



2020-2021 ASB PRESIDENT
Robert G. Methvin, Jr. and Family

▲
**An Overview of the 2020 Amendments
To the Alabama Rules of Evidence**

Page 350

▲
**Assessing Reliability of Non-DNA Forensic
Feature-Comparison Evidence in Alabama**

Page 357

▲
**Standard of Review: Pesky Requirement
Or Powerful Tool?**

Page 364

CYBER LIABILITY INSURANCE

**YOU
NEED
IT...**



**AIM
PROVIDES
IT.**

**Your AIM Lawyer Malpractice Policy offers
cyber liability and cyber crime coverage.**

For more information, visit: www.attorneysinsurancemutual.com/cyber-liability-insurance



**ATTORNEYS
INSURANCE
MUTUAL
of the South®**

Our aim is your peace of mind.

200 INVERNESS PARKWAY, BIRMINGHAM, AL 35242 | P. 205.980.0009 | F. 205.980.9009
WWW.ATTORNEYSINSURANCEMUTUAL.COM



WHERE VOICE BECOMES VISIBLE.®



ALABAMA
COURT REPORTING, INC
STATE & NATIONWIDE COVERAGE

Offices in
Birmingham
Huntsville
Montgomery
Mobile
Florence
Gadsden

877.
478.3376

Nationwide Scheduling
Realtime
Court Reporters
Videographers
Videoconferencing
Trial Technicians
Daily Copy

Bringing the experience you need for your next big case.

WWW.ALABAMAREPORTING.COM



LAWPAY IS FIVE STAR!



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

– Cheryl Ischy, Legal Administrator
Austin, Texas



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



LAWPAY[®]

AN AFFINIPAY SOLUTION

THE #1 PAYMENT SOLUTION FOR LAW FIRMS

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

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

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



Special offer for bar members.
Call for details



On The Cover

Alabama State Bar President Bob Methvin of Birmingham with his wife, Lee Methvin, and their daughters, Kate, Hope, and Laine Methvin

Photo courtesy of Image Arts Etc. of Birmingham

FEATURE ARTICLES

2020 Alabama Legal Food Frenzy Winners Announced
337

Hall of Fame Takes Hiatus for 2020
338

ASB 2020 Annual Meeting Award Recipients and Photo Highlights
342

CRIMINAL LAW ARTICLES

An Overview of the 2020 Amendments to the Alabama Rules of Evidence

By Dean Charles W. Gamble, Professor Robert J. Goodwin, and Terrence W. McCarthy
350

Assessing Reliability of Non-DNA Forensic Feature-Comparison Evidence in Alabama

By William L. Smith
357

Standard of Review: Pesky Requirement or Powerful Tool?
By John J. Davis
364

A New Font and Word Limits for Filings in Alabama's Appellate Courts

By Ed R. Haden and Wilson F. Green
370

Medicaid Simplifies Mandatory Estate Notice Process
By Samuel M. White
375

President's Page
328

Executive Director's Report
332

Editor's Corner
334

Important Notices
336

Legislative Wrap-Up
376

Opinions of the General Counsel
380

Memorials
383

Disciplinary Notices
384

The Appellate Corner
386

About Members, Among Firms
398

W. Gregory Ward, Lanett.....Chair and Editor
wward@mindspring.com

Linda G. Flippo, Birmingham.....Associate Editor
lflippo@whitearnolddowd.com

Wilson F. Green, Tuscaloosa.....Associate Editor
wgreen@fleenorgreen.com

Jonathan C. Hill (Rudy), Montgomery.....Associate Editor
rhill@bradley.com



facebook.com/AlabamaStateBar



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



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



youtube.com/TheAlabamaStateBar



flickr.com/AlabamaStateBar

ADVERTISERS

Alabama Court Reporting, Inc.....323

Alabama Legal & Investigative Services, Inc.373

Attorneys First Insurance329

Attorneys Insurance Mutual Of the South.....322

Cain & Associates Engineers.....351

Davis Direct.....397

J. Forrester DeBuys, III355

The Finklea Group389

Insurance Specialists, Inc.400

Stewart Y. Johnson, Financial Advisor395

LawPay324

National Academy of Distinguished Neutrals327

Upchurch Watson White & Max331

Veritext.....399

Vocational & Rehabilitation Consultants, Inc.368



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

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

ADMINISTRATION

Phillip McCallum.....Executive Director
Justin AdayAssistant Executive Director
Michelle ShawExecutive Assistant
Melissa Warnke.....Director of Communications
Megan Hughes.....Content/Outreach Manager
Hunter Harris.....Information Systems Manager
Matt Mara.....Building and Security Superintendent
Margaret MurphyDirector of Publications

ADMISSIONS & ATTORNEY LICENSING

Justin AdayAssistant Executive Director
Sonia Douglas.....Administrative Assistant
Angie Fuqua.....Administrative Assistant
Morgan Lott.....Administrative Assistant
Cathy Sue McCurryAdministrative Assistant

CENTER FOR PROFESSIONAL RESPONSIBILITY

Roman ShaulGeneral Counsel
Melissa LawsonParalegal to General Counsel
Jeremy McIntireDeputy Chief General Counsel
Mark MoodyAssistant General Counsel
Dawynrico McCain.....Paralegal/Investigator
Stacey Moseley.....Disciplinary Clerk
Laurie BlazerCSF Coordinator
Julie LeeReceptionist

ETHICS DIVISION

Tripp Vickers.....Ethics Counsel
Autumn Caudell.....Assistant Ethics Counsel
Joycelyn Hill.....Administrative Assistant

PROGRAMS

Ashley PenhaleDirector of Programs
Robyn Bernier.....Administrative Assistant

ACCOUNTING/TRAVEL

Merinda Hall.....Director of Finance
Kristi NealFinancial Assistant

LAWYER ASSISTANCE PROGRAM

(334) 269-1515 • (334) 834-7576
Jeremy Rakes.....Director of Lawyer Assistance Program
Shannon KnightCase Manager
Joycelyn Hill.....Administrative Assistant

LAWYER REFERRAL SERVICE

John DunnLRS Representative

RECEPTIONIST

Stephanie Oglesby.....Receptionist

VOLUNTEER LAWYERS PROGRAM

Linda LundDirector of Volunteer Lawyers Program
Hilaire ArmstrongABAP Coordinator
Debbie Harper.....Intake Clerk
Doris McDaniel.....Intake Clerk

OFFICERS AND EXECUTIVE COUNSEL

Robert G. Methvin, Jr., Birmingham.....President
Tazewell T. Shepard, III, HuntsvillePresident-Elect
Christina D. Crow, Union Springs.....Past President
C. Gibson Vance, Montgomery.....Vice President
Phillip W. McCallum, MontgomerySecretary
Leon Hampton, Jr., MontgomeryEx Officio Member
Jeffrey L. Bowling, Russellville.....Executive Council
Diandra S. Debrosse, Birmingham.....Executive Council
R. Clifford Mendheim, Dothan.....Executive Council

BOARD OF BAR COMMISSIONERS

1st Circuit, Halron W. Turner, Chatom • 2nd Circuit, J. Levi Nichols, Luverne • 3rd Circuit, Elizabeth C. Smithart, Union Springs • 4th Circuit, Jana R. Garner, Selma • 5th Circuit, Larry W. Morris, Alex City • 6th Circuit, Place No. 1, Terri O. Tompkins, Tuscaloosa • Place No. 2, Scott B. Holmes, Tuscaloosa • 7th Circuit, William H. Broome, Jr., Anniston • 8th Circuit, David W. Langston, Decatur • 9th Circuit, Dana J. Grimes, Ft. Payne • 10th Circuit, Place No. 1, James M. Terrell, Birmingham • Place No. 2, John A. Smyth, Birmingham • Place No. 3, Barry A. Ragsdale, Birmingham • Place No. 4, S. Freddy Rubio, Birmingham • Place No. 5, LaBella S. McCallum, Birmingham • Place No. 6, Michael D. Ermert, Birmingham • Place No. 7, Allison O. Skinner, Birmingham • Place No. 8, Brannon J. Buck, Birmingham • Place No. 9, Erik S. Heninger, Birmingham • Bessemer Cut-off, Kenneth Moore, Bessemer • 11th Circuit, Leigh Anne Landis, Florence • 12th Circuit, Carmen F. Howell, Enterprise • 13th Circuit, Place No. 1, R. Edwin Lamberth, Mobile • Place No. 2, Frederick G. Helmsing, Jr., Mobile • Place No. 3, William R. Lancaster, Mobile • Place No. 4, Bryan E. Comer, Mobile • Place No. 5, James Rebarchak, Mobile • 14th Circuit, Charles C. Tatum, Jr., Jasper • 15th Circuit, Place No. 1, George R. Parker, Montgomery • Place No. 2, Pat Sefton, Montgomery • Place No. 3, Joel D. Connally, Montgomery • Place No. 4, C. Gibson Vance, Montgomery • Place No. 5, Felicia A. Long, Montgomery • Place No. 6, J. David Martin, Montgomery • 16th Circuit, Bradley W. Cornett, Gadsden • 17th Circuit, T. Thomas Perry, Jr., Demopolis • 18th Circuit, Place No. 1, Clay R. Carr, Chelsea • Place No. 2, Mark S. Boardman, Chelsea • Place No. 3, Anne Malatia Glass, Birmingham • 19th Circuit, Tina S. Moon, Prattville • 20th Circuit, R. Cliff Mendheim, Dothan • Holly L. Sawyer, Dothan • 21st Circuit, J. Kirkman Garrett, Brewton • 22nd Circuit, Manish H. Patel, Andalusia • 23rd Circuit, Place No. 1, J. Mark Debro, Huntsville • Place No. 2, John A. Brinkley, Jr., Huntsville • Place No. 3, Rebekah K. McKinney, Huntsville • Place No. 4, M. Clay Martin, Huntsville • 24th Circuit, Amanda W. Porter, Fayette • 25th Circuit, Chrissy L. Riddle, Haleyville • 26th Circuit, F. Patrick Loftin, Phenix City • 27th Circuit, Clint L. Maze, Arab • 28th Circuit, Place No. 1, J. Lynn Perry, Gulf Shores • Place No. 2, J. Langford Floyd, Fairhope • 29th Circuit, Sarah Clark Bowers, Sylacauga • 30th Circuit, John W. Rea, Pell City • 31st Circuit, D. Edgar Black, Muscle Shoals • 32nd Circuit, Jason P. Knight, Cullman • 33rd Circuit, Robert H. Brogden, Ozark • 34th Circuit, Jeffrey L. Bowling, Russellville • 35th Circuit, W. Robert McMillan, Monroeville • 36th Circuit, Christy W. Graham, Moulton • 37th Circuit, Andrew D. Stanley, Opelika • 38th Circuit, Deborah L. Dunsmore, Scottsboro • 39th Circuit, Donald B. Mansell, Athens • 40th Circuit, Mallory B. Whitley, Rockford • 41st Circuit, Brett A. King, Locust Fork

AT-LARGE BOARD MEMBERS

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

The Alabama Lawyer (USPS 743-090) is published six times a year by the Alabama State Bar, 415 Dexter Avenue, Montgomery, Alabama 36104. Periodicals postage paid at Montgomery, Alabama and additional mailing offices. POSTMASTER: Send address changes to *The Alabama Lawyer*, P.O. Box 4156, Montgomery, AL 36103-4156.

The Alabama Lawyer is the official publication of the Alabama State Bar. Views and conclusions expressed in articles herein are those of the authors, not necessarily those of the board of editors, officers or board of commissioners of the Alabama State Bar. Advertising rates will be furnished upon request. Advertising copy is carefully reviewed and must receive approval from the Office of General Counsel, but publication herein does not necessarily imply endorsement of any product or service offered. *The Alabama Lawyer* reserves the right to reject any advertisement. Copyright 2020. The Alabama State Bar. All rights reserved.



THE NATIONAL ACADEMY OF DISTINGUISHED NEUTRALS

ALABAMA CHAPTER

WWW.ALMEDIATORS.ORG

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



Phil Adams
OPELIKA



Danny Banks
HUNTSVILLE



Reggie Copeland
MOBILE



Sam Crosby
DAPHNE



Charles Denaburg
BIRMINGHAM



Charles Fleming
MOBILE



Stevan Goozee
BIRMINGHAM



Arthur Hanes
BIRMINGHAM



Bernard Harwood
TUSCALOOSA



Braxton Kittrell
MOBILE



Debra Leo
BIRMINGHAM



Michael Maddox
BIRMINGHAM



Rodney Max
BIRMINGHAM



Boyd Miller
MOBILE



Larry Moore
FLORENCE



William Ratliff
BIRMINGHAM



Ben Rice
HUNTSVILLE



Jim Rives
MONTGOMERY



Allen Schreiber
BIRMINGHAM



Kenneth Simon
BIRMINGHAM



Spin Spires
BIRMINGHAM



Harold Stephens
HUNTSVILLE



Glynn Tubb
DECATUR



Michael Upchurch
MOBILE



Marty VAN TASSEL
BIRMINGHAM



Michael WALLS
BIRMINGHAM



Brad Wash
BIRMINGHAM

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



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

Robert G. Methvin, Jr.
rgm@mtattorneys.com



Simply Because ... for Many Reasons

I am honored to serve as the 145th president of the Alabama State Bar.

As I sit here writing this article at the end of July, it hit me again that the traditional way all of us have become accustomed to practicing law has been turned on its head. Lawyers and judges are still adjusting to Zoom for virtual hearings and meetings. In-person contact has been severely limited with our clients and each other. Lawyers are learning the virtual process of notarizing documents. Jury trials are suspended until at least September 14 (hopefully, jury trials have resumed by the time you read this article). Many lawyers who once chastised other lawyers for working remotely are

now finding that they actually like working that way. New phrases have entered our lexicon such as “social distancing” and “sheltering in place.” I was the first, and hopefully will forever hold the distinction as the only, Alabama State Bar President installed at a virtual annual meeting. These are just a few of the changes we are seeing, and like it or not, change is here to stay for a while in our profession. However, not all change is bad.

As some of you may know, I grew up in Eufaula. I have held a number of jobs since age 12, but one of the most memorable was as a disc jockey on the local radio station (WULA) circa 1983. Shockingly, the FCC gave me a license at 15. In

those days, the DJ was the person on the radio who chose the songs to play and then actually “spun the tunes.” More importantly, the DJ was in charge of playing the pre-recorded commercials advertising the goods and services offered by local businesses. The station manager made most of our commercials, but I will never forget one of them for a local retailer (the names have been changed to protect the innocent). It went something like this: “John’s furniture store is a fine furniture store, simply because . . . for many reasons. So, come shop with us at John’s, your hometown furniture store.” I always thought it was odd that the commercial did not list any of the “many reasons” that John’s was a fine furniture store. Apparently, John’s Furniture felt the public should simply trust that it was a fine store and leave it at that, with no further details necessary. While strange, there was something about it that stuck with me.

Eventually I moved on from my DJ career. I got married and now have a wonderful wife (Lee) and three incredible daughters (Hope, 19; Kate, 16; and Laine, 11). As you parents know, parenting 101 dictates that you lay down the rules for children to follow. Often children challenge these rules with simple, yet difficult-to-answer questions, such as, “But, why?” Trying to be a good parent, my natural response was to give my children a specific reason. Many times, I knew that our

rules were the right rules, but I didn’t have a particularly eloquent explanation. In those moments, I reverted to my days as a DJ and told them, “Simply because . . . for many reasons.” When pressed for what these “many reasons” were, I stuck to my guns, saying that my children should just trust me. Naturally, they did not like this answer, but eventually they grew to accept it—mostly. Of course, now as my daughters have gotten older, when I ask them to explain the reasoning behind a particular choice that they made, I get the predictable jovial response, “Simply because . . . for many reasons.”

Sometimes in our profession, and particularly in instances when we are trying to explain why we do what we do, our default response is similar to “simply because . . . for many reasons.” In other words, we cannot always articulate the value that lawyers contribute to our society nor do we often have the energy, particularly after enduring a litany of lawyer jokes. As your president, my mission is to highlight the “many reasons” that our profession is honorable and worthy of recognition and respect. Foremost among these is our renewed commitment to unify through diversity and inclusion, as well as to serve. “Unify and Serve” will be our mantra.

To address the monumental changes that have occurred in the last six months, the goals for my presidency have evolved into three major initiatives for our bar:

SAVE 20% to 40% On Your Professional Liability Insurance

Insurance for Lawyers & Title Agents
If we can't **SAVE** you up to **40%**,
WE WON'T WASTE YOUR TIME
Call (866) 977-6720 Today!

ATTORNEYS FIRST INSURANCE

www.attorneysfirst.com

(866) 977-6720

(Continued from page 329)

- Unity, Diversity, and Inclusion;
- Helping the Legal Profession Adapt to a New Norm; and
- Lawyer Public Relations

Unity, Diversity, and Inclusion

As lawyers, we stand for justice and fairness and against those who seek to tear down the rule of law. Racism, inequality, and unfairness have no place in our justice system. These misguided concepts are an affront to human dignity and run counter to the mission of our bar. To help guide the bar and provide critical feedback on these issues, I appointed a three-person Presidential Council on Unity and Diversity. This council advises our leadership on actions that we as a state bar need to take on these issues. Cassandra Adams from Birmingham, Hilaire Armstrong from Montgomery, and Ricardo Woods from Mobile serve on this council. Their collective wisdom, along with feedback gathered from all of our members, will help us engage, learn, and grow.

Helping Our Profession Adapt to a New Norm

Continuing education will be a focus this year to help lawyers deal with our new norm. We will continue providing CLEs on technology, especially regarding working remotely, and will continue offering CLEs on attorney wellness. Importantly, in an attempt to assist those attorneys who are struggling financially, *we will offer at least 12 hours of free CLE online so lawyers can get all of their credits this year at no charge.*

I re-appointed the COVID-19 Bench & Bar Task Force, which was originally appointed by President Crow. The task force is made up of lawyers, trial judges, and supreme court justices. They previously worked very quickly to recommend best practices to address the many issues presented by this pandemic. I look forward to working with them again as we try to fully open the courthouse doors and ensure that jury trials can proceed in the most safe and effective manner throughout the state.

I also appointed a COVID-19 task force made up of only lawyers. This task force is reaching out to attorneys all over the state to identify issues that are specific to lawyers and their practices and will develop best practices and solutions for those issues. Jeanne Rizzardi, Tom Perry, and Clay Martin are serving as co-chairs, and I hope you will reach out to them if you have any concerns that you want to raise.

You can also visit our COVID-19 page at www.alabar.org where we have local court information listed by county and information from federal district courts, as well as other

announcements, webinars, and resources to help attorneys navigate the pandemic.

Lawyer Public Relations

We will improve the image and standing of lawyers in the public by highlighting all of the great deeds lawyers do on a daily basis. By the end of my term, my goal is for the public to know and understand specifically, unlike John's Furniture, the "many reasons" ours is an honorable profession.

We will highlight the fact that virtually every corporate, charitable, and school board in this state has at least one lawyer serving on it. Lawyers also serve in leadership positions in almost every religious organization and are involved as coaches and leaders in youth sports and organizations. Our profession is so involved in giving back to our communities and our state because we understand that servant leadership is our civic and professional duty (hence our motto, "Lawyers Render Service"). Lawyers are sought by community, service, and religious organizations for our leadership skills and because we are uniquely trained to solve problems. I believe that lawyers give back more than any other profession in our state.

We will show that year in and year out, the legal profession and the court system together are one of the largest economic engines in this state.

We will focus on the fact that Alabama lawyers provide millions of dollars each year in pro bono services to Alabama citizens. To encourage our tradition of ever-expanding pro bono service, I created two new task forces.

The first is Helping Heroes in Healthcare. This task force will provide free legal assistance to our front-line medical personnel who have sacrificed so much for our state during this pandemic.

The second is Lawyer Voices for Survivors, our anti-human trafficking task force. This task force will provide free legal services to victims of human trafficking, which has unfortunately become a huge problem in Alabama. We will do our part to educate the public and help the survivors. LaBella McCallum and Rachel Lary serve as co-chairs of this important task force.

The Unity and Diversity Council and the task forces I identified will be working hand-in-hand with the Executive Council this year. The Executive Council includes Taze Shepard (Huntsville), president-elect; Gibson Vance (Montgomery), vice president; Christy Crow (Union Springs), immediate past president; Jeff Bowling (Russellville); Dian-dra Debrosse (Birmingham); Cliff Mendheim (Dothan); Leon

Hampton (Montgomery), Alabama Lawyers Association president, ex officio; and Evan Allen (Montgomery), Young Lawyers' Section president, ex officio.

I thank Christy Crow for her tremendous leadership, guidance, and friendship this past year as president. Christy exhibited amazing judgment and temperament and was an incredible leader during very difficult times. This year, we will enjoy the fruits of her efforts to create a group health plan for our members, underwritten by Blue Cross/Blue Shield. Through this program, you will be able to obtain health insurance for yourself, your family, and your employees—at a substantial discount. Building upon one of Christy's most popular initiatives, I intend to keep the Member Benefits Committee working hard to increase our already incredible benefits, which include the Fastcase legal research software platform (free to all members), travel discounts, shipping discounts, and many others listed in the Member Benefits section at www.alabar.org. I will continue to ensure that all members have access to benefits that greatly exceed the amount of their bar dues.

Hope Springs Eternal

I love lawyers (we have better stories and are more fun than members of other professions), and I am truly energized

by spending time with lawyers. I miss the collegiality and camaraderie that we have in our bar—especially our annual meeting and other lawyer social events, visiting the lawyers and support staff at my office every workday, and seeing lawyers and judges in the courtroom. More than ever, most of us realize that we have taken for granted many common, or even mundane, activities.

As president-elect, one thing I eagerly anticipated was visiting each local bar. Because this is *your bar*, I still want to hear from you (good or bad), even though in-person gatherings can't be currently held. I plan to visit some of you via Zoom very soon, but I am hopeful that I will be making in-person visits with many local bars in the spring. Whether you are in the Quad Cities or the Wiregrass, in Fort Payne, Three Notch, or Fairhope, I hope to visit you as soon as possible.

I am grateful to be a member of our profession. While this year brings its challenges, as a bar, we will be instrumental in helping our communities, our state, and our country heal and recover. Throughout history lawyers have been agents for positive change. Because of this, I am confident that we will continue to improvise, adapt, and persevere as a profession. Together we will lead by example and show the citizens of our state what we already collectively know, that Lawyers Render Service, "simply because . . . for many reasons." ▲

Upchurch Watson White & Max Mediation Group



Alan B. Lasseter
alasseter@uww-adr.com

welcomes mediator Alan Lasseter to its distinguished panel of neutrals.

- » As a trial attorney, he represented the interests of individuals, businesses and insurers throughout Alabama for more than 27 years.
- » He handled more than 1,500 cases representing both plaintiffs and defendants before beginning his transition to being a neutral.
- » Alan has tried more than 60 jury trials to verdict in a wide variety of practice areas including personal injury, wrongful death, medical malpractice, trucking accidents, police liability and product liability.

MEDIATION | ARBITRATION | E-DISCOVERY | SPECIAL MASTERS
Successfully Resolving Conflicts in Alabama,
Florida & Nationwide Since 1988

CALL TOLL FREE: 888-435-9033 | READ MORE & SCHEDULE: WWW.UWW-ADR.COM



[linkedin.com/company/upchurch-watson-white-&-max](https://www.linkedin.com/company/upchurch-watson-white-&-max)



www.facebook.com/UWWMmediation



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





EXECUTIVE DIRECTOR'S REPORT

Phillip W. McCallum
phillip.mccallum@alabar.org



At a Crossroad

We all measure our years in different ways, whether it's by tax year, fiscal year, or calendar year.

For us, the "bar year" is determined by the terms of our elected leaders, and that term normally runs from July to June.

As you know, Christy Crow ended her presidency amidst a global pandemic. Her final months in office can only be described as "unprecedented." President Bob Methvin's beginning was much the same.

In his inaugural address as president, Bob highlighted the fact that he was being sworn in during the bar's first-ever virtual Grand Convocation. (You can watch the full recording of the

Grand Convocation on the bar's YouTube Channel, by the way!)

In addition to Bob's swearing in, we also heard Supreme Court Chief Justice Tom Parker give the State of the Judiciary address, and we celebrated the 200th anniversary of the Alabama Supreme Court.

It wasn't just the Grand Convocation; our entire 143rd Annual Meeting was virtual. I'm so proud of our staff, who, without any past experiences or plans to follow, hosted a top-notch annual meeting through Zoom. Thanks to that technology, we were able to invite speakers from all over the country to present



You don't have to be a body language expert to see that this group is all on the same team! Pictured together are Megan Hughes and Melissa Warnke (front row) and Ashley Penhale and Robyn Bernier, while Merinda Hall is on the right.

CLE programming that prompted some very important conversations.

Those speakers and their respective topics included:

- Tiffany Cross: Black Voters, White Voices, and Saving Our Democracy
- Jan Hargrave: Body Language and Nonverbal Communication Skills that Build Trust Via Teleconference
- Lilly Ledbetter: Equal Pay Activism and the Role of Lawyers
- Shon Hopwood: From Convicted Felon to Georgetown Law Professor
- Robert Bilott: The Story Behind the Environmental Legal Battle Exposing Corporate Cover-Up
- Lauren Sisler: The Importance of Mental Health and Wellness
- Dr. Bryan Fair: The Intersection of Free Speech and Protests

We also got to hear from some familiar names here in Alabama—Alabama head football Coach Nick Saban and Auburn University men's head basketball Coach Bruce Pearl. I give special kudos to our communications department and programs department who worked hard to make the vision of a virtual meeting a reality, and we have received great responses from our members. Melissa Warnke, Megan Hughes, Ashley Penhale, Robyn Bernier, and Merinda Hall, our director

of finance, demonstrated how “team work” truly is the best approach to success! The virtual aspect of our meeting was such a success that we believe it will become a part of all meetings in the future, in some form or fashion.

Let's face it—legal institutions and lawyers are at a cross-road, and there is no going back to normal. I believe many of the technological changes brought about by COVID-19 will become part of the new normal of the legal profession. In fact, helping lawyers adapt in the current climate is one of President Methvin's biggest goals during his term.

Rather than being fearful of the change, we have been embracing the possibilities for how we might re-think and re-strategize how we can serve our members. We are re-envisioning what it looks like and what it means to connect, learn, and serve together.

Over the past few months, the bar has invested in technology to facilitate and emphasize virtual meetings for leadership, task forces, committees, and sections. In addition, we are upgrading our equipment in the building to provide tech-savvy meeting rooms for visiting attorneys and groups.

Although the bar is not currently open to the public, we are ensuring that when we do open, we will be ready to host state-of-the-art meetings for our members.

In some ways, this awful, terrible pandemic has forced us to accelerate the pace of technological adoption. We hope to help you carve a new path of innovation and to successfully navigate this new normal. ▲



EDITOR'S CORNER

W. Gregory Ward
wgward@mindspring.com



Welcome to the criminal law edition of *The Alabama Lawyer*.

First, a little housekeeping. You may have noticed—tell me you did—that my “Editor’s Corner” was absent from the last edition. I had a little unexpected surgery just when I was to get the column to Margaret Murphy, the bar’s director of publications, and, since I could not get it in on time, I asked her to push the edition out without me. She obliged me, and her smile was a little too big. Margaret!

And what an edition it was. Our topic was military law, and if any edition ever gave us a national footprint, it was that one. It began with an introduction by Lt. Gen. Charles N. Pede, the Judge Advocate General of the U.S. Army. General Pede was so taken with the issue that he

sent out a national link to it in the *JAG Connector*, and Col. Charles A. Langley, the Alabama National Guard Staff Judge Advocate (who is the exceptional Alabama lawyer who gets all of the credit for putting that issue together) has gotten accolades and contacts from all across the country. If Chuck Langley is what the United States military is made up of, we are well-served.

I think that was an issue we can all be proud of.

And now we turn our attention to criminal law.

Dean Charles Gamble, Professor Bob Goodwin, and Terry McCarthy are the formidable editorial team for *McElroy’s Alabama Rules of Evidence*, probably the

most regularly cited and routinely followed legal treatise in the state. They joined forces to give us an overview to the 2020 Amendments to the Alabama Rules of Evidence (page 350). How can you not read that? By the way, a new edition of *McElroy's Alabama Rules of Evidence* will be out shortly. Look for it.

Bill Smith received an LL.M. from the prestigious program at the West Virginia University Law School in 2018 with an LL.M. in Forensic Justice. He gives us the benefit of his studies in "Assessing Reliability of Non-DNA Forensic Feature-Comparison Evidence in Alabama." It is easy to see why Bill is one of the most effective criminal defense lawyers in Alabama, and now he is one of the most knowledgeable about forensic science. Take a minute and read this one (page 357).

John Davis sent in an article about criminal appeals that I predict people will print and use for years to come. In "Standard of Review: Pesky Requirement or Powerful Tool?" he helps us understand why, in criminal cases, we should be wise and wary when reciting what the appellate standard of review is for the issue we are briefing. And he goes one step further and gives us the standards of review. Nice work, John (page 364).

Speaking of appeals, did you know that we have a new rule about what font to use in our brief? Two of Alabama's finest appellate advocates, Ed Haden, and *The Alabama Lawyer* editorial board member Wilson Green, teamed up to give us some advance warning and some insights into this. They put this together in record time, which heightens my respect when I thought my respect could go no higher (page 370).

Remember Sam White's article a few issues back about Medicaid? We have a new law that Medicaid has to be notified when an estate is opened. Some of our readers had some follow-up questions, and Sam gave them an immediate response. Now he is giving us all an update about how they've simplified the mandatory notice provisions dealing with estates (page 375).

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

And just wait until you see what we have for you next time.

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



Hire a PRIVATE JUDGE

to hear any case assigned a CV or DR case number by the Alabama Administrative Office of Courts
Qualified, Former or Retired Alabama Judges Registered with the Alabama Center for Dispute Resolution

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

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

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

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

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

Hon. Jill Ganus
jill@jillganuslaw.com
(205) 616-7237

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

Hon. David A. Kimberley
judgedak@gmail.com
(256) 390-3352

Hon. Charles "Chuck" R. Malone
chuck@malonenelson.com
(205) 349-3449

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

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

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

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

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

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

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

Hon. Edward B. Vines
evinesattorney@yahoo.com
(205) 586-0222

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

FAST • EASY • APPEALABLE AL Acts No. 2012-266 and 2018-384
For more information, search "Find a Private Judge" at www.alabamaADR.org



IMPORTANT NOTICES

▲ Annual License Fees and Membership Dues



Annual License Fees and Membership Dues

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

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



2020 Alabama Legal Food Frenzy Winners Announced

Despite unprecedented external challenges, the 2020 Alabama Legal Food Frenzy was a success. Over \$32,000 was raised, which translates to 160,000 meals for Alabama families.

Congratulations to all our winners!

Attorney General's Cup

Martin & Helms PC

Food Bank of North Alabama

15,000 meals donated • 3,750 meals per employee

Sole Proprietor (1-2)

Dagney Johnson Law Group

Community Food Bank of Central Alabama

2,875 meals donated • 1,438 meals per employee

Small (3-20)

Martin & Helms PC

Food Bank of North Alabama

15,000 meals donated • 3,750 meals per employee

Medium (21-40)

Hill Hill Carter Franco Cole & Black PC

Montgomery Area Food Bank

26,175 meals donated • 689 meals per employee

Large (40+)

Carr Allison-Birmingham

Community Food Bank of Central Alabama

24,600 meals donated • 181 per employee

Legal Organization

Progress Rail-A Caterpillar Company

Food Bank of North Alabama

9,500 meals donated • 864 per employee

ALABAMA LAWYERS HALL OF FAME

Hall of Fame Takes Hiatus for 2020

Due to the coronavirus pandemic, the decision was made to postpone the Hall of Fame Induction Ceremony from May 1, 2020 until May 2021.

The committee wanted the friends and family of the 2019 inductees to experience a public recognition ceremony, as all of the previous inductees have. The next selection of inductees will take place following the May 2021 induction ceremony, as in past years. Thus, the Hall of Fame, like so many other activities, will take a hiatus for calendar year 2020. These new inductees now bring the total number of Hall of Fame members to 75. We hope that all of their stories will serve to inspire the present and future citizens of Alabama.

May is traditionally the month when new members are inducted into the Alabama Lawyers Hall of Fame which is located at our state judicial building. The idea for a Hall of Fame first appeared in 2000, when Montgomery attorney Terry Brown wrote Alabama State Bar President Sam Rumore with a proposal that the

former supreme court building, adjacent to the Alabama State Bar building and vacant at that time, should be turned into a museum memorializing the many great lawyers in the history of this state.

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

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

consider the nominees and to make selections for induction.

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

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



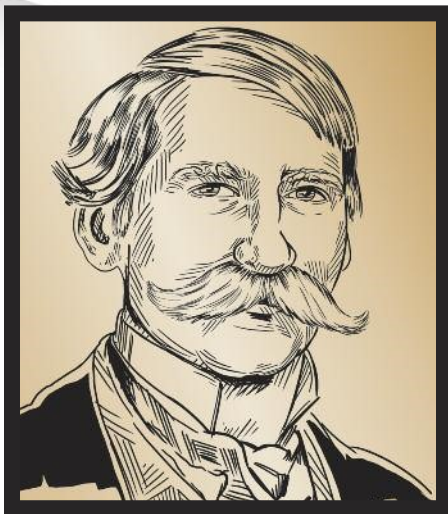
Clifford J. Durr (1899–1975)

Respected nationally as a defender of civil liberties during the post-WW II Red Scare; a supporter of the civil rights movement; born in Montgomery, Alabama where his family owned Durr Drug Company; educated at the University of Alabama where he was elected president of his class; won a Rhodes scholarship to Oxford University in England and graduated in 1922; a member of the Alabama and Wisconsin bars; worked at the Reconstruction Finance Corporation in Washington, D.C. and was later nominated to the Federal Communications Commission; resigned from the FCC because he refused to sign Harry Truman's Federal Loyalty Oath; later returned to Alabama and worked with Fred Gray in defending Rosa Parks.



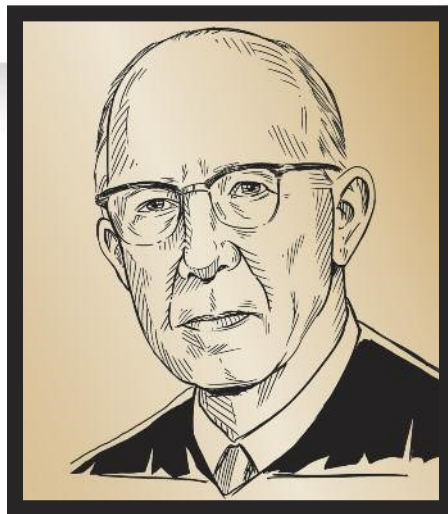
Broox G. Garrett (1915–1991)

Born in Grove Hill, Alabama (1915); attended the University of Alabama; admitted to the Alabama State Bar (1939); a member of Phi Beta Kappa; Omicron Delta Kappa; Farrar Order of Jurisprudence; entered the private practice of law in 1939 in Brewton, Alabama; entered the United States Navy in 1941 and discharged as a lieutenant in 1945; a member of the Alabama State Bar Board of Bar Commissioners (1966); elected vice president of the Alabama State Bar in July 1981 and succeeded as president in November 1981 when preceding president died; served on the Alabama Law Institute, as county solicitor of Escambia County, as a member of the Brewton Board of Education, and as a Fellow of the American College of Trial Lawyers.



Henry W. Hilliard (1808–1892)

A lawyer, professor, Methodist preacher, diplomat, and statesman; born in Fayetteville, North Carolina in 1808 and attended South Carolina College; admitted to practice in 1829; moved to Tuscaloosa, Alabama in 1831 and served as a professor of literature; in 1834 he moved to Montgomery to open a law practice; served in Alabama House of Representatives (1838); elected to Congress for three terms; served as a regent for the Smithsonian Institute; supported the Compromise of 1850; fought to maintain the Union until Alabama seceded; served Alabama as a brigadier general and fought with General Bragg in the west; returned to diplomatic service in 1877 and appointed United States Minister to Brazil by President Hayes.



Richard T. Rives (1895–1982)

Born in Montgomery, Alabama; lawyer; judge; politician; military leader; educated at Tulane University and passed the bar examination when he was 19 years old; served in the United States Army during WW I; president of the Montgomery Bar Association and president of the Alabama State Bar (1939–1940); established his own law firm; named to the U.S. Fifth Circuit Court of Appeals and later the newly-created U.S. Eleventh Circuit Court of Appeals; repeatedly ruled against segregation laws and wrote opinions on significant cases involving public transportation, education, housing, voting rights, and legislative reapportionment; received honorary degrees from Notre Dame University and Cumberland School of Law.



Ellene G. Winn (1911–1986)

Born in Clayton, Alabama; earned degrees from Agnes Scott College (BA, 1931) and Radcliffe College (MA, 1932); earned law degree from Birmingham School of Law (1941); became an associate at Bradley, Baldwin, All & White (now Bradley) in 1944 and is believed to be the first woman to present an oral argument before the Supreme Court of Alabama; made partner at firm in 1958 becoming one of the first women partners at a major law firm in Alabama or the Southeast. The Winn Initiative was established in her honor for her contributions to the practice of law and the community and continues to encourage the successful development and mentoring of women in the legal profession. ▲

ALABAMA LAWYERS HALL OF FAME PAST INDUCTEES

2018

Jeremiah Clemens (1814-1865)
Carl Atwood Elliott, Sr. (1913-1999)
Robert A. Huffaker (1944-2010)
Henry Upson Sims (1873-1961)
George Peach Taylor (1925-2008)

2017

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

2016

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

2015

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

2014

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

2013

Marion Augustus Baldwin (1813-1865)
T. Massey Bedsole (1917-2011)
William Dowdell Denson (1913-1998)
Maud McLure Kelly (1887-1973)
Seybourn Harris Lynne (1907-2000)

2012

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

2011

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

2010

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

2009

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

2008

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

2007

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

2006

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

2005

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

2004

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

The Alabama Lawyers Hall of Fame is located on the ground floor of the Heflin-Torbert Judicial Building,
300 Dexter Avenue, Montgomery, Alabama



AWARD RECIPIENTS & PHOTO HIGHLIGHTS

JUDICIAL AWARD OF MERIT

The award is the highest honor given to a sitting judge, whether state or federal court, trial or appellate, who has contributed significantly to the administration of justice in Alabama.



Judge Haikala and President Crow

Judge Madeline Hughes Haikala

Judge Haikala graduated from Williams College in 1986 with a Bachelor of Arts degree in psychology. She received her juris doctor degree in 1989 from Tulane University Law School, where she graduated magna cum laude and was inducted into the Order of the Coif.

President Barack Obama appointed Judge Madeline Hughes Haikala to the United States District Court for the Northern District of Alabama in 2013. The United States Senate confirmed the appointment in October 2013. Before her appointment to the district court, Judge Haikala served as a Magistrate Judge for the Northern District of Alabama for one year. Before taking the bench, Judge Haikala practiced law for more than two decades with the Birmingham firm of Lightfoot, Franklin & White, where she specialized in trial and appellate work.

Judge Haikala has served as an adjunct professor at Cumberland School of Law, and she has held leadership roles in a variety of professional and community organizations. For example, she has had the privilege of serving as a member of the Board of the Women's Section of the Birmingham Bar Association.

AWARD OF MERIT

This award is the highest honor given by the Alabama State Bar to a lawyer and serves to recognize outstanding constructive service to the legal profession in Alabama.

Allison O'Neal Skinner

Skinner is deputy general counsel at Cadence Bank NA. She graduated from the University of Alabama School of Law in 1994 and has served as an adjunct professor teaching e-discovery. She has also served on the board of several non-profits having been trained in non-profit governance at Harvard University School of Government Executive Program.



Skinner

In addition to working with several Birmingham area firms, Skinner was the founding partner of Skinner Neutral Services LLC and clerked for the Honorable Sharon G. Yates of the Alabama Court of Civil Appeals. Skinner is serving in her third term as a 10th Judicial Circuit Board of Bar Commissioner.

She was the 2019 recipient of the Susan Bevill Livingston Leadership Award and the Girl Scouts of Northern Alabama Woman of Distinction. She is a recipient of the President's Award by ASB President Sam Irby and, as a bar commissioner, she has volunteered on numerous committees, including the Consolidated Fundraising Task Force; Election Rules Committee; Local Bar Task Force; the Long-Range Planning Task Force, and Futures of the Profession Task Force. Skinner has been a contributing editor to *The Alabama Lawyer* since 2013 and served as the *Addendum* e-Newsletter editor for two years, as well as participating on numerous CLE panels.

WILLIAM D. "BILL" SCRUGGS, JR. SERVICE TO THE BAR AWARD

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



Heflin and President Crow

H. Thomas Heflin, Jr.

Heflin attended the University of the South and graduated from the University of Alabama and the University of Alabama School of Law. He has been an active member of the Alabama State Bar since 1979. Heflin practices in Sheffield, concentrating on asbestos defense, education employment law, corporate litigation, wills and estate litigation, personal injury litigation, and general civil litigation.

Since 2014, Heflin has served as a member of the Board of Bar Commissioners. He has been a member of the state bar's Pro Bono Celebration Task Force since 2017, the Personnel Committee co-chair since 2018, and the co-chair of the 19th Amendment Centennial Celebration Task Force since 2018, in addition to numerous other state bar committees and task forces.

Heflin has been a member of or served on the board of many local, state, and national organizations, including the Children's Museum of the Shoals, Riverbend Center for Mental Health, Colbert County Bar Association, Alabama Trial Lawyers Association, Alabama Head Injury Foundation, Legal Services Corporation, and American Bar Foundation.

He and his family are members of Grace Episcopal Church in Sheffield, where he has served on the vestry and as a senior warden and a delegate to the Diocesan Convention, Episcopal Diocese of Alabama.

J. ANTHONY "TONY" MCLAIN PROFESSIONALISM AWARD

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



President Crow and Prater

Harlan I. Prater, IV

Prater is a partner at Lightfoot, Franklin & White LLC in Birmingham. He is a Fellow of the American College of Trial Lawyers, the International Academy of Trial Lawyers, and the American Board of Trial Advocates. He is a tireless advocate, defending clients and protecting their interests in high-stakes civil trials.

He received his A.B. magna cum laude from Duke University and his J.D. with honors from Duke University School of Law.

A *Chambers USA* "Leading Lawyer," *Benchmark Litigation* "Litigation Star," and two-time *The Best Lawyers in America* "Lawyer of the Year," clients have relied on Prater's experience and skill in product liability, pharmaceutical, medical device, environmental, and business litigation for more than 30 years.

Prater has served as national counsel for various product manufacturers and is one of only 15 Alabama lawyers selected as a member of the Product Liability Advisory Council.

Beyond the courtroom, Prater is dedicated to giving back. He chairs the Alabama State Bar Committee on Disciplinary Rules and Enforcement and has served on the Birmingham Bar Association executive committee. He served as chair of the Board of Directors of the Birmingham YMCA and of the Board of Trustees for both Canterbury United Methodist Church and the North Alabama Conference of the United Methodist Church.

Prater and his late wife, Alice, were married for 32 years and have two daughters, one of whom recently graduated from law school and plans to practice in Charlotte, North Carolina, and one who is an elementary school teacher in Washington, D.C.

Michael E. Upchurch

Upchurch is a 1983 graduate of the University of Virginia School of Law and is a partner with Frazer Greene in Mobile. Upchurch's practice is primarily trial work and mediation.



Upchurch

COMMISSIONERS' AWARD

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



Judge Graham and President Crow

Judge John Henninger Graham

Judge Graham established and runs the Jackson County Drug Court, which has been recognized as the best such program in

Alabama and has received national recognition for its innovative programming. He is involved in numerous activities to improve the administration of justice locally and statewide, is president of the Alabama Association of Drug Court Professionals, is a member of the Circuit Judges Association Education Committee, and was appointed by the Supreme Court of Alabama to the Pattern Criminal Jury Instruction Committee and the Alabama Chemical Testing Advisory Board. He is a much sought-after speaker at both state and national drug court meetings and seminars.

Graham was appointed circuit judge in 2006 by Governor Bob Riley and has since been elected three times, all without opposition. He graduated from Berea College in Kentucky and the University of Alabama School of Law. He is married to Angela R. Graham, a clinical nurse educator with Encompass Home Health, Inc. They live in Stevenson and have two adult children.

JEANNE MARIE LESLIE AWARD

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

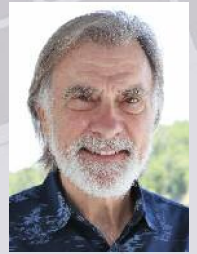
Robert B. Thornhill, MS, LPC

Thornhill was honored to serve as director of the Alabama Lawyer Assistance Program from October 1, 2012 to February 15, 2020. During his tenure, he had the privilege of assisting

lawyers, judges, and law students who were struggling with addiction or another mental health issue. The memories of those whose lives he touched will remain with him forever.

Thornhill holds a master's degree in counseling and human development from Troy University in Montgomery. He is a Licensed Professional Counselor, an Internationally Certified Alcohol and Drug Counselor, and a Certified Adolescent Alcohol and Drug Counselor. He also holds certifications as a Trauma Specialist and a Prevention Specialist.

Thornhill and his wife, Cindy Rose Thornhill, have two sons; John Taylor Thornhill and Robert Willis Thornhill. They also have two granddaughters, Willow Rose Thornhill and River Lee Thornhill.



Thornhill

LOCAL BAR ACHIEVEMENT AWARDS

These awards were created in the early 1990s to recognize the work of local bar associations for the programs or activities conducted in a particular year.

Mobile Bar Association

Calhoun/Cleburne County Bar Association

50 - YEAR MEMBERS

William Scears Barnes, Jr.
Billy Lee Barnett
Walter McFarland Beale, Jr.
Peyton Dandridge Bibb, Jr.
Alva Caswell Caine
Cecil Boyd Caine, Jr.
Joseph Terrace Carpenter
Carl Edward Chamblee
Robert Fulton Clark
James Whitney Compton
Algernon Johnson Cooper, Jr.
Judith Sullivan Crittenden
Walter Edmund Daniels, Jr.
Don Charles Dickert
John Douglas Evans

Nancy Smith Gaines
Robert W. Hanson
Nicholas Stallworth Hare, Jr.
Wilson Maxwell Hawkins, Jr.
James Clifton Heard
Robert Lyndieth Humphries
William Tipton Johnson, Jr.
Richard Owens Jones
John W. Lowe
John Russell Martin
Joseph William Mathews, Jr.
Emit Luther McCafferty, III
Bertram Goodwin Minisman, Jr.
Charles Henry Morris, III
Johnny Wayne Norton

Tabor Robert Novak, Jr.
William Frank Prosch, Jr.
David Albert Rains
Francis Payne Ralph
Robert Earl Sasser
John Seymour Somerset
Joseph Charles Sullivan, Jr.
Henry Randall Thomas
Cooper Campbell Thurber
William Thomas Watson
Warren Overton Wheeler
William Roy Willard, Jr.
John Rogers Wynn
Thomas Troy Ziemann, Jr.
Woodrow Hobson Barnes, II

David Humphrey Bibb
Joseph Arlington Colquitt
Herman Leonard Fussell
Roy Bonder Gonas
Charles Allen Graddick
William Ernest Hereford
Baxter Cannon Howell, Jr.
Victor Talmage Hudson, II
James Fletcher Hughey, Jr.
Robert Lamar Milam
Laszlo Daniel Morris, Jr.
James Dillard Sloan, Jr.
William Tascal Snyder
William Ward Stoudenmire
Roderick Paul Stout

PRESIDENT'S AWARD

The President's Award is presented to members of the bar who best exemplify the Alabama State Bar motto, "Lawyers Render Service."

Below are the 2020 recipients, selected by President Christy Crow.

Jeff Bowling
Kitty Brown
Brannon Buck
Ryan Duplechin

Susan Han
Ralph Holt
Emily Hornsby
Morris Lilienthal

Linda Lund
Marcus Maples
Brian Murphy
George Parker

Judge Kelly Pate
Manish Patel
Robert Shreve
Davis Smith

Jimbo Terrell
Gibson Vance
Greg Ward

RETIRING COMMISSIONERS' AWARDS

Emily L. Baggett, 8th Judicial Circuit
Robert L. Bowers, Jr., 19th Judicial Circuit
Jeffery C. Duffey, 15th Judicial Circuit, Place 5
Erskine R. Funderburg, Jr., 30th Judicial Circuit
H. Thomas Heflin, Jr., 31st Judicial Circuit
Ralph E. Holt, 11th Judicial Circuit
Clinton H. Hyde, 35th Judicial Circuit
W. Randall May, 18th Judicial Circuit, Place 1
C. Zackery Moore, 13th Judicial Circuit, Place 1
Tazewell T. Shepard, III, 23rd Judicial Circuit, Place 1
Gregory M. Varner, 40th Judicial Circuit

VOLUNTEER LAWYERS PROGRAM PRO BONO AWARDS

The Alabama State Bar Pro Bono Awards are presented to an individual attorney (Albert Vreeland Award), a mediator, a law firm, a law student and a public interest attorney who demonstrate outstanding pro bono efforts, through the active donation of time to the civil representation of those who cannot otherwise afford legal counsel and by encouraging greater legal representation in and acceptance of pro bono cases.

ALBERT VREELAND PRO BONO AWARD

E. Peyton Faulk

Faulk, of Montgomery, volunteers with the Montgomery Volunteers Lawyers Program and regularly provides assistance at their bi-monthly and Lawyer for the Day clinics. She is also willing to take on difficult hard-to-place cases for representation. Last year, she provided assistance to 51 clients, totaling 250 pro bono hours.



Faulk

LAW FIRM AWARD



Gaines, Gault & Hendrix PC

Attorneys with the Huntsville office of Gaines, Gault & Hendrix PC have provided assistance to Madison County Volunteer Lawyers Program clients since 2016. During the past four years, the firm has helped 75 MCVLP clients and contributed over 250 pro bono service hours to those clients. While the primary practice area of the firm is insurance defense litigation, the attorneys are not afraid to step outside of their comfort zone to provide pro bono assistance to clients in uncontested divorces, adoptions, and simple estate planning, along with contract and tort litigation.

LAW STUDENT AWARD

Mindy Kidd

While attending the University of Alabama School of Law, Kidd has volunteered on a regular basis at the Alabama State Bar Volunteer Lawyers Program's Tuscaloosa Legal Assistance clinic. She has provided 42 hours of pro bono service, performing client intake and screening clients for eligibility and legal issues prior to their seeing a volunteer attorney. She is such a regular volunteer that she trains other students in eligibility screening. Kidd has also performed 36 additional community service hours, volunteering at the soup kitchen and at Tuscaloosa Emergency Services. Additionally, she serves as a Law School Ambassador and is a junior editor on the *Alabama Law Review*.



Kidd

MEDIATOR AWARD

Susan M. Donovan

Donovan serves as director of the Mediation Law Clinic in Tuscaloosa and volunteers with the Alabama State Bar Volunteer Lawyers Program. Since joining the VLP in 2013, she has accepted multiple cases each year in the areas most difficult for the program to place, contested family law including cases involving domestic violence. As director of the Mediation Law Clinic, she trains second- and third-year students to serve clients, the profession, and society through the provision of free legal assistance to low-income residents.



Donovan

PUBLIC INTEREST ATTORNEY AWARD

James O. Smith

Jim Smith, of Montgomery, has spent his career expanding access to justice and assisting those often forgotten by the legal community. Smith started his career in 1978 as a staff attorney in the Selma office of Legal Services Corporation of Alabama where he represented clients with wide-ranging legal issues, from voting rights to domestic violence to consumer issues.



Smith

In 1989, he moved from the Opelika office to the Montgomery Region office where he was named managing attorney in 1992. During these years, he maintained a full case load including appellate work, domestic violence, and sexual assault cases.

In 2005, Jim was named the Domestic Violence/Family Law Director of Advocacy for Legal Services Alabama.

In 2010, Smith became the first attorney housed at One Place Family Justice Center, a safe place for victims of domestic violence, sexual assault, stalking, and child and elder abuse to find help.

For the foreseeable future, Smith is the longest-serving advocate of a legal assistance program in Alabama. Through the years, he has provided assistance to thousands of Alabamians who had nowhere else to turn. He is a relentless advocate for his clients and for the domestic violence community, seeking resources for and

recognition of this problem most would rather ignore. He has also served as a mentor to hundreds of attorneys around the state.

In his role as advocate, supervisor, instructor, manager, and friend, Jim Smith provides an unwavering example of service, to his clients, his community, and the bar.

WOMEN'S SECTION AWARDS

MAUD MCLURE KELLY AWARD

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

Augusta S. Dowd

Born and raised in Birmingham, Dowd graduated from the University of the South and Vanderbilt University School of Law, where she served as articles editor for the *Vanderbilt Law Review*. After law school, she clerked for the Hon. Seybourne H. Lynne and then practiced with Lange, Simpson, Robinson & Somerville. Dowd spent most of the 1990s at home with her three children until 2000, when she joined what eventually became White Arnold & Dowd PC. Dowd practices in federal and state courts as well as in administrative and regulatory proceedings and arbitrations.



Dowd

She served as the 2017-2018 president of the Alabama State Bar, only the second woman to serve in that important role. She was also a member of the state bar's Board of Bar Commissioners. In 2011, she was appointed to the Judicial Inquiry Commission and served until 2017.

Dowd was a member of the Birmingham Bar Association's Executive Committee, and she led the inaugural class of the BBA's Future Leaders Forum.

She is a member of the American Board of Trial Advocates, the International Academy of Trial Lawyers, and the American Bar Association, and a Fellow of the American Bar Foundation.

She serves as assistant chancellor to the Bishop of the Episcopal Diocese of Alabama.

Dowd and her husband, David D. Dowd, III, a partner at Burr & Forman LLP, have three children who are making their own professional marks across the country.

SUSAN B. LIVINGSTON AWARD

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

Christina D. Crow

Crow earned her undergraduate degree from Auburn University. A 1997 magna cum laude graduate of the University of Alabama School of Law, she entered private practice in Union Springs, where she became known as a fierce advocate for her clients, her community, and her profession.



Crow

Crow focuses on helping those who have been injured or had loved ones killed due to shortcuts taken by manufacturers of defective products, and those injured as a result of road defects, dram shop violations, pharmaceuticals and medical devices, and heavy equipment.

She is an active member of the First United Methodist Church of Union Springs, the Board of Trustees for the Alabama West Florida United Methodist Conference, the Board of the Girl Scouts of Southern Alabama, and the Bullock County Chunnenugee Fair Committee.

Crow just completed an outstanding term as the 144th president of the Alabama State Bar. She also served the state bar as vice president, a member of the Executive Committee under two presidents, and a member of the Board of Bar Commissioners.

Her leadership during the unprecedented pandemic highlighted her ability to lead, organize, and motivate her fellow attorneys to help their clients, each other, and their communities. Crow is a "lawyer's lawyer." She and her husband, Van Wadsworth, have three children and live in Union Springs.

THANK YOU GOLD SPONSORS:



THANK YOU SILVER SPONSORS:



THANK YOU BRONZE SPONSORS:

ABA Retirement Fund
Alabama Association for Justice
Fastcase

Alabama State Bar's 2020
GRAND CONVOCATION
 FRIDAY, JUNE 26




The 2020 Grand Convocation and Awards Ceremony gets kicked off in the chambers of the Supreme Court of Alabama.



President Christy Crow addresses the court and the attendees, both in-person and online, during the first-ever virtual Alabama State Bar annual meeting.



Executive Director Philip McCallum presents President Crow with a framed copy of the September 2019 Alabama Lawyer, featuring her family on the cover.



In honor of the bicentennial of the Alabama Supreme Court, State Law Librarian Tim Lewis takes members on a tour of the Antebellum Gallery in the Heflin-Torbert Judicial Building.

Alabama State Bar's 2020
GRAND CONVOCATION
 FRIDAY, JUNE 26




Carmen Sconyers, President Crow's legal assistant, is recognized and thanked for her extra efforts during the past year.



Huntsville attorney Taze Shepard greets attendees and outlines his goals as the 2020-2021 president-elect.



With family members looking on, Alabama Supreme Court Chief Justice Tom Parker swears in Robert G. Methvin, Jr. as the 145th president of the state bar.



2020-2021 ASB President Bob Methvin in his first official address



President Methvin, award recipient Harlan Prater and law student Solly Thomas stand apart while catching up after the Grand Convocation.



Relaxing after the swearing-in are Pat Hannahan, Lindsey (Methvin) Hannah, Hope Methvin, President Bob Methvin, Past President Tom Methvin, Laine Methvin, Lee Methvin, and Slade Methvin.



Rodney Miller, Jimbo Terrell, Michael Yancey, Matt Stephens, Courtney Gipson, Brooke Rebarchak, and Patrick Marshall are all smiles after law partner Bob Methvin is sworn in as the 2020-2021 president of the Alabama State Bar.



And they're still smiling!



Chief Justice Parker and the past, present, and future of the Alabama State Bar—President-elect Shepard, President Methvin, and Past President Crow

See you next year at the Grand Hotel, July 14-17!

(Photography by Fouts Commercial Photography, photofouts@aol.com)



An Overview of the 2020 Amendments to the Alabama Rules of Evidence

By Dean Charles W. Gamble, Professor Robert J. Goodwin, and Terrence W. McCarthy

Introduction

On January 30, 2020, the Alabama Supreme Court entered an order that made several changes to the Alabama Rules of Evidence and the advisory committee's notes. This order added two new sections to Rule 902 (Rules 902(13) and 902(14)) and amended Rule 803(16) and the advisory committee's notes to Rules 503A(d)(3), 803(7), and 803(8). These amendments became effective the day the order was issued, January 30, 2020.

The purpose of this article is to give the Alabama practitioner an overview of these changes.

Addition of New Self-Authenticating Rules for Electronic Evidence—Rules 902(13) and (14)

The amendments added two new methods of self-authentication to rule 902—Rules 902(13) and 902(14)—which were taken verbatim from amendments made to Federal Rule 902 in 2017. The text of Rules 902(13) and 902(14) provide as follows:

Rule 902. Self-Authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(13) Certified Records Generated by an Electronic Process or System.

A record generated by an electronic process or system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(14) Certified Data Copied from an Electronic Device, Storage Medium, or File.

Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent also must meet the notice requirements of Rule 902(11).

Simply put, these rules provide a procedure for parties to authenticate certain electronic evidence without live testimony from a foundation witness.¹ Rule 902(13) pertains to certified records *generated* by an electronic process or system, and Rule 902(14) pertains to certified data *copied from* an electronic device, storage medium, or file. Authenticating this type of evidence with a live witness can

be expensive and time consuming, and because the adverse party often stipulates to authenticity or chooses not to challenge authenticity testimony at trial, these rules were designed to develop a procedure to help determine before trial whether there will be a legitimate challenge to authenticity.²

The practicality of these rules is perhaps best demonstrated with the following examples given in a report from the advisory committee on the Federal Rules of Evidence when the rules were proposed. That report listed the following examples of how Rule 902(13) could be utilized to authenticate records generated by an electronic process or system using a certification as opposed to calling a live witness.

1. Proving that a USB device was connected to (i.e., plugged into) a computer:

In a hypothetical civil or criminal case in Chicago, a disputed issue is whether Dev-era Hall used her computer to access files stored on a USB thumb drive owned by a co-worker. Hall's computer uses the Windows operating system, which automatically records information about every USB device connected to her computer in a database known as the "Windows registry." The Windows registry database is maintained on the computer by the Windows operating system in order to facilitate the computer's operations. A forensic technician, located in Dallas, Texas, has provided a printout from the Windows registry that indicates that a USB thumb drive, identified by manufacturer, model, and

serial number, was last connected to Hall's computer at a specific date and time.

. . . .

2. Proving that a server was used to connect to a particular webpage:

Hypothetically, a malicious hacker executed a denial-of-service attack against Acme's website. Acme's server maintained an Internet Information Services (IIS) log that automatically records information about every internet connection routed to the web server to view a web page, including the IP address, webpage, user agent string and what was requested from the website. The IIS logs

CONSTRUCTION & ENGINEERING EXPERTS

Forensic engineering and investigative inspections:

Commercial • Industrial • Residential

Our specialists have Testifying Expertise

- Construction delay damages
- Construction defects
- Acceleration of schedule
- Structural issues
- Foundations, settlement
- Stucco & EIFS
- Electrical issues
- Mechanical Systems
- Roofing problems
- Flooding & Retention Ponds
- Engineering Standard of Care issues
- Radio & Television Towers

CAIN AND ASSOCIATES
ENGINEERS & CONSTRUCTORS, INC.

CONTACT: HAL K. CAIN, PRINCIPAL ENGINEER
HALKCAIN@AOL.COM
251.473.7781 • 251.689.8975
WWW.HKCAIN.COM

reflected repeated access to Acme’s website from an IP address known to be used by the hacker. The proponent wants to introduce the IIS log to prove that the hacker’s IP address was an instrument of the attack.

....

3. Proving that a person was or was not near the scene of an event: Hypothetically, Robert Jackson is a defendant in a civil (or criminal) action alleging that he was the driver in a hit-and-run collision with a U.S. Postal Service mail carrier in Atlanta at 2:15 p.m. on March 6, 2015. Jackson owns an iPhone, which has software that records machine-generated dates, times, and GPS coordinates of each picture he takes with his iPhone. Jackson’s iPhone contains two pictures of his home in an Atlanta suburb at about 1 p.m. on March 6. He wants to introduce into evidence the photos together with the metadata, including the date, time, and GPS coordinates, recovered forensically from his iPhone to corroborate his alibi that he was at home several miles from the scene at the time of the collision.

....

4. Proving association and activity between alleged co-conspirators: Hypothetically, Ian Nichols is charged with conspiracy to commit the robbery of First National Bank that occurred in San Diego on January 30, 2015. Two robbers drove away in a silver Ford Taurus. The alleged co-conspirator was Dain Miller. Miller was arrested

on an outstanding warrant on February 1, 2015, and in his pocket was his Samsung Galaxy phone. The Samsung phone’s software automatically maintains a log of text messages that includes the text content, date, time, and number of the other phone involved. Pursuant to a warrant, forensic technicians examined Miller’s phone and located four text messages to Nichols’s phone from January 29: “Meet my house @9”; “Is Taurus the Bull out of shop?”; “Sheri says you have some blow”; and “see ya tomorrow.” In the separate trial of Nichols, the government wants to offer the four text messages to prove the conspiracy.³

In all four of the above examples, absent a stipulation of the parties, the proponent of the evidence would normally be required to call a live witness at trial to testify about the system used to capture the particular type of electronic evidence at issue. With the passage of Rule 902(13), however, the proponent could obtain a written certification from that witness to satisfy the authentication requirement without calling the witness live.

As for how Rule 902(14) could be utilized to authenticate data copied from an electronic device, storage medium, or file, the federal advisory committee gave the following example:

In the armed robbery hypothetical, above, forensic technician Smith made a forensic copy of Dain’s Samsung Galaxy phone in the field. Smith verified that the forensic

copy was identical to the original phone’s text logs using an industry standard methodology (e.g., hash value or other means). Smith gave the copy to forensic technician Jones, who performed his examination at his lab. Jones used the copy to conduct his entire forensic examination so that he would not inadvertently alter the data on the phone. Jones found the text messages. The government wants to offer the copy into evidence as part of the basis of Jones’s testimony about the text messages he found.⁴

Under this hypothetical, without Rule 902(14), the proponent would typically be required to call both Smith and Jones live at trial. With the passage of Rule 902(14), however, Smith could provide a certification compliant with Rule 902(14) in lieu of live testimony, and only Jones would be needed to testify live at trial about his examination.

Substantive requirements of Rules 902(13) and (14)

There are several substantive and procedural requirements of both rules that are critical for the practitioner to know. First, as for the substantive requirements, the proponent under either rule “must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial.”⁵ The certification must show that it comes from a “qualified person,” who presumably will often be someone with technical and/or computer expertise.⁶

While the rules and advisory notes do not give specific language that should be included in the certification, the advisory committee's notes to Rule 902(13) explain that the "amendment specifically allows the authenticity foundation that satisfies Rule 901(b)(9) to be established by a certification rather than the testimony of a live witness."⁷ Rule 901(b)(9), which provides an avenue for authenticating the results of a "process or system," traditionally "carries a double requirement of a showing as to both the nature and accuracy of the process or system."⁸ Thus, a Rule 902(13) certification that purports to authenticate a "process or system" should, at the very least, cover these basic requirements in addition to setting forth the qualifications of the witness.

A Rule 902(14) certification should, at the very least, set forth the qualifications of the witness and certify that the electronic copy offered into evidence is identical to the original based on a comparison of hash value or other reliable means.⁹ But, ultimately, the proponent should make sure the certification covers the same information the proponent would elicit from the witness if the witness were to testify live at trial.

Second, the certification under either rule must "compl[y] with the certification requirements of Rule 902(11) or (12)."¹⁰ Rule 902(11), which provides for the self-authentication of certified domestic business records, requires the records to be "accompanied by an "affidavit or sworn testimony."¹¹ Rule 902(12), which provides for the self-authentication of certified

foreign business records, requires the records to be "accompanied by a written declaration."¹²

Third, both rules are "solely limited to authentication."¹³ If the evidence contains hearsay, the proponent must find some other rule to overcome a hearsay objection. Similarly, all other objections, such as relevance, remain even if the proponent satisfies the requirements of either rule.¹⁴ In other words, satisfying either rule would circumvent an authenticity objection, but it does not mean *carte blanche* admissibility.

Procedural requirements of Rules 902(13) and (14)

As for the procedural requirements, both rules specify that the proponent "must" satisfy "the notice requirements of Rule 902(11)."¹⁵ These notice requirements require the proponent to provide written notice to all adverse parties of the intent to offer evidence under the rule, and the proponent must also make the underlying records and certification available for inspection "sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them."¹⁶

Amendment to the Ancient Documents Exception to the Hearsay Rule—Rule 803(16)

This amendment limits the "ancient documents exception" to the hearsay rule to documents prepared before January 1, 1998. To understand the change, a brief history of the rule is helpful.

The "ancient documents exception" to the hearsay rule was

recognized by the common law long before the Alabama Rules of Evidence were adopted.¹⁷ A document qualified as an "ancient document" under the common law if it was shown to have been in existence 30 years or more.¹⁸

When the Alabama Rules of Evidence became effective in 1996, the 30-year common law hearsay exception for ancient documents was codified in Rule 803(16). That 30-year rule, which remained in effect until the January 30, 2020 amendment, provided as follows:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

(16) Statements in ancient documents. Statements in a document in existence thirty years or more the authenticity of which is established.

While the Alabama Rules of Evidence are largely patterned after the Federal Rules of Evidence, Alabama's decision to define an ancient document as one 30 years old or greater was a rejection of the corresponding federal rule, which adopted a 20-year period.¹⁹

One rationale for the ancient documents exception has always been that "age affords assurance that the writing antedates the present controversy," which therefore arguably makes the document more reliable than other hearsay documents.²⁰ Professor Daniel Capra, a leading

evidence commentator and reporter to the Judicial Conference Advisory Committee on Evidence Rules, credits Professors Christopher Mueller and Laird Kirkpatrick with articulating “the most complete articulation of the rationale for the ancient documents hearsay exception” as follows:

Need is the main justification. The lapse of 20 years since the acts, events or conditions described almost guarantees a shortage of evidence. Witnesses will have died or disappeared. Written statements that might fit other exceptions (business records, past recollection) are typically thrown out or lost or destroyed

Naturally, statements in ancient documents are affected by risks of misperception, faulty memory, ambiguity, and lack of candor (they are not intrinsically more reliable than oral statements), and a written statement unreliable when made is unreliable forever. Ancient documents do, however, bring fewer risks of misreporting (because the document is in writing), and they bring at least some assurance against negative influences: When authenticated, an ancient document leaves little doubt that the statement was made; there is little risk of errors in transmission; because of its age, the document is not likely to have suffered from the forces generating the suit, so there is less reason to fear distortion or lack of candor.²¹

Professor Capra, among others, eventually became concerned that,

under the federal rule, unreliable information on the Internet and other electronic communications could be admitted for the truth of the matter asserted when the electronic information reached the age of 20 years old.²² In a very persuasive article published in 2015—that was eventually read and discussed by the advisory committee for the Alabama Rules of Evidence—Professor Capra argued that “the ancient document exception needs to be changed because its rationale, while never very convincing in the first place, is simply invalid when applied to prevalent and retrievable electronically stored information (ESI).”²³

The advisory committee for the Federal Rules of Evidence agreed with Professor Capra, and ultimately “determined that the ancient documents exception should be limited due to the risk that it will be used as a vehicle to admit vast amounts of unreliable electronically stored information (ESI). Given the exponential development and growth of electronic information since 1998, the hearsay exception for ancient documents has now become a possible open door for large amounts of unreliable ESI, as no showing of reliability needs to be made to qualify under the exception.”²⁴

The federal advisory committee considered several options for “fixing” the ancient documents problem. Ultimately, Rule 803(16) of the Federal Rules of Evidence was amended to limit the ancient documents exception to “statements in ancient documents prepared before January 1, 1998.”²⁵ While the committee acknowledged the “arbitrariness” of a January 1, 1998 cut-off date, the members believed this was “a rational date for treating

concerns about old and unreliable ESI” and it was no more arbitrary than the 20-year cut-off date in the original rule.²⁶

The advisory committee for the Alabama Rules of Evidence agreed with the federal advisory committee that the ancient documents exception needed to be amended, and the committee ultimately proposed that Alabama amend Rule 803(16) consistent with the amendment to the corresponding federal rule. The Alabama Supreme Court agreed with the advisory committee’s recommendation, and as of January 30, 2020, the Alabama rule reads as follows:

Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

(16) Statements in ancient documents. Statements in a document that was prepared before January 1, 1998, the authenticity of which is established.

The advisory committee’s notes that accompany the amendment to Rule 803(16) make it clear that: “The limitation of the ancient-documents hearsay exception is not intended to have any effect on authentication of ancient documents. The methods of authenticating old documents remain unchanged.”²⁷ For example, Rule 901(b)(8), which provides an avenue for the authentication of “Ancient documents or data compilation,” has not changed.²⁸

Amendment to Advisory Committee’s Notes to Counselor-Client Privilege—Rule 503A(d)(3)

Rule 503A provides that certain confidential communications between a counselor and client are privileged. There has been no substantive change to this rule, but as explained in the following paragraphs, the advisory committee’s notes were amended to correct a clerical error from when the rule was originally enacted.

The counselor-client privilege is subject to certain exceptions, which are contained in 503A(d). One of those exceptions states that there is no privilege when the client’s condition is an element of a claim or a defense and provides as follows:

(3) When the client’s condition is an element of a claim or a defense. There is no privilege under this rule as to a communication relevant to an issue regarding the mental or emotional condition of the client, in any proceeding in which the client relies upon the condition as an element of the client’s claim or defense, or, after the client’s death, in any proceeding in which any party relies upon the condition as an element of the party’s claim or defense.²⁹

The original advisory committee’s notes to Rule 503A(d)(3) incorrectly stated that “[T]his exception is identical to an exception to the psychotherapist-patient privilege. See Ala. R. Evid. 503(d)(3).”³⁰ This passage from the original advisory committee’s notes has been deleted because

that reference to the psychotherapist-patient privilege was from an earlier draft of the psychotherapist-patient privilege that contained that exception.³¹ The final version of the psychotherapist-patient privilege, found in Rule 503, does not contain the exception that was numbered as 503(d)(3) in earlier drafts.³²

In sum, there has been no substantive change to Rule 503A or Rule 503, but the advisory committee’s notes to Rule 503A(d)(3) were amended to correct the error from when the rules were originally enacted.


Amendment to Advisory Committee’s Notes to Rules 803(7) and (8)

Rule 803(7) provides a hearsay exception for the absence of business records, and Rule 803(8) provides a hearsay exception for public records. Both rules contain identical language stating that the trial court may still exclude evidence that falls under either exception if “*the sources of information or other circumstances indicate lack of trustworthiness.*”³³

The original advisory committee’s notes to both rules were silent as to who carried the burden on the “trustworthiness” issue. The advisory committee’s notes to both rules have been amended to make clear that it is the *objecting party’s* burden to prove lack of trustworthiness.³⁴ To be clear, the proponent has the initial burden of establishing the requirements of the hearsay exception. Once the proponent meets that initial burden, the burden then shifts to the opposing party to prove lack of trustworthiness. This is consistent

with the corresponding federal rules.³⁵

This analysis is also consistent with the business records exception to the hearsay rule (Rule 803(6)), which contains similar language stating that the court may exclude business records “if the sources of information or the method or circumstances of preparation indicate lack of trustworthiness.”³⁶ The advisory committee’s notes to Rule 803(6) as originally enacted specified that the objecting party carries the burden to prove lack of trustworthiness.³⁷ The amended advisory committee’s notes to Rules 803(7) and (8) now contain the identical sentence



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

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

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

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

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

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

WWW.FORRESTDUBUYS.COM

from the original advisory committee's notes to Rule 803(6), which reads as follows: "The party objecting to the admissibility of the record, for the lack of trustworthiness, carries the burden of proof in that regard. *In re Japanese Electronic Prods. Antitrust Litig.*, 723 F. 2d 238 (3d Cir. 1983), reversed, *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)."³⁸ ▲

Endnotes

1. Ala. R. Evid. 902(13) and (14) advisory committee's notes to adoption of Rule 902(13) and Rule 902(14) effective January 30, 2020.
2. Ala. R. Evid. 902(13) and (14) advisory committee's notes to adoption of Rule 902(13) and Rule 902(14) effective January 30, 2020.
3. Report to Standing Committee By Advisory Committee on Evidence Rules, at pp. 50-52 (May 7, 2016), http://www.uscourts.gov/sites/default/files/2016-05-07-evidence_rules_report_to_the_standing_committee_0.pdf.
4. Report to Standing Committee By Advisory Committee on Evidence Rules, at p. 53 (May 7, 2016), http://www.uscourts.gov/sites/default/files/2016-05-07-evidence_rules_report_to_the_standing_committee_0.pdf.
5. Ala. R. Evid. 902(13) and (14) advisory committee's notes to adoption of Rule 902(13) and Rule 902(14) effective January 30, 2020.
6. See Ala. R. Evid. 902(13) and 902(14).
7. Ala. R. Evid. 902(13) advisory committee's notes to adoption of Rule 902(13) and Rule 902(14) effective January 30, 2020.
8. Charles W. Gamble, Robert J. Goodwin & Terrence W. McCarthy, *McElroy's Alabama Evidence*, § 319.01(13) (7th ed. 2020).
9. Ala. R. Evid. 902(14) advisory committee's notes to adoption of Rule 902(13) and Rule 902(14) effective January 30, 2020.
10. Ala. R. Evid. 902(13) and 902(14).
11. Ala. R. Evid. 902(11).
12. Ala. R. Evid. 902(12).
13. Ala. R. Evid. 902(13) and (14) advisory committee's notes to adoption of Rule 902(13) and Rule 902(14) effective January 30, 2020.
14. *Id.*
15. Ala. R. Evid. 902(13) and 902(14).
16. Ala. R. Evid. 902(11).
17. Ala. R. Evid. 803(16) advisory committee's notes.

18. Charles W. Gamble, Robert J. Goodwin & Terrence W. McCarthy, *McElroy's Alabama Evidence*, § 251.01 (7th ed. 2020); *Busken v. AmSouth Bank, N.A.*, 504 So. 2d 231, (Ala. 1987) ("A deed 30 years old, or older, is considered to be ancient."); *Stewart v. Peabody*, 280 Ala. 5, 8, 189 So. 2d 554, 557 (1966) ("The present deed, being less than 30 years old, cannot be considered an ancient deed").
19. Ala. R. Evid. 803(16) advisory committee's notes.
20. See Fed. R. Evid. 803(16) advisory committee's note (arguing that "age affords assurance that the writing antedates the present controversy").
21. Daniel J. Capra, *Electronically Stored Information and the Ancient Documents Exception to the Hearsay Rule: Fix it Before People Find Out About It*, 17 YJLT 1, 7-8 (2015) (quoting Christopher Mueller & Laird Kirkpatrick, 4 Federal Evidence § 8:100 (4th ed. 2013)).
22. *Id.*
23. *Id.* at 1.
24. Fed. R. Evid. 803(16) advisory committee's notes to 2017 amendments.
25. *Id.*
26. *Id.*
27. Ala. R. Evid. 803(16) advisory committee's notes to amendment to Rule 803(16) effective January 30, 2020.
28. For a detailed discussion regarding the authentication of ancient documents, please see *McElroy's*, § 321.01.
29. Ala. R. Evid. 503A(d)(3).
30. Ala. R. Evid. 503A(d)(3) advisory committee's notes (original advisory committee's notes to Rule 503A(d)(3)).
31. Advisory committee's notes to amendment to advisory committee's notes to Rule 503A(d)(3) effective January 30, 2020.
32. *Id.*
33. Ala. R. Evid. 803(7) & Ala. R. Evid. 803(8) (emphasis added).
34. Advisory committee's notes to amendment to advisory committee's notes to Rule 803 effective January 30, 2020.
35. *Id.* See also, Fed. R. Evid. 803(7) and 803(8).
36. Ala. R. Evid. 803(6).
37. Ala. R. Evid. 803(6) advisory committee's notes.
38. Advisory committee's notes to amendment to advisory committee's notes to Rule 803 effective January 30, 2020.

Dean Charles W. Gamble



Dean Charles Gamble is retired and holds the position of Dean Emeritus at the University of Alabama School of Law where he taught for 25 years. Additionally, he was a member of the faculty at Cumberland School of Law for a decade. Dean Gamble is published widely in the legal field, having authored many articles and books, including *McElroy's Alabama Evidence* and *Gamble's Alabama Rules of Evidence*. His latest publication is *The New Testament in Poetry* which may be ordered at amazon.com.

Professor Robert J. Goodwin



Professor Bob Goodwin is the J. Russell McElroy Professor Emeritus of Law at Samford University's Cumberland School of Law. He serves as reporter for the Standing Committee on the Alabama Rules of Evidence, and is coauthor (along with Charles Gamble and Terry McCarthy) of the newly published Seventh Edition of *McElroy's Alabama Evidence* and the Third Edition of *Gamble's Alabama Rules of Evidence*.

Terrence W. McCarthy



Terry McCarthy (along with Charles Gamble and Robert Goodwin) is coauthor of the newly-published Seventh Edition of *McElroy's Alabama Evidence* and the Third Edition of *Gamble's Alabama Rules of Evidence*. He is a partner at Lightfoot, Franklin & White in Birmingham, serves on the Advisory Committee for the Alabama Rules of Evidence, and has taught evidence courses at Cumberland School of Law, the University of Alabama School of Law, and Birmingham School of Law.



Assessing Reliability of Non-DNA Forensic Feature-Comparison Evidence in Alabama

By William L. Smith

Five years ago, on the heels of admitting that its latent print unit incorrectly identified

an Oregon lawyer as the Madrid train bomber, the Federal Bureau of Investigation disclosed yet another disconcerting forensic failure.¹ Testimony given by that agency's forensic hair examiners in criminal trials had included "erroneous statements" at least 90 percent of the time.² While shocking, the case review which exposed the erroneous hair comparison testimony is only a small part of a much larger

reckoning currently taking place within the criminal justice system.

For several years now, a sea change has been occurring in our understanding of the reliability and the limitations of many common forensic techniques and methods routinely used in criminal trials. The watershed event in this change occurred in 2009 with the long-awaited release of a report by the National Academy of Sciences on the state of forensic science. Once released, the report proved to be "a thoughtful, but devastating critique of the practice of forensic science in the criminal courts of the United States."³

The importance of this report cannot be overstated. It has been said that it “fundamentally altered the landscape for forensic science in the criminal justice system.”⁴

Despite this fundamental alteration, the broader legal community has been widely criticized for failing to recognize and respond adequately to the use of forensic evidence that has proven to be wholly unreliable in some cases or of limited probative value in others. One commentator has bluntly expressed that:

Despite the advancement in forensic disciplines and research a significant obstruction remains to restoring reliability in our criminal justice system: the courts. Judges, defense attorneys, and prosecutors continue to misuse, mishandle, and misrepresent forensic findings with impunity. Unfortunately, the wave of reform attendant to the forensic sciences seems to have eluded lawyers.⁵

Whether such criticism is warranted can be debated, but it is true that ignoring or downplaying the extent and significance of the limitations of forensic evidence has caused incalculable harm to innocent people accused of crimes as well as to victims and to the families of victims of those crimes.

To put the terms “forensic science” and “forensic evidence” in proper perspective, it is important to remember that forensics is a patchwork of disciplines with diverse areas of practice, interest, methodologies, and techniques. Although there can be some overlap, the individual disciplines can generally be thought of as falling into one of two categories. The first category includes those disciplines that are laboratory based (e.g., nuclear and mitochondrial DNA analysis, toxicology, and drug analysis). Those laboratory-based disciplines involve the straight-forward application of basic science to the task at hand.

The second category is comprised of those disciplines that involve the interpretation of “observed patterns,” also known as “feature-comparison.”⁶ The feature-comparison disciplines are those “that attempt to determine whether an evidentiary sample (e.g., from a crime scene) is or is not associated with a potential

The traditional, non-DNA feature comparisons to be discussed here include comparisons of such things as fingerprints, hairs, fibers, tool marks, and bite marks.

“source” sample (e.g., from a suspect), based on the presence of similar patterns, impressions, or other features in the sample and the source.”⁷ The traditional, non-DNA feature comparisons to be discussed here include comparisons of such things as fingerprints, hairs, fibers, tool marks, and bite marks.

Historically, testimony regarding the non-DNA feature comparisons by forensic scientists has been deemed admissible in Alabama provided that the witness is qualified and his or her testimony would assist the trier of fact.⁸ Because this type of testimony was considered simply the product of subjective observations and comparisons, there was generally no further inquiry into the actual reliability of the testi-

mony. If the witness was qualified and the testimony would assist the trier of fact, the reliability of the evidence was effectively *assumed* based on nothing more than the *ipse dixit* of the expert.

Events which have transpired over the last several years have revealed that such assumptions of reliability are unfounded. The emergence of DNA profiling as a forensic discipline unmistakably introduced a powerful new tool into criminal investigations, but it also did much more than that. Post-conviction DNA analysis of crime scene samples that had been collected before the advent of DNA profiling quickly began exposing erroneous convictions that had occurred from using unreliable forensic evidence at trial, while very often implicating the actual perpetrator.

The second thing that came out of DNA profiling as a forensic tool was the exposure of forensic scientists to “a model for a scientifically sound identification science.”⁹ Whereas the traditional disciplines had historically rested upon *assumptions* of validity, DNA injected into the field of forensics a science-based model for examining and processing physical evidence and for reaching valid conclusions regarding that evidence. The juxtaposition of the methods and techniques of those traditional disciplines against the scientific model exemplified by DNA exposed fatal weaknesses in the theories, reasoning, and underlying assumptions of many of the traditional forensic identification (feature comparison) disciplines. It has been said that,

“From the viewpoint of conventional science, the forensic identification sciences are contenders for being the shoddiest science offered to the courts.”¹⁰

The problem with the feature-comparison techniques is that they have historically relied upon an assumption of “discernable uniqueness.”¹¹ When the DNA “model for a scientifically sound identification science” was applied to the traditional identification disciplines, it revealed why there were so many actual innocence exonerations taking place.¹² The “assumption of discernible uniqueness” combined with expressions of “bold, definitive conclusions” by forensic scientists lacked “theoretical or empirical foundations.”¹³ “When defendants convicted with the help of forensic evidence from those traditional disciplines began to be exonerated on the basis of persuasive DNA comparisons deeper inquiry into scientific validity began.”¹⁴

In 2005, Congress directed the U.S. Attorney General to provide funds for the National Academy of Sciences (The Academy) to assess and make recommendations for the future of forensic sciences.¹⁵ In 2009, the Academy issued its report, “Strengthening Forensic Science in the United States: A Path Forward” (the NAS Report).¹⁶ In addition to providing a broad overview of forensics in general, the NAS report also looked at several specific forensic disciplines and provided a critique of their “reliability and precision of results—attributes that factor into probative value and admissibility decisions.”¹⁷ Although the committee discussed a wide range of forensic disciplines, the most serious criticisms were leveled at the traditional feature-comparison disciplines. Among its many damning conclusions was that other than DNA, “no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source.”¹⁸

Following the NAS report, the President’s Counsel of Advisors on Science and Technology (PCAST)¹⁹ was asked to address the problems revealed in that report and to determine how to “help ensure the validity of forensic evidence used in the Nation’s legal system.”²⁰ In 2016, the PCAST issued what amounts to a follow-up report to the NAS Report, “Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods.” That report confirms the problems with many of the forensic disciplines that were exposed by the Academy in the NAS Report.

More importantly, the PCAST Report clarified the appropriate standards for the validity and reliability of

forensic feature comparison methods. It then went on to apply those standards in an evaluation of the validity and reliability of several specific forensic disciplines in widespread use today. This established a benchmark for the state of the disciplines addressed in that report as of the time of the report. By outlining the proper standards and how to apply them, the report provides a simple roadmap for continuing evaluations on a case-by-case basis.

This is important because forensics is not static. Each discipline must undergo continuing scrutiny to evaluate its reliability in the context of the best available information and knowledge at the time of its proposed use. Disciplines that lack validity today might improve over time and become able to produce reliable evidence later. Conversely, others may eventually reveal themselves to simply be “junk science.”

Bullet lead analysis, bite mark comparisons, and microscopic hair examinations are just a few examples of forensic techniques which were once hailed as cutting edge, but are now all but abandoned. In 2005, the FBI announced that it was discontinuing its bullet lead examination program.²¹ A 2003 National Research Council report had concluded that “research does not support testimony that two bullets originated from the same manufacturer, from the same melt of lead, from the same box of bullets, or on the same date.”²²

A few years later, under pressure from the National Association of Criminal Defense Lawyers and the Innocence Project, the FBI, in conjunction with those organizations, began a review of its cases involving microscopic hair analysis. The FBI’s own review revealed that, “Twenty-six of 28 FBI agent/analysts provided either testimony with erroneous statements or submitted laboratory reports with erroneous statements.”²³ “In the 268 cases where examiners provided testimony used to inculcate a defendant at trial, erroneous statements were made in 257 (96 percent) of the cases. Defendants in at least 35 of these cases received the death penalty and errors were identified in 33 (94 percent) of those cases.”²⁴

Incredibly, as bad as hair comparison testimony has been, bite mark evidence has proven to be much worse. So much so that in 2016 the State of Texas Forensic Science Commission issued a report calling for a moratorium on bite mark testimony and concluded that “there is no scientific basis for stating that a particular patterned injury can be associated to an individual’s dentition.”²⁵ That same year, the PCAST report found that bite mark comparisons are so unreliable

that it advised against expending resources to try to salvage the practice.²⁶ Yet this evidence has been admitted in the past in Alabama and many other states with no inquiry whatsoever as to its reliability.²⁷ Once deemed admissible, it was simply admitted again and again, without questioning its reliability, based simply on established precedence.²⁸

The continued use of feature comparison evidence that has been revealed to be “junk science” demonstrates the impropriety of allowing the reliability of a technique to attain the status of established legal precedent. Following forensic precedent without evaluating reliability on a case-by-case basis reveals what one commentator has described as a “lethal dissonance between scientific reality and legal precedent.”²⁹ Alabama is no different than many other states in having legal precedent which we now know is contrary to scientific reality.³⁰ The extent to which this legal precedent will continue to control the admissibility of feature comparison evidence in Alabama will depend upon how courts apply our current Rule 702 of the Alabama Rules of Evidence.

Ala. R. Evid. Rule 702

Prior to the 2012 amendment to Rule 702, there was little to no requirement in Alabama that feature comparison evidence be evaluated for reliability beyond the witness being qualified and the evidence assisting the trier of fact.³¹ For example, in 2013, the Alabama Court of Criminal Appeals held (under the pre-2012 Rule 702), in a plain error review, that, “In Alabama, a properly qualified expert should be permitted to testify whether a particular shell was fired from a specific firearm based upon his comparison of the distinctive marks on the shell with the physical features of the firearm.” *Jackson v State*, 169 So. 3d 1, 60 n15 (Ala. Crim. App. 2013).³² See also, *Revis v. State*, 101 So. 3d 247 (Ala. Crim. App. 2011).

At this point, it is vitally important to make a distinction between testimony as to *observations* based on physical comparisons and expressions of *conclusions* reached by examiners based on those observations. The leap from testimony of observations to expressions of conclusions based on those observations represents a “deep flaw running through the jurisprudence: the failure to distinguish between the methodology experts employ to collect data and the scientific basis for interpreting the data collected.”³³

Jackson and the line of physical comparison cases preceding it demonstrate a blurring of the lines between *observations* (i.e., comparisons) and the *interpretation* of those observations (i.e., conclusions of individualization).

There was no mention in *Jackson* of a need to consider the reliability of the experts’ conclusions, and scientists now say that, “While criminalistics continues to depend on the theory of individualization and the assumption that it is attainable in practice, thoughtful and informed scientists long have recognized the lack of evidence for that core belief.”³⁴ Given our present understanding of the limitations of forensic feature-comparison evidence and the fact that Alabama has a “new” Rule 702, there is a need for a consistent, coherent standard of reliability for expressions of *conclusions* based on non-DNA feature comparisons. Any path to such an end depends upon whether Alabama courts continue to deem the whole of feature-comparison testimony to be “nonscientific.”³⁵

Science v. Nonscience

When Alabama amended Rule 702 effective 2012, it maintained the science/nonscience dichotomy that began with the old *Frye* test.³⁶ It did this by keeping the original Rule 702 and designating it 702(a) while adopting and adding a *Daubert*-based³⁷ 702(b) for “expert testimony based on a scientific theory, principle, methodology, or procedure.”³⁸ Courts must first apply 702(a), as that section applies to all expert testimony. Expert testimony that satisfies 702(a) must then also satisfy 702(b) if it is “based on a scientific theory, principle, methodology, or procedure.”

Under Alabama’s “old” Rule 702 the *Frye* standard governed the admissibility of novel scientific evidence, and feature comparison evidence was not deemed to be “scientific.” Courts in Alabama have generally held that simple visual feature comparisons are not “science.” It is generally assumed, and courts have indicated, that precedent under the old *Frye* standard as to what was then deemed “scientific” will still be good law under the new rule. Of course this would mean that feature-comparison testimony need only pass muster under 702(a), and there would remain the question of whether and how Alabama courts will address the actual reliability of that evidence under Rule 702.

702(a)

If Alabama courts continue to apply only 702(a) to feature-comparison testimony, one should be able to get

some idea of whether they might look more closely at the reliability of that testimony in the future by considering the Alabama cases which have cited to *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999). In *Kumho*, the United States Supreme Court held that the gatekeeping responsibilities of trial judges is not limited to “scientific” evidence, but extends as well to “technical” and “other specialized” knowledge. The court explained that trial courts could use whatever “reasonable reliability criteria” are appropriate to the type testimony at issue, but there must be a judicial determination of reliability even for nonscientific testimony. Of course, *Kumho* only applies in federal courts.

The Alabama Supreme Court has not addressed *Kumho* in the context of a criminal case. The court of criminal appeals has addressed *Kumho* five times.³⁹ Four of those cases, *Simmons v. State*, 797 So. 2d 1134 (Ala. Crim. App. 2000), *Barber v. State*, 952 So. 2d 393 (Ala. Crim. App. 2005), *W.R.C. v. State*, 69 So. 3d 933 (Ala. Crim. App. 2010), and *Revis v. State*, 101 So. 3d 247, (Ala. Crim. App. 2011) were all decided under our “old” Rule 702.

In *Simmons*, the court referred to *Kumho* as a well-reasoned opinion and said, “Fairness to a party seems to dictate that before evidence based on specialized knowledge can be admitted against a party at trial, the party is entitled to a determination that the specialized knowledge is reliable and that it is relevant to a material issue.”⁴⁰ The court then went about considering the reliability of the testimony at issue in that case beyond simply whether the witness was qualified and whether the testimony would assist the jury.

In *Barber*, the court backed away from any suggestion that it had adopted *Kumho* in *Simmons*, even though the court acknowledged using “some of the language in *Kumho* and *Daubert* when determining the admissibility of the expert’s testimony.” Later, in both *WRC* and *Revis*, the court held that only Rule 702 governs the admissibility of nonscientific testimony.

The court explained that trial courts could use whatever “reasonable reliability criteria” are appropriate to the type testimony at issue, but there must be a judicial determination of reliability even for nonscientific testimony.

Again, *Simmons*, *Barber*, *WRC*, and *Revis* all involved Alabama’s “old” Rule 702. The only criminal case to address *Kumho* since the 2012 rule change is *Payne v State*, 239 So. 3d 1173 (Ala. Crim. App. 2017).

At issue in *Payne* was the admissibility of medical opinions as to the cause of injuries to a child. The court did not address the issue of whether this testimony was “scientific” under 702(b), but as Professor Robert J. Goodwin pointed out, a case cited by the Alabama Supreme Court following *Payne*, *Mazda Motor Corp. v. Hurst*, 261 So. 3d 167 (Ala. 2017), suggests that the type of testimony at issue in *Payne* “could properly be considered nonscientific.”⁴¹ This is significant because the *Payne* court evaluated the testimony in that case under what can only be considered a *Daubert/Kumho* analysis.

It is not unreasonable to expect that Alabama courts will continue to regard the *Kumho* decision as persuasive authority and apply its reasoning to feature-comparison testimony. After all, *Kumho* specifically speaks to the issue of the reliability of nonscientific testimony. If feature-comparison testimony continues to be deemed “nonscientific” in Alabama, it is hard to take issue with *Kumho*’s simple admonition to look to the reliability criteria appropriate to the discipline in question.

702(b)

Although it is generally assumed that Alabama courts will continue to apply only 702(a) to feature-comparison evidence, there is an argument to be made that 702(b) applies as well. This is particularly true regarding an expert’s expression of conclusions. There are few Alabama appellate cases that address forensic feature-comparison evidence since the 2012 amendment of Rule 702, and in none of these cases was the admissibility of that evidence and a standard of reliability the question presented on appeal. Therefore, courts can address the proper application of Rule 702 to feature-comparison testimony free of the science/nonscience baggage from *Frye* and its

test that has been explicitly rejected in Alabama.

While it is customary to refer to 702(b) as applying to “scientific evidence,”⁴² the rule itself is more explicit and broader than simply “scientific evidence.”⁴³ By its own terms, 702(b) applies equally to scientific knowledge, technical knowledge, and specialized knowledge if that scientific, technical or specialized knowledge is “based on” a scientific theory, a scientific principle, a scientific method, or a scientific procedure (emphasis added). When considering whether a given forensic feature-comparison technique is based on a scientific theory, principle, methodology, or procedure, it is important to keep in mind that forensic science is an *applied* science.

The forensic disciplines currently in widespread use are scientifically informed, but technical in their application. They are based on scientific theories and principles, and the application of those theories and principles is done by analysts and technicians following established scientific techniques, methodologies, and procedures. The nature of the specific technique, methodology, or procedure in question will inform the area(s) of science which are implicated, but according to scientists, feature-comparisons are “a common scientific activity” that “belong squarely to the discipline of metrology—the science of measurement and its application.”⁴⁴ In practice, “Forensic feature-comparison methods involve determining whether two sets of features agree within a given measurement tolerance.”⁴⁵

Science or Not, There Is Only One Way to Determine Reliability

Regardless of how it is characterized, there is only one way to determine the reliability of conclusions based on non-DNA feature comparisons. As Alabama courts have long recognized, feature comparison is a subjective exercise, and in its 2016 report, the PCAST stressed that there is only one way to establish the reliability of a subjective forensic feature-comparison

It is important to note that empirical testing is not the same thing as the proficiency testing of an individual examiner.

method, and that is “to test it *empirically* by seeing how often examiners actually get the right answer” (emphasis in original).⁴⁶ It is important to note that empirical testing is not the same thing as the proficiency testing of an individual examiner. Likewise, “experience and judgment alone—no matter how great—can *never* establish the validity or degree of reliability of any particular method” (emphasis in original).⁴⁷

Fortunately, evaluating the reliability of a given feature-comparison technique based upon empirical

testing is not nearly as complicated as it might sound. The PCAST report has already done the work for several of the feature-comparison techniques, and it is quick to point out that the basic analysis can be applied to any discipline. This will be of particular benefit to courts as new comparison methods are developed and existing techniques change and evolve.

The National Institute of Standards and Technology (NIST) and its Organization of Scientific Area Committees (OSAC) are now home to the federal government’s research into feature-comparison techniques and forensics in general. As part of its research, NIST is conducting “Scientific Foundation Reviews” of various forensic disciplines in order to identify “knowledge gaps.”⁴⁸ The work of these organizations through research, development, and the promulgation of appropriate standards and techniques will hopefully see the feature-comparison disciplines to their full potential, whatever that may be. Some that are not able to reliably individualize at present might achieve that ability in the future. It is likely that some others never will.

Regardless of whether Alabama courts deem feature-comparison testimony to be scientific or not, the unraveling of long-held assumptions of reliability now compels closer scrutiny of this evidence under Rule 702. Relying on the *ipse dixit* of experts and granting case-specific evaluations of reliability the status of legal precedent has had tragic consequences in far too many cases. The important thing is to recognize the limitations of forensics and be circumspect when considering the lengths to which examiners are permitted to go in expressing conclusions based on their observations. ▲

Endnotes

1. Brandon Mayfield was arrested and held for two weeks based on a latent print match that the FBI claimed was “100% verified.” The details of this case can be found in the Inspector General’s report on the matter at the Homeland Security Digital Library. www.hsd.l.org/?view&id=458960.
2. FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review (April 20, 2015, press release). www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review.
3. Marjorie Anne McDiarmid, *Mandating Meaningful Forensic Discovery: A Proposal to Fuel the Engine of Truthfulness* (2018) at 1.
4. Jennifer E. Laurin, *Remapping the Path Forward: Toward a Systemic View of Forensic Science Reform and Oversight*, 91 Tex. L. Rev. 1051 at 1118.
5. Valena Elizabeth Beety, *Cops in Lab Coats and Forensics in the Courtroom* (July 1, 2015). Ohio State Journal of Criminal Law, Vol. 13, No. 2, 2016; WVU Law Research Paper No. 2015-13. Available at SSRN: <https://ssrn.com/abstract=2686231> at 545.
6. DNA is actually properly considered a feature-comparison technique and is acknowledged as such in the PCAST Report.
7. President’s Council of Advisors on Sci. and Tech., *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods 1* (2016) [hereinafter PCAST Report] at 1.
8. See *Barber v. State*, 952 So. 2d 393 (Ala. Crim. App. 2005).
9. Jonathan Koehler & Michael Saks, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCIENCE 892 (2005) at 892.
10. Michael J. Saks, *Banishing ipse dixit: The Impact of Kumho Tire on Forensic Identification Science*, 57 Wash & Lee L. Rev. 879 (2000) at 879.
11. Koehler & Saks, supra note 9.
12. Koehler & Saks, supra note 9 at 892.
13. Koehler & Saks, supra note 9 at 892.
14. President’s Council of Advisors on Sci. and Tech., *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods 1* (2016) [hereinafter PCAST Report] at 25.
15. “Established by an Act of Congress, signed by President Abraham Lincoln in 1863, the NAS is charged with providing independent, objective advice to the nation on matters related to science and technology.” NAS Mission Statement. www.nasonline.org/about-nas/mission/.
16. Comm. on Identifying Needs of Forensic Sci. Cmty. et al., Nat’l Research Council of Nat’l Acad., *Strengthening Forensic Science in the United States: A Path Forward 14* (2009) [hereinafter NAS Report].
17. NAS Report, supra note 16 at 5-1.
18. NAS Report, supra note 16 at 5-5.
19. “Beginning in 1933 with President Franklin D. Roosevelt’s Science Advisory Board, each President has established an advisory committee of scientists, engineers, and health professionals. Although the names of the advisory boards have varied over the years, the purpose of each remains the same—to provide scientific and technical advice to the President of the United States.” <https://obamawhitehouse.archives.gov/administration/eop/ostp/pcast/about>.
20. PCAST Report, supra note 14 at x.
21. Federal Bureau of Investigation, *FBI Laboratory Announces Discontinuation of Bullet Lead Examinations*. (September 1, 2005, press release). www.fbi.gov/news/pressrel/press-releases/fbi-laboratory-announces-discontinuation-of-bullet-lead-examinations.
22. National Research Council, *Committee on Scientific Assessment of Bullet Lead Elemental Composition Comparison, Forensic Analysis: Weighing Bullet Lead Evidence* (2004); *The Current State of Bullet-Lead Evidence** D.H. Kaye p. 2 (2006 D.H. Kaye).
23. FBI Testimony on Microscopic Hair Analysis Contained Errors in at Least 90 Percent of Cases in Ongoing Review (April 20, 2015, press release). www.fbi.gov/news/pressrel/press-releases/fbi-testimony-on-microscopic-hair-analysis-contained-errors-in-at-least-90-percent-of-cases-in-ongoing-review.
24. *Id.* at 23.
25. Tex. Forensic Sci. Comm’n, *Forensic Bitemark Comparison Complaint Filed by National Innocence Project on Behalf of Steven Mark Chaney—Final Report* (2016) at 11-12.
26. PCAST Report, supra note 14 at 87.
27. See, *Handley v. State*, 515 So. 2d 121, 1987 Ala. Crim. App. LEXIS 4756.
28. The cases of Henry Lee Stinson (Wisconsin), Kennedy Brewer, and Lavonne Brooks (both Mississippi) are a few examples of cases that have been used as legal precedent upholding the validity of bitemark evidence after the defendants in those cases had been proven by DNA to be actually innocent.
29. Fabricant, supra note 26 at 85 (referring specifically to hair analysis).
30. The State of Texas was the first state to enact a statutory “junk science writ” specifically to have convictions based on outdated science reviewed.
31. But see also, *Bird v State*, 594 So. 2d 644, 653, 54 (Ala. Crim. App. 1990) (reversed on other grounds) (court required a showing that the “method of comparison and identification was based upon reasonably sound scientific approaches”).
32. It should be noted that the issue was actually not preserved for appellate review in this case.
33. M. Chris Fabricant & William Tucker Carrington, *The Shifted Paradigm: Forensic Science’s Overdue Evolution from Magic to Law* (March 2, 2015). 4 Va. J. Crim. L. 1 (2016), at 44-45.
34. Koehler & Saks, *The Individualization Fallacy in Forensic Science Evidence* (2008). *Vanderbilt Law Review*, Vol 61, No. 1, pp. 199-219, 2008 at 214.
35. It is fair to say that the word “science” means different things in different contexts. To scientists, it is a process (the scientific method). In common parlance, it is a body of knowledge based on the scientific method, and in criminal courts, science is almost always discussed in the context of an applied science.
36. *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923).
37. See, *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).
38. Ala. R. Evid. Rule 702.
39. *Lewis v. State*, 24 So. 3d 480 (Ala. Crim. App. 2007) mentioned *Kumho* in a footnote, but it was not addressed in the context of expert testimony.
40. *Simmons*, 797 So. 2d at 1154.
41. Robert J. Goodwin, *An Overview of Alabama’s New Daubert-Based Admissibility Standard*, 73 Ala. Law. 196, 199 (May 2012) at 10.
42. See Committee Comments to Ala. R. Evid. Rule 702.
43. Chief Justice Rehnquist’s comment in *GE v. Joiner*, 522 U.S. 136, 142 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997), that “the Federal Rules of Evidence allow district courts to admit a somewhat broader range of scientific testimony than would have been admissible under *Frye*” is also worth noting. However, it should be acknowledged that this comment is subject to more than one interpretation.
44. PCAST Report, supra note 7, at 44.
45. PCAST Report, supra note 7, at 44 fn 93.
46. Addendum to the PCAST Report at 1.
47. Addendum to the PCAST Report at 3.
48. John M. Butler. (2018). *NIST Scientific Foundation Reviews*. 10.6028/NIST.IR.8225-draft at i. Available at <https://doi.org/10.6028/NIST.IR.8225-draft>.

William L. Smith



Bill Smith is a criminal defense attorney in Lanett. He graduated from the University of Alabama in 1989, from the University of Alabama School of Law in 1992, and from the West Virginia University Law School in 2018 with an LL.M. in forensic justice. He is an associate member of the Jurisprudence Section of the American Academy of Forensic Sciences.



Standard of Review

STANDARD OF REVIEW:

Pesky Requirement or Powerful Tool?

By John J. Davis

Abstract

Standards of review are required for all state and federal appellate briefs. Most advocates look upon standards of review as simply a requirement of an appellate court which is often hard to find within the court's own opinions. The standards of review, however, are far from an unnecessary procedural requirement. They are an indicator of your potential success on appeal as well as a powerful tool to craft a winning argument on appeal.

Introduction

As a young appellate lawyer engaged in private practice, I was in the process of putting the finishing touches on an appellate brief that just happened to be due in a few hours. While proofing the brief, I realized there was no standard of review. I had attempted to find the appropriate standard earlier in the writing process, but had abandoned my search out of frustration. That frustration reached the boiling point over the next hour or so as I desperately tried to find

something to put in the standard of review section. The most disturbing part of the story is not that I waited until the last minute to add the standard of review, but instead, that I had obviously not incorporated or even referenced the appropriate standard of review into the argument section of my brief. Spoiler alert: I lost the case. The standard of review is not an afterthought or just another of the many requirements that appellate courts require from advocates who practice before them. In fact, it is perhaps the most important procedural aspect of your appeal next to any jurisdictional requirements and deadlines.

As illustrated above, many lawyers do not fully comprehend or appreciate the significance of the standards of review. I specifically recall a case which forever changed my view regarding the importance of the standard of review and the benefits of using it as a powerful tool of advocacy. In March 2009, an Assistant United States Attorney for the Middle District of Alabama filed a response to a defendant's post-trial motion for judgment of acquittal. What was unique about this response was how the prosecutor wove into the fabric of his response, at each and every key point, the highly deferential standard of review.¹ The pleading began with a simple presentation of the standard of review that is commonly used in all federal and state criminal cases in which the sufficiency of the evidence is challenged in a motion for new trial and on appeal.² But the prosecutor

did not stop there. He then cited numerous legal authorities in support of his contention that the standard of review "narrowly circumscribes" the issues that the court could even consider at this point in the proceedings.³ The prosecutor expounded on his argument by supplying additional authorities as to the "heavy burden" carried by a defendant who challenges the evidence that supported his conviction.⁴

While this prosecutor laid a strong foundation for his position, the real damage that he did to his opponent's case was how effectively he repeatedly looped his convincing factual arguments back into the standard of review, which strongly favored the government's position. After factually demolishing the defendant's contentions, the prosecutor would immediately cite to specific language from cases that narrowly prescribe the authority that a trial court has to overturn a jury's verdict when granting a motion for new trial. Specifically, the prosecutor frequently pointed out that defendants are not entitled to relief just because they disagree with the jury's verdict and cannot accept the jury's rejection of their argument.⁵ Suffice it to say that after using this formula, both the trial court and anyone reading the government's response is left with the conclusion that not only was the defendant not entitled to any relief, but the law which governs the review of the defendant's claims compels their outright denial by any fair-minded jurist or appellate court.

Background: What Is the Standard of Review?

Far from being just another procedural requirement of an appellate brief, standards of review are the essential language of an appeal.⁶ Indeed, they are the "keystone to court of appeals decision-making."⁷ They are much easier to describe than they are to define.⁸ When a case is appealed, it is an appellate court's duty to review the results below to determine if there was any error that requires remand or reversal. That authority, however, has boundaries and those boundaries are set out either by the court's jurisdiction and/or the appropriate standards of review. Simply stated, the standard of review tells an appellate court "how wrong" a trial court must be before it will be reversed.⁹ In the words of Professor Maurice Rosenberg of Columbia University Law School, a noted expert on this issue, "[t]here are wide variations in the degree of wrongness which will be tolerated" by appellate courts.¹⁰

More importantly, standards of review serve the purpose of creating a more respected and consistent body of law by requiring appellate judges to exercise self-restraint.¹¹ Specifically, standards of review require appellate judges to recognize that trial court proceedings are not just a "warm-up

exercise,” and therefore the decision reached in the trial court should be the final determination unless the error was harmful enough to require reversal.¹² This prevents trial court decisions from being rendered meaningless.¹³ Practically speaking, standards of review, when properly applied, ensure that appellate judges view the issues presented in the appeal from the same perspective.¹⁴

What Are the Different Standards of Review?

There are, practically speaking, four basic standards of appellate review. It is perhaps easiest to discuss the two most extreme standards of review first. Almost every appellant either seeks or claims to be entitled to de novo review of the trial court’s decision below and with good reason: it is the least deferential standard of review because it gives no deference to the trial court’s rulings.¹⁵ De novo review, however, is generally reserved for conclusions of law and/or the review of legal issues.¹⁶ Abuse of discretion is the most restrictive standard of review and is sought and preferred by every appellee. It is perhaps the most discussed standard of review, and, since it covers procedural rulings by the trial court, it is often the most applicable standard of review in a criminal case. In reality, it is a difficult standard for any appellant to overcome because

The difference between the two standards is perhaps best set forth by Judge Francis M. Allegra of the United States Court of Federal Claims who once stated that a trial court’s decision under a de novo review standard is protected by “a gossamer film,” whereas under an abuse of discretion standard, a trial court’s decision is protected by a “Kevlar shield.”¹⁸

a decision by the trial court can be considered an abuse of discretion only if it is unsound, unreasonable, or illegal.¹⁷ The difference between the two standards is perhaps best set forth by Judge Francis M. Allegra of the United States Court of Federal Claims who once stated that a trial court’s decision under a de novo review standard is protected by “a gossamer film,” whereas under an abuse of discretion standard, a trial court’s decision is protected by a “Kevlar shield.”¹⁸

The remaining standards of review are more closely related to each other, but contain small though consequential differences. The courts of appeal also use a

clearly erroneous standard in certain cases. This standard, like abuse of discretion, grants a trial court much deference.¹⁹ The Seventh Circuit Court of Appeals once stated that to warrant reversal under this standard, a trial court’s ruling must be wrong with the force of a five-week-old, unrefrigerated dead fish.²⁰ The courts of appeal also use a reasonableness standard when evaluating claims of ineffective assistance of counsel.²¹

One of the most misunderstood of those remaining standards is that of plain error. Plain error is reserved for cases where the death penalty has been imposed. It allows the appellate court to notice any plain error or defect in the proceedings so long as the error seriously affects the defendant’s substantial rights, but it also must have an unfair prejudicial impact on the jury’s deliberations.²² One of the most common mistakes of appellate advocates and trial advocates is wrongfully assuming the doctrine of plain error applies in a case where the death penalty has not been imposed. That is a fatal mistake which normally results in the issue being precluded from appellate review because it was not reserved by a timely objection at trial.

One final note for criminal cases—one of the most common issues raised on appeal in a criminal case is sufficiency of the evidence. The author has seen briefs in which advocates have mistakenly claimed de novo review as well as abuse of discretion. The standard of review for a claim of sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the prosecution,

a rational finder of fact could have found the defendant guilty beyond a reasonable doubt.²³ The appellate courts in this state have repeatedly advised litigants that their role is not to say what the facts are and only to judge whether the evidence was legally sufficient to allow it to be submitted for a decision by the jury.²⁴ Thus, advocates should be firmly aware that the facts at trial are the facts to be considered on appeal, and those facts are viewed in a light most favorable to the prosecution. Effective advocates, in the author's opinion, create legal arguments that accept those facts or construe facts to the benefit of their cause while at the same time not running afoul of the court. Simply stated, when dealing with the sufficiency of the evidence, the facts are what they are and your argument must take that into account to avoid being rejected by the court.

Specific Standards Of Review

Below is a comprehensive listing of the applicable standards of review for commonly raised issues before Alabama's appellate courts in criminal cases.

1. Admissibility of Evidence: Admissibility of evidence is reviewed under an abuse of discretion standard. *McRay v. State*, 88 So. 3d 1, 75 (Ala. Crim. App. 2010).
2. Restitution: Issues involving the amount of restitution are reviewed under an abuse of discretion standard. *Ex parte Theodorou*, 53 So. 3d 151, 156 (Ala. 2010).
3. Batson Challenge: A Batson claim is reviewed under a clear error standard. *Welch v. State*, 63 So. 3d 1275, 1278 (Ala. Crim. App. 2010).
4. Chain of Custody: Issues involving the chain of custody of evidence at trial are reviewed under an abuse of discretion standard. *Smith v. State*, 898 So. 2d, 907, 918 (Ala. Crim. App. 2004).
5. Constitutionality of a Legislative Act: A constitutional challenge to an act of the Alabama legislature is reviewed under a de novo standard. *Jefferson County Comm'n v. Edwards*, 49 So. 3d 685, 690 (Ala. 2010).
6. Credibility of Witnesses: During a suppression hearing, any conflicts in the testimony or credibility of witnesses are reviewed under an abuse of discretion standard. *State v. J.L.D.*, 39 So. 3d 214, 222 (Ala. Crim. App. 2009).
7. Cross-Examination of Witnesses: Claims regarding the scope of cross-examination in a criminal proceeding are reviewed under an abuse of discretion standard. *McMillan v. State*, 139 So. 3d 184, 224-25 (Ala. Crim. App. 2010).
8. Denial of a Rule 32 Petition: The trial court's decision to deny a Rule 32 petition is reviewed under an abuse of discretion standard. *McGahee v. State*, 885 So. 2d 191, 201 (Ala. Crim. App. 2003).
9. Pure Questions of Law: Pure questions of law in criminal cases are reviewed under a de novo standard. *Ex parte Lamb*, 113 So. 3d 686 (Ala. 2011).
10. Dismissal of a Juror: The decision of the trial court to disqualify a juror is reviewed under an abuse of discretion standard. *Hoobler v. State*, 668 So. 2d 905, 909 (Ala. Crim. App. 1995).
11. Double Jeopardy: A claim of double jeopardy is reviewed under a de novo standard. *State v. Smith*, 46 So. 3d 14, 16 (Ala. Crim. App. 2010).
12. Findings of Fact: A trial court's findings of fact are reviewed under an abuse of discretion standard. *Albarran v. State*, 96 So. 3d 131, 198 (Ala. Crim. App. 2011).
13. The Grant or Denial of a Mistrial: The grant or denial of a mistrial is reviewed under an abuse of discretion standard. *Culver v. State*, 22 So. 3d 499, 518 (Ala. Crim. App. 2008.)
14. Ineffective Assistance of Counsel: Claims of ineffective assistance of counsel are reviewed under a reasonableness standard as set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). See *Wilkinson v. State*, 70 So. 3d 442, 450 (Ala. Crim. App. 2011).
15. Juror Misconduct: Claims of juror misconduct are reviewed under an abuse of discretion standard. *Ex parte Dixon*, 55 So. 3d 1257, 1260-61 (Ala. 2010).

VOCATIONAL & REHABILITATION
CONSULTANTS, LLC



**Experienced Vocational
Rehabilitation Consultant**

More than 18 years of practical knowledge and experience ready to assist you in your litigation cases.

WORK EXPERIENCE

- Rehabilitation Counselor- US Dept. of Labor
- Vocational Expert- Social Security Administration Office of Hearing Operations
- Job Placement Service Provider- Social Security Administration Ticket to Work
- Pre-employment Transition Consultant- MS Department of Rehabilitation Services



Dr. Sabrina Singleton, CRC, ALC
Certified Rehabilitation Counselor
Associate Licensed Counselor

Office: (205) 598-2447 ext. 103
Cell: (601) 580-7770

Mailing Address: P.O. Box 361131
Birmingham, AL 35244

www.vocrehabconsultants.com
dr.singleton@vocrehabconsultants.com

THE ALABAMA LAWYER

16. Jury Instructions: Claims regarding a trial court's instruction to the jury are reviewed under an abuse of discretion standard. *Stanley v. State*, 143 So. 3d 230, 289 (Ala. Crim. App. 2011).
17. Legal Sufficiency of an Indictment: The legal sufficiency of an indictment is reviewed under a de novo standard. *Harrison v. State*, 879 So. 2d 594, 603 (Ala. Crim. App. 2003).
18. Motion for Change of Venue: A trial court's ruling on a motion for a change of venue is reviewed under an abuse of discretion standard. *Johnson v. State*, 43 So. 3d 7, 15 (Ala. Crim. App. 2009).
19. Motion for a Continuance: The denial of a motion for a continuance is reviewed under an abuse of discretion standard. *Sheffield v. State*, 87 So. 3d 607, 641 (Ala. Crim. App. 2010).
20. Motion for Mental Evaluation: Issues regarding the question of whether a defendant is competent to stand trial is reviewed under an abuse of discretion standard. *Russell v. State*, 715 So. 2d 866, 868-69 (Ala. Crim. App. 1997).
21. Motion for New Trial: The denial of a motion for new trial by the trial court is reviewed under an abuse of discretion standard. *Ex parte Dixon*, 55 So. 3d 1257, 1260 (Ala. 2010).
22. Motion to Sever: A trial court's ruling on a motion to sever is reviewed under an abuse of discretion standard. *Tariq-Madyun v. State*, 59 So. 3d 744, 749 (Ala. Crim. App. 2010).
23. Motion for Speedy Trial: The denial of a motion for speedy trial is reviewed under a de novo standard. *State v. Jones*, 35 So. 3d 644, 646 (Ala. Crim. App. 2009).
24. Motion to Suppress: The denial of a motion to suppress is reviewed under an abuse of discretion standard. *C.B.D. v. State*, 90 So. 3d 227, 237 (Ala. Crim. App. 2011).
25. Motion to Withdraw a Guilty Plea: The trial court's decision to allow a defendant to withdraw his guilty plea is reviewed under an abuse of discretion standard. *White v. State*, 4 So. 3d 1208, 1213 (Ala. Crim. App. 2008).
26. Probation Revocation: A trial court's decision to revoke probation is reviewed under an abuse of discretion standard. *Sams v. State*, 48 So. 3d 665, 667 (Ala. 2010).
27. Propriety of Argument: Questions regarding the propriety of argument of counsel during trial are reviewed under an abuse of discretion standard. *Saunders v. State*, 10 So. 3d 53, 101 (Ala. Crim. App. 2007).
28. Prosecutorial Misconduct: Issues relating to the prosecutor's comments made during trial are reviewed under a harmless error analysis. *Reynolds v. State*, 114 So. 3d 61, 140-41 (Ala. Crim. App. 2010).
29. Qualified Expert: Whether a witness is allowed to testify as an expert is reviewed under an abuse of discretion standard. *Barber v. State*, 952 So. 2d

393, 411 (Ala. Crim. App. 2005).

30. **Statutory Interpretation:** Claims regarding the interpretation of a statute involve pure questions of law and are thus reviewed under a de novo standard. *Ex parte Knight*, 92 So. 3d 717, 719 (Ala. 2011).
31. **Sentencing:** In situations where the trial court imposes a sentence within the statutory range, any claim regarding that sentence on appeal is reviewed under an abuse of discretion standard. *Lane v. State*, 66 So. 3d 830, 831 (Ala. Crim. App. 2010).
32. **Voir Dire:** Claims relating to the trial court's decision regarding the conduct of voir dire examinations are reviewed under an abuse of discretion standard. *Stanley v. State*, 143 So. 3d 230, 263 (Ala. Crim. App. 2011).
33. **Voluntariness of a Confession:** Claims regarding a ruling on the voluntariness of a confession are reviewed under an abuse of discretion standard. *Brown v. State*, 56 So. 3d 729, 737-38 (Ala. Crim. App. 2009).

Conclusion

As shown above, other than rulings by the trial court that solely involve questions of law, most decisions by the trial court are reviewed under an abuse of discretion standard. Advocates, however, should be alert to those situations wherein a ruling by the trial court consists of both factual and legal conclusions. The legal

The fact that many advocates fail to identify the appropriate standard of review and, even worse, fail to properly use it as a part of their advocacy of their claims is one of the most unrecognized pitfalls in the practice of appellate law.

conclusions are often subject to de novo review which clearly favors the appealing party. The choice of the standard of review used by the court in your case is often the most determinative factor in whether you prevail on appeal. The fact that many advocates fail to identify the appropriate standard of review and, even worse, fail to properly use it as a part of their advocacy of their claims is one of the most unrecognized pitfalls in the practice of appellate law. It is an error that no effective advocate should ever make. The standards of review are a powerful tool and should never be regarded as a pesky requirement. Your success on appeal depends, in part, on how you understand and utilize the standards by which your client's claims will be reviewed by an appellate court. ▲

Endnotes

1. *United States of America v. John W. Goff*, CR.NO. 2:07-CR322-MHT.
2. *Id.* at 1.

3. *Id.* at 2.
4. *Id.* at 3.
5. *Id.* at 12-13.
6. Steven Alan Childress & Martha S. Davis, *Federal Standards of Review ix* (3d ed. 1999).
7. Michael D. Murray & Christy H. DeSanctis, *Legal Research and Writing 493* (2005).
8. Amanda Peters, *The Meaning, Measure, and Misuse of Standards of Review*, 13 *Lewis and Clark L. Rev.* 233, 235 (2009).
9. *Id.* at 235.
10. *Id.*
11. *Id.*
12. *Id.* at 239.
13. *Id.* at 240.
14. *Id.* at 241.
15. *Id.* at 246.
16. *Id.*
17. *Id.* at 244.
18. Francis M. Allegra, *Section 482: Mapping the Contours of the Abuse of Discretion Standard of Judicial Review*, 13 *Va. Tax Rev.* 423, 465-66 (1994).
19. Peters, *supra*, at 245.
20. *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).
21. *Wilkerson v. State*, 70 So. 3d 442, 450 (Ala. Crim. App. 2011).
22. *Ex parte Brown*, 11 So. 3d 933 (Ala. 2008).
23. *Powell v. State*, 72 So. 3d 1268, 1285-86 (Ala. Crim. App. 2011).
24. *Id.*

John J. Davis



John Davis has served as an Alabama Assistant Attorney General for the past 24 years, with the majority of that time assigned to the criminal appeals division in the Office of the Attorney General. He is a graduate of Auburn University Montgomery and Jones School of Law. In addition to his government service, Davis was engaged in the private practice of law where he specialized in appellate law as well as civil litigation on behalf of both plaintiffs and defendants.



A New Font and Word Limits for Filings in Alabama’s Appellate Courts

By Ed R. Haden and Wilson F. Green

The Reason for The Changes

The old Courier New 13 font is dated and reminiscent of a manual typewriter. Moreover, it is a mono-spaced font, which means that every letter takes up the same amount of space horizontally on the page. So an “m” and an “i” are the same width. The use of Courier New 13 made briefs produced by computers and word-processing programs look like briefs had always looked.

But reading has changed. The growing use of iPads, laptops, and other devices to read PDF documents have made Courier New 13 harder to read compared to proportionally-spaced fonts—fonts designed for computer screens, where different letters take up different amounts of space

The Supreme Court of Alabama has amended the Alabama

Rules of Appellate Procedure to require the use of:

- Century Schoolbook font in 14-point type, instead of Courier New font in 13-point type;
- Word limits, instead of page limits, except for documents filed pro se;
- A certificate of compliance with the font and word limit requirements; and
- Fully justified paragraphs.

These changes are effective October 1, 2020.

horizontally on a page. When a proportionally-spaced font is used, an “m” is wider than an “i.”

In 1998, the U.S. Supreme Court amended Federal Rule of Appellate Procedure 32 to allow the use of proportionally spaced fonts in 14-point or larger for papers filed in the federal courts of appeal. The experience has been favorable. Many federal judges using computer devices to read briefs, instead of lugging paper briefs around with them, have found reading the proportionally spaced fonts easier. The U.S. Court of Appeals for the Seventh Circuit has explored depths of the topic in a paper on its website entitled, *Requirement and Suggestions for Typography in Briefs and Other Papers*.¹

The Font

Federal Rule 32 allows numerous fonts, with specific criteria for different fonts. After reviewing several of the most commonly used fonts, the Alabama Supreme Court, our ultimate readers, made it easy for practitioners by adopting one font: Century Schoolbook 14.² Century Schoolbook is the font used in textbooks for ease of reading. And it reads well on computer devices.

The Word Limits

The use of footnotes, charts, and other means to try to squeeze more words into a brief has resulted in some briefs becoming visually crowded and difficult to read. Federal Rule 32 has long allowed the use of word limits, instead of page limits, to cure such verbal astigmatism. Because the word limits were a bit more liberal than the page limits, practitioners almost always use word limits for briefs filed in the federal courts of appeal. The current word limit for a principal brief in the federal courts of appeal is 13,000.³

Alabama’s amended rules have replaced page limits with word limits, except for pro se filers. Whether a practitioner places a sentence in a footnote, a chart, or the body of a brief does not matter; words are counted, not pages.

A page typed in Courier New 13, on average, contains approximately 200 words using Microsoft Word. The amendments fashioned word limits by converting the long-standing page limits using a multiplier of 200 (e.g., a 70-page limit for a brief is now a 14,000-word limit). On the next page is a chart showing the old page

Here are two paragraphs, side by side. The left paragraph is in Century Schoolbook 14, proportionally spaced. The right paragraph is in the monospaced Courier New 13. Because of the difference between monospacing and proportional spacing, a brief typed in Courier New 13 will actually have more pages than a brief typed in Century Schoolbook 14. And as should be visible to the reader, monospaced type more often creates eye-catching oddities in spacing when both margins are justified. So, out with the old.

Here are two paragraphs, side by side. The left paragraph is in Century Schoolbook 14, proportionally spaced. The right paragraph is in the monospaced Courier New 13. Because of the difference between monospacing and proportional spacing, a brief typed in Courier New 13 will actually have more pages than a brief typed in Century Schoolbook 14. And as should be visible to the reader, monospaced type more often creates eye-catching oddities in spacing when both margins are justified. So, out with the old.

numbers, which pro se filers can still use, and the new word limits for the different types of papers filed in the appellate courts:

Word Limits Effective October 1, 2020

Type of Paper	Old Page Limits (Still Applicable to Pro Se Filings)	New Word Limits
Opening and Responsive Brief (Non-capital case) [Ala. R. App. P. 28(j)(1).]	70 pages	14,000 words
Reply Brief (Non-capital case) [Ala. R. App. P. 28(j)(1).]	35 pages	7,000 words
Opening and Responsive Briefs (Capital Case) [Ala. R. App. P. 28(j)(2).]	80 pages	16,000 words
Reply Brief (Capital Case) [Ala. R. App. P. 28(j)(2).]	40 pages	8,000 words
Petition for Permissive Appeal and Answer [Ala. R. App. P. 5(e).]	20 pages	4,000 words
Petition for Mandamus or Prohibition [Ala. R. App. P. 21(d).]	30 pages	6,000 words
Motion [Ala. R. App. P. 27(d).]	10 pages	2,000 words
Memorandum in Support of Motion or in Opposition to Motion [Ala. R. App. P. 27(d).]	15 pages	3,000 words
Petition for Writ of Certiorari [Ala. R. App. P. 39(d).]	15 pages	3,000 words
Application for Rehearing [Ala. R. App. P. 40(g).]	15 pages	3,000 words
Brief in Support of Application or in Opposition to Rehearing [Ala. R. App. P. 40(g) & (f).]	15 pages	3,000 words
Supplemental Brief and Responsive Supplemental Brief on Return to Remand (Non-Capital Case) [Ala. R. App. P. 28A(c).]	50 pages	10,000 words
Supplemental Brief and Responsive Supplemental Brief on Return to Remand (Capital Case) [Ala. R. App. P. 28A(c).]	60 pages	12,000 words
Supplemental Authority Letter [Ala. R. App. P. 28B.].	2 pages	400 words

The Certificate of Compliance

To ensure compliance with the word limits, the rule amendments also require briefs and other filings to include a certificate stating the number of words and the type and size font used in the brief. Instead of counting each word in a brief manually, amended Alabama Rule of Appellate Procedure 32, like federal Rule 32 has provided for years, allows practitioners to use the word-count function on their word-processing program. For Microsoft Word, a typist can use his or her cursor to highlight all the words from the Statement of the Case to the Conclusion and then select Review and Word Count. When doing so, though, remember to check the box to include the words in footnotes too. Below is an example certificate:

Certificate of Compliance

I certify that this brief complies with the words limitation set forth in Ala. R. App. P. 28(j)(1). According to the word-count function of Microsoft Word, the brief contains 13,751 words from the Statement of the Case through the Conclusion. I further certify that this brief complies with the font requirements set forth in Ala. R. App. P. 32(a)(7). The brief was prepared in the Century Schoolbook font using 14-point type. See Ala. R. App. P. 32(d).

/s/ Ed R. Haden
Counsel for Appellant XYZ, Inc.

The reference above to Ala. R. App. P. 28(j)(1), which contains the word limits for opening and responsive briefs in non-capital cases, will change depending on the type of filing (e.g., a motion would reference Ala. R. App. P. 27(d)). The certificate of compliance should be placed immediately before the certificate of service in the brief or other paper that is filed.

Full Justification

The Supreme Court of Alabama has also required that the margins of headings, sentences, and paragraphs in text and footnotes be fully justified.⁴ That means that each side of each line of a paragraph extends to the one-inch margin of the text. Books commonly use full justification. The paragraphs in this article are fully justified.

Left justification, on the other hand, means that the left side of each line of a paragraph, except the first line that may be indented, extends to the left, one-inch margin of the text, but the right side of each line does not. Left justification has the advantage of keeping the spacing between words uniform without using hyphens, but it is not as pretty as the text in a book and has an unfinished, unpolished appearance. As an example, this paragraph is left justified.

The Credit

As with any package of amendments, there are many people who put in the hard work to make it happen. First, Mary Margaret Bailey of Mobile, who is a member of the Standing Committee on the Alabama Rules of Appellate Procedure, was the chief champion of the rules changes in the committee. She researched font rules in other jurisdiction, read the studies on the different fonts, and helped the committee understand the numerous different issues about fonts, type size, computer screens, etc.

Next, the justices on the Supreme Court of Alabama really dug in, reviewed the draft amendments, accepted some things, and changed others. They were very engaged in making the process of practicing law more enjoyable for lawyers.

And the staff of the Office of the Reporter of Decisions worked hard to check cross-references, review interactions among the amendments and other rules, and ensure the grammar was correct. Just as with last year's amendments allowing notices of appeal to be filed electronically, this package of amendments requiring Century Schoolbook 14 and word limits takes advantage of technology. Beginning October 1, 2020, briefs filed in Alabama's appellate courts should be easier for lawyers to write and more of a pleasure for judges to read. ▲

Endnotes

1. Available at <http://www.ca7.uscourts.gov/forms/type.pdf>.
2. Ala. R. App. P. 32(a)(7).
3. Fed. R. App. P. 32(a)(7)(B).
4. Ala. R. App. P. 32(a)(7).

Ed R. Haden



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

Wilson F. Green



Wilson Green practices in Tuscaloosa and Birmingham and is a regular contributor to "The Appellate Corner" in *The Alabama Lawyer*.

ALABAMA
LEGAL & INVESTIGATIVE
SERVICES, INC.

SERVICES

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

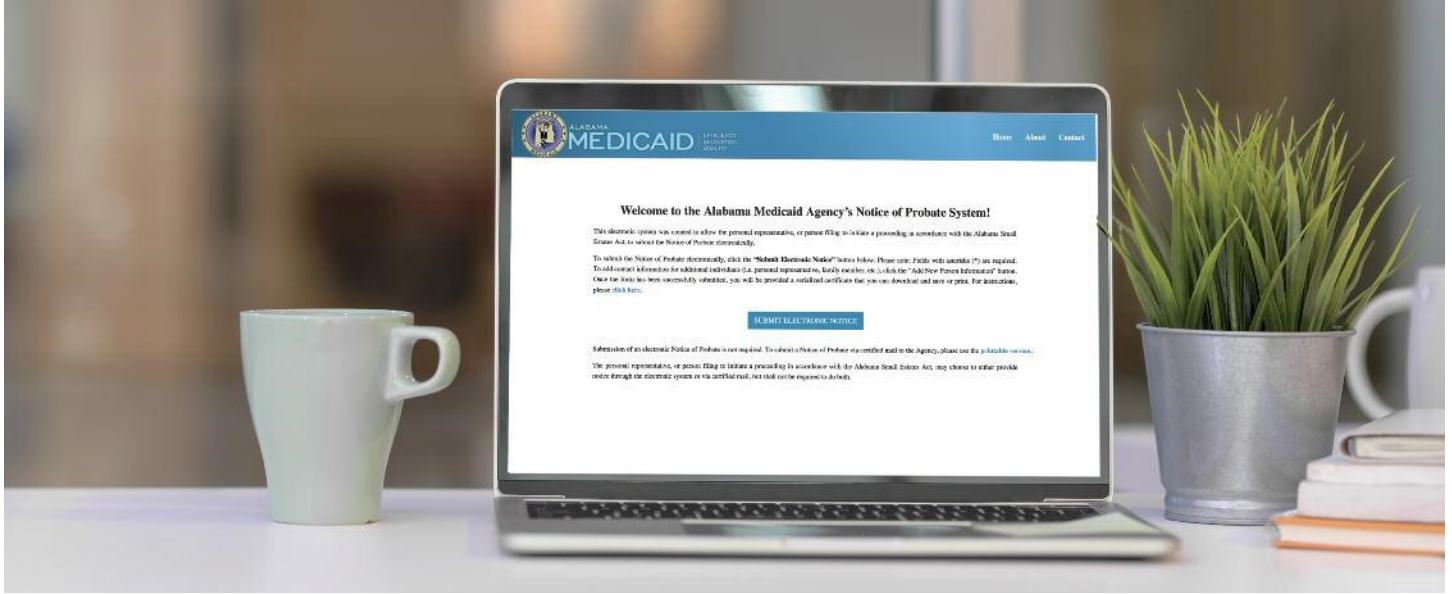
JIM HENDERSON **CLAY HENDERSON**

(334) 478-4147 • www.alis-inc.com



JOIN THE CONVERSATION ON SOCIAL MEDIA

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



Medicaid Simplifies Mandatory Estate Notice Process

By Samuel M. White

In the November 2019 *Alabama Lawyer*, we discussed that Act 2019-489

requires that the Alabama Medicaid Agency (Medicaid) receive notice of all post-death probate estates.¹ Since that article, one of the most common questions lawyers have asked is, “When will the electronic notice system be available?” The default method of providing notice to Medicaid is by certified mailed paper notice.² But the law allows Medicaid to create an optional electronic notice system that alleviates many burdens.³

Notice of probate estates can now be provided to Medicaid at [https:// estatetnotice.medicaid.alabama.gov/](https://estatetnotice.medicaid.alabama.gov/). The estate notice website has fillable fields and provides a serialized certificate after submission. After submission, only the serialized certificate must be filed in the probate court instead of an affidavit and copy of the written notice.⁴ The electronic system streamlines the notice process and saves the costs of certified mailing.

Submitting the notice through the electronic notice system satisfies the notice requirement of Act 2019-489.⁵ But if someone chooses, paper notice can still be sent to Medicaid.⁶ If you have any questions about a notice that has been provided, either written or electronic, please contact the Estate Notice Office at (334) 242-5000. ▲

Endnotes

1. *The Alabama Lawyer*, Volume 80, Number 6, page 450, November 2019.
2. Ala. Act 2019-489 § 1(c).
3. Ala. Act 2019-489 § 1(f).
4. Compare Ala. Act 2019-489 § 1(c) and Ala. Act 2019-489 § 1(f).
5. Ala. Act 2019-489 § 1(f).
6. *Id.*

Samuel M. White



Sam White is an assistant attorney general for the Alabama Medicaid Agency. He is admitted to practice in Alabama, the U.S. Supreme Court, the U.S. Eleventh Circuit, and the U.S. Federal District Court for the Middle District of Alabama. He is a graduate of Towson University and the Thomas Goode Jones School of Law.



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

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



Caleb Hindman
Attorney, Legislative Services Agency
chornsby@law.ua.edu

LEGISLATIVE WRAP-UP

2020 Legislative Recap

This month's column covers noteworthy legislation passed during the 2020 Regular Legislative Session. The first couple months of this session were quite active as always, with 856 bills introduced. Although the legislature's activities were hampered due to the COVID-19 pandemic that seized the state, lawmakers were able to work remotely and returned to the statehouse in May to pass both of the budgets and a large amount of local legislation before adjourning sine die. In all, there were 206 acts, including bills and resolutions. This article will cover select general acts and proposed constitutional amendments that are most likely to be encountered by practitioners around the state. Summaries of all of the general acts and proposed constitutional amendments can be found at <http://lsa.state.al.us> under the Legal Division Publications.

Business Law

Alabama Business and Nonprofit Entities Code (Act 2020-73, HB202)

Representative Bill Poole

This act substantially revises the Alabama Business and Nonprofit Entities Code to: (1) allow business corporations to elect to become benefit corporations; (2) allow electronic business entity filings with the secretary of state; (3) reduce the number of filings currently necessary through county probate judges; (4) establish certain basic standards for all filing instruments to allow for easier electronic transmissions; (5) revise the business entity filing fee schedule; (6) provide a mechanism for the secretary of state to reject certain filing instruments not accompanied by full payment; (7) clarify requirements of certificates of existence for entities; and (8) clarify that volunteer partners, managers, members, governing persons, and other members of a governing authority are considered officers of a qualifying nonprofit entity, thereby recognizing that there are nonprofit partnerships, nonprofit limited partnerships, and nonprofit limited liability companies. Effective: January 1, 2021

Mental Health Law

The Missing and Endangered Persons Alert Act (Act 2020-40, SB12)

Senator Rodger Smitherman

This act provides that an alert shall be activated when a person is reported missing and the person is living with a mental disability, physical disability, Alzheimer's disease, dementia, or autism and is at risk of bodily harm or death. Effective: June 1, 2020

Local Governmental Law

Municipal Occupational Taxes (Act 2020-14, HB147)

Representative Chris Sells

This act prohibits any municipality that does not have an occupational tax in effect prior to February 1, 2020 from imposing an occupational tax unless the municipality is specifically authorized to do so by the legislature through local law. Effective: March 3, 2020

Bonds (Act 2020-121, SB183)

Senator David Sessions

This act authorizes the county commission of any county, without an election, and no later than December 31, 2020, to issue bonds of the county to refund bonds issued by the county prior to January 1, 2011. The act also ratifies and confirms the validity of any refunding bonds originally issued prior to January 1, 2011, with the exception of bonds previously held invalid by the Supreme Court of Alabama and under other certain conditions. Effective: May 18, 2020

Municipal Employment (Act 2020-192, HB479)

Representative Artis McCampbell

This act provides that in Class 4 municipalities with a mayor-council form of government: (1) the prohibition that a person who has been convicted of a felony or an offense involving dishonesty or false statement may not be appointed

to municipal employment is removed; and (2) when certain municipal employees are demoted, the demotion is on a probationary basis for one year. Effective: August 1, 2020

Environmental Law

Landfills (Act 2020-30, HB140)

Representative Alan Baker

This act allows sanitary landfills to be covered with earth or an alternative cover approved by the Alabama Department of Environmental Management in compliance with federal law and United States Environmental Protection Agency rules to achieve a level of performance equal to or greater than earthen cover material. Effective: June 1, 2020

Criminal Law and Procedure

Synthetic Urine (Act 2020-84, SB111)

Senator Arthur Orr

This act: (1) prohibits the knowing manufacture, marketing, sale, distribution, use, and possession of synthetic urine and urine additives to defraud an alcohol, drug, or urine screening test; (2) prohibits a person from knowingly using his or her urine to defraud an alcohol, drug, or urine screening test if the person's urine was expelled or withdrawn before collection of the urine specimen for the test; (3) provides that a person is guilty of a Class B misdemeanor on a first violation and a Class A misdemeanor on a second or subsequent violation; and (4) provides certain exemptions for urine, synthetic urine, and urine additives manufactured and sold solely for educational, medical, or scientific research. Effective: June 1, 2020

Parking Enforcement (Act 2020-130, HB316)

Representative Allen Treadaway

This act provides that in Class 1 municipalities (the City of Birmingham only), parking enforcement officers and traffic enforcement officers, who are not required to be certified by the Alabama Peace Officers' Standards and Training Commission, may cause a motor vehicle to be towed under certain conditions. Effective: August 1, 2020

(Continued from page 377)

Use of Force in Defense of a Person in a Church (Act 2020-16, HB94; Act 2020-90, HB135; and Act 2020-92, HB199)

Representatives Ron Johnson, Jamie Kiel, and Danny Crawford

These acts each propose an amendment to the Constitution of Alabama of 1901, relating to Talladega County, Colbert County, and Limestone County, respectively, to: (1) provide that a person may use deadly physical force, and is legally presumed to be justified in using deadly physical force in self-defense or defense of another person, if the person reasonably believes that another person is using or about to use physical force against an employee, volunteer, or member of a church, or any other person authorized to be on the premises of the church, when the church is open or closed to the public while committing or attempting to commit a crime involving death, serious physical injury, robbery in the first degree, or kidnapping in the first degree; (2) specify that a person has no duty to retreat prior to using the deadly physical force authorized in the amendment; (3) grant immunity from criminal prosecution and civil action for any force, deadly or otherwise, permitted in the amendment; and (4) provide a procedure for the granting of immunity to a person prior to trial. Effective: Contingent upon ratification

Courts

Probate Court Jurisdiction (Act 2020-91, HB138; Act 2020-173, SB256; Act 2020-96, HB370)

Representative April Weaver, Senator Bobby Singleton, and Representative Tim Wadsworth

These acts each propose an amendment to the Constitution of Alabama of 1901, relating to Bibb County, Marengo County, and Walker County, respectively, to allow the judge of probate of each county to exercise equity jurisdiction concurrent with that of the circuit court in cases filed in the probate court of the county if the judge of probate is a member of the Alabama State Bar. Effective: Contingent upon ratification

Domestic Relations Law

Termination of Parental Rights (Act 2019-34, HB157)

Representative Paul Lee

This act: (1) provides that when determining whether to terminate parental rights, the juvenile court is required to consider the best interests of the child, including the child's relationship with his or her foster parents and the existence of any significant emotional ties that have developed between the child and his or her current foster parents; (2) provides that a juvenile court is not required to consider a relative for candidacy to be a child's legal guardian if the relative has not met certain requirements; and (3) provides that an individual whose parental rights have been terminated is not entitled to receive notice of pendency regarding an adoption proceeding involving the child for whom the individual's parental rights have been terminated. Effective: March 11, 2020

Elections Law

Qualification Deadlines for Candidates (Act 2020-39, HB272)

Representative April Weaver

This act revises the deadlines for candidates to qualify for the November 3, 2020 general election schedule to accommodate the dates of the 2020 Republican National Convention. The deadline revision is a one-time occurrence. Effective: March 30, 2020

Emergency Management Law

Statewide Emergency Notification System (Act 2020-85, SB140)

Senator Bobby Singleton

This act: (1) establishes a Statewide Emergency Notification System to facilitate statewide communication of emergency responses, decisions, and warnings of developing emergency situations; and (2) provides for the appropriation of funds to the Alabama Disaster Recovery Fund for the purpose of establishing, implementing, maintaining, and operating the Statewide Emergency Notification System. Effective: March 31, 2020

Education Law

Virtual School Enrollment (Act 2020-68, SB143)

Senator Donnie Chesteen

This act provides that, for the purposes of enrolling in and attending a virtual school operating in this state, the dependents

of a member of the United States Armed Forces are considered residents of Alabama upon the member receiving orders to relocate to this state. Effective: June 1, 2020

Taxation Law

Taxpayer’s Rights (Act 2020-31, HB158)

Representative Paul Lee

This act provides that when the state or a county or municipal governing body enters into a contract or other agreement with a private auditing or collecting firm to audit the books and records of a taxpayer and collect any taxes due, the private auditing or collecting firm is prohibited from recovering certain expenses, including professional service fees, travel costs, salary, or personnel-related expenses, and auditing and collecting costs, from the taxpayer. Effective: March 11, 2020 ▲

Legislative Award Recipients

(These awards are usually presented at the Alabama State Bar Annual Meeting during the Alabama Law Institute’s business meeting. Due to the COVID-19 virus, Sen. Givhan and Rep. Poole will be recognized at a later date.)

The Business Entities Committee of the Alabama Law Institute continues to review and update Alabama’s business entity laws. Since its inception, members of the committee have incorporated technological advances into Alabama’s law, especially with respect to name reservation, which was codified in 2013. In the 2014 legislative session, amendments were passed regarding mergers and conversions for all entities. Also, in 2014 the Alabama Limited Liability Company law was passed, with the Alabama limited partnership law passed in 2016, the Alabama partnership law in 2018, and the Alabama Corporation law in 2019.

In 2020, the Alabama Law Institute’s voluminous Business Entities’ bill, sponsored by Senator Sam Givhan and Representative Bill Poole, passed just before the session was postponed due to the COVID-19 virus. This bill allows for electronic filing of all entity filings; updates definitions to include terms applicable to the allowance of electronic and digital transactions and transmissions of filings, notices, and data; establishes certain basic standards for all filing instruments; provides a mechanism to allow the secretary of state to reject certain filing instruments which are not accompanied by full payment; clarifies the requirements of certificates of existence for entities; removes certain outdated definitions and matters; clarifies that volunteer partners, managers, members, governing persons, and other members of a governing authority are considered officers of a qualifying nonprofit entity, thereby recognizing that there are nonprofit partnerships, nonprofit limited partnerships, and non-profit limited liability companies; and also allows business corporations to elect to become benefit corporations. ▲



Givhan



Poole



OPINIONS OF THE GENERAL COUNSEL

Roman A. Shaul
roman.shaul@alabar.org



Imputed Disqualification— Part-Time Judges and Part-Time Assistant District Attorneys

QUESTIONS:

1. May a partner or associate of a part-time municipal court judge represent clients in municipal court provided that the matter is unrelated to any matter presided over by the partner as a part-time municipal court judge?
2. May a partner or associate of a part-time assistant district attorney represent criminal clients within or outside the jurisdiction of the part-time assistant district attorney?

ANSWERS:

1. Pursuant to Rule 1.10, Alabama Rules of Professional Conduct, a partner

or associate of a part-time municipal court judge may not represent a client in municipal court regardless of whether their law partner has or may have had any involvement as a part-time municipal court judge.

2. A partner or associate of a part-time assistant district attorney may only represent criminal clients in matters in courts not within the jurisdiction of their law partner and that are unrelated to any matter handled by the part-time assistant district attorney.

DISCUSSION:

The use of part-time municipal court judges and part-time assistant district

attorneys is prevalent throughout Alabama, especially in more rural areas of the state. Oftentimes, the attorneys who serve in these roles are members of firms in which the firm's other members continue to represent criminal clients. Clearly, attorneys who serve as either a part-time municipal court judge or part-time assistant district attorney are ethically prohibited from representing criminal clients within the jurisdiction in which they serve. In the case of a part-time assistant district attorney, the attorney is also prohibited by statute from representing criminal clients anywhere in the state. The more difficult issue is how other members of the firm are affected by a law partner or associate's service as a part-time municipal court judge or part-time assistant district attorney.

Specifically, the issue before the Disciplinary Commission is whether the disqualification of the part-time judge or part-time assistant district attorney is imputed to the remaining members of the firm pursuant to Rule 1.10(a). Rule 1.10(a), of the Alabama Rules of Professional Conduct, provides as follows:

RULE 1.10 IMPUTED DISQUALIFICATION:
GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2.

In RO-1999-03, the Disciplinary Commission held that law partners may represent criminal defendants in municipal court, even though a law partner may serve as a substitute municipal court judge, provided that the matters wherein the law partners represent clients are completely unrelated to those wherein the law partner presided as a substitute judge. In reaching that conclusion, the Disciplinary Commission determined that the conflict of interest that would prevent an attorney from representing a client in a court wherein that attorney serves as a judge is a personal rather than general disqualification. As such, the conflict of interest is not imputed to other members of the attorney's firm under Rule 1.10.

However, in determining that such disqualification was personal rather than general, the Disciplinary Commission focused on the frequency of the law partner acting as a substitute municipal court judge. Specifically, the Disciplinary Commission noted that:

[T]he frequency of a lawyer as a part-time judge or administrative hearing officer would dictate whether that lawyer or his law partners could represent clients before those same agencies or boards.

The Commission would reference Rule 8.4 which concludes that it is professional misconduct for a lawyer to state or imply an ability to influence improperly a government

agency or official. Pursuant to this provision, the Commission obviously considers the frequency of appearance as administrative law judge or hearing officer a primary factor in determining whether the law partners of such a hearing officer or substitute judge could represent clients before the same agency or tribunal.

Absent such frequency, the Commission is of the opinion that your infrequent service as substitute municipal court judge does not prohibit your remaining law partners from handling cases for clients appearing in this same court provided that you are in no way involved in or connected with said proceedings.

In the instant matter, a part-time judge serves on a regular and continuous basis as opposed to a rare or infrequent basis as previously considered in RO-1999-03. Therefore, the issue becomes whether regular and continuous service as a part-time judge by a law partner would constitute a mere personal disqualification or would it create a general disqualification that would be subsequently imputed to other members of the part-time judge's law firm.

The Comment to Rule 1.10(a), Ala. R. Prof. C., states in pertinent part that:

The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated.

Where an attorney only serves as a municipal court judge on a rare and infrequent basis, loyalty to the criminal client would not be a concern. Such would not be the case where an attorney serves as a judge on a regular basis. In the case at hand, as the part-time municipal court judge, an attorney would have a duty to uphold the laws and ordinances of that municipality. This duty would not be an infrequent one as discussed in RO-1999-03, but rather a continuous one. Such a duty would limit the attorney's ability to attack such laws and ordinances when representing a client in that court. Moreover, while representing a client, an attorney may be required to attack the credibility of a police officer's testimony one week, and be required the next week to consider that same officer's testimony in a separate matter as a non-biased jurist. Such conflicting roles and responsibilities create a conflict of interest for the attorney under Rule 1.7(b).

Rule 1.7(b), Ala. R. Prof. C., provides as follows:

RULE 1.7 CONFLICT OF INTEREST:
GENERAL RULE

* * * *

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by

(Continued from page 381)

the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

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

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

The Disciplinary Commission believes that an attorney serving as a part-time municipal court judge would be prevented from representing clients in that same court under Rule 1.7(b), Ala. R. Prof. C. Pursuant to Rule 1.10(a), Ala. R. Prof. C., disqualification would be imputed to the judge's law partners and/or associates by virtue of the Rule 1.7 conflict of interest. As such, a partner or associate of a part-time municipal court judge may not represent a client in municipal court regardless of whether their law partner has or may have had any involvement as a part-time municipal court judge.

Likewise, a partner or associate of a part-time assistant district attorney would similarly be precluded both ethically and by statute from representing clients in any court in which the part-time assistant district attorney would have jurisdiction. Alabama Code § 12-17-195 provides that, "Any assistant district attorney who acts as attorney for, represents or defends any defendant charged with a criminal offense of any kind or character in any court, state, municipal or federal, in this state, shall be guilty of a misdemeanor and, upon conviction, shall be fined not less than \$100.00 nor more than \$1,000.00." As such, a part-time district attorney is prohibited by statute from representing any criminal client in any court in the state. The issue then is whether the other members of the firm would also be precluded from representing criminal clients in other jurisdictions.

It appears to the Disciplinary Commission that the majority of states that have addressed this issue have determined that the disqualification is imputed to other members of the attorney's firm. The reasoning most often expressed is that a part-time assistant district attorney's client is the state and that any representation of a client adverse to the state by a part-time assistant district attorney would constitute a conflict of interest under Rule 1.7(a), Ala. R. Prof. C., which provides as follows:

**RULE 1.7 CONFLICT OF INTEREST:
GENERAL RULE**

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

Because the part-time assistant district attorney has a conflict of interest pursuant to Rule 1.7(a), it is necessarily imputed to his law partners under Rule 1.10(a). While such logic is sound, the Disciplinary Commission believes that such an application of Rule 1.7(a) and Rule 1.10(a) is unnecessarily strict and would not serve the true purpose of Rules 1.7(a) and 1.10(a), which is the preservation of client loyalty and confidences.

The State of Alabama is not a single individual but rather a large and complex entity comprised of many different agencies and departments. In RO-89-115, the Disciplinary Commission previously held that a lawyer or law firm may represent an agency of state government in one matter, while simultaneously representing a client adverse to a different state agency in an unrelated matter. To treat the state as a single individual for the purpose of determining conflicts of interests, would be, in the opinion of the Disciplinary Commission, inappropriate and an overbroad application of Rule 1.10(a). In the instant matter, the duty of client loyalty and preservation of client confidences are not imperiled by the representation of the state by one member of the firm and the representation of a criminal client in an unrelated matter in a wholly separate jurisdiction by another member of the firm.

Additionally, the Annotation to the Annotated Model Rules of Professional Conduct, 6th Edition, notes that:

Amendments made to Model Rule 1.10 in 2000 eliminate the imputation of most "personal-interests" conflicts. Pursuant to these amendments, a disqualification attributable to the lawyer's own interests (rather than those of, for example, other clients or former clients) will not be imputed absent a significant threat to the representation.

* * * *

According to Comment [3], this exception recognizes that conflicts should not be imputed "where neither questions of client loyalty nor protection of confidential information are presented . . ."

As such, the Disciplinary Commission finds that the disqualification of a part-time assistant district attorney from representing criminal clients is not imputed to that attorney's law partners as long as the partners are representing criminal clients in matters in courts not within the jurisdiction of their law partner and that are unrelated to any matter handled by that part-time assistant district attorney. ▲



MEMORIALS

Adams, John Quincy

Birmingham

Admitted: September 26, 2008

Died: May 28, 2020

Alvis, Wallace Barry

Birmingham

Admitted: January 28, 1984

Died: June 3, 2020

Barksdale, Jerry Rufus

Athens

Admitted: September 8, 1967

Died: April 7, 2020

Boohaker, Hon. Joseph Louis

Birmingham

Admitted: September 28, 1979

Died: June 6, 2020

Bowers, Hon. Robert Lamar, Sr.

Clanton

Admitted: September 17, 1954

Died: April 29, 2020

Carter, Clinton Chadwell

Montgomery

Admitted: September 30, 1994

Died: April 3, 2020

Conner, Roianne Houlton

Montgomery

Admitted: September 28, 1987

Died: May 25, 2020

Copeland, Paul Whiting

Pike Road

Admitted May 2, 1988

Died: March 9, 2020

Garner, Alan Wayne

Birmingham

Admitted: September 26, 1997

Died: May 17, 2020

Groom, Harlan Hobart, Jr.

Birmingham

Admitted: January 1, 1955

Died: April 25, 2020

Hamilton, Orville Lee, III

Dadeville

Admitted: September 26, 1997

Died: February 6, 2020

Hampe, David Earl, Jr.

Birmingham

Admitted: April 7, 1967

Died: March 7, 2020

Hudgens, Albert Neil

Mobile

Admitted: January 1, 1959

Died: May 9, 2020

Loveless, Ralph Peyton

Pensacola

Admitted: September 4, 1959

Died: March 26, 2020

Pitts, Philip Henry, V

Selma

Admitted: January 1, 1963

Died: May 20, 2020

Pritchard, William Shelton, Jr.

Birmingham

Admitted: March 2, 1950

Died: March 23, 2020

Ray, Borden Martin

Tuscaloosa

Admitted: January 1, 1960

Died: December 29, 2019

Smith, Willard Wheeler

Birmingham

Admitted: March 24, 1971

Died: April 30, 2020

Stanford, Mary Jane

Helena

Admitted: September 26, 1980

Died: October 22, 2019

Topazi, Hon. Gerald Stephen

Birmingham

Admitted: January 1, 1963

Died: June 3, 2020

Trent, Jere Cooper

Athens

Admitted: January 1, 1965


Died: May 29, 2020

Umbach, Arnold William, Jr.

Auburn

Admitted: September 7, 1971

Died: May 30, 2020



NOTICE

DISCIPLINARY NOTICES

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

Notice

- **Frank Brian Rice**, who practiced in Scottsboro and whose whereabouts are unknown, must answer the Alabama State Bar's formal disciplinary charges within 28 days of September 30, 2020 or, thereafter, the charges contained therein shall be deemed admitted and appropriate discipline shall be imposed against him in ASB Nos. 2019-1025 and 2019-1444 before the Disciplinary Board of the Alabama State Bar. [ASB Nos. 2019-1025 and 2019-1444]

Reinstatements

- Meridian, Mississippi attorney **Joseph Anthony Denson**, who is also licensed in Alabama, was reinstated to the active practice of law in Alabama by order of the Supreme Court of Alabama, effective June 29, 2020. Denson was previously suspended from the active practice of law for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [Rule 28, Pet. No. 2020-460]
- Dallas, Texas attorney **Michael Clark Dodd**, who is also licensed in Alabama, was reinstated to the active practice of law in Alabama by order of the Supreme Court of Alabama, effective February 20, 2020. Dodd was previously suspended from the active practice of law for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [Rule 28, Pet. No. 2020-160]
- **William Henry Robertson, V**, formerly of Montgomery, was reinstated to the active practice of law in Alabama by order of the Supreme Court of Alabama, effective May 19, 2020. Robertson filed a petition for reinstatement to the active practice of law in Alabama on January 31, 2020 and was subsequently reinstated by order of the Supreme Court of Alabama. [Rule 28, Pet. No. 2020-221]

Transfer to Inactive Status

- Butler attorney **James David Abston, III** was transferred to inactive status, effective March 12, 2020, by order of the Supreme Court of Alabama. The Supreme Court of Alabama entered its order based upon the March 11, 2020 order of Panel I of the Disciplinary Board of the Alabama State Bar in response to Abston's petition filed with the Office of General Counsel requesting he be transferred to inactive status. [Rule 27(c), Pet. No. 2020-338]

Disbarments

- Montgomery attorney **William Henry Fuller, Jr.** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective April 1, 2020. The Supreme Court of Alabama entered its order based on the Disciplinary Board's order accepting Fuller's consent to disbarment, based upon an investigation involving the misappropriation of client and/or third-party funds involved in real estate transactions and closings. [Rule 23(a), Pet. No. 2020-344; ASB No. 2019-412]
- Montgomery attorney **Walter James, III** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective March 17, 2020. The Supreme Court of Alabama entered its order based on the Disciplinary Board's order accepting James's consent to disbarment, which was based upon an investigation involving James's misappropriation of public funds while an assistant principal at Jefferson Davis High School in Montgomery. [Rule 23(a), Pet. No. 2020-382; CSP No. 2020-300]

Suspensions

- Mobile attorney **Kevin Darrell Graham** was summarily suspended pursuant to Rule 20a, Ala. R. Disc. P., from the


practice of law in Alabama by the Supreme Court of Alabama, effective March 11, 2020. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order that Graham be summarily suspended for failing to respond to requests for information concerning a disciplinary matter. [Rule 20(a), Pet. No. 2020-265]

- The Alabama Supreme Court issued an order suspending McCalla attorney **Samuel Mark Hill** from the practice of law in Alabama for 180 days. However, Hill will only be required to serve 90 days of the 180 days, effective May 28, 2020 through August 26, 2020. The remainder of the suspension shall be held in abeyance, and Hill will serve a two-year probationary period. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order, wherein Hill admitted to violating Rules 3.5 [Impartiality and Decorum of the Tribunal], 8.2(a) [Judicial and Legal Officials], and 8.4(d) [Misconduct], Alabama Rules of Professional Conduct. While representing a client in ongoing litigation, on multiple occasions Hill attempted to communicate ex parte with the trial court and the presiding judge of the circuit. Hill made serious and unfounded allegations of misconduct against the trial judge and opposing counsel. Additionally, Hill failed to comply with a court order regarding discovery after sanctions had been imposed against him and attempted to remove the litigation to federal court without a reasonably objective basis to do so, and, as a result, was sanctioned by the federal court. [ASB No. 2017-1223] ▲

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

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

ALABAMA LAWYER ASSISTANCE PROGRAM





Wilson F. Green

Wilson F. Green is a partner with Fleenor & Green LLP and practices in Tuscaloosa and Birmingham. 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

Statutory Construction

Blankenship v. Kennedy, No. 1180649 (Ala. May 29, 2020)

Two rules of statutory construction are in play; the issue is which to apply. The “series qualifier” principle treats a final phrase as modifying an entire series preceding the phrase, and the “rule of last antecedent” treats the final phrase as modifying only the last in the series. The choice of rule depends on context. In this case, the court borrowed the analysis of these competing principles in *Lockhart v. United States*, 136 S. Ct. 958 (2016), and applied the latter principle.

UIM; Lambert Procedure

Turner v. State Farm Mut. Ins. Co., No. 1181076 (Ala. May 29, 2020)

Under *Ex parte Allstate Ins. Co.*, 237 So. 3d at 207 (Ala. 2017), UIM carrier’s payment of a *Lambert* advance “enjoin[s] the insureds’ consummation of the tortfeasor’s offered settlements; insured’s consummating the settlement thus violated the “consent to settle” provision of the UIM policy.

Statutory (Constitutional) Construction

Kennamur v. City of Guntersville, No. 1180939 (Ala. May 29, 2020)

Under Ala. Const. Sec. 94.01 (Amendment 772), which authorizes municipalities to enter into leases for commercial purposes “of any kind,” a municipality is empowered to enter into lease of real property with a private retail enterprise.

Personal Jurisdiction; Evidence

Ex parte TD Bank, No. 1180998 (Ala. May 29, 2020)

TD was sued for purportedly receiving a fraudulent transfer via wire. TD made initial prima facie showing that it was not subject to personal jurisdiction in an Alabama court through generalized evidence that it had no office in Alabama, no employees, did not advertise, owned no property, and that its incoming wires are processed through a server located in Canada. That evidence was sufficient to shift the burden to plaintiff, which offered no evidence to substantiate any allegations of actions in Alabama.

Juror Misconduct

Resurrection of Life, Inc. v. Dailey, No. 1180154 (Ala. June 5, 2020)

Trial court was within its discretion in denying new trial motion based on jurors’ consultation of Internet sources. Mere exposure to extraneous information does not create “actual prejudice,” and the trial court properly investigated the misconduct during deliberations, voir dired the jury, and within its discretion determined that they could render an impartial verdict.

Statutory Construction; Taxation

Barrett v. Panama City Wholesale, Inc., No. 1190321 (Ala. June 5, 2020)

Under Ala. Code § 40-25-8, the “confiscation” statute, the ADOR may confiscate any product held for distribution on which tobacco taxes have not been paid unless, under section 40-25-8, the product is at the “primary location” of certain permitted jobbers or retailers.

Contractual Attorneys’ Fees

SMM Gulf Coast, LLC v. Dade Capital Corp., No. 1170743 (Ala. June 5, 2020)

De novo review applies to a trial court’s grant or denial of a request for attorneys’ fees recoverable under a contract. In this case, prevailing parties were entitled to contractual attorneys’ fees, and trial court erred in refusing to grant them. Where a contractual fee provision applies to a “prevailing party,” that party is not required to assert entitlement to fees in a counterclaim in an action which will determine whether that party is in fact a prevailing party. The trial court may award fees and costs owed under a prevailing party provision even after final judgment and even if the issue were not reserved. Post-judgment motions under Rule 59 were also not required to raise the issue.

Forum Non Conveniens

Ex parte Allen, No. 1190276 (Ala. June 5, 2020)

MVA occurred in Lee County, and non-party witnesses were situated there; plaintiff sued in Macon County (county of plaintiff’s residence). Held: interests of justice mandated transfer to Lee County under Ala. Code § 6-3-21.1, because connection to Macon County was weak and connection to Lee County was strong. Even though plaintiff lived in Macon County, he worked in Lee County, which further attenuated the connection to Macon County.

Ethics Act; Retaliation; Statutory Construction

Craft v. McCoy, No. 1180820 (Ala. June 5, 2020)

Anti-retaliation provision in the Alabama Ethics Act, § 36-25-24(a) is triggered only on an act of “reporting,” referring only to the filing of a complaint with the Ethics Commission.

Cranman Immunity

Walters v. D’Andrea, No. 1190062 (Ala. June 5, 2020)

Patrol officer who rear-ended motorcycle while officer was en route to station, having completed shift, to turn in end of day paperwork was not entitled to *Cranman* immunity because officer admitted she had completed patrol shift, was returning to precinct, and was not performing any patrol duties.

Need more clients?

Join the ASB Lawyer Referral Service



WHY JOIN?

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

OVERVIEW OF THE PROGRAM

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

Sign me up!

Download the application
at www.alabar.org or
email LRS@alabar.org.

(Continued from page 387)

Preservation of Error; Evidence (MVA)

Hicks v. Allstate Insurance Co, No. 1170589 (Ala. June 19, 2020)

(1) Allstate did not properly preserve as error on appeal the sufficiency of evidence as to causation, for failure to move for partial JML on that ground at the close of the evidence; (2) trial court exceeded its discretion in refusing to admit mortality table into evidence for use by jury in determining damages due to alleged permanent injury, given the state of the record supporting claim to permanent spinal injury.

Premises Liability; Open and Obvious

Daniels v. Wiley, No. 1190208 (Ala. June 26, 2020)

Landlord's failure to eliminate open and obvious danger does not create liability on the landlord, when the condition is demonstrated to be open and obvious to the tenant.

Tax Sale Procedures

Stiff v. Equivest Financial, LLC, No. 1181051 (Ala. June 26, 2020)

Tax sale occurring inside the courthouse instead of "in front of the door of the Courthouse," Ala. Code § 40-10-15, is invalid.

Estates

Ex parte Beamon, No. 1181060 (Ala. June 26, 2020)

Claim brought in Alabama circuit court against PR of estate probated in Georgia was in actuality a claim against the estate. Because no ancillary probate had been commenced in Alabama, the circuit court lacked personal jurisdiction over the claims against the PR because the PR's letters testamentary were issued by a Georgia court; PR had no authority to defend a lawsuit in Alabama.

Relation Back; Fictitious Parties

Ex parte Russell, No. 1180317 (Ala. June 26, 2020)

Because original complaint did not state a claim against an administrator party, trial court erred in denying summary judgment to administrator defendant substituted for a fictitious party after expiration of the limitations period. As to remaining three petitioners (all of whom were added by post-limitations substitution), plaintiff exercised reasonable diligence in discovery by ascertaining their identities and timely substituting.

Forum Non Conveniens

Ex parte Sanders, No. 1190478 (Ala. June 26, 2020)

Plaintiff (Barbour County resident working in Macon County) was injured in Macon County accident involving other vehicles driven by Shelby County and Montgomery County drivers. One non-party witness lived in Montgomery County. Sanders sued in Macon County. Defendants moved to transfer to Montgomery County under Ala. Code § 6-3-21.1. The trial court granted a transfer, and plaintiff petitioned for mandamus. The supreme court granted the writ, reasoning that both Macon and Montgomery counties were proper venues, and neither had "weak" connections to the case.

Contract Construction

Porter v. Williamson, No. 1180355 (Ala. June 26, 2020)

Though this case largely turns on its facts, in an action for specific performance, contract terms must be definite for enforcement.

Medical Liability; Causation

Williams v. Barry, No. 1180352 (Ala. June 26, 2020)

Trial court erred by granting pre-verdict JML to defendant surgeon in AMLA action arising from removal of 17-year-old's gall bladder, which turned out to be normal, following which surgery minor died later in the day of surgery. Plaintiff's expert offered direct testimony concerning breach of the applicable standard of care for failure to order ultrasound on the gall bladder prior to removal. As for proximate cause, when plaintiff's case theory is based on performance of an unnecessary medical procedure, expert testimony is not required to establish causation, though damages based on complications from the unnecessary medical procedure would require expert testimony. In this case, there was sufficient medical evidence of causation that death was proximately caused by surgeon's failure to clip the cystic artery during the procedure.

Insurance; Failure to Procure and Contributory Negligence

Crook v. Allstate Indemnity Co., No. 1180996 (Ala. June 26, 2020)

Exterior deck and boat dock connected by an exterior stairway to an insured home were not "attached structures" under a homeowner's policy for a lake house. Claim of negligent failure to procure insurance were barred by insured's contributory negligence in failing to read policy and ascertain limits of coverage.

Cranman Immunity

Odom v. Helms, No. 1180749 (Ala. June 26, 2020)

Odom (driver) was involved in late-night interstate accident. She was transported from scene by McHenry (state trooper) to a drop-off location at an exit. En route, McHenry detoured and took Odom to a wooded area, where he sexually assaulted her. Odom sued McHenry's supervisors claiming that based on McHenry's violation of the "relay" procedure governing trooper transports of motorists. The circuit court granted summary judgment based on *Cranman* immunity. The supreme court affirmed, holding that there was no evidence the supervisors were aware of the breach of policy, and that the policy applicable to the supervisors was not a detailed checklist.

Conservatorships; Statutory Construction

Ex parte Bashinsky, No. 1190193 (Ala. July 2, 2020)

(1) Former attorney and personal assistant for putative ward were parties entitled to bring action under the Alabama Uniform Guardianship and Protective Proceedings Act, Ala. Code § 26-2A-102(a) and -133(a) (the AUGPPA), because the statute confers any "person interested in the welfare" or "any person interested in the estate, affairs, or welfare" of the putative incapacitated person authority to bring an action for guardianship or conservatorship; (2) Probate court erred by determining

that an "emergency" existed under Ala. Code § 26-2A-107(a) because such an "emergency" requires that there be shown a risk of substantial harm to the putative ward's health, safety, and welfare if immediate relief is not considered; (3) under Ala. Code § 26-2A-102(b) and (c), putative ward was entitled to representation by counsel in the proceedings to determine incapacity, and probate court erred by disqualifying counsel for putative ward and hearing the emergency petition without allowing her the opportunity to secure counsel.

Bessemer Division of Jefferson County

Veitch v. Friday, No. 1180152 (Ala. June 30, 2020)

The court invalidated (on equal protection grounds) a 1953 local act, under which only electors of the Birmingham division selected the nominees for DA for the Bessemer division of Jefferson County.

HIPAA; Ex Parte Interviews with Treating Doctors

Ex parte Freudenberger, No. 1190159 (Ala. June 30, 2020)

Under HIPAA, defendant may conduct *ex parte* interviews with plaintiff's treating physicians, provided the defendants first obtain a "qualified protective order" that places safeguards on the use and dissemination of the plaintiff's private medical information.

Proud graphic designer of
The Alabama Lawyer
magazine for over 30 years.



THE FINKLEA GROUP INC
Creative solutions for your marketing strategies

Design and Marketing Services

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

300 North Dean Road, Suite 5-193 • Auburn, AL 36830
334.799.7843 • gavin@taplink.com

(Continued from page 389)

Estates

Brown v. Berry-Pratt, No. 1180348 (Ala. June 30, 2020)

Administrator of estate had authority to sell, over heirs' objections, real property for the purposes of payment of pre- and post-death debts of the estate, including for the purpose of funding estate administration, pursuant to Ala. Code § 43-2-442.

From the Court of Civil Appeals

Implied Contracts

Autauga Creek Craft House, LLC v. Brust, No. 2180300 (Ala. Civ. App. May 29, 2020)

Implied contract differs from express contract only in manner in which consent is shown. Evidence supported trial court's conclusion *ore tenus* that agreement existed even absent specific agreement as to price. Trial court erred in not awarding attorneys' fees under Prompt Pay Act; remand was necessary to set amount of fees.

Fraud; Reasonable Reliance

Wood v. ADT, LLC, No. 2180739 (Ala. Civ. App. May 29, 2020)

Attorney plaintiff's pre-contract receipt of information which conflicted with initial advertising information triggered duty to inquire further, such that attorney could not reasonably rely on initial alleged misrepresentations in fraud.

Charter Schools

Ex parte Washington County Students First, No. 2190529 (Ala. Civ. App. June 5, 2020)

Alabama Administrative Procedures Act provides for judicial review of certain decisions regarding decisions of the Alabama Public Charter School Commission.

Preliminary Injunctions

City of Trussville v. Personnel Board of Jefferson County, No. 2190075 (Ala. Civ. App. June 12, 2020)

The circuit court's preliminary injunction order did not sufficiently set out the reasons for issuing the injunctions using each of the four elements required to be shown.

Ejectment; Strict Compliance with Mortgage Terms

Barnes v. US Bank, No. 2180699 (Ala. Civ. App. June 26, 2020)

Failure to comply strictly with terms of notice provisions in mortgage instrument rendered foreclosure invalid, and thus relief in ejectment was improper.

Default Judgment; Service of Process

Slocumb Law Firm, LLC v. Greenberger, No. 2190038 (Ala. Civ. App. July 24, 2020)

Person receiving service who told process server she could accept service was shown not to be employed by defendant, and secretary of state's records confirmed that the registered agent of the law firm was not the person receiving service. Service was therefore improper and would not support a default judgment.

From the United States Supreme Court

International Arbitration

GE Power v. Outokumpu Stainless USA, No. 18-1048 (U.S. June 1, 2020)

New York Convention does not conflict with domestic equitable estoppel doctrines, and thus enforcement of arbitration agreements by non-signatories is available in both domestic and international arbitration contexts.

Standing; ERISA

Thole v. US Bank, No. 17-1712 (U.S. June 1, 2020)

Retired plaintiffs who have been paid all of their monthly pension benefits so far, and are legally and contractually entitled to those payments for the rest of their lives, lacked standing to sue under ERISA for mismanagement of plan assets, for want of injury in fact.

Labor and Employment

Bostock v. Clayton County, No. 17-1618 (U.S. June 15, 2020)

Sexual orientation and transgender discrimination constitute discrimination based on “sex” covered by Title VII. When an employer takes adverse employment action against a gay or transgender person, the employer is taking an action motivated by an animus which would not exist if the gender of the person were different, and thus the action is based on gender.

Environmental Law

***U.S. Forest Service v. Cowpasture River Preservation Assn.*, No. 18-1584 (U.S. June 15, 2020)**

Because Department of Interior’s decision to assign responsibility over the Appalachian Trail to the National Park Service did not transform the trail into land within the National Park System, Forest Service had authority to issue special-use permit for a ROW for a pipeline under the trail.

DACA; Administrative Law

***DHS v. Regents of Univ. of Cal. System*, No. 18-587 (U.S. June 18, 2020)**

(1) DHS’s decision to rescind the DACA program is subject to judicial review under the Administrative Procedures Act; (2) DHS’s decision to rescind the program was arbitrary and capricious; judicial review of agency action is limited to the material available to the decision-maker at the time of the agency action, but the Acting Secretary failed to consider important information available at the time.

Securities

***Liu v. SEC*, No. 18-1501 (U.S. June 22, 2020)**

As “equitable relief” in civil proceedings, 15 U.S.C. § 78u(d)(5), the SEC’s obtaining a disgorgement award that does not exceed a wrongdoer’s net profits and is awarded for victims is permissible.

Immigration; Habeas Corpus

***DHS v. Thuraissigiam*, No. 19-161 (U.S. June 25, 2020)**

8 U.S.C. § 1252(e)(2), which limits judicial review to asylum determinations in connection with removal proceedings in a petition for a writ of habeas corpus, does not violate due process or the Suspension Clause.

Separation of Powers

***Seila Law LLC v. CFPB*, No. 19-7 (U.S. June 29, 2020)**

The structure of the Consumer Financial Protection Bureau’s director’s position (created under the Dodd-Frank Act) is unconstitutional; leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates separation of powers. However, the director’s removal protection is severable from the other provisions of the Act that establish the CFPB and define its authority.

Abortion

***June Medical Services, LLC v. Russo*, No. 18-1323 (U.S. June 29, 2020)**

The Court invalidated a Louisiana “admitting privileges” abortion law which was almost word-for-word identical to a Texas law invalidated in *Whole Woman’s Health v. Hellerstedt*, 579 U.S. — (2016). In *Hellerstedt*, the Court invalidated the Texas law, with the Chief Justice and three other justices dissenting. In this case, the Court invalidated the Louisiana law 5-4, with the Chief Justice concurring based on *stare decisis*.

First Amendment (Speech)

***Agency for International Development v. Alliance for Open Society International*, No. 19-177 (U.S. June 30, 2020)**

Foreign citizens outside U.S. territory do not possess rights under the U.S. Constitution.

First Amendment (Religion)

***Espinoza v. Montana Dept. of Revenue*, No. 18-1195 (U.S. June 30, 2020)**

“Blaine Amendments” (existing in 30 state constitutions) generally prohibit government aid to schools controlled in whole or in part by a church. A Montana scholarship program prohibited families from using state-sponsored scholarships at religious schools. The Court held the program unconstitutional; disqualifying otherwise eligible recipients from a public benefit “solely because of their religious character” imposes “a penalty on the free exercise of religion that triggers the most exacting scrutiny.”

Trademark

***USPTO v. Booking.com*, No. 19-46 (U.S. June 30, 2020)**

A generic name (the name of a class of products or services) is ineligible for federal trademark registration. Booking.com, however, is not necessarily generic; a term styled “generic.com” is a generic name for a class of goods or services only if the term has that meaning to consumers.

Electoral College

***Chiafalo v. Washington*, No. 19-465 (U.S. July 6, 2020)**

Nothing in the Constitution expressly prohibits states from taking away presidential electors’ voting discretion. The Court upheld Washington state’s legislation which enforces an elector’s pledge to support his party’s nominee (and the state voters’ choice) for president in a “faithless elector” statute.

TCPA

***Barr v. American Assn. of Political Consultants*, No. 19-631 (U.S. July 6, 2020)**

Under a 2015 amendment to TCPA, robocalls for collection of government debt are allowed. Political organizations challenged the amendment on First-Amendment content-based discrimination grounds. The Supreme Court agreed, concluding (1) the government-debt exception is content-based and thus subject to strict scrutiny, and it fails such review, and (2) the government-debt exception is severable from the remainder of the TCPA.

(Continued from page 391)

Free Exercise; ACA

***Little Sisters of the Poor v. Pennsylvania*, No. 19-431 (U.S. July 8, 2020)**

Multiple departments empowered the Health Resources and Services Administration with discretion to exempt religious employers, such as churches, from providing contraceptive coverage under the ACA. Pennsylvania sued, claiming regulation was unlawful because the departments lacked statutory authority under either the ACA or the Religious Freedom Restoration Act to promulgate the exemptions. Held: regulations were within the departments' statutory authority and were properly adopted under APA.

First Amendment

***Our Lady of Guadalupe School v. Morrissey-Berru*, No. 19-267 (U.S. July 8, 2020)**

Elementary school teachers at religious schools who provide some religious instruction to students, and whose employment agreements set out schools' faith-based mission and imposed commitments regarding religious instruction, worship, and personal modeling of the faith, cannot claim the protection of federal employment discrimination law under the "ministerial" exception created by case law.

Presidential Powers; Subpoenas

***Trump v. Vance*, No. 19-635 (U.S. July 9, 2020)**

Article II and the Supremacy Clause do not categorically preclude, or require a heightened standard for, the issuance of a state criminal subpoena to a sitting president.

Presidential Powers; Subpoenas

***Trump v. Mazars USA, LLP*, No. 19-715 (U.S. July 9, 2020)**

Congressional subpoenas to the president regarding his tax returns must appreciate the delicate balance of power among coordinate branches of government. Whether a subpoena directed at the president's personal information is "related to, and in furtherance of, a legitimate task of the Congress, courts must take adequate account of the separation of powers principles at stake, including both the significant legislative interests of Congress and the unique position of the president.

From the Eleventh Circuit Court of Appeals

Qualified Immunity; Impact of Inconclusive Video Recordings

***Patel v. City of Madison*, No. 18-12061 (11th Cir. May 27, 2020)**

District court properly denied summary judgment to officer in action by injured detainee in excessive force case. Video recordings from two police dashboard cameras were unable to resolve definitively the parties' dispute about whether plaintiff resisted officer's efforts to secure and frisk him.

Bankruptcy

***In re Cumbess*, No. 19-12088 (11th Cir. June 3, 2020)**

Under 11 U.S.C. § 365(p)(1), "[i]f a lease of personal property is rejected or not timely assumed by the trustee . . . the leased property is no longer property of the estate."

Qualified Immunity

***King v. Pridmore*, No. 18-14245 (11th Cir. June 5, 2020)**

King was reluctantly helping police catch fugitive (King's partner in crime); fugitive was shot 13 times and King was shot several times and seriously injured. King sued officers, asserting § 1983 and state-law claims. The district court granted summary judgment to officers, and the Eleventh Circuit affirmed. Officers' telling King he would be charged if he did not cooperate was not unconstitutional, and there were no threats of violence against King.

Labor and Employment

***Fernandez v. Trees, Inc.*, No. 18-12239 (11th Cir. June 9, 2020)**

After being fired, Fernandez sued Trees for hostile work environment and national origin discrimination claims under Title VII. The district court granted summary judgment, but the Eleventh Circuit reversed as to hostile work environment. There was no direct evidence of discrimination based on hostile environment: Supervisor's statement "new

policy in the company: no more Cuban people” might provide direct evidence for a failure-to-hire claim, but not for a firing claim. As to hostile work environment, however, there was substantial evidence to support both subjective hostility (based on Fernandez’s perception of the environment) and the four factors for objective hostility—especially with a frequent number of derogatory terms regarding Cubans.

Sanctions

Hyde v. Sauta, No. 15-13010 (11th Cir. June 17, 2020)

District court has the power to grant or deny sanctions (under the court’s inherent powers or 28 U.S.C. § 1927) when it lacks subject-matter jurisdiction over the underlying case.

COVID; Prison Conditions

Swain v. Junior, No. 20-11622 (11th Cir. June 15, 2020)

Medically vulnerable inmates who challenged the conditions of confinement at Miami’s Metro West jail sought and obtained preliminary relief, enjoining the county and Junior to take a number of precautionary measures to halt COVID spread. The Eleventh Circuit reversed, holding plaintiffs did not show a substantial likelihood of success, because they had to (but did not) demonstrate defendants’ deliberate indifference.

False Claims Act

Ruckh v. Salus Rehabilitation, LLC, No. 18-10500 (11th Cir. June 26, 2020)

(1) Litigation Funding Agreement did not vitiate plaintiffs’ standing to represent the interests of the government as a relator, because the relator retains sole authority over the litigation, financing counterparty had no power to control or influence it, and nothing in the FCA precludes such a transference. (2) Evidence was sufficient to support jury’s determination of FCA liability based on false implied certification, based on plaintiff’s expert’s testimony and review of records which reflected upcoding and billing violations in about one-sixth of reviewed cases. Those representations were material to the government’s payment decisions because different reimbursement rates applied to the codes which corresponded to greater therapeutic time. (3) Evidence of “ramping” was also sufficient; that is the impermissible, artificial timing of services to coincide with Medicare’s regularly scheduled assessment periods and thereby maximize reimbursements. (4) Evidence was sufficient to impose liability on management company for “caus[ing] to be presented” false claims; deciding an issue of first impression, proximate cause standards apply to “cause to be presented” claims. Under that standard, the evidence was sufficient that management company caused the submission of false claims. Ultimately, the Court held that on remand the district court must reinstate the jury’s verdict in the amount of \$85,137,095 and directed the district court to enter judgment on those claims, after applying trebling and statutory penalties.

Derivative v. Direct Claims; Securities

Freedman v. majicJack VocalTec Ltd., No. 18-15303 (11th Cir. June 25, 2020)

(1) The law of the state of incorporation determines whether an action is properly deemed derivative or direct, which in this case would be Israeli law. (2) Under Florida’s choice of law rules (i.e. the forum court’s choice of law rules), a court is to adhere to the “internal affairs” doctrine when faced with a question concerning corporate powers - which would also counsel in favor of applying Israeli law. (3) District court properly relied upon and applied English translations of two decisions rendered by the courts of Israel, under which a shareholder seeking to sue on direct claim must “sustain damage independent of the damage the company sustains[,]” whereas a claim is derivative where “all the shareholders [are generally] damaged to the same degree.” (4) Claim arising from an allegedly misleading proxy statement was derivative. (5) There were no allegations of special injury, thus confirming the derivative nature of the claim.

Removal

Bowling v. US Bank, No. 17-11953 (11th Cir. June 24, 2020)

Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743 (2019), under which counterclaim defendant may not remove an action under 28 U.S.C. § 1441(a), abrogated *Carl Heck Engineers, Inc. v. Lafourche Parish Police Jury*, 622 F.2d 133 (5th Cir. 1980), the longstanding circuit precedent authorizing removal by third-party counterclaim defendants.

Qualified Immunity; Monell

Grochowski v. Clayton County, No. 18-14567 (11th Cir. June 22, 2020)

(1) Constitution does not require in-person security screenings or consideration of violent misdemeanors before classifying a detainee for housing and cellmate assignment, and hourly rounding for supervision of prisoners is Constitutionally adequate. (2) Claims against the county failed to establish any Constitutional violation, in that jail design claim amounted to an argument that the Constitution requires continuous observation of double-celled inmates, which it does not, and inadequate funding and staffing claims failed because hourly monitoring, which is Constitutionally adequate, was funded and being performed.

Standing

Gardner v. Mutz, No. 19-10461 (11th Cir. June 22, 2020)

Individuals and organizations who objected to city’s decision to relocate Confederate monument from one city park to another lacked standing to sue on claims that relocation violates their rights under the First Amendment’s Free Speech Clause and the Fourteenth Amendment’s Due Process Clause.

(Continued from page 393)

Social Security

***Noble v. Commissioner*, No. 18-13817 (11th Cir. June 30, 2020)**

ALJ gave appropriate consideration to VA's determination of applicant's inability to work due to disability and thus entitled to veterans' benefits. Substantial evidence, in the form of the medical records that postdate the VA's decision, supported the ALJ's rejection of the VA's disability decision as determinative of whether Noble was disabled for Social Security purposes.

Forum Selection Clauses

***Deroy v. Carnival Corp.*, No. 18-12619 (11th Cir. June 30, 2020)**

Under this forum-selection clause's plain language, when jurisdiction for a claim could lie in federal district court with a correctly-pleaded claim, federal court is the only option for plaintiff.

Spokeo Standing; FDCPA

***Trichell v. Midland Credit Mgmt., Inc.*, No. 18-14144 (11th Cir. July 6, 2020)**

Plaintiffs who received debt-collection letters on time-barred debt which they claimed were misleading, but by which they themselves did not claim to have been misled, lacked Article III standing under *Spokeo*. Recognizing a Circuit split, the Court held that "a statutory violation that poses a risk of concrete harm to consumers in general, but not to the individual plaintiff, cannot fairly be described as causing a particularized injury to the plaintiff." The Court also rejected standing arguments based on claimed "informational injury."

Qualified Immunity

***Williams v. Aguirre*, No. 19-11941 (11th Cir. July 13, 2020)**

District court properly denied summary judgment to officers who, after firing on and injuring suspect, obtained a probable cause warrant on a bogus attempted murder charge relating to the officer, leading to suspect's 16-month detention due to an inability to make bond. The Court rejected the application of the "any-crime rule," under which an officer is not liable for malicious prosecution relating to an underlying arrest so long as probable cause existed to arrest the suspect for some crime (carrying a concealed firearm in this case). Fourth Amendment malicious prosecution requires the plaintiff to prove that the judicial determination of probable cause underlying his seizure was invalid; suspect offered substantial

evidence (1) that the legal process justifying his seizure was constitutionally infirm and (2) that his seizure would not otherwise be justified without legal process.

Appellate Jurisdiction; Motions for Reconsideration

***Corley v. Long-Lewis, Inc.*, No. 18-10474 (11th Cir. July 16, 2020)**

(1) Order granting plaintiff's voluntary dismissal without prejudice, Fed. R. Civ. P. 41(a)(2), is a "final decision[]," 28 U.S.C. § 1291. (2) There is territorial jurisdiction under 28 U.S.C. § 1294 to review an interlocutory decision by an out-of-circuit district court that merged into the final judgment of a district court inside the Circuit. (3) Plaintiff had standing to appeal from final judgment triggered by plaintiff's own voluntary dismissal, when subject of appeal was interlocutory order merged into the judgment. (4) District court acted within its discretion in refusing to consider argument made for the first time on motion for reconsideration.

Rational Basis Review; Standing

***Georgia Electronic Life Safety & System Assn v. City of Sandy Springs*, No. 19-10121 (11th Cir. July 17, 2020)**

Two alarm companies and a trade association challenged municipal ordinance subjecting alarm companies to fines when a false alarm is sounded at a serviced property. Held: there was no substantive due process claim, because the ordinance is an economic regulation surviving rational basis review. There was no standing as to the procedural due process claim, based on insufficient procedural safeguards in the ordinance's appeal process, because plaintiffs never attempted an appeal.

Eighth Amendment

***Mosley v. Zachary*, No. 17-14631 (11th Cir. July 24, 2020)**

Prison official, for purposes of an Eighth Amendment deliberate indifference claim, upon being informed of an inmate's threat to kill a fellow inmate, is not necessarily required to place the at-risk inmate in immediate protective custody.

Voting Rights Act

***Greater Birmingham Ministries v. Secretary of State of Alabama*, No. 18-10151 (11th Cir. June 21, 2020)**

The Court upheld Alabama's 2011 Photo Voter Identification Law, Ala. Code § 17-9-30, requiring voters to present photo ID when casting in-person or absentee votes.

Bar Orders

SEC v. Quiros, No. 19-11409 (11th Cir. July 20, 2020)

District court abused its discretion in approving a settlement among some parties containing a bar order adversely impacting the claims of non-settling parties. A bar order is allowed only where “essential,” and if the parties would have still resolved their dispute without entry of the bar order, the order is not essential.

RECENT CRIMINAL DECISIONS

From the United States Supreme Court

Ineffective Assistance

Andrus v. Texas, 140 S. Ct. 1875 (2020)

Capital murder defendant’s defense counsel rendered ineffective assistance by failing to investigate mitigating evidence and by not rebutting aggravating evidence during the sentencing phase of trial.

Habeas Petitions

Banister v. Davis, 140 S. Ct. 1698 (2020)

Motion to alter or amend a court’s judgment in federal habeas proceedings under Fed. R. Civ. P. 59(e) does not constitute a second or successive habeas petition under 28 U.S.C. § 2244(b).

Indian Sovereignty; Treaties

McGirt v. Oklahoma, No. 18-9526 (U.S. July 9, 2020)

Under the Major Crimes Act, 18 U.S.C. § 1153(a), land reserved for the Creek Nation since the 19th century remains “Indian country,” such that prosecutions of Native Americans allegedly committing crimes in the “Indian country” must take place in federal court. (This apparently means that about half of the State of Oklahoma constitutes “Indian country” as well.)

From the Eleventh Circuit Court of Appeals

Sentencing; First Step Act

USA v. Tigua, No. 19-10177 (11th Cir. June 26, 2020)

The Act’s amendment of the statutory safety-valve provision “shall apply only to a conviction entered on or after the date of [its] enactment” on December 21, 2018. First Step Act § 402(b). Held: defendant who has pleaded guilty before enactment of the First Step Act, but is sentenced after its enactment does not qualify for the safety valve.

First Step Act; Resentencing

USA v. Denson, No. 19-11696 (11th Cir. June 24, 2020)

The Act does not require district courts to hold a hearing with the defendant present before ruling on a defendant’s motion for a reduced sentence under the Act.

From the Alabama Supreme Court

Bail

Ex parte Barnes, No. 1180802 (Ala. June 5, 2020)

Trial court could not *sua sponte* revoke non-capital murder defendant’s bail, because record did not show failure to comply with or violation of conditions of release or any

Patent attorney. Jazz enthusiast. Philanthropist.
A life well planned allows you to
LIVE YOUR LIFE.

If there's one thing we all share, it's that our lives are all unique. Backed by sophisticated resources, a Raymond James financial advisor can help you plan for what's important to you. That's **LIFE WELL PLANNED.**

STUART Y. JOHNSON, J.D., AAMS®
Financial Advisor
2900 Hwy. 280, Suite 100, Birmingham, AL 35223
D 205.802.4228 // O 205.879.0016
stuart.johnson@raymondjames.com
raymondjames.com/stuartjohnson

RAYMOND JAMES

© 2020 Raymond James & Associates, Inc., member New York Stock Exchange/SIPC.
20-BR3JK-0013 TA 5/20

(Continued from page 395)

misrepresentations or omissions when bail was initially granted. Defendant's decision to change defense counsel and request to continue were not sufficient grounds to revoke his bail.

Double Jeopardy

Ex parte Blackman, No. 1190105 (Ala. June 12, 2020)

Trial court's *sua sponte* withdrawal of defendant's guilty plea subjected defendant to double jeopardy. Defendant could obtain mandamus relief even though petition was untimely filed, because double jeopardy claim implicated trial court's jurisdiction.

Direct Contempt

Ex parte Dearman, No. 1180911 (Ala. June 26, 2020)

The court reversed the circuit court's order of direct contempt against attorney for interposing objection based on evidentiary rules at probation revocation hearing, at which Rules of Evidence do not apply. Attorney's actions were not sufficient to rise to the level of disturbing the business of the court.

From the Court of Criminal Appeals

Vehicular Homicide

State v. K.E.L., CR-18-1177 (Ala. Crim. App. July 10, 2020)

Although defendant possessed standing to challenge the vehicular homicide statute, Ala. Code § 32-5A-190.1, as unconstitutionally vague, she was not entitled to dismissal of her charge: statute's phrase "may be guilty of homicide by vehicle" can be reasonably construed as mandatory (i.e., "is guilty") in order to effectuate the legislative intent.

Felony Murder; Ineffective Assistance

Contreras v. State, CR-19-0298 (Ala. Crim. App. July 10, 2020)

Ala. Code § 13A-6-2(a)(3)'s residual clause defining felony murder as an act causing death while committing "any other felony clearly dangerous to human life" is not unconstitutionally vague, because Alabama "uses real-world conduct, not an idealized version of the crime," to gauge the crime's risk. Defense counsel was not ineffective by not raising this claim.

Ineffective Assistance

Brooks v. State, CR-16-1219 (Ala. Crim. App. July 10, 2020)

Defense counsel was not ineffective by not challenging the legality of the defendant's arrest; arresting officers acted within limited scope of authority given to private citizens to arrest when they conducted a warrantless arrest outside of their jurisdiction.

Reckless Manslaughter

Grant v. State, CR-18-0355 (Ala. Crim. App. July 10, 2020)

Trial court properly instructed the jury regarding the lesser-included offense of reckless manslaughter. The evidence showed that the defendant led another defendant to the victim's home, as if "leading the slaughterer to the lamb[.]" and the other defendant killed the victim.

Hearsay

Baggett v. State, CR-18-1097 (Ala. Crim. App. July 10, 2020)

Sex abuse victim's prior written statements were not hearsay under Ala. R. Evid. 801 (d)(1)(B), because he was subject to cross-examination and the statements were offered to rebut a charge of recent fabrication or improper influence or motive.

"Stand Your Ground"

Robertson v. State, CR-18-0476 (Ala. Crim. App. July 10, 2020)

Though it instructed the jury regarding self-defense, trial court erred by not also giving an instruction regarding the "Stand Your Ground" defense under Ala. Code § 13A-3-23 in this manslaughter case.

Solicitation to Commit Murder

Lang v. State, CR-18-0612 (Ala. Crim. App. May 29, 2020)

The court reversed and rendered the defendant's conviction of solicitation to commit murder; evidence regarding his prior antagonism toward the victim did not establish his commission of the offense.

New Trial

Ex parte State, CR-19-0588 (Ala. Crim. App. May 29, 2020)

State was not entitled to mandamus relief from the trial court's grant of defendant's timely motion for a new trial following his capital murder conviction; authority to grant a new trial falls "almost entirely" within trial court's discretion.

Communication to Clergy Privilege

Lane v. State, CR-15-1087 (Ala. Crim. App. May 29, 2020)

Trial court properly refused to permit defendant to invoke the communications-to-clergy privilege under Ala. R. Evid. 505. Chaplain could properly testify that the defendant sought his assistance in collecting proceeds of victim's life insurance policy; conversation was for secular purposes not related to religious or spiritual concerns.

Sixth Amendment

Morgan v. State, CR-18-0169 (Ala. Crim. App. May 29, 2020)

While defendant has a right under the Sixth Amendment to set the objective of his defense, defense counsel does not violate that right by advising the trial court, but not the jury, that he believes that self-defense, rather than absolute innocence, is his only viable defense.

Sentencing; Plea Agreements

Saulter v. State, CR-18-0986 (Ala. Crim. App. May 29, 2020)

Trial court abused its discretion in refusing to permit defendant to withdraw guilty plea after not sentencing him consistent with his plea agreement.

Terrorist Threat

N.C. v. State, CR-17-1134 (Ala. Crim. App. May 29, 2020)

Evidence that a juvenile posted photo of mass shooting in private social media conversation, then deleted it when he saw it was not received as a joke, did not suffice to constitute "terroristic threat" under Ala. Code § 13A-10-15 (a).

Search and Seizure

Earl v. State, CR-18-0332 (Ala. Crim. App. May 29, 2020)

Use of drug-sniffing dog to sniff the door seams of an apartment constituted an illegal warrantless search.

Parole

P.C. v. State, CR-19-0297 (Ala. Crim. App. May 29, 2020)

Defendant was entitled to withdraw guilty plea to allowing a child to engage in the production of obscene matter, a violation of Ala. Code § 13A-12-196, because he was not advised that he would be ineligible for parole under Ala. Code § 15-22-27.3. ▲



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



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



ABOUT MEMBERS, AMONG FIRMS

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

Among Firms

Balch & Bingham LLP announces that **James T. Dawkins** joined the Birmingham office.

CENTRL, Inc. announces that **Elena A. Lovoy** joined as chief privacy officer and compliance counsel.

Kathryn Crawford Gentle announces the opening of **Crawford Gentle Law PC** at 4505 Pine Tree Cir., Ste. 121, Vestavia 35243. Phone (205) 208-1800. **Emily Peake Mauck** joined as an associate.

Dominick, Feld, Hyde PC of Birmingham announces that **Richard W. Theibert** joined of counsel.

Gaines Gault Hendrix PC announces that **Michael J. Marable** joined as an associate in the Birmingham office.

The **Harris Firm LLC** announces that **Devin O'Dell** and **John Tyler Winans** joined the Montgomery office as associates.

Morris, Cary, Andrews, Talmadge & Driggers LLC announces the opening of a Fairhope office at 21 South Section St., 36532. Phone (334) 702-0000.

The Nomberg Law Firm of Birmingham announces that **Steven D. Altmann** joined the firm. ▲



WORKING REMOTELY?

NEED TO DEPOSE WITNESSES, EXPERTS, OR CONNECT REMOTELY FROM THE SAFETY OF YOUR HOME OFFICE? **TRY VERITEXT VIRTUAL!**



REGISTER FOR OUR
COMPLIMENTARY
REMOTE PROCEEDING CLE
[VERITEXT.COM/CLE](https://www.veritext.com/cle)

Proceed Safely.

Veritext's virtual technology provides a convenient solution for deposing remote witnesses domestically or internationally. Easily connect with just your web-cam-equipped laptop, computer or mobile device.



NO TRAVEL NECESSARY

Avoid the cost and health risks of travel by remote connection.

ACCOMMODATES UP TO 100 PARTICIPANTS

Streaming realtime video lets you view witness demeanor and body language for up to 100 participants.

EXHIBIT SHARING

Securely view, share, annotate and digitally stamp exhibits. Easily delegate control to other participants.

STREAMING REALTIME TEXT

Scrolling text of the deposition can be highlighted, annotated and saved, without the need for additional software.

WORLD-CLASS SECURE PLATFORM

Built on a user-friendly platform. Our team follows secure protocols to ensure your proceeding is private.

ON-CALL TECHNICAL SUPPORT

24/7 technical support available to assist you in participating from wherever there is an internet connection.

SCHEDULE YOUR REMOTE PROCEEDING: calendar-al@veritext.com | (877) 373-3660

BIRMINGHAM | DOTHAN | HUNTSVILLE | MOBILE | MONTGOMERY | TUSCALOOSA

Did you know...

50% of confirmed Data breaches target small businesses

& 60% of small businesses fail within 6 months of a breach



Cyber Small Business Solution

What does Cyber Insurance cover?

- The cost to respond and recover from a data breach
- Theft of funds electronically or through fraudulent instructions
- Cost of ransom if your computer is encrypted
- Business interruption if your computer systems are damaged due to an attack

What are the Policy Details?

- Limit of Liability per business options: \$1,000,000 (annual aggregate)
- Coverage territory is worldwide
- No aggregate limit on master policy
- Eligibility: US businesses with less than \$50,000,000 in annual revenue

**Application
Process
takes only
Five Minutes**

For further information
and to apply visit
isi1959.com/CLI

To speak with a member
service agent call ISI at
1-888-474-1959

