

THE

ALABAMA LAWYER

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Historic railroad station in Decatur, Alabama

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

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A Year of Challenges Brought Opportunities for Success

Those who know me well know that I often speak of life lessons taught by my parents, who unfortunately are no longer with us. My dad, affectionately known in Eufaula as “Big Bob,” loved various sayings and quotes, which we compiled in a short book. My friends call them “Big Bobisms.” One of his favorites and mine is “your attitude, not your aptitude, determines your altitude.” My mom also taught my siblings and me that we could accomplish anything if we worked hard and never quit. Armed with my parents’ guiding wisdom and the help of our amazing bar leadership, we were able to successfully navigate and overcome the challenges presented this year.

I started my presidency with three main initiatives: unity, diversity, and inclusion; helping the legal profession adapt to a new norm; and lawyer public relations with an emphasis on pro bono service. I express my appreciation to all of the people who helped lead these initiatives; without them, we would not have accomplished so much.

Three dedicated task forces, the Presidential Council on Unity and Diversity led by Cassandra Adams, Hilaire Armstrong, and Ricardo Woods; the COVID-19 Task Force led by Tom Perry, Jeanne Rizzardi, and Clay Martin; and the COVID-19 Bench and Bar Task Force led by Christy Crow, Melody Eagan, and Circuit Judge

Jim Hughey, guided us through these turbulent times.

As discussed in my last article, the bar honored one of the greatest civil rights leaders of our history, Fred Gray, and will soon break ground on the Fred Gray Courtyard adjacent to the state bar building. We sponsored the free "Unity Matters" CLE series which addressed diversity and unity issues.

I am also very proud of the COVID-19 Bench & Bar Task Force's work in preparing a Zoom virtual hearing handbook and creating a plan to safely re-start jury trials.¹ The outstanding staff at the Alabama State Bar continues to update a very useful COVID-19 resource page on the bar's website.²

As part of our adaption to working remotely, we started a virtual CLE

program allowing attorneys to obtain all of their required hours for free. Because of its popularity (over 3,000 lawyers completed more than 20,000 hours with the program last year), this valuable member benefit is also available this year. Other cost-saving measures that we implemented this year included lowering the annual dues to \$300, reevaluating how to efficiently and cost-effectively operate the state bar, and increasing the number of member benefits.

Just when I began getting comfortable with our progress on these initiatives, another unexpected thing happened: we began searching for a new executive director. During this process, former Montgomery County District Attorney Ellen Brooks agreed

to leave her retirement to take on the role of interim executive director. After being without an executive director for approximately four months, Ellen immediately got our ship moving in the right direction. Her management style and people skills are second to none. I have learned a lot from my friend, Ellen, and I am immensely grateful for all of her hard work.

On April 23, the Board of Bar Commissioners, at the recommendation of the Executive Director Search Task Force, unanimously chose Judge Terri Bozeman Lovell to lead the Alabama State Bar. Judge Lovell is the first female executive director of our organization. Prior to her hiring, she served as the presiding circuit judge in the second judicial circuit, which consists



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of Butler, Crenshaw, and Lowndes counties. I am ecstatic to welcome Judge Lovell and look forward to her great leadership in the years to come.

I am grateful to our Lawyer Public Relations Task Force led by Sara Williams, George Parker, and Mike Ermert for spreading the positive message about lawyers to the public. Due to the hard work of this task force, we have been able to give presentations to numerous civic organizations throughout the state about the importance of the court system and the legal profession in Alabama. Our goal is to present this message in every Alabama county by the time this article reaches you. We

have received overwhelmingly positive feedback for this presentation, which showcases the billions of dollars that Alabama lawyers and the court system contribute to our state's economy each year, highlights the leadership of lawyers in charitable and civic causes, and educates the public about the tens of millions of dollars in pro bono lawyer time that is donated each year.

This is starting to feel like one of those award speeches where they give you less than a minute to thank the hundreds of people who helped make the award possible. Please know that I am grateful to every single bar member who assisted us this year. I salute all of

you who continue to make our motto, "Lawyers Render Service," a reality through volunteer contributions to your community and profession. As a reminder, Lawyers Render Service is also the name of our newly-formed 501(c)(3) charity designed to provide financial help to attorneys experiencing serious life-changing events.³

I specifically recognize my Executive Council for all of their hard work, advice, and willingness to support the good ideas and cast aside the not-so-good: Gibson Vance, Christy Crowe, Diandra Debrosse, Taze Shepard, Cliff Mendheim, Jeff Bowling, Roman Shaul, Ellen Brooks, Leon Hampton, and Evan Allen.

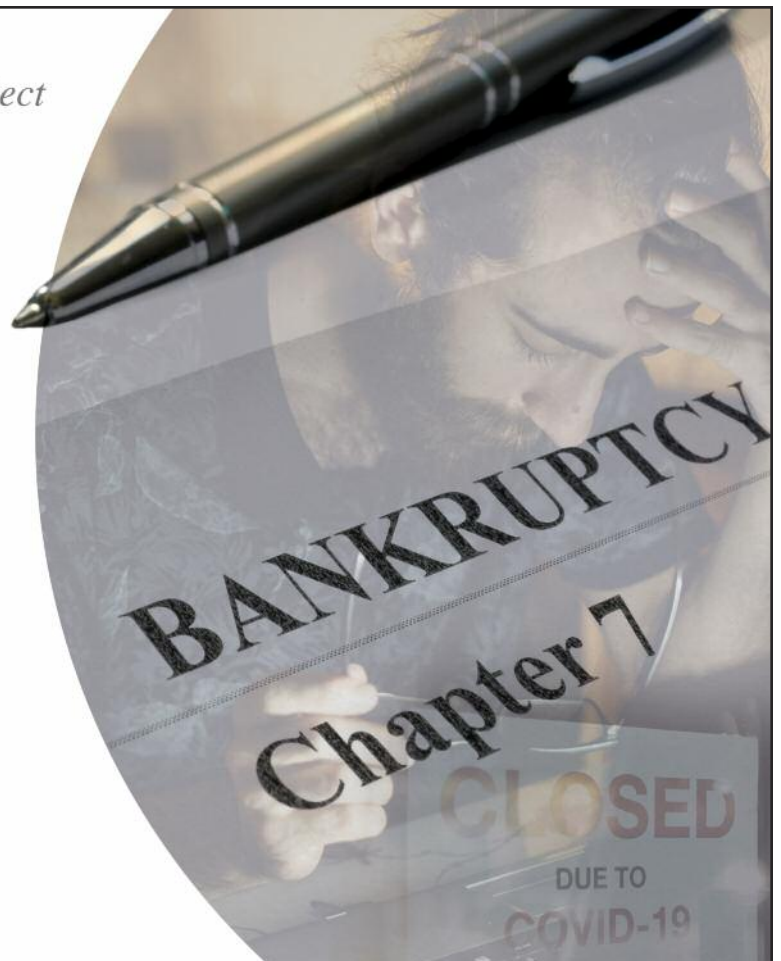
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Christy, Gibson, and Roman—I appreciate all of your advice and guidance this past year. You were selfless with your time and were largely responsible for helping keep this ship afloat during our time of transition, especially when we were without an executive director.

I am excited to pass the torch to Taze who will soon be installed as the 146th president of our state bar. Taze and I have worked very well together this past year, and I am excited to see the implementation of his great ideas. I also congratulate Gibson, our president-elect-designate, who will serve after Taze.

I cannot close without thanking my wife, Lee, and my wonderful daughters, Hope, Kate, and Laine, for their daily support and willingness to adapt to my schedule this past year. I am also grateful for the encouragement and support that I received from my law firm. And I would be remiss not to thank both our incredible bar staff for providing great service to all of our members and Michelle Shaw for her professional assistance to me. A special thanks to Greg Ward and those at *The Alabama Lawyer* for their patience (I am zero for six in getting my articles to them by the deadline). I am grateful for the talents of Courtney Gipson and Jimbo Terrell who helped edit each article I have written.

Finally, to the bar commissioners, thank you for your hard work and support throughout this year. This was a year of transition with many long virtual meetings, and yet we were still able to accomplish our objectives. Social distancing frequently required us to confront tough issues and reach difficult decisions without the normal comradery of lunch and social events that we have enjoyed in the past. As a result of your professionalism, we were able to obtain consensus on almost every major issue presented, even following spirited discussion and debate. Thanks again to each of you for your leadership and your patience this year.

I am humbled and honored to have served as the 145th president of the Alabama State Bar. Serving as your president

has truly been the highlight of my legal career. Although we faced many challenges and much uncertainty, we were able to effectuate lasting, positive change because of the incredible team effort, great attitude, and hard work of our bar staff, executive council, bar commissioners, and you, our members. ▲

Endnotes

1. This handbook provides information on how to use Zoom, including introducing exhibits and evidence at trial, and can be downloaded from <https://www.alabar.org/news/download-this-zoom-virtual-hearing-handbook-for-alabama-lawyers/>.
2. Alabama State Bar COVID-19 Updates, ALABAMA STATE BAR, <https://www.alabar.org/alabama-state-bar-coronavirus-covid-19-safety-measures/>.
3. You can find out more information about this charity at <https://www.alabar.org/lawyers-render-service/>.


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EXECUTIVE DIRECTOR'S REPORT

Terri Lovell
terri.lovell@alabar.org



Open Doors

*When one door closes,
another opens; but we
often look so long and
so regretfully upon the
closed door that we do
not see the one which
has opened for us.*

—Alexander Graham Bell

I always knew that at the end of my judicial career another door would open. But never in my search for purpose and direction did I dream that my new open door would be an opportunity to serve lawyers and to help direct the future of our legal profession. To say that I am humbled to be entrusted to serve as your next executive director would be an understatement. Many lawyers and friends have asked me if I am sad to be leaving the bench. After serving the State of Alabama and the Second Judicial Circuit for the past 24 years, I have realized that being a judge has been more than a privilege, it has been a classroom to learn how to problem-solve, collaborate, learn, and grow. Listening and learning from lawyers and judges for my entire life, I sincerely have a desire to give back to those men and women who have influenced me.

I am, as we all are, where I am today because of the influencers in my life. As the doors of opportunity and the actual doors reopen after a year of virtual

meetings and closed offices and courtrooms, I want you to remember that not only do you add value to our legal community, but you are also an influencer in your family, in your community, and over everyone you meet and serve. Sometimes it takes fresh eyes to remind you of your importance.

As you can imagine, engaging with lawyers across the state has been the highlight of my first days in office. You have turned the challenges of the past year into something positive, and that inspires me to create and envision ways that the Alabama State Bar can come alongside you and serve you better. There is no doubt that our members are the heartbeat of the Alabama State Bar, and my priority is to ensure that all lawyers in Alabama are engaged, equipped, and empowered for this great work.

It is an honor to be a lawyer. Opportunities are just behind the open door. Please join with me as we enter the open doors to serve our profession with excellence. ▲



IMPORTANT NOTICES

▲ Harold Albritton Pro Bono Leadership Award

▲ Notice of and Opportunity for Comment on Amendments to The Rules of the United States Court of Appeals for the Eleventh Circuit



Harold Albritton Pro Bono Leadership Award

The Harold Albritton Pro Bono Leadership Award seeks to identify and honor individual lawyers who through their leadership and commitment have enhanced the human dignity of others by improving pro bono legal services to our state's poor and disadvantaged. The award will be presented in October, which is officially designated Pro Bono Month.

To nominate an individual for this award, submit no more than two single-spaced pages that provide specific, concrete examples of the nominee's performance of as many of the following criteria as apply:

1. Demonstrated dedication to the development and delivery of legal services to persons of limited means or low-income communities through a pro bono program;
2. Contributed significant work toward developing innovative approaches to delivery of volunteer legal services;
3. Participated in an activity that resulted in satisfying previously unmet needs or in extending services to underserved segments of the population; *or*
4. Successfully achieved legislation or rule changes that contributed substantially to legal services to persons of limited means or low-income communities.

(Continued from page 237)

To the extent appropriate, include in the award criteria narrative a description of any bar activities applicable to the above criteria.

To be considered for the award, nominations must be submitted by **August 1**. For more information about the nomination process, contact Linda Lund at (334) 269-1515 or linda.lund@alabar.org.

Notice of and Opportunity for Comment on Amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit

Pursuant to 28 U.S.C. § 2071(b), notice and opportunity for comment is hereby given of proposed amendments to the Rules of the United States Court of Appeals for the Eleventh Circuit. The public comment period is from August 4 to September 3, 2021.

A copy of the proposed amendments may be obtained on and after August 4, 2021 from the court's website at <http://www.ca11.uscourts.gov/rules/proposed-revisions>. A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., N.W., Atlanta 30303. Phone (404) 335-6100.

Comments on the proposed amendments may be submitted in writing to the Clerk at the above address or at <http://www.ca11.uscourts.gov/rules/proposed-revisions>, by 5:00 p.m. ET on September 3, 2021. ▲



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End of an Era

By Justice Michael F. Bolin

The Alabama appellate courts recently experienced the end of an era

when Bilee Cauley retired as the reporter of decisions on December 31, 2020. Tasked with ensuring that the opinions of our appellate courts are accurately reported, the reporter also serves in a less publicized role as the courts' legal editor, advising the justices, judges, and their staffs on the proper use of grammar and punctuation, editing court rules and amendments thereto, and last, but probably most importantly, offering input and advice on drafts of opinions. Needless to say, it is a job that requires the complete trust of the members of the courts, which Bilee

earned—along with their respect and friendship.

Bilee was appointed as the courts' first assistant reporter of decisions in 1989, and she assumed the mantle of reporter of decisions, one of only four over the course of the last century in 2001. She was the first woman to hold the position. During her nearly 20-year tenure as reporter, Bilee oversaw the publication of 164 volumes of the *Alabama Reporter*.

No doubt, we could fill up an entire volume of *The Alabama Lawyer* with fond remembrances of Bilee and her service, but I hope a few words from several friends and former colleagues will suffice to show what she has meant to the courts and how much she will be missed.

As former Associate Justice Champ Lyons observes, “[t]he task of serving as the Supreme Proofreader for Supreme Court Justices, a class of people not known for their reticence or lack of self-confidence, is not an easy one. It takes a very gentle touch while wielding a skilled, sharp pen. Bilee is blessed with both talents. I can remember her soft and cheerful presence and the cautious question, ‘Is that really what you mean to say?’ More often than not the answer was, ‘Not really.’ A stronger opinion would result. I could go on, but I am becoming a bit apprehensive over the prospect of her smiling to herself as she muses over my choice of words en route to pursuit of perhaps a better way to express these thoughts.”

Describing one of his first interactions with Bilee after reviewing

her editorial comments, former Associate Justice Bernard Harwood fondly recalls, “I argued for a relaxation of the formal rules of grammar and syntax I can’t recall these years later the actual details of the calmly reasoned tutorial Bilee gave me on why the revisions she’d made should be adopted, but she won me over completely with her great command of proper English composition and established rules of grammar and punctuation, all so diplomatically explained. I came over the years to appreciate that every change she suggested served to make the meaning clearer and more grammatically coherent. She never proposed anything to alter the sense or effect of an opinion, but she sure knew how to revise in a way that got the wording just right. She was a marvelous resource for the Court for clear and correct expression.”

Former Associate Justice Tom Woodall recalls Bilee’s skills and personality similarly: “The reporter must polish and refine an opinion of the Court without affecting the substance of the opinion or unduly irritating its author. Bilee was always able to accomplish this daunting task with kindness and good humor. Although she had to be a critical reader, Bilee never criticized an opinion. Instead, through just the right mixture of corrections, comments, suggestions, questions, and discussions, she improved every opinion she reviewed. By doing so, Bilee obviously enhanced the quality of the Court’s work product and, in the process, made us all better writers. Bilee, thank you for being our editor and, at the same time, becoming a friend.”

Perhaps, though, Jean Brown, commissioner of the Alabama Department of Senior Services and a

former associate justice, sums up Bilee’s unique contributions most succinctly: “I was acutely aware that, in some ways, our decisions were like paintings—once we released them and the opinion became final, there was no going back to improve a brush stroke here or there. Bilee made us all look like accomplished artists.”

I would be remiss if I did not add that I concur completely and wholeheartedly with the above comments and opinions of Justices Lyons, Harwood, Woodall, and Brown with regard to Bilee. Her abilities, intellect, and integrity pale only in comparison to her kind and gentle nature.

I first met Bilee in January 2005 as a new justice on the court. I began my tenure by assuming that I knew everything and would be completely self-sufficient as an author of opinions. Although I was surrounded by quality lawyers, I decided that I would research and write my first opinion on my own. So I began and finished my work after a couple of weeks. After circulating it and obtaining the votes of a majority of the court, I submitted it to my judicial assistant to prepare it for release. A few days later, she gave it back to me with, as she put it, some “suggested Bilee changes” for my review. I looked at my opinion, and I don’t think that there was a single paragraph without pencilled-in, squiggly, and unintelligible punctuation marks and suggestions. I had no idea what these marks meant, so I asked my assistant to give me two copies of the opinion, one as originally drafted and the other with Bilee’s suggested changes. Needless to say, I was at least bright enough to admit that I had a lot to learn, and I wisely chose the Bilee version.

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I cannot imagine how any one person could ever juggle proposed opinions from nine justices and 10 judges of the intermediate appellate courts each week, with a great majority of these jurists expecting their opinions to be released the very next Friday. But Bilee did it as our reporter, week after week, for over two decades, always with a smile.

Although Bilee loved her work, she was never defined by it, which is why I am confident she will prosper in retirement. Raised in Pittsburgh, Pennsylvania, Bilee attended Eckerd College in St. Petersburg, Florida, where she earned an undergraduate degree in English literature and met her husband of 41 years, Wendell Cauley, a well-known and well-respected attorney in his own right, who tragically passed away in 2013. Before embarking on her own legal career, Bilee was an English instructor at the University of Alabama while Wendell attended law school. Bilee followed in Wendell's footsteps, graduating from the Thomas Goode Jones School of Law, where she was awarded the James J. Carter Award for Scholarship for maintaining the highest grade-point average in her class. Even back then, she was usually the smartest person in the room!

Shortly after joining the court, I attended a banquet and, by chance, was seated next to Wendell and Bilee. For those of you who knew Wendell Cauley, you know that he was a lawyer's lawyer, and the three of us became very good friends that night. Over the years, I realized what everyone who knew them thought about Bilee and Wendell—they were made for each other, this Yankee girl and this Southern boy.

Bilee and Wendell loved to travel together, often accompanying each

other to work conferences, and they found time to relax together in such varying locales as Disney World, Hawaii, and many places in between. Bilee is also fond of exotic cruises, having explored the eastern Caribbean Sea, the Mediterranean Sea, and the Danube River. Although COVID-19 has interfered with any immediate plans, I know she is looking forward to many more years of globe-trotting with friends and family.

Those of you who know Bilee also know that she is an avid cyclist who has competed at several Senior Olympics, medaling in several events. She has toured Maine by bicycle during the fall, leaf-changing season, has ridden the Natchez Trace in Mississippi, and hopes to continue her two-wheeled adventures cycling across Europe. Her longtime, valued administrative assistant, Terri Vaughn, loves to remind Bilee of the 200-mile bicycle trek Bilee and her best friend took from Montgomery to Destin, not realizing that their overnight pit stop was in a dry county in south Alabama. Needless to say, they appreciated their arrival in Destin that much more the next day.

Realizing early that all of us retire someday, Bilee anticipated that, and, as her predecessor did for her, she has trained her longtime assistant reporter of decisions, Sean Blum, to succeed her. Bilee always had the welfare of the appellate courts uppermost in her professional mind, and her legacy will live on through Sean.

A lover of the beach, Bilee plans to spend much of the coming years on the Gulf coast, listening to her favorite musician, Jimmy Buffett, and entertaining her friends and family. I feel confident speaking for the many court members she has worked with over the years when I

fondly wish her nothing but the best as she adjusts to her “changes in latitudes, changes in attitudes.” ▲

Justice Michael F. Bolin



Justice Mike Bolin is a lifelong resident of Jefferson County. He received his Bachelor of Science degree in business administration from Samford University

and his Juris Doctorate degree from Cumberland School of Law, graduating cum laude and being inducted into Curia Honoris. He practiced in Birmingham for 16 years. He was elected Probate Judge of Jefferson County in 1988 and served in this position until he was elected to the Alabama Supreme Court in 2004. Justice Bolin serves as the Senior Associate Justice of the Court.



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Municipal and Local Government Edition

Since I've spent some serious time representing governmental entities, I've long thought that an edition dedicated to their special problems might be fun. When I contacted my friend Jake Key—he is a member of the editorial board of *The Alabama Lawyer*—and asked if he'd be interested in working on this with me, he jumped in with both feet. I think you will agree that he came up with some good articles.

One word of warning. Unless you do this for a living—and sometimes even if you do—this can be a little dry. I mean, just how exciting can an article be when

its focus is to explain the different forms of government that can be organized for small cities or towns, the Open Meetings Act, procurement law, or the cap on damages when you sue a city. But I have to give it to our authors—they did a great job. And, on second thought, their articles are not that dry after all.

I think this edition's authors did an outstanding job of laying out information logically, carefully, and in a way that it can be gathered up and used. Governmental entities are an area of the law unto themselves. There are lots of code sections that have to be consulted, and

they are not neatly kept in one place. In other words, before you begin, you should consult with an expert.

We've done that for you.

We begin with "Alabama Municipal Law 101" (page 244). I love the title. Three lawyers for the Alabama League of Municipalities—Lorelei A. Lein, Tenee´ R.J. Frazier, and H. Robert Johnston—accepted the task of showing us the ropes. If you are new to the field of city or town governments (spoiler alert: there is a difference—read the article to find out what it is), then this is the place to start. Or if you just want a refresher course on what it's all about, Alfie, take a look.

Mark and Wilson Boardman gave us "A Primer on the Alabama Open Meetings Act" (page 251). If you know anyone with more experience or who is better informed on this topic than Mark Boardman, let me know. He's been doing this for a while now, and his expertise in the field has been broadly recognized. His son, Wilson, gave his dad a hand. Wilson is in his third year at the University of Chicago School of Law.

Morgan Arrington turned in "Alabama Local Government Procurement Law Basics" (page 258). Morgan is general counsel for the Alabama Association of County Commissions, so she's well-positioned to know whereof she speaks. If you deal with county or municipal governments, you might want to spend some eye-time on this one. Do you know the difference between the competitive bid law and the public works law? She'll clue you in. And she did a fine job of it, too.

So far, we've stayed with the basics. Now let's venture out a bit. If you want to defend a lawsuit against a city, or if you want to sue a city, and you want to know the statutory caps, Angela Taylor supplies a solid footing with "Municipal Liability Cap on Damages and UIM Insurance" (page 262). Not only does she talk about those caps, but, as the title suggests, she goes farther afield and tops off an already-excellent treatment with information about efforts to overcome the statutory cap limits and uninsured motorist policies.

This edition has lots of information. If this is something you do, or if it is something you might get into, this is an edition you want to hang onto.

I hope you enjoy this issue 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 at wguard@mindspring.com if you have questions, or comments, or want to write. We are always looking for our next group of excellent writers. ▲



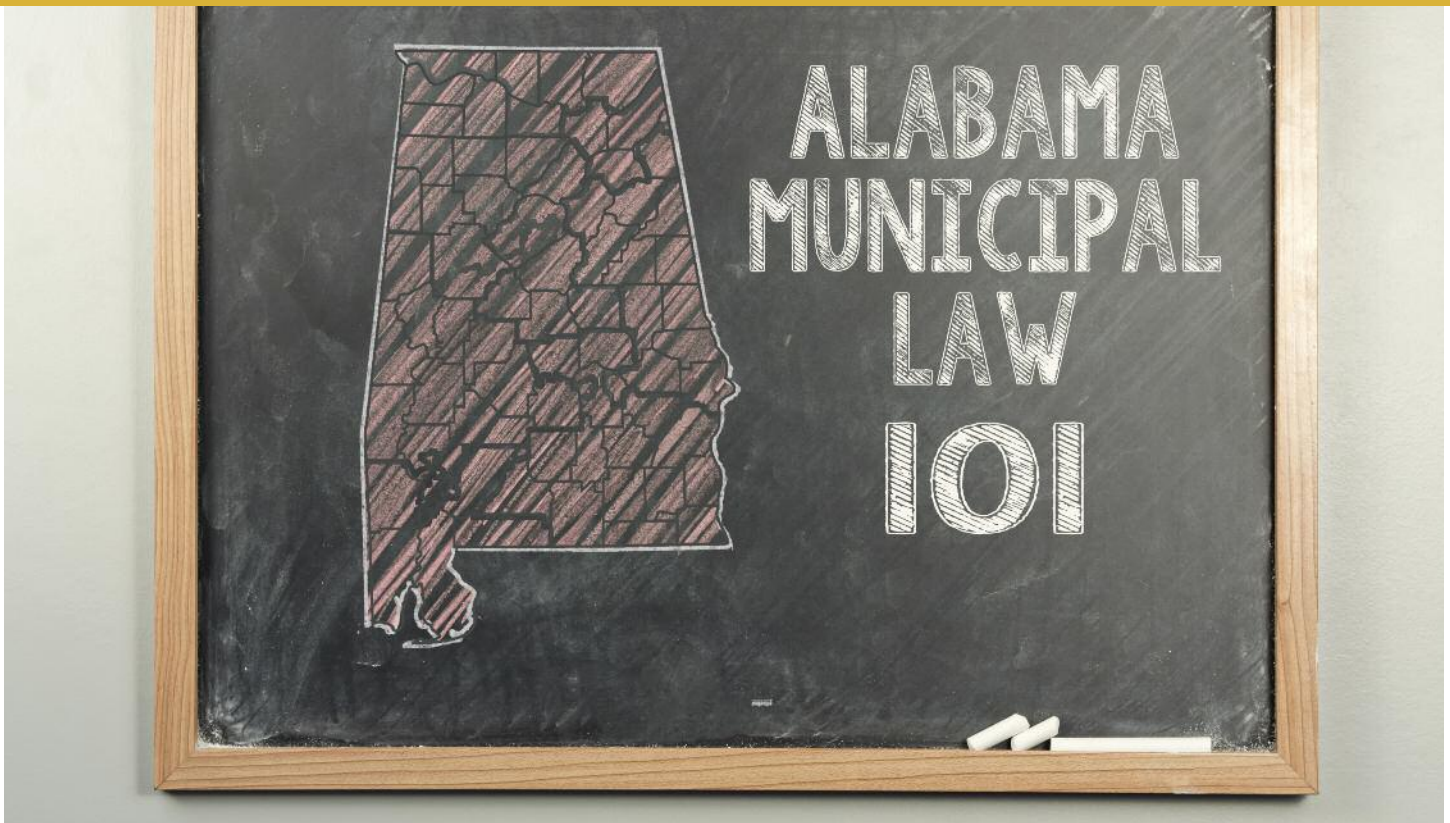
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ALABAMA MUNICIPAL LAW 101 (A Primer on the Basics)

By Lorelei A. Lein, Teneé R.J. Frazier, and H. Robert Johnston

Alabama has 463 incorporated municipalities located in 67 counties.

These entities are designated by state law as either cities (population of more than 2,000) or towns (population of fewer than 2,000) and range in size from the state's largest city, Birmingham (population 212,247) to the town of McMullen (population 10). Alabama is predominantly a state of small municipalities; more than 60 percent have a population of fewer than 2,000, and 27 percent have a population of fewer than 500.

Mayor-Council Government

Most Alabama cities and towns use the mayor-council form of government. This form is provided for by Ala. Code §§ 11-43-1 to -232. There are two variations of the mayor-council form of government. In cities with 12,000 or more inhabitants, the governing body is generally composed of a mayor and five councilmembers, and in a handful of municipalities, seven or nine councilmembers. These officials are elected by the voters of the city or town at-large

unless the council, at least six months prior to an election, has voted to elect the councilmembers from districts or is otherwise required by law to be districted.

In municipalities with fewer than 12,000 in population, the legislative functions are exercised by the council which is generally composed of the mayor and five councilmembers. Section 11-43-63 permits up to seven councilmembers in municipalities which are districted. The mayor presides over all deliberations of the council. At the mayor's discretion, the mayor may vote as a member of the council on any issue coming to a vote. In the case of a tie vote, the mayor must vote. § 11-43-2. The mayor, however, may never vote more than once on any issue that comes before the council, even in the case of a tie vote. *Jones v. Coosada*, 356 So. 2d 168 (Ala. 1978). All of the legislative powers of the municipality are exercised by the council acting as a whole.

Council-Manager Government

Any Alabama municipality can hire a city manager as provided for in § 11-43-20 to -22. However, that a city has a manager hired under the provisions of this statute does not by itself give the municipality a true council-manager form of government. To deal with this, the legislature adopted the Council-Manager Act of 1982, §§ 11-43A-1 to -52, to allow all Class 2 through Class 8 municipalities the option of becoming a true council-manager form of government.

The council is the governing body of a municipality organized under the council-manager form of government, and it is composed of five or seven members. One member shall be the mayor who is elected at large, who shall be a voting member of the council, and either four or six members shall be council members elected either at large or from single-member districts, as the resolution shall provide. § 11-43A-1.1. If a municipality has single-member districts for the election of council members when the council-manager form of government is adopted in the municipality, the municipality must continue with either four or six council members elected from single-member districts, and the mayor shall be elected at large. The mayor is the presiding officer of the

council and may vote on any issue coming before that body. § 11-43A-8.

The council has the power to appoint and remove a city manager and establish other administrative departments and distribute the work of such departments. § 11-43A-17. According to the Act, the city manager is the chief executive and head of the administrative branch of the municipal government and is responsible to the council for the proper administration of all affairs of the municipality. § 11-43A-28. Currently, Auburn, Tuskegee, and Vestavia Hills operate under this form of government.

Other Forms of Municipal Government

The Alabama legislature has adopted specific legislation to provide either a form of government for a particular municipality or to provide a procedure by which the form of government of certain municipalities may be altered. These laws generally apply only to a single city or town. Those municipalities affected by specific enactments are:

- **Anniston**—Council-Manager, Act No. 71-1049
- **Phenix City**—Council-Manager, Act No. 77-71
- **Montgomery**—Mayor-Council, Act No. 73-618
- **Birmingham**—Mayor-Council, Act No. 55-452
- **Troy**—Mayor-Council, §§ 11-44A-1 to -16
- **Opelika**—Mayor-Council, §§ 11-44D-1 to -21
- **Prichard**—Mayor-Council, §§ 11-43C-1 to -92
- **Tuscaloosa**—Mayor-Council, §§ 11-44B-1 to -22
- **Bessemer**—Mayor-Council, §§ 11-43D-1 to -22
- **Gadsden**—Mayor-Council, §§ 11-43B-1 to -32
- **Mobile**—Mayor-Council, Ala. §§ 11-44C-1 to -93
- **Dothan**—Class 5 cities with a mayor-commissioner, §§ 11-44E-1 to -221
- **Talladega**—Council-Manager—Amendment 738 (Talladega 13), Alabama Constitution, 1901 provides that the city shall operate under the council-manager form of government authorized by Chapter 43A of Title 11, with certain modifications.

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Classification of Municipalities

Section 104(18) of the Alabama Constitution, 1901 prohibits the legislature from creating or amending by local legislation the charter powers of municipal corporations. The only exception to this restriction on the legislature is the power to change or alter the corporate limits of cities and towns by local legislation. Because of this constitutional provision, the laws governing the incorporation, organization, and operation of cities and towns in Alabama are general in nature and either apply to all municipalities in the state or to all municipalities within a specified population group.

Prior to 1978, the state legislature adopted numerous statutes to provide powers for municipalities with very narrow population ranges. These laws were known as general laws of local application. In 1978, the Alabama Supreme Court, in the case of *Peddycoart v. Birmingham*, 354 So. 2d 808 (Ala. 1978), held that the state legislature could no longer adopt general bills of local application. The court held that the legislature could pass only statewide general bills affecting every jurisdiction in the state or local bills affecting single jurisdictions. Since Section 104 of the Alabama Constitution prevents amendment of municipal charters by local acts, another method of enacting such amendments was needed.

Amendment 397 (Section 110) of the Alabama Constitution, 1901, which was passed by the legislature and ratified by Alabama citizens post-*Peddycoart*, authorizes the legislature to establish no more than eight classes of municipalities based on population. This provision also allows legislation to be passed affecting one or more of the classes and that any such legislation shall be deemed to be general laws rather than local laws.

At the same time the legislature passed Amendment 397, it passed legislation now codified as §§ 11-40-12 to-13, which established eight classes of municipalities:

- Class 1**—Cities of 300,000 inhabitants or more
- Class 2**—Cities of not fewer than 175,000 and not more than 299,999 inhabitants
- Class 3**—Cities of not fewer than 100,000 and not more than 174,999 inhabitants
- Class 4**—Cities or not fewer than 50,000 and not more than 99,999 inhabitants
- Class 5**—Cities of not fewer than 25,000 and not more than 49,999 inhabitants

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Class 6—Cities of not fewer than 12,000 and not more than 24,999 inhabitants

Class 7—Cities of not fewer than 6,000 and not more than 11,999 inhabitants

Class 8—Cities and towns with a population of 5,999 or fewer.

The population figures refer to the 1970 federal decennial census. Once a classification is set, it never changes regardless of changes in population. Any municipality incorporated after June 28, 1979 is placed in one of the above classes according to the population of the municipality at the time of its incorporation.

In addition, Amendment 389 (Section 106.01) of the Alabama Constitution, 1901, validated most general acts of local application enacted prior to *Peddycoart*, that were otherwise valid and constitutional, even though they were not advertised as required by Section 106 of the state constitution. This provision mandates that the acts shall forever apply only to the county or to the municipality to which they applied on January 13, 1978, despite changes in population. Such acts can only be amended by advertised local bills. In cases where a general law exempts cities of a certain, stated population from being subject to said law, Section 106.01 will not help the city maintain its exemption when a population change causes them to fall outside the protected population bracket. *Birmingham v. George*, 988 So. 2d 1031 (2007).

Sources of Municipal Power

The Constitution of Alabama does not recognize any inherent right of local government. Except where restricted by limitations imposed by the state and federal constitutions, the legislature of Alabama is vested with complete authority over what municipalities in Alabama can and cannot do. In general, municipalities are delegated a portion of the sovereign powers of the state for the welfare and protection of their inhabitants and the general public within their jurisdictional areas. The sources of municipal power include the Alabama Constitution, the Code of Alabama, and special acts of the legislature.

In an early Alabama case, *Mobile v. Moog*, 53 Ala. 561 (Ala. 1875), Justice Manning quoted Judge Dillon from his work on municipal corporations:

“It is a general rule, and undisputed proposition of law, that a municipal corporation possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in, or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.”

McQuillin cites this case as authority in stating that Alabama cities and towns have no inherent powers, but such a statement requires an understanding and agreement on the meaning of the word “inherent.” See 2A McQuillin *Municipal Corporations*, 3rd Ed. Section 10:12. It is true that a city has no authority to confer upon itself power it does not possess. Courts in Alabama follow the “Dillon Rule” in determining whether a city or town is authorized to exercise a particular power. See *New Decatur v. Berry*, 7 So. 838 (Ala. 1890); *Best v. Birmingham*, 79 So. 113 (Ala. 1918).

In *Best v. Birmingham*, the Supreme Court of Alabama held that the Alabama Court of Appeals erred in



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holding that municipal corporations have no implied powers. In so ruling, the court pointed out that except for the power of taxation (and probably some others not necessary to mention here), municipal corporations are clothed with powers implied or incidental. As a guide, the court noted that these incidental or implied powers must be germane to the purpose for which the corporation was created. Municipal powers cannot be enlarged by construction to the detriment of individual or public rights. The power must relate to some corporate purpose which is germane to the general scope of the object for which the corporation was created or has a legitimate connection with that object. *Harris v. Livingston*, 28 Ala. 577 (Ala. 1856).

Unfortunately, no precise definition distinguishes indispensable powers from powers which are merely useful or convenient. As a general policy, municipal corporations are held to a reasonably strict observance of their express powers. *Ex parte Rowe*, 59 So. 69 (Ala. App. 1912). The safest rule is that if there is substantial doubt as to the existence of a particular power, such power will be held by the courts not to exist.

The powers of a municipality may be derived from a single express grant or from a combination of enumerated powers which must be construed together. The purpose of all rules of construction is to arrive at the intent of the legislature. It follows that if fairly included in or inferable from other powers expressly conferred and consistent with the purposes of the municipal corporation, the exercise of the power should be resolved in favor of the municipality to enable it to perform its proper functions.

Types of Power

Two basic types of powers are delegated to and exercised by Alabama cities and towns: those of a political body (legislative) and those of a corporate body (ministerial). As a political body, municipal powers are general in application and public in character. As a corporate body, a municipality has powers that are proprietary in character, exercised for the benefit of the municipality in its corporate or individual capacity. Such powers are for the internal benefit of the municipality as a separate legal entity. *State v. Lane*, 62 So. 31 (Ala. 1913).

As a political body, a municipal corporation exercises legislative powers of a general and permanent nature which affect the public generally within the territorial jurisdiction of the municipality. In this

instance, the council acts very much as an arm of the state legislature. As a corporate body, a municipality exercises powers of a ministerial nature for the private benefit of the corporation. In this case, a municipality acts in a manner comparable to the board of directors of a private corporation.

The distinction between these two types of powers is important to determine if a council must formally adopt an ordinance to exercise a particular power. If the power exercised requires the action of the council in its legislative capacity, then a formal ordinance is required in the manner prescribed by statute. If the action is of a ministerial nature, then the council may exercise the power by resolution or simple motion set forth in the journal.

The formalities required by statute for the adoption and publication of ordinances of a general and permanent nature are set out in, §§ 11-45-2 and 11-45-8, and must be followed closely by the council.

Exercise of Powers

In some instances, statutes relating to municipal powers are self-executing. In most instances, however, the grants of power are not effective until the council takes legislative action to set them in motion. Such action is taken by the adoption of an ordinance, resolution, or motion depending on the power being exercised and any statutory requirements imposed.

The powers of a municipality, both legislative and corporate, are required to be exercised by the council in legally convened meetings as provided in the Alabama Open Meetings Act. Further, the municipal journal (minutes) is the only evidence acceptable in determining the action taken by the council, and parol evidence will not be received to establish such action. *Penton v. Brown-Crummer Inv. Co.*, 131 So. 14 (Ala. 1930).

The method of exercising a power granted by the legislature depends upon whether the statute prescribes the manner of performance. The prescribed procedure for adopting ordinances of a general and permanent nature is mandatory. In exercising ministerial powers, it should be noted that sometimes procedures are prescribed by statute. In some cases, courts recognize such procedures as mandatory and in other instances, they are declared to be directory only.

Generally, where a statutory grant of power provides that a municipality “shall” or “must” perform an act in a prescribed manner, the statute is declared mandatory. *Prince v. Hunter*, 388 So. 2d 546 (Ala.

1980). Where a statute provides that the municipality “may” perform an act or exercise a power, it is declared to be directory or permissive. *Jackson v. State*, 581 So. 2d 553, 559 (Ala. Crim. App. 1991).

Legislative and Executive Power

In providing for the organization and administration of mayor-council cities and towns, the legislature deemed that the legislative functions of a municipality should be vested in the council. §§ 11-43-2, 11-43-40, and 11-43-43. Section 11-43-43 states that all legislative powers and other powers granted to cities and towns shall be exercised by the council, except those powers conferred on some officer by law or ordinance. Therefore, the state legislature has entrusted the municipal council with the duty and responsibility of exercising a wide variety of the sovereign powers of the state which vitally affect the life, liberty, and property of citizens within their jurisdictions. Further, where cities have adopted the council-manager form of government, the council is also authorized to exercise all legislative functions of the municipality. § 11-43A-8.

Legislative power is the authority to make laws and is vested in the council. Executive powers are generally vested in the mayor, city manager, and heads of departments. The crucial test to determine the difference between legislative powers and executive or administrative powers is whether an ordinance makes a new law or executes a law already in existence.

The legislative powers of the council are not to be confused with the power to administer or execute the laws of the municipality. It is the responsibility of the mayor (or manager) to see that the officers and employees of the municipality faithfully execute the laws and policies established by the council. § 11-43-81.

Discretion Not Reviewable

Where a council has acted within the sphere of powers granted to the municipality, it is well established that courts will not sit in review of the proceedings of municipal officers and departments in the exercise of their legislative discretion. Cases where bad faith, fraud, arbitrary action, or abuse of power are affirmatively shown are exceptions to this rule.



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Hamilton v. Anniston, 27 So. 2d 857 (Ala. 1946). Where a power exists, there is a legal presumption that public officials properly and legally executed it in a reasonable manner. Courts do not inquire into the motives prompting a municipal governing body to exercise a discretionary power, be it legislative or corporate in nature, unless there is a showing of fraud, corruption, or oppression. *Pilcher v. Dothan*, 93 So. 16 (Ala. 1922). Error or mistakes in judgment do not constitute an abuse of discretion.

Extraterritorial Powers

It is a general rule of law that the powers granted to cities and towns can be exercised only within their corporate limits, unless specifically provided otherwise by statute. Alabama's laws granting extraterritorial powers to cities and towns are probably the broadest of any state. See *McQuillin, Municipal Corporations*, 3rd Ed., Section 24.59. Municipalities, with some exceptions, have the authority to exercise police powers to protect the public health, safety, and welfare of citizens just outside the corporate limits; the authority to license and tax those citizens; and the authority to regulate subdivisions. See §§ 11-40-10 (police jurisdiction), 11-51-90 (licensing), and 11-52-30 (subdivision). The authority to extend municipal police, sanitary, and business licensing powers to those residing in the police jurisdiction of a municipality, without permitting these residents to vote in municipal elections, has been upheld by the U.S. Supreme Court in the case of *Holt Civic Club v. Tuscaloosa*, 99 S. Ct. 383 (1978).

Municipal authority outside of the corporate limits has come under fire in recent years and remains a hot button issue resulting in frequent attempts to further limit municipal authority legislatively. Most recently, the legislature passed Act 2021-297 (SB107) which made significant changes to municipal police and planning jurisdictions and places additional burdens on municipalities who are exercising extraterritorial authority.

Conclusion

Very few people understand the true significance of municipal government. It has an impact on every aspect of our daily lives—from dogs, garbage, water, and sewer

to infrastructure, recreation, economic development, and public safety. The powers delegated to Alabama cities and towns play an integral role in the communities they serve. They empower municipalities to provide essential resources and services to the constituents and businesses located within them, and they foster the safe and vibrant spaces for businesses to thrive and citizens to live, work, play, and prosper. ▲

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A Primer on the Alabama Open Meetings Act

By Mark S. Boardman and Wilson P. Boardman

“It is the policy of this state that the deliberative process of governmental bodies

shall be open to the public during meetings . . . except for executive sessions . . . or as otherwise expressly provided by federal or state statutes, all meetings of a governmental body shall be open to the public and no meeting of the governmental body shall be held without providing notice.”¹

So begins the Alabama Open Meetings Act (“the OMA”). Applying to virtually all governmen-

tal bodies in Alabama (except the courts), the OMA requires that the public be given notice of government meetings and that the meetings have minutes. A government body can discuss confidential matters in executive session only under limited circumstances. But, not every gathering of elected or appointed officials is a meeting. And, since the purpose of the OMA is to allow the public to see the wheels of government turn, the OMA provides that the public has the right to *attend* meetings, not the right to *speak* at them.

Application of the Open Meetings Act

The OMA applies to meetings of all boards, bodies, and commissions of the executive and legislative branches, of all cities and counties, and of multi-member governing bodies of departments, agencies, and institutions. Generally, if a majority of members of any governmental board, body, commission, department, agency or institution are either appointed or elected, the OMA probably applies to its meetings.² A government entity's committees and subcommittees also must comply with the OMA.³

So, what is not regulated by the OMA? Excluded are the Alabama Senate and Alabama House of Representatives,⁴ legislative party caucuses or coalitions,⁵ and voluntary membership associations, assuming they have not been delegated any legislative or executive functions by the legislature or the governor. Thus, the Alabama League of Municipalities, the Alabama Education Association, the Alabama County Commission Association, and the Alabama State Employees Association are not governed by the OMA.⁶ (As noted above, the appellate or trial courts also are not governed by the OMA, unless the Alabama Supreme Court or the state Constitution requires it.)⁷

What Is a Meeting?

A meeting is a prearranged gathering of a quorum⁸ of the government body, committee, or

subcommittee. However, even if the gathering is not prearranged, when a quorum of members discusses specific matters that the members expect to come before them, the gathering is a meeting.⁹

The OMA's definition of meeting tends to eliminate council, commission or board committees and subcommittees. A committee or subcommittee of three members means that if two members meet, the members must send out notice of the meeting and must keep minutes. Surprisingly, lawyers throughout Alabama will find committees and subcommittees meetings in violation of the OMA. To avoid this problem, some governments instead use task forces, where the majority of the people on the task force are citizen volunteers, not elected or appointed officials. For example, if the local high school is looking for a new principal, a task force of board of education mentors, teachers, PTO officers, parents, and/or alumni can meet and even interview candidates for principal, without notice or minutes. The OMA does not apply to that task force.

When Is a Gathering Not a Meeting?

A social gathering, a convention or conference, a media event (including press conferences), and training programs are not meetings, as long as the participating members do not deliberate about things that they expect to come before them. Further, when government bodies meet with higher

ranking government officials, the gathering is probably not a meeting. Thus, when city officials meet with ALDOT about a road to report or obtain information or to seek support, that gathering is not a meeting. Likewise, when municipal or state officials meet with federal officials, such as when discussing community development block grants, those gatherings are not meetings.¹⁰

One key to determining if the gathering is a meeting is whether the officials deliberate or exchange information and ideas with each other to arrive at or influence any member's decision on an issue. The mere presence of government officials attending the gathering is not enough to make it a meeting under the Act.¹¹ For example, in September, the Alabama Supreme Court held that a Public Service Commission public hearing before an administrative law judge was not a meeting under the OMA.¹²

The Act prohibits circumvention. Email cannot be used instead of a meeting. For instance, if the mayor sends an email out to all city councilors announcing the agenda for the upcoming meeting, and city councilors "reply all" to discuss a matter on the agenda, this "reply all" may violate the OMA.¹³ Further, members of a government body cannot meet in a series of gatherings of two or more members, but less than a quorum, so that ultimately everybody, or at least a majority of the members, discuss an issue. The OMA expressly prohibits these gatherings, which it calls "serial meetings."¹⁴

Meeting Notice Requirements, Time, Place, Location, and Agenda¹⁵

The Act specifies the notice requirements, the majority of which are summarized here (see table below). Certain circumstances allow for 24 hours of notice or as little as one hour of notice as discussed below the table.

In no event shall a meeting be called less than 24 hours before the meeting is scheduled to begin, unless such notice:

- (i) is prevented by emergency circumstances; or
- (ii) relates to a meeting to be held solely to accept the resignation of a public official or employee.

In such situations, notice shall be given as soon as practical, but in no case less than one hour before the meeting is to begin.¹⁷

The Requirement of a Quorum

A government body cannot meet without a quorum, defined as “a majority of the voting members of the governmental body.”¹⁸ Until the OMA was amended in 2015, a quorum required that the members be physically present. Now, if a government body is comprised of members from two or more counties, a member can participate in the meeting by telephone, video,

| Organization | Deadline | Location | Authorized but not Required |
|---|-------------------------|--|--|
| State Agency with Statewide Jurisdiction | 7 days prior to meeting | Submit notice of meeting to Secretary of State, which posts on Internet and sends email notifications to those registered with SOS to receive notification of meetings | <i>May give, but not required to give, notice of quasi-judicial or contested case hearings which could properly be conducted as an executive session</i> |
| State Agency with Less Than Statewide Jurisdiction | 7 days prior to meeting | May submit notice of meeting to Secretary of State If practicable, in addition to the posting requirements, shall provide direct notification of a meeting... to any member of the public or news media covering that governmental body who has registered to receive meeting notifications | <i>May give, but not required to give, notice of quasi-judicial or contested case hearings which could properly be conducted as an executive session</i> |
| Municipal Governmental Body | 7 days prior to meeting | Bulletin board at a place convenient to the public in city hall | <i>May give, but not required to give, notice of quasi-judicial or contested case hearings which could properly be conducted as an executive session</i> |
| School Board | 7 days prior to meeting | Bulletin board at a place convenient to the public in the central administrative office of the board | <i>May give, but not required to give, notice of quasi-judicial or contested case hearings which could properly be conducted as an executive session</i> |
| Any Other Governmental Body | 7 days prior to meeting | Reasonable location or use reasonable method of notice that is convenient to the public | <i>May give, but not required to give, notice of quasi-judicial or contested case hearings which could properly be conducted as an executive session</i> |

Posted Notice¹⁶

PRELIMINARY AGENDA AVAILABLE: Shall be posted in the same manner as the notice

PRELIMINARY AGENDA NOT AVAILABLE: Posted notice shall include a general description of the nature and purpose of the meeting

or similar communications conference equipment which allows all participants in the meeting to hear each other at the same time.¹⁹

Under those circumstances, the meeting must have a physical location allowing members of the public to be present. All persons participating in the meeting must be able to hear, but not necessarily see, each other at the same time. Votes must be taken by roll call.

The meeting, however, cannot involve the government (a) acting in a quasi-judicial capacity, (b) conducting a hearing that could result in loss of licensure or professional censure, or (c) meeting to promulgate rules pursuant to the statutory authority of the government body.²⁰ Further, the Board of Pardons and Paroles, the Public Service Commission, a standing committee of the legislature while the legislature is in session, a school board acting under the Students First Act of 2011, and the Alabama Ethics Commission cannot use this provision.²¹

When a government body does not have a quorum, the members present can still discuss government business, assuming the government body has adopted rules of order which allow it. For example, Roberts Rules of Order, the most commonly adopted rules for meetings of organizations, provide that the body may move into a committee of the whole or its alternatives, a quasi-committee of the whole and committee for informal consideration. Those in attendance at the meeting then act as a committee, like any other committee of the governing body. As with any

When a government body does not have a quorum, the members present can still discuss government business, assuming the government body has adopted rules of order which allow it.

committee, the committee must have a chairman, there must be proper notice of the meeting (In this situation there was notice of the meeting, but the quorum did not appear), and the committee must keep minutes. Motions from this meeting are then reported to the whole body. (Roberts Rules of Order uses the old English phrase that the committee “rises and reports.”²²)

Executive Sessions

The OMA specifically states that executive sessions are not required but may be held if the government body decides to do so.²³

The procedure for going into executive session is:²⁴

1. Unless this is a quasi-judicial meeting (such as conducting

an employee hearing), the meeting must be called with proper notice; a quorum must be present.

2. A member must make a motion, which must be seconded, to call for the executive session, specifically setting out the purpose of the executive session. (Under some circumstances, discussed later, someone must certify the executive session, which would be done at this point.)
3. The government body must vote on the motion, and “[t]he vote of each member shall be recorded in the minutes.”²⁵ The State Records Commission/Local Government Records Commission²⁶ states that the vote of each individual member must be recorded in the minutes.²⁷ As a practical matter, if the vote is unanimous, and the minutes simply state that the vote is unanimous, this requirement is met.
4. Prior to convening the executive session, the presiding officer must state whether the body will reconvene after the executive session and, if so, the approximate time the body expects to reconvene.
5. The State Records Commission/Local Government Records Commission in their procedural leaflet say that the minutes of the meeting must record the time the executive session convenes and the open meeting reconvenes.²⁸ The statute, however, does not specifically require this.

No votes may be taken in an executive session.²⁹

Under the 2015 amendment to the Open Meetings Act, someone who attends via electronic communications may not participate in an executive session.³⁰

Reasons for an Executive Session

Under the OMA, sunshine reigns. Executive sessions are to be the exception rather than the rule. Alabama law allows executive sessions only for nine reasons:

1. To discuss the general reputation, character, physical condition, professional competence, or mental health of individuals. Also, the governing body may conduct an executive session to discuss job performance of employees who are not elected or appointed public officials, appointed members of a board or commission, or employees who must file a Statement of Economic Interests.³¹ Further, the executive session may not be convened to discuss the salary, compensation, or job benefits of specific public officials or specific public employees.³² However, those in the executive session can discuss the professional competence of someone who possesses a certification or license from the state but only for those professional roles that require at least a college-level degree.³³
2. To hear employee or student grievances, discipline, or

Under the 2015 amendment to the Open Meetings Act, someone who attends via electronic communications may not participate in an executive session.³⁰

dismissal, or the regulation of an individual or other legal entity regulated by the governing body, but only when expressly allowed by federal or state law.³⁴

3. To discuss with legal counsel the legal ramifications of and legal options for pending litigation, controversies not yet litigated, but imminently likely to be litigated, or imminently likely to be litigated if the government body pursues a proposed course of action. A government body may also go into an executive session to meet with the mediator or arbitrator. Prior to this executive session, an Alabama lawyer must state the grounds for the executive session, reciting the above.³⁵

4. To discuss security plans, procedures, assessments, measures, or systems or the safety or security of persons, structures, facilities, or other infrastructure, but only if the public disclosure of this conversation could be detrimental to the public's safety or welfare.³⁶
5. To discuss information that would disclose the identity of an undercover law enforcement agent or informer or to discuss the criminal investigation of someone who is not a public official where allegations of criminal misconduct have been made, or to discuss whether to file a criminal complaint. Like the attorney litigation certification above, this also requires specific certification from a district attorney, the attorney general, or an assistant to either.³⁷
6. To discuss the purchase, sale, exchange, lease, or market value for the property, but this does not apply if a condemnation action is pending.³⁸
7. To discuss matters of economic development, trade, or commerce, but only if the government body is in competition with another entity or under the Alabama Trade Secrets Act. This executive session, too, requires a specific certification of someone knowledgeable in the recruitment effort, the retention effort, or the Alabama Trade Secrets Act that revealing publicly these negotiations would have "a detrimental effect upon the competitive position."³⁹

8. To discuss strategy and preparation for negotiations between the government body and a group of public employees. Again, the law requires that a person representing the interest of the government body specifically represent that public discussions would “have a detrimental effect upon the negotiating position of the government body if disclosed.”⁴⁰
9. To deliberate or to discuss evidence or testimony presented in a public or contested hearing, provided the government body is acting quasi-judicially.⁴¹

Minutes

The OMA requires government bodies to maintain “accurate records of its meetings, excluding executive sessions, setting forth the date, time, place, members present or absent, and the action taken at each meeting.”⁴² The State Records Commission/Local Government Records Commission has prepared a procedural leaflet detailing how minutes should be kept. Although the statute does not specifically require it, the Records Commissions state that the time of the beginning of the meeting and the conclusion of the meeting should be kept in the minutes. The Records Commissions also suggest that devotions should be included in the minutes.⁴³ In certain public meetings, when done properly, prayers can be constitutional. But when done improperly, prayers may violate the First Amendment.⁴⁴

The government body can determine whether public comments will be allowed, including setting limitations on those comments and requiring order and decorum be maintained.⁴⁹

All votes must be taken in open session. (In executive session, the body may not vote or take any action.⁴⁵) In particular, the minutes must record all votes involving the spending of public money, the levying taxes or fees, the forgiving of debts, or the granting tax abatements.⁴⁶

Anyone May Record The Meeting

Except when the government body is in executive session, any attendee may record the meeting as long as doing so does not disrupt the conduct of the meeting.⁴⁷

Public Comment

The Open Meetings Act grants citizens the right to be present in a

meeting—but not to speak.⁴⁸ The purpose for a public meeting is to allow the public to observe the affairs of government, which may not include obtaining citizen input. There are other ways citizens may share their opinions, such as speaking to government officials outside of the meeting, sending letters, or writing emails. Public comment at meetings can unnecessarily delay the work of underpaid or volunteer members of the government body.

The government body can determine whether public comments will be allowed, including setting limitations on those comments and requiring order and decorum be maintained.⁴⁹ Public hearings obviously involve public comment. But regular meetings might not. Boards of education, for example, are required to allow public comment at budget hearings.⁵⁰

Conclusion

The OMA is as dry as toast, but that description also applies to the Rules of Civil Procedure, the Rules of Criminal Procedure, and the rules of the Parker Brothers game Monopoly. But if a government body violates the OMA, a court may invalidate actions taken in the meeting.⁵¹ Further, a court may impose a civil penalty payable to whoever filed suit to enforce the OMA. The penalty shall not exceed \$1,000 or half of a board member’s monthly salary, whichever is less, with a minimum penalty of \$1.⁵² Thus, the fines are not big, but for public officials, they are significant because the

government entity cannot pay or reimburse a member of the governmental body for payment of these penalties. As a result, government officials who violate the Open Meetings Act also suffer the potential embarrassment of public rebuke. ▲

Endnotes

1. *Ala. Code* § 36-25A-1(a).
2. § 36-25A-2(4).
3. *Id.*
4. § 36-25A-3(a)(1).
5. § 36-25A-2(4)(a).
6. § 36-25A-2(4)(c).
7. § 36-25A-2(4)(b).
8. A quorum is the majority of the voting members. *Id.* § 36-25A-2(12).
9. § 36-25A-2(6)(a)(3).
10. § 36-25A-2(6)(b).
11. *Casey v. Beeker*, 2020 WL 5268491 (Ala. Sept. 4, 2020).
12. *Id.*
13. § 36-25A-1(a).
14. § 36-25A-2(13).
15. § 36-25A-3.
16. *Id.*
17. § 36-25A-3(b).
18. § 36-25A-2(12).
19. § 36-25A-5.1(a).
20. § 36-25A-7(b).
21. *Id.*
22. Roberts Rules of Order, Newly Revised, Tenth Edition, Section 52.
23. § 36-25A-7(b).
24. *Id.*
25. § 36-25A-7(b)(3).
26. "Procedural Leaflet: Guidelines for Taking and Preserving Formal Meeting Minutes," State Records Commission/Local Government Records Commission, Revised 2009, page 4.
27. See also Lori Lein, Alabama League of Municipalities General Counsel, "The Legal Viewpoint: Executive Sessions - Getting Them Right," Alabama Municipal Journal, May-June 2018, page 13.
28. "Procedural Leaflet: Guidelines for Taking and Preserving Formal Meeting Minutes," State Records Commission/Local Government Records Commission, Revised 2009, page 4-5.
29. *Ala. Code* § 36-25A-5(b).
30. § 36-25A-5.1(e). Nevertheless, under Governor Ivey's emergency Proclamation of March 18, 2020, those "Zoom meetings are not precluded from an executive session where participants 'remote' into the session."
31. This is a requirement of the Alabama Ethics Act, § 36-25-14.
32. § 36-25A-7(a)(1).
33. *Id.* and *Ala. Code* § 36-25A-2(8).
34. § 36-25A-7(a)(2).
35. § 36-25A-7(a)(3).
36. § 36-25A-7(a)(4).
37. § 36-25A-7(a)(5).
38. § 36-25A-7(a)(6).
39. § 36-25A-7(a)(7).
40. § 36-25A-7(a)(8).
41. § 36-25A-7(a)(9).
42. § 36-25A-4.
43. "Procedural Leaflet: Guidelines for Taking and Preserving Formal Meeting Minutes," State Records Commission/Local Government Records Commission, Revised 2009. In my practice, I do not recommend following this suggestion.
44. *Town of Greece v. Galloway*, 572 U.S. 565 (2014).
45. *Ala. Code* § 36-25A-5(b).
46. *Id.*
47. *Id.* at § 36-25A-6.
48. *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984); Ken Smith, The Legal Viewpoint; The Council Meeting; "Dealing with Disruptions," Alabama Municipal Journal, November 2010.
49. Alabama Attorney General Opinion 98-134.
50. *Ala. Code* § 16-13-140(c).
51. *Id.* at § 36-25A-9(f).
52. *Id.* at § 36-25A-9(g).

...government officials who violate the Open Meetings Act also suffer the potential embarrassment of public rebuke.

Mark S. Boardman



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Alabama Local Government Procurement Law Basics

By Morgan G. Arrington

There are two procurement laws in Alabama that apply to nearly every purchase

made by county commissions and other local governmental entities. Commonly referred to as the Competitive Bid Law and the Public Works Law, these two sets of statutes contain several requirements that must be satisfied in order for local governmental entities to properly expend public

funds on certain projects, goods, or services. The result of not complying with these laws is important for attorneys on both sides of the contracting process to understand. Contracts entered into in violation of the Competitive Bid Law “shall be void.”¹ Similarly, contracts let in violation of the Public Works Law “shall be null, void and violative of public policy” and “unenforceable.”² Additionally, violations of either law may result in Class C felony charges.

Competitive Bid Law—The Basics

The Competitive Bid Law is codified in Ala. Code §§ 41-16-1 to -144 (1975). County commissions and municipalities, among others, are governed by Article 3 of Chapter 16 when more than \$15,000 will be expended on labor, services, and work; the purchase of materials, equipment, supplies, or other personal property; and certain leases. Section 41-16-50(a) further provides that these expenditures “shall be made under contractual agreement entered into by free and open competitive bidding, on sealed bids, to the lowest responsible bidder.” It is important to point out that not all statutes in Chapter 16 of Title 41 apply equally to all entities of government. As an example, because the Competitive Bid Law requires that award be made to the lowest responsible bidder, a county commission may not utilize requests for proposal (RFPs) allowing for negotiation with bidders on specific details of a bid if competitive bidding is required.

There are a small number of purchases that are exempted entirely from the Competitive Bid Law, including the purchase of products where the price is already regulated and established by state law, and purchases for public hospitals operated by the governing boards of instrumentalities of the state, counties, and municipalities. In contrast, there are purchases that are exempted only from the “competitive bidding requirements” of Article 3.³ Exemptions from only the competitive bidding requirements include the purchase of insurance, contracts for fiscal or financial advice or services, and contractual services and purchases of products related to security plans. County commissions are expressly permitted to purchase dirt, sand, or gravel from in-county property owners in order to supply a county road or bridge project in which the materials will be used without competitively bidding. This section also includes permission to proceed with an alternative to competitive bidding commonly referred to as cooperative purchasing. There are several elements to satisfy when assessing whether a cooperative purchasing program may be used, including approval by the Alabama Department of Examiners of Public Accounts. The department maintains a list of currently-approved purchasing cooperatives on its website for convenience.⁴

Section 41-16-57(a) states that the contract shall be made to the lowest responsible bidder, by taking into consideration the qualities of the commodities proposed to be supplied, their conformity with specifications, the purposes for which required, the terms of delivery, transportation charges, and the dates of delivery. The appellate courts and the Alabama Attorney General’s Office have provided some guidance which helps an awarding authority determine the lowest responsible bidder. A county may take into consideration the bidder’s integrity.⁵ Quality is a consideration when determining responsibility of the bidder, and it is appropriate to look at size, experience, lack of equipment, and other resources.⁶ In determining who the lowest responsible bidder is, the awarding authority may take into consideration the quality of the materials as well as their adaptability to the particular use required.⁷ The use of insider information, as well as the possibility or perception of use of insider information, is a factor that the awarding authority may use in determining the responsibility of a vendor.⁸ The Alabama Supreme Court has held that courts will not interfere with the discretion of the awarding authority in determining who was the lowest responsible bidder unless the decision was based upon misconception of the law, was the result of improper influence, was made in violation of the law, or was based upon ignorance through lack of inquiry.⁹ A bid accepted in error as the lowest responsible bid is null and void and the awarding authority, upon discovery of the error, may accept the lowest bid and award the contract to that bidder.¹⁰ A conviction and bar by a federal agency are factors which may be considered in determining if a bidder is responsible.¹¹

It is not uncommon for county commissions to be surprised by the proposed cost of goods and services when presented with bid proposals. Where the bid proposals exceed the resources available for the procurement, the awarding authority may reject any bid if the price is deemed excessive. Bids may also be rejected if the quality of the proposed product is considered to be inferior. Once a bid is rejected it ceases to exist and the awarding authority cannot accept the rejected bid and award the contract.¹²

In the event only one bidder responds to an invitation to bid, the awarding authority may reject the bid and negotiate the purchase or contract, provided the negotiated price is lower than the bid price.¹³ Additionally,

the awarding authority may negotiate a lower price with the successful bidder provided there is no change in specifications.¹⁴

Alabama law limits the term of competitively bid contracts. Contracts for the purchase of personal property or contractual services shall not be for periods greater than three years and contracts for the leasing of motor vehicles shall not be for periods greater than five years. Lease-purchase contracts for capital improvements and repairs to real property shall not exceed periods of 10 years, and all other lease-purchase contracts shall not be greater than 10 years.

Public Works Law— The Basics

Local governmental entities, including county commissions, are governed by Chapter 2 of Title 39 of the Code of Alabama for public works projects in excess of \$50,000. Public works is a defined term and applies to the construction, repair, renovation or maintenance of structures such as buildings, roads, and bridges as well as other improvements on public property to be paid, in whole or in part, with public funds. Like the Competitive Bid Law, several persons, entities, or projects are exempted or excluded from some or all of the provisions of the Public Works Law, including professionals, industrial development boards, and employee projects.

The advertising requirements for public works projects are different than the requirements in the Competitive Bid Law. Under the Public Works Law, the awarding authority must advertise for sealed bids once each week for three consecutive weeks in a paper of general circulation in the county. The advertisement must briefly describe the project, state the procedures for obtaining plans and specifications, state the time and place for bids to be received and opened, and state whether prequalification is required and where prequalification information is available. Contracts in excess of \$500,000 must also be advertised at least once in three newspapers of general circulation throughout the state. County road and bridge projects may also be advertised pursuant to § 40-17-371(c)(2)(d).¹⁵

Like other potential procurement efforts, public works proposals often exceed the available resources

of a county commission. Under § 39-2-6(b), if no bids are received or if only one bid is received, the awarding authority has a few options. The awarding authority may re-bid the project, direct that the work be done by force account, or negotiate for the work through the receipt of informal bids not subject to the requirements of § 39-2-6. Where only one responsible and responsive bidder has been received, any negotiation for the work shall be for a price lower than that bid. If force account or negotiation is used, the awarding authority shall make available for review by the Department of Examiners of Public Accounts the plans and specifications, an itemized estimate of costs, and any informal bids.

There are several procedures regarding the award of public works contracts detailed in the Public Works Law. For example, written notice must be provided to the successful bidder, and if no award is made within 30 days of the bid opening all bids shall be rejected. Other timelines include 20 days from award to approve bonds and evidence of insurance and complete execution of the contract; 15 days from award for the vendor to enter into a contract, furnish a performance bond, a payment bond, and provide evidence of insurance as required; and 15 days after final execution of the contract for the awarding authority to issue a proceed order.

Likewise, there are also several provisions related to payment procedures. If a county elects to provide partial payments to contractors on public works projects, then retainage must be handled properly. “Retainage” is defined in § 39-2-12(a)(3) as, “[t]hat money belonging to the contractor which has been retained by the awarding authority pending final completion and acceptance of all work in connection with a project or projects by the contractor.” The procedures for retainage may be summarized as follows: (1) Unless otherwise provided in the specifications, partial payments are made at the end of each month as work progresses; (2) No more than five percent of estimated work done and value of materials is retained; (3) No further retainage shall be held after 50 percent of the work is completed; and (4) The retainage (on the first 50 percent) shall be held until final completion and acceptance of all work covered by the contract (unless a statutory alternative is utilized). As an alternative to retainage, the Public Works Law also permits the use of escrow accounts and other security arrangements.

Final payment for projects of \$50,000 or more are conditioned on acceptance of the work by the awarding authority and the contractor presenting a duly certified

voucher, a release of all claims and claims of liens, and proof of advertisement of project completion. For projects less than \$50,000, before final payment may be made, the contractor is required to certify under oath that all bills have been paid in full, publish notice of completion in a newspaper of general circulation, and also post notice of completion at the courthouse for at least one week.

Common Treatment Under Both Laws

Like-Item Purchases

When assessing whether an expenditure will meet or exceed the threshold values of these two laws, thus triggering their application, the concept of “like-item” purchases must be factored into the analysis. The Alabama Attorney General’s Office has concluded that the total amount of the unit price of all items in a group purchase, and not the individual unit price, must be considered when determining if the purchase is subject to the Competitive Bid Law. “If two or more items of the same type or of a similar type are to be purchased, and the total cost of all of the items is \$2000.00 (the State Competitive Bid Law threshold amount at the time) or more, the purchase is subject to competitive bidding, although the unit price of each item is less than \$2000.00.”¹⁶

Emergencies

The Competitive Bid Law and the Public Works Law address emergencies in nearly identical ways. In case of an emergency affecting public health, safety, or convenience, contracts may be let without public advertisement to the extent necessary to meet the emergency. The emergency must be declared in writing by the awarding authority and must set forth the nature of the danger involved in a delay. Neither law eliminates the need to competitively bid or follow the other requirements of the respective statutes. Instead, the allowance is to simply put the goods, services, or project out for bid without public advertisement. Under the Competitive Bid Law, the action and reason shall immediately be made public by the awarding authority. The Public Works Law requires the action and reason to be made immediately available upon request.

Conclusion

The Competitive Bid Law and the Public Works Law each present a checklist of requirements to satisfy in order for a local governmental entity to properly expend public funds. While good faith is said to be the single most important requirement for officials charged with carrying out the requirements of the procurement laws,¹⁷ it might also be true that the single most important task for an attorney is to help produce an enforceable and valid contract. ▲

Endnotes

1. Ala. Code § 41-16-51(d) (1975).
2. *Id.* at § 39-2-2(c).
3. *Id.* at § 41-16-51(a).
4. <http://www.examiners.alabama.gov/purchase-coop.aspx>.
5. Ala. Att’y Gen. Op. No. 2007-063 (March 28, 2007) and Ala. Att’y Gen. Op. No. 82-00305 (April 29, 1982).
6. *Crest Constr. Corp. v. Shelby Cnty. Bd. of Educ.*, 612 So. 2d 425 (Ala. 1992).
7. *White v. McDonald Ford Tractor Co.*, 248 So. 2d 121 (Ala. 1971).
8. Ala. Att’y Gen. Op. No. 2002-030 (October 16, 2001).
9. *Advance Tank and Constr. Co., Inc. v. Arab Works*, 910 F. 2d 761 (11th Cir. 1990) (citing *White v. McDonald Ford Tractor Co.*, 248 So. 2d 121 (Ala. 1971)).
10. Ala. Att’y Gen. Op. No. 2002-071 (November 28, 2001).
11. Ala. Att’y Gen. Op. No. 2007-063 (March 28, 2007).
12. Ala. Att’y Gen. Op. No. 96-00317 (September 17, 1996).
13. Ala. Code § 41-16-50(a) (1975); *See also* Ala. Att’y Gen. Op. No. 98-00104 (May 8, 1998).
14. Ala. Att’y Gen. Op. No. 95-00002 (October 4, 1994); Ala. Att’y Gen. Op. No. 96-00240 (June 14, 1996).
15. *See also* Ala. Acts 2021-146.
16. Ala. Att’y Gen. Op. No. 2003-098 (March 11, 2003).
17. *See White v. McDonald Ford Tractor Co.*, 248 So. 2d 121 (Ala. 1971).

Morgan G. Arrington



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Municipal Liability Cap on Damages and UIM Insurance

By Angela C. Taylor

No matter which side of the fence you find yourself on

in litigation involving a municipality and allegations of damages, there are some basics you need to first familiarize yourself with before you can appropriately advise your client. While the subject of municipal liability is extremely broad, and

while the case law that arose from it is voluminous, this article will focus on issues relating to statutory caps on damages and underinsured motorist (UIM) insurance.

Understanding the statutory cap on municipal liability and how the courts in Alabama have applied the cap in UIM insurance-related litigation is essential. This article provides a snapshot of the applicable Alabama statutes and some key court rulings.

The amount of damages awardable against a municipality in Alabama are limited to the amounts set forth in Ala. Code § 11-93-2 (1975), which provides:

The recovery of damages under any judgment against a governmental entity shall be limited to \$100,000.00 for bodily injury or death for one person in any single occurrence. Recovery of damages under any judgment or judgments against a governmental entity shall be limited to \$300,000.00 in the aggregate where more than two persons have claims or judgments on account of bodily injury or death arising out of any single occurrence. Recovery of damages under any judgment against a governmental entity shall be limited to \$100,000.00 for damage or loss of property arising out of any single occurrence. No governmental entity shall settle or compromise any claim for bodily injury, death or property damage in excess of the amounts hereinabove set forth.

Section 11-47-190 identifies the circumstances under which a municipality may be held liable. It specifically states: “no recovery may be had under any judgment or combination of judgments, whether direct or by way of indemnity under Section 11-47-24, or otherwise, arising out of a single occurrence, against a municipality, and/or any officer or officers, or employee or employees, or agents thereof, in excess of a total \$100,000 per injured person up to a maximum of \$300,000 per

single occurrence, the limits set out in the provisions of Section 11-93-2 notwithstanding.”

Statutory municipal immunity is an affirmative defense pursuant to Rule 8(c), Ala. R. Civ. P. and must be specifically pled in order to avoid a waiver. “Although statutory municipal immunity, like the statutory employer immunity provided by the Workers’ Compensation Act and like sovereign immunity, is not specifically listed in Rule 8(c), it quite obviously is of the same nature as those defenses specifically listed there.”¹

Municipalities are required to indemnify their employees in certain circumstances pursuant to § 11-47-24(a). Claims against municipal employees and officials sued in their official capacity are, as a matter of law, claims against the municipality, and are subject to the statutory liability cap.² However, a municipality cannot be held liable for the intentional torts of its employees, agents, or officials. “There is no exception in the statute allowing an action against a municipality for the wanton or willful conduct of its agents or employees.”³

It is important to note that municipal employees and officials sued in their individual capacity for conduct outside their official duties are not protected by the liability cap provided in § 11-47-24.⁴

A pivotal question must be answered in any litigation against a municipal employee or official. “Whether a state officer is being sued in an official capacity or an individual capacity is not mere semantics; the question is whether the plaintiff is reasonably seeking relief from the state coffers or

from the individual’s assets.”⁵

Thus, if the plaintiff seeks relief from a municipal employee or official in their individual capacity and from his or her own assets, no statutory liability cap protection is available based on current Alabama law.

Tort lawsuits filed against municipalities and their employees have attempted to recover damages over and above the statutory cap by seeking underinsured motorist benefits from the plaintiffs’ automobile insurers. Plaintiffs have argued that due to the statutory municipal liability cap, the municipality is in essence underinsured and thus the proceeds of private automobile policies should pay the uncompensated portion of plaintiffs’ damages.

Typically, automobile insurance policies providing underinsured motorist (UIM) coverage in Alabama contain the “legally entitled to recover” language found in the Alabama statute governing UIM coverage, § 32-7-23. In defining the meaning of “legally entitled to recover,” the Alabama Court of Civil Appeals stated:

One must, then, make a determination as to what the words, ‘legally entitled to recover damages,’ mean. They mean that the insured must be able to establish fault on the part of the uninsured motorist, which gives rise to damages, and must be able to prove the extent of those damages. In a direct action by the insured against the insurer, the insured has the burden of proving in this regard that the other motorist was uninsured,

legally liable for damage to the insured, and the amount of this liability. Note that the insurer would have available, in addition to policy defenses, the substantive defenses that would have been available to the uninsured motorist.⁶

In *State Farm Mut. Auto. Ins. Co. v. Causey*, 509 F. Supp. 2d 1026 (M.D. Ala. 2007), State Farm filed a declaratory judgment action asking the court to declare that State Farm had no duty to pay underinsured motorist benefits to the defendants (claiming parties) after an accident between Causey and a street-sweeper owned by a municipality and driven by its employee.⁷ The municipality paid its policy limits of \$100,000 to Causey.⁸ State Farm argued that it had no liability to the defendants for any judgment in excess of the \$100,000 paid on behalf of the municipality.⁹ State Farm reasoned that the municipality's employee/driver was acting in the scope of his employment at the time of the accident, and thus the defendants' damages were subject to the cap found in § 11-93-2.¹⁰ State Farm asserted that the statutory liability cap could be invoked by a UIM insurer because it was a substantive defense available to the tortfeasor.¹¹ The defendants insisted, however, that "the cap is merely a post-verdict remedy, and that this situation is no different than where a claimant's recovery against the tortfeasor is limited by the tortfeasor's policy limits."¹² They also argued "that insured persons who are legally entitled to recover some damages, but are partially barred from recovering all damages, should be able to treat their claim as

a pure underinsured motorist claim entitling them to recover the barred amount from their UIM carrier."¹³

In reaching its decision in *Causey*, the Court examined how the courts in Alabama had ruled in a variety of circumstances dealing with statutory and immunity doctrines and insurance claims. During the 1980s and 1990s, several decisions by the Alabama Supreme Court created exceptions for the recoverability of damages irrespective of statutory or immunity doctrines.¹⁴ Those decisions by the Alabama Supreme Court were later overturned, however, by *Ex parte Carlton*, 867 So. 2d 332 (Ala.2003) which firmly barred recovery above and beyond the protection given municipalities and their employees, acting in their official capacities. Because the Alabama Supreme Court overturned the rulings in *Hogan*, *Jeffers*, and *Baldwin*, the *Causey* court explained these various doctrines and the phrase "legally entitled to recover" as follows:

Under a literal reading of "legally entitled to recover," which is the only reading permitted this court, the partial bar/total bar distinction is one without a legal difference. "Legally entitled to recover" requires analysis of the merits of the insureds' claim and the remedies available to the insureds. To recover, the insureds must be able to establish liability, not just fault.⁵ The parties agree the driver of the street-sweeper was at fault; he owes damages. In this case those damages are at least \$175,000. Can one then surmise that the driver is liable for \$175,000?

Clearly not. Though he is at fault, he is not liable for any amount over \$100,000. Nor is his employer. See *Benson*, 659 So.2d at 86. The remedy of the insured against the tortfeasor is limited to \$100,000. The insured can legally recover no more than that. Those are the merits of the insured's case against the tortfeasor; applying the reasoning of *Carlton*, those are also the merits of the case against the UIM carrier. Thus, the distinction between the complete bars of the Workers' Compensation Act, various forms of absolute governmental immunity, and defenses created by the guest statute and the statute of limitations, on the one hand, and the partial bar of the municipal cap on the other, is one of degree and not principle in the UM/UIM context. There is no rational basis for treating them differently solely on that distinction.¹⁵

Based on this rationale, the court ruled "that Defendants are 'legally entitled to recover' under their UIM coverage what they could recover in a direct suit against the tortfeasors who damaged them. If, in a direct suit against those tortfeasors, Defendants' recovery would be limited to a statutory maximum, as Defendants' recovery is limited here by Alabama's municipal cap, then that statutory maximum applies to Defendants' UIM claim against their insurer."¹⁶

The same issue was presented in *Kendall v. United Servs. Auto. Ass'n*, 23 So. 3d 1119 (Ala. 2009), where the meaning of the phrase "legally entitled to recover" was

discussed. The Alabama Supreme Court, in discussing its prior decision in *Ex parte Carlton*, supra, held that “[t]oday we return to the point from which this Court never should have departed—the language of the statute. The language of the uninsured-motorist statute is plain and unambiguous.”¹⁷ The Alabama Supreme Court agreed with the holding in *Causey* and refused to expand the meaning of “legally entitled to recover.” It affirmed the lower court’s ruling that the insured was not entitled to recover damages from the county above the statutory liability damages cap she had already received through settlement, and therefore she was also not entitled to UIM benefits from her automobile insurer.¹⁸

In *Ala. Mun. Ins. Corp. v. Allen*, 164 So. 3d 569 (Ala. 2014), the passenger and driver filed a negligence action against police officer Beard in his individual capacity for personal injuries sustained in a vehicle accident. Beard was driving a police vehicle on his way to work. At the time of the accident, he reached speeds in excess of 100 miles per hour in a 45-mile-an-hour speed zone.¹⁹ State Farm Mutual Automobile Insurance Company and Government Employee Insurance Corporation were also named as defendants, as plaintiffs sought underinsured motorist benefits.²⁰

Officer Beard claimed that the statutory municipal liability cap of § 11-47-190 and § 11-93-2, “in conjunction with the indemnification provisions of Section 11-47-24, Ala. Code 1975, applied because he was on duty when the accident occurred.”²¹ The trial court ultimately entered two judgments against Beard individually totaling

\$1,800,000.²² The trial court held that the statutory municipal liability cap of § 11-93-2 did not apply to the judgments entered against Beard given that he was sued in his individual capacity for conduct outside the scope of his employment.²³

The City of Madison, Alabama and Alabama Municipal Insurance Corporation moved jointly to intervene, claiming they had an interest in the collection of the judgments rendered against officer Beard, because he was an employee of the City of Madison and driving a car insured by AMIC at the time of the accident.²⁴ The City of Madison also moved to deposit \$100,000 with the court as final satisfaction of the judgments entered against officer Beard, but the trial court denied the motion.²⁵ The City of Madison and AMIC filed separate appeals. The Alabama Supreme Court affirmed the trial court’s ruling that a police officer sued in his individual capacity for actions outside of his employment does not enjoy the benefit of the statutory municipal liability cap. ▲²⁶

Endnotes

1. *City of Birmingham v. Business Realty Inv. Co.*, 722 So. 2d 747, 750 (Ala. 1998).
2. *Smitherman v. Marshall Cnty. Comm’n*, 746 So. 2d 1001, 1007 (Ala. 1999).
3. *Morrow v. Caldwell*, 153 So. 3d 764, 769 (Ala. 2014). (citing *Creemens v. City of Montgomery*, 779 So. 2d 1190, 1201 (Ala. 2000) and *Town of Loxley v. Coleman*, 720 So. 2d 907, 909 (Ala. 1998) (“This Court has construed § 11-47-190 to exclude liability for wanton misconduct.”)).
4. *See Ala. Mut. Ins. Corp. v. Allen*, 164 So. 3d 568, 578 (Ala. 2014); *See also Suttles v. Roy*, 75 So. 3d 90 (Ala. 2010) (for a detailed discussion of the issues involving immunity of peace officers).
5. *Suttles*, 75 So. 3d at 98 (citing *Gamble v. Fla. Dep’t of Health & Rehabilitative Servs.*, 779 F. 2d 1509, 1513 (11th Cir. 1986), (quoted in *Ex parte Troy Univ.*, 961 So. 2d 105, 110 (Ala. 2006)).
6. *State Farm Mutual Auto. Ins. Co. v. Griffin*, 51 Ala. App. 426, 431, 286 So. 2d 302, 306 (1973).
7. *State Farm Mutual Auto. Ins. Co. v. Causey*, 509 F. Supp. 2d 1026 (M.D. Ala. 2007).
8. *Id.* at 1027.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 129.
13. *Id.* at 1031.
14. *See Hogan v. State Farm Mut. Auto. Ins. Co.*, 730 So. 2d 1157 (Ala. 1998) (holding that passenger was entitled to recover UM benefits even though guest statute granted immunity to driver); *State Farm Mut. Auto. Ins. Co. v. Jeffers*, 686 So. 2d 248 (Ala. 1996) (holding that accident victim was entitled to recover UM benefits despite police officer driver’s protection from liability under doctrine of Alabama substantive immunity); *State Farm Auto. Ins. Co. v. Baldwin*, 470 So. 2d 1230 (Ala. 1985) (holding that insureds were legally entitled to recover from UM carrier despite the total bar to recovery from the tortfeasor because of governmental immunity under the Feres doctrine); *See also Feres v. U.S.*, 340 U.S. 135 (1950) (interpreting the Federal Tort Claims Act, 28 U.S.C. § 1346, to bar actions against the Government or its employees for injuries incurred by a member of the military arising out of and in the course of his military service).
15. *Causey*, 509 F. Supp. 2d at 1031-1032; *see also Benson v. City of Birmingham*, 659 So. 2d 82 (Ala. 1995).
16. *Causey*, 509 F. Supp. 2d at 1029.
17. *Kendall v. United Servs. Auto. Ass’n*, 23 So. 3d 1119, 1122 (Ala. 2009).
18. *Id.* at 125.
19. *Ala. Mun. Ins. Corp. v. Allen*, 164 So. 3d 569 (Ala. 2014).
20. *Id.*
21. *Id.* at 570.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 579-580.

Angela C. Taylor



Angela Taylor obtained her J.D. from the Thomas Goode Jones School of Law at Faulkner University and is admitted to the Alabama State Bar; the U.S. District

Courts for the Northern, Middle, and Southern Districts of Alabama; the U.S. Court of Appeals for the Eleventh Circuit; and the U.S. Supreme Court. She practices with Butler Snow LLP in Montgomery.



PRIVATE JUDGING :
**A Means for Expediting
Justice for Litigants**

By Eileen L. Harris

The pandemic of 2020 has certainly posed challenges for our Alabama court system

and contributed to a backlog of cases. This backlog creates a hardship for litigants in civil matters seeking resolution to their legal matters. Private judging offers a means for litigants to have their day in court while avoiding a potentially lengthy period of time.

Alabama's Private Judge Acts allow parties to hire qualified former judges to hear certain types of cases and make decisions, bypassing the court system to streamline the process. Private judges may preside over a case in which the former judge served would have had subject matter and monetary jurisdiction. These are cases which have a CV or DR case number by the Alabama Administrative Office of Courts.¹

Who Are Private Judges?

Private judges (1) have been, but are not actively serving as, a judge of a district, circuit, or probate court and have served in the capacity of judge for at least six consecutive years; (2) are admitted to the practice of law in Alabama; (3) are active members in good standing of the Alabama State Bar; and (4) are residents of Alabama.²

How Do I Find a Private Judge?

Private judges must register with the Alabama Center for Dispute Resolution per Ala. Code § 12-11A-2(a). Litigants may search for a private judge by name, location, and/or subject matter by visiting the center's website at www.alabamaadr.org.

How Can I Get My Case Before a Private Judge?

The process is not as complicated as one would think. All parties to the action file a written petition with the circuit clerk of the court where the action is pending requesting a private judge and naming the person whom the parties wish to have serve as private judge. Accompanying the petition is a form signed by the private judge selected consenting to the appointment.³

The clerk forwards the petition to the presiding judge of the circuit who verifies that the former judge is registered with the Alabama Center for Dispute Resolution. The presiding circuit judge enters an order granting the petition and appoints the private judge selected by the parties.⁴

You may file a petition for appointment of a private judge in any proceeding contemporaneously with the filing of the action or any time after the action has been filed, but before the beginning of a trial.⁵

Private Judging Procedures

Trials conducted by private judges are without a jury. The private judge has the same powers as the judge of the circuit court in relation to the following as set out in Ala. Code § 12-11A-4(b). These include:

- 1) Court procedure,
- 2) Deciding the outcome of the case,
- 3) Attendance of witnesses,
- 4) Punishment of contempt,
- 5) Enforcement of orders,
- 6) Administering oaths, and
- 7) Giving all necessary certificates for the authentication of records and proceedings

Private judges have judicial immunity.⁶ All proceedings in an action heard by a private judge are of record and must be filed with the clerk of the circuit court in the county of proper venue under the Alabama Rules of Civil Procedure and made available to the public in the same manner as circuit court records.⁷

The Alabama Rules of Civil Procedure apply for all actions brought before a private judge. The private judge maintains jurisdiction over all matters before him or her to the same extent as matters before a trial court, including all post-trial proceedings and subsequent proceedings between the same parties arising from the same case. An appeal from an action or a judgement of a private judge may be taken in the same manner as an appeal from the circuit court of the county where the case is filed.⁸

Are There Costs Associated with Hiring a Private Judge?

Yes. Per Ala. Code § 12-11A-5, there is a filing fee required with every petition to appoint a private judge. Further, costs in an action heard by a private judge are taxed and distributed in the same manner as costs in the circuit court of the county where the case is filed.

There is also compensation of the private judge to consider. Private judges are compensated by the parties subject to the terms and conditions agreed to by the private judge and the parties. The contract for services must provide for the payment of the judge's compensation, compensation of all personnel (for example, court reporters), and costs of all facilities and materials that are used in relation to the case and not otherwise covered. See Ala. Code § 12-11A-8.

When Will Your Case Be Heard?

A case may be heard at any time and at any place. The private judge and the parties have greater flexibility with scheduling the hearing. Private judges typically do not have a full docket to contend with which provides greater latitude for scheduling.

The private judge will provide the clerk of the court the dates, times, and places of any proceeding that could result in a judgment. The notice is provided to the clerk and entered in the clerk's record at least three days before the proceeding is conducted.⁹

Private Judging in Alabama

Private judging in Alabama is one form of alternative dispute resolution (ADR) available to litigants. The Alabama Center for Dispute Resolution maintains the state court roster of registered private judges. Litigants may search for a private judge by name, location, and/or subject matter by visiting the center's website at www.alabamaadr.org.

While the concept has been around since 2012, there hasn't been widespread use of this resource. There were 19 private judges registered with the center at the end of 2020. Private judges reported 26 cases went to trial with two cases pending as of December 31, 2020.¹⁰ The vast majority of cases tried by private judges have been in the realm of domestic relations according to the center's statistics. If you have any questions, you may contact the center at assistant@alabamaadr.org or (334) 356-3802.

Conclusion

Private judging offers litigants a means by which their case may be heard timelier given the backlog of cases facing our courts as a result of the pandemic. Private judges do not have the concerns of a "full" docket and may be in a better position to hear the case. The result is the parties may have a decision sooner rather than later. Judge Scott Vowell, a registered private judge, noted, "...private judging provides a method of ADR which could be a good choice in certain civil litigation. It provides another alternative to litigation and to arbitration and helps the parties reach the goals of the Alabama Rules of Civil Procedure: to obtain a just, speedy, and inexpensive conclusion of their legal disputes."¹¹ ▲



Endnotes

1. Ala. Code § 12-11A-2(b)(3).
2. Ala. Code § 12-11A-2(a).
3. Ala. Code § 12-11A-2(b)(1).
4. Ala. Code § 12-11A-3(c).
5. Ala. Code § 12-11A-3(d).
6. Ala. Code § 12-11A-4(c).
7. Ala. Code § 12-11A-4(d).
8. Ala. Code § 12-11A-4(e).
9. Ala. Code § 12-11A-7.
10. As reported by registered private judges with the Alabama Center for Dispute Resolution 2020 year-end survey.
11. *The Alabama Lawyer*, November 2018, "Update on Private Judging in Alabama," J. Scott Vowell, p. 404.

Eileen L. Harris



Eileen Harris serves as the executive director of the Alabama Center for Dispute Resolution.



30 Faces of Pro Bono

P A R T 4 O F 6

This year marks the 30th anniversary of the Alabama State Bar’s Volunteer Lawyers Program. As a way to thank all of our volunteers, we have selected 30 representatives and will be sharing their stories over the coming year. Each volunteer represents hundreds of others who have made the program successful. That success is not confined to the program, but is shared with every volunteer and every client that received assistance.

Tim W. Milam, Law Office of Tim W. Milam, Tuscumbia

“To whom much is given, much is expected,” is one of Tim Milam’s favorite quotes. It comes to mind quite often as he



reflects on his life and practice. He first got involved with pro bono work a few years after graduation, working on some local indigent cases. As his practice grew and he gained more experience, he saw the great need for legal services of those struggling financially. In an effort to make a difference, he began volunteering with the Alabama State Bar Volunteer Lawyers Program in 1997.

“I certainly recommend and encourage each member of the Alabama State Bar to become a volunteer and commit to accepting some pro bono cases annually. The need for pro bono assistance overwhelmingly exceeds the available resources. I find it as rewarding for me as it is helpful to those in need.”

One of the most memorable cases he has had as a pro bono volunteer is of a young mother with three children struggling to provide for her children’s basic necessities. Her husband had abandoned them and eventually ended up in prison. She felt trapped in her marriage with no way out. She was humbled and tearfully grateful when Tim was able to help her get divorced and allow her family to move forward.

“I have been blessed with a successful practice for many years and will continue to give back to the community that has entrusted me for close to 30 years.” As lawyers, we have been blessed with a major responsibility and opportunity to do good. Tim challenges his fellow attorneys to commit and volunteer a portion of their time for pro bono work in their communities.

Brenda M. Pompey, Pompey & Pompey PC, Camden

Meeting clients where they are is key to doing pro bono work. Most people in need of legal help are desperate for someone to listen,



and provide a solution. Thanks to attorneys like Brenda Pompey, we know our clients are in good hands. She practices in a rural community and understands the issues of limited access of legal services and their consequences. “Families with limited income often have to make a choice between whether to purchase essential medications, food, childcare, or shelter versus whether to address critical property, marital, or probate issues.” Poverty should not be a barrier to getting legal services.

One client in particular had been separated from her husband for years. Both partners had moved on, and the client was ready to begin her new life with her fiancé. She and her estranged husband acknowledged they were better at being friends than at being a married couple. There was only one barrier standing in her way—money. The client could not afford to hire a lawyer to get a divorce, so she contacted the VLP. Brenda was able to remove this barrier and give her the best wedding gift.

Being a lawyer is about providing service, not just a way to make a living. “Pro bono service is like giving a gift, and the feeling that you’ve helped someone is priceless.” Brenda has been an active volunteer for the VLP for over 20 years and served on the Pro Bono Committee since 2013 because she has a passion for service and wants to expand access to legal services to communities like the one she works in every day.

Everette A. Price, Jr., Everette A. Price, Jr. PC, Brewton

Everette started practicing law in 1965 in a small town, Evergreen, in Conecuh County. As has always been the case, there were people who couldn’t afford to pay a lawyer for assistance. At that time, county court judges were not usually lawyers, and they frequently asked members of the bar to help. Also, law school taught that there were times when you needed to give back, and senior partners expected you to do some pro bono work.

Everette joined the VLP in 1999 and worked hard to recruit others to join the program. His former law partner once said, “As lawyers, we can help people and also make a living.” This was a reminder that lawyers have a duty to serve. “I think it is satisfying to assist someone who needs it and who generally is very grateful for your help.”

One of his most memorable pro bono clients was an elderly woman who signed a car note for her granddaughter. Her granddaughter defaulted on the loan, and the case was sent to collections. The client was worried that she would lose her home. She was only receiving a little Social Security and had three generations living in the home. Everette accepted the case and contacted the collections attorney. He knew opposing council



and was able to get the case dismissed. A little work can make a huge difference in a person's life and that is more valuable than always receiving an attorney's fee.

Many things may have changed in the practice of law since 1965, but the need for assistance, the satisfaction of helping those in need, and Everette Price's willingness to serve have not.

L. Thomas Ryan, Jr., Ryan, Hicks, Cumpton & Cumpton LLP, Huntsville

A hero is defined by their ability to save the day, despite the risks and challenges. One significant project sponsored by the VLP is the Wills for Heroes clinics. During these clinics, volunteer lawyers prepare estate-planning documents for local heroes, our first-responders. Today we get to recognize one of our pro bono heroes, Tom Ryan. Tom has been instrumental in organizing, recruiting, and training attorneys for the Wills for Heroes clinics, and he served with the committee that drafted the document templates. He also served as a board member for the Madison County Volunteer Lawyers Program for 35 years, since it first began.

These are not the only reasons that Tom is a hero. As everyone worked to navigate through uncertain times and a global pandemic, he assisted 18 VLP clients in 2020.



The pandemic introduced some new heroes, healthcare workers. Tom was instrumental in creating a new project called Wills for Healthcare Workers. He understands that providing legal assistance during a pandemic is critical and crucial to clients and those on the frontlines.

Tom doesn't shy away from a challenge. He can be counted on to take on the more difficult pro bono cases and has also represented multiple pro bono clients at one time. Tom wants to ensure that clients receive services despite their inability to pay, so that no one is left behind. He has assisted clients with a myriad of legal issues including, but not limited to, divorces, child support, wills, estate planning, guardianships, adoptions, advanced directives, tort defense, and custody issues.

Not only has he given tirelessly to his clients, but also to other lawyers. He has mentored and guided many lawyers through new practice areas and complicated areas of law to ensure that clients are receiving quality legal services. There are over 136 clients who have been assisted by Tom, and they serve as a testament to his dedication to this state, community, and profession. He doesn't perform his service for the accolades or recognition, but simply because he wants to do what is right and fair for all citizens of this state.

M. Elaine Thomaston, Beverlye Brady & Associates, Auburn

Elaine Thomaston began her legal career as a law clerk for the

Hon. Richard Lane, family court judge for Lee County. She witnessed cases involving people from all socioeconomic backgrounds and saw the need firsthand for pro bono services, particularly in the area of family law. Elaine joined the VLP in 2008, after hearing about the program during a CLE. She was eager to join and is still an active volunteer.

Elaine has assisted clients with various family law issues. From her clerkship, she knew that this was a major area of need and one in which she could make a major impact. However, her service has not been limited only to family law issues. She has been an active volunteer at the Wills for Heroes clinics in Lee County. Volunteering with the VLP has allowed her to encounter people who may not have crossed paths with her and hear their stories. She is dedicated to using her skills and knowledge to serve her community and those who serve the community.

Pro bono work truly makes a difference. "I firmly believe that it's important to give back to your community, and I am honored when I can be of assistance to someone who would not otherwise be able to obtain legal help. I know how stressful trying to navigate the court system can be, especially when you do not have representation. To be able to ease that burden for someone is a blessing that I encourage all other attorneys to experience." ▲





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NOTICE

DISCIPLINARY NOTICES

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

Notices

- **Lance Andrew Adams**, who practiced in Birmingham and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated June 16, 2020, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2019. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 2020-598]
- **Ryan Russell Priddy**, who practiced in Birmingham and whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated June 16, 2020, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2019. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 2020-588]
- **Michael Lee Weimorts**, who practiced in Santa Rosa Beach, Florida and

whose whereabouts are unknown, that pursuant to the Disciplinary Commission's order to show cause dated June 16, 2020, he has 60 days from the date of this publication to come into compliance with the Mandatory Continuing Legal Education requirements for 2019. Noncompliance with the MCLE requirements shall result in a suspension of his license. [CLE No. 2020-596]

Transfer to Inactive Status

- Huntsville attorney **Brandon Wayne Hall** was transferred to inactive status, effective April 7, 2021, by order of the Supreme Court of Alabama. The Alabama Supreme Court entered its order based upon the April 7, 2021 order of the Disciplinary Board of the Alabama State Bar transferring Hall to inactive status. [Rule 27(c), Pet. No. 2021-395]

(Continued from page 273)

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Disbarments

- Birmingham attorney **Steven Clyde Reed Brown** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective March 12, 2021. The Alabama Supreme Court entered its order based on the Disciplinary Board's order accepting Brown's consent to disbarment, which was based upon Brown's recent conviction of securities fraud, a Class B. Felony. [Rule 23(a), Pet. No. 2021-240; ASB No. 2013-1391; Rule 20(a), Pet. No. 2018-223]
- Birmingham attorney **Edward Lemuel McRight, Jr.** was disbarred from the practice of law in Alabama by order of the Supreme Court of Alabama, effective February 25, 2021. The Alabama Supreme Court entered its order following affirmance of an appeal filed by McRight to the Alabama Supreme Court on February 20, 2020. McRight was found guilty of violating Rules 1.16 [Confidentiality]; 1.8(a) [Conflict of Interest: Prohibited Transactions]; 1.15 [Safekeeping Property]; and 8.4(c), (d), and (g) [Misconduct], Alabama Rules of Professional Conduct. McRight represented a client in a divorce action. The divorce was settled through mediation, and the divorce was final in March 2014. Through the course of representation McRight borrowed \$270,000 from the client and failed to repay the debt despite executing two promissory notes. The client made the loans based on representations made by McRight that he had the ability to repay the loans. [ASB No. 2018-187]

Suspensions

- Detroit, Michigan attorney **Mary Michelle Alexander-Oliver**, who is also licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective February 9, 2021. A notation was entered on the Supreme Court of Alabama roll of attorneys based upon the Disciplinary Commission's order that Alexander-Oliver be suspended for failing to comply with the 2019 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2020-550]
- Nederland, Colorado attorney **Douglas Alan Baymiller**, who is also licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective February 9, 2021. A notation was entered

on the Supreme Court of Alabama roll of attorneys based upon the Disciplinary Commission's order that Baymiller be suspended for failing to comply with the 2019 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2020-562]

- Birmingham attorney **Lora Diane Doblar** was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective February 9, 2021. A notation was entered on the Supreme Court of Alabama roll of attorneys based upon the Disciplinary Commission's order that Doblar be suspended for failing to comply with the 2019 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2020-562]

- Chattanooga, Tennessee attorney **Stuart Fawcett James**, who is also licensed in Alabama, was suspended from the practice of law in the State of Alabama by the Supreme Court of Alabama, effective February 9, 2021. A notation was entered on the Supreme Court of Alabama roll of attorneys based upon the Disciplinary Commission's order that James be suspended for failing to comply with the 2019 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2020-594]

- Orlando, Florida attorney **Bharath Reddy Konda**, who is also licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective February 9, 2021. A notation was entered on the Supreme Court of Alabama roll of attorneys based upon the Disciplinary Commission's order that Konda be suspended for failing to comply with the 2019 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2020-607]

- Columbus, Georgia attorney **Robert Parker Varner Jr.**, who is also licensed in Alabama, was suspended from the practice of law in Alabama by the Supreme Court of Alabama, effective February 9, 2021. A notation was entered on the Supreme Court

of Alabama roll of attorneys based upon the Disciplinary Commission's order that Varner be suspended for failing to comply with the 2019 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [CLE No. 2020-593] ▲

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LEGISLATIVE WRAP-UP

2021 Legislative Recap

This edition of this column will cover noteworthy legislation that passed during the 2021 Regular Legislative Session. There was a total of 545 acts that became law this session, making it an active year for the legislature. Given the volume of acts adopted, we can only highlight select general bills most likely to be encountered by practitioners around the state. This month's edition serves as the first of two parts, with this part focusing on legislation dealing with health, medical cannabis, state and county government, tobacco and alcoholic beverages, firearms, the Department of Corrections, and the Board of Pardons and Paroles. Part 2, which will be presented in the next edition of this column, is expected to cover other various topics, including broadband Internet deployment, law enforcement, criminal law and procedure, civil law and procedure, elections, and taxation. Summaries of all of the general acts can be found at <http://lsa.state.al.us> under the Legal Division Publications.

Health

Pharmacy Benefits Managers (Act 2021-341, SB227)

Senator Tom Butler

The act: (1) prohibits a pharmacy benefits manager from: (i) incentivizing a patient's choice in pharmacies, (ii) denying a pharmacy from participating as a contract provider of pharmacy services for a health benefit plan if the pharmacy meets certain contract terms, (iii) steering an insured to use a mail-order pharmacy or a pharmacy benefits manager affiliate, and (iv) limiting certain powers of a pharmacy; (2) provides further for the licensure of pharmacy benefits managers and for oversight by the Department of Insurance; (3) provides for civil penalties; and (4) provide exceptions. The act also provides that, commencing January 1, 2022, a pharmacy benefits manager licensed by the Commissioner of Insurance prior to January 1, 2022 is required to submit a new application in accordance with the new licensure requirements of the act, and provides that any license issued prior to January 1, 2022 expires on the date the new license is issued or on April 1, 2022, whichever occurs earlier. Effective: August 1, 2021

Medical Cannabis: Darren Wesley “Ato” Hall Compassion Act (Act 2021-450, SB46)

Senator Tim Melson and Representative Mike Ball

The act (1) provides a program permitting patients diagnosed with a specified medical condition to be certified by his or her physician to obtain a medical cannabis card and purchase and use medical cannabis; (2) specifies which specific medical conditions qualify a patient to use medical cannabis after documentation indicates that conventional medical treatment or therapy has failed, including: (i) Autism Spectrum Disorder; (ii) cancer-related cachexia, nausea or vomiting, weight loss, or chronic pain; (iii) Crohn’s Disease; (iv) depression; (v) epilepsy; (vi) HIV/AIDS-related nausea or weight loss; (vii) panic disorder; (viii) Parkinson’s disease; (ix) persistent nausea that is not significantly responsive to traditional treatment, with exceptions; (x) Post Traumatic Stress Disorder; (xi) Sickle Cell Anemia; (xii) spasticity associated with a motor neuron disease, including Amyotrophic Lateral Sclerosis (ALS); (xiii) any terminal illness; (xiv) Tourette’s Syndrome; and (xv) a condition causing chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or has proven ineffective; (3) defines medical cannabis to include products derived from hemp (mainly for CBD derivatives) or marijuana (mainly for THC derivatives), or both, processed into a specified form that does not contain raw plant material and is not smokable or vapeable; (4) establishes the Alabama Medical Cannabis Commission and provide for the appointment and qualifications of members; (5) authorizes the commission to generally administer the medical cannabis program and more specifically: (i) issue medical cannabis cards; (ii) establish a patient registry database; (iii) establish a seed-to-sale tracking system; and (iv) license and regulate the processing, dispensing, transporting, and testing of cannabis plants and processed medical cannabis products; (6) provides for physicians with special training and registration by the Alabama Board of Medical Examiners to certify certain qualified patients to use medical cannabis product(s) and recommend the type and dosage of the product; (7) authorizes the Alabama Board of Medical Examiners to regulate certain aspects of the patient-physician relationship with regard to certifying patients for medical cannabis use; (8) permits qualified caregivers 21 years of age or older, with exceptions, to assist qualified patients in the use of medical cannabis; (9) provides limits on the maximum amount of delta-9-THC that may be recommended to a patient; (10) provides for a 60-day limit on the amount of medical cannabis products that may be purchased at one time; (11) provides that the patient registry database be used to track who has been issued a medical cannabis card, the dosage and type of product that may be used, and the amount and date of products dispensed to each individual patient; (12) provides access to the patient registry database by certain health care practitioners, the Board of Medical Examiners, pharmacists,

dispensaries, and law enforcement agencies; (13) authorizes the Department of Agriculture and Industries to license and regulate the cultivation of cannabis; (14) authorizes licensure for independent cultivators, processors, dispensaries, secured transporters, and testing laboratories and for integrated facilities which conduct cultivating, processing, and dispensing under one license; (15) establishes licensure fees and qualifications for applicants seeking licensure, including residency requirements for all applicants and horticulture or agronomic experience requirements for cultivator applicants; (16) limits the number of licenses that may be issued by the Medical Cannabis Commission or Department of Agriculture and Industries; (17) establishes packaging and labelling requirements for all medical cannabis products, including a prohibition on making products that appeal to minors, making products tamper resistant and tamper evident, and including information on the lot and batch number in order to track product quality and consistency; (18) establishes security requirements for all medical cannabis facilities; (19) establishes a process for dispensaries to ensure patients have a valid medical cannabis card, are dispensed the correct product, and are not dispensed more than the recommended dosage; (20) prohibits dispensaries from operating in any unincorporated area of a county that has not adopted a resolution to permit operation or in any municipality that has not adopted an ordinance to permit operation; (21) restricts where medical cannabis products may be possessed or used, including prohibiting the products from being possessed or used on any property of a public K-12 school, daycare or childcare facility, in any correctional facility, or in any motor vehicle unless the medical cannabis is in its original package and is sealed and reasonably inaccessible while the vehicle is moving; (22) restricts the operation of dispensaries within 1,000 feet from any school, daycare, or childcare facility; (23) provides that the use and acquisition of medical cannabis in accordance with this act supersedes criminal laws relating to marijuana possession and use; (24) provides protections for employers, including the ability to refuse to hire, discharge, discipline, or take other adverse action against an employee who uses medical cannabis, and the ability to require a drug-free work place or require drug-testing; (25) provides that this act does not affect or alter any obligation imposed on a parolee, probationer, or person in a pretrial diversion program; (26) prohibits the disqualification of any patient from receiving medical care or an organ transplant because of medical cannabis use; (27) authorizes the Department of Human Resources to consider medical cannabis use when determining adoption, foster care, evidence of child abuse or neglect, or child custody; (28) levies a nine percent tax on the gross proceeds of medical cannabis when sold at retail and an annual privilege tax not to exceed \$15,000 on any person doing business under this act and provide for the allocation of the tax proceeds; (29) establishes the Medical Cannabis

(Continued from page 277)

Research Consortium to issue grants for research on the use of cannabis for medical purposes; and (30) provides that an employee who is injured or killed, and who is otherwise eligible for workers' compensation benefits as a result of the injury or death, is ineligible to receive the compensation if the injury or death occurred due to the employee's impairment by medical cannabis, which impairment shall be conclusively presumed in the event of a positive drug test or upon the employee's refusal to submit to a blood or urine test. The act also: (1) automatically suspends the driver's license of any qualified patient who is recommended a daily dosage of a medical cannabis product that exceeds a certain amount of delta-9-THC; and (2) amends Section 13A-7-2, Code of Alabama 1975, to provide that a person who trespasses on the premises of a cultivator or processor of medical cannabis is guilty of trespass in the first degree, a Class A misdemeanor. Effective: May 17, 2021

Health Care Visitation Policies: Harold Sachs Act (Act 2021-470, HB521)

Representative Debbie Wood

The act (1) requires health care facilities to allow patients to receive visitors consistent with all applicable federal laws and regulations and certain federal guidance; (2) allows health care facilities to require visitors to comply with reasonable safety protocols; (3) requires health care facilities to notify patients of their visitation rights; and (4) provides immunity from suit for health care facilities in circumstances where claims are made against those facilities for damages, injury, or death based on a claim of negligence connected to exposure to contagious sickness arising from the allowance of visitation for patients. Effective: May 18, 2021

Sexual Assault Survivors Bill of Rights (Act 2021-481, HB137)

Representative Chip Brown

The act establishes various rights for sexual assault survivors, including: (1) the right to not be prevented from, or charged for receiving a medical forensic examination; (2) the right to have a sexual assault evidence collection kit preserved, without charge, by a law enforcement agency for at least 20 years or until the survivor reaches the age of 40 if the survivor was a minor when the assault occurred; and (3) the right to be informed, upon request by the investigating law enforcement agency of test results from the sexual assault evidence kit, including a DNA profile match. The act also requires the attorney general to develop a survivor notification document and to establish the Sexual Assault Task

Force and provides for the membership of the task force. Effective: August 1, 2021

Prohibition of Vaccine Passports (Act 2021-493, SB267)

Senator Arthur Orr

The act (1) prohibits state and local governing bodies from issuing vaccine passports, except as otherwise required by law for schoolchildren; (2) prohibits state and local governing bodies from requiring an individual to receive an immunization or present documentation of an immunization in order to receive any government service or enter into a government building, except as otherwise required by law for schoolchildren; (3) authorizes institutions of education to require a student to prove vaccination status as a condition of attendance only for the specific vaccines already required by the institutions as of January 1, 2021, so long as the institutions of education continue to provide exemptions for medical conditions or religious beliefs; (4) provides exemptions for the documentation of vaccinations already required by law for school aged children; and (5) prohibits businesses from refusing to provide goods or services, or refusing to allow admission, to a customer based on immunization status or documentation of immunization. Effective: May 24, 2021

Do-Not-Resuscitate Orders: Simon's Law (Act 2021-500, HB224)

Representative Nathaniel Ledbetter

The act (1) provides civil and criminal immunity for physicians, health care professionals, health care facilities, health care providers, and their employees for issuing or following a do-not-resuscitate (DNAR) order, or for participating in the providing, withholding, or withdrawing of life-sustaining treatment pursuant to a living will or designated proxy; and (2) provides civil and criminal immunity for health care providers or facilities that do not know or could not reasonably know that a DNAR order exists, if they take actions to provide life sustaining treatment to a qualified minor under a DNAR order. The act also establishes Simon's Law to: (1) provide that a DNAR order may not be instituted for a qualified minor unless consent is obtained from the minor's representative and a reasonable attempt is made to inform one of the parents of the consent by the minor's representative; (2) provide for a minor's representative's ability to refuse consent for a DNAR order; and (3) provide for the resolution of conflict between parents or representatives of a qualified minor regarding whether to institute or revoke a DNAR order. Effective: August 1, 2021

Born Alive: Gianna's Law (Act 2021-502, HB237)

Representative Ginny Shaver

The act: (1) provides that a human child born alive after an attempted abortion at an abortion center or reproductive health center is entitled to the same rights, powers, and privileges under law as any other child born alive in this state; (2) provides that a child born alive after an attempted abortion is entitled to the same physician-patient relationship available for any other individual in need of medical care in this state; (3) provides that a child born alive after an attempted abortion is entitled to the same degree of professional skill, care, and diligence by the physician to preserve the life and health of the child as any other child born alive would be entitled to; (4) authorizes the attorney general to bring actions to enforce the requirements of the act; (5) provides immunity from liability to a woman upon whom an abortion is performed or attempted; and (6) provides that a physician who fails to preserve the life and health of a child born alive after an attempted abortion is guilty of a Class A felony. Effective: August 1, 2021

State and Local Government

Contract Review Permanent Legislative Oversight Committee (Act 2021-536, HB392)

Representative Mike Jones

The act (1) requires the Contract Review Permanent Legislative Oversight Committee to review certain proposed agreements and obligations when a state agency or department that receives a direct appropriation from the state General Fund proposes to enter into any agreement obligating the agency or department to expend more than \$10,000,000 of the annual appropriation in a future fiscal year or years; (2) provides that if the committee does not give notice to the agency or department of its approval or disapproval within 30 days of the submission of the proposed agreement or obligation, the proposal is deemed approved; and (3) authorizes members of the committee to participate by means of telephone conference, video conference, or similar means for purposes of a quorum. Effective: May 27, 2021

Judge and District Attorney Uniform Pay Plan (Act 2021-441, SB292)

Senator Greg Albritton

The act (1) establishes a uniform pay plan for circuit judges, district judges, appellate court judges, supreme

court judges, and the Chief Justice of the Supreme Court; (2) requires all supreme court justices, judges of the appellate courts, circuit court judges, and district court judges to be licensed attorneys; (3) requires judges to complete at least 12 hours of continuing legal education each year, including one hour of ethics; (4) establishes a uniform pay plan for district attorneys in office after October 1, 2021, and provides for the salary of the attorney general; (5) provides for the elimination of county salary supplements and expense allowances for circuit and district judges; and (6) repeals Section 12-17-68 of the Code of Alabama 1975, relating to local salary supplements and expense allowances of district court judges. Effective: October 1, 2021

County Boards of Equalization (Act 2021-173, SB54)

Senator Malika Sanders-Fortier

The act (1) authorizes the Commissioner of the Department of Revenue to make appointments to county boards of equalization from nominations submitted by any of the nominating bodies in the event that a nominating body fails to submit a nomination; (2) provides a process for filling vacancies in board positions; (3) authorizes the chair of the county commission to appoint a temporary board member for a period not to exceed 45 days to fill the vacancy pending an appointment by the Commissioner of Revenue; (4) increases the per diem rate for active board members from \$35 to \$100 and the mileage cap from \$600 to \$1,000; and (5) further provides for the compensation of the members of the boards. Effective: April 8, 2021

Municipal Police Jurisdictions (Act 2021-297, SB107)

Senator Chris Elliott

The act (1) provides that police jurisdictions in existence as of January 1, 2021 may not be extended beyond corporate limits by annexation with limited exceptions for municipalities crossing a 6,000 population mark between the 2010 and 2020 Federal Decennial Censuses; (2) authorizes a municipality and a county to enter into an agreement under which the municipality will regulate construction in the police jurisdiction beyond the corporate limits, and to provide that neither party may waive this agreement for 24 months following the agreement; (3) authorizes any municipality, by ordinance, to eliminate or reduce its police jurisdiction outside the corporate limits of the municipality by any number of half-mile increments and provide a procedure for this elimination or reduction to include notice to the county commission; (4) provides that only municipal ordinances that are also state misdemeanors shall have force and effect in the police jurisdiction beyond the municipal limits, and that municipal ordinances enforcing police and sanitary regulations shall have effect

(Continued from page 279)

only within the municipal limits and on municipal property, including municipal drinking water reservoirs and adjoining property, except that ordinances regulating subdivisions or construction may have effect beyond the corporate limits as otherwise specifically provided in this act; (5) reduces the planning jurisdiction of a municipality to one and a half miles outside the corporate limits, unless extended by local law enacted after January 1, 2023; (6) provides a process for mutual agreement between a municipality and a county regarding regulation of subdivisions and to exempt certain transfers of property between related persons from municipal subdivision regulations; and (7) revises the reporting and auditing procedures for the Department of Examiners of Public Accounts as they relate to municipalities levying taxes or fees outside its corporate limits. Effective: July 26, 2021

Tobacco and Alcoholic Beverages

Delivery of Alcohol (Act 2021-188, SB126)

Senator J.T. Waggoner

The act (1) provides for a delivery service license from the Alcoholic Beverage Control Board (ABC Board) that authorizes the licensee to deliver beer, wine, and spirits directly in sealed, unopened containers to individuals over 21 years of age in the state within 75 miles of the place that the order was made and on the same day that the alcohol was ordered, and using only the licensee's own employees or contractors and the licensee's own vehicles; (2) places limits upon the delivery of alcoholic beverages by a licensee, including prohibiting delivery to any public institution of higher education or to any licensee of the board, or to any person who appears intoxicated or refuses to accept delivery; (3) establishes security and compliance measures, including training of a licensee's employees and contractors, conspicuous labeling of products, and signature verification of individuals receiving deliveries; (4) provides a process for licensure, including annual reporting of certain aggregate delivery data and a requirement that licensees maintain a specified general liability insurance policy; (5) establishes fees for the issuance and renewal of delivery service licenses, including a \$250 license issuance or renewal fee and a \$100 filing fee; (6) sets limits for the amount that may be delivered to any individual on any one day, including limits on the amount a manufacturer or brewpub may deliver; (7) provides for audit of

delivery service licensees by the ABC Board or the Department of Revenue; and (8) amends the definition of beer to include malt or brewed beverages incorporating honey, fruit, or other produce, and to establish a definition for a delivery service license. Effective: October 1, 2021

Direct Wine Shipments (Act 2021-419, HB437)

Representative Terri Collins

The act (1) creates a direct wine shipper license and a fulfillment center license; (2) authorizes common or permit carriers to ship and transport shipments of wine to Alabama residents who are at least 21 years of age at the direction of a direct wine shipper licensee or a wine fulfillment center; (3) provides requirements and safeguards for the shipping and transporting of wine, including signature and ID verification of age upon receipt of shipment, conspicuous labeling of products, and reporting requirements to the Alcoholic Beverage Control Board (ABC Board); (4) establishes a process for licensure and conditions for renewal and issuance, including a requirement that the licensee is licensed to manufacture wine in Alabama or another state; (5) authorizes the ABC Board to audit a direct wine shipper licensee and provide for the suspension of a common or permit carrier's license to operate in the state for failure to comply with the ABC Board licensing requirements; (6) sets fees for licensure, including a \$200 application fee and a \$150 annual renewal fee for a direct wine shipper license and an annual license fee of \$500 plus \$100 for each operating site for a wine fulfillment center license; (7) provides a \$500 civil penalty for a first violation of Title 28, a \$3,000 civil penalty for a second violation of Title 28, and a \$6,000 civil penalty for a third or subsequent violation of Title 28; and (8) provides that shipment of wine without a direct wine shipper license is a Class C misdemeanor. The act also (1) requires licensed importers and manufacturers of wine to enter into exclusive franchise agreements with wholesalers, as is required by current law for manufacturers and wholesalers of beer; and (2) regulates these agreements. Effective: August 1, 2021

Purchase of Tobacco Products (Act 2021-453, HB273)

Representative Barbara Drummond

The act (1) raises the age for legal possession, transportation, and purchase of tobacco products, alternative nicotine products, and electronic nicotine delivery systems (ENDS) from 19 to 21; (2) prohibits advertising of these products in any of the following manners: (i) as being tobacco cessation

products, (ii) as being healthier alternatives to smoking, or (iii) as being available in flavors other than tobacco, mint, or menthol on any outdoor billboard; (3) prohibits companies making these products from advertising on any outdoor billboard located within 1,000 feet of any public or private K-12 school or public playground; (4) prohibits companies making these products from sponsoring, financing, or advertising a scholarship of any kind using the brand name of the product, or from sponsoring events for which individuals 21 or more years of age make up less than 85 percent of the total age demographic of performing participants; (5) prohibits companies making these products from advertising the products in a print or digital publication distributed in this state for which less than 85 percent of the viewership or readership is made up of individuals 21 years of age or older as measured by competent and reliable survey evidences; (6) requires stores that offer for sale ENDS to place signage in the stores warning of the dangers of vaping; (7) prohibits sales of tobacco products, alternative nicotine products, and ENDS in vending machines except when entry to the facility is restricted by age; (8) beginning September 1, 2021, prohibits the sale of e-liquids, e-liquid in combination with an END, or an alternative nicotine product that contains synthetic nicotine or nicotine derived from a source other than tobacco without first obtaining approval from the U.S. Food and Drug Administration; (9) requires manufacturers of tobacco products, alternative nicotine products, and ENDS to make representations regarding the products to the Commissioner of the Department of Revenue; (10) requires the creation by the Department of Revenue of a directory for approved tobacco products, alternative nicotine products, and ENDS; (11) requires the Department of Mental Health to ensure compliance by this state with reporting and enforcement obligations of the United States Department of Health and Human Services pertaining to the sale of these products; and (12) provides civil penalties for violations, including a civil penalty of a \$1,000 daily fine for each product illegally offered for sale, and a \$500 fine for all other violations. Effective: August 1, 2021

Firearms

Alabama Uniform Concealed Carry Act (Act 2021-246, SB308)

Senator Randy Price

The act (1) requires the Alabama State Law Enforcement Agency (ALEA) to create and administer a database capable of allowing state, county, and municipal courts to report convictions and orders that would prohibit an individual

from possessing a firearm under federal or state law; (2) requires the database to allow law enforcement officers to be able to view Firearms Prohibited Person notifications for law enforcement purposes; and (3) directs the Alabama Justice Information Commission to issue guidelines on the operation of the database and transmittal of convictions, court orders, and other information related to the database; (4) authorizes qualified residents of the state to apply for and receive a concealed carry permit valid for one year, five years, or the lifetime of the resident; (5) requires each sheriff to conduct a criminal background check on each applicant for a concealed carry permit; (6) requires a sheriff to deny an application if the sheriff determines that the applicant is prohibited from the possession of a pistol or firearm under state or federal law; (7) upon making a determination that an applicant is not prohibited by law from possessing a pistol or firearm, requires the sheriff to approve the application; (8) provides that if there is no local law setting the fee for a one-year permit, the application fee is \$25; (9) provides that if there is no local law setting the fee for a five-year permit, the application fee is \$125; (10) establishes the fee for a lifetime carry permit, which is \$300 or, if the applicant is 60 years of age or older, \$150, and that the fee shall be prorated by the cost of any permit held by the applicant and which expired less than one year prior to application for a lifetime permit; (11) provides that there is no application fee for a permit for a service member, a retired or honorably discharged military veteran, a law enforcement officer, or an honorably retired law enforcement officer; (12) provides for the distribution of permit fees, including providing 80 percent to the issuing sheriff and 20 percent to ALEA; (13) requires each sheriff to conduct a background check on each lifetime carry permit holder at least once every five years to ensure the permit holder remains eligible to hold the permit; (14) provides a procedure for the revocation of a permit upon a finding that the permit holder has become prohibited from possessing a pistol or firearm under state or federal law; (15) specifies that a lifetime permit, including a permit held by a service member, expires if the individual establishes residence in another state; (16) provides that an individual who knowingly or intentionally makes a false statement when applying for a permit is guilty of a Class C misdemeanor; (17) provides that within 30 days after a conviction or final order in a case involving a misdemeanor charge of domestic violence, the court is required to report the conviction or order to ALEA for entry into the Firearms Prohibited Person Database; and (18) authorizes the court to collect a \$50 court cost for filing the report, taxed to the defendant; (19) requires a judge of probate, upon ordering a person to receive involuntary inpatient commitment, to report the commitment to ALEA for entry into the State

(Continued from page 281)

Firearms Prohibited Person Database. The creation and administration of the State Firearms Prohibited Person Database is effective April 20, 2021. The remainder of the act is effective upon certification from the Secretary of the Alabama State Law Enforcement Agency that the State Firearms Prohibited Person Database is operational and fully compliant with the requirements of the act.

Department of Corrections and Board of Pardons And Paroles

Parolees and Probationers “Dips and Dunks” Reform (Act 2021-249, HB110)

Representative Jim Hill

The act (1) adds a condition of parole and probation that prohibits a parolee or probationer from buying, owning, or possessing a firearm in violation of state or federal law; (2) provides that a parolee or probationer may serve an imposed 45-day period of confinement in a residential transition center operated by the Board of Pardons and Paroles or a regional county jail; (3) provides that, effective April 21, 2021, a parolee or probationer who is required to be held in custody awaiting a parole court hearing or a probation revocation hearing must be held in the county jail, and the parolee or probationer must be given credit toward the 45-day confinement for time in custody prior to the parole court or revocation hearing; (4) provides that a parolee or probationer sanctioned to a short period of confinement may not exceed a total of nine days during the term of parole or probation; (5) provides that a parolee or probationer may only be held in custody pending a parole court or probation revocation hearing if he or she poses a threat to public safety or is a flight risk; (6) revises the process for a court clerk or a court to notify the Department of Corrections of a defendant sentenced to its custody; (7) establishes when the Department of Corrections is required to take physical custody of an inmate sentenced to its custody; (8) clarifies when the Department of Corrections is responsible for the health care costs of inmates sentenced to its custody and in the

custody of a county jail; (9) establishes a per diem of \$28 for each day a parolee or probationer is housed in a county jail, and requires the per diem rate to be recalculated every three years; (10) effective April 21, 2021, allows the Board of Pardons and Paroles to establish and maintain one or more residential transition centers to be used for the housing of parolees and probationers ordered to serve a period of confinement in certain circumstances; (11) effective April 21, 2021, requires the Department of Corrections to designate county jails for confinement of certain parole and probationer violators and provides for the selection of the county jails; and (12) requires the Department of Corrections, by January 1, 2022, to have entered into agreements, and have begun operations, with at least one residential transition center or at least three designated county jails being used for the housing and care of certain parolees and probationers ordered to serve a period of confinement. Effective: January 1, 2022, with certain designated portions of the act taking effect April 21, 2021

Alabama Education Incentive Time Act (Act 2021-477, SB323)

Senator Clyde Chambliss

The act provides for a possible deduction of a prisoner’s sentence upon the completion of qualifying academic, vocational, risk-reducing, or apprenticeship programs while in the custody of the Department of Corrections. Effective: May 21, 2021

Joint Legislative Prison Oversight Committee (Act 2021-480, HB106)

Representative Chris England

The act (1) requires the Department of Corrections to make quarterly reports to the Joint Legislative Prison Oversight Committee; and (2) specifies that the quarterly reports must include statistical data that would allow the legislature to assess the size or composition of the inmate population, the general status of correctional officer staffing levels, the statistical data of inmate participation in various programs designed to assist inmates, a list of all litigation involving the Department of Corrections and the amount of money paid by the department to defend the litigation, statistical data of all occurrences of sexual abuse and sexual victimization of inmates, and statistical data containing the number, manner, and cause of inmate deaths occurring in a correctional facility. Effective: August 1, 2021 ▲



MEMORIALS

▲ Donald M. Phillips

Donald M. Phillips



Don Phillips, 75, of Lanett, Alabama passed away on April 22 at UAB Hospital in Birmingham. He was born November 10, 1945 at the West Point Hospital in West Point, Georgia to Cora Owens Phillips and Alvin Guy Phillips. Don graduated from Valley High School in 1964 and then from Jacksonville State University in 1969 with a bachelor of science in secondary education. He served honorably as a 1st Lieutenant for the U.S. Army in military intelligence and saw combat in Vietnam from February 1969 to January 1971. The Army awarded him the Bronze Star in 1971, and the Republic of Vietnam awarded him the Cross of Gallantry.

After his military service, Don returned home to complete his master of public administration degree. In 1975 he received his juris doctor degree from the University of Alabama School of Law. While in law school, he was awarded the Dean's Award. He was a member of the John A. Campbell Moot Court Board, the Bench and Bar Legal Honor Society, and the Phi Alpha Delta law fraternity.

He passed the bar exam in September 1975 and worked for the Alabama Attorney General's Office for one year. Don opened his practice in Lanett in 1976 and worked there until his death. One of his last wishes was for people to know that he was proud to have served as a guardian ad litem in Chambers County Juvenile Court cases for 25 years.

Don was a devoted father and avid traveler. He enjoyed cruises and had traveled to more than 60 countries. He enjoyed reading books about science and history, and he was a self-proclaimed generalist who loved to learn broadly.

Don is survived by his wife, Joycee M. Phillips; his children, Donald M. Phillips Jr., Hilary A. Phillips (her children Lee and Porter), Cherith E. Phillips, and Corbin J. Phillips. He is predeceased by his parents, Cora O. Phillips and Alvin G. Phillips; sister Martha R. Pike; grandparents Warner M. Phillips, Alice M. Phillips, Lum Owens, and Clara M. Owens. ▲

Bradford, Robert William, Jr.

Montgomery

Admitted: September 26, 1975

Died: March 19, 2021

Dixon, Brenda Ann

Tuscaloosa

Admitted: September 27, 1983

Died: March 29, 2021

Pearson, Jack Howell

Birmingham

Admitted: April 7, 1960

Died: March 26, 2021

Smith, William Clay

Roswell, GA

Admitted: September 25, 1981

Died: April 11, 2021

Cox, Hon. Emmett Ripley

Daphne

Admitted: January 1, 1959

Died: March 2, 2021

Langner, James Scott

Oneonta

Admitted: September 24, 1982

Died: April 14, 2021

Smelser, Thomas Edward, Sr.

Mobile

Admitted: April 26, 1996

Died: March 14, 2021



OPINIONS OF THE GENERAL COUNSEL

Roman A. Shaul
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Ethical Propriety of Using Temporary Lawyers

QUESTION(S):

Under what conditions may a law firm employ a temporary lawyer? May a staffing agency act as a recruiter or agent (“agency” or “placement agency”) to assist law firms and sole practitioners in locating and hiring qualified temporary or contract lawyers?

ANSWER:

Law firms may utilize the services of a temporary lawyer, and a lawyer may participate in an arrangement with a

temporary attorney staffing agency so long as: (1) the temporary lawyer and hiring law firm comply with all applicable conflict of interest requirements; (2) the temporary lawyer safeguards all confidential client information; (3) the client is informed that a temporary lawyer will be or has been hired to work on their case and the client consents; (4) the staffing agency and temporary lawyer do not split legal fees; and (5) the temporary lawyer and hiring law firm abide by all other provisions of the Alabama Rules of Professional Conduct.

DISCUSSION:

In researching this issue, it appears to the Disciplinary Commission that every state or national ethics organization, including the ABA, that has addressed the issue of temporary lawyers and temporary lawyer staffing agencies has authorized their use by law firms. However, in authorizing their use, each organization has done so under varying restrictions and conditions. While generally approving the use of temporary lawyers and staffing agencies, the Disciplinary Commission finds it necessary to place its own restrictions and conditions on the practice. As such, this opinion attempts to address certain ethical issues facing the temporary lawyer, the hiring law firm, and the temporary lawyer staffing agency. While this opinion addresses some of the more pressing ethical dilemmas surrounding the use of temporary lawyers, it is by no means meant to be an exhaustive analysis of the ethical considerations surrounding the placement and hiring of temporary lawyers. Under any arrangement, both the temporary lawyer and hiring law firm must abide by all ethical duties arising under the Alabama Rules of Professional Conduct, including the duty to provide competent representation under Rule 1.1, Ala. R. Prof. C. With that caveat in mind, the Disciplinary Commission addresses below certain key ethical issues raised by the placement and hiring of temporary lawyers.

Conflicts of Interest

The most daunting ethical dilemma that will be faced by temporary lawyers and those firms that hire them will be determining whether a conflict of interest exists. For the purpose of determining whether a conflict of interest exists, a temporary lawyer who performs work for a client, even under the sole direction of the hiring law firm, represents that client. In other words, even if the temporary lawyer never meets or speaks with the client and all directions are issued by the hiring law firm, an attorney/client relationship is still formed between the temporary lawyer and the firm's client. As such, the temporary lawyer and hiring law firm must abide by Rules 1.7 and 1.9, Ala. R. Prof. C., regarding conflicts of interest involving current and former clients.

The more difficult question that is raised in regards to temporary lawyers and resulting conflicts of interests involves Rule 1.10, Ala. R. Prof. C., which 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.

- (b) When a lawyer becomes associated with a firm, the firm may not knowingly represent a person in the same or a substantially related matter in which that lawyer, or a firm with which the lawyer was associated, had previously represented a client whose interests are materially adverse to that person and about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(b) that is material to the matter.
- (c) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, unless:
 - (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and
 - (2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(b) that is material to the matter.
- (d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

The ethical dilemma posed by Rule 1.10 was aptly described in Hazard & Hodes, *The Law of Lawyering*, § 57.3, 4. 3rd Edition (2005):

The question then arises how these lawyers should stand vis-à-vis the firms employing them. Are they closely enough affiliated with the firm so that imputed disqualification (in both directions) will apply during the time they are on staff? Plainly, a “temp” lawyer who has formerly represented a particular client (whether or not as a law temp) cannot personally oppose that client in a substantially related matter, no matter what the practice setting . . . But would it be permissible for that lawyer to work for a firm as a law temp on matters not involving that client while permanent members of the firm (perhaps in the next room) either initiate or continue litigation against the law temp's former client?

The fundamental question then becomes when, for the purposes of Rule 1.10, is a temporary lawyer considered a member or associate of the hiring law firm?

The ABA and others have embraced the functional analysis test for temporary lawyers in ABA Op. 88-356, holding that:

Ultimately, whether a temporary lawyer is treated as being ‘associated with a firm’ while working on a matter for the firm depends on whether the nature of the relationship is such that the temporary lawyer has access to information relating to the representation of

(Continued from page 285)

firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure or misuse of information relating to representation of other clients of the firm.

The primary tenet of the functional analysis test is that the temporary lawyer may be screened from other matters while working for the hiring law firm and, thus, avoid imputed disqualification. However, the effectiveness of using screens or “Chinese walls” has been questioned in recent years by several other jurisdictions. In fact, in RO 2002-01, we rejected the use of “Chinese walls” and determined that non-lawyer employees who change law firms must be held to the same standards as a lawyer in determining whether a conflict of interest exists. Similarly, the Disciplinary Commission sees no reason to differentiate between temporary lawyers and full-time lawyers. As such, for the purposes of Rule 1.10 and determining whether a conflict of interest exists, a temporary lawyer will be treated as a member or associate of the firm while employed by the firm.

Confidentiality

Under Rule 1.6, Ala. R. Prof. C., a lawyer has a duty to preserve the confidences and secrets of a client. It is the responsibility of the temporary lawyer to abide by Rule 1.6 by observing strict confidentiality regarding any confidences or secrets gained in the course of temporary employment. Absent client consent, a temporary lawyer may not reveal the subject matter and/or content of the services provided to clients of the hiring law firm to the staffing agency. Moreover, the temporary lawyer should not disclose any confidential information to the staffing agency in any time records submitted to the staffing agency. See Virginia State Bar Opinion 1712 (Op. in footnote 1).

Notice to Client

In determining whether the client must be informed and consent to the use of a temporary lawyer, many ethics organizations have drawn distinctions between whether the temporary lawyer works on a client’s case under the direct supervision of the hiring law firm. For instance, the ABA held in Formal Opinion 88-356, that if the temporary attorney will work under the direct supervision of a lawyer associated with the firm, the law firm is not required to disclose to the

client that a temporary attorney is working on the client’s case. In support of its position, the ABA stated that “[a] client who retains a firm expects that the legal services will be rendered by lawyers and other personnel closely supervised by the firm. Client consent to the involvement of firm personnel ... is inherent in the act of retaining the firm.” ABA Op. 88-356 at 10. According to this Opinion, use of a temporary attorney that will be closely supervised by a firm lawyer is akin to the use of firm personnel and does not require the consent of the client. If the temporary lawyer will not be closely supervised, but will work independently of the firm, then the client will need to be informed and his consent obtained for the use of the temporary attorney.

However, in Formal Opinion 05-9, the Georgia State Bar rejected such distinctions and adroitly observed that “[a] client reasonably assumes that only attorneys within the firm are doing work on that client’s case, and thus, a client should be informed that the firm is using temporary attorneys to do the client’s work.” The Disciplinary Commission agrees with the Georgia State Bar and believes that a lawyer has a duty under Rule 1.3, Ala. R. Prof. C., to inform the client of the law firm’s intention—whether at the commencement or at a later point in the course of representation—to use a temporary lawyer’s services on the client’s case. The client should always be given the option of either consenting to or rejecting the use of the temporary lawyer. Additionally, if the law firm wishes to pass the agency placement fee on to the client, the fee should be separately identified when billed to the client.

If the law firm intends on passing the costs of the temporary lawyer along to the client, the client must be so informed and consent to the fee arrangement. Any charge for the services of a temporary lawyer is subject to Rule 1.5, Ala. R. Prof. C., and, therefore, must be reasonable. If the cost of the staffing agency is to be passed along to the client, the expense must be clearly communicated to the client and approved by the client at the outset of representation or when the hiring of a temporary lawyer from a staffing agency is first contemplated. Clearly, a payment to a staffing agency for the services of a temporary lawyer is not among those expenses that ordinarily could be anticipated by a client. As such, the hiring law firm may only pass along the cost of the staffing agency to the client if the client has consented to the expense.

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Fees

Regardless of whether a staffing agency is solely owned by an attorney or non-attorney, legal fees should not be split between the agency and the temporary attorney. For example, if non-attorneys have any ownership interest in the staffing agency, any splitting of legal fees would be in violation of Rule 5.4, Ala. R. Prof. C., which forbids a lawyer or law firm from sharing legal fees with a non-lawyer. Likewise, even if the staffing agency is solely owned by an attorney, the splitting of legal fees would still be inappropriate. While Rule 5.4 would not apply to a lawyer-owned staffing agency, the practical effect of splitting legal fees between the agency and the temporary lawyer would be to create a de facto law firm. The creation of a de facto law firm would lead to further problems involving Rule 1.10 and conflicts of interest. As such, the Disciplinary Commission has determined that regardless of ownership, legal fees should never be split between the staffing agency and lawyer.

Of course, this prohibition leads one to ask when is a payment to a staffing agency considered the splitting of a legal fee. One often-used payment option involves the hiring law firm paying the staffing agency a certain amount per hour for the services of the temporary lawyer. The staffing agency then pays a portion of that amount to the temporary lawyer. In practical terms, the temporary lawyer is on the payroll of the staffing agency, not the law firm. Such a payment arrangement certainly suggests that a legal fee is being split between the staffing agency and the temporary lawyer.

As such, the Disciplinary Commission believes that the better practice would be for the hiring firm to pay the temporary lawyer directly and then pay a separate placement/administrative fee to the staffing agency for locating and placing the temporary lawyer with the requesting law firm. The ABA has approved "an arrangement whereby a law firm pays to a temporary lawyer compensation in a fixed dollar amount or at an hourly rate and pays a placement agency a fee based upon a percentage of the lawyer's compensation, . . ." ABA Op. 88-356. Any fee for the location and placement of the temporary lawyer, however, could still be tied to the number of hours of work performed by the temporary lawyer on behalf of the hiring law firm.

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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

Intentional Interference; Vicarious Liability

Cobbs, Allen & Hall, Inc. v. EPIC Holdings, Inc., No. 1190687 (Ala. March 26, 2021)

Among other holdings: (1) the court adopted Restatement (Second) of Torts § 772, under which “honest advice” is a mechanism by which the justification defense to an intentional interference claim may be established, and under which the defendant must demonstrate (a) that the advice was requested, (b) that the advice was given within the scope of the request, and (c) that the advice was honest; (2) as applied to this case, there was an issue of fact as to whether the advice given to plaintiff was “honest,” because the controlling equity-interest document provided the bases on which equity interests were to be transferred or paid out; (3) there was no substantial evidence to support holding defendant’s employer (EPIC) vicariously liable for potential intentional interference, because (a) employee’s actions were not within the line and scope of his employment with EPIC, and (b) EPIC could not have ratified his conduct because it did not have knowledge of the statements to Mercer before they were made.

Probate Court Removal

Ex parte Tutt Real Estate, LLC, No. 1190963 (Ala. March 26, 2021)

Under Ala. Code § 26-2-2, a petition for removal of a guardianship or conservatorship action from probate court to circuit court must (a) be sworn, (b) be filed by either the guardian/conservator or next friend of the ward, or person entitled to support out of the estate of the ward, (c) state the capacity in which the removing party is acting, and (d) state that, in the petitioner’s opinion, the matter may be more efficiently administered in the circuit court. Failure to meet the statutory requirements deprived the circuit court of jurisdiction.

Testamentary Capacity; Undue Influence

Brock v. Kelsoe, No. 1200141 (Ala. March 26, 2021)

Trial court erred by granting summary judgment to will proponent in will contest. Evidence was in conflict as to testamentary capacity between treating physician, who examined testator about one week before and nine days after will execution, and opined that she was incapable of executing a legal document, and drafting attorney, who generally testified that testator was pleasant and conversant but also stated that testator said her pre-deceased children lived out of state, and where there was no mention of living children in the will as would be the attorney’s normal practice. Substantial evidence supported claim of undue influence, based on proponent’s having inserted himself into testator’s life, changed the locks on her house, and failed to notify family members of her situation, thus suggesting an “unnatural discrimination” for the proponent. There was also evidence that proponent had dominant position in a confidential

relationship, and that proponent was unduly active in procuring the will, given that proponent suggested the lawyer for the will drafting and took plaintiff to two appointments with the lawyer, all within two months of her husband's death.

Rule 59.1

Ex parte Miller, No. 1190918 (Ala. April 2, 2021)

Trial court lacked jurisdiction to adjudicate Rule 59 motion more than 90 days past the time of filing, without express consent of the parties on the record to the continued pendency of the motion, by operation of Rule 59.1. The supreme court's COVID-related administrative orders suspending in-person court hearings did not alter Rule 59 calculations.

Creditor-Debtor

Cadence Bank, N.A. v. Robertson, No. 1190997 (Ala. April 2, 2021)

Trial court's grant of summary judgment to borrower in collection action by lender was error. Trial court entered summary judgment for borrower based on three-year statute of limitations applicable to open accounts, but lender also asserted a claim for account stated (which relies on a post-transaction agreement whereby the parties to an original account agree that a particular amount is owed), subject to a six-year statute.

Self-Defense; Statutory Immunity

Ex parte Teal, No. 1180877 (Ala. April 9, 2021)

Trial court improperly struck affirmative defense under Ala. Code § 13A-3-23(b), under which the party applying force may or may not be immune for actions taken in third-party defense if the party applying force negligently or wantonly injures the plaintiff while applying force against the perpetrator.

Guardianships and Conservatorships

Ex parte Jamison, No. 1190984 (Ala. April 9, 2021)

(1) Probate court was not ousted of jurisdiction under guardianship and conservatorship statutes due to pendency of adult-in-need proceedings in circuit court, because those statutory schemes co-exist and are not hierarchical; (2) probate court's rolling 30-day orders for an emergency or temporary guardianship or conservatorship were improper, because "it is not the intent of the Legislature to allow a temporary

conservatorship. . . to essentially ripen into a permanent conservatorship without further action and timely oversight from the probate court."

Probate Court Jurisdiction

Weems v. Long, No. 1190369 (Ala. April 18, 2021)

Probate court lacked jurisdiction to take any action in the proceeding after



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a timely and proper motion to transfer a pre-admission contest had been filed under Ala. Code § 43-8-198. Probate court's post-motion orders were invalid even though the movant later withdrew the request for transfer.

Relation Back

Ex parte Dail, No. 1190846 (Ala. April 23, 2021)

Rule 15(c)(3) applies to situations in which the plaintiff is amending to correctly identify a defendant included in or contemplated by the original complaint, not one named in a collateral action. In this case, the original complaint did not contemplate the Dails to be defendants. Although the Dails were named in another civil action brought by other plaintiffs arising from the same MVA, that action did not give the Dails notice, under Rule 15(c)(3), that an action would be asserted by Jordan against them.

Noncompete Agreements; Death

Boyd v. Mills, No. 1190615 (Ala. April 23, 2021)

Issue: whether noncompete agreement executed in connection with sale of business terminates on the death of the individual subject to the agreement. Held: because the noncompete did not impose any affirmative obligation on the decedent and was executed separately from the other agreements relating to the sale, the agreement did not terminate, and thus the death of the individual did not give the business buyer the right to terminate making payments.

Intentional Torts; Suicide and Potential Superseding or Intervening Causation

Rondini v. Bunn, No. 1190439 (Ala. May 7, 2021)

The suicide of a person who was sexually assaulted does not constitute a superseding cause that, as a matter of law, breaks the chain of causation between the sexual assault and the victim's death so as to absolve the alleged assailant of liability. Under preexisting Alabama law, no action would generally lie to recover damages for allegedly causing another person's suicide. However, preexisting Alabama law had recognized two exceptions: (1) where a custodial relationship existed so that the custodian may have foreseen the suicide, and (2) where defendant's actions led to the creation of an "uncontrollable impulse" leading to suicide. Neither exception applied in this case, because the alleged assailant and the victim were not in a custodial relationship, and eight months passed between the alleged assault and the suicide, by which time the parties were living in different states. In this case, the court created a third

exception—for intentional acts, as to which rules of proximate causation have a more limited application. The court concluded that a wrongful death claim may be pursued on behalf of a suicide victim against a sexual assailant if there is substantial evidence that the defendant caused the sexual assault and the assault was the cause in fact of the suicide. In such cases, liability may attach without regard to whether the defendant could have intended or even reasonably foreseen the suicide.

Retaliatory Discharge in Workers' Comp

Register v. Outdoor Aluminum, Inc., No. 1200181 (Ala. May 7, 2021)

Circuit court improperly granted summary judgment to employer in retaliatory discharge case. Although employer's stated reason for discharge was absenteeism, there was substantial evidence that that reason was pretextual, given the evidence that employer had skipped steps in its disciplinary process, and disputes over whether emails involving decision-maker evinced a negative attitude toward the workers' comp claim, and whether employer was or should have been aware of employer's physician's restrictions for plaintiff on returning to work.

State Immunity; Declaratory Relief

Reagan v. Alabama ABC Board, No. 1200213 (Ala. May 14, 2021)

Taxpayer brought putative class action against ABC Board and its members, seeking refunds and declaratory relief arising from board's calculation of taxes on spirituous and vinous liquors. City which receives portion of tax revenues intervened. The circuit court dismissed the action, holding that under *Patterson v. Gladwin Corp.*, 835 So. 2d 137 (Ala. 2002), it lacked subject matter jurisdiction due to a refund action being an action against the state barred by § 14 immunity, and that declaratory relief was ancillary to a claim for damages and thus triggered immunity. The supreme court affirmed.

State Agent Immunity

Shell v. Butcher, No. 1200097 (Ala. May 14, 2021)

Policies and procedures for jail intake were not "checklist" type requirements and were ambiguous in part, thus requiring exercise of judgment and triggering *Cranman* immunity. Policies stating that the "jail nurse must be notified" were ambiguous as to the timing of notification, and thus jail officers were entitled to immunity on claims brought when inmate died after suffering stroke who was mistakenly thought as being drunk at arrest and intake.

Section 105 (Constitutional Law); SSUT Tax Distributions

Barrett v. Jones, No. 1190470 (Ala. May 14, 2021)

The SSUT is a statewide tax imposed and collected on the sale of online goods and services, the proceeds of which are distributed under general law. As relevant here, under Ala. Code § 40-23-197(b) (2018 version), certain distributions are to be made to each county “and deposited into the general fund of the respective county commission.” A Morgan County local act passed in 2019 dictates how that county’s allocation of proceeds are to be appropriated following their deposit into the county’s general fund, with 85 percent of proceeds going to school boards. After the county commission refused to follow the local law, school boards brought an action against the commission, which defended the case by arguing that the Morgan County local law was at variance with the general law (in §40-23-197(b)), under which the counties were given the funds to appropriate as they wish. The circuit court upheld the validity of the local act. The supreme court affirmed. The lead opinion is by Justice Mitchell, who reviews the history of § 105 jurisprudence, notes its sometime inconsistencies, and ultimately concludes that the general act, though it requires depositing of funds into the general fund of the counties, does not state that the counties have exclusive control over the appropriation of those proceeds, and thus the subject of the local law is not “provided for” in the general law and thus passes § 105 muster. Mitchell also wrote a special concurrence, urging litigants in future cases to focus on the interpretation of texts (constitutional and otherwise) based on the meaning of terms at the time the laws were enacted or adopted. Justices Sellers, Bolin, and Bryan dissented.

Probate Court Jurisdiction

Turner v. Turner, No. 1190948 (Ala. May 14, 2021)

Once a person interested in a will files a contest and a demand for the transfer of her contest to circuit court under Ala. Code § 43-8-198, the probate court has no jurisdiction to do anything other than to refer the contest to the circuit court.

Trusts

Hon v. Hon, No. 1190682 (Ala. May 21, 2021)

Plurality panel opinion; trust grantor lacked standing to seek rescission or reformation of a trust under the Alabama Uniform Trust Code. Grantor was not entitled to relief on the merits for reformation or rescission, because the plain language of the trust made clear that the assets granted into trust would be beyond grantor’s control.

Personal Jurisdiction

Ex parte TitleMax of Georgia, Inc., No. 1200128 (Ala. May 21, 2021)

(1) TMX (parent entity) did not have continuous and systematic contacts with Alabama though its operation of its Alabama subsidiary, TitleMax of Alabama, nor did TMX’s

consent decree with CFPB concerning operations in multiple states (including Alabama), operation of a common commercial website for the subsidiaries, or failure to contest personal jurisdiction in a workers’ comp action, amount to the continuous and systematic contacts necessary for general personal jurisdiction; and (2) contacts of TMGA’s independent contractor in Alabama were insufficient to be imputed to TMGA for exercise of specific personal jurisdiction.

From the Court of Civil Appeals

Rule 59.1

West v. Bagwell, No. 2190780 (Ala. Civ. App. March 26, 2021)

Trial court erred by granting an extension of the Rule 59.1 deadline where one party did not consent.

Environmental

ADEM v. Wynlake Dev., LLC, No. 2190999 (Ala. Civ. App. April 9, 2021)

ADEM has statutory authority to levy civil penalties for violations of NPDES permits under Ala. Code § 22-22A-5(18)c. In the absence of any specific statutory language requiring that ADEM set forth the method it used in calculating a civil penalty, courts may not require ADEM to present evidence of its mathematical determinations of the civil penalty.

From the United States Supreme Court

Personal Jurisdiction

Ford Motor Co. v. Montana Eighth Judicial District Court, No. 19-368 (U.S. March 25, 2021)

State courts had specific personal jurisdiction over Ford Motor Company in a products-liability suit stemming from a car accident occurring in the forum states and brought on behalf of states’ residents, but where the cars were not first sold in the respective forum states, nor were they designed or manufactured there. Ford admitted that it “purposefully availed” itself of the two fora, but argued that its ties were not sufficiently causally connected to the product liability claims in issue. The Supreme Court disagreed, rejecting a strict causal relationship between the defendant’s in-state activity and the litigation. In an important concurrence in the judgment only, Justice Gorsuch (joined by Thomas and applauded separately by Alito) wrote extensively on the

(Continued from page 291)

case-driven distinction between “general” and “specific” jurisdiction, and how modern commerce may be rendering these animating principles anachronistic.

TCPA; Autodialer

Facebook, Inc. v. Duguid, No. 19-511 (U.S. April 1, 2021)

To qualify as an “automatic telephone dialing system” under the TCPA, a device must have the capacity either to store a telephone number using a random or sequential number generator, or to produce a telephone number using a random or sequential number generator. The case turns on which canon of statutory construction controls—the series qualifier principle or the “rule of last antecedent.”

Fourth Amendment

Torres v. Madrid, No. 19-292 (U.S. March 25, 2021)

The application of physical force to the body of a person with intent to restrain is a seizure within the Fourth Amendment, even if the person does not submit and is not subdued by the force applied.

ALJs, Social Security

Carr v. Saul, No. 19-1442 (U.S. April 22, 2021)

Social Security claimants challenging the constitutionality of the appointment of their ALJs by lower-level SSA staff are not required to raise challenges to the appointments of the ALJs in administrative proceedings, but she may instead reserve those challenges to judicial review.

FTC Enforcement

AMG Capital Mgmt., LLC v. FTC, No. 19-508 (U.S. April 22, 2021)

Section 13(b) of the FTC Act does not authorize the Commission to seek or a court to award equitable monetary relief (restitution or disgorgement).

Removal and Remand

BP PLC v. Mayor of Baltimore, No. 19-1189 (U.S. May 17, 2021)

When an action is removed based on both federal officer removal (28 U.S.C. § 1442) and other grounds, an order remanding the action is reviewable in all respects, not only as to the federal officer ground for removal but as to grounds which would be otherwise non-reviewable under 28 U.S.C. § 1447(d).

Search and Seizure

Caniglia v. Strom, No. 20-157 (U.S. May 17, 2021)

Officers’ removal of plaintiff and his firearms from his home after plaintiff had been removed from the scene for psychiatric evaluation was not justified by a “community caretaking exception” to the warrant requirement.

From the Eleventh Circuit Court of Appeals

Bankruptcy; Dischargeability; Fraudulent Transfers

Suvcmon Development, Inc. v. Morrison, No. 20-11681 (11th Cir. March 25, 2021)

Bankruptcy Court acted within its discretion in denying post-discharge leave of creditors, who had a non-dischargeable securities fraud judgment against the debtor, to proceed post-discharge against the debtor in a fraudulent transfer action against debtors’ sons (the purported transferees). The Court held: (1) a fraudulent transfer suit relating to collection of an underlying non-dischargeable debt is not merely an action to collect a non-dischargeable debt and is thus remains subject to the discharge injunction; (2) before a plaintiff may proceed nominally against a discharged debtor in order to recover from a third party, (a) the debtor’s status as a defendant in the case must be a prerequisite to the plaintiff’s recovering from the third party; and (b) maintaining suit against the debtor will not place any economic burden on the debtor.

Employment

Tonkyro v. Secretary of Vet. Affairs, No. 19-10014 (11th Cir. March 24, 2021)

Three ultrasound techs alleged they were sexually harassed in their employment at the Tampa VA, a fourth testified for them in an internal proceeding, and all three claims were settled in 2013. In 2014, the three filing techs brought EEOC charges for retaliation arising from their prior complaints and settlements; in 2016, the then-witness brought her own EEOC charge for sexual harassment and retaliation for her testimony from the prior proceeding. The district court granted summary judgment to the Secretary on all claims. The Eleventh Circuit affirmed in greater part, holding: (1) evidence of direct retaliatory intent was inferential at best and insufficiently connected to any specific

retaliatory action; (2) as for circumstantial inference of retaliation, “adverse employment action” based on rumors and comments about the plaintiffs were not, analyzed individually and not in the collective, sufficient to exceed the ‘petty slights and minor annoyances’ which are not actionable; (3) plaintiffs failed to offer substantial evidence that explanations of the Secretary for any specific employment decisions were pretextual. However, the district court erred in one respect; retaliatory hostile work environment claims are not governed by the “severe or pervasive” standard applied by the District Court here. *Monaghan v. Worldpay U.S. Inc.*, 955 F.3d 855, 862 (11th Cir. 2020), and thus remand was necessary for reconsideration of that claim.

Arbitration; Post-Arbitral Procedure

***O’Neal Constructors, LLC v. DRT America, LLC*, No. 20-11045 (11th Cir. April 2, 2021)**

Required service of “notice of a motion to vacate” under 9 U.S.C. § 12 is not accomplished by emailing to opposing counsel a “courtesy copy” of a memorandum supporting the motion. Under Rule 5 service by email, which is an “other electronic means” permitted by the rule, was appropriate only if O’Neal expressly consented in writing to be served by email, and consent cannot be inferred.

Employment

***Babb v. Secretary (Vet. Affairs)*, No. 16-16492 (11th Cir. April 1, 2021)**

The test for Title VII retaliation in *Trask v. Secretary, Department of Veterans Affairs*, 822 F.3d 1179 (11th Cir. 2016), is abrogated, and in a “retaliatory-hostile-work-environment” claim, the controlling standard is the less onerous “might have dissuaded a reasonable worker” test articulated rather than the more stringent “severe or pervasive” test.

Immigration

***Hylton v. U.S. Atty. Gen.*, No. 19-14825 (11th Cir. March 31, 2021)**

Federal law provides that “[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable.” 8 U.S.C. § 1227(a)(2)(A)(iii) (emphasis added). This provision does not apply to aliens who were citizens when convicted, and thus a denaturalized alien is not removable as an aggravated felon based on convictions entered while he was an American citizen.

Admiralty; Evidence (Experts)

***Buland v. NCL (Bahamas) Ltd.*, No. 19-13012 (11th Cir. March 29, 2021)**

In admiralty case concerning negligent treatment of a patient aboard a cruise ship, district court did not abuse discretion in excluding evidence from plaintiff’s expert economist concerning lost earning capacity. Economist’s opinions were based on unsupported assumptions about plaintiff’s post-injury capacity and thus lacked the “good grounds” for each step of the analysis under *Daubert*.

PLRA

***Hoever v. Marks*, No. 17-10792 (11th Cir. April 9, 2021) (en banc)**

Punitive damages may be recovered in a prisoner’s civil action even where no physical injury is shown.

Calculation of Time; Inaccessibility

***Circuitronix, LLC v. Kinwong Electronic*, No. 19-12547 (11th Cir. April 8, 2021)**

Under FRCP 6(a)(3), the closure of the clerk’s office renders the office inaccessible and tolls the filing deadline, even if electronic filing is available.

ADA

***Gil v. Winn-Dixie Stores, Inc.*, No. 17-13467 (11th Cir. April 7, 2021)**

Commercial websites are not spaces of “public accommodation” under the plain language of Title III of ADA.

Qualified Immunity

***Hardigree v. Lofton*, No. 19-13352 (11th Cir. April 6, 2021)**

Officer was not entitled to summary judgment in section 1983 claim based on warrantless unlawful entry into home and subsequent altercation; fact issues permeated the case.

Title VII

***Bailey v. Metro Ambulance Services, LLC*, No. 19-135513 (11th Cir. April 6, 2021)**

Rastafarian plaintiff sued employer for Title VII religious discrimination, refusal to accommodate (although he was offered a position on the non-emergency side of operations), and retaliation, arising from his religiously-based need for facial hair. The district court granted summary judgment to employer. The Eleventh Circuit affirmed, holding: (1) employer offered a reasonable accommodation, under which his salary, hours, and job description would have remained the same; (2) plaintiff’s retaliation claim failed for lack of evidence that employer’s discovery of his participation in proceedings against another ambulance company for discrimination was the but-for cause of his ultimate termination.

FMLA

***Ramji v. Hospital Housekeeping Systems, LLC*, No. 19-13461 (11th Cir. April 6, 2021)**

Employee suffered on-the-job injury and received workers’ comp benefits. She was not advised of her FMLA rights. After failing a return-to-work essential function test, employer fired employee, again without advising employee of FMLA rights. Employee filed FMLA action, which employer defended based on compliance with worker’s comp law, and on which district court granted summary judgment. The Eleventh Circuit reversed, holding that the FMLA regulations specify that “the workers’ compensation absence and FMLA leave may run concurrently.” Offering light-duty work did not relieve employer of FMLA duties.

(Continued from page 293)

ERISA; Attorneys' Fees

Peer v. Liberty Life Ass. Co., No. 19-13974 (11th Cir. April 6, 2021)

ERISA's fee-shifting provision, 29 U.S.C. 1132(g)(1), cannot support a fee award against a losing counsel.

CVRA

In re Wild, No. 19-13843 (11th Cir. April 15, 2021) (en banc)

Wild, one of 30+ victims of Jeffrey Epstein, sued under the Crime Victims' Rights Act of 2004, claiming that when federal prosecutors secretly negotiated and entered into a non-prosecution agreement with Epstein in 2007, they violated her rights under the CVRA-in particular, her rights to confer with the government's lawyers and to be treated fairly by them. Held: as the CVRA is currently written, rights under the CVRA do not attach until criminal proceedings have been initiated against a defendant, either by complaint, information, or indictment. Because the government never filed charges or otherwise commenced criminal proceedings against Epstein, the CVRA was never triggered.

Daubert

Moore v. Intuitive Surgical, Inc., No. 19-10869 (11th Cir. April 22, 2021)

Plaintiff was injured in a robotically assisted laparoscopic hysterectomy when the surgeon, using an IS pair of electrified scissors, burned her left ureter and caused post-surgical inability to urinate. Plaintiff's expert on both the standard of care in these procedures and causation was an OB-GYN who had performed over 4,000 procedures like this, but never using the IS model scissors at issue. After a two-day *Daubert* hearing, the district court granted IS's motion to exclude his testimony and granted summary judgment to IS. The Eleventh Circuit reversed. The Court first noted that at issue was only the first of the three *Daubert* factors (the expert's qualifications). Expert's inability to describe differences between the instruments used in robotic vs traditional surgery, initial port placement, or orientation or trajectory of the instruments during the procedure went to weight and not admissibility. "Our caselaw does not support a bright line rule that an expert witness is qualified to testify regarding the cause of an injury only if he has personally used the allegedly defective product."

Standing; Declaratory Judgments

Mack v. USAA Cas. Ins. Co., No. 19-14958 (11th Cir. April 22, 2021)

Insured lacked standing to seek declaratory judgment that method for calculating total loss on auto policy violated

Florida law, for lack of any real and immediate threat of future injury, and he deliberately sought no relief for retrospective harm in order to avoid federal jurisdiction.

FDCPA

Hunstein v. Preferred Collection and Management Services, Inc., No. 19-14434 (11th Cir. April 21, 2021)

Section 1692c(b) of FDCPA prohibits a debt collector from communicating consumers' personal information to any third party in connection with the collection of a debt. Debt collector sent personal information to vendor, which then used the information to create and mail dunning letter. Held: (a) a violation of 1692c(b) creates an Article III injury in fact sufficient to confer standing; and (b) the debt collector's transmission of information to the vendor constituted a "communication in connection with the collection of a debt" under section 1692c(b). The case has a significant discussion of the extant case law on standing in statutory-violation cases.

Qualified Immunity

Crocker v. Beatty, No. 18-14682 (11th Cir. April 21, 2021)

Officer was entitled to qualified immunity as to noncompliant citizen's First Amendment claim arising from seizure of cell phone citizen was using to take pictures of MVA scene; that there was no false arrest claim because officer had probable cause; and excessive force claim failed on the merits and was also barred by qualified immunity.

Juror Exclusion; Outside Sources

USA v. Brown, No. 17-15470 (11th Cir. May 6, 2021) (en banc)

Defendant's Sixth Amendment right to jury trial was violated when district court excluded juror during deliberations, after another juror reported that the subject juror related that the Holy Spirit told the juror that the defendant was not guilty. On voir dire of the subject juror, the juror admitted making those statements but continued to state that the juror was applying the evidence to the law in deliberations. After a deliberate voir dire of both the reporting juror and the subject juror, the district court excused the subject juror for attempting to base a verdict on something other than the evidence and the law, despite accepting the sincerity of the subject juror's statements.

Removal and Remand

Shipley v. Helping Hands Therapy, No. 19-13812 (11th Cir. May 6, 2021)

(1) Although a remand order based on a procedural defect is generally unreviewable, there is appellate jurisdiction to

review such an order when a district court exceeds its statutory authority. (2) the district court has no authority to remand a case based on a procedural defect in removal when (a) a motion to remand for lack of subject matter jurisdiction is filed within 30 days of the notice of removal, but (b) a procedural defect is not raised until after the 30-day statutory time limit.

Qualified Immunity

***Fuqua v. Turner*, No. 19-13877 (11th Cir. May 6, 2021)**

Among other issues, district court properly considered testimony from a criminal suppression hearing in a related subsequent civil action. “[T]estimony in a judicial proceeding as functionally equivalent to deposition testimony since it is given under oath and with the opportunity for cross-examination.” Fire marshal was entitled to qualified immunity because, on the facts, a reasonable person in his position could have believed he had consent to search both the nightclub and private bedroom in the nightclub without a warrant.

ADA; Standing

***Sierra v. City of Hallendale Beach*, No. 19-13694 (11th Cir. May 6, 2021)**

Deaf plaintiff had standing to sue city for public accommodation access claims; he alleged an inability to access public information videos) and sought redress for that violation.

Social Security

***Buckwalter v. Commissioner*, No. 19-14420 (11th Cir. May 14, 2021)**

There is no apparent conflict between one’s limitation to following simple instructions and positions that require the ability to follow “detailed but uninvolved” instructions.

FLSA; Agriculture Exception

***Ramirez v. Statewide Harvesting & Hauling, LLC*, No. 20-11995 (11th Cir. May 21, 2021)**

Fruit-harvesting company’s crew leaders activities in transporting field workers between company-provided housing and a grocery store, laundromat, and bank every week do not fall within the agriculture exemption to overtime requirements under FLSA, 29 U.S.C. § 213(b)(12).

Title VII Retaliation

***Tolar v. Marion Bank & Trust*, No. 19-11546 (11th Cir. May 17, 2021)**

There was a lack of causal connection between the allegedly retaliatory conduct undertaken by third parties (scorched-earth litigation tactics) and the protected conduct (the charge), because they were not temporally proximate and because no other evidence tended to demonstrate a connection.

RECENT CRIMINAL DECISIONS

From the United States Supreme Court

Habeas

***Mays v. Hines*, No. 20-507 (U.S. March 29, 2021)**

Once a state court has considered and rejected the ground for § 2254 habeas relief, petitioner must demonstrate that the state court took an “unreasonable” view of the facts or law, which is met “only when a decision “was so lacking in justification . . . beyond any possibility for fair-minded disagreement.”

Juveniles; Life Without Parole

***Jones v. Mississippi*, No. 18-1259 (U.S. April 22, 2021)**

Juvenile defendant is not entitled to a specific finding of permanent incorrigibility before the sentencing court sentences the defendant to life without parole. A discretionary sentencing system which allows for the imposition of the penalty but does not require it is constitutionally necessary and constitutionally sufficient.

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Habeas

Edwards v. Vannoy, No. 19-5807 (U.S. May 17, 2021)

Under *Ramos v. Louisiana*, — U.S. — (2020), a state jury must be unanimous to convict a criminal defendant of a serious offense. The *Ramos* unanimity requirement does not apply retroactively to overturn final convictions on federal collateral review.

From the Alabama Supreme Court

Revocation; Split Sentence

Ex parte McGowan, No. 1190090 (Ala. Apr. 30, 2021)

Circuit court erred in revoking the defendant's probation and imposing its original 15-year sentences, because their five-year terms of confinement were not authorized by the Split Sentence Act, Ala. Code § 15-8-8.

From the Alabama Court of Criminal Appeals

Ineffective Assistance; Immigration

Okeowa v. State, CR-19-0273 (Ala. Crim. App. Apr. 23, 2021)

Defense counsel had no reason to inquire about client's citizenship status in their discussion regarding a possible guilty plea; fact that the client spoke English "with an accent" was insufficient to trigger a *Padilla* obligation to inquire regarding her citizenship. Counsel may ask every client about their citizenship status as a "best practice," but the failure to do so does not automatically trigger a Sixth Amendment violation.

Revocation

Gann v. State, CR-20-0196 (Ala. Crim. App. Apr. 23, 2021)

Circuit court was required to conduct a hearing to consider whether it should revoke the defendant's community corrections sentence.

Hearsay; Revocation

Knight v. State, CR-19-1128 (Ala. Crim. App. Apr. 23, 2021)

While hearsay evidence is admissible in revocation proceedings under Ala. R. Crim. P. 27. 6(d)(1), it cannot serve as the sole basis for revocation.

Dismissal of Indictment

State v. Stallworth, CR-19-0546 (Ala. Crim. App. Apr. 23, 2021)

Rule 13.5 does not authorize dismissal of an indictment due to insufficiency of evidence.

Jury Selection

May v. State, CR-19-0721 (Ala. Crim. App. Apr. 23, 2021)

Selection of potential jurors from a random computerized group of licensed drivers did not inherently result in an underrepresentation of citizens of the murder defendant's race in his venire.

Sentence Modification

Hydrick v. State, CR-20-0019 (Ala. Crim. App. Apr. 23, 2021)

Circuit court could not modify the defendant's sentence more than 30 days after its original pronouncement, regardless that she did not heed the circuit court's condition that she appear at the county jail by a certain date.

Rule 32; Timeliness

Williams v. State, CR-19-0524 (Ala. Crim. App. Apr. 23, 2021)

After granting petitioner's request for an out-of-time appeal from the denial of a postconviction petition under Rule 32.1 (f), the circuit court should hold any other pending Rule 32 claims in abeyance until completion of the appeal.

Double Jeopardy

Garrison v. State, CR-19-0832 (Ala. Crim. App. Apr. 23, 2021)

Defendant's three convictions of burglary arising from the same incident constituted a double jeopardy violation; three counts were alternative methods of proving the same offense under Ala. Code § 13A-7-5.

Cellphone Data

Watson v. State, CR-18-0377 (Ala. Crim. App. Apr. 23, 2021)

Under *Ex parte George*, No. 1190490 (Ala. Jan. 8, 2021), ALEA analyst's testimony regarding cellphone data was subject to Ala. R. Evid. 702; circuit court must determine whether analyst

was qualified to provide expert testimony and whether her testimony was admissible under the rule.

Escape

Jones v. State, CR-18-0997 (Ala. Crim. App. Apr. 23, 2021)

Defendant's failure to return to work-release barracks constituted second-degree escape under Ala. Code § 13A-10-32.

Search and Seizure; Faulty Warrant

State v. Gray, CR-19-1110 (Ala. Crim. App. Apr. 23, 2021)

Finding that arrest warrant was pretextual did not require exclusion of contraband discovered during search of residence stemming from a facially valid search warrant. Officers' reliance on arrest warrant to approach defendant's residence was objectively reasonable. Once there, officers smelled marijuana and then obtained search warrant for drugs and paraphernalia.

Search and Seizure; Auto Exception

Lawson v. State, CR-19-0471 (Ala. Crim. App. Mar. 12, 2021)

Law enforcement officer's viewing of digital scale and plastic bags in defendant's vehicle during traffic stop, along with observation that defendant appeared to be "out of it," was sufficient to support warrantless search of vehicle.

Miranda

Ruiz v. State, CR-19-0307 (Ala. Crim. App. Mar. 12, 2021)

Defendant's waiver of *Miranda* rights was voluntary, though his primary language was Spanish; officer's questions were translated into Spanish for defendant by his cousin. *Miranda* warnings need not be given in an exact form or by a certified translator.

Challenges for Cause

Collins v. State, CR-14-0753 (Ala. Crim. App. Mar. 12, 2021)

Trial court properly denied defendant's challenge for cause regarding prosecutor's prior legal work for a venire member while in private practice. Record did not suggest that the venire member was biased for the prosecution, and business relationship had ended approximately 12 years before the trial.

Heat of Passion

Varnado v. State, CR-18-0673 (Ala. Crim. App. Mar. 12, 2021)

Circuit court erred by failing to instruct jury regarding heat of passion manslaughter as a lesser-included offense. Defendant's testimony regarding altercation in which he grabbed a gun and fatally shot the victim sufficiently raised the issue of provoked heat of passion to warrant the instruction. ▲



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