

2021-2022 ASB PRESIDENT
Tazewell T. Shepard, III and Family



▲
Top Five Traits of
Legal Professionals

Page 318

▲
Hanging a Shingle
(Some Practical Pointers)

Page 324

▲
Practical Considerations for
Opening and Running a
Plaintiff's Litigation Practice

Page 330

▲
Employment Law for the
Solo and Small Firm Lawyer

Page 335

SOLO AND SMALL FIRMS ISSUE

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On The Cover

Alabama State Bar President Taze Shepard of Huntsville with his family

FIRST ROW: Wells Shepard, Taze Shepard, Pam Shepard, and Madeline Shepard

SECOND ROW: Stella Jacobs, Thomas Broughton, Reese Broughton, and Mia Jacobs

THIRD ROW: Sarah Shepard, Ty Shepard, John Shepard, Caitlyn Howard, Hunt Shepard, Tom Broughton, Jana Broughton, Riley Jacobs, and Sarah Jacobs

Photo courtesy of Olivia Reed Photography of Huntsville

FEATURE ARTICLES

SOLO AND SMALL FIRMS ISSUE

Top Five Traits of Legal Professionals

By Judge Donna S. Pate

318

Hanging a Shingle (Some Practical Pointers)

By Andrew M. Skier

324

Practical Considerations for Opening and Running a Plaintiff's Litigation Practice

By Bryan E. Comer

330

Employment Law for the Solo and Small Firm Lawyer

By John D. Saxton

335

ALABAMA STATE BAR 144TH ANNUAL MEETING AWARD RECIPIENTS & PHOTO HIGHLIGHTS

341

30 Faces of Pro Bono: Part 5 of 6

356

Giving and Getting the Most from Your Pro Bono Service

By Jon D. Townsend

360

COLUMNS

President's Page

308

Executive Director's Report

312

Important Notices

314

Editor's Corner

316

Disciplinary Notices

363

Legislative Wrap-Up

368

Memorials

376

Opinions of the General Counsel

380

The Appellate Corner

382

About Members, Among Firms

394

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Cain & Associates Engineers.....	326
Cognito Software.....	311
Davis Direct.....	393
J. Forrester DeBuys, III.....	327
Fidelity Fiduciary Co. LLC.....	383
The Finklea Group, Inc.....	367
Hilton Sandestin	340
Insurance Specialists, Inc.....	396
LawPay.....	304
McFerrin Mediation	359
National Academy of Distinguished Neutrals.....	307
Schreiber Dispute Resolution Inc.....	337
Vargas Vocational Consulting.....	389
Veritext Legal Solutions.....	395



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

Tazewell T. Shepard, III
taze@ssmattorneys.com

President Shepard has designated a theme for each month of his term as president. State bar sections and local bars are encouraged to plan events and activities for each topic. Be sure to let us know about your activities relating to these themes so that we can report them to our members statewide!

September: Solo and Small Firms

October: Pro Bono Service

November: Law Practice Management and Technology

December: Federal and State Government Lawyers

January: Human Trafficking

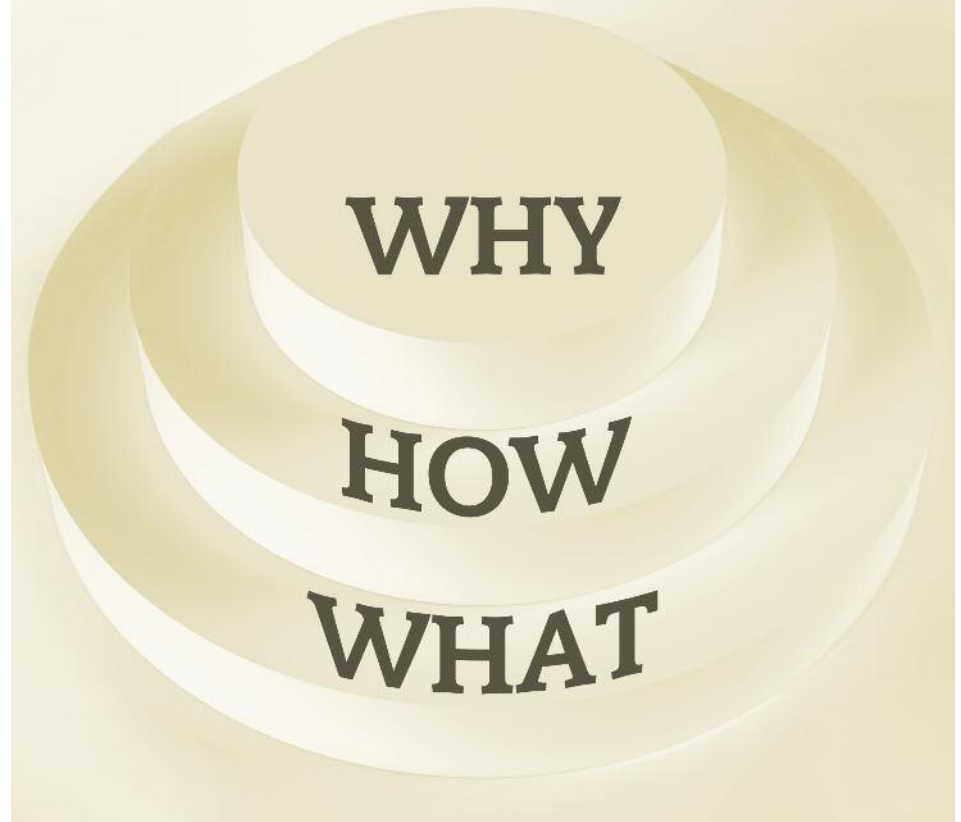
February: Diversity and Inclusion

March: Women in the Law

April: Mediation and Dispute Resolution

May: Lawyer Health and Wellness

June: Annual Meeting



I am honored to serve as the 2021-2022 president of your Alabama State Bar.

With this first column, I will focus on why the state bar exists (or rather why it should exist), and how assembling the right team will make this a very successful bar year.

During my year as president-elect, I had a lot of time to think about the core mission and goals of the state bar. My favorite author/lecturer on this subject is Simon Sinek, who devised the concept of the Golden Circle and the search for Why. I recommend that you take the time to watch his "How Great Leaders Inspire Action" on Ted Talks. You can find it at the TED Talks website, and it is free.

To understand Sinek's Golden Circle concept, visualize three concentric rings. The inner ring contains the word WHY, the next ring contains the word HOW, and the outside ring has the word WHAT.

Sinek points out that most profit and non-profit companies start with the outside ring, focusing on what they do and how they do it, but only a few begin with the innermost ring of why they do what they do. This is an important distinction because the companies that figure out why they do what they do are able to inspire their employees and their stakeholders to join them in pursuing their core mission and goals.

One of the examples that Sinek provides is the battle for the PC market between Apple and IBM. IBM had vastly more resources than Apple. However, Apple was able to position itself as a cool outsider with high standards of design and customer convenience, which happened to make personal computers. This led Apple to success not only with PCs but also iPhones, iPads, and related personal devices, whereas IBM eventually dropped out of the PC market and sold its PC division to Lenovo in 2005.

Applying Sinek's Golden Circle analysis to the Alabama State Bar can be more complex than one might assume. Is it to license lawyers in the state? No, that is only part of what and how. Is it to conduct the bar exam? Again, that is part of what and how.

I invite you to send me an email with your thoughts on what the core mission and goals of the state bar should be. But be advised—I am looking for someone who wants to do much more than just burnish their resume. I am looking for someone committed enough to finish a project on the weekend and who will volunteer to give time and effort even though they may not get any recognition.

My first idea on this subject is that the state bar should be a beacon of kindness and tolerance for our profession. Consider how often you have thought that lawyers in Alabama should display more respect for judges, more courtesy for other lawyers, and more empathy for clients and their families.

The state bar should take every opportunity to encourage our members to embrace kindness and love. I use "love" here almost interchangeably with kindness, as in love of the law, love of being a lawyer, and love of helping others.

Let me put it to you this way—if each of us wants to be a better lawyer or a

better judge, perhaps we should start by seeking to be a better person. This is not just fluff talk. You can be assertive for your client and still be courteous to opposing counsel and their client.

Think how different life will be if each of us practices love and kindness as a professional, a family member, and a community leader. Consider my favorite quote:

"Love suffers long and is kind; love does not envy; love does not parade itself, is not puffed up; does not behave rudely, does not seek its own, is not provoked, thinks no evil; does not rejoice in iniquity, but rejoices in the truth; bears all things, believes all things, hopes all things, endures all things."

I may never fully achieve this standard of love and kindness, but it is certainly the world I want to live in. I expect many of you want to as well. Again, please feel free to let me know if you have any thoughts on how the state bar can inspire our 18,000-plus members with this core value.

At the beginning of this column, I mentioned how assembling the right team will make this a successful bar year.

The success of our state bar is not dependent on one person, but on the excellent team we have assembled to improve the existing programs and benefits and to find new ways to provide value to our members.

The importance of the team concept is well known to business and social sector leaders. As author and former Stanford professor Jim Collins noted: "Those who build great organizations make sure they have the right people on the bus and the right people in the key seats before they figure out where to drive the bus. *They always think first about who and then about what.*" jimcollins.com/concepts (emphasis added).

It would take a while to name everyone on our state bar team this year, but here are some highlights:

- **Terri Lovell—our executive director**
- **Roman Shaul—our general counsel**

Both Terri and Roman are former circuit judges. They are respected by the courts and by our members who have appeared before them.

- **Gibson Vance—president-elect**

Gibson will be the next president, and he already has impressive leadership experience. He and I agreed to work together so that the improvements to existing programs and the implementation of new programs will not change each year, but instead will have a two-year time frame for implementation and improvement.

- **Tom Perry—vice president**

Tom practices in Demopolis and is also in his second term as chair of the Solo & Small Firm Section of our state bar. He brings an important perspective to our executive council.

- **Fred Helmsing**
- **Elizabeth Smithart**
- **John Stamps**

Fred, Elizabeth, and John have served on numerous bar committees and task forces. Their knowledge and experience will be very helpful in our council discussions.

- **Angeline Sperling, Alabama Lawyers Association (ALA president)**
- **Aaron Chastain, Young Lawyers' Section (YLS president)**

I have continued the tradition of appointing the leaders of the ALA and the state bar's YLS.

- **Mark Debro (Finance & Audit Committee co-chair)**
- **Clay Martin (Personnel Committee chair)**
- **Leon Hampton (Governance & Internal Operations Task Force chair)**

I have appointed leaders from two committees and one task force that will be most crucial to our success this

(Continued from page 309)

year—finance, personnel, and governance. It will be more efficient for them to be in the room when we discuss issues that are relevant to their groups. Both Mark Debro and Clay Martin are state bar commissioners and former presidents of their local bar associations. Leon Hampton is immediate past president of the Alabama Lawyers Association.

• **Mark Boardman—parliamentarian**

Mark is one of the most knowledgeable attorneys on board governance in this country. He will be a great help as we make sure that our state bar fully complies with all pertinent statutes

and requirements, including the ethics and open meetings laws.

• **Bob Methvin**

Bob is the state bar's immediate past president. He guided the bar through a turbulent year of the pandemic, the resulting financial distress for many of our members, and the sudden departure of the bar's executive director.

• **ASB Volunteers**

I have appointed over 50 chairs and vice-chairs and hundreds of members to the bar's committees and task forces. Other members of our team include the leaders of the bar's sections

and the local bar associations around the state.

So, having gotten talented people on the bus and placed them in the right seats, we turn to where we want to go on this journey.

In this first column, I address three significant concepts for the direction of our bar—being more responsive, transparent, and accountable.

By “responsive” I mean that the state bar should put more thought into programs and services that will actually benefit our members. Here are a few examples:

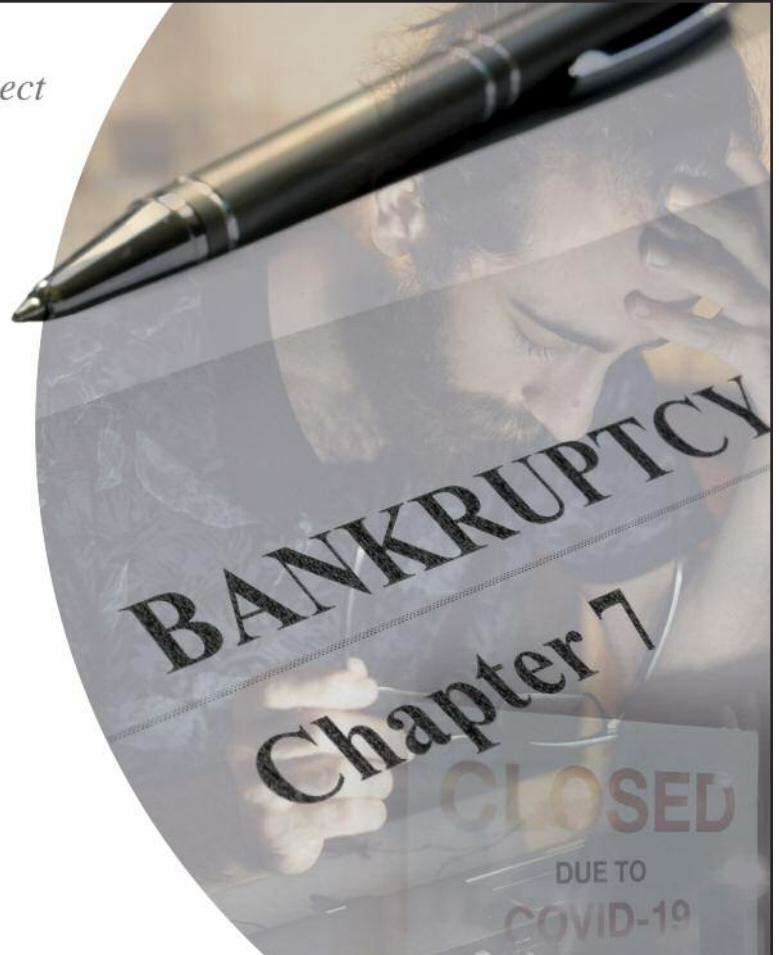
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- Conduct a triannual needs assessment with all of the bar's members and stakeholders, and use the result to plan future programs and benefits. Don't assume that we already know what our members want and need from the state bar.
- Create and promote a series of topical indexes to make it easier for members to find substantive articles in *The Alabama Lawyer* and the BBC votes or minutes.
- Declare a relevant legal theme for each month, and work with local bar associations for supportive events and CLE sessions.
- Focus on current issues, such as human trafficking and diversity in partnership with other governmental and private organizations.

By transparent, I have in mind a greater effort by the state bar to inform our members of what the bar does and how decisions are made. For example:

- Live stream all BBC meetings and include the link in *The Scoop*.
- Require the Executive Council to keep minutes of all meetings and make them accessible online.
- Require sections, committees, and task forces to issue two reports per year, and publish those reports online.
- Invite other government leaders and law school students to meetings of the Board of Bar Commissioners.

Finally, being accountable flows from the first two concepts: being responsive and transparent. For example:

- Create processes to keep other parts of state government, such as the Alabama Supreme Court and the Ethics Commission, informed of state bar activities and goals.
- Make structural changes to involve the Board of Bar Commissioners

more in the decision-making process and avoid "inner circle" governance.

- Create a PowerPoint so that every commissioner can make a member-benefits presentation to a local bar in their judicial circuit or a "How the State Bar Works" presentation to a civic club in their judicial circuit.

Regardless of what the state bar has accomplished in the past, we can always do better. The examples described above are just a sampling of the many ways that we will inspire and lead the Alabama State Bar and its members to a great bar year! ▲


STAY IN THE FLOW

If you want to run a successful legal practice, you need to apply every ounce of the education, experience, and practical knowledge you've gained along the way. The best way is to create a good workflow and then stay in it. That's harder than it sounds, because every time you stop to look for information, you disrupt your core work process. Staying in the flow means that your time stays billable—and that your clients stay happy.

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EXECUTIVE DIRECTOR'S REPORT

Terri Lovell
terri.lovell@alabar.org



The Path Forward

Participating on the Alabama State Bar Hall of Fame Selection Committee has been one of many great opportunities of serving as executive director. I have never felt prouder to be a lawyer than when I heard the inspiring stories of the giants of our profession. I know that many years from now a committee will be honoring many of you for your contributions—not only to our profession, but also for your service to others. The future of our legal community depends on our leadership.

Leaders build each other up, and they have a vision for those who follow. We are gathering again in conference rooms and courtrooms. The sounds of people talking, laughing, and solving problems has given me a new appreciation for the importance of communication and relationships, and it has been a recurring reminder of hope. Have you noticed that nothing connects people more than when they face adversity together? Listen to those wonderful sounds of people gathering to solve problems, and be inspired by the hope that you are bringing to those with whom you work and serve. Appreciate the renewed opportunities to see colleagues, to have long days in the office, and to have problems to solve.

We are lawyers. We are leaders on the path forward. The opportunities are ripe like never before for better relationships, innovative solutions, and engagement. Together, we are charting our course, engaging with one another in meaningful ways, and bringing value to both our profession and the people we serve. ▲



PRESENTS



OCTOBER 16, 2021

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Renewal notices for payment of annual license fees and special membership dues were emailed September 1. Alabama State Bar members will notice a decrease for the 2021-2022 license year. At its March 2021 board meeting, Bar Commissioners unanimously approved extending a **one-year fee decrease** to its 18,700+ members. Occupational license fees are reduced from \$325 to \$300, and the corresponding reduction of the special membership fee goes from \$162.50 to \$150. **Please note, fees will return to the regular rate in 2022.**

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by September 19, 2021.**





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wgward@mindspring.com



Solo and Small Firm Issue

Welcome to the solo and small firm issue of *The Alabama Lawyer*. Since our new president, Taze Shepard, came to us from that section of the bar, we thought we'd shine a spotlight in that direction.

Before we talk about this issue too much, let's pause to remember that this is our first one since the state bar annual meeting. I thought it was an excellent meeting. Annual meetings, like every issue of the *Lawyer*, bear the singular goal of dropping flares by the roadside in an effort to add to the illumination along the paths of our fellow travelers. And that it did.

Not everything I learned was academic: I learned that besides being the chief justice of the Alabama Supreme Court, Tom Parker is quite the conversationalist. We were at an event where everyone was walking around and pressing the flesh when he sat down at my table while he was munching a Rice Crispy treat. He was doing what we were doing—looking for a few moments of quiet. He chatted with my wife and me for the next while, and law didn't come up. It was a refreshing moment.

I learned that if you are driving to Mobile, as you dip below a certain

latitudinal point, you can pull off the interstate, stop at what we used to call service stations, and buy deer feed from an outside dispenser.

But back to our issue. Taze asked Laura Calloway to step in and help put this one together, and help she did. She recruited some top-flight articles.

Judge Donna Pate is my favorite new writer. She gave us "Top Five Traits of Legal Professionals" (page 318). Not only does she begin with a wonderfully apt quote (go look), but her tips are incredibly useful—look and sound like a professional; be respectful; have integrity; be reliable; be accountable—and she gives them in such a way that you want to keep reading. She gives a birdshot scattering of quotes throughout, and they are as interesting as the article. I bet you like this one as much as I did.

Andrew Skier puts on work gloves and in "Hanging a Shingle (Some Practical Pointers)" tells us how to actually open that new law practice (page 324). How do you think about overhead? How do you set fees? Where do you find clients? I wish I'd had an article like this when I hung out my shingle.

Bryan Comer gave us "Practical Considerations for Opening and Running a Plaintiff's Litigation Practice" (page 330). New lawyers may not realize just how much opening and running a bankruptcy practice looks far different than opening and running a litigation practice, and Bryan helps parse out why. Read this if you are opening any kind of practice. His pointers are strong, and his advice seems sound.

And John Saxon tells us all we need to know—okay, not all, but he nudges us to a good beginning—in "Employment Law for the Solo and Small Firm Lawyer" (page 335). Here is a great beginning point for what you need to know about employment law when you open your practice. That's one aspect that a lot of people don't think about. John not only asks us to think about it, he gives us some much-needed direction.

May I take one moment to point out something else that I think is important? Turn to page 344. These are our newest members in the 50-year club. It is incredibly fitting that we tip our hats to these statesmen in the same issue in which we are helping the new members get started. In a day when

people seem to hop from job to job, these stalwarts followed through. We should all take a moment to acknowledge them.

I hope you enjoy this issue as much as we enjoyed putting it together for you. And just wait until you see what we have for you next time.

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



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Top Five Traits of Legal Professionals

By Judge Donna S. Pate

“The society which scorns excellence in plumbing as a humble activity and tolerates shoddiness in philosophy because it is an exalted activity will have neither good plumbing nor good philosophy; neither its pipes nor its theories will hold water.”

—JOHN GARDNER

Lawyers of my generation are fond of reminiscing about what we term “the good old days.”

Back in our day, we say, we knew how to pick up the phone and take care of business; we had no need of snarky emails. Back in our day, we say, we knew how to fight fair. If we had a beef with another lawyer, we shared our grievances directly with that lawyer instead of airing them on Facebook. We duked it out in the courtroom during work hours, and then coached our kids together on the same baseball teams in the afternoons. Business was business, and it was never personal. We carried

paper files with us in our briefcases instead of on iPads and cell phones, so we had no need to worry about chargers and backup drives. We did not feel the need to put everything in writing. Instead, we believed that a lawyer's word was his bond.

These days, tired of hearing our lamentations about the way things used to be, young lawyers quickly remind us that it is a different day. Change, they argue, is good. For example, the pressure to rush to the clerk's office to meet a filing deadline before the office closes at 5 p.m. is a thing of the past, as the ability to e-file before midnight eases those clerical burdens. Instead of driving hours to depose a witness in another county, you can simply set up a Zoom conference from the comfort of your office. "You old fossils just need to embrace change and get with it," they say.

In these examples and more, they are correct. The modern world has brought many conveniences to our occupation.

Yet, one thing that has not changed is the need for all attorneys to uphold and maintain professionalism in our field.

The concept of professionalism is inherent in our name; we are members of the legal *profession*. We are governed by the Rules of *Professional Conduct*. However lofty that sounds, we have to remember that professionalism means more than a J.D. degree and a passing score on the bar exam. A common saying is that "professionalism is not the job you do, it is how you do the job." Like philosophy, the practice of law is an exalted profession. Shoddiness should not and cannot be tolerated.

To be professional, what traits, then, must lawyers display?

Because I have been a member of the legal profession long enough to qualify as antique (in the sense of age, not value), my experience lends credence to my expectations on professional behavior. I have seen the good, the bad, and, yes, the ugly.

But to be sure I aptly answer the question, I did what savvy people in search of knowledge do these days. I googled "what are the traits of professional people?" as well as canvassed my judicial colleagues.

I found many lists and heard many similar responses, so allow me to present my "Top Five Traits of Legal Professionals."

1. Professionals Look (and Sound) the Part

"Clothes and manners do not make the man; but when he is made, they greatly improve his appearance."

—ARTHUR ASHE

According to *Psychology Today*, first impressions are formed in seven seconds, and those first impressions are based largely on how a person looks and sounds.

Whether we like it or not, physical appearance matters. Good grooming and proper attire are essential for lawyers. I am frequently reminded that very few lawyers dress up for work now, especially since so many are working from home. Jeans, T-shirts, cropped pants, and flip flops may be fine for the office, especially if your office is at home. However, that attire has no place in court. One of my young lawyer friends, himself a snappy dresser, told me that he chose his work attire based on a conversation with his father when he was eight years old. He was headed off to baseball tryouts wearing jeans and a T-shirt. His father sent him upstairs to change with this admonition: "If you want to be a baseball player, look like a baseball player." The same goes for lawyers.

Judges do not expect lawyers to have a personal tailor or a wardrobe from Brooks Brothers or Saks, but we do expect them to look business-like and, well, professional. It is always a good practice to find out whether the judge before whom you are appearing has a dress code, even for virtual appearances or conferences. To be safe rather than sorry, ask a colleague, the judge's judicial assistant, or, if that fails, reach out to the judge directly.

Now a word about words. Lawyers make just as many first impressions by the spoken or written word as by personal appearances. The first glimpse may be,

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for example, a phone call, a demand letter, or a request for discovery. As we said, lawyers of my generation love to talk about how things were "back in our day." While I am far removed from my first-year legal research and writing class, I well remember navigating *A Uniform System of Citation* (the "Blue book") and *The Texas Law Review Manual on Style* (the "White book"). I am assured by recent law school graduates that those publications, or similar ones, are still used. Of particular relevance to the topic of this article is the "Foreword" from the *Second Edition of the Texas Law Review Manual on Usage and Style*:

The only tool of the lawyer is words. It is therefore regrettable that, as generations of law teachers have lamented, most law students and lawyers do not understand the basic principles of English usage. The great goal in writing is clarity. The ability to state one's thoughts in a clear and understandable fashion is of importance, whether the task be writing a law review note, drafting a statute or a contract, preparing the opinion of an appellate court, making a jury argument, or even answering an examination question. The rules of usage developed over the centuries are intended to produce clarity. Observance of them lends a *professional* polish to the product, and this in turn inspires confidence that the writer or speaker is equally *professional* and equally competent in the substance of what he says.

(italics added)

To make your legal writing look more professional, I suggest the following:

First, find a treatise on legal writing and brush up on the basics. The *Manual on Usage and Style* provides clear and simple direction regarding punctuation, use of numbers and symbols, capitalization, grammar, and word choice. Other helpful publications include *The Elements of Style*, by William Strunk, Jr. and E.B. White, and *A Practical Guide and Legal Writing and Legal Method*, by John C. Dernbach and Richard Singleton, II.

Second, remember that less is more. Rule 8 of the *Alabama Rules of Civil Procedure* requires that a

pleading setting forth a claim for relief *shall* contain a *short and plain* statement of the claim showing that the pleader is entitled to relief and a demand for judgment. That's all. A party's answer *shall* state in *short and plain terms* the defenses to each claim and an admission or denial of each averment. That's all. To drive home the point, Rule 8(e), captioned "*Pleadings to be concise and direct*," says that each averment of a pleading should be "simple, concise, and direct." Logic and common sense dictate that the rules regarding pleadings work well for legal writing in general.

Finally, to make your legal writing look like a professional wrote it:

- (A) Do not write in all capital letters. It is against all rules of style and form, and it makes the reader think that you are yelling at them.
- (B) Do not use exclamation points at the end of every sentence. You could not possibly be that excited. As my daughter, an educator, tells her students, "If you would not shout it at your reader, you do not need an exclamation point."
- (C) Do not make your writing look as if you simply transferred your stream of consciousness to paper and filed it with no thought to proper form or professional norms. For example, the repeated use of the first person (the personal pronoun "we" or "I") and the use of vernacular phrases (such as "we're gonna" or "we don't know what else to do here") are inconsistent with professional standards and customary practices in the legal profession and are inappropriate.
- (D) Do not rely on Spellcheck. Granted, it is a useful tool. But if you write "we road down the rode," your processor will not flag any errors. There is no substitute for good, old-fashioned proofreading (like we did back in our day).

I hasten to add that no judge I know is going to check your citations against the Bluebook, or correct your run-on sentences, your grammar, or your spelling. (Well, I can think of one who might.) But we notice.

2. Professionals Are Respectful

"Good manners on a man are like wearing an exquisite suit. They never go out of style."

—COCO CHANEL

The Preamble to the Rules of Professional Conduct states that, "A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials." In addition to those worthy recipients, I would add clients, opposing parties, jurors, your firm's employees, the judge's staff, court reporters—you get the point. Everybody is somebody, and everybody deserves respect.

The basic definition of "respect" is this: "having due regard for the feelings, wishes, rights, or traditions of others." Sounds suspiciously like "do unto others," doesn't it?

Judges and lawyers alike frequently lament the erosion of respect and civility in our profession. The reason for that erosion, it seems to me, is our failure to practice the manners our mamas drilled into us from childhood. As children, we said "please" and "thank you" and "yes ma'am" and "pardon me" without thinking twice. If another person was speaking, we knew harsh consequences would befall us if we even attempted to interrupt. Sadly, we all too often leave our manners at home when we leave for work each day. The true professional, however, knows those good manners still have just as much a place in the courtroom or the office or mediation as they did at the dinner table or in Sunday School. Dust them off, and use them.

Of particular concern among judges is the emerging and totally disrespectful practice of using written submissions (pleadings, motions, briefs, and the like) to call out opposing counsel with insults and accusations of misconduct. Completely absent from Rule 8, or any other Rule, for that matter, is any suggestion that such use is proper. Not only is this practice unprofessional, it is also ineffective. Consider the following observation

by the late Supreme Court Justice Antonin Scalia and Bryan A. Gardner in *Making Your Case: The Art of Persuading Judges*:

Cultivate a tone of civility, showing that you are not blinded by passion. Don't accuse opposing counsel of chicanery or bad faith, even if there is some evidence of it. Your poker-faced public presumption must always be that an adversary has misspoken or has inadvertently erred—not that the adversary has deliberately tried to mislead the court. It's imperative. As an astute observer on the trial bench puts: "An attack on opposing counsel undercuts the persuasive force of any legal argument. The practice is uncalled for, unpleasant, and ineffective."

Also troubling is the practice of divulging communications with opposing counsel which were clearly intended for lawyers' eyes and ears only. It's one thing to say "opposing counsel takes no position on this motion." It's quite another to say "opposing counsel said he personally does not oppose this motion but his client is very difficult and will not let him consent." Equally disturbing is the highly unprofessional practice of attaching correspondence from opposing counsel to AlaCourt filings. There is no quicker way to destroy trust between counsel.

3. Professionals Have Integrity

"In the simple moral maxim the Marine Corps teaches—do the right thing, for the right reason—no exception exists that says: unless there's criticism or risk. Damn the consequences."

—JOHN RUSHING, UNITED STATES MARINE CORPS

Some say that integrity is synonymous with honesty and uprightness. Another definition states, "having a firm adherence to a code of especially moral or artistic values: incorruptibility." Perhaps the best definition of integrity is the simplest one: It's knowing the right thing to do, and doing it, no matter who's watching.

For the lawyer, that means knowing how to advocate zealously for a client while playing by the rules. It means valuing everyone's time by not wasting it. It means being honest. With everyone. At all times. No matter what. It means knowing what goes around comes around. It means never taking cheap shots. It means never going for the jugular unless it is absolutely necessary, which seldom happens. It means giving the client the bang to which their buck entitles them. Finally, perhaps the most important thing about integrity is this: once you lose it, rarely are you able to regain it. Guard it carefully.

4. Professionals Are Reliable

"A man who lacks reliability is utterly useless."

—CONFUCIUS

Reliable lawyers make happy judges; the converse is also true. The "big ticket" items here include:

Read and comply with orders

The following example demonstrates why I feel the need to state the obvious. Because of COVID-19 concerns, I entered the following order in several criminal cases:

Counsel and parties are ordered not to appear in person for the callback docket on March 21, 2021. **By close of business on March 25, 2021, counsel for defendant shall file a status report via AlaCourt advising defendant's response to the State's offer.**

Simple enough, right? Two lawyers showed up in person with their clients. Several more sent emails to my judicial assistant rather than filing a status report via AlaCourt. When questioned, all said the same thing: "I guess I didn't read the order."

Calendar

Nobody's perfect. Every lawyer is bound to miss something. Saying "that didn't get on my calendar" is

acceptable once. Maybe twice. But after that, it is unacceptable. Fix the problem.

DO NOT BE LATE

When an order says a docket starts at 9:00 a.m., that does *not* mean 9:05 or just whenever it’s convenient to get there. Being punctual requires effort. Tardiness is rude and disrespectful of others’ time. You know how long it takes to get to court; the route doesn’t change. You know the elevators will be full on the Monday morning of a jury week. Plan accordingly. Always have the court’s number available. If you hit a traffic snag, have a last-minute childcare issue, or forget your exhibits and have to go back to your office, a quick call to the judge’s office will cover you.

Provide a conflict letter

Looking for lawyers who do not provide conflict letters is a huge waste of judges’ time. One reliable and seasoned lawyer in my circuit follows an effective practice—not only does he file his conflict letter, he gets to the courthouse early enough to stop by the office of each judge before whom he is set to appear that day to remind us of his whereabouts.

This is how I explain the importance of reliability to new lawyers: Every time you read and follow an order, or show up prepared and on time, you make a deposit in your Bank of Reliability. Chances are you’ll miss something along the way, and you’ll have to make a withdrawal. Just be sure you don’t have insufficient funds.

5. Professionals Are Accountable

“Ninety-nine percent of all failures come from people who have a habit of making excuses.”

—GEORGE WASHINGTON CARVER

I can say without fear of contradiction that the perfect lawyer remains unborn. Everybody makes mistakes. Despite the best intentions, we miss appointments and court appearances. We miss deadlines, we misinterpret case law, and we make a host of other mistakes. When

those circumstances inevitably happen, it is very easy to take the very unprofessional approach of playing the blame game. But when a mistake is made, professionalism requires at least two steps. The obvious first step is the hardest: admit your mistake and accept the blame. For some, it’s very difficult to utter words such as “I was wrong” or “It’s my fault.” Some have the notion that admitting a mistake shows weakness or vulnerability, when in fact the opposite is true. Admitting a mistake takes courage. It earns credibility and respect. Refusal does just the opposite. Admitting a mistake also gives you a clear conscience and allows everybody to move on to the next thing.

The second step is a plan for making sure the mistake does not happen again.

One final consideration—if a lawyer admits a mistake, what should opposing counsel’s response be? If you are 100 percent certain that you have never and will never make a mistake, take a hard line. Demand a pound of flesh. But if your first thought is (and it should be), “There but for the grace of God go I,” show a little grace.

I conclude with one final reference to the old days. Some of you may remember a fairly successful former Alabama football coach named Paul William Bryant. He once recounted a story about how he befriended an elderly diner owner in south Alabama on a recruiting trip. Years later, he successfully recruited the man’s grandson to play at Alabama. The recruit made clear that he chose Alabama because Coach Bryant had been kind to his grandfather years earlier. Coach Bryant ended the story with these words: “It really doesn’t cost anything to be nice, and the rewards can be unimaginable.”

The same is true for professionalism. It costs nothing. And the rewards can be unimaginable. ▲

Judge Donna S. Pate



Judge Donna Pate was admitted to the Alabama State Bar in 1982 after earning her J.D. at the University of Alabama School of Law. She practiced in the areas of civil litigation and education law for 29 years before becoming a Madison County Circuit Judge in 2012.



Hanging a Shingle

(Some Practical Pointers)

By Andrew M. Skier

Congratulations!

By making the decision to enter the world of solo or small firm practice,

you have embarked on a career that will provide you moments of unspeakable personal and professional satisfaction, punctuated by periods of uncertainty, self-doubt, great frustration, and, yes, sheer terror. Not to worry—you are not the first person to choose this path. Help is available. Read on.

A solo practice offers benefits that many of our colleagues can only dream about. Ask any associate at a large firm how much schedule flexibility they have. Do lawyers who work for government agencies get to decide which cases they handle? How many of your colleagues get to select their office location and hours? When a big-firm associate brings in a large client or wins a significant case, how much of the fee do they have to turn over to their employer? As a solo practitioner, you will not have to worry about any of these things.

Instead, we solos have our own set of worries.

Solos often feel themselves getting bogged down in the administrative and office-management side of things.

We often lack the kind of peer support and camaraderie that our big-firm counterparts have.

Law school doesn't train us in how to address the day-to-day operations of a small law practice. I say this not to knock the law schools. After all, it's not their job to train lawyers in bookkeeping, marketing, setting fees, and the daily minutiae of a law practice. But every solo has to learn his own way to run his office, and that often comes from trial and error, with the emphasis on error. Every lawyer will develop his or her own best fit over time.

As a solo, you will regularly experience nagging doubts with worries such as: Will the phone ever ring again? Why does this judge seem to hate me? Did someone leave a negative review for me online? Can I pay my rent this month? Questions like these come to all of us. And if you are emotionally fragile or prone to panic in the face of worries like this, perhaps solo practice isn't right for you.

Let's look at some things you want to think about as you decide whether to enter the world of a sole practitioner.

Overhead And Hidden Expenses

If there is one piece of practical advice that every aspiring solo

lawyer should hear, it is this: Keep your overhead as low as you can.

Every dollar spent on overhead expenses is a dollar that you have to earn back. Do you want to work to pay your overhead, or do you want to enjoy the results of your labor? Solo practice is largely unpredictable, and you can expect both good and bad months. Knowing that there will be months when the money does not flow in, it is unwise to burden yourself with unnecessary recurring expenses.

What kind of expenses are necessary? Some are obvious. Rent, sure. Telephone? Absolutely. But there are hidden expenses that aren't as obvious. Left unchecked, these can take over your monthly budget.

For example, I do not recommend practicing without some type of malpractice insurance. Unless you are planning on doing complex securities work (and, if this is the case, what on earth are you doing as a solo?), this insurance is affordable. And if you ever need it, you need it, and you will be glad you have it.

You also need some way to let potential clients know that you are there. Back in the stone age before online marketing, the Yellow Pages had a stranglehold on lawyer marketing. Every year each lawyer would sign a new contract for their ad in the phone book, and that was that. Today, marketing a practice is a much more complex series of decisions for a solo practitioner, and marketing costs can create an obligation that can quickly become overwhelming. You will receive pitches from all manner of marketing enterprises, some with pushy and aggressive sales representatives. Be very

careful when listening to their promises.

Hiring office staff is expensive. When I was young and working without any staff, an older lawyer commented that once a lawyer hires support staff it is difficult, if not impossible, to do without them. Good advice, that. When I began, I was not aware that bringing in full-time employees is a far larger proposition than simply making payroll. Payroll is an extraordinarily complex beast and involves more bookkeeping than most solos are equipped to handle. That means that you will likely need to have a payroll service. Even if you do not offer your employees benefits like health insurance, you still must withhold and pay taxes and unemployment insurance for your employees quarterly, which can add up to shocking amounts of money. Be prepared for this before you take the plunge of hiring staff.

Taxes—the word alone fills many with dread. As a self-employed person, no employer will be withholding income from your paycheck, and you will be responsible for writing a check to Uncle Sam (and Aunt Kay) one or more times per year. Most solos pay taxes on a quarterly basis, and that helps to spread out the pain. All of this requires planning and discipline. Be prepared for this (I was not), and plan accordingly. Were you also aware that in many places you are required to pay taxes on the value of business equipment and furnishings used for an office? Neither was I. Now you are too.

You may not anticipate the need for and cost of various licenses required. Besides the annual state bar dues, you will likely be required to

buy a local business license. In most jurisdictions, the cost of a license is based on gross receipts. This can add hundreds of dollars to your annual outlay and, like many others, is an expense that can catch a new solo by surprise.

If you expect to offer clients the option to pay via credit card (a must if you want to be competitive today), you will be amazed how quickly the seemingly minimal transaction fees stack up. Who knew the seemingly tiny 3.5 percent of each credit card transaction would actually turn out to be a lot of money? No one who ever signed up for their first credit card merchant account, that's who! In addition, your bank may charge maintenance and other fees for holding your money. Both of these

You never really know someone until you go into business with them, and many long-term friendships have been damaged irreparably by lack of business compatibility or because of a business disagreement.

kinds of fees are negotiable, but not entirely avoidable. Be prepared and budget for them.

Many solos use the strategy of pooling resources with other solos and sharing expenses such as rent, utilities, reception, and the like. Office sharing can be a great idea, and it can lead to significant savings. It has the added benefit of building in a group of lawyers with whom to discuss cases, ask for advice, and generally share ideas. But you have to be very selective with whom you enter into an office-sharing arrangement. You never really know someone until you go into business with them, and many long-term friendships have been damaged irreparably by lack of business compatibility or because of a business disagreement. Don't let this happen to you.

The Art of Setting Fees

I can vividly remember the first few times I sat across my desk

from a potential client. I had built a rapport with them. I understood their situation. I offered them a solution. Things were going swimmingly. Then the time came to talk about legal fees. This terrified me.

Having spent the first three years of my legal career as a government lawyer, I felt utterly unprepared for this part of our conversation. And I was.

Here are several things to think about.

Flat fee or hourly rate: There's no question that from the lawyer's perspective it's just easier to charge flat fees. On a flat-fee matter, you don't have to keep a detailed time record, though you should in case someone complains that your fee was excessive. And you don't have that awkward conversation with you asking the client to replenish a depleted retainer.

Not all cases, however, are predictable enough to employ a flat-fee scheme. Domestic relations cases immediately come to mind.

In the long run, if you charge a flat fee in all of your cases, you may wind up working harder for less money.

While flat fees are great for cases that can be handled relatively quickly and have little chance for unforeseen complexities to arise (if there is any such thing), they don't work well for all of them. If there is a chance that a case could be more complex than you believe, or if it appears during the meeting that the client will demand a lot of your time, then an hourly rate billed against a retainer is probably the better option.

So how much should I charge? I wish I could give a definitive answer to this excellent question. Fees are based on multiple factors,

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including the prevailing fee levels in your community, the lawyer's level of experience in the area of law related to the case, the legal specialty involved, the complexity of the client's legal issue, and, last but not least, the client's ability to pay.

Unfortunately for the novice, this is another area of solo practice where the concept of trial and error comes into play. As a general rule, don't undercharge for your services. Stop, go back, and read that last sentence again. You almost certainly will undercharge in some cases (I still do it sometimes after 26 years), but the trick is to minimize this. After all, if you are going to bring in the same amount of money, isn't it better to have fewer clients to whom you can devote more of your attention?

(Almost) always charge a consultation fee, and make it applicable to a flat fee: Unless you are in the business of bringing in large plaintiff's cases or other types of contingency fee matters, you are going to want to charge potential clients for your time doing initial consultations on nearly every other type of case.

Even a nominal amount such as \$50 or \$100 has a four-fold benefit:

First, a consultation fee sets the precedent that your time is valuable and should be respected.

Second, it is likely that you will give at least some advice to a potential client during a consultation, and even that advice can result in that client's filing a complaint against you even if they do not hire you.

Third, paying a consultation fee makes the client more likely to choose you over other lawyers as

they have already paid you a "first installment" on your fee.

Fourth, a consultation fee has a screening effect. If a client is unwilling to pay anything to come talk to you, either their matter isn't that important or they are going to be a difficult client down the road. Let them be a difficult client for someone else who didn't have the foresight to charge a consultation fee.

This is controversial, but I don't bargain on my fees. Occasionally a client will try to negotiate a lower hourly rate or flat fee. When confronted with this, I firmly say that my fees are what they are and that I do not negotiate. My belief is that waffling on fees sends a bad message to the client that (a) you are a weak negotiator and can be pushed around, (b) you don't value your own time, or (c) you lack confidence in your own abilities. If the client says, "Well, I spoke with lawyer X and they quoted me less," my response is, "Then you should go hire lawyer X." They almost never do, and if they do, they (as well as lawyer X) probably did you a favor in the long run.

Finally, never, ever guarantee a particular result. There are thousands of variables present in each and every case, and your potential client likely didn't make you aware of all of them. This doesn't necessarily mean they are being deceptive. They are not in a position to know the nuances of the law. Also, they may be subconsciously downplaying the weaknesses in their situation. Promising a particular result is asking for trouble from a disillusioned client to worse, a client who complains about you to the Alabama State

Bar. I have said hundreds of times to clients, "There are no guarantees in this business, and if a lawyer makes you a guarantee, don't walk but *run* out of that lawyer's office."

Marketing Your Practice To Potential Clients

Shortly after hanging your shingle, you will likely be inundated by sales pitches from companies wishing to help you to market your law practice.



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The relatively simple (but expensive) days of the annual visit from the Yellow Pages representative to sign up for another year of advertising are long over. In today's reality, hardly a day goes by without multiple unsolicited emails promising "website hosting!" "search engine optimization!" or "be on the first page of Google results!" arriving in our inboxes. First and most obviously, it's likely not a good idea to do business with anyone whose own marketing plan consists of spamming you via email. Further, even legitimate legal marketing companies sometimes utilize high-pressure sales tactics that prey upon the insecurities you will likely feel in operating a solo practice.

Here are some questions to ask to help you make good marketing decisions:

(1) Is the company reputable, and do they have a track record of helping lawyers? Pretty much anyone can purchase a web domain, obtain a high-speed Internet connection, and begin marketing themselves to lawyers nationwide.

With a little bit of research, it's not hard to determine whether a marketing service has a good track record. Ask for a list of references. Visit the websites of those references, and reach out to one or two who have similar practices. Find out whether they would recommend them. If a company refuses to provide a list of references, they are likely hiding something.

(2) Is a sales representative pressuring you to make a quick decision? Generally, when a sales person asks for a quick decision, they don't want you to take the time to really think things over. Take your time in deciding. A decision to go with that company

"When they pay your fee," he told me with a sly grin, "they aren't buying you, they're just renting you."

creates an obligation to the company. There's nothing wrong with taking some time to think about this important decision and comparison shop. If a sales representative discourages this process, or says things like, "Well, I have three other lawyers in your town about to sign up with me," view them with additional skepticism.

(3) What are the goals of the marketing plan, and how will these goals be quantified? One of my pet peeves is when a marketing sales person says that an advertising plan will pay for itself. An advertising campaign paying for itself is not what anyone needs. After all, if all the plan does is pay for itself, you will be working for the marketing company, not yourself. What you will actually need is for any marketing plan to pay for itself multiple times over. A reputable company will be able to set specific goals for their marketing plan, *and* it will be able to provide hard data over time in order to allow you to analyze whether those goals are being met.

(4) What kind of commitment is the marketing company requiring? Early in my career I made the mistake of signing an extended contract with a very well-known online legal marketing company. Without going into too much detail about how stupid I was, over the course of my contract I paid this company over \$10,000 and in return only

was able to attribute one new client to their marketing efforts. Every month I got more and more angry with the company and also with myself for falling for a sales pitch and signing such a lengthy contract. This led to my personal rule that I will not sign an extended contract. After all, if a marketing plan isn't showing results after 90 days, when will it? If a marketing sales rep balks at a short-term trial contract, this shows a lack of confidence in their own product and should be a data point in making your marketing decision.

Setting Client Boundaries

As a young lawyer, I remember an older solo lawyer (now a judge) giving me his advice on how to handle clients who demand too much of a lawyer's time: "When they pay your fee," he told me with a sly grin, "they aren't *buying* you, they're just *renting* you." Like much of the advice from more experienced lawyers, with the perspective of time this turned out to be extraordinarily valuable advice.

If you got into law, at least in part, because you want to help people (and I certainly hope this is the case), then you should have no issue with a client truly in need reaching out during an emergency situation. This suggestion is not about that rare case. There are and always will be certain clients who simply do not respect evenings, weekends, and other times when a lawyer is away from work, and who persistently abuse the good nature of their frazzled and overworked lawyer.

The initial consultation is your first chance to let a potential client know that you have time boundaries. I like to lay out my office hours and say that for non-emergency communications we expect the client to contact us during working hours. This is followed by a detailed explanation of what constitutes an emergency (“the police are knocking at my door with a warrant”) and what does not (“I forgot when my court date is”). If a client later tries to take advantage of your time, they can be gently reminded of this conversation.

I do know lawyers who charge a premium for excessive non-emergency after-hours communications with clients, but since I have been making this statement early on in the representation process, it has become much less of a problem for me.

Of course, many solos are now basically running their office’s communications via cell phone and no longer use land lines. While this is a smart decision when limiting overhead (see above), when all of your clients have your cell phone number, it makes it a bit more difficult to avoid the occasional inconvenience and makes the setting of time boundaries even more important.

Take Time for Yourself

Being a lawyer is a great job and can make for a fantastically satisfying and rewarding career. It’s as easy as it is unwise to let your lawyer-self completely take over your personal life. Burnout and dissatisfaction with professional

life are endemic in all types of law practice, solo or not. If you want to eventually become one of us old(er) lawyers giving advice to the next generations, it’s important to have a work-life balance. At the end of your career, no one will be giving out awards for who worked the most hours or who spent the most time in front of a glowing computer screen staring at documents. In order to have a healthy work life, it is important to have a good personal life, and vice versa.

I was recently in an extended trial against a lawyer with whom I am also friendly. I noticed that he was wearing himself down while trying the case. He rarely ate lunch, he was not exercising, and his stress level was off the charts. Around the fourth or fifth day of trial, I went to him as a friend and expressed my concern. I told him that his body didn’t quit needing nourishment just because he was in trial, and that he needed to take better care or he would not make it through the remaining weeks of trial. He did slow down a bit, and I like to think that I helped him in a little way to manage the stresses that all lawyers occasionally feel. My friend fell into a trap that many of us do, without even realizing it.

In the same way, whatever it is you like to do in your free time, take the time to do it. Anybody who has been practicing a significant length of time can probably name lawyers who did not take this advice and ended up with substance abuse issues (lawyers have some of the highest numbers of any profession), failing relationships, professional frustration, and general malaise. Many of these lawyers ended up leaving the

practice of law or, far worse, driving themselves to premature deaths.

I find that the occasional weekend trip out of town helps me to refresh and recharge and, equally importantly, to keep the practice of law in perspective. Getting out and away from work is healthy for both body and mind.

Don’t downplay the importance of exercise as part of your daily routine. The mind is supported by the rest of the body and requires oxygen, vitamins, and sunshine to function properly. Deprive your body of these basics, and you will feel your mind start to go along with your general health. It goes without saying that this spells doom for the up and coming lawyer.

I sincerely hope that some of these thoughts are helpful if you are currently running a solo practice or if you are thinking about doing so. If, 30 years ago, someone had sat me down and told me that my legal career would have taken the path it did, I would have been incredulous. With the benefit of hindsight, the experiences I have had, the relationships I have made, and the satisfaction of knowing that what I have today I built, myself, from the ground up, have made my career as a solo lawyer a satisfying one. I wish the same for you. ▲

Andrew M. Skier



Andrew Skier is the founder of Skier & Associates in Montgomery where he has practiced as a solo/small firm lawyer for 23 years.



Practical Considerations for Opening and Running a Plaintiff's Litigation Practice

By Bryan E. Comer

Starting a new firm, despite the area of practice, can be a daunting challenge.

When I left a firm and decided to open my own practice in 2010 (before eventually teaming up with my current senior partner), I knew practically nothing about how to open or run a law office. Malpractice insurance, lines of credit,

payroll—I had no idea where to start. This article is not intended to discuss whether you *should* open a plaintiff's litigation practice. The article is intended for those who have already decided and will address various aspects of how to run a plaintiff's litigation practice, from the business of the practice to ideas to consider regarding how you handle cases.

The Business of the Plaintiff's Litigation Practice

Determine the Form of the Business

The first step to take in opening a practice is to decide what the practice will look like. Are you going to hang a shingle as a solo practitioner, or are you going to partner with one or more other lawyers? No matter if you are a solo practitioner or are starting a firm with colleagues, you need to make sure the business is properly set up with business licenses, corporate filings, and malpractice insurance, and of course, update your contact information with the Alabama State Bar.

I am a firm believer in hiring qualified experts and relying on each expert's advice in areas with which I am unfamiliar. To that end, it is important to talk with a business lawyer or CPA to discuss the corporate form your business will take. Determine whether it is best for your business to be an LLC, a partnership, or a corporation, or take some other form. Once you decide what shape your business will take, you must file paperwork with the Alabama Secretary of State to create it. After the business is officially formed, it is imperative to maintain the corporate form for your business. An established CPA or business lawyer can educate you on the requirements to maintain the corporate form so that you are insulated from liability stemming from the business (such as properly capitalizing the business and not using the business accounts as a personal "piggy bank").

Keep Operating Costs as Low as Possible

One of the biggest mistakes many plaintiff's lawyers make is monthly overhead that is too high. This is especially true for lawyers who come from larger firms who are accustomed to conveniences such as Westlaw subscriptions, a full allotment of support staff, and every book in the West repertoire. While some of those items may be necessary when you begin your practice, it is important to prioritize what you really need. Remember that every dollar you spend in overhead is a dollar for which you must account and a dollar that comes out of your pocket. It

should always remain in the front of your mind that your office is a business, and it must be profitable so that it, and you, survive.

There are many resources available to help you obtain necessary items affordably or even for free. The Alabama State Bar offers "Fastcase," an Internet-based legal research platform that is free to all members. For a full list of available benefits for Alabama State Bar members, go to <https://www.alabar.org/members/benefits/>. If you have access to a law library, which can be found in most courthouses, many have free Westlaw access in addition to up-to-date reporters and digests.

There are also many hidden costs to running your own practice with which you may not be familiar, especially if you are moving from a large firm where an office manager or managing partner handled items such as business privilege taxes, business licenses, malpractice premiums, and renewal of your license fee. These are a few examples of the recurring costs you will incur, and it is good for budgeting purposes to know what they are and when they are due.

As the business generates income, you need to keep an eye on your tax liability. How you set up your business (LLC, corporation, etc.) will determine how you pay taxes. Many lawyers pay estimated quarterly taxes which are determined by the firm's income—not necessarily how much money you actually put in your pocket. Thus, it is important to factor in taxes when making decisions about spending the income you generate. A good practice to get into from the beginning is taking a certain percentage of income and sticking it into an account (and not touching it) so that it is available when your taxes are due.

Maintain Separate Accounts and Balance Them Regularly

You will need to open several accounts in a plaintiff's litigation practice, none more important, or regulated, than your IOLTA account. When you receive funds for a client or funds for yourself and a client which have not yet been divided, they must first go into the trust account where they will remain until you are ready to disburse. You absolutely cannot co-mingle client funds with personal or firm funds, and you should never bounce a trust check. If you do bounce a check, the bank must report you to the Office of General Counsel.

In addition to a trust account, you will also need an operating account to pay day-to-day office expenses (such as rent, the phone bill, malpractice insurance premiums, and equipment). It can also be a good idea to maintain a client cost account to pay for expenses advanced during a case (such as filing fees, deposition transcripts, and expert retainers) if you are not already holding funds in trust to cover these costs. Maintain the accounts separately, and keep them adequately funded. Make sure you track your expenses, whether they are operating expenses or client costs, and routinely balance your accounts. If you do not want or cannot afford an in-house or part-time bookkeeper, QuickBooks is user-friendly, can generate reports, and will help you track expenses.

The Practice of the Plaintiff's Litigation Practice

Do Your Homework Before You Take a Case

Research the issues in each case *before* you take the case or at least before you file suit. It is important to know what the requirements are for certain cases, such as pleading fraud with particularity, or knowing that only the duly appointed personal representative has standing to bring a wrongful death case on behalf of a decedent's estate, before you are staring down a dispositive motion. Many issues must be thought through before filing a complaint: where is venue proper; is the case removable; does your plaintiff have standing? For instance, if you have a car wreck case involving parties from multiple counties, venue may be proper in more than one county, but if you file suit in a technically proper, but remote, venue, you may face a motion to transfer to another venue under the doctrine of forum non conveniens. I always try to find the answers to issues such as these before filing suit so I can avoid unnecessary motion practice.

It is also important to determine the statute of limitations for a case as soon as it comes in the door. Most cases will fall into the negligence/wantonness or breach of contract realms, with two-year and six-year

statutes of limitations, respectively. However, there are other deadlines that are just as critical as a statute of limitations. Is the case against a municipality? If so, remember that a proof of claim must be filed within six months of injury (one year if the claim is against a county). Is the case against the federal government? If so, research the requirements of the Federal Tort Claims Act, and make sure you follow them to the letter. If you are close to a statute of limitations, make sure you do your due diligence to ensure you have the proper defendants named or, if you do not know the identities of one or more defendants after an exhaustive search, that you list the fictitious parties sufficiently to relate back to your original filing.

At the beginning of a case, always look at the jury charges for the causes of action you are asserting and put the pertinent ones at the beginning of the file. Then, every time you pick up the file, you will see what you must prove, which helps direct you in what to do in the case. By knowing what you must prove at the beginning of the case, you can then work toward meeting your elements as you move purposefully through discovery. You don't want to find out you missed something when you read about it in your opponent's motion for summary judgment.

Keep a Case List and Constantly Review It

Every new case that comes in the door needs to be immediately placed on a case list. My case list is kept on a spreadsheet and includes the style of the case, where it is pending, the statute of limitations, and whether suit has been filed. Maintain the list in real time, and look at it every day. Use it to prioritize your day and plan your weeks ahead. Additionally, maintain a paper calendar that is kept up to date in real time. While two calendars may seem redundant, the redundancy is in place to make sure nothing falls through the cracks.

Know When to Say No

A friend who is a seasoned trial lawyer once offered good advice: You are much better off spending time with your family or doing a leisure activity you enjoy than working hard on a terrible case. Early on there may be a fear that you will not have any cases so you will feel the urge to take anything that comes in the door. While that may be a good strategy if it is an

hourly case that will generate income, if you are taking cases on a contingency fee (which is the vast majority of the cases in plaintiff's litigation), you cannot afford to waste time on bad cases. You will lose the money and the time you spend on them, which is time you could devote to better cases or to maintain your sanity.

It is also worth noting that there is a difference between a small case and a terrible case. Small cases will keep your practice moving forward by generating even modest income, while bad cases will consume your time and resources with no hope of success. You will typically know the bad cases when you see them.

If you are opening a solo practice, especially if you are just starting to practice law, do not take complex cases in an area of practice with which you have no experience. Defective product cases, medical malpractice cases, and class actions are intellectually challenging and usually interesting cases on which to work. However, those cases are usually extremely expensive, time-consuming, fraught with pitfalls that can sink your case (not to mention you run the risk of violating Rule 1.1, Ala. R. Prof. Resp.), and require detailed knowledge of the subject matter.

This is not to say you cannot work on difficult, complicated, or expensive cases. Often, lawyers who leave an established practice with years of experience and financial flexibility will open boutique firms specializing in class actions or defective product cases. However, if you have never tried a jury trial, you certainly do not want to take a complicated medical malpractice case against a local surgeon or sue a Fortune 500 company for a product defect, at least not by yourself. Your client is better served if you refer those cases to more experienced lawyers, or at the very least, associate a lawyer who specializes in that area of law. Referring the case or associating counsel will

serve multiple purposes: you will greatly improve the work done for the client, you will increase the likelihood of a successful result, you will learn from the case (if you associate another lawyer), and you will establish a relationship with a lawyer that you may have for decades.

If you are opening a solo practice, especially if you are just starting to practice law, do not take complex cases in an area of practice with which you have no experience.

Be at the Office and Push Your Cases

There is no substitute for being in the office. If you work from home, set office hours and keep them. If you have an office, go there and stay there all day. Establish a routine and keep it. You will never know when the phone will ring with a new case or a new client will walk in the door. If you are at the office you are going to get more work done. As a plaintiff's lawyer, you must be proactive, and each day must be spent urgently pushing the cases to trial. There is no substitute or shortcut for putting in the time necessary to get your cases ready for trial. There is also no better investment you can make than to invest time in your cases.

Move urgently and with a sense of purpose from the moment the case comes in the door. If you cannot resolve the case pre-suit, then do your due diligence and file suit. If the case is pending in state court, I try to serve discovery requests with each complaint to start moving the case from the outset. Obtain the written discovery you need so that you can start taking depositions. Make sure deposition transcripts are delivered in a timely way, and read them as soon as they come in. While you read the transcripts, plan your next moves—perhaps you need to request more documents or perhaps you discover an issue that needs further deposition testimony before you can disclose an expert and announce ready for trial. Get trial settings as soon as you can and keep them. Get your case ready, and it will send a message to the other side, especially the insurance adjuster on the file, that you handle

your business and have no qualms about trying a case. You will improve the value of your case, usually resolve your cases more favorably (or if you cannot resolve the case, it is ready for resolution at trial), and earn respect from your opposing counsel and the judges.

Try Cases

There is also no substitute for trying cases. Before one of my first jury trials, a judge in Mobile told me that trying a case is like riding a bicycle: You can read all the books in the world about how to ride a bicycle and how you need to peddle fast enough while maintaining your balance. But until you sit in the seat and inevitably fall a few times, you will not really know how to ride a bike. The same is true for trying cases. There is no book or CLE program that will prepare you for trial like sitting at counsel's table and "skinning your knee." You and your clients, current and future, will be better served if you try cases. You will become a better litigator. Other people will see you in court, which will lead to more cases. Your opposing counsel, and their clients, will learn that you are not a lawyer who will settle a case because you are afraid to try a case. That, in turn, will lead to more favorable resolution of your cases. Plus, trials are the fun part of a litigation practice.

Do a Good Job for Your Clients

No matter the size of your case, do a good job on it. It seems too simple to be included in this article, but it is true and worth stating. Many times, you are the only lawyer your client has ever met, and you are the person the client has trusted with his or her case. If you do a good job for your client, the client will remember it. While there are usually not many repeat clients in a plaintiff's litigation practice, the clients you have will inevitably have family members and friends or know people in the community who will need a lawyer one day. Additionally, a substantial number of cases come from other lawyers, and other lawyers know who puts in the work necessary to obtain a successful result for the client. If you do a good job on a case, whether it is a large case or a small one, it can, and often will, lead to more cases.

Develop a Marketing Strategy

The lifeblood of any plaintiff's litigation practice is cases. You should spend a good portion of your time thinking about how to get new cases in the door. There is no magic formula for this, and, unfortunately, it is an extremely competitive market. Advertising can be extremely expensive, so I recommend looking at other ways you can attract business.

The most tried and true method is the example you set. Be visible in the courtroom (not for the wrong reasons), and people will send cases your way. I would caution against hiring one of the many companies that will inundate your inbox promising so many cases per week or month. Typically, those companies require a substantial fee and rarely deliver on the promises they make of bringing in quality cases. Do establish brand identity and a good website. Focus your messaging on who you are and what you do. Whatever marketing plan you choose, constantly review the data from the plan to see if it needs modifying, and stay with what works.

Join With Other Lawyers

Finally, I strongly encourage you to join the Alabama State Bar's Solo & Small Firm Section. The section provides resources for small firm lawyers, including a Listserv® where you can ask questions of other lawyers who may have run into similar issues that you are facing. And, feel free to contact me to discuss these items, or others, in more depth. ▲

Bryan E. Comer



Bryan Comer is a partner at the Mobile firm Tobias, McCormick & Comer, and has more than 15 years of plaintiff litigation experience. His practice focuses primarily on defective product litigation, wrongful death litigation, and general personal injury litigation. Bryan is a member of the Alabama State Bar Board of Bar Commissioners and the Mobile Bar Association Executive Committee, and president of the Mobile Bar Foundation.



Employment Law for the Solo and Small Firm Lawyer

By John D. Saxon

Alabama is an at-will employment state.

An employer can terminate an employee for any reason, for no reason, or for a bad reason. The employer doesn't have to have a reason, and he doesn't have to give a reason.¹

So, if a terminated employee comes to your office, at-will employment ends the discussion, right? Wrong. An employer can terminate an employee (or refuse to hire, demote, or pass over for promotion) for any reason as long as it is not an *illegal* reason.

This article provides an introduction to the many causes of action which exist under federal and state law to assist you in representing employees mistreated in the workplace.

Exceptions To At-Will Employment

There are some exceptions to at-will employment. Some employees

(senior corporate executives, on-air television personalities, head football coaches) have written contracts. Obviously, their employment is governed by the language of their contracts.

If an employee is a member of a union, the terms and conditions of employment are determined by a written collective bargaining agreement.

In the education arena, a non-probationary (tenured) employee has a property interest in her job and cannot be summarily dismissed without a hearing and without specified reasons.

If an employer has an employee handbook, progressive discipline scheme, or a set of written regulations which govern terms and conditions of employment, there may be language which would protect an employee against dismissal.² In order to create a contract, the language in the handbook must be sufficiently clear and specific so as to constitute an actual offer rather than a mere statement of policy.

In the case of *Ex parte Graham*, the Alabama Supreme Court determined that provisions of a former employer's personnel manual were sufficiently clear and specific to constitute an offer of a unilateral contract of employment.³ The handbook not only did not contain the appropriate disclaimer language, it contained language that precluded discipline except for cause, and it set forth a grievance procedure that had to be followed prior to an employee's termination.

If the employer did not live up to certain terms of employment or promises and commitments, the employee might have a cause of

action for breach of contract, especially if the prospective employee gave up an existing job to take a new job.⁴

Finally, if the employer made representations of fact in the recruitment and negotiations which induced a prospective employee to accept employment, but then did not live up to those promises and commitments, the employee may have a cause of action for fraud.⁵

Federal Employment Discrimination Laws

The principal federal statute providing protection from workplace discrimination is Title VII of the Civil Rights Act of 1964.⁶ It prohibits discrimination based on race, color, religion, sex or gender (including pregnancy), or national origin. The Supreme Court has subsequently construed sex or gender to prohibit sexual harassment, both opposite sex, and same sex, harassment, and to prevent discrimination based on sexual orientation and transgender status.

Section 1981 of the Civil Rights Act of 1866 was the first United States federal law to define citizenship and affirm that all citizens are equally protected by the law. It gives all U.S. citizens the same right to "make and enforce contracts".⁷

Three years after enacting Title VII, Congress added age to the protected categories of Title VII with the Age Discrimination in

Employment Act of 1967 ("ADEA"), protecting employees 40 years of age and older from adverse workplace actions.⁸

In 1990, Congress added another protected category—disability—by enacting the Americans with Disabilities Act of 1990 ("ADA"). It prevents discrimination against an employee who is a qualified individual with a disability who can, with or without accommodation, perform the essential functions of his job.⁹

The Rehabilitation Act of 1973 (Rehab Act) prohibits discrimination on the basis of disability in programs conducted by federal agencies, in programs receiving federal financial assistance, in federal employment, and in the employment practices of federal contractors.¹⁰

The standards for determining employment discrimination under the Rehab Act are the same as those used in Title I of the ADA: It protects "qualified individuals with disabilities." An "individual with a disability" is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment. "Qualified" means the person satisfies the job-related requirements of the position the person holds (or is applying for) and can perform its essential functions with or without a reasonable accommodation.

The Family and Medical Leave Act ("FMLA") was signed into law in 1993.¹¹ It provides up to 12 weeks of leave for either the birth of a child (for both mother and father) or for a serious health condition of the employee or an

immediate family member. The employer cannot interfere with the employee's right to take the leave and, under all but a few circumstances, the employee's job is guaranteed when they return to work.

In 2008, Congress passed the Genetic Information Nondiscrimination Act ("GINA"), which bars an employer from using an employee's genetic information when making hiring, termination, job placement, or promotion decisions.¹²

The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA") protects the employment of active and reserve military personnel called to active duty. USERRA mandates that returning service members must be promptly re-employed in the same position that they would have had had they not been absent for military service, with the same status, seniority, and compensation.¹³

The Employee Retirement Income Security Act of 1974 ("ERISA") is a complicated tax and labor law that establishes minimum standards for pension plans in private industry. Among other provisions, it not only protects the rights of individuals covered by these plans, but also prevents termination of an employee to avoid vesting in his pension.¹⁴

The Fair Labor Standards Act of 1938 ("FLSA") creates the right to a minimum wage, determines when workers are on the clock, and requires time-and-a-half overtime pay when covered (non-exempt) employees work more than 40 hours a week.¹⁵


The Equal Pay Act of 1963 ("EPA") amended the FLSA to

abolish wage disparity based on gender between men and women who perform jobs that require substantially equal skill, effort, and responsibility under similar working conditions.¹⁶


For causes of action under Title VII, ADA, ADEA, and GINA, an employee must first file a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") within 180 days of the

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discriminatory act. After its investigation, the EEOC will issue a dismissal and a notice of rights. This “right to sue” letter is your client’s permission to file suit in federal district court, which must be done within 90 days of receipt.

For causes of action under other federal statutes (§ 1981, FMLA, FLSA, EPA, USERRA), one may file suit directly in federal court without resort to the EEOC. ERISA requires a plan participant or beneficiary to exhaust internal administrative remedies before filing suit.

Some of these statutes only come into play if the employer reaches a prescribed number of employees. To be covered by Title VII or the ADA, an employee must work for an employer with at least 15 employees; for ADEA coverage, the requirement is 20 employees; for FMLA, it is 50.

The statute of limitations for these actions vary. As previously noted, for these statutes requiring resort to the EEOC (Title VII, ADA, ADEA, and GINA), it is 180 days from the act of discrimination. For FLSA (overtime), FLMA, and EPA claims, it is two years, three if the unlawful act was willful. USERRA has no stated statute of limitations, and expressly excludes default to the most analogous state statute of limitations. The Rehab Act, for federal employees, is 45 days. For § 1981 causes of action, it is generally four years.

Title VII, the ADA, ADEA, USERRA, GINA, EPA, § 1981, and the Rehab Act all prohibit retaliation for engaging in protected activity under the act (such as complaining to the employer’s HR manager about discrimination) and

also prohibit harassment. The FMLA prohibits retaliation for taking FMLA leave and prohibits interference with attempts to take leave.

Regarding remedies, for most of these causes of action, an employee can recover back pay and other compensatory damages, punitive damages, and be reinstated if terminated. For the ADEA, EPA, and FMLA, there are no punitive damages, but if the plaintiff recovers, and a jury finds the discrimination was willful, the jury award is doubled as liquidated damages.

For ERISA, a prevailing plaintiff is limited to the benefits which could have been recovered under the plan.

For all of these statutes, a prevailing plaintiff can recover attorney’s fees and costs.

State Employment Discrimination Laws

The protections afforded Alabama workers by state law are more limited than at the federal level.

For a potential client who seeks your assistance with a valid sexual harassment case, but came in after her 180 days to file an EEOC charge has expired, all is not lost. She may have valid claims for assault and battery (six-year statute of limitations),¹⁷ invasion of privacy (two-year statute of limitations),¹⁸ and, if her freedom of movement was impaired, false imprisonment (two-year statute of

limitations).¹⁹ There may also be claims against the employer for negligent hiring, training, or supervision of the harassing employee.²⁰

If the conduct visited upon an employee is particularly egregious, there may be a cause of action for outrage. The Alabama Supreme Court has defined the tort of outrage as “conduct that goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized society.”²¹ In *Henry v. Georgia Pacific Corp.*, the Alabama Supreme Court affirmed that the tort of outrage was available for cases involving egregious sexual harassment.²²

Regarding the exceptions set out above to the at-will employment doctrine, breach of contract and fraud are also potential state causes of action. If an employer retains or refuses to return property to a terminated employee (which often happens), there may be a cause of action for conversion.²³

From time to time, an employer will level accusations at an employee or former employee which could constitute defamation.²⁴

For public employees, the facts could support a cause of action for violation of the employee’s due process rights.

There are also a number of Alabama statutes providing some protection to employees. For example, Alabama’s workers’ compensation statute prohibits retaliation against an employee who files a workers’ comp claim.²⁵

Alabama also has an age discrimination statute, modeled after the federal ADEA, which, like the federal statute, covers employees 40 years of age and older.²⁶

In 2019, the legislature passed (without a single no vote), and Governor Ivey signed, a state Equal Pay Act similar in most respects to the federal EPA. It abolishes wage disparity between workers as to both gender (like the federal EPA) and race. Unlike the federal statute, the statute of limitations is only two years (not two, three if willful), and there is no provision for liquidated damages.²⁷

There is also a little-known state statute preventing discrimination based on disability which applies to state employees and employees of employers receiving state funds.²⁸ There is at least a question as to whether this statute permits a private cause of action.

For employees who are compensated in whole or in part on a commission basis and who are in sales of products to third parties for ultimate sale to the consuming public, if their employer has not paid the commissions due and owing within 30 days after demand has been made, the employee may file suit in state court and, if he prevails, receive treble damages and attorneys' fees.²⁹ While the applicability of this statute to someone in sales is limited, the threat of treble damages and attorneys' fees should significantly benefit the covered employee.

Finally, there is an obscure statute which, while not requiring an employer to have an affirmative action plan, mandates that if an Alabama employer does have such a plan, that plan must cover Native Americans.³⁰

Alabama law prohibits the discharge of, or adverse employment action against, an employee "solely because he or she serves on any jury

empaneled under any state or federal statute; ..."³¹ The statute allows both actual and punitive damages.

Conclusion

This article has only scratched the surface. But, armed with the knowledge of these statutes and common law causes of action, a sole practitioner or lawyer in a small firm will not be limited to turning down or referring out that next employment client who comes in the door. ▲

Endnotes

1. *Howard v. Wolff Broadcasting Corp.*, 611 So. 2d 307 (Ala. 1992).
2. *Dykes v. Lane Trucking, Inc.*, 652 So. 2d 248 (Ala. 1994).
3. *Ex parte Graham*, 702 So. 2d 1215 (Ala. 1997).
4. This mutual extra-contractual consideration of permanent employment has been held to create a non-at-will-employment contract. *Scott v. Lane*, 409 So. 2d 791 (Ala. 1982).
5. *Shaddix v. United Insurance Co. of America*, 678 So. 2d 1097 (Ala. Civ. App. 1995); *Kidder v. AmSouth Bank, N.A.*, 639 So. 2d 1361 (Ala. 1994); *Smith v. Reynolds Metals*, 497 So. 2d 93 (Ala. 1986). The common law principles and elements applicable to the proof of fraud in Alabama are likewise applicable to lawsuits arising out of the employment context. See, *Mobley v. BancTec, Inc.*, in which U.S. District Judge Karon Bowdre, citing Alabama law, granted summary judgment on a breach of contract claim, but denied it on a fraud claim in the employment context. Memorandum Opinion, *Mobley v. BancTec Inc.*, 2:10-cv-02649-KOB (Doc. 30), at 18-19.
6. 42 U.S.C. § 2000e, et seq.
7. 42 U.S.C. § 1981. The Act was primarily intended, in the aftermath of the Civil War, to protect the civil rights of citizens of African descent who were either born in, or brought to, the United States.
8. 29 U.S. Code § 623.
9. 42 U.S.C. § 12101.
10. 29 U.S.C. § 701.
11. *Id.* at § 28.
12. 42 U.S.C. §§ 2000ff-2000ff-11.
13. 38 U.S.C. § 4301.
14. 29 U.S.C. § 1001.
15. *Id.* at § 203.
16. *Id.* at § 206(d).

17. *Brewery Petroleum Suppliers, Inc.*, 946 F.Supp. 926 (N.D. Ala. 1996).
18. *Phillips v. Smalley Maintenance Services*, 435 So. 2d 705 (Ala. 1983).
19. Ala. Code § 6-5-170 describes the tort of false imprisonment as: "False imprisonment consists in the unlawful detention of the person of another for any length of time whereby he is deprived of his personal liberty." See *Big B., Inc. v. Cottingham*, 634 So. 2d 999 (Ala. 1993).
20. *Thompson v. Harvard*, 235 So. 2d 853 (Ala. 1970); *Mardis v. Robbins Tire Rubber Co.*, 669 So. 2d 885 (Ala. 1995).
21. *American Road Service v. Inmon*, 394 So. 2d 361 (Ala. 1990).
22. *Henry v. Georgia Pacific Corp.*, 730 So. 2d 119 (Ala. 1999).
23. *In re Louis*, 137 F. 3d 1280 (11th Cir. 1998); *Cothran v. Moore*, 1 Ala. 423 (1854); *McGrady v. Nissan Motor Acceptance Corp.*, 40 F.Supp. 2d 1323 (M.D. Ala. 1998). The statute of limitations for conversion under Ala. Code § 6-2-34 is six years.
24. The Alabama Supreme Court has recognized an employee's right to file suit against his employer based upon the theory of defamation. *Harris v. School Annual Publishing Co.*, 466 So. 2d 963 (Ala. 1985). In this regard, the traditional law of defamation will apply.
25. Ala. Code § 25-5-11.1 (1975).
26. *Id.* at § 25-1-20.
27. The Clarke-Figures Equal Pay Act (HB 225) became effective on September 1, 2019.
28. Ala. Code § 21-7-8.
29. *Id.* at § 8-24-3.
30. *Id.* at § 25-1-10. The statute requires an employer to include in the definition of "minority" any citizen or lawful permanent U.S. resident who establishes by birth certificate, tribal records, or "other reliable records, that he or she is an American Indian or Alaskan native, having origins in any of the original peoples of North America."
31. Ala. Code § 12-16-8.1 (1975).

John D. Saxon



John Saxon practices exclusively employment law. A Fellow of the American College of Trial Lawyers, he is former chair of the Alabama State Bar's Labor & Employment Section. He is a graduate of the University of Alabama School of Law, which, in 2008, presented him the Sam W. Pipes Distinguished Alumnus award.




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ALABAMA STATE BAR 144TH ANNUAL MEETING

Award Recipients and Photo Highlights

JUDICIAL AWARD OF MERIT

This award is presented to a judge who is not retired, whether state or federal court, trial or appellate, and who is determined to have contributed significantly to the administration of justice in Alabama.

Judge Brendette Brown Green

Judge Brendette Green learned very early the value of education, exposure, and experience, with her parents instilling the importance of caring for each other—family, community and, especially, those in need.

After graduating from the University of Alabama and a career in the corporate arena, she returned to school, graduated magna cum laude from Miles Law School, and established a successful law firm. She now has served in the judiciary for more than 15 years.

Judge Green is a member of the Education Committee for the Circuit Judges Association of Alabama and the CLE committees for the Alabama Lawyers Association Judicial Council and the National Bar Association Judicial Council.

Judge Green routinely speaks to the community on access to justice, appropriate interaction with the judicial system, and the importance of civic responsibility and engagement.

She established and chairs the Security Committee for the Tenth Judicial Circuit to address security issues related to the daily activities of judges. Judge Green has collaborated with the Jefferson County Sheriff and other county officials to provide active shooter training and firearms safety training for the judges.

Judge Green is committed to continuous education, exposure, and experience as well as the full integration of the administration of justice.

Judge Sibley G. Reynolds

Prior to taking the bench, Judge Sibley Reynolds was in practice with his father, Morgan Reynolds, in Reynolds &



President Bob Methvin and Judge Brendette Green

Reynolds in Clanton. As a third-generation attorney, he practiced in all areas of the law, including serving as city prosecutor for the City of Clanton and the Town of Maplesville.

In November 1992, he was elected without opposition to the newly-created 19th Judicial Circuit, Place 3, and has served the circuit and the communities in it as circuit judge for 28 years. Serving as the presiding judge for a number of years, he is the most senior circuit judge in the state. He is a member of the Circuit Judges Association and has served on the Education Committee. At the end of his current term, January 2023, he will retire.

Judge Reynolds graduated from the University of Alabama in 1978 and from the University of Alabama School of Law in 1982.

He is an active member of Clanton First United Methodist Church, as well as many civic and charitable organizations. Judge Reynolds and his wife, Rhonda, have two grown children, Mary Beth Wyatt, who is a member of the Alabama State Bar, and Mac Reynolds, and one grandchild, Reynolds Wyatt.



Judge Sibley Reynolds and President Methvin

AWARD OF MERIT

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

Eleanor I. Brooks

Ellen Brooks served as the interim executive director of the Alabama State Bar from January to June of this year. Brooks is a former Montgomery County District Attorney, who served from 1993 until 2014. She began working in the District Attorney's Office for Alabama's 15th Judicial Circuit in 1977 and served as chief deputy district attorney



Ellen Brooks

beginning in 1983. She also served for a year as a deputy attorney general. Brooks has extensive experience as a volunteer working with her church and not-for-profits, including co-founding the One Place Family Justice Center.

WILLIAM D. "BILL" SCRUGGS, JR. AWARD

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

Christina D. Crow

Christy Crow graduated from Auburn University and the University of Alabama School of Law (magna cum laude). She then began practicing with the firm now known as Jinks, Crow & Dickson.

With over 20 years of experience in civil litigation, she has represented clients throughout Alabama and Georgia in claims involving personal injuries, wrongful death, and product liability, among others.

Christy served as the 2019-2020 state bar president, as well as president of the Young Lawyers' Section, treasurer of the Women's Section, and longtime bar commissioner from the 3rd Judicial Circuit. She has volunteered on many bar committees and task forces, including the Disciplinary Commission and the Pro Bono Celebration Task Force.

She is a member of the American Board of Trial Advocates, the American Bar Association, and the Alabama Association for Justice. Christy is a fellow of the Alabama Law Foundation and serves on the board, and is a graduate of the state bar's Leadership Forum and Leadership Alabama. She is president of Lawyers Render Service, Inc., a non-profit to help lawyers in need, and volunteers with the Girl Scouts of Southern Alabama and the Alabama/West Florida United Methodist Conference.

Christy and her husband, Van Wadsworth, have three children and a son-in-law.



President Methvin and Christy Crow

J. ANTHONY "TONY" MCLAIN PROFESSIONALISM AWARD

This award recognizes members for distinguished service in the advancement of professionalism.

LaBella S. McCallum

LaBella McCallum graduated from Cumberland School of Law and is a partner with McCallum, Hoaglund & McCallum LLP in Birmingham.

She served as president of the Birmingham Bar Association YLS and as a mentor promoting professionalism and charitable work among young lawyers, including forming a racquetball program for low-income children.

LaBella co-founded what is now known as Volunteer Lawyers Birmingham and served as its volunteer director until a director was hired. She still assists with cases and serves on the board.

She produced a cabaret for the Birmingham Bar Foundation that netted \$30,000 for the Children's Hospital car seat program.

LaBella and Maibeth Porter helped form the Women Lawyers Section, and she has served on the board for many years.

She is a member of the ASB Women's Section and has been a bar commissioner since 2016. She received the Commissioners Award in 2018 and was one of the recipients of the 2019 President's Award. She serves as co-chair of the Lawyers' Voices for Survivors Task Force and as a state bar disciplinary panel member.

LaBella is co-chair of the International Academy of Trial Lawyers Halt Human Trafficking Task Force and a supporter of and volunteer with Special Equestrians, Inc.



President Methvin and LaBella McCallum

COMMISSIONERS AWARD

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

John A. Brinkley, Jr.

John Brinkley is a general practitioner in Huntsville. He and wife Kristen are blessed with eight children—Wini (2005), John (2007), Lyn (2009), Andy (2011), George (2014), Charles (2016), Jeb (2018), and Elizabeth (2020). John is actively engaged in his community trying to assist others who need it—providing some traction in an otherwise slippery environment. He was honored to serve on the Board of Bar Commissioners and is flattered by this recognition.



John Brinkley

Michael D. Ermert

Mike Ermert is of counsel with Hare, Wynn, Newell & Newton LLP in Birmingham. He received his bachelor's degree and his law degree from the University of Alabama. Between completing his undergraduate studies and starting law school, Mike served on active duty in the United States Army, attaining the rank of captain.

He is a past president of the Alabama Association for Justice, the Birmingham Bar Foundation, the Alabama Civil Justice Foundation, the Alabama Chapter of the American Board of Trial Advocates, and the Red Elephant Club of Birmingham. He is a past chair of the Downtown Birmingham YMCA Board of Management and the University of Alabama School of Law Alumni Society.

Mike is in his second term on the Board of Bar Commissioners, representing the 10th Judicial Circuit. He also serves as a member of the Jefferson County Judicial Commission and the University of Alabama Law School Foundation Board of Governors. Mike and Lori have been married for 37 years, and they have two daughters and a son-in-law. He is an active member of the Homewood Church of Christ, where he has served on the Missions Committee and chaired the major gift early commitment effort in their recent capital campaign.



Mike Ermert

Jana R. Garner

Jana Garner is a sole practitioner at JRG Law Offices LLC in the 4th Judicial Circuit. She received her juris doctor from Cumberland School of Law in 1997. Jana served on the Board of Bar Commissioners from 2012 to 2021, holding many leadership positions during her tenure. She is a member of the Alabama Court of the Judiciary and the Supreme Court Advisory Committee on the Alabama Rules of Evidence.

She and Paul have been married for 17 years, and they have two children, Sam and Fairchild. She and her family live in Selma and are active members of St. Paul's Episcopal Church.

Jana has served on various local boards, including the Chamber of Commerce and the Salvation Army.



Jana Garner

Rebekah K. McKinney

Rebekah McKinney was born in Huntsville and practiced there since 1997. She graduated from Vanderbilt University and the University of Alabama School of Law, where she was a member of the Bench and Bar Legal Honor Society and the Farrah Law Society.



Rebekah McKinney

She spent the first year of practice at the United States Merit Systems Protection Board. In 1998, she joined Watson, Fees & Jimmerson PC, founded in 1961 by her father, Buck Watson, and practiced with him until his death. Their firm, Watson McKinney LLP, continues to provide a wide range of legal services.

Rebekah served as president of the Alabama Association for Justice, of which she is still a board member, and on the board of the Alabama Civil Justice Foundation. She is a bar commissioner for the 23rd Judicial Circuit, a fellow of the Alabama Law Foundation, and a member of the Appellate Rules Committee of the Alabama Supreme Court. She served as a member of the Alabama Law Institute and is a member of various legislation-drafting committees.

Rebekah's involvement in her local community includes the Earlyworks Museum, the Alabama Constitution Village Foundation, the Arts Council of Huntsville, and Free 2 Teach.

She has three sons, Sam, Griffin, and John.

RETIRING COMMISSIONERS AWARDS

John A. Brinkley, Jr., 23rd Judicial Circuit, Place 2

Brannon J. Buck, 10th Judicial Circuit, Place 8

Diandra S. Debrosse, At Large, Place 1

Jana R. Garner, 4th Judicial Circuit

J. Levi Nichols, 2nd Judicial Circuit

Amanda W. Porter, 24th Judicial Circuit

Jeanne D. Rizzardi, At Large, Place 7

C. Gibson Vance, 15th Judicial Circuit, Place 4

PRESIDENT'S AWARD

President Methvin recognizes these attorneys for best exemplifying the Alabama State Bar motto, "Lawyers Render Service."

Cassandra Adams

Raymond Bell

Mark Boardman

Jeff Bowling

Ane Debro

Diandra Debrosse

Mike Ermert

Lang Floyd

Jana Garner

Courtney Gipson

Rebekah McKinney

Cliff Mendheim

Tom Perry

Clay Ryan

Terri Tompkins

Hal Turner



President Methvin with some of the 50-year members (plus a 51-year member!)

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VOLUNTEER LAWYERS PROGRAM

Pro Bono Awards

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

ALBERT VREELAND PRO BONO AWARD

L. Thomas Ryan, Jr.

Tom Ryan has volunteered with the Madison County Volunteer Lawyers Program for 40 years. He has assisted 136 clients since 2009 alone and is always willing to take cases that are difficult to place. He steps in when the VLP needs him the most. As an MCVLP board member, Tom assisted with the development of a mentorship program and a family law mediation program. He also helped with revisions to the MCVLP bylaws to make operations more efficient and effective.

Tom was an original member of the Wills for Heroes Task Force and assisted in the development of templates that have been used to help thousands of first-responders in Alabama. Tom's work and dedication have affected many lives, and he is a true servant leader.



Tom Ryan

LAW FIRM AWARD

Carr Allison

Attorneys with the Birmingham office of Carr Allison volunteer with Volunteer Lawyers Birmingham, assisting with the civil legal help desk. They help clients with a variety of legal issues, including evictions, landlord tenant issues, collections, and credit card fraud. Several attorneys have taken on extended



President Methvin and Amanda Goozee (accepting for Carr Allison)

representation cases, taking cases to trial in district court when needed. When a landlord went into foreclosure and multiple tenants were told they had five days to vacate, attorneys from Carr Allison stepped in. They tracked down the new owner and worked out a deal that allowed tenants to have 45 days to find new housing. Instead of pulling back during the pandemic, Carr Allison continued to show up for those in the community who needed free legal assistance.

MEDIATOR AWARD

R. Boyd Miller

Boyd Miller is a selfless advocate for mediation. Since 2017, his efforts have heightened awareness of the use of mediation to help litigants and the courts. Boyd has donated his time and talents to educating attorneys, mediators, and members of the bench. During the pandemic in 2020, he brought in a nationally recognized speaker to train mediators on "Conducting Virtual Mediations." He followed that up by assisting in a training on "How to Get the Best Experience from Online Mediation." Boyd jumped in to provide necessary skills to Alabama's mediators during challenging times.

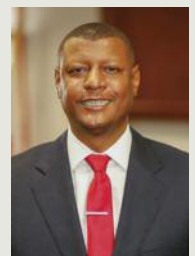


President Methvin and Boyd Miller

LAW STUDENT AWARD

Joseph A. Holley

Using his 3L limited practice certificate and volunteering with the Faulkner Legal Clinics, Jones School of Law student Joseph Holley has provided services to 28 clients. In the summer of 2020, while many courts were still shut down and legal service providers were struggling to meet the needs of indigent litigants, Joseph began drafting wills, powers of attorney, and advance healthcare directives through the legal clinic, providing help and assistance to worried elderly clients.



Joseph Holley

He has represented clients in family law cases that are often difficult to place, defaults, contested divorces, and protection from abuse petitions referred by the One Place Family Justice Center.

Joseph also volunteers with Meals on Wheels and Flatline Church Ministries, providing support and services to some of Montgomery's poorest neighborhoods.

PUBLIC INTEREST ATTORNEY AWARD

Stephen D. Rygiel

Steve Rygiel began serving as director of the Aiding Alabama Legal Program at Birmingham Aids Outreach in 2010. The program collaborates with numerous legal providers, agencies, and court systems to maximize the impact of poverty law practice to help stem the tide of the HIV/AIDS epidemic in Alabama and throughout the Deep South. Since then, he has provided pro bono legal help to over 1,000 HIV+

individuals in Alabama with thousands of requests for legal services across many areas of law practice. Steve has solo-authored over \$500,000 in grants specifically awarded to fund the BAO legal program, while serving as chief editor on awarded BAO project grants totaling over \$5,000,000. He has lectured at numerous accredited CLE programs and at regional and national HIV/AIDS conferences.



President Methvin and Steve Rygiel

Women's Section Awards

MAUD MCLURE KELLY AWARD

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

Jacqueline E. Austin

Jacqueline Austin has been an Alabama State Bar member for 53 years and practiced in Elmore County for 45 years.

She served as a Wetumpka municipal judge and city attorney and an assistant district attorney and special assistant attorney general for the 19th Judicial Circuit, following in the public service footsteps of her grandmother (the first female sheriff in Alabama), her grandfather (also a sheriff), and her great-grandfather (a probate judge). Jacqueline helped start the child support enforcement unit for the circuit and was one of the first assistant DAs to use DNA testing to determine paternity.

Jacqueline graduated from Auburn University and Cumberland School of Law. She has two daughters, Pratt (who practices with her) and Jamelyn, and three grandchildren, Turner, Smith, and Maxwell.



Jacqueline Austin

JUSTICE JANIE L. SHORES SCHOLARSHIP

To encourage the next generation of women lawyers, the Women's Section of the Alabama State Bar established the Justice Janie L. Shores Scholarship Fund. Named in honor of the first woman to sit on the Supreme Court of Alabama, the scholarship is awarded to an outstanding woman who is an Alabama resident attending law school in Alabama.

Courtney L. Howard

Courtney Howard is a native of Birmingham, a 2015 graduate of Howard University, and a recent graduate of Cumberland School of Law, where she served as president for the class of 2021 and as a member of the Black Law Students Association, the Career Development Advisory Board, and the Women in Law Society. Courtney's interest in attending law school was sparked while she was working on a research and policy project for Growing Kings, Inc. and the Regional Planning Commission of Greater Birmingham. She sat for the July bar exam and will join Protective Life Corporation as a staff attorney.



Courtney Howard

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ALABAMA STATE BAR 144TH ANNUAL MEETING PHOTO HIGHLIGHTS

Wednesday, July 14



Commissioner Jeanne Dowdle Rizzardi and President Methvin visit at their last Board of Bar Commissioners meeting before going out of office.



Britney McComb and Lori Warren with Alabama Court Reporting, Inc. and Pamela Butler and Natasha Marvin with the Alabama Department of Mental Health are set up and ready for business!





The friendly faces of Suze Long, Tim Lewis, and Janice Schultz at the Alabama Bench & Bar Historical Society booth



Scott Holmes and John Stamps surprise VLP Director Linda Lund with a plaque of appreciation for her dedication to the Pro Bono Celebration Task Force.

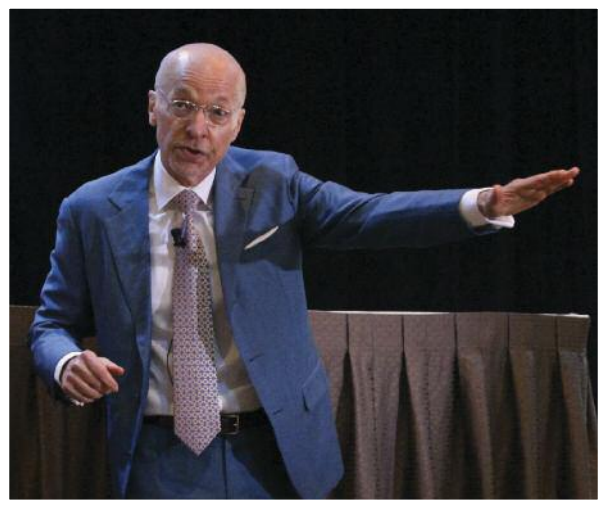


Dean Cassandra Adams, Hilaire Armstrong, and Judge Martha Cook visit after "Moving Forward with Professionalism, Civility, and Equality in Post-2020 America."



ALABAMA STATE BAR 144TH ANNUAL MEETING PHOTO HIGHLIGHTS

Thursday, July 15



Chris DeSantis explains "Embracing Generational Diversity."



Barry Matson discusses the "Intersection of Civil and Criminal Law."



Eric Grabski simplifies "Cell Phone Tracking for Legal Professionals."



Courtney Johnson and Nikki Thomas with the Alabama Civil Justice Foundation love lawyers!



Speakers Marc James Ayers, Associate Justice Jay Mitchell, and Chief Judge Bill Pryor during "Effective (and Ineffective) Appellate Practice—Tips from the Bench"



Dean Corky Strickland, Derek Chen, and Sally Bowers enjoy the shade during the midday reception honoring ASB Executive Director Terri Lovell.



The photographer is photographed! The Alabama Lawyer editor Greg Ward with Terri and Jeff Lovell



Preeti Sharma and Ken Sharma with Atlanta Custom Tailors can make anyone look more professional!



Bench & Bar Luncheon speaker Fred Gray and President Methvin



Eileen Harris thanks fellow "Access to Justice and Mediation" speakers Judge Martha Cook, Jon Lewis, and Boyd Miller.



ALABAMA STATE BAR 144TH ANNUAL MEETING PHOTO HIGHLIGHTS

Friday, July 16



Past presidents are the happiest group around! Front row—Christy Crow, Fred Gray, Justice Sonny Hornsby, and Augusta Dowd. Middle row—Sam Rumore, Rich Raleigh, Anthony Joseph, Sam Irby, Sam Crosby, Mark White, and Alva Caine. Back row—Tom Methvin, Lee Copeland, Broox Holmes, and Larry Morris



Ron Prevatte and Fresh Managed IT are ready to help you grow your business.



Heather Meadows discusses "Keeping Your Firm Cyber-Safe: Solutions Born of Experience."



Judge Joel Dubina and Judge Annemarie Axon at the "Federal Judge Panel Discussion"



Sharon Muse shares her experience during "From Zealous Representation to Threat Assessment: Identifying When a Client Becomes a Threat."



Clay Lanham and Judge Stephanie Kemmer answer questions after "Ask the Experts: Answers to Common Questions in Real Property, Probate, and Trusts."



James Ward, Gregg Everett, and Angela Kennedy visit before "Top 10 Things You Need to Know About Administrative Law."



John Civils gets the teams ready before "Alabama Workers' Compensation Trivia."



Women's Section members Jennifer Buettner and Ane Debro hand out bid cards before the silent auction.



There's something for everyone at the auction!



President Methvin with sister Lindsey Hannahan and brother Tom Methvin (2009-2010 ASB president)



The Closing Night Family Reception gives everyone a chance to relax and rewind.



Attendees of all ages enjoy the sound of "Big Night Dynamite."



ALABAMA STATE BAR 144TH ANNUAL MEETING PHOTO HIGHLIGHTS

Saturday, July 17



President Methvin gets the 2021 Grand Convocation under way.



At her first grand convocation as executive director, Terri Lovell welcomes and thanks the attendees.



Grand prize winner Herman Padgett (center) with Charlotte Gardner and Joe Purus of Insurance Specialists, Inc., Alabama



Susan Reynolds, President Methvin's legal assistant, is presented with a plaque of appreciation by Christy Crow for her help during his term.



With his wife, Pam, holding the Bible, Taze Shepard is sworn in by Alabama Supreme Court Chief Justice Tom Parker as the 146th president of the Alabama State Bar.



Past President Methvin passes the gavel to President Taze Shepard.



Then and now—Past President Methvin (holding a copy of the September 2020 Alabama Lawyer featuring his family on the cover) with wife Leigh and daughters Laine, Kate, and Hope



President-elect Gibson Vance, President Taze Shepard, and Chief Justice Tom Parker



Taze and Pam Shepard with their children and grandchildren at the Presidential Reception



30 Faces of Pro Bono

P A R T 5 O F 6

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

Roger H. Bedford, Jr., Roger Bedford Attorney At Law LLC, Russellville

Being a small-town lawyer can have a big impact. Roger Bedford joined his family's law firm in 1981 and began making his impact. When he got started, he asked his father what type of law they practiced. His father smiled and said, "Son, do you see that front door? We practice whatever walks in the door." At that moment he realized that being a lawyer was a service and not just a career.

Roger has made an impact on both the state and his community by dedicating his life to service. Not only has he served countless clients pro bono, but he has also served the state as a senator for 28 years, trying to improve the lives of all Alabamians.

He believes that it's important to give back to the community that you live in and benefit from, and that volunteering with the Alabama State Bar VLP is a positive way to do that. Roger joined the VLP in 1997 because he had a passion for helping his fellow Alabamians and their families deal with crisis situations. He is still an active volunteer



who uses his knowledge and skills to solve problems in a fair and equitable manner.

And, he has seen first-hand how people never expect to receive free help from lawyers. One day a client walked into his office to discuss a problem about a mobile home. Her husband had recently died, and the mobile home had foundation issues. The client was in tears and desperately needed. Roger got the company to repair the mobile home over the weekend, at no cost to the client. Early Monday morning, the client was in his office again, anxious and nervous. He asked if she was still having issues with the home. She explained that everything was fine with it, but that she was nervous because she didn't know what he was going to charge her. When he asked what her best baked good was, she said apple pie. Roger told her that would be payment enough.

Danny W. Crenshaw, Crenshaw Law & Associates, Selma

Practicing law is a privilege and not a right. Danny Crenshaw understands this and takes it seriously. "The practice of law should be



viewed as a calling, of the highest order. And in that regard, a lawyer should be willing to assist those in society who are less fortunate, or more aptly known as the 'least of these,' without being compensated when the need for doing so is the right thing to do."

Danny joined the VLP in 2009 when he learned about the large number of people in dire need of legal services, but who could not afford an attorney. By assisting clients pro bono, Danny has changed lives and communities and recommends that others get involved because it is so rewarding.

One memorable experience was helping a divorced, middle-aged woman maintain custody of her grandson. Before divorcing, the woman and her husband had adopted their grandson, after his father became addicted to drugs. After the divorce, her ex-husband tried to convince the court that she was an unfit mother. Danny was able to plead his client's case and show that she was a loving and caring mother, who should not be excluded from his life, because "he was her world."

Danny stresses to fellow attorneys, "Don't take your privilege for granted, but use your time, skills, and expertise as a lawyer to make a difference through pro bono work."

Timothy J.F. Gallagher, Sasser Sefton & Brown PC, Montgomery

When beginning the practice of law, attorneys quickly learn the importance and value of setting priorities. Tim Gallagher has made providing pro bono legal assistance a priority.



He joined the VLP early in his career as a result of his firm's culture and intentional support of pro bono services. "I found that the more time I spent providing pro bono service, the more I got back in terms of gratitude, experience, relationships, and even opportunities for paid work down the road. It is absolutely true that volunteering is a worthwhile endeavor without any other benefit, but the feeling of helping someone who has no one else to turn to, and the relationships and opportunities that pro bono service can create, make the effort even more worthwhile."

Tim served as the first president of the Montgomery Volunteer Lawyers Program (MVLP) board, where he played a major role in establishing and growing the MVLP and extending services.

Some of Tim's most memorable cases dealt with housing issues. In one, he assisted long-term occupants of a hotel, who were facing immediate eviction contrary to the law and without due process.

He also provided pro bono representation in a rent-to-own case where the seller was attempting to wrongfully convert the agreement into a traditional lease, despite the purchaser making thousands of dollars of payments and numerous improvements to the property over a 15-year period. He obtained a favorable result for the client. For several years after that, she would call just to see how he was doing and to thank him for his service.

His dedication has been recognized with the Montgomery VLP Medal of the Samaritan, the Alabama State Bar Pro Bono Exemplar Award, and the Montgomery County Volunteer Lawyer of the Year Award.

Tim shares, "Through my pro bono work, I have come to understand the saying that 'the happiest people are not those getting more, but those giving more,' and I am proud to be a volunteer lawyer."

Judge Emily C. Marks, United States District Court, Middle District of Alabama, Montgomery

At the start of her legal career, Chief United States District Judge Emily Marks learned the value of pro bono work. As a new associate in her firm, Judge Marks assisted a seasoned partner with a pro bono



matter involving a woman who was engaged in a family dispute. Through this, she saw how pro bono work benefits both the client and the lawyer providing the assistance.

In 2000, Judge Marks joined the Alabama Pro Bono Committee and served as a co-chair (2007-2009) and chair (2009-2012). She and the committee focused on increasing lawyer participation by holding membership drives and developing a model pro bono policy for firms, encouraging young associates to do pro bono work. They also joined forces with the local bench and created limited-scope representation forms to assist volunteer lawyers with managing the extent of their involvement in a case. All of this resulted in a significant increase in the number of lawyers participating in the program.

For Judge Marks, performing pro bono work benefits people in need, but it also provides lawyers—particularly those beginning their careers—with opportunities to gain practical experience. She strongly believes that experienced attorneys have a responsibility to encourage new attorneys to take part in such work.

As she recalled her first pro bono experience, Judge Marks expressed gratitude that the partner at her firm involved her in the case. Their client gained a favorable result, and Judge Marks was inspired to prioritize pro bono work within her own career. This inspiration ultimately led her to lead pro bono efforts throughout the state, touching many lives

along the way. Thanks go to Judge Marks for her contributions and also to the attorney who recognized the importance of involving her in the first place.

Alyce Manley Spruell, Rosen Harwood PA, Tuscaloosa

Like father, like daughter, Alyce Spruell saw how rewarding it was for her father, Rick Manley, to do pro bono work, and she followed in his footsteps.



She found this work to be an “enriching experience, even when

you sometimes are unable to offer assistance. People appreciate someone taking the time to explain what their options are (or aren’t), which then allows them to move forward.” When Judge Harold Albritton and Professor Pam Bucy initiated the bar’s statewide program, Alyce joined in to support their efforts.

Alyce was the first chair of the Pro Bono Celebration Task Force, where she implemented many of the goals that are still used today. And, her service as a bar president was instrumental for her leadership in initiating disaster relief services for those affected by the Horizon Oil Spill and allocating funding to further the goals of the Pro Bono Celebration Task Force.

As an active volunteer, her primary area of service is legal assistance to veterans because, according to Alyce, “there is truly no better feeling than helping someone who has served our country.”

Explaining why she would recommend pro bono work, she said, “I continually find that my pro bono cases not only teach me something new about the law, but also educate me about human nature and the significant needs of our community, invaluable lessons that hopefully make me a better lawyer and a better person. I can’t imagine practicing law and not being involved in our pro bono program efforts.”

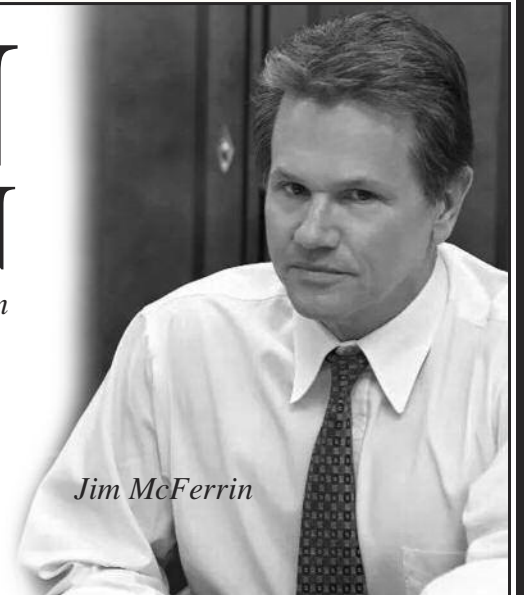
The community demand for legal assistance is great, but VLP volunteers work hard every day to provide this help. ▲

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Giving and Getting the Most from Your Pro Bono Service

By Jon D. Townsend

Before I was a lawyer, I was a minister.

I know there's a joke in there somewhere. Nevertheless, the ministry was an excellent teacher of humanities. Ministry and law share this education. Both must recognize relationship dynamics and problems. Both must take people and their issues as they come to us. And when they come, burdened with issues, they look to us

to solve them. As a minister, I was a servant, and as a lawyer, I am a servant.

Pro bono service is perhaps the most ethical and responsible way to discharge our duty to serve our communities in need. In Matthew 6.3, Jesus says, "But when you give to someone in need, don't let your left hand know what your right hand is doing." This teaching is curious but entirely logical. We can apply this approach to pro bono service to give and get the most out of it.

Give to Someone in Need

This value is not difficult to apply. The Alabama Rules of Professional Conduct Rule 6.1 states, “[a] lawyer should render public interest legal service.” But just because we “should” doesn’t mean we do. So how do we get over the should-do into the am-doing, thereby serving someone in need?

First, we must commit to pro bono service and budget our time accordingly. If all 14,822 Alabama licensed lawyers gave 5 percent of a 40-hour workweek to pro bono service, our underserved communities would have access to approximately 1,541,488 hours of free or reduced fee legal representation.

According to the Alabama State Bar, “The need for legal aid in Alabama is dire. Unlike the criminal defense system, the constitutional guarantee of funding for low-income Alabamians who need civil legal assistance has not yet been met. The consequences of a lack of access to justice are devastating for the poor and weaken a democratic society as a whole. Last year, more than 422,000 households experienced more than 733,000 legal issues with low-income households only having had legal assistance for approximately 16 percent of these legal problems.”

The 5 percent commitment would equate to approximately 104 hours of service per year, per attorney. The average amount of time attorneys spent on their most recent case was 45.7 hours for full representation cases and 16.4 hours for limited-scope representation. Therefore, many of us would handle, on average, at least two cases and as many as six cases per year. We would dramatically lower the need in our low-income communities for quality legal representation if we committed to 5 percent of our time and resources to pro bono service.

Give Without Applause

In a recent peer-reviewed study entitled, “Unobserved Altruism: How Self-Signaling Motivations and Social Benefits Shape Willingness to Donate,” researchers found that donating, or giving, made us feel altruistic.

Researchers also “found that the prospect of public recognition seemed to make givers feel confused about their motives, making them wonder if they were donating out of genuine altruism or just for a pat on the back.” The public recognition effect was so powerful that it made givers decisively less likely to give.

This altruistic motivation also applies to our pro bono service. If we give without recognition, then we know that our motives to serve are pure. So, give without applause. Let us celebrate as a profession the collective efforts of our pro bono service in October. Our Pro Bono Celebration month is a time to give and share what our profession is doing for those in need in our communities. Instead of shining a spotlight on individuals, let’s celebrate the work of all lawyers as servants. We will find that more of us will give of ourselves when we know our service is without public recognition.

If we give to someone in need and do so without applause, then we will discover what Harper Lee meant when she wrote:

“But there is one way in this country in which all men are created equal—there is one human institution that makes a pauper the equal of a Rockefeller, the stupid man the equal of an Einstein, and the ignorant man the equal of any college president. That institution gentlemen, is a court. It can be the Supreme Court of the United States or the humblest JP court in the land, or this honourable court which you serve. Our courts have their faults as does any human institution, but in this country our courts are the great levelers, and in our courts all men are created equal.” *To Kill a Mockingbird*

Let us then give and serve. ▲

Jon D. Townsend



Jon Townsend practices with Sydney Cook & Associates LLC in Tuscaloosa. He graduated summa cum laude from Southern Christian University and received a master of ministry from Freed-Hardman University. After spending time in ministry, Townsend graduated from Cumberland School of Law in 2014. He serves on the Alabama State Bar Strategic Planning Task Force and the Pro Bono Celebration Task Force.



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NOTICE

DISCIPLINARY NOTICES

▲ Surrender of Licenses

▲ Disbarments

▲ Suspension

▲ Public Reprimands

Surrender of Licenses

- Tampa, Florida attorney **Hilary Lauren Jones**, who is also licensed in Alabama, surrendered her license on March 30, 2021. Jones was issued a show cause order on June 16, 2020 for non-compliance with Rule 9, MCLE requirements. On March 30, 2021, Jones 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 Jones's surrender of her license to practice law in Alabama, effective March 30, 2021. [CLE No. 2020-605]
- On May 14, 2021, the Alabama Supreme Court issued an order accepting the voluntary surrender of **William Jordan Underwood's** license to practice law in Alabama, with an effective date of April 21, 2021. [ASB Nos. 2018-54 and 2019-1184; Rule 22(a), Pet. No. 2020-129]

Disbarments

- Arab attorney **Mark Edgar Johnson** was disbarred from the practice of law in Alabama by the Supreme Court of Alabama, effective April 19, 2021. The Supreme Court of Alabama entered its order based upon the Disciplinary Board's order accepting Johnson's consent to disbarment, which was based on pending disciplinary matters involving allegations that Johnson mishandled client funds, failed to abide by court orders, failed to diligently represent clients, failed to adequately communicate with clients, and engaged in the unauthorized practice of law. [Rule 23(a), Pet. No. 2021-523; ASB Nos. 2018-1388, 2019-1160, 2020-718, 2020-747, 2020-847, 2020-992, 2020-995, 2020-1026, 2020-1099, 2021-166, and 2021-227]
- Clanton attorney **Angie Avery Mayfield** was disbarred from the practice of law in Alabama by the Supreme Court of Alabama, effective April 27, 2021. The Supreme Court of Alabama entered its order based upon the Disciplinary Board's order accepting Mayfield's consent to disbarment, which was based on pending disciplinary matters involving allegations that Mayfield mishandled client funds, failed to diligently represent clients, failed to adequately communicate with clients, and failed to respond to disciplinary complaints. [Rule 23(a), Pet. No. 2021-554; ASB Nos. 2019-759, 2019-767, 2019-958, 2020-235, 2020-263, 2020-549, 2020-868, 2018-910, 2020-937, 2020-970, 2020-1015, 2021-215, and 2021-315; CSP Nos. 2021-389, 2021-398, and 2021-508]

(Continued from page 363)

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**ALABAMA LAWYER
ASSISTANCE PROGRAM**

- Scottsboro attorney **Frank Brian Rice** was disbarred from the practice of law in Alabama, effective May 14, 2021. In ASB No. 2019-1025, the Supreme Court of Alabama entered its order based on the Disciplinary Board's order, wherein Rice was found guilty of violating Rules 1.3 [Diligence], 1.4 [Communication], 1.15 [Safekeeping Property], 1.16(d) [Declining or Terminating Representation], 5.5 [Unauthorized Practice of Law], 8.1(b) [Bar Admission and Disciplinary Matters], and 8.4(d) and (g) [Misconduct], Alabama Rules of Professional Conduct. Rice was hired to represent a client on three felony charges in January 2019. The client made down payments of \$500 and \$2,500. Rice failed to enter a notice of appearance and failed to appear at court dates in February, March, and April 2019. Rice was summarily suspended from the practice on law on April 15, 2019 as a result of his failure to respond to a disciplinary complaint in an unrelated matter. Rice remained summarily suspended until his disbarment in an unrelated matter in October 2019. Rice never informed the complainant of his summary suspension and failed to return the fees paid by the complainant. The complainant filed a bar complaint against Rice on August 8, 2019. Thereafter, Rice failed to respond to letters and emails from the Office of General Counsel on August 14, 2019; September 24, 2019; and October 28, 2019.

In ASB No. 2019-1444, Rice was previously summarily suspended from the practice of law on April 15, 2019 and was disbarred on October 23, 2019. Rice was retained to file a petition for termination of parental rights in order to begin adoption proceedings for the child. The client paid Rice \$600. Rice cashed the check in May 2019. Rice failed to inform the client that he was summarily suspended. Rice failed to return any of the client's telephone calls or messages after receiving the payment. On May 16, 2019, while suspended, Rice failed to submit a written response to the client's complaint filed with the bar and failed to refund any of the fees. Based on these findings, the Disciplinary Board found Rice guilty of violating Rules 1.3 [Diligence], 1.4 [Communication], 1.15 [Safekeeping Property], 1.16(d) [Declining or Terminating Representation], 5.5 [Unauthorized Practice of Law], 8.1(b) [Bar Admission and Disciplinary Matters], and 8.4(d) and (g) [Misconduct], Alabama Rules of Professional Conduct. [ASB Nos. 2019-1025 and 2019-1444]



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Suspension

- Mobile attorney **Douglas Kendall Dunning** was suspended from the practice of law in Alabama for five years by the Supreme Court of Alabama, effective June 23, 2021. The Supreme Court of Alabama entered its order based on the Disciplinary Commission’s order accepting Dunning’s conditional guilty plea wherein he voluntarily entered a plea of guilty to violating Rules 1.3 [Diligence], 1.4 [Communication], 1.15 [Safekeeping Property], 5.3 [Responsibilities Regarding Non-Lawyer Assistants], 8.1 [Bar Admission and Disciplinary Matters], and 8.4(d) and (g) [Misconduct], Alabama Rules of Professional Conduct. Dunning failed to properly supervise a non-lawyer employee resulting in the theft of trust account funds by the employee. [ASB No. 2020-268]

Public Reprimands

- On May 7, 2021, **James Joseph Eufinger** received a public reprimand with general publication, as ordered by the Disciplinary Commission of the Alabama State Bar, for violating Rules 1.1 [Competency], 4.1 [Truthfulness in Statements to Others], 5.1 [Responsibilities of a Partner or Supervisory Lawyer], and 8.4 (c), (d), and (g) [Misconduct], Alabama Rules of Professional Conduct. In 2007, Eufinger was licensed to practice in Missouri and joined Faber & Brand LLC in Columbia, Missouri in 2011. Faber & Brand LLC is a debt-collections law firm and represents numerous hospitals across the country. In or around 2017, Eufinger became licensed to practice in Alabama in order to represent several Alabama hospitals on debt-collection matters. An individual contacted the Department of Public Examiners and advised that Eufinger was impermissibly attempting to collect funds from her employer after a previous garnishment issued against her was paid and released. Eufinger was sending letters to employers seeking additional funds above and beyond what was allowed for the garnishment entered by the court. On numerous occasions, Eufinger attempted to collect or did collect amounts

(Continued from page 365)

beyond what was allowed by the court. Eufinger provided an accounting showing that his firm received overpayments in 27 different cases after sending out the improper letter. Eufinger stated that all overpayments have been returned to the defendants or their employers and that he has ceased any further collection attempts in these matters. [ASB No. 2020-867]

- Scottsboro attorney **George Alexander Hartline, III** was issued a public reprimand without general publication on May 7, 2021, as ordered by the Disciplinary Commission of the Alabama State Bar, for violating Rules 1.3 [Diligence], 1.4 [Communication], and 8.4(d) [Misconduct], Alabama Rules of Professional Conduct. In August 2018, a suit was filed against a company and a person, individually, in a superior court in Georgia. The individual previously operated a restaurant in Alabama pursuant to a franchise agreement with the restaurant's corporation. The suit alleged that the individual had violated numerous provisions of the franchise agreement. Within a few days of service, the individual provided Hartline with a copy of the lawsuit and retained Hartline to represent him on the matter. On September 20, 2018, with the deadline to file an answer and counterclaim set to expire, Hartline contacted a licensed Georgia attorney to act as local counsel in the matter. The Georgia attorney agreed to sign, as local counsel, Hartline's request for pro hac vice admission to the State Bar of Georgia. Hartline's verified application for pro hac vice admission was filed that same day, September 20, 2018. In addition, the Georgia attorney electronically filed the answer and counterclaim Hartline prepared on the individual's behalf. The answer and counterclaim were electronically signed by Hartline. The Georgia attorney did not sign the answer and counterclaim as local counsel. At the time of filing, Hartline's verified application for pro hac vice admission had not been approved by the court or the State Bar of Georgia and, in fact, was not approved until December 12, 2018. In the interim, counsel for the restaurant corporation filed a motion to strike the answer and counterclaim because Hartline was not a licensed Georgia attorney at the time of filing. Hartline did not respond to the motion to strike and failed to secure local counsel even after it was clear that the Georgia attorney was refusing to act as local counsel. On February 27, 2019, the court granted the motion to strike and subsequently entered a default judgment against the restaurant and the individual in the amount of \$137,479.48, plus interest. As a result, on April 16, 2019, the restaurant corporation filed the foreign judgment with a circuit court in Alabama. Because Hartline failed to diligently monitor the case, he was unaware of the default judgment and collection efforts until June 2019. At that time, Hartline notified the client of what had occurred. With the client's consent, Hartline entered into settlement negotiations, and the matter was subsequently resolved to the client's satisfaction. [ASB No 2019-509]
- Tusculumbia attorney **Dawn Marie Quinn** received a public reprimand without general publication on May 7, 2021, as ordered by the Disciplinary Commission of the Alabama State Bar, for violating Rules 1.1 [Competence] and 1.15 [Safekeeping Property], Alabama Rules of Professional Conduct. In July 2016, an individual consulted with the attorney regarding legal options concerning his minor child. In doing so, the attorney was made aware of prior custody proceedings in Colorado. The attorney suggested the individual retain her to initiate legal proceedings in Alabama in an effort to gain custody. The individual agreed and paid the attorney a \$10,000 retainer in July 2016. However, the attorney failed to place the unearned funds into her trust account. A review of the attorney's trust account by the Office of General Counsel of the Alabama State Bar revealed she placed all unearned fees directly into her operating account. In July 2016, the attorney filed a petition for emergency custody and temporary emergency jurisdiction on the client's behalf. However, the petition failed to disclose the prior court proceedings that occurred in Colorado concerning custody of the child, as required by § 30-3B-209, Code of Alabama (1975). The circuit court, unaware of the prior proceedings, issued an ex parte order granting temporary emergency custody to the client. The client's ex-wife filed an emergency motion to dismiss showing that the Colorado court had exclusive and continuing jurisdiction over the custody of the child. The circuit court, upon being informed of the prior and current proceedings in Colorado, issued an order granting the emergency motion to dismiss. As a result of the client's filing for emergency custody in Alabama, the Colorado

court suspended the client's visitation for three months and ordered him to pay all attorney's fees incurred by the ex-wife in the amount of \$26,041.29. [ASB No 2019-1155]

- On May 7, 2021, **Cynthia Rena Wright** received a public reprimand with general publication, as ordered by the Disciplinary Commission of the Alabama State Bar, for violating Rules 1.2 [Scope of Representation], 1.4 [Communication], 1.8(a) [Conflict of Interest: Prohibited Transactions], 1.16(d) [Declining or Terminating Representation], and 8.4(g) [Misconduct], Alabama Rules of Professional Conduct. On June 14, 2016, Wright was retained to represent a client on two separate patent applications. The first was an invention for the identification of contaminants in aviation fuel. The second invention was to assist doctors in prescribing prescriptions for patients. On July 5, 2016, Wright filed a provisional patent application on behalf of the client in one of the matters. The client then had one year to file a non-provisional utility patent application to secure the rights to his invention. At this time, Wright suggested to the client he may want to consider pursuing the pharmacogenetics invention to include HIV detection. In the interim, Wright was paid an additional \$600 to incorporate the client's company. On August 29 and October 25, 2016, the client emailed, seeking legal advice on behalf of his company regarding non-disclosure agreements. At that time, Wright undertook representation of the client's company pursuant to Rule 1.13 [Organization as Client]. On May 4, 2017, Wright met with the client to review the HIV detection invention application. Wright informed the client that to file the application he would need to formulate coatings for the HIV sensors. According to the client, he agreed to pay Wright \$3,000 at the time to research possible coatings for the sensors because she had a master's degree in biochemistry. On September 27, 2017, Wright sent the client a draft of the HIV detection patent application. The draft of the patent application included Wright as a co-inventor. Without the client's express permission, Wright subsequently filed the patent application in which she named herself as a co-inventor. [ASB No. 2018-236] ▲



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LEGISLATIVE WRAP-UP

2021 Legislative Recap PART 2

This month's edition of this column serves as the second of two parts covering the noteworthy legislation that passed during the 2021 Regular Legislative Session. This part will cover topics such as broadband Internet deployment, taxation, law enforcement, criminal law, elections, and civil law. Part 1, which was covered in the July edition of this column, focused on legislation dealing with health, medical cannabis, state and county government, tobacco and alcoholic beverages, firearms, the Department of Corrections, and the Board of Pardons and Paroles. This selection represents only a small portion of the 545 acts that passed during the 2021 Regular Legislative Session. Summaries of all of the general acts and proposed constitutional amendments can be found at <http://lsa.state.al.us> under the Legal Division Publications.

TAXATION

Alabama Jobs Act (Act 2021-2, HB192)

Representative Bill Poole

This act (1) reestablishes the Growing Alabama Credit, which was repealed following the close of fiscal year 2020, with certain modifications; (2) allows a job credit against utility taxes in an amount equal to 4 percent of the wages paid to eligible employees during the prior year if the company receiving incentives under the Jobs Act is engaged in pharmaceutical, biomedical, medical technology, or medical supplies manufacturing or their related research and development activities, or the company is a technology company, or the company is an underrepresented company and the Department of Commerce finds that the project will increase economic diversity and will benefit the state; (3) allows the incentivized company an investment credit of 1.5 percent of the capital investment to offset certain state public utility license taxes; (4) allows a transferee to carry earned investment credits forward for five years when the amount of credit earned exceeds the amount that may be offset, under certain conditions; (5) caps the annualized balance of the Jobs Act at \$300 million and provides for its increase in future fiscal years; (6) earmarks \$20 million of the annualized balance to qualifying projects located in targeted or jumpstart counties; (7) provides a procedure for a local economic development organization to apply to the Department of Commerce for funding and provides for the review and approval of applications by the department and the Renewal of Alabama Commission; (8) authorizes a Growing Alabama Credit to be applied against certain taxes of accepted applicants and caps the annual funding approved at \$20 million; (9) provides a procedure for an economic development organization to apply for funding; (10) allows for the credit to be taken against the state portion of the financial institution excise tax and the insurance premiums tax; (11) provides for an annual cap for the amount of Growing Alabama Credits; (12) clarifies the reservation of credits for projects in targeted or jumpstart counties; (13) allows the credit to be taken by owners of S corporations and other partnerships; and (14) provides for a sunset of the Growing Alabama Credits after calendar year 2023. Effective February 12, 2021

Tax Sales (Act 2021-175, SB111; Act 2021-521, HB201)

Senator Tom Butler and Representative Jim Hill

This act authorizes the sale of land for taxes to occur on the premises of or within the courthouse or courthouse annex of the county in which the land is situated. Effective July 1, 2021

State Qualified Historic Structure Rehabilitation Tax Credit (Act 2021-431, HB281)

Representative Victor Gaston

This act (1) extends the state income tax credits for the rehabilitation of qualified historic structures through 2027; (2) eliminates any tax credits for the rehabilitation of residential structures when the structure is used as a primary or secondary residence by the owner; (3) specifies that additional credits may not exceed \$200,000,000 from calendar years 2017-2027; and (4) clarifies that a transferee of a tax credit may claim a refund of prior taxes paid. Effective May 14, 2021

CRIMINAL LAW AND PROCEDURE

Denial of Bail Constitutional Amendment: Aniah's Law (Act 2021-201, HB131)

Representative Chip Brown

This act proposes an amendment to the Constitution of Alabama of 1901, to provide that, prior to a conviction, a person may be denied bail if the person is charged with capital murder, murder, kidnapping 1st, rape 1st, sodomy 1st, sexual torture, domestic violence 1st, human trafficking 1st, burglary 1st, arson 1st, robbery 1st, terrorism when the specified offense is a Class A felony other than murder, or aggravated child abuse of a child under the age of six years. Effective upon ratification

Denial of Bail: Aniah's Law (Act 2021-267, HB130)

Representative Chip Brown

This act implements the constitutional changes authorized by Act 2021-201 by (1) providing that, prior to a conviction, an individual may be denied bail by a judge if the individual is charged with capital murder, murder, kidnapping 1st, rape 1st, sodomy 1st, sexual torture, domestic violence 1st, human trafficking 1st, burglary 1st, arson 1st, robbery 1st, terrorism when the specified offense is a Class A felony other than murder, or aggravated child abuse of a child under the age of six; (2) requiring the individual to receive a pretrial detention hearing; and (3) providing for the factors a judge should use to determine whether to deny bail. Effective immediately upon the ratification of the constitutional amendment proposed by Act 2021-201

(Continued from page 369)

Law Enforcement Officer Employment Database (Act 2021-268, HB411)

Representative Artis McCampbell

This act: (1) requires the Alabama Peace Officers' Standards and Training Commission (APOST) to establish the Law Enforcement Officer Employment Database and requires law enforcement agencies to report to the database use of force complaints, disciplinary actions, and any separation of a law enforcement officer with an employing agency; (2) requires law enforcement agencies, before hiring a law enforcement officer, to request from APOST disclosure of any information held within the database concerning the law enforcement officer; (3) restricts the use of information in the database only for employment or appointment decisions and specifies that the information is otherwise confidential; (4) authorizes APOST to assess a civil penalty of up to \$1,000 against a law enforcement agency not in compliance with the reporting requirements of the act and additional penalties for each day the information is not properly reported; (5) provides that information in the database is confidential and creates criminal penalties for unauthorized access or use of the database; (6) requires former employers of law enforcement officers to give full disclosure of an officer's employment history if another law enforcement agency in the state requests the information; (7) provides civil immunity for disclosures made in good faith; (8) requires that prior to employment, law enforcement agencies must complete a full background check on law enforcement officers; and (9) provides that the release or disclosure of any information received from the pre-employment check to any individual not authorized to receive it is a Class A misdemeanor. Effective July 1, 2021

Expungement (Act 2021-286, SB117)

Senator Linda Coleman-Madison

This act (1) allows a person convicted of a misdemeanor offense, violation, traffic violation, or municipal ordinance violation to file a petition to expunge the conviction if all of the person's probation and parole requirements have been met, and at least three years have passed from the date of conviction, with exceptions; (2) allows a person convicted of a felony offense to file a petition to expunge the conviction if a pardon with restoration of civil and political rights has been granted, all civil and political rights have been restored, and at least 180 days have passed from the date of conviction, with exceptions; (3) expands the circumstances when a person charged with any criminal offense may file a petition to expunge the arrest; (4) increases the filing fee for

an expungement petition from \$300 to \$500; (5) specifies that only one filing fee is required to expunge all arrests or convictions relating to a single arrest; (6) provides that an indigent defendant's filing fee shall be waived; (7) provides for the number of expungements a person may be granted; and (8) provides when the record of an expungement may be admissible in court. Effective July 1, 2021

Driving Under the Influence (Act 2021-387, SB195)

Senator Sam Givhan

This act (1) increases the lookback period for which a court may consider a defendant's previous refusal to submit to a chemical breath test from five years to 10 years; (2) provides that on a person's first refusal to submit to a chemical breath test, the person's driver's license is suspended for 90 days; on a second refusal, the suspension is for one year; on a third refusal, the suspension is for three years; and on a fourth or subsequent refusal, the suspension is for five years; (3) increases the lookback period from five to 10 years for when determining the driving privilege suspension period based on previous alcohol or drug-related enforcement contacts, and increases the suspension period for having three or more prior alcohol or drug-related enforcement contacts within that lookback period; and (4) requires the Secretary of the Alabama State Law Enforcement Agency to revoke a person's driver's license upon a second or subsequent conviction within a 10-year period of driving or being in actual physical control of a vehicle while under the influence. Effective August 1, 2021

Civil Asset Forfeiture (Act 2021-497, SB210)

Senator Arthur Orr

This act (1) exempts U.S. currency totaling \$250 or less and motor vehicles worth less than \$5,000 from seizure and forfeiture; (2) provides due process protections for owners of seized property that was seized without a warrant by requiring the prosecuting authority to obtain a post-seizure order from the court within a certain time frame; (3) requires a finding of probable cause by the court before a forfeiture action may be instituted; (4) prohibits illegal roadside waivers of property rights by prohibiting a law enforcement officer from inducing or requiring a person to waive, for purposes of a seizure or forfeiture action, the person's interest in property; (5) prohibits courts from authorizing the forfeiture of property the value of which is disproportionate to the penalty for the underlying criminal offense; (6) creates a list

of factors a court must use to determine whether the forfeiture of seized property is proportionate to the penalty for the underlying criminal offense; (7) revises the procedure for an innocent owner whose property was seized to enable the innocent owner to have the property returned by deleting certain requirements that the innocent owner previously would have had to prove to meet the burden; and (8) prohibits a state or local law enforcement agency from seizing property under state law and then transferring it to the federal government for forfeiture proceedings, unless the property exceeds \$10,000. Effective January 1, 2022

School Employee Distributing Obscene Material to Student (Act 2021-538, HB240)

Representative Ginny Shaver

This act includes an additional offense within the crime of school employee distributing obscene material to a student to specifically prohibit a school employee from soliciting a student to transmit obscene material by any means. Effective August 1, 2021

ELECTIONS

Campaign Finance (Act 2021-314, HB154)

Representative Andy Whitt

This act (1) requires all campaign finance reports and statements to be filed electronically; (2) requires all campaign finance reports and statements, including those for candidates running for municipal office, to be filed with the Secretary of State; and (3) requires all electronic filings to be available to the public on a searchable database maintained by the Secretary of State. Effective August 1, 2023

Voter Registration Lists (Act 2021-335, HB123)

Representative David Faulkner

This act (1) permits a registered voter, or his or her spouse, who is a federal or state prosecutor, federal, state, probate, or municipal judge, legislator, or law enforcement officer, to submit a signed written affidavit requesting that the Secretary of State omit all information from the voter registration list except the name of the registered voter or his or her spouse; and (2) requires the Secretary of State to develop and provide to each county the affidavit to be completed under this act. Effective May 4, 2021

Absentee Voting (Act 2021-364, HB538)

Representative Alan Baker

This act (1) provides that applications to vote by absentee ballot returned by mail must be received not less than seven

days prior to the election and that applications returned by hand must be received not less than five days prior to the election; (2) eliminates the existing timelines for the return of absentee ballot applications for those members of the Armed Forces of the United States on active duty or active duty for training or an applicant who is the spouse of the member; (3) requires absentee election officials to begin performing their duties at 7:00 a.m., rather than noon, on election day; and (4) updates references to the federal Uniform and Overseas Citizens Absentee Voting Act. Effective May 6, 2021

Post-Election Audit (Act 2021-446, HB116)

Representative David Standridge

This act (1) authorizes the Secretary of State to conduct a one-time, post-election audit after the November 8, 2022 general election, to determine the accuracy of the originally reported outcome of the election; (2) limits the conduction of the audit to three counties and one statewide office, selected by the Secretary of State; and (3) requires the Secretary of State to report the findings to the Governor and the Legislature upon completion. Effective May 14, 2021

Election Violations (Act 2021-448, HB167)

Representative Chris Blackshear

This act: (1) prohibits any voter from: (i) voting or attempting to vote more than once in a primary election in this state or voting in this state and another state in the same or equivalent election; (ii) voting or attempting to vote more than once in any election held in this state or voting in this state and another state in the same or equivalent election; (iii) voting when he or she has knowledge that he or she is not entitled to vote; or (iv) otherwise committing any unlawful or fraudulent voting; and (2) provides that a first violation of the act is a Class A misdemeanor and that a second or subsequent violation is a Class C felony. Effective May 17, 2021

Election Procedures and Restrictions (Act 2021-535, HB285)

Representative Wes Allen

This act (1) prohibits electronic voting machines, or voting machines of any kind, from being installed or operated during an election except within the interior of an enclosed building designated as a voting place; and (2) prohibits any election officer or poll worker from taking a ballot into or out of any voting place, except in the performance of his or her authorized or official duties that include only the pre-election and post-election transportation of ballots to and from voting places as part of established election procedures. Effective May 26, 2021

(Continued from page 371)

EDUCATION

Alabama G.I. and Dependent's Educational Benefit Act (Act 2021-84 SB106)

Senator Will Barfoot

This act (1) increases the survivor and education benefits for guardsmen on state active duty; (2) amends the definition of "state active duty" to clarify that deaths occurring less than three years after state active duty and that are proximately caused by an injury received while on state active duty count as a death while on active duty; and (3) provides that the federal Servicemembers Civil Relief Act (SCRA) and federal Uniformed Services Employment and Reemployment Rights Act shall apply while on state active duty status, so long as federal requirements on terms of active service are fulfilled. Effective June 1, 2021

Student Athlete Compensation for Use of Name, Image, or Likeness (Act 2021-227, HB404)

Representative Kyle South

This act (1) provides that a college student athlete at certain postsecondary educational institutions within the state may earn compensation for the use of his or her name, image, or likeness, commensurate with market value of the student athlete's name, image, or likeness; (2) prohibits a postsecondary educational institution from unreasonably restricting a student athlete from receiving compensation for use of the student athlete's name, image, or likeness; (3) allows a postsecondary educational institution to prevent a student athlete from entering into an agreement for compensation for use of name, image, or likeness when the agreement: (i) involves institution-licensed gear or uniforms; (ii) conflicts with any contract held by the institution; or (iii) involves certain entities, including casinos, adult entertainment businesses, and sellers of alcoholic beverages and controlled substances; (4) provides a process by which a student athlete is required to report name, image, and likeness compensation and representation agreements to the student athlete's postsecondary educational institution; (5) requires each postsecondary educational institution to host financial literacy and life skills workshops; (6) establishes the Alabama Collegiate Athletics Commission and the membership of the commission; (7) provides a reporting process for violations

of the act; (8) establishes criminal penalties for certain violations of the act; (9) requires the Alabama Athlete Agents Commission to investigate violations of the act; and (10) requires the Alabama Athlete Agents Commission to carry out the functions assigned to it in the act. Effective July 1, 2021

Participation in Athletic Events (Act 2021-285, HB391)

Representative Scott Stadthagen

This act prohibits public K-12 schools from participating in, sponsoring, or providing coaching staff for interscholastic athletic events in Alabama that permit or allow participation in athletic events conducted exclusively for one gender by an individual who is not biologically of that gender. Effective July 1, 2021

Teacher Excellence and Accountability for Mathematics and Science (TEAMS) Salary Schedule Program (Act 2021-340, SB327)

Senator Donnie Chesteen

This act (1) provides criteria an eligible teacher must satisfy to participate in the TEAMS program; (2) authorizes school boards to offer a preliminary or advanced contract to participating teachers; (3) provides for the designation of hard-to-staff schools by the Department of Education; and (4) provides an additional annual supplement of \$5,000 per year to program participants teaching in hard-to-staff schools. Effective May 6, 2021

Math and Science Teacher Education Program (Act 2021-389, HB175)

Representative Joe Lovvorn

This act (1) allows teachers certified in computer science and certain qualified teachers certified in other fields, who return to college to complete a program in math, science, or computer science and obtain certification in any of those fields, to qualify for the loan repayment program of the Alabama Math and Science Teacher Education Program; (2) expands the loan repayment program to teachers of math, science, or computer science in failing schools; and (3) reduces the teaching load requirement from a full-time teaching load of math, science, or computer science courses to three-fourths of the full-time teaching load being comprised of math, science, or computer science courses for which the teacher is properly certified. Effective August 1, 2021

Media Broadcast of Sporting Events (Act 2021-452, HB248)

Representative Kerry Rich

This act provides that no entity shall interfere with or restrict the ability of media organizations to cover or broadcast regular season sporting events involving public K-12 schools and that each public K-12 school shall have the sole authority to determine what media organizations are permitted to cover or broadcast a regular season sporting event and to contract for the broadcast of regular season sporting events involving that school. Effective August 1, 2021

BROADBAND INTERNET DEPLOYMENT

Small Wireless Facility Deployment (Act 2021-5, SB76)

Senator Arthur Orr

This act provides for the deployment of 5G Internet across the state by: (1) establishing statewide uniform procedures to allow wireless providers to file applications with authorities to collocate, mount, or install small wireless facilities on new or existing poles in the public right-of-way, or to install new poles in the public right-of-way; (2) providing uniform requirements for authorities that receive applications for a permit, including a procedure by which applications may be deemed granted by operation of law for failure of the authority to act on the application; (3) providing uniform caps on application costs for permits for the collocation of a small wireless facility, for the modification or replacement of an existing pole together with the mounting or installation of an associated small wireless facility, or the installation of a new pole together with the mounting of an associated small wireless facility in the right-of-way; and (4) providing uniform limits on the annual rate an authority may charge for access to and use of the public right-of-way and for use of authority-owned or authority-controlled poles. Effective February 19, 2021

Connect Alabama Act (Act 2021-465, SB215)

Senator Del Marsh

This act (1) creates the Alabama Digital Expansion Authority to recommend policies and procedures for the expansion and availability of high-speed broadband services throughout the

state through review and approval of a statewide connectivity plan; (2) creates the Alabama Digital Expansion Division with the Alabama Department of Economic and Community Affairs (ADECA) to promote and facilitate the expansion and availability of high-speed broadband Internet networks, services, and technologies throughout the state, including, in particular, rural areas, underserved areas, and unserved areas; (3) creates the Alabama Digital Expansion Finance Corporation as a public non-profit corporation and authorizes the corporation to raise money for projects that will expand high-speed broadband Internet services by issuing bonds in an aggregate principal amount not to exceed \$250,000,000 in any fiscal year; and (4) creates the Connect Alabama Fund within the State Treasury to be administered by the corporation to be used for the implementation and administration of the statewide connectivity plan. Effective May 17, 2021

CIVIL LAW AND PROCEDURE

Elder Abuse Protection Order and Enforcement Act (Act 2021-77, SB85)

Senator Rodger Smitherman

This act (1) provides that a plaintiff possessing the capacity to seek protection for himself or herself may represent himself or herself or may hire legal counsel for representation for matters arising under the Elder Abuse Protection Order and Enforcement Act; and (2) provides that the filer of any court document is required to redact certain identifying information pertaining to the plaintiff or any member of the plaintiff's family or household, including home address, business address, home phone number, cellular number, and business phone number. Effective June 1, 2021

Regional Mental Health Programs (Act 2021-437, SB289)

Senator Greg Albritton

This act (1) provides that regional mental health programs and facilities organized pursuant to law, and the directors and employees thereof, when engaged in the discharge of services or programs certified and contracted for by the Alabama Department of Mental Health, are entitled to immunity to the same extent and under the same circumstances afforded to state employees under the state sovereign immunity statute; and (2) specifies that the limitation of liability provided by the act does not extend to subcontractors and independent contractors of the programs and facilities. Effective August 1, 2021

(Continued from page 373)

LEGISLATIVE AWARDS

These awards are presented during the Alabama Law Institute's business meeting at the Alabama State Bar Annual Meeting.

Sponsors of Decanting Act Fixes (Act 2021-143)

Senator Greg Albritton

Sen. Albritton was elected to the Alabama Senate in 2014 and again in 2018, having previously served in the Alabama House of Representatives from 2002-2006. Sen. Albritton is an attorney and graduated from Jones School of Law. He is a member of the Church of Jesus Christ of Latter-Day Saints.



Albritton

Representative Matt Simpson

Rep. Simpson was elected to the Alabama House in 2018. He graduated from the University of Alabama and Cumberland School of Law and was a prosecutor with the Baldwin and Mobile County District Attorney's offices. He served on the boards of Fairhope/Point Clear Rotary Youth Center, The Family Center, and the Baldwin County Department of Human Resources. He graduated from the FBI Citizens' Academy and Leadership Baldwin County. Rep. Simpson and his wife, Marina, have two children, John Wallace and Elizabeth. He is an elder at Coastal Church in Daphne.



Simpson

Sponsors of Alabama Qualified Distributions in Trust Act (Act 2021-238)

Senator Will Barfoot

Sen. Barfoot was elected to the Alabama Senate in 2018. He graduated from Auburn University and Jones School of Law. He is a founding member of Barfoot & Schoettker LLC.



Barfoot

Memberships and activities include Thorington Road Baptist Church, probate judge for Montgomery County (as needed), the Montgomery County Republican Executive Committee, the Alabama Republican Executive Committee, and the National Republican Party Convention Delegate.

Representative David Faulkner

Rep. Faulkner was elected to the Alabama House in 2014. He is a member of the Insurance, Judiciary, Rules, Jefferson County Legislation, and Ways and Means Education legislative committees.



Faulkner

Sponsors of Elimination of Term "Orphans' Business" in Probate Court (Act 2021-202)

Senator Will Barfoot

Sen. Barfoot was elected to the Alabama Senate in 2018. He graduated from Auburn University and Jones School of Law. He is a founding member of Barfoot & Schoettker LLC. Memberships and activities include Thorington Road Baptist Church, probate judge for Montgomery County (as needed), the Montgomery County Republican Executive Committee, the Alabama Republican Executive Committee, and the National Republican Party Convention Delegate.



Barfoot

Representative Tim Wadsworth

Rep. Wadsworth was elected to the Alabama House of Representatives in 2014. He was raised in Winston County



Wadsworth

and graduated from the University of Alabama with an undergraduate and a master's degree in tax accounting. He began his career as a certified public accountant. Rep. Wadsworth later graduated from Cumberland School of Law and has been practicing tax law and general law for 28 years, with offices in Arley and Sulligent. He is a member of the NRA and several civic organizations.

Sponsors of Alabama Business Entities and Non-Profit Entities Code Revisions (Act 2021-299)

Senator Sam Givhan

Sen. Givhan was elected to the Alabama Senate in 2018. He graduated from Auburn University in 1989 and the University of Alabama School of Law in 1994. He is a real estate attorney. His memberships and activities include Whitesburg Baptist Church, the Huntsville Rotary Club, and the Huntsville-Madison County Bar Association.



Givhan

Representative Bill Poole

Rep. Poole was elected to the Alabama House in 2010. He graduated from the University of Alabama and the University of Alabama School of Law and is an attorney in Tuscaloosa. He served as chair of the Tuscaloosa County Legislation Committee and the Ways and Means Education Committee. He volunteers with Outback America and the Boys and Girls Club of West Alabama. Rep. Poole and his wife, Niccole, are the parents of Sally, William, and Whittman, and members of the First United Methodist Church in Tuscaloosa.



Poole

Sponsor of Alabama Model Procurement Code (Act 2021-296)

Senator Arthur Orr

Sen. Orr was elected to the Alabama Senate in 2006. He graduated from Wake Forest University and the University of Alabama School of Law. He is an executive vice president with Cook's Pest Control, Inc. and a member of First Bible Church in Decatur. He served as a U.S. Peace Corps Volunteer (Nepal), a new country developer (Bangladesh),



Orr

and a staff attorney for Habitat for Humanity International. Sen. Orr helped start the Community Free Clinic of Decatur-Morgan Co. and is a graduate of Leadership Alabama.

Sponsor of Small and Disadvantaged Entities Data Collection Act (Act 2021-223)

Senator Bobby Singleton

Sen. Singleton is serving his fourth term in the Alabama Senate after being elected in 2005 to fill the unexpired term of former Sen. Charles Steele. He also served one term in the Alabama House. Sen. Singleton graduated from Alabama State University and Miles Law School and is a consultant. He is a member of Greenleaf Missionary Baptist Church in Greensboro and Omega Psi Phi Fraternity.



Singleton

Sponsors of Alabama Non-Disparagement Obligations Act (Act 2021-503)

Senator Rodger Smitherman

Sen. Smitherman is serving his sixth term in the Alabama Senate. He graduated from the University of Montevallo and with honors from Miles Law School. Sen. Smitherman and his wife, Carole, have four children: Rodger, II; Tonya Renee; Mary Elaine; and Crystal Nicole. He is a practicing attorney, a Democrat, an elder at More Than Conquerors Faith Church, and an advocate for education, youth programs, and senior citizens. Sen. Smitherman served as president pro tempore of the Alabama Senate from February 2009 until November 2010.



Smitherman

Representative Chris England

Rep. England was elected to the Alabama House in 2006. He graduated from Howard University and the University of Alabama School of Law. Rep. England is an associate city attorney for the City of Tuscaloosa. He is a member of the Police Athletic League Board of Directors, the PRIDE Board of Directors, and Alpha Phi Alpha Fraternity, Inc. Representative England is married to Shea and they have three children. They attend Bailey Tabernacle CME Church in Tuscaloosa. ▲



England



MEMORIALS

- ▲ John M. Patterson
- ▲ William H. Rogers, Sr.
- ▲ Gene R. Smitherman

John Malcolm Patterson

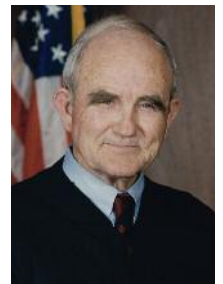
After a lifetime of service to the State of Alabama and just four months shy of his 100th birthday, John M. Patterson passed away on June 4, 2021, surrounded by family. He was at Timbergut Farm, the place of his birth, in Goldville, Alabama.

John Patterson never forgot his roots in Tallapoosa County. He graduated from Central High School in Phenix City. With his father's permission, he joined the U.S. Army at 17 years of age. In World War II, he rose to the rank of major, earning a Bronze Star for his meritorious service on General Eisenhower's command staff in military campaigns across North Africa, Sicily, Italy, Southern France, and Germany.

After the war, he attended the University of Alabama, majoring in political science. He followed in his father's footsteps and earned his law degree in 1949. He was then recalled by the Army for service in the Korean War, where he served in the Judge Advocate General section.

Returning to Phenix City after completing his military service, he practiced with his father until his father was assassinated as he left their law office. He reluctantly assumed the law-and-order mantle of his fallen father and was elected at the age of 33 as the 36th Attorney General of Alabama. His campaign platform focused on ending the illegal gambling operations and corruption that had been pervasive throughout Phenix City and elsewhere in the state.

In 1958, he defeated George Wallace in the race for governor and became the youngest person to hold that position. "The civil rights movement was so dominant during Patterson's four years at the helm that history has almost overlooked the many positive accomplishments of his administration." Warren Trest, *Nobody but the People: The Life and Times of Alabama's Youngest Governor* (2008), pp 14, 15. He devised a rescue plan for the state's schools, which were in disrepair and underfunded; he called a special legislative session on education to raise teachers' salaries and pass a



\$100 million bond issue for schools, which would be almost a billion dollars today; he worked fiercely to pass a \$60 million bond issue for highway construction and maintenance, which would be around \$600 million today; he obtained desperately needed additional revenue for education, human resources, and mental health by increasing the state sales tax on liquor and cigarettes and closing several sales tax loopholes; and he marshalled support for the passage of a much needed small-loan law that effectively curtailed the activities of loan sharks. According to Trest, "even detractors admired his drive and leadership, conceding that he had given Alabama four years of progressive leadership." Clearly, John Malcolm Patterson demonstrated his unwavering love for his state by daily working to improve it.

After serving with distinction and dedication for eight years, Governor Patterson returned home to practice law and teach American government at Troy State University. In 1984, his former political opponent, Governor George Wallace, appointed him to the Alabama Court of Criminal Appeals. During his term, the court had one of the highest caseloads per judge, but was also one of the most current in issuing opinions.

Governor Patterson always said that one of his greatest rewards of his judicial career was training and mentoring his law clerks and then watching them succeed. Following his retirement due to the mandatory retirement age, Judge Patterson returned to the Alabama Court of Criminal Appeals as a specially appointed judge until 2003. He said that his favorite job in government was serving on this intermediate appellate court.

In 2004, as his last act of public service, after the entire Alabama Supreme Court recused itself, he served as the Special Chief Justice of the Alabama Supreme Court to preside over an appeal of the removal by the Alabama Court of Judiciary of a former chief justice of the Alabama Supreme Court.

While he served the state admirably as attorney general and governor, many believe his true calling was in a judicial robe; unquestionably an extraordinary legal scholar, Judge Patterson lent wisdom, fairness, common sense, and refined judicial temperament to the courts of Alabama. Those who worked with him at the Heflin-Torbert Judicial Building knew him as a rare person who was dedicated completely to justice and personally incapable of holding a grudge. After final retirement from public service, he returned to Goldville, where he and Tina were surrounded by his pines, his cows (named by Tina and him), his goat named Rebecca (who

could open the screen door and let herself in), and his stray dog (named after Tip O'Neal).

Governor Patterson's countless stories always demonstrated that he was a treasure trove of Alabama and American history. Few Alabamians have prominently participated in government from such varied and influential vantage points, and his contributions to our state and country remain meaningful, continuing, and significant. After a lifetime spent in the service of our great state and country, the Alabama State Bar has lost one of its finest lawyers and judges, and the state has lost one of its finest public servants.

Governor Patterson wanted his life to end where he was born. He firmly believed that one must not forget one's roots. He remained faithful to that axiom until his dying day. Governor Patterson was survived by his beloved wife of 46 years, Florentina "Tina" Patterson; two children, Albert Love Patterson, III, and Barbara Louise "Babel" Patterson Scholl; and a number of grandchildren, brothers, nieces, and nephews.

—Justice Sue Bell Cobb (ret.), with special thanks to John's son, Albert Patterson; his grandson-in-law, Caleb Hindman; and his former senior staff attorney, Jenny Garrett

William Howell Rogers, Sr.

I write this obituary as a tribute to William H. "Skip" Rogers, my mentor, colleague, and friend. It has taken me quite a while to put my thoughts and feelings about Mr. Rogers into words because of the impact that he has had on my life.

I began my legal career as a clerk in Mr. Rogers's law office after my first year of law school. I worked for him on and off until after I passed the bar. After that, I started my law practice in an office located across the street from his. Mr. Rogers was always willing to give me advice on my law practice, the practice of law in general, money, my personal life, or any other important thing to me at the time. He became my life-long friend!

Mr. Rogers could be a tough taskmaster and demanded perfection. He was, however, extremely fair and understanding. He made me the lawyer I am today! I remember daily how he reminded me that you should "never assume" in law.



(Continued from page 377)

He was usually right in the advice he gave me. Mr. Rogers was also the ultimate professional. He was a hard worker and extremely dedicated to his clients. As a lawyer he was very successful and the most interesting of persons. Having conversations with Mr. Rogers was always intriguing because he was so knowledgeable in so many different things.

By way of a history of Mr. Rogers's life, he was born on March 23, 1931 in Tennessee, but lived in Jefferson County, Alabama during most of his youth. He passed away on March 24, 2020 at the age of 89, a resident of Moulton. Mr. Rogers was admitted to the Alabama State Bar as an attorney on January 1, 1962 and remained a licensed attorney until the time of his passing. He served in the United States Air Force during the Korean War. After his service to our country, Mr. Rogers earned a degree in commerce and business administration from the University of Alabama. He later received his law degree from the University of Alabama.

In the early 1960s, Mr. Rogers moved to Moulton and began his law career. He proudly represented the City of Moulton for more than 50 years. Mr. Rogers also represented Champion Paper Company for 15 years. And, he served in various capacities as a city attorney or prosecutor in other municipalities in our county during his law career. Mr. Rogers loved to represent workers hurt on the job or drivers injured by other people. He stood up for those injured or hurt against big corporations or insurance companies. He was most proud of that.

Mr. Rogers dearly loved his daughter and son, grandchildren, and friends, and was a member of his local church. He loved spending time with his family and friends.

I believe everyone who knew Mr. Rogers regarded him in high esteem as an attorney. He was definitely an asset to the City of Moulton and Lawrence County, Alabama as a whole. He is missed by all who knew him.

—Mark A. Dutton, Moulton

Gene Ramsey Smitherman

Gene Smitherman was born December 7, 1947, and on January 22, 2020, relocated to his place beside God in Heaven.

Gene was a renaissance man. After graduating from Indian Springs High School near Birmingham, he moved on over to Vanderbilt University. He served as the manager of the Vanderbilt basketball team under Coach Roy Skinner. That team welcomed the first African-American basketball player in the Southeastern Conference, Perry Wallace. That experience gave Gene great insight into those times of integration.

Gene moved from Vanderbilt to seminary, and then on to law school at the University of Alabama. That is where I first met Gene Smitherman, my best friend for the next 45 years.

After graduation, Gene worked in the General Counsel's Office of the University of Alabama Birmingham, and provided legal counsel as UAB began its first NCAA basketball team with the hiring of Coach Gene Bartow and when they built the UAB arena and many buildings of the growing medical center. He then moved on to Chambliss Bahner in Chattanooga, where he worked until the time he ceased to practice law and, along with his wife, Suzanne, became an Episcopal priest, upon graduating from the University of the South, also known as Sewanee.

Those things are just details, and do not begin to measure the man. Gene had the unique ability to communicate with his fellow man. It didn't matter whether the situation called for a sharp word to get the listener's attention, or a kind word to reach out to a broken heart, he was blessed to have an innate ability to do both. After Gene retired from his second career as an Episcopal priest, he kept himself busy writing, dabbling in filmmaking, and appearing as an extra in *First Man* when it was filmed in Atlanta. He was oft quoted in *Strong Inside*, a book about Perry Wallace written by Andrew Maraniss.

Gene had a unique ability to see and understand circumstances and people's reactions to those circumstances, including the ability to examine his own reactions, and re-examine them in a different light if needed. However, none of that was the true measure of Gene. The true measure of Gene Smitherman was his family, children Matthew, Caroline, and Eleanor, together with his faithful partner in life and wife, Suzanne. It isn't possible for me to express the uniqueness of this family in this day and time. They shared love, humor, dedication and ultimately bravery. In the end, battling through a short combat with ALS, far shorter than anybody expected, Gene never lost his sense of humor. The last time I talked with him, discussing how rapidly the dis-

ease had moved in comparison to the norm, Gene remarked, "Well, I guess that I'm the Usain Bolt of ALS." We laughed while our hearts broke. Rarely a day goes by that some wisdom that he passed on, or that I picked up by observing Gene, through the relationship that I had with him over those 45 years, doesn't come to my mind, including a bit of wisdom which has helped me deal with facing the death of people that I deeply care for over the last 20 years.

In presiding over the funeral of my grandson, who was born premature and did not survive, Gene stated, "Connor has fulfilled the purpose for which God sent him to this Earth."

Gene Smitherman most certainly fulfilled his purpose. And while his years were too short, to quote Abraham Lincoln, Gene was the epitome of the fact that "it is not the years in the life, but the life in the years that matter."

—W.N. Watson, Fort Payne



<p>Bradford, Robert William, Jr. Montgomery Admitted: September 26, 1975 Died: March 19, 2021</p>	<p>Hamilton, Eugenia Lee Walker Helena Admitted: September 25, 2009 Died: April 27, 2021</p>	<p>Smelser, Thomas Edward, Sr. Mobile Admitted: April 26, 1996 Died: March 14, 2021</p>
<p>Carreker, Tillman, Jr. Birmingham Admitted: April 24, 1992 Died: March 31, 2021</p>	<p>Irons, William Lee Birmingham Admitted: September 7, 1966 Died: June 1, 2021</p>	<p>Smith, William Clay Roswell, GA Admitted: September 25, 1981 Died: April 11, 2021</p>
<p>Cox, Hon. Emmett Ripley Daphne Admitted: January 1, 1959 Died: March 2, 2021</p>	<p>Langner, James Scott Oneonta Admitted: September 24, 1982 Died: April 14, 2021</p>	<p>Tedder, Michael Keith Atlanta, GA Admitted: April 30, 1990 Died: October 17, 2000</p>
<p>Davenport, Ronald Gregg Alex City Admitted: September 26, 1975 Died: May 23, 2021</p>	<p>Liveoak, Thomas Blake Birmingham Admitted: September 27, 2002 Died: May 22, 2021</p>	<p>Tingle, James Manley Birmingham Admitted: September 3, 1959 Died: June 1, 2021</p>
<p>Denniston, Robert Pendas Birmingham Admitted: June 3, 1941 Died: May 25, 2021</p>	<p>Orso, Stephen Keith Mobile Admitted: September 25, 1981 Died: June 10, 2021</p>	<p>Turner, Edward Powell, Jr. Chatom Admitted: January 1, 1955 Died: April 21, 2021</p>
<p>Dixon, Brenda Ann Tuscaloosa Admitted: September 27, 1983 Died: March 29, 2021</p>	<p>Pearson, Jack Howell Birmingham Admitted: April 7, 1960 Died: March 26, 2021</p>	<p>Whiddon, Durell Headland Admitted: June 20, 1951 Died: April 25, 2021</p>
<p>Gomes, Patrick Fitzgerald Covington, GA Admitted: September 26, 1997 Died: April 17, 2021</p>	<p>Potthoff, Courtney Reilly Eufaula Admitted: September 24, 1993 Died: May 7, 2021</p>	



OPINIONS OF THE GENERAL COUNSEL

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There Is No Negotiating the Withdrawal of a Bar Complaint

QUESTION:

Can an Alabama lawyer, in connection with a settlement of a civil or criminal matter, propose or participate in an agreement to withdraw or dismiss a bar complaint?

ANSWER:

It is ethically impermissible for a lawyer, in connection with the settlement of a civil or criminal matter, to propose or participate in an agreement to withdraw a bar complaint.

DISCUSSION:

It is not uncommon for the Office of General Counsel (“OGC”) to receive bar complaints against lawyers who are engaged in a pending and related civil or criminal matter. Those bar complaints are often filed by opposing clients or counsel. Occasionally, when it comes time to resolve the case, there is an attempt to insert a provision into a settlement agreement requiring withdrawal of the bar complaint. It is the opinion of the OGC that a lawyer cannot request

that a meritorious bar complaint be withdrawn or allow her client to agree to withdraw said bar complaint.

As an initial matter, the OGC does not have a formal process whereby an individual may withdraw a bar complaint that has already been filed. Rule 13 of the Alabama Rules of Disciplinary Procedure makes clear that the OGC can proceed with a disciplinary matter even if the original complainant decides not to cooperate. Specifically, the rule states that, "Disciplinary proceedings shall not necessarily be abated because of unwillingness or neglect of the complainant to sign a complaint or to cooperate in the investigation or prosecution of a charge, settlement or compromise between the complainant and the respondent, or because of restitution by the respondent." In other words, agreements between the parties in the civil or criminal action are not binding on the OGC.

Lawyers are ethically required to report violations of the Alabama Rules of Professional Conduct.¹ Rule 8.3(a), Ala. R. Prof. C., requires "[a] lawyer possessing unprivileged knowledge of a violation of Rule 8.4 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." 8.4(a), Ala. R. Prof. C., states: "[i]t is professional misconduct for a lawyer to: ... violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Thus, Rule 8.3(a) compels a lawyer to report unprivileged knowledge of a lawyer's violation of any professional conduct rule, a lawyer's attempt to violate a professional conduct rule, or a lawyer's assistance or inducement of a violation of the professional conduct rules. A lawyer's failure to report a violation of the Alabama Rules of Professional Conduct, when reporting is required by Rule 8.3, "would itself be a professional offense." Comment, Rule 8.3, Ala. R. Prof. C. Therefore, a lawyer's participation or solicitation of an agreement to withdraw a meritorious bar complaint would be deemed as an attempt to circumvent a Rule 8.3(a) reporting obligation, and thus equate to an ethics rule violation itself.

Where a proposed bar complaint has yet to be filed, a lawyer should not negotiate the filing of a grievance as part

of the settlement of a civil or criminal case. It is professional misconduct for a lawyer to participate in a resolution that in any way attempts to supersede the lawyer's mandatory duty to report pursuant to Rule 8.3. The OGC has adopted the rationale for this conclusion that is stated in ABA Formal Opinion 94-383:

In those instances in which a lawyer is required to report the professional misconduct of another, the lawyer's failure to report would itself violate Rule 8.4(a). Similarly, an agreement not to file a complaint would violate Rule 8.4(a) where the filing of a complaint would otherwise be required by Rule 8.3(a). **Because an agreement not to file a complaint if a satisfactory settlement is made is the logical corollary of a threat to file a complaint in the absence of such a settlement, we conclude that a threat to file disciplinary charges is unethical in any circumstance where a lawyer would be required to file such charges by Rule 8.3(a).**

(emphasis added). Consistent with this interpretation, the Alabama Supreme Court has previously affirmed, without opinion, the discipline of a lawyer for such an offer and sustained the conduct as "prejudicial to the administration of justice" in violation of Rule 8.4(d), Ala. R. Prof. C.²

If you have questions related to this article or any other matter, please contact us at ethics@alabar.org. ▲

Endnotes

1. Importantly, Rule 8.3(a) does not require a lawyer to report information which is confidential pursuant to Rule 1.6, Ala. R. Prof. C. See Rule 8.3(e), Ala. R. Prof. C. ("This rule does not require disclosure of information otherwise protected by Rule 1.6.") However, "a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests." Comment, Rule 8.3, Ala. R. Prof. C. A lawyer representing another lawyer in a malpractice or bar disciplinary matter does not have an obligation to report the misconduct of a client whose conduct is in question. See Comment, Rule 8.3, Ala. R. Prof. C. ("The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.")
2. *Blevins v. Alabama State Bar*, 877 So. 2d 646 (Ala. 2002).



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

Alabama Constitutional Law (Section 45)

Clay County Animal Shelter, Inc. v. Clay County Commission, No. 1190947 (Ala. May 28, 2021)

Plurality opinion; 2018 Act amending a prior local act, modifying a local tobacco tax and altering the distributions of revenues derived from the tax, did not violate the "single subject" requirement of Section 45 of the Alabama Constitution.

Estates

Brooks v. Svenby, No. 1190405 (Ala. May 28, 2021)

(1) Circuit court lacked jurisdiction to appoint S administrator or executor, because under Ala. Code § 12-22-21(2), appeal from the probate court's appointment of administrator had to have been taken within seven days of the order, and once administrator is appointed, only § 43-2-290 provides the grounds for removal of administrator; (2) final settlement failed to follow Ala. Code § 43-2-502, requiring administrator to file documents in support.

Arbitration

Performance Builders, LLC v. Lopas, No. 1190977 (Ala. May 28, 2021)

Home inspection agreement entered into online contained valid and enforceable arbitration agreement. Issue of unconscionability was an issue of arbitrability for the arbitrator, because the clause designated AAA administration and because AAA rules allow arbitrators to determine their own jurisdiction.

Statute of Limitations; Opioids

Ex parte Abbott Labs., No. 1191001 (Ala. May 28, 2021)

Face of public nuisance (opioid-related) claims against multiple parties did not state claim against petitioner, because the complaint did not allege any conduct specifically undertaken by Abbott after 2006, and therefore the statute of limitations barred any claims against Abbott.

Tax Sale Redemptions

Hamilton v. Guardian Tax AL LLC, No. 1200048 (Ala. May 28, 2021)

Under Ala. Code § 40-10-83, original owner or successor in possession of the property may redeem the property sold at tax sale without limit of time, contrary to the general three-year limitation.

Fictitious Party Practice; Workers' Comp Exclusivity; Safety Devices

***Means v. Glover*, No. 1190660 (Ala. June 4, 2021)**

(1) Plaintiff failed to exercise due diligence in substituting co-employees for fictitious parties after running of statute of limitations, because at the time of filing plaintiff had OSHA report and employer's response thereto in which co-employees were identified; (2) plaintiff failed to exercise reasonable diligence as to belated substitution of a consulting metallurgist, because same OSHA-related materials identified the role of the consulting metallurgist but did not name that person, but plaintiff did not undertake efforts to discover that person's identity; (3) Ala. Code § 25-5-11(c)(2) does not provide an injured employee with a cause of action against a co-employee for failure to install an available safety device, the statute requires removal of a safety device.

UM; Policy Construction

***Jay v. USAA*, No. 1190941 (Ala. June 18, 2021)**

Passenger in uninsured motorist's car sought recovery for injuries under policy issued to his father-in-law and under which passenger's wife was listed as "operator." Held: policy unambiguously extended coverage to family members of the "named insured," but not of "operators," and thus passenger was not entitled to UM benefits under the policy.

Trusts

***Skelton v. Skelton*, No. 1190700 (Ala. June 18, 2021)**

Plurality opinion; probate court did not err in terminating trust after determining, under Ala. Code § 19-3B-414(b), that the value of trust property was insufficient to justify the cost of administration.

Latent Ambiguity; Contracts

***Burdette v. Auburn-Opelika Investments, LLC*, No. 1190767 (Ala. June 18, 2021)**

Plurality opinion; latent ambiguity existed in parties' agreements, allowing the trial court properly to consider extrinsic evidence on a claim of accord and satisfaction.

Finality of Judgments

***Cathedral of Faith Baptist Church, Inc. v. Moulton*, No. 1200062 (Ala. June 25, 2021)**

Trial court lacked authority to raise the statute of limitations as a defense and enter summary judgment thereon.



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(Continued from page 383)

Negligence; Effect of Regulations on Duty; Contributory Negligence

Lands v. Ward, No. 1191074 (Ala. June 25, 2021)

(1) "In a negligence action, it is possible for a legal duty imposed by statute or regulation to inform the common-law standard of reasonable care or to supplant it entirely." The decision of whether a violation occurred, whether such violation was negligence, and whether such negligence was the proximate cause of injury will be left to the jury. (2) Logging truck owner was subject to FMCSA regs under the multi-factor test for determining same, and thus a legal duty could be based on them. (3) Foreseeability does not require that the particular consequence should have been anticipated, but rather that some general harm or consequence should have been anticipated. (4) The record did not contain evidence that plaintiff consciously appreciated the risk associated with hot-wiring method, especially since the employer showed him the method and instructed its use.

Indemnity

Nucor Steel Tuscaloosa, Inc. v. Zurich American Ins. Co., No. 1190545 (Ala. June 25, 2021)

Plurality opinion, because Nucor controlled every aspect of injured party's work, and Onin (Nucor's contract counterparty) had no supervisory employees on site at Nucor, contractual indemnity provision requiring Nucor to be indemnified from any loss "caused in whole or in part by any act or omission of Onin" "because that provision violates public policy." The entire court agreed that failure to perform a contractual duty is not negligence or wantonness.

Veil Piercing; Summary Judgment Procedure

Shorter Bros. Inc. v. Vectus 3, Inc., No. 1190876 (Ala. June 25, 2021)

(1) Trial court did not abuse its discretion in denying a Rule 56(f) motion when defendants did not serve discovery until a month after the SJ hearing, nor was there any abuse of discretion in refusing to consider an untimely affidavit. (2) Trial court did not err in piercing corporate veil of SB based on alter ego, where there was evidence of undercapitalization and where defendants did not even produce copies of corporate documents to support separate existence.

Foreclosures

Pentagon Fed. Credit Union v. McMahan, No. 1191075 (Ala. June 25, 2021)

PFCU (second mortgage holder) purchased M's house at foreclosure sale and sold it less than one year later. First mortgage was with Wells Fargo for \$91k; second with PFCU was \$47k. Home sold for \$157k. The dispute is over division of sale proceeds. McMahan claimed entitlement to the \$91k used to pay off Wells's first position; PFCU claimed that M could not recover that due to unjust enrichment. The trial court held for M. The supreme court reversed, holding that the doctrine of unjust enrichment prevented M. from recovering.

AMLA

Peterson v. Triad of Alabama, LLC, No. 1190982 (Ala. June 30, 2021)

Plurality panel opinion. Plaintiff failed to offer expert testimony from a similarly situated health care provider; record did not contain substantial evidence linking the DVT to the PICC line, and documentary evidence purportedly establishing that fact (though not sufficient) was not shown to be authored by a similarly situated health care provider.

Rule 59.1 and Rule 60

Ex parte Caterpillar Fin. Services Corp., No. 1200332 (Ala. June 30, 2021)

Trial court lacked jurisdiction to set aside default judgment on motion pending more than 90 days, per Rule 59.1 Use of Rule 60 in this context was impermissible; Rule 60 cannot substitute for appeal or be used for reconsideration of Rule 59.1 operations.

AMLA

Fletcher v. Health Care Authority of City of Huntsville, No. 1190706 (Ala. June 30, 2021)

Standard of care for restraining a surgical patient who may be placed in the deep Trendelenburg position during surgery is not a matter of common knowledge or one in which a lack of skill or care would be apparent.

Timeliness of Appeals; Garnishments

Rainwater Family Trust v. Rainwater, No. 1190951 (Ala. June 30, 2021)

Order directing parties to comply with terms of settlement agreement was interlocutory and injunctive under the facts, triggering ARAP Rule 4(a)(1)(A)'s 14-day time limit.

Partition of Heirs Property

Stephens v. Claridy, No. 1200006 (Ala. June 30, 2021)

Alabama Uniform Partition of Heirs Property Act, Ala. Code § 35-6A-1, presumes that a partition in kind can be ordered unless that would result in great prejudice to the cotenants (§ 35-6A-8(a)). If it cannot be partitioned in kind, a partition by sale is ordered. In making the determination of prejudice, the court considers the seven factors set out in § 35-6A-9(a).

Stay of Civil Proceedings

***Ex parte Doe*, No. 1191073 (Ala. July 9, 2021)**

Premises liability defendants were not entitled to assert perpetrator's Fifth Amendment privilege as a basis for a stay of the civil case. The balancing test under *Ex parte Ebbers*, 871 So. 2d 776, 789 (Ala. 2003), was inapplicable because movants could not invoke the privilege for the perpetrator party.

From the Court of Civil Appeals

Necessary Parties

***Randolph County Comm'n. v. Landrum*, No. 2190961 (Ala. Civ. App. June 18, 2021)**

Before granting judgment dedicating a public road, trial court must comply with Rule 19 to join all persons who own an interest on which the road was located to the action, whether heirs or successors to the owners.

Real Property

***Smith v. Dunn*, No. 2200106 (Ala. Civ. App. June 25, 2021)**

Trial court erred by dismissing claim for mesne profits during time of wrongful possession of property, after occupiers belatedly redeemed the property.

From the United States Supreme Court

Costs

***City of San Antonio v. Hotels.com L.P.*, No. 20-334 (U.S. May 27, 2021)**

Rule 39 does not permit a district court to alter a court of appeals' allocation of the costs listed in subdivision (e) of that Rule.

Immigration

***Garland v. Ming-Dai*, No. 19-1155 (U.S. June 1, 2021)**

Ninth Circuit's rule that a reviewing court must treat a noncitizen's testimony as credible and true absent an explicit

adverse credibility determination cannot be reconciled with the INA's terms.

Immigration

***Sanchez v. Mayorkas*, No. 20-315 (U.S. June 7, 2021)**

TPS recipient who entered the United States unlawfully is not eligible under § 1255 for LPR status merely by dint of his TPS.

First Amendment; Free Exercise

***Fulton v. City of Philadelphia*, No. 19-123 (U.S. June 17, 2021)**

City refused to contract with Catholic Social Services to provide foster care because CSS refused to certify same-sex couples for foster placement. CSS and affiliated foster parents sued to enjoin the city's referral freeze, which the lower courts denied. The Supreme Court reversed, holding that the city's refusal to contract with CSS violates the Free Exercise Clause.

Alien Tort Statute

***Nestle USA, Inc. v. Doe*, No. 19-416 (U.S. June 17, 2021)**

Plurality opinion. *Under Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004), causes of action cognizable under the Alien Tort Statute generally consist of violations of three historical torts: violation of safe conducts, infringement of the rights of ambassadors, and piracy. Expansion beyond those might be strictly a legislative task. Corporations are not immune from suit under the ATS.

Standing; ACA

***California v. Texas*, No. 19-840 (U.S. June 17, 2021)**

States and two individual plaintiffs lacked Article III standing to assert claim that ACA was unconstitutional because of Congress's reduction of the penalty for violations of the individual mandate to \$0 in 2017.

Standing; FCRA

***Transunion LLC v. Ramirez*, No. 20-297 (U.S. June 25, 2021)**

Even though Congress may deem a statutory violation sufficiently injurious to trigger a right to recovery of statutory damages, a litigant must still establish a sufficiently concrete injury in fact for purposes of Article III in order to sue in federal court. Only the 1,800 class members in this case whose information had actually been conveyed to a third party had a sufficiently concrete injury for Article III purposes; mere internal holding of incorrect information by TU was insufficient, even if reasonable procedures (under FCRA) were not followed to correct the misinformation, to trigger an injury in fact.

Separation of Powers

***Collins v. Yellen*, No. 19-422 (U.S. June 23, 2021)**

The Court invalidated (on separation of powers grounds) the provision in the Housing and Economic Recovery Act of 2008

(Continued from page 385)

(Recovery Act), which created the Federal Housing Finance Agency (FHFA) to regulate FNMA and Freddie Mac subject to a single director, removable by the President only “for cause.” §§ 4512(a), (b)(2). The Constitution prohibits even “modest restrictions” on the President’s power to remove the head of an agency with a single top officer.

First Amendment; Public Schools

Mahanoy Area School Dist. v. B.L., No. 20-255 (U.S. June 23, 2021)

While public schools may have a special interest in regulating some off-campus student speech, special interests offered by the school were not sufficient to overcome student’s interest in free expression. Three features of off-campus speech distinguish schools’ efforts to regulate off-campus speech. First, a school will rarely stand *in loco parentis* when a student speaks off campus. Second, from the student speaker’s perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day, meaning courts must be more skeptical of a school’s efforts to regulate off-campus speech. Third, the school itself has an interest in protecting a student’s unpopular expression. In this case, student’s posts appeared outside of school hours from a location outside the school. Student did not identify the school in her posts or target any member of the school community with vulgar or abusive language. Student also transmitted speech through personal cellphone, to an audience consisting of her Snapchat friends.

Takings; Labor

Cedar Point Nursery v. Hassid, No. 20-107 (U.S. June 23, 2021)

California’s regulation mandating that agricultural employers allow union organizers onto their property for up to three hours per day, 120 days per year, works a physical per se taking, even though it does not allow for access 365 days per year.

Securities; Fraud on the Market

Goldman Sachs Group v. Arkansas Teachers Retirement System, No. 20-222 (U.S. June 21, 2021)

Plaintiffs sought to certify a class of Goldman shareholders by invoking the presumption of reliance under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). Goldman attempted to rebut the *Basic* presumption through evidence that its alleged misrepresentations had no impact on its stock price. After

determining Goldman had failed to carry its burden of proving a lack of price impact, the District Court certified the class, and the Second Circuit affirmed. Held: (1) the generic nature of a misrepresentation often is important evidence of price impact that courts should consider at class certification, and the Second Circuit may not have properly considered that factor, requiring remand; (2) defendants bear the burden of persuasion to prove a lack of price impact by a preponderance of the evidence, but that the burden of persuasion should rarely be outcome determinative.

Antitrust

NCAA v. Alston, No. 20-512 (U.S. June 21, 2021)

District Court properly employed the “rule of reason” analysis to assess the anti-competitive effects of NCAA’s compensation restrictions for college athletes, to the extent those restrictions apply to education-related benefits. The Court specifically rejected the NCAA’s argument that its member schools are not “commercial enterprises.” Justice Gorsuch wrote for a unanimous court. In a special concurrence, Justice Kavanaugh wrote “to underscore that the NCAA’s remaining compensation rules also raise serious questions under the antitrust laws.”

Patents

U.S. v. Arthrex, Inc., No. 19-1434 (U.S. June 21, 2021)

Unreviewable authority of Administrative Patent Judges to issue decisions on behalf of the Executive Branch is incompatible with their appointment by the Secretary of Commerce to an inferior office.

Voting Rights Act

Brnovich v. DNC, No. 19-1257 (U.S. July 1, 2021)

Arizona’s out-of-precinct policy (requiring ballots cast in the wrong place to be discarded, so that statewide votes such as for senator or governor also aren’t counted) and its ban on ballot harvesting (collection of ballots by third parties) do not violate Section 2 of the Voting Rights Act, and the ban on ballot harvesting was not enacted with a racially discriminatory purpose. The Court outlined five guideposts for Section 2 claims: (1) the extent of the burden a voting rule imposes; (2) the extent of departure in the challenged practice from what standard practice was in 1982, when Section 2 was amended; (3) the extent of disparities in a rule’s effect on members of different racial or ethnic groups; (4) opportunities to vote that a state provides as a whole; and (5) the strength of the state’s interest.

First Amendment; Elections

***Americans for Prosperity Foundation v. Bonta*, No. 19-251 (U.S. July 1, 2021)**

California donor disclosure requirement is facially invalid as it burdens donors' First Amendment rights and is not narrowly tailored to an important government interest. Part II-B-1, which did not garner a majority, deals with the standard of review—Roberts wrote for the plurality that “compelled disclosure requirements are reviewed under exacting scrutiny.”

Excessive Force

***Lombardo v. City of St. Louis*, No. 20-391 (U.S. June 28, 2021)**

Per curiam opinion; the Court vacated the Eighth Circuit's finding of no Fourth Amendment violation in an excessive force case in which a 160-pound previously-resisting arrestee (arrested for trespassing in a condemned building and failure to appear on a traffic ticket) was, after being handcuffed and leg-shackled, maintained in a prone position for 15 minutes-plus with applied pressure, after which he died. The Eighth Circuit cited multi-factor test for excessiveness, but then appeared to decide the case improperly, solely on the basis of whether the prone restraint was per se unconstitutional.

Takings

***Pakdel v. City & County of San Francisco*, No. 20-1212 (U.S. June 28, 2021)**

Per curiam opinion: When a plaintiff alleges a regulatory taking in violation of the Fifth Amendment, a federal court should not consider the claim before the government has reached a “final” decision. This does not require exhaustion of all state remedies, however.

Eminent Domain; Eleventh Amendment

***PennEast Pipeline Co., LLC v. New Jersey*, No. 19-1039 (U.S. June 29, 2021)**

For as long as the eminent domain power has been exercised by the United States, it has also been delegated to private parties. The states implicitly consented to private condemnation suits when they ratified the Constitution.

Immigration

***Johnson v. Guzman Chavez*, No. 19-897 (U.S. June 29, 2021)**

Plurality decision. Aliens removed from the U.S. who later reentered without authorization are not entitled to a bond hearing while they pursue removal.

Patents

***Minerva Surgical, Inc. v. Hologic, Inc.*, No. 20-440 (U.S. June 29, 2021)**

Assignor estoppel, under which the assignor of a patent is estopped from contesting the patent's validity, is well grounded in centuries-old fairness principles, but assignor

estoppel applies only when the assignor's claim of invalidity contradicts explicit or implicit representations the assignor made in assigning the patent.

From the Eleventh Circuit Court of Appeals

Rule 41

***Absolute Activist Value Master Fund Ltd. v. Devine*, No. 20-10237 (11th Cir. May 28, 2021)**

Voluntary dismissal of their claims under Rule 41(a)(1)(A)(i) strips the District Court of jurisdiction to take any further action.

ADA

***Todd v. Fayette County School Dist.*, No. 19-13821 (11th Cir. May 27, 2021)**

District court properly granted summary judgment to district on ADA and related claims by former schoolteacher suffering from major depressive order; undisputed material evidence was that her threats against herself and others, which were non-discriminatory reasons for the adverse action, were the reasons for her termination.

ADA; Standing

***Kennedy v. Floridian Hotel, Inc.*, No. 20-10648 (11th Cir. May 27, 2021)**

The “immediacy” needed to show standing for injunctive relief in an ADA Title III context focuses on the plaintiff's concrete plans to visit the place in the future, which must be specific in time and not too far off. The court considers four factors: (a) the proximity of the defendant's business to the plaintiff's residence, (b) the plaintiff's past patronage of the defendant's business, (c) the definiteness of the plaintiff's plan to return, and (d) the frequency of the plaintiff's travel near the defendant's business.

RICO; Personal Jurisdiction; Forum Selection Clauses

***Don't Look Media, LLC v. Fly Victor, Ltd.*, No. 20-10779 (11th Cir. June 4, 2021)**

(1) RICO provision allowing for service of process in any United States judicial district did not provide personal jurisdiction because DLM did not serve any party within the United States, instead only attempting service at a London office building; (2) forum selection clauses are enforceable, plainly apply to DLM's claims, and require dismissal in favor of an English forum.

(Continued from page 387)

Class Actions; Settlements; Incentive Awards

In re Equifax Inc. Customer Data Security Breach Litigation, No. 20-10249 (11th Cir. June 3, 2021)

The Court affirmed the district court's approval of a class settlement in the Equifax data breach litigation involving 147 million class members, holding: (1) plaintiffs had Article III standing based on "material" and "substantial" risk of identity theft; (2) district court did not abuse its discretion in managing the settlement approval process by requiring that each objection include objector and attorney information; (3) use of "ghostwritten order" by counsel was not an abuse of discretion; (4) although some class members had state law statutory damages claims while others did not, that difference was not a "fundamental" conflict; (5) fee award of 20+ percent of the common fund (in this case, a megafund) was not an abuse of discretion. The Court reversed the incentive awards paid to named plaintiffs under *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1260 (11th Cir. 2020).

Social Security

Simon v. Commissioner, No. 19-14682 (11th Cir. June 9, 2021)

ALJ improperly gave little or no weight to three pieces of evidence in the record indicating that Simon's mental illness prevents him from maintaining a job: (1) the opinions of Simon's treating psychiatrist, (2) the opinions of a consulting psychologist who examined Simon at the request of the SSA, and (3) Simon's own testimony as to the severity of his symptoms.

Constitutional Law; Property Rights

Burns v. Town of Palm Beach, No. 18-14515 (11th Cir. June 8, 2021)

After being denied an architectural review application to tear down and replace his beachfront house, Burns sued the town, raising First and Fourteenth Amendment claims. The district court granted summary judgment to the town. The Eleventh Circuit affirmed, holding as to the First Amendment claim there was no great likelihood that any message would be understood by those who viewed Burns's proposed new beachfront mansion. As to the Fourteenth Amendment claim, the commission's criteria were not unconstitutionally vague, and Burns presented no evidence that the commission applied its criteria differently for him than for other similarly situated mansion-builders.

Lanham Act; Food and Drug

Belcher Pharmaceuticals, LLC v. Hospira, Inc., No. 20-10497 (11th Cir. June 24, 2021)

Lanham Act private actions can be sustained even with FDA-approved products, as long as the Lanham Act claim does not invade the FDA's enforcement authority and the scope of its approval. However, there was insufficient evidence of a misrepresentation.

Arbitration; Section 1 FAA (Workers in Interstate Commerce)

Hamrick v. PartsFleet, LLC, No. 19-13339 (11th Cir. June 22, 2021)

FAA § 1 does not "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1. This "exemption" excludes workers: (1) employed in the transportation industry; and (2) that, in the main, actually engage in interstate commerce. *Hill v. Rent-A-Center, Inc.*, 398 F.3d 1286, 1290 (11th Cir. 2005). Issue: whether the Section 1 exemption covers final-mile delivery drivers—drivers who make local deliveries of goods and materials that have been shipped from out of state to a local warehouse. Held: The *Hill* test focuses not on the movement of the goods, but the work performed by the specific worker. For section 1 to apply under *Hill*, the employee's duties must regularly involve interstate commerce, which is the interstate movement of goods.

Discovery; Summary Judgment Procedure

Akridge v. Alfa Mut. Ins. Co., No. 19-10827 (11th Cir. June 21, 2021)

District court abused its discretion in granting summary judgment, but disallowing plaintiff the opportunity to depose defendant's EVP of HR. The Court stated, "We find it difficult to believe that Forrest had no information touching on Akridge's medical expenses and termination."

Securities; Equitable Tolling

Fedance v. Harris, No. 20-12222 (11th Cir. June 21, 2021)

Statutes of limitation under section 12(a)(1) of the Securities Act of 1933, 15 U.S.C. § 771(a)(1), and section 15(a) of the Act, *id.* § 770(a), can be subject to equitable tolling. However, the district court nevertheless properly dismissed the claims in this case (for sale of unregistered securities) because equitable tolling based on fraudulent concealment requires a plaintiff to show both successful concealment of the cause of action and fraudulent means to achieve that concealment.

Choice of Law; Maritime

Goodloe v. Royal Caribbean Cruises, No. 19-14324 (11th Cir. June 21, 2021)

General maritime law does not allow non-pecuniary damages for wrongful death, but state law supplements general maritime law for damages in wrongful death suits for deaths that occur within state territorial waters. A modified version of the so-called *Lauritzen* test is used for domestic choice of law determinations made in the maritime context.

Takings; Evidence

***South Grande View Development Corp. v. City of Alabaster*, No. 18-14044 (11th Cir. June 21, 2021)**

The Court affirmed a judgment on jury verdict for \$3.5 million for a regulatory taking of property. The Court held: (1) regulatory taking claim was ripe despite developer's failure to seek variance, because (a) zoning ordinance can itself be a final decision on the merits, (b) the zoning was specifically targeted to the developer, and (c) given the facts of the city's continuous involvement with the developer for several years regarding the property, there was a sufficient "final determination" to trigger a taking; (2) evidence of city's motive in passing the zoning ordinance was admissible—(a) the Court rejected a categorical rule which would exclude all evidence regarding why a zoning ordinance was passed in just compensation trials, (b) although prior Circuit precedent interpreted the *Penn Central* factor "character of the government action" to include the "nature of the state's interest" in the regulation, the Supreme Court's decision in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005) abrogates that prior Circuit law, and (c) despite the lack of proper basis for evidence of motive going to the *Penn Central* factors, admitting evidence of motive was harmless error on the record because substantial, permissible evidence produced at trial supported the jury's verdict.

Abortion Rights

***Reproductive Health Services v. Bailey*, No. 17-13561 (11th Cir. June 30, 2021)**

The Court affirmed the district court's invalidation of a number of provisions in Alabama's Parental Consent Act, Ala. Code § 26-21-4, regulating an unemancipated minor's ability to obtain an abortion, under the *Casey* "undue burden" standard.

Class Actions; Ascertainability

***Rensel v. Centra Tech, Inc.*, No. 20-10894 (11th Cir. June 29, 2021)**

District court abused its discretion in denying as untimely a motion for class certification in a securities fraud case, where a PSLRA-mandated stay was in effect for 15 of the 18 months between the time the complaint was filed and the time the motion for certification was filed. Under *Cherry v. Dometic Corp.*, 986 F.3d 1296, 1304 (11th Cir. 2021), the classes were ascertainable because membership in each of the subclasses turns on the objective, verifiable criterion of having purchased a particular security within a particular date range.

Diversity Jurisdiction; "Probate Exception"

***Fisher v. PNC Bank*, No. 20-10110 (11th Cir. June 28, 2021)**

Probate exception (which is a judicial and not Congressional creation) to federal jurisdiction applies in only three circumstances. It reserves to state probate courts (1) the probate or annulment of a will, (2) the administration of a decedent's estate, and (3) disposal of property that is in the custody of a state probate court. Even if suit is commenced in federal court to "circumvent the normal probate process," a plaintiff's intent does not control the probate exception to federal jurisdiction.

Qualified Immunity; Excessive Force; First Amendment

***Khoury v. Miami-Dade County School Board*, No. 18-11430 (11th Cir. July 7, 2021)**

District court erred by granting summary judgment to arresting officer (school board officer) based on qualified immunity; differing accounts of whether arrestee shoved officer (with the arrestee denying the account) precluded summary judgment based on the arguable probable cause standard. Summary judgment for arresting officer on First Amendment retaliation claim was also improper, act of filming officer and improperly parked vehicles was protected, act of detaining the arrestee would clearly deter exercise of First Amendment rights, and issues of fact existed as to

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(Continued from page 389)

causal connection between the arrest and the filming. Excessive force claim was subsumed into claim concerning lack of probable cause to arrest, and thus was not separately actionable. Board was entitled to summary judgment under *Monell* for lack of evidence of policy or custom of arresting persons for involuntary commitments.

Qualified Immunity

Spencer v. Benison, No. 18-14397 (11th Cir. July 16, 2021)

Discretionary authority is utilized for purposes of triggering qualified immunity when the actor is “(a) performing a legitimate job-related function (that is, pursuing a job-related goal), (b) through means that were within his power to utilize.” In this case, district court erred by framing the issue as whether a sheriff had discretionary authority to order the removal of private property from a private landowner’s property—that framing of the issue fails to strip out the allegedly illegal conduct, which a proper discretionary function analysis requires. The district court further erred by finding substantial evidence of a constitutional violation—sheriff’s action did not deprive landowner of right to contest further the adjacent landowner’s activity which was allegedly exceeding the scope of an easement between the parties.

Fair Housing Act

Fox v. Gaines, No. 20-12620 (11th Cir. July 16, 2021)

Sexual harassment claims are actionable under the Fair Housing Act provided the plaintiff can demonstrate that she would not have been harassed but for her sex.

Transgender Rights; Public Schools

Adams v. School Board of St. John County, No. 18-13592 (11th Cir. July 14, 2021)

In August 2020, the panel held that a high school transgender (female at birth, transitioning to male) student’s Equal Protection and Title IX rights were violated in connection with the school system’s prohibition of his use of the boys’ school bathrooms. 968 F.3d 1286 (11th Cir. 2020). On the day of the original panel decision, an active member of the Court withheld issuance of the mandate. The Court withdrew its original opinion and issued a new opinion; “[t]his revised opinion does not reach the Title IX question and reaches only one ground under the Equal Protection Clause instead of the three Equal Protection rulings we made in the August 7 opinion.” The Court applied “heightened scrutiny” to the board’s policy of disallowing trans youth to use the bathrooms of their non-birth gender, and further acknowledged that student privacy was a sufficiently important governmental interest to protect. However, the Court concluded

that the policy was not sufficiently tailored to the interest. Chief Judge Bill Pryor reiterated his original dissent.

Bankruptcy; Dischargeability

In re Harris, No. 19-11286 (11th Cir. July 14, 2021)

Bankruptcy Code’s discharge exemption for “any debt . . . for money . . . to the extent obtained by . . . false pretenses, a false representation, or actual fraud,” 11 U.S.C. § 523(a)(2)(A), does not apply to a default judgment on claims which might or might not require proof of those elements.

Arbitration; Role of Presumption Favoring Arbitrability

Calderon v. Sixt Rent a Car, LLC, No. 20-10989 (11th Cir. July 14, 2021)

Scope of arbitration agreement between Orbitz and its customer covered “any services or products provided.” Held: Claims based on services provided by Sixt, a company that does business through Orbitz, did not fall within the scope of the arbitration agreement. There is a debate among the panel members (primarily Judges Newsom and Jill Pryor) about the role of the “presumption of arbitrability” under *Moses H. Cone*. Judge Newsom (joined by Judge Marcus) concluded that “*Moses H. Cone*’s [] strong pro-arbitration canon of construction applies here only to the extent that Marin’s lawsuit against Sixt ‘aris[es] out of’ his contract with Orbitz”—which is not a creature of contract but rather of FAA § 2. Judge Newsom wrote an extensive concurrence questioning the validity of the *Moses H. Cone* presumption.

Preliminary Injunctions; Irreparable Harm

Brown v. Secretary, HHS, No. 20-14210 (11th Cir. July 14, 2021)

Landlords seeking to evict their tenants for nonpayment of rent failed to show irreparable harm from CDC’s COVID-related eviction moratorium—even though the Court indicated (contrary to the district court) that plaintiffs demonstrated a likelihood of success on the merits. Landlords agreed that their interests were economic, but they argued the insolvency of their tenants would render back rent uncollectible. Although the collectability of a future money judgment is relevant in determining whether legal remedies are adequate for preliminary-injunction purposes, landlords did not offer sufficient evidence of tenant insolvency.

Section 1981

Ziyadat v. Diamondrock Hospitality Co., No. 20-10485 (11th Cir. July 13, 2021)

Former hotel guest's allegations plausibly alleged a circumstantial case of racial discrimination. Specifically, "Ziyadat says that he and his fiancée were hotel guests, sat by the pool, and behaved entirely appropriately. He alleges that other, non-Arab hotel guests sat by the pool and acted similarly. In other words, they all engaged in the same basic conduct. He then claims that the towel attendant singled out him and his fiancée, fabricated a story about them, and caused them to be evicted."

Maritime

Yusko v. NCL (Bahamas) Ltd., No. 20-10452 (11th Cir. July 12, 2021)

In passenger's maritime negligence claim against shipowner based on employee's negligence under a theory of vicarious liability, passenger need not establish that the shipowner had actual or constructive notice of a risk-creating condition.

ADA; Private Club Exception

Ring v. Boco Ciega Yacht Club, Inc., No. 20-11571 (11th Cir. July 12, 2021)

ADA Title II's exception for "private clubs or establishments," 42 U.S.C. § 12187, requires demonstration that the club exercises self-government and member-ownership, and pursues a plan or purpose of exclusiveness by acting to ensure seclusion from others in critical aspects of the relationships between members at its facilities. An organization is not a private club if it allows outsiders easy access to its facilities through loose membership criteria or guest policies.

Trial Procedure

St. Louis Condo. Assn. v. Rockhill Ins. Co., No. 19-12716 (11th Cir. July 20, 2021)

Among other holdings, party did not properly preserve for appeal the denial of its JML motion under Rule 50(a), because the motion was not renewed under Rule 50(b) after the jury's verdict: "If a party makes an unsuccessful Rule 50(a) motion during trial, it must file a Rule 50(b) motion to preserve the issue for appeal."

RECENT CRIMINAL DECISIONS

From the United States Supreme Court

Indian Law

U.S. v. Cooley, No. 19-1414 (U.S. June 1, 2021)

A tribal police officer has authority to detain temporarily and to search non-Indian persons traveling on public rights-of-way

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(Continued from page 391)

running through a reservation for potential violations of state or federal law.

Computer Crimes; Statutory Construction

Van Buren v. U.S., No. 19-783 (U.S. June 1, 2021)

Computer Fraud and Abuse Act of 1986 subjects to criminal liability anyone who “intentionally accesses a computer without authorization or exceeds authorized access.” 18 U.S.C. § 1030(a)(2). Here, defendant undisputedly had authority to access the materials, but he was accused of misusing materials he obtained (in this case, retrieving motor vehicle numbers for compensation). Held: individual “exceeds authorized access” when he accesses a computer with authorization but then obtains information located in particular areas of the computer—such as files, folders, or databases—that are off limits to him.

ACCA

Borden v. U.S., No. 19-5410 (U.S. June 10, 2021)

Criminal offense with a *mens rea* of recklessness does not qualify as a “violent felony” under ACCA’s elements clause.

First Step Act

Terry v. U.S., No. 20-65904 (U.S. June 14, 2021)

Sentence reduction under the First Step Act is available to a crack cocaine offender only if the offense of conviction triggered a mandatory minimum sentence.

Felon in Possession

Greer v. U.S., No. 19-123 (U.S. June 14, 2021)

In felon-in-possession cases, a *Rehaif* error is not a basis for plain-error relief unless the defendant first makes a sufficient argument or representation on appeal that he would have presented evidence at trial that he did not in fact know he was a felon.

Fourth Amendment

Lange v. California, No. 20-18 (U.S. June 23, 2021)

Under the Fourth Amendment, pursuit of fleeing misdemeanant does not categorically justify a warrantless entry into a home, but rather requires the case-by-case assessment of the exigencies arising from misdemeanants’ flight. When the totality of circumstances shows an emergency—a need to act before it is possible to get a warrant—the police may act without waiting. Those circumstances include the flight itself.

From the Alabama Court of Criminal Appeals

Probation Revocation

S.K.G. v. State, CR-19-0976 (Ala. Crim. App. July 9, 2021)

Circuit court did not err in affording probationer chance to make a statement before revoking probation, though there is no right to allocution in a revocation proceeding. Probationer waived his argument that the circuit court violated Ala. R. Crim. P. 27.6 by not informing him that any statement made in the revocation hearing could be used against him in subsequent proceedings, because he failed to first present this argument to the circuit court.

Ineffective Assistance

Lockhart v. State, CR-19-0703 (Ala. Crim. App. July 9, 2021)

Rule 32 was properly denied on claims that trial counsel failed to properly investigate or present evidence regarding his alleged brain injury or PTSD and that trial counsel should have called military witnesses and presented evidence that the defendant had difficulty distinguishing between the fingers of his hand. Defendant’s Rule 32 petition failed to establish good cause to warrant discovery of the murder weapon for forensic testing; claim was speculative and failed to provide the name of a firearm and tool marks expert who would testify on his behalf.

Ineffective Assistance; Recusal

Harris v. State, CR-19-0231 (Ala. Crim. App. July 9, 2021)

Circuit court was not required to recuse for reviewing defendant’s postconviction ineffective assistance of counsel claims because it had favorably commented on the performance of trial counsel in its sentencing order. Comments did not indicate that the circuit court had prejudged ineffective assistance claims.

Sentencing

Bishop v. State, CR-19-0726 (Ala. Crim. App. July 9, 2021)

Defendant's postconviction claim, that his sentence was illegal because it did not include a period of post-release supervision as required by Ala. Code § 13A-5-6(c), was jurisdictional and thus not subject to preclusion under Rule 32.2(c). Resentencing was necessary "to correct the illegality... by imposing a term of not less than 10 years' post-release supervision as required by § 13A-5-6(c)."

Heat of Passion

Varnado v. State, CR-18-0673 (Ala. Crim. App. July 9, 2021)

Circuit court erred in refusing to instruct jury regarding heat-of-passion manslaughter as a lesser-included offense of capital murder, because defendant "injected the issue of provoked heat of passion" by presenting evidence that he fatally shot his victims as he attempted to protect his brother during a fight.

Habitual Offender

McGuire v. State, CR-19-0714 (Ala. Crim. App. July 9, 2021)

Court declined the state's request to remand the case for the circuit court to apply habitual felony offender treatment under Ala. Code § 13A-5-9 to the defendant's burglary conviction.

Split Sentence

Sartain v. State, CR-20-0391 (Ala. Crim. App. July 9, 2021)

Defendant's probationary term on community-corrections split sentence exceeded the term authorized by Ala. Code § 15-18-8(b) and was thus void.

Chain of Custody

Meeks v. State, CR-19-0807 (Ala. Crim. App. July 9, 2021)

Because defendant's blood samples were never in state's possession, it was not required to prove the chain of custody for that evidence before introducing the toxicology report regarding those samples.

Juvenile Life Without Parole

Wynn v. State, CR-19-0589 (Ala. Crim. App. May 28, 2021)

Under *Miller v. Alabama*, 567 U. S. 460 (2012) and its progeny, imposition of a life-without-parole sentence on a juvenile is not "categorically" barred by the Eighth Amendment.

Capital Punishment

Hicks v. State, CR-15-0747 (Ala. Crim. App. May 28, 2021)

Under Ala. Code § 13A-5-53(b)(3), defendant's death sentence was neither disproportionate nor excessive to the penalty imposed in similar cases. ▲



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Among Firms

The **District Attorney's Office for the Fifteenth Judicial Circuit** (Montgomery County) announces that **Grace Winans** and **Theresa Basile** joined as deputy district attorneys.

Baker Donelson announces that **Jenna M. Bedsole** is the managing shareholder and that **Blake Harper** joined as an associate, both in the Birmingham office.

Balch & Bingham LLP announces that **Claire Johnson** and **Shalyn McKitt** joined the Birmingham office.

Belt & Bruner PC of Birmingham announces that **Jessica Bonds** joined as an associate.

Blasingame, Burch, Garrard & Ashley PC of Georgia announces the opening of a Birmingham office and that **Leanna Pittard** practices there.

Bradley Arant Boult Cummings LLP announces that **Chandler Combest** re-joined the Birmingham office as a senior attorney. The firm also announces that **Sarah A. Baldwin, Sarah Gunn, Hirshel M. Hall, Katie A. Humphries, Demi A. Kampakis, Mallory C. Koger, J. Tanner Lusk, Jackson Olsen, Carson S. Phillips, William Stoll, Sarahanne Y. Vaughan, Mary Katherine White, and Sydney H.**

Willmann joined as associates in the Birmingham office.

Butler Snow LLP announces that **Elizabeth S. Ostendorf** is a partner in the Montgomery office.

Carney Dye LLC of Birmingham announces that **J. Winston Busby** joined the firm as a member.

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Dentons Sirote PC announces that **Dorothy Lee Donaldson** joined as of counsel in the Huntsville office.

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The **City of Tuscaloosa** announces that **Scott Holmes** was appointed city attorney by Mayor Walt Maddox.

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