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William H. Pryor, Jr., Chief Judge, Eleventh Circuit Court of Appeals



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William H. Pryor, Jr., Chief Judge,
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Telling Our Story

As many of you know, one of my main initiatives is to educate the public on the valuable role that lawyers play in our state, not only from an economic standpoint but also from a charitable standpoint. In furtherance of that goal, I recently spoke to a civic organization where I discussed the importance of Alabama's court system and the legal profession to our state as well as our local communities. The feedback I received was overwhelmingly positive. Several people even commented that they had no idea how much lawyers give back to our state each year.

I am working with our Lawyer Public Relations Task Force, chaired by Sara

Williams, George Parker, and Mike Ermer, to modify my presentation to be used by members of the task force in speeches to civic organizations throughout the state. If you know of a civic organization in your community that we can speak to, please contact me at rgm@mtattorneys.com or Megan Hughes at megan.hughes@alabar.org. It is my goal that this presentation will be given to at least one civic organization in every county before the summer, either in person or virtually. Working with our outstanding communications department, we will also deliver a shorter version of this message to the general public through a robust advertising campaign.

Through these presentations, we will demonstrate that the court system and the legal profession combine to form one of the largest economic engines in the state. For example, in fiscal year 2020, our court system distributed a total of \$382.4 million directly into the Alabama economy, despite the pandemic covering half the year.¹ Our court system also currently employs over 1,600 people statewide. When you include the salaries paid to judicial employees, third-party vendors, and others, the Alabama court system adds billions of dollars to the state's economy each year. We will also emphasize the fact that our court system is one of the largest collection agencies in Alabama. For example, our courts collect funds for child support (over \$140M collected in fiscal year 2020), restitution, and other county-specific projects and do not receive any compensation for performing this public service.

Alabama lawyers add billions of dollars to the state's economy each year through their daily work and that of their staff. However, what I feel is most important for our presentation is highlighting the valuable pro bono services performed by Alabama lawyers each year. In 2019 alone, Alabama lawyers contributed more than 167,000 pro bono hours, resulting in tens of millions of dollars of donated time. The number of donated hours is drawn from voluntary attorney responses included in their 2019 bar membership renewals, and only 20 percent of attorneys chose to respond. Therefore, the actual donated hours and monetary value is likely much higher. For those attorneys who did respond, the average pro bono hours donated was 47 per year. This is 10 hours more than the national average of 37.² And, that number is even more impressive when one considers that Alabama lawyers closed almost 2.5 times the number of pro bono cases per 10,000 persons living at or below the poverty level than that of lawyers nationally.³

We will also be highlighting the great work of our pro bono task forces,


Lawyer Voices for Survivors (our anti-human trafficking task force) and our Helping Heroes in Healthcare Task Force, which assists our Volunteer Lawyers Program in providing free legal services to front-line medical responders. We will further publicize the outstanding work performed by members of our Young Lawyers' Section who tirelessly manned FEMA disaster relief

hotlines after the devastation caused by recent hurricanes in Alabama.


An additional part of our presentation will emphasize how we make sure to take care of our own. The Board of Bar Commissioners of the Alabama State Bar has created Lawyers Render Service, Inc., a non-profit organization designed to assist lawyers who experience significant, adverse events in their


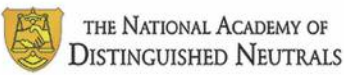

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I know I have said it many times, but in my opinion, lawyers give back more to our state and take better care of our colleagues than any other profession does (my friends and family are tired of hearing me say this). As your president, I have made it my mission to prove this theory and continue to build our reputation in the communities in which we commit so much of our time and energy. I look forward to continuing to educate the public about the economic and charitable impact that attorneys have on this state. Stay tuned for my next article where I plan to showcase some of the inspiring stories of leaders in our profession in our #MoreThanALawyer series. I hope this message not only enhances the

image of lawyers, but also inspires attorneys to continue to take pride in our profession. ▲

Endnotes

1. By comparison, the next most recent, publicly available numbers show that the court system distributed \$473.6M in 2018 directly into the economy.
2. Jay Reeves, *Lawyers Spend 37 Hours a Year in Pro Bono Service*, LAWYERS MUTUAL (May 25, 2018), available at <https://www.lawyersmutualinc.com/blog/lawyers-spend-37-hours-a-year-in-pro-bono-service-2> (citing *Supporting Justice A Report on the Pro Bono Work of America's Lawyers*, AMERICAN BAR ASSOCIATION (April 2018)).
3. Order designating October 2020 Pro Bono Month (Ala. Sept. 29, 2020) (Parker, C.J.), available at <https://judicial.alabama.gov/docs/CJParkerOrderProBonoMonth2020.pdf>.

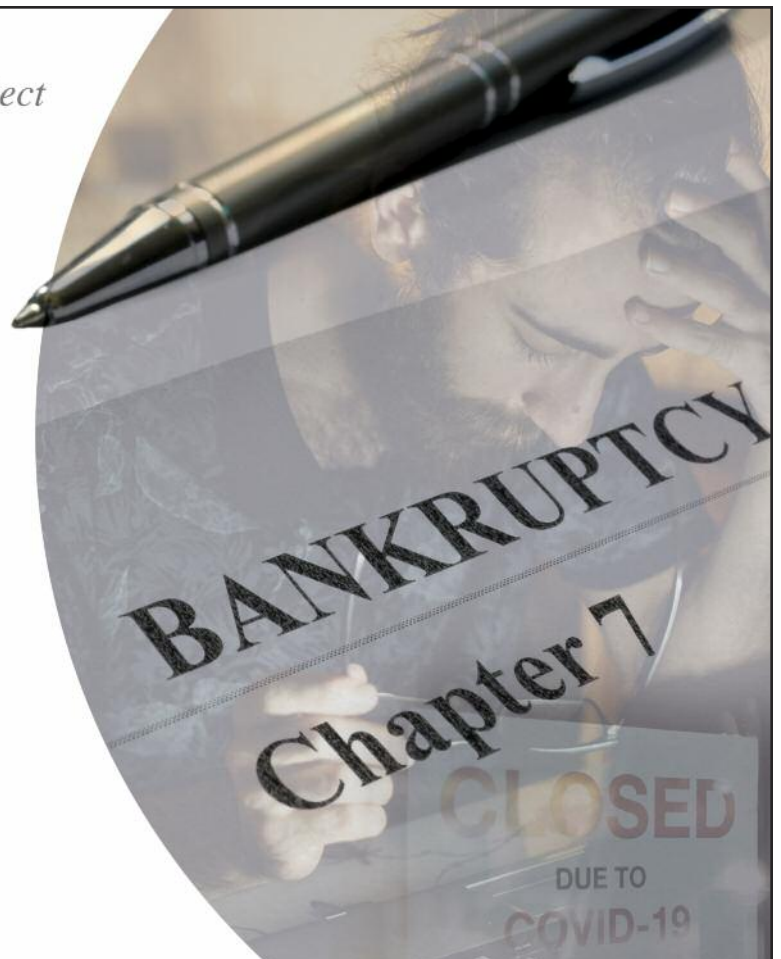
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*Pursuant to the Alabama State Bar's Rules Governing the Election of President-elect, the following biographical sketch is provided of **C. Gibson Vance**. Vance was the sole qualifying candidate for the position of president-elect of the Alabama State Bar for the 2021-2022 term and will assume the presidency in 2022.*

C. Gibson Vance

Gibson Vance has served in many leadership capacities at the Alabama State Bar, currently serving as vice president. He has been a bar commissioner representing the 15th Judicial Circuit since 2016 and has chaired and been a member of numerous committees and task forces, including the Alabama Lawyers Care Task Force, the Government Relations Liaison Committee, the Finance & Audit Committee, and the Lawyer Assistance Program Committee.

He is a member of the American Board of Trial Advocates, a Fellow of the Alabama Law Foundation, and regularly recognized by Best Lawyers in America.

Gibson's 28-year law career has been spent representing those who have been injured or mistreated. Advocating for and helping others through his work is deeply rooted in his upbringing. Born in Troy and raised by his mother, a school-teacher, Gibson attended Troy State University on a Pell Grant, student loans, and work study. He attended Jones School of Law at night and worked for a law firm full-time as a law clerk during the day. While attending Jones, he was elected student bar president.

He began practicing during law school after obtaining his third-year practice card, and he assisted in trying several jury trials. Gibson started in a two-person firm, handling all types of cases, including criminal, civil, probate, and domestic.

For the last 20 years, he has been a partner at Beasley, Allen, Crow, Methvin,



Vance

Portis & Miles PC and has had handled cases throughout the state.

In addition to his service with the Alabama State Bar, Gibson has been active in bar activities at the local and national levels. He has served as president of the Montgomery County Bar Association (MCBA), the MCBA's Young Lawyers' Section, the Alabama Civil Justice Foundation, the Alabama Association for Justice, the Southern Trial Lawyers Association, and the American Association for Justice.

He is active in a leadership capacity in several other organizations and currently serves as president pro tempore of the Troy University Board of Trustees.

Gibson is married to Kate Vance, and they have two sons, Carter, who attends seminary, and Andrew, who is a junior at Troy. ▲

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The DUI Edition

I've known Kearney Dee Hutsler for more than 35 years. He is a new member of the editorial board, and when we were looking for someone to help put together the DUI edition, we turned to him. Dee, you did a great job.

We begin with Steve Shaw's first article, "Driving Under the Influence—An Overview." (We have two articles by Steve in this edition.) When I talk to lawyers about our content, one of the things I hear is how many of you enjoy articles that point young lawyers or new

practitioners in a field in the right direction. This is one of those articles. It points out the statute you should begin with, looks to a case examines some important elements, and then it gives practical pointers. Reading this would be time well spent (page 106).

Dan Wainscott's "Practical Tips in DUI Cases" pivots perfectly between an overview and what to do once the client walks in the door, tells you he's been arrested and charged with a DUI, and asks for your help. What do you need to ask?

Dan gets you started. One of the things I liked best about the article was the frankness in pointing out that different jurisdictions handle these cases differently, including that pretrial diversion programs are anything but uniform. Dan talks about expert witnesses, the special rules that apply to clients who hold a commercial driver's license (CDL), the all-important scientific tests, and how to think about a preliminary hearing. Good stuff throughout (page 110).

I don't know the statistic, but I expect the majority of DUI cases end with some sort of plea. George Flowers helps you navigate those waters with "Avoid Conviction Through Settlement—The Rise of Deferred Prosecution." This article also warns you to be understand that not every jurisdiction is uniform in either its pretrial diversion requirements, or in the way their pretrial diversion programs are handled. He also tells you just how much your client gives up when he agrees to pretrial diversion. Did you know that a person holding a CDL is not generally eligible for pretrial diversion? Since the person who holds a CDL generally makes their living from it, this is important stuff to know. And if you need to know about interlock devices—which prevents someone consuming alcohol from starting the motor vehicle—this is a good place to start (page 112).

Finally, Steve Shaw walks us through the process of removing the DUI from your client's records in his second article, "Expungement of Criminal Records." Alabama passed its expungement law in 2014, and Steve explains what led the legislature to take an interest in this topic, and what they did about it. He tells us what statutes we need to look at, and then he directs us to a website and some helpful forms. Did you know that your mayor has the authority to pardon? It's worth exploring in the right case (page 115).

When you've read all of these, I think you'll agree that you have a much better grasp of just how tough DUI defense work is. Our goal was for you to both become acquainted with enough law to find an entry point in the field, and, if you are already there, to become even better.

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

And just wait till you see what we have for you in our next edition. ▲

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IMPORTANT NOTICES

- ▲ **Notice of Election and Electronic Balloting**
- ▲ **Notice of and Opportunity for Comment on Amendments to The Rules of the United States Court of Appeals for the Eleventh Circuit**
- ▲ **Pro Bono Awards**

Notice of Election And Electronic Balloting

Notice is given here pursuant to the *Alabama State Bar Rules Governing Election and Selection of President-elect and Board of Bar Commissioners* that the election of these officers will be held beginning Monday, May 17, 2021 and ending Friday, May 21, 2021.

On the third Monday in May (May 17, 2021), members will be notified by email with instructions for accessing an electronic ballot. Members who wish to vote by paper ballot should notify the secretary in writing on or before the first Friday in May (May 7, 2021) requesting a paper ballot. A single written request will be sufficient for all elections, including run-offs and contested president-elect races during this election cycle. All ballots (paper and electronic) must be voted and received by the Alabama State Bar by 5:00 p.m. on the Friday (May 21, 2021) immediately following the opening of the election.

Nomination and Election of Board of Bar Commissioners

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

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- 9th Judicial Circuit
- 10th Judicial Circuit, Place 1
- 10th Judicial Circuit, Place 2
- 10th Judicial Circuit, Place 5
- 10th Judicial Circuit, Place 8
- 10th Judicial Circuit, Place 9
- 12th Judicial Circuit
- 13th Judicial Circuit, Place 2
- 15th Judicial Circuit, Place 2
- 15th Judicial Circuit, Place 6
- 16th Judicial Circuit
- 18th Judicial Circuit, Place 2
- 20th Judicial Circuit
- 23rd Judicial Circuit, Place 2
- 23rd Judicial Circuit, Place 4
- 24th Judicial Circuit
- 27th Judicial Circuit
- 29th Judicial Circuit
- 38th Judicial Circuit
- 39th Judicial Circuit

Additional commissioners will be elected for each 300 members of the state bar with principal offices therein. New commissioner positions for these and the remaining circuits will be determined by a census on March 1, 2021 and vacancies certified by the secretary no later than March 15, 2021. All terms will be for three years.

A candidate for commissioner may be nominated by petition bearing the signatures of five members in good standing with principal offices in the circuit in which the election will be held or by the candidate's written declaration of candidacy. Nomination forms and/or declarations of candidacy must be received by the secretary no later than 5:00 p.m. on the last Friday in April (April 30, 2021).

Election of At-Large Commissioners

At-large commissioners will be elected for the following place numbers: 1, 4, and 7. Petitions for these positions, which are elected by the Board of Bar Commissioners, are due by April 1, 2021.

Submission of Nominations

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

Justin C. Aday
Acting Secretary
Alabama State Bar
P.O. Box 671
Montgomery, AL 36101

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

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

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

Notice 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 March 31 to April 30, 2021.

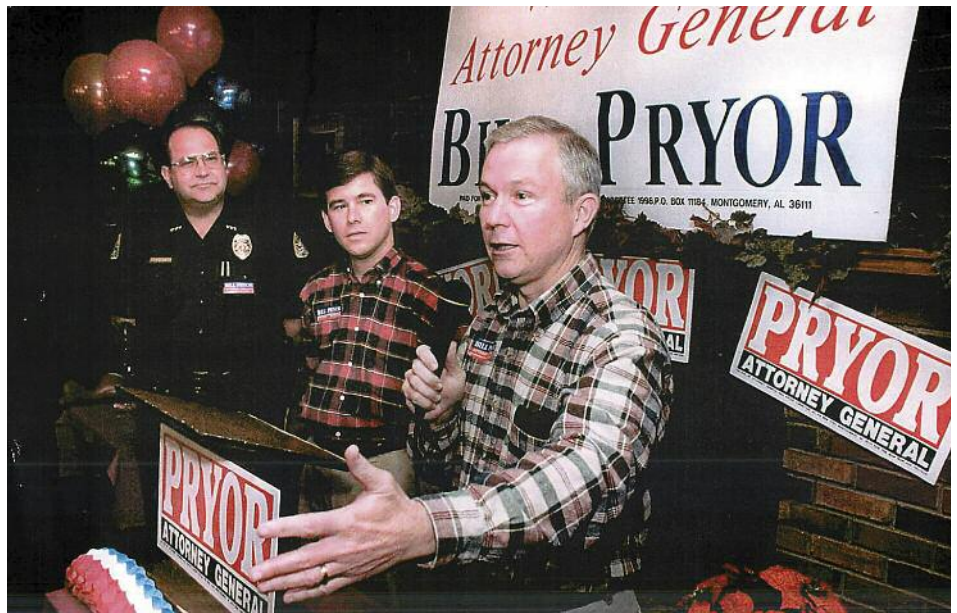
A copy of the proposed amendments may be obtained on and after March 31, 2021 from the court's website at <http://www.ca11.uscourts.gov/rules/proposed-revisions>. A copy may also be obtained without charge from the Office of the Clerk, U.S. Court of Appeals for the Eleventh Circuit, 56 Forsyth St., NW, Atlanta, Georgia 30303 [phone: 404-335-6100].

Comments on the proposed amendments may be submitted in writing to the Clerk at the above address, or electronically at <http://www.ca11.uscourts.gov/rules/proposed-revisions>, by 5:00 p.m. Eastern Time on April 30, 2021.

Pro Bono Awards

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

Download a nomination form at <https://www.alabar.org/assets/2020/03/ProBonoAwardNomination-Fillable3.pdf>, complete, and submit to Linda Lund (linda.lund@alabar.org) by **April 1**. Awards are presented each year at the Alabama State Bar Annual Meeting. ▲



Campaigning for Alabama Attorney General

One of the Good Guys— Pryor Becomes Chief Judge of the Eleventh Circuit

By Taylor A. Meehan and Kasdin M. Mitchell

Judge William H. Pryor, Jr. became Chief Judge

of the United States Court of Appeals for the Eleventh Circuit in June 2020, making him the highest-ranking officer of his court. It's not exactly where a young Bill Pryor thought his career would take him. The Mobile-born son of a band director was more likely to make a career in music than as a lawyer, let alone as one of the most prominent federal judges in the country.

Partway through college, Pryor changed course from music major to legal studies. In law school, he graduated in the top of his class

and was elected editor-in-chief of the *Tulane Law Review*. He then clerked for a civil rights hero, Judge John Minor Wisdom. His own clerkship with Judge Wisdom was transformative. So much of Pryor's career can be traced back to Wisdom, one of the Fifth Circuit judges who was instrumental in dismantling segregation in the Deep South.

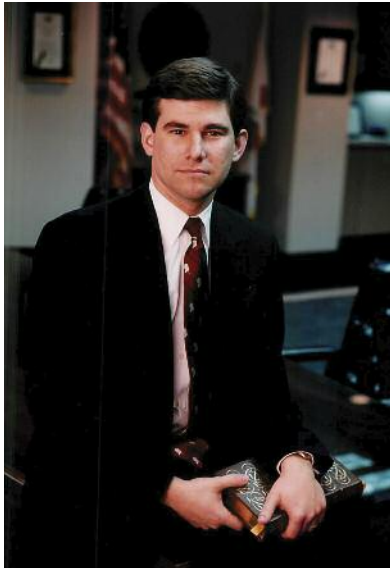
What came next for Pryor is the stuff of a great screenplay: Alabama Attorney General by age 34, the youngest in the country at the time; involved in the prosecutions of two Ku Klux Klan murderers who perpetrated the 16th Street Baptist Church bombings; prosecuted former Alabama Chief Justice Roy Moore after he defied a federal court order; and nominated to the federal bench by age 40.



Being sworn in as Alabama Attorney General

His nomination was not without drama. Pryor’s Senate confirmation hearing was held 40 years to the day that Governor Wallace stood in a schoolhouse door and declared “segregation now, segregation tomorrow, segregation forever.” Alabama Democrats, including former Alabama Chief Justice Sue Bell Cobb, former U.S. Attorney and Senator Doug Jones, and state representative Alvin Holmes, joined with Alabama Republicans to support Pryor’s nomination. His supporters praised him specifically for his contributions to the great progress made by the state in those four decades. They repeated Pryor’s memorable rejoinder to Wallace—“Equal under law today, equal under law tomorrow, equal under law forever”—delivered in Pryor’s second inaugural address as attorney general.¹ They spoke of Pryor’s leadership in bringing criminal sentencing reform to Alabama—a harbinger for Pryor’s later service on the U.S. Sentencing Commission. They highlighted that Pryor personally argued before the Alabama Court of Criminal Appeals to uphold the conviction of one of the 16th Street Baptist Church bombers. And they commended Pryor for authoring the legislation to make cross-burning a felony and for leading the long-overdue effort to erase an old ban on interracial marriage from Alabama’s constitution.

Pryor was unlike many recent judicial nominees. He had not carefully planned his life to position himself to become a federal judge. His personal beliefs were well-known. He had spent years as a politician. He was “no shrinking violet,” in the words of then-Senate



Alabama Attorney General Pryor

Judiciary Chair Orrin Hatch.²

Pryor’s judicial philosophy has been that judges have no authority to use personal beliefs “to update or alter the text of our Constitution and laws.”³ When it comes to the “business of using moral judgment to change the law,” that “is reserved to the political branches” or “the real lawmaker,” in Pryor’s words.⁴ Pryor’s faith, in particular the Catholic teaching to obey government and its laws, reinforces that judicial philosophy. “When I placed my left hand on the Holy Bible and swore to ‘perform all the duties incumbent upon me as United States Circuit Judge under the Constitution and laws of the United States,’” Pryor wrote shortly after becoming a judge, “my conscience was and remains affected by my religious beliefs. Were it not so, what would be the point of placing my hand on the Bible or ending the oath with the declaration, ‘So Help Me God’?”⁵

Senate Democrats filibustered Pryor’s nomination, along with others. During a Senate recess, President Bush installed Pryor as a recess appointee to the Eleventh Circuit. He spent those next months in Birmingham setting up his judicial chambers, not sure what would follow in Washington. The Senate ultimately confirmed Pryor by a vote of 53 to 45. He was part of a deal struck by the so-called “Gang of 14”—a group of 14 bipartisan senators who agreed to end the filibuster of Pryor’s nomination and confirm him, on the condition that the filibuster would remain for future nominees. The roll call vote hangs in his chambers.

Now more than 15 years later, Pryor has authored hundreds of opinions.

Among them are his many majority opinions for the *en banc* court,⁶ a school desegregation dispute that Judge Wisdom first ruled on decades ago (“Dilatory tactics and half-hearted efforts slowed the pace of desegregation”⁷), and memorable concurring and dissenting opinions (“Our duty is not to reach the outcomes we think will please whomever comes to sit on the court of human history”⁸). He has hired more than 60 law clerks, five of whom have gone on to become judges themselves. Beyond chambers, he has taught federal jurisdiction and statutory interpretation for more than a decade at the University of Alabama and Cumberland law schools. He lectures regularly



Investiture ceremony at the Eleventh Circuit Court of Appeals



Judge Wisdom, Kris Pryor, and Judge Pryor

across the country and has been published by more than a dozen law reviews. He has participated in the American Law Institute, including as an adviser for the Restatement on Conflicts of Law, and recently co-authored a treatise of judicial precedent. He has been considered a potential nominee to the U.S. Supreme Court. And he is no less a rabid Alabama football fan now than he was as a kid.

His chambers, now well lived-in, tells the story of his most remarkable career. Visitors sit across from a photo of Pryor on Air Force One with senior Bush administration officials and next to a photo of Pryor with Obama and his former U.S. Sentencing Commission colleagues. In the kitchen there are political cartoons, kind and unkind. The sketch from his Supreme Court argument sits on the floor of the coat closet. And back in his office, commissions from two presidents hang across from busts of Hamilton and Reagan, an area devoted to the University of Alabama football, and a stack of opinion drafts ready for more and more rounds of the judge's handwritten edits.

But the first and last thing any visitor will see are the photos of every law clerk class that hang at the entrance to his chambers.

As a boss, Pryor is tough, honest, and exacting. He gives incoming clerks a two-inch-thick manual full of idiosyncrasies and expectations, some adopted from Judge Wisdom himself: "For you, footnotes do not exist." "Protestors 'demonstrate,' not litigants..." "In the light of,' is a cast-iron idiom; 'in light of' is unacceptable." "Prefer the short word to a longer synonym." New Orleans is pronounced "New Aw-lee-uns, not New Orlins, as you hear it on TV, and not New Orleans."⁹ And he holds his clerks to the highest standards. Every piece of paper that leaves his chambers—even a routine order—deserves full attention. He exchanges dozens of draft opinions with his clerks.

Pryor asks the same from his clerks in return. He does not hire "yes men." At the very first lunch, he tells his clerks he did not hire them to tell him what he wants to hear. It is their job to tell him what they really think, backed by exhaustive research and analysis. He invites his clerks to disagree with him and each other. There is no pride of authorship; what matters is getting it right. But his process works only if everyone in chambers trusts each other.

Pryor eats lunch with his clerks nearly every day, working through his weekly rotation of Birmingham staples beginning with barbecue on Monday and ending with fish on Friday. The lunches are ordinarily full of storytelling, be it about Pryor's own career or politics, or Alabama history. Pryor opens his home for dinner. Clerks join him at Alabama football games, spin class, and Mass. He attends (and has officiated) their weddings. He always asks about their families. A clerkship with Pryor is coveted not just because young lawyers know they will be trained by him, but also because they know he will invest in them—as people, and as future leaders of the profession.

His investment has paid off. This year alone, he has five former clerks—more than any other judge in the country—clerking for justices on the U.S. Supreme Court. Meanwhile, four of his former law clerks are federal judges, including one on Pryor's court. One is a state supreme court justice. Another is the U.S. Attorney for the Northern District of Alabama. Four have served as state solicitors general. Nearly a dozen have held other posts in federal and state government, including at the White House. And still others have joined the nation's best law firms, law schools, companies, and nonprofits. He often jokes that his former law clerks would compose the best law firm in the country.

Pryor's new post as Chief Judge of the Eleventh Circuit is one more step in his remarkable career. He

no doubt will lead his court with the same devotion and integrity that guided his career so far. As then-Senator Sessions put it more than 15 years ago, “Bill is one of the good guys. He does the right thing.”¹⁰ ▲

Endnotes

1. <https://www.congress.gov/108/chrg/CHRG-108shrg91200/CHRG-108shrg91200.htm> (statement of Sen. Jeff Sessions).
2. <https://www.congress.gov/108/chrg/CHRG-108shrg91200/CHRG-108shrg91200.htm> (statement of Sen. Orrin Hatch).
3. Pryor, *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 Yale L. & Policy Rev. 347, 357 (2006).
4. *Id.* at 357; <https://www.congress.gov/108/chrg/CHRG-108shrg91200/CHRG-108shrg91200.htm> (response to Sen. John Cornyn).
5. Pryor, *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 Yale L. & Policy Rev. at 351.
6. See, e.g., *Jones v. Governor of Florida*, 975 F.3d 1016 (11th Cir. 2020) (en banc); *United States v. Johnson*, 921 F.3d 991 (11th Cir. 2019) (en banc); *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169 (11th Cir. 2017) (en banc); *McCarthan v. Director of Goodwill Indus-Suncoast, Inc.*, 851 F.3d 1076 (11th Cir. 2017) (en banc); *Evans v. Sec’y, Dept. of Corrections*, 703 F.3d 1316 (11th Cir. 2013) (en banc); *First Vagabonds Church of God v. City of Orlando, Fla.*, 638 F.3d 756 (11th Cir. 2011) (en banc); *United States v. Svete*, 556 F.3d 1157 (11th Cir. 2009); *Tanner Advertising Group, L.L.C. v. Fayette County, Ga.*, 451 F.3d 777 (11th Cir. 2006) (en banc).
7. *Stout v. Jefferson County Board of Education*, 882 F.3d 988, 992 (11th Cir. 2018).
8. *Jones*, 975 F.3d at 1050.

9. *Wisdom’s Idiosyncrasies*, 109 Yale L. J. 1273, 1273-1277 (2000).

10. <https://www.congress.gov/108/chrg/CHRG-108shrg91200/CHRG-108shrg91200.htm> (statement of Sen. Jeff Sessions).

Taylor A. Meehan



Taylor Meehan clerked for Chief Judge Pryor between 2013 and 2014, and then on the United States Supreme Court for Justices Antonin Scalia and Clarence Thomas between 2015 and 2016. She is a partner at Bartlit Beck LLP in Chicago.

Kasdin M. Mitchell



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Driving Under the Influence— AN OVERVIEW

By Stephen W. Shaw

Driving under the influence, or DUI, is a serious crime.

It can have serious consequences for the livelihood and freedom of the accused. It is one of the few crimes where the initial behavior—consumption of an alcoholic beverage—is a legal act. However, once the person who consumes the alcoholic beverage decides to operate a motor vehicle, life-changing events can be triggered.

First, it is not unlawful to consume alcoholic beverages and operate a motor vehicle in Alabama. However, the amount of alcohol consumed can gradually increase in a driver's body until the driver has a blood alcohol level so high that the law presumes criminal behavior.

This brings us to the most common question we are asked as attorney's at social gatherings—how much can I drink and drive? The answer—it depends.

Ala. Code § 32-5A-191 (a) (1975) provides the elements of

the crime of driving under the influence. The most common prosecutions are under subsection (a)(1) and (a)(2) which provide two different methods of proving the offense of driving under the influence of alcohol.¹

Section 32-5A-191(a)(1) provides that “[a] person shall not drive or be in actual physical control of any vehicle while ... there is 0.08 percent or more by weight of alcohol in his or her blood.”

Section 32-5A-191(a)(2) provides that “[a] person shall not drive or be in actual physical control of any vehicle while ... [u]nder the influence of alcohol.”²

In a recent case, *Mitchell v. State*, 2019 WL 3070070 (Ala. Crim. App. 2019), the Alabama Court of Criminal Appeals reaffirmed the standard or the burden of proof of proving a prima facie case:

To establish a prima facie case of driving while under the influence of alcohol under § 32-5A-191(a)(2), [Ala. Code 1975,] the state must prove beyond a reasonable doubt that the appellant drove, or was in actual physical control of, a motor vehicle while he was under the influence of alcohol to such an extent that it affected his ability to operate his vehicle in a safe manner.

The *Mitchell* case provides a good analysis of what occurs during a DUI investigation. In *Mitchell*, the defendant passed a state trooper while the defendant was operating a motor vehicle 40 miles per hour over the posted speed limit. The trooper stopped the defendant, and

as he approached the window, the officer smelled a strong odor of alcohol coming from the breath of the driver and from the vehicle. The defendant admitted that he had consumed alcohol. Further, the defendant had an open container of alcohol in his vehicle. The officer then testified as to the boisterous and unengaged conduct of the defendant who was speaking fast, repeating himself, and slurring his words. The defendant complied when he was asked to get out of his vehicle. The trooper administered a field sobriety test, but the defendant later alleged that his physical ailments may have contributed to his inability to perform the one-leg stand. He adequately performed the walk-and-turn test, however a portable field breathalyzer test indicated that his breath alcohol content was .138 (the legal limit was .08). The officer testified that the defendant was definitely under the influence of alcohol. The jury watched a video from the trooper’s body camera to help it to assess the defendant’s appearance and demeanor. The court of criminal appeals concluded that the evidence presented was more than sufficient to establish a prima facie case of DUI.

This case is important to read because it analyzes the circumstances of the arrest and conviction from beginning to end. Did the officer have reasonable suspicion to initiate the stop? Was the officer diligent in his assessment of the defendant and the defendant’s ability to comply with his requests? What was the purpose of the field sobriety test, and what benefit did the jury have in assessing the raw footage of the body camera?

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Common Questions

How much alcohol can someone consume and operate a motor vehicle? Studies vary on the answer to this question. The answer depends on the size of the individual who is being tested; how long since they consumed it; and their tolerance to alcohol. As a general rule, one 10-ounce drink of 86 proof alcohol, a 12-ounce beer, or a five-ounce glass of wine all contain about the same amount of alcohol.

However, observers generally note that one drink per hour, or a maximum of two to three drinks over three hours with a meal, will not significantly impair the ability to operate a motor vehicle—but, again, it depends and there really are no hard-and-fast rules.

Probably the simplest and best answer is to say when in doubt do not drive. The availability of driving services makes this instruction a lot simpler to follow.

Initial Stop and Investigation

If I am pulled over what do I do? When a law enforcement officer turns on the blue lights behind your client, this can cause a lot of reactions and panic. Your client has a duty to pull over at the nearest safe location. While approaching the car, the officer has most likely called into headquarters to report the stop-and-run a check on the tag and already knows the name and address of the vehicle's owner. The officer will then approach the window and ask the driver for his name and address. The client is obligated to respond to these questions and produce his driver's license and insurance card. After that, caution should be

Most of the time the officer will either have a body camera or a dash camera, or both, recording both the video and audio of everything that happens.

taken in responding to any questions. Most of the time the officer will either have a body camera or a dash camera, or both, recording both the video and audio of everything that happens.

Following the initial interview, the officer may wish to conduct a further evaluation. The client will be asked to exit the car and perform several tests for the purpose of determining whether, in the officer's opinion, there is probable cause to arrest the defendant for driving under the influence. These are known as field sobriety tests. The officer may ask two or more questions simultaneously to the driver, which might be interrupting or distracting questions or unusual questions. The purpose of asking for two things simultaneously from the driver, such as driver's license and insurance or registration, is to test for impairment to see if the driver can retain the two questions and respond. The officer then would look to see if the driver forgets to produce

both documents, produced documents other than the ones requested, fails to see his license or insurance card while searching for them, fumbles or drops his wallet, purse or items, or is unable to retrieve the documents using his fingertips. All of these actions are carefully observed by the officer. The officer may then direct the driver to step out of the vehicle. Once the driver has exited the vehicle, the officer then will instruct him on the other tests which he is about to perform.

Walk-and-Turn Test

The most common test is the walk-and-turn test. This test, like all divided attention tests, has two stages. The officer tells the client what to do, and he observes whether the client can keep his balance while listening to the instructions. The officer also looks to see whether the defendant starts to walk too soon, stops while walking, does not touch heel-to-toe, steps off the line (or imaginary line), uses his arms to balance, makes an improper turn, or takes the incorrect number of steps. Although this is not a pass-fail test, it assists the officer in looking for visible signs of impairment. It also provides an opportunity for you in defending a case to show how well your client complied.

The test is generally administered with these instructions:

1. Put your left foot on the line, then place your right foot on the line ahead of your left, with the heel of your right foot against the toe of your left foot.
2. Do not start until I tell you to do so.

3. Do you understand? (Must receive affirmative response)
4. When I tell you to begin, take nine heel-to-toe steps on the line (demonstrate) and take nine heel-to-toe steps back down the line.
5. When you turn on the ninth step, keep your front foot on the line and turn taking several small steps with the other foot (demonstrate), and take nine heel-to-toe steps back down the line.
6. Ensure you look at your feet, count each step out loud, keep your arms at your side, ensure you touch heel-to-toe, and do not stop until you have completed the test.
7. Do you understand the instructions?
8. You may begin.
9. If the suspect does not understand some part of the instructions, only the part in which the suspect does not understand should be repeated.

One-Leg Stand

This is another divided attention test. The officer is looking for swaying while balancing, using arms to balance, hopping, or putting down the foot too early. According to the National Highway Traffic Safety Administration (NHTSA), a person with a BAC above .10 can maintain balance for up to 25 seconds, but seldom as long as 30 seconds.

The test is generally administered with these instructions:

1. Stand with your feet together and your arms at your side (demonstrate).

2. Maintain position until told otherwise.
3. When I tell you to, I want you to raise one leg, either one, approximately six inches off the ground, foot pointed out, both legs straight, and look at the elevated foot. Count out loud in the following manner: 1001, 1002, 1003, 1004, and so on until told to stop.
4. Do you understand the instructions?
5. You may begin the test.

Try this at your office and see how well you can follow the instructions given under more stressful conditions.

Your client can be convicted of a DUI in Alabama even if they have not consumed any alcohol. Section 32-5A-191 (a) (3) allows DUI convictions for driving under the influence of a controlled substance, and the controlled substance can either be an illegal substance or it can be a legal prescription. Section 32-5A-191 (a) (4) allows DUI convictions when there is a combination of a controlled substance and alcohol. Section 32-5A-191 (a) (5) allows DUI convictions for taking any other substance which render a motorist incapable of safely driving. This could include off-the-shelf items such as glue.

Added Precautions When Consuming Alcohol

If your client decides to consume any alcoholic beverages and operate a motor vehicle, he should keep in mind the following recommendations. Do not drink on an empty stomach; consume alcohol with meals or snacks. Be careful if

you have had any sleep aids within the last 48 hours. Alternate water or soft drinks with alcoholic beverages. Be careful if someone offers to buy a round of drinks for the table. Many times, someone is cautious throughout the evening, but then gets less cautious and has “one for the road.” Avoid someone refilling half-empty glasses, like wine or draft beer. Last of all, do not participate in any “drinking games.”

All of these factors come into consideration in advising clients in advance or in defending a case. Did your client take pre-cautions? Did he operate his vehicle safely? Focus on what he did right and not solely on what the officer contends. Remember, jurors bring their common sense and life experiences to court. All of this can help you focus on the defense of the case and not rush to a resolution based on a client just wanting to get it over. The consequences of a conviction can have a long-lasting impact on your client. ▲

Endnotes

1. *Sisson v. State*, 528 So. 2d 1159, 1162 (Ala.1988).
2. *Pierce v. State*, 217 So. 3d 64 (Ala.2016).

Stephen W. Shaw



Steve Shaw is a partner at Wallace, Jordan, Ratliff & Brandt in Birmingham. His practice concentrates on DUI and criminal defense, as well as family law and

the Alabama ethics law, in state, federal, and municipal courts. He is a regular presenter in continuing legal education programs within these areas.



Practical Tips in DUI Cases

By Daniel W. Wainscott

A DUI case can be almost a walk-through case,

or it can be one of the most complicated cases a criminal defense lawyer will handle. This article is intended to provide practical tips no matter what kind of case you have.

When I was first asked to give advice on DUI cases to general practitioners and beginning attorneys, my first thought was to tell them to be nice to all of the magistrates and court staff—they can be a great help to you or they can make your life difficult. Many of you practice in larger counties that have numerous municipal courts and all are different. Take the time to learn the names of the magistrates and the procedures of each court—it will serve you well. They can actually help you with your case.

All courts are different, but the DUI code is uniform throughout the state, so learn it from beginning to end.

Three amendments are important (1) Interlock devices: Ala Code § 32-5A-191 (y) (1) (1975) requires that each person approved for pre-trial diversion program must have an interlock device installed on their vehicle; (2) Section 32-5A-191 (m) (5) requires a defendant to pay a \$100 mandatory fee when successfully completing a pretrial diversion program; and (3) Section 32-5A-191(p) (1) extends the period of time a sentencing court can consider a prior DUI from five to 10 years.

When you first meet with your client, have a detailed interview with them and cover all of the facts. Go over all of their paperwork, including the uniform traffic citation form (UTC), which is

sometimes called the complaint. It is the charging document in a DUI case.

When I get a UTC, I immediately look for two things: which code section my client is charged under, and what their blood alcohol content (BAC) was. In some courts, a BAC of .15 or more excludes your client from entering a pretrial diversion program and may enhance the punishment. Be aware that § 32-5A-191 (i) provides that when a person convicted of this section has a BAC of a least .15 or more, he shall be sentenced to at least double the minimum punishment. It is also important to look at the UTC to determine if it properly executed and witnessed by the magistrate.

Make sure the prosecution can meet the predicates for admission of the BAC test. There are several.

The prosecutor must prove the predicate in that the police never let the defendant out of their sight from time of the traffic stop until the time the test is given.

The prosecutor must also prove that the defendant did not have anything to eat or drink for 20 minutes immediately before the test. If the arresting officer did not transfer the defendant from the scene of the arrest, then the transporting officer will likely have to testify.

The prosecutor will have the burden of proving the officer who administered the test is qualified to do so. If the UTC charges the defendant under § 32-5A-191 (a) (3) (driving under the influence of a controlled substance to the degree which renders the driver incapable of safely driving) and blood was taken, the prosecutor has to prove the chain of evidence from the place of arrest to the place where the blood was drawn and then from the place the blood was drawn to the lab that tested the blood. The lab must testify to the results.

Attorneys who represent clients in complex DUI cases often hire experts to counter the testimony of the prosecution expert witnesses. I recommend that you contact an expert to help in your cases.

Be sure to determine the class of driver license your client has. If he has a commercial driver's license (CDL), he is considered under the influence at a much lower level. In addition, a CDL license is not eligible for any pretrial diversion programs. § 32-6-49.23.

Look at the facts as to the probable cause for the traffic stop. If there is an improper traffic stop you may have grounds to move to dismiss the DUI.

When you file your notice of appearance with the court, also file your motion for discovery. Be sure to request all video taken of the arrest and the results of

all chemical tests. You will be surprised at how often your client's admission about drinking is recorded on body cams and dash cams. This is something you need to know.

If your client is charged under § 32-5A-191 (a) (3) (driving under the influence of a controlled substance), you must look at the discovery carefully to determine if blood was drawn and, if so, whether it was analyzed by the Alabama Law Enforcement Agency (ALEA) lab. If blood was not drawn and analyzed, it will be difficult for the prosecutor to convict your client. Also ask your client about his medical problems. Diabetes can cause your client to appear intoxicated.

When attempting to settle your case with the prosecutor, remember your client has an absolute right to a trial. Do not be afraid to use that right to your advantage. Sometimes pressing for a trial can reveal problems with the prosecutor's case. For example, a crucial witness may be unavailable or a police officer may no longer be with the police force and that may not come to light until you have a trial setting.

The trial in the lower court can be used like a preliminary hearing as in a felony case. This is a great discovery tool. And remember this: you will initially be in district court or municipal court, and there is nothing done in those courts that cannot be undone by posting an appeal bond and giving notice of appeal to the circuit court of the county your case is in. Always demand a trial by struck jury with your appeal.

This article just barely touches the surfaces of this area of the law. New lawyers can represent their client successfully in most DUIs. But if there are injuries involved or if one feels uncomfortable, I would recommend associating a more experienced attorney or referring the case to another attorney.

I hope some of what I have written will help you to have great success in representing your clients. ▲

Daniel W. Wainscott



Dan Wainscott is a graduate of Jacksonville State University and the Birmingham School of Law. He entered private practice in June 1979 after a three-year clerkship for Judge Charles R. Crowder in the Jefferson County Circuit Court, criminal division.

His career has focused on criminal law, including everything from shoplifting to capital murder. He serves as a prosecutor for several local municipalities.



AVOID CONVICTION THROUGH SETTLEMENT— The Rise of Deferred Prosecution

By George D. Flowers

Alabama has dramatically increased pretrial diversion programs.

They now exist in criminal cases involving theft, driving under the influence (DUI), drug offenses, property offenses, traffic offense, sex offenses, domestic violence, and others. They almost all have a few common threads.

While we are focusing on pretrial diversion for DUI, but it is important to know where they came from.

Pretrial diversion programs are creatures of statute. Ala Code §§ 12-17-226 to -226.18. (1975). Though the legislature gave it no

name, we will refer to it as the pretrial diversion program (PDP).

A pretrial diversion program is defined as “[a] voluntary option that allows an offender, upon advice of counsel or where counsel is waived in a judicial process, to knowingly agree to the imposition by the district attorney of certain conditions of behavior and conduct for a specified period of time upon the offender which would allow the offender to have his or her charges reduced, dismissed without prejudice, or otherwise mitigated, should all conditions be satisfied during the time frame set by the district attorney as provided

in the agreement.” § 12-17-226 (7). This is a statutorily-authorized contract between the defendant and the prosecuting authority that, if all of the conditions of the contract are met, has a goal of the “charges [being] reduced, dismissed without prejudice, or otherwise mitigated...” *Id.*

The PDP grants the district attorney of each jurisdiction broad discretion in creating pretrial programs. After the Act was passed, there was a swell of municipalities passing ordinances to create their own pretrial programs. Generally, it allowed them to not divert fees to their local district attorney’s office. However, the various systems also had very little uniformity. There is no greater example in showing a lack of consistency between programs than regarding the offense of driving under the influence.

The first step in almost all diversion programs is paying an application fee. Application fees vary from place to place, and can be several thousand dollars. With hundreds of different of municipalities in Alabama acting as independent agencies with little to no oversight, it is virtually impossible to tell how these funds are collected or allocated within the municipality. How they are allocated in municipal cases is determined by each city’s municipal code. However, in cases which the pretrial programs are established by the district attorney, the “[r]emaining administration fees shall be allocated to the district attorney’s office. At the discretion of the district attorney, all administration fees paid by the offender pursuant to this division may either be paid to the district attorney, to be placed in the District Attorney’s

Solicitor Fund, or if the district attorney and the clerk agree, may be paid to the circuit clerk of the jurisdiction for distribution to the District Attorney’s Solicitor Fund.” § 12-17-226.11.

There are several things that can be expected in the majority of pretrial programs. Typically, this entails waiving one’s right to a speedy trial, waiving one’s right to a jury, tolling of the statutes of limitations, the entry of a plea to the charge which is accepted if the defendant does not comply with the terms of his agreement, waiver of the right to appeal, the timely payment of fees pretrial fees, and an agreement that the prosecution will nolle prosequi or dismiss the case upon completion. It is also not unusual that the defendant be required to waive their right to privacy in health care and medical records in DUI or drug pretrial diversion programs.

One of the common pitfalls a practitioner or a citizen would experience is for those with a class A driver’s license, otherwise known as a CDL. §§ 32-6-49.1 to -49.24. The holder of a CDL “shall not be eligible for a deferred prosecution program, diversion program, or any deferred imposition of judgment program.” § 32-6-49.23.

Furthermore, even if a person with a commercial driver license were to participate in a diversionary program, even one as common as defensive driving school (it is often forgotten that defensive driving school is a diversionary program), this could be viewed as a conviction for purposes of their commercial license. The Code of Federal Regulations defines a conviction involving a CDL as “[a]n unvacated adjudication of guilt, or

a determination that a person has violated or failed to comply with the law in a court of original jurisdiction or by an authorized administrative tribunal, an unvacated forfeiture of bail or collateral deposited to secure the person’s appearance in court, a plea of guilty or nolo contendere accepted by the court, the payment of a fine or court cost, or violation of a condition of release without bail, regardless of whether or not the penalty is rebated, suspended, or probated.” 49 CFR 383.5. Thus, even in those situations where one is able to circumvent the commercial driver’s license prohibitions against pretrial programs, if the final result is that the client paid court costs as a condition of dismissal, this could be considered a “conviction” under the CFR.

The DUI statute has been modified to allow ignition interlock devices, “a constant monitoring device that prevents a motor vehicle from being started at any time without first determining the equivalent blood alcohol level of the operator...” § 32-5A-191.4. Now, “[a]ny person charged in a district, circuit, or municipal court with a violation of this section or a municipal ordinance adopted in conformance with this section who is approved for any pretrial diversion program or similar program shall be required to install an ignition interlock device for a minimum of six months or the duration of the pretrial diversion program, whichever is greater, and meet all the requirements of this section and § 32-5A-191.4. A participant in a pretrial diversion program shall be eligible for indigency status if the program enrolls indigent

defendants and waives fees for indigent defendants.” § 32-5A-191(y)(1). When these requirements are applied (and they exist in what is likely the majority of cases), it is possible that a person has an interlock device their vehicle for longer than they would have been required to if they were convicted. With many pretrial programs lasting a year or even several years, this is a tremendous financial, as well as personal, obligation to the defendant.

Those who are admitted to a pretrial can be subject to a wide range of requirements and expenses. Application fees of between \$1,000 and \$2,000 are not uncommon. This application typically goes straight to the coffers of the office of the district attorney or municipality depending on the prosecuting jurisdiction. Then a defendant will typically be required to pay a processing fee of \$150, victims impact panel fee of \$35 to \$100, and a court referral evaluation fee of \$75. While they complete the pretrial program, they may also have a monthly drug testing fees of \$30 to \$60, and they may have supervision fees around \$40 per month.

The costs can vary wildly with court referral drug and alcohol programs. The defendant is evaluated based on a criterion from the Administrative Office of Courts and this criterion determines what level of treatment the defendant must complete. Most people are required to complete what is known as a Level 1 or Level 2 program. Level 1 programs take on average six months to complete and cost slightly less than \$200 for class enrollment. Level 2 programs will typically be six to 12 months and cost in the range of \$300 to \$400

It is fair to say that most people who enter into a pretrial diversion pretrial program do so because they are desperate for a path out of the trouble they are in.

for enrollment. However, in some cases, a defendant may be subject to an intensive outpatient program or an inpatient program. These Level 3 court referral programs come from a short list of facilities approved by the state and often cost thousands of dollars.

The initial expense for installation of an ignition interlock varies with each distributor, and it seems to average between \$200 and \$300, with an addition \$100 monthly monitoring fee. This also does not include special servicing fees if an interlock warning is triggered. Finally, if an ignition interlock is required the person must obtain an interlock “Scarlet Letter” license which is an additional \$150 and then pay another fee for a replacement license once they have that restriction lifted. Thus, if a defendant’s pretrial program lasts for 12 to 24 months,

as many of them do, you could be easily looking at up to just under \$3,000 on top of all other fees.

Finally, a person is almost always going to be expected to pay the costs associated with the action, namely court costs, bond fees, subpoena fees, and others, and these other costs are typically not calculated until the conclusion of the case. Court costs can vary dramatically, from hundreds of dollars to thousands, depending on whether the matter is resolved at a municipal court, district court, or in the circuit court and the number of charges (often companion tickets) the person received. It is not unusual that court costs for a DUI and companion tickets could range from \$500 to \$1,500.

It is fair to say that most people who enter into a pretrial diversion pretrial program do so because they are desperate for a path out of the trouble they are in. For many people, it is an opportunity for a second chance. It is undisputed that the ramifications of a conviction for any number of offenses can have lifetime consequences on a person’s career and future opportunities. However, many people enter these programs without full knowledge of the requirements that will be placed upon them or the gravity of the financial requirements. ▲

George D. Flowers



George Flowers has practiced in DUI and criminal defense in the state, federal, and municipal courts of north Alabama for more than 20 years and been a regular presenter for numerous DUI and criminal defense professional organizations. He began practicing as a solo practitioner in 2020.



Expungement of Criminal Records

By Stephen W. Shaw

Why do we have or need an expungement law?

Since judicial records are generally considered to be public records, they are usually available for inspection and copying by the public. *See, Ex parte Consolidated Publ'g Co., Inc.*, 601 So. 2d 423 (Ala. 1992). As a public record,

anyone with access to the Ala-Court system, or who requests information from municipal court, can obtain information regarding the charges against an individual—even if the charges were erroneous, or voluntarily dismissed by the prosecutor. This could have an effect on potential employment, or it could serve as a basis for declining someone the opportunity to serve as a volunteer.

What is the benefit of an expungement? Succinctly stated in our expungement law: “After the expungement of records ... the proceeding regarding the charge shall be deemed never to have occurred.” Ala.Code § 15-27-6 (b) (1975). Further “the petitioner whose record was expunged shall not have to disclose the fact of the record or any matter related thereafter on an application for employment, credit, or other type of application [subject to statutory exceptions].” § 15-27-6 (b).

Overview of Sealed Records, Sealed Cases, And Expungement Cases

First, a quick analysis of cases that led to the need for, and passage of, our expungement law. In *Holland v. Eads*, 614 So. 2d 1012 (Ala. 1993), the plaintiff filed a motion to intervene in a case seeking to unseal court records in a case in which they had not been a party. The jury returned a verdict, but before the entry of a judgment, the parties reached a settlement. As a part of the settlement agreement, the court dismissed the case with prejudice and sealed the entire court file, including notes and tapes of the court reporter. Two years later, Holland sought to intervene to obtain the trial transcript for use in a similar case against one of the defendants in a separate case. The Alabama Supreme Court noted that there were no comprehensive standards to guide the courts in this state in determining whether to seal a record or reopen a sealed file. Examining different approaches used in other jurisdictions, the Alabama Supreme Court held that the trial court shall not seal records except where a written finding that the moving party has proved by clear and convincing evidence that the information sought to be sealed and met certain specific requirements. The court observed:

We have examined the different approaches used in other jurisdictions. In light of the public policy in favor of public access and the prevailing analysis of this presumption in most American courts, we hold that if a motion to seal is filed, then the trial court shall conduct a hearing. The trial court shall not seal court records except upon a written finding that the moving party has proved by clear and convincing evidence that the information contained in the document sought to be sealed:

- (1) constitutes a trade secret or other confidential commercial research or information;¹ or
- (2) is a matter of national security;² or
- (3) promotes scandal or defamation; or
- (4) pertains to wholly private family matters, such as divorce, child custody, or adoption;^{3,4,5} or
- (5) poses a serious threat of harassment, exploitation, physical intrusion, or other particularized harm to the parties to the action; or
- (6) poses the potential for harm to third persons not parties to the litigation.

In 2006, the Alabama Supreme Court urged the Alabama Legislature to consider an expungement law. In *Mobile Press Register, Inc., v. Lackey*, 938 So. 2d 398 (Ala. 2006), the *Mobile Press Register* filed suit against the presiding municipal judge and court administrator seeking expunged records. The circuit court entered an order holding that the municipal court had no authority to expunge its records and a permanent injunction prohibiting the court from doing so in the future.

However, the circuit court refused to order the municipal court to grant the plaintiff access to previously expunged files. The supreme court reversed the circuit court’s ruling denying the plaintiff access to the expunged records. The court held:

Whether citizens should be entitled to have their criminal arrest records expunged is a substantive matter involving policy considerations within the purview of the legislature, not this Court. Cf. § 12-15-103, Ala. Code 1975 (allowing for the sealing and destruction of juvenile court files). We take this opportunity to urge the legislature to address the policy of expunging the criminal records of adults and to clarify the applicability of the ACJIC Act to courts. It is of course the legislature’s prerogative to allow expungement, to reject it, or to refuse to address the issue at all. If the legislature chooses to allow expungement, we note that important considerations include whether to require notice to the State or other prosecuting agency of the expungement proceedings, along with an opportu-

nity to object, and the right of parties to appeal the grant or denial of an expungement request, thereby giving finality to the determination. Further, what is the legal effect of an expungement? Is a person whose record is expunged entitled to state in a job application, without risk of making a false statement, that the expunged matters, such as an arrest, did not take place? We note that the legislatures of other states have provided clear guidelines for courts to follow in determining whether to expunge the criminal records of adults. See generally, Kristin K. Henson, Comment, *Can You Make This Go Away?: Alabama's Inconsistent Approach to Expunging Criminal Records*, 35 Cumb. L. Rev. 385 (2005).

Id at 403.

The Alabama Supreme Court was clear with its legislative request, and the wheels were placed in motion for the Alabama expungement law, which became effective on July 7, 2014, as §§ 15-27-1 through -20. This act has been recently amended to allow for convictions to be expunged but only when the defendant is “a victim of human trafficking and that the person committed the felony offense during the period that the person was being trafficked and that the person would not have committed the felony offense but for being trafficked.” § 15-27-2(a)(6).

Prior Efforts to Use Other Statutes to Expunge Records

Before the passage of the current expungement law, Alabama lawyers made some creative efforts to get records expunged.

Alabama has a process for the correction of inaccurate criminal records. § 41-9-645. This section provides the process for purging, modifying, or supplementing

If an individual believes such information in their state criminal records is inaccurate or incomplete, they may request the original agency having custody or control of the detailed records to purge, modify, or supplement them and to so notify the Alabama law enforcement of such changes.

criminal records. If an individual believes such information in their state criminal records is inaccurate or incomplete, they may request the original agency having custody or control of the detailed records to purge, modify, or supplement them and to so notify the Alabama law enforcement of such changes. But this is a correction of records and does not expunge the record.

An example of a case which attempted to expunge a conviction was *State v. Blane*, 985 So. 2d 384 (Ala. 2007). The defendant plead guilty to theft of property. After a Homeland Security check on him, he later moved to expunge his record under § 41-9-646 as misleading. Rejecting this contention, the Alabama Court of Criminal Appeals suggested to the Alabama Legislature the need of a specific expungement statute:

“If there is erroneous information in the record, the record may be purged of that information; if the record misstates the offense, it may be modified; or,

if the record is incomplete, it may be supplemented. The legislature knows how to draft a statute providing for the expungement of a criminal record.” *State v. Blane*, 985 So. 2d at 387.

Continuing, the *Blane* court analyzed other legislative efforts toward expungements. In § 12-15-103(g),⁶ in juvenile delinquency cases, the legislature provided that “[u]pon the entry of a sealing order or a destruction order, all references including arrest, complaint, referrals, petitions, reports and orders shall be removed from all agency ... files and sealed or destroyed ... and a finding of delinquency shall be deemed never to have occurred.”

The next year, the Alabama Supreme Court again affirmed the denial of a defendant’s efforts to use the “correcting inaccurate records” provision of § 41-9-645 to expunge records. In *Jackson v. State*, 993 So.

2d 491 (Ala. Civ. App. 2008), the Alabama Supreme Court noted: “Like the petitioner in *Blane*, Jackson has failed to demonstrate that the records of the pertinent criminal cases are ‘inaccurate, incomplete, or misleading’ so as to potentially warrant relief.”

In *Ex parte City of Dothan*, 18 So. 3d 930 (Ala. 2009), the defendant contended the charge of “carrying a pistol without a permit” was inaccurate because the pistol was under the seat of the passenger side of car and his plea of guilt was entered without benefit of counsel. The trial court ordered the record purged under § 41-9-646. The Alabama Supreme Court granted mandamus and held the circuit court exceeded its authority.

Alabama Expungement Law

You should first read all of the expungement statutes. §§ 15-27-1 through -20.

The process and forms for obtaining an expungement have been assisted by the Alabama Law Enforcement Agency (ALEA) and the Alabama Administrative Office of Courts (AOC). First, go to www.alea.gov, the website for the Alabama Law Enforcement Agency (ALEA). On the first page, go to the pull-down entitled “Services” and click on “Criminal History.” There you will find the documents needed to obtain a copy of your client’s criminal history, which include the Application to Review Alabama Criminal History Record Information (which includes a specific authorization for ALEA to release the criminal information to the attorney); the Application to Challenge a Criminal Record. (you do not need this, and you will not use this for an expungement), and application instructions. This will provide you with the information you need to obtain the Criminal History Report which will later be included in the Petition for Expungements.

After obtaining the Criminal History Report from ALEA, you will then complete the Petition for Expungement. Forms for the Expungement Petition

are located at www.alacourt.gov, the website for the Alabama Administrative Office of Courts. Under the “Home” pulldown tab, go to “Eforms.” This will take you to the page for various forms. Go to “Criminal Forms” and scroll down to the forms beginning “CR-65 through 65D.” These are the Expungement Forms you can use.

Expungement Law Checklist–2021

Confirm Client Eligibility. Only arrests, and not convictions, are eligible. If the client was charged with a crime of violence, the charge is not eligible with an exception for a victim of sexual trafficking who committed the felony while they were being trafficked.

If the client was charged with a crime of violence, the charge is not eligible with an exception for a victim of sexual trafficking who committed the felony while they were being trafficked.

- Review Alacourt records (obtain certified copy of records)
- Review municipal court records (obtain certified copy of records)
- Engagement letter with fee and expenses outlined (\$300 per case administrative fee)

Your client will have to obtain a blue fingerprint card (for you to send to ALEA).

The client will provide you with a copy of their driver’s license or passport (to send to ALEA).

You will prepare request for ALEA records and include:

- \$25 admin fee for one copy, \$5 for each additional copy requested
- Letter requesting a certified copy *for every* case to be filed
- Consent to release of information directly to attorney signed by client (this is now included in the ALEA forms at www.alea.gov/services/CriminalHistoryRecordsInformation)
- Include blue fingerprint card for client (available at your local police/sheriff’s department)
- Include color copy of client’s identification, current driver’s license, passport, etc.

Prepare Petition—Complete the Forms—and file in circuit court where the charges were made, not where the client resides.

- Use forms from Alabama Administrative Office of Courts, www.alacourt.gov/Home/EForm/CriminalForms/CR-65.
- Include certified copy of arrest disposition or case action summary from clerk’s office at county courthouse or municipality.
- Include certified copy of ALEA record
- Complete certificate of service to district attorney, law enforcement agency making the arrest, law enforcement agency where the client was booked or jailed, and the clerk of court of the jurisdiction of the records sought to be expunged
- Certified mail receipt (or service form from clerk’s office)
- Pay clerk’s office \$300 per case as administrative fee (it is technically not a filing fee) and deliver to district attorney
- Mark your calendar and follow up with the judicial assistant of the court to whom the case is assigned for their procedure on expungement cases.
- Prepare proposed final order—if requested by the judge.

Following the entry of the expunged order send a letter to your client and include:

1. Copy of order
2. Copy of all pleadings
3. Copy of applicable code sections
4. Advise client on potential answers to job applications and exceptions.
5. Have and maintain file retention policy or agreement with client. Remember the records are expunged so the only copy remaining may be with you or the client.
6. Check AlaCourt to see if the record of the petition for expungement has been designated as confidential. (When the petition for expungement is filed, it is a public accessible record. Once the order is

signed by the court, the clerk’s office is due to designate the case as confidential or private. If a search is run under your client’s name, nothing will appear or you will see a notice that “No records match this search.” In the event someone checks the status of the case by using a case number, they will see a note that “This case is confidential” but it will not include your client’s name.)

Other Code Sections

Alabama Board of Pardons and Parole. Remember, a pardon is not an expungement. Under § 15-22-36 the Alabama Board of Pardons and Parole has the authority to pardon as follows:

- (a) In all cases, except treason and impeachment and cases in which sentence of death is imposed and not commuted, as is provided by law, the Board of Parsons and Paroles after conviction and not otherwise, may grant pardons and paroles and to remit fines and forfeitures.
- (b) Each member of the Board of Parsons and Paroles favoring a pardon, parole, remission of a fine or forfeiture, or restoration of civil and political rights shall enter in the file his or her reasons in detail, which entry and the order shall be public records, but all other portions of the file shall be privileged.

Mayoral Pardon. This is not an expungement. The mayor may remit fines and such costs as are payable to the municipality and commute sentences imposed by a municipal court of the court to which an appeal was taken for violation of municipal ordinances and may grant pardons, after conviction, for violation of such ordinances, and he shall report his action to the council or other governing body at the first regular meeting thereof in the succeeding month with his reasons therefor in writing. § 12-14-15.

Rule 609 of the Alabama Rules of Evidence allows your client to be impeached “even if the conviction has been the subject of a pardon, annulment, or equivalent procedure.”

Youthful Offender. The records of a youthful offender are handled differently. “No determination made under the provisions of this chapter shall disqualify any youth for public office or public employment, operate

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as a forfeiture of any right or privilege or make the youth ineligible to receive any license granted by public authority, and such determination shall not be deemed a conviction of crime; provided however, that if the youth is subsequently convicted of a crime, the prior adjudication as a youthful offender shall be considered.” § 15-19-7.

Expungement of DNA Records. Upon the reversal of conviction, the director (of Forensic Sciences) shall be authorized and empowered to expunge DNA records upon request of the person from whom the sample was taken. § 36-18-26.

Expungement of Records Regarding Allegations of Child Abuse or Neglect. “In the case of any child abuse or neglect investigation which is determined to be ‘not indicated,’ the alleged perpetrator may request after five years from the completion of the investigation that his or her name be expunged from the central registry so long as the Department of Human Resources has received no further reports concerning the alleged perpetrator during the five years, at which time the department shall expunge the same.” § 26-14-8(e). ▲

Endnotes

1. *Brown & Williamson Tobacco Corp.*, supra, at 1179.
2. *Barron*, supra, at 118.
3. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978).
4. *Ex parte Balogun*, 516 So. 2d 606, 612 (Ala.1987).
5. *Holcombe v. State ex rel. Chandler*, 240 Ala. 590, 200 So. 2d 739 (1941).
6. Subsection (g) was removed under the Alabama Juvenile Justice Act. Acts 2008, No. 08-277, effective January 1, 2009.

Stephen W. Shaw

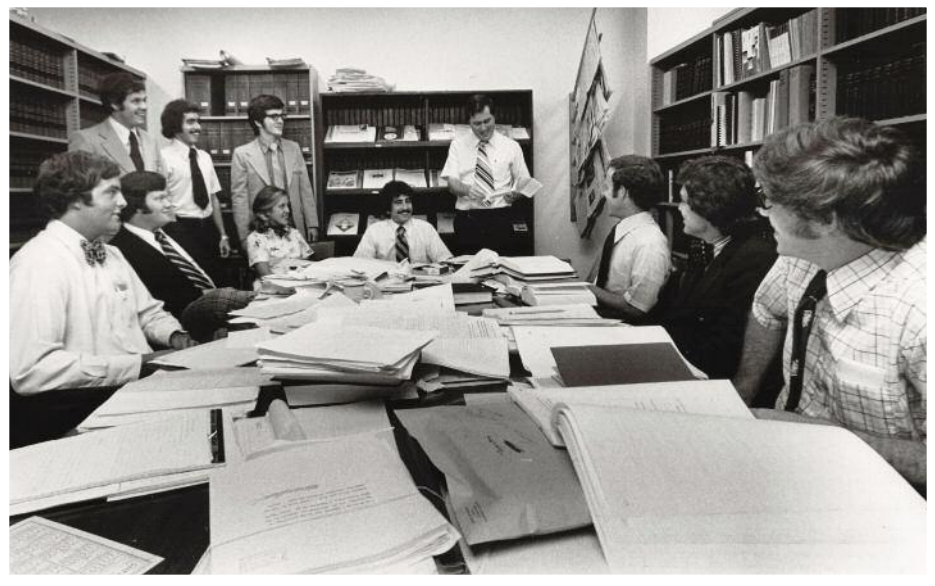


Steve Shaw is a partner at Wallace, Jordan, Ratliff & Brandt in Birmingham. His practice concentrates on DUI and criminal defense, as well as family law and the Alabama ethics law, in state, federal, and municipal courts. He is a regular presenter in continuing legal education programs within these areas.

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Baxley (center) with staff

A GATHERING OF EAGLES: The Fiftieth Anniversary of Bill Baxley's Service as Attorney General

By John J. Davis and William G. McKnight

In September 2019, district courts in Alabama became much more active

On May 5, 1970, the attention of the state of Alabama and, indeed, the country was focused on the democratic primary for governor where George Wallace was attempting to return to office by unseating incumbent governor Albert Brewer. That campaign is still regarded today as one of the most hard-fought contests in Alabama's storied election history. There were many other races on the ballot that May night. One of those began the legendary career of Attorney General and future Lieutenant Governor Bill Baxley of Dothan. Baxley would serve two

terms as attorney general and, in 1983, be elected lieutenant governor of Alabama. He would also lose two races for governor in the intervening years. Maxwell Air Force Base hosts an event each year they call "A Gathering of Eagles." The event honors service members who served with distinction in service to their country. Bill Baxley gathered a host of "legal eagles" around him during his two terms in office. This article examines who those men and women were and highlights their numerous accomplishments and contributions to the legal profession.

The office that Bill Baxley inherited in the winter of 1971 was somewhat similar in size and structure to the office that Baxley's predecessors had occupied in the

past. It would never be that way again. Baxley retained most, if not all, of the staff bequeathed to him by his predecessor. Baxley, however, soon began hiring a diverse group of young attorneys who would go on to achieve significant accomplishments during and after their employment by him. They would become a gathering of eagles in Alabama's legal community. To mention all by name is not possible here, but those who achieved success in a special manner are discussed below.

Many attorneys aspire, at some point in their career, to be a judge. Very few get the opportunity. Several of the Baxley attorneys became judges. He hired future Chief Justice of the Alabama Supreme Court Tom Parker, future Chief Judge of the Eleventh Circuit Court of Appeals Ed Carnes,



Official staff photo

and United States District Judge Myron Thompson. At the state court level, Baxley hired future Alabama Supreme Court Justice Jean Brown, as well as Alabama Court of Criminal Appeals Judge Bill Bowen. In addition to the appellate judges cited above, several Baxley assistants were appointed/elected circuit judges. Sally Greenhaw and Charles Price became long-serving Montgomery County circuit judges. Lawson Little served as a Houston County judge, and Eddie Hardaway still serves as one in west Alabama. Aubrey Ford served as Macon County District Judge and Federal Magistrate Judge Vanzetta McPherson served the Middle District of Alabama. Benjamin Cohen became a Bankruptcy Judge for the Northern Division and served until he retired.

In addition to those later serving as judges, Baxley hired numerous assistant attorneys general and non-attorney personnel who went on to serve distinguished careers as well upon leaving the attorney general's office. Tom Sorrells

served as the long-time Houston County District Attorney and Baxley assistant David Whetstone had a similar career in Baldwin County. Baxley's chief deputy attorney general, George Beck, served as U.S. Attorney for the Middle District of Alabama, and a much-earlier Baxley assistant, Barry Teague, served in the same capacity in the Middle District office in the late 1970s. Kent Brunson also left to serve as Assistant U.S. Attorney for the Middle District of Alabama. Baxley's executive assistant, Jim Sumner, served as the executive director for the Alabama Ethics Commission, where he helped implement major revisions to Alabama's ethics law. Special Investigator Lane Mann served for decades as the clerk of Alabama's Court of Criminal Appeals. Investigator Brice Paul was later elected sheriff of Coffee County. Chief Investigator Jack Shows became the chair of the Alabama Board of Pardons and Paroles.

In addition to hiring distinguished lawyers who went on to

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serve in judicial or prosecutorial capacities, Baxley hired numerous young attorneys who served the legal community in other significant ways. Tony McLain was general counsel of the Alabama State Bar for many years. And, Gil Kendrick and John Yung both served as assistant general counsels for the state bar, where they provided advice and guidance to members for decades. Bill Stephens, who sought to succeed Baxley as attorney general in 1978, became the longest-serving general counsel in the history of the Retirement Systems of Alabama. Julian McPhillips, who also sought to succeed Baxley in 1978, still has a distinguished career as a noted civil rights attorney here in Alabama. The authors think it is especially significant to note that Baxley's administrative assistant who helped run the office throughout his tenure would herself later later elected state treasurer, president of the Public Service Commission, and lieutenant governor—Lucy Baxley!

While many Baxley assistants left the office to achieve prominence in the legal community in private practice, many stayed or came back to government service, but their contributions are no less significant. Baxley's law school classmate, Walter Turner, rose to become chief assistant attorney general and was the longest-serving head of the office's civil division and later became an administrative law judge where he served with distinction until retirement. Baxley's law school friend and associate, Bill McKnight (one of the authors of this article), participated in the investigation and prosecution of many high-profile criminal cases and after leaving private practice, served as counsel of the Alabama

Department of Public Safety. Don Valeska returned to the office under Baxley's successor, Charlie Gradick, and, for several decades, became the most feared criminal prosecutor in the state court system. Baxley was the first attorney general to regularly hire women as attorneys in the office and place them in prominent positions. Carol Jean Smith and Rosa Davis were both hired in the early 1970s. Carol Jean Smith became a recognized expert on municipal law and served as head of the opinions division before her retirement. Rosa Davis served as head of the criminal appeals division and the capital litigation division before ending her career as the attorney for the Judicial Inquiry Commission. Linda Valeska left to become counsel for the Alabama Forestry Commission. Jack Curtis would later serve as general counsel for the Department of Public Safety. John Gibbs served under two future attorneys general as head of their public corruption units.

Today, Bill Baxley is still practicing in his adopted hometown of Birmingham. After serving two terms as attorney general, he went on to be elected Lt. governor. As attorney general, he personally tried some of the highest profile cases in the history of this state. Most famous was his successful prosecution of Robert Chambliss for the murder of four little girls at the 16th Street Baptist Church in 1963. Bill Baxley changed the Attorney General's Office in dramatic fashion during his eight years there. Much like United States Attorney General Robert Kennedy, Baxley transformed the office that he held into something that endures to this very day. The men and women he gathered around him deserve as much credit as the man who hired them. They were truly a gathering of eagles. ▲

John J. Davis



John Davis has served as an Alabama Assistant Attorney General for the past 24 years, with the majority of that time assigned to the criminal appeals division in the


Office of the Attorney General. He is a graduate of Auburn University Montgomery and Jones School of Law. In addition to his government service, Davis was engaged in the private practice of law where he specialized in appellate law as well as civil litigation on behalf of both plaintiffs and defendants.

William G. McKnight



Bill McKnight is a graduate of Auburn University and the University of Alabama School of Law. He was an Alabama Assistant Attorney General for several years before

going into private practice in Montgomery. Many years later, McKnight returned to the Attorney General's staff before retiring as general counsel for the Alabama Department of Public Safety.



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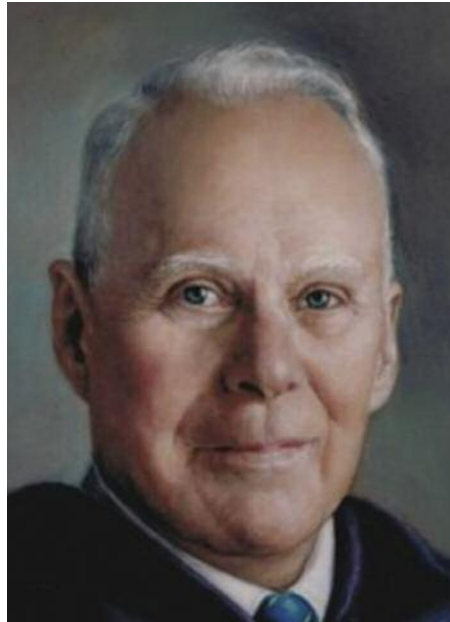
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Justice Samuel Alston Beatty— A Reminiscence

By Patrick H. Graves, Jr. and Edward L. Hardin, Jr.

Samuel Alston Beatty was a man of many titles and talents:

lieutenant, bomber pilot, member of the Greatest Generation, major, lawyer, doctor, professor, assistant dean, dean, and judge. He can be described by many adjectives: smart, humorous, devilish, animated, irascible, persistent, outgoing, larger than life, and testy.

Sam was born in 1923 to Eugene Columbus Beatty and Rosa Bell Horton in Tuscaloosa, graduating from high school in 1939 at 16.



This photograph is from Justice Beatty's 1938 yearbook.

In February 1942, at the age of 19, Sam dropped out of the University of Alabama and enlisted in the Army Air Corps. He



Army Air Corps days

trained at many locations in the states. Following training, Sam was assigned to the 69th Squadron, 42d Bomb Group of the XIII Bomber Command, piloting a North American B-25 Mitchell, a medium bomber, of the Doolittle-raid fame. It was also the plane flown by the fictional 256th Squadron in Joseph Heller's satirical novel *Catch-22*.

In May 1943, Lieutenant Beatty flew his bomber named "Sweet Pea" from California to Hawaii, a



The 69th Squadron

2,300-mile 13-hour hop. The bomber then island-hopped another 3,000 miles to Fiji. Initially, the 69th operated out of the Guadalcanal, conducting low-altitude raids on Japanese ports, including skip-bombing ships at Bougainville. He described his first mission:

We had 12 planes in our first mission to Kahili Airfield on Bougainville, and we expected 100 percent losses, but we lost only one plane. We went in on the deck at dusk, lined up six abreast, firing everything we had and going in as fast as we could. As soon as we hit the ridge to come down toward Kahili Airfield dark became daytime. Their antiaircraft fire and ours lit up the sky....¹

His second combat tour was in the Russell Islands, attacking the large Japanese base at Rabaul, New Britain Island. Beatty earned the *nom de guerre* “Lucky” at Rabaul. His B-25 was hit by enemy flak 15 times in 25 missions, 12 of them consecutively. A Movietone cameraman accompanied “Sweet Pea” on a Rabaul raid. His unsourced article reported that a ton and half of bombs were dropped on the dock and wharf area of the city and added:



This photograph shows Justice Beatty (back to camera) and his crew performing maintenance on “Sweet Pea” somewhere in the South Pacific.

The Japanese showed their appreciation by contributing a thick barrage of anti-aircraft, only one shrapnel of which pierced the hull. A community sing was held over the interphone system of the bomber. The bomber mission began with “When the Roll is Called Up Yonder.” Over the target the party sang “I’m only a Bird in a Gilded Cage,” followed immediately by “I Want’a Go Home.” Turret gunner Hartley was off key several times having been nicked by anti-aircraft fire on a previous mission.²

After 15 months and 60 missions, the 35th of which was on his 21st birthday, Sam returned to the states in July 1944 as an instructor at Albany, Georgia. On his last training mission, he flew over Tuscaloosa. Grabbing the controls, Sam told his students, “This is how it’s done,” buzzing his hometown in several passes. One telling had him flying under the Fosters Ferry bridge on Highway 11.

Lieutenant Beatty was awarded the Air Medal with seven bronze oak leaf clusters.

In 2007, Sam recorded a 1:37-hour video of his war experiences. He was 84. His memory and clarity of mind were truly remarkable. He told of the many terrifying raids on the large port at Rabaul. The video can be viewed at <https://www.youtube.com/watch?v=qNI7AmGXVUs>.

Sam returned to the University of Alabama and finished undergraduate school in 1948. Former Justice of the Supreme Court of Alabama Champ Lyons remembers a story Sam told about his return to the university: “When I enrolled in the University of Alabama, a cocky ‘frat boy’ told me I needed to join a fraternity to prove my manhood. I told him, ‘Son, I just finished flying 60 missions in a B-25 over the Pacific and several times almost got my rear end shot off. I don’t have to prove my manhood to you or anyone else.’”

In 1953 Sam graduated from the University of Alabama School of Law, first in his class.



Justice Beatty married Maude Applegate (known fondly as “Apple”) in 1949. Apple’s brother was killed in Europe during the war.

Following a brief law practice and at Dean Harrison's urging, Sam became a member of the faculty at the University of Alabama School of Law in 1955. Sam was awarded a Ford Foundation fellowship to pursue graduate studies at Columbia University where he earned a master's degree (1959) and a doctorate of juridical law (1964). While at Alabama, he taught criminal law, evidence, equity, contracts, and negotiable instruments.



Professor Beatty

Sam retired as a reserve major in the Air Force Judge Advocate General Corps.

Sam attributed his teaching techniques to training as an air cadet. The best accounts of his teaching career and methods in Farrah Hall come from his students. To keep the student's attention, reduce boredom, and drive home a point, Sam often resorted to theatrics. Judge Art Hanes notes Beatty's unsurpassed talent for

needling students and lawyers, a penchant in which he reveled and carried out with great humor.

One of Dr. Beatty's no-no's was being late to class. One spring morning in 1964, Bill Baxley arrived late for class. Ed Hardin tells of Baxley's entry into Sam's class:

"Glad you could drop in for a visit Mr. Baxley, but this is the third time you have been late for my class. So, you can turn around and go back through the doors you just came in and don't ever come through those doors again." Baxley mumbled, "Yes sir, Dr. Beatty" and left. As Beatty started his next class, a scuffling noise came from an open window at the back of the classroom. Everyone turned around to see Baxley climbing through the window. Beatty said in a loud voice, "Mr. Baxley, I told you not to come in my class again! Didn't you hear me?" Baxley responded, "Dr. Beatty, sir, you told me not to come through those doors again. I need this class to graduate." Beatty responded, "Well, at least you listen carefully. Now sit down and don't be late again."

In 1969, Sam's criminal law classroom had frosted windows on the doors. As he began a class one morning, Sam noticed his students looking at the door. The image of a student appeared, listening to see if Dr. Beatty had arrived. Sam signaled for the class to be quiet and, continuing his lecture, crouched and stealthily pranced to the door. He flung it open and chased the hapless student down the hall, growling in a loud voice.

Sam hated yellow shirts. A story goes that he called on a student at the start of a class and kept him up the entire hour. When the class ended, Dr. Beatty told the shell-shocked student, "Don't ever wear a yellow shirt in my class again." Don Sweeney of the Montgomery bar made the mistake of wearing an offending yellow shirt to class. Sam had Don stand on his desk and repeatedly sing "Blue Suede Shoes."

Judge Harold Albritton of the U.S. District Court for the Middle District of Alabama remembers being in Beatty's class during a discussion of causes of action. Sam threw a book at a student. It missed. Beatty: "Since it missed you, that was an assault. Had I hit you, it would have been an assault and battery."

Arthur Stephens tells of an event involving future Chief Justice Ernest C. "Sonny" Hornsby. Sam called

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on Sonny to speak about the elements of first-degree murder. As Sonny fumbled with his book, Sam ripped the pertinent page from his own book and gave it to his frustrated student.

Judge Lyons tells of a practice by Dean Harrison near exams that allowed students to turn in “unprepared slips” before class to avoid the embarrassment of not being prepared. Dr. Beatty disapproved of the practice. At the end of the third-year semester, when all were worried about exams, the stack of slips on the dean’s desk was quite large. As Sam finished up a lecture in the same classroom, he noticed the stack of slips. With that devilish glint in his eye for which he was famous, Sam snatched up the slips, made a show of wadding them up, and stuffed them in his pocket. He faced the dean’s class and with a fiendish grin exited the room, giving a forceful one-finger salute. The class stampeded to put new slips on the dean’s desk.

During a summer school session, Sam declared helmet day, on which all had to don a helmet of some sort. Those students who did not were called upon to recite.

Tuscaloosa lawyer Wilbor J. Hust found Sam on a jury venire. The opposing lawyer asked if any knew Wilbor. Dr. Beatty stood up and said he had taught Wilbor in law school. The opposing lawyer reminded Beatty that he too had been one of his students. Spying an opening, Sam responded, “Maybe, but you sure did not stand out.”

Mobile lawyer Broox G. Holmes was in Beatty’s criminal law class during a discussion of “breaking the close.” As a student was reciting, Sam began picking up items off desks and putting them in a suitcase. He then left the room. Finally, someone said, “He’s gone.” And he was. In the next class, he called on a student, and asked, “What was that?” The student asked “Sir?” Sam responded, “You saw me pick up those things, put them in my suitcase, and leave the room, didn’t you?”

It was not easy to get the best of Sam Beatty. One who did was the late Bobby Faulk. Sam stood Bobby up and asked him to explain the crime that involved fencing stolen TVs. Bobby responded, “Dr. Beatty, I don’t know but if you can get them, I can move them for you.” But Sam got even. Bobby, who often hunted with Beatty, confronted Sam about a bad grade. Sam retorted, “If you

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spent more time studying and not hunting, maybe the grade would have been better.”

In 1970, Sam served as the dean of the law school at Mercer University in Macon for four years. He later served as chief of the civil division for Attorney General Baxley.

In 1976, a group of former law students persuaded Sam to run for the Alabama Supreme Court. He won and again in 1982, serving 12 years before retiring in 1989. Milton Coxwell, Jr., of Monroeville, argued a case before the court, representing a used car dealer who lost an automobile in a fire. The insurance company took the position that the owner’s fraudulent statements in the proof of loss voided the policy. Milton found an old case in which a ship had gone down in Mobile Bay with a cargo of whiskey. The owner had misrepresented the quality and quantity of the cargo, but the court did not void the policy. Justice Beatty stated, “Mr. Coxwell, you have argued your position ably, and you might even be right. But let’s move on to more important matters. Do you have any intelligence as to the location of that cargo of whiskey?” A rare moment of levity in the court.

Judge Art Hanes granted summary judgment on a routine dispute. On appeal, Justice Beatty affirmed the order and attached a note, “Hanes, I did this because I love you, but you still don’t know anything about contracts. S.A.B.”

Sam created a business card while practicing law in Birmingham after retiring from the bench, stating in part: “The greatest law giver since Moses, Hammurabi and Judge Roy Bean.”

Samuel Alston Beatty, 91, left us on May 21, 2014, survived by Apple; their children, Rosa Beatty Lord and Eugene Applegate Beatty, both law school graduates; and grandchildren. Sam and Apple’s 61 years together are a testament to Sam’s excellent choice of a mate and Apple’s perseverance. ▲

Endnotes

1. Delbert Reed, *All of Us Fought the War: The University of Alabama Men and Women in World War II* (Tuscaloosa: The University of Alabama Press, 2012) 74.
2. Attempts to locate the Movietone footage have not been successful. YouTube has footage of numerous B-25 raids on Rabaul.

Credits

Sam’s son, Gene Beatty, who provided much information and photos; David Durham and Andrew Toler, the University of Alabama Bounds Law Library; Monique Fields, the University of Alabama School of Law; and the many contributors of stories



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Patrick H. Graves, Jr.



Pat Graves is a retired partner in the Huntsville office of Bradley Arant Boult Cummings LLP. He graduated from West Point in 1964 and served two tours in Vietnam as an infantry platoon leader, aide-de-camp, and rifle company commander. He graduated from the University of Alabama School of Law in 1972. In retirement, he is writing family history and his adventures at West Point and in the Army.

Edward L. Hardin, Jr.



Ed Hardin graduated from Birmingham Southern College (bachelor’s and doctor of laws, hon. causa) and from the University of Alabama School of Law. From 1965 to 1998, he practiced in Birmingham focusing on civil litigation. He then served as executive vice president, general counsel, and director of Caremark, Inc. until 2007. After Caremark’s merger with CVS, Inc., he joined the Birmingham office of Burr Forman LLP as counsel. Since 2019, he has limited his practice to consulting in select complex civil litigation matters.



30 Faces of Pro Bono

P A R T 2 O F 6

Joseph R. Abrams, City Attorney's Office, Birmingham

Joseph Abrams, an attorney for the City of Birmingham, has dedicated the majority of his young career to providing legal services to



those who can't afford it. He began as a staff attorney for Legal Services Alabama, where he represented clients in housing and consumer law, domestic relations, and public benefits. During his time there, he served as a member of LSA's High Impact Litigation Unit, where he worked on litigation that would change the lives of the most vulnerable and co-authored several amicus briefs on behalf of low-income Alabamians.

His impact on the state reaches far and wide because he used his skills and talents to help others.

Abrams's passion for service extends outside of his full-time job. He often can be found volunteering at the Alabama State Bar Volunteer Lawyers Program monthly counsel and advice clinics held at the Tuscaloosa County Library. At the clinics, clients feel relief over being able to tell their stories to someone who cared. Abrams meets clients where they are and provides a safe space for those who often feel unheard by the rest of the world.

When attorneys provide pro bono services, they give hope to the hopeless and change lives. When asked why pro bono work is important, Abrams says, "At its most essential parts, pro bono work helps to prop up the scales of justice, ensuring that they remain balanced." It's the work of pro bono attorneys like Joseph Abrams that ensures justice is fair and truly blind.

Mark H. Carlton, Carlton, Crutchfield & Maddox LLC, LaFayette

When you think of someone you can count on, Mark Carlton is that person. Carlton joined the Volunteer Lawyers Program in 2002 and has



accepted every single case that has been referred to him. That level of commitment and dedication needs to be recognized.

Carlton has been in practice for over 20 years, specializing in

criminal defense/DUI, divorce/child support, probate, estates, adoptions, motor vehicle accidents, personal injury, and wrongful death. His work for the Volunteer Lawyers Program focuses on the programs greatest area of need, divorces, making a difference in so many lives. Carlton says, "Pro bono work is important to me because it's helping people who truly need the help, but can't afford to hire a lawyer to assist them."

By volunteering his services, Carlton is changing the world and the profession. "[Pro bono work] is a small form of community service, and [my] hope is that the clients will share that there are attorneys in the community who actually care about people and not just money. Attorneys often get a 'bad rap' for many things, and for some reason it usually has to do with only caring about money. This is a small way to show people in the community that is not actually the case." Carlton understands the importance and value of pro bono work and recommends that everyone volunteer. He says his clients share their appreciation of his service by telling friends and family who have then become paying clients.

Samuel N. Crosby, Stone Crosby PC, Daphne

Like many Alabama lawyers, Sam Crosby has been helping people who could not afford legal services his entire career. Crosby's most memorable



pro bono case was for widow. She raised nine children while taking care of her disabled husband and supporting her family by babysitting and cleaning houses. When her husband died, Crosby kept her from losing her house through a circuit court action. Later, he was deeply touched when the client donated to the South Alabama VLP to "help other people like me."

In 2012, Crosby received the Harold Albritton Pro Bono Leadership Award. The award honors 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. Crosby demonstrated this commitment first as president of the Baldwin County Bar Association when he helped establish a program to provide free legal services to families who had a service member mobilized during Desert Storm. The idea came from his tenure in the JAG Corps. Later, when he became president of the Alabama State Bar, he attended a conference where the South Carolina Bar president mentioned the Wills for Heroes program. Crosby contacted the lawyer who started the program and, working with him, the VLP, the Young Lawyers' Section, and a committee of Alabama lawyers, started the Alabama program. In his opinion, "Alabama now has the best program in the country, and our lawyers have assisted thousands of first responders with estate planning needs."

Crosby added, "It was also very rewarding to work as president with the Board of Bar Commissioners to establish the mandatory IOLTA program, which has raised millions of dollars in funding to

provide civil legal services to indigent Alabama citizens.”

The motto of the Alabama State Bar is “Lawyers Render Service.” As Sam Crosby said, “Rendering service to others has been one of the greatest joys in my life.”

Phillip D. Mitchell, II, Harris, Caddell & Shanks PC, Decatur

One of the greatest compliments a person can get is from someone they love. When Phil Mitchell’s son, Phillip, was very



young, he drew a picture of who he wanted to be. To Phil’s surprise, his son drew a picture of his father. When asked why he chose his father, Phillip proudly said that he wanted to be just like him because he helps people. His son already knew the impact his father was having on the lives of vulnerable families.

Phil Mitchell began practicing with Legal Services Corporation of Alabama in Tuscaloosa, but soon returned to his hometown of Decatur, where he is now a shareholder with Harris, Caddell & Shanks PC.

Even in private practice, he has upheld his commitment to providing access to justice by serving on the Board of Directors of Legal Services Alabama, Inc., a statewide non-profit law firm dedicated to providing access to justice to Alabama’s low-income community. Phil was the first attorney in his family and recognizes that they could have

benefited from the very services he now provides.

He feels he has an obligation and responsibility to do pro bono work. During his 30-plus years of practicing, his fondest memories are from his pro bono work. Early in his career, he served as chair of the Alabama State Bar Pro Bono Committee and later as chair of the Pro Bono Celebration Task Force. As a member on the committee, his team was responsible for recruiting the majority of the volunteer attorneys in Morgan County. One major accomplishment from his service on the task force was the establishment of the “Lunch with the Chief Justice” during Pro Bono Week, a coveted event with the Alabama Supreme Court Chief Justice, awarded randomly to new volunteers during Pro Bono Month.

His pro bono work was recognized when he received the state bar’s Pro Bono Award for outstanding service to his community. Phil reminds us all that “a sincere thank-you from a pro bono client is extremely rewarding, and can be overwhelming, especially when the client’s appreciation of the help is truly all they can afford to give or pay you.”

Pamela Bucy Pierson, professor emerita of law, University of Alabama School of Law, Tuscaloosa

Professor Pierson has worked with the Volunteer Lawyers Program since it began. Professor Pierson was at a state bar annual meeting and sat next to Melinda Waters,

whom she had never met. “She [Melinda] told me about a new program the bar was starting, the Volunteer Lawyers Program. I said, ‘Sign me up!’”



Professor Pierson believes, “Pro bono keeps me anchored to why I became a lawyer.” While interning at a Legal Services program during her second year in law school, she saw the profound difference attorneys could make in their clients’ lives, and the gratitude of clients for their lawyers. As she became involved in the VLP, Professor Pierson “saw the same thing over and over.”

For several years, Professor Pierson wrote about VLP cases for *The Alabama Lawyer*. “To prepare each story, I visited with the lawyer who handled the case. I also visited the client, in the client’s home, to hear about the case from the client’s perspective. I loved going to clients’ homes. Each client was thrilled to sit with me and tell me about his or her case and, as they said proudly, ‘my lawyer.’ To these clients, their lawyers were sacred. Not only did their lawyers help them with their case, but they listened to them, advocated for them, and cared enough to help them. Their lawyers made these clients feel important, and heard. One client proudly showed me a picture on the mantle alongside pictures of her two children. She said, ‘This is my VLP lawyer.’”

Professor Pierson believes that through her pro bono service she has seen the “best of the best in our legal profession.” ▲



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Notice

- **Michael Lee Weimorts**, who practiced in Santa Rosa Beach, Florida and who is licensed in Alabama and whose whereabouts are unknown, must answer the Disciplinary Board's show cause order within 28 days of March 31, 2021 or, thereafter, the reciprocal discipline shall be imposed in Rule 25(a), Pet. No. 2020-811 before the Disciplinary Board of the Alabama State Bar. [Rule 25(a), Pet. No. 2020-811]

Reinstatements

- Johns Creek, Georgia attorney **Raymond Eric Powers, III**, who is also licensed in Alabama, was reinstated to the active practice of law in Alabama by order of the Supreme Court of Alabama, effective November 18, 2020. Powers was previously suspended from the active practice of law for failing to comply with the 2018 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [Rule 28, Pet. No. 2020-1035]
- Rainsville, Alabama attorney **Andrew Ashkaun Taheri** was reinstated to the active practice of law in Alabama by order of the Supreme Court of Alabama, effective November 18, 2020. Taheri was previously suspended from the active practice of law for failing to comply with the 2014 Mandatory Continuing Legal Education requirements of the Alabama State Bar. [Rule 28, Pet. No. 2020-1038]

Transfers to Inactive Status

- Florence attorney **Gregory Keith Burdine** was transferred to inactive status, effective October 28, 2020, by order of the Supreme Court of Alabama. The Supreme Court of Alabama entered its order based upon the October 28, 2020 order of the Disciplinary Board of the Alabama State Bar in response to Burdine's petition submitted to the Office of General Counsel requesting he be transferred to inactive status. [Rule 27(b), Pet. No. 2020-1058]
- Mobile attorney **Richard Ernest Corrigan** was transferred to inactive status, effective October 9, 2020, by order of the Supreme Court of Alabama. The Supreme Court of Alabama entered its order based upon the October 9, 2020 order of the Disciplinary Board of the Alabama State Bar transferring Corrigan to inactive status. [ASB Nos. 2018-392, 2018-403, and 2018-815]

(Continued from page 133)

- Montgomery attorney **Susan Graham James** was transferred to inactive status, effective October 21, 2020, by order of the Supreme Court of Alabama. The Supreme Court of Alabama entered its order based upon the October 21, 2020 order of the Disciplinary Board of the Alabama State Bar in response to James's petition submitted to the Office of General Counsel requesting she be transferred to inactive status. [Rule 27(c), Pet. No. 2020-1018]

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Surrender of Licenses

- Nashville, Tennessee attorney **Kristin Ashlee Forbes**, who is also licensed in Alabama, surrendered her license on October 6, 2020. Forbes was issued a show cause order on June 16, 2020 for non-compliance with the 2019 MCLE requirements. On August 4, 2020, Forbes responded to the show cause order voluntarily surrendering her license to practice law in Alabama. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order accepting Forbes's surrender of her license to practice law in Alabama, effective August 10, 2020. [CLE No. 2020-601]
- West Palm Beach, Florida attorney **Zade Athear Shamsi-Basha**, who is also licensed in Alabama, surrendered his license on October 6, 2020. Shamsi-Basha was issued a show cause order on June 16, 2020 for non-compliance with Rule 9, MCLE requirements. On August 13, 2020, Shamsi-Basha responded to the show cause order voluntarily surrendering his license to practice law in Alabama. The Supreme Court of Alabama entered its order based upon the Disciplinary Commission's order accepting Shamsi-Basha's surrender of his license to practice law in Alabama, effective October 6, 2020. [CLE No. 2020-613]

Suspensions

- Montgomery attorney **Connie J. Morrow** was previously suspended from the practice of law in Alabama for 90 days, of which she was required to serve 45 days, and placed on probation for two years. On August 24, 2020, the Disciplinary Commission of the Alabama State Bar entered an order revoking Morrow's probation and ordered her to serve the remaining 45 days of her suspension. On October 2, 2020, the Alabama Supreme Court entered an order suspending Morrow from the practice of law, effective September 8 through October 23, 2020, and transferred her to inactive status effective September 8, 2020. [ASB Nos. 2019-107 and 2019-931]
- Huntsville attorney **Curtis Lee Whitmore** was suspended from the practice of law for three years in Alabama by the Supreme Court of Alabama, to be effective January 1, 2021. The Supreme Court of Alabama entered its order based upon the Disciplinary Board's order on consent to discipline, wherein Whitmore admitted in both ASB No. 2020-362 and 2020-631 to violating Rules 1.1 [Competence], 1.3 [Diligence], 1.4 [Communication], and 8.4(c), (d), and (g) [Misconduct], Ala. R. Prof. C. Whitmore later consented to a three-year suspension from the practice of law. [ASB Nos. 2020-362 and 2020-631] ▲

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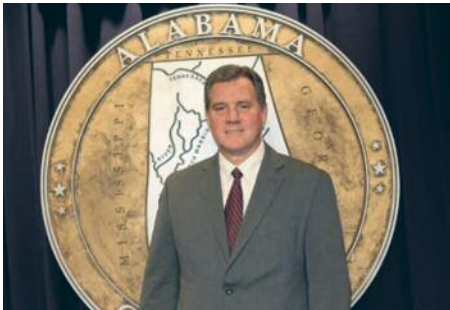
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Othni J. Lathram
Director, Legislative Services Agency
olathram@lsa.state.al.us

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



David A. Kimberley
Deputy Director
Alabama Law Institute
dkimberley@lsa.state.al.us

LEGISLATIVE WRAP-UP



2021 ALI Legislative Agenda

On January 15, 2021, the council of the Alabama Law Institute held its annual meeting and approved new projects to be proposed in the current legislative session. These bills are the result of more than 1,000 hours of hard work by more than 100 lawyers who volunteer on these committees.

We also appreciate the hard work of the legislative members of our executive committee to keep our efforts on track: Director Cam Ward, president; Representative Chris England, vice president; Representative Mike Jones; Senator Arthur Orr; Representative Bill Poole; and Senator Rodger Smitherman.

While approved by the council in 2020, several bills did not have an opportunity to advance because the 2020 session was cut short by the COVID-19 shutdown. For review, those bills are as follows:

Non-Disparagement Obligations

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

The committee's proposed act: a) Establishes the circumstances and scope of both enforcement and defense of an NDO provision; b) Allows enforcement without further publicizing the alleged disparagement; and c) Places the parties on notice that NDO clauses will not interfere with the ability to communicate with law enforcement, regulators, or legal counsel. This proposed Act governs contractual rights only. Therefore, it does not expand or contract any existing common law tort causes of action.

Government Procurement

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

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

- Bringing together the state's procurement law, currently scattered across multiple code titles, into an updated and easier-to-locate format;
- Creating within the Department of Finance the position of a state chief procurement officer with regulatory creation authority and limited review of individual executive agency procurement officer's decisions;
- Extensively defining essential terms in governmental procurement procedure;
- Establishing limited due process procedures for review of contractor suspension or debarment;
- Updating thresholds that would trigger the implementation of mandated competitive bid processes; and
- Updating the procedures for execution, submission, amendment, and review of competitive bid proposals.

Subdivisions

Charlie Beavers of the Standing Real Estate Committee chaired a review of what constitutes a "subdivision" and the import of that under the state law enabling statutes for counties and municipalities. This committee has drafted a bill that provides more consistency between counties and municipalities in this area.

Trusts

The Standing Trust Committee, chaired by Brian Williams, has reviewed qualified trust distributions in trust planning.

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

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

In addition, Law Institute committees, in spite of all the practical difficulties caused by the pandemic of 2020, persevered in readying proposals for 2021. Those projects given final approval by the Institute Council are:

Business Entities

Chair: Jim Wilson

Reporter: Scott Ludwig

The Business Entities Committee continued reviewing and updating Alabama's Business and Nonprofit Entities Code (Title 10A) (the "Code"). Since inception, members of the committee have incorporated technological and other advances into the Code.

(Continued from page 137)

The committee proposes changes so that the Code (1) stays current with the rest of the country, (2) provides Alabama businesses with the tools to quickly and efficiently conduct business in the state, and (3) encourages Alabama businesses to use Alabama entities rather than being forced to utilize Delaware or another state's entity laws.

This year, the committee focused its efforts on resolving a number of technical issues in the Code. Among the proposed changes are those which:

- Amend Chapter 1 (the "HUB") to clarify when a provision of the HUB applies to a specific chapter, allowing the specific chapter to specify that provisions of the HUB do not apply to that chapter;
- Amend the HUB to clarify certain filing requirements to provide for easier administration of filings;
- Amend the HUB to clarify the name of a reinstated entity to align those naming conventions with the various chapters that have separate provisions regarding reinstatement;
- Amend Chapter 2A (Business Corporations) to conform with the changes to the HUB and to clarify issues surrounding remote or virtual stockholder meetings and electronic notices;
- Amend Chapter 3 (Nonprofit Corporations) to allow for electronic communications among members and to allow for remote or virtual meetings;
- Amend Chapter 3 (Nonprofit Corporations) to remove certain traps for the unwary regarding the expansion or contraction of the board of directors and who may serve as an officer of the nonprofit corporation;
(NOTE: The amendments to Chapters 2A and 3 regarding electronic notices and remote or virtual meetings prevent any need to amend Chapter 4 since Chapter 4 relies on Chapters 2A and 3 for those processes.)
- Amend Chapter 5A to conform with the changes to the HUB;
- Amend Chapter 8A to conform with the changes to the HUB; and
- Amend Chapter 9A to conform with the changes to the HUB.

Trusts

Chair Brian Williams and the Standing Trust Committee reviewed the well-received Decanting Act from 2018 and noted the need for a couple of improvements:

- Changing the term "record notice" to "notice in a record" at Ala. Code § 19-3D-7(c). This change is recommended because the term "record notice" is not a defined term in the Act while "record" is defined at §19-3D-2 (22) as "information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form"; and
- Changing "notice period" in §19-3D-9(d) to "time by which such proceeding must be commenced" to clarify that what is being referenced is the time in which to commence an action, and not the period before which an authorized fiduciary may exercise the decanting power after providing the 60-day notice.

Small and Disadvantaged Businesses

Chair John Montgomery and a committee of legislators, state agency representatives, and other stakeholders propose this bill to accompany the Government Procurement bill to establish data-collection procedures for Alabama's small and disadvantaged businesses.

This bill defines key terms and sets up methods for the chief procurement officer to acquire and maintain accurate information about these Alabama business entities.

This information will be reported to the legislature on a regular basis for use by the legislature, in its discretion, to craft appropriate policy regarding Alabama's small and disadvantaged businesses' role in the government procurement process. This bill would not become effective unless the Model Procurement Code bill were to also pass.

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

The January council meeting also marked the final meeting presided over by Cam Ward as president, a position he has held for a decade. Under Ward's leadership the institute has re-defined its position in the state and built upon its tremendous legacy. We are grateful for his dedication, service, and the great amount of energy he has dedicated to achieving the institute's mission of improving the laws of Alabama. ▲

David Kimberley assumed the role of deputy director of the institute, effective November 2020. He had been serving as an attorney at the institute since January 2019, after 12 years on the bench as a circuit judge.

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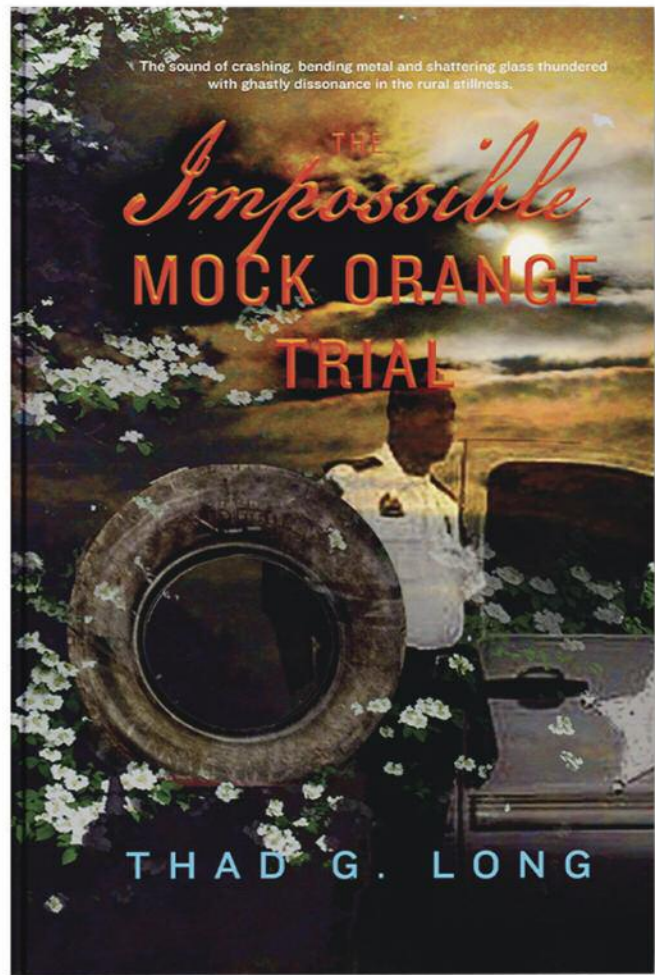
Ted Born and a young untested associate were called upon to defend a tough – seemingly impossible – lawsuit in one of the most challenging county courts in the United States. The facts looked bad: the client was a tire manufacturer of a tire that blew out, followed by a vehicular crash resulting in a child's death, a brain injury for another child and other serious injuries. The dead and injured were residents of a county where juries had a history of rendering verdicts in generally millions of dollars in favor of local residents against big out-of-state corporations, even in minor cases. The case, with racial overtones, leads through a labyrinth of mystery and intrigue no one could have imagined as the trial date of a BIG one looms, with surprises that do not end with the trial.

AMAZON REVIEWS

5.0 OUT OF 5 STARS TEXTBOOK LAWYERING

Though a work of fiction, this book draws on the author's decades of experience as a trial attorney to describe the anatomy of a complex trial resulting from the tragic crash of a van into a mock orange (hence the title) tree. The Preface concludes by saying that he is writing to illuminate "issues critical to justice in our courts and what civil justice really means." In what may be a more important lesson, I would add that justice often needs an assist, and this book illustrates how, from really first-rate lawyering. This is a textbook on how to try a case, and how thorough preparation and clear presentation can make complex issues simple and accessible.

– Peter W. Low, Professor of Law, U. of Virginia and former Provost, U. of Virginia system



5.0 OUT OF 5 STARS GREAT!!

I really liked this book! It was very interesting, the story was compelling, the characters believable, and it was easy to read!

– W.S.

5.0 OUT OF 5 STARS GREAT READ!

Certainly a legal story but I liked the character developments. It showed [the] perspectives of the characters whether it be racial, socio economic or cultural. There was compassion between characters. I enjoyed the book a lot.

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OPINIONS OF THE GENERAL COUNSEL

Roman A. Shaul
roman.shaul@alabar.org



Advertising Ability to Communicate in a Foreign Language

QUESTION:

May an attorney advertise the ability to communicate in a foreign language if an employee of the attorney, and not the attorney, will be communicating with clients in the second language? If so, what ethical obligations and responsibilities are imposed upon the supervising attorney?

ANSWER:

An attorney may advertise the ability of a nonlawyer employee to communicate in a foreign language if the advertisement makes it clear that the nonlawyer employee and not the attorney will be

communicating with the client in the foreign language. Additionally, if the advertisement is placed using the foreign language being advertised, then the disclaimer required by Rule 7.2(e) must also be in that same foreign language. If the advertisement being placed uses both English and the foreign language, then the disclaimer must be communicated through both the foreign language and English. Finally, any attorney using a nonlawyer employee to communicate with a client in a foreign language assumes all responsibility for the accuracy of the information relayed between the nonlawyer employee and client.

DISCUSSION:

Rule 7.2, Alabama Rules of Professional Conduct, provides, in pertinent part, as follows:

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make or cause to be made a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it:

- (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

As such, an attorney cannot imply an ability to speak a foreign language when, in fact, it is an employee of the attorney that will be communicating with the client in the foreign language. Rather, if the attorney wishes to advertise the fact that his law firm can communicate with a client in a particular language, the advertisement must state with particularity whether the attorney has the ability to communicate in the foreign language or whether an employee has that ability. Additionally, if the advertisement is going to be published via the foreign language, the disclaimer required by Rule 7.2(e) must also be translated into the foreign language. If an advertisement is going to be published using both English and the foreign language, then the disclaimer should be included using both the foreign language and English formats.

Any attorney using a nonlawyer employee to communicate with a client in a foreign language should also be aware of Rule 5.3, Ala. R. Prof. C., which provides as follows:

RULE 5.3 RESPONSIBILITIES REGARDING NONLAWYER ASSISTANTS

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- (a) a partner in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
- (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to

ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

- (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer, if:
 - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
 - (2) the lawyer is a partner in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Under Rule 5.3, an attorney is held responsible for the conduct of any non-lawyer employee to the same extent as if the attorney engaged in the conduct himself. In the instant situation, by using a nonlawyer employee to communicate with a client, the lawyer is under a duty to ensure that information received from the client is accurately communicated to the lawyer through the nonlawyer employee. Likewise, the lawyer is also responsible for ensuring that the non-lawyer employee accurately relays the lawyer's communications to the client. Any failure by the nonlawyer employee to accurately relay information between the client and the lawyer that adversely affects the rights or interests of the client could constitute an ethics violation by the lawyer.

Furthermore, pursuant to Rule 5.5(b), Ala. R. Prof. C., the lawyer employing the nonlawyer employee as a translator must also be careful to avoid assisting the nonlawyer employee in the performance of activities that constitute the unauthorized practice of law. For example, while legal advice may be relayed to a client through the use of a translator, the legal advice given must be that of the lawyer and not the translator. As such, the lawyer should always be present during conferences with the client and should not allow the nonlawyer employee to meet privately with the client. In addition, when making court appearances, the approval of the court should be sought in order to use the non-lawyer employee to translate information between the client and the lawyer and/or the court.

As always, if you have any ethics questions, please contact us at ethics@alabar.org. ▲



MEMORIALS

▲ S. Allen Baker, Jr.



S. Allen Baker, Jr.

Being with Allen Baker meant a firm handshake, a warm smile, and questions about you and your family. Allen was always steady and strong in his belief that everyone has value, that faith, family, and friends are priorities, and that good humor helps any conversation. We lost Allen on October 28, 2020 after his courageous battle with cancer.

Allen was a loving husband, father, grandfather, and friend. He is survived by the love of his life, Patty, their four children, and their many grandchildren. Allen practiced with Balch & Bingham for 50 years. He was a lawyer's lawyer and a wonderful courtroom advocate. Allen's court cases earned him an invitation to become a fellow in the American College of Trial Lawyers in 2012, an honor that he treasured.

When Allen wasn't practicing law, he coached Little League sports, told ghost stories and created adventures for his grandchildren, and played golf with his buddies on Sunday afternoons. Allen loved his family and friends and also enjoyed the spirit of competition in both his practice and in sports. When we think of a "good man," we think of Allen. Living a good life, loved by his family and friends, and loyal to a personal code of honor, Allen Baker was and will be the best example for all of us. ▲

—Alan T. Rogers, Birmingham

Addison, Elizabeth Vickers

Montgomery

Admitted: April 28, 1987

Died: November 14, 2020

Bozeman, Hon. Archie Ted

Hayneville

Admitted: September 8, 1967

Died: December 26, 2020

Brobston, Edwin Lipscomb

Bessemer

Admitted: February 10, 1954

Died: November 12, 2019

Clark, Sara Dominick

Birmingham

Admitted: January 1, 1941

Died: November 8, 2020

Davis, Timothy Bledsoe

Alex City

Admitted: April 25, 1986

Died: April 26, 2020

DeBardeleben, Elizabeth Beddow

Birmingham

Admitted: September 26, 1980

Died: November 20, 2020

Fowler, Conrad Murphree, Jr.

Birmingham

Admitted: September 1, 1972

Died: November 2, 2020

Hildreth, Emmett Franklin, Jr.

Santa Rosa Beach, FL

Admitted: August 29, 1963

Died: December 11, 2019

Kilpatric, Jimmy Gaines

Sleepy Hollow, NY

Admitted: April 22, 1968

Died: November 6, 2020

Lakey, Jimmy Randall

Jasper

Admitted: April 30, 2009

Died: December 13, 2020

Maddox, Hon. Alva Hugh

Montgomery

Admitted: February 18, 1957

Died: December 11, 2020

McFadden, Hon. Frank Hampton

Birmingham

Admitted: April 9, 1959

Died: December 28, 2020

Mears, Thomas Anderson, II

Birmingham

Admitted: September 28, 2012

Died: October 28, 2020

Parris, MacKenzie Paul

Gadsden

Admitted: April 13, 1993

Died: July 10, 2020

Pirtle, Henry Winston, Sr.

Montgomery

Admitted: April 30, 1999

Died: February 25, 2020

Price, Shannon Eugene

Birmingham

Admitted: September 30, 1999

Died: October 27, 2020

Quarles, Tyrone

Birmingham

Admitted: September 29, 1998

Died: December 23, 2020

Ramsey, Joel Wardlaw

Dothan

Admitted: April 23, 1973

Died: November 20, 2020

Rogers, William Howell, Sr.

Moulton

Admitted: January 1, 1962

Died: March 25, 2020

Salvagio, Charles

Birmingham

Admitted: September 27, 1996

Died: November 20, 2020

Vines, Lanny Sterling

Birmingham

Admitted: September 7, 1966

Died: December 9, 2020

Wesch, Paul Charles

Mobile

Admitted: December 26, 1980

Died: December 17, 2020

Witcher, James Stanley, Jr.

Birmingham

Admitted: September 7, 1966

Died: December 24, 2020

Zarzaur, Ben Louis

Birmingham

Admitted: September 1, 1972

Died: December 22, 2020



ABOUT MEMBERS, AMONG FIRMS

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

About Members

Karen M. Henney announces the opening of **Henney Law LLC** at 500 Office Park Dr., Ste. 100, Birmingham 35223. Phone (205) 527-8837.

Balch & Bingham announces that **Julia Barber, Steven Corhern,** and **Jonathan Hoffmann** are now partners in the Birmingham office.

Barze Taylor Noles Lowther LLC of Birmingham announces that **Catherine C. Masingill** joined as an associate.

Browne House Law Group LLC of Tuscaloosa announces that **Greg L. Gambriel** joined the firm.

Conchin, Cole, Jordan & Sherrod of Huntsville announces that **Andrew F. Banks** joined as an associate.

F&B Law Firm PC of Huntsville announces that **Patrick E. Sebesta, II** joined as an associate.

Fish Nelson & Holden LLC of Birmingham announces that **Emily Pollock** joined as an associate.

Galloway, Scott & Hancock LLC of Birmingham announces that **Charles L. Denaburg, J. Sanford Mullins, III,** and **David D. Schoel** joined the firm.

Gilpin Givhan of Montgomery announces that **Christopher L. Richard** is now a shareholder.

Among Firms

Adams & Reese announces that **Danielle Douglas** and **Blake T. Richardson** joined as associates, in the Birmingham and Mobile offices, respectively.

The Adoption Law Firm of Birmingham announces that **Susan M. Brown** joined as an associate.

The **District Attorney's Office for the Thirteenth Judicial Circuit** announces that **Keith Blackwood** is now the chief assistant district attorney.

The **District Attorney's Office for the Fifteenth Judicial Circuit** announces that **Azzie Taylor** joined as chief deputy district attorney and **John F. Phillips** and **Kevin B. Durick** joined as deputy district attorneys.

The Hawley Firm PC announces it joined **Hand Arendall Harrison Sale LLC**, effective March 1, with offices at 1801 5th Ave. N, Ste. 400, Birmingham 35203. Phone (205) 502-0187.

Holtsford Gilliland Higgins Hitson & Howard PC announces that **Ursula L.A. Shakespeare** joined as an associate in the Gulf Coast office.

Lawton & Associates of Anniston announces that **Chase A. Arnold** joined as an associate.

Otts Moore of Brewton announces that **Judge J. David Jordan** (ret.) rejoined as a partner.

Pittman, Dutton & Hellums PC of Birmingham announces a name change to **Pittman, Dutton, Hellums, Bradley & Mann PC**.

Richie & Gueringer PC announces that **Mary-Ellen King** joined the firm in the Austin office.

Rosen Harwood PA of Tuscaloosa announces that **Terri Olive Tompkins** joined as a shareholder and **Allie S. Montgomery** joined as an associate.

Samford & Denson LLP of Opelika announces that **Houston W. Kessler** joined as an associate.

The Serious Injury Law Group announces that **David L. Brown, Jr.** joined the Birmingham office, and **Johnna Ingalls** and **Amy Gonzalez** joined the Montgomery office.

Starnes Davis Florie LLP announces that **Grace Ann Garner**, **Kristyn Hardy**, and **Brad Prosch** joined the Birmingham office, and **Edward Hines** joined the Mobile office, all as associates.

Traditions Law Group of Northport announces that **Charles F. Horton, III** joined as an associate.

Warren Averett of Birmingham announces that **Heather Locklar** is now a member of the 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

Defamation; Litigation Privilege; Counselor-Patient Privilege

***Borden v. Malone*, No. 1190327 (Ala. Nov. 25, 2020)**

Father of minor sued son's counselor for defamation and negligence/wantonness in drafting and disseminating a letter by counselor regarding custody proceedings involving father and mother, based on counselor's observations as counselor for son and mother. Letter was ultimately not admitted into evidence in the custody proceeding. Father's complaint alleged that fraudulent, reckless, and unprofessional allegations were lodged in the letter against father, that counselor caused the letter to be disseminated beyond the attorney addressee and beyond the court to son's school officials and other third parties, and that the letter's dissemination also caused damage to both son and father. Trial court dismissed the complaint, holding that all communications were "privileged." The supreme court reversed, holding (1) even though ultimately not admitted into evidence, the contents of the letter would fall within the litigation privilege if disseminated only as was necessary in furtherance of the judicial proceeding; however, since the complaint alleged that counselor caused the letter to be disseminated beyond the judicial sphere to school officials and other third parties, the litigation privilege would not extend to such dissemination; and (2) negligence/wantonness claims were at their core a claim that counselor had breached the counselor-patient privilege as to the son (the patient), which was a viable claim based on the following: (a) the privilege as to communications between a minor child and LPC under Ala. Code § 34-8A-21 is the same as that afforded generally under § 34-26-2, (b) statutory right of confidentiality as to counselor-patient privilege supplants common-law litigation privilege, such that the litigation privilege cannot standing alone insulate the counselor from a private action based on unauthorized disclosure of the patient's confidential information—even though the letter written by the counselor made clear that the divulging of the minor's information was being done with the minor's consent.

Counties; Flood Liability; Road Safety Maintenance

***Richardson v. Mobile County*, No. 1190468 (Ala. Nov. 25, 2020)**

Two homeowners, residents of the Cottage Park neighborhood in Mobile County, sued the county for negligence, nuisance, and related claims, asserting that their homes had been devalued and they suffered losses of personalty resulting from repeated flooding events to the neighborhood after construction of a nearby subdivision (the O'Fallon subdivision) with county engineering approval. Allegation and evidence were that flooding of the Cottage Park subdivision substantially increased after construction of the O'Fallon subdivision, including flooding of public roads within Cottage Park. Held: (1) because county did not design or construct the system within Cottage Park which handled drainage (including the increased load from upland subdivisions such as O'Fallon, whose design was approved by the county) and because that system was not within county right of way, county had no duty to prevent overtaxing of the Cottage Park drainage system which led to flooding events;

however, (2) because county accepted dedication of public roads in the Cottage Park subdivision, county did have duty to remediate flooding of the public roads therein in order to render them safe, and remand was necessary to determine whether evidence suggested that county breached that duty.

Easements; Experts; Attorneys' Fees

Toomey v. Riverside RV Resort, LLC, No. 1180521 (Ala. Dec. 4, 2020)

Toomey and Riverside are adjoining landowners. A culvert had been installed within an ingress-egress easement on which the common road to the properties lay, to channel stormwater away from the only road providing access to both properties. Toomey blocked the culvert knowing that the blockage might cause damage to the road and to Riverside's property. Riverside sued, obtaining an injunction and awards of compensatory and punitive damages, as well as attorney's fees. The supreme court affirmed in part, holding as follows: (a) mortgagee holder of contingent reversionary interest in the Riverside property was not a necessary party to the action, because Riverside was exclusive possessory interest holder in the property; (b) construction of the culvert did not exceed the scope of the easement because it was reasonably necessary for the purpose of the easement; (c) trial court did not abuse its discretion in limiting expert testimony from Toomey's expert, a land surveyor, to matters within his purview and not extending to engineering and causes of erosion; (d) trial court's award of attorneys' fees without stating the rationale under which they were awarded, or the evidence relied upon to support the award, was an abuse of discretion.

Trusts; Attorneys' Fees

Stockham v. Ladd, No. 1180904 (Ala. Dec. 4, 2020)

In a prior appeal, the supreme court held that the circuit court abused its discretion in denying attorneys' fees to trustee under Ala. Code §§19-3B-708, 19-3B-709, and 34-3-60, because

the claims against the trustee were based on actions taken while a co-trustee of the trust. On remand, challenger filed an objection to the fees, making more extensive allegations and arguments not made previously. The circuit court ultimately denied fees based on a finding that the co-trustee willfully or wantonly committed a material breach of trust. The supreme court reversed, holding that the willful

breach argument was not properly before the circuit court because it was raised for the first time after remand.

Personal Jurisdiction

Ex parte Bradshaw, No. 1190765 (Ala. Dec. 4, 2020)

Plaintiff (resident of Mobile) and defendant Bradshaw (resident of Florida) were involved in MVA in Mississippi. Plaintiff sued in Mobile County. Defen-



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dant moved to dismiss based on lack of personal jurisdiction. In discovery, defendant testified that he lived in Alabama until 2006, but he has lived in Florida since then, yet still occasionally comes to Alabama to visit family or use a local Alabama branch of his bank. The circuit court denied defendant's motion to dismiss, and defendant petitioned for mandamus. The supreme court granted the writ. The court noted that plaintiff argued only "general" personal jurisdiction, holding defendant's sporadic contacts with Alabama were not sufficient to establish general jurisdiction.

Will Contests; Post-Removal Procedure

Segrest v. Segrest, No. 1190676 (Ala. Dec. 4, 2020)

After the administration a decedent's estate has been removed to the circuit court, the circuit court's jurisdiction over a will contest filed pursuant to § 43-8-199 may be invoked either by filing a complaint with the circuit clerk as an original action, or by filing a complaint or petition with the circuit clerk as an adversarial proceeding where circuit court has acquired subject-matter jurisdiction estate administration under a proper removal under Ala. Code § 12-11-41.

Arbitration; Contractual Capacity

TitleMax of Alabama, Inc. v. Falligant, No. 1190670 (Ala. Dec. 4, 2020)

Next friend of alleged incompetent's receipt of Social Security disability benefits did not establish receipt of those benefits based on mental disability to support a claimed lack of contractual capacity as a defense to arbitration. The fact that third party received person's disability benefits did not suggest mental incapacity in itself, because under federal regulations that receipt was permissible even if the intended recipient was mentally competent. Testimony from next friend that person suffers from a variety of mental and emotional illnesses, and his opinion that she lacked the mental capacity to understand the contract terms, was insufficient to demonstrate that she lacked the mental capacity to understand and comprehend her actions. (Four-justice plurality opinion)

Frivolous Appeals; Attorneys' Fees

Guthrie v. Fanning, No. 1190852 (Ala. Dec. 11, 2020)

Ala. Code § 12-19-272(a) authorizes an appellate court to award attorneys' fees if an appeal is brought without substantial justification, either on motion of a party or on the court's own motion.

Forfeiture

State v. Two White Hook Wreckers, No. 1190180 (Ala. Dec. 11, 2020)

Ala. Code § 28-4-287 provides the exclusive means for obtaining seized personal property during the pendency of a forfeiture action; injunctive relief under Rule 65 is unavailable.

Attorney Disqualification; Waiver

Ex parte Petway Olsen LLC, No. 1190402 (Ala. Dec. 11, 2020)

Trial court abused its discretion in disqualifying plaintiff's counsel on motion of a defendant (MBUSA) which raised the disqualification issue in its initial answer (an answer filed with its co-defendant and sister entity MBUSI), but which delayed in filing its own motion to disqualify, due to the pendency of a similar motion filed by MBUSI, until after MBUSI was dismissed, even though MBUSI filed its own motion while it remained in the action.

Retaliatory Discharge; Collateral Estoppel

Caton v. City of Pelham, No. 1190589 (Ala. Dec. 11, 2020)

Trial court properly granted summary judgment to city moved on retaliation claim based on collateral estoppel effect of unemployment compensation determination finding employee to have committed misconduct. The court rejected plaintiff's argument that there should be no preclusive effect from administrative determinations where a trial by jury is available in the second proceeding.

Spoilation

Ex parte Water Works & Sewer Board of City of Anniston, No. 11904346 (Ala. Dec. 11, 2020)

Mandamus relief was available to board for order striking defenses and granting partial summary judgment to plaintiffs based on spoliation of evidence. On the merits, mandamus was denied; though there was sufficient evidence the board had culpability for destroying the evidence, plaintiff had alternative sources of information to rebut board's allegations of third-party tampering. Plaintiffs failed to demonstrate that "fundamental fairness" demanded imposition of most severe sanction, when a spoliation charge could be provided to the jury.

Probate Courts; Jurisdiction; Appeals

Williams v. Mari Properties, LLC, No. 1190555 (Ala. Dec. 18, 2020)

Any appeal from probate to the circuit court under Ala. Code § 12-22-20 divests probate court of jurisdiction to proceed further.

Commencement of Action; Service of Process

Varden Capital Properties, LLC v. Reese, No. 1190692 (Ala. Dec. 18, 2020)

Filing of complaint commences an action for purposes of the Rules of Civil Procedure, but for purposes of the statute of limitations the plaintiff must also possess a bona fide intent to effect immediate service of the filed complaint. On a Rule 5 permissive appeal, the supreme court reversed the trial court's denial of a Rule 12(b)(5) motion based on improper service not made until over 100 days after filing. Plaintiff lacked bona fide intent to serve, given lack of explanation for the delay in service.

Recusal; Release-Dismissal Agreements; Intentional Interference; ALAA

Newsome v. Cooper, No. 1180252 (Ala. Dec. 18, 2020)

Trial judge acted within discretion in denying motion to recuse based on allegation that her husband, a state legislator, had in combination with her received donations of \$34,500 from various claimed "agents" of his opponents. Release-dismissal agreement, under which criminal charges will be dismissed with a covenant by the criminally accused not to pursue civil claims or criminal charges arising out of the matter forming the basis of the criminal charge, does not per se violate Ala. Code § 13A-10-7(a), concerning the crime of "compounding." Judgments for all of the civil defendants was therefore proper based on the civil plaintiff's (criminal defendant's) having released all claims against all defendants. Attorney's sending competing attorney's mugshot to mutual client constituted conclusive evidence of justification in tort of intentional interference. Plaintiff's prosecution of claims clearly released were pursued without substantial justification, thus supporting award of attorneys' fees in favor of defendants.

Trusts; Jurisdiction

Martin v. Martin, No. 1181002 (Ala. Dec. 18, 2020)

Under Ala. Code § 19-3B-203(a), circuit court has exclusive jurisdiction over cases brought by a trustee or beneficiary concerning administration of a trust. Under subsection (b), probate courts with statutory equitable jurisdiction may also handle such matters, but that is currently confined to five counties (Jefferson, Shelby, Mobile, Pickens, and Houston). In this case in Colbert County, the circuit court had jurisdiction over the matter.

Vested Rights; Land Use

Breland v. City of Fairhope, No. 1180492 (Ala. Dec. 31, 2020)

Breland purchased land for construction of a subdivision. The planned subdivision would have required filling of 10.5 acres of wetlands, which the city and Baldwin County opposed. Breland sued Fairhope, claiming a vested right to fill the wetlands, and that municipal ordinances could not lawfully be enforced to prohibit the filling activities. The circuit court held for the city and county following a non-jury trial. The supreme court affirmed, holding *inter alia* that (1) Breland had no vested right to fill the wetlands, even though they expended money attempting to fill the wetlands, because the county and city consistently objected to the their actions, and because the fed-

eral permit on which the vested rights claim was based specifically conditioned permitted activities on compliance with state and local law; and (2) state law does not preempt Fairhope's ordinances, because the Alabama Environmental Management Act, Ala. Code § 22-22A-1 ("AEMA"), and the Alabama Water Pollution Control Act, Ala. Code § 22-22-1 ("AWPCA") do not preempt the field of wetlands regulations.

Venue; Forum Non Conveniens

Ex parte Johnson & Johnson, No. 1190423 (Ala. Dec. 31, 2020)

Group of health care provider institutions from various counties sued manufacturers of, distributors of, and pharmacies carrying opioid products, contending that they suffered damages from care for addicted patients. Lawsuit was brought in Conecuh County, where one of the plaintiffs was principally situated. Defendants moved to transfer venue to Jefferson County, contending that venue was improper under § 6-3-7 and that the convenience of parties and interests of justice demanded that the case proceed in Jefferson County, due to complexity of case and ease of travel from out of state. Moving defendants did not contend that the plaintiffs' claims were mis-joined with one another. The trial court denied the motion, and defendants sought mandamus relief. The supreme court denied the writ, reasoning: (1) defendants had stipulated to the propriety of joinder in one action, which pretermitted discussion of several of the elements plaintiffs would have to demonstrate for proper joinder of plaintiffs under Ala. Code § 6-3-7(c), and plaintiffs' allegations that defendants jointly create the opioid epidemic was sufficient to establish a claim to joint liability, as well as give rise to the likelihood that common evidence would be used to establish such a public nuisance; (2) transfer based on convenience of parties and witnesses was not established; a defendant cannot assert the inconvenience of its witnesses without making a detailed statement specifying the key witnesses and providing generally statements of the subject matter of their testimony; (3) transfer based on interests of justice was not warranted, because both Conecuh and Jefferson counties had a strong connection to the controversy, given the presence of plaintiffs from both counties.

Mortgages

SE Property Holdings, LLC v. Bama Bayou, LLC, No. 1190205 (Ala. Dec. 31, 2020)

Trial court erred in disallowing lender interest, late charges, attorneys' fees, collection costs, and property preservation expenses incurred by lender after commencement of foreclosure proceedings which were ultimately deemed wrongful. Under plain language of promissory note, in the event of a wrongful foreclosure, the remedy of the borrower was restoration of the status quo ante, and lender was preserved all of its rights and powers. Trial court erred by contravening the language of the note in fashioning an equitable remedy. Although the mortgagee in possession of

(Continued from page 149)

property following wrongful foreclosure is liable for rents and waste, the mortgagee is also entitled to receive interest on the mortgage debt—because the interest continues to accrue on the debt—during the period between the foreclosure and the time when the mortgage debt is adjudicated.

Arbitration

Wayne Farms LLC v. Primus Builders, Inc., No. 1190533 (Ala. Dec. 31, 2020)

Trial court improperly compelled arbitration of claim arising from allegedly defective provision of “passivation services” under a Design Build Agreement; because the contract containing arbitration excluded passivation services from scope.

Medical Liability

McGill v. Szymela, No. 1190260 (Ala. Dec. 31, 2020)

Among other conclusions, trial court acted within its discretion in excluding plaintiff’s proffered expert (a world-renowned TMJ specialist and oral and maxillofacial surgeon) under Ala. Code § 6-5-548. Although he was renowned, he stopped performing surgeries in 2010 (the surgery in issue occurred in 2014) and thus was not “practicing” in the specialty under Ala. Code § 6-5-548(c) within one year of the incident in question. (Two-justice plurality panel opinion)

Arbitration; Waiver

Health Care Authority for Baptist Health v. Dickson, No. 1190179 (Ala. Jan. 15, 2021)

The court affirmed the trial court’s denial of HCA’s motions to compel arbitration in putative class action. HCA waived its right to compel arbitration by litigating venue issue, filing an answer not invoking any rights to compel arbitration, and engaging in active discovery for nearly two years. (Three-justice panel decision)

Stay of Civil Proceedings

Ex parte Steinberg, No. 1190576 (Ala. Jan. 15, 2021)

Party seeking stay on Fifth Amendment grounds must establish with evidence the existence of a “parallel” criminal proceeding, which requires affidavits, typically from criminal defense counsel, indicating that the discovery topics are a portion of the matters under criminal investigation. In this case, the movant simply alleged that there was an ongoing investigation, that a prior criminal information had been dismissed but that the potential for indictment was still present.

State Immunity; Third-Party Standing

Butler v. Parks, No. 1190043 (Ala. Jan. 22, 2021)

Section 14 immunity barred claims brought by attorneys seeking retrospective monetary relief against state officials for recovery of unpaid attorneys’ fees exceeding statutory cap for representation of indigent defendants, where claim was that legislature inadvertently omitted a “good cause” exception from the statutory cap. Attorneys lacked standing to assert that Ala. Code § 15-12-21 was unconstitutional in that the statutory caps deprived indigent defendants to their right to counsel. Because attorneys did not identify whose specific rights were violated, they could not establish the required “close relationship between the attorney plaintiffs and the affected clients to establish third-party standing.

Mandamus Review

Ex parte Brown, No. 1190962 (Ala. Jan. 22, 2021)

Mandamus review was not available to challenge trial court’s denial of motion to dismiss under Rule 12(b)(6) based on expiration of statute of limitations, where plaintiff filed timely action in federal court under mistaken impression that there was diversity of citizenship between plaintiff and defendant, and where defendant moved to dismiss the federal action for want of diversity jurisdiction two days after the two-year statute expired, prompting plaintiff to then file an action in state court and claim equitable tolling.

New Trials; Jury Instructions

Nix v. Myers, No. 1170224 (Ala. Jan. 22, 2021)

In MVA action against municipality and police officer, new trial was required based on trial court’s erroneous admission into evidence of copies of Ala. Code §§ 32-5A-7 and -86. Whether officer’s crossing of double yellow lines in no-passing zone (prohibited by § 32-5A-86) was permitted by § 32-5A-7(b)(4), which allows authorized emergency vehicle driver to “[d]isregard regulations governing direction of movement or turning in specified directions,” was a legal question for the court, not the jury. Under ARCP 51, the instructions to the jury, of which the law would be a part, were not permitted to be in the jury room. Providing a copy of some of the written charge without others would cause the jury potentially to place improper emphasis on some charges over others.

Discovery; Mandamus

Ex parte Harbor Freight Tools, Inc., No. 1190969 (Ala. Jan. 22, 2021)

Mandamus relief seeking vacatur of order compelling discovery based on overbreadth was premature, because petitioner had not filed timely motion for protective order within 30 days following the order compelling production as required

by *Ex parte Horton Homes, Inc.*, 774 So. 2d 536, 540 (Ala. 2000) and other related authority. Harbor did not demonstrate that failure to adopt its proposed protective order would result in disclosure of confidential or proprietary information; mandamus relief would be denied as to that aspect of the petition.

Amendments to Pleadings; Substitution for Fictitious Parties; Reasonable Diligence

Ex parte McCoy, No. 1190403 (Ala. Jan. 22, 2021)

Amendment to complaint after expiration of the statute of limitations substituting named parties for fictitiously-identified parties did not relate back; plaintiff should have ascertained the identities of the involved officer defendants at the time the complaint was filed or in the 21 months before the filing of the complaint in which plaintiff had counsel.

From the Court of Civil Appeals

Rule 54(b)

Tucker v. McNabb, No. 2190213 (Ala. Civ. App. Dec. 11, 2020)

Rule 54(b) certification of partially final order was not proper because remaining claims were intertwined with claims certified as final.

Real Property

Brackett v. Central Bank, No. 2190212 (Ala. Civ. App. Dec. 11, 2020)

Because Alabama is a "title" state, title to mortgaged property passes to the mortgagee, subject to the mortgagor's equity of redemption. Thus, despite language in warranty deed in which mortgagor conveyed property in fee simple and warranted that mortgagor held the property in fee simple, it was not so. Transferees could not invoke statutory adverse possession because their possession before the 2010 foreclosure was not adverse to the mortgagee.

Easements

Henson v. Thomas, No. 2190587 (Ala. Civ. App. Dec. 11, 2020)

Among other holdings, perpetual easement for ingress and egress over and across an existing roadway, given without condition or reference to a specific purpose, was not extinguished merely because the dominant estate had developed an alternative means for ingress and egress.

Workers' Compensation

City of Birmingham v. Jenkins, No. 2190224 (Ala. Civ. App. Dec. 11, 2020)

In comp action by dependents for death benefits, evidence was in conflict as to whether assault on employee was

committed because of the person's status as employee so as to make resulting death compensable.

Appellate Procedure

Pilgrim's Pride, Inc. v. Smith, No. 2181055 (Ala. Civ. App. Dec. 31, 2020)

Filing of improper (premature, not from final judgment) notice of appeal nevertheless divested the trial court of jurisdiction to adjudicate remaining claim, and thus eventual appeal from remaining claim was to be dismissed because trial court had no jurisdiction when it adjudicated the remaining claim.

From the United States Supreme Court

ERISA; Preemption

Rutledge v. Pharmaceutical Care Mgmt. Ass'n, No. 18-540 (U.S. Dec. 10, 2020)

Arkansas statute requiring PBMs to reimburse Arkansas pharmacies at a price equal to or higher than the pharmacy's wholesale cost is not preempted by ERISA.

State Courts; Standing

Carney v. Adams, No. 19-309 (U.S. Dec. 10, 2020)

Attorney and potential judicial candidate sued Delaware, challenging on First Amendment grounds Delaware constitutional provision under which no more than a bare majority of judges on any of its five major courts "shall be of the same political party" and that the minority members must be from the "other major political party." Held: Because Adams did not show he was "able and ready" to apply for a judicial vacancy in the imminent future, he failed to show a "personal," "concrete," and "imminent" injury necessary for Article III standing.

RFRA

Tanzin v. Tanvir, No. 19-71 (U.S. Dec. 10, 2020)

RFRA's express remedies provision permits litigants, when appropriate, to obtain money damages against federal officials in their individual capacities.

Census; Standing; Justiciability

Trump v. New York, No. 20-366 (U.S. Dec. 17, 2020)

Plaintiffs challenging the Trump Administration's memorandum directing the Secretary of Commerce to provide illegal alien data in the census lacked Article III standing to challenge the Presidential memorandum, and the actual harm which might inure was contingent upon too many eventualities to present a ripe controversy.

(Continued from page 151)

Bankruptcy

City of Chicago v. Fulton, No. 19-357 (U.S. Jan. 14, 2021)

Mere retention of estate property after the filing of a bankruptcy petition does not violate §362(a)(3) of the Bankruptcy Code, under which the filing of a bankruptcy petition operates as a “stay” of “any act” to “exercise control” over the property of the estate. §362(a)(3) prohibits affirmative acts that would disturb the status quo of estate property as of the time when the bankruptcy petition was filed.

From the Eleventh Circuit Court of Appeals

FLSA; Offers of Judgment; Attorneys’ Fees

Vasconcelo v. Miami Auto Max, Inc., No. 19-10679 (11th Cir. Nov. 25, 2020)

Because unresolved attorneys’ fee issue does not prevent judgment on the merits from being a final appealable judgment, appeal of underlying judgment was untimely. District court did not abuse its discretion in considering plaintiff’s refusal to settle as part of fee calculus, did not abuse its discretion in its line-by-line review of the time expended, properly considered the limited degree of success, and considered the public interest in enforcing FLSA by considering the fact that plaintiff was trying to use the prospect of fees offensively.

Class Actions; Class Counsel Duties

Medical & Chiropractic Clinic, P.C. v. Oppenheim, No. 18-13714 (11th Cir. Dec. 1, 2020)

TCPA class actions were filed against the Tampa Bay Bucs professional football team’s operating entity. Oppenheim, a lawyer at the AW Firm, filed an action on behalf of M&C. After an unsuccessful pre-certification mediation, Oppenheim left the AW firm and joined the Bock Firm, where he filed a competing class action for another client; the Bucs reached a class settlement in that case. M&C sued Oppenheim, claiming that he breached his fiduciary duties to M&C as a putative class representative. The district court granted summary judgment to Oppenheim. The Eleventh Circuit affirmed, holding that counsel’s duties owed to a named class representative do not differ from the duties owed to a class, and that M&C and the AW firm had launched an impermissible

collateral attack on the class settlement by filing a separate action rather than making their challenges in the court in which a request to certify a settlement class had been made.

Employment (ADA and FMLA)

Munoz v. Selig Enterprises, Inc., No. 18-14606 (11th Cir. Dec. 4, 2020)

The Eleventh Circuit affirmed summary judgment as to ADA claims, reasoning that because plaintiff failed to adduce substantial evidence in the record of the timing, frequency, and duration of Munoz’s impairments, she did not prove a “disability.” The Court reversed as to an FMLA retaliation claim, reasoning that there was evidence supervisor interfered with her exercise of FMLA rights by withholding notice of her right to take unpaid leave, and that there was substantial evidence of retaliation based on the refusal to sign the performance memo.

FCRA

Erickson v. First Advantage Background Services Corp., No. 19-11587 (11th Cir. Dec. 4, 2020)

In order to violate the maximal accuracy standard of the Fair Credit Reporting Act, a consumer report must be factually incorrect, objectively likely to mislead its intended user, or both. In this case, the report specifically stated that the report recipient needed to conduct further investigation to determine whether the match (to a sex offender) was accurate to the subject, and thus was not factually inaccurate or likely to mislead.

TCPA

Lucoff v. Navient Solutions, LLC, No. 19-13482 (11th Cir. Dec. 4, 2020)

Plaintiff who submitted an online demographic form which contained a written consent to ATDS dialing properly consented to receiving over 2,000 collection calls to his cell phone concerning his student loan debt.

Public Schools

L.S. v. Peterson, No. 19-14414 (11th Cir. Dec. 11, 2020)

Students present at the Parkland school shooting sued Broward County and five public officials, claiming their response to the school shooting was so incompetent that it violated the students’ substantive due process rights. The district court dismissed the claims, reasoning the students were not in a custodial relationship with the officials and failed to allege conduct by the officials that was “arbitrary” or “shocks the conscience.” The Eleventh Circuit affirmed; official acts of negligence or even incompetence in this setting do not violate the right to due process of law.

Personal Jurisdiction

***SEC v. Marin*, No. 19-14871 (11th Cir. Dec. 14, 2020)**

Among other holdings, “[w]hen a federal statute provides for nationwide service of process, it becomes the statutory basis for personal jurisdiction” over a person served according to the statute.

Bankruptcy; PPP Loans

***In re Gateway Radiology Consultants P.A.*, No. 20-13462 (11th Cir. Dec. 22, 2020)**

SBA rule under which active bankruptcy debtors ineligible for PPP loans is neither an unreasonable interpretation of the relevant statute nor arbitrary and capricious.

Medical Liability

***Smith v. Crisp Regional Hosp., Inc.*, No. 19-12225 (11th Cir. Jan. 22, 2021)**

Emergency Medical Treatment and Active Labor Act, 42 U.S.C. § 1395, does not impose time restrictions with respect to a hospital’s decision to transfer a patient to another hospital. Thus, claim based on hospital’s delay in transferring patient did not state a claim under the Act.

FCA

***Hickman v. Spirit of Athens, Inc.*, No. 19-10945 (11th Cir. Jan. 19, 2021)**

District court properly granted summary judgment to defendant on False Claims Act-based retaliation claim. Although plaintiff may have suspected that defendant was engaged in fraud, it did not involve the submission of a false claim to the government, and thus was not protected by the FCA.

FCA

***USA ex rel. Bibby v. Mortgage Investors Corp.*, No. 19-12736 (11th Cir. Jan. 15, 2021)**

(1) Summary judgment was improper on relators’ FCA claim, because genuine issues of material fact remain as to whether defendant’s alleged false certifications were material; (2) district court correctly concluded relators’ claim is not barred by previous public disclosure; and (3) district court correctly concluded relators lack standing on a fraudulent transfer claim because their pre-judgment interest in preventing a fraudulent transfer is a mere byproduct of their FCA claim and cannot give rise to an Article III injury in fact.

RECENT CRIMINAL DECISIONS

From the United States Supreme Court

AEDPA; Habeas Corpus

***Shinn v. Kayer*, No. 19-1302 (U.S. Dec. 14, 2020)**

Under the AEDPA (28 U.S.C. § 2254(d)), when a state court has applied clearly established federal law to reasonably determined facts in the process of adjudicating a claim on the merits, a federal habeas court may not disturb the state court’s decision unless its error lies “beyond any possibility for fair-minded disagreement.”

From the Alabama Supreme Court

Rule 702; Cellphone Data

***Ex parte George*, No. 1190490 (Ala. Jan. 8, 2021)**

Testimony from ALEA analyst regarding historical cell-site data from defendants’ cellphones constituted “scientific testimony,” and it was therefore required to meet the admissibility standards of Ala. R. Evid. 702 governing expert testimony.

From the Court of Criminal Appeals

Restitution

***Fitzgerald v. State*, CR-19-1017 (Ala. Crim. App. Dec. 16, 2020)**

Following defendant’s conviction for receipt of stolen car, trial court’s resulting restitution judgment was reversed in part because there was no evidence showing defendant’s actions proximately caused victim’s loss of items taken from his automobile.

Rule 404(b)

***Belcher v. State*, CR-18-0740 (Ala. Crim. App. Dec. 16, 2020)**

In this capital murder case, there was no error under Rule 404(b) in admission of evidence that defendant manufactured methamphetamine and furnished it to his codefendants. Evidence was offered to show circumstances surrounding the charged crime.

Rule 32

***Shrove v. State*, CR-19-0043 (Ala. Crim. App. Dec. 16, 2020)**

Under *Tennyson v. State*, 101 So. 3d 1256 (Ala. Crim. App. 2012), conviction for soliciting a child by computer under the former Ala. Code § 13A-6-110 could not arise from the defendant’s solicitation of an adult whom he believed to be a child. Held: *Tennyson* has retroactive application to cases on collateral review and reversed the trial court’s denial of Ala. R. Crim. P. 32 relief from the defendant’s 2006 guilty plea conviction under § 13A-6-110.

(Continued from page 153)

Capital Crimes

Francis v. State, CR-18-1090 (Ala. Crim. App. Dec. 16, 2020)

In sentencing in capital cases, Ala. Code § 13A-5-49(2) does not authorize the trial court to review the circumstances of a prior conviction to determine whether it would constitute a felony under Alabama law to suffice as an aggravating circumstance. In this case, a North Dakota conviction was a misdemeanor under that state's law and thus did not qualify as an aggravating circumstance under the statute.

Probation Revocation

Williford v. State, CR-19-0481 (Ala. Crim. App. Dec. 16, 2020)

Probationer's admission that she had been arrested on new charges and failed to report to her probation officer because she was unaware that the state was "looking for" her did not constitute admissions to the allegations of her delinquency report. Remand for hearing was necessary, because record did not reflect that probationer was given sufficient notice of the charges and evidence against her and that she admitted to having violated the conditions of her probation.

Split Sentence Act

Reynolds v. State, CR-19-0094 (Ala. Crim. App. Dec. 16, 2020)

Under Ala. Code § 13A-5-6(a)(4) and § 15-18-8(b) of the Split Sentence Act, once the trial court imposes a sentence length between one year and one day and five years, it must either sentence the defendant to probation, drug court, or a pretrial diversion program, or split the confinement portion of the sentence for a period up to two years followed by probation. The court noted that the five-year underlying sentence was valid and could not be altered on remand.

Community Notification

Woodruff v. State, CR-19-0113 (Ala. Crim. App. Dec. 16, 2020)

Municipal-court indecent exposure conviction appealed to the circuit court for a trial de novo constitutes a "conviction" under Ala. Code § 15-20A-4(4), part of the Alabama Sex Offender Registration and Community Notification Act.

U.S. Customs

Wesson v. State, CR-18-0790 (Ala. Crim. App. Dec. 16, 2020)

DHS agent could properly issue a United States Customs Service summons to an Internet provider under 19 U.S.C. § 1509 for records of an Internet protocol address that had shared child pornography files; no court order was required.

Evidence

Adams v. State, CR-18-1190 (Ala. Crim. App. Dec. 16, 2020)

Autopsy photographs were admissible to aid the jury in understanding the murder victim's injuries, and they were not repetitive or unduly gruesome.

Custodial Interrogation

Steele v. State, CR-19-0355 (Ala. Crim. App. Dec. 16, 2020)

Defendant's statement, "Can I wait on a lawyer or something? I just want to get this — over with[,] " was not a clear and unequivocal request for an attorney and therefore did not require a police investigator to stop his custodial interrogation.

Fatal Variance

Scott v. State, CR-19-0211 (Ala. Crim. App. Dec. 16, 2020)

No fatal variance existed between the defendant's robbery indictment and the evidence presented at trial. The indictment listed United States currency as the property that the defendant attempted to steal, and the evidence showed that he told the victim to "give it up" after the victim offered him cash in his wallet.

Speedy Trial

Wilson v. State, CR-19-0469 (Ala. Crim. App. Dec. 16, 2020)

Delay of eight years and one month between the defendant's indictment and guilty plea did not violate his right to a speedy trial when the circumstances of the delay were reviewed under *Barker v. Wingo*, 407 U.S. 514 (1972).

Juveniles; Life Without Parole

Bracewell v. State, CR-17-0014 (Ala. Crim. App. Dec. 16, 2020)

Trial court erred in resentencing a juvenile capital murder defendant to life imprisonment without parole under *Miller v. Alabama*, 567 U.S. 460 (2012) and *Ex parte Henderson*, 144 So. 3d 1262 (Ala. 2013). It treated the defendant's age at the time of the offense—17 years and four months—as an aggravating, rather than a mitigating, factor, and it failed to properly consider the "hallmark features of youth." ▲

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