)(2).
19. 29 C.F.R. § 825.115(a)(1).
20. 29 C.F.R. § 825.220.
21. 29 U.S.C. § 2612(a)(1).
22. 29 U.S.C. § 2612(b)(1); 29 C.F.R. § 825.202.
23. 29 C.F.R. § 825.202.
24. 29 U.S.C. § 2612(c).
25. 29 U.S.C. § 2614(a)(1); 29 C.F.R. § 825.214.
26. 29 U.S.C. § 2617(c).
27. *Bleier v. Wellington Sears Co.*, 757 So. 2d 1163, 1172 (Ala. 2000).
28. *See Heil Co. v. Crowley*, 659 So. 2d 105, 106-07 (Ala. 1995)(court inferred that light duty assignment of answering a phone that never rang served only for the purpose of annoying the employee and encouraging him to quit).
29. *Sutton v. Lader*, 185 F. 3d 1203 (11th Cir. 1999) (employers are not required to create light-duty positions); *Hammock v. Ryder Dedicated Logistics, Inc.*, 716 So. 2d 215, 218 (Ala. Civ. App. 1998) (noting that nothing under the Alabama Workers' Compensation Act requires an employer "to create a light-duty position, nor [is the employer] required to provide the employee with accommodations to aid his ability to perform the job.") *overruled on other grounds by Bleier*, 757 So. 2d 1163.
30. U.S. Equal Employment Opportunity Commission, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act IX-5 (1992), *available at https://play.google.com/books/reader?id=CLKLh1s_Zs0C&hl=en&pg=GBS.RA4-PA5.*
31. *See* Ala. Code § 25-5-77(d)("If an employee refuses, without the consent of the court, to accept vocational rehabilitation at the employer's request, the refusal shall result in loss of compensation for the period of refusal.").
32. 29 C.F.R. § 825.220(d).
33. *See Hayden v. Bruno's, Inc.*, 588 So. 2d 874, 876 (Ala. 1991)(termination pursuant to one year leave of absence policy not a retaliatory discharge); *See also Hatch v. NTW, Inc.*, 35 So. 3d 623 (Ala. Civ. App. 2009)(termination pursuant to three-month leave of absence policy was not retaliatory).
34. *See* U.S. Equal Employment Opportunity Commission, Employer-Provided Leave and the Americans with Disabilities Act, *http://www.eeoc.gov/eeoc/publications/ada-leave.cfm#edn1* (last visited Feb. 3, 2020).
35. *See* 29 C.F.R. § 825.312(a)-(b).
36. 42 U.S.C. § 12111(3).
37. 29 C.F.R. § 1630(r).
38. 29 C.F.R. § 1630(r)(1)-(4).
39. Ala. Code § 25-5-1(6).

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The Grand Bargain[1] Is 100!

A Look Back at the Alabama Workers' Compensation Act and a Look Ahead

By Tracy W. Cary

The Alabama Legislature got around to adopting the state's first workers' compensation act in 1919, roughly 100 years after Alabama became the 22nd state to enter the union on December 14, 1819.

By the time of Alabama's centennial in 1919, all but eight of the 48 states had one version or another of a workers' compensation law.[2] Governor Thomas Kilby,[3] Alabama's 36th governor, signed Alabama's Workers' Compensation Act into law on August 23, 1919,[4] and the new law took effect on January 1, 1920.[5]

Thus, in 2019, when Alabama celebrated its bicentennial, our workers' compensation law turned 100 years old.

This article will discuss what was considered revolutionary about the first workers' compensation law, why Alabama chose the specific workers' compensation law it first enacted, what the Act looks like now on its 100th anniversary, and what its future might look like.

Introduction

Germany was first to enact a workers' compensation law in 1884.[6] England followed in 1897.[7] The Alabama Legislature passed the Employers' Liability Act in 1886.[8]

Alabama's Employers' Liability Act allowed an employee to recover damages for the negligence of his employer or his agent. However, expanding industrialism and increased accidents called out for a solution that would work for both employers and employees. Before 1886, it was a tort claim or it was nothing: "Before the advent of no-fault worker's compensation systems, workers who were injured on the job found themselves in one of three situations: they had to prove that their injury was the fault of their employer via a tort claim, be at the mercy of their employer's benevolence in caring for them beyond what the law required, or their families became stigmatized with poverty."[9] Shockingly, Alabama courts even permitted employers to avoid liability in some cases by shifting responsibility for the condition of the workplace to the employees themselves.[10]

Workers' compensation laws attempt to strike a compromise between providing a safety net for workers who are injured on the job, while also addressing the concerns of industry about the financial burdens involved in providing benefits for injured workers.[11] This quid quo pro is sometimes referred to as "the grand bargain."[12]

"While sometimes seen as a victory for labor, the original workers' compensation statutes are now generally viewed as representing a compromise of all parties–employers, trade and business associations, insurance companies, unions, [and] progressive political activists …"[13]

Workers' compensation laws attempt to strike a compromise between providing a safety net for workers who are injured on the job, while also addressing the concerns of industry about the financial burdens involved in providing benefits for injured workers.[11]

What Was Revolutionary About Alabama's First Law?

Before states began enacting workers' compensation laws, "early industrial workers and their families were forced by judicial doctrine to bear all the costs of their own unfortunate accidents."[14]

Common law tort principles effectively precluded recovery by employees or their families for work-related accidents and deaths.[15] Even if an employee could establish proof of his employer's negligence, the employer could raise certain defenses, such as contributory negligence, assumption of the risk, and the fellow servant doctrine to prevent recovery in most cases.[16]

The harshness of these defenses "became the subject of universal criticism"[17] and slowly things began to change as "industrial development in the late 1800s transformed the relatively safe and individualized workplace into an often-dangerous and densely populated site."[18]

State laws protecting workers began to change starting with Massachusetts in 1904, followed by Illinois, Connecticut, and New York, so that by 1910, the reform movement was in full swing.[19] A Uniform Workmen's Compensation Law was drafted at a conference in Chicago in 1910, and "the discussions at this conference did much to set the fundamental pattern of legislation."[20]

Workers' compensation is "a no-fault strict liability compensation system that provides limited benefits to workers and generally protects employers from further liability."[21]

Interestingly, even though every state now has a workers' compensation law, not every worker is covered for

injuries at work. Professor Larson estimates, "The proportion of employees covered varies markedly from state to state, from 100 percent in Vermont, Hawaii, Maine and the District of Columbia and 99 percent in Wisconsin to 72 percent in Louisiana and Texas."[22] Primarily, domestic and farm employees and employees of small companies are the workers most likely to be excluded from coverage.[23]

Arguably, what was revolutionary about Alabama's first workers' compensation law was that it passed in the first place. The Alabama Employer's Liability Act put in motion the expectation and the requirement that workers have a safe place to work.

The workers' compensation law took it a step further and struck a compromise between employer and employee interests by placing upon industry the burden of disability and death resulting from industrial accidents.[24]

Why Alabama Chose the Specific Workers' Compensation Law It First Enacted

It is widely understood that when the Act was first enacted in Alabama in 1919, it was largely based on Minnesota's law.[25] In fact, the Alabama Legislature adopted virtually verbatim the reopening provision of the Minnesota act.[26] Thus, Minnesota court decisions are often deemed persuasive for interpreting the Act.[27]

Our law was first known as the Alabama Workmen's Compensation Act (often abbreviated AWA in early court decisions). While no one seems to know for sure why Alabama adopted Minnesota's law, perhaps at least part of the reason is that Minnesota's law

was not seen as being overly generous to injured workers. "The Workers' Compensation law that Minnesota enacted in 1913 was relatively stingy when compared to the laws of the other 21 states that had adopted workers' compensation by the end of the year."[28]

The Minnesota law was seen as a compromise of "shifting the financial risk as a certainty upon the employer, like other expenses of the business, and relieving him of the hazardous uncertainties and expenses incident to present methods of defense, which will leave both parties in the state in reasonably satisfactory condition without imposing upon the other lead degree of taxation which would either tend to drive industries from, or keep them out of, this state as a result."[29]

In fact, the law's minimal benefits caused some to conclude that "the compensation law is really a joke if a pathetic one."[30] However, it was recognized by some in Minnesota that their law fell far short of the ideal, but "it was the very best that could have been passed."[31]

Judge Terry Moore's special concurrence in *Vintage Pharm., LLC v. Hayes*, No. 2060284, 2007 Ala. Civ. App. LEXIS 607 (Civ. App. Sep. 14, 2007) (overruled on other grounds by *Ex parte Hayes*, 70 So. 3d 1211 (Ala. 2011)) sets out a concise history of the genesis of Alabama's workers' compensation law.

There, he notes that "under the new theory of workmen's compensation, the employer's liability is predicated solely on the relationship between the injury and the work so that an employee is entitled to compensation on account of a disabling injury caused by an accident arising out of and in the course of the employment."

Another commentator noted:

> "The 1919 Workmen's Compensation Act is a voluntary substitute for the common law, for the Alabama Employer's Liability Act, and other statutory rights of action for personal injuries against an employer applicable to those who elect to come within its provisions. It is that elective option between the employer and employee, the parties being free to accept or reject and to operate under and abide by the act, that reconciles the Act with § 13 [of the Alabama Constitution of 1901]. The election is made on the basis of a *quid pro quo* between employer and employee. Each voluntarily gives up rights guaranteed by § 13 in exchange for benefits or protection under the Workmen's Compensation Act."[32]

The bedrock principles of workers' compensation law are that the Act is to be liberally construed in favor of the employee,[33] and that all reasonable doubts are to be resolved in favor of the employee.[34]

The bedrock principles of workers' compensation law are that the Act is to be liberally construed in favor of the employee,[33] and that all reasonable doubts are to be resolved in favor of the employee.[34] These principles are aimed at accomplishing the Act's beneficent purposes,[35] which are:

- to provide certain relief to workers who become unable to work because of their employment-related injuries;
- to avoid the delay of relief associated with taking a tort claim to trial; and
- to shift the burden of industrial injuries onto the industry that caused the injury.[36]

The constitutionality of the law was unsuccessfully challenged very early on[37] and at other times since then, a topic which is addressed in the final part of this article.

What Alabama's Workers' Compensation Law Looks Like Now at Age 100

The original Act fixed temporary total disability (TTD) benefits at 50 percent of a maximum compensation rate of $12 per week and a minimum rate of $5

per week. By 1940, TTD was capped at 55 percent of a maximum compensation rate of $18 per week and a minimum rate of $5 per week.

The original Act contained something like today's schedule. Permanent total disability extended only for 550 weeks at a maximum rate of $12 per week. Attorney fees were capped at 10 percent in both 1919 and in 1940. Interestingly, the original waiting period for TTD was 14 days.

The initial law was elective in nature and gave employers "an opportunity to come under the new worker's compensation scheme or face litigation under the common law as modified by the statute."[38] The legislature amended the workmen's compensation law in 1973 to make the law compulsory instead of elective.[39]

In 1985, the Act was amended again. Some of the changes included limited immunity for co-employees, the elimination of certain defenses, an increase of the statute of limitations from one year to two years, a change in the method for selecting initial treating doctors, and a prohibition against terminating employees in retaliation for their pursuit of workers' compensation benefits.[40]

The Act was substantially amended in 1992.[41] "The 1992 amendments made the most wide reaching changes in the Workers' Compensation Act since its enactment in 1919."[42] There were dramatic sweeping changes made in the matter of compensation.

Other changes include the following: the appellate standard of review was modified, discovery and evidence rules were created, utilization review was created, the ombudsman program was created, a scheme was established for determining whether an employee may reopen his or her case, cumulative trauma injuries were added, and fringe benefits were redefined.

To distinguish the 1992 Act from the prior law, the law is now known as the Alabama *Workers'* Compensation Act, instead of the prior Alabama *Workmen's* Compensation Act.

There have been various attempts since 1992 to amend the Act, but it remains largely unchanged since 1992.

There have been various attempts since 1992 to amend the Act, but it remains largely unchanged since 1992.

Efforts in 2012 and 2015 stalled.[43] In 2017, an Alabama State Bar task force was appointed "comprised of more than 20 attorneys representing the interests of employees, employers, insurers, self-insured employers, self-insurance funds, and the medical community."[44] The task force unanimously approved a proposed bill on October 17, 2018 that would make substantial changes to the Act.[45]

The task force's bill was never introduced in the legislature.

The Future of The Workers' Compensation Act

There are at least three possibilities for what the future could hold for the Alabama Workers' Compensation Act: (1) we could maintain the status quo, (2) the Act could once again be declared unconstitutional, and/or (3) the legislature can amend it.

Status Quo

In 2004, the author published an article called "A NEW TOP TEN LIST: The top 10 list of things that should be changed about the Alabama Workers' Compensation Act."[46] There it was noted that "the number one issue on the list that cried out for change was the $220 cap on permanent partial disability benefits." Ala. Code § 25-5-68(a) provides that "the maximum compensation payable for permanent partial disability (PPD) shall be no more than the lesser of $220.00 per week or 100 percent of the average weekly wage."

The "$220 cap" on permanent partial disability benefits became effective January 9, 1985. In the years since 1985, the maximum compensation rate has increased from $303 per week to $892 for TTD benefits and permanent total disability benefits.

However, nothing has happened to PPD benefits since 1985. It would take $525.41 in 2020 to have the same purchasing power that $220 had in 1985.[47]

The Top Ten List went on to warn that "[a]t the current rate of annual increase, the minimum compensation rate of temporary total disability benefits will exceed

the maximum compensation payable for permanent partial disability in just 10 years." The minimum in fact passed the maximum on July 1, 2015.

As of the date of this article, the minimum temporary benefit is $245[48] while the maximum permanent partial disability benefit is still stuck at $220 per week. Minimum wage is $7.25 per hour, but the $220 cap equates to $5.50 per hour.

The Act May Once Again Be Declared Unconstitutional

In 2017, the Jefferson County Circuit Court entered an order in the case of *Clower v. CVS Caremark Corp*. (Case No. 01-CV-2013-904687) finding Ala. Code §§ 25-5-68 and 25-5-90(a) to be unconstitutional. Because of § 25-5-17's non-severability provision, the circuit court effectively declared the entire Alabama Workers' Compensation Act to be unconstitutional.

The circuit court stayed the order to allow the legislature time to amend the sections it found to be defective, but the legislative session ended without any changes in the law.

The *Clower* case was settled and dismissed so the trial court's order has no legal effect. But a brief review of what the trial court found could be helpful.

Ala. Code § 25-5-68–The $220 Cap

The trial court "found that Ala. Code § 25-5-68, with no identifiable rational basis, created a group of injured workers that was entitled to indexed benefits for temporary total disability and permanent total disability and a second group of injured workers that was not entitled to indexed benefits for permanent partial disability." By "indexed benefits," [the trial court] referred to benefits that increased annually due to a rise in the State of Alabama's average weekly wage. The maximum compensation for temporary total disability benefits and permanent total disability benefits has increased annually, but the $220 cap for permanent partial disability benefits was not indexed and has remained the same for more than three decades."[49]

Ala. Code § 25-5-90(a)–Attorney's Fees

The trial court "determined that Ala. Code § 25-5-90(a) constituted legislative trespass into a function reserved to the judicial branch of government, and found Ala. Code § 25-5-90(a) was unconstitutional under Alabama's constitutional guaranty of separation of powers."[50]

Perhaps the threat of the "nuclear option" of an unconstitutional Workers' Compensation Act will be enough to cause the Act to be updated.

If the Act is once again declared constitutional and the grand bargain goes away, many workers' compensation claims could go with it. Before workers' compensation acts, workers had to sue in tort to have any hope of a recovery for a job-related accident. "The tort system was laden with so many obstacles that injured workers experienced early tort claims and the problems that nineteenth century workers commonly encountered when asserting their claims."[51]

But if the Act goes away, employer immunity will also go away, and in those instances when a tort claim can be proven, the recovery could well dwarf benefits available under the Act.

The Legislature Can Amend the Act

Perhaps the threat of the "nuclear option" of an unconstitutional Workers' Compensation Act will be enough to cause the Act to be updated. Looking back at the Alabama Workers' Compensation Act's 100th anniversary, the Act may not have evolved with time the way some laws have changed. Perhaps a major overhaul is needed to keep the grand bargain grand. ▲

Endnotes

1. (Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017, 69 Rutgers L. Rev. 891.
2. J. Hood, B. Hardy and E. Saad, Alabama Workers' Compensation (3d ed. 1993), § 1-1 at 3. By 1963, when Hawaii adopted its workers' compensation law, all 50 states were on board.
3. Namesake of Kilby Correctional Facility who also served as mayor of Anniston and lieutenant governor before serving one term as governor, from 1919 to 1923. (*http://www.encyclopediaofalabama.org/article/h-1536*).
4. *Ex parte Rosengrant*, 213 Ala. 202, 104 So. 409 (1925).
5. Acts 1919, No. 245, p. 206.

6. See Larson, Workmen's Compensation Law.
7. J. Hood, B. Hardy and E. Saad, Alabama Workers' Compensation (3d ed. 1993), § 1-1 at 3.
8. Ala. Code § 25-6-1.
9. Article: Historical Development of Alabama's Workers' Compensation Law: Remedies Existing Prior to Workers' Compensation Legislation, 61 Ala. Law 48
10. *Sloss-Sheffield Steel & Iron Co. v. Jones,* 207 Ala. 7, 91 So. 808 (1921); Terry A. Moore, Alabama Workers' Compensation, Vol 1, § 1:3 at 9-10.
11. *Scott Paper Co. v. Taylor,* 728 So. 2d 632 (Ala. Civ. App. 1997).
12. (Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017, 69 Rutgers L. Rev. 891.
13. *Id.*
14. 1 Alabama Workers' Compensation Law and Handbook § 1.1 (2019) (Cites omitted).
15. J. Hood, B. Hardy and E. Saad, Alabama Workers' Compensation (3d ed. 1993), § 1-1 at 1.
16. J. Hood, B. Hardy and E. Saad, Alabama Workers' Compensation (3d ed. 1993), § 1-1 at 3.
17. J. Hood, B. Hardy and E. Saad, Alabama Workers' Compensation (3d ed. 1993), § 1-1 at 2.
18. Terry A. Moore, Alabama Workers' Compensation, Vol 1, § 1:1 at 2 (Cites omitted).
19. Larson's Workers' Compensation Desk Edition, Vol. I, § 2:07 at 2-12.
20. Larson's Workers' Compensation Desk Edition, Vol. I, § 2:07 at 2-13.
21. (Re)assessing the Grand Bargain: Compensation for Work Injuries in the United States, 1900-2017, 69 Rutgers L. Rev. 891.
22. Larson's Workers' Compensation Desk Edition, Vol. I, § 2:08 at 2-16.
23. Larson's Workers' Compensation Desk Edition, Vol. I, § 2:08 at 2-16-2-17.
24. J. Hood, B. Hardy and E. Saad, Alabama Workers' Compensation (3d ed. 1993), § 1-1 at 3; 1 Alabama Tort Law § 15.01 (2019).
25. *Ex parte Sloss-Sheffield Steel & Iron Co.*, 207 Ala. 219, 92 So. 458 (1922).
26. *Reed v. Brunson*, 527 So. 2d 102 (Ala. 1988); *Ex parte Kimberly-Clark Corp.*, 779 So. 2d 178 (Ala. 2000).
27. *See Steagall v. Sloss-Sheffield Steel & Iron Co.,* 205 Ala. 100, 87 So. 787 (1920); *Pound v. Gaulding*, 237 Ala. 387, 187 So. 468 (1939); *Eley v. Brunner-Lay Southern Corp.*, 289 Ala. 120, 266 So. 2d 276 (1972).
28. Shawn Everett Kantor & Price V. Fishback, How Minnesota Adopted Workers' Compensation, *The Independent Review*, Vol. 2, No. 4 (Spring 1998), pp. 557-578.
29. Shawn Everett Kantor & Price V. Fishback, How Minnesota Adopted Workers' Compensation, *The Independent Review*, Vol. 2, No. 4 (Spring 1998), at 563.
30. *Labor Review,* 25 April 1913.
31. Minnesota State Federation of Labor 1913, 36; 1914, 27.
32. 1 Alabama Tort Law § 15.01 (2019).
33. *Ex parte* Majestic Coal Co., 208 Ala. 86 (1922).
34. *National Cast Iron Pipe Co. v. Higginbotham,* 216 Ala. 129 (1927).
35. 1 Alabama Workers' Compensation Law and Handbook § 1.02.
36. Robert W. Lee & Steven W. Ford, Alabama Workers' Compensation Law and Handbook.
37. *Woodward Iron Co. v. Bradford*, 206 Ala. 447, 90 So. 803 (1921).
38. Terry A. Moore, Alabama Workers' Compensation, Vol. 1, § 3.
39. Acts 1973, No. 1062. But see *Reed v. Brunson*, 527 So. 2d 102 (Ala. 1988) for the proposition that the Alabama Supreme Court held that the law is still elective and not compulsory.
40. J. Hood, B. Hardy and E. Saad, Alabama Workers' Compensation (3d ed. 1993), § 1-1 at 4; Ala. Code §§ 25-5-11, 25-5-51, 25-5-53, 25-5-57, 25-5-58, 25-5-77, and 25-5-80; Act 85-41, §§ 10-11.
41. Robert W. Lee & Steven W. Ford, Alabama Workers' Compensation Law and Handbook, § 2.11.
42. *Id.*
43. *http://www.nwcdn.com/state-news/alabama-worker-s-compensation-reform-bill-not-likely-to-pass.*
44. *http://www.alabamaworkerscompblawg.com/blawg-post/alabama-workers-compensation-task-force-shooting-for-change-in-2019.*
45. *http://www.alabamaworkerscompblawg.com/blawg-post/alabama-bar-association-task-force-unanimously-agrees-to-proposed-changes-to-workers-compensation-ac.*
46. Alabama Trial Lawyers Association Journal, Vol. 24 No. 3 (summer), 2004.
47. *www.dollartimes.com.*
48. *https://labor.alabama.gov/docs/guides/wc_weeklywage.pdf.*
49. Steven W. Ford, Workers' Compensation Update, Tuscaloosa County Bar Association End of the Year CLE December 15, 2017.
50. *Id.*
51. Robert W. Lee & Steven W. Ford, Alabama Workers' Compensation Law and Handbook, § 1:1.

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Alabama Law Foundation News

Law Foundation Announces New Fellows

The selection committee of the Fellows of the Alabama Law Foundation (ALF) meets annually to select lawyers, from among those nominated by incumbent Fellows, to be invited to membership. Those selected have demonstrated outstanding dedication to their profession and their community.

New members were inducted at the annual Fellows dinner in January in Montgomery.

The Fellows program was established in 1995 to honor Alabama State Bar members for outstanding service and commitment. Since no more than one percent of bar members are invited into fellowship, the selection committee chooses new members from an exceptional group of lawyers. ALF Executive Director Tracy Daniel explains, "We are honored to welcome the 2019 class of Fellows to the Alabama Law Foundation. This class reflects the best of the best. Throughout their careers, these men and women have distinguished themselves as lawyers, judges, and servant leaders in the profession and community. We are proud to welcome them into the ranks of our foundation."

The foundation depends upon Fellows to provide financial and personal support. Fellows' gifts help the foundation fund important projects and programs that benefit Alabama residents and the legal community alike, toward the goal of providing equal access to justice for all Alabama citizens. The foundation awarded $1,147,667 for calendar year 2020. Eighty-eight percent of grants were given to organizations providing free civil legal aid to low-income residents of Alabama, and the remaining 12 percent went to projects to improve the administration of justice.

Below are the Fellows accepted into membership for 2019:

Annemarie C. Axon, Birmingham, United States District Judge, Northern District of Alabama

Emily L. Baggett, Decatur, Legal Department, City of Decatur

Liles C. Burke, Huntsville, United States District Judge, Northern District of Alabama

Bradley R. Byrne, Mobile, United States House of Representatives, 1st District of Alabama

Shawn J. Cole, Montgomery, shareholder, Hill, Hill, Carter, Franco, Cole & Black

John H. Graham, Scottsboro, circuit judge, 38th Judicial Circuit

Elizabeth H. Huntley, Birmingham, of counsel, Lightfoot Franklin & White

Clinton H. Hyde, Evergreen, partner, Hyde & Hyde

J. Elizabeth Kellum, Montgomery, judge, Alabama Court of Criminal Appeals

Karen L. Laneaux, Montgomery, Law Offices of Sandra Lewis

J. Trent Lowry, Cullman, partner, Griffith, Lowry & Meherg

E. De Martenson, Birmingham, senior partner, Huie, Fernambucq & Stewart

Matthew C. McDonald, Mobile, partner, Jones Walker

A. Clark Morris, Montgomery, Office of the Attorney General, State of Alabama

Mark A. Newell, Mobile, partner, Armbrecht Jackson

Andrew S. Nix, Birmingham, shareholder, Maynard, Cooper & Gale

George R. Parker, Montgomery, partner, Bradley Arant

Jill P. Phillips, Mobile, circuit judge, 13th Judicial Circuit

James Rebarchak, Mobile, partner, Jones Walker

Benjamin R. Rice, Huntsville, partner, Wilmer & Lee

Donald N. Rizzardi, Huntsville, district judge, 23rd Judicial Circuit

J. Gregory Shaw, Birmingham, associate justice, Supreme Court of Alabama

Patrick M. Shegon, Montgomery, shareholder, Rushton, Stakely, Johnston & Garrett

Robert Smith, Florence, sole practitioner

Scott M. Speagle, Montgomery, managing shareholder, Webster, Henry, Bradwell, Cohan, Speagle & DeShazo

Finis E. St. John IV, Cullman, chancellor, University of Alabama System

Sarah H. Stewart, Montgomery, associate justice, Supreme Court of Alabama

R. Gregory Watts, Mobile, partner, Johnstone Adams

Judson W. Wells, Daphne, shareholder, Carr Allison

Stephen E. Whitehead, Birmingham, shareholder, Lloyd, Gray, Whitehead & Monroe

E. Ham Wilson, Montgomery, partner, Ball, Ball, Matthews & Novak

A. Kelli Wise, Montgomery, associate justice, Supreme Court of Alabama

Champion of Equal Justice for All: Law Foundation 2020 Grants

The Alabama Law Foundation's yearly grants support programs committed to the foundation's mission of making access to justice a reality for all of Alabama's citizens. The 2020 grants were in three categories: legal aid to the poor, the administration of justice, and foreclosure prevention. Grants for 2020 totaled $1,147,667.

The following programs that provide civil legal services for low-income residents of Alabama received grants totaling $982,667:

- The **Alabama State Bar Volunteer Lawyers Program,** which refers cases directly to lawyers in 60 counties and coordinates 1,988 volunteers received a $149,000 grant.
- The **Hispanic Interest Coalition of Alabama** received a $51,667 grant to continue providing low-cost, quality legal and immigration services to low-income immigrants.
- **Legal Services Alabama,** which provides civil legal aid to economically disadvantaged citizens throughout Alabama, received a $126,000 grant.
- The **Madison County Volunteer Lawyers Program** works with 460 lawyers and received a $94,000 grant.
- The **Montgomery County Volunteer Lawyers Program**, which works with 309 lawyers to meet the legal needs of low-income clients in Montgomery County, received a $94,000 grant.
- The **South Alabama Volunteer Lawyers Program**, which refers cases directly to 744 lawyers in Mobile, Baldwin, Clarke, and Washington counties, received a $129,000 grant.
- **Volunteer Lawyers Birmingham,** which refers cases to 850 attorneys in the Birmingham area, received a $129,000 grant.
- The **YWCA of Central Alabama** received a $75,000 IOLTA grant to continue the "Justice on Wheels" program which provides civil legal aid to victims of domestic violence in Blount and St. Clair counties.

The foundation's legal aid grant recipients closed over 15,000 cases in 2019.

The following programs that improve the administration of justice received grants totaling $135,000:

- **Alabama Administrative Office of Courts** received a $20,000 grant to help support its Working Interdisciplinary Networks of Guardianship Stakeholders to improve guardianship and conservatorship practices in Alabama.
- **Alabama Appleseed,** which advocates for policies that encourage a more just Alabama, received a $45,000 grant.
- The **Equal Justice Initiative of Alabama,** which assists attorneys appointed to capital cases in the post-conviction stage and supplies some representation to indigent defendants, received a $50,000 grant.
- **Georgia Innocence Project** works to secure the release of people who are incarcerated in prison for crimes they did not commit. The GIP received a $20,000 grant to advance the two-year Alabama Innocence Fellowship, an Alabama-specific mission.

Grants totaling $165,000 were awarded to the following programs to provide legal services to help Alabama homeowners avoid losing their homes to foreclosure.

- **Alabama State Bar VLP** $19,500
- **Legal Services Alabama** $67,500
- **Madison County VLP** $19,500
- **Montgomery VLP** $18,500
- **South Alabama VLP** $12,500
- **Volunteer Lawyers Birmingham** $27,500

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LEGISLATIVE WRAP-UP

Continuity of Government: The Legislature

Thanks to the patience of the tremendous editors and staff of *The Alabama Lawyer* and the Alabama State Bar, I am working on this article well past the prescribed deadline and as our nation and state are in the midst of a public health emergency the likes of which most of us have never experienced. We are all seeing the world and the responses of its inhabitants play out before us in daily cycles that hit on every emotion and reaction. In that spirit, I ask that you indulge me a moment of "personal privilege" to say a few things I think important. First, I hope and pray that each of us and our loved ones make it through this with our health and a new resolve about the way in which we face each day on our journey on this earth. Second, I have never been prouder to share this profession with you. Each day I am seeing the members of our bar do the ordinary things they do in extraordinary ways to make sure that the needs of the most vulnerable among us are met carefully and timely with little regard for personal risk and sacrifice. And finally, I am proud of our state's leaders. I know that in the scope of the many public servants and their many decisions, each of us will find some that we agree with, some that we don't, and many we just don't understand; however, I believe that the vast majority of those leaders act as best they can with the information they have to serve and protect the citizens of Alabama and with a genuine love and concern for those who are most affected by those decisions.

One area of the law that unfortunately goes largely overlooked and only gets

scrutinized in times of great crisis is how we are set to survive and continue the operation of state government during an emergency. The stress that gets put on the system in times like these tests the planning and imagination that was often done decades ago in different times and in response to different challenges. I have no doubt that following this time we will propose and debate many changes to how things operate and function in times like these. In fact, I am keeping a list that changes almost daily as we react to this health crisis and welcome thoughts from each of you reading this about what worked well, what did not, and how we can improve our legal framework to better deal with challenges in the future.

As you have no doubt already noticed and probably researched, our system of laws has some fairly broad and sweeping ability to allow for swift and certain action. Chapter 9 of Title 31 gives the governor the ability to act swiftly and decisively to declare an emergency and implement sweeping initiatives to react to it. These powers are intentionally broad with significant enforcement powers. In the present crisis they have been used to close schools and businesses, move an election, and relieve certain legal burdens that would normally require the close interaction of groups of people.

Likewise, Chapter 2 of Title 22 gives the state board of health, acting through the state health officer, broad ability to issue orders that when promulgated as emergency rules have the force of law and the ability to be enforced. In similar fashion, other executive branch officers and agencies can promulgate emergency rules that are in force for limited periods of time. These emergency rules go into force without the normal requirements of public comment period or legislative review, but can only be in force for limited periods of time.

At some point, we expect the governance of the state to resume a more normal pattern and the legislature to resume its work. Our law actually has a number of provisions to ensure the continuity of the legislature and its functioning. While I have already thought of some possible ways to improve these, I thought it might be interesting to review them here.

Place of Meeting

Section 48 of the Constitution of Alabama of 1901 provides that the legislature shall meet in the capitol in the senate and house chambers, respectively. However, if for any reason it shall become "impossible or dangerous" to remain in that location, the governor may convene the legislature elsewhere or move them if already convenient.

Section 48 was altered by Amendment 56 which was ratified in 1946. Amendment 56 retained the same flexibility, but also added the possibility of designating a different spot to convene. Amendment 427, ratified in 1982, provided further flexibility to allow the legislature to transact business outside of the capitol in a building to be designated the Alabama State House. That option was exercised effective January 1, 1984 when the legislature moved across Union Street from the capitol and began conducting business in what was previously the highway department building.

Call to Special Session

The governor has sole authority to call a special session. That authority exists pursuant to Section 122 of the Constitution of Alabama of 1901. Of interesting note, that provision has the express option of being called to a place other than the seat of government if since their last adjournment that location "shall have become dangerous … from any infectious or contagious disease." However, according to Section 31-9-8, once the governor has declared an emergency, "the Lieutenant Governor or the Speaker of the House may request in writing that the Governor call the Legislature into special session."

Quorum Requirements and How to Meet Them

A quorum of 50 percent of the membership plus one is always required to conduct the business of the legislature pursuant to the constitution. One of the more interesting provisions of our continuity of government plans is how that number can be arrived at in the event that our state or country is under attack. In the days of the Cuban Missile Crisis, the legislature passed, and the voters ratified, Amendment 159:

> The legislature may provide for the continuity of the Alabama legislature of the state of Alabama and the representation therein of each of the political subdivisions of the state in the event of an attack by an enemy of the United States, by providing for the selection of emergency interim legislators who shall be designated for temporary succession to the powers and duties but not the office of a legislator in case of such emergency. Such emergency interim legislator may serve only when the legislator in whose stead he is authorized to serve has died or is unable temporarily for physical, mental or legal reasons to exercise the powers and discharge the duties of his office, and until such time as the elected legislator is able to resume the duties of his office, or in case of a vacancy in such office a successor has been elected in accordance with section 46 of this Constitution.

In furtherance of this directive, the legislature passed Act 1961-875 codified as Chapter 3 of Title 29, Code of Alabama, 1975. This act, among other things, provides for the ability of each legislator to appoint a successor to exercise her authority in the event she is unable to fulfil her duties when the nation is under attack.

While this interesting relic of the Cold War era is fascinating to read, it also serves as a reminder that we as a state have been through difficult times before and come out of them. It will be interesting to watch what provisions and changes to the law come out of this modern-day crisis. ▲

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Practicing in the Age of Pandemics

The current coronavirus crisis is distinctive and unprecedented in many ways. However, our obligations as lawyers to inform ourselves and respond appropriately are not exceptional, even when dealing with the coronavirus. Whether dealing with massive hurricanes, tornados, or pandemics, our clients are depending on us to know what to do in times of crises. Here are a few considerations:

Rule 1.1, Alabama Rules of Professional Conduct, addresses a lawyer's obligation of "competence." A lawyer's ethical duty of competence includes obtaining the requisite "legal knowledge" needed to prepare a case or reasonably advise a client, including staying up to date on both substantive and procedural changes that may affect clients.

The Alabama Supreme Court has issued several administrative orders in the last several weeks. Subsequent orders often clarify previous orders. Therefore, it is very important to always know you have the latest information. The Alabama Supreme Court has also empowered presiding judges in each circuit to deviate from the administrative orders when legally or constitutionally required or justice requires. Many probate judges are also posting recommendations for lawyers practicing in their courts. As of now, most federal courts have issued

guidelines outlining their expectations for lawyers dealing with quarantine issues. Whatever your practice area, it is incumbent on you to know what the administrative bodies and courts are doing in your jurisdiction.

The duty of competence further requires a lawyer to be mindful of certain key personnel, i.e., a paralegal, who may have specialized knowledge about client issues. The lawyer in charge of a file has an obligation to make sure clients can maintain access to important information should those key employees fall ill. If a lawyer is retaining important information or funds that a client may need during these uncertain times, a plan of action should be created to facilitate or address those concerns.

Rule 1.4, Alabama Rules of Professional Conduct, outlines a lawyer's ethical obligation to communicate with clients. The lawyer should keep a client "reasonably informed about the status of a matter…and…explain a matter to the extent reasonably necessary to permit the client to make informed decisions…" This obligation includes explaining to your clients that there have been recent developments and that there could be more down the road that affect their case.

In some instances, your client may have been seriously affected by the coronavirus. Rule 1.14, Alabama Rules of Professional Conduct, discusses dealing with clients who suffer from diminished capacity. The general requirement when dealing with a client during a period of diminished capacity is to maintain a normal-client relationship as reasonably possible. However, if the lawyer reasonably believes a client with diminished capacity cannot adequately act in his or her own self-interest and is at risk of substantial physical, financial, or other harm unless action is taken, he or she may ethically take reasonably necessary protective measures to help the client. In some cases, this may include consulting with individuals or organizations that have the ability to take action and protect the client. In appropriate cases, this may include seeking the appointment of a guardian ad litem, conservator, or guardian. Due to the recent closure of the majority of the court systems, any judicial action requiring an in-person hearing may need to be approved by the presiding judge, probate judge, or designee in your jurisdiction.

The Office of General Counsel ("OGC") understands how difficult this time is on every lawyer, every client, every staff member, and every family. We are hopeful that you will let us help you with your difficult decisions. If you have questions about an ethical issue or obligation, please email us at *ethics@alabar.org*. For all other OGC inquiries, please email us at *ogc@alabar.org*. ▲

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

Estates

***Player v. J.C.*, No. 1180606 (Ala. Jan. 24, 2020)**

Among other holdings: (1) Ala. Code § 12-22-21 authorizes immediate appeal from order of a probate court removing personal representative. This also applies to estates removed to circuit court, in which event an appeal is to the Alabama Supreme Court. (2) Former PR was not entitled to hearing on second petition for final settlement under Ala. Code § 43-2-550 filed after her removal; former PR had repeatedly refused to comply with prior circuit court orders directing filing of an accounting.

Corporate Depositions; "Apex" Doctrine; Discovery Standards

***Ex parte Willimon*, No. 180439 (Ala. Jan. 24, 2020)**

In action for damages against local United Methodist ministers and district, plaintiff sought depositions of former and current bishop of the North Alabama Conference of the UMC. Bishops moved to quash, which were denied. Bishops sought mandamus relief. The supreme court denied the writ. The bishops argued that the court should explicitly adopt the "apex" doctrine, invoked by high-ranking corporate executives to be relieved from testifying in actions when they lack personal knowledge of any of the matters involved in the action. The court has applied principles akin to the apex doctrine in prior cases, but concluded that the bishops' testimony was being sought for their superior knowledge of certain matters, including the procedures for handling child sexual abuse allegations during their respective tenures, implementation of those policies, and the efforts to address such allegations at the local church level. The court declined to consider the "apex" doctrine because of these distinguishing facts. The court also rejected current bishop's argument that the discovery was unreasonably duplicative or cumulative, because prior depositions of district superintendents did not specifically address conference's involvement in preventing or investigating such allegations. The court rejected current bishop's argument that the discovery was unduly burdensome; Rule 26(b)(2)(B)(iii) was amended in December 2018 to alter the undue burden standard for protective orders to a standard which parallels general standards of discovery under Rule 26(b)(1), which (after December 2018) is not privileged, relevant, and proportional to the needs of the case.

AMLA; Discovery

***Ex parte BBH BMC LLC*, No. 1180961 (Ala. Jan. 24, 2020)**

PR sued Brookwood Medical Center, claiming negligence in maintenance of premises from which psychiatric outpatient services recipient was allowed access to parking deck from which she took her life. In discovery, PR sought discovery from Brookwood regarding whether changes to the premises access or characteristics were considered after either of two prior suicides in like manner. Brookwood refused to provide the discovery under Ala. Code § 6-5-551, which precludes discovery of other acts in AMLA actions. The trial court ordered production of the materials and responses. The supreme court granted mandamus relief. At the outset, the court noted that there was no independent premises liability claim asserted, and thus that all claims fell under AMLA. Such "other acts" evidence was precluded by the statute, and even though the facts regarding the suicides themselves were not being sought, the information regarding the condition of the premises was inextricably intertwined with the suicides themselves, bringing all such information under the exclusion of the statute.

Statute of Limitations; Mandamus Review

***Ex parte Dow AgroSciences LLC*, No. 1180887 (Ala. Jan. 24, 2020)**

Plaintiff was not entitled to relation back, under Ala. Code § 6-8-84, of a counterclaim as to a defendant to the counterclaim which is not a plaintiff suing the counterclaiming party. The issue of relation back of this amendment as to the counterclaim defendant was reviewable by mandamus.

County Engineers

***Robbins v. Cleburne County Commission*, No. 1180106 (Ala. Jan. 31, 2020)**

Provision in county's five-year contract with engineer giving engineer unilateral option for sixth year was void; under Ala. Code § 11-6-1, a county may hire an engineer for up to five years.

Premises Liability

***McClurg v. Birmingham Realty Co.*, No. 1180635 (Ala. Jan. 31, 2020)**

Trial court granted summary judgment to premises owner based on plaintiff's stepping in 16" x 5" pothole which was

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deemed "open and obvious." The supreme court reversed in a plurality opinion, reasoning that the issue of "open and obvious" is generally not for resolution on summary judgment except in three instances: (1) where plaintiff admitted carelessness or subjective knowledge of the condition; (2) where the type of condition was so dangerous as to preclude liability under any circumstances; and (3) where no reasonable jury could not find the condition open and obvious. According to the plurality, "holes in parking lots are not so categorically obvious that the situation merits a *per se* defense." Here, the position and dimensions of the hole, the surrounding asphalt, and other conditions made it a jury question.

UM Opt-Out Procedure; Jury Demands

***Ex parte Allstate Property & Casualty Ins. Co.*, No. 1180871 (Ala. Jan. 31, 2020)**

After UM carrier answers and demands a jury, then opts out under *Lowe v. Nationwide Ins. Co.*, 521 So. 2d 1309 (Ala. 1988), UM carrier can nevertheless insist that its demand for jury trial be honored when remaining litigants try case.

Direct Action Statute; Mandamus Review

***Ex parte State Farm Fire & Cas. Co.*, No. 1170760 (Ala. Jan. 31, 2020)**

Denial of motion to dismiss action against insurer under the direct-action statute, Ala. Code § 27-23-2, was not reviewable by mandamus.

Arbitration; Nonsignatory

***Wiggins v. Warren Averett, LLC*, No. 1170943 (Ala. Feb. 7, 2020)**

Wiggins was a physician in Eastern Shore Children's Clinic, PC (the "PC"). Warren Averett ("WA") had accounting retainer agreement with the PC, under which WA would prepare the PC's returns and its shareholders' personal returns, including Wiggins's. The retainer agreement contained an arbitration provision requiring arbitration of all disputes "asserted or brought by or on behalf of" the PC, but did not address potential disputes regarding individual shareholder's returns. Wiggins sued WA regarding his personal returns. WA moved to compel arbitration, which was granted. Wiggins appealed. The supreme court reversed in a plurality decision, reasoning that although the clause covered only disputes "asserted or brought by or on behalf of" the PC, the clause was a AAA commercial clause, under which the arbitrator determines the scope of his/her own jurisdiction, and thus the scope of the clause would be an issue for the arbitrator. *This case largely turns on what was deemed a waiver of arguments on appeal, so it may be of limited precedential value.*

Substitution; Relation Back; Due Diligence

***Ex parte Cowgill*, No. 1180936 (Ala. Feb. 7, 2020)**

Trial court erred in holding that claims against individual defendants substituted for fictitious parties after expiration of the statute of limitations related back under Rule 9(h). Plaintiff had actual knowledge of individual defendants' identities and roles well before expiration of the statute in pre-trial discovery (and even in pre-suit discovery) and did not substitute, demonstrating lack of reasonable diligence.

Power of Attorney

***Forbes v. Platinum Mortgage, Inc.*, No. 1180985 (Ala. Feb. 14, 2020)**

Evidence was sufficient (from notary's testimony) that POA was verified before the notary and thus was "acknowledged" under Ala. Code § 26-1A-119(a), making it valid under § 26-1A-120.

Workers' Compensation Exclusivity

***Ex parte Drury Hotels Co., LLC*, No. 1181010 (Ala. Feb. 28, 2020)**

Housekeeper sued her employer for injuries sustained in sexual assault committed while she was working at hotel. Suit was based on premises liability theories (failure to maintain safe premises) and on tort of outrage. Employer moved to dismiss based on exclusivity under Ala. Code § 25-5-52; trial court denied the motion with respect to negligence and wantonness claims, but reserved ruling on the outrage claims pending discovery. Employer petitioned for mandamus. The supreme court denied the writ. Under Ala. Code § 25-5-1(9), an assault on an employee may be compensable under the act unless the assault was committed against the employee for "personal" reasons and not for reasons related to employment. Pleading on its face did not address whether assault was for "personal" reasons, so denial of Rule 12 motion was not improper.

Arbitration; Evidence

***Oaks v. Parkerson Construction, LLC*, No. 1171193 (Ala. Feb. 28, 2020)**

Trial court's order compelling arbitration was not properly supported by a motion supported by evidence of an agree-

ment to arbitrate. Attaching the arbitration agreement to the motion to compel arbitration without authentication did not make for proper evidentiary support.

Personal Jurisdiction

***Ex parte LED Corporations, Inc.*, No. 1180629 (Ala. Feb. 28, 2020)**

SDM, an electrical subcontractor for a high-school project in Calhoun County, contracted with LED under a $181,000 agreement for procurement of light fixtures for the project. LED's employee came to Alabama from Florida to discuss the project in person and to assist in the design of lighting specs. After partial payment, LED's president and sole shareholder (Florence) sent emails/texts to SDM representatives stating that certain goods would be shipped upon complete payment. After complete payment was sent to LED, LED allegedly did not send the goods. SDM sued LED and Florence for fraud and breach of contract. Defendants moved to dismiss for lack of personal jurisdiction. Trial court denied the motion, and defendants sought mandamus relief. The supreme court denied the writ. As to LED, although a single contract standing alone is insufficient in itself to establish specific jurisdiction, the fact that the contract here involved the purchase of goods to be delivered and installed in Alabama, and that a representative of LED physically came to Alabama concerning the contract, established "purposeful availment" and intentional conduct directed to Alabama. As to Florence, there were no required minimum contacts for breach of contract (since he was not a party to it), but applying the "effects" test, there were minimum contacts to support a claim that Florence's alleged misrepresentations induced an Alabama party to pay money from Alabama, thus having effects in Alabama and giving rise to personal jurisdiction. "Fiduciary shield" doctrine established in *Ex parte Kohlberg Kravis Roberts & Co., L.P.*, 78 So. 3d 959, 974 (Ala. 2011), did not protect Florence; he was alleged to have personally committed the torts, so his status as a defendant did not simply spring from his status as a manager of or member in the entity.

Real Estate Agents; Duties

***Rosenthal v. JRHBW Realty, Inc. dba RealtySouth*, No. 1180718 (Ala. Feb. 28, 2020)**

Buyer sued buyer's agent, claiming that buyer's agent undertook voluntary duty to have property inspected by structural engineer before buyer executed contract of sale; that agent failed to retain engineer; and that after closing, $100,000+ in structural problems were discovered. Importantly here, (1) buyer executed agency agreement with buyer's agent at the time of the contract of sale, and (2) contract and various documents contained merger and integration clauses, as well as provisions circumscribing the duties of agent and imposing on buyer an as is purchase and a duty to inspect. Agent and his firm moved for summary judgment, claiming under the Real Estate Consumer's Agency and Disclosure Act, § 34-27-80 et seq., Ala. Code 1975 ("the RECAD"), agent and buyer did not have an agency relationship at the time the duty allegedly arose, and that accordingly, the only duty which could have arisen before the contract would have been as a "transaction broker." The trial court granted summary judgment, and the supreme court affirmed. The court agreed that under Ala. Code § 34-27-82(b), no agency relationship arises until memorialized in a written agency agreement, and prior to that time the parties had only a "transaction broker" relationship. Under Ala. Code § 34-27-82(f), the duties of a transaction broker are limited to those enumerated in section 34-27-84; those duties (a) do not provide any duties regarding property inspection, and (b) under section 34-37-87, displace any common-law duties, including any duty arising from a voluntary undertaking at common law.

Defamation; State Agent Immunity

***Birmingham Broadcasting (WVTM-TV) LLC v. Hill*, No. 1180343 (Ala. Feb. 28, 2020)**

Under exception [2] to the "fair report" privilege from defamation in Ala. Code § 13A-11-161, a publisher is not entitled to the privilege if "the defendant has refused or neglected to publish in the same manner in which the

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publication complained of appeared, a reasonable explanation or contradiction thereof by the plaintiff." Held: under this provision, the defendant must refuse to report a contradiction or explanation offered to the defendant by the plaintiff, meaning plaintiff must contact the defendant to offer that alternative reportage. Publisher was entitled to JML on all claims because plaintiff did not contact publisher to provide alternative reportage. Sheriff's employees were properly granted section 14-based immunity for issuing warrants to potential offender because they had been provided with a legal opinion from the DA before obtaining the warrants, which were duly issued by a magistrate.

Municipalities; Immunity

***Ex parte City of Millbrook*, No. 1180050 (Ala. March 6, 2020)**

City civic center which was rented for events and was adjacent to city baseball fields, but which did not facilitate the use of the fields or any other outdoor recreational land, is not "outdoor recreational land" under the recreational use immunity statute, Ala. Code § 35-15-23.

Trusts

***Foster v. Foster*, No. 1180648 (Ala. March 6, 2020)**

Among other holdings: (1) trust provision stating that instrument was to be "construed" according to California law did not preclude trial court's jurisdiction over the trust under Ala. Code § 19-3B-202; (2) trial court's order that trustee repay $244,000+ to the trust misappropriated for personal expenses was supported by substantial evidence, in the form of a forensic accounting ordered by the trial court; (3) award of prejudgment interest on the reimbursement amount was proper because the amount was readily ascertainable as of the time of the forensic audit, if not at the time the misappropriation began; and (4) order awarding attorneys' fees against trustee was not erroneous under the equitable exception in *Reynolds v. First Alabama Bank of Montgomery, N.A.*, 471 So. 2d 1238 (Ala. 1985), which provides discretion to award attorneys' fees "when a defendant has committed fraud, willful negligence, or malice or otherwise acted in bad faith."

Wrongful Death; Relation Back

***Pollard v. H.C. Partnership*, No. 1180795 (Ala. March 13, 2020)**

Two days before expiration of the two-year statute under Ala. Code § 6-5-410, Pollard sued HC for wrongful death of decedent Young. At the time of filing, Pollard had not been appointed PR of estate of Young. The next day (the day before the statute of limitations expired), probate court appointed Pollard PR of Young's estate. The next day, the two-year statute expired. Pollard filed an amended complaint after expiration of the statute, and HC moved for summary judgment, arguing that the original filing was a nullity for lack of appointment, lack of relation back because the original filing was a nullity, and thus that the entire action was time-barred. The trial court granted summary judgment to HC. The supreme court reversed. Under *Ellis v. Hilburn*, 688 So. 2d 236 (Ala. 1997), relation back of an amended complaint filed by a plaintiff PR is allowed where the original complaint was filed by the plaintiff before plaintiff had become the PR of the estate. The opinion contains an extensive review of the law in this area.

From the Court of Civil Appeals

Education Law

***Wilkinson v. Cochran*, No. 2180741 (Ala. Civ. App. Jan. 31, 2020)**

(1) Under Ala. Code 16-24C-6(l), part of the Students First Act, appeals for teacher/principal suspensions of 20 or fewer days are not appealable, but the common-law writ of certiorari is nevertheless available for judicial review of the board's decision (the dissent argued that because the board was not required to make a record of its proceedings, certiorari review should not be available); (2) even though the complaint did not seek the writ of certiorari, the court would construe the complaint as seeking that remedy.

Rule 59

***Harvison v. Lynn*, No. 2180999 (Ala. Civ. App. March 6, 2020)**

The court reversed a ruling on a Rule 59 motion for failure to conduct a hearing, as required by Rule 59(g).

Landlord-Tenant; Service of Process

***Mays v. Trinity Property Consultants LLC (Mays III)*, No. 2170867 (Ala. Civ. App. March 6, 2020)**

No person is "found" on the premises under Ala. Code § 35-9A-461(c) after "reasonable effort" (allowing "post and mail" service) even though tenant was residing at residence

at the time. Post and mail service is allowed if the server does not locate anyone residing on the premises while making a reasonable effort to serve tenant.

Post-Judgment Discovery

***Ex parte Slocumb Law Firm, LLC*, No. 2190297 (Ala. Civ. App. March 13, 2020)**

Trial court had authority to enter order compelling responses to post-judgment discovery even though an appeal of the judgment was pending. Defendant had not posted supersedeas bond, notably.

Municipal Liability

***Bailey v. City of Leeds*, No. 2180720 (Ala. Civ. App. March 13, 2020)**

Trial court properly granted summary judgment to city on trespass claims by family members regarding disturbances of adornments on gravesites at city-owned cemetery, where city's employees were simply applying reasonable rules and regulations regarding adornments. However, summary judgment was inappropriate on negligence claims.

From the United States Supreme Court

Removal

***Roman Catholic Diocese of San Juan v. Feliciano*, No. 18-921 (U.S. Feb. 24, 2020)**

Orders entered by a state court after a notice of removal is filed in the federal court are void, because the state court lacks any jurisdiction to proceed.

Hague Convention; Child Residences

***Monasky v. Taglieri*, No. 18-935 (U.S. Feb. 25, 2020)**

Hague Convention provides that a child wrongfully removed from her country of "habitual residence" ordinarily must be returned to that country. Held: (1) child's habitual residence depends on the totality of the circumstances specific to the case, not on categorical requirements such as an actual agreement between the parents; and (2) first-instance habitual-residence determination is a mixed question of law and fact, subject to deferential appellate review for clear error.

Bivens Actions

***Hernandez v. Mesa*, No. 17-1678 (U.S. Feb. 25, 2020)**

The court declined to extend a *Bivens* federal common-law cause of action to the victim of a cross-border shooting by federal agents. The opinion refers to the "demise of the federal common law" (see next case for why that theme is important).

Tax; Federal Common Law

***Rodriguez v. FDIC*, No. 18-1269 (U.S. Feb. 25, 2020)**

Federal courts have created what is known as the *Bob Richards* rule, under which, when a group of corporations files a consolidated tax return and a refund is owed, the refund belongs to the group member responsible for the losses that led to it, in the absence of an unambiguous agreement among the group otherwise. This case questions the application of that rule. The Court unanimously rejected the *Bob Richards* rule as an illegitimate exercise of federal common law. State law governs any allocation of the refund.

ERISA

***Intel Corp. Investment Policy v. Sulyma*, No. 18-1116 (U.S. Feb. 26, 2020)**

Under ERISA, plaintiff with "actual knowledge" of an alleged fiduciary breach must file suit within three years of gaining that knowledge, 29 U.S.C. § 1113(2), rather than within the six-year period that would otherwise apply. Held: plaintiff does not necessarily have "actual knowledge" under § 1113(2) of the information contained in disclosures that he receives, but does not read or cannot recall reading. To meet § 1113(2)'s "actual knowledge" requirement, the plaintiff must in fact have become aware of that information.

From the Eleventh Circuit Court of Appeals

Bankruptcy; Dischargeability of Tax Debt

***In re Shek*, No. 18-14922 (11th Cir. Jan. 23, 2020)**

Late-filed state tax return is nevertheless a "return" under BAPCPA's definition in § 523 and other related law, and thus taxes under that "return" represent a debt subject to discharge.

Experts; Lay Testimony

***Sabal Trail Commission, LLC v. 3.921 Acres*, No. 18-11836 (11th Cir. Jan. 22, 2020)**

In condemnation action, trial court did not abuse discretion in allowing lay opinion testimony from owner about remaining property's value after the pipeline was built. Unlike in *Williams v. Mosaic Fertilizer, LLC*, 889 F. 3d 1239, 1250 (11th Cir. 2018), here the owner/witness explained the basis of her opinions from personal knowledge, not based on speculation.

TCPA; Autodialer

***Glasser v. Hilton Grand Vacations Company LLC*, No. 18-14499 (11th Cir. Jan. 27, 2020)**

Section 227(a)(1) of the TCPA defines an "automatic telephone dialing system" (colloquially called an "autodialer") as

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"equipment which has the capacity (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." The issue in this case concerns the clause: "using a random or sequential number generator." Does it modify both verbs ("to store" and "[to] produce") or just one of them ("[to] produce" but not "to store")? Held: it modifies both. Thus, to be an autodialer, the equipment must (1) store telephone numbers using a random or sequential number generator and dial them or (2) produce such numbers using a random or sequential number generator and dial them. Because the equipment used in the debt-collection calls targeted a list of debtors (like Evans) and the equipment used in the solicitation calls targeted individuals likely to be interested in buying vacation properties (like Glasser), the statute does not apply to their calls. This is an issue embroiling the circuits now. The panel consists of two Eleventh Circuit judges (W. Pryor and Martin) and a Sixth Circuit judge (Sutton). Sutton was the writing judge; Martin dissented.

Employment

***Johnson v. Miami-Dade County*, No. 18-11479 (11th Cir. Jan. 30, 2020)**

In an involved and messy set of facts, the court (1) vacated summary judgment on Title VII claims against police supervisors and the county for race-based discrimination because the comparator evidence required reevaluation under *Lewis v. City of Union City*, 918 F. 3d 1213 (11th Cir. 2019) (*en banc*); (2) affirmed summary judgment on retaliation claims for lack of comparator evidence; (3) held that 58-day gap between protected activity and adverse action is not sufficient temporal proximity, standing alone, to suggest causal link; (4) held that alleged falsified report of insubordination by White did not causally link with termination, because Patterson and not White terminated the plaintiff–and even if a "cat's paw" theory had been articulated to link Patterson to White, Patterson considered both the versions of the event by White and by the plaintiff before making a decision, thus negating any cat's paw argument.

Statutory Construction; FDCPA

***Darrisaw v. Pennsylvania Higher Ed. Assistance Agency*, No. 17-12113 (11th Cir. Feb. 7, 2020)**

This case provoked some coverage in the *National Law Journal* Friday afternoon. FDCPA excludes from definition of "debt collector" "any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity . . . is incidental to a bona fide fiduciary obligation." 15 U.S.C. § 1692a(6)(F)(i). Darrisaw argued that the activity of student loan guaranty agency is not "incidental to a bona fide or fiduciary obligation" when the debt in fact does not exist–because the fiduciary obligation itself does not exist. The majority disagreed, holding guaranty agency "acts incidental to a bona fide fiduciary obligation" whenever it "acts in good faith to collect a debt."

Monell; Heck v. Humphrey

***Teagan v. City of McDonough*, No. 18-11060 (11th Cir. Feb. 11, 2020)**

Georgia municipal court's adjudication of state-law offenses is an exercise of state and not municipal judicial authority under Georgia law. Therefore, the municipal judge was the final policymaker and was exercising the power of Georgia, not of the municipality, and thus the city could not be liable under section 1983 for alleged constitutional infractions associated with the judge's handling of the matter. Judge Tjoflat concurred specially to note that he believed the claims were also barred by *Heck v. Humphrey*. The per curiam panel opinion rejected that rationale because (1) there is an open question in the Eleventh Circuit as to whether *Heck* is an affirmative defense or a jurisdictional rule, and some circuit law suggests the former; and (2) there is an open question as to whether *Heck* applies to situations where, as here, a § 1983 plaintiff may no longer seek habeas relief because she is no longer in custody.

Trademarks

***Royal Palm Properties, LLC v. Pink Palm Properties, LLC*, No. 18-14092 (11th Cir. Feb. 18, 2020)**

Evidence was disputed as to whether mark (1) was "distinctive" or (2) was "confusingly similar" to previously registered marks. District court erred in granting JML canceling marks.

Voting Rights

***Jones v. Governor of Florida*, No. 19-14551 (11th Cir. Feb. 19, 2020)**

The court affirmed the district court's preliminary injunction restraining Florida from enforcing its state Amendment 4 and implementing legislation, which provided for restoration of voting rights of felons after payment of all legal financial obligations ("LFOs"). The panel held that that based

on evidence, purportedly indigent ex-felons were likely to succeed on claim that heightened scrutiny should be applied, under which the FLO obligations would work an Equal Protection violation.

Establishment Clause

***Kondrat'yev v. City of Pensacola (II)*, No. 17-13025 (11th Cir. Feb. 19, 2020)**

On remand from the Supreme Court, the Eleventh Circuit held (a) under *ACLU v. Rabun [ ]*, 698 F. 2d 1098 (11th Cir. 1983), plaintiffs had Article III standing to challenge display of 34-foot Latin cross in public park, (b) *American Legion v. American Humanist Assn.*, 139 S. Ct. 2067, 2074, 2077 (2019), abrogates *Rabun* to the extent *Rabun* disregarded evidence of "historical acceptance," and (c) under *American Legion*, the cross's presence on city property does not violate the Establishment Clause.

Alien Protections

***Barrientos v. CoreCivic, Inc.*, No. 18-15081 (11th Cir. Feb. 28, 2020)**

(1) Trafficking Victims Protection Act ("TVPA"), 18 U.S.C. §§ 1589, covers the conduct of private contractors operating federal immigration detention facilities; (2) the TVPA does not bar private contractors from operating the sort of voluntary work programs generally authorized under federal law for aliens held in immigration detention facilities; but (3) private contractors who operate such work programs are not categorically excluded from the TVPA and may be liable if they knowingly obtain or procure the labor or services of a program participant through the illegal coercive means explicitly listed in the TVPA.

Hague Convention

***Barenguela-Alvarado v. Castanos*, No. 19-13436 (11th Cir. Feb. 25, 2020)**

Party defending against wrongful retention of a child under the Convention may prove an affirmative defense of consent, under which retaining/removing parent proves by a preponderance of the evidence that petitioner "consented to . . . the removal or retention." District court's finding of consent was clearly erroneous and improperly placed the burden of proof for consent on the petitioner.

Rule 41

***Sargeant v. Hall*, No. 18-15205 (11th Cir. March 2, 2020)**

Under FRCP 41(d), if plaintiff who voluntarily dismissed action files second action against same defendant asserting same claim, "the court: (1) may order the plaintiff to pay all or part of the costs of that previous action; and (2) may stay the proceedings until the plaintiff has complied." Held: Rule 41(d) does not apply when plaintiff, after dismissing first federal action, files subsequent action in state court.

RECENT CRIMINAL DECISIONS From the United States Supreme Court

Capital Offenses

***McKinney v. Arizona*, No. 18-1109 (U.S. Feb. 25, 2020)**

McKinney's conviction for murder and death penalty was vacated by the Ninth Circuit, for the Arizona courts' failure to comply with *Eddings v. Oklahoma* and to consider the mitigating effect of McKinney's PTSD. On return to the Arizona Supreme Court, McKinney argued he was entitled to a new sentencing determination before a jury, but the Arizona Supreme Court reweighed aggravating and mitigating factors under *Clemons v. Mississippi* and upheld sentence. The Supreme Court affirmed: when an *Eddings* error is found on collateral review, a state appellate court may conduct a *Clemons* reweighing on collateral review. Although *Ring v. Arizona* and *Hurst v. Florida* require a jury to find the aggravating circumstance that makes the defendant death eligible, that does not mean that the jury must weigh the aggravating and mitigating factors.

ACCA

***Shular v. U.S.*, No. 18-6662 (U.S. Feb. 26, 2020)**

A "serious drug offense" triggering ACCA's 15-year mandatory minimum is one which "involv[es] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance." 18 U.S.C. § 924(e)(2)(A)(ii). Held: statutory definition requires only that a qualifying offense involve the conduct specified in the statute; it does not require that an offense match certain generic offenses.

Preservation of Error

***Holguin-Hernandez v. U.S.*, No. 18-7739 (U.S. Feb. 26, 2020)**

Defendant who wants to "preserve a claim of error" for appellate review must first inform the trial judge "of [1] the action the party wishes the court to take, or [2] the party's objection to the court's action and the grounds for that objection." Fed. Rule Crim. Proc. 51(b). Held: a rejected argument for a specific sentence preserved an argument that the longer sentence actually imposed was unreasonable.

Immigration; Preemption

***Kansas v. Garcia*, No. 17-834 (U.S. March 3, 2020)**

Kansas state identity-theft statutes (under which defendants were convicted for use of other persons' SSNs on I-9s and other citizenship forms) were not expressly or impliedly preempted by the Immigration Reform and Control Act of 1986 (IRCA).

(Continued from page 239)

From the Court of Criminal Appeals

Warrants; Exclusionary Rule

***Berry v. State*, CR-18-0233 (Ala. Crim. App. Jan. 17, 2020)**

Law enforcement officer is not required to physically possess active capias warrant to make valid arrest under Ala. Code § 15-10-3(a)(6). Fourth Amendment does not require officers to have physical possession of arrest warrants. Exclusionary rule is appropriate only where statute specifically provides for suppression as a remedy or the statutory violation implicates the defendant's underlying constitutional rights.

Probation Revocation

***Hyche v. State*, CR-18-0899 (Ala. Crim. App. Feb. 7, 2020)**

Probation revocation reversed for lack of transcribed revocation hearing or written statement regarding evidence upon which trial court relied.

Probation Revocation

***Harper v. State*, CR-18-1109 (Ala. Crim. App. Feb. 7, 2020)**

Failure to report to probation officer is technical violation of the conditions of probation, so a 45-day "dunk" pursuant to Ala. Code § 15-22-54(e)(1) was the appropriate sanction, not revocation.

No Diminished-Capacity Defense

***Cartwright v. State*, CR-16-1166 (Ala. Crim. App. Feb. 7, 2020)**

Trial court did not abuse discretion in excluding evidence that defendant's mental disability prevented him from seeking medical help for his bleeding, unconscious child. Alabama has no "diminished-capacity defense," and this evidence would have confused the jury regarding the defendant's culpability for his deadly abuse of the child.

Pronouncement of Sentence

***Harris v. State*, CR-17-1149 (Ala. Crim. App. Feb. 7, 2020)**

Issuance of a sentence by written order without pronouncement in open court is insufficient to support appeal.

Capital Murder

***Lindsay v. State*, CR-15-1061 (Ala. Crim. App. Feb. 7, 2020)**

Death penalty was warranted as punishment for the defendant's murder of 21-month-old daughter. Evidence was sufficient that the defendant was not under the influence of an extreme emotional disturbance, that he did not lack capacity to appreciate the nature of his conduct, and murder was especially heinous, atrocious, or cruel.

Assault

***Dailey v. State*, CR-18-0699 (Ala. Crim. App. Feb. 7, 2020)**

Evidence victim suffered permanent scarring, hearing loss, and vision loss after defendant threw hot grease on her was sufficient to show a "disfiguring injury" under Ala. Code § 13A-6-20(a)(2).

Split Sentence Act

***Jackson v. State*, CR-18-0454 (Ala. Crim. App. Feb. 7, 2020)**

Trial court could not issue "straight" 10-year sentence on defendant's conviction of shooting into an unoccupied dwelling, a Class C offense, because he was not a habitual felony offender. Instead, under Ala. Code §§ 13A-5-6(a)(3) and 15-18-8(b), defendant sentenced up to 10 years on a felony conviction must then be sentenced to probation, drug court, or pretrial diversion, or sentence must be split to maximum of two years' incarceration followed by probation.

Search Warrant; Electronic Devices

***Adams v. State*, CR-18-1083 (Ala. Crim. App. Feb. 7, 2020)**

Search warrant for defendant's electronic devices containing images of child pornography was valid. "Cyber tip" from Internet company was presumed reliable based on mandatory federal reporting requirements, and investigating law enforcement officer corroborated tip by reviewing the images and verifying the IP address and the defendant's name and physical address. Information was not stale, because only three months had passed from the date of the images' discovery by the Internet company to the date the search warrant was executed.

Search Warrants

***State v. Jeffery Dale Hunt*, CR-18-0886 (Ala. Crim. App. Mar. 13, 2020)**

Search warrant may be executed by any law enforcement officer of the state or its political subdivisions, regardless whether the officer is employed by the county where search occurred. If search warrant is sufficient support the seizure of an electronic device, a second search warrant is not required to authorize the officer to view its contents or to extract data.

Accomplice Corroboration

***Norton v. State*, CR-18-0174 (Ala. Crim. App. Mar. 13, 2020)**

While Ala. Code § 12-21-221 requires accomplice testimony to be corroborated, evidence did not show that a witness was complicit in the defendant's act of intentional murder; his testimony therefore did not require corroboration.

Rape Shield Rule

***S.E. v. State*, CR-18-0593 (Ala. Crim. App. Mar. 13, 2020)**

Victim's testimony of manner of defendant's sexual assault did not require corroboration for proof of his incest offense; regardless, DNA and other evidence corroborated her testimony. There was also no error under the "rape shield" provisions of Ala. R. Evid. R. 412 in refusal to allow defendant to examine the state's expert witness regarding victim's prior sexual activity.

Juvenile Restitution

***State v. R.B.F.*, CR-18-0902 (Ala. Crim. App. Mar. 13, 2020)**

While juvenile court must consider juvenile's financial resources and obligations in determining restitution, it is juvenile's burden to present evidence regarding those resources and his ability to reasonably meet restitution obligation.

Plea Agreements

***Saulter v. State*, CR-18-0986 (Ala. Crim. App. Mar. 13, 2020)**

Defendant was entitled to withdraw guilty plea because trial court did not follow terms of agreement; even though he failed to appear for sentencing, his appearance at sentencing was not an express condition of the plea agreement. The court noted that the guilty plea forms appended to the Rules could be revised to state presence at sentencing is an express condition of the plea. ▲

DISCIPLINARY NOTICES

Disbarments

- Birmingham attorney **Zebulon Peyton Little** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective August 23, 2017. The Alabama Supreme Court entered its order based on the Disciplinary Board's order accepting Little's consent to disbarment, in which Little admitted to various violations of the Alabama Rules of Professional Conduct, to include his failure to properly handle and account for client funds. Additionally, Little pled guilty to two counts of theft of property in the first degree in the Circuit Court of Cullman County. [Rule 23(a), Pet. No. 2019-1291; ASB Nos. 2017-1001, 2017-1119, and 2018-379]

- Sylvania attorney **Teresa Darwin Phillips** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective December 12, 2019. The Alabama Supreme Court entered its order based on the Disciplinary Board's order accepting Phillips's consent to disbarment. [Rule 23(a), Pet. No. 2019-1495; ASB No. 2018-610]

- Scottsboro attorney **Frank Brian Rice** was disbarred from the practice of law in Alabama, effective October 23, 2019. The Alabama Supreme Court entered its order based on the Disciplinary Board's order, wherein Rice was found guilty of violating Rules 3.4 [Fairness to Opposing Party and Counsel] and 8.4(d) and (g) [Misconduct], Alabama Rules of Professional Conduct. In a separate disciplinary proceeding, on July 24, 2017, the Disciplinary Commission ordered Rice to receive a public reprimand with general publication. In addition, as part of his discipline, Rice was ordered to "participate and complete the Practice Management Assistance Program six (6) months from the date of the Commission's Order." Rice failed to do so. Rice was also taxed all costs of the disciplinary proceedings and assessed an administrative fee of $750. Rice was allowed to make a payment plan in order to satisfy the costs and fees. However, Rice subsequently failed to submit payment. [ASB No. 2019-492]

- Scottsboro attorney **Frank Brian Rice** was disbarred from the practice of law Alabama, effective October 23, 2019. The Alabama Supreme Court entered its order based on the Disciplinary Board's order, wherein Rice was found guilty of violating Rules 1.3 [Diligence]; 1.4 [Communication]; 1.15(a), (b), (e), and (n) [Safekeeping Property]; 8.1(a) and (b) [Bar Admission and Disciplinary Matters]; and 8.4(d) and (g) [Misconduct], Alabama Rules of Professional Conduct. Rice was hired by a client to draft and file an uncontested divorce on her behalf. The client paid $400 to Rice as his legal fee in the matter. On September 14, 2018, the client and her husband signed all of the paperwork and paid Rice $225 for the filing fee. Rice informed the client he would file the paperwork on September 17, 2018. Rice failed to do so. The client attempted to communicate with Rice as to why the uncontested divorce had

not been filed. Rice failed to respond until November 19, 2018, when he informed the client, via text message, that he would file the paperwork the next day. However, Rice failed to do so. On November 26, 2018, the client learned the paperwork had not been filed and demanded a refund of her fee and the filing fee. Rice responded he would file her paperwork the next day. Again, Rice failed to do so. After the client filed a bar complaint, Rice represented to the bar that the filing fee and legal fee were still being held in his trust account. However, Rice did not deposit either in this trust account as required by Rule 1.15, Alabama Rules of Professional Conduct. Rice had already spent both the legal and filing fees paid by the client. Additionally, Rice was ordered to provide the bar with all trust account records required to be maintained under Rule 1.15, Alabama Rules of Professional Conduct. However, Rice failed to produce any of the trust account records. [ASB No. 2018-1352]

Suspensions

- Montgomery attorney **Salem Peter Afangideh** was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective January 30, 2020. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order that Afangideh be suspended for failing to pay the costs associated with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2019-552]
- Sulligent attorney **Daniel Heath Boman** was suspended from the practice of law in Alabama for two years by the Supreme Court of Alabama, effective January 23, 2020. The Alabama Supreme Court entered its order based upon the Disciplinary Board's order, wherein Boman was found guilty of violating Rules 8.4(d) and (g) [Misconduct], Alabama Rules of Professional Conduct. In December 2015, while holding himself out as a lawyer, Boman used racist, misogynistic, and threatening language toward customer service representatives regarding an appointment for an in-home appliance recall repair. [ASB No. 2019-162]
- The Alabama Supreme Court issued an order suspending former Birmingham attorney **Mark Bishop Turner** from the practice of law in Alabama for 91 days, split to serve 45 days, followed by a two-year probationary period, effective December 19, 2019 through February 2, 2020. In addition, Turner was ordered to make a full refund to the client. The Alabama Supreme Court entered its order based upon the Disciplinary Commission's order, wherein Turner admitted to violating Rules 1.1 [Competence], 1.3 [Diligence], 1.4 [Communication], 1.15(a) [Safekeeping Property],

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1.16(d) [Declining or Terminating Representation], and 8.4(d) and (g) [Misconduct], Alabama Rules of Professional Conduct. In December 2016, Turner was retained to probate the estate of a client's deceased brother and to file suit to prevent the deceased brother's girlfriend from selling any of his possessions until after the estate had been probated. Turner agreed to accept a flat fee of $5,000 in the matter. From December 2016 until April 2017, the client repeatedly questioned Turner as to whether he had taken any action to preserve her brother's property or open an estate. Turner promised to file suit in district court to prevent the girlfriend from selling or disposing of any property belonging to the deceased brother, and he repeatedly informed the client he would be filing for probate of her brother's estate. However, Turner failed to do so. Instead, in March 2017, a stepdaughter from a former marriage of the deceased brother submitted a 2002 will for probate. Turner subsequently entered a notice of appearance on the client's behalf, which was the only filing on the client's behalf prior to Turner's termination by the client in April 2017. After Turner's termination, he failed to refund any unearned fees to the client. Additionally, the client issued a check to Turner in the amount of $680.77 to pay property taxes on her deceased brother's home. Turner failed to place the funds in trust as required by Rule 1.15, Alabama Rules of Professional Conduct. Turner also failed to pay the property taxes until approximately three months later. [ASB No. 2019-314]

Public Reprimands

- On January 10, 2020, **Martin Kassab Berks** received a public reprimand with general publication, as ordered by the Disciplinary Commission of the Alabama State Bar, for violating Rule 1.4 [Communication], Alabama Rules of Professional Conduct. In 2001 and 2004, Berks was hired by clients to handle asbestos-related claims on their or their spouse's behalf. Over the course of several years, Berks received settlement checks related to the asbestos claims. Thereafter, the clients attempted to contact Berks to inquire about the status of settlements from additional claims. However, they were unable to get in contact with him, despite numerous attempts. In October 2015, after previously suffering severe injuries from a motor vehicle accident, Berks ceased the practice of law. At the time, Berks handed off his cases to another attorney with the belief that the attorney would contact all of Berks's current clients, inform them of his cessation of the practice of law, and that the new attorney would be taking over their cases. However, the clients were not made aware that Berks was no longer practicing law, by either himself or the other attorney. In addition, Berks failed to notify the clients that the other attorney would now be handling their legal matters. [ASB Nos. 2018-128 and 2018-583]

- On January 10, 2020, the Disciplinary Commission issued **Barry Glenn Curtis** a public reprimand without general publication for violating Rules 5.5 [Unauthorized Practice of Law], and 8.4 (d) and (g) [Misconduct], Alabama Rules of Professional Conduct. On January 12, 2018, Curtis was officially listed as inactive after failing to renew his occupational license. Prior to being listed as inactive, Curtis received several notifications from September 1, 2017 to January 12, 2018 reminding him to renew his occupational license. On April 26, 2019, Curtis submitted a letter to the Office of General Counsel wherein he admitted that he continued to engage in the practice of law after failing to renew his occupational license for 2018 and 2019. While unlicensed in 2018, Curtis served as a GAL for the Talladega County Probate Court on three separate occasions. In addition, Curtis assisted clients with Medicaid long-term care placement, probated simple estates, and prepared simple wills and powers of attorneys in 2018 and 2019. Curtis subsequently renewed his occupational license on April 30, 2019. [ASB No. 2019-735]

- On November 1, 2019, the Disciplinary Commission issued **John Meighan Little** a public reprimand without general publication for violating Rules 5.5 [Unauthorized Practice of Law] and 8.4 (d) and (g) [Misconduct], Alabama Rules of Professional Conduct. In January 2018, Little was involved in a dispute between an attorney, who is licensed to practice law in Oklahoma, and Zona Energy Inc., with whom Little was employed in Texas. The attorney submitted a bar complaint against Little, wherein he provided an unsolicited affidavit that Little filed in his divorce case. In the affidavit, Little averred that he was an "attorney providing legal services to Zona Energy Inc." However, Little was not licensed to practice law in Texas, and Texas does not have a rule allowing lawyers licensed in other states to serve as in-house counsel for a Texas-based company. Additionally, Little claimed to be working in a non-legal role as an executive for an oil and gas company known as Le Cle Minerals, Inc. in Dallas, Texas. Le Cle Minerals, Inc. is, however, a subsidiary of Zona Energy. Additionally, on Little's LinkedIn page, he identified himself as general counsel for

Zona Energy Inc. and Le Cle Minerals, Inc. in Dallas, Texas. [ASB No. 2019-175]

- Birmingham attorney **Jack Bernard McNamee** received a public reprimand with general publication for violating Rules 8.4(c) and 8.4(g) [Misconduct], Ala. R. Prof. C. The pertinent facts are the violations arose out of a dispute with the Internal Revenue Service ("IRS") over amounts owed in unpaid taxes. McNamee retained counsel who actively engaged in negotiations with the IRS. In an effort to reduce the amount owed, he paid the past amounts due as aggressively as he was financially able and sold assets including the office building housing his law practice as well as multiple parcels of land. During this time, the Office of General Counsel received multiple tax notices from the IRS. Despite these efforts and his bankruptcy filing, the United States Department of Treasury ("Treasury") still held valid liens against him for personal income taxes (1040) for the years 2013, 2014, and 2015, and the Treasury holds valid liens against him for federal unemployment taxes (940) for the years 2009 and 2010. Additionally, the Treasury holds valid liens against him for employee withholding taxes (941) for the third and fourth quarter of 2009, all four quarters of 2010, and the first quarter of 2011. With this conduct, McNamee violated Rules 8.4(c) and 8.4(g), Ala. R. Prof. C., by engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation while also engaging in conduct adversely reflecting on his fitness to practice law. McNamee is also required pay any costs taxed against him pursuant to Rule 33, Ala. R. Disc. P, including but not limited to a $1,000 administrative fee. [ASB No. 2015-1538]

- On January 10, 2020, **Nathan James Rubino** received a public reprimand without general publication, 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, Rubino was officially listed as inactive after failing to renew his occupational license. Prior to being listed as inactive, Rubino received several notifications from September 1, 2018 to January 15, 2019, reminding him to renew his occupational license. On February 15, 2019, the Winston County Sheriff's Office notified the bar that on February 13, 2019, Rubino attempted to visit a legal client at the county jail while not licensed to practice law. Rubino subsequently admitted to the bar he was acting as legal counsel in 12 separate legal matters on behalf of four separate clients, including the client in the Winston County jail, while unlicensed to practice law. [ASB No. 2019-270] ▲

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

Among Firms

Balch & Bingham LLP announces that **David Bowsher** joined as a partner in the newly-opened Houston office.

Former Alabama Attorney General and Lt. Governor **William J. Baxley** and **Joseph D. Jackson, Jr.** announce the formation of **Baxley | Jackson Law Firm** at 300 Vestavia Parkway, Ste. 3200, Vestavia Hills 35216.

Bradley Arant Boult Cummings LLP announces that **Nancy Williams Ball** and **L. Justin Burney** joined as partners, in the Birmingham and Huntsville offices, respectively.

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

Timothy M. Fulmer, W. Randall May, Jason A. Stuckey, and **John Natter** announce the opening of **Fulmer, May & Stuckey LLC** at 300 Cahaba Park Circle, Ste. 100, Birmingham 35242. Phone (205) 991-6367.

Lanier Ford of Huntsville announces that **Fred Coffey, John Baggette,** and **Franklin Corley** are now shareholders.

Sirote & Permutt PC announces that **Winston Busby** and **Dan Hugunine** are now shareholders in the Birmingham office, and **Michelle Levin** is a shareholder in the Huntsville office.

Starnes Davis Florie LLP announces that **John J. Geer, III** is now a partner in the Birmingham office.

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